

**PROCEDURAL OFFICER DECISION
2019/4**

**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 CMA's decision to refuse to disclose to [X] the written representations of the other parties who are addressees of the Statement of Objections issued in the CMA investigation in relation to [X] (the Investigation) (the Application).

The SRO's Decision

2. The Senior Responsible Officer (SRO) for the Investigation notified [X] on 10 September that there would be no disclosure to [X] of the written representations on the Statement of Objections made by the other parties involved in the Investigation (the SRO's Decision), as set out in paragraph 1 above.

The Procedural Officer's Process

3. The Application was made on [X].
4. I held a meeting by telephone with [X], legal advisers to [X], on [X]. I held meetings with the CMA case team on [X].
5. I have considered the representations and information provided in the meetings I held with [X]'s legal advisers and the CMA case team, together with the information set out in the Application. I have also taken account of the reasons set out in the SRO's Decision.

The role of the Procedural Officer

6. 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

7. The role of the Procedural Officer in a Competition Act case is set out in the CMA Rules.¹ 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.’

8. 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 Procedures² (the Guidance) and also in the Procedural Officer content on the CMA's webpage.³ 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.’

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

9. As noted above, the CMA Rules state that the Procedural Officer is to consider significant issues that relate to the ‘procedures followed’⁴ by the CMA during the

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

² Paragraph 15.4, Guidance on the CMA's investigation procedures in Competition Act 1998 cases (CMA8).

³ [CMA webpage](#).

⁴ Rule 8(1), CMA Rules, see footnote 1 above.

course of an investigation. The fifth bullet point in the Guidance (set out in paragraph 8 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.

10. 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.'⁵

11. 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.'⁶

12. 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.'⁷

Scope for the Procedural Officer to consider the Application

13. [X] 's legal advisers suggested in the meeting I held with them that the two bullet points which would be likely to be relevant to the Procedural Officer's remit in relation to this Application are bullet point 3 and bullet point 5.

14. This was not disputed by the CMA case team.

15. I consider therefore that the Application falls within the Procedural Officer's remit.

⁵ Paragraph 15.1, CMA8, see footnote 2 above.

⁶ Paragraph 15.6, CMA8, see footnote 2 above.

⁷ See footnote 3 above.

The Application and meeting with [X]'s legal advisers

The Application

16. The Application relates to a request by [X] for the disclosure of the written representations submitted to the CMA by the other parties who are addressees of the Statement of Objections in the Investigation. It states that the CMA's refusal to disclose those representations to [X]:

'is not consistent with the rules of natural justice and does prejudice our client's right to a fair hearing.'

17. The Application relates to the provisions of the Guidance in relation to disclosure of written representations as part of a Competition Act investigation. The Guidance states:

'Where there are multiple Addressees the CMA will not cross disclose the written (or oral) representations made by an Addressee to each of the other Addressees, other than in exceptional circumstances.'⁸

18. A footnote to this paragraph explains this may occur:

'For instance, where the CMA considers it necessary for rights of defence of the other Addressees [sic] or where it assists the CMA in clarifying a substantive factual or legal or economic issue.'⁹

19. [X]'s legal advisers stated in the correspondence provided with the Application 'we are surprised that the CMA proposes to invoke its policy under paragraph 12.5 CMA8 in this case' and made the following points:

1. 'It is a CMA Guideline and not the law. In our view it seriously offends against the rules of natural justice and should not be applied;
2. There are [X] Addressees of the SO, the remaining companies identified being [X]. It is difficult to interpret [X] other Addressees as constituting a "multiplicity";
3. The administrative burden of cross disclosure for the CMA, (which we assume to be the reason for paragraph 12.5) cannot justify preventing a defendant from access to the response of other Addressees;

⁸ Paragraph 12.5, CMA8, see footnote 2 above.

⁹ Footnote 130, CMA8, see footnote 2 above.

4. The written representations of the other Addressees would be disclosable on Appeal, subject to consideration of confidentiality.'

Meeting with [X] 's legal advisers

20. At the meeting with [X] 's legal advisers, they emphasised the points made in the Application and noted the following:

- The points made in the SRO's Decision that the policy in the Guidance is about efficiency rather than administrative burdens is a distinction without a difference: there can be no efficiency if there are administrative burdens. [X] objects to this being a guiding reason for refusing disclosure of the written representations.
- The CMA is approaching the issue the wrong way around: considering administrative efficiency before rights of defence. The CMA should consider disclosure where it is required for the rights of the defence and it is proportionate to do so. [X] does not consider that the CMA has reviewed the documents from this perspective: if the written representations were considered properly, it would be clear that they are material to [X] 's defence. It is likely that the other parties would have referred to [X] including, for example, conduct and correspondence which might contain material exculpatory for [X]. It was noted that one of the parties, [X], had agreed a settlement with the CMA. [X] is entitled to know what [X] may have said in any representations, recognising that [X] is not in a position to know if any may have been made.
- The Guidance is only guidance and cannot trump rights of defence and natural justice.
- The Guidance must have been designed to cover an investigation where disclosure may not be practical because of a large number of addressees. That is not the situation in the Investigation where [X] is asking for disclosure of the written representations of only [X] other parties.
- The concerns set out in the SRO's Decision about an endless cycle of disclosure are an exaggeration of what might occur. The interests of truth should not be obstructed by practicality.
- Documents would be disclosable on any appeal to the Competition Appeal Tribunal. [X] should have the opportunity to look at the documents now and be informed of the facts, rather than having to wait until that stage.

- The investigation has potentially serious implications for [X]. It is therefore not acceptable to say that in practice, the rights of defence will be protected at a future stage by a Letter of Facts or further Statement of Objections referring to any new documents.
- The CMA alone should not be able to determine what is relevant and what is inculpatory or exculpatory. [X] is entitled to see and make its own determination of those issues.
- [X]’s request for disclosure reflects general principles recognised by administrative tribunals and criminal courts.

The SRO’s Decision and meeting with the CMA case team

The SRO’s Decision

21. The SRO’s Decision sets out and explains the SRO’s conclusion on [X]’s request, the protections which are in place to respect the rights of defence and the policy on cross disclosure in the Guidance. It states:

‘there will not be any cross-disclosure of the written responses to the SO in this case unless and until it is necessary to issue a letter of facts or an SSO, in which case disclosure of any representations or new evidence will be made in accordance with the provisions of CMA8 [the Guidance].’

22. In relation to [X]’s rights of defence and the policy in the Guidance, the SRO’s Decision notes:

‘the CMA acknowledges the importance of respecting your client’s rights of defence and this is recognised in our policy, which expressly notes that the “exceptional circumstances” where the CMA will cross-disclose representations include “where the CMA considers it necessary for rights of defence of the other Addressees”. ... However, in this case, it is my view that there are currently no such “exceptional circumstances” and that the existing obligations on the CMA to issue a letter of facts and/or a Supplementary Statement of Objections (SSO) including the associated disclosure requirements and rights to make representations in those circumstances ... are sufficient to satisfy your client’s rights of defence. It is also, in my view and contrary to what you allege, consistent with “the rules of natural justice” and your “client’s right to a fair hearing”.’

23. The SRO’s Decision also addresses points raised on behalf of [X]:

'The reason for this policy is not, as you suggest ... solely to reduce the "administrative burden" on the CMA, but also to ensure that investigations can be progressed efficiently. If the CMA were to cross disclose other Addressees' representations as a matter of course, investigations could be delayed significantly by requests to make representations on the new documents submitted belatedly and subsequent requests to submit further remarks on such representations, with this cycle potentially being repeated multiple times.'

Meeting with the CMA case team

24. The points set out in the SRO's Decision were emphasised at the meetings I held with the CMA case team. In particular, the following points were made:

- The issue raised by the Application is about disclosure of the written representations of the other parties to the Investigation. There is a distinction between written representations (which cover the views and arguments of the parties) and new evidence (which might have been provided with or form part of the written representations). There are procedures in place to respect the rights of defence.
- The arguments about administrative efficiency and the need to avoid a potential continuous cycle of confidentiality representations following cross disclosure of written representations relate to the ability to progress investigations.
- There was an administrative and resource concern about how cross disclosure might become a cumbersome process. In this case, for example, although there were only a small number of parties, the written representations which had been received comprised hundreds of pages.
- [§<] had provided no specific explanation why their rights of defence were affected in order to fall within the exceptional circumstances set out in the Guidance.
- The approach was similar at EU level: as a general rule there was no access to other parties' written representations, with exceptions consistent with those in the Guidance.

Consideration of the Issues

25. In dealing with this Application, I have considered the procedures followed in dealing with [§<]'s request for disclosure of the written representations of the other parties. In particular I have considered the SRO's Decision including the

explanation of the policy which is set out in the Guidance, the application of that policy in this case and the reasons that were given. In light of the issues raised by [X] in this Application, I have also considered the rights of defence more generally both for an addressee of a Statement of Objections and as part of the Competition Act framework. In doing so, I have considered carefully the points that have been made in the Application and at the meetings I held with [X]’s legal advisers and the CMA case team and as summarised above.

26. As explained above (see paragraph 17), this Application relates to the provisions of the Guidance on the disclosure of written representations. The Guidance sets out the CMA’s policy that in a multi-party case written (and oral) representations will not as a matter of practice be cross disclosed. It also acknowledges that there may be ‘exceptional circumstances’ which may provide exceptions to this policy and where cross disclosure may therefore be made by the CMA. Two examples of the ‘exceptional circumstances’ are set out in the footnote in the Guidance. I note that at EU level there is a similar policy about the approach to cross disclosure of written representations. This states:

‘As a general rule ... no access will be granted to other parties’ replies to the Commission’s objections.’¹⁰

27. The ‘exceptional circumstances’ set out in the footnote in the Guidance are provided by way of example. The first example is ‘where the CMA considers it necessary for rights of defence’. The rights of defence of [X] as an addressee of the Statement of Objections to see the written representations of the other addressees is the exceptional circumstance which has been raised in this Application.

28. It is important to note that the policy on cross disclosure and this exceptional circumstance relate only to the rights of defence insofar as this is linked to cross disclosure of written representations. There are separate procedures as part of the Competition Act framework which provide protection for the rights of defence should any new evidence be presented to the CMA together with the written representations on a Statement of Objections. The way in which any such new evidence would be disclosed to the parties concerned would depend on the particular investigation and the way in which it might be progressed.

29. It is also important to note that the exceptional circumstances in relation to cross disclosure of written representations is separate from and additional to the protection for the rights of defence in responding to the Statement of Objections

¹⁰ Paragraph 27, Commission Notice on the rules for access to the Commission file, OJ C325, 22 December 2005.

provided in accordance with the CMA Rules.¹¹ The CMA Rules provide that the Statement of Objections itself must state the facts on which the CMA relies. The CMA Rules also provide that an addressee of a Statement of Objections has the right of access to the CMA's file and an opportunity to make written and oral representations on the Statement of Objections.

30. The Guidance states that the rights of defence exception in relation to cross disclosure of written representations arises 'where the CMA considers it necessary'. Any decision to make cross disclosure of written representations in light of exceptional circumstances relating to the rights of defence therefore falls within the CMA's discretion.

31. In this case, the request for cross disclosure of written representations made on behalf of [X] was considered by the CMA case team and that refusal was then reviewed by the SRO. The SRO's Decision clearly set out the CMA's policy on cross disclosure and explained how it was being applied to the request made by [X]. It stated that this was done after a careful review of the correspondence with [X]. I note in particular that the SRO's Decision explained the application of the general policy set out in the Guidance and also why the SRO had decided that there were no exceptional circumstances in accordance with the Guidance which would mean that an exception to that general policy would be appropriate in this particular case.

32. I note that the SRO's Decision provided reasons for the policy set out in the Guidance (see paragraph 23 above). In addition, the SRO's Decision clearly acknowledged the importance of [X]'s rights of defence and set out how these would be protected more generally should there be any new evidence provided with the written representations of the other parties (see paragraph 21 above). It explained that the way in which any such new evidence would be disclosed to [X] would depend on its nature and the progress of the Investigation: this might for example be by way of a Letter of Facts or a Supplementary Statement of Objections.

33. In light of the points set out above, I therefore do not consider that there are any concerns with the procedures followed in refusing to disclose to [X] the written representations of the other parties to the Investigation. The SRO's Decision clearly set out and explained the policy on cross disclosure of written representations in the Guidance, properly applied that policy to [X]'s request and provided reasons for the decision to refuse that request.

¹¹ Rule 6, CMA Rules, see footnote 1 above.

34. I note that the Application states the CMA's refusal to make cross disclosure to [X] of the other parties' written representations 'is not consistent with the rules of natural justice and does prejudice our client's right to a fair hearing.' In dealing with this Application, I have therefore considered [X]'s rights of defence.
35. At the meeting I held with [X]'s legal advisers, they explained the importance they attached to [X] being able to see the other parties' written representations which they considered were material to [X]'s defence (see paragraph 20 above). I note that the CMA case team indicated at the meeting I held with them that [X] had not provided any specific explanation why disclosure of the written representations of the other parties was necessary for [X]'s rights of defence such that an exception should be made to the policy set out in the Guidance (see paragraph 24 above). I do not consider that the other parties' written representations are of themselves clearly related to [X]'s rights of defence. These written representations may for example contain views and arguments. This is different from evidence. This distinction was pointed out at the meeting I held with the CMA case team (see paragraph 24 above). Moreover, the Competition Act framework provides protection for the rights of defence (as noted above, see paragraph 29). In particular, I note that the provisions of the CMA Rules protect the rights of defence of an addressee of a Statement of Objections.
36. At the meeting, [X]'s legal advisers also noted that the potentially serious implications of the Investigation for [X] meant it was not acceptable to say that [X]'s rights of defence would be protected at a future stage (see paragraph 20 above). As set out above, the SRO's Decision clearly explained how [X]'s rights of defence would be protected by disclosure at any such future stage (see paragraph 21). I note that the Application relates to [X]'s position in responding to the Statement of Objections. The provisions of the CMA Rules provide protection for the rights of defence in responding to a Statement of Objections, as already set out above (see paragraph 29).
37. A number of points about proportionality and the relative weight to be attributed to administrative practicality and the rights of the defence were made on behalf of [X] in relation to the policy in the Guidance on cross disclosure of written representations itself. It was argued that the policy was wrong as well as that the way it had been applied to [X]'s request was wrong. In particular, it was argued that the issue was approached by the CMA the wrong way around and that consideration needed to be given to the rights of defence before administrative efficiency (see paragraph 20 above). After careful review of the points that have been made, I do not consider that the policy in the Guidance itself 'seriously offends against the rules of natural justice' as [X] argued in the correspondence provided with the Application (see paragraph 19 above). As

already noted above, the policy in the Guidance relates to written representations only and there is an exception where the CMA considers cross disclosure is necessary for protection of the rights of defence. Moreover, there are broader protections for the rights of defence both in relation to a Statement of Objections and more generally as part of an investigation should new evidence come to light.

38. In light of the nature of the policy set out in the Guidance, I do not consider that the refusal to disclose the written representations of the other parties has affected [X]'s rights of defence in responding to the Statement of Objections that has been issued in this Investigation. Moreover, I note that more generally the Competition Act framework provides appropriate procedures to respect [X]'s rights of defence as an addressee of the Statement of Objections in the Investigation.

Decision

39. After careful consideration, in light of the reasons set out above, on [X] I decided to reject the Application.

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

FRANCES BARR

PROCEDURAL OFFICER

[X]