

Regulated Payment Systems Appeals Rules and Guide

Response to consultation

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1. Introduction

- 1.1 The Competition and Markets Authority (CMA) on 20 June 2017 opened a three-week consultation on draft rules of procedure to govern appeals that may be made to it under section 79 of the Financial Services (Banking Reform) Act 2013 (the Act) in respect of certain decisions made by the Payment Systems Regulator (the Authority) under the Act. The CMA also consulted on a draft guide intended to assist participants involved in such appeals.

Background

- 1.2 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 (CMA-appealable decisions).

- 1.3 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.

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

- 1.5 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.

- 1.6 Elements of the procedures for regulating appeals, including the time periods for appealing and completing them and provisions 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.
- 1.7 The CMA proposes to exercise its discretion to make rules of procedure for the purpose of regulating the conduct and disposal of appeals against CMA-appealable decisions and to publish a guide intended to assist participants involved in such appeals.
- 1.8 The CMA therefore sought views in a consultation on draft *Regulated Payment Systems Appeals: Competition and Markets Authority Rules* and a draft guide to appeals, entitled *Regulated Payment Systems Appeals: Competition and Markets Authority Guide*.
- 1.9 We asked consultees the following questions:
- Do you have any comments on the draft:**
- (a) *Regulated Payment Systems Appeals: Competition and Markets Authority Rules*; and/or**
- (b) *Regulated Payment Systems Appeals: Competition and Markets Authority Guide*?**
- 1.10 The consultation closed on 12 July 2017.
- 1.11 We received one response to the consultation, from Visa Europe. A non-confidential version of its response is available on the consultation page.
- 1.12 This document summarises the key comments made by the respondent and our response to them. It then sets out the changes we have made to the Rules and Guide, following the consultation. It also gives our reasons where we have not made changes following the respondent's comments.

2. Issues raised by the consultation and our response

- 2.1 As noted above in paragraph 1.11, the CMA received one response to the consultation.
- 2.2 The respondent stated that the Rules left a number of elements to the discretion of the CMA and considered that in places the Rules are not as process-specific, as for instance, the Competition Appeal Tribunal Rules 2015 (SI 2015/1648). The respondent said that it understood the balance to be achieved between user-friendliness and certainty around process, but stated that it believed that there were a number of elements that it considered could be improved and provided some commentary on individual examples.

Hearings and case management

- 2.3 The respondent noted that the Rules and Guide indicated that the CMA had discretion as to whether to hold hearings at various points in the appeal process, but stated that there were no details as to how the CMA would apply this discretion in particular circumstances. The respondent believed that it would be useful for the CMA to provide more details of the circumstances under which the CMA would choose (or choose not) to hold hearings. The respondent added that in any event it believed that effective and swift application of CMA discretion and decision-making in practice would be vital in ensuring efficient outcomes in relation to appeals under this framework.

CMA response

- 2.4 The CMA notes that paragraphs 4.25 and following of the Guide indicate when hearings may be held and what they may cover. It has nevertheless added some additional text to that paragraph further describing when hearings might be held and the factors to which the CMA will have regard in deciding whether to hold them.

Costs

- 2.5 The respondent noted that the CMA was bound by the Act to make an order requiring payment of the CMA's own costs incurred in connection with the appeal. Nevertheless, it was concerned that neither the Rules nor the Guide set out the methodology by which the CMA proposed to calculate such costs, nor how the CMA intended to justify such costs, especially in view of the fact that paragraph 17(1) of Schedule 5 of the Act imposed no requirement for the CMA's costs to be 'reasonably incurred'. The respondent would have particular concern in this regard if the appeal's timeline (and by implication,

cost) were to be extended due to factors not related to the conduct of the appellant. The respondent asserted that the parties needed assurance that the CMA's costs would be evidenced and justified.

- 2.6 The respondent also noted that paragraph 17(2) of Schedule 5 of the Act outlined which parties were to pay the CMA's costs in particular circumstances. The respondent stated that it believed that the Guide and Rules could more directly refer to those provisions.
- 2.7 The respondent observed that there did not appear to be any specific provision for parties to raise concerns or disputes regarding the CMA's calculation of its own costs or of any costs incurred by another party. It believed that it would be useful if such detail was set out in the Rules.
- 2.8 The respondent noted while the Act did not establish a formal framework for third party intervention, it welcomed the CMA's proposal to allow this under Rule 10 and that doing so would contribute to effective case management.
- 2.9 The respondent nevertheless stated that it was not clear on the current drafting of the Rules and Guide how costs incurred by virtue of intervener involvement were handled. It also stated that it understood that the CMA's ability to define this position further could be constrained by primary legislation.

CMA response

- 2.10 The CMA has considered each of the respondent's points regarding costs below.

Cost methodology

- 2.11 The CMA notes that the costs the CMA will expect to recover will be the full costs incurred by the CMA in conducting an appeal (including those of obtaining any external legal or expert advice on issues arising in the appeal). These will vary depending on the case and it is not possible to estimate them in advance. However, the CMA's experience of other regulatory appeals suggests that the main element of the costs will be the time incurred by staff and members of the Group on the appeal.
- 2.12 The CMA has added some text to Rule 21.1 and paragraph 6.1 of the Guide that clarifies what the CMA regards as ordinarily comprising its costs.

Parties who pay the CMA's costs

- 2.13 The CMA has added text to Rule 21.1 and paragraph 6.1 of the Guide indicating who can be required to pay the CMA's costs under paragraph 17(2) of Schedule 5 to the Act.

Raising concerns or disputes about cost calculations

- 2.14 The CMA notes that Rule 19.4(d) provides that any provisional determination the CMA may issue under Rule 19.1 among other things will normally contain the CMA's provisional conclusions on liability for its costs incurred in connection with the appeal and other costs issues. However, the CMA has added a new Rule (Rule 21.4) and text to paragraph 6.6 of the Guide stating that where any CMA provisional determination issued in an appeal does not contain the information set out in Rule 19.4(d) or no provisional determination is issued, then before making any order for costs, the Group will provide the parties with a provisional determination on costs and give them a reasonable opportunity to make representations on it. The CMA will normally publish non-confidential versions of any orders for costs on its website.
- 2.15 In view of the fact that the CMA lacks an explicit power under paragraph 17 of Schedule 5 to award costs in favour or against an intervener, the CMA does not consider it appropriate to provide further commentary on the relationship between interveners and costs beyond what it has already stated in paragraph 6.3 of the Guide. Nevertheless, the CMA might revisit this issue in future editions of the Guide, as it gains experience of appeals under the Rules.

Amending Notices of Appeal and new evidence

- 2.16 The respondent noted that neither the Rules nor the Guide appear to set out any formal mechanism for the amendment of Notices of Appeal. The respondent suggested that this would be particularly useful where the applicant has identified new evidence that the applicant wished the CMA to consider in an appeal. It observed that such mechanisms existed under other comparable appeal rules, such as Rule 12 of the Competition Appeal Tribunal Rules 2015. The respondent believed that it would be useful to have such a mechanism included in the Rules.

CMA response

- 2.17 The CMA will conduct appeals having regard to the overriding objective of Rule 4 as well as to the six-month time frame for determination stipulated in paragraph 7(1) of Schedule 5 to the Act. It also notes that in paragraph 3.6 of

the Guide, the CMA encourages participants to send all their evidence to the CMA at the beginning of the process. In the same paragraph, the CMA states that it does not intend the provision of evidence by participants to be an iterative process. Furthermore, the CMA may, if it thinks it necessary to do so for the purpose of determining an appeal within the period provided for by paragraph 7 of Schedule 5 of the Act, disregard among other things any or all matters raised by an appellant that were not raised by the appellant at the time of the application for permission to appeal or for a suspension of the Authority's decision.¹

- 2.18 In view of these considerations, the CMA does not consider it appropriate to change the Rules or Guide to make reference to the possibility of amending Notices of Appeal, especially where the appellant has identified new evidence. The CMA considers that an appellant could nevertheless apply to the CMA for permission to amend its Notice of Appeal. Having regard to the considerations mentioned above, however, the CMA expects that such permission is only likely to be granted in exceptional circumstances.

Other changes

- 2.19 The CMA has of its own motion made some additional small changes to the Rules.
- 2.20 It has amended Rule 10.7 to provide that 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 five working days beginning with the first working day after the day on which the Authority sends its response to the CMA and the appellant under Rule 9. The consultation draft of the Rules had provided that such representations should be made before the end of period of seven working days beginning with the working day after the day on which the application was received by them. This change was made to make Rule 10.7 consistent with a similar rule in the draft *Energy Licence Modification Appeals: Competition and Markets Authority Rules*, on which consultation opened on 24 July 2017.²
- 2.21 Furthermore, the CMA has noted in paragraph 4.25 of the Guide that the CMA may permit the use of teleconferencing or videoconferencing facilities in hearings.

¹ Paragraph 8(1)(a) of Schedule 5 to the Act.

² See [Energy licence modification appeals: draft CMA rules](#).