

## Procedural Adjudicator Decision

<b>Procedural Adjudicator Case Ref:</b> PA2011/2	<b>Date of SRO's decision:</b> 12 August 2011
<b>Applicant:</b> Royal Mail Group Limited (RM)	<b>Date application received:</b> 19 August 2011
<b>Applicant's lawyers (where applicable):</b> -	<b>Date of Procedural Adjudicator's decision:</b> 26 August 2011
<b>OFT Case Name:</b> Bunker Fuel Card Sector Investigation	

### Summary of application

1. RM is a third party to the above investigation, having provided information to the OFT in response to a notice issued under s.26 Competition Act 1998 ("s.26 notice"). RM is not a party to the investigation itself. CH Jones is the party to the investigation. The SRO has decided that it is necessary to disclose certain confidential information supplied by RM in response to the s.26 Notice ("RM Confidential Information") to the external advisers to CH Jones (the "Advisers") in a data room under the terms of a confidentiality agreement, as part of the access to file process. RM considers that the arrangements put in place do not provide sufficient protection to RM in the event of onward disclosure by the Advisers in breach of s.241(2) Enterprise Act 2002 ("EA02"). RM has proposed to the OFT case team an alternative basis on which it was prepared to allow the Advisers to access the RM Confidential Information (the "RM Alternative Proposal"), which was rejected by the OFT case team and the SRO.
2. RM has applied for a review of the SRO's decision that the RM Confidential Information should be disclosed to the Advisers (subject to a confidentiality agreement).
3. RM has also applied for a review of the SRO's decision to reject the RM Alternative Proposal and considers that the SRO did not provide adequate reasons for his decision.

### Summary of SRO's decision that is the subject of the application

4. By email dated 12 August 2011, the SRO decided:
  - it was necessary to disclose the RM Confidential Information to the Advisers (subject to a confidentiality agreement) in order to facilitate the exercise of CH Jones' rights of defence. In essence the SRO concluded that, in carrying out the required balancing act under s.244 EA02, the necessity of disclosure to ensure that CH Jones could fully exercise its

rights of defence (s.244(4)) overrode the interests of RM in protecting the RM Confidential Information (s.244(3)(a)); and

- to reject the RM Alternative Proposal as not being appropriate in this case.

## **Process**

5. The application was received on 19 August 2011. The OFT case team attended a meeting with the Procedural Adjudicator on 23 August 2011 to discuss the application. A separate meeting was held between the SRO and the Procedural Adjudicator on 25 August 2011. RM attended a meeting with the Procedural Adjudicator on 23 August 2011 to discuss the application.

## **Scope of Trial**

6. The first question I considered was whether the SRO's decisions presented to me for review fell within the scope of the Procedural Adjudicator trial. I note that the application relates to a case in which the OFT has decided to open a formal investigation under the CA98 and that RM has already raised its concerns with the SRO. Paragraph 10 of the Briefing Note on the Trial of the Procedural Adjudicator in Competition Act 1998 Cases<sup>1</sup> sets out the decisions relating to procedural matters in CA98 cases that fall within the scope of the trial.
7. I concluded that the application fell within the scope of paragraph 10(c) of the Briefing Note, namely a decision taken by the SRO with regard to "requests for disclosure or non-disclosure of certain documents at access to file stage".
8. As set out in paragraph 13 of the Briefing Note, the standard of my review is similar to judicial review grounds. I am required to consider whether the SRO's decision was unreasonable or irrational and whether the case team has respected the necessary procedural requirements. Since RM is not a party to the investigation, it is not relevant for me to consider whether RM's rights of defence have been respected.

## **Disclosure of the RM Confidential Information**

9. RM and SRO are in agreement that the RM Confidential Information is *"commercial information whose disclosure the authority thinks might*

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<sup>1</sup> Available on the OFT's website at <http://www.of.gov.uk/about-the-oft/legal-powers/legal/competition-act-1998/procedural-adjudicator-trial>

*significantly harm the legitimate business interests of the undertaking to which it relates*" within the meaning of s.244(3)(a) EA02.

10. The disagreement is whether, in the circumstances of this case, the SRO was correct to conclude that, nevertheless, it is necessary to disclose this information to the Advisers (subject to a confidentiality agreement) in order to facilitate the exercise of CH Jones' rights of defence; and whether the SRO was reasonable in rejecting the RM Alternative Proposal.
11. To put this in context, the RM Confidential Information was provided to the OFT in RM's response to a question in an s.26 notice that requested information on the prices charged to RM for fuel drawn using fuel cards for four weeks in March 2010. RM provided other confidential information in the response, but this is outside the scope of this application since RM and the case team were able to agree a basis on which the remainder of RM's response could be disclosed to the Advisers (e.g. through redacting the confidential information in question or disclosing it as a range rather than a specific number).
12. In the Statement of Objections issued in February 2011, the OFT included median pricing differential data to support its conclusion that other fuel cards were not in the same market as bunker fuel cards. The median pricing differential data was calculated from pricing data supplied by a large number of hauliers, including RM.
13. Originally, the underlying pricing data provided by the hauliers was not supplied to CH Jones as part of the access to the file, with the OFT case team redacting this as confidential information within the meaning of s.244(3)(a) EA02.
14. In April 2011, CH Jones indicated to the case team that it required access to be provided to the underlying pricing data (as well as various other information which is outside the scope of this Application) so that it could exercise its rights of defence through checking whether the data supported the conclusions drawn by the OFT in the Statement of Objections in relation to market definition.
15. The case team explained to me that they had weighed up carefully the conflicting interests of CH Jones, in receiving the underlying pricing data (and other information which is outside the scope of this Application) to facilitate the exercise of its rights of defence, and the hauliers (including RM), in protecting their confidential pricing information and ensuring that it was not seen by CH Jones. The case team recognised that in this case

market definition is a key part of their case against CH Jones given that this is an investigation of an alleged abuse of a dominant position within the relevant market defined by the case team. They concluded that it was not necessary to disclose the underlying pricing data directly to CH Jones, provided that it was made available to the Advisers on an 'external adviser only' basis so that they could prepare written representations to the OFT on the data on behalf of CH Jones. They considered the 'external adviser only' solution to be preferable to disclosing the data direct to CH Jones since this would avoid CH Jones itself having access to confidential prices charged by other fuel card suppliers and so would continue to provide some protection to the hauliers' confidential pricing information.

16. Accordingly, in May 2011 the case team wrote to all third parties proposing to disclose unredacted versions of a number of documents to the Advisers subject to the individuals entering into a confidentiality agreement with the OFT and requesting their views on whether such a proposal would significantly harm their company's legitimate business interests. A number of third parties expressed concerns about this approach and, as a result, the case team decided that it would only disclose confidential information to the Advisers where the party that provided the data consented to the disclosure or where the case team concluded that disclosure of specific confidential information within the document was necessary in order for CH Jones to exercise its rights of defence. In the latter case, the case team also considered whether it would be sufficient to disclose the confidential information in a range or whether the precise data should be disclosed.
17. This approach was communicated to RM in a letter dated 1 July 2011. This letter also detailed the precise information that the case team proposed to disclose to the Advisers under the confidentiality agreement and the form in which it would be disclosed (i.e. precise data or a range). RM was provided with an opportunity to make representations on the case team's proposed approach.
18. On 15 July, RM indicated that it was prepared to allow the disclosure of the RM Confidential Information to the Advisers in a range. On 19 July, the case team indicated to RM that they considered it necessary to disclose the precise pricing data to the Advisers in order to enable them to test the median pricing differential analysis carried out by the OFT.
19. The case team considered that there are no exceptional circumstances justifying differential treatment for the data provided by RM. RM highlighted that it was a public utility subject to the EU and UK public

procurement rules that needed to tender its bunker fuel/fuel service contracts on a regular basis. RM was concerned that disclosure of the pricing information to CH Jones might distort their next tender exercise. The case team told me that the pricing data in question only relates to four weeks in March 2010 and that they consider this may be of limited value to prospective bidders for the next RM contract for fuel supply given the volatility of the fuel market. In any event, the proposal is to disclose the data only to the Advisers subject to a confidentiality undertaking including a requirement not to disclose this to CH Jones and so the information is not being disclosed to a prospective bidder for the next RM contract.

20. In response to a request by RM, on 25 July 2011 the case team provided RM with a copy of the draft confidentiality agreement to be entered into between the OFT and the Advisers and the draft dataroom rules. These set out the terms on which access is given to the confidential information in the dataroom and contain provisions preventing the Advisers from removing confidential data from the dataroom and from onward disclosure of such data in any form.
21. On 28 July 2011, RM expressed concern that the draft confidentiality agreement did not provide RM with any direct actionable rights against the Advisers if they were to breach the terms of the undertaking. RM therefore requested that the Advisers also entered into direct non-disclosure agreements with RM based on the OFT draft confidentiality agreement (the "RM Alternative Proposal"). RM also requested further information on the consequences of CH Jones' breaching the OFT confidentiality agreement.
22. On 2 August 2011, the case team responded to RM highlighting that the confidentiality agreement included a statement in which the Advisers confirmed that they were aware it was a criminal offence under s.245 EA02 for them to disclose the information provided under the terms of the undertaking to any other person, punishable by two years' imprisonment, a fine or both. The case team also rejected the RM Alternative Proposal, considering it to be inappropriate given the arrangements they had put in place.
23. On 5 August 2011, RM requested that the matter be escalated to the SRO, in particular requesting an explanation as to why the RM Alternative Proposal was 'inappropriate' in this case.
24. On 9 August the correspondence was escalated to the SRO. On 12 August 2011, the SRO wrote to RM confirming the case team's decision, as set out

in paragraph 4 above. In relation to the rejection of the RM Alternative Proposal, the SRO considered that it would be *"inappropriate for the OFT to facilitate or in any way require CH Jones' advisers to enter into a separate confidentiality agreement with Royal Mail, in circumstances where the OFT has decided to disclose certain information for a particular purpose, having had regard to the provisions of Part 9 EA2002 and where any onward disclosure by those parties is also restricted by the provisions of Part 9 EA2002 (and the terms of the confidentiality agreement entered into with the OFT by CH Jones's advisers)."*

25. The case team informed me that the underlying pricing data provided by all hauliers other than RM has now been disclosed to the Advisers in the dataroom under the terms of the confidentiality agreement. RM is therefore the only provider of the underlying pricing data that continues to object to its disclosure to the Advisers under the terms of the confidentiality agreement.
26. I am satisfied that the case team have provided RM with a reasonable opportunity to make representations to the OFT on the OFT's proposed action as required by Rule 6(1) of the OFT Rules<sup>2</sup> and as set out in paragraphs 7.10-7.11 of the Competition Act 1998 Procedural Guidance<sup>3</sup>.
27. In my view, the SRO's decision is reasonable in deciding that the RM Confidential Data should be disclosed to the Advisers subject to a confidentiality agreement. It is important that parties to investigations under the Competition Act 1998 are provided with information on the OFT's file necessary for them to exercise fully their rights of defence. At times this principle may justify the disclosure of another person's confidential information on which the OFT relies. Section 244(1) EA02 specifically provides that the OFT must consider these conflicting considerations before taking a decision on whether it is necessary to disclose the information and I am satisfied that the SRO has done so in this case. I therefore confirm the SRO's decision of 12 August 2011 in this regard.
28. In relation to the rejection of the RM Alternative Proposal, I consider that the SRO's decision is reasonable. The SRO and case team had already put in place specific arrangements to ensure that the Advisers are unable to disclose the RM Confidential Information to CH Jones, through the confidentiality agreement and dataroom rules which set out in detail the

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<sup>2</sup> SI 2004/2751 The Competition Act 1998 (Office of Fair Trading's Rules) Order 2004

<sup>3</sup> OFT 1263 A guide to the OFT's investigation procedures in competition cases

terms on which disclosure is made. These arrangements are in addition to the general statutory restrictions on onward disclosure in s.241(2) EA02 which provide that the Advisers are not permitted to disclose the information to any other person (including CH Jones). If the Advisers were to disclose the RM confidential information to CH Jones or any other person, they would commit a criminal offence under s.245 EA02. This is a sanction that is highly likely to deter the Advisers from breaching the confidentiality undertaking. Indeed this is the sanction that is regularly used in every Competition Act 1998 case to deter parties to the investigation from onward disclosures of any confidential information that is disclosed to them as part of the OFT's Statement of Objections, access to file process or otherwise.

29. It is not usual OFT practice, in addition to relying on s.241(2) EA02, to require a party to an investigation to enter into a direct confidentiality agreement with the provider of the confidential information. Whilst I fully understand RM's concerns that the EA02 regime for the disclosure of confidential information provides no directly actionable rights to the provider of the information if onward disclosure is made by the recipient of the information in breach of s.241(2) EA02, the legislation does not require the OFT to put any such arrangements in place before making a disclosure under s.241(1) EA02. Such a practice would create additional administrative burdens on the OFT and potentially delay investigations whilst such arrangements were put in place. It is also unclear what the impact would be on the OFT investigation if the party to the investigation refused to enter into such direct arrangements with one or more providers of information.

## **Conclusion**

30. I confirm the SRO's decision of 12 August 2011 that the RM Confidential Data should be disclosed to the Advisers (subject to a confidentiality agreement) and the SRO's reasons for this. I also confirm the SRO's decision to reject the RM Alternative Proposal for the reasons set out above.
31. I note that RM has expressed concern about the lack of information publicly available on the OFT's use of datarooms and confidentiality agreements to provide access to unredacted versions of documents at access to file stage. This was of particular concern to RM in this case since when the case team presented the proposal to provide access to the Advisers under the terms of a confidentiality agreement, RM was not provided with a copy of the draft

agreement or any detailed information on likely contents. It was not until 25 July that RM was provided with access to the draft agreement and draft dataroom rules.

32. Whilst I recognise that OFT case teams are currently trialling various methodologies to speed up investigations under the Competition Act 1998 and there is merit in allowing case teams freedom to do so, I have sympathy with RM's concern that such new procedures are unfamiliar to parties to an investigation and that insufficient information was made available to RM when the proposal was first presented to RM. I agree with RM that there would be considerable benefit in the OFT publishing some form of guidance on the circumstances in which such methodologies may be used and the type of protections that will be put in place in the confidentiality agreement and/or dataroom rules to avoid confidential information being onward disclosed. This would provide greater transparency to parties asked to agree to such arrangements and facilitate understanding by them of how such arrangements work in practice.

**JACKIE HOLLAND**  
**PROCEDURAL ADJUDICATOR**  
**26 AUGUST 2011**