

From: Gavin Knott
*Director –
Remedies Business and Financial
Analysis*

7 December 2021

Dear Sir/Madam,

Open letter on the CMA's licence modification appeal rules and guidance

The regulated utility and infrastructure sectors form a key part of the UK economy, and regulatory references and appeals can currently be made to the CMA in relation to price control and other decisions by eight different regulators and across ten different regulated sectors.

In 2021, the CMA gained new functions to hear licence modification appeals in water (relating to matters other than price controls) and air traffic services. Previously the route of appeal, where a licence modification was not agreed, had been through a reference leading to a redetermination.¹

As a result of these changes, all the sectors in which licence modifications are appealable to the CMA, are in the form of appeals, rather than references leading to a redetermination, with the exception of price controls for water and sewerage, and any appeals in rail.

In this letter we are seeking views on the new rules and guidance that the CMA should adopt for the new appeals functions, and whether there should be any changes to the rules and guidance in the other sectors where the CMA follows a similar process. The existing sectors where there are the most directly comparable appeals regimes covering the same or similar grounds of appeal are energy and airports. The new legal frameworks for water licence appeals and air traffic services appeals largely draw on these other sectors.²

¹ These functions were previously in the form of regulatory references, often described as redeterminations.

² Whilst the CMA has a large number of other appeals functions, they are sufficiently distinct that we do not propose to seek to review the rules and guidance associated with these other functions at the same time. We may consider a subsequent review of these other sectors.

We believe that gaining these new functions gives us a good opportunity to engage with interested stakeholders, to take stock and review whether the existing rules and guidance in place to regulate the conduct and disposals of appeals are as effective as possible in achieving the relevant objectives.³

The rules and guidance that the CMA has developed for the energy and airports functions are similar and have the objective of ensuring that the CMA can manage appeals fairly, expeditiously and at proportionate cost, having regard to the interest of the parties to the appeal, interested third parties and the need to make decisions within statutory timeframes. If the rules and guidance are not achieving this objective, we would welcome views from stakeholders as to what improvements could be made.⁴ We are particularly interested in submissions on the following areas:

1. Pre-appeal stage
2. Process for serving of documents, including any changes to reflect developments in technology
3. Procedures for hearing multiple, linked, appeals
4. Management by the CMA of the submission of evidence, including any evidence beyond the notice of appeal, response and reply
5. Interveners
6. Role and number of hearings (clarification hearings, main hearings, and relief hearings) at different stages of the appeal.
7. Cost process

Rules for the CMA's new appeal functions

As well as potentially updating existing rules and guidance, the CMA will also be developing rules and guidance for the following areas in early 2022:

- The CMA's new appeal function in respect of licence modification decisions made by the CAA under the TA00. The Air Traffic Management and Unmanned Aircraft Act 2021 (ATMUAA) amended the TA00, replacing the reference procedure with the appeal procedure
- The CMA's role in licence modifications decisions by Ofwat. This is as a result of the Environment Act 2021 which changes the licence modification (i.e. modification of appointment conditions) from a redetermination to an appeal

³ Specifically the overriding objective stated in each of the appeals rules within scope are as follows:
(i) [Energy Licence Modification appeals](#): to enable the CMA to dispose of appeals fairly and efficiently and at proportionate cost within the time periods prescribed by the relevant energy and gas acts; and
(ii) [Airport Licence Condition appeals](#): to enable the CC to exercise its functions fairly, efficiently and in accordance with the time limits prescribed by the Civil Aviation Act 2021

⁴ See Annex 1 for a list of the existing appeals rules and guidance in the scope of this review. The airports appeal powers have yet to be used in practice, whereas the CMA has heard multiple appeals subject to the energy rules and guidance.

We would welcome submissions as to whether there are any specific features in these sectors which might suggest the need for different rules and guidance compared to those that are in place for the energy and airports appeals functions.

Next Steps

We are seeking submissions from interested stakeholders by 31 January 2022. Please provide submissions to licenceappealsproject@cma.gov.uk.

Following completion of the process of stakeholder engagement, we will consult on rules and guidance for the new functions described above, and will consider whether consulting on changes to the existing rules and guidance is appropriate. Our current intention is to publish a consultation at least on the rules and guidance for the new sectors in order to complete this process by Spring 2022.

Yours faithfully,

Gavin Knott
Director
Remedies Business and Financial Analysis

Annex 1 – existing rules and guidance within scope

The following existing licence appeal rules and guidance are within scope:

- **Airport licence condition appeal rules: CC19**
- **Airport licence condition appeal rules for participants: CC20**
- **Energy licence modification appeals rules: CMA70**
- **Energy licence modification appeals guide for participants: CMA71**

While we are not considering other sectors or non-licence appeals as part of our review, we will also consider lessons learned for the rules and guidance associated with other sectors or non-licence appeals.