

**PROCEDURAL OFFICER DECISION  
2018/4**

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

**The Application**

1. [X] has requested a review of the decision by the Senior Responsible Officer (SRO) to:
  - i) refuse the request for [X] legal advisers, [X], to attend the interviews under section 26A of the Competition Act 1998 (the Competition Act) with [X] (the Individuals) in addition to the Individuals' own legal advisers, and
  - ii) refuse the request for disclosure to [X] legal advisers of documents referred to in the section 26A notices (the Application).

**The SRO's Decision**

2. The SRO for the CMA's investigation in relation to suspected anti-competitive conduct in [X] (the Investigation) decided on 12 September 2018 to uphold the decision of the CMA case team (the SRO's Decision). In that decision, the CMA case team had refused [X] legal advisers' request to attend the section 26A interviews and for the disclosure of documents referred to in the section 26A notices, as noted in paragraph 1 above.

**The Procedural Officer's Process**

3. The Application was made on 14 September 2018.
4. [X] legal advisers, [X], were asked to confirm the scope of the Application by email on 18 September 2018, in order to establish if it covered both aspects of the SRO's Decision referred to in paragraph 2 above. They confirmed on the same date that the Application related to the disclosure of documents, as set out above, as well as the attendance at the section 26A interviews.
5. [X] legal advisers were informed of the provisional view that the issue of attendance of legal advisers of an undertaking at an interview of an individual

under section 26A was not considered to be within the Procedural Officer's remit. The basis for this provisional view was sent to [X] legal advisers by email on 18 September 2018 and they were provided with an opportunity to make representations on this issue within a reasonable time frame. These representations were made on 20 September 2018. [X] legal advisers were informed on 24 September 2018 that these representations did not change the provisional view that this issue did not fall within the Procedural Officer's remit, as set out on 18 September 2018.

6. I held a meeting with [X] legal advisers by telephone on 27 September 2018. I held a meeting with the CMA case team on 2 October 2018.
7. I have considered the representations and information provided in the meetings I held with [X] legal advisers and the CMA case team, together with the information set out in the Application and the representations made on 20 September 2018.

### **The role of the Procedural Officer**

8. 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.
9. The Application addresses two issues related to section 26A notices under the Competition Act:
  - i) attendance of an undertaking's legal advisers at interviews under section 26A, and
  - ii) disclosure of documents referred to in the section 26A notices to the undertaking's legal advisers.
10. In relation to each issue, the Application requests access for and disclosure to the legal advisers acting for [X], an undertaking involved in the Investigation.

### *The Procedural Officer's remit*

11. The role of the Procedural Officer in a Competition Act case is set out in the CMA Rules.<sup>1</sup> 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

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<sup>1</sup> The Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014 SI 2014/458.

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.'

12. 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)<sup>2</sup> and also in the Procedural Officer content on the CMA's webpage.<sup>3</sup> 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
- other significant procedural issues that may arise during the course of an investigation.'

13. The Application requests disclosure of documents referred to in the section 26A notice which are on the Investigation's case file. The part of the Application which deals with disclosure of documents falls within the third bullet point. This therefore raises issues which may be considered by the Procedural Officer.

14. The part of 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 set out below my consideration of what may fall within the fifth bullet point to assess whether this part of the Application may be considered to be relating to 'other significant procedural issues'.

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<sup>2</sup> Guidance on the CMA's investigation procedures in Competition Act 1998 cases (CMA8), paragraph 15.4.

<sup>3</sup> [CMA webpage](#).

*'Other significant procedural issues' within the Procedural Officer's remit*

15. As noted above, the CMA Rules state that the Procedural Officer is to consider significant issues that relate to the 'procedures followed'<sup>4</sup> 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 view of the meaning of 'significant procedural complaint' in Rule 8(1) of the CMA Rules.

16. 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.'<sup>5</sup>

17. 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.'<sup>6</sup>

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

'The role of the Procedural Officer is intended to ensure that procedural issues can be addressed quickly, efficiently and cost effectively.'<sup>7</sup>

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<sup>4</sup> Rule 8(1), CMA Rules, see footnote 1 above.

<sup>5</sup> CMA8, paragraph 15.1, see footnote 2 above.

<sup>6</sup> CMA8, paragraph 15.6, see footnote 2 above.

<sup>7</sup> See footnote 3 above.

## **Scope for the Procedural Officer to consider the Application**

### Disclosure of documents

19. As set out above (see paragraph 13), the part of the Application which deals with disclosure of documents falls within the third bullet point of procedural complaints that may be considered by the Procedural Officer.
20. An assessment of the issues raised by this part of the Application has therefore been made further below.

### Attendance of legal advisers

21. I have considered whether or not the part of the Application which deals with 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'.
22. I note that in this particular case, the legal representation relates to the representation of [X], an undertaking, at the interview of Individuals who have a connection with that undertaking. I understand that the CMA case team has agreed to a request that the Individuals will be represented by a legal adviser at those interviews.

### *The position of [X]*

23. The Application states:

'We believe this matter falls within the procedural officer's remit under the fifth ground given in the relevant guidance, namely;

- Other significant procedural issues that may arise during the course of an investigation.'

24. In the Application, the following observations are made, addressing comments made in the SRO's Decision. The emphasis used in the Application has been included.

'(1) Even if it were right to say that there is no particular statutory reference affording particular legal rights to the undertaking in the context of S26A interviews, it is also right to say that there is no particular statutory reference

depriving the undertaking from exercising its legal rights in accordance with existing law.

We also query the terminology used in the second half of the referenced Explanatory Note being Explanatory Note 318 as follows:

*“318. Section 26A(2) requires a copy of the notice to be given to each relevant undertaking with which the individual has a current connection. This ensures that companies are able to offer legal support to individuals who may be asked questions about them, **and that they are aware that such questions are being asked.**”*

It is clear that the phrasing in the second half of that sentence shows that the undertaking is to be made generally aware that the questions are being asked which leads to the consideration that in so doing the undertaking remains entitled to consider its own legal position.

(2) We make the further point that the privilege against self-incrimination cannot be relied upon once the privilege is lost and hence that it is vital that the interviews which currently remain scheduled for [X] be adjourned pending your consideration of these issues. This is also a reason why we disagree with the contention made in the SRO's letter of the 12<sup>th</sup> September that:

*“...[X] rights of defence are adequately protected through the opportunity to make representations on the CMA's case and the evidence on which it relies (including the CMA's use)(if any) of the material provided by individuals in Section 26A interviews) following the issue of any formal Statement of Objections in relation to the investigation.”*

With this important point in mind that assertion simply cannot be right.'

25. A number of points were made in the additional representations provided by [X] legal advisers dated 20 September 2018 (the Representations), as set out below.

26. First, the Representations note that the reasons provided by email dated 18 September:

'appear to unduly limit matters of procedure to matters of administration; namely the CMA's own internal policies as set out in its internal guidance with reference to issues of efficiency and cost effectiveness.'

27. They note that investigations:

'are part of a decision-making process. That process comprises procedural steps, of which s26A notices may form part.'

28. The Representations also highlight the issues of procedural impropriety, fairness and the privilege against self-incrimination:

'To avoid procedural impropriety, the common law expects the "rules of natural justice" to be observed. Natural justice requires the decision-making process to be "fair". Fairness includes the right to representation. Fairness also includes the presumption of innocence and the right to exercise the privilege against self-incrimination, if needs be ...

The suggestion that the Procedural Officer cannot review a decision by the case team and the SRO to refuse our client the right to legal representation at a s26A interview because it is not sufficiently procedural in nature is difficult to understand or accept not least because of the risk of the process leading to "procedural impropriety", a concept well understood in the context of judicial review.'

29. The Representations also refer to general dictionary definitions of 'procedure', and note:

'It follows that s26A notices, consequential compulsory interviews and the manner these are conducted by the CMA and used in its decision-making process in CA98 investigations raise procedural issues which lend themselves to review by the Procedural Officer, not least because failure to get it right could amount to "procedural impropriety".'

30. The Representations also note that:

'there can be no doubt that the issue raised is "significant". We believe it reasonable to assume that CA98 procedures generally must include a fair process that protects all the legal rights of those under investigation.'

#### *Views on the Procedural Officer's remit*

31. 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. In considering this issue, I have taken into account the points that have been made on behalf of [X], both in the Application and in the Representations, as set out and summarised above.

32. 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 (paragraph 14), this means that this part of 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.
33. In this context, I have noted the points made in the Representations referred to above about Competition Act investigations being part of a decision making process and that section 26A notices may form part of the procedural steps in that process.
34. 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.
35. I note that section 26A of the Competition Act itself does not provide for legal representation of an undertaking at an 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 Application considers these issues, as noted above, acknowledging the absence of any particular statutory reference providing rights to undertakings and pointing out that 'it is also right to say that there is no particular statutory reference depriving the undertaking from exercising its legal rights'. The relevant factor for my consideration is nevertheless that since there is no explicit provision which gives the undertaking a right to legal representation at a section 26A interview, this is not clearly a procedural matter.
36. In the absence of any explicit statutory provision in relation to legal representation, the CMA has provided guidance on the issues raised, setting out its approach to the conduct of interviews in the Guidance. In this case, as explained above, part of the Application relates to the legal representation of an undertaking at the interview of [§<] Individuals, connected with that undertaking, under section 26A of the Competition Act. Since the CMA has already agreed that the Individuals may be represented by a legal adviser at those interviews, 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 [§<]. While noting that the interview power



may be used in a range of circumstances, the relevant part of the paragraph in the Guidance 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.’<sup>8</sup>

37. I have taken into account the points made in the Application which refers to the procedures for issuing section 26A notices, the terminology of the Explanatory Note, and the fact that in receiving a copy of the section 26A notice ‘the undertaking is to be made generally aware that questions are being asked’. I do not however consider that this means that it follows that there is a clear procedural right for an undertaking to be represented at a section 26A interview. 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.
38. Since this part of the Application concerns legal representation, I have also considered what that legal representation may comprise. I have therefore considered whether the fact of legal representation can of itself be seen as a procedural matter, separate from any substantive legal rights which it is designed to protect. I note that in the Application and the Representations emphasis is placed on the rights of the undertaking, [X], including the privilege against self-incrimination. In my view, any such distinction between legal representation and substantive legal rights would be an artificial, as well as an impractical, one.
39. It follows therefore that I do not 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.
40. In light of the above, I have reached the view that the attendance of legal advisers representing an undertaking at an interview held under section 26A of the Competition Act is not a ‘significant procedural issue’.
41. I have therefore concluded that the part of this Application that deals with the attendance of legal advisers acting for [X] at the interview of the Individuals under section 26A of the Competition Act does not fall within the scope of the Procedural Officer’s remit.

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<sup>8</sup> CMA8, paragraph 6.27, see footnote 2 above.

42. Since this part of 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.

### **Request for disclosure of documents**

43. The Application requests disclosure to [X] of the documents referred to in the section 26A notices. The section 26A notices explain that these documents will be provided to the legal advisers acting for the Individuals in advance of the interviews.

44. The original request from [X] for all the documents which would be provided as part of the section 26A interview process was modified in a letter dated 11 September 2018 from [X] legal advisers to the SRO (paragraph 45, below). This followed the CMA case team's explanation in a letter dated 7 September 2018 that the CMA's ability to disclose to [X] material received from other parties was limited by the provisions in Part 9 of the Enterprise Act 2002.

45. The SRO's Decision set out the reasons why the decision taken by the CMA case team not to provide pre-interview disclosure of documents to [X] was being upheld. The SRO noted the modification of the request to exclude documents from [X].

46. The SRO's Decision states:

'In particular, I am satisfied that there is no need for any such disclosure to [X] at this stage, given (i) that [X] legal representatives will not be attending the section 26A interviews and (ii) as set out in the case team's letter of 7 September, that [X] will have an opportunity to inspect documents on the CMA's file as part of the access to file process in due course, should the case proceed to the issue of a formal Statement of Objections.'

### **The position of [X]**

47. At the meeting I held with [X] legal advisers, a number of points were made in relation to the disclosure of documents. These emphasised the importance of a fair decision making process and the right to the privilege against self-incrimination, which it was argued, once lost, could not be regained. The key arguments which were made are set out below.

48. [X] legal advisers considered that the disclosure of documents which would form the basis for questions at the section 26A interviews was part of [X] right to the privilege against self-incrimination. [X] was an undertaking subject to an

investigation under the Competition Act and it was essential that there was no procedural impropriety in the decision making process of which the section 26A interviews formed part. This meant that the decision making process had to be fair, including a presumption of innocence and the privilege against self-incrimination.

49. The concern highlighted at the meeting was the risk that [X] might be denied the presumption of innocence and the privilege against self-incrimination, rather than that this would actually occur. It was asserted that once the privilege had been lost, it could not be regained. It was argued that since it had been accepted that [X] legal advisers would not be allowed to attend the interviews and intervene to protect the undertaking, access to the documents would enable an assessment of risk and an understanding of the issues that might be raised at those interviews.
50. In the particular circumstances of this case, it was noted that the [X] Individuals who would be subject to the section 26A interviews [X]. [X] legal advisers argued therefore that if during the course of the interviews [X] made an admission of conduct that it would otherwise be for the CMA to prove, [X] would not be able to remedy the position. It was argued that although, as had been set out in the SRO's Decision, [X] would be able to make representations on the information obtained from the section 26A interviews should the investigation proceed to a Statement of Objections, any privilege against self-incrimination could not be reclaimed and the 'genie could not be put back into the bottle'.
51. [X] legal advisers emphasised that this was a genuine concern: recognising that [X] could not be represented at the interviews and was being denied the opportunity to protect its rights, the next step, although not ideal, would be for it to be given access to the documents.

*The position of the CMA case team*

52. At the meeting I held with the CMA case team, they presented the process for dealing with documents during an inspection under warrant and in an ongoing Competition Act investigation and set out the nature of interviews held under section 26A. The CMA case team's view was that the issues raised by the Application relate to the advance disclosure to [X] of [X] documents on the CMA's case file during an ongoing Competition Act investigation.
53. The CMA case team first presented the process for dealing with documents when the CMA conducts an inspection under warrant. Parties are provided with copies and a schedule of the physical (hard-copy) documents of which the CMA has

taken copies. The CMA also provides parties with a list detailing the types of digital material which have been copied. When a request for documents is made in a section 26 notice, the party concerned will be providing the documents and will therefore clearly be aware of what has been sent to the CMA in response to that request. The CMA case team therefore noted that [X] and its legal advisers would be aware of all the documents which were in the CMA's case file which were [X] documents.

54. The CMA case team then outlined the access to file stage of a Competition Act investigation. If the CMA issues a Statement of Objections, the parties will be given a reasonable opportunity to inspect the documents in the CMA's case file that relate to the matters set out in the Statement of Objections.
55. The CMA case team also outlined the process for dealing with confidentiality in the access to file process. They said that in preparation for this process, a party will be provided with a copy of its own documents and given an opportunity to make representations about the confidentiality of the information in those documents. Before the documents are made available to all parties at the access to file stage, the CMA will consider those representations and make appropriate confidentiality redactions.
56. The CMA case team explained that it planned to provide the Individuals with copies of certain documents that are in the case file, subject to restrictions on further use and disclosure. This was to enable each of the Individuals to refresh their memory in advance of the section 26A interviews.
57. The CMA case team noted however that providing documents to an undertaking in relation to section 26A notices and in advance of the access to file stage could compromise an investigation, raising risks of wider document destruction and witness contamination. It could also potentially be resource intensive. The public interest in the progress of the investigation therefore had to be balanced against the request by an individual undertaking. The CMA case team emphasised that this should all be considered in the wider context of the access to file process which provided an undertaking with the opportunity to see the documents on which the CMA relied and to make representations in order to exercise its rights of defence.
58. The CMA case team also noted the nature of section 26A interviews. These were interviews of individuals and not of undertakings. Since [X] was not itself being interviewed, no issues about self-incrimination could arise. [X] was not being asked to provide the CMA with anything. This was all the more the position since [X] itself would not be present or represented at the interviews.

The CMA case team also noted that, at the access to file stage, it would be open to [X] to make representations in relation to any statements which might be made by the Individuals at the section 26A interviews, [X].

59. The CMA case team did not therefore consider that early access to the documents on the CMA case file, in advance of the access to file process, was necessary for [X] to exercise its rights of defence.

#### Views on request for disclosure of documents

60. I have carefully considered the Application, the Representations and the points that have been made by [X] legal advisers about the request for disclosure of [X] documents to [X] in advance of the section 26A interviews and the reasons for this request. I have also carefully considered the SRO's Decision, and the comments in relation to the Application that have been made by the CMA case team. I have set out below my views on the SRO's Decision and the process followed in taking it.

61. I consider that the SRO's Decision carefully reviewed the CMA case team's approach and the points made by [X] legal advisers and that it provided clear reasons for the decision to uphold the case team's refusal of the request for disclosure of documents to [X] in advance of the section 26A interviews. The SRO's Decision also properly took account of the change in the request and the limitation to documents relating only to [X] itself. I therefore consider that a fair and proper process was followed in taking the SRO's Decision.

62. I note that the CMA's usual practice in a Competition Act investigation is to provide access to the documents in the CMA's case file at access to file stage. Rule 6(2) of the CMA Rules<sup>9</sup> provides that:

'The CMA must give a relevant party a reasonable opportunity to inspect the documents in the CMA's file that relate to the matters referred to in a notice given to that relevant party.'

63. There is no requirement on the CMA to provide access to documents at an earlier stage of an investigation. In this case, the CMA case team has decided to provide each of the Individuals with limited access to certain documents for the purpose of the section 26A interviews, to refresh their memory.

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<sup>9</sup> See footnote 1 above. Rule 6(2) provides an exception that the CMA may withhold any document that contains confidential information or is internal.

64. I consider that the SRO's Decision that there is no need to disclose these documents to [X] at this stage was reasonable in the circumstances of this case, for the reasons set out below.
65. I note the specific nature of interviews under section 26A of the Competition Act, including the fact that the interviews are of individuals (and not of the undertaking). In this case, [X] legal advisers will not be attending the section 26A interviews and [X], the undertaking, will not be represented at the interviews. I note also that [X] will have an opportunity to inspect documents on the CMA's case file as part of the access to file process in due course should the Investigation proceed to a Statement of Objections, as set out in the SRO's Decision.
66. In addition, I note that the documents which form the subject of this Application are [X] own documents. These documents are therefore ones to which [X] already has access.
67. I have carefully considered the arguments made by [X] legal advisers that in this particular case the Individuals [X]. I consider however that the SRO's view, set out in the SRO's Decision, that [X] will have the opportunity to make representations, including on the evidence on which the CMA relies (for instance, the CMA's use (if any) of the material provided by the Individuals in section 26A interviews) following the issue of any formal Statement of Objections, is reasonable. I consider therefore that the fact that [X] does not of itself give rise to concerns about the rights of defence of [X]. Moreover, I note the CMA case team's comment that providing documents to an undertaking in relation to section 26A notices and in advance of the access to file stage could compromise an investigation. I note that the public interest in the progress of an investigation has to be balanced against the request by an individual undertaking.
68. In light of all these points, I have concluded that the SRO's Decision was a reasonable one and, in particular, in reaching that decision appropriate consideration was given to the wider procedural safeguards in place in the Competition Act regime.

## **Decision**

69. After careful consideration, in light of the reasons set out above, on 10 October, I decided:
- i) the part of the Application which relates to the attendance of [X] legal advisers at the section 26A interviews of the Individuals 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

- ii) to dismiss the part of the Application which relates to the refusal to disclose documents to [X] and its legal advisers in advance of the section 26A interviews of the Individuals.

70. My decision was communicated to [X] legal advisers and to the CMA case team on that date.

**FRANCES BARR  
PROCEDURAL OFFICER**

**22 October 2018**