

PROCEDURAL OFFICER DECISION

2017/1

APPLICATION BY INVALUABLE LLC

IN RELATION TO

THE CMA INVESTIGATION UNDER THE COMPETITION ACT 1998 INTO THE SUPPLY OF ONLINE AUCTION SERVICES

The Application

1. Invaluable LLC (Invaluable) has requested that the CMA's decision to disclose certain information as part of the investigation into the supply of online auction services (the Investigation) should be set aside (the Application). The Application was made on 30 March 2017.
2. Invaluable is a third party to the Investigation. The Application concerns the proposed disclosure of certain information of a commercially sensitive nature provided by Invaluable into a confidentiality ring established as part of the CMA's consideration of a request for interim measures against ATG Media Limited (ATG). The information concerned is a list of every UK-based auction house registered with Invaluable between 1 January 2015 and 8 December 2016 (the Customer List). Information will be disclosed to ATG's advisers in the confidentiality ring.

The SRO's Decision

3. An email was sent on 22 March 2017 to Invaluable's legal advisers, Gowling WLG, setting out the decision of the Senior Responsible Officer (SRO) for the Investigation in relation to the information that would be disclosed in a confidentiality ring (the SRO's Decision).

The Procedural Officer's Process

4. The Application was received on 30 March 2017. I held a meeting with the CMA case team on 4 April 2017 and a meeting with Invaluable's legal advisers on 6 April 2017.
5. I suspended my consideration of the Application while Invaluable's legal advisers took the opportunity to consider certain additional information with the CMA case team. This information had not been available when the SRO's Decision was made. The CMA case team informed me on 12 April 2017 that a discussion had taken place with Invaluable's legal advisers and that the SRO's Decision still stood. I therefore resumed my consideration of the Application on this date.
6. I have considered the representations and information provided in, and following, the meetings I held with the CMA case team and Invaluable's legal advisers, together with the information set out in the Application.

Scope for the Procedural Officer to consider the Application

7. The Application relates to the disclosure of information within a confidentiality ring, which had already been established by the CMA. It relates to information which has been identified by Invaluable as of a commercially sensitive nature. I consider it falls within the scope of procedural complaints that can be considered by the Procedural Officer.¹

Summary of the Application and the issues raised

8. The Application requests that the SRO's Decision should be set aside. It provides three reasons:

“firstly, the Decision fails to afford due regard to the right of the Applicant to protect its commercial interests and

secondly, the Decision fails to take account of the content of the Customer List and its likely relevance to ATG's defence; and in the alternative,

even if contents contained within the Customer List are potentially relevant to ATG's right of defence, the Applicant submits that the CMA has failed to take into account alternative ways of ensuring ATG's rights without compromising the Applicant's right to protect its legitimate commercial interests.”

9. The importance attached to finding a way of balancing commercial sensitivity with the rights of defence of the party under investigation by the CMA was reiterated by Invaluable's legal advisers at the meeting I held with them.

10. The Application argues that, in light of the reasons provided (as set out above):

“ATG's legal advisers' request for access to unredacted versions of the documents in question be denied.”

11. [X] At the meeting, Invaluable's legal advisers reiterated [X] the Customer List was considered to be commercially sensitive and therefore should not be disclosed. As noted in the Application:

“the Customer List contains commercial information, the disclosure of which (even in the context of a confidentiality ring) could significantly harm the legitimate business interests of the Applicant, which is a direct competitor of ATG.”

Background to the Application

12. The Investigation concerns suspected breaches of competition law in respect of the supply of auction services in the UK. It relates to suspected anti-competitive agreement(s) or concerted practice(s) and suspected abuse, in particular, suspected exclusionary and restrictive pricing practices, including most favoured nation provisions in respect of online sales.

¹ The CMA's Guidance on the CMA's investigation procedures in Competition Act 1998 cases (CMA8) expressly lists as within the scope of the Procedural Officer remit: “requests for confidentiality redactions of information in documents on the CMA's case file” and “requests for disclosure or non-disclosure of certain documents on the CMA's case file” (paragraph 15.4). This is also set out in the Procedural Officer content on the CMA's webpage.

13. Invaluable operates an online auction platform and on 8 December 2016 received a notice under section 26 of the Competition Act to produce specified documents and information. The section 26 notice set out the subject matter and purpose of the Investigation. Invaluable responded to the section 26 notice on 26 December 2016, providing documents including the Customer List.

14. I was provided with a timeline of the correspondence which followed by Invaluable's legal advisers and by the CMA case team. I have summarised the key events which I consider relevant to the Application. These include:

- the CMA's decision to establish a confidentiality ring following a request by ATG (the request was made on 19 January, it was notified to Invaluable on 26 January and confirmed to Invaluable on 6 February)
- the file disclosable in the confidentiality ring was sent to ATG's advisers following agreement on redactions with Invaluable (15 and 16 February)
- the request by ATG's legal advisers for information to be disclosed in that confidentiality ring unredacted, and the further submission made by ATG in relation to 20 documents, including the Customer List, following the CMA's notification that ATG's legal advisers needed to make reasoned representations in relation to specific documents (initial request for all documents to be disclosed unredacted made by ATG on 23 February, CMA's notification sent on 28 February, submission in relation to 20 documents made by ATG on 7 March)
- the exchanges with Invaluable in relation to the documents to be disclosed, initially in redacted form and subsequently following the further request by ATG (6 and 15 February, 15 March)
- the internal CMA discussions to consider the merits of the requests made by ATG on a document by document basis and, following notification to Invaluable of the proposed decisions in relation to two documents provided by Invaluable, to consider the concerns raised by Invaluable (internal CMA meeting with SRO and General Counsel on 9 March, correspondence with Invaluable 15 and 20 March, internal CMA meeting with General Counsel on 22 March).

15. [REDACTED]

The nature of the SRO's Decision

16. The SRO's Decision relates to the disclosure of information on the CMA's file provided by Invaluable into a confidentiality ring. The confidentiality ring had been established following a request made by ATG. It is accessible by advisers acting for ATG. The decision to make a disclosure followed an assessment of the representations made by Invaluable in relation to the commercial sensitivity of the information. The SRO's Decision states:

"We fully appreciate and understand the concerns your client has regarding the protection of sensitive information. I hope they can be confident, however, that the CMA takes the maintenance of confidentiality and the protection of legitimate business interests extremely seriously whilst also being required to

facilitate the legitimate exercise of the rights of defence by the company under investigation.”

17. The assessment made by the CMA included consideration of disclosure of other information provided by Invaluable, in addition to the Customer List. Different decisions were made in relation to the different pieces of information provided by Invaluable. It was decided that while the Customer List would be disclosed, another document (a total volume and sales spreadsheet) would not.

18. The CMA case team informed me in the meeting that information, including customer lists, provided by other parties would also be disclosed in the confidentiality ring. Objections to such disclosure had not been made by those other parties.

19. Part 9 of the Enterprise Act 2002 and The Competition Act 1998 Rules² provide the framework for the assessment undertaken by the CMA before deciding to disclose information, including disclosure into a confidentiality ring. The CMA must take into account both the extent to which disclosure is necessary for the purpose for which it is permitted and the harm that may be caused by disclosure of confidential information to the legitimate business interests of the party concerned.³

20. The Competition Act 1998 Rules provide that parties must be given a reasonable opportunity to inspect the documents the CMA has on file which are relevant to proposed action, subject to the ability of the CMA to withhold confidential information. This forms part of the rights of defence of parties under investigation.

21. In this case therefore a way had to be found to respect, so far as practicable, the commercial sensitivity of the Customer List and to enable ATG to exercise its rights of defence.

22. In undertaking this exercise, the SRO’s Decision was that the Customer List should be disclosed in the confidentiality ring. The SRO’s Decision states:

“We consider this approach to be consistent with our obligations under the Competition Act 1998 Rules and reflects a proportionate balancing of the concerns raised by you and ATG’s rights of defence.”

Observations on issues raised by the Application

23. The Application relates to a decision about disclosure taken by the SRO in making an assessment in accordance with Part 9 of the Enterprise Act between respect for confidentiality and the rights of defence. The CMA’s approach to confidentiality in Competition Act investigations is set out in CMA Guidance.⁴ The important considerations in the Application are those relevant to how that

² The Competition Act 1998 (Competition and Markets Authority’s Rules) Order 2014, SI 2014 No. 458.

³ The Enterprise Act 2002, section 244.

⁴ Guidance on the CMA’s investigation procedures in Competition Act 1998 cases, see footnote 1 above, and Transparency and disclosure: Statement of the CMA’s policy and approach (CMA 6).

assessment under Part 9 was carried out and why it reached the conclusions that it did. Those conclusions were explained to Invaluable in the SRO's Decision.

24. I have carefully considered the information provided by Invaluable and the issues raised in the Application and at the meeting I held with Invaluable's legal advisers, as well as the information provided at the meeting I held with the CMA case team. I make the following observations in relation to these, using as headings the three reasons set out in the Application (set out in paragraph 8 above) why Invaluable considers the SRO's Decision should be set aside.

The SRO's decision "fails to afford due regard to the right of the Applicant to protect its commercial interests."

25. The commercial sensitivity of the Customer List and the importance of this to Invaluable has been acknowledged throughout the Investigation, from the time it was provided to the CMA by Invaluable, together with other documents, in response to the section 26 notice. This was acknowledged by the CMA in correspondence and the Customer List was initially included in the confidentiality ring only in redacted form. The proposal for disclosure into the confidentiality ring in unredacted form came following a request made by ATG. In advance of each proposed disclosure, Invaluable was provided with an opportunity to make representations in relation to confidentiality, in accordance with the CMA Rules.⁵ The key issue is therefore rather whether the proper weight was accorded to this commercial sensitivity when assessed against the rights of defence of ATG, the party under investigation.

26. In this context, it is important to note the fact that a confidentiality ring was established. The purpose of a confidentiality ring is to provide a mechanism for enabling disclosure of commercially sensitive information in a manner that minimises the risk of prejudice to that information. [X] I note also that Invaluable considered the commercial sensitivity of the Customer List such that it should not be disclosed, irrespective of the existence of a confidentiality ring. [X]

27. I note also the events (summarised in paragraph 14 above) which took place as part of the CMA's consideration of the documents provided by Invaluable which it was proposed be disclosed in the confidentiality ring, reflecting a careful consideration of each document, following representations. The initial proposals for redactions were agreed in correspondence.

28. The CMA case team informed me of the internal discussions that had taken place in considering ATG's request for further disclosure of unredacted documents. Following these meetings and further correspondence, a final recommendation on disclosure was made to the SRO. This formed the subject of the SRO's Decision.

29. The SRO's Decision addresses two documents provided by Invaluable: a total volume and sales spreadsheet document in addition to the Customer List. As noted above, the conclusion on the proposed disclosure was different for these two documents with a decision taken only to disclose the Customer List into the

⁵ Rule 7, CMA Rules, see footnote 2 above.

confidentiality ring and not to disclose the total volume and sales spreadsheet document.

The SRO's Decision "fails to take account of the content of the Customer List and its likely relevance to ATG's defence."

30. The Application sets out why Invaluable considers that ATG does not need to see the Customer List at this stage because Invaluable does not consider the information is likely to be relevant to ATG's defence.

31. The proposal for disclosure of the Customer List followed a request made by ATG's legal advisers on 7 March 2017. This was a reasoned submission for further access to information in relation to 20 documents, made after the CMA had informed ATG that it needed to explain why such further access was required. In relation to the Customer List, I have been informed by the CMA case team that ATG stated:

"the identity of the auction houses listed in this document would allow us to determine whether these are ATG customers or not. As such, they may be relevant to any foreclosure effect..."

32. The CMA carries out what can be seen as a balancing exercise under Part 9 of the Enterprise Act before making any disclosure. The CMA therefore has to take into account and seek to satisfy potentially conflicting considerations: it is important that parties under investigation are provided with the information on the CMA's file which may be necessary to exercise rights of defence and this may require disclosure of confidential information relating to a third party. The fact that the CMA may have to disclose confidential information is recognised by Part 9 and, as noted above, the way in which the CMA approaches this is set out in published guidance.

33. The Application is made by Invaluable which is a third party to the Investigation. ATG was asked by the CMA to make reasoned submissions why the disclosure was required. The decision about disclosure in accordance with Part 9 has been made by the CMA. I note that although information had been provided to Invaluable about the nature of the Investigation in the section 26 notice, as a third party it is not at this stage in the same position as the SRO to make an assessment about the "likely relevance to ATG's defence".

34. As noted above, the SRO's Decision acknowledges that there is a balancing exercise to be made and refers to the fact that the decision "reflects a proportionate balancing of the concerns raised by you and ATG's rights of defence".

The CMA has "failed to take into account alternative ways of ensuring ATG's rights without compromising the Applicants rights to protect its legitimate business interests."

35. As noted above, the establishment of a confidentiality ring is a mechanism to address concerns about disclosure of commercially sensitive information. I note that a confidentiality ring was established in order to do so in the Investigation. The CMA case team informed me that consideration was also given to other methods of disclosure (for example, the establishment of a data room).

36. Invaluable's legal advisers had an opportunity to explore other possible options with the CMA case team after the Application had been made. I was informed by the CMA case team on 12 April 2017 that following that discussion, the SRO's Decision still stood.

Conclusion

37. I have carefully considered the issues that have been raised. In particular, I have considered the process that was carried out and the issues that were taken into account in making the SRO's Decision. I note in particular that a proper and thorough process was carried out, with both ATG and Invaluable provided with a reasonable opportunity to make representations in relation respectively to rights of defence and commercial sensitivity, and that those representations were given careful consideration by the CMA with the commercial sensitivity of the Customer List recognised and a confidentiality ring already established.

38. I note that since the SRO's Decision is about the application of Part 9, this of itself requires a balancing exercise. The outcome in this case means that in order to enable ATG to exercise its rights of defence, information provided by Invaluable will be disclosed. These are conflicting considerations which Part 9 provides the CMA must consider before taking a decision on whether or not disclosure is necessary. This balancing exercise has been reasonably and properly done in this case, in accordance with the relevant legislation and published CMA Guidance, and the conclusion reached set out in the SRO's Decision.


Decision

39. After careful consideration, in light of the reasons set out above, on 18 April I decided to dismiss the Application and communicated my decision to Invaluable's legal advisers and the CMA case team.

FRANCES BARR

PROCEDURAL OFFICER

28 April 2017

[] indicates confidential information that the CMA has redacted from the published version of this decision.