

## Summary of Procedural Officer Decision 2018/2

***Decision 2018/2 relates to the finality of Procedural Officer decisions. The application was made following Procedural Officer Decision 2018/1.***

***A non-confidential summary of this decision is set out below. The details of the Procedural Officer's process and the nature of this application have been omitted. In light of the conclusion on the scope for the Procedural Officer to consider the application, the Procedural Officer did not consider it necessary to reach a view on the issues raised in the application.***

1. The application argued that the CMA was seeking to revise and expand a previous CMA decision in relation to an investigation and/or make a new decision.
2. The first issue to consider on receipt of any application to the Procedural Officer is whether or not it relates to matters which the Procedural Officer is able to review.
3. The role of the Procedural Officer to consider procedural complaints in a Competition Act case is set out in the CMA Rules.<sup>1</sup> Rule 8 explains that the Procedural Officer:

‘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.’

4. The CMA's view about the role of the Procedural Officer and the process for making a procedural complaint 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>
5. The Procedural Officer content on the CMA's webpage explains that:

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

6. In addition, the Procedural Officer content on the CMA webpage states that:

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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> The CMA's Guidance on the CMA's investigation procedures in Competition Act 1998 cases (CMA8), paragraphs 15.4-15.11.

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

‘A party wishing to refer an issue to the Procedural Officer needs to make an application as soon as possible after being notified of the SRO’s decision on the issue in question and, in any event, within five working days of that notification.’

7. This all indicates that the Procedural Officer role is designed to deal with individual and specific procedural complaints which are made following decisions by the Senior Responsible Officer (SRO) on an investigation on the particular issues raised (for example, the Procedural Officer noted the references to ‘that complaint’ and ‘the issue in question’) and to do so quickly and efficiently.

8. The application stated that in the SRO’s Decision the CMA:

‘is *ex post* seeking to revise and expand the clear terms of its decision and/or is seeking to arrive at a new decision [...].’

9. The key issue was therefore whether or not the CMA had changed its position (see paragraph 13 below).

10. The decisions made by the Procedural Officer under Rule 8 of the CMA’s Rules are final. This view is based on the Procedural Officer process and the CMA’s publicly stated aims for the Procedural Officer role, set out above, as well as the principles of good administration.

11. It follows that a party to an investigation should not be able to make an application to the Procedural Officer which operates to circumvent an earlier decision in that investigation made by the Procedural Officer. Nevertheless, it is possible that there may be an exceptional case where in all the circumstances it would be unfair not to consider that new, further, application.

12. The Procedural Officer therefore considered first if the issues raised by the complaint against the SRO’s Decision in this application had already been the subject of a decision by the Procedural Officer in the investigation. If this was so, the Procedural Officer considered the application should be rejected unless to do so would be unfair to the party making the application.

13. The issues covered by the application related to a decision which the Procedural Officer made on a previous application by the same party in the same investigation. The previous application had been rejected by the Procedural Officer because it was made out of time. The reasons were set out in Procedural Officer Decision 2018/1. The main issue in considering this application was therefore the scope of the decision taken by the SRO which was

dealt with by the earlier Procedural Officer decision and therefore whether or not the SRO's Decision, which this application challenged, was a new one.

14. The arguments presented as part of this application and considered during the Procedural Officer process were based on the nature and interpretation of the emails which had been exchanged in correspondence, as well as other factors including the wording of the earlier Procedural Officer decision and information provided in the earlier application.
15. After careful consideration of the application and the correspondence provided with it, as well as the observations made by the applicants and the CMA case team, the Procedural Officer reached the view that the wording of the SRO's Decision was not new or different from the decision made by the SRO which was the subject of the earlier Procedural Officer decision.
16. This conclusion was based on a number of factors including consideration of the wording of the correspondence between the applicants and the CMA case team which had to be read in the wider context of the chain of previous correspondence, as well as other statements in the correspondence. In addition to the actual wording used in the emails, the Procedural Officer also considered the broader context of the email exchanges, including the reasons that were provided by the CMA case team about the potential for prejudice to the investigation and issues of confidentiality. The Procedural Officer considered the conclusion reached about the nature of the wording in the SRO's Decision should have been clear from the context and an understanding of the situation and the ongoing investigation.
17. The Procedural Officer considered whether in all the circumstances it would nevertheless have been unfair not to consider the new, further application which had been made. The Procedural Officer noted that there had been a reasonable opportunity to submit an application in relation to the earlier decision made by the SRO which was addressed in the previous Procedural Officer decision. The Procedural Officer did not consider that there was any information in the application which suggested that it would be unfair not to consider the new application which had been made.
18. Therefore, after careful consideration, the Procedural Officer decided to reject the application.