

**PROCEDURAL OFFICER DECISION  
2018/5**

**APPLICATION BY  
[REDACTED]  
ON BEHALF OF  
[REDACTED]  
IN RELATION TO  
THE CMA INVESTIGATION UNDER THE COMPETITION ACT 1998 INTO THE  
[REDACTED]**

**The Application**

1. [REDACTED], acting on behalf of [REDACTED] individuals, [REDACTED] (the Individuals), has requested a review of the decision by the Senior Responsible Officer (SRO) that:
  - i) refused to withdraw notices issued to the Individuals on 31 August 2018 to attend the interviews under section 26A of the Competition Act 1998 (the Competition Act),
  - ii) rejected the assertion that witnesses interviewed under section 26A of the Competition Act would be entitled not to answer any question which might expose them to a Competition Disqualification Order and stated that evidence obtained under compulsion has been held to be admissible in director disqualification proceedings, and
  - iii) refused the request for the legal advisers of the undertaking to attend the interviews to be held under section 26A of the Competition Act.
2. The request also asked for representatives of the undertaking to attend the interviews to be held under section 26A of the Competition Act. This issue was not part of the original request made on behalf of the Individuals to the SRO and therefore was not considered by the SRO. It has nevertheless been addressed in this decision which treats all these four issues as forming part of the Application (the Application).

**The SRO's Decision**

3. The SRO for the CMA's investigation in relation to suspected anti-competitive conduct in [REDACTED] (the Investigation) decided on 12 September 2018 to uphold the decision of the CMA case team, as set out in paragraph 1 above (the SRO's Decision). The SRO's Decision relates to the notices under section 26A of the

Competition Act which have been sent to the Individuals because of their connection with an undertaking which is a party to the Investigation. [X].

### **The Procedural Officer's Process**

4. The Application was made on 17 September 2018.
5. [X], the Individuals' legal advisers, were asked to confirm the scope of the Application by email on 19 September 2018, in order to establish if it covered the request for representatives of [X], the undertaking, to attend the section 26A interviews, in addition to [X] legal advisers in light of the fact that the SRO's Decision only addressed the request for attendance of legal advisers representing [X]. They confirmed on 20 September 2018 that the Application related to the attendance of representatives of [X] and to the attendance of legal advisers of [X].
6. The Individuals' legal advisers were asked to clarify the nature of the Application in relation to the privilege against self-incrimination by email on 20 September 2018. They explained that the Application sought confirmation that any statements made by the Individuals in the section 26A interviews would not be used or relied upon when considering whether to apply for a Competition Disqualification Order either against the Individuals and/or during any part of the process. This was set out in an email dated 2 October 2018.
7. The Individuals' legal advisers were informed of the provisional view that the issues raised in the Application were not considered to be within the Procedural Officer's remit. The basis for this provisional view was sent to the Individuals' legal advisers by email on 20 September 2018 and they were provided with an opportunity to make representations on this issue. They made representations on 2 October 2018. The Individuals' legal advisers were informed on 8 October 2018 that these representations did not change the provisional view that the issues raised in the Application did not fall within the Procedural Officer's remit, as set out on 20 September 2018.
8. The timetable for considering the Application in this case was extended, in particular to take account of the circumstances of this case including the nature of the correspondence referred to above.
9. I held meetings with the CMA case team on 25 and 30 October 2018. I held a meeting with the Individuals' legal advisers by telephone on 26 October 2018.

10. I have considered the representations and information provided in the meetings I held with the Individuals' legal advisers and the CMA case team, together with the information set out in the Application and in correspondence.

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

11. 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***

12. 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 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.'

13. 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

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

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

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

- 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.’

14. The Application raises a number of issues related to section 26A notices under the Competition Act. These cover:

- i) the issue of section 26A notices,
- ii) the CMA’s ability to rely on and/or use statements made at the section 26A interviews in relation to Competition Disqualification Orders and the privilege against self-incrimination, and
- iii) the representation of an undertaking at the section 26A interviews of the Individuals.

15. I have considered each of these issues separately. These issues are not covered by any of the first four bullet points set out above. I have therefore considered below what may fall within the fifth bullet point to assess whether each of the issues raised may be considered to relate to ‘other significant procedural issues’.

***‘Other significant procedural issues’ within the Procedural Officer’s remit***

16. 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 (set out in paragraph 13 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.

17. 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

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

certain aspects of the investigation procedure after a formal investigation under section 25 of the CA98 [Competition Act] has been opened.<sup>5</sup>

18. 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>

19. In the Guidance, a footnote to this paragraph explains:

'Section 26 of the CA98 [Competition Act] provides the CMA with the power to require documents or information.'<sup>7</sup>

20. 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>8</sup>

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

21. I have considered whether or not the Application raises issues which fall within the fifth bullet point of 'other significant procedural issues' and can be considered as a 'significant procedural complaint'.

### ***The position of the Individuals***

22. The Individuals' legal advisers consider that all of the issues raised in the Application fall within the fifth bullet point and therefore fall within the Procedural Officer's remit. This was emphasised at the meeting I held with them.

23. The points that were made at the meeting with the Individuals' legal advisers were categorised in relation to three issues which the Individuals' legal advisers referred to as the 'Issuance Complaint', the 'CDO Complaint' and the 'Company Representative Complaint'. The arguments that were made covered both the jurisdiction of the Procedural Officer and the substance of the complaints raised

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<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> CMA8, footnote 196 to paragraph 15.6, see footnote 2 above.

<sup>8</sup> See footnote 3 above.

in the Application. The points are set out below in the order presented at the meeting.

*'The Issuance Complaint': issuing section 26A notices*

24. In the Application, it was argued that the 'the proposed interviews are an abuse of process'. This was based on concerns that: 'the interviews remain of doubtful utility ... and oppressive ...'.
25. The Individuals' legal advisers argued at the meeting that the decision to issue a section 26A notice was a decision by the CMA to exercise powers in a particular way. It was a question of procedure and therefore a procedural step.
26. They acknowledged that there was no absolute legal bar on a section 26A notice being issued and it was precisely because the CMA has a wide-ranging toolkit that it was argued to be all the more necessary for the CMA to govern itself in accordance with public law duties, with any notice being issued fairly and according to natural justice.
27. At the meeting, the Individuals' legal advisers noted that the Individuals had complied fully and freely with dawn raids, recognising that what they referred to as 'the hardship, inconvenience and intrusion' accompanying such raids was within the CMA's rights. They also noted that the Individuals had attended interviews voluntarily. At those interviews, [§<]. In relation to the section 26A interviews, the Application stated:

'We query whether explanations are in fact required or rather admissions.'
28. At the meeting I held with them, the Individuals' legal advisers stated that the CMA should instead use interviews to ask direct and pointed questions on which to build its evidence. They argued that a new set of interviews therefore would serve no additional purpose. The Individuals' legal advisers said that if there had been documents for the Individuals to consider these should have been provided earlier. Instead, it was argued, that this second set of interviews was a 'rehash', allowing a 'second bite of the cherry' rather than arising from any new circumstances.
29. The Individuals' legal advisers also noted that a 'stop/go' decision had been taken on the Investigation in 2017. They therefore questioned the utility of any new information and the incentive behind the decision to hold these further interviews. They argued that the section 26A interviews should not be used to

reveal vital information about documents that could have been provided at the first interviews.

*'The CDO Complaint': Privilege against self-incrimination*

30. The Application stated:

'Our clients should be entitled to the privilege against self-incrimination, not only in relation to criminal prosecutions but also in relation to Competition Disqualification Orders.'

31. In the Application, a request was also made for the SRO to 'provide details with appropriate case references' to support a statement made in the SRO's Decision about the admissibility in director disqualification proceedings of evidence obtained under compulsion.

32. This point was emphasised by the Individuals' legal advisers in the email of 2 October 2018:

'...it is our view that the CMA does not have a legal right to use or rely upon statements given in Section 26A interviews when considering whether to apply for a Competition Disqualification Order against our clients and/or during any part of that process. Accordingly we seek confirmation that any statements made by our client will not be so used.'

33. At the meeting, the Individuals' legal advisers raised a concern that the section 26A notices contained a threat against the Individuals because of the implications of the potential use of any statements made and therefore the Individuals would be going into the section 26A interviews on an uncertain and potentially prejudicial footing. They explained that they were not seeking legal advice from the CMA and acknowledged that the CMA has stated that the Individuals can take their own legal advice. The Individuals' legal advisers argued that the concern in this case was that since the section 26A notices contain a threat which potentially prejudices rights, that threat should be withdrawn, even if the argument for withdrawal of the section 26A notices failed.

34. The Individuals' legal advisers argued that since there was no express statutory provision for making use of any information obtained in section 26A interviews, fundamental legal principles applied including the privilege against self-incrimination. They noted the boundary established in case law between requests for factual information and requests for confessions of wrongdoing. In this case, the Individuals' legal advisers asserted that no distinction could be

drawn if information could be turned against the Individuals, arguing that asking questions for the purposes of an investigation was different from recycling that information for the purposes of a Competition Disqualification Order.

*'The Company Representative Complaint': attendance of legal advisers and representatives of the undertaking at the section 26A interviews*

35. The Application stated:

'We cannot see any specific statutory reference which prevents our clients exercising their legal rights and we envisage they are entitled to support from their employer...'

36. At the meeting I held with the Individuals' legal advisers, they considered that this issue was about procedure since it was about 'how the CMA does things'. They pointed out that the CMA's published guidance<sup>9</sup> leaves the issue open, although acknowledging that the Guidance states that the attendance of legal advisers acting for the undertaking at a section 26A interview was not the normal state of affairs. The Individuals' legal advisers argued that in this case, the reasons why the representatives of an undertaking should not be present did not apply. [X]. The Individuals' legal advisers therefore argued that the usual concerns set out in the Guidance about the risk that any evidence would be subject to pressure from the company involved did not arise and there was no suggestion of any 'malign influence' by such attendance. The Individuals' legal advisers pointed out that [X] was represented at the voluntary interviews which had already been held in the Investigation. Moreover, they asserted that the company itself has an interest in participation in the section 26A interviews since it is 'in the dock'.

***Views of the CMA case team***

37. At the meetings I held with the CMA case team they argued that the issues raised by the Application did not fall within the Procedural Officer's remit. It was noted that the SRO's Decision addressed each of the issues which had been raised with the SRO and provided clear reasons for the CMA's approach. The points made at the meetings which are summarised below were made within that context.

*Issuing section 26A notices*

38. The CMA case team highlighted that the approach to the interviews, including the conduct of the voluntary interviews and the decision to use formal section 26A

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<sup>9</sup> CMA8, see footnote 2 above.



powers, followed usual CMA procedures in investigations. In this case, the Individuals had declined to attend a second set of voluntary interviews. The CMA case team pointed out that the reasons for the steps which had been taken in relation to the interviews were communicated clearly to the Individuals and their legal advisers. The CMA case team did not therefore accept that the approach was 'oppressive' or of 'doubtful utility' or that this meant that the section 26A notices were issued in a way that brought the decision to do so within the Procedural Officer's remit.

#### *Privilege against self-incrimination*

39. The CMA case team noted that the reference to disqualification orders in the section 26A notices states the law and considered that it would be un-transparent not to include it. The CMA case team also noted that, as explained in the SRO's Decision, no decision had yet been taken on this case about the use of Competition Disqualification Orders.

#### *Representation of [X] at the section 26A interviews*

40. The CMA case team noted that the starting point was that there was no right to representation for an undertaking at a section 26A interview, either by an officer of that undertaking or by a lawyer. Any attendee at a section 26A interview had to have a reason to be there. The CMA case team noted that the Individuals were the witnesses and not the undertaking. [X]. [X] Individuals would have legal representatives at the section 26A interviews. The CMA case team also noted that at this stage of the Investigation there was a risk that representation for [X] would cause prejudice to the Investigation, including an impact on candour and the possibility of witness contamination.

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

41. As noted above, I have considered whether or not the Application raises issues which fall within the fifth bullet point of 'other significant procedural issues' and can be considered as a 'significant procedural complaint'. I have carefully considered the points made in the Application, in correspondence with the Individuals' legal advisers and at the meeting I held with them. I have also carefully considered the points set out in the SRO's Decision and made by the CMA case team at the meetings I held with them.

42. 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 15), this means that the issues raised by the Application only fall within the Procedural Officer's remit if each of

these 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 of the Procedural Officer 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. 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.

43. I have set out my views on each of the issues separately below. I have followed the order in which the points were addressed in the SRO's Decision (see paragraph 1 above) and raised at the meeting I held with the Individuals' legal advisers.

#### *Issuing section 26A notices*

44. The CMA states in the Guidance (see paragraph 18 above) that 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'.

45. The decision to issue a section 26A notice in any investigation is a step which is integral to the conduct of that investigation. The CMA case team will consider carefully whether there is sufficient evidence to establish a suspected infringement and how a particular individual who has a connection with a business which is party to the investigation should be required to answer questions on any matter relevant to the investigation. It is therefore part of the way in which the CMA case team builds a case. As a consequence, the decision to issue a section 26A notice is bound up with the substance of any particular case. It is not simply a procedural matter. Such a decision does not therefore itself fall within the Procedural Officer's remit. The process followed in reaching such a decision may nevertheless fall within the Procedural Officer's remit.

46. I note the points that have been made on behalf of the Individuals, both in the Application and at the meeting I held with the Individuals' legal advisers, about the decision to issue a section 26A notice in this case being 'oppressive' and of 'doubtful utility' and that this makes the decision in this particular case into one about the process adopted by the CMA, including the fairness of the procedures. On the contrary, as noted above, the decision to issue a section 26A notice is bound up with the substance of the suspected infringement of competition law and decisions 'relating to the substance of a case' are not ones which the Procedural Officer is able to review. In this case, the decision to issue a section 26A notice followed an assessment by the CMA case team of the evidence which

had already been obtained and the voluntary interviews which had already been conducted as part of the usual CMA investigation process. I note also that as explained by the CMA case team at the meeting I held with them, the Individuals had declined to attend a second set of voluntary interviews.

47. In addition, I note that the SRO's Decision sets out a clear explanation of the conduct of the Investigation to date and the reasons for issuing section 26A notices. In particular, I note the explanation provided that:

'...the sole purpose of the interviews is to assist the CMA in establishing whether breaches of competition law have taken place by obtaining a full account from your clients as to their knowledge of matters relevant to the investigation, including as regards documents obtained by the CMA as part of its investigation. This is standard practice in CMA investigations of this kind.'

48. Moreover, I note that the manner of issuing the section 26A notices was in accordance with usual CMA practice and that a proper process was followed in issuing these to the Individuals. A formal notice was issued requiring each of the Individuals to answer questions which specified the time and place where the interviews would be held and provided all the relevant statutory information.

49. I do not therefore consider that any steps have been taken that can be seen to operate to make the process followed in issuing the section 26A notices in this Investigation procedurally unfair in some way, as the Individuals' legal advisers had argued.

50. In light of these points, I have concluded that the issues raised by the Application in relation to the issuing of section 26A notices do not fall within the 'other significant procedural issues' category (the fifth bullet point set out in paragraph 13 above) and cannot therefore be considered as a 'significant procedural complaint'. These issues therefore do not fall within the Procedural Officer's remit.

#### *Privilege against self-incrimination*

51. The request in the Application in relation to the privilege against self-incrimination was developed and clarified as part of the Procedural Officer's process.

52. I note first that the letter sent with the section 26A notices contains the following standard wording under the heading Competition Disqualification Orders:

'The CMA may use, and if necessary disclose, information and documents provided in response to this notice ...for the purposes of deciding whether to

make an application for a disqualification order and/or in relation to any such application it may make.'

53. This sets out the CMA's view of the legal position. This reflects an intention to be clear and open to recipients of section 26A notices, providing some guidance in setting out the legal position. The letter sent with the section 26A notices also reminds the recipient:

'If you are in any doubt about your legal rights and obligations under this notice you may wish to consult a legal adviser.'

54. It is not the role of the Procedural Officer to provide a legal interpretation of the privilege against self-incrimination. A request to do so is not a procedural complaint.

55. I note also that the CMA case team explained in the meetings that the reference to the use of information was intended to state the law and so to be helpful. It was considered that to do otherwise would be un-transparent.

56. Moreover, I note that the approach to Competition Disqualification Orders and the protections against self-incrimination provided for in the statutory regime were explained in the SRO's Decision. In particular, the SRO's Decision makes clear that

'As set out in Annex 2 to the section 26A notices, the statutory regime includes protections against self-incrimination for individuals interviewed under section 26A in the form of restrictions on the use of section 26A statements in criminal prosecutions.'

57. It further explains:

'Disqualification proceedings are not criminal prosecutions, however, and the privilege against self-incrimination would not therefore arise in that context'

58. I note also that the request by the Individuals' legal advisers for the appropriate case references on which this is based was addressed when these were provided by the CMA case team by email on 25 September 2018.

59. I do not therefore consider that the references to issues related to Competition Disqualification Orders and the privilege against self-incrimination in the section 26A notices can in any way be seen as some form of threat, as the Individuals' legal advisers argued, nor can these references operate to make the issue of the section 26A notices procedurally unfair in some way.

60. In light of these points, I have concluded that the issues raised by the Application in relation to the privilege against self-incrimination do not fall within the 'other significant procedural issues' category (the fifth bullet point set out in paragraph 13 above) and cannot therefore be considered as a 'significant procedural complaint'. These issues therefore do not fall within the Procedural Officer's remit.

#### *Representation of the undertaking*

61. Two issues have been raised in relation to the representation of [X], the undertaking, at the section 26A interviews: representation by legal advisers and representation by corporate representatives. As noted above, these two issues have been raised in different ways. The representation by legal advisers was raised with the CMA case team and considered in the SRO's Decision. The representation by corporate representatives was raised for the first time when the Application was made. The Individuals' legal advisers confirmed that both issues should be treated as part of the Application (see paragraph 5 above). These are considered separately below.

#### *a) Attendance of legal advisers*

62. I note that in this particular case, the request for legal representation relates to the representation of [X], an undertaking, at the interview of [X] Individuals who each have a connection with that undertaking. I note that the request has been made on behalf of the Individuals to whom the section 26A notices have been sent and who are attending the interviews. I understand that the CMA case team has agreed to a request that the Individuals will each be represented by legal advisers at those interviews.

63. 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. 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 right.

64. 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. This part of the Application relates to the legal representation of an undertaking at the interview of [X] 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 legal advisers 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 [X]. 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>10</sup>

65. I note in particular that this is stated as ‘the starting point’ and 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. It does not therefore follow that there is a clear procedural right for an undertaking to be represented at a section 26A interview.

66. I note that the SRO’s Decision stated that there was no reason in the circumstances of this case to justify departing from the starting point in the Guidance. The fact that the Guidance presents a ‘starting point’ was acknowledged in the meeting I held with the Individuals’ legal advisers. They disagreed with the SRO’s decision, on the basis that, as noted above (paragraph 36), they did not consider that there were any concerns in this case with the undertaking being represented since this had been requested by the Individuals. In contrast, as noted above (paragraph 40), the risks of prejudice to the Investigation were raised by the CMA case team in the meetings I held with them. This does not change my view that, as noted above, there is no clear procedural right for an undertaking to be represented at a section 26A interview.

67. 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 emphasis is placed on the privilege against self-incrimination (referred to above). In my view, any such distinction between legal representation and substantive legal rights would be an artificial, as well as an impractical, one.

68. 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.

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<sup>10</sup> CMA8, paragraph 6.27, see footnote 2 above.

69. I have therefore reached the view that the attendance of legal advisers representing an undertaking at an interview held under section 26A of the Competition Act does not fall within the 'other significant procedural issues' category (the fifth bullet point set out in paragraph 13 above) and cannot therefore be considered as a 'significant procedural complaint'. The issues raised by the Application in relation to the request for the attendance of legal advisers representing [X] therefore do not fall within the Procedural Officer's remit.

*b) Attendance of corporate representatives*

70. The Application also relates to a request for the attendance of a corporate representative at the section 26A interviews. The Individuals' legal advisers were asked to confirm this in light of the fact that only the attendance of legal representatives of [X] was raised with the CMA case team and therefore considered in the SRO's Decision. This was confirmed by the Individuals' legal advisers by email on 20 September 2018. Since the issue had not been raised with and therefore has not been considered by the SRO it does not fall within the Procedural Officer's remit. As set out above (paragraph 12), the Procedural Officer is only able to consider a significant procedural complaint 'where that complaint has not been determined or settled by the relevant person overseeing the investigation'.

71. If the request for the attendance of a corporate representative had been raised with the SRO in this Investigation and formed part of the SRO's Decision, it is likely that the same considerations would apply about whether or not it fell within the Procedural Officer's remit as set out above in relation to the attendance of legal representatives of [X]. It is therefore unlikely that it would be considered to be a 'significant procedural issue' and fall within the Procedural Officer's remit. I note that, as pointed out by the CMA case team, there is no clear procedural right to representation for an undertaking at a section 26A interview of an individual connected with the undertaking. I do not consider that any of the arguments which were put forward by the Individuals' legal advisers as part of the Procedural Officer's process in considering this Application would be likely to alter this view.

72. I have therefore reached the view that the issues raised by the Application in relation to the request for the attendance of a corporate representative of [X] have not been addressed in the SRO's Decision and have not therefore 'been determined or settled by the relevant person overseeing the investigation'. This does not therefore fall within the Procedural Officer's remit.

73. In light of these points, I have concluded that the part of this Application that deals with the representation of [X], the undertaking, 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. The attendance of legal advisers cannot be considered as a 'significant procedural complaint' and the attendance of corporate representatives has not been addressed in the SRO's Decision.

### **Consideration of the Issues**

74. Since the issues raised by the Application all fall outside the scope of the Procedural Officer's remit, I have not considered it necessary to consider the substantive issues that are raised.

### **Decision**

75. After careful consideration, in light of the reasons set out above, on 30 October I decided:

- i) the part of the Application which relates to the request for withdrawal of the section 26A notices 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) the part of the Application which relates to the representation of [X] at the section 26A interviews of the Individuals (by the attendance of legal advisers and/or the attendance of individuals representing [X]) 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
- iii) the part of the Application which relates to the protection against self-incrimination and Competition Disqualification Orders 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.

76. My decision was communicated to the Individuals' legal advisers and to the CMA case team on that date.

**FRANCES BARR  
PROCEDURAL OFFICER**

**29 November 2018**