

**PROCEDURAL OFFICER DECISION
2018/3**

**APPLICATION BY [X]
IN RELATION TO
THE CMA INVESTIGATION UNDER THE COMPETITION ACT 1998 INTO [X]**

The Application

1. [X] has requested that the CMA's decision to refuse the request for [X]'s external legal advisers to attend an interview under section 26A of the Competition Act 1998 (the Competition Act) with [X] (the Individual) in addition to the Individual's own legal advisers should be set aside (the Application). The Application was made on 19 July 2018.

The SRO's Decision

2. The Senior Responsible Officer (SRO) for the CMA's investigation in relation to suspected [X] (the Investigation) decided on 13 July 2018 to uphold the decision of the CMA case team refusing to allow external legal advisers acting only for [X] to be present at the interview of the Individual (the SRO's Decision), in addition to the Individual's legal advisers.

The Procedural Officer's Process

3. The Application was received on 19 July 2018.
4. The Application was clear and succinct and followed the information set out on the Procedural Officer content on the CMA webpage in relation to making an application.¹
5. I held a meeting with [X] and its legal advisers on 31 July 2018. I held a meeting with the CMA case team on 1 August 2018.
6. I have considered the representations and information provided in the meetings I held with [X] and the CMA case team, together with the information set out in the Application.

¹ [CMA webpage.](#)

The role of the Procedural Officer

7. The first issue to consider on receipt of any application to the Procedural Officer is whether or not it relates to matters within the remit of the Procedural Officer.

The Procedural Officer's remit

8. The role of the Procedural Officer in a Competition Act case is set out in the CMA Rules.² Rule 8(1) provides that:

“Complaints about the procedures followed during the course of an investigation under the [Competition] Act may be made to a Procedural Officer. The Procedural Officer, who, other than in acting as Procedural Officer...must not have been involved in the investigation, is to consider a significant procedural complaint where that complaint has not been determined or settled by the relevant person overseeing the investigation to the satisfaction of the complainant.”

9. The CMA's view about the scope of complaints within the remit of the Procedural Officer is provided in the Guidance on the CMA's Investigation Procedures (the Guidance)³ and also in the Procedural Officer content on the CMA's webpage.⁴ These each provide the same five bullet points setting out the issues to which, in the CMA's view, a procedural complaint may relate and which the Procedural Officer is able to review. These bullet points state that procedural complaints relate to the following:

- “deadlines for parties to respond to information requests, submit non-confidential versions of documents or to submit written representations on the Statement of Objections or Supplementary Statement of Objections
- requests for confidentiality redactions of information in documents on the CMA's case file, in a Statement of Objections or in a final decision
- requests for disclosure or non-disclosure of certain documents on the CMA's case file
- issues relating to oral hearings, including, for example, with regard to issues such as the date of the hearing, and

² The Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014 SI 2014/458.

³ Guidance on the CMA's investigation procedures in Competition Act 1998 cases (CMA8), paragraph 15.4.

⁴ See footnote 1 above.

- other significant procedural issues that may arise during the course of an investigation.”

10. It is clear that the Application, which deals with the attendance of legal advisers at an interview held under section 26A of the Competition Act, does not fall within any of the first four bullet points. I have therefore considered what may fall within the fifth bullet point to assess whether the Application may be considered to be relating to “other significant procedural issues”.

“Other significant procedural issues” within the Procedural Officer’s remit

11. As noted above, the CMA Rules state that the Procedural Officer is to consider significant issues that relate to the “procedures followed”⁵ by the CMA during the course of an investigation. The fifth bullet point in the Guidance (referred to above) follows four other bullet points which cover matters of process. I consider that, reviewed in the context as a whole, the fifth bullet point therefore relates to the processes followed by the CMA in the course of an investigation. This is consistent with my interpretation of the wording “significant procedural complaint” in Rule 8(1) of the CMA Rules.

12. Moreover, in introducing the section on procedural complaints, the Guidance explains:

“Parties to an investigation under the CA98 [Competition Act] have recourse to a procedural complaints process in the event that they are unhappy with certain aspects of the investigation procedure after a formal investigation under section 25 of the CA98 [Competition Act] has been opened.”⁶

13. The Guidance and information in the Procedural Officer content on the CMA’s webpage also state the areas which in the CMA’s view fall outside the scope of the Procedural Officer’s remit. The Guidance states:

“The Procedural Officer does not have jurisdiction to review decisions on the scope of requests for information or other decisions relating to the substance of a case.”⁷

14. I note also that the Procedural Officer content on the CMA’s webpage sets out that:

⁵ Rule 8(1), CMA Rules, see footnote 2 above.

⁶ CMA8, paragraph 15.1, see footnote 3 above.

⁷ CMA8, paragraph 15.6, see footnote 3 above.

“The role of the Procedural Officer is intended to ensure that procedural issues can be addressed quickly, efficiently and cost effectively.”⁸

Scope for the Procedural Officer to consider the Application

15. In relation to this Application, I have therefore considered whether or not the request for the attendance of legal advisers of an undertaking at an interview held under section 26A of the Competition Act falls within the fifth bullet point of “other significant procedural issues” and can be considered as a “significant procedural complaint”.

16. I note that in this particular case, the legal representation relates to the representation of an undertaking at the interview of an individual who has a connection with that undertaking. The CMA has agreed to a request that the Individual be represented by a legal adviser at that interview.

The position of [X]

17. The Application states:

“this matter is within the Procedural Officer’s remit: given the importance of the issues raised below concerning [X]’s rights of defence, it is within the category of “other significant procedural issues arising during the course of an investigation” (CMA8 para 15.4). It does not touch on the substance of the CMA’s case and is limited to a narrow procedural question which is clearly within the framework for which the Procedural Officer’s role is designed.”

18. This was reiterated by [X]’s legal advisers at the meeting I held with them. They argued that the attendance of legal representatives was a procedural matter in relation to how a meeting was held; an SRO decision to exclude the attendance of a legal adviser was therefore one concerning the process of an investigation. They also argued that attendance of a legal adviser was a procedural safeguard, to ensure that substantive legal rights could be protected.

19. A number of other points were made by [X]’s legal advisers at the meeting, highlighting points that had been set out in the Application. These included consideration of the nature and consequences of the absence of legal representation as a result of the SRO’s Decision. [X]’s legal advisers pointed out that the Application addressed a minimal request and the detriment to [X] (including in terms of procedural fairness and rights of defence) should be balanced against the public interest (including in terms of the absence of any harm to the conduct of the interview or risk to the investigation) and referred to

⁸ See footnote 1 above.

the impact on [X]’s ability to cooperate with the Investigation. They also contested the application of the Guidance on the attendance of a legal adviser as applied by the CMA case team. In particular, they argued that the concerns set out in the Guidance, and the guidance dealing with conflicts of interest and candour issued by the Solicitors Regulation Authority to which it refers⁹, do not apply to the facts of the case.

The position of the CMA case team

20. The CMA case team considered that the Application does not fall within the Procedural Officer’s remit. At the meeting I held with them, they noted that the statutory framework of section 26A of the Competition Act does not provide for legal representation of an undertaking at an interview. The CMA Rules address legal representation of an individual, in relation to section 26A, during an inspection, and under certain conditions, allowing a reasonable time for a legal adviser to arrive before the interview is started.¹⁰ Instead, legal representation is discussed in the Guidance, which sets out the approach in a paragraph under the heading “Can a legal adviser be present” in the section which deals with the conduct of interviews.¹¹ In particular, it states:

“the starting point for the CMA is that it will be generally inappropriate for a legal adviser only acting for the undertaking to be present at the interview.”

21. The CMA case team argued that whether or not there was a right to legal representation in a section 26A interview was a matter of legal substance, which involved questions including the balance between provisions of the Competition Act and rights of defence on any investigation, and the scope of the rights of the defence. These issues were appropriate for review by the courts rather than the Procedural Officer process. The CMA case team also considered that the issues related to the investigative strategy under the Competition Act rather than simply to procedural matters.

Views on the Procedural Officer’s remit

22. I have considered carefully whether or not the attendance of legal advisers of an undertaking at an interview held under section 26A of the Competition Act can be considered as a “significant procedural issue” within the Procedural Officer’s remit. I have taken into account the points that have been made, as set out above.

⁹ CMA8, footnote 72, see footnote 3 above.

¹⁰ Rule 4(3), CMA Rules, see footnote 2 above.

¹¹ CMA8, paragraph 6.27, see footnote 3 above.

23. I have considered first the nature and context of the Procedural Officer's role, as set out in the CMA Rules, Guidance and in the Procedural Officer content on the CMA webpage. As noted above, this means that the Application only falls within the Procedural Officer's remit if it can be considered within the "other significant procedural issues" fifth bullet point category and relates to the processes followed by the CMA during an investigation. In assessing this context, I have also taken into account the fact that the role has been designed to deal with procedural issues "quickly, efficiently and cost effectively". It follows that procedural issues are matters that may be dealt with in that way and are appropriate to the administrative process and function of the Procedural Officer.
24. I have also taken account of the statutory framework of the Competition Act and the nature of the rights which may arise as part of an investigation. I note that the Competition Act itself does not provide an individual or an undertaking with the right for a legal adviser to attend a section 26A interview. I note also that the provisions in the CMA Rules relate only to the circumstances for the attendance of a legal adviser during an inspection. The CMA has provided guidance on the issues raised by legal representation, setting out its approach to the conduct of interviews in the Guidance.¹² I note in particular that the approach may depend on the circumstances of each case, requiring on each occasion a careful balance between the rights of individuals and undertakings and the public interest issues in the conduct of an investigation.
25. Since the Application concerns legal representation, I have also considered what that may comprise. I have therefore considered whether the fact of legal representation can of itself be seen as a procedural matter, separate from the substantive legal rights which it is designed to protect. In my view, this would be an artificial, as well as an impractical, distinction.
26. I do not therefore consider that the issue of legal representation and the rights that it is designed to protect can be viewed simply as a matter of the format and conduct of a section 26A interview and therefore as part of the processes followed during the course of any investigation.
27. In light of the above, I have reached the view that the attendance of legal advisers of an undertaking at an interview held under section 26A of the Competition Act is not a "significant procedural issue".
28. I have therefore concluded that this Application does not fall within the scope of the Procedural Officer's remit.

¹² CMA8, paragraph 6.27, see footnote 3 above.

29. Since the Application falls outside the scope of the Procedural Officer's remit, I have not considered it necessary to consider the substantive issues that it raises.

Other considerations

30. In the circumstances of this Application, I have nevertheless considered it appropriate to assess whether there were any more general procedural matters raised by the way in which the CMA handled the request by [X] for its legal advisers to attend the section 26A interview with the Individual and in the procedures followed by the CMA in reaching the SRO's Decision.

31. As explained above, the Application relates to the legal representation of an undertaking at the interview of an individual, connected with that undertaking, under section 26A of the Competition Act. Since the CMA has already agreed that the Individual may be represented by a legal adviser at that interview, the relevant part of the Guidance is therefore that which relates to the additional representation at such an interview by legal advisers acting only for the undertaking concerned, in this case [X]. While noting that the interview power may be used in a range of circumstances, the relevant part of the paragraph states:

“the starting point for the CMA is that it will be generally inappropriate for a legal adviser only acting for the undertaking to be present at the interview. The CMA also considers that in certain circumstances there may be a risk that the presence at the interview of a legal adviser only acting for the business will prejudice the investigation, for example if their presence reduces the incentives on the individual being questioned to be open and honest in their account.”¹³

32. I consider that the SRO's Decision carefully reviewed the CMA case team's approach, taking account of the Guidance and the representations made by [X], and that it provided clear reasons for the decision to uphold the case team's refusal of the request for legal representation for [X]. I do not therefore consider that there were any concerns with the process followed in reaching the SRO's decision.

33. Finally, for completeness, I have also noted the specific nature of an interview of an individual under section 26A of the Competition Act and the place that this plays in an investigation as well as the provisions that are in place to protect the rights of defence of an undertaking should a case proceed to a Statement of Objections. I note that the CMA process includes procedural safeguards to

¹³ CMA8, paragraph 6.27, see footnote 3 above.

ensure that rights of defence are respected. In particular, in this case, [X] will have the opportunity to make written and oral representations on evidence which has been obtained from the section 26A interview and on which the CMA investigation relies, should a Statement of Objections be issued.

34. In light of my comments above, I do not therefore consider that the fact that this Application falls outside the scope of the Procedural Officer's remit should of itself lead to concerns about the rights of defence for [X] in relation to the conduct of the interview of the Individual under Section 26A.

Decision

35. After careful consideration, in light of the reasons set out above, I have decided that the Application falls outside the scope of the procedural complaints that can be considered by the Procedural Officer on the request of a party to an investigation.

**FRANCES BARR
PROCEDURAL OFFICER**

16 August 2018