

Draft rules of procedure and guidance for water redetermination references

Consultation document

1 August 2024





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1. About the consultation

Introduction

- 1.1 The Water Industry Act 1991 (the Act) allows for water companies in England and Wales to dispute a price control determination by requesting that the regulator (Ofwat) refer such a determination to the Competition and Markets Authority (CMA) for redetermination.¹
- 1.2 Where Ofwat has made a redetermination reference to the CMA, the chair of the CMA must appoint an independent special reference group (the Group) under Schedule 4 to the Enterprise and Regulatory Reform Act 2013 (ERRA13).² The Group must then conduct a redetermination of the price control determination in accordance with the principles that apply to Ofwat, including various statutory duties.³
- 1.3 The CMA Board is required to make rules of procedure for special reference groups under Schedule 4 to the ERRA13.⁴ The current procedural rules applying to water redetermination references are set out in the [CMA rules of procedure for merger, market and special reference groups \(CMA17\)](#) (Current Rules).
- 1.4 As set out more fully below, the CMA considers that the Current Rules, as they apply to water redetermination references, should be replaced by new specific rules and guidance.
- 1.5 The purpose of this document is to consult on the CMA's draft new rules (Rules) that will replace the Current Rules so far as they relate to water redetermination references, along with the accompanying draft guidance (Guide).

Background and rationale

- 1.6 Ofwat issued its draft price control determination for the period 2025-2030 (PR24) on 11 July.⁵ The final PR24 price control determination is expected in

¹ Section 12(2) of the Act.

² See section 12(3D) of the Act and Schedule 4, paragraph 36, ERRA13.

³ The primary and secondary duties of Ofwat are set out in section 2 and 3 of the Act. The Group must also act in accordance with the objectives set out in a Strategic Policy Statement issued by the Department of Environment, Food and Rural Affairs (for England) or Welsh Ministers (for Wales) and have regard to the principles of best regulatory practice.

⁴ Schedule 4, paragraph 51, ERRA13.

⁵ [Ofwat PR24 Draft Determination](#); [Overview of Thames Water's PR24 draft determination](#).

December 2024, following which the CMA may receive redetermination references from Ofwat.

- 1.7 In preparation for any future redetermination references, the CMA has reviewed the Current Rules so far as they relate to water redetermination references and determined that new rules and guidance should be adopted specifically for water redetermination references.
- 1.8 The rationale for adoption of the Rules and Guide is to ensure that the rules and guidance fully reflect the specific requirements of water redetermination references. The Current Rules apply to a range of matters, namely merger reference, market reference and special reference groups. When undertaking a water redetermination reference in the past, the CMA has supplemented the Current Rules with additional guidance to set out its procedure for a specific redetermination.⁶ The proposed approach is in line with other redetermination references and regulatory appeals to the CMA, for which the CMA has published specific rules and guides.⁷
- 1.9 As such, the CMA considers that standalone rules and guidance should be adopted for water redetermination references, and therefore plans to:
 - amend the Current Rules to remove water redetermination references from their scope; and
 - adopt the Rules and Guide for water redetermination references.

Scope of the consultation

- 1.10 This consultation seeks the views of interested parties on the CMA's proposed Rules and Guide.
- 1.11 This consultation is aimed at those who have an interest in the CMA's process for water redetermination references. It may be of particular interest to

⁶ For example, during the most recent water redetermination references carried out by the CMA in December 2019 (in respect of Ofwat's price control determination for the period 2020-25, the CMA issued additional documentation setting out its procedure, including an 'Approaches Document' ([PR19 Water redeterminations: Approach to the redeterminations](#))).

⁷ For example: [Airport licence condition appeals rules: CMA172](#); [Airport licence condition appeals guide for participants: CMA173](#); [Energy licence modification appeals rules: CMA70](#); [Energy licence modification appeals guide for participants: CMA71](#); [Water appointment modification appeals rules: CMA163](#); [Water appointment modification appeals guide for participants: CMA162](#); [Air traffic services licence modification appeals rules: CMA168](#); [Air traffic services licence modification appeals guide for participants: CMA167](#).

regulators, consumer representative bodies and businesses as well as their legal and other advisers.

2. Proposed new Rules and Guide

- 2.1 The section includes a high-level overview of the proposed Rules and Guide.
- 2.2 In drafting the proposed Rules and Guide, the CMA has, where appropriate, retained and/or updated the wording of the Current Rules while also taking into account other relevant materials, including the documentation issued during the course of PR19 explaining the CMA's procedures, as well as procedural rules or guidance issued for other CMA appeals and reference groups.

Introduction

- 2.3 Rule 1 explains that the Rules replace the Current Rules for water redetermination references.⁸ Rules 2 and 3, respectively, contain the defined terms used throughout the Rules and state that in the event of a conflict between the Rules and the relevant enactments⁹ the latter shall prevail. Paragraphs 1.1 to 1.9 of the Guide describe the procedure the CMA may use when conducting water redetermination references and explain that the Guide is not intended to be binding and may be adapted where relevant to the specific redetermination.

Background

- 2.4 Rule 4 states that the overriding objective of the Rules is to enable the CMA to dispose of redetermination references fairly, efficiently and at a proportionate cost within the time periods prescribed in the Act.
- 2.5 Paragraphs 2.1 to 2.7 of the Guide provide an overview of the water redetermination process. A summary of the principles, including various statutory duties, that the CMA must consider when undertaking a redetermination reference is also provided.¹⁰
- 2.6 The Guide explains that the CMA will apply the Rules and have regard to the Guide to give effect to the overriding objective. Paragraphs 3.3 to 3.4 explain the CMA's approach to the applicable statutory duties, principles and obligations, including that it will exercise its own regulatory discretion on how

⁸ General (Rule 1) of Current Rules.

⁹ Defined in Rule 2.1 as the Act, the Enterprise Act 2002 and ERRA13.

¹⁰ This includes the primary and secondary duties applicable to Ofwat, the principles of best regulatory practice and certain other duties (as set out in the Act), and the strategic priorities and objectives in the Strategic Policy Statement.

to balance the applicable statutory duties and may reach different conclusions from Ofwat as to how duties and guidance should be interpreted and balanced.

- 2.7 The Guide also addresses, in paragraphs 3.5 to 3.12, how the CMA will approach the issues raised by a redetermination reference. It explains that the CMA is not limited to assessing the specific issues raised by the main parties in their Statements of Case and may decide the issues on which to focus. In doing so, it may invite views to establish if there is common ground on aspects of the Ofwat's determination that do not need to be considered. Where the CMA receives multiple references, it may consider the scope of its review in a way which ensures that there is an appropriate level of consistency across these references.

Appointment and conduct of Group

- 2.8 Rule 5 sets out how a Group is to be appointed, its conduct and how any changes to the Group are to be made. This largely replicates the corresponding section in the Current Rules.¹¹

Reporting period and extension requests

- 2.9 Rule 6 sets out the reporting period in which the CMA is required to deliver its redetermination to Ofwat. The reporting period will be specified in the redetermination reference from Ofwat and may be for a period of up to six months. This can be extended by Ofwat (for a further six months or less) following an application by the CMA.¹² The Rules explain how the CMA can request an extension to the reporting period and, if an extension is agreed, how the CMA should publish the Notice of Extension.

Administrative timetable/key stages of the redetermination process

- 2.10 Rule 7 requires a Group to establish an administrative timetable and contains a suggested list of the main stages of the water redetermination reference that may be included in such a timetable. This replicates the corresponding section of the Current Rules,¹³ although the wording has been amended to

¹¹ Appointment and conduct of Groups (Rule 2) of Current Rules.

¹² Section 14(3A) of the Act.

¹³ Chapter 7 (Timetable) of the Current Rules.

align with other appeal rules more recently issued by the CMA and to include requirements specific to water redetermination references.¹⁴

- 2.11 Paragraphs 3.17 to 3.34 of the Guide set out what the key stages and milestones of a redetermination reference may be. These include the stages before the CMA has received the reference from Ofwat, as well as the stages and milestones following the reference up to the point of the CMA submitting its final report to Ofwat.

Procedure

- 2.12 Rule 8 states that the CMA may determine its own procedure in conducting a redetermination reference (subject to the requirements of the Act).¹⁵ It may also, on application or of its own motion, give directions or make requests as it considers necessary for the conduct of any redetermination, and will give written notice of its directions and requests. The main parties and any third party may also apply to the CMA for permission to make further submissions or provide supplementary evidence.
- 2.13 Rule 8.6 provides that the CMA may hold case management conferences with the parties to the redetermination reference. Paragraph 3.24 of the Guide details some of the matters that the CMA may invite the main parties to discuss at the case management conference (for instance, the administrative timetable, key stages and availability for hearings).
- 2.14 Rules 8.7 to 8.9 set out the investigation powers available to a Group under sections 109 to 115 of the Enterprise Act 2002.¹⁶

Hearings

- 2.15 Rule 9 contains rules on both the conduct of and appearances at hearings. While Rule 9 largely replicates the corresponding sections of the Current Rules,¹⁷ it also includes additional rules on the opening of a hearing and directions on the length and substance of oral submissions, and who may represent parties at a hearing.¹⁸

¹⁴ For example, Rule 7.3 states that administrative timetable shall also include arrangements for the CMA's final report to be provided to Ofwat in accordance with section 12(3C) of the Act.

¹⁵ Rule 8.1.

¹⁶ As applied by sections 12(3B) and 14B of the Act.

¹⁷ Chapter 8 (Hearings) and 9 (Appearance at hearings) of the Current Rules.

¹⁸ Rules 9.1, 9.7 and 9.11, respectively.

- 2.16 Paragraphs 5.1 to 5.8 of the Guide provide some general directions as to how hearings will be conducted. The Group will decide which, if any, of its hearings are to be held in public having regard to certain matters.¹⁹ The Group will not normally conduct hearings in public and will consider whether hearings should be held in person, virtually or on a hybrid basis. The Group will also decide the extent, if any, to which third parties are allowed to attend hearings. The Group may hold joint hearings where there are multiple disputing companies which may involve one or more of the main parties.
- 2.17 Paragraphs 5.9 to 5.16 of the Guide provide an explanation of clarification hearings and main hearings, including their purpose and the matters that may be addressed in such hearings. Where a clarification hearing is held, this will take place at an early stage in the redetermination reference. Paragraph 5.17 explains that the CMA may conduct meetings, make phone calls or make written requests for further information to clarify specific facts.
- 2.18 Paragraphs 6.3 of the Guide explains that the CMA may invite additional attendees as observers to hearings and impose limits on the number of such observers.

Submissions

- 2.19 Rule 10 allows the Group to invite submissions from both main and third parties. This rule is new, as the Current Rules do not contain an equivalent provision.
- 2.20 The Rules allow the Group to specify the matters on which it wishes to receive submissions, how they are to be made and whether the main parties should copy each other into their submissions. Non-sensitive submissions may be published by the Group on the CMA's website, although main and third parties will be able to make a non-disclosure application where they consider information contained within a submission is sensitive.
- 2.21 Paragraphs 6.1 to 6.2 of the Guide explain the importance of transparency between the main parties and expects that each main party will have access to all materials relevant to the redetermination reference, including additional submissions, correspondence (eg pre-appeal correspondence), and any materials prepared for site visits, teach-ins and/or hearings. The Guide also

¹⁹ Rule 9.3 sets out the matters to which a Group should have reference (for example, the views of the main and third parties).

suggests that a Group will likely publish non-sensitive versions of parties' submissions and other documents where it considers appropriate.

Provisional determination

- 2.22 Rule 11 states that the Group shall normally issue a provisional determination stating its provisional conclusions and describes what a provisional determination will usually contain. This rule is new, as the Current Rules do not contain equivalent provisions that apply to water redetermination references.
- 2.23 Paragraphs 4.16 to 4.18 provide further information in relation to the provisional determination, the purpose of which is to allow parties to comment on the CMA's reasoning and accuracy of arguments of the matters in the provisional determination. Furthermore, if the CMA has issued a provisional determination, the main and third parties will be notified and invited to make submissions on the provisional determination.

Final report

- 2.24 Rule 12 is drafted to reflect the requirements of the Act for reports on the water redetermination reference and also carries across certain material from the Current Rules. It requires the CMA to submit its final report to Ofwat and sets out the matters that must be addressed by it (which are stipulated by the Act²⁰).
- 2.25 Paragraph 4.19 of the Guide provides further detail regarding the final report, including explaining that, once the CMA has submitted the final report to Ofwat, there is a formal process (taking a minimum of fourteen days) that Ofwat and the Department for Environment, Food & Rural Affairs must follow before the final report can be published by the CMA.²¹

Costs

- 2.26 Rule 13 requires that the Group decide to what extent it is reasonable to take into account in its determination costs incurred or borne by the company in connection with the reference, and it may have regard to when making that determination.²² It also provides that the CMA must provide an estimate of the

²⁰ Section 13(3C)(b) of the Act.

²¹ Section 15(5) of the Act.

²² Section 12(3A) of the Act.

costs incurred by the CMA in carrying out the redetermination. Rule 13 is new, as the Current Rules do not address the issue of costs.

- 2.27 Paragraphs 7.1 to 7.8 of the Guide set out the approach and factors the CMA will usually consider in determining what proportion of costs are recoverable by a disputing company. This includes the extent to which the final report agrees with the disputing company or Ofwat, and how that should translate into recovery of costs from customers. The CMA will invite the disputing company to provide details of their costs incurred in relation to the redetermination references and the reasonableness of the costs claimed.
- 2.28 The CMA may recover all costs associated with the redetermination reference from the disputing companies through the CMA fee, which the disputing companies are required to pay to the Secretary of State under the conditions of their licences. Paragraphs 7.9 to 7.13 of the Guide explain how the CMA will normally determine its costs and, if there are multiple disputing companies, how those costs will be distributed amongst them.

Slip rule/filing of documents

- 2.29 Rule 14 addresses how errors, slips or omissions in documents issued by the CMA will be corrected. Rule 15 outlines how documents sent to the CMA are to be marked and how they should be sent to the CMA. These rules are new, as the Current Rules do not contain equivalent provisions.

Role of third parties

- 2.30 The Rules allow third parties to make submissions and participate in hearings and provide the Group with a discretion as to how to engage with the submissions of third parties. While the Current Rules do not address the role of third parties, the approach adopted in the Rules aligns with how the CMA engaged with third parties during its PR19 water redetermination reference.

3. Questions for consideration

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

Rules and Guide

- 3.1 Do you agree with the CMA's proposal of adopting new rules and guidance for water redetermination references? Please provide reasons for your answer.
- 3.2 Overall, are the Rules and Guide sufficiently clear and helpful?
- 3.3 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.
- 3.4 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 4.10 to 4.11 below).

Duration

- 4.4 The consultation will run from 1 August 2024 to 12 September 2024.

Contact details

- 4.5 Responses should be submitted by no later than 17:00 on 12 September 2024 by email to waterrulesandguide2024@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)²³ and the Data 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.

²³ 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.

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).²⁴

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.

²⁴ <https://www.gov.uk/government/publications/transparency-and-disclosure-statement-of-the-cmas-policy-and-approach>.