Terms of Reference of the Competition Decisions Committee (approved by ERPC on 9 October 2024)

Terms of Reference of the Competition Decisions Committee

Background and purpose

1. The Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014[1] (CMA Rules) requires separation between (a) the person(s) who oversees an investigation and decides to issue a notice setting out a proposed finding of infringement of the Competition Act 1998 (CA98) (i.e. the Statement of Objections) and (b) the person who decides whether any supplementary Statement of Objections is required, whether there has in fact been such an infringement and whether to impose a penalty under the CMA Rules.[2] It also requires that the person in (b) comprises at least two persons.

2. To meet the requirement of separation of decision-making, in 2015 the Board of the Financial Conduct Authority (FCA) authorised the creation of a pool of persons (CDC Panel) who can be appointed to a Competition Decisions Committee (CDC) to act as decision-makers in any particular CA98 investigation following the issuing of a Statement of Objections.

3. The CDC comprises three persons appointed from the CDC Panel. It exercises certain decision-making powers in CA98 investigations on behalf of the FCA: see paragraph 6 for its specific functions.

4. A CDC will be appointed to be the final decision-makers each time the FCA has issued a Statement of Objections. This means that there may be more than one CDC in place at any one time, that is, one for each investigation.

5. The CDC and CDC Panel are separate from the FCA's executive management structure. All members of the CDC Panel are appointed for fixed periods by the People Committee of the Board. The People Committee may remove a member of the CDC Panel, but only in the event of that member's misconduct or incapacity.

Functions of the CDC

6. The CDC's functions are:

6.1 To decide whether to issue any letter of facts (setting out any new evidence on which the CDC proposes to rely to support existing allegations in a Statement of Objections in order to establish that an infringement has been committed);

6.2 To decide whether to issue any supplementary Statement of Objections (setting out any new or amended allegations from the original Statement of Objections and supporting evidence);

6.3 Based on its review of the facts and arguments presented, to decide whether to issue an infringement decision, including in hybrid settlement cases where

[1] SI 2014/458.
[2] Rule 3(2) of the CMA Rules.

appropriate,[3] or a 'no grounds for action' decision[4];

6.4 To decide on the appropriate level of any penalty for an infringement, having regard to the penalty guidance in force for the time being under section 38 CA98 and following the issue of a draft penalty statement by the Case Sponsors. Where no draft penalty statement has previously been issued, the CDC will first give notice of the appropriate level of any penalty, based on a proposal put forward by the case team. In the case of hybrid settlements, the penalty will be subject to the maximum financial penalty that can be imposed on a settling party established in the settlement agreement;[5] and

6.5 If it has found an infringement of CA98, to decide whether to impose directions under section 32 or section 33 CA98 and, if so, what directions to impose.

7. In exercising its functions, the CDC will consider the Statement of Objections, documents on the case file, the written and/or oral representations of the party/parties and any representations received from third parties on the Statement of Objections and any other supplementary notices issued by the FCA (see paragraphs 6.1 and 6.2 above). CDC members will attend any oral hearing(s) on liability and on penalty, described below, or review transcripts of such hearings (in the event that a member of the CDC changes after the oral hearing has taken place).

8. Before deciding whether to issue an infringement or 'no grounds for action' decision, the CDC may ask the case team and Case Sponsors to:

8.1 provide a further explanation of the Statement of Objections, the draft penalty statement, any aspect of any FCA staff recommendation or any accompanying papers;

8.2 explain or provide any other additional information about the matter;

8.3 investigate any matter further; and/or

8.4 issue a letter of facts and/or supplementary Statement of Objections under its direction.

9. The CDC will take a decision based on all the relevant information available to it, including the views of FCA staff about the relative quality of the evidence.

10. The CDC will direct the case team in the drafting of any letter of facts, supplementary Statement of Objections, supplementary draft penalty statement, and/or infringement decision or 'no grounds for action' decision.

11. The CDC does not take any of the following decisions:

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[3] Settlement cases are where the infringing party admits the infringement and agrees to a streamlined administrative process (the governance and process for which are set out in FG15/8 *The FCA's concurrent competition enforcement powers for the provision of financial services)*. Settlements can be 'full settlements' or 'hybrid settlements'. Full settlements are cases where all parties to the investigation agree to settle the case; hybrid settlements are cases where only some of the parties to the investigation agree to settle.

[4] Which could include a non-infringement decision.

[5] The Draft Penalty Statement will generally be issued by the Case Sponsors together with the Statement of Objections. See paragraph 5.7 of FG15/8 *The FCA's concurrent competition enforcement powers for the provision of financial services.*

11.1 Closing a case on grounds of administrative priority

11.2 Accepting commitments under section 31A CA98

11.3 Issuing interim measures under section 35 CA98

11.4 Settling a case (including taking the infringement decision following any such settlement, except in multi-party cases where at least one party is contesting rather than seeking settlement); or

11.5 Imposing a penalty under section 40A CA98 relating to failures of parties to comply with the FCA's information-gathering powers in CA98 investigations.

12. The CDC is not appointed and does not have a role in the case before a Statement of Objections is issued.

13. In addition, it is the case team and Case Sponsor who are responsible for resolving any issues raised by parties relating to access to file and redaction of confidential information, both in relation to disclosure to addressee(s) of a Statement of Objections and in relation to the publication of any final infringement decision. Such issues are subject to parties' rights to raise complaints with the Procedural Officer appointed to the relevant investigation.

14. The CDC is accountable to ERPC in respect of its procedures, policies and general arrangements, but this does not affect its independence in relation to its decisions.

Appointment of the CDC

15. The CDC is appointed from the CDC Panel when the FCA has issued a Statement of Objections setting out its provisional finding of infringement against one or more parties. The Executive Regulation and Policy Committee (ERPC) shall make the appointment, after considering the recommendation of the CA98 enforcement team as to its composition.

16. CDC Panel members can be a member of more than one CDC at any one time.

17. If a member of the CDC Panel has a potential conflict of interest in any matter in which they are asked to participate, they will disclose the conflict to the Decision-Making Committees Secretariat (the Secretariat) and to the Regulatory Decisions Committee (RDC) Chair. The RDC Chair, in conjunction with other FCA staff, will decide whether it is appropriate for the CDC Panel member to act on the CDC for the matter in question.

CDC membership and quorum

18. The CDC is composed of three members of the CDC Panel, who are appointed to act as the CDC in any particular case. If a CDC member needs to leave their position on the CDC before an investigation is closed, a new member will generally be appointed by ERPC, after considering a recommendation from the CA98 enforcement team.

19. Each CDC will typically include at least one lawyer and one economist.

20. Decisions require at least two members of the CDC to be in agreement. Dissenting opinions will not be published.

Case team and party liaison

21. One member of the CDC in any particular case will be designated as the main liaison point for the FCA case team.

22. The party or parties under investigation will not engage with the CDC directly; day-to-day contact will continue to take place through the case team (under the guidance of the Case Sponsor overseeing the investigation).

Oral hearings and report of the Procedural Officer

23. Addressee(s) of the Statement of Objections are invited to make oral submissions to the CDC, but they are not obliged to do so. Any oral hearing will be chaired by the Procedural Officer, in accordance with the CMA Rules.[6]

24. The CDC will determine the format and timing of the oral hearing (which could include a multi-party hearing).

25. During the oral hearing, both the CDC and FCA staff present may ask questions about the addressee's representations or questions of clarification. There is no obligation on the addressee to respond, and it may respond to questions in writing after the hearing.

26. Following the oral hearing, the Procedural Officer will report to the CDC, indicating any procedural issues that have been brought to the attention of the Procedural Officer during the investigation and confirming whether the parties' right to be heard has been respected, including an assessment of the fairness of the procedure followed in the oral hearing.[7]

Legal and economic input

27. The CDC will be advised by the legal and economic advisers to the case team, though it may choose to obtain advice from a new adviser from within the FCA or externally if it feels that this is required in order to reach its final view on infringement.

Resources

28. The CDC shall have access to sufficient resources in order to carry out its functions including, in particular, the resources of the Secretariat. However, final decisions on case team resources (to do things as directed by the CDC) will be taken by FCA executives. If the CDC has concerns that the available resources are insufficient to enable the CDC to discharge its functions, it should raise this with the executive who will consider whether to make available additional resources or, ultimately, whether closure of the case on grounds of administrative priority is more appropriate.

Notice of Meetings

29. The Secretariat shall make the arrangements for each meeting, including confirming the availability of each CDC member. This includes meetings of the CDC, meetings of the CDC with the case team and meetings of the CDC with the

[6] Rule 6(5) of the CMA Rules.
[7] Rule 6(6) and (7) of the CMA Rules.

case team and parties.

30. Unless otherwise agreed, confirmation of the arrangements for each meeting shall be forwarded to each CDC member and any other relevant person as soon as practicable before the date of the meeting, together with the papers to be considered at the meeting.

31. Attendance at meetings may be by video/ telephone call or similar facility, so far as practicable and subject to prior agreement with the Secretariat and case team. Decisions may also be taken in writing including email or other electronic means. The CDC meets in private.

Records of decisions

32. The Secretariat will make and retain appropriate records of the decisions taken by the CDC.

Duties of the CDC Panel

33. Each CDC Panel member has agreed to comply with the FCA and PSR Decision-Making Committee Members Code of Conduct. The Secretariat will record and document all disclosures of potential conflicts of interest and the steps taken to manage them.

34. Each CDC Panel member must make themselves reasonably available to attend training in relation to their role as a CDC Panel member regardless of whether they are currently sitting on a CDC.

Review

35. The FCA CA98 enforcement team will review the Terms of Reference of the CDC annually and within three months of the closing of an investigation (whether the CDC has adopted a decision or not). Any changes to the Terms of Reference of the CDC require ERPC approval.