

Summary of Ofgem Procedural Officer Decisions 2020/1 and 2020/2

Decision 2020/1 and Decision 2020/2 relate to the treatment of information that the applicant regards as confidential, including in circumstances where the identity of the party under investigation has not been disclosed to the applicant. Decision 2020/2 additionally considered the circumstances in which the Procedural Officer can re-examine issues which have already been the subject of an earlier decision.

A non-confidential summary of these decisions is set out below. Details of the Procedural Officer's process are not included in these summaries. Steps have also been taken to protect the identity of the applicant and to avoid inadvertent disclosure of the information in question.

Decision 2020/1

1. The applicant itself is not under investigation, and is a third party to the investigation. It provided material to Ofgem in connection with the investigation, in response to formal notices pursuant to section 26 of the Competition Act 1998 ("CA98").
2. At the time of making its application, the applicant had not been informed of the identity of the party under investigation. The Procedural Officer was satisfied that there were good reasons for maintaining confidentiality over the identity of the party under investigation in relation to the applicant. He noted that the applicant had been able to make its representations on alternative bases, including on the basis of what it considered to be the most sensitive scenario: that disclosure would be made to a competitor of the applicant. He considered that the representations had been conscientiously considered by the SRO and case team on each basis. Given this, he saw no benefit would be gained by allowing a further opportunity for the applicant to make representations once the identity of the party under investigation had been disclosed to it.
3. The applicant argued that some of the material it provided should be treated as confidential, including as part of any future access to file process. There were three particular categories of data that were subject to this application:
 - a. Tender letter
 - b. Fees data and volume data
 - c. Market share data
4. The applicant submitted that disclosure of the information in question would harm its legitimate business interests. The applicant noted that the harm to it would be particularly acute if the information were to be disclosed to a competitor. The applicant suggested that, if Ofgem considered it necessary to disclose the information to the party under investigation, this should occur through a confidentiality ring. It suggested that access to the confidentiality ring should be limited to the external advisers of the party under investigation only.
5. While the Procedural Officer had carefully considered the matters raised by the applicant and scrutinised the approach of the Ofgem case team and SRO, he had also taken account of

the degree of judgment required in these matters. In determining this application, the Procedural Officer considered that he should only uphold the application if there was a clear and obvious error of approach, or if he considered the SRO's decision to be otherwise unreasonable.

6. A summary of the issues according to the categories of data is outlined below.

Tender letter

7. The first category relates to text in a letter concerning a tender process. The applicant argued that the tender letter included information that may be used strategically against it in future tenders and cause harm to its legitimate business interests.

8. The case team considered that the disclosure of this material did not carry a credible risk of commercial harm. The case team noted that it had taken account of the position set out in the CMA's Guidance¹ in relation to material which is more than two years old; the tender letter was more than two years old. There were further developments that meant that the case team considered the information to be of limited relevance to the current situation. Further, the information contained in the letter was similar to information that appears in the public domain. The case team considered that, notwithstanding its view that the document would be of little probative value, the letter may be considered by the party under investigation as being relevant to its rights of defence and needed to be available for disclosure to it.

9. The Procedural Officer concluded that it was clear that the case team had carefully considered the letter in the relevant market context and also the specific context of the investigation.

Fees data and volume data

10. The second category relates to data on transaction fees charged and quoted by the applicant to particular customers in respect of certain contracts and the volumes of transactions arising under those contracts.

11. The applicant was particularly concerned about the data on the transaction fees charged. It explained that it considered such data to be the most commercially sensitive information as that the data related, in some cases, to existing contracts. It said that disclosure of even a range for such information, particularly if it were to a competitor and in such narrow ranges, could cause significant harm to its legitimate business interests, given that it would reveal its current lowest and highest price levels (i.e. the range) and capacities for certain clients.

12. The applicant also noted that disclosure of this data directly between the applicant and the party under investigation, were it to be a competitor, could potentially provide a basis for an investigation under other provisions of the CA98. The applicant submitted that Ofgem taking steps to facilitate the disclosure of such information would therefore be improper.

¹ See paragraphs 4.11 to 4.17 of the CMA's guidance "*Transparency and disclosure: Statement of the CMA's policy and approach*" ("**CMA6**").

13. The case team explained that in its balancing exercise under Part 9 of the Enterprise Act 2002 (“**EA02**”), it considered both the purpose of the information in the context of the investigation and the need to protect the identity of the source of the information. In doing so, the case team explained that the data (both that relating to fees and to volumes) would be presented in regular bands, so as to mitigate the type of concerns now raised by the applicant. The case

team explained that, unlike market shares, there is no standardised format in which to present ranges for fees. It had therefore chosen ranges which were set at a sufficiently granular level to demonstrate the necessary matters for the purposes of the investigation while maintaining a considerable degree of uncertainty as to the actual level of fees or volumes.

14. The case team also noted that in line with the approach in CMA6, the transaction volumes would be considered historic. In these circumstances, it was submitted that the disclosure of the material would be unlikely to significantly harm the applicant’s business interests.

15. The Procedural Officer made a distinction between the fees data and the volume data.

16. In relation to the fees data, he acknowledged that this was potentially competitively sensitive. The Procedural Officer found that in the circumstances there had been a failure to consider fully the potential impact on the applicant’s business interests from disclosure of the fees data. He could not be satisfied as to the judgments reached by the case team about the absence of a risk of significant harm to the applicant’s legitimate business interests. On that basis, he upheld the application insofar as it related to fees data. He also noted that it was not for him to determine the outcome of the further considerations which will be required, including whether this matter should be treated as confidential and whether it is appropriate to offer protection through a confidentiality ring.

17. In relation to the volume data, the Procedural Officer considered that there were significant similarities with the market share data (outlined below), and he ultimately reached the same conclusions in respect of both. The only difference between the two was that in respect of the volume data, the bands to be used were not based on pre-existing guidance in the manner of the market share data. The Procedural Officer noted that the case team considered carefully the ranges used, and found that the conclusions reached by the case team were reasonable in the circumstances.

18. Accordingly, the Procedural Officer found no basis on which the case team’s assessment could be called into question with regard to the volume data.

Market share data

19. The applicant explained that market share data that is less than 5 years old is not sufficiently historic to not constitute commercially sensitive information. The data had not been obtained from publicly available sources, but from companies’ internal data, and thus was commercially sensitive information. Its disclosure could cause significant harm to the applicant’s legitimate business interests.

20. The case team explained that data provided by the applicant would be an input source, alongside that from other data sources, for estimated market shares. Data from sources internal to the applicant would not be reported directly. The case team explained the importance of such shares in the context of the investigation. Such shares would be presented in bands as set out in guidance, following consideration of earlier representations put forwards

on behalf of the applicant and other persons. Further, the case team noted that the data was historic, in line with the approach in guidance, and equivalent material was already in the public domain. The case team considered that disclosing information on market shares would be unlikely to significantly harm the applicant's legitimate business interests.

21. The Procedural Officer found no basis on which the case team's assessment could be called into question for this category of information.

Conclusions

22. After careful consideration, the Procedural Officer decided to:

- a. reject the application insofar as it related to the tender letter, market share data and volume data;
- b. uphold the application in respect of the fees data. The decision of the case team (and if relevant the SRO) would be reconsidered taking account of the matters outlined by the Procedural Officer. No specific directions were given for how this reconsideration should occur.

Decision 2020/2

23. Following the case team's reconsideration in respect of the fees data, the applicant submitted a second application to the Procedural Officer. The second application related to the treatment of the fees data and the market share and volume data.

24. At the time of its second application, the applicant continued to be unaware of the identity of the party under investigation. The Procedural Officer had concluded in Decision 2020/1 that no prejudice had been suffered by the applicant from this issue and he reached the same conclusion in respect of this application. Further, as he concluded in Decision 2020/1, he saw no benefit would be gained by allowing a further opportunity for the applicant to make representations once the identity of the investigated party had been disclosed to it.

25. The Procedural Officer had an additional issue to consider in respect of the market share and volume data only: whether the application in relation to those matters had, in effect, sought to circumvent his decisions in respect of that material in Decision 2020/1 or whether there was a new or revised decision of the SRO in respect of those matters.

Fees Data

26. Since Decision 2020/1 the case team proposed, and the SRO had decided, to disclose the fees data (in specific form and not in ranges) via a confidentiality ring at the same time as issuing an SO. The confidentiality ring would be restricted to the external lawyers/advisers of the party under investigation.

27. As part of their consideration of the balancing exercise under Part 9 EA02, the case team concluded that excluding this material entirely would prevent understanding of allegations by the party under investigation. This would go further than what was necessary in the circumstances of the case, which had been considered carefully.

28. One of the concerns that the applicant raised was on the effectiveness of a confidentiality ring to protect this data. In particular, it noted that it was unclear how the external advisers would be able to brief the investigated party without disclosing the fees data. Further concerns were raised about the monitoring of potential breaches of the terms of the relevant undertaking.

29. In response to this argument, the case team noted that the use of confidentiality rings was widely-accepted. It would be making use of the CMA's standard undertakings in this regard. To the extent that there were concerns about compliance with them, a number of enforcement mechanisms would be available. The case team considered these to provide an appropriate protection and deterrence mechanism to ensure compliance.

30. The Procedural Officer considered that ultimately the decision on disclosure was one to be taken by the case team and SRO, in exercise of Ofgem's powers under the CA98. He reiterated that his role was not to intervene merely because a different approach had been suggested or might be preferred; his role was to intervene only where there had been a clear and obvious error of approach, or if he considered the SRO's decision to be otherwise unreasonable. He decided that that was not the case.

Market Share Data and Volume Data

31. The applicant reiterated that any disclosure should be through a confidentiality ring limited only to the external advisers of the party under investigation and that market share data should only be disclosed in ranges that were not client-specific but aggregated.

32. The case team noted that Decision 2020/1 had rejected the earlier application in relation to Ofgem's intended approach to the disclosure of information relating to this material. Even if that in itself did not provide a basis for the Procedural Officer to reject the complaint, the case team reiterated that the matters that the Procedural Officer had considered in his earlier decision as the basis for rejecting the application continued to be valid.

33. The Procedural Officer considered the preliminary point regarding his jurisdiction to consider issues relating to this material. He took account of the approach adopted by the CMA's Procedural Officer in her Decision 2018/2.² He considered that the approach he should adopt was to consider whether issues raised by the applicant had already been the subject of an earlier decision.

34. In this context, the Procedural Officer agreed with the observation made by the case team that he had already determined this issue in Decision 2020/1. Furthermore, there were no exceptional reasons of fairness which justified reconsidering the decision. The Procedural Officer therefore concluded that he should reject the application.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/766164/Summary_of_PO_Decision_2018_2.pdf

Conclusions

35. The Procedural Officer decided to reject the second application in its entirety.

DAVID ASHBOURNE

PROCEDURAL OFFICER