

By email to: steven.preece@cma.gsi.gov.uk

The Regulatory Appeals Team
Competition and Markets Authority
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12th July 2017

Dear Steve,

We welcome the opportunity to respond to this consultation on the Water Code Appeals: Rules and Guidance published by the Competition and Markets Authority (CMA) on 20th June 2017.

We support the principle of an appeal mechanism, as it improves accountability of the governance of the market codes. We also welcome the intention of designing a flexible and efficient framework which is adapted in the interests of common sense and good practice.

There are a couple of areas which the CMA may consider revisiting to provide further clarity in both the rules and guidance documents.

Firstly, we believe it may be useful to consider providing further information as to how the CMA will apply the criteria in the Regulations to determine permission to appeal. Secondly, we believe that it would be useful to consider the interdependencies and interactions between the Water Codes Appeals framework and the process by which approved code Change Proposals are implemented.

We would like to offer our support to work with the CMA to help to develop the guidance and rules to address the points we make in our response.

Kind regards

Chris Scoggins

Water Codes Appeals: Rules and Guidance – MOSL Response

Consultation questions

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**

We support the principle of an appeals mechanism as it strengthens the role of accountability within the market governance arrangements. We recognise the efficiency of an appeals mechanism as a mechanism to review the Authority decision, on the grounds set out in the Regulations, on the codes in comparison to a judiciary review. Additionally, the lower costs of the appeal mechanism improve accessibility to appealing, which ensures a more level playing field between trading parties.

We believe that additional clarification or guidance on two key points would greatly benefit the process. These being, the grounds on which permission to appeal is granted and the interdependencies of the code appeals and implementation processes.

Further guidance on the grounds on which the CMA grants permission to appeal

The Water Industry Designated Codes: Appeals to the Competition and Markets Authority (CMA) Regulations 2017 No. 447, sets out that an application for permission to appeal may be refused by the CMA on the grounds that the appeal brought is trivial, vexatious or that it has no reasonable grounds for success. The CMA guidance document notes that the grounds on which permission is granted will be applied rigorously to maintain the thoroughness of the process.

We believe that triviality, vexatiousness and a lack of reasonable likelihood of success are broad criteria, which will likely be subject to interpretational differences by prospective appellants. We recommend providing further guidance on what the CMA interprets vexatious, trivial or unlikely to succeed applications to be. This could be in the form of fictitious examples.

We believe that this would achieve the benefit of encouraging licensees to strengthen their applications to ensure that they meet the CMA's interpretation of the permission criteria. We also believe that further guidance will allow applicants, whose grounds for appeal are vexatious or trivial, to reconsider submitting their application based on this further guidance. This, in turn, may reduce the volume of applications submitted to the CMA.

Further guidance on the interdependencies between the code implementation and appeals processes

We believe that the rules and guidance could be further clarified in relation to the interdependencies between the code implementation process and appeal mechanism. The two key areas that the CMA may wish to reconsider are the stage prior to the CMA deciding whether to grant permission, and following the publication of the CMA's decision on whether to grant permission.

First, we will provide some background information on the code implementation and the appeal mechanism and our view of the interdependencies between them.

Code Implementation

The Panel, recommends an implementation date to the Authority in the Recommendation Report which is submitted from the Panel to the Authority. The implementation date that is recommended is usually aligned with the quarterly code and system release timetable. When the Authority decides to approve a Change Proposal they publish the implementation date in their determination document. The Authority may publish the decision document anytime it wishes. We expect most approved Change Proposals,

unless they have a material system impact, will be implemented within three to six months of a decision from the Authority. It is worth noting that Change Proposals which are deemed urgent and 'Authority Timetabled Change Proposals' may be implemented in much shorter timescales.

Code Appeals

The Regulations set out that an appeal must be made before the end of 15 working days following the day on which a decision was made by the Authority. The CMA then has 10 working days to grant/refuse permission for appeal. The CMA expect that the average appeal process from an Authority decision should run over approximately 12 weeks. Our reading of Section 3.32 of the draft guidance document is that if an application is not in respect of a Suspension Application, pursuant of Rule 14, then the code change shall be implemented on the date specified by the Authority in their determination document.

Prior the CMA making a decision on the whether to grant or refuse permission to appeal

There is a potential period of 25 working days, following the Authority's decision, before the CMA must decide whether to grant permission to appeal. A code change may be implemented within those 25 working days prior to an application for suspension being granted permission to appeal.

Additionally, if the code change is raised as an urgent change or an Authority Timetabled Change Proposal, it may be implemented prior to the end of the 15 working days when permission to appeal can be sought.

We believe that currently it is not clear, in the situations described above, how code changes are then suspended from the code; the date code changes are suspended from; how this is communicated to the industry and how this would be reinstated following an unsuccessful appeal.

Following the publication of the CMA's decision on the appeal

Where the CMA allows the appeal, it may quash the Authorities decision, or part of it, or return it to the Authority for reconsideration. The publication on the CMA's website will set out the directions given, other orders and the CMA's final decision on the appeal. The Change Proposal decision being appealed may have an implementation date which is prior to the CMA making a final decision on the appeal.

Further guidance or rules would be useful on how an implemented Authority approved code change is quashed, or partially quashed from the codes. Further guidance would also be useful to determine the status of an implemented code change if the CMA decide to return the change to the Authority for reconsideration. It would also be useful to understand which version of the codes are published/republished and whether the Change Proposal is returned to the Panel or Authority.

Additionally, if the application is in respect of a Suspension Application and the Authority's decision is not overturned, further guidance describing how a new implementation date is decided would be useful.

Alternative suggestions

A simpler solution to consider may be to employ Regulation 8, to suspend all code changes which are subject to an application to appeal which the CMA has granted permission to. MOSL would be happy to engage with the CMA as they consider the interdependencies of the code appeal and implementation processes.