

Note on legal issues for P61

The Modifications Group asked legal a number of questions concerning P61. In reviewing these and the Modification proposal, legal also identified some issues that the Modifications Group and Consultees ought to be aware of in considering P61.

As we understand it, P61 is a proposal to abolish Ad Hoc Settlement Runs for the reason that current systems do not allow for them to be carried out as contemplated by the Code. In the place of Ad Hoc Settlement Runs, it is proposed that a better methodology for the adjustment of a settlement error is:

1. in the case of a pre-Final Reconciliation Run dispute, to undertake the adjustment at the next convenient timetabled Reconciliation Run; and
2. in the case of a post Final Reconciliation Run dispute, to undertake the adjustment through a single Dispute Final Run (new term).

The concept of an "interim adjustment" has also been created. This is a manual calculation of the error carried out by the TDC and agreed by the Panel outside the normal Settlement Runs. This would be used if there was an "urgent requirement" to adjust the error in between Settlement Runs and would be superseded by the next settlement run.

Issues to consider

Ad-Hoc Settlement Runs are provided for in U2.2. Under U2.2.1 it is recognised that "it may be necessary or appropriate" to carry out a Settlement Run beyond a timetabled run (ie an Ad-Hoc Settlement Run). Under U2.2.2 the Panel may decide to carry out an Ad-Hoc Settlement Run:

- on the recommendation of the TDC, following resolution of a Trading Dispute;
- following the award of an arbitrator;
- otherwise in its discretion.

The last of these is a wide power, if unlikely to be frequently exercised. However, a point for the group and consultees to consider is that Ad Hoc Settlement Runs are intended not only to be used following a Trading Dispute, but can also be triggered for any reason that the Panel may decide.

The Code does not contain further provisions which expressly contemplate the use of Ad-Hoc Settlement Runs in particular circumstances (other than in Section W, in the context of Trading Disputes). However that does not mean the power is not potentially important.

We think it can be viewed as an assurance that, whatever unlikely and unforeseeable circumstances may arise, settlement can be achieved in accordance with the Code. The power must be viewed in the context of the Panel's objectives in B1.2.1, the first of which is 'that the Code is given effect fully and promptly and in accordance with its terms'. Given how tightly the powers of individual Parties and BSC Agents to alter data are limited (U2.5) it is sensible for the Panel to have this wide power in case of a serious problem.

One important point to note is that the Panel do not need to await the outcome of a Trading Dispute in order to exercise the power. It might be argued that in all cases where the power needed to be exercised, there would always be a settlement error, and a Party could and would raise a Trading Dispute, so that any problem would eventually be sorted out. However it may well be desirable for the Panel to move much more quickly in a case where it is clear that there has been a substantial problem in settlement.

The Modification Proposal appears only to contemplate abolishing Ad Hoc Settlement Runs following a Trading Dispute. This would presumably need to be extended to cover all instances contemplated under U2.2. Therefore, the concept of interim adjustment would also need to be expanded to cover all instances where it is currently contemplated that an Ad Hoc Settlement Run may be carried out.

Questions from the Modifications Group

The Modifications Group asked a number of specific questions, which are set out below together with some initial thoughts from the legal department.

- 1. P61 introduces the concept of an 'Interim adjustment'. The Mod Group would like to treat this as a Method of Apportionment (Section W 4.3) and hence triggering an 'Ad hoc Trading Charge' (Section N 6.9.1). This appears to give the TDC/Panel clear powers to mandate charges and ensure that Parties have clear obligations to pay (through Section N 6.9.1). The key difference here is that such an 'Interim adjustment' would be reversed and superseded at the point of the subsequent Timetabled Run. Can we have a view whether such an interim adjustment could be brought under the umbrella of apportionment or whether it requires a definition in its own right with its own linkages back into Section N.*

Paragraph W4.3 already provides for the manual interim adjustment contemplated by P61, in that it provides that if it an Ad Hoc Settlement Run ought to have been performed, but the TDC has decided that this is not appropriate (for whatever reason) then the Panel can decide the method and basis of adjustment and apportionment which will be applied outside Settlement Runs. However, if the concept of Ad Hoc Settlement Run as contemplated by the Code were removed, then this paragraph would need to be amended to reflect the fact that this manual adjustment outside of settlement would be the only interim settlement adjustments between settlement runs. The hooks into Section N 6.9 and the concept of Ad Hoc trading charge could be retained in this paragraph. However, the hooks in W4.3 into N6.9 would not work for the

other circumstances contemplated by U2.2, and therefore new drafting would have to be done to cover this.

2. *The existing Section W 4.3.1 does not seem clear as to how it is triggered in the case when apportionment is required between Timetabled Runs. Do you agree?*

Yes, however the reason that W4.3.1 is broadly worded was to give the Panel a broad discretion to decide the method and basis of the adjustment and apportionment, and to give the TDC a broad discretion around when it might not be appropriate to carry out an Ad Hoc Settlement Run. This paragraph will be amended if Ad Hoc Settlement Runs are abolished, but we would not want to fetter the discretion of either the Panel or the TDC.

3. *Would such an Interim adjustment process fall within the scope of the BSC Audit (Section H 5.1.3)?*

Yes it would if it was written into the Code as part of the Settlement process.

4. *P61 seeks to remove 'Ad Hoc Settlement Runs' between Timetabled Runs, and to retain only a single instance, namely a Disputes Final Run. There are many cross references to the term 'Ad Hoc Settlement Runs' both in the Code and Code Subsidiary documents. Would it be preferable to retain the term but refine/constrain the definition in Section U 2.*

Given the changes, which are not insubstantial, we would want to abolish the term along with the concept. Otherwise it could be very confusing for parties who had been used to the old meaning of the term. This is a matter that can be picked up in the drafting later.