

Summary of Procedural Officer Decision 2019/2

*A non-confidential summary of this decision is set out below.
The details of the Procedural Officer's process have been omitted.*

The Application

1. The Application related to documents that an addressee of a Statement of Objections (the Applicant) is entitled to review in order to make representations, in accordance with Rule 6(2) of the CMA Rules (the Application).¹
2. The Application questioned the number of documents on the CMA investigation file in light of the number of documents which had been seized by the CMA at unannounced inspections and also questioned the transparency of the search methodology which had been used to establish which documents were relevant to the CMA's investigation.
3. The Application argued:
 - since no documents had been returned to the Applicant, all documents obtained, produced and/or assembled by the CMA during its investigation must form part of the investigation file.
 - the Applicant was not in a position to agree that documents that it had not seen were not relevant to the CMA's investigation noting that those documents could be exculpatory.
4. The Application referred to the EU Charter of Fundamental Rights, European case law and the practice of the European Commission in support of these arguments.

The role of the Procedural Officer

5. On receipt of any application, the Procedural Officer considers whether or not it relates to matters within the Procedural Officer's remit. The CMA Rules, CMA Guidance and information on the CMA webpage are relevant to this consideration.²

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

² Rule 8(1) of the CMA Rules (see footnote 1 above) sets out the role of the Procedural Officer in considering "complaints about the procedures followed during the course of an investigation". 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 (CMA8), paragraph 15.4 and in the Procedural Officer content on the [CMA webpage](#).

6. The CMA's Guidance and the content on the CMA webpage 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. The relevant bullet points for considering the scope of the Procedural Officer's remit in relation to this Application appeared to be the following:

- requests for disclosure or non-disclosure of certain documents on the CMA's case file (bullet point 3).
- other significant procedural issues that may arise during the course of an investigation (bullet point 5).

7. The Procedural Officer considers that bullet point 5 relates to the processes followed by the CMA in the course of an investigation, noting 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.'³

8. 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.'⁴

9. In determining if this Application fell within the Procedural Officer's remit, the following were carefully considered:

- the arguments made on behalf of the Applicant and by the CMA case team.
- other points made in the Application about the nature of the file and the concerns which gave rise to the Application.
- the statutory framework, the provisions governing the file and the access to file process.

10. Although the Application did not state the basis on which the issues it raised were considered to fall within the Procedural Officer's remit or refer explicitly to any of the bullet points, the Applicant's legal advisers subsequently noted:

³ CMA8, paragraph 15.6.

⁴ CMA webpage, see footnote 2 above.

- the Application would be likely to fall within bullet point 3 since it raised issues about access to the CMA file. They could not however identify any specific documents which had not been included in the file and which might fall within the meaning of ‘certain’ documents in bullet point 3 since the Application related to access to documents more widely, including documents that they had not seen.
- the Application would also be likely to fall within bullet point 5 because of the fundamental rights involved.

11. The CMA case team considered that the Application did not fall within the Procedural Officer’s remit and noted:

- the Application raised issues about the nature of the CMA file which raised significant questions of law. These are substantive legal matters relating to the scope of Rule 6(2) of the CMA Rules⁵ (which deals with the access to file process) and the interaction with search and seizure provisions under the Criminal Justice and Police Act 2001 (CJPA), as well as with European law. These are therefore not procedural matters within the Procedural Officer’s remit.
- the Procedural Officer’s remit under bullet point 3 relates to disclosure and non-disclosure of specific documents. It does not cover the substantive issue of what constitutes the file itself. It cannot therefore relate to disclosure of material that is not on the CMA file.
- bullet point 5 needs to be read in the context of the preceding four, which are all procedural in nature.
- the Procedural Officer’s remit covers procedural matters which relate to the administrative process in an investigation and which can be addressed in a quick, efficient and cost effective manner. The Application raised issues which are not straightforward to address and which cannot be dealt with as part of the review of administrative processes undertaken by the Procedural Officer.

12. The Application raised wider issues about what constitutes the CMA file, how the file for the purposes of Rule 6 of the CMA’s Rules is created and concerns about the protection of fundamental rights. The Procedural Officer considered these to the extent that they were relevant to the consideration of the scope of bullet points 3 and 5. As noted above, these points had been made in support of the

⁵ See footnote 1 above.

Application and not specifically in relation to the scope of the Procedural Officer's remit.

13. The Applicant's legal advisers considered that the file should comprise all the documents that the CMA case team had obtained as part of an investigation: this would include both documents collected by the CMA during an investigation which had not been included on the CMA file and documents which the CMA had provided as part of the access to file process. The Applicant's legal advisers recognised that certain documents taken during an inspection may subsequently be found by the CMA case team not to be relevant to that investigation and therefore returned. If the documents are not returned, the Applicant's legal advisers argued they formed part of the file.
14. The Applicant's legal advisers made a number of points about the way in which the file was created in this investigation - the way in which documents had been selected, the principles applied and the importance of knowledge and understanding of the commercial situation:
 - the Applicant had the right to see potentially exculpatory evidence; the CMA alone had considered all the documents and determined what was 'related to' matters set out in the Statement of Objections, without any oversight, in a manner that was not transparent.
 - the principles were the same at both UK and EU level. At EU level documents which are not relevant are returned to the parties concerned. No documents had been returned in this case which supported the argument that all the documents collected by the CMA case team during an inspection were therefore part of the file.
 - the CMA did not have sufficient knowledge about the business of the Applicant to be in a position to identify documents that might be exculpatory. In addition, the CMA did not know the nature of the defence which the Applicant would present to address the allegations in the Statement of Objections.
 - the reliability of the CMA evidence. The Applicant's legal advisers had not had access to the documents of the other parties. The CMA as both prosecutor and decision maker could not be seen to be unbiased in the process.
15. The CMA case team outlined a number of points in considering the nature of the file noting the general nature of the investigation and enforcement procedures which lead to the creation of the file for the purposes of the access to file process,

why it is therefore considered that these are the documents which make up the CMA file and to which an addressee of a Statement of Objections is entitled to have access and why these are the only documents to which an addressee is entitled to have access.

16. The Procedural Officer considered the provisions which govern the file and the investigation and enforcement powers of the CMA: the key provisions are Rule 6 of the CMA Rules and section 26 of the Competition Act. These provisions, together with other relevant statutory provisions, were explained by the CMA case team as well as how they were followed in practice.

17. The CMA Rules provide:⁶

‘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, except that the CMA may withhold any document

(a) to the extent that it contains confidential information; or

(b) which is an internal document.’

18. Section 26 of the Competition Act states:⁷

‘For the purposes of an investigation ... the [CMA] may require any person to produce to [it] a specified document, or to provide [it] with specified information, which [it] considers relates to any matter relevant to the investigation.’

19. At the start of each investigation therefore the CMA case team uses investigatory powers to obtain documents which it considers ‘*relate[s] to any matter relevant to the investigation*’. At the stage of any investigation where the CMA case team issues a Statement of Objections, it must provide the addressees of that Statement of Objections with the opportunity to inspect the documents in the file. Those documents are ones that ‘*relate to the matters*’ referred to in the Statement of Objections.

20. The Procedural Officer also noted that there are provisions in relation to material that the CMA is entitled to take on an investigation in accordance with the CIPA and how it exercises those powers of seizure.

⁶ Rule 6(2), CMA Rules, see footnote 1 above.

⁷ Competition Act 1998, section 26(1).

21. The Procedural Officer noted that it is clear from the statutory framework and the provisions governing the CMA's approach to the enforcement of the prohibitions contained in the Competition Act that the nature and creation of the file is not a simple procedural matter. The file which is established by the CMA case team from the documents which the CMA has gathered as part of its investigation develops as the investigation progresses. The nature of the documents which are taken on an inspection raise issues of judgement and legal assessment when acting within the scope of statutory powers under the Competition Act and the CIPA. An investigation will develop from the initial stage of obtaining documents while the CMA case team builds its case. This is fundamental to the CMA's investigation and enforcement powers. The case that is put forward in the Statement of Objections and the case file that is created are an integral part of this. These are legal matters which go to the substance of a case, relating to whether or not the CMA considers the evidence it has obtained is sufficient on which to base an allegation of infringement of one of the prohibitions in the Competition Act. These are not simply about 'requests for disclosure or non-disclosure of certain documents on the CMA's case file' within the scope of bullet point 3.⁸

22. The Procedural Officer noted that the Applicant's legal advisers raised a number of points about the CMA's ability to carry out this process and the way in which the file had been put together, arguing about how documents had been assessed for 'relevance', and how they 'relate' to a case, the process for dealing with irrelevant documents, as well as the identification of inculpatory and exculpatory material. The Applicant's legal advisers also raised issues about the relevance of EU case law and EU provisions. The very fact that these substantive issues were a matter of debate in this investigation and the detailed nature of the arguments used suggested that the Application raised issues beyond the remit of the Procedural Officer to deal with procedural matters. The questions of legal interpretation involved were not 'complaints about the procedures followed' in this investigation. These were not therefore within the scope of bullet point 3 or bullet point 5.

23. The Procedural Officer did not consider it necessary or appropriate to determine the particular issues raised by these arguments in order to reach a conclusion on the scope of the Procedural Officer's remit in relation to this Application.

⁸ Rule 6(2) of the CMA Rules contains specific provisions about handling confidential information and internal documents. The Application did not specifically relate to issues about confidentiality or internal documents. This aspect of Rule 6 was therefore not considered further in this decision.

24. The Procedural Officer found that the Application did not therefore concern procedural matters capable of falling within either the scope of bullet point 3 or of bullet point 5.
25. The Procedural Officer found that any arguments about the CMA's ability to determine the documents placed on the case file (other than any decision in relation to documents which may be withheld under Rule 6(2) of the CMA Rules)⁹ raised substantive issues and were therefore outside of the Procedural Officer's remit.
26. Since the Application fell outside the scope of the Procedural Officer's remit, the Procedural Officer did not consider it necessary to consider the substantive issues that it raised.

Other Considerations

27. In the circumstances of this Application, and in light of the fact that the Application referred to issues of fundamental rights, the Procedural Officer considered whether the procedures followed by the CMA case team in assembling the CMA case file and making documents available for inspection by the Applicant in accordance with the CMA Rules were fair and reasonable.
28. The Procedural Officer therefore considered the process that led to the creation of the file to which access was provided to the Applicant in accordance with the CMA Rules and the way in which this process was explained to the Applicant. In doing so, the Procedural Officer considered the information which is set out in the Guidance, the approach which was adopted in this investigation and the information which was provided to the Applicant's legal advisers by the CMA case team.
29. After considering these issues, the Procedural Officer noted that it appeared that the CMA case team clearly set out the nature of the process for the creation of the file containing the documents that would be made available to the Applicant in accordance with Rule 6(2) and also that it appeared that this followed the CMA's normal approach and the procedures set out in the Guidance.¹⁰
30. The Procedural Officer also noted that it appeared that the procedures followed in relation to obtaining and sifting information in this case reflected the normal process for the creation of a case file used by CMA case teams and as set out in

⁹ See footnote 8 above.

¹⁰ CMA8, chapters 6 and 11.

the Guidance. The process as it applied in this case was set out by the CMA case team in correspondence with the Applicant's legal advisers.

31. The Procedural Officer noted the arguments raised on behalf of the Applicant about consistency with European Commission proceedings and European case law. The Procedural Officer noted however that certain procedures are different at European and national level and that the case investigation file is created in different ways, in part because of the CIPA. The Procedural Officer did not consider that identifying parallels with European procedure and practice was necessary for the consideration of the fairness and reasonableness of the process followed in creating the file in this investigation.
32. In light of all these points, and on the basis of the information the Procedural Officer had seen as part of the Application, the Procedural Officer considered that the procedures followed for the creation of the file in this investigation were fair and reasonable. This did not affect the Procedural Officer's decision that the Application itself was outside the scope of the Procedural Officer's remit.

Decision

33. The Procedural Officer therefore decided to reject the Application.