

# Regulatory appeals rules and guidance: energy, water, airports and air traffic services

12 July 2022

CMA165con

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# 1. Introduction

1.1 The Competition and Markets Authority (CMA) is consulting on:

(a) draft changes to the following existing rules and guidance:

- i. [Energy Licence Modification Appeals: Competition and Markets Authorities Rules \(CMA70\)](#) (Energy Rules) and [Energy Licence Modification Appeals: Competition and Markets Authorities Guide \(CMA71\)](#) (Energy Guidance);
- ii. [Competition Commission Airport Licence Condition Appeal Rules \(CC19\)](#) (Airport Rules) and [Airport Licence Condition Appeal Rules: Competition Commission Guide \(CC20\)](#) (Airport Guidance);  
and

(b) draft new rules and guidance for the CMA's new regulatory appeals functions:

- i. water appointment modification appeals relating to matters other than the periodic price review (Water Rules and Water Guidance);
- ii. air traffic services licence modification appeals (Air Traffic Services Rules and Air Traffic Services Guidance).

## Background

1.2 In December 2021, the CMA published an [open letter](#), calling for views on whether to make changes to its existing rules and guidance for energy and airport appeals.

1.3 In addition, the CMA also sought views on the rules and guidance the CMA should adopt for the new appeal functions it gained in 2021. The CMA's new appeal functions are to hear licence modification appeals in water (relating to matters other than the periodic price review) and air traffic services.

1.4 The open letter sought views in particular on the following key areas:

- i. Pre-appeal stage;
- ii. Process for serving of documents, including any changes to reflect developments in technology;
- iii. Procedures for hearing multiple, linked, appeals;

- iv. Management by the CMA of the submission of evidence, including any evidence beyond the notice of appeal, response and reply;
- v. Interveners;
- vi. Role and number of hearings (clarification hearings, main hearings, and relief hearings) at different stages of the appeal; and
- vii. Cost process.

1.5 The rationale for this consultation is twofold.

1.6 First, following recent cases including the [Energy Licence Modification Appeals 2021](#) (ELMA), which was the largest case to date under the licence modification appeals regime, the CMA identified areas for clarification in our existing Energy Rules and Energy Guidance.

1.7 Second, in 2021, the CMA gained new functions to hear licence modification appeals in:

(a) water (relating to matters other than the periodic price review), as a result of the Environment Act 2021 which amended the Water Industry Act 1991; and

(b) air traffic services, as a result of the Air Traffic Management and Unmanned Aircraft Act 2021 which amended the Transport Act 2000.

As such, the CMA also plans to introduce new rules and guidance for the new appeal functions gained by the CMA.

1.8 Gaining these new functions has given the CMA a good opportunity to engage with interested stakeholders, and to take stock of the existing rules and guidance. The CMA has in particular considered whether the existing rules and guidance are as effective as possible in achieving the relevant objectives.<sup>1</sup> In doing so, the CMA has considered whether certain improvements could be made to the existing rules and guidance. We have also considered how these improvements might be incorporated into the Water Rules, Water Guidance, Air Traffic Services Rules and Air Traffic Services Guidance.

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<sup>1</sup> Specifically the overriding objective stated in each of the existing appeal rules within scope are as follows: (i) Energy Licence Modification appeals, Rule 4: to enable the CMA to dispose of appeals fairly and efficiently and at proportionate cost within the time periods prescribed by the relevant legislation; and (ii) Airport Licence Condition appeals, Rule 3: to enable the Competition Commission to exercise its functions fairly, efficiently and in accordance with the time limits prescribed by the Civil Aviation Act 2012.

## Consultation process

### *How to respond*

- 1.9 We are publishing this consultation document on the CMA webpages and drawing it to the attention of a range of stakeholders. We invite and welcome comments on our proposed amendments to the existing rules and guidance (Energy Rules, Energy Guidance, Airports Rules, Airports Guidance), as well as the new sets of rules and guidance (Water Rules, Water Guidance, Air Traffic Services Rules, Air Traffic Services Guidance).
- 1.10 We encourage you to respond to the consultation in writing (by email) using the contact details provided below. Please provide supporting evidence or examples for your views where possible.
- 1.11 When responding to this consultation, please state whether you are responding as an individual or are representing the views of a group or organisation. If the latter, please make clear who you are representing and their role or interest.
- 1.12 In accordance with our policy of openness and transparency, we will publish non-confidential versions of responses on our webpages. If your response contains any information that you regard as sensitive and that you would not wish to be published, please provide at the same time a non-confidential version for publication on our webpages which omits that material and which explains why you regard it as sensitive (see also paragraph 1.18 below).

### *Duration*

- 1.13 ***The consultation will run from 12 July to 9 August. Responses should be submitted by email by 5:00 p.m. on 9 August 2022 and should be sent to: [licenceappealsproject@cma.gov.uk](mailto:licenceappealsproject@cma.gov.uk).***

### *Compliance with government consultation principles*

- 1.14 In preparing this consultation document, the CMA has taken into account the published [government consultation principles](#), which set out the principles that government departments and other public bodies should adopt when consulting with stakeholders.

### ***Statement about how we use information and personal data that is supplied in consultation responses***

- 1.15 Any personal data that you supply in response to this consultation will be processed by the CMA, as controller, in line with data protection legislation. This legislation is the General Data Protection Regulation 2016 (GDPR) and

the Data Protection Act 2018. 'Personal data' is information which relates to a living individual who may be identifiable from it.

- 1.16 We are processing this personal data for the purposes of our work. This processing is necessary for the performance of our functions and is carried out in the public interest, in order to take consultation responses into account and to ensure that we properly consult on the proposed recommendation to the Secretary of State before it is finalised.
- 1.17 For more information about how the CMA processes personal data, your rights in relation to that personal data, how to contact us, details of the CMA's Data Protection Officer, and how long we retain personal data, see our [Privacy Notice](#).
- 1.18 Our use of all information and personal data that we receive is also subject to Part 9 of the Enterprise Act 2002. We may wish to refer to comments received in response to this consultation in future publications. In deciding whether to do so, we will have regard to the need for excluding from publication, so far as practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, might, in our opinion, significantly harm the individual's interests, or, as the case may be, the legitimate business interests of that business. If you consider that your response contains such information, please identify the relevant information, mark it as 'confidential' and explain why you consider that it is confidential. When submitting your response, please also let us know if you wish to remain anonymous.
- 1.19 Please note that information and personal data provided in response to this consultation may be the subject of requests by members of the public under the Freedom of Information Act 2000. In responding to such requests, we will take fully into consideration representations made by you in support of confidentiality. We will also be mindful of our responsibilities under the data protection legislation referred to above and under Part 9 of the Enterprise Act 2002.
- 1.20 If you are replying by email, this statement overrides any standard confidentiality disclaimer that may be generated by your organisation's IT system.

### ***Next steps***

- 1.21 After the consultation, the CMA will consider the submissions received and prepare a response, alongside finalised rules and guidance for energy, water, airports and air traffic services.

1.22 The CMA will publish its response and finalised rules and guidance on <http://www.gov.uk/cma>. The CMA will also publish the responses received during the consultation (with any confidential information redacted). These documents will be available on our webpages and respondents will be notified when they are available.



## 2. Scope of consultation

- 2.1 Taking into consideration the responses received<sup>2</sup> to the CMA's open letter, the CMA has proposed a number of amendments to the existing Energy Rules, Energy Guidance, Airports Rules and Airports Guidance which we summarise below, and which are set out in the revised draft versions of the relevant rules and guidance documents.
- 2.2 The CMA has also taken into account the responses received to the CMA's open letter in drafting the Water Rules, Water Guidance, Air Traffic Services Rules and Air Traffic Services Guidance. Our approach to developing new rules and guidance for these new appeal functions has been to model them on the existing rules and guidance where possible (taking into account the improvements that we are proposing in this consultation).
- 2.3 The Water Rules and Water Guidance are modelled on the amended Energy Rules and Energy Guidance since the statutory framework for the water appeal function is similar to that of energy. Any differences between the two sets of rules and guidance reflect any relevant differences in the underlying legislative frameworks. Similarly, the Air Traffic Services Rules and Air Traffic Services Guidance are modelled on the amended Airports Rules and Airports Guidance, again with any differences between the two reflecting any relevant differences in the underlying legislative frameworks.
- 2.4 In addition to making improvements to the existing rules and guidance, taking into account the responses to the CMA's open letter, the CMA is proposing a number of changes to align the rules and guidance for each of the appeals functions as much as possible.<sup>3</sup>
- 2.5 We explain in more detail below the changes that we are proposing to make, taking into account the feedback we received in response to the CMA's open letter. We also explain some additional changes that we are proposing.

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<sup>2</sup> The CMA received a total of 9 responses to the open letter. Respondents consisted of regulators (CAA, Ofgem), licensees (Electricity North West, Centrica, National Grid, Heathrow) as well as law firms and other professional services firms (Linklaters, Freshfields, Norton Rose Fulbright, Allen & Overy, First Economics).

<sup>3</sup> For example, the Airports Rules did not previously have a rule dealing with the withdrawal of an appeal. We propose to add a rule (Rule 7) which is similar to the equivalent rule in the Energy Rules (Rule 8) and have also included a similar rule in the Water Rules and Air Traffic Services Rules. Similarly, we propose to add sections to the Airports Guidance setting out the approach to appeals and administrative matters (see paragraphs 3.2 to 3.9), again modelled on the amended equivalent sections in the Energy Guidance (see paragraphs 3.1 to 3.7), and also propose to add those sections to the Water Guidance and Air Traffic Services Guidance.

## *Pre- appeal stage*

- 2.6 The existing rules and guidance do not include specific requirements for engagement with the CMA at the pre-appeal stage (ie prior to the submission of a notice of appeal).<sup>4</sup> The CMA considers that engagement at the pre-appeal stage can be useful in enabling the CMA to manage the appeals more efficiently, in line with the overriding objective set out in the rules,<sup>5</sup> in particular by assisting with its internal resource allocation and to front-load any logistical issues in terms of the submission of documents. As such, we sought views on the pre-appeal stage in the open letter.
- 2.7 There was general agreement from respondents that there was merit in providing certain pre-appeal information to the CMA as appropriate to support the CMA's effective disposal of the appeals. This is, as noted above, to allow effective preparation by the CMA for the case. However, we received differing views in the responses regarding whether it was appropriate to include any formal requirements to engage in pre-action correspondence. The regulators that responded<sup>6</sup> requested a formal requirement to inform them of potential appeals, whereas prospective appellants generally submitted that the provision of pre-appeal information should not be formalised in rules, citing the short timelines that prospective appellants needed to meet in order to submit an application to appeal (particularly for listed companies that need to adhere to internal governance processes), and that formal decisions to appeal were often not taken until very close to the deadline for submission of an appeal.
- 2.8 We propose to include in each guidance document an indication of the steps that we would like prospective appellants to take at the pre-appeal stage. In particular, we propose to state that prospective appellants should be strongly advised to provide the CMA with 'reasonable notice' that it may appeal a decision of the regulator.<sup>7</sup> The draft guidance for each appeal function includes an explanation of what the CMA considers to constitute 'reasonable notice', as well as certain other related provisions.
- 2.9 In line with the feedback from some respondents that we should not include a formalised requirement to provide pre-appeal information, we have not proposed to include a rule requiring pre-appeal engagement, but have rather sought to address the issue in guidance in a way that provides a degree of

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<sup>4</sup> The Airports Guidance currently includes a brief reference to pre-appeal contacts at paragraph 21.

<sup>5</sup> See Rule 4 in the proposed Airports Rules, Energy Rules, Water Rules and Air Traffic Services Rules.

<sup>6</sup> CAA and Ofgem.

<sup>7</sup> See paragraphs 3.8-3.9 of the proposed Energy Guidance, paragraphs 3.8-3.9 of the Water Guidance, paragraphs 3.11-3.12 of the Airports Guidance, and paragraphs 3.11-3.12 of the Air Traffic Services Guidance.

flexibility. The CMA recognises that decisions about whether to appeal and on what grounds may only be taken formally at a late stage. Our proposed guidance on pre-appeal contacts is intended to set the expectation that prospective appellants will typically only be expected to provide a limited amount of high level information on a confidential basis. The CMA also recognises that doing this in no way commits prospective appellants to bringing an appeal.

- 2.10 We do not consider it appropriate for the CMA's rules to include a formal requirement to contact the relevant regulator. However, we propose to state in guidance that the CMA encourages prospective appellants to inform their respective regulator that they are considering bringing an appeal at pre-appeal stage, as a matter of best practice, as this could also help with ensuring effective management of the appeal, given the tight deadlines in the early stages of any appeal.
- 2.11 We also propose to amend the guidance<sup>8</sup> to clarify our expectation that prospective appellants should in the first instance make contact with their respective regulators, where the licence modification concerns what they consider to be manifest errors, such as errors in the calculations made in setting the level of the price control, or other non-contentious errors, before submitting an appeal to the CMA. We consider that this would be good practice and would enable licensees first to explore with their regulators whether a solution could be found without submitting an appeal. Ofgem noted that many such errors could be resolved through engagement with the regulator rather than via a licence modification appeal.

*Process for serving of documents, including any changes to reflect developments in technology*

- 2.12 The current process for serving documents requires that appellants submit both hard copies as well as electronic copies to the CMA.<sup>9</sup> The CMA considers that it is timely to review its current processes for serving documents, particularly in light of developments in technology as well as lessons learnt from conducting appeal processes virtually during the course of the Covid-19 pandemic.
- 2.13 Respondents agreed that there should be an electronic-only option for the serving of documents to the CMA. They further submitted that an online

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<sup>8</sup> See paragraph 3.13 of the proposed Energy Guidance, paragraph 3.13 of the Water Guidance, paragraph 3.16 of the Airports Guidance and paragraph 3.16 of the Air Traffic Services Guidance.

<sup>9</sup> See Rule 23.2 of the existing Energy Rules and Rule 15 of the existing Airport Rules.

sharing platform would be helpful to minimise email traffic and enhance the efficiency of serving of documents. We will continue to keep under review the most effective form of technology to be used when submitting documents electronically, and would expect to communicate the appropriate format during the pre-appeal stage.

- 2.14 We propose to amend the existing rules<sup>10</sup> and guidance<sup>11</sup>(adopting the same approach in the new rules<sup>12</sup> and guidance<sup>13</sup>) to specify that electronic submissions **must** be provided, with the possibility of the CMA requesting a hard copy, if needed.

#### *Procedures for hearing multiple, (wholly or partially) linked, appeals*

- 2.15 The existing rules allow for the CMA to grant permission to appeal subject to conditions requiring appeals to be considered together with other appeals, where it considers that it is appropriate to do so,<sup>14</sup> in accordance with the overriding objective in the rules.<sup>15</sup> ELMA was the first case where the CMA exercised the power to join appeals under the energy licence modification appeal regime. The CMA did this due to the unprecedented number of appellants involved and the number of grounds that were common to appellants. We sought views from respondents in our open letter on how the CMA had managed the joining of appeals, and also any particular views on how the process of joining appeals should be managed in future appeals.
- 2.16 Respondents were generally supportive of the approach taken by the CMA to manage the joined appeals in ELMA. However, they also felt that it was important to allow individual appellants to be heard individually, in addition to being heard in any joined hearings, particularly given that one appellant might have specific points to raise with the CMA Group which might not be common to other appellants. We also note a submission from one stakeholder<sup>16</sup> that further clarity on what it means for appeals to be consolidated and heard together would be useful.

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<sup>10</sup> See Rule 22.2 of the Energy Rules and Rule 22.2 of the Airports Rules.

<sup>11</sup> See paragraph 4.4 of the Energy Guidance and paragraph 4.3 of the Airports Guidance.

<sup>12</sup> See Rule 22.2 of the Water Rules and Rule 22.2 of the Air Traffic Services Rules.

<sup>13</sup> See paragraph 4.4 of the Water Guidance and paragraph 4.3 of the Air Traffic Services Guidance.

<sup>14</sup> See Rule 14.2 of the Energy Rules and paragraph 1(11) of Schedule 5A of the Electricity Act 1989 and Schedule 4A of the Gas Act 1986, Rule 14.2 of the Water Rules and paragraph 1(11) of Schedule 2ZA to the Water Industry Act 1991, Rule 12.1 of the Airports Rules and paragraph 2(4) of Schedule 2 to the the Civil Aviation Act 2012, and Rule 12.1 of the Air Traffic Services Rules and paragraph 2(4) of Schedule A1 of the Transport Act 2000.

<sup>15</sup> See Rule 4 in the Airports Rules, Energy Rules, Water Rules and Air Traffic Services Rules.

<sup>16</sup> Norton Rose Fulbright.

- 2.17 We consider that it is important to preserve the flexibility to join appeals, where appropriate to do so, without limiting this discretion to specific circumstances in the rules or guidance. The CMA considers that, in appropriate cases, joining appeals can enable them to be conducted in a more administratively efficient way, particularly where a number of appellants have raised grounds of appeal in respect of related issues and there is value in hearing those grounds together. At the same time, the CMA recognises that it will need to consider on a case-by-case basis whether joining can be expected to bring benefits, for example, depending on the extent to which the CMA's decisions are likely to be based on common sources of evidence.
- 2.18 As such, we propose not to change the substance of the existing rules which afford the CMA a discretion to consider together two or more appeals in respect of the same decision. We do however propose to clarify in the guidance that the CMA may invite parties to make representations to the CMA where the CMA has made a proposal to consider appeals together, to ensure that any decision to consider appeals together that the CMA makes has taken into account the parties' views as to the most appropriate course of action in the circumstances.<sup>17</sup>
- 2.19 In addition, we propose to clarify in guidance how we will aim to manage joined and linked appeals.<sup>18</sup> The proposed revised guidance indicates that the CMA will work with the parties on administrative matters needed to ensure the consolidated appeals proceed in accordance with the overriding objectives in the rules.<sup>19</sup> This may include measures such as confidentiality rings and encouraging joint representations on particular issues by joined appellants (including through joint hearings and joint submissions), where this is appropriate and proportionate in the circumstances, while also considering whether it is appropriate to hear individual appellants individually in addition to joint hearings.
- 2.20 We have reflected in the proposed guidance that joined appeals may result in the CMA issuing a combined decision applicable to all parties whose appeals have been heard together, however in other circumstances this may not be suitable.<sup>20</sup> As such, we propose to retain a discretion to issue separate

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<sup>17</sup> See paragraph 3.32 of the Energy Guidance, 3.32 of the Water Guidance, 4.29 of the Airports Guidance and 4.29 of the Air Traffic Services Guidance.

<sup>18</sup> See paragraphs 4.31-4.33 of the Energy Guidance, paragraphs 4.31-4.33 of the Water Guidance, paragraphs 4.30-4.32 of the Airports Guidance and paragraph 4.30-4.32 of the Air Traffic Services Guidance.

<sup>19</sup> See Rule 4 in the Airports Rules, Energy Rules, Water Rules and Air Traffic Services Rules.

<sup>20</sup> See paragraph 4.34 of the Energy Guidance, paragraph 4.34 of the Water Guidance, paragraph 4.32 of the Airports Guidance and paragraph 4.32 of the Air Traffic Services Guidance.

decisions for joined appeals where required, particularly where the impact of the appeals vary by individual appellant.

*Management by the CMA of the submission of evidence, including any evidence beyond the notice of appeal, response by the regulator, and the appellants' reply*

- 2.21 The existing rules and guidance do not currently specify in great detail the form and length of submissions expected from appellants. In addition, the treatment of unsolicited submissions and submissions made out of time is not currently made explicit in the rules and guidance.
- 2.22 A number of respondents supported a clearer approach to the enforcement of page limits and admissibility of unsolicited submissions, though there was also recognition that it may be difficult to set out defined page limits given that there could be significant variation in the submissions required, depending on the complexity of the appeal concerned. There were also requests for greater clarity on what should be in the main notice of appeal submission, what should be in supporting witness evidence and which parts of the notice of appeal submission should be published and should be shared with the other parties.
- 2.23 We have proposed amendments to the approach in the existing rules and guidance to set out more clearly the information that parties should include in their submissions.<sup>21</sup> In particular, we have set out greater clarity on the requirements for information that parties need to include in their notice of appeal. This includes making it clear that the notice of appeal is comprised of a main submission and a bundle of supporting documentation, and specifying what should be included in the main submission and in the bundle of supporting documentation.<sup>22</sup> We have tracked our approach here where possible to other relevant areas such as applications for suspension,<sup>23</sup> the Authority's response after permission to appeal has been granted,<sup>24</sup> and

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<sup>21</sup> While we have proposed the same broad approach for setting out the requirements of what parties should include in their submissions in the Rules in each of our appeal functions, differences in some of the detailed requirements reflect difference in the underlying statutory provisions for the different appeal regimes.

<sup>22</sup> See Rule 5.2 of the Energy Rules, Rule 5.2 of the Water Rules, Rule 5.2 of the Airports Rules and Rule 5.2 of the Air Traffic Services Rules.

<sup>23</sup> See Rule 7 of the Energy Rules, Rule 7 of the Water Rules, Rule 9 of the Airports Rules and Rule 9 of the Air Traffic Services Rules.

<sup>24</sup> See Rule 9 of the Energy Rules, Rule 9 of the Water Rules, Rule 11 of the Airports Rules and Rule 11 of the Air Traffic Services Rules.

applications for intervention.<sup>25</sup> We have also sought to provide greater clarity on the requirements to provide a statement of truth.<sup>26</sup>

- 2.24 With regard to the enforcement of discipline over the length of submissions and limits on the provision of evidence, the CMA recognises that the length and volume of submissions and supporting documentation submitted can vary greatly and largely depend on the complexity of the appeal concerned. However, we propose to amend the guidance to ask parties to make clear the relevance of the documentation submitted in support of the appeal and to ensure that it relates to the relevant grounds of appeal. We also propose to make it clear that 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.<sup>27</sup> In addition, we propose to include a provision in the rules<sup>28</sup> and guidance<sup>29</sup> which clarifies that the CMA may specify the form and length of submissions in a way that enables the CMA to take into account the complexity of the appeal and is in accordance with the overriding objective.
- 2.25 The proposed revised rules<sup>30</sup> and guidance<sup>31</sup> also provide further clarification on supplementary/late submission of evidence. The CMA expects parties to submit evidence at an early stage of the process. As such, we propose to specify that participants should not submit supplementary evidence without having received permission from the CMA to do so. The CMA reserves the right to reject unsolicited submissions or the provision of supplementary evidence in certain circumstances, in order to ensure that appeals are carried out efficiently.<sup>32</sup>
- 2.26 We propose to delete the existing rule<sup>33</sup> in the Energy Rules on written evidence and to make the same change across the appeal regimes. In light of

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<sup>25</sup> See Rule 10 of the Energy Rules, Rule 10 of the Water Rules, Rule 8 of the Airports Rules and Rule 8 of the Air Traffic Services Rules.

<sup>26</sup> See for example Rule 5.3 of the Energy Rules, Rule 5.3 of the Water Rules, Rule 5.3 of the Airports Rules and Rule 5.3 of the Air Traffic Services Rules.

<sup>27</sup> See paragraph 4.28 of the Energy Guidance, Paragraph 4.28 of the Water Guidance, Paragraph 4.26 of the Airports Guidance, paragraph 4.26 of the Air Traffic Services Guidance.

<sup>28</sup> See Rule 14.2(i) of the Energy Rules, Rule 14.2(i) of the Water Rules, Rule 12.2(i) of the Airports Rules and Rule 12.2(i) of the Air Traffic Services Rules.

<sup>29</sup> See paragraph 4.25 of the Energy Guidance, paragraph 4.25 of the Water Guidance, paragraph 4.23 of the Airports Guidance and paragraph 4.23 of the Air Traffic Services Guidance.

<sup>30</sup> See Rule 14.5 of the Energy Rules, Rule 14.5 of the Water Rules, Rule 12.5 of the Airports Rules and Rule 12.5 of the Air Traffic Services Rules.

<sup>31</sup> See paragraphs 4.23-4.24 of the Energy Guidance, paragraphs 4.23-4.24 of the Water Guidance, paragraphs 4.21-4.22 of the Airports Guidance and paragraphs 4.21-4.22 of the Air Traffic Services Guidance.

<sup>32</sup> See above.

<sup>33</sup> See Rule 18 of the existing Energy Rules.

the other proposed amendments to the rules and guidance, the CMA now considers that it will be sufficiently clear when written evidence must take the form of a witness statement. We have added references to expert reports in the rules and guidance where appropriate, including adding guidance on what an expert report should contain.<sup>34</sup>

- 2.27 We have also proposed some amendments to clarify the deadlines for submission of non-sensitive versions of various appeal documents.<sup>35</sup>

### *Interveners*

- 2.28 The existing statutory framework in energy and the new statutory framework in water do not provide explicitly for an intervention process. The intervention process in energy is instead governed purely by the Energy Rules<sup>36</sup> and the Energy Guide.<sup>37</sup> This can be contrasted with the airports and air traffic services legislation that does include specific legislative provisions for the intervention process.<sup>38</sup> The CMA considers that in light of the experience it has gained in handling applications to intervene, from a wide variety of potential interveners, it is appropriate to update aspects of the current rules and guidance on intervention.

- 2.29 This section focuses on changes proposed to the energy intervention regime that will be largely replicated in the new water regime. The CMA has less flexibility to change the rules and guidance associated with the intervention regime in airport charges and air traffic services as it is based on the relevant legislation. However, we propose to incorporate a similar approach to interventions in the airport charges and air traffic services regimes where it is appropriate to do so.<sup>39</sup>

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<sup>34</sup> See paragraph 4.35-4.41 of the Energy Guidance, paragraph 4.35-4.41 of the Water Guidance, paragraph 4.33-4.39 of the Airports Guidance and paragraphs 4.33-4.39 of the Air Traffic Services Guidance.

<sup>35</sup> See for example Rule 5.4 in the Energy Rules, Rule 5.4 of the Water Rules, Rule 5.5 of the Airports Rules and Rule 5.5 of the Air Traffic Services Rules.

<sup>36</sup> Rule 10.

<sup>37</sup> In particular paras 4.15-4.17.

<sup>38</sup> See Part 2, Schedule 2 of the Civil Aviation Act 2012 and Part 2, Schedule A1 of the Transport Act 2000.

<sup>39</sup> The principal changes that the CMA has made to the existing Airports Rules and Guidance and to the new Air Traffic Services Rules and Guidance are to bring them more into line with the Rules and Guidance for Energy and Water (to the extent possible, taking into account the legislative regime for interveners in the Civil Aviation Act 2012 and the Transport Act 2000), for example, by providing greater clarity on what should be included in the application to intervene (see Rule 8.3 of the Airports Rules and Rule 8.3 of the Air Traffic Services Rules) and including similar procedural provisions such as the requirement for the applicant to provide a non-sensitive version of the main submission to the CMA and CAA (see Rule 8.6 of the Airports Rules and Rule 8.6 of the Air Traffic Services Rules) and provisions for the holding of hearings and representations and observations on the applications to intervene (see Rules 8.7-8.8 of the Airports Rules and Rules 8.7 to 8.8 of the Air Traffic Services Rules).



- 2.30 Respondents have indicated that they would welcome more clarity on the role of interveners in regulatory appeals and guidance as to when applications to intervene would be approved. The CMA agrees that further guidance on the criteria that the CMA will take into account in deciding whether to grant permission to intervene would be beneficial in ensuring that potential interveners are aware of the requirements for a successful application to intervene.
- 2.31 Generally, we note that there is a wide spectrum of interest that parties may have in an appeal, and that the circumstances in which parties may formally intervene may vary. As such, the CMA retains a discretionary approach to deciding which parties can formally intervene. The CMA considers that it is beneficial to maintain the current degree of flexibility that it has with regards to whether to approve an application to intervene, while at the same time recognising the need for greater clarity as to the criteria that will likely inform its assessment of an application to intervene. For these reasons, the CMA proposes broadly to retain its overall approach as stated in the existing rules.<sup>40</sup> However, we have proposed amendments to the rules and guidance designed to provide applicants with clarification on how the CMA expects to decide applications to intervene.<sup>41</sup> We have also proposed changes in the rules to provide further detail on what needs to be included in applications to intervene,<sup>42</sup> as well as a provision for the CMA to accept late applications to intervene in certain circumstances.<sup>43</sup>
- 2.32 The list of circumstances to be taken into account when deciding whether to grant permission to intervene in the rules (along with the accompanying explanation in guidance) are not designed to be exhaustive, and we do not propose that they are taken to apply prescriptively in all cases. In line with our observation above that parties may have a wide spectrum of interest in a case, the CMA will have regard to these factors but it remains the case that each application for intervention should be assessed in light of all the circumstances. Where the CMA does not consider that an applicant meets the required threshold to be joined as an intervener, or where the benefits of the intervention are not considered to be proportionate to the case, the CMA may

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<sup>40</sup> See Rule 10 in the Energy Rules, Rule 10 in the Water Rules, Rule 8 in the Airports Rules and Rule 8 in the Air Traffic Services Rules.

<sup>41</sup> See paragraphs 4.15-4.18 in the Energy Guidance, paragraphs 4.15-4.18 in the Water Guidance, paragraphs 4.16-4.18 of the Airports Guidance and paragraphs 4.16-4.18 of the Air Traffic Services Guidance.

<sup>42</sup> See Rule 10.5 of the Energy Rules, Rule 10.5 of the Water Rules, Rule 8.3 of the Airports Rules and Rule 8.3 of the Air Traffic Services Rules.

<sup>43</sup> See Rule 10.4 of the Energy Rules and Rule 10.4 of the Water Rules, Rule 8.2 of the Airports Rules and Rule 8.2 of the Air Traffic Services Rules.

instead invite the applicant to submit evidence using alternative mechanisms.<sup>44</sup>

- 2.33 The CMA considers that the proposed changes to the rules and guidance on interveners achieve the right balance between improving clarity over the role of interveners and retaining a flexible approach that allows the CMA to address each application as it considers appropriate to the circumstances of the case. We consider that in many circumstances, if the CMA does not accept permission to intervene, then the use of Rule 14.4(e) in the Energy Rules (and its equivalents in other regimes<sup>45</sup>) would suffice to allow an interested party to submit relevant evidence, and for this to be properly considered by the Group in support of the overriding objective.

*Role and number of hearings (clarification hearings, main hearings, and relief hearings) at different stages of the appeal*

- 2.34 The existing Energy Guidance explains that the CMA has the power to hold 'clarification hearings' in advance of the main hearing(s) but sets out no further detail as to how these hearings should operate.<sup>46</sup> The existing Airports Guidance is silent on the role of clarification hearings. There is also at present no explicit provision in the CMA's existing guidance for hearings to be held virtually. As such, the CMA requested views in the open letter on the role and number of hearings to be held during the appeals, and any views appellants had on how these should be conducted in the future.
- 2.35 A majority of the respondents agreed that the option to hold virtual hearings, particularly where there are a large number of participants in the appeals, should continue to be offered. In terms of the benefits of each of site visits/teach-ins/clarification hearings, respondents had different views, in part reflecting that the benefits of these different types of engagement with the CMA have varied across recent cases. Some respondents<sup>47</sup> suggested that the objectives of clarification hearings could similarly be achieved through alternative means such as written requests for information, while others<sup>48</sup> found clarification hearings to be a good opportunity for appellants to fully explain the factual context of their grounds of appeal, particularly when used in combination with teach-ins and site visits.

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<sup>44</sup> This is done via Rule 14.4(e) in the Energy Rules, Rule 14.4(e) in the Water Rules, Rule 12.4(e) in the Airport Rules and and Rule 12.4(e) in the Air Traffic Services Rules.

<sup>45</sup> See above.

<sup>46</sup> See paragraph 4.38 of the existing Energy Guidance.

<sup>47</sup> Eg Freshfields.

<sup>48</sup> Linklaters, Norton Rose Fulbright and National Grid.

2.36 We propose to amend the existing guidance (adopting the same approach in the new guidance) to reflect that the CMA may hold hearings virtually, in person or on a hybrid basis, depending on what would be more consistent with the overriding objectives.<sup>49</sup> The CMA considers that clarification hearings, teach-ins and site visits are useful tools for the CMA to have at its disposal when gathering information and seeking to better understand the context for the grounds of appeal. As such, we have made explicit in the rules and guidance<sup>50</sup> that the CMA may use clarification hearings and other supplementary tools to focus on narrow areas of the appeals which require further explanation, while the main hearings are more likely to be the forum for parties to present their main arguments. Following the recent ELMA, we have also proposed to include in the guidance the option of issuing to the parties a CMA ‘working paper’ which provides the CMA’s understanding of the issues subject to appeal.<sup>51</sup> This would give the parties the opportunity to provide written comments on the CMA’s understanding of the case. We propose to include this as an alternative step within the procedure.

### *Cost process*

- 2.37 The Supreme Court in May 2022 handed down its judgment in *Competition and Markets Authority (Respondent) v Flynn Pharma Ltd*.<sup>52</sup> The CMA does not consider that *Flynn Pharma* displaces the Court of Appeal judgment in *British Telecommunications PLC v The Office of Communications*.<sup>53</sup> Specifically, the CMA considers that, although the starting point as to costs is not “no order as to costs” against a regulator, considerations relevant to determining an order for inter partes costs in appeals concerning a regulator include the ‘chilling effect’ an order for inter partes costs against a regulator may have.
- 2.38 Therefore in line with the Supreme Court’s judgment in *Flynn Pharma*, and the continuing applicability of *BT v Ofcom*, we have made some changes across the rules and guidance. In terms of the rules, we have proposed amendments to reflect that the potential ‘chilling effect’ on the relevant regulators is a factor

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<sup>49</sup> See paragraph 4.42 of the Energy Guidance, paragraph 4.42 of the Water Guidance, paragraph 4.40 in the Airports Guidance and paragraph 4.40 of the Air Traffic Services Guidance.

<sup>50</sup> See paragraph 4.44 of the Energy Guidance, paragraph 4.44 of the Water Guidance, paragraph 4.42 of the Airports Guidance and paragraph 4.42 of the Air Traffic Services Guidance.

<sup>51</sup> See paragraph 3.6 and 4.44 of the Energy Guidance, paragraph 3.6 and 4.44 of the Water Guidance, paragraph 3.9 and 4.42 of the Airports Guidance and paragraphs 3.9 and 4.42 of the Air Traffic Services Guidance.

<sup>52</sup> [2022] UKSC 14.

<sup>53</sup> [2018] EWCA Civ 2542.

which the CMA may take into account when considering what order for inter partes costs to make.<sup>54</sup>

2.39 We have also amended the guidance<sup>55</sup> to state that in considering whether to make an award for inter partes costs, the CMA will have regard to the principles outlined in *BT v Ofcom* and noting that a costs order is discretionary.<sup>56</sup>

2.40 The rules and guidance have also been updated to make it clear that 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.<sup>57</sup>

### *Provisional determination*

2.41 The existing and new rules have now been amended/drafted to make it clear that the CMA may issue a provisional determination, depending on the circumstances of the case. In this respect, the existing Energy Rules and Energy Guidance have been updated as they previously indicated that a provisional determination would normally be published.<sup>58</sup> The amended/new rules and guidance recognise that it will not be appropriate to publish a provisional determination in all appeals.<sup>59</sup>

2.42 The existing rules state that the CMA would not normally expect to publish the provisional determination. However, we have previously departed from this practice.<sup>60</sup>

2.43 Though provisional determinations was not a matter for which we explicitly sought views on in the open letter, some stakeholders<sup>61</sup> submitted in their open letter responses that it would be useful if the CMA published its provisional determination, and requested further clarity on the circumstances in which the CMA might consider publication.

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<sup>54</sup> See Rule 20.5 in the Energy Rules, Rule 20.5 in the Water Rules, Rule 19.5 in the Airports Rules and Rule 19.5 in the Air Traffic Services Rules.

<sup>55</sup> See paragraph 6.4 in the Energy Guidance, paragraph 6.4 in the Water Guidance, paragraph 6.4 in the Airports Guidance and paragraph 6.4 in the Air Traffic Services Guidance.

<sup>56</sup> See above.

<sup>57</sup> See Rule 20.7 and paragraph 6.10 of the Energy Rules and Guidance, Rule 20.7 and paragraph 6.10 of the Water Rules and Guidance, Rule 19.7 and paragraph 6.10 of the Airports Rules and Guidance and Rule 19.7 and paragraph 6.10 of the Air Traffic Services Rules and Guidance.

<sup>58</sup> See Rule 19.1 of the existing Energy Rules and paragraph 5.1 of the existing Energy Guidance.

<sup>59</sup> See Rule 18.3 of the Energy Rules, Rule 18.3 of the Water Rules, Rule 16.3 of the Airports Rules and Rule 16.3 of the Air Traffic Services Rules.

<sup>60</sup> For example in ELMA.

<sup>61</sup> Freshfields, National Grid and First Economics.

- 2.44 We have considered whether it would be appropriate to change our approach and publish provisional determinations on a more regular basis. The CMA recognises that it publishes provisional decisions in some of its other cases (such as mergers). However, on balance, the CMA considers that its role in hearing regulatory appeals is sufficiently distinct from its other functions, in particular because it is performing a quasi-judicial role, that it is appropriate to maintain its current approach where the provisional determination is shared only with the parties involved in the appeal. However, we propose to amend the rules<sup>62</sup> and guidance<sup>63</sup> to recognise that we may in certain circumstances publish a summary of the provisional determination, as was done in ELMA. For example, publication of a summary may be appropriate in cases where there are market sensitivity concerns (particularly where there are a large number of parties involved and consequently a large number of stakeholders receiving the provisional decision).
- 2.45 We have also clarified that where the CMA is considering appeals or parts of appeals together, it may elect to make a single provisional determination in relation to two or more appeals in part or in their entirety.<sup>64</sup>

#### *Other changes*

- 2.46 In addition to the specific changes outlined above, we have reviewed the drafting of the rules and guidance more generally, and made certain updates to clarify wording, including where it supports the intentions of the changes above.
- 2.47 We have also made other more detailed changes such as providing further guidance on the handling of procedural matters and whether the CMA will use directions or more informal means for such matters,<sup>65</sup> and clarifying the requirements for the provision of a glossary.<sup>66</sup> It should, however, be noted that some changes appear in some rules and guidance and not others (for example, the proposed Energy Rules and Water Rules contain a list of documents that the CMA will publish on its website<sup>67</sup> which is not included in

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<sup>62</sup> See Rule 18.3 of the Energy Rules, Rule 18.3 of the Water Rules, Rule 16.3 of the Airports Rules and Rule 16.3 of the Air Traffic Services Control Rules.

<sup>63</sup> See paragraph 5.3 of the Energy Guidance, paragraph 5.3 of the Water Guidance, paragraph 5.3 of the Airports Guidance and paragraph 5.3 of the Air Traffic Services Guidance.

<sup>64</sup> See Rule 18.6 of the Energy Rules, Rule 18.6 of the Water Rules, Rule 16.6 of the Airports Rules and Rule 16.6 of the Air Traffic Services Rules

<sup>65</sup> See paragraph 3.19 of the Energy Guidance, paragraph 3.19 of the Water Guidance, paragraph 3.26 of the Airports Guidance and paragraph 3.27 of the Air Traffic Services Guidance

<sup>66</sup> See paragraph 4.26 of the Energy Guidance, paragraph 4.26 of the Water Guidance, paragraph 4.24 of the Airports Guidance and paragraph 4.24 of the Air Traffic Services Guidance.

<sup>67</sup> See Rule 12 in the Energy Rules and Rule 12 in the Water Rules.

the proposed Airports Rules or Air Traffic Services Rules because in those regimes several of the publication obligations fall on the CAA rather than the CMA, and therefore we did not consider that a rule summarising the CMA's publication requirements would be particularly useful).

### **3. Questions for consultees**

3.1 We are asking consultees the following questions :

1. Do you agree with our proposed approach of having regard to proposed amendments to the energy licence modification appeals rules in making amendments to the airport licence appeals rules and guidance, and in the draft rules and guidance that we are proposing for our new water and air traffic services appeal regimes?
2. Do you have any comments on the draft amendments to the energy and airport licence appeal rules and guidance?
3. Do you have any comments on the new draft rules and guidance for water appeals (other than for periodic price reviews) and air traffic services?