

Water Codes Appeals Rules and Guide

Response to consultation

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Contents

	<i>Page</i>
1. Introduction	2
2. Issues raised by the consultation and our response	5
3. List of respondents.....	9

1. Introduction

- 1.1 On 20 June 2017, the Competition and Markets Authority (CMA) launched a consultation on draft rules of procedure to govern appeals that may be made to it under the Regulation 4 of the Water Industry Designated Codes (Appeals to the Competition and Markets Authority) Regulations (the Regulations) in respect of decisions of the Water Services Regulation Authority (the Authority) as to whether to modify codes designated for the purposes of section 207A(2) of the Water Industry Act 1991 (the Act) (*Water Codes Appeals: Competition and Markets Authority Rules*).
- 1.2 At the same time, the CMA also consulted on a draft guide that is intended to assist participants involved in such appeals (see *Water Codes Appeals: Competition and Markets Authority Guide*).
- 1.3 We received four submissions in response to the consultation from water businesses, an industry group and a consumer organisation. The list of respondents is in Section 3, and non-confidential versions of all submissions are available on the consultation page.
- 1.4 This document summarises the key comments made in submissions from respondents and our response to them. It then sets out the changes we have made to the draft Rules and Guide, following the consultation. It also gives our reasons where we have not made changes following respondents' comments.

Background

- 1.5 The Water Act 2014 (WA14) introduced reforms to the regulatory regime in the water sector. These included statutory codes to regulate agreements between incumbent undertakers and new entrants that want to provide water services in competition with those incumbents.
- 1.6 The WA14 also amended the Act to allow for regulations to be made for appeals to the CMA of a decision of the Authority to make a revision, or not to make a proposed revision, to a code designated under those regulations. The Regulations were made by the Secretary of State on 17 March 2017 under these powers under the Act and under powers conferred by the WA14.
- 1.7 The Regulations among other things provide that appealable decisions of the Authority must concern designated codes and such decisions are only

appealable by a water supply licensee, a sewerage licensee, or an undertaker.¹

1.8 The CMA may allow appeals only to the extent that it is satisfied that the Authority's decision was wrong on one or more of the following grounds:

- That the Authority failed properly to have regard to the matters mentioned in Regulation 12(2).
- That the Authority failed properly to have regard to the purposes, listed in column 3 of the table in the Schedule to the Regulations, for which the designated code in question was issued.
- That the Authority failed to give appropriate weight to one or more of those matters or purposes.
- That the decision was based, wholly or partly, on an error of fact.
- That the decision was wrong in law.²

1.9 Where the CMA does not allow the appeal, it must confirm the decision appealed against.³

1.10 Where the CMA allows an appeal, it must do one or more of the following:

- (a) quash the Authority's decision;
- (b) refer the matter back to the Authority to reconsider and redetermine in accordance with any directions given by the CMA; and/or
- (c) where the decision quashed was a decision not to revise a code or part of it, the CMA must direct the Authority to ensure that the relevant designated code takes effect as if it had been revised or modified.⁴

1.11 Elements of the procedure regulating appeals, including the time periods for appealing and completing them and provision relating to the payment of costs by the parties to an appeal, are set out in the Regulations. Furthermore, the Act provides that the CMA may make rules of procedure regulating the conduct and disposal of these appeals.⁵

¹ The relevant codes are designated in Regulation 3 and are listed in a table in the Schedule to the Regulations. Regulation 4(2) lists the persons that can appeal an Authority decision.

² See Regulation 18(2).

³ See Regulation 18(3).

⁴ See Regulation 18(4).

⁵ See paragraph 6(1) of Schedule 16 to the Act.

Consultation questions for consideration

1.12 The consultation document set out two questions for consideration:

Do you have any comments on the draft:

(a) *Water Codes Appeals: Competition and Markets Authority Rules; and/or*

(b) *Water Codes Appeals: Competition and Markets Authority Guide?*

1.13 The consultation closed on 12 July 2017.

1.14 We received four responses to the consultation. The list of respondents is in Section 3.

1.15 In the next section, we summarise the main points raised in relation to these questions and our response to them.

2. Issues raised by the consultation and our response

- 2.1 Most respondents welcomed the CMA's approach in the draft Rules and the draft Guide, generally considering the approach in each document to be clear. A number of respondents nevertheless made suggestions for changes or clarifications to these documents.
- 2.2 The CMA has also made some changes of its own accord. For example, the CMA decided to transpose the notes from the Rules to the Guide to make a clear distinction between the procedural Rules and the explanatory Guide. It also decided to join draft Rules 20 and 21 into one Rule and deleted the reference to 'Practice Directions'.

Comments on specific drafting in the Rules and Guide

- 2.3 Some respondents made some specific suggestions for amendments to the draft Rules and where necessary, the draft Guide.
- 2.4 For example, one respondent suggested that the CMA amend draft Rule 3 and the draft Guide to clarify that rights of appeal are only excluded in the case of minor or urgent changes to the Wholesale Retail Code, which are required to be set out in a notice under section 66DC(3) or 117H(3) of the Act. That respondent also suggested the addition of the words 'a copy of' after the words '[...] persons to whom' in draft Rule 5.1(e). The same respondent noted that while draft Rule 5.8 stated that those notified under Regulation 6(3)(b) for an application for permission to appeal should acknowledge receipt to the CMA within three working days of receipt, there was no requirement for the appellant to notify the person affected of this expectation to acknowledge receipt.
- 2.5 Another respondent noted that draft Rule 5.1(d) requested that applications for permission to appeal should include a statement of how the interests of the applicant are affected. That respondent suggested that this rule should also focus in part on the interest of non-household (NHH) customers, in the expectation that there would likely be overlap in the interests of applicants (ie retailers and wholesalers) and the customers they serve. The same respondent said that draft Rule 10.1 does not make it clear what criteria, process or timeline would be used where appeals are consolidated, noting that in some cases, consolidation might not be considered appropriate or desirable from the point of view of applicants or customers. It asked if the CMA could consider an application process that would allow multiple parties jointly to appeal.

- 2.6 With respect to the Guide, that respondent observed that draft paragraph 2.3 of the Guide provided a mini-glossary, but did not define who the ‘parties’ are. The respondent also said that it was not clear if case conferences or hearings would be held in person or if there was an option to use remote meeting technology (eg teleconference, videoconference), noting that the use of such technology could save time and costs and be attractive to retailers who are small or new entrants to the market. That respondent also asked whether appellants in consolidated parties could also elect for a single representative to take up their case.
- 2.7 Another respondent recommended that the CMA provide further guidance on what applications the CMA would consider vexatious, trivial or applications with no reasonable prospect of success, perhaps in the form of fictitious examples.

CMA response

- 2.8 The CMA agrees that the provisions of the draft Rules and Guide dealing with excluded appeals under the Wholesale-Retail Code should be clarified and has made a number of changes for that purpose. The CMA has also agreed the suggested change to draft Rule 5.1(e). However, the CMA does not consider it appropriate to impose a requirement in the Rules that an applicant must draw the attention of those served with notice of the application under Regulation 6(3)(b) to provisions of draft Rule 5.8. Instead, the CMA has amended draft paragraph 4.2 of the Guide to indicate that it will be helpful if the applicant can direct the provisions of draft Rule 5.8 to those to whom it has sent the application.
- 2.9 The CMA appreciates that the interests of NHH customers might be (indirectly) affected by any impact that an appealable decision of the Authority would have on a party with standing to appeal. That said, Regulation 4(2) is in terms specific to the applicant⁶ and does not provide that the interests of customers are a relevant factor for the purposes of determining who has standing to bring an appeal. Accordingly, the CMA does not consider it appropriate to amend draft Rule 5.1(d) in order to also to focus in part on the interest of NHH customers.
- 2.10 With respect to consolidation of appeals, the CMA has slightly amended draft Rule 10.1 to clarify that it will give the parties a reasonable opportunity to make representations before making an order consolidating appeals. On the issue of joint appeals, the CMA considers that Regulation 6(7)(c) clearly

⁶ Regulation 4(2) refers to ‘one or more of the following persons, where their interests are materially affected’.

provides for the possibility of joint appeals⁷ and the CMA has amended draft paragraph 4.1 of its Guide to refer to this possibility.

- 2.11 The CMA agrees that unlike the Rules, the Guide lacks a definition of who the 'parties' are as the Guide is not itself a technical document. Nevertheless, any words used in the Rules and Regulations will be given the same meaning in the Guide.
- 2.12 The CMA welcomes the suggestion of referring to videoconferencing and similar technology for the purposes of oral hearings, and has added wording to draft Rule 18 as well as paragraph draft 4.56 of the Guide to state that videoconferencing or teleconferencing facilities may be used in oral hearings with the permission of the Group.
- 2.13 The CMA has amended draft paragraph 4.61 to state that where cases are being considered and heard together, the parties may elect to be represented in the hearing by a single representative.
- 2.14 The CMA does not consider it appropriate at this time to provide examples of appeals that might be considered to be trivial or vexatious, or to lack a reasonable prospect of success. This is due to the fact that the CMA does not have any experience considering water codes appeals to date..

Higher-level comments

- 2.15 The same respondent suggested that the draft Rules and Guide could be further clarified in relation to the interdependencies between the code implementation process and the appeal mechanism. In particular, it stated that it was currently unclear, where the CMA makes a suspension direction, how code changes relating to the decision are then suspended from the code, the date that code changes would be suspended from, how this the communicated to the industry and how they would be reinstated following an appeal. It also sought further guidance on how an implemented Authority-approved code change is quashed, or partially quashed from the codes; on the status of an implemented code change in case where the CMA decided to return the code change to the Authority for reconsideration; and on which version of the codes would be published/republished and whether the change proposal would be returned to the Panel or to the Authority. Furthermore, that respondent said that if the application is in respect of a suspension application and the Authority's decision is not overturned, further guidance describing

⁷ By stating that permission may be granted subject to 'conditions requiring the appeal to be considered together with other appeals'.

how a new implementation date is decided would be useful. It suggested using Regulation 8, to suspend all code changes which are subject to an application to appeal in respect of which the CMA has granted permission.

- 2.16 In a similar vein, one respondent noted that in its view, certain changes to the codes would need to be made in order to reflect the impact of a successful appeal and it made certain suggestions for provisions that should be included in any such changes.

CMA response

- 2.17 The CMA does not consider it appropriate to offer any more detailed views on the potential application of Regulation 8 (suspension of the Authority's decision). The CMA notes that before exercising its power to give directions suspending the decision, the CMA must give the Authority an opportunity to make representations about the matter and must consider whether the balance of convenience does not otherwise require effect to be given to the Authority decision pending the CMA's determination.

3. List of respondents

3.1 Consultation responses were received from the following:

- Consumer Council for Water
- Market Operator Services Ltd (MOSL)
- Thames Water
- Yorkshire Water