

**PROCEDURAL OFFICER DECISION**

**2018/1**

**APPLICATION BY**

**ECONOMY ENERGY TRADING LIMITED**

**IN RELATION TO**

**AN OFGEM INVESTIGATION UNDER THE COMPETITION ACT 1998 INTO A POSSIBLE INFRINGEMENT OF CHAPTER I BY A SMALL NUMBER OF PARTIES PROVIDING SERVICES TO THE ENERGY INDUSTRY**

**Summary**

1. Ofgem has an ongoing investigation under the Competition Act 1998 (“**CA98**”) into a possible infringement of Chapter I by a small number of parties providing services to the energy industry. One of the parties under investigation is Economy Energy Trading Limited (the “**Applicant**”).

**The Application**

2. The Applicant, through its legal representatives, Ashurst LLP (“**Ashurst**”), has requested that certain aspects of the investigation be reviewed. The Application was made to me as the Procedural Officer on 27 March 2018.

**Background to the Application**

3. I note here a chronology of correspondence with regards to the Application:
  - 3.1. On 8 February 2018, Ashurst wrote to me as Procedural Officer to raise issues regarding the investigation.
  - 3.2. On 20 February 2018, James Waugh, the Senior Responsible Officer (“**SRO**”) responded to Ashurst’s letter of 8 February 2018, as a matter of process since the issues had not previously been raised with him.
  - 3.3. On 27 March 2018, Ashurst wrote to me as Procedural Officer to say that the SRO’s response has not been satisfactory.

**The Procedural Officer’s Process**

4. The Application was received on 27 March 2018, and the original statutory deadline for my decision was 24 April 2018. However, this timeframe has had to be extended by a further 20 working days for special reasons, namely practical issues arising from Ofgem’s office relocation from Westminster to Canary Wharf, and finding a convenient date for a meeting with the Applicant’s representatives to make oral submissions.
5. I received a written submission from the Ofgem case team on 13 April 2018, and subsequently held a meeting with them on 24 April 2018.
6. I met with Ashurst on 3 May 2018. I then received a follow-up letter and bundle of documents on 15 May 2018.

7. I note that throughout the course of the correspondence that slightly different arguments have been presented, and if a strict interpretation was taken, I consider that it could be validly argued that certain matters have not been properly raised in dispute with the SRO before coming to me. However, given the overall views I have reached on this case, I have not found it necessary to take this approach, but would remind the Applicant's representatives to carefully consider this aspect in the event that they are minded to raise any further procedural matters with Ofgem or other UK competition authorities.
8. I have considered the representations and information provided in, and following, the meetings I held with the Ofgem case team and Ashurst, together with the information set out in the Application.

### **Issues raised in the Application**

9. In Ashurst's letter of 27 March 2018, the Applicant has requested a review of certain aspects of the handling of the investigation by the Ofgem case team. The Applicant argues that significant procedural issues have arisen during the course of the investigation. The arguments raised in the Application and outcomes sought are as follows:

#### 9.1. Privilege against self-incrimination

The Ofgem case team did not have proper consideration of the right against self-incrimination in using its powers to compel interviews with officers of the company under investigation.

#### 9.2. Selective interrogation of an unrelated case file

The Applicant raised concerns about the procedural basis upon which documents obtained by Ofgem in the course of unrelated regulatory proceedings were taken into account in the current investigation.

#### 9.3. Loss of objectivity by the case team / request for internal review

In the original submission dated 27 March 2018, the Applicant raised concerns about the manner in which investigations were conducted, in particular, about a partial interrogation and extraction of certain documents, and the selective questioning of witnesses. In this submission, the Applicant requested an internal quality assurance review based on the points raised above. However in the follow-up submission dated 15 May 2018, the Applicant sought an independent review on the basis that the case team have not ensured or observed sufficient standards of review according to the standards required by other agencies such as the Competition Markets Authority (the "CMA") in CA98 cases.

10. I consider these in turn below.

### **Scope for the Procedural Officer to consider the Application**

11. When considering any Application, the first issue to consider is whether the matters raised fall within the remit of the Procedural Officer role.

12. The role of the Procedural Officer in a CA98 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.”

13. Guidance on the CMA’s view about the scope of the complaints within the remit of the Procedural Officer is provided in the CMA 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 responses 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.

14. It is clear that the issues raised in the Application do not fall within any of the first four bullet points, and Ashurst, on behalf of the Applicant, submits that the basis of the Application is that the issues raised in it constitute a significant procedural issue falling within the fifth bullet point.

15. The CMA 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 CMA 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 the case.”<sup>4</sup>

16. Before turning to the matters raised in this Application, I will start by summarising my interpretation of the scope of the role of the Procedural Officer, and have therefore set out the following points:

16.1. It is clear from Rule 8(1) and the CMA Guidance that the Procedural Officer’s role is limited to the certain aspects of the investigation procedure followed once a formal investigation has been opened under section 25 CA98.

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<sup>1</sup> The Competition Act 1998 (Competition and Markets Authority’s Rules) Order 2014 (*SI 2014/458*) (“**CMA Rules**”).

<sup>2</sup> Guidance on the CMA’s investigation procedures in Competition Act 1998 cases (“**CMA Guidance**”), paragraph 15.4.

<sup>3</sup> <https://www.gov.uk/guidance/procedural-officer-raising-procedural-issues-in-cma-cases>.

<sup>4</sup> Paragraph 15.6 of the CMA Guidance.

- 16.2. The concept of “other significant procedural issues” as set out in the fifth bullet point in the CMA Guidance is to be interpreted in light of the nature and characteristics of the issues set out in the preceding four bullet points.
- 16.3. The concept of “other significant procedural issues” must also be interpreted in a manner consistent with the clear exclusions set out in the CMA Guidance in relation to substantive matters and the scope of requests for information.
- 16.4. I am mindful that the CMA was responsible for producing the statutory rules, namely CMA Rules,<sup>5</sup> which created the role of Procedural Officer and in producing guidance on this role chose to refer to particular types of issues that are within and outside of scope in the form of final guidance issued.
- 16.5. I therefore place particular weight on the fact that the CMA did not set out examples of types of procedural issues that have a substantive bearing on the outcome of an investigation, such as the use of evidence and the way in which it is gathered.
- 16.6. It follows in my view that the role of the Procedural Officer (in comparison to the role of a court) is limited to particular types of procedural issues, and I will be adopting the interpretation I have outlined above in considering this particular Application.

### **The privilege against self-incrimination**

17. The Applicant’s complaint is that:
  - 17.1. The case team has misdirected itself in law by refusing to accept that the Applicant benefits from the privilege against self-incrimination in circumstances where its representatives are interviewed pursuant to section 26A CA98.
  - 17.2. In carrying out the interviews on this basis, the case team has breached the Applicant’s rights of defence and to a fair legal process under EU law.
18. The case team in turn has submitted that they do not accept Ashurst’s interpretation of the scope of the privilege, and that they have provided an explanation to Ashurst of key points on why it takes this view.
19. I have taken into account the oral and written submissions from the Applicant and from the case team. I have also looked at relevant documents including the notices that were issued under section 26A and transcripts of the interviews that were conducted.
20. It seems to me that the matter in contention is ultimately about asking questions that go to the issue of whether or not the parties under investigation are separate undertakings. For this reason, I feel unable to distinguish this from the two matters that are expressly cited in the CMA guidance as being outside the scope of the Procedural Officer role. First, the activity of seeking information about the particular subject matter amounts, in my view, to the scope of “requests for information”. Secondly, the same subject matter and use of evidence about it goes to the heart of whether or not there can be a competition law infringement, and therefore “relates to the substance of the case”.
21. I have also reached the view that the complaint about the privilege against self-incrimination could be characterised as a submission that the provisions of primary legislation, namely section 26A CA98, are in conflict with other legal principles. I come to this view because it is clear on the

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<sup>5</sup> Under section 51 CA98.

face of the legislation that the section 26A power is particularly intended to be used in relation to individuals who are in a senior and controlling position of a company. It follows in my view that matters relating to potential conflicts between laws amount to substantive legal issues that may ultimately need to be resolved by the courts. For that reason and the way in which the CMA Guidance on the Procedural Officer role has been framed, I do not consider that matters of such legal significance were intended to fall within the non-judicial role performed by a Procedural Officer.

22. Whilst I do not consider that the matters raised by the Applicant fall within the scope of the Procedural Officer role, I have considered that it is appropriate for me to examine whether there were any more general procedural matters raised by the way in which the case team exercised powers under section 26A. In particular, I have examined the contents of the section 26A notices issued by the case team and the transcripts of the interviews conducted. On the basis of the information contained in these documents, I am satisfied that the process requirements set out in statute were properly followed, and the approach taken was otherwise consistent with the CMA Guidance. I note in particular that:
  - 22.1. the contents of the section 26A notices properly reflect the requirements of section 26A (including subsection (5)) and properly referenced the safeguards on the use of statements on prosecutions set out in section 30A;
  - 22.2. the safeguards on the use of statements set out in section 30A were properly explained at the start of the interviews by the case team to the individuals being interviewed; and
  - 22.3. the individuals being interviewed were accompanied by lawyers who are representing both the interests of the company under investigation and the individuals in their personal capacity.
23. Finally, for completeness, I note that in the event that the case proceeds to a statement of objections, that the process envisages that the parties will be informed of how any evidence from the interviews is being relied on, and they will therefore have a right to make written and oral representations on the use of such evidence. I therefore consider that the right of the defence is duly respected.

#### **Selective interrogation of an unrelated case file**

24. The Applicant's complaint is set out as follows:
  - 24.1. The case team has acted *ultra vires* in interrogating a closed and unrelated regulatory case file for evidence in this case.
  - 24.2. Even if it has not acted *ultra vires*, the case team has not exercised its powers in an objective fashion, because it has "cherry picked" documents in a selective manner. This "cherry picking" of documents is unfair and in breach of the principle of equality of arms.
  - 24.3. The case team has failed to understand or attempt to address this unfairness, including by providing the Applicant with an opportunity to examine all the documents in the investigation that might be relevant for its defence, including those documents contained in the regulatory case file to which the case team has access but the Applicant does not.
25. Dealing first with the issue of the use of information from an unrelated regulatory case file, I consider as a general matter that issues relating to reliance or use of evidence are likely to fall outside of the scope of the Procedural Officer role because there is likely to be a close

relationship with the substantial issues of the case. For example, where the evidence may be relied on as a component or key part of establishing an infringement.

26. With this general approach in mind, I note that in this particular case, the evidence from the unrelated case file appears to be particularly relevant to the issue of whether the parties under investigation are separate undertakings. Given that this issue has a direct bearing on whether or not there can be an infringement of competition law, it seems clear to me that this is a substantive issue “relating to the substance of the case”, and therefore falls outside of the scope of the Procedural Officer role.
27. As to the complaint around “cherry-picking”, I have also reached the view that this would fall outside the scope of the Procedural Officer role on the basis that the targeting and collection of particular documents during an investigation is a matter relating to the scope of information gathering, and therefore falls within the exception cited in the CMA guidance for “scope of requests for information”. In reaching this view, I have been particularly mindful of how a draft version of the document in contention was originally produced to the case team during an information gathering exercise conducted pursuant to section 27 CA98, and that the final version of the relevant document was ultimately produced to Ofgem in response to a compulsory information request under section 26 CA98.
28. For completeness, even if the matters complained of were to be considered to fall within the scope of the Procedural Officer role, I would have been minded to reach the general view that there was no procedural defect. This is for the following reasons:
  - 28.1. In general terms, I consider that the legal framework that applies to Ofgem envisages that information collected for one purpose may be used for different purposes by both Ofgem and other relevant public bodies. For example, the provisions of section 105 Utilities Act 2000 provide a legal gateway for Ofgem to disclose information gathered during a sectoral investigation to the CMA for the purposes of their functions under the CA98.
  - 28.2. In any event, the case team ultimately used information collected during a sectoral investigation (the “sectoral document”) to confirm the existence of a particular version of a document, which was then re-requested using powers under section 26 CA98. This meant that the parties under investigation were able to make representations about the interpretation of that document and its use in the investigation. For these reasons, I consider the sectoral document was only used by the case team in a manner which respects the judgments of the European Court of Justice in *Spanish Banks*<sup>6</sup> and *Dow Benelux*<sup>7</sup> – i.e. it was not used in evidence but rather as intelligence as to the existence of a document.
  - 28.3. Finally, I consider that any procedural issues around access to documents that would be relevant to the Applicant’s defence would ultimately be addressed by the access to file process that applies in the event that a statement of objections is issued.

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<sup>6</sup> *Dirección General de Defensa de la Competencia v Asociación Española de Banca Privada and Others* (Case C-67/91) (“**Spanish Banks**”).

<sup>7</sup> *Dow Benelux v Commission* (Case 85/87) (“**Dow Benelux**”).

## Loss of objectivity

29. The Applicant's complaint is as follows:
- 29.1. The case team has not responded to, or engaged in a material or timely manner with the fundamental issue regarding the lack of legal basis for the alleged infringement, and is proceeding on the incorrect basis that such a fundamental legal issue need not be addressed until after the issue of a statement of objections.
  - 29.2. From the point in time at which the case team was minded to issue a statement of objections, it has collected and interrogated evidence in a partial and selective manner, including:
    - 29.2.1. the "cherry picking" of evidence from an unrelated case file;
    - 29.2.2. the conduct of questioning at interview; and
    - 29.2.3. requesting that further evidence only be provided in response to a statement of objections.
  - 29.3. Those supervising the case team have not ensured or observed sufficient standards of review, that is, the standards required by other agencies such as the CMA in CA98 cases. In particular:
    - 29.3.1. there has been a fundamental misunderstanding regarding the obligations of objectivity incumbent on the case team and SRO at the pre-statement of objections stage;
    - 29.3.2. there has been a fundamental misunderstanding regarding the obligations of review incumbent on the case team and SRO at the pre-statement of objections stage, which the Applicant considers is required under Chapter 9 of the CMA Guidance; and
    - 29.3.3. the case team has provided no confirmation that an independent review will be carried out and/or that expert, external advice will be sought prior to issuing the statement of objections, in accordance with the procedural safeguards established by the CMA Guidance.
30. In respect of the issues raised above about the manner of collection and interrogation of the evidence by the case team, I consider that this constitutes the same type of issue that has already been dealt with earlier in this document. I therefore do not intend to cover this in more detail but would reiterate my view that such issues fall outside the scope of the Procedural Officer role because they relate to the scope of information gathering and the substance of the case.
31. In terms of the other issues raised above, I consider that these can be consolidated into two inter-related issues. These are whether or not there can be an infringement of competition law because of the contended issue of whether the parties under investigation are separate undertakings, and that this matter needs to be properly and independently reviewed within Ofgem before a statement of objections is issued.
32. It seems clear to me in this particular case that the issue of whether or not the parties under investigation are separate undertakings is an important matter "relating to the substance of the case" because the answer is likely to determine whether or not there can be an infringement of competition law. I am therefore firmly of the view that this aspect falls outside of the scope of the Procedural Officer role.

33. However, I understand that the Applicant is also raising a different aspect in terms of whether the case team has been subject to appropriate internal review throughout the investigation and in decisions which may ultimately lead to a statement of objections being issued. In this regard, I note that in the most recent submission from the Applicant dated 15 May 2018, the points put to me include the issue of whether the case team has been subject to the same type of internal review as that referred to in Chapter 9 of the CMA Guidance. Whilst I am not convinced from the materials I have seen that this issue and the arguments around it have first been properly put to the SRO, I have decided on this occasion that it is appropriate for me to explore this topic further.
34. My assessment of this issue is that there has not been any procedural defect by the case team and my reasoning for this conclusion is as follows:
- 34.1. First, I note that the CMA Guidance that has been cited by the Applicant states that it is only intended to explain the CMA's approach, and it expressly provides that it "does not cover the procedures used by sectoral regulators in their competition law investigations".<sup>8</sup> For this reason, I do not consider that the CMA Guidance in itself can be relied on by the Applicant as a basis for expecting Ofgem to follow the approach described by the CMA. Equally, I also note that there is nothing set out in Ofgem's own Enforcement Guidelines that would give rise to an expectation that Ofgem will follow the approach set out in Chapter 9 of the CMA Guidance.
- 34.2. Secondly, from my general understanding of Ofgem's internal processes and the general desire to act consistently with the CMA and other UK competition authorities, I am nevertheless comfortable that internal review arrangements that would normally be followed by Ofgem are similar to those outlined by the CMA in Chapter 9 of their guidance. For example, Ofgem's Enforcement Guidelines explain that an internal group consisting of senior civil servants (which is known as the Enforcement Oversight Board) are responsible for providing strategic oversight and governance to enforcement work and overseeing the portfolio of cases, including monitoring their progress.<sup>9</sup> I also understand that Ofgem case teams would typically engage with the CMA about their thinking at appropriate points during an investigations, receive scrutiny from other senior Ofgem employees, such as the Head of Competition Law, Jonathan Spence, and, where appropriate, seek external legal advice. I am comfortable from submissions received from the case team, including senior members of staff, that appropriate case review arrangements have been carried out in this particular investigation, such as discussions with CMA and internal lawyers.
- 34.3. Finally, I do not consider that there is a legal right for the parties subject to a CA98 investigation to require a competition authority to conduct an internal review before reaching a decision to issue a statement of objections. In my view, it is clear from Rule 3(1) of the CMA Rules that this is a decision of a single person, that is the SRO for the investigation. Further, in my view, the procedures that flow from a decision to issue a statement of objections are the ones designed to safeguard the rights of the defence and to address the possibility of confirmation bias by a case team. These procedures include access to documents relevant to the case, the right to make written and oral representations to

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<sup>8</sup> Paragraph 1.6 of the CMA Guidance.

<sup>9</sup> See paragraphs 6.4 and 6.6 of Ofgem's Enforcement Guidelines.



the final decision-makers, and that these decision-makers are different persons to the SRO and other members of staff that have been involved in the investigation.

**Decision**

35. After careful consideration and for the reasons explained above, I have decided that:
- 35.1. the complaints summarised in paragraphs 9.1 and 9.2 fall outside the scope of the role of the Procedural Officer, and
  - 35.2. the complaint summarised in paragraph 9.3 is mainly outside of the scope of the Procedural Officer save in one respect in which I have concluded there is no procedural defect.

**DAVID ASHBOURNE**

**PROCEDURAL OFFICER**

**23 May 2018**