

# Water Appointment Modification Appeals: Competition and Markets Authority Guide

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CMA162con



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# 1. Introduction

- 1.1 This guide has been prepared to assist participants involved in appointment modification appeals under the Water Industry Act 1991.<sup>1</sup> 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 *Water Appointment Modification Appeals: Competition and Markets Authority Rules* (CMA[x]), to govern these appeals. This guide should be read in conjunction with the Act<sup>2</sup> 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, expeditiously and at proportionate cost, having regard to the interests of the parties to the appeal and interested third parties 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 and expects participants to present their submissions clearly.
- 1.6 This guide does not contain details of all the provisions of the Act and 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 Water Industry Act 1991;

**‘Authority’** means the decision-making Water Services Regulation Authority – referred to as the Authority in the Rules and the Act;

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<sup>1</sup> 1991 c56, as amended in particular by the Environment Act 2021 (2021 c30).

<sup>2</sup> See paragraph 1.7 for a definition of ‘the Act’ in this guide.

**‘the CCW’** means the Consumer Council for Water;<sup>3</sup>

**‘the CMA’** means the Competition and Markets Authority;

**‘intervener’** means any person given permission by the CMA under Rule 10 of the Rules to intervene in an appeal;

**‘participants’** means the parties to an appeal and interveners;

**‘the Rules’** mean the Water Appointment Modification Appeals: Competition and Markets Authority Rules;

**‘the Schedule’** means Schedule 2ZA to the Act;

**‘sensitive information’** means information which is:

- (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.

## 2. Background<sup>4</sup>

2.1 Section 12A of the Act sets out the process that the Authority must adopt in making modifications to the conditions of appointment of water undertakers or sewerage undertakers appointed under Part 2 of the Act whose area is wholly or mainly in England. It also sets out the appeal mechanism in respect of such appointment modifications. An appeal against a decision of the Authority to amend the conditions of an appointment may be made to the CMA by:<sup>5</sup>

- (a) a company holding an appointment, the conditions of which the Authority has decided to modify;
- (b) any other company holding an appointment, any water supply licensee or any sewerage licensee, whose interests are materially affected by the decision of the Authority;

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<sup>3</sup> The CCW may bring an appeal in the capacity of representing consumers whose interests are materially affected by the Authority’s decision.

<sup>4</sup> The statutory regime covered by these Rules and this Guide is distinct from the regime under Section 12 of the Act that provides for CMA redeterminations of the Authority’s periodic price control. For the avoidance of doubt, the Rules and this Guide do not apply to that separate regime.

<sup>5</sup> See Section 12D of the Act.

- (c) a person whose functions are or include representing those within the preceding two sub-paragraphs in respect of interests of theirs which are materially affected by the decision; and
  - (d) the CCW.
- 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:<sup>6</sup>
  - (a) the Authority failed properly to have regard to, or give appropriate weight to, its duties, strategic priorities and objectives as set out in the Act<sup>7</sup>
  - (b) the decision was based, wholly or partly, on an error of fact;
  - (c) the modifications fail to achieve, in whole or in part, the effect stated by the Authority in its decision;<sup>8</sup>
  - (d) the Authority did not follow the procedure required by the Act;<sup>9</sup>
  - (e) the decision was wrong in law.
- 2.3 To the extent that the CMA does not allow the appeal, it must confirm the decision appealed against.<sup>10</sup>
- 2.4 If the CMA allows the appeal, it must do one or both of the following:<sup>11</sup>
  - (a) quash the Authority's decision (to the extent that the appeal is allowed);
  - (b) remit the matter back to the Authority for reconsideration and determination in accordance with any directions given by the CMA.
- 2.5 The CMA must publish an order containing its determination, with reasons.<sup>12</sup>
- 2.6 Key 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 the appeal, are set out in the Act. The

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<sup>6</sup> See section 12F(4) of the Act.

<sup>7</sup> See Section 2 and Section 2A of the Act.

<sup>8</sup> Under section 12A(9)(b) of the Act the Authority is required to state the effect of the modifications in its decision.

<sup>9</sup> See Sections 12A to 12C of the Act.

<sup>10</sup> See section 12F(5) of the Act.

<sup>11</sup> See Section 12G(1) of the Act.

<sup>12</sup> Section 12I(1) of the Act.

Schedule, however, also provides that the CMA may make rules of procedure regulating the conduct and disposal of these appeals.<sup>13</sup>

- 2.7 The CMA's appeal process may involve the parties to the appeal – the appellant(s) and the Authority – and any interveners (as defined in the Rules). In order to facilitate the conduct of the appeal the CMA will publish non-sensitive versions of certain submissions of the participants, as well as its decisions (as set out in Rule 12.1 and Rule 12.2). The CMA also reserves the right to publish non-sensitive versions of any other document (as set out in Rule 12.3).

### **3. General observations on appeals**

#### **Approach to appeals**

- 3.1 The appeal must be clearly linked to the grounds of appeal set out in the Act and summarised in paragraph 2.2.
- 3.2 The CMA will not consider afresh the appointment modifications imposed 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 Authority. The CMA may 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 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 Authority's duties, strategic priorities and objectives as set out in the Act.<sup>14</sup>
- 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,

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<sup>13</sup> Paragraph 11 of the Schedule.

<sup>14</sup> Section 12F(2) of the Act.

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.<sup>15</sup>

- 3.6 The CMA will seek to narrow the issues and points in dispute during the course of the appeal. It may, for example, seek to do so at appeal management conferences and hearings, or through working papers shared with the parties.

## **Administrative matters**

- 3.7 The CMA's staff team is led by an Appeal Director who is supported by project delivery staff and specialist staff. Participants in the appeal will have a contact in the project delivery 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 the appellant and the Authority with the necessary contact details and publish these details on a designated page on the CMA's website.

## **Pre-appeal**

- 3.8 Any prospective appellant is strongly advised to provide the CMA with reasonable notice that it may appeal a decision of the Authority prior to commencing an appeal under Rule 5.
- 3.9 'Reasonable notice' in this context would typically cover an initial contact with the CMA<sup>16</sup> at the latest two weeks prior to submission of a notice of appeal to warn the CMA of the possibility of an appeal and to provide a high level indication of the likely grounds of that appeal, even if no final decision to appeal has been made. This would usually be supplemented by a further contact at least one week prior to submission to discuss logistical matters for submission of the significant amount of documentation that is contained in a notice of appeal.
- 3.10 These pre-appeal contacts will be treated as confidential between the prospective appellant and the CMA.
- 3.11 The pre-appeal contacts create no obligation on the prospective appellant to submit a notice of appeal or to submit a notice of appeal on the basis of the same grounds that the prospective appellant may have indicated to the CMA.

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<sup>15</sup> Section 12F(3) of the Act.

<sup>16</sup> If a prospective appellant does not possess a named contact at the CMA, these initial contacts can be made to [appeals@cma.gov.uk](mailto:appeals@cma.gov.uk).



They are rather designed to ensure as smooth an appeal process as possible and to assist the CMA with its internal resource allocation, as well as to front-load any logistical issues in terms of the submission of documents. As such, these pre-appeal contacts are beneficial for both the CMA and prospective appellants.

- 3.12 The CMA would also encourage a prospective appellant to inform the Authority that it is considering bringing an appeal. A prospective appellant should tell the CMA in its pre-appeal contacts if it has also contacted the Authority or if it plans to do so.
- 3.13 The CMA expects prospective appellants to have raised calculation errors or other non-contentious errors with the Authority prior to commencing an appeal. This would cover the sort of errors that the prospective appellant would reasonably expect that the Authority may be in a position to correct without argument. The appeal process should be reserved for substantive disagreements between the prospective appellant and the Authority.

## **Time frames**

- 3.14 The Act prescribes the time frames within which various steps in the appeal process must be completed.
- 3.15 The Act requires that applications for permission to appeal must be made within 20 working days, beginning with the first working day after the day on which the Authority's decision is published.<sup>17</sup> An application for permission to appeal is made by submitting a 'notice of appeal' to the CMA. Appellants should be aware that the notice must be submitted within this time and the CMA does not consider it has discretion to grant permission to appeal in respect of notices of appeal not submitted within the statutory deadline.
- 3.16 The Act provides that the CMA will have four months to determine an appeal. This time frame starts from the day on which the CMA grants permission to appeal.<sup>18</sup> 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.<sup>19</sup> If the CMA considers it necessary or appropriate to extend the period of a determination in this way, it will consult with the participants before doing so.

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<sup>17</sup> Paragraph 1(3) of the Schedule.

<sup>18</sup> Section 12H(1) of the Act.

<sup>19</sup> See section 12H(2)-(3) of the Act.

## **Administrative timetable**

- 3.17 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.
- 3.18 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**

- 3.19 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. The CMA will ordinarily address many procedural matters in an appeal (including the examples provided in Rule 14.2) through informal means, without it being necessary to give directions under Rule 14. However, where necessary the CMA will give directions in relation to the conduct of the appeal. Participants may apply for directions or the CMA may of its own volition propose a direction if it 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. 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.
- 3.20 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 considered necessary by the CMA.

## **Appeal management conferences**

- 3.21 Appeal management conferences may be held under Rule 15. These are opportunities for the CMA to manage the appeal. The CMA will expect to invite the parties to the appeal to attend the initial appeal management

conference and any intervener. The CMA may also invite any applicants or potential applicants for permission to intervene.

- 3.22 Active appeal management will be an important tool in ensuring that the CMA makes the right decision in the time allowed.

## Permission stage

- 3.23 The Act requires that permission to appeal is obtained before an appeal can be brought.<sup>20</sup> Applications for permission to appeal are made by submitting a notice of appeal in accordance with Rule 5, within the time frame set out in the Act.<sup>21</sup>
- 3.24 Rule 5.2 provides that a notice of appeal should comprise a main submission (which should include the items set out at Rule 5.2(a)) and a bundle of supporting documentation (which should include the items set out at Rule 5.2(b)). Unless otherwise specified, where the Rules refer to the 'notice of appeal', they refer to all of the content required pursuant to Rule 5.2.
- 3.25 A copy of the Authority's decision is required to be included as part of the bundle under Rule 5.2(b). The CMA is greatly assisted where parties indicate the specific parts of the decision subject to appeal, and where they include copies of prior determinations by the Authority that are relevant to the appeal, with the relevant parts indicated.
- 3.26 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.<sup>22</sup> The CMA would not typically expect the notice of appeal to contain sensitive information that cannot be shared with the Authority. An appellant should contact the CMA in the first instance if there are particular circumstances that may warrant the sharing of a redacted version of the notice of appeal with the Authority.
- 3.27 Once the Authority has received a copy of the notice of appeal it has ten working days,<sup>23</sup> beginning with the first working day after the day it receives the notice of appeal, to make representations or observations to the CMA on whether the CMA should grant permission to appeal. Where the Authority makes representations or observations, the CMA then has ten working

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<sup>20</sup> Section 12D(3) of the Act.

<sup>21</sup> 20 working days beginning with the first working day after the day on which the Authority's decision is published. Paragraph 1(3) of the Schedule.

<sup>22</sup> Paragraph 1(7) of the Schedule and Rule 5.6.

<sup>23</sup> Paragraph 3(2) of the Schedule.

days,<sup>24</sup> beginning with the first working day after the day it receives the Authority's representations or observations, in which to decide whether to grant permission to appeal. If the Authority does not make representations or observations on whether permission to appeal should be granted based on the notice of appeal, the CMA has 14 working days, 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.<sup>25</sup>

- 3.28 The CMA will normally make a decision on permission without a hearing.<sup>26</sup> The CMA may decide to hold a hearing to determine whether permission should be granted either of its own motion or on the application of the appellant, or the Authority. Where it decides to hold a hearing the CMA will notify the appellant, the Authority and such other persons as it considers appropriate.<sup>27</sup> The CMA may also request additional information or representations from the appellant or Authority, copies of which may be sent to the appellant or Authority (as applicable) or such other persons as the CMA considers appropriate (subject to any confidentiality claims made by the appellant or the Authority at the time of submission).
- 3.29 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 materially affected. As noted above in paragraph 2.1, under the Act appeals can only be brought by:
- (a) a company holding an appointment under the relevant Chapter of the Act;
  - (b) certain materially affected appointment holders, water supply licensees or sewerage licensees;
  - (c) a person whose functions are or include representing those within the preceding two sub-paragraphs in respect of interests of theirs which are materially affected by the decision; and
  - (d) the CCW.<sup>28</sup>
- 3.30 The CMA may refuse permission to appeal on one of the following grounds:
- (a) the appellant does not have standing.

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<sup>24</sup> Paragraph 1(10)(a) of the Schedule.

<sup>25</sup> Paragraph 1(10)(b) of the Schedule.

<sup>26</sup> Rule 6.1.

<sup>27</sup> Rule 6.3.

<sup>28</sup> Section 12D(2) of the Act.

(b) the appeal is brought for reasons that are trivial or vexatious.

(c) the appeal has no reasonable prospect of success.<sup>29</sup>

- 3.31 Rule 5.2(a) requires that appellants clearly set out as part of their main submission why they consider that they have standing to appeal. It is important that the CMA has sufficient detail to be able quickly to establish whether an appellant has standing. Where an appellant is claiming to be materially affected it should clearly and concisely set out the interest that is affected and how it is affected. Where an appellant is a person representing materially affected appointees or licence holders it should clearly evidence that the person has the authority to represent these appointees or licence holders.
- 3.32 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/or consider the appeal together with other appeals.<sup>30</sup> Where the CMA is considering granting permission to appeal subject to conditions, it may inform the parties to the appeals and may invite them to make representations.
- 3.33 Although the CMA may allow the filing of further submissions and evidence either informally or by issuing a direction under Rule 14, the CMA will not allow this Rule to be used to circumvent the time limit by which a notice of appeal must be submitted.
- 3.34 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 Act<sup>31</sup> 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 interested third parties (including any company holding an appointment under the relevant Chapter of the Act the conditions of which the Authority has decided to modify who has not applied for permission to appeal). However, Rule 6.3 does allow for a hearing, and notice to parties to the appeal and other persons where the CMA considers it appropriate.<sup>32</sup>

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<sup>29</sup> Section 12D(4) of the Act.

<sup>30</sup> Paragraph 1(11) of the Schedule.

<sup>31</sup> Section 12D(4) of the Act.

<sup>32</sup> The CMA does not expect the Authority's representations or observations on the application for permission to bring an appeal to be available to participants (other than the appellant – see paragraph 3(5) of the Schedule) prior to making its decision on the application. However, the CMA may publish a non-sensitive version of the Authority's representations or observations on its website (see Rule 12).

## Suspension of the Authority's decision

- 3.35 The Schedule allows the CMA, upon the appellant's application, to suspend the Authority's decision where the appellant (or, where the appellant is within section 12D(2)(c) or (d) of the Act, those represented by the appellant, or consumers, respectively) would incur significant costs if the decision were to have effect before the determination of the appeal and the balance of convenience<sup>33</sup> does not otherwise require effect to be given to the decision pending that determination.<sup>34</sup> Having regard to these factors, in order to make a direction suspending the Authority's decision, the CMA will require evidence from the appellant of the costs involved if the appointment modification is not suspended and will consider whether such costs are likely to outweigh the public benefit of allowing the appointment modification in question to operate, pending the determination of the appeal. The CMA will also take into account whether there may be an opportunity for appropriate adjustments to be made to the relevant appointment condition, if any part of the appeal is successful.
- 3.36 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).<sup>35</sup> 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<sup>36</sup> and a non-sensitive version of the application to any company holding an appointment under the relevant Chapter of the Act the conditions of which the Authority has decided to modify.<sup>37</sup>
- 3.37 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.
- 3.38 In making an application for the suspension of the Authority's decision, the appellant should clearly set out why it believes that it would incur significant costs if the decision were to have effect before the determination of the

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<sup>33</sup> In applying this test the CMA will consider the risk of damage to the appointment holder and other materially affected persons if the decision were to be suspended.

<sup>34</sup> Paragraph 2(3) of the Schedule. Paragraph 2(2) of the Schedule also includes provision for suspension of decisions of the Authority which are already has effect by virtue of Section 12B of the Act.

<sup>35</sup> Paragraph 2(3)(a) of the Schedule.

<sup>36</sup> Paragraph 2(5) of the Schedule.

<sup>37</sup> Rule 7.6.

appeal and why the balance of convenience favours the suspension of the decision.

3.39 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 this application.<sup>38</sup> Any company holding an appointment under the relevant Chapter of the Act the conditions of which the Authority has decided to modify must send any submissions in relation to suspension of the Authority's decision to the CMA within five working days, beginning with the first working day after the day on which it receives the notification of the application for suspension.<sup>39</sup> 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.<sup>40</sup> 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.<sup>41</sup>

3.40 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 whether to grant permission to appeal. Where the CMA decides to hold a hearing in relation to the suspension application, it will notify the appellant, the Authority, any company holding an appointment under the relevant Chapter of the Act the conditions of which the Authority has decided to modify and any other person the CMA considers appropriate.<sup>42</sup> The CMA may also request additional information or representations from the appellant or Authority, copies of which may be sent to the appellant or Authority (as applicable) or such other persons as the CMA considers appropriate (subject to any confidentiality claims made by the appellant or the Authority at the time of submission).

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<sup>38</sup> Paragraph 3(2) of the Schedule.

<sup>39</sup> See Rule 7.9.

<sup>40</sup> Paragraph 2(4)(a) of the Schedule.

<sup>41</sup> Paragraph 2(4)(b) of the Schedule.

<sup>42</sup> See Rule 7.11.

## 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 1 of the Schedule and with Rule 5.
- 4.2 To assist the appellant in complying with Rule 5.6 (sending a non-sensitive notice to any company holding an appointment under the relevant Chapter if the Act the conditions of which the Authority has decided to modify), the CMA expects the Authority to append a list of those companies to its decision. If necessary if this list has not been provided, the appellant should contact the Authority.
- 4.3 The main submission required under Rule 5.2(a) 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 and should highlight the significance of supporting documentation included in the bundle required under Rule 5.2(b) to particular grounds of appeal.
- 4.4 Unless notified otherwise by the CMA, documents must be sent to the CMA by email. The CMA may request hard copies if it considers it necessary based on the circumstances of the case.<sup>43</sup>
- 4.5 The CMA has no power to extend the period of time within which a notice of appeal must be submitted.

### The Authority's representations or observations

- 4.6 If the Authority wishes to make representations or observations on whether permission to appeal should be granted, on an application for suspension of its decision or in relation to the reasons for its decision and/or any of the grounds of appeal, it must submit those representations or observations under the relevant Rule.<sup>44</sup> The Authority must send a copy of any such

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<sup>43</sup> Where the CMA has requested hard copies, it will, by prior arrangement, accept delivery of documents at any time up to midnight on the last day on which delivery can be made. Appellants that need 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.

<sup>44</sup> Rule 6.2 in respect of permission to appeal, Rule 7.8 in respect of suspension applications and Rule 9.1 in respect of its reasons for its decision and/or in respect of any of the grounds of appeal.



representations or observations to the appellant within the deadline for the Authority to make the submission to the CMA under the relevant Rule.<sup>45</sup>

- 4.7 Where the CMA has granted permission to appeal, the Authority may send a response to the CMA setting out its representations or observations 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 representations or observations.<sup>46</sup> The Authority's representations or observations 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 evidence in the form of witness statements, expert reports or documents it wishes to adduce in support of its statement. Where the Authority wishes to rely on interlinkages with other parts of its decision, it should include a description of these interlinkages in its statement.
- 4.8 The Authority should also at the same time provide a non-sensitive version of the statement in response. A non-sensitive version of any witness statements, expert reports or documents adduced in support of that statement should follow as soon as reasonably practicable but at the very latest by the end of the second working day following the date on which the sensitive versions were submitted to the CMA.<sup>47</sup> The CMA will publish on its website a non-sensitive version of the statement filed in response under Rule 9.3(a) as soon as reasonably practicable following receipt.

### **Withdrawal of appeals and summary determinations allowing an appeal**

- 4.9 Where the CMA grants permission to an appellant to withdraw its appeal, pursuant to an application made under Rule 8.1, it will make the appropriate determination, having regard to all the circumstances. It will make an order for its own costs that reflects the nature of the determination, in accordance with Rule 20.1 and paragraph 12 of the Schedule.<sup>48</sup> The CMA in such

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<sup>45</sup> Paragraph 3(5) of the Schedule.

<sup>46</sup> Paragraph 3(4) of the Schedule.

<sup>47</sup> Rule 9.5.

<sup>48</sup> See paragraph 12(1) and 12(2) of the Schedule.

circumstances may also make an order for payment of inter partes costs under Rule 20.3, having regard to the factors set out in Rule 20.5.<sup>49</sup>

- 4.10 Where the CMA makes a summary determination allowing the appeal, pursuant to an application under Rule 8.2, it will make an order against the Authority requiring the payment to the CMA of the costs incurred by the CMA in connection with the appeal.<sup>50</sup> In such circumstances, the CMA may also require the Authority to pay the costs that the appellant has reasonably incurred in connection with the appeal.<sup>51</sup>
- 4.11 Any costs of the CMA relating to a withdrawn application for suspension of the Authority's decision will be taken into account when, having determined the appeal, the CMA makes an order for recovery of its own costs incurred in connection with the appeal. The CMA may require the appellant to pay the Authority's costs reasonably incurred in connection with a withdrawn application for suspension, even where the appeal is successful.
- 4.12 All such orders for costs will be made in accordance with the process set out in Rule 20. Paragraphs 6.1 and following below discuss orders for costs in more detail.

## **Interveners and other third party involvement**

- 4.13 Although the Act does not set up a formal framework for intervention in appeals, the CMA recognises that certain third parties should be granted permission to intervene in an appeal. Interveners typically play a greater role than other third parties in an appeal. For instance, interveners may be permitted to:
- (a) attend hearings at the CMA's discretion; and
  - (b) comment on any provisional determination, in relation to the grounds on which permission to intervene has been granted.
- 4.14 Rule 10 sets out the requirements for seeking permission to intervene in an appeal.
- 4.15 In considering whether to grant permission to intervene under Rule 10.2, the CMA will take account of all the circumstances, including:

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<sup>49</sup> See paragraph 12(3) of the Schedule.

<sup>50</sup> See footnote 48 above.

<sup>51</sup> See footnote 49 above.

- (a) whether the applicant is materially interested in the outcome of the appeal;
  - (b) whether the applicant's intervention in the appeal will assist the CMA to determine the appeal; and
  - (c) whether granting permission to intervene would be proportionate in the circumstances.
- 4.16 The CMA will normally regard as being materially interested in the outcome of the appeal any company, person or association<sup>52</sup> who could themselves have appealed to the CMA against the appealed decision but who is not an appellant against that decision. With regard to other persons, the CMA will have regard to whether the outcome of the appeal will have a direct and material impact on that person (or in the case of a representative organisation, those whom the organisation represents).
- 4.17 The CMA would not regard interventions duplicative of the arguments of the parties to the appeal or an intervener as assisting it to determine the appeal. On the other hand, the CMA may regard as being of assistance in its determination of the appeal an intervention that adds something material over and above the arguments or evidence already submitted by the parties to the appeal or by other interveners. The CMA would also not regard interventions as assisting it to determine the appeal where interventions are principally concerned with matters to which the CMA must not have regard when determining the appeal under the Act.<sup>53</sup> The CMA is likely to take a similar view where permitting an intervention risks creating a proliferation of documents or evidence or otherwise risks having an adverse effect on the CMA's ability to determine the appeal in accordance with the overriding objective (see Rule 4.1).
- 4.18 When considering whether granting permission to appeal would be proportionate, the CMA may take into consideration any relevant matter, including the scope of the intervention in terms of grounds of appeal covered and arguments raised, the value of the appointee's business to which the appointment modification relates, as well as the potential added cost to the parties and the CMA of dealing with such intervention(s). The CMA may also consider whether an alternative means of third party involvement is more appropriate in the circumstances, such as requesting an applicant to re-submit its evidence under Rule 14.4(e). The CMA may, on the basis of

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<sup>52</sup> See Section 12D(2) of the Act. Under the Act, the only association that can bring an appeal is the CCW.

<sup>53</sup> Section 12F(3) of the Act.

proportionality concerns, also elect to limit an intervention to particular grounds of appeal.

- 4.19 The application should indicate the degree of involvement in the appeal that the applicant would wish to have, if it was granted permission to intervene, such as whether it would wish to have no further involvement beyond the submissions made in its application or whether it would wish to attend hearings and to make its own oral representations to the CMA.
- 4.20 Any person considering whether to make an application for leave to intervene will assist the CMA by advising it at the earliest opportunity that it is considering whether to do so. The CMA encourages persons who are minded to support one party to liaise with that party (and with each other, as the case may be) in order to reduce cost, delay and duplication as far as possible.
- 4.21 The CMA may of its own motion issue any directions it considers fit to interveners, including where practicable and appropriate that two or more interveners liaise with each other (and/or the party whom they support) to reduce duplication, or that they file joint submissions.
- 4.22 In addition to the above, the CMA at any time may of its own motion invite representations from any person whom it appears to the CMA may be affected by the outcome of the appeal pursuant to Rule 14.4(e).

## **Written submissions and other documentation**

- 4.23 The CMA expects 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, whether by formal directions under Rule 14 or through informal means. If participants consider that there are good reasons why it is appropriate to make submissions or provide supplementary evidence later in the appeal, they can apply for directions under Rule 14 to make such submissions or provide such supplementary evidence. The application should include an explanation as to why it is appropriate for them to make the submissions or provide supplementary evidence and why it was not possible to do so earlier in the appeal process.
- 4.24 Participants should not submit supplementary submissions or provide supplementary evidence without a request or direction from the CMA to do so. The CMA reserves the right to reject unsolicited submissions. Parties are reminded that the conduct of the parties is taken into account for the purposes of cost orders under Rule 20.

- 4.25 Participants must also comply with any page limits set by the CMA in relation to written submissions.
- 4.26 The CMA expects the parties to provide it with a coherent and readily comprehensible explanation of the 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. As a result, in addition to any glossary that the parties choose to include in their submissions, the CMA will expect them to agree a glossary between them shortly after permission to appeal is granted, 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 the appeal about the use of a term, that disagreement should be stated and the competing understandings set out concisely.
- 4.27 The CMA will also find it helpful to see a chronology of the modification proposal from its inception to 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 the development of the appointment modification proposal up to the point at which the Authority published its decision. The chronology should be uncontroversial and should be agreed if possible. Where there is disagreement between the parties to the appeal about an event or description of it, that disagreement should be stated and the competing versions set out concisely.
- 4.28 Where parties seek to rely on and attach supporting documentation at any stage of the appeal, parties should take care to explain clearly the relevance of the document, including pointing the CMA to relevant extracts of the document that relate to specific grounds of appeal or arguments advanced. The CMA reserves the right to disregard lengthy supporting documents submitted with no explanation given or where the parties have not cited specific references in their submissions. Parties should attach documents or extracts of documents to the relevant submission and should not only provide internet links to the relevant content.

## **Appeal management**

- 4.29 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.

## Considering appeals together

- 4.30 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.<sup>54</sup> The Rules include provision for directions being made by the CMA relating to considering appeals or parts of appeals together.
- 4.31 Individual appellants and the Authority will be invited to make representations before the CMA makes any decision to consider appeals together in whole or in part. Once appeals are consolidated in whole or in part, the CMA will work with the parties on administrative matters needed to ensure the appeals considered together proceed in accordance with the overriding objective in Rule 4. The CMA will aim to make clear early in the appeal process the process it intends to follow to facilitate considering appeals together, taking into account the specific circumstances of the case.
- 4.32 This process may include measures such as confidentiality rings and encouraging joint representations or responses to questions on particular issues by joined appellants where this is appropriate and proportionate in the circumstances. It may in some circumstances also be appropriate for the parties to appoint a primary spokesperson.
- 4.33 The CMA may also take appropriate measures to facilitate joint hearings and may require parties to make joint submissions in respect of particular grounds of appeal, where it is appropriate to do so. The CMA will take into account confidentiality concerns between joined parties to appeals when making these arrangements (for instance, by limiting attendance to parties' professional advisers where necessary).
- 4.34 The CMA will typically produce one final decision in relation to appeals dealt with together, or, in the case of appeals considered together only in part, one final decision in relation to the parts of the respective appeals considered together. Where circumstances justify a different approach, the CMA will produce separate decisions even where appeals are consolidated in whole or in part.

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<sup>54</sup> Paragraph 1(11)(c) of the Schedule.

## Witness statements and expert reports

- 4.35 A witness statement or expert report must be verified by a statement of truth,<sup>55</sup> signed by the witness or expert.
- 4.36 Witness statements and expert reports 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 or expert report is made, the initials and surname of the witness or expert, the number of the statement or report in relation to that witness or expert, the identifying initials and number of each exhibit referred to and the date the statement or report was made;
  - (c) state the full name of the witness or expert;
  - (d) state their place of residence or, if the statement or report is made in a professional, business or other occupational capacity, the address at which they work and the position held and the name of the firm or employer;
  - (e) state the occupation of the witness or expert (and, in the case of experts, state the expert's qualifications);
  - (f) state the relationship of the witness or expert to the party on whose behalf the evidence is given; and
  - (g) be in numbered paragraphs and paginated.
- 4.37 In a witness statement or expert report, the witness or expert must indicate which of the statements are made from their own knowledge and which are matters of information or belief. In relation to matters of information or belief, the witness or expert should state the source of that information or belief (including, in the case of experts, details of any literature or other material relied on in making the report).
- 4.38 In the case of experts, where there is a range of opinion on a matter dealt with in the report, the expert should summarise the range of opinion and give

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<sup>55</sup> Paragraph 13(1) 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.

reasons for their own opinion. The expert should also detail any qualifications to which their opinions are subject.

- 4.39 A witness statement or expert report should be as concise as the circumstances allow and should only contain content that is relevant to appellant's grounds of appeal. It should not contain long quotations from documents. Documents used in conjunction with a witness statement or expert report should be verified and identified by the witness or expert and placed in an exhibit separate from the witness statement or expert report. The location of the document in the exhibit should be set out in the witness statement or expert report.
- 4.40 Where the witness or expert refers in a witness statement to correspondence, the letters should be collected together and exhibited in chronological order with the earliest at the top.
- 4.41 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.

## Hearings

- 4.42 The CMA will not normally conduct hearings in public. The CMA will consider whether hearings should be held in person, virtually or on a hybrid basis in accordance with the overriding objective in Rule 4.
- 4.43 The CMA may conduct separate hearings with the appellant and the Authority which the appellant or Authority (as applicable), as well as any interveners may attend as observers.
- 4.44 In order to obtain clarification on aspects of the parties' appeals, the CMA may hold clarification hearings in advance of the main hearing or may request written clarifications (whether in response to CMA working papers or otherwise), as appropriate to further the overriding objective in Rule 4. These hearings and / or written clarifications are primarily designed to allow the Group<sup>56</sup> to ask questions about a case. The CMA may decide to use these hearings and / or written clarifications to focus on narrow areas of appeals that require clarifications.
- 4.45 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

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<sup>56</sup> This is a group of the CMA's members, formed for the purpose of carrying out the CMA's functions. See paragraph 4 of the Schedule.



a stand-alone hearing or to all or part of any hearing with the appellant and the Authority. The CMA may of its own initiative invite interveners to attend any hearing.

- 4.46 Hearings will normally be held with the Group, although CMA staff will also participate. The CMA will determine the appropriate structure and substance to be covered in the hearings. Subject to the CMA's direction on the topics to be covered, 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.
- 4.47 Hearings are formal and will normally be led by the chair of the Group or by such other member of the CMA as appropriate.
- 4.48 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. An electronic copy of any presentation or exhibits used by the parties must be provided to the CMA.
- 4.49 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. The CMA may share a non-sensitive version of the transcript with such other persons as it considers appropriate based on the circumstances of the case.

## **Staff meetings**

- 4.50 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 issues concerning any economic models relevant to

the appeal. A transcript will normally be taken but where practical other participants may be invited to send observers.

## **Confidentiality and Freedom of Information**

- 4.51 The Act makes provision for the exclusion from the published version of the CMA determination of:
- (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.
- 4.52 Provision for the protection of sensitive information (as defined in the Rules) is also included in the Rules (see, for example, Rule 11).
- 4.53 Participants' attention is also drawn to section 206 of the Act which contains general restrictions on the disclosure by the CMA of information obtained under or by virtue of the provisions of the Act which relate to the affairs of any individual or to any particular business. Section 206 of the Act makes certain exceptions to those restrictions, including provision permitting disclosures made with consent of the individual or the person for the time being carrying on the business (section 206(1) of the Act) or made for the purpose of facilitating the performance of the functions of the CMA, the Authority or other specified persons (section 206(3)(a) and 206(4) of the Act).
- 4.54 The CMA considers that in most cases, section 206 of the Act will enable the CMA to disclose to the parties or potential parties to the appeal any submissions received from another party in the proceedings, subject to any redactions it considers appropriate to safeguard any confidentiality concerns.
- 4.55 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.
- 4.56 Where it can do so while 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 participants, other than communications of a purely administrative nature, and transcripts of hearings to other participants.
- 4.57 The CMA may propose that disclosure of certain information should be made solely within a 'confidentiality ring', normally comprising the participants'

named legal representatives and, possibly, other external advisers or experts such as accountants and economists, subject to appropriate confidentiality undertakings, rather than to the participants themselves. The CMA will seek views from the participants as to whether a confidentiality ring is necessary. Where some grounds of appeal have been joined, it may be appropriate to establish multiple confidentiality rings.

- 4.58 Exceptionally, claims may be made that certain information is of such sensitivity that it should not be disclosed within the confidentiality ring.
- 4.59 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.
- 4.60 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 may issue a provisional determination depending on the circumstances of the case stating its provisional conclusions which will be notified to the parties to the appeal, as well as to 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 If issued, the provisional determination will be notified to the parties, as well as to any interveners. The CMA does not generally expect to publish its provisional determination and, where it does, it will consider the extent to which any information contained within it will remain subject to the controls in section 206 of the Act. Parties are also reminded that the contents of the provisional determination may be price-sensitive information whose disclosure is prohibited under the Criminal Justice Act 1993 or relevant Financial Conduct Authority Rules.

- 5.3 The CMA may publish a summary of the provisional determination where considered appropriate based on the circumstances of the case.

## 6. Costs

### The CMA's costs

- 6.1 Under the Act, the CMA is required to make an order requiring the payment of its own costs incurred in connection with the appeal.<sup>57</sup> Such an order must require those costs to be paid:
- (a) where the appeal is allowed in full, by the Authority;
  - (b) where the appeal is dismissed in full, by the appellant; or
  - (c) where the appeal is partially allowed, by one or more parties in such proportions as the CMA considers appropriate in all the circumstances.
- 6.2 When considering the appropriate proportions of the CMA's costs to be paid by one or more of the parties where an appeal is partially allowed, the CMA will ordinarily follow the principle that costs follow the outcome of the appeal. This means that the Authority should normally pay the proportion of the CMA's costs incurred in connection with any appeal grounds allowed, and that the appellant should normally pay the proportion of the CMA's costs incurred in connection with the dismissed appeal grounds. The CMA will, however, also consider whether for each ground there are any good reasons to depart from this approach. The CMA might, for example, consider that good reasons exist for these purposes where a relevant ground of appeal is dismissed, but the CMA considers the ground of appeal was reasonably made in view of a relevant error made by the Authority in its decision and that error had a material impact on the time and expense of the CMA in addressing the ground of appeal to which it relates. In such a situation, the CMA might consider it appropriate for the Authority to pay the proportion of the CMA's costs incurred in connection with the relevant ground of appeal, notwithstanding that the ground of appeal was dismissed. This is likely to depend upon the magnitude of the error and whether the Authority had a reasonable opportunity to correct it prior to making its decision and whether the appellant could have reasonably raised the error with the Authority prior to initiating an appeal.
- 6.3 Before making any order for payment of its own costs, the CMA will provide the parties with a provisional determination on the CMA's costs and a draft of

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<sup>57</sup> Paragraph 12(1) of the Schedule.

the costs order and give them a reasonable opportunity to make representations on each.

## Inter partes costs

- 6.4 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.<sup>58</sup> The CMA may have regard to all the circumstances, including (as set out in Rule 20.5) the conduct of the parties, a party's degree of success and the reasonableness and proportionality of the costs claimed.<sup>59</sup> In addition, the CMA considers that the principles as set out in *BT v Ofcom*<sup>60</sup> apply where a regulator is carrying out its regulatory functions and that this is relevant in considering what costs order, if any, to make in relation to *inter partes* costs noting that an *inter partes* order is discretionary. The CMA does not have the power to order costs against or for interveners.
- 6.5 Before making any order for costs under Rule 20.3, the CMA will provide the parties with a provisional determination on costs and a draft of the costs order and give them a reasonable opportunity to make representations on each.
- 6.6 Where the CMA makes an order for costs in favour of one or more of the parties to the appeal under Rule 20.3, 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.
- 6.7 Any party to the appeal seeking an award of costs in its favour should file a statement of costs when invited by the CMA, which should be disclosed to any party to the appeal who may become liable to pay those costs.
- 6.8 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 hours claimed, hourly rate, position of the fee earner and the nature of the work performed.

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<sup>58</sup> Paragraph 12(3) of the Schedule.

<sup>59</sup> The proportionality of the costs claimed will be assessed having regard to the matters in issue.

<sup>60</sup> *British Telecommunications plc v Office of Communications* [2018] EWCA Civ 2542.

- 6.9 Each statement of costs should be signed by the party to the appeal or, where applicable, its legal representative.
- 6.10 The CMA will normally publish non-confidential versions of any final determination on both the CMA's costs and inter partes costs on its website.