

Gavin Knott
Director RBFA
Competition and Markets Authority
(By email)



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Dear Gavin

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

Thank you for the opportunity to input to this important topic. In this response we restrict our feedback to the new appeal functions arising from the amendment to the Transport Act 2000 ("TA00"), and the existing appeal functions in the Civil Aviation Act 2012 ("CAA12"). We note that your open letter is a precursor to any formal consultation on new, and potentially amended, rules and guidance and keep our comments at a high level accordingly.

New rules and guidance for the TA00

The main distinction between the air traffic services (ATS) and airports regulatory frameworks is the TA00 primary duty on the CAA and Secretary of State in respect of safety. The CMA is required to have regard to our section 2 duties when carrying out certain of its appeal functions (section 19F TA00). The CAA12 does not have an equivalent provision. This additional duty does not necessarily require a different approach by the CMA in the appeals rules and guidance. However, you may wish to consider whether specific reference should be made to safety in any new rules and guidance.

We also note that while currently there is only a single licensee under the TA00, any new rules and guidance should be developed in a manner that they can be neutrally applied regardless of the number of licensees – or who an individual licensee is. The current air traffic management system has evolved slowly over the last 80 years or so, however the pace of change has rapidly increased in recent years with new and novel airspace users and potential traffic management needs emerging, which may give rise to changes in the scope and role of air traffic management, including ATS, in the future.

Notwithstanding the need to consider the safety and new types of airspace user points highlighted above, there are synergies between ATS and airports, and taking a similar approach to rules and guidance for ATS as already exist for airports seems a sensible and practical starting point.

Existing rules and guidance of the CAA12

There have been no licence modification appeals under the CAA12 since its implementation and the current CMA rules and guidance are untested. Therefore, we cannot feedback directly on the efficacy of the current rules and guidance based on any experience of a CAA12 appeal. It is also difficult to directly overlay the RP3 experience (under the TA00) over the CAA12 rules and guidance given the RP3 reference was a redetermination, rather than an appeal.

Nevertheless, taking a broader view of the airport appeals rules and guidance considering our experience of the 2019 TA00 reference, the area we would most likely identify as particularly challenging would be the timescales for parties to respond and make submissions – particularly if there are multiple appeals of the same decision. While the key 'deadlines' are prescribed in the primary legislation that underpin the rules and guidance, there is some scope to address these timing challenges through the flexibility the CMA has in setting

the administrative timetable. This should therefore be explored as part of the procedures for hearing multiple, linked, appeals.

Reaching a minimum level of understanding of the licensee's business and activities also has the potential to create some challenges. We would encourage the CMA to consider how best to prepare itself for appeals as part of its ongoing work, this could include through guidance on the pre-appeal stage.

Below are some high-level comments on the serving of documents, the procedures for hearing multiple linked appeals, and other areas highlighted in your letter:

Serving of documents and CMA management of evidence submission: The serving of initial documents should be required in a universally accessible electronic format and sent to all required parties simultaneously by secure email. The need to also submit original physical copies of initial applications appears dated and unnecessary.

Following the serving of initial documents, further submission of information and evidence should be through a CMA managed file sharing capability. This could then also serve as a document management tool. While this was not a material issue for the 2019 TA00 reference, there were occasions where documents could not be easily uploaded, downloaded, or opened, necessitating workarounds, and causing some delays.

Where a financial model, or similar, is provided as evidence or to support the CMA's investigation, discussion and agreement of expectations of how and who runs the model should take place at an early stage, with a short note summarising the results of these discussions to be agreed between the parties.

Procedures for hearing multiple, linked, appeals: For both the CAA12 and the TA00 there is the potential for multiple appeals from parties covering different aspects of a CAA decision. This could be different to one party intervening on another party's appeal. For reasons of efficiency, for all parties and the CMA, consistency, clarity of process and decision-making, it would likely make sense for appeals arising out of the same decision to be linked and considered together. In such circumstances it will be particularly important to consider the impact and demands this would place on the CAA in responding to multiple appeals, and the administrative timetable should be adapted and developed accordingly.

Role and number of hearings: Provision to follow and, if necessary, effectively take part in all hearings remotely should be established. In the case of third-party hearings, both the CAA and parties with appeal rights should have the opportunity to observe (or follow remotely).

Costs: We note the costs provisions in paragraph 24 of Schedule A1 of the TA00 and paragraph 32 of Schedule 2 of the CAA12. However, in determining how the reasonable costs of the CAA and the CMA should be apportioned for an appeal, it should be recognised that such costs will ultimately be met by airspace users.

Please do not hesitate to get in touch should you wish to discuss any of the comments above or your emerging draft rules and guidance. We will continue to engage with any formal consultation on these matters.

Yours sincerely

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