# CMA Consultation on its draft Regulatory Appeals Rules and Guidance: energy, water, airports and air traffic services

## Response by Freshfields Bruckhaus Deringer LLP

9 August 2022

## 1. Introduction and overview

1.1 Freshfields Bruckhaus Deringer LLP (***Freshfields*** or ***we***) welcomes the opportunity to comment on the draft amendments to the existing rules and guidance in energy and airports appeals and new rules and guidance in water and air traffic services appeals published by the Competition and Markets Authority (***CMA***) on 12 July 2022 (the ***Consultation***).

1.2 Freshfields is a leading international law firm. Our comments are based on our extensive experience in representing clients in regulatory appeals to the CMA in a number of different sectors, including, the recent RIIO-T2 energy appeals and PR19 water appeal. The comments in this response are those of Freshfields and do not necessarily represent the views of any of our clients.

1.3 While we acknowledge that updates to the rules and guidance are necessary following the Energy Licence Modification Appeals (***ELMA***), we have concerns that certain proposals made by the CMA in the Consultation could, in practice, hinder a licensee's ability to efficiently and effectively bring (and participate in) a regulatory appeal. Furthermore, it is not clear to us how certain changes would aid the CMA in managing appeals more efficiently, in line with the overriding objective.

1.4 We have confined our comments to those areas of the Consultation which we feel are most significant. Where we have not commented on a specific topic in this response, it does not mean we necessarily agree with it in its entirety. This response contains our comments in the following topics arising from the Consultation:

(a) Pre-appeal stage;

(b) Management by the CMA of the submission of evidence (including any evidence submitted after the notice of appeal, the regulatory authority's response, and the appellant's reply);

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

(d) Costs.

1.5 We would be happy to discuss any of our comments in further detail and to contribute to further thinking or analysis on these issues.

## 2. Pre-appeal stage

*Reasonable notice of the possibility of an appeal*

2.1 We welcome the CMA's acknowledgement that it should not require formalised and inflexible procedures in relation to pre-appeal engagement.[1] We also note that our general practice would in any event be to inform the CMA in advance

[1] CMA165con, paragraph 2.9.

of filing any notice of appeal on behalf of a regulated company client.[2] However, we are concerned that, despite the CMA's acknowledgement of the need for flexibility, the provision requiring prospective appellants to make pre-appeal contact with the CMA at least two weeks in advance of an application for permission to appeal is overly prescriptive. There is no basis for the assumption that two weeks is considered to be 'reasonable notice' in all circumstances, and the provision accordingly does not align with the CMA's objective in ensuring 'a degree of flexibility' in relation to pre-appeal engagement. The prescriptive timing creates an additional burden on prospective appellants at a point in the appeal process that is already extremely time pressured. Prospective appellants devote substantial internal and external resources and time to deciding whether or not to make an appeal and to preparing formal appeal submissions and supporting documentation in advance of the already compressed statutory appeal deadline. The CMA's proposals would place yet another burden upon them, without good cause.

2.2 In particular, a public listed company may be unable to complete all necessary internal governance procedures associated with confirming a decision to launch an appeal in sufficient time to enable compliance with the timing of the CMA's pre-appeal contact guidance. In our experience, companies do not make a decision to pursue an appeal lightly and typically only proceed with the final decision to launch an appeal a few days before the deadline.

2.3 Furthermore, the guidance should clarify that prospective appellants will face no adverse consequences (in particular in relation to costs orders) if they are unable to give the CMA notice at least two weeks in advance of bringing an appeal. It would be wholly inappropriate for appellants to be punished with an adverse costs order due to a failure to comply with the pre-appeal contact process.

*Calculation errors or other non-contentious errors*

2.4 While we agree that calculation errors or other non-contentious errors should be resolved outside of the appeal process, our clients' experience is that the likelihood of a regulator agreeing that an error is non-contentious, or otherwise capable of correction without argument, is very low. Indeed, prospective appellants will likely have been consulted or made representations on a regulator's draft licence modification in advance of a final decision being published. Prospective appellants are therefore likely to have already addressed such errors and brought them to the regulator's attention for correction, such that any errors that arise in the published decision are more likely to be those that remain contentious.

2.5 Clarity on the expected level of engagement with a regulator in relation to non-contentious errors is particularly important where such engagement is expected *prior to* commencing an appeal. As noted above, prospective appellants are already under significant time and resource pressure during the pre-appeal period and adding a further process designed to determine whether errors can

[2] As set out in our letter dated 31 January 2022 in response to the CMA's open letter on the licence modification appeals rules and guidance.

be considered non-contentious or not is unlikely to have the result that the CMA desires.

## 3. Management by the CMA of the submission of evidence (including any evidence submitted after the notice of appeal, the authority's response, and the appellants' reply)

*Unsolicited submissions*

3.1 We welcome the CMA's rules and guidance that participants should not submit supplementary submissions or evidence on an unsolicited basis. However, we ask the CMA to make it clear that these rules and guidance apply equally to appellants, interveners and the relevant regulator, and that this extends to all forms of contact about the issues in the proceedings. In our experience, regulators often benefit from greater contact with the CMA through unsolicited submissions, teach-in sessions and informal communications – these offer the regulator additional opportunities to present their case to the CMA, or at the very least convey the impression to the appellants that the regulator has been afforded an unwarranted privileged position in the proceedings. If such opportunities are afforded, they should be provided on an equal basis to regulators, interveners and appellants.

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

*Virtual hearings*

4.1 We agree with the CMA's proposal to update the guidance to reflect that the CMA may hold hearings virtually, in person or on a hybrid basis.

*Working Paper*

4.2 We also welcome the inclusion of the option for the CMA to provide parties with a working paper which provides the CMA's understanding of the issues under appeal. Given the constraints of the condensed appeal timeline, we consider that working papers and RFIs, to elicit or consult on areas which require additional information, could allow for more helpful main party hearings focused on the contentious issues rather than fact gathering.

*Timeline*

4.3 As noted in our response to the CMA's Open Letter in February 2022, we encourage the CMA to continue to evaluate each step of the appeal process and whether it is necessary or useful in advancing the overriding objective, having regard to the condensed timeline for the appeal process. Further, we encourage the CMA to allot greater time to the main party hearings so that the issues in contention can be fully aired and to give the parties a proper opportunity to put their case to the decision makers in the case.

## 5. Costs

5.1 The CMA states that it does not consider that the recent Supreme Court judgment in *Competition and Markets Authority (Respondent) v Flynn Pharma*

*Ltd*[3] (***Flynn Pharma***) displaces the Court of Appeal judgment in *British Telecommunications PLC v The Office of Communications* (***BT v Ofcom***).[4] For the reasons set out below, that position is misconceived and should be abandoned.

5.2 Further, the CMA notes in the Consultation that "*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*". However, the CMA has not presented any evidence demonstrating that the so called "chilling effect" on regulators is a real risk which arises in practice. it is bare assertion on the CMA's part.

*Legislative intention*

5.3 Legislative history shows a clear intention that costs should follow the event. The example of the statutory appeals framework under the Electricity Act 1989 is instructive and of wider application. This appeals mechanism was adopted under the Electricity and Gas (Internal Markets) Regulations 2011 in order to comply with the requirements of the EU "Third Energy Package", which included Directive 2009/72/EC concerning common rules for the internal market in electricity. The Directive required that GEMA, as the UK regulatory authority, should be able to make licence modifications autonomously (Article 35), but also required that the interests of licensees must be protected by giving them an ex post right of appeal to an independent body: "*Member States shall ensure that suitable mechanisms exist at national level under which a party affected by a decision of a regulatory authority has a right of appeal to a body independent of the parties involved and of any government*".[5]

5.4 The legislative purpose underpinning the 2011 Regulations is clear from Government publications, in particular the Department of Energy and Climate Change documents "*Implementations of the EU Third Energy Package: Consultation on licence modification appeals"* (September 2010) (***Third Energy Package Consultation***) and "*Implementation of the EU Third Internal Energy Package: Government Response*" (January 2011) (***Government Response to Third Energy Package***).[6]

5.5 Importantly, specific consideration was given to the issue of how the costs of an appeal would be addressed (both in relation to the costs of the appeal body and those of the parties). The Government clarified that so far as inter partes costs are concerned, the appeal body would be expected to apply the "*common*

[3] [2022] UKSC 14.

[4] [2018] EWCA Civ 2542.

[5] Article 31(17) Directive 2009/72/EC.

[6] Respectively at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/43240/586-eu-third-package-condoc2.pdf and https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/43266/1163-eu-third-package-gov-response.pdf

*practice*" whereby the successful party's costs are paid by the unsuccessful party. This is evidenced by the Third Energy Package Consultation:

*"How will the costs of appeal be recovered?*

*2.29 Appeals will involve costs for the appeal body, these costs will need to be recovered. They will also involve costs for the Regulator and any other party to the proceedings.* ***In order not to deter appeals with a reasonable chance of success, or regulatory decisions unlikely to attract a successful appeal, it should be possible for the 'winner's' costs to be paid by the 'loser': this is common practice.*** *It should also act to deter trivial and vexatious appeals (see paragraph 2.9) or regulatory decisions likely to attract a successful appeal. The Government is minded to provide the appeal body with the discretion to award costs on either side of an appeal. The appeal body should be able to make decisions on the costs of the parties, and its own economic cost.* ***It should have discretion to apply the 'loser pays' principle or to require both parties to pay costs, as appropriate***.*"*[7] [emphasis added]

5.6 Further, the Government Response to the Third Energy Package made clear its intention to proceed as proposed and specifically addressed whether GEMA would pay the costs of a successful appellant:

*"Costs of an appeal*

*2.39 Respondents were concerned that the cost of the appeal may restrict access to the process, particularly for smaller companies. The Competition Commission would have to make an order to recover its costs.* ***If the company is successful in its appeal, the Competition Commission would order Ofgem to pay its costs****. In relation to the costs of other parties, we are intending that the Competition Commission should have discretion to award these costs and that in doing so it should be able to take into account the reasonableness of the costs incurred in all the circumstances. This means that even if a party loses the appeal it may not necessarily be liable for all the costs if the Competition Commission decides that the other party's costs are unreasonable. Where appropriate, the Competition Commission will also be able to amalgamate separate appeals, so they can be heard together with a view to reducing costs."*[8] [emphasis added]

5.7 The CMA's proposal to adopt rules and guidance which would lead to successful appellants being unable to recover costs in an appeal frustrates this legislative intention. This would render ineffective these important appeal rights, which were introduced in order to ensure that a regulator is held to account for its licence modification decisions, with a particular need for scrutiny of price control decisions.

5.8 If the CMA persists in adopting the wholly different 'starting point' that no order for costs orders should be made against regulators, not only would this frustrate the statutory intention and licensees' legitimate expectations that the 'starting point' would be to order a regulator to pay a successful appellant's costs on

[7] Implementations of the EU Third Energy Package: Consultation on licence modification appeals, paragraph 2.29.

[8] Implementation of the EU Third Internal Energy Package: Government Response, paragraph 2.39.

issues on which it has succeeded, it is also a wholly unevidenced proposition. The CMA is therefore not entitled to take the position adopted in the Consultation.

*Flynn Pharma*

5.9 The issue addressed in Flynn Pharma is how a tribunal should go about identifying the correct 'starting point' on costs against a public body that has been unsuccessful in bringing or defending proceedings in the exercise of its statutory functions, in circumstances where the legislative intention as to the correct 'starting point' is not clear. Leaving to one side the fact that this is not the typical legislative position in the context of appeals coming before the CMA, the Supreme Court's approach in Flynn Pharma makes clear that the correct 'starting point' is that costs follow the event. In particular, applying the factors identified by the Supreme Court, there is no proper basis to conclude that such a 'starting point' would have a 'chilling effect' on the decision making of a regulator in respect of price control decisions.

5.10 We consider the conclusion in Flynn Pharma is very clear – the Supreme Court accepted the appellants' submissions stating that "*there is no generally applicable principle that all public bodies should enjoy a protected status as parties to litigation where they lose a case which they brought or defended in the exercise of their public functions in the public interest*".[9] Further to this, the Supreme Court clearly explained why it did not accept the CMA's argument that previous case law established the suggested general principle.[10] The CMA's interpretation and application, as set out in the Consultation, is therefore clearly incorrect.

## 6. Concluding remarks

6.1 As mentioned at the outset, we acknowledge that updates to the rules and guidance are necessary following ELMA, but we are concerned that, in reality, some of the Consultation's proposals will undermine a licensee's ability effectively to bring an appeal against a decision made by a regulator. This is particularly the case in regard to: (i) the proposed prescriptive guidance in relation to the pre-appeal stage; and (ii) the proposed costs rules, which together stand to deter future appeals by skewing the process against appellants unfairly.

**Freshfields Bruckhaus Deringer LLP**

9 August 2022

[9] [2022] UKSC 14, paragraph 97-98.

[10] [2022] UKSC 14, paragraph 99-104.