

# PROCEDURAL OFFICER DECISION

2016/1

## APPLICATION BY

**THE ASSOCIATION OF MODEL AGENTS, STORM MODEL MANAGEMENT,  
MODELS ONE AND PREMIERE MODEL MANAGEMENT**

## IN RELATION TO

**THE CMA INVESTIGATION UNDER THE COMPETITION ACT 1998 INTO THE UK  
MODELLING AND MODEL AGENCY SERVICES SECTOR**

### **The Application**

1. The Association of Model Agents (AMA), Storm Model Management, Models One and Premiere Model Management (together the Applicants) claim that the Statement of Objections (SO) issued by the CMA in the investigation into the UK modelling and model agency services sector should be set aside (the Application). The Application was made on 1 July 2016.

### **The SRO's Decision**

2. The Senior Responsible Officer (SRO) for the CMA investigation sent a letter to Goodman Derrick, the Applicants' legal advisers, on 24 June 2016 (the SRO's Decision). The SRO's Decision was sent in response to concerns raised on behalf of the Applicants in letters of 13 and 20 June 2016. These concerns are summarised below.

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

3. The Application was received on 1 July 2016 by a letter sent by email to me as the CMA Procedural Officer. I have considered the information provided in relation to the Application and taken account of the correspondence with the case team and the reasons set out in the SRO's Decision.

### **Summary of the Application**

4. The Application argues that the SO should be set aside. It argues that no valid decision could be reached on the basis that the CMA's investigation and the issue of an SO are procedurally defective and unfair. On my analysis, the Application essentially argues that this is for the following reasons:

- the CMA has failed to make the case that the alleged agreement or concerted practice has an appreciable effect on trade or competition. The consequence is that the CMA has failed to discharge the burden of proof and enable the Applicants to defend the case which is being made against them;

- the CMA has misunderstood the nature of the turnover of the individual undertakings to whom the SO is addressed resulting in a miscalculation of their total turnover. This miscalculation coupled with a misapplication of the relevant legislation relating to immunity from penalties (Competition Act 1998, section 39 and The Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000) has resulted in a flawed provisional conclusion that a financial penalty can be imposed;
- no penalty could validly be imposed on the AMA [✂];
- the CMA’s investigation has been selective [✂].

### **The Procedural Officer’s Remit**

5. 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.

6. The role of the Procedural Officer in a Competition Act 1998 (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.”

7. Guidance on the CMA’s view about the scope of complaints within the remit of the Procedural Officer is provided in CMA8 (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.”

8. It is clear that the issues set out in the Application, as summarised above, do not fall within any of the first four bullet points. The basis of the Application is that the issues raised in it constitute a significant procedural issue falling within the fifth bullet point.

9. 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>4</sup>

10. As noted above, the CMA Rules state that the Procedural Officer is to consider significant issues that relate to the “procedures followed”<sup>5</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 interpretation of the wording “significant procedural complaint” in Rule 8(1) of the CMA Rules.

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

“Parties to an investigation under the CA98 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 has been opened.”<sup>6</sup>

12. In the light of all of the foregoing, I conclude that the Procedural Officer does not have a role in considering any issues which relate to the substantive matters in a Competition Act case. I consider that this covers matters such as the nature of an alleged infringement, the potential application of the prohibitions contained in the Competition Act and the level of any penalty proposed to be imposed.

13. Moreover, the scope of the Procedural Officer remit arises as a consequence of the role of the Procedural Officer within the CMA and as part of the wider framework for Competition Act investigations. The Competition Act provides for

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<sup>4</sup> CMA8, paragraph 15.6, see footnote 2 above.

<sup>5</sup> Rule 8(1), CMA Rules, see footnote 1 above.

<sup>6</sup> CMA8, paragraph 15.1, see footnote 2 above.

certain key stages in an investigation including the formal step of the issue of a Statement of Objections and the parties' right to reply to it before any decision is taken. The right to make oral and written representations provides the parties with the formal opportunity to respond to the substance of the case being made.

### **Consideration of the Application**

14. As noted above, the basis of the Application is that the issues raised in it fall within the "significant procedural issue" category of complaints (the fifth of the CMA's bullet points) that the Procedural Officer may review at the request of a party.

15. The Applicants claim that the SO should be set aside because an insufficient case of an alleged infringement has been made for them to be able to defend themselves. I note that this claim is based on challenge of the CMA's case relating to the nature of the alleged anti-competitive agreement, the parties allegedly concerned and the calculation of turnover.

16. I consider that the nature of the issues raised in the Application are of substance, rather than procedure. I do not therefore consider that the Application raises issues that can be considered by the Procedural Officer.

17. In view of my conclusion that the Application does not fall within the Procedural Officer's remit, I do not need to determine the issues raised by the Application.

18. The Applicants will have an opportunity to address these issues in any representations on the Statement of Objections.

### **Decision**

19. 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**

**14 JULY 2016**

This decision uses the names of the parties as they were set out in the Application and referred to in paragraph 1. One of the parties to the Application was stated to be Premiere Model Management which is understood to be the same as Premier Model Management.

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