

Air Traffic Services Licence Modification Appeals: Competition and Markets Authority Guide

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CMA167

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1. Introduction

- 1.1 This Guide has been prepared to assist parties involved in air traffic services appeals under the Transport Act 2000 (the Act).¹ 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, *Air Traffic Services Licence Modification Appeals: Competition and Markets Authority Rules (CMA168)*, to govern these appeals. This Guide should be read in conjunction with the Act 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 parties and expects parties 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 Transport Act 2000;
- ‘the CAA’** means the Civil Aviation Authority;
- ‘the CMA’** means the Competition and Markets Authority;
- ‘intervener’** means any person given permission by the CMA under Rule 8 of the Rules to intervene in an appeal;

¹ As amended, in particular, by the Air Traffic Management and Unmanned Aircraft Act 2021 (2021 c.12).

'party' to an appeal means the the appellant, an intervener or the CAA.

'the Rules' means the Air Traffic Services Licence Modification Appeals: Competition and Markets Authority Rules;

'the Schedule' means Schedule A1 to the Act;

'sensitive information' means information which is:

- (i) commercial information, the disclosure of which would, or might, significantly harm the legitimate business interests of an undertaking to which it relates; or
- (ii) information relating to the private affairs of an individual, the disclosure of which would, or might, significantly harm the individual's interests.

2. Background

2.1 The Act introduced a new system of economic regulation for air traffic services.² Under the Act, it is an offence to provide air traffic services in respect of a managed area unless the person is subject to an exemption by order of the Secretary of State or holds a licence to provide the services.³ A licence may be granted by the Civil Aviation Authority (CAA)⁴ to a company authorising it to provide air traffic services in respect of a managed area⁵ A licence may include such provisions as the CAA thinks are necessary or expedient and a provision need not relate to services authorised by the licence. A licence may also include such provisions in a licence as the CAA thinks fit.⁶

2.2 Licence conditions relating to modifications must specify or describe:⁷

- (a) the circumstances in which it may be modified;

² Section 98 of the Act defines the following as 'air traffic services': (a) providing instructions, information or advice with a view to preventing aircraft colliding with other aircraft or with other obstructions (whether in the air or on the ground); (b) providing instructions, information or advice with a view to securing safe and efficient flying; (c) managing the flow of air traffic with a view to ensuring the most efficient use of airspace; (d) providing facilities for communicating with aircraft and for the navigation and surveillance of aircraft; (e) notifying organisations of aircraft needing search and rescue facilities, and assisting organisations to provide such facilities.

³ See Sections 3-4 of the Act.

⁴ See Section 6 of the Act. The Secretary of State can also grant a licence after consulting the CAA.

⁵ See Section 5 of the Act.

⁶ See Section 7 of the Act.

⁷ See Section 7 of the Act.

- (b) the types of modification that may be made; and
 - (c) the period or periods in which it may be modified.
- 2.3 The procedure that the CAA must follow when modifying a licence is set out at Section 11A of the Act.
- 2.4 Schedule B1 to the Act provides for appeals to the Competition Appeal Tribunal in certain circumstances relating to the enforcement of licence holder duties under Section 8 of the Act and the enforcement of licence conditions.
- 2.5 Appeals against decisions by the CAA to modify licence conditions can be made to the CMA by the holder of the relevant licence, an owner or operator of an aircraft whose interests are materially affected by the decision or an owner or manager of a prescribed aerodrome whose interests are materially affected by the decision.⁸
- 2.6 The CMA may allow appeals only to the extent that it is satisfied that the CAA decision was wrong on one or more of the following grounds:
 - (a) that the decision was based on an error of fact;
 - (b) that the decision was wrong in law; or
 - (c) or that an error was made in the exercise of a discretion.⁹
- 2.7 To the extent that the CMA does not allow the appeal, it must confirm the decision appealed against.¹⁰
- 2.8 If the CMA allows the appeal, it must do one or more of the following:¹¹
 - (a) quash the decision appealed against;
 - (b) remit the matter that is the subject of the decision appealed against to the CAA for reconsideration and decision in accordance with Chapter 1 of the Act and any directions given by the CMA; and/or
 - (c) substitute its own decision for that of the CAA.
- 2.9 The CMA must publish an order containing its determination, with reasons.¹²

⁸ Section 19A(2) of the Act.

⁹ Section 19B of the Act.

¹⁰ Section 19C(1) of the Act.

¹¹ Section 19C(2) of the Act.

¹² Section 19E of the Act.

- 2.10 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, as well as certain publication obligations, are set out in the Act and the Schedule. The Schedule, however, also provides that the CMA may make rules of procedure regulating the conduct and disposal of these appeals.¹³

3. General observations on appeals

- 3.1 The Rules set an administrative deadline on the CAA of two weeks from the day on which the CMA grants permission to appeal for the making of representations on the appeal under paragraph 19 of the Schedule. Once permission is granted the Act requires the CMA to determine the appeal within 14 weeks (extendable by 12 weeks).¹⁴ This is a tight time frame and therefore it is important that the CMA receives any evidence from the CAA as close to the start of this period as possible. The CMA considers that the presumption of a two-week deadline for the CAA is appropriate having regard to the overall statutory time frame for these appeals. As this is an administrative deadline (rather than a statutory one), it will be open to the Group¹⁵ determining the appeal to vary this time period having regard to the circumstances of the appeal.
- 3.2 The Rules do not set deadlines for other possible stages in the appeal process not subject to a statutory deadline; for example, for the CAA and other parties to the appeal in relation to the making of representations on any application for permission to intervene and any application to suspend the CAA's decision (excluding early applications where there is a statutory deadline); or for the appellant and any interveners in relation to making any representations in reply to the CAA's representations under paragraph 12 of the Schedule. The CMA expects to set administrative deadlines for such actions in particular cases having regard to the particular matters raised in the relevant cases.

¹³ Paragraph 23 of the Schedule.

¹⁴ Under s19D(1) of the Act, the CMA must determine an appeal under s19A within the period of 24 weeks beginning with the date the CAA published its decision notice. The 14 week timing included above assumes that the prior steps in the appeal process took place on the last day permitted by the Act (i.e. in particular that the CMA took the full 10 weeks to grant permission to appeal under paragraph 2(2) of the Schedule). If any of these steps occur earlier than the last permitted day, the timing for the CMA to make its determination will be longer.

¹⁵ This is a group of the CMA's members, formed for the purpose of carrying out the CMA's functions. See paragraph 11 of the Schedule.

Approach to appeals

- 3.3 The appeal must be clearly linked to the grounds of appeal set out in the Act and summarised in paragraph 2.6.
- 3.4 The CMA will not consider afresh the licence modifications imposed by the CAA. 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 CAA. The CMA may only allow an appeal where it is satisfied that the appellant has shown on the balance of probabilities that the CAA's decision was wrong on one or more of the grounds set out in the Act.
- 3.5 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, efficiently and at proportionate cost within the time periods prescribed by the Act. The CMA expects parties to the appeal to assist it in meeting the overriding objective and to conduct themselves in a way that is consistent with this approach.
- 3.6 In determining the appeal, the CMA must have regard to the matters in respect of which duties are imposed on the CAA by section 2 of the Act.¹⁶
- 3.7 In determining the appeal, the CMA must not have regard to any matter, information or evidence raised or provided by the CAA if it was not considered by the CAA in making the decision that is the subject of the appeal, unless the CMA considers that:
- (a) the CAA could not reasonably have been expected to consider the matter, information or evidence when making that decision, and
 - (b) the matter, information or evidence is likely to have an important effect on the outcome of the application or appeal, either by itself or taken together with other matters, information or evidence.¹⁷
- 3.8 In determining the appeal, the CMA must not have regard to any matter, information or evidence raised or provided by a person other than the CAA if it was not considered by the CAA in making the decision that is the subject of the application or appeal, unless the CMA considers that:

¹⁶ Section 19E(2) of the Act.

¹⁷ Paragraph 16(2) of the Schedule.

- (a) the person or a relevant connected person could not reasonably have raised the matter with the CAA, or provided the information or evidence to the CAA, during the period in which the CAA was making that decision, and
- (b) the matter, information or evidence is likely to have an important effect on the outcome of the application or appeal, either by itself or taken together with other matters, information or evidence.¹⁸

3.9 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.

3.10 The CMA places great importance on transparency between parties in appeals and expects as a starting point that parties will have access to all appeal materials (subject to any confidentiality requests). This is equally the case for non-core documentation, the disclosure of which is not covered in detail in the Rules or this guidance (for instance, additional submissions, correspondence (including pre-appeal correspondence), and any materials prepared for site visits, teach-ins and/or hearings). If any party considers that it is not appropriate for other parties to have access to a particular document or material, it should make representations to the CMA explaining why it considers that to be the case. Administrative matters

Administrative matters

3.11 The CMA's staff team is led by an Appeal Director who is supported by project delivery staff and specialist staff. Once a notice of appeal is sent to the CMA, the CMA will write to the applicant and the CAA with the necessary contact details and publish these details on a designated page on the CMA's website. Parties to 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.

Pre-appeal

3.12 Any prospective appellant is strongly advised to provide the CMA with reasonable notice that it may appeal a decision of the CAA prior to commencing an appeal under Rule 5. Such notice may be provided informally, for example, through telephone contact with the CMA.

¹⁸ Paragraph 16(3) of the Schedule.

- 3.13 'Reasonable notice' in this context would typically cover an initial contact with the CMA¹⁹ 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.
- 3.14 These pre-appeal contacts will be treated as confidential between the prospective appellant and the CMA.
- 3.15 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. 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.
- 3.16 The CMA would also encourage a prospective appellant to inform the CAA 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 CAA or if it plans to do so.
- 3.17 Wherever possible, the CMA expects prospective appellants and the CAA to seek to resolve calculation errors or other non-contentious errors before reaching the appeal stage. This would cover the sort of errors that the prospective appellant and the CAA would reasonably expect could be corrected without argument. The appeal process should be reserved for substantive disagreements between the prospective appellant and the CAA.

Publication and notification requirements

- 3.18 The Act requires the CMA to publish its decision and the reasons for its determination of the appeal, the decision on applications for permission to appeal, for permission to intervene and for a direction under paragraph 9 or paragraph 6 of the Schedule. The CMA must also send a copy of these decisions and reasons to persons specified in the Schedule. Generally, these

¹⁹ If a prospective appellant does not possess a named contact at the CMA, these initial contacts can be made to appeals@cma.gov.uk.

persons include the licence holder which is the subject of the application or direction, any other person with a qualifying interest in the decision that is the subject of the application or direction, the CAA and any owners or operators of aircraft or owners or managers of prescribed aerodromes as the CMA considers appropriate.

- 3.19 This Guide places the rules in their statutory context and explains how, in practice, the CMA expects to deal with several issues that could arise in relation to appeals that are not specifically dealt with in the Act or the rules.

Time frames

- 3.20 The Act prescribes the time frames within which various steps in the appeal process must be completed.
- 3.21 The Act requires that applications for permission to appeal must be made within six weeks beginning with the day of publication of the notice of the CAA's decision under section 11A of the Act.²⁰ An application for permission to appeal is made by submitting a 'notice of appeal' to the CMA. Applicants 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.
- 3.22 The Act provides that the CMA must determine an appeal within the period of 24 weeks beginning with the day on which the CAA published the notice of the decision that is being appealed.²¹ The CMA may extend the appeal period on one occasion only by not more than 12 weeks if it is satisfied that there are good reasons for doing so.²² The CMA may also extend the appeal period as it considers appropriate on more than one occasion if there is an appeal to the CAT under the relevant Chapter of the Act which the CMA considers to be relevant to the appeal and the appeal has not been determined or withdrawn.²³ If the CMA considers it necessary or appropriate to extend the period of a determination in either circumstance, it will consult with the parties to the appeal before doing so.
- 3.23 The deadlines prescribed by the Act are set out in Appendix A.

²⁰ Paragraph 1(1) and (2) of the Schedule.

²¹ Section 19D(1) of the Act.

²² Section 19D(2) and (3) of the Act.

²³ Section 19D(4) and (5) of the Act.

Administrative timetable

- 3.24 As soon as possible after granting permission to appeal and any applications for permission to intervene in an appeal under paragraph 4(2) of the Schedule have been determined, the CMA will draw up an administrative timetable for the appeal in accordance with Rule 10. When drawing up the timetable the CMA will have regard to the views of the parties to the appeal as well as the overriding objective set out in Rule 4 and the circumstances of the case. Once the timetable has been set, the CMA will aim to keep to it; parties to the appeal 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.
- 3.25 In order to conduct an efficient process, the CMA expects that parties to the appeal will treat the timetable as ‘hard’ deadlines. Should it become apparent to a party that it will struggle to adhere to a deadline the CMA should be contacted as soon as possible.
- 3.26 The CMA expects to set an administrative timetable designed to enable the CMA and the parties to the appeal to conduct a satisfactory process within the statutory timescale. There are provisions in the Act to help facilitate this including the following:
- (a) The Act permits the CMA to disregard certain matters raised by the CAA, the appellant or an intervener if it thinks it necessary to do so for the purpose of securing that the appeal is determined within the statutory period.²⁴
 - (b) The Act also limits the circumstances in which the CMA can consider matters, information or evidence that was not considered by the CAA at the time of making the decision that is the subject of the application or appeal (new matters).²⁵ These restrictions are summarised in paragraph 3.7-3.8 above.

²⁴ Paragraph 13 of the Schedule. However, the CMA is not able to disregard matters:

(a) contained in representations made by the CAA in relation to an application for suspension or before the end of the period of 12 weeks beginning with the day on which the decision notice was published; (b) raised by the appellant at the time of the application for permission to appeal or in an application for suspension; and (c) raised by the interveners at the time of the application for permission to intervene or in an application for suspension.

²⁵ Paragraph 16 of the Schedule.

- (c) The Act requires the CMA to make any permission to intervene for the purposes of supporting an appeal subject to conditions preventing the intervener from putting forward new grounds of appeal.²⁶
- (d) Finally, where the CMA or the CAA is required by the Schedule to the Act to publish something or send a copy of something and no time is specified, the CMA and the CAA must publish or send it as soon as practicable.²⁷

Procedure

- 3.27 Rule 12 sets out a non-exhaustive list of matters upon which the CMA can give directions or make informal requests. Parties 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 12.2) through informal means, without it being necessary to give directions under Rule 12. However, where necessary the CMA will give directions in relation to the conduct of the appeal. Parties to the appeal 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 parties to the appeal 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.
- 3.28 Where parties to the appeal are applying for directions the CMA expects that they would have sought to agree the direction with the other parties to the appeal beforehand.
- 3.29 The CMA expects that parties to the appeal 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. Where it has not been possible for the parties to agree such documents, the CMA expects the parties to bring any such disagreements to the CMA's attention.
- 3.30 Where appropriate, the CMA will inform parties in advance of the procedure and practicalities for certain aspects of the appeal process such as any teach-

²⁶ Paragraph 5(3)(b) of the Schedule.

²⁷ Paragraph 26 of the Schedule.

ins and hearings. The CMA will typically prepare a series of process notes to assist parties to an appeal (including any interveners) with practical matters.

Appeal management conferences

- 3.31 Appeal management conferences may be held under Rule 13. These are opportunities for the CMA to manage the appeal. The CMA will invite the parties to the appeal to attend the initial appeal management conference and the CMA may, if applicable and appropriate to do so, choose to invite any applicants or potential applicants for permission to intervene.
- 3.32 Active appeal management will be an important tool in ensuring that the CMA makes the right decision in the time allowed.

Permission stage

- 3.33 The Act requires that permission to appeal is obtained before an appeal can be brought.²⁸ 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.²⁹
- 3.34 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.
- 3.35 A copy of the CAA’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 including by reference to page numbers where relevant, and where they include copies of prior determinations by the CAA that are relevant to the appeal, with the relevant parts indicated.
- 3.36 A copy of the notice of appeal must be sent to the CAA at the same time as the notice of appeal is sent to the CMA.³⁰ The CMA would not typically expect the notice of appeal to contain sensitive information that cannot be shared with the CAA. An applicant should contact the CMA in the first instance if

²⁸ Section 19A(4) of the Act.

²⁹ Six weeks beginning with the day on which the CAA published the decision notice. Paragraph 1(1) of the Schedule.

³⁰ Paragraph 1(3) of the Schedule and Rule 5.4.

there are particular circumstances that may warrant the sharing of a redacted version of the notice of appeal with the CAA.

- 3.37 Once the CAA has received a copy of the notice of appeal it has 8 weeks, beginning with the first working day on which it publishes the decision notice, to make representations to the CMA on whether the CMA should grant permission to appeal.³¹
- 3.38 The CMA has ten weeks, beginning with the day on which the CAA published the decision notice, to decide whether to grant permission to appeal.³²
- 3.39 The CMA will normally make a decision on permission without a hearing.³³ The CMA may decide to hold a hearing to determine an application for whether permission should be granted either of its own motion or on the application of the applicant, or the CAA. Where it decides to hold a hearing the CMA will notify the applicant, the CAA and such other persons as it considers appropriate. The CMA may also request additional information or representations from the applicant or the CAA, copies of which may be sent to the applicant or the CAA (as applicable) or such other persons as the CMA considers appropriate (subject to any confidentiality claims made by the applicant or the CAA at the time of submission).
- 3.40 The CMA will consider whether the applicant 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 2.5, under the Act appeals can only be brought by the holder of the relevant licence or by an owner or operator of an aircraft whose interests are materially affected by the decision or an owner or manager of a prescribed aerodrome whose interests are materially affected by the decision.³⁴
- 3.41 The CMA may refuse permission to appeal on one of the following grounds:³⁵
- (a) the applicant does not have standing to bring an appeal;
 - (b) the appeal is brought for reasons that are trivial or vexatious;
 - (c) the appeal does not have a reasonable prospect of success; or

³¹ See paragraph 3(2) of the Schedule. The CAA must send a copy of its representations to the persons listed in paragraph 3(3) of the Schedule.

³² Paragraph 2(2) of the Schedule.

³³ Rule 6.

³⁴ Section 19A(2) of the Act.

³⁵ Section 19A(6) and (7) of the Act.

- (d) the appeal relates entirely to a matter remitted to the CAA following an earlier appeal to the CMA on grounds that were considered, or could have been raised by the current applicant or relevant connected person, as part of the earlier appeal.
- 3.42 Rule 5.2(a) requires that applicants 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 applicant has standing. Where an applicant is claiming to be materially affected it should clearly and concisely set out the interest that is affected and how it is affected.
- 3.43 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.³⁶ 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.
- 3.44 Although the CMA may allow the filing of further submissions and evidence either informally or by issuing a direction under Rule 12, the CMA will not allow this Rule to be used to circumvent the time limit by which a notice of appeal must be submitted.
- 3.45 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 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. 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.³⁷

Suspension of the CAA's decision

- 3.46 The Schedule allows the CMA, upon application by the person who applied for permission to appeal or by another person who would be entitled to appeal against the decision, to suspend the CAA's decision to modify a licence condition³⁸ where the applicant for the direction to suspend would incur

³⁶ Paragraphs 2(3) and 2(4) of the Schedule.

³⁷ The CMA does not expect the CAA's representations on the application for permission to bring an appeal to be made available other than to those listed paragraph 3(3) of the Schedule prior to making its decision on the application. However, the CMA may publish a non-sensitive version of the CAA's representations.

³⁸ Paragraph 6 of the Schedule.

significant costs if the licence condition were to have effect from the date specified in the decision and the balance of convenience does not otherwise require the licence condition to have effect from that time.³⁹ Having regard to these factors, in order to make a direction suspending the CAA's decision, the CMA will require evidence from the applicant of the costs involved if the condition of new licence or licence modification is not suspended and will consider whether such costs are likely to outweigh the public benefit of allowing the licence 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 modification, if any part of the appeal is successful.

- 3.47 An application to suspend the CAA's decision may be made at any time before the determination of the appeal.⁴⁰ At the same time as sending the application for suspension to the CMA, the applicant must send a copy of the application to the CAA.⁴¹
- 3.48 Where an application for a direction to suspend is made under paragraph 6 of the Schedule, but it is made within six weeks beginning on the day on which the CAA published notice of its decision and the modification would have effect, but for the application, before the end of the period of 10 weeks beginning with that day, the condition or modification does not have effect during that 10 week period.⁴²
- 3.49 Rule 9 sets out the requirements for making applications for suspension and the process that the CMA will follow in considering the application. Subject to Rule 9, 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.
- 3.50 In making an application for the suspension of the CAA's decision, the applicant 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 appeal and why the balance of convenience favours the suspension of the decision.
- 3.51 The CAA has eight weeks beginning with the day on which the CAA published the decision notice to make any submissions to the CMA about an early

³⁹ Paragraph 8(2) of the Schedule.

⁴⁰ Paragraph 6(2) of the Schedule.

⁴¹ Paragraph 6(3) of the Schedule. Under paragraph 6(4) of the Schedule, the CAA must publish the application and send a copy to the persons listed in paragraph 6(5) of the Schedule.

⁴² See paragraph 7(1) of the Schedule.

application for suspension.⁴³ In any other case, the CMA must specify a reasonable period for making representations and the CAA must make representations in writing before the end of that period.⁴⁴

- 3.52 The CMA may consider an application for suspension of the CAA'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 applicant, the CAA and any other person the CMA considers appropriate. The CMA may also request additional information or representations from the applicant or the CAA, copies of which may be sent to the applicant or the CAA (as applicable) or such other persons as the CMA considers appropriate (subject to any confidentiality claims made by the applicant or the CAA at the time of submission).

4. Particular issues in appeals

Commencing an appeal

- 4.1 Applicants 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 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 CAA'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.

⁴³ These are cases to which paragraph 7 of the Schedule applies. In summary, an early application is one which is made under paragraph 6 before the end of the period of six weeks beginning with the day on which the CAA published notice of the decision to modify a licence condition and that decision would have effect but for the application, before the end of the period of ten weeks beginning with that day.

⁴⁴ Paragraph 10(3) of the Schedule.

- 4.3 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.⁴⁵
- 4.4 The CMA has no power to extend the period of time within which a notice of appeal must be submitted.

The CAA's representations

- 4.5 If the CAA wishes to make representations 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 under the relevant Rule.⁴⁶ The CAA must send a copy of any such representations to the relevant persons listed within the Schedule⁴⁷ within the deadline for the CAA to make the submission to the CMA under the relevant Rule.
- 4.6 Where the CMA has granted permission to appeal, the CAA may send a response to the CMA setting out its representations 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 CAA has two weeks beginning with the day on which the CMA publishes its decision to grant permission to bring the appeal to make such representations or observations.⁴⁸ The CAA's representations 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 CAA wishes to rely on interlinkages with other parts of its decision, it should include a description of these interlinkages in its statement.
- 4.7 The CAA should also at the same time provide a non-sensitive version of the statement in response both to the CMA and to the persons specified in

⁴⁵ 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.

⁴⁶ Rule 5 in respect of applications for permission to appeal, Rule 9 in respect of suspension applications and Rule 11 in respect of its reasons for its decision and/or in respect of any of the grounds of appeal.

⁴⁷ See paragraph 3(3) of the Schedule (representations on permission application); paragraph 10(4) (representations on suspension application); paragraph 12(2) of the Schedule (representations on the appeal after permission has been granted).

⁴⁸ Rule 11.1.

paragraph 12(2) of the Schedule.⁴⁹ 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 (unless the CMA agrees to an extended deadline where necessary based on the circumstances of the case).⁵⁰ The CMA will publish on its website a non-sensitive version of the statement filed in response under Rule 11.2(a) as soon as reasonably practicable following receipt.

Withdrawal of appeals and summary determinations allowing an appeal

- 4.8 Where the CMA grants permission to an appellant to withdraw its appeal, pursuant to an application made under Rule 7.1, it will make the appropriate determination, having regard to all the circumstances. It may make an order for its own costs that reflects the nature of the determination, in accordance with Rule 19.1 and paragraph 24(1) of the Schedule. The CMA in such circumstances may also make an order for payment of inter partes costs under Rule 19.3, in accordance with paragraph 24(1) of the Schedule and having regard to the factors set out in Rule 19.5.
- 4.9 Where the CMA makes a summary determination allowing the appeal, pursuant to an application under Rule 7.2, it will make an order against the CAA requiring the payment to the CMA of the costs incurred by the CMA in connection with the appeal. In such circumstances, the CMA may also require the CAA to pay the costs that the appellant has reasonably incurred in connection with the appeal.
- 4.10 All such orders for costs will be made in accordance with the process set out in Rule 19. Paragraphs 6 and following below discuss orders for costs in more detail.

Interveners and third party involvement

- 4.11 Where an application is made for permission to appeal, an application for permission to intervene may be made to the CMA by those who would be entitled to appeal against the decision.⁵¹ Interveners typically play a greater

⁴⁹ By 'non-sensitive' versions, we refer to versions of documents with sensitive information (as defined above) redacted.

⁵⁰ Rule 11.5.

⁵¹ Paragraph 4(1) of the Schedule.

role than 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.

- 4.12 Applications for permission to intervene may be made before the end of the period of one week beginning with the day on which the CMA publishes its decision to grant permission to appeal against the decision.⁵² An application to intervene may be made after that period only with the leave of the CMA.⁵³
- 4.13 Applications for permission to intervene are made when applicants send their applications in accordance with Rule 8. At the same time as sending the application for permission to intervene to the CMA, the applicant must send a copy of it to the CAA.⁵⁴
- 4.14 Subject to Rule 8 and those provisions contained within the Act, the CMA expects that the procedure for intervention 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.
- 4.15 The CAA will publish the application for permission to intervene and send copies to the relevant parties in accordance with the Act.⁵⁵ Any such disclosure or publication is subject to the restrictions set out in the Act and the Rules and the considerations detailed below in paragraphs 4.49 to 4.56.
- 4.16 The CMA may grant permission to intervene in an appeal only if satisfied that allowing the application to intervene is necessary or desirable for the proper resolution of the appeal.⁵⁶ In making an application to intervene, the applicant should therefore clearly set out why it believes its intervention is necessary or desirable for the resolution of the appeal. The CMA would therefore normally expect to deal with this stage based on the written evidence. However, Rule 8.7 does allow for a hearing and notice to be given of any hearing where the CMA considers it necessary to do so before a decision is taken on the application to intervene.

⁵² Paragraph 4(2)(a) of the Schedule.

⁵³ Paragraph 4(2)(b) of the Schedule.

⁵⁴ Paragraph 4(3) of the Schedule.

⁵⁵ Paragraph 4(4) and 4(5) of the Schedule.

⁵⁶ Paragraph 5(2) of the Schedule.

- 4.17 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.
- 4.18 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.
- 4.19 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.
- 4.20 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 12.4(e).

Written submissions and other documentation

- 4.21 The CMA expects parties to send all their evidence to the CMA at the beginning of the process. The CMA does not intend the provision of evidence by parties 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 12 or through informal means. If parties 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 12 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.
- 4.22 Parties 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 19.
- 4.23 Parties must also comply with any page limits set by the CMA in relation to written submissions.

- 4.24 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 it should as far as possible be consistent with the usage of technical terms by the CAA and others prior to the CAA'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.
- 4.25 The CMA will also find it helpful to see a chronology of the licence modification proposal from its inception to the CAA's decision. The purpose of the chronology is to provide the CMA and the parties with a single reference point from which to understand the development of the licence modification proposal up to the point at which the CAA 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.
- 4.26 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

- 4.27 All appeals will be subject to active appeal management by the CMA. The CMA does not require parties to the appeal to be legally represented at any appeal management conferences and hearings. The CMA does, however, want focused arguments from the parties at any conferences.

Considering appeals together

- 4.28 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.⁵⁷ The Rules include provision for directions being made by the CMA relating to considering appeals or parts of appeals together.
- 4.29 Individual appellants and the CAA 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.
- 4.30 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.
- 4.31 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). Notwithstanding this, the CMA will consider whether it is appropriate to hear an appellant individually in addition to joint hearings. The CMA will decide on this based on the circumstances of the case and in accordance with the overriding objective.
- 4.32 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.

⁵⁷ Paragraph 2(3) and (4) of the Schedule.

Witness statements and expert reports

4.33 A witness statement or expert report must be verified by a statement of truth,⁵⁸ signed by the witness or expert.⁵⁹

4.34 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.

4.35 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

⁵⁸ Paragraph 27(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. In the case of expert evidence, the expert may wish to supplement this basic statement along the lines of the standard statement of truth for experts included in CPR Practice Direction 35, paragraph 3.3 to cover the opinion element of their report. The CMA is content with this approach provided that the statement includes at some point a confirmation of the expert's belief in the truthfulness of factual statements made by the expert in their report.

⁵⁹ The CMA will accept electronic signatures in witness statements and statements of truth and in all other situations where signatures are envisaged under the Rules or in this Guide.

(including, in the case of experts, details of any literature or other material relied on in making the report).

- 4.36 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 reasons for their own opinion. The expert should also detail any qualifications to which their opinions are subject.
- 4.37 A witness statement or expert report should be as concise as the circumstances allow and should only contain content that is relevant to the 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.
- 4.38 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.
- 4.39 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

- 4.40 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.
- 4.41 The CMA⁶⁰ may conduct separate hearings with the appellant and the CAA which the appellant or the CAA (as applicable), as well as any interveners, may attend as observers.
- 4.42 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 to ask questions about a case. The CMA may decide to use these hearings

⁶⁰ Under paragraph 18(1) of the Schedule, the CMA Group holds hearings for the purpose of determining appeals and authorised members of the CMA may also hold hearings relating to certain applications.

and/or written clarifications to focus on narrow areas of appeals that require clarifications.

- 4.43 Interveners 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 a stand-alone hearing or to all or part of any hearing with the appellant and the CAA. The CMA may of its own initiative invite interveners to attend any hearing.
- 4.44 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 provision will be used very rarely.
- 4.45 Hearings are formal and will normally be led by the Chair of the Group.
- 4.46 Parties 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 parties. Parties 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 parties may present their submissions using, for example, a PowerPoint presentation, if they consider that would assist the CMA. Parties 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.
- 4.47 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

- 4.48 The CMA may conduct meetings or make phone calls to clarify specific facts; for example, CMA staff may hold meetings with the CAA or other parties to the appeal to discuss technical issues. A transcript or note will normally be taken but where practical other parties to the appeal may be invited to send observers.

Confidentiality and Freedom of Information

- 4.49 The Act makes provision for the CMA and the CAA to exclude from publication or disclosure required under the Act or the Rules any information which they are satisfied is:⁶¹
- (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.
- 4.50 Such information is defined in Rule 2 as 'sensitive information' and provision for its protection is included in the Rules.
- 4.51 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. When submitting non-sensitive versions of documents, a version that highlights confidential information should always be provided. Where a document will be published, a version with the confidential information redacted should also be provided.
- 4.52 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 parties, other than communications of a purely administrative nature, and transcripts of hearings to other parties.
- 4.53 The CMA may propose that disclosure of certain information should be made solely within a 'confidentiality ring', normally comprising the parties' named legal representatives and, possibly, other external advisers or experts such as accountants and economists, subject to appropriate confidentiality

⁶¹ Sections 19E(5), paragraph 2(9) and 5(6) of the Schedule.

undertakings, rather than to the parties themselves. The CMA will seek views from the parties 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.

- 4.54 Exceptionally, claims may be made that certain information is of such sensitivity that it should not be disclosed within the confidentiality ring.
- 4.55 Rule 12 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 party has concerns about providing sensitive information to another party, it can provide the proposed version of the document to the CMA and ask it to provide directions on the proposed excisions (Rule 12). The CMA respects the importance of protecting sensitive information. However, it also discourages parties from making excessive or blanket confidentiality claims over submissions and may consider them to be inconsistent with the overriding objective.
- 4.56 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 will normally issue a provisional determination stating its provisional conclusions which will be notified to the parties to the appeal. However, there may be cases where the CMA considers that it is not appropriate to issue a provisional determination. In such cases, the CMA will determine what alternative procedure is appropriate based on the circumstances of the case and in accordance with the overriding objective. 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. 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 applicable confidentiality protections. 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. Costs⁶²

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.⁶³ Such an order must require those costs to be paid:
- (a) where the appeal is allowed in full, by the CAA;
 - (b) where the appeal is dismissed in full, by the appellant; or
 - (c) where the appeal is partially allowed, by the appellant and the CAA in such proportions as the CMA considers appropriate.⁶⁴
- 6.2 When considering the appropriate proportions of the CMA's costs to be paid by one of 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 CAA 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 CAA 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 CAA 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 CAA had a reasonable opportunity to correct it

⁶² Paragraph 24(8) of the Schedule provides that for the purposes of paragraph 24 (Costs), references to an intervener in an appeal, and to a party to an appeal, include a person who was granted permission to intervene in the appeal and subsequently withdrew from the appeal.

⁶³ Paragraph 24(2) and 24(3) of the Schedule.

⁶⁴ Under paragraph 32(4) of the Schedule, the order may require an intervener in the appeal to pay such proportion of those costs (if any) as the CMA considers appropriate.

prior to making its decision and whether the appellant could have reasonably raised the error with the CAA 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 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 to make payments to another party in respect of costs reasonably incurred by the other party in connection with the appeal.⁶⁵ The CMA may have regard to all the circumstances, including (as set out in Rule 19.5) the conduct of the parties, a party's degree of success and the reasonableness and proportionality of the costs claimed. In addition, the CMA considers that the principles as set out in *BT v Ofcom*⁶⁶ 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. Those principles are taken from the Booth line of judgments endorsed in both *BT v Ofcom* and *Flynn Pharma*, described at paragraph 97 of *Flynn Pharma* and set out at paragraph 29 of *BT v Ofcom* extracting the statement by Bingham LJ in *Bradford MDC v Booth*.⁶⁷
- 6.5 Before making any order for costs under Rule 19, 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 19.3, 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 CAA 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.

⁶⁵ Paragraph 24(5) of the Schedule

⁶⁶ *British Telecommunications plc v Office of Communications* [2018] EWCA Civ 2542.

⁶⁷ *Bradford MDC v Booth* [2000] 164 JP 485.

- 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.
- 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.

Appendix A: Statutory deadlines under the Act

<i>Stage</i>	<i>Time frame prescribed by the Act</i>
The CAA publishes decision notice under section 11A	Not specified
Applicant sends application for permission to appeal	Six weeks beginning with the day on which the CAA published its decision notice
Applicant makes early application for suspension of modification	Six weeks beginning with the day on which the CAA published its decision notice
The CAA makes any representations on the application for permission to appeal	Eight weeks beginning with the day on which the CAA published its decision notice
The CAA makes any representations on early the application for suspension of condition of new licence or modification	Eight weeks beginning with the day on which the CAA published its decision notice
CMA takes its decision on the application for permission to appeal and its reasons	Ten weeks beginning with the day on which the CAA published its decision notice
If applicable, the CMA takes its decision on the early application for suspension of licence modification	Ten weeks beginning with the day on which the CAA published its decision notice
Applicants send application for permission to intervene in the appeal	One week beginning with the day on which the CMA published its decision to grant permission to appeal ⁶⁸
CMA takes its decision on any applications for permission to intervene and its reasons	Not specified
CMA determines the appeal	24 weeks beginning with the day on which the CAA published its decision notice
CMA determines the appeal (extension if required)	32 weeks beginning with the day on which the CAA published its decision notice

⁶⁸ An application for permission to intervene may be made after the end of that period only with the leave of the CMA (paragraph 4(2)(b) of the Schedule).