

Regulated Payment Systems Appeals: Competition and Markets Authority Guide

Draft for consultation

© Crown copyright 2017

You may reuse this information (not including logos) free of charge in any format or medium, under the terms of the Open Government Licence.

To view this licence, visit www.nationalarchives.gov.uk/doc/open-government-licence/ or write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or email: psi@nationalarchives.gsi.gov.uk.

Contents

	<i>Page</i>
1. Introduction	2
2. Background.....	4
3. General observations on appeals	6
4. Particular issues in appeals	13
5. Provisional determination.....	20
6. Costs.....	21

1. Introduction

- 1.1 This guide has been prepared to assist participants involved in appeals of 'CMA-appealable' decisions of the Payment Systems Regulator under the Financial Services (Banking Reform) Act 2013 (the Act). It may be revised and supplemented from time to time and as the Competition and Markets Authority (CMA) gains experience of such appeals. Comments in this guide are not intended to bind the CMA in its consideration of particular cases.
- 1.2 The CMA has published procedural rules, the *Regulated Payment Systems Appeals: Competition and Markets Authority Rules* (CMA65), to govern these appeals. This guide should be read in conjunction with the Act and those Rules.
- 1.3 The procedural framework is designed to enable the CMA to conduct a satisfactory appeal process within the strict time frames set out in the Act. The framework is flexible and will be adapted in the interests of common sense and good practice as the CMA gains experience of handling appeals under it.
- 1.4 The Rules seek to ensure that the CMA has flexibility to manage appeals fairly and expeditiously, having regard to the interests of the parties to an appeal and interveners and the statutory time frames. This sentiment is reflected in the overriding objective which is set out in Rule 4. Those involved in appeals are required to assist the CMA in meeting this objective.
- 1.5 In every case, the CMA will look for a high degree of cooperation from participants. The CMA expects appellants to be realistic in drafting their grounds of appeal and that all participants will present their submissions clearly.
- 1.6 This guidance does not contain details of all the provisions of the Act or the Rules relevant to appeals and is not intended to modify or constrain the full application of those provisions to particular cases.
- 1.7 In this guide:

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

'the CMA' means the Competition and Markets Authority;

'Authority' means the Payment Systems Regulator;

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

'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;

'the Rules' mean the *Regulated Payment Systems Appeals: Competition and Markets Authority Rules*; and

'the Schedule' means Schedule 5 to the Act.

2. Background

2.1 The Act among other things provides that decisions of the Authority to require:

- the granting of access to a payment system;
- the variation of certain agreements relating to payment systems; or
- a person who has an interest in the operator of a regulated payment system to dispose of all or part of that interest;

are appealable to the CMA by any person who is affected by the decision.¹

2.2 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, or give appropriate weight to, the matters to which the Authority must have regard, in the carrying out of its functions under Part 5 of the Act.
- That the decision was based, wholly or partly, on an error of fact.
- That the decision was wrong in law.²

2.3 To the extent that the CMA does not allow the appeal, it must confirm the decision appealed against.

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

- (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.³

2.5 Elements of the procedures for 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 Act. The Act, however, also provides that the CMA may make rules of procedure regulating the conduct and disposal of these appeals.⁴

¹ Section 76(7) of the Act.

² Section 79(5) of the Act.

³ See section 79(4) and (6) of the Act.

⁴ Paragraph 16 of the Schedule.

2.6 In order to facilitate the conduct of the appeal the CMA may publish non-sensitive versions of the submissions of the participants, its decisions and its directions in regard to the conduct of the appeal on its website.⁵

⁵ In accordance with Rule 12.

3. General observations on appeals

Approach to appeals

- 3.1 The CMA must decide whether the appellant has demonstrated that the Authority's decision was wrong on one or more of the grounds set out in its notice of appeal.
- 3.2 The CMA will not consider afresh the decision made by the Authority. The CMA's function is to hear an appeal and it will review the challenged decision for error on the grounds of appeal put forward by the appellant. The CMA will not allow an appeal merely because it would not have reached that decision had it been the regulator. The CMA will only allow an appeal where it is satisfied that the appellant has shown on the balance of probabilities that the Authority's decision was wrong on one or more of the grounds set out in the Act.
- 3.3 In conducting the appeal the CMA will have regard to the overriding objective set out in Rule 4. The overriding objective of the 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 expects participants to assist it in meeting the overriding objective and to conduct themselves in a way that is consistent with this approach.
- 3.4 In determining the appeal the CMA must have regard, to the same extent as is required of the Authority, to the matters to which the Authority must have regard when discharging its functions under Part 5 of the Act.⁶
- 3.5 The CMA may have regard to any matter that the Authority was not able to have regard to in relation to the decision which is the subject of the appeal, but must not have regard to any matter which the Authority would not have been entitled to have regard to in reaching its decision had it had the opportunity to do so.⁷
- 3.6 The CMA encourages participants to send all their evidence to the CMA at the beginning of the process. The CMA does not intend the provision of evidence by participants to be an iterative process. If the CMA requires supplementary evidence later in the appeal, it will make this request. The CMA will seek to narrow the issues and points in dispute during the course of the appeal. It

⁶ Section 79(2) of the Act.

⁷ Section 79(3) of the Act.

may, in particular, seek to do so at appeal management conferences and hearings.

Administrative matters

3.7 The CMA's staff team is led by an Appeal Director who is supported by an administrative team and professional advisers. Participants in the appeal will have a contact in the administrative team who will take enquiries and act as the main point of contact for the appeal. Once a notice of appeal is sent to the CMA, the CMA will write to these appellant/s and the Authority with the necessary contact details and publish these details on a designated page on the CMA's website.

Time frames

3.8 The Act prescribes the time frames within which various steps in the appeal process must be completed.

3.9 Rule 5 specifies that an application of permission to appeal against a decision must be made to the CMA 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. While the Act does not specify a period within which an application for permission to appeal must be made,⁸ the CMA nevertheless considers that Parliament intended that applications for permission to appeal must be made within a reasonably prompt period. When considering what is a 'reasonably prompt period' for these purposes, the CMA notes that decisions of the Authority appealable to the Competition Appeal Tribunal (CAT) under the Act (CAT-appealable decisions)⁹ must be made by filing a notice of appeal 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.¹⁰ The CAT may not extend that time limit unless it is satisfied that the circumstances are exceptional.¹¹ The CMA considers that the deadline for seeking permission to appeal against CAT-appealable decisions is a reasonable one for the purposes of decisions that can be appealed to the CMA.¹² In making this Rule, the CMA has also had regard to paragraph 16(2) of the Schedule, which provides that appeal rules made by the CMA under the Act 'may include provision supplementing the

⁸ Consider Paragraph 3 of the Schedule.

⁹ See section 76(4) of the Act for CAT-appealable decisions.

¹⁰ Rule 9(1) of the Competition Appeal Tribunal Rules.

¹¹ Rule 9(2), *ibid.*

¹² The CMA may consider a longer period to be reasonable in exceptional circumstances.

provisions of...Schedule [5] in relation to any application ... for which this Schedule provides...’.

- 3.10 The CMA must determine an appeal within six months, starting from the day on which it grants permission to appeal.¹³ Where the CMA has received representations on the timing of the determination from a party to the appeal and is satisfied that there are special reasons, it may extend the period for its determination by one month.¹⁴ If the CMA considers it necessary or appropriate to extend the timetable during an appeal, it will consult with the participants.

Administrative timetable

- 3.11 As soon as possible after granting permission to appeal the CMA will draw up an administrative timetable for the appeal in accordance with Rule 13. When drawing up the timetable the CMA will have regard to the views of the participants as well as the overriding objective set out in Rule 4. Once the timetable has been set, the CMA will aim to keep to it; participants should therefore check their availability on the notified dates at an early stage. The CMA will not normally consider that the unavailability of advisers or of legal representatives is a reason to depart from these dates
- 3.12 In order to conduct an efficient process, the CMA expects that participants will treat the timetable as ‘hard’ deadlines. Should it become apparent to a participant that it will struggle to adhere to a deadline the CMA should be contacted as soon as possible.

Procedure and directions

- 3.13 Where necessary, the CMA may issue directions in relation to the conduct of the appeal under Rule 14. Participants may apply for directions or the CMA may of its own volition propose that a direction appears necessary in the circumstances. The CMA will usually give participants an opportunity to comment ahead of issuing a direction. Depending on the circumstances, applications for directions may be dealt with in writing or at an appeal management conference. However, the CMA will ordinarily consider that many procedural matters in an appeal (which include the examples provided in Rule 14.2) can be addressed through informal means, without it being necessary to give directions.

¹³ Paragraph 7(1) of the Schedule.

¹⁴ Paragraph 7(2), *ibid*.

- 3.14 Where participants are applying for directions the CMA expects that they would have sought to agree the direction with the other participants in the appeal beforehand.
- 3.15 Rule 14 sets out a non-exhaustive list of matters upon which the CMA can give directions. Participants should be aware that the CMA will have regard to the overriding objective in managing the conduct of the appeal.
- 3.16 The CMA expects that participants will be able to cooperate promptly to produce bundles, chronologies, glossaries, issues lists and case memoranda where any or all of these are necessary.

Appeal management conferences

- 3.17 Appeal management conferences may be held under Rule 15. These are opportunities for the CMA to manage the appeal. The CMA will normally expect to invite all of the parties to an appeal and any interveners. Active appeal management will be an important tool in ensuring that the CMA makes the right decision in the time allowed.

Permission stage

- 3.18 The Act requires that permission to appeal is obtained before an appeal can be brought.¹⁵ Applications for permission to appeal are made when appellants send their notice of appeal in accordance with Rule 5, within the time frame set out in that Rule.¹⁶ A copy of the notice of appeal must be sent to the Authority at the same time as the notice of appeal is sent to the CMA.¹⁷
- 3.19 Once the Authority has received a copy of the notice of appeal it has ten working days,¹⁸ beginning with the first working day after the day it receives the notice of appeal, to make submissions to the CMA on whether the CMA should grant permission to appeal. Where the Authority makes submissions, the CMA then has ten working days,¹⁹ beginning with the first working day after the day it receives the Authority's submissions, in which to decide whether to grant permission to appeal. If the Authority does not make submissions on the permission to appeal, the CMA has 14 working days,

¹⁵ Section 76(8) of the Act,

¹⁶ See Rule 5.1 and paragraph 3.10 above.

¹⁷ Paragraph 3(5) of the Schedule and Rule 5.6.

¹⁸ Paragraph 5(3) of the Schedule.

¹⁹ Paragraph 3(8)(a) of the Schedule.

beginning with the first working day after the day it receives the notice of appeal, in which to decide whether to grant permission to appeal.²⁰

- 3.20 The CMA will normally make a decision on permission without a hearing.²¹ The CMA may decide to hold a hearing to determine an application for permission either of its own motion or on the application of the appellant, the Authority or an intervener. Where it decides to hold a hearing the CMA will notify the parties to an appeal and such other persons as it considers appropriate.²²
- 3.21 The CMA will consider whether the appellant has standing to bring the appeal and, where appropriate, the nature of any interests they claim to be affected. Under the Act appeals can only be brought by a person affected by the CMA-appealable decision.²³ The CMA may refuse a person affected by a decision permission to appeal only if the appeal:
- (a) is made for reasons that are trivial or vexatious; or
 - (b) has no reasonable prospect of success.²⁴
- 3.22 Rule 5.2 has the effect of requiring the appellants clearly to set out why they consider that they have standing to appeal in their notice of appeal. It is important that the CMA has sufficient detail to be able quickly to establish whether an appellant has standing. An appellant should clearly and concisely set out the interest that it considers is affected and how this interest is affected.
- 3.23 The CMA may grant permission subject to conditions, which include conditions designed to expedite the consideration of the appeal, limit the matters to be considered on appeal and consolidate the appeal with other appeals.²⁵
- 3.24 Although the CMA may allow the filing of further submissions and evidence by issuing a direction under Rule 14,²⁶ the CMA will not allow this Rule to be used to circumvent the time limit by which an application for permission to appeal must be made.

²⁰ Paragraph 3(8)(b) of the Schedule.

²¹ Rule 6.1.

²² Rule 6.3.

²³ Section 76(1) of the Act.

²⁴ Section 76(9) of the Act.

²⁵ Paragraph 3(9) of the Schedule.

²⁶ Note also the comments in paragraph 3.14 above about directions.

3.25 The CMA considers that the scope of the permission stage is intended to be limited. The basis for granting or refusing permission to appeal is set out in the Act²⁷ and the time frame to determine permission to bring an appeal is strict. The CMA would therefore normally expect to deal with this stage without the involvement of any third parties. However, Rule 6.3 provides that the CMA may hold a hearing to determine an application for permission to appeal. Under Rule 6.3, the CMA will give notice of such a hearing to the parties to an appeal and the CMA may give notice of that hearing to other persons as it considers appropriate.²⁸

Suspension of the Authority's decision

3.26 The CMA may suspend the Authority's decision, either in whole or to a specified extent, pending its determination of an appeal under the Act, provided certain procedural requirements have been met (see paragraph 3.28 below) and the balance of convenience does not otherwise require that the decision be given effect pending the determination of the appeal.²⁹

3.27 An application to suspend the decision must be made at the same time as making the application for permission to appeal (ie with the sending of the notice of appeal to the CMA).³⁰ At the same time as sending the application for suspension to the CMA, the appellant must send a copy of this application to the Authority.³¹

3.28 Rule 7 sets out the requirements for making applications for suspension and the process that the CMA will follow in considering the application. Subject to Rule 7, the CMA expects that the procedure for suspension applications will depend upon the nature of the issues to be considered and the CMA will set this out on a case-by-case basis.

3.29 In making an application for the suspension of the Authority's decision the appellant should clearly set why it considers that the balance of convenience favours the suspension of the decision.

3.30 Once the Authority has received a copy of the application for suspension, it has ten working days, beginning with the first working day after the day on which it receives the application, to make any submissions to the CMA about

²⁷ See section 25(9) of the Act and paragraph 3.22 above.

²⁸ The CMA does not expect the Authority's submissions on the application for permission to bring an appeal to be available to anyone other than the appellant (see paragraph 5(5) of the Schedule for the Authority's submissions) prior to making its decision on the application. However, the CMA may publish the non-sensitive version of the Authority's submission on its website (see Rule 12).

²⁹ Paragraph 4(2) of the Schedule.

³⁰ Paragraph 4(4)(a) of the Schedule.

³¹ Paragraph 4(4) of the Schedule.

this application.³² Where the Authority does make submissions, the CMA then has ten working days, beginning with the first working day after the day it receives the Authority's submissions, to take its decision.³³ If the Authority does not make submissions, the CMA has 14 working days, beginning with the first working day after the day it receives the application for suspension, to take its decision.³⁴

- 3.31 Under Rule 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 that Rule, that person must at the same time send a copy to the Authority and to the appellant.
- 3.32 The CMA may consider an application for suspension of the Authority's decision under appeal with or without a hearing. It will decide whether to hold any such hearing depending on the nature of the applications and whether it appears to the CMA that such a hearing is necessary. So far as possible and necessary any suspension hearing will be held at the same time as any hearing about the application for permission. Where the CMA decides to hold a hearing in relation to the suspension application, it will notify the parties to an appeal and any other person the CMA considers appropriate.³⁵

³² Paragraph 5(2) of the Schedule.

³³ Paragraph 4(3)(a) of the Schedule.

³⁴ Paragraph 4(3)(b) of the Schedule.

³⁵ See Rule 7.5.

4. Particular issues in appeals

Commencing an appeal

- 4.1 Appellants apply for permission to bring an appeal by sending a notice of appeal in accordance with paragraph 3 of the Schedule and with Rule 5.
- 4.2 The notice of appeal should be set out in consecutively numbered paragraphs and be paginated. It should include cross-references to the relevant parts of the Authority's decision, the grounds of appeal etc.
- 4.3 Unless notified otherwise by the CMA, documents must be sent to the CMA both by email and in hard copy (by first class post or delivered personally).
- 4.4 The CMA will, by prior arrangement, accept delivery of an application for permission at any time up to midnight on the last day on which it can be made. An appellant wishing to deliver documents to the CMA outside normal office hours (after 6pm or before 8:30am) should liaise with the CMA in advance to ensure delivery.

The Authority's submissions

- 4.5 If the Authority wishes to make submissions on an application for permission to appeal and of suspension, it should submit a response under the relevant rules (see Rules 6.2 and 7.4) and it must send a copy of its representations and observations to the appellant.³⁶
- 4.6 Where the CMA has granted permission to appeal, the Authority may make submissions to the CMA about its reasons for the decision against which the appeal is being brought and/or any grounds of appeal on which that appeal is being brought against that decision. The Authority has 15 working days beginning with the first working day after the day on which permission to bring the appeal was granted to make such submissions.³⁷
- 4.7 The Authority's submissions should contain a statement identifying the facts and reasons why it believes the appeal should not succeed and/or why it believes the relief sought should not be allowed and include any written evidence it wishes to adduce in support of its response. The Authority should also provide a non-sensitive version of the statement in response and any

³⁶ Paragraph 5(5) of the Schedule.

³⁷ Paragraph 5(4) of the Schedule.

written evidence adduced in support of that response in a form suitable for publication on the CMA's website.³⁸

Third party involvement

- 4.8 Although the Act does not set up a formal framework for intervention in appeals, the CMA recognises that certain persons materially interested in the outcome of the appeal should be afforded the opportunity to submit views or respond to the grounds of appeal as appropriate, having regard to the nature of their interest in the outcome of the appeal.
- 4.9 A person considering whether to make an application for permission to intervene will assist the CMA by advising it at the earliest opportunity that it is considering whether to do so. The CMA encourages third parties who are minded to support one party, to liaise with each other and that party in order to reduce cost, delay and duplication as far as possible.
- 4.10 Where the CMA has granted permission to appeal, it may grant certain persons materially interested in the outcome of the appeal permission to intervene, in accordance with Rule 10. Where an intervention is permitted, the CMA may of its own motion issue such directions for the intervention as it considers appropriate including, where practicable and appropriate, that two or more applicant interveners liaise with each other (and/or the party whom they support) to reduce duplication or that they file joint submissions.

Other documentation

- 4.11 The CMA expects the parties to provide it with a coherent and readily comprehensible explanation of any technical issues relevant to the appeal. As part of this explanation, the CMA should, if necessary, be provided with a glossary of technical terms. The purpose of the glossary of technical terms is to provide the CMA and the parties with a single reference point. The glossary should therefore be agreed between the parties if possible, and should as far as possible be consistent with the usage of technical terms by the Authority and others prior to the Authority's decision. Where there is a disagreement between the parties to an appeal about the use of a term, that disagreement should be stated and the competing understandings set out concisely.
- 4.12 The CMA will also find it helpful to see a chronology of the Authority's decision. The purpose of the chronology is to provide the CMA and the participants with a single reference point from which to understand all relevant

³⁸ Rule 9.4.

issues up until the time that the Authority published its decision. The chronology should be uncontroversial and should be agreed if possible. Where there is disagreement between the parties to an appeal about an event or description of it, that disagreement should be stated and the competing versions concisely set out.

Appeal management

4.13 All appeals will be subject to active appeal management by the CMA. The CMA does not require the parties to be legally represented at the appeal management conferences and hearings. The CMA does, however, want focused arguments from the participants.

Consolidation of appeals

4.14 The Act 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.³⁹ The Rules include provision for directions being made by the CMA relating to consolidation of appeals.

4.15 Individual appellants and the Authority will be given the opportunity to state their case before the CMA makes any decision to consolidate their appeals.

Witness statements

4.16 The CMA expects that a large part of the evidence used in the appeal will be written evidence.

4.17 Subject to the direction of the CMA, written evidence must be in the form of a witness statement. A witness statement must be verified by a statement of truth,⁴⁰ signed by the witness.

4.18 Witness statements should:

(a) be headed with the title of the appeal;

(b) be clearly marked at the top right-hand corner with the name of the party on whose behalf the witness statement is made, the initials and surname of the witness, the number of the statement in relation to that witness, the

³⁹ Paragraph 3(9)(c) of the Schedule.

⁴⁰ Paragraph 18(1)(b) 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.

identifying initials and number of each exhibit referred to and the date the statement was made;

- (c) state the full name of the witness;
- (d) state his or her place of residence or, if the statement is made in a professional, business or other occupational capacity, the address at which he or she works and the position held and the name of the firm or employer;
- (e) state the occupation of the witness;
- (f) state the relationship of the witness to the party on whose behalf the evidence is given; and
- (g) be paginated.

4.19 In a witness statement, the witness must indicate which of the statements are made from his or her own knowledge and which are matters of information or belief. In relation to matter of information or belief, the witness should state the source of that information or belief.

4.20 A witness statement should be as concise as the circumstances allow. It should not contain long quotations from documents. Documents used in conjunction with a witness statement should be verified and identified by the witness and placed in an exhibit separate from the witness statement. The location of the document in the exhibit should be set out in the witness statement.

4.21 Where the witness refers in a witness statement to correspondence, the letters should be collected together and exhibited in chronological order with the earliest at the top.

4.22 Photocopies may be used instead of original documents provided that the originals are available for inspection by the CMA if necessary.

4.23 Where an exhibit contains more than one document, the front page should list the documents contained in the exhibit and should give the date of each document. The exhibit should be paginated.

4.24 Witness statements and exhibits should be fully legible. Witness statements should be typed on one side of the paper only and should be divided into numbered paragraphs.

Hearings

- 4.25 The CMA will not normally conduct hearings in public.
- 4.26 Where the CMA holds a hearing on the substance of the appeal, the date of the hearing will normally be stated in the administrative timetable, which will be published on the CMA's website. The CMA may also hold clarification hearings in advance of hearings on the substance of the appeal.
- 4.27 The CMA may conduct separate hearings with the parties to an appeal which any interveners may attend as observers.
- 4.28 Intervenors may request a hearing. The CMA will consider any such request and the reasons for the request and decide whether to invite the intervener to a stand-alone hearing or to all or part of any hearing with the appellant and the Authority.
- 4.29 Hearings will normally be held with the Group⁴¹ although CMA staff will also participate. The hearings are an opportunity for the parties to make oral submissions to the Group and members of the CMA staff advising them. However, they are also an opportunity for the Group to ask such questions as it considers necessary in order to make the necessary findings in its determination. Although the Act and the Rules make provision for cross-examination, the CMA expects that this power will be used very rarely.
- 4.30 Hearings are formal and will normally be led by the chair of the Group or by such other member of the Group as appropriate.
- 4.31 Participants will normally be directed before the hearing as to the matters on which the CMA wishes to hear submissions and the length of time they will be allowed to make submissions. The CMA will indicate the order in which it wishes to hear the participants. Participants may be represented by more than one person and the CMA will be sympathetic to such arrangements to facilitate the clear presentation of technical issues and ensure that the person with the requisite level of expertise and knowledge is available to answer the Group's questions. At hearings, participants may present their submissions using, for example, a PowerPoint presentation, if they consider that would assist the CMA. Participants who wish to employ technology during their submissions should make prior arrangements with the CMA.

⁴¹ This is a group of the CMA's members, formed for the purpose of carrying out the CMA's functions. See paragraphs 1 and 6 of the Schedule and paragraph 3.7 above.

4.32 Verbatim transcripts are taken of hearings. Transcripts will be sent to the relevant party after the hearing to check its accuracy and to enable the party to identify any sensitive material. The CMA may request the relevant party to verify by a statement of truth the transcript of the statements made by it (or on its behalf) at the hearing.

Staff meetings

4.33 The CMA may conduct meetings or make phone calls to clarify specific facts; for example, CMA staff may hold meetings with the Authority or other participants to discuss modelling issues. A transcript will normally be taken but where practical other participants may be invited to send observers.

Confidentiality and Freedom of Information

4.34 Paragraph 15(2) of the Schedule makes provision for the exclusion from the published version of the CMA determination of certain information:

- (a) Commercial information, the disclosure of which would, or might in the CMA's opinion, 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 in the CMA's opinion, significantly harm the individual's interests.

4.35 Such information is defined in Rule 2.1 as 'sensitive information' and provision for its protection is included in the Rules (see, for example, Rule 11).

4.36 Where non-sensitive versions of submissions and evidence are submitted to the CMA, the party filing the information is taken to have consented to the disclosure of that non-sensitive version.

4.37 Where it can do so while appropriately protecting confidentiality, in order to secure fairness and assist it to perform its functions effectively, the CMA may disclose relevant material provided by or to parties to an appeal, any interveners or other persons making representations or observations on a suspension application (other than communications of a purely administrative nature) and transcripts of hearings to various persons. It may in particular disclose such information to the other parties to an appeal, any interveners and other persons making representations or observations on a suspension application.

- 4.38 The CMA may propose that disclosure of certain information should be made solely within a 'confidentiality ring', normally comprising named legal representatives and, possibly, other external advisers or experts such as accountants and economists, subject to appropriate confidentiality undertakings, rather than to the parties to an appeal or interveners themselves.
- 4.39 Exceptionally, claims may be made that certain information is of such sensitivity that it should not be disclosed within the confidentiality ring.
- 4.40 Rule 14 sets out a non-exhaustive list of matters upon which the CMA can give directions. Under this rule the CMA can give directions about the handling of sensitive information. If a participant has concerns about providing sensitive information to another participant, it can provide the proposed version of the document to the CMA and ask it to provide directions on the proposed excisions (Rule 11). The CMA respects the importance of protecting sensitive information. However, it also discourages participants from making excessive or blanket confidentiality claims over submissions and may consider them to be inconsistent with the overriding objective.
- 4.41 The CMA may receive requests from third parties for information which it holds in connection with appeals. The CMA notes that by virtue of paragraph 1ZA of Schedule 1 to the Freedom of Information Act 2000, the general right of access to information held by a public authority does not extend to information held by the CMA as a tribunal.

5. Provisional determination

- 5.1 The CMA will normally issue a provisional determination stating its provisional conclusions which will be notified to the parties to an appeal and any interveners. The purpose of a provisional determination is to allow parties to comment on the CMA's reasoning and accuracy of arguments. It may also establish a context for any necessary consideration of remedies.
- 5.2 The provisional determination will be notified to the parties, including interveners. The CMA does not generally expect to publish its provisional determination. Parties are also reminded that the contents of the determination may be share-price sensitive information whose disclosure is prohibited under the Criminal Justice Act 1993 or relevant Financial Conduct Authority rules on disclosure of share-price sensitive information.

6. Costs

- 6.1 Under the Act, the CMA is bound to make an order requiring the payment of its own costs incurred in connection with the appeal.⁴² The CMA has discretion to make an order requiring a party to the appeal (appellant or the Authority) to make payments to another party in respect of costs reasonably incurred by the other party in connection with the appeal.⁴³
- 6.2 The CMA will normally order an unsuccessful party to pay the costs of the successful party, but may make a different order. Factors influencing the CMA's decision are set out in Rule 21.3 and include the conduct of the parties, a party's degree of success and the proportionality of the costs claimed having regard to the matters in issue.
- 6.3 While the CMA does not have the power to order costs against or for interveners or persons other than parties to an appeal who have made representations or observations on a suspension application, the CMA will take into account the involvement of such interveners or persons in making an order for costs under Rule 21.2 and paragraph 17(3) of the Schedule.
- 6.4 Where the CMA makes an order for costs in favour of one or more of the parties to an appeal under Rule 21.2, the costs recoverable may include all those fees, charges, disbursements, expenses and remuneration incurred by a party in the preparation and conduct of the appeal. However, the CMA will not normally allow any amount in respect of costs incurred before the Authority first published its decision.
- 6.5 The CMA may make an order for costs at the time that it gives its determination. However, the CMA may choose to reserve its position on costs and make a subsequent written order.
- 6.6 Any party to the appeal seeking an award of costs in its favour should file a statement of costs which should be disclosed to any party to the appeal who may become liable to pay those costs.
- 6.7 Each statement of costs should include detailed information about the costs (including categories such as solicitors' costs, Counsel fees, experts' costs and any other disbursements) reasonably incurred by the party to the appeal in connection with the appeal. The CMA will normally expect the amounts for each category of costs to be broken down by reference to the number of

⁴² Paragraph 17(1) of the Schedule.

⁴³ Paragraph 17(3) of the Schedule.

hours claimed, hourly rate, position of the fee earner and the nature of the work performed.

- 6.8 Each statement of costs should be signed by the party to the appeal or where applicable its legal representative.