

Regulated Payment Systems Appeals: Competition and Markets Authority Rules

Draft for consultation

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1. Introduction, citation and commencement

- 1.1 These Rules are made in exercise of the powers conferred by paragraph 16(1) of Schedule 5 to the Financial Services (Banking Reform) Act 2013.
- 1.2 Before making these Rules the Competition and Markets Authority (CMA) consulted such persons as it considered appropriate.
- 1.3 These Rules are to be known as the 'Regulated Payment Systems Appeals: Competition and Markets Authority Rules'.
- 1.4 These Rules will have effect from [] 2017.

2. Interpretation

- 2.1 In these Rules:

'the Act' means the Financial Services (Banking Reform) Act 2013;

'the Authority' means the Payment Systems Regulator;

'Authorised Member of the CMA' has the same meaning as in paragraph 18(1)(a) of the Schedule;

'the CMA' means the Competition and Markets Authority;

'electronic form' means in a form capable of being transmitted electronically such that the document so transmitted is capable of being reproduced in legible form;

'intervener' means any person given permission under Rule 10 to intervene in an appeal;

'the Schedule' means Schedule 5 to the Act;

'parties to an appeal' means the appellant and the Authority;

'sensitive information' means information which is either:

- (a) commercial information, the disclosure of which would or might significantly harm the legitimate business interests of an undertaking to which it relates; or
- (b) information relating to the private affairs of an individual, the disclosure of which would or might significantly harm the individual's interests.

- 2.2 In these Rules, unless the contrary intention appears, words in the singular include the plural and words in the plural include the singular.
- 2.3 Words defined in the Schedule have the same meaning in these Rules as they have in the Schedule.

3. Application of rules

- 3.1 These Rules are supplementary to the provisions of the Act. In the event of any conflict between the Rules and the Act, the latter will prevail.

4. Overriding objective

- 4.1 The overriding objective of these Rules is to enable the CMA to dispose of appeals fairly and efficiently and at proportionate cost within the time periods prescribed by the Act. The CMA will apply these Rules so as to give effect to the overriding objective.
- 4.2 All parties to an appeal must assist the CMA to further the overriding objective.

5. Notice of appeal¹

- 5.1 Any person who wishes to make an application for permission to appeal must send a notice, marked Notice of Payment Systems Appeal ('the notice of appeal') to the CMA within two months following the date on which the appellant was notified of the decision or the date of publication of the decision, whichever is the earlier.²
- 5.2 The notice of appeal must state:
- (a) the decision of the Authority the appellant wishes to appeal and the date it was published;
 - (b) the grounds of appeal on which the appellant wishes to rely;

¹ See also paragraph 3 of the Schedule.

² While the Act does not explicitly prescribe a period within which an application for permission to appeal must be made, the CMA considers that Parliament intended that such appeals to be made within a reasonable period of time. The CMA notes that application for permission to appeal against 'CAT-appealable' decisions under section 77 of the Act must be made within two months of the date upon which the appellant was notified of the disputed decision or the date of publication of the decision, whichever is the earlier: see Rule 9(1) of the Competition Appeal Tribunal Rules 2015. The CMA considers that this is also a reasonable period within which an application for permission to appeal decisions to the CMA under section 79 of the Act must be brought. The CMA may consider a longer period to be reasonable in exceptional circumstances.

- (c) the relief sought and any directions necessary to give effect to that relief;
- (d) the capacity in which the appellant is making the application;
- (e) a description of the interests that the appellant believes are affected by the decision;
- (f) a copy of the decision to be appealed;
- (g) the appellant's name and address and, where applicable, the name and address of the appellant's solicitors and, or alternatively, the name and address of the appellant's other legal representatives; and
- (h) an address in the UK, together with an address for electronic mail, for the purpose of receiving documents.

5.3 The notice of appeal must include:

- (a) a statement of the facts and reasons supporting each ground of appeal on which the appellant is relying;
- (b) any evidence on which the appellant wishes to rely;
- (c) particulars of any other documents which the appellant believes the CMA should have regard to in determining the appeal; and
- (d) a statement identifying which, if any, of the matters relied on in any ground of appeal were, in the belief of the appellant, matters to which the Authority was unable to have regard in reaching its decision and why such matters were not brought to the attention of the Authority before it reached its decision.

5.4 The appellant must verify the information contained in a notice of appeal by a statement of truth.³

5.5 Where the appellant considers that the notice of appeal contains sensitive information the appellant must provide the CMA with a non-sensitive version with the notice of appeal. The non-sensitive notice of appeal should be in a form suitable for publication on the CMA's website.

³ Paragraph 18(1) of the Schedule provides that a 'statement of truth' in relation to the production of a statement or provision of information by a person, means a statement that the person believes the facts stated in the statement or information to be true.

- 5.6 The appellant must send the Authority a copy of the notice of appeal at the same time as it is sent to the CMA.⁴
- 5.7 If the CMA considers that the notice of appeal is incomplete, or is insufficiently clear, it may take this into account in considering whether to grant permission, or whether to grant permission subject to conditions.

6. Permission to appeal⁵

- 6.1 The CMA will normally consider applications for permission to appeal without a hearing.
- 6.2 The Authority must send the CMA and the appellant any representations or observations it wishes to make about the application for permission to appeal in writing within the period specified in paragraph 5(2) of the Schedule.⁶
- 6.3 The CMA may hold a hearing to determine an application for permission to appeal, either of its own motion or on application. Where the CMA decides to hold a permission hearing the CMA will give notice to the parties to an appeal, and may give notice to such other persons as it considers appropriate.
- 6.4 If the CMA grants permission to appeal, it will notify the parties to an appeal and such other persons as it considers appropriate of its decision, giving reasons, and of any conditions subject to which the decision to grant permission is made.
- 6.5 If the CMA refuses permission to appeal, it will notify the parties to an appeal and such other persons as it considers appropriate of its decision and its reasons.
- 6.6 The CMA will normally publish its decision on its website subject to the exclusion of what in the CMA's opinion is sensitive information as soon as reasonably practicable after it is made.

⁴ Paragraph 3(5) of the Schedule.

⁵ See also paragraphs 3 of the Schedule.

⁶ Ten working days beginning with the first working day after the day on which it received a copy of the application under paragraph 3(5) of the Schedule.

7. Application for suspension of decision⁷

- 7.1 The CMA may consider an application for suspension of the Authority's decision, with or without a hearing, and may hold any such hearing either of its own motion or on application.
- 7.2 On making an application for suspension the appellant must provide a non-sensitive version of the application in a form suitable for publication on the CMA's website.
- 7.3 When the appellant sends its application for suspension to the CMA, it must at the same time send a copy to the Authority.⁸
- 7.4 The Authority must send any representations or observations it wishes to make about an application for suspension to the CMA and the appellant within the period specified in paragraph 5(2) of the Schedule.⁹
- 7.5 Any person materially interested in the outcome of an application for suspension must send any representations or observations it wishes to make about that application to the CMA within five working days of the non-sensitive version of the application being published on the CMA's website. Such representations or observations should include a statement as to why that person considers himself materially interested in the outcome of the suspension application. When sending his representations or observations to the CMA under this Rule, that person must at the same time send a copy to the Authority and to the appellant.
- 7.6 If the CMA decides to hold a hearing to consider an application for suspension, it will give notice to the parties to an appeal, and may give notice to such other persons as it considers appropriate.
- 7.7 The CMA will notify the parties to an appeal and such other persons as it considers appropriate of its decision and reasons and, as soon as reasonably practicable after making its decision, publish it on the CMA's website.

⁷ See paragraph 4 of the Schedule.

⁸ Paragraph 4(4) of the Schedule.

⁹ Ten working days beginning with the first working day after the day on which it received a copy of the application under paragraph 4(4) of the Schedule.

8. Withdrawal of application

- 8.1 An appellant may apply to the CMA for permission to withdraw the application for permission to appeal, the application for suspension of the Authority's decision, or the appeal.
- 8.2 The Authority may apply to the CMA for a summary determination allowing the appeal.
- 8.3 When the CMA grants permission to withdraw an application for permission to appeal, an application for suspension or an appeal, or issues a summary determination, it may make an order as to costs.

9. The Authority's response¹⁰

- 9.1 Where the CMA has granted permission to appeal, the Authority may make representations or observations to the CMA about its reasons for the decision, and/or any grounds on which the appeal is brought. It must send its representations or observations (its 'response') to the CMA in writing within the period specified in paragraph 5(4) of the Schedule.¹¹
- 9.2 At the time of sending its response to the CMA, the Authority must send to the appellant:
- (a) a copy of the response; and
 - (b) any written evidence on which it wishes to rely.
- 9.3 The response should contain:
- (a) a statement, identifying the facts and reasons why the appeal should not succeed and, or alternatively, why the relief sought should not be allowed;
 - (b) any evidence in support of that response; and
 - (c) a non-sensitive version of the statement in response and any written evidence adduced in support of that response, with any sensitive information redacted.

¹⁰ See paragraph 5 of the Schedule.

¹¹ Fifteen working days beginning with the first working day after the day on which permission to bring the appeal was granted.

9.4 The non-sensitive version of the statement in response and any evidence adduced in support of that response should be in a form suitable for publication on the CMA's website.

10. Interveners

10.1 Where the CMA has granted permission to appeal, it may on the application of any person give permission to intervene.

10.2 An application for permission to intervene must be made within ten working days of publication on the CMA's website of the decision granting permission to appeal.

10.3 In considering whether to give permission to intervene, the CMA shall take account of all the circumstances including:

(a) whether the applicant is materially interested in the outcome of the appeal;

(b) whether the applicant's intervention in the appeal will assist the CMA to resolve the issues in the appeal expeditiously; and

(c) whether the nature and extent of the intervention sought is proportionate to the issues to be decided.

10.4 To make an application for permission to intervene in the appeal a person must send to the CMA a notice, marked Application for Permission to Intervene in Payment Systems Appeal, which contains the following:

(a) A statement as to the matters set out in Rule 10.3; and

(b) A concise statement, identifying the facts and reasons why they believe the appeal should or should not succeed, or alternatively, why they believe the relief sought should or should not be allowed.

10.5 At the time of making an application for permission to intervene the applicant must send to the parties to an appeal a copy of the application.

10.6 At the time of sending its application for leave to intervene to the CMA, the applicant must send a non-sensitive version of the application and in a form suitable for publication on the CMA's website.

10.7 The parties to an appeal may make representations on an application to intervene provided that such representations are made before the end of the period of seven working days beginning with the working day after the day on which the application was received by them.

- 10.8 The CMA may consider an application for leave to intervene with or without a hearing, and may hold any such hearing either of its own motion or on application. Where the CMA decides to hold a permission hearing the CMA will give notice to the parties to an appeal, the applicant and such other persons as it considers appropriate.
- 10.9 The CMA may grant leave to intervene subject to any conditions it considers appropriate including conditions suspending an intervention pending further steps in the proceedings or decision of the CMA and/or limiting the scope of such intervention.
- 10.10 Where leave to intervene is granted, the CMA may issue consequential directions including directions regarding the filing by the intervener or any party to the appeal of any further submissions.

11. Non-disclosure applications

- 11.1 Where a party to the appeal or applicant for permission to intervene is required by these Rules, or a direction made under these Rules, to send to any person any document, and the party to the appeal or applicant for permission to intervene considers that information contained within the document is sensitive information which should not be disclosed to that person, it may:
- (a) make a non-disclosure application to the CMA at the same time that it sends the document to the CMA; and
 - (b) pending the CMA's direction, excise the sensitive information from the relevant document sent in accordance with these Rules.

12. Publication on the CMA's website

- 12.1 The CMA will normally publish on its website, as soon as reasonably practicable after receipt, the non-sensitive version of:
- (a) the notice of appeal provided under Rule 5.5; and
 - (b) any application for suspension of the decision under appeal provided under Rule 7.2.
- 12.2 The CMA may publish on its website in such manner and at such time as it considers appropriate:
- (a) the Authority's statement in response and any written evidence provided under Rule 9.3(c);

- (b) any non-sensitive version of an application for permission to intervene provided under Rule 10.8 and any representations under Rule 10.9;
- (c) any further submissions or written evidence required or permitted by directions issued under Rule 10.12 and/or 14.2; and
- (d) any other material which, in the view of the CMA, it is necessary to publish for the purposes of the overriding objective.

12.3 The CMA will publish on its website a version of the CMA's determination that excludes what in the CMA's opinion constitutes sensitive information.

13. Administrative timetable

13.1 As soon as practicable after permission to appeal has been granted, the CMA will set an administrative timetable which makes provision for the major stages of the appeal.

13.2 The administrative timetable may, in particular, include arrangements for the following:

- (a) considering and notifying possible directions;
- (b) considering submissions and representations;
- (c) clarifying and verifying information;
- (d) holding appeal management conferences;
- (e) holding hearings;
- (f) notifying provisional findings; and
- (g) publishing the CMA's determination;

provided that where these stages are mentioned in the administrative timetable, they need not necessarily take place in the order in which they are mentioned in this rule.

13.3 The CMA will, when drawing up the administrative timetable, have regard to any views which the parties to an appeal, and any interveners, submit to it.

13.4 The CMA will proceed on the basis that the parties to an appeal and interveners will comply with the administrative timetable.

- 13.5 Once the administrative timetable has been drawn up, the CMA will notify it to the parties to an appeal, and any interveners or applicants for permission to intervene and will publish it on the CMA's website.
- 13.6 If, at any point during the appeal, the CMA has reason to believe that the administrative timetable will not be met for any reason, then the CMA may prepare a revised timetable to which the notification and publication requirements contained in Rule 13.5 will apply.

14. Procedure and directions

- 14.1 Subject to the provisions of the Act and these Rules, the CMA may determine its own procedure.
- 14.2 The CMA may at any time give such directions as it considers necessary for the conduct of any appeal including but not limited to any of the following matters:
- (a) the holding of appeal management conferences;
 - (b) (where there are two or more appeals pending in respect of the same decision, or in respect of decisions which in the view of the CMA are closely related) that the appeals in whole or part should be consolidated and heard together;¹²
 - (c) the conduct of hearings;
 - (d) the making of further submissions;
 - (e) the filing and service of further evidence;
 - (f) the appointment and instruction of experts, whether by the CMA,¹³ by the parties to an appeal, or by any intervener, and as to the manner in which expert evidence is to be given;
 - (g) the submission of witness statements or expert reports;
 - (h) the examination or cross-examination of witnesses;
 - (i) the fixing of time limits in respect of any aspect of the appeal;

¹² Paragraph 3(9) of the Schedule provides that the CMA may grant permission to bring an appeal subject to conditions, which may include conditions requiring that the appeal be considered together with other appeals (including appeals relating to different matters or decisions and appeals brought by different persons).

¹³ See paragraph 12 of the Schedule.

- (j) the disclosure or the production of documents, or classes of documents, between the parties to an appeal or to other persons and to give directions as to the treatment of sensitive information;
- (k) the variation of the provisions of these Rules in relation to the requirements for sending documents;
- (l) the hearing of a person who is not a party to the appeal where it is proposed to give a notice or direction in relation to that person; and
- (m) such other matters as appear to the CMA to be necessary to meet the overriding objective.

14.3 The CMA will give written notice of its directions.

14.4 The CMA may at any time:

- (a) put questions to the parties to an appeal or interveners;
- (b) invite the parties to an appeal or interveners to make written or oral submissions on aspects of the appeal;
- (c) direct the parties to an appeal or interveners to provide information or particulars and direct them to produce documents or papers relating to the appeal; and
- (d) require the parties to an appeal or interveners to attend meetings or hearings.

15. Appeal management conferences

15.1 The CMA may hold appeal management conferences with the parties to an appeal and any intervener and any person invited under Rule 15.2 where it considers that to do so would further the overriding objective.

15.2 The CMA may invite any applicants for permission to intervene to the appeal management conferences.

16. Oral hearings¹⁴

16.1 The procedure at a hearing will be determined by the CMA.

¹⁴ See paragraph 10 of the Schedule in relation to oral hearings. Paragraphs 9, 10 and 11 of the Schedule provide the CMA with powers to issue notices to any person requiring the provision of documents or information,

- 16.2 Hearings will be opened and directed by the chair of the Group or by such other member of the CMA as is appropriate.
- 16.3 The CMA will decide the extent, if any, to which at a hearing the parties and any intervener are allowed:
- (a) to be present or to be heard, in person or by their representatives;
 - (b) to cross-examine witnesses; and
 - (c) otherwise to take part.
- 16.4 If no previous direction has been made, at the start of the hearing the attendees will be directed as to the length of their oral submissions, the issues on which the CMA wishes to concentrate at the hearing, and the order in which the CMA wishes to hear the submissions.
- 16.5 At a hearing a party may be represented by:
- (a) a qualified lawyer having a right of audience before a court in the United Kingdom; or
 - (b) such other person as the CMA allows.

17. The production of documents, calling witnesses and the production of written statements¹⁵

- 17.1 Where the CMA requires a person to produce a document, to attend and give evidence or to produce a written statement pursuant to paragraphs 9, 10 and 11 of the Schedule, it may provide a copy of the notice to each party to the appeal and interveners.

18. Written evidence

- 18.1 Subject to any direction of the CMA, written evidence must be in the form of a witness statement.

the attendance at hearings and the making of written statements. Where a person (a) fails to comply with a notice issued or other requirement imposed by these paragraphs; (b) in complying with a notice under paragraph 9, makes a statement that is false in any material particular; or (c) in providing information verified in accordance with a statement of truth required by these Rules, provides information that is false in a material particular, paragraph 13 of the Schedule provides that the High Court or Court of Session may punish the defaulter as if the person had been guilty of contempt of court.

¹⁵ See paragraphs 9, 10 and 11 of the Schedule.

- 18.2 A witness statement must be verified by a statement of truth¹⁶ signed by the witness.
- 18.3 If a person wishes to rely on facts contained in a notice of appeal, an application for suspension of the Authority's decision, any representations or observations or any other application, those facts must be verified by a statement of truth.

19. Provisional determination

- 19.1 The CMA will normally issue a provisional determination stating its provisional conclusions on the appeal.
- 19.2 When the CMA issues a provisional determination, it shall notify the parties to an appeal and interveners of that provisional determination on such terms and in such manner as the CMA considers appropriate.
- 19.3 The provisional determination will not normally be published on the CMA's website.
- 19.4 The provisional determination will normally contain:
- (a) the CMA's provisional findings on the grounds of appeal raised by the appellant;
 - (b) an explanation for the CMA's provisional conclusions and findings;
 - (c) the relief which the CMA is proposing to grant; and
 - (d) the CMA's provisional conclusions on liability for its costs incurred in connection with the appeal and other costs issues.
- 19.5 Where the CMA issues a provisional determination, it will at the same time invite the parties to an appeal and any interveners to make submissions in response to the provisional determination within such time as the CMA considers appropriate.

20. The CMA's powers where an appeal is allowed¹⁷

- 20.1 Where the CMA allows an appeal, it must quash the decision (to the extent that the appeal is allowed) and may:

¹⁶ See footnote 3 above.

¹⁷ See section 79 of the Act.

- (a) refer the matter back to the Authority with a direction to reconsider and make a new decision in accordance with its ruling; or
- (b) substitute the CMA's decision for that of the Authority.

21. Costs¹⁸

- 21.1 The Group that determines an appeal will make an order for the payment of the costs it has incurred in connection with the appeal.¹⁹
- 21.2 The same Group may also make such order as it thinks fit for requiring a party to the appeal to make payments to another party in respect of costs reasonably incurred by that other party in connection with the appeal.²⁰
- 21.3 In deciding what order to make under Rule 21.2, the Group will have regard to all the circumstances, including:
 - (a) the conduct of the parties, including:
 - (i) the extent to which each party has assisted the CMA to meet the overriding objective;
 - (ii) whether it was reasonable for a party to raise, pursue or contest a particular issue;
 - (iii) the manner in which a party has pursued its case or a particular aspect of its case;
 - (b) whether a party has succeeded wholly or in part; and
 - (c) the proportionality of the costs claimed.

22. Slip rule

- 22.1 Where any order or decision of the CMA contains a clerical error, or a slip or omission, that error, slip or omission may be corrected and a further order or decision issued by any person who could have made the original order or decision.

¹⁸ See paragraph 17 of the Schedule.

¹⁹ Ibid.

²⁰ Ibid.

23. Filing of documents

- 23.1 All sensitive documents sent to the CMA or any other person should be marked to identify sensitive information.
- 23.2 Unless a person is notified otherwise by the CMA, any document that is to be sent to the CMA under the Act or these Rules must be sent both in electronic form and in hard copy:
- (a) by email to appeals@cma.gsi.gov.uk; and
 - (b) by first class post or personal delivery, marked for the attention of the Regulatory Appeals Team, Competition and Markets Authority, Victoria House, Southampton Row, London WC1B 4AD.
- 23.3 Unless a person is notified otherwise by the CMA, any document required to be sent to a person other than the CMA under these Rules may be:
- (a) delivered personally;
 - (b) sent by first class post; or
 - (c) sent by electronic mail.