Trial of Procedural Adjudicator in Competition Act 1998 Cases: Updated Briefing Note – October 2013

Background

1. We are committed to continuous improvement of our Competition Act 1998 (CA98) procedures in order to maximise the effectiveness of the CA98 regime and minimise burdens on parties to an investigation. This involves streamlining our processes where possible, whilst fully respecting the rights of defence. We are also committed to improving the transparency of our CA98 investigations and procedures, where possible.

2. During the consultation on our draft CA98 investigation procedural guidance in August 2010, a significant number of respondents called for the introduction of a Hearing Officer role in CA98 investigations, principally to provide a swift mechanism to resolve disputes in relation to case team decisions on procedural matters in the course of CA98 investigations. Many had the perception that currently the only option available to parties is to apply for judicial review of such decisions.

3. We have a common interest with parties to investigations in ensuring that such disputes are resolved efficiently to avoid delays to our CA98 investigations and additional costs to all. Accordingly, we considered this request carefully to see whether we could, without legislation, introduce a mechanism to address the concern and assist in the swift resolution of procedural disputes.

Procedural Adjudicator’s role

4. Therefore, we decided to trial a Procedural Adjudicator role for CA98 cases for a one-year period starting from 21 March 2011. We subsequently announced in March 2012, as part of our consultation on revised OFT investigation procedures in competition cases, that we would extend the trial until 21 March 2013, with an extended remit.

1 The title Procedural Adjudicator was chosen to distinguish the role from that of the EU Hearing Officer, which differs in scope.
5. On 16 October 2012, we extended the trial further, until such time as the OFT’s responsibility for competition law enforcement under the CA98 is transferred to the Competition and Markets Authority (CMA).² It is for the CMA to determine the extent to which it establishes a Procedural Adjudicator or equivalent role from that point onwards.³

6. The Procedural Adjudicator role is to resolve disputes in relation to case team decisions on certain procedural issues in a swift, efficient and cost-effective manner. Since March 2012, the Procedural Adjudicator has also been responsible for chairing oral hearings in CA98 cases and reporting on procedural issues to the relevant decision-maker(s) following the oral hearing (see paragraph 25).

Identity of the Procedural Adjudicator

7. For the trial period, the Procedural Adjudicator has been an internal OFT appointment. The Procedural Adjudicator is currently Sheldon Mills, Senior Director of Policy, who is a qualified solicitor. Sheldon is a senior OFT official who is experienced in procedural issues arising in CA98 cases. If we consider it necessary or appropriate, we may in future appoint additional Procedural Adjudicators.

8. The Procedural Adjudicator does not have any current involvement in the OFT’s CA98 cases to ensure that he is independent of the case team. The Procedural Adjudicator reports directly to the Chief Executive of the OFT (or the Chairman if the Chief Executive is the decision maker on the case).

² [www.oft.gov.uk/OFTwork/consultations/ca98-investigation-procedures](http://www.oft.gov.uk/OFTwork/consultations/ca98-investigation-procedures)

³ The Enterprise and Regulatory Reform Bill, which is currently before Parliament, provides for the establishment of the CMA to take over the OFT’s responsibility for enforcing the CA98. Under clause 34(6) of the Bill, the rules adopted by the CMA may include arrangements for it to deal with procedural complaints about its conduct during an investigation, including the possible appointment of a person who has not been involved in the investigation in question to consider any such complaint.
Scope of Procedural Adjudicator role

9. The Procedural Adjudicator role only applies to cases in which we have decided to open a formal investigation under the CA98, that is, where we have reasonable grounds to suspect that competition law has been breached and we have decided to prioritise the case for investigation. These are cases in which the section 25 CA98 threshold, that allows us to use our formal powers of investigation, has been met.

10. The Procedural Adjudicator only becomes involved at the request of a party to the investigation and only after the party has been unable to resolve the dispute with the Senior Responsible Officer (SRO) of the case. If a party is unhappy with the decision of a case team on a procedural matter, it should raise its concern with the SRO as soon as possible. Where an approach to the SRO has not resulted in a resolution of the concerns and they fall within the scope of the trial, the party can apply for a review of the SRO’s decision by the Procedural Adjudicator.

11. The Procedural Adjudicator is able to review decisions taken by case teams in relation to the following procedural matters in CA98 cases:

   a. 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

   b. requests for confidentiality redactions at the access to file and Statement of Objections stages or in a final decision

   c. requests for disclosure or non-disclosure of certain documents at access to file stage

   d. procedural issues relating to oral representations meetings, such as the date of the meeting, and

   e. other significant procedural decisions that may arise.

12. Some disputed decisions may fall outside the scope of the Procedural Adjudicator trial, and in such cases the party should refer to our...
13. The Procedural Adjudicator is not able to review case team decisions on the scope of information requests or other decisions of the case team relating to the substance of the case.

14. The standard of review exercised by the Procedural Adjudicator is similar to judicial review grounds. The Procedural Adjudicator will consider whether the case team’s decision is unreasonable or irrational, whether the case team has respected the necessary procedural requirements and/or whether the party’s rights of defence have been respected.

Timing and Procedure

15. The purpose of the trial is to provide a swift, efficient and cost-effective mechanism for reviewing specific decisions of the case team on procedural matters. The success of the trial would be assessed by reference to the criteria discussed at paragraph 21 below.

16. A party wishing to apply to the Procedural Adjudicator for a review of a decision will need to make an application as soon as possible and, in any event, within five working days of being notified of the SRO’s decision on the issue in question (see paragraph 9 above).

17. The party will need to provide a short summary of the issue in question and provide copies of relevant correspondence between the party and the case team. The Procedural Adjudicator will provide an opportunity for each side to present their arguments orally on the telephone or at a meeting before issuing a short, reasoned decision.

18. The Procedural Adjudicator will endeavour to deal with the complaint as quickly as possible, with an indicative administrative target of taking decisions in 90 per cent of cases within 10 working days from receipt of the application.

19. The Procedural Adjudicator will arrive at a short, reasoned decision either confirming the case team’s decision or reaching a different one in whole or in part. The Procedural Adjudicator’s decision will be binding on the case team. The role of the Procedural Adjudicator does not prejudice the party’s rights in respect of judicial review and/or any appeal before the CAT.

20. We will publish the Procedural Adjudicator’s decision, or a summary of that decision, either at the time of the decision or at the end of the case, subject to confidentiality redactions as appropriate.

21. Further details of the procedure are available on the OFT website.

Evaluation of Trial

22. We evaluate the trial to see whether the trial has achieved its objectives against the following criteria:

   a. whether the Procedural Adjudicator role has assisted in resolving procedural issues more swiftly

   b. whether in fact cases are taking longer than before the trial

   c. whether the Procedural Adjudicator role has assisted in building confidence in the fairness and robustness of our procedures in CA98 cases, and

   d. whether the Procedural Adjudicator role is working well in the absence of a specific statutory framework

23. The possible outcomes of the trial are as follows:

   a. establishing the role permanently, with or without changes and whether or not with recommendations that the role operate on a statutory basis

   b. discontinuing the role, or

   c. extending the duration of the trial – if it is considered that insufficient data has been gathered to take a decision on whether the role has been successful or not.
24. We reserve the right to suspend the trial during the remainder of the trial period, should we find that parties or their lawyers are misusing the system, for example with a view to delaying investigations, and this is resulting in cases taking longer than before the trial.

Additional Roles from 21 March 2012

25. From 21 March 2012, the Procedural Adjudicator role was expanded to include:

a. Chairing oral hearings in CA98 cases, and

b. Reporting to the relevant decision-maker(s) following the oral hearing to highlight any procedural issues that have been brought to the attention of the Procedural Adjudicator during the investigation and to confirm whether the parties’ right to be heard has been respected, including whether the oral hearing was properly conducted.

26. The OFT considers that these additional roles will provide greater consistency in the conduct of oral hearings whilst also providing further comfort to the parties that the effective exercise of their right to be heard is respected and, more generally, in the legitimacy and fairness of the OFT’s processes.

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