

Tribunal Rules

Implementing part 1 of the Tribunals, Courts and Enforcement Act 2007

Responses to the consultation on possible changes to the Upper Tribunal Rules 2008 and the Upper Tribunal (Lands Chamber) Rules 2010 in connection with CE-Filing

(June to August 2022)

Reply from the Tribunal Procedure Committee

December 2022

Introduction

1. The Tribunal Procedure Committee (the “TPC”) is the body that makes Rules that govern practice and procedure in the First-tier Tribunal and in the Upper Tribunal. Both are independent tribunals, and the First-tier Tribunal is the first instance tribunal for most jurisdictions. Further information on Tribunals can be found on the HMCTS website at:
<https://www.gov.uk/government/organisations/hm-courts-and-tribunals-service/about#our-tribunals>
2. The TPC is established under section 22 of, and Schedule 5 to, the Tribunals, Courts and Enforcement Act 2007 (“the TCEA”), with the function of making Tribunal Procedure Rules for the First-tier Tribunal and the Upper Tribunal.
3. Under section 22(4) of the TCEA, power to make Tribunal Procedure Rules is to be exercised with a view to securing that:
 - (a) in proceedings before the First-tier Tribunal and Upper Tribunal, justice is done;
 - (b) the tribunal system is accessible and fair;
 - (c) proceedings before the First-tier Tribunal or Upper Tribunal are handled quickly and efficiently;
 - (d) the rules are both simple and simply expressed; and
 - (e) the rules where appropriate confer on members of the First-tier Tribunal, or Upper Tribunal, responsibility for ensuring that proceedings before the tribunal are handled quickly and efficiently.
4. In pursuing these aims the TPC seeks, among other things, to:
 - (a) make the rules as simple and streamlined as possible;
 - (b) avoid unnecessarily technical language;
 - (c) enable tribunals to continue to operate tried and tested procedures which have been shown to work well; and
 - (d) adopt common rules across tribunals wherever possible.
5. The TPC also has due regard to the public sector equality duty contained in section 149 of the Equality Act 2010 when making rules. Further information on the TPC can be found at our website: <https://www.gov.uk/government/organisations/tribunal-procedure-committee>

6. The First-tier Tribunal (“F-tT”) is divided into separate chambers which group together jurisdictions dealing with like subjects or requiring similar skills. The F-tT Chambers are:
 - Social Entitlement Chamber (“F-tT(SEC)”)
 - Health, Education and Social Care Chamber (“F-tT(HESCC)”)
 - War Pensions and Armed Forces Compensation Chamber (“F-tT(WPAFCC)”)
 - General Regulatory Chamber (“F-tT(GRC)”)
 - Immigration and Asylum Chamber (“F-tT(IAC)”)
 - Tax Chamber (“F-tT(Tax)”); and
 - Property Chamber (“F-tT(PC)”).

7. Likewise, the Upper Tribunal (“UT”) is divided into separate Chambers. The UT mainly, but not exclusively, decides appeals from the F-tT.

8. Appeals from F-tT Chambers other than the F-tT(PC) are dealt with by either the Upper Tribunal (Administrative Appeals Chamber) (the “UT(AAC)”), the Upper Tribunal (Immigration and Asylum Chamber) (the “UT(IAC)”), or the Upper Tribunal (Tax and Chancery Chamber) (the “UT(TCC)”). The Rules which apply across these Chambers are the Upper Tribunal Rules 2008 (the “UT Rules”). These Rules can be found in the “Publications” section of our website:
<https://www.gov.uk/government/organisations/tribunal-procedure-committee>

9. Appeals from the F-tT(PC) are dealt with by the Upper Tribunal (Lands Chamber) (the “UT(LC)”). That Chamber also has other jurisdictions, but all matters are dealt with under the Upper Tribunal (Lands Chamber) Rules 2010 (the “UT(LC) Rules”). These Rules can also be found on our website.

The Consultation Process

10. A consultation (the “Consultation”) ran over the period June to August 2022, its purpose being to seek views as to possible changes to the UT Rules and to the UT(LC) Rules in relation to CE-Filing.

11. CE-File is an online system in use by HMCTS staff as a case management system in the UT Chambers. It is also an e-filing system and can be made available for parties to proceedings to lodge or file documents (pleadings, correspondence and evidence

etc.) electronically at the Tribunal. Similarly, the Tribunal can make a document available to a party via CE-File. CE-File does not provide a mechanism whereby parties can serve documents directly on other parties.

12. Permissive use of CE-Filing by a party is already enabled by the UT Rules and the UT(LC) Rules; as such, CE-Filing is now available in all of the UT Chambers. The respective Presidents of each Chamber have issued Practice Notes governing such permissive use. A party must first register for CE-File before it may use it. (Such Practice Notes were set out in **Annexes B to E** to the Consultation.)
13. The UT(TCC) commenced permissive CE-Filing on 17 May 2021, followed by the UT(LC) on 28 June 2021. The UT(IAC) commenced permissive CE-Filing for Appeals and Judicial Review cases on 17 January 2022, followed by the UT(AAC) on 24 January 2022. (As further background, the Employment Appeal Tribunal also commenced permissive CE-Filing on 12 July 2021.)

CE-Filing in the UT

14. Rules 13(1)-(5) of the UT Rules and Rule 13 of the UT(LC) Rules are essentially identical. The UT “*may permit*”, under Rule 13(1)(c), CE-Filing of documents. This is what it presently does, pursuant to the respective Practice Notes. Further, subject to Rule 13(3), if a party is registered for CE-Filing, then the Tribunal may deliver documents to that party via CE-File (by reason of Rule 13(2)).
15. The Consultation followed the making to the TPC of a ‘mandation’ proposal in relation to CE-Filing by a Working Group of administrative staff within HM Courts and Tribunals Service (“HMCTS”) and judges from each of the four UT Chambers. The proposal is that detailed provisions as to mandatory CE-Filing would be a matter governed by Practice Directions, not expressly by detailed provisions of the Rules. Amendment of the Rules would enable the making of Practice Directions for such purpose. The SPT supports this proposal as an important step towards the modernisation of tribunal procedure.
16. Certain Courts have already progressed to mandation for CE-Filing, as discussed in the Consultation.

Which parties might be 'mandated' to use CE-Filing?

17. The Consultation noted that there is no present intention to make CE-Filing mandatory for all UT users. It is likely there will remain a variety of filing methods available for some users; for non-mandated users not wishing to use CE-Filing, HMCTS staff will communicate with them outside the CE-Filing system.
18. It is proposed that each UT Chamber may, but will not have to, require certain classes or categories of users (such as those who are legally represented, and those who are represented by non-legal professionals) to adopt CE-File. The precise date that mandatory use would come into force, and its scope, would be for each UT Chamber to decide in conjunction with the SPT, so that a Practice Direction may be issued by the SPT.

The UT Chambers and their respective approaches to CE-File

19. As stated above, all UT Chambers have now been permitting CE-Filing. **Annexes B to E** to the Consultation set out information drawn from the respective UT Chambers, both as to the progress of permissive CE-Filing and as to scope for mandation. They included the terms of the current respective Practice Notes.

UT(LC)

20. The provisional intention of the UT(LC) is that, if the rules permit, CE-Filing should become compulsory, after a lead-in period allowing for extensive publicity and preparation, for all parties who are represented by a regulated professional person or firm, whether a lawyer (including a barrister or a member of CILEX), surveyor or accountant, and CE-Filing should remain recommended but not obligatory for LiPs. It is not, at present, envisaged that it will ever be made compulsory for LiPs.
21. The UT(LC) proposes to work with the F-tT(PC) and the Valuation Tribunal in England, from which its appeals principally come, to educate and encourage would-be appellants from those tribunals to make use of CE-Filing, even if they are not required to do so.

22. As for any possible 'exceptions' to mandation, although the alternative of paper filing will always have to be there for LiPs, it is unlikely that a professional will be able to demonstrate an inability to use a computer to CE-File.

23. Regarding down-time issues (for example), the UT(LC) would expect to follow a similar path as that set out in the CPR Practice Direction (**Annex F** to the Consultation).

UT(TCC)

24. The UT(TCC) would be minded to follow the CPR practice for the Rolls Building jurisdictions of mandatory CE-filing for legally represented parties, with optional CE-filing for others.

UT(IAC)

25. In broad terms, the UT(IAC)'s position is akin to that of the UT(TCC). More particularly, the UT(IAC) envisages mandating CE-Filing in order to start and/or continue/respond to any appeal or application, where the party is legally represented. For this purpose, being "legally represented" includes being represented by (a) a qualified person (within the meaning of section 84 of the Immigration and Asylum Act 1999); and (b) a Home Office Presenting Officer. One exception to mandatory CE-Filing which may be considered is if an application is for urgent consideration in judicial review.

UT(AAC)

26. Presently, the UT(AAC) does not have a firm view about which type of user may be subject to mandation. CE-Filing has not been used much to date in that Chamber. Access to justice issues might suggest that only regulated representatives should be mandated to use it. (That is because professional regulation (Bar Standards Board, Solicitors Regulation Authority, Chartered Institute of Legal Executives) is a reasonable proxy for representatives who can be expected to have the digital resources to use the system.) LiPs may well not have enough digital resources or skills and some may fall into digitally excluded groups who form a proportion of UT(AAC) users.

27. That said, staff resources are considered important and there is advantage in treating everyone in the same way. Staff may struggle to operate a digital system and a paper system in tandem and, if this administrative complexity causes delay to the progression and resolution of cases then access to justice will suffer.
28. For these reasons, the UT(AAC) has no finalised or settled view as to users who may be subject to mandation, and whether there might be 'exceptions/extenuating circumstances'. An evidence-based approach would be appropriate. This consultation may assist to shed light on these matters.

Possible Rule Changes

29. In order to make clear provision for the use of the online CE-File portal, the proposal made in the Consultation was to add "*Uploaded to the Tribunal's secure portal*" to the list of possible delivery methods in Rule 13(1). It would be for a Practice Direction to deal with issues of compatible file formats. The Consultation also noted that the TPC was also considering removing the reference to sending documents by fax, since this is expected to be much less common in the future (although it will remain an option where a fax number is provided by the Tribunal or a party, since it will remain within the scope of 'any other method identified ... by the Tribunal or person to whom the document is directed').
30. To cater for possible mandation of CE-filing, over and above the current permissive use, an overall proposal for amendment of Rule 13 was as follows (by indicative drafting, with emphasis in bold).

Sending and delivery of documents

13.—(1) Any document to be provided to the Upper Tribunal under these Rules, a practice direction or a direction must be—

(a) sent by pre-paid post or by document exchange, or delivered by hand, to the address specified for the proceedings;

(b) sent by fax to the number specified for the proceedings

(bb) uploaded to the Tribunal's secure portal; or

(c) sent or delivered by such other method as the Upper Tribunal may permit or direct.

(1A) A practice direction may specify for any document subject to paragraph (1)

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(a) the requirements that must be fulfilled for it to be uploaded to the Tribunal's secure portal; and

(b) in any specified category of case, that it must be so uploaded to the Tribunal's secure portal.

(2) Subject to paragraph (3), if a party provides a fax number, email address or other details for the electronic transmission of documents to them **including through the Tribunal's secure portal**, that party must accept delivery of documents by that method.

(3) If a party informs the Upper Tribunal and all other parties that a particular form of communication, other than pre-paid post or delivery by hand, should not be used to provide documents to that party, that form of communication must not be so used.

(4) If the Upper Tribunal or a party sends a document to a party or the Upper Tribunal by email or any other electronic means of communication **including through the Tribunal's secure portal**, the recipient may request that the sender provide a hard copy of the document to the recipient. The recipient must make such a request as soon as reasonably practicable after receiving the document electronically.

(5) The Upper Tribunal and each party may assume that the address provided by a party or its representative is and remains the address to which documents should be sent or delivered until receiving written notification to the contrary.

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Responses to the Consultation, and Conclusions

31. There were 2 responses to the Consultation – see Annex A.

32. The Questions raised are listed below, with the responses then set out, followed by the conclusions of the TPC (in light of the responses).

Question 1: Do you agree that it is appropriate for there to be mandation of CE-Filing for certain parties in the UT? If not, why not?

33. One respondent did not agree. Its reasoning was as follows. Although the benefits of submitting certain documents online cannot be disputed, it should not be mandatory. Not all users will have the IT skills required to navigate online submissions, and more importantly CE-Filing is a very difficult system to operate. It is not user intuitive, and requires a significant amount of training in order to master it. Therefore its use should not be made mandatory.

34. The other respondent agreed that it was appropriate for there to be mandation of CE-Filing for certain parties in the UT.

Conclusion

35. The TPC noted the concerns expressed as to potential problems in using CE-Filing, but recognised that the proposal was to facilitate the making of CE-Filing mandatory only for certain parties. As such, it was important to understand the class of party who

might experience the difficulties described. Thus, a conclusion on Question 1 was linked to a conclusion on Question 2. Further, as regards comments received under Question 10 (see below), the TPC recognises the importance of training in the context of access to justice. Such training may alleviate the concerns expressed.

Question 2: If so, for which classes of party should the use of CE-Filing be mandatory?

36. One respondent did not understand the rationale of “classes” of users, stating that the regulatory oversight for legally qualified representatives cannot in any way be considered as providing competency in the CE-Filing system. As already stated the CE-Filing system is very difficult to operate, and in this respondent’s opinion poorly designed; it requires specific training in order to master it to a competent standard.
37. The other respondent answered: “Professionally represented parties, including those represented by professionals other than lawyers or by in-house legal or other professional departments.”

Conclusion

38. If a party is ‘professionally represented’ that must mean that such representation has some regulatory oversight. It does not seem unreasonable to the TPC that a professional should be able to master the use of CE-Filing. The TPC is not aware of any body of evidence to suggest that there are significant difficulties experienced in the use of CE-Filing in the Courts. The TPC recognises, however, the importance of training in the context of access to justice.
39. The TPC has no doubt that the classes of party who may be mandated to use CE-Filing will be a matter to which Chamber Presidents and the SPT will give considerable careful thought. There may well be a need (at least in some Chambers) to consider staffing/resource issues, albeit that this is not a matter for the TPC.

Question 3: For such parties, what (if any) additional safeguards should there be in the event of non-compliance with mandatory CE-Filing, over and above any provision for ‘down-time’, and the operation of UT rule 7?

40. One respondent stated that mandating users to litigate only via the CE-Filing system represented a real threat to access to justice. Users who do not have the specific skill

set to use the CE-Filing system will not be able to participate in proceedings, present evidence, or conduct litigation representing their positions to the best of their ability.

41. The other respondent stated that the Tribunal should retain a discretion to accept documents filed by other means “if the interests of justice require it”. This should be made clear in supporting Practice Directions. It would not be acceptable, for example, for a valuable claim to be time barred because it was delivered in hard copy to the Tribunal’s offices, rather than by CE-File. If this proposal is adopted, reference to “exceptional circumstances” should be avoided, in the supporting Practice Directions, in the expression of this discretion. Its use would likely lead to expensive and unnecessary argument in cases where exercise of the discretion is in issue. It is likely that most unrepresented parties will continue to use conventional methods to file documents, and the degree of inconvenience to the Tribunal in occasionally processing material filed in the same way by represented parties is therefore likely to be small and would not justify as high a bar as “exceptional circumstances”.

Conclusion

42. The TPC recognises (again) the argument about access to justice, but is unpersuaded that it should mean that there is no scope at all for mandatory CE-Filing. Rather, the TPC notes that it would be for Chamber Presidents and the SPT to consider further any issues regarding non-compliance with any mandatory requirement.

Question 4: If there is to be mandation of CE-Filing, should it be done through a Practice Direction? If not, why not?

43. One respondent was against the mandating of the CE-Filing system, whether done by a change in the procedure rules, or a Practice Direction.
44. The other respondent stated that Practice Directions are a relatively flexible means of managing tribunal business and are easier to adapt in the light of experience than procedure rules; they are an appropriate method of mandating the use of CE-File.

Conclusion

45. The TPC agrees that mandation should be through Practice Directions. An important advantage of individual Practice Directions is that Chambers Presidents and the SPT will be able to assess what is most appropriate for the respective Chambers, in terms

of whether mandation should apply, to what classes of party, when, and with what safeguards. This is an area in respect of which there is no good reason to ensure consistency of approach across all Chambers – far better that each Chamber develops (in conjunction with the SPT) an approach which best suits its individual users.

Question 5: If through a Practice Direction, what aspects should (or should not) be specified in a Practice Direction?

46. One respondent referred to its answer above at question 4.

47. The other respondent stated that a Practice Direction should identify those who must use CE-File, encourage others to make use of it and include practical guidance on how to do so. Experience gained since the platform has become available should be used to identify common problems (for example by explaining what documents should be uploaded individually and what may be provided in a bundle). CPR PD 51O may be a useful starting point but versions appropriate for each UT Chamber are likely to be tailored to their particular jurisdictions.

Conclusion

48. The TPC recognises the value of the points made above. Benefits of Practice Directions include that experience may be factored into their preparation, and that the different UT Chambers (with their individual jurisdictions) may approach the task of preparation with enhanced focus.

Question 6: If there is to be mandation of CE-Filing, should it be done expressly through Rule change? If so, why?

49. One respondent stated 'As above at question 4'.

50. The other respondent stated that an express rule requiring professional users to file documents by CE-File would probably need to be supplemented by a Practice Direction providing more detail. The better route may be to rely on the Practice Direction and limit the change to rule 13 simply to giving power to make the necessary Practice Direction making E-filing mandatory in certain types of case or user. An alternative would be to specify in a rule that all documents must be uploaded using CE-File unless a Practice Direction permits the use of an alternative method. That

would make the use of CE-File the default method and set a tone which would encourage its use.

Conclusion

51. The TPC does not consider that there should be any express mandation in a Rule, other than a simple rule-change facilitating it. Rather, it should be for Chambers Presidents to determine the ambit of mandation.

52. Nor is the TPC attracted to a 'default' position of mandatory CE-Filing. That is not the approach adopted in the Courts, and although a rule of mandatory CE-Filing as the default position may well encourage the use of CE-File, the TPC does not see its role as including the making of Rules designed specifically to encourage particular litigant behaviour. Such matters are best suited to Practice Directions, Practice Notes, and Chamber Guidance.

Question 7: If through Rule change, what aspects should (or should not) be specified in a change to the Rules?

53. One respondent stated 'As above at question 4'.

54. The other respondent stated that it should be made clear that the power to require use of CE-File by Practice Direction applies both to different categories of case and different types of user or representative.

Conclusion

55. The TPC believes that the point raised above in paragraph 54 anticipates a Practice Direction that may say that for a certain category of case a professionally represented party must use CE-File, rather than a Practice Direction stating simply that for any party in a certain category of case, that party must use CE-File. We return to this point below.

Question 8: Is it appropriate to amend Rule 13 in the way proposed (i.e. enabling a Practice Direction to deal with mandation)? If not, why not?

56. One respondent stated 'As above at question 4'.

57. The other respondent stated 'It is appropriate'.

Conclusion

58. The TPC concludes that it is appropriate to amend Rule 13 to enable a Practice Direction to deal with mandation.

Question 9: Do you have any comments on the indicative drafting proposal?

59. One respondent offered no comment.

60. The other respondent made the point set out in the response to question 7 above.

Conclusion

61. The Consultation was clear that it is 'professionally represented' parties who may be subject to mandation. That may be across different categories of case. The indicative drafting may be thought to focus unduly on categories of case. The TPC therefore considers that it should be adjusted to achieve further clarity. Rule 13(1A) would read as follows.

(1A) A practice direction may specify for any document subject to paragraph (1)

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(a) the requirements that must be fulfilled for it to be uploaded to the Tribunal's secure portal; and

(b) for any specified category of party in any specified category of case, that it must be so uploaded to the Tribunal's secure portal.

Question 10: Do you have any further comments?

62. One respondent stated that if the use of CE-Filing is mandated, then the UT must provide the appropriate support for Tribunal users, so that they have the required IT skills to use this "*very complicated and poorly designed system*". It was said that so far there have been no training events advertised to users. Those that have taken place "*have done so almost anonymously, as they have not been widely advertised*".

63. This respondent described their own experience of obtaining training support from the UT as poor. They had contacted the UT on several occasions, and written a letter to the UT manager requesting training resources. It was said that if CE-Filing is to be mandated, the UT must provide the appropriate training resources so users will be able to participate in proceedings without a compromise to their rights of access to justice.

64. The other respondent stated that professional users continue to make good use of CE-File in the UT(LC) and that a stage has now been reached at which all new references for compensation or under the Electronic Communications Code filed in the last four months have used the platform. The UT(LC)'s documents, and those of the F-tT Property Chamber, have been amended to encourage use of CE-File for appeals and applications for PTA. Early signs are encouraging although it is still rare for unrepresented parties to make use of the facility.

Conclusion

65. The TPC understands that there was pre-launch CE-file training which potential users of the system were able to attend, and that this was publicised by HMCTS and consisted of a live webinar. The office of the UT(AAC) also endeavoured to publicise the training on a more directed basis to a targeted audience, including through the well-known social welfare law website 'rightsnet'. The training was conducted by Practical Law (i.e. Thomson Reuters, who built the system).

66. The UT(AAC) has however reached the view that mandation in the next year or so would be premature, if there remain issues around training or guidance.

67. It is understood that HMCTS will communicate with the respondent who expressed frustration; there is a keenness to encourage anyone who shows interest in the CE-File system; take up has been very small in the UT(AAC). The TPC recognises the importance of training in the context of access to justice.

68. It is not within the remit of the TPC specifically to consider training or guidance issues; those are for HMTCS. However, the TPC would expect that Chamber Presidents, in conjunction with the SPT, will bear such issues in mind when deciding if and when to provide for mandation of CE-Filing.

Overall Conclusion

69. The TPC considers that it is appropriate to provide for mandation of CE-Filing through the issue of Practice Directions, and in accordance with the indicative drafting now set out in this Reply.

70. The TPC has had due regard to the public sector equality duty in reaching all its conclusions as set out above.

Keeping the Rules under review

71. The TPC wishes to thank those who contributed to the Consultation process. The TPC has benefited from the responses.

72. The remit of the TPC is to keep rules under review.

Contact details

Please send any suggestions for further amendments to Rules to:

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Further copies of this Reply can be obtained from the Secretariat. The Consultation paper, this Reply and the Rules are available on the Secretariat's website:

<http://www.justice.gov.uk/about/moj/advisory-groups/tribunal-procedure-committee.htm>

Annex A – List of respondents to Consultation

1. Mr Renato Colonna of Tribune Legal
2. Martin Rodger KC, Deputy Chamber President of the UT(LC)