

8 August 2022



## **CAA response to CMA165con – Regulatory appeals rules and guidance: energy, water, airports and air traffic services**

We welcome the opportunity to comment on the subject consultation on regulatory appeals rules and guidance. This response concentrates on the CMA's proposed changes to guidance and rules for airport appeals and new guidance and rules for air traffic services appeals.

Our overall view is that these rules and guidance are appropriate and helpful. We have provided a comments below on specific issues raised by the rules and guidance, where we consider they could be clearer.

This response is focussed mainly on the rules, noting that, to the extent that the CMA amends the draft rules, the guidance will need to follow any such changes. To help with this, we have indicated in our comments on the guidance where these should follow our proposed changes to the rules.

We have sought to provide a single set of comments that deals with both airports and air traffic services. Any divergence in the comments on each set of materials is indicated below.

### **Comments on the draft rules**

Rule 4: We consider that the aim of the rules is generally sound, but that there may be benefits in referring to the relevant statutory duties (which will be different for airports and air traffic services) that the CAA must take account of in taking its decisions, on the face of the rules. Amending Rule 4.1 to this effect would be consistent with, and reinforce, the obligation on the CMA in section 30(2) of Civil Aviation Act 2012 ("CAA12") and section 19F of the Transport Act 2000 ("TA00")TA00.

We also consider that the word "fairly" is not sufficiently well defined to form part of the overriding objective. Instead, given the quasi-judicial nature of the CMA's role as an appellant body, it would be clearer to explicitly state that the rules enable the CMA to dispose of appeals "in the interests of justice" – this could be inserted at the start of Rule 4.1, and the word "fairly" deleted.

Rule 5.2 (a) (iii): We consider that this rule could usefully be clarified by requiring that the notice "specifying the particular parts(s) of the decision to which each ground relates, including by reference to paragraph numbers where relevant" in order to have a clear common understanding on which parts of the decision in question the applicant seeks to appeal. Similar clarification could usefully be added to the requirements for an application for permission to intervene under Rule 8.3.

Rule 5.5: This rule could usefully define a "non-sensitive version", for example by making clear that it is a version of the Notice from which sensitive information has been redacted.

Rule 7.3: The first part of this rule only appears to be relevant to a notification under Rule 7.1, as otherwise the CAA would be required to send a notice to itself. The second part ("the CAA must then publish...") is relevant to both notifications under Rules 7.1 and 7.2 and, as such, might be clearer if this second part were to be separated out as Rule 7.4.

Rule 8.3: Please see our comments in relation to Rule 5.2 above.

Rule 10: We consider that any directions given under this rule should take account of the impact of multiple appeals on the appropriate timescales for disposing of the appeal.

Rule 12.2(b): We support the hearing of appeals together where practicable and reasonable to do so and would encourage the CMA to make any directions on such matters at as early a stage as possible, including prior to the grant of permission to appeal in order to help streamline the process. Please see also our comments on paragraph 4.29 of the guidance below.

Rule 12.4(d): We consider that it may be helpful for the expeditious conduct of the proceedings for the CMA to clarify that such meetings or hearings may be in person or virtually, or as a mixture of in person and virtual hearings as appropriate.

Rule 12.5: We consider that the drafting may be simplified by replacing the term "reserves the right to", with "may". It may also be helpful to clarify whether unsolicited submissions would be likely to have consequences in any costs order made by the CMA by reference to Rule 19.5(a)(iii).

Rule 13: We consider that the CMA might usefully set a presumption that such conferences will be held virtually, to facilitate the expeditious arrangement of those conferences.

Rule 14.4: The CMA might consider setting out whether there might be consequences of a party overrunning the time limit set for any oral submission or straying away from the issues on which the CMA wishes to concentrate in the hearing, for instance by reference to Rule 19.5(a)(iii).

Rule 19.5: While this might be covered by Rule 19.5(a)(ii) or (iii), we consider that a relevant factor in costs should be the nature and extent of the appellant's engagement with the CAA in relation to the CAA's decision and before seeking permission to appeal, not least in order to encourage potential applicants to seek to resolve matters, such as in relation to calculation errors or other non-contentious errors, that need not properly be the subject of an appeal with the CAA without recourse to the CMA, as contemplated by the CMA's guidance at paragraph 3.16.

Rule 19.5(d): We consider that it might be useful to clarify what is meant by the "chilling effect" on the CAA referred to.

### **Comments on the draft guidance**

Paragraph 1.4: We consider that the guidance should reflect the wording of the Rule 4, which sets out the "overriding objective", rather than a sentiment. We propose that the word "sentiment" is deleted. See also other comments on Rule 4, in respect of the use of the word, "fairly".

Paragraph 2.4 (Airport Licence Modification Appeals Guide only): We suggest that the sentence referring to the Airports Act 1986 is sufficiently historic now to be deleted.

Paragraph 3.5: Please see our comments on Rule 4 above.

Paragraph 3.6: We consider that the guidance could be improved by specifically setting out at the end of the paragraph, the relevant statutory duties that the CAA must take account of in taking its decision (which will be different for airports and air traffic services), rather than by simple reference to the relevant sections of CAA12 and TA00.

Paragraphs 3.11 to 3.16: Please see our comments on costs issues in relation to Rule 19 above.

Paragraph 4.22: Please see our comments on Rule 12 above.

Paragraph 4.23: We note the possibility of page limits being set and would welcome further indication of the likelihood of such limits being imposed.

Paragraph 4.29: We consider that there would be significant merit in the CMA considering all appeals in relation to the same licence modification decision together and that this should be done at the earliest stage practicable, to facilitate a streamlined process, including such elements as a single response from the CAA.

We consider that the CMA may also wish to consider the interplay between consolidation of multiple appeals and the deadline it sets for the CAA to make its substantive response(s) in relation to them. Specifically, to facilitate a properly consolidated response from the CAA that would bring longer-term benefits in the efficiency of the overall process, it may be appropriate to lengthen the deadline for the CAA's substantive response (for example to the end of the 12<sup>th</sup> week following the publication of its decision) even if the date of grant of permission to appeal would otherwise imply an earlier deadline.

Paragraphs 4.33 to 4.39: We consider that these paragraphs are very helpful in the preparation of submissions. To the extent that they are supplemented by other directions by the CMA, we consider that these directions should be made as soon as possible (see also our comments on paragraphs 4.23 and 4.29 above).

Paragraphs 6.4 to 6.10: Please see our comments on Rule 19 above.

We hope that these comments are useful in finalising these materials. If you would like to discuss the issues raised above, please do not hesitate to contact me. In the meantime, I can confirm this response does not contain information regarded as sensitive or confidential and acknowledge that it will be published on your web pages.

Yours sincerely

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