

# DRAFT RULES OF PROCEDURE AND GUIDANCE FOR ENERGY CODE MODIFICATION APPEALS

Consultation document

23 July 2024



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# 1. About the consultation

## Introduction

- 1.1 The Competition and Markets Authority (CMA)<sup>1</sup> is consulting on draft changes to the following existing rules and guidance:
- (a) [Competition Commission: The Energy Code Modification Rules](#) (CC10);<sup>2</sup> and
  - (b) [Guide to Appeals in Energy Code Modification Cases](#) (CC11).<sup>3</sup>

## Background and rationale

- 1.2 The CMA is responsible for determining appeals against certain energy industry code modification decisions made by the Gas and Electricity Markets Authority (GEMA).
- 1.3 The Energy Act 2004 (EA04) together with the Electricity and Gas Appeals (Designation and Exclusion) Order 2014 (the Order) set the legislative framework for energy code modification appeals. EA04 establishes the appeal framework and the Order designates the codes and the types of decisions in relation to those codes which may be appealed to the CMA.
- 1.4 The CMA is permitted to make rules of procedure under Schedule 22 of the EA04.<sup>4</sup> In 2014, the CMA adopted the rules that had been made by the Competition Commission,<sup>5</sup> CC10 and CC11, for this purpose.
- 1.5 CC10 and CC11 were issued by the Competition Commission in 2005 and are now nearly 20 years old. They predate the Order (drawing on an earlier version) and do not reflect the CMA's current procedural practice in relation to appeals. The CMA therefore considers that it is timely to update them.<sup>6</sup>
- 1.6 We are therefore consulting on updated draft Rules and Guide which (i) reflect the updated legislative framework, (ii) incorporate the CMA's experience of conducting appeals, (iii) align more closely to the CMA70 Rules<sup>7</sup> and CMA71 Guide<sup>8</sup> in place

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<sup>1</sup> The CMA is the UK's economy-wide competition and consumer authority and works to promote competition for the benefit of consumers, both within and outside the UK. Its aim is to make markets work well for consumers, businesses and the economy as a whole.

<sup>2</sup> <https://www.gov.uk/government/publications/energy-code-modification-rules>.

<sup>3</sup> <https://www.gov.uk/government/publications/energy-code-modification-cases-appeals>.

<sup>4</sup> Schedule 22, paragraph 12, EA04.

<sup>5</sup> The Competition Commission was one of the two predecessor organisations (alongside the Office of Fair Trading) which combined to become the CMA.

<sup>6</sup> We will continue to review the Rules and Guide in line with any wider amendments to the code governance framework, for example as a consequence of provisions made in the Energy Act 2023 to reform energy code governance. However, we do not consider the possibility of such amendments to be a reason not to update the Rules and Guide at this time.

<sup>7</sup> <https://www.gov.uk/government/publications/energy-licence-modification-appeals-rules-cma70>.

<sup>8</sup> <https://www.gov.uk/government/publications/energy-licence-modification-appeals-guide-for-participants-cma71>.

for energy licence modification appeals issued in 2022,<sup>9</sup> and (iv) reflect the use of technology to reduce administrative burdens.

## **Scope of the consultation**

- 1.7 This consultation seeks the views of interested parties on the CMA's draft updated Rules and Guide.
- 1.8 This consultation is aimed at those who have an interest in the CMA's process for energy code modification appeals. It may be of particular interest to regulators, consumer representative bodies and businesses as well as their legal and other advisers.

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<sup>9</sup> Energy licence modification appeals relate to challenges of price control decisions and other changes to requirements given effect through licence modifications.

## **2. Proposed updated Rules and Guide**

- 2.1 The section includes a high-level overview of the key changes we are proposing to make in the updated Rules and Guide.
- 2.2 In drafting the Rules and Guide, the CMA has, where appropriate, retained and updated the wording of CC10 and CC11 while also taking into account other relevant documents, including procedural rules and guidance for regulatory appeals issued in 2022, particularly CMA70 and CMA71.

### **Structure and approach**

- 2.3 We have sought to align the Rules and Guide more closely with our 2022 rules and guidance, particularly CMA70 and CMA71. This is to reflect the CMA's current practice with respect to its appeal procedures as well as to ensure greater consistency where appropriate. However, these Rules and Guide necessarily differ from CMA70 and CMA71 in certain respects, particularly due to the different underlying legislation and the much shorter timescales involved in energy code modification appeals.

### **Pre-appeal contact with the CMA**

- 2.4 In line with current practice, the Guide now sets out the steps for prospective applicants to take before submitting a notice of appeal. Establishing contact well before the appeal deadline (we advise at least two weeks in advance of the deadline) greatly assists both the CMA and the applicant. This contact enables the CMA to plan for conducting an appeal, to answer any questions on points of detail and for the applicant to set up and test the electronic means of submitting notices of appeal to avoid any technical issues. As the Guide explains, such contact may be informal and is kept confidential between the CMA and the applicant.

### **Transparency between parties**

- 2.5 Transparency between parties is very important to achieving the overriding objective to enable the CMA to dispose of appeals fairly, efficiently and at proportionate cost within the time periods prescribed by the Act.
- 2.6 In line with the 2022 rules and guidance, the Rules and Guide make clearer provision for ensuring transparency between parties during appeals. To support this, they set out in more detail what is required, including the timing for preparing non-sensitive versions of submissions, the form in which sensitive versions should be marked and the process for seeking permission for non-disclosure of confidential information. These changes aim to reduce burdens and increase efficiency by making clear upfront what is to happen when.

## Providing information to persons with standing to appeal

- 2.7 The statutory framework requires that, alongside GEMA, such persons as appear to the applicant to be affected by the decision (or their representatives) be provided with copies of key submissions to ensure that they are aware of and, where appropriate, can apply to participate in appeals. GEMA is also afforded the opportunity to specify to applicants for permission to appeal/intervene that further persons be provided with the documentation. It is important that this is done promptly to enable persons with standing to decide whether to apply for permission to intervene.
- 2.8 To assist with this, we have set out facilitating steps in the Rules and more detail in the Guide as to our expectations of how they will work. We note that this includes encouraging GEMA to prepare a list of who should be kept informed of any appeals either at the same time as or shortly after taking a relevant decision.

## Managing the appeal process: timetable, clarification, hearings and requests for information

- 2.9 We have updated these provisions to reflect our experience of conducting appeals.
- (a) **Timetable:** we now provide more detail in the Guide on the timetable for energy code modification appeals. In addition to a diagram providing a high level indicative timetable with the stages of the appeal set out in weeks (rather than working days) for illustrative purposes, a new Appendix sets out a more detailed timetable which lists the various statutory deadlines (expressed in working days as they are in the Act) and identifies the timing of the various stages in the appeal on an indicative basis.<sup>10</sup>
  - (b) **Clarification:** CC10 envisages holding clarification hearings as a primary means of obtaining clarification of submissions. In our experience, factual teach-ins and written clarifications can often be a more efficient approach than clarification hearings. The Rules and Guide therefore provide flexibility as to how to conduct the clarification process.
  - (c) **Hearings:** the Rules and Guide reflect our experience of conducting appeals and provide more detail on how hearings will be conducted, subject again to the CMA group's discretion. Given the short duration of energy code modification appeals, we will continue to provide the parties with a timetable

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<sup>10</sup> This is indicative because not all stages are subject to statutory deadlines and the CMA group appointed to determine an appeal has a wide discretion to direct the procedure that will be followed.

which sets out when hearings may be held to assist parties and their representatives in planning.

- (d) **Requests for information:** the Rules and Guide continue to provide for the CMA to request any additional information as needed. They explain that the CMA reserves the right to reject unsolicited submissions and the Guide now includes information about the potential sanctions for defaults in relation to evidence that reflects the relevant provisions in Schedule 22 of the Act.

## **Streamlining to remove unnecessary requirements**

- 2.10 We have removed the requirement for the applicant and GEMA to produce a separate, non-confidential summary of respectively the notice of appeal and GEMA response. Instead, we will use the non-confidential version of these submissions for publication on our website and require that they be used for the purposes of sending copies to those persons which the Rules require be sent such copies.
- 2.11 We have also removed the requirement to create, share and submit interim costs statements, reflecting our current practice of determining costs in energy code modification appeals after the end of the substantive phase. We consider this will reduce burdens on all parties, as well as the CMA.

## **Reflecting current use of technology**

- 2.12 Finally, a number of updates reflect the CMA's current use of technology such as electronic document management, videoconferencing during appeal management meetings and hearings, as well as secure file sharing. This brings the procedural guidance up to date, moving away from the use of primarily hard-copy materials. We have aimed to future-proof the Rules and Guide to future technological developments by retaining flexibility through outcome-based requirements (eg requiring electronic, machine-readable submissions).



### **3. Questions for consideration**

In responding to these questions, please give your reasons and any relevant supporting information or evidence.

- 3.1 Overall, are the Rules and Guide sufficiently clear and helpful?
- 3.2 What aspects of the Rules and Guide, if any, do you consider need further clarification or explanation? In responding, please specify which Rule and/or part of the Guide each of your comments relates to.
- 3.3 Is there anything else which you consider should be included in the Rules and/or Guide?

## 4. Consultation process

### How to respond

- 4.1 The CMA encourages parties to respond to the consultation in writing (by email) using the contact details provided in paragraph 4.5 below.
- 4.2 When responding to this consultation, please state whether you are responding as an individual or are representing the views of a group or organisation. If the latter, please make clear who you are representing and their role or interest.
- 4.3 In accordance with our policy of openness and transparency, we will publish non-confidential versions of responses on our webpages. If your response contains any information that you regard as sensitive and that you would not wish to be published, please provide a non-confidential version for publication on our webpages which omits that material and explain why you regard it as sensitive at the same time (see further paragraphs 4.7 to 4.8 below).

### Duration

- 4.4 The consultation will run from 23 July 2024 to 3 September 2024.

### Contact details

- 4.5 Responses should be submitted by no later than 17:00 on 3 September 2024 and should be sent by email to [ecmarulesandguide2024@cma.gov.uk](mailto:ecmarulesandguide2024@cma.gov.uk).

### Compliance with government consultation principles

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

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

- 4.7 Any personal data that you supply in responding to this consultation will be processed by the CMA, as controller, in line with data protection legislation. This legislation is the UK General Data Protection Regulation (GDPR)<sup>11</sup> and the Data

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<sup>11</sup> The UK GDPR refers to the EU GDPR ((EU) 2016/679, which has been adopted into UK law by the EU Withdrawal Act 2018, as amended by the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019.

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

- 4.8 We are processing this personal data for the purposes of our work. This processing is necessary for the performance of our functions and is carried out in the public interest in order to take consultation responses into account and to ensure we properly consult on the Rules and Guide before they are finalised and issued.
- 4.9 For more information about how the CMA processes personal data, your rights in relation to that personal data, how to contact us, details of the CMA's Data Protection Officer, and how long we retain personal data, see our [Privacy Notice](#).
- 4.10 Our use of all information and personal data that we receive is also subject to Part 9 of the Enterprise Act 2002. We may wish to refer to comments received in response to this consultation in future publications. In deciding whether to do so, we will have regard to the need for excluding from publication, so far as practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, might, in our opinion, significantly harm the individual's interests, or, as the case may be, the legitimate business interests of that business. If you consider that your response contains such information, please identify the relevant information, mark it as 'confidential' and explain why you consider that it is confidential.
- 4.11 Please note that information and personal data provided in response to this consultation may be the subject of requests by members of the public under the Freedom of Information Act 2000. In responding to such requests, we will take fully into consideration any representations made by you here in support of confidentiality. We will also be mindful of our responsibilities under the data protection legislation referred to above and under Part 9 of the Enterprise Act 2002.
- 4.12 If you are replying by email, this statement overrides any standard confidentiality disclaimer that may be generated by your organisation's IT system.
- 4.13 Further details of the CMA's approach can be found in the Transparency and Disclosure: Statement of the CMA's Policy and Approach (CMA6).<sup>12</sup>

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<sup>12</sup> <https://www.gov.uk/government/publications/transparency-and-disclosure-statement-of-the-cmas-policy-and-approach>.

## **After the consultation**

- 4.14 After the consultation, we will collate and analyse the responses before deciding whether to implement the Rules and Guide and whether any further changes are necessary.
- 4.15 The CMA will publish the final version of the Rules and Guide on its webpages at <http://www.gov.uk/cma>. These documents will be available on CMA webpages, together with the non-confidential versions of responses received during the consultation.