

**DRAFT NEW RULES AND
GUIDE FOR WATER
REFERENCES:
RESPONSE TO
CONSULTATION
CMA204 and CMA205**

10 December 2024

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1. Introduction

- 1.1 On 1 August 2024, the Competition and Markets Authority (CMA) opened a consultation which ran until 12 September 2024.¹ We sought views on proposed draft new rules and guide for water references (CMA204con and CMA205con).
- 1.2 We refer to the rules and guide put out to consultation (and listed in paragraph 1.1 above) as consultation rules and consultation guide respectively. Collectively, we refer to them as the consultation rules and guide.
- 1.3 We asked the following questions:
- (a) Do you agree with the CMA's proposal of adopting new rules and guidance for water references? Please provide reasons for your answer.
 - (b) Overall, are the rules and guide sufficiently clear and helpful?
 - (c) 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.
 - (d) Is there anything else which you consider should be included in the rules and/or guide?
- 1.4 The CMA received 15 responses to the consultation. Non-confidential versions of these responses have been published on the updated consultation webpage.² The CMA thanks all those who responded to the consultation.
- 1.5 Overall, respondents were welcoming of the consultation rules and guide and of the introduction of a standalone set of rules and standalone guide for water references. We consider more specific points raised by respondents in Section 2 below.
- 1.6 Having considered the consultation responses, we have made amendments to the consultation rules and guide. The amendments that we have made and the reasons for those amendments are explained in Section 2 below. We also set out our reasons for not implementing some of the changes requested by respondents. In addition, we have made some minor tidy-up and clarificatory drafting changes to the text of the consultation rules and guide.
- 1.7 As a result, the CMA has now finalised and adopted the final rules and guide for water references, which are referred to herein as the Rules and Guide.

¹ [Draft new rules and guide for water redetermination references - GOV.UK \(www.gov.uk\)](https://www.gov.uk)

² [New rules and guide for water references consultation](#)

2. Issues raised by respondents and our response

Scope of the Rules and Guide

- 2.1 Some respondents raised clarificatory questions regarding the exact scope of the consultation rules and guide for water references. These questions and the CMA's views in response are set out below.

Summary of responses

- 2.2 One respondent asked whether the consultation rules and guide apply in Scotland as well as in England and Wales, given equivalent provisions under the Water Services etc. (Scotland) Act 2005 (Consequential Provisions and Modifications) Order 2005 (2005 Order).³ Another respondent asked whether the consultation rules and guide were intended to apply to all references under section 12 of the Water Industry Act 1991 (the Act).⁴

The CMA's views

- 2.3 The 2005 Order sets out three scenarios in which the Water Industry Commissioner for Scotland (WIC) must make a reference to the CMA.⁵ The process for such references has similarities with the process for references under section 12 of the Act, but there are also differences. On that basis, references by the WIC under the 2005 Order will continue to be subject to the *CMA rules of procedure for merger, market and special reference groups (CMA17)*.⁶ In the event that the CMA receives a reference from WIC under the 2005 Order, the CMA may use the procedure described in the Rules and Guide to adapt the procedure set out in CMA17.
- 2.4 As regards the scope of the Rules and Guide, the CMA intends that all references under section 12 of the Act should be covered by the Rules and Guide. The CMA has amended the titles of the Rules and Guide, Rule 1.1 and paragraphs 1.1 and 2.2 of the Guide and the definitions in each of the Rules and Guide to clarify this.⁷ The CMA has also added wording in Rule 1.1 and footnote 2 of the Rules and in paragraph 1.5 and footnote 1 of the Guide to further clarify that whilst the Rules and Guide have been designed in particular to assist the CMA in carrying out a

³ See response from Water UK.

⁴ See response from the Authority.

⁵ Article 3 of the 2005 Order set out the three scenarios, which includes instances where the WIC has already determined the maximum amount of charges or, where there has been a material change, where WIC has revised its determination or decided not to revise its determination and Scottish Water has requested in writing that the WIC make a reference to the CMA

⁶ See [CMA rules of procedure for merger, market and special reference groups \(CMA17\)](#) and in particular Part 7 that applies to special reference groups. As set out in paragraph 51(1)(6)(c) of Schedule 4 to ERRA13, a special reference group is to be constituted for references under section 12 of the Act.

⁷ See the definitions of Appointment, disputed determination, Final Determination and redetermination reference.

redetermination reference (as defined in the Rules and Guide), the CMA may adjust the procedures described in the Rules and Guide as necessary where other matters are referred to the CMA under section 12 of the Act.

The overriding objective

2.5 Rule 4 sets out the overriding objective, which provides that the CMA will dispose of redetermination references fairly, efficiently and at proportionate cost within the time periods prescribed in the Act. Rule 3.1 clarifies that in the event of any conflict between the Rules and the relevant enactments, the latter will prevail.

Summary of responses

2.6 One respondent suggested that an express caveat be included in the Rules to clarify that the overriding objective would not override the CMA's obligation to comply with the requirements set out in Part 1 of the Act.⁸ Another respondent similarly commented that the proposed overriding objective was not grounded in the objectives of the Act.⁹

2.7 A further respondent also commented that the wording used in the overriding objective could have a wide degree of interpretation between the parties and suggested that further detail on the key terms used in the redetermination reference and how they may be interpreted would be useful. This respondent also requested that further references to the relevant enactments be included throughout the Rules or in a separate section.¹⁰

The CMA's views

2.8 The overriding objective provides that the CMA should dispose of a redetermination reference fairly, efficiently and at proportionate cost within the time periods prescribed in the Act. We consider that this description of the overriding objective is sufficient to inform CMA decisions on process without requiring further detail. Furthermore, a corresponding overriding objective applies in other regulatory appeals conducted by the CMA and has been found to be helpful in the running of such cases.¹¹

2.9 Rule 3.1 provides that in the event of any conflict between the Rules and the relevant enactments, the latter will prevail. The CMA therefore considers that the precedence of the statutory objectives by which the CMA is bound in the Act is clear. The CMA also considers that in the event of any conflict between the overriding objective in the Rules and provisions of the Act, it is clear that pursuant

⁸ See response from Linklaters.

⁹ See response from MCC Economics.

¹⁰ See response from Thames Water.

¹¹ See for example Rule 4.1 of CMA 70 [Energy licence modification appeals: rules \(publishing.service.gov.uk\)](https://publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/614447/energy-licences-modification-appeals-rules.pdf).

to Rule 3.1 the provisions of the Act will take precedence. We have nonetheless amended paragraph 1.4 of the Guide to further clarify that the Rules and Guide are supplementary to provisions in the relevant enactments.

- 2.10 As regards the references to relevant enactments, the CMA notes that the Rules refer to the relevant enactments ordinarily in the footnotes where these have been used as the basis for particular Rules. The CMA considers this is sufficiently clear and that a separate section further explaining the relevant enactments and additional references to the relevant enactments is not necessary.

Appointment and conduct of the group

- 2.11 Rule 5 sets out the procedure for appointing the group to conduct the redetermination reference. In particular, Rule 5.3 clarifies that, as required by the Enterprise and Regulatory Reform Act 2013 (ERRA13), a group must consist of at least three members of the CMA panel, one of which must be a specialist utility panel member.
- 2.12 Furthermore, Rule 5.5 provides that when determining a redetermination reference, the group shall decide the matter on its own merits in accordance with the principles that apply to the Water Services Regulation Authority (Ofwat) (the Authority) by virtue of the Act, and that the group shall exercise its discretion as to how to appropriately balance the relevant statutory duties.

Summary of responses

- 2.13 Two respondents suggested that further detail be provided on the requisite experience of members of the group conducting a redetermination reference, including having sufficient experience within the water sector and experience working with a regulator.¹² One of these respondents also suggested that panel members are rotated to demonstrate that each redetermination reference is considered fairly on its merits and not unduly influenced by the outcome of past redetermination references.
- 2.14 In addition, one of these respondents suggested a change to the phrasing of Rule 5.5 to better reflect the wording in section 2 of the Act.¹³ Another respondent requested a fuller explanation of 'own merits' in Rule 5.5 and suggested that links to key CMA web pages including biographies and disclosure of interests of specialist panel members be included.¹⁴

¹² See responses from Linklaters and the Authority.

¹³ See response from the Authority.

¹⁴ See response from Thames Water.

The CMA's views

- 2.15 The Rules reflect the statutory requirements pursuant to ERRA13 for at least one member of the group to be a specialist utility panel member. In addition to adhering to this requirement, the CMA will seek in practice to select what it considers to be a suitable group to conduct the redetermination reference, taking into account a number of factors such as experience within the water sector or regulatory matters, or other relevant technical skills and experience. The CMA has added wording to paragraph 3.11 of the Guide clarifying that it will seek to ensure that both the group and the CMA staff team have the appropriate balance of skills and expertise for the circumstances of the redetermination reference and does not consider that any further additions to the Rules on this point are warranted. The CMA will consider each redetermination reference on its own merits.
- 2.16 In addition, the CMA has retained the reference to 'own merits' in Rule 5.5 in order to distinguish the water redetermination reference process as a full redetermination process (as explained in paragraph 3.5 of the Guide) where the CMA is able to substitute its own decision for that of the Authority, from the standard of review applicable in other regulatory appeals where the CMA has to determine whether the regulator was wrong by reference to specified grounds of appeal. However, the CMA has amended the later wording in Rule 5.5 to reflect more accurately section 2 of the Act in response to one of the respondent's comments, by referring to the group exercising its discretion as to how to carry out the CMA's function(s) in the manner it considers is best calculated to meet the relevant statutory objectives.
- 2.17 As regards the links to biographies and disclosure of interests of specialist panel members, the CMA notes that this information is readily available on the CMA website for all panel members and that a panel member's specialist role is also specified in their biography and disclosures of interest.¹⁵

The Authority's statutory duties

- 2.18 Section 2 of the Guide sets out the Authority's primary and secondary statutory duties. Pursuant to section 12(3) of the Act and as described in paragraph 2.2 of the Guide, the CMA is required to decide the redetermination reference on its own merits in accordance with such duties, as well as in accordance with other principles applicable to the Authority.

Summary of responses

- 2.19 Three respondents raised comments specifically in relation to the statutory duties described in the Guide. One respondent suggested amendments to the wording to

¹⁵ [Our governance - Competition and Markets Authority - GOV.UK \(www.gov.uk\)](https://www.gov.uk)

reflect more accurately the statutory duties and the scope of the applicability of the Secretary of State's Strategic Policy Statement (SPS).¹⁶ Another respondent requested that the text describing the Authority's resilience objective be included in the main body of the Guide rather than a footnote, given its importance in redetermination references.¹⁷

- 2.20 A third respondent identified that the Authority's new growth duty which came into force on 21 May 2024 should be incorporated into the Guide.¹⁸

The CMA's views

- 2.21 The CMA has made minor changes to the wording of paragraphs 2.4 and 2.8 of the Guide in order to reflect more accurately the statutory duties in section 2(2A) of the Act and the scope of the applicability of the SPS. The CMA has also included the description of the resilience objective in the main body of paragraph 2.4(e) of the Guide.
- 2.22 The CMA has also incorporated the Authority's growth duty in a new paragraph 2.6 of the Guide and made corresponding changes to the wording in paragraph 3.4 of the Guide to reflect the incorporation of this duty.

The reporting period

- 2.23 Rule 6.2 provides that the CMA may request an extension of the period for conducting the redetermination reference from the Authority and that the Authority may grant such extension where it is satisfied that there are special reasons to do so.

Summary of responses

- 2.24 One respondent suggested that the Rules include a definition of 'special reasons' for the purposes of Rule 6.2¹⁹ on the basis that, whilst it is in the interests of all parties for flexibility to be built into the CMA's redetermination timeline, it is also appropriate for a disputing company to understand on what basis an extension may be agreed between the Authority and the CMA and to be able to make a

¹⁶ See response from the Authority.

¹⁷ See response from Thames Water.

¹⁸ See response from Norton Rose Fulbright. [The Economic Growth \(Regulatory Functions\) \(Amendment\) Order 2024](#) amends Schedule 1 of [The Economic Growth \(Regulatory Functions\) Order 2017](#) such that it now lists the Authority as one of the regulators to which section 108 of the [Deregulation Act 2015](#) now applies. Section 108 of the [Deregulation Act 2015](#) requires that regulators (to whom it applies), in the exercise of their functions, have regard to the desirability of promoting economic growth (ie the growth duty). Whilst the growth duty is not expressly referenced in Part I of the Act, section 2(7) of the Act stipulates that duties imposed on the Authority by that section do not affect its obligation to perform or comply with any other duty or requirement, whether arising under the Act or another enactment.

¹⁹ See response from Linklaters.

request or representation if it believes that granting or prohibiting an extension request would be in accordance with the overriding objective and Part 1 of the Act.

The CMA's views

2.25 The CMA notes that the concept of special reasons is not specifically defined in other CMA guidance²⁰ and does not have a statutory definition in the Act. The CMA has therefore elected not to include a specific definition of special reasons in the Rules. This also helps to maintain flexibility in the reference process and ensure that any extensions are assessed on a case-by-case basis. The CMA further notes that pursuant to Rule 6.4 and paragraph 4.2 of the Guide, the parties will be notified of any extension and the notice of extension will be published on the CMA's website.

Administrative timetable

2.26 Rule 7 provides that the group conducting a redetermination reference will make arrangements for an administrative timetable to be drawn up which will make provision for the major stages of the redetermination reference. Rule 7.5 provides that the CMA may publish the timetable on its website.

Summary of responses

2.27 One respondent noted that the consultation rules do not explicitly refer to communicating the administrative timetable to the public and that there should be a clear commitment to widely publicising the redetermination process in order to ensure that interested parties are made aware.²¹

The CMA's views

2.28 The CMA reiterates that it is committed to maintaining transparency throughout the redetermination reference process. For example, during the course of the PR19 redetermination, the CMA regularly published details about the redetermination at various stages on the redetermination case page. The CMA is also required to conduct its procedures in accordance with its general transparency obligations.²²

2.29 Paragraph 3.23 of the Guide also provides that after consulting with the main parties on a draft administrative timetable, the CMA will finalise such timetable and communicate it to the main parties and the public as it considers appropriate. The

²⁰ See, for example, paragraph 11.69 of [Mergers guidance on the CMA's jurisdiction and procedure \(2024 - revised guidance\) \(publishing.service.gov.uk\)](#) where special reasons are described based on case law guidance but where the term is not otherwise defined.

²¹ See response from CCWater.

²² [Transparency and disclosure - statement of CMA's policy and approach: CMA6 - GOV.UK \(www.gov.uk\)](#)

CMA has added wording to paragraph 3.23 of the Guide to clarify that the CMA will normally publish the administrative timetable on its website.

- 2.30 On this basis, whilst the CMA retains some flexibility to determine the appropriate circumstances in which to publish the administrative timetable, it generally expects to adopt a transparent approach to its redetermination process by, for example, publishing regular updates to its case page. We consider that such updates are sufficient to ensure that interested third parties are aware of the intended process for the redetermination reference should they wish to make submissions in this regard, although it would also be open to the CMA to take other steps to further publicise the process should it consider it necessary (for example through a press release or other online post).

Procedure

- 2.31 The overall procedure for conducting the redetermination reference is set out in Rule 8. Section 3 of the Guide also sets out the key stages in the CMA's process.
- 2.32 A number of respondents to the consultation made submissions regarding the CMA's process. These responses and the CMA's views are summarised below.

Summary of responses

- 2.33 One respondent suggested the inclusion of a process map for the redetermination reference and an illustrative timeline of milestone events.²³
- 2.34 Two respondents made comments related to the involvement of multiple disputing companies in the redetermination reference. One respondent suggested that the CMA give consideration to a greater balance of opportunity of being heard across multiple disputing companies, including by allowing for equal time to be provided to parties making submissions on cross cutting issues.²⁴ Another respondent noted the increased merit in holding joint hearings and submissions on common issues.²⁵
- 2.35 In response to Rules 8.5 and 9.7 as well as paragraph 3.13 of the Guide,²⁶ one respondent suggested that the Rules should explicitly state that all relevant evidence and arguments put forward by a disputing company will be considered as part of the redetermination reference where possible, in line with the overriding

²³ See response from Thames Water.

²⁴ See response from the Authority.

²⁵ See response from Northumbrian Water.

²⁶ Rule 8.5 provides that the CMA is able to reject unsolicited submissions or the provision of supplementary evidence from disputing companies and Rule 9.7 provides that the group has the discretion to determine the form and structure of hearings such that main party arguments may not be heard in full. Paragraph 3.13 of the Guide discusses the CMA's approach to prioritisation of issues in a redetermination reference.

objective and applicable statutory duties.²⁷ Another respondent suggested that the CMA should clarify in the Guide that it expects disputing companies to identify all the issues they would like the CMA to consider in their statement of case.²⁸ This respondent also encouraged the CMA to be clear on how it intends to manage the provision of new information in further submissions throughout the redetermination process.

- 2.36 Other respondents suggested that there should be a high threshold for determining that certain arguments are not being covered at a hearing,²⁹ with one respondent suggesting that only more trivial matters are not discussed at hearings.³⁰ This respondent also suggested that it should be clarified that the CMA can consider additional issues beyond those raised in disputing companies' statements of case where relevant.
- 2.37 One respondent also suggested that the CMA should consider the interaction between issues when conducting its prioritisation assessment. This respondent also requested more detail on the evidential standards required for the various directions or requests set out in Rule 8 as well as in relation to hearings and meetings, and also suggested that the Guide may wish to set out the types of error that could provide the basis for successful appeal (for example by citing examples from previous cases).³¹
- 2.38 Two respondents made submissions regarding site visits.³² One such respondent asked for further detail on which party may initiate site visits and how they may be agreed, and the other reiterated that it may be helpful to include a provision that allows the group to undertake a site visit with a referring party.

The CMA's views

- 2.39 The Rules recognise the possibility for multiple disputing companies to be part of the redetermination reference process and make provision for the process to be adapted by the group accordingly. In particular, Rules 8.2(b) – (d) and 9.5 provide the flexibility for the group to determine the appropriate method of conducting the redetermination reference process including by accommodating multiple disputing companies through joint submissions or joint hearings, which provides an opportunity for such parties to be heard. The group may also consider the

²⁷ See response from Linklaters.

²⁸ See response from the Authority.

²⁹ See response from Water UK.

³⁰ See response from Northumbrian Water.

³¹ See response from Thames Water.

³² See responses from Thames Water and South West Water.

appropriate mix of joint and individual hearings and submissions in a redetermination reference in order to further the overriding objective.³³

2.40 The CMA notes that whilst it does consider all evidence and arguments raised by the parties in a redetermination reference, it must also decide what issues to prioritise and deprioritise in accordance with the factors set out in the Guide. In particular:

- (a) The group retains the flexibility to determine the appropriate process for a redetermination reference (including through Rules 8.5 and 9.7). As regards Rule 9.7 in particular, the CMA notes that although an argument may not be considered at a hearing, this does not necessarily mean that it is not being assessed by the CMA. Furthermore, the CMA reiterates that hearings in the redetermination reference process are aimed at giving the group the opportunity to probe certain issues in more detail (given that the group will already have an understanding of such issues from its review of written submissions) and are not necessarily designed for parties to present all their arguments.
- (b) The parties to a redetermination reference are also given regular opportunity to comment on the group's intended approach to conducting the redetermination reference. For example, parties can comment on any 'approaches document' published by the CMA regarding the areas which it proposes to prioritise as part of the redetermination reference.³⁴
- (c) Part of the CMA's considerations in determining which issues to prioritise also includes considering whether specific issues impact other parts of the redetermination.³⁵ Paragraph 3.13 of the Guide clarifies that the CMA will generally adopt a proportionate approach to the redetermination reference given the time available and scrutinise most closely the areas that would have the largest effect on customer prices and other outcomes, and on the disputing companies. The CMA would in any case expect disputing companies to raise all the issues they would like the CMA to consider as part of a redetermination reference in their statement of case. Whilst parties are able to apply to the CMA for permission to make further submissions pursuant to Rule 8.5, the CMA reserves the right to reject unsolicited submissions when they are submitted outside of this process or where accepting them would be inconsistent with the overriding objective.

2.41 As regards evidential standards, the CMA notes that it is not within its remit to construct the relevant evidential standards applicable to the redetermination

³³ See, for example, paragraph 3.12(a) of the Guide which provides that the CMA may group issues for consideration bearing in mind any interlinkages and interdependencies arising between them.

³⁴ See paragraph 3.16 of the Guide.

³⁵ See paragraph 3.14(c) of the Guide.

reference process. The CMA is required to conduct a redetermination reference pursuant to the objectives applicable to it by virtue of Part 1 of the Act.

2.42 The CMA has also opted not to refer to specific previous redetermination references in the Rules and Guide including, for instance, to give examples of errors that might form the basis of a successful redetermination reference, on the basis that this is likely to depend on the particular circumstances of the case.

2.43 In relation to site visits, paragraph 3.24(c) of the Guide clarifies that such visits will generally be agreed between the parties at case management conferences. This provides flexibility for site visits to be arranged in the most appropriate form (for example, whether in person or as a hybrid event) in the circumstances of a specific redetermination reference and to further the overriding objective.

2.44 Finally, the CMA has prepared a process chart to help illustrate the key stages in the redetermination reference process.

Hearings

2.45 Rule 9 and section 5 of the Guide set out the procedure for the conduct of hearings and meetings as part of the redetermination reference. Hearings will not generally be conducted in public, although the group has the discretion to decide which if any of its hearings are to be held in public in accordance with the principles set out in Rule 9.3.

Summary of responses

2.46 One respondent commented that the presumption should be that hearings will be conducted in public unless there are good reasons not to do so.³⁶

2.47 Another respondent suggested that the CMA give adequate notice and sufficient details of the topics to be discussed at hearings and working groups so that parties' input can be well considered, given that the timing and detail of such notice can significantly influence the effectiveness of such hearings or working groups.³⁷

2.48 A third respondent requested further clarity on the situations in which the CMA would consider a staff meeting to be more appropriate than a hearing.³⁸

³⁶ See response from MCC Economics.

³⁷ See response from the Authority.

³⁸ See response from Linklaters.

The CMA's views

- 2.49 The CMA notes that there is generally no default expectation that hearings in redetermination references will be held in public. For example, the previous rules applicable to water references similarly provided that the group has the discretion to decide which if any of its hearings are to be held in public.³⁹
- 2.50 The CMA nevertheless acknowledges the importance of transparency in the way that it conducts a redetermination reference and seeks to ensure transparency through multiple elements of its process. These elements may include, for example, the publication of an approaches document, where prepared, and invitation for comments on the same, as well as the publication of and invitation for comment on statements of case and the Authority's response to such statements of case. The CMA would also draw attention to the transparency of its approach in the PR19 redetermination reference, where parties' submissions as well as working papers, consultation responses and the provisional determination were published on the CMA case page.⁴⁰
- 2.51 Furthermore, the CMA notes that in accordance with its procedures and with the overriding objective, it will endeavour to provide parties with a reasonable time to review a hearing agenda sent pursuant to paragraph 5.13 of the Guide and any directions sent regarding the topics to be discussed at a hearing pursuant to paragraph 5.7 of the Guide.
- 2.52 As regards the distinction between hearings and staff meetings, the CMA would clarify that it does not consider staff meetings to be held in lieu of hearings but that, as explained in paragraph 5.17 of the Guide, staff meetings are intended to cover specific technical matters such as modelling issues and administrative matters such as case management issues.

Submissions

- 2.53 Rule 10 sets out the procedure by which submissions can be made by the main and third parties, as well as the matters on which the group may wish to invite input in such submissions.
- 2.54 Furthermore, Rule 10.5 sets out the procedure for handling sensitive information in any such submissions. In particular, any main or third party who believes that information contained in a submission is sensitive information which should not be disclosed should make a non-disclosure application to the group setting out their reasons for treating each item or category of information as sensitive information.

³⁹ [CMA17 rules \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

⁴⁰ [Ofwat Price Determinations - GOV.UK \(www.gov.uk\)](https://www.gov.uk)

Summary of responses

- 2.55 One respondent suggested the CMA may wish to clarify whether submissions will be invited from specific third parties or from any third parties, and if the latter, any circumstances under which the CMA may be unable to consider all such submissions (for instance, due to their volume).⁴¹
- 2.56 A number of respondents also identified the need to consider consumer interests as part of submissions. For instance, one respondent suggested that consumers and consumer representatives should also be entitled to request a redetermination reference.⁴² Another respondent proposed that the redetermination reference process should place consumer outcomes at the centre,⁴³ and a third respondent encouraged the CMA to consider how it ensures that the customer voice is heard in exercising its statutory duties in conducting the redetermination reference.⁴⁴
- 2.57 One respondent requested further detail on the process by which sensitive information would be handled, including in the context of the exchange of information between disputing companies where there are multiple disputing companies.⁴⁵ This respondent also suggested that the Rules should include specific provisions prohibiting the onward sharing of sensitive information or the collateral use of any information that the CMA agrees should not be made public.

The CMA's views

- 2.58 Pursuant to section 12 of the Act, only those companies holding an appointment under Chapter 1 of Part II of the Act are entitled to refer questions arising under such appointment and such other matters (including disputes as to determinations by the Authority) to the CMA. The Act therefore does not provide scope for other parties such as consumers or consumer bodies to formally refer a question arising under such appointment to the CMA.
- 2.59 'Third party' in the Rules is defined as a party that is not a main party, rather than specific third parties. The CMA therefore welcomes submissions from third parties at certain points during a redetermination reference process, including, for example, submissions from a consumer group or body. It would also be open for the group to request submissions or a hearing from a specific third party if it considered this would be helpful to further the overriding objective.
- 2.60 The CMA also notes that, pursuant to paragraph 2.2 of the Guide, it is required to decide the redetermination reference in accordance with the various statutory duties that apply to the Authority. This includes the consumer objective set out in

⁴¹ See response from Welsh Water.

⁴² See response from CCWater.

⁴³ See response from MCC Economics.

⁴⁴ See response from the Authority.

⁴⁵ See response from Linklaters.

paragraph 2.4(a) of the Guide, which is to protect the interests of consumers, wherever appropriate by promoting effective competition between persons engaged in, or in commercial activities connected with, the provision of water and sewerage services. The CMA will therefore take appropriate steps to ensure the consumer voice is heard as part of a redetermination reference process and will do so in conjunction with its consideration of the Authority's other statutory objectives listed in paragraph 2.4 of the Guide. As described above, consumers will also be invited to make submissions as third parties which gives further scope for their views to be considered as part of the redetermination process.

- 2.61 As regards the handling of sensitive information, the CMA has included the wording in Rule 8.2(m) in order to provide the group with flexibility to adopt the most appropriate approach as regards sensitive information in each specific redetermination reference. The CMA also notes that it will have regard to its procedures in CMA6 regarding transparency and the handling of confidential information as part of its cases.⁴⁶ Rule 10.5 in particular provides a mechanism for all parties making submissions to the CMA to identify any sensitive information in such submissions, which the CMA will consider before determining whether such information should be excised before being provided to other parties to the redetermination reference or more widely. Pursuant to paragraph 6.2 of the Guide, the mechanism in Rule 10.5 applies despite the CMA's generally transparent approach described in paragraph 6.1 of the Guide.

Provisional determination

- 2.62 Rule 11.1 clarifies that the group will normally issue a provisional determination stating its provisional conclusions but that, where the group considers it is not appropriate to issue a provisional determination, it will determine what alternative procedure is appropriate in the circumstances of the case in accordance with the overriding objective. Paragraph 3.29 of the Guide reiterates that the CMA will normally issue a provisional determination.

Summary of responses

- 2.63 Many respondents commented on Rule 11.1, noting that it would either not be appropriate to dispense with a requirement to issue a provisional determination⁴⁷ or that there are unlikely to be circumstances where a provisional determination would not be appropriate.⁴⁸ One such respondent suggested that not issuing a provisional determination would reduce the independence of the redetermination process which would have implications for investment in the UK,⁴⁹ and another

⁴⁶ [CMA6 Transparency and disclosure: Statement of the CMA's policy and approach \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

⁴⁷ See responses from Linklaters, Water UK and Welsh Water.

⁴⁸ See responses from Northumbrian Water and Severn Trent.

⁴⁹ See response from Severn Trent.

noted that all parties should have the opportunity to provide comments to the CMA before a final decision is made given the very large sums of money involved in a redetermination reference and the public's general interest in the water sector.⁵⁰ Another respondent noted that the complexity of considerations within a redetermination process renders it critical for companies and regulators to be able to fully engage with the evidence and put forward their submissions following an understanding of the CMA's position in a provisional determination.⁵¹

- 2.64 Some respondents also requested further detail on the situations where the group would consider it appropriate not to issue a provisional determination⁵² and what type of alternative procedure may be appropriate in such circumstances.⁵³
- 2.65 Other respondents also noted the impact of the statutory timeframe on the issuance of a provisional determination and for the purposes of allowing a response to such provisional determination. For instance, one respondent noted that the fact that the statutory period for water redeterminations can be extended to a total of 12 months provides sufficient time to factor in the issuance of a provisional determination in the redetermination reference process.⁵⁴ Another respondent suggested that a minimum period of four weeks should be provided for parties to respond to a provisional determination,⁵⁵ whilst one other respondent commented that such period should not be made discretionary.⁵⁶

The CMA's views

- 2.66 The CMA drafted Rule 11.1 and paragraph 3.29 of the Guide to allow for flexibility in the water reference process and to give the group the opportunity to determine whether the issuance of a provisional determination is appropriate on a case-by-case basis, particularly given that, as clarified above, the Rules and Guide are intended to apply to all references made under section 12 of the Act. However, the CMA considers that in practice, it is more likely to issue a provisional determination as part of a reference than not to issue such a provisional determination.
- 2.67 The CMA has therefore amended the wording of Rule 11.1 and paragraph 3.29⁵⁷ to clarify that it expects to issue a provisional determination in most cases and that where it would not, the group will determine what alternative procedure is appropriate in the circumstances of the case and in accordance with the overriding

⁵⁰ See response from Water UK.

⁵¹ See response from Thames Water.

⁵² See responses from Linklaters, Northumbrian Water, Welsh Water and Thames Water.

⁵³ See responses from Linklaters, Welsh Water and Thames Water.

⁵⁴ See response from Linklaters.

⁵⁵ See response from Northumbrian Water.

⁵⁶ See response from Water UK.

⁵⁷ The CMA has also removed duplicative wording from paragraph 3.30 of the Guide.

objective.⁵⁸ The CMA does not propose to list the instances in which it would not issue a provisional determination as this will depend on the context and circumstances of a particular reference.

- 2.68 As regards the applicable time periods, Rules 6.1 and 6.2 clarify that the default period for conducting a redetermination is six months which can be extended by up to a further six months where there are special reasons for doing so. The CMA will therefore determine the appropriate timeframe for parties to respond to any provisional determination that is issued pursuant to Rule 11.4, on a case-by-case basis and in accordance with the statutory timetable.

Final report

- 2.69 Rule 12 sets out the procedure by which the group will adopt and publish its final report on the redetermination reference.

Summary of responses

- 2.70 One respondent suggested that the final report be accompanied by a more accessible summary document which outlines the impact of the final report for the customers of companies involved, on the basis that such report will affect the bills and services customers receive.⁵⁹

The CMA's views

- 2.71 As part of the CMA's conclusion and publication of the final report in a redetermination reference, Rule 12.6 notes that the CMA may publish a summary of the final report on its website. For example, the CMA published such a summary in its PR19 redetermination reference.⁶⁰
- 2.72 The CMA acknowledges the potential value of a more consumer friendly summary of its final report in a redetermination reference. The CMA has therefore amended the wording in paragraph 4.19 of the Guide, noting that whilst the final report will primarily be written for the main parties and is therefore likely to make use of technical language and be based on an expectation that the reader has a general knowledge of the industry and regulatory context,⁶¹ any summary that the CMA decides to publish of its findings may on a case-by-case basis include a more user-friendly summary for customers.

⁵⁸ See also the response from United Utilities, suggesting that it be made clear that only in rare circumstances would no provisional determination be issued.

⁵⁹ See response from CCWater.

⁶⁰ [CMA water redeterminations - summary \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/644441/cma-water-redeterminations-summary.pdf)

⁶¹ This wording was previously included in paragraph 4.18 of the Guide, but has now been consolidated together with the other changes in paragraph 4.19 of the Guide.

Costs

- 2.73 Rule 13 and section 7 of the Guide set out the process by which the group will consider the costs incurred by a disputing company in connection with the redetermination reference, pursuant to section 12(3A) of the Act.

Summary of responses

- 2.74 One respondent suggested that the CMA could improve the balance in the reference process by signalling a high hurdle before cost orders are made against consumers.⁶²
- 2.75 Another respondent suggested that further detail as to what would constitute a 'reasonably incurred' cost (in particular, whether this can be ascertained by reference to the costs incurred in the round by other disputing companies) would be beneficial.⁶³

The CMA's views

- 2.76 In respect of the concern raised regarding potential cost orders against consumers, the CMA notes that its consideration of disputing companies' and its own costs as part of a redetermination reference would not involve the imposition of costs orders directly on consumers.⁶⁴ In any event, the CMA is required by section 12(3A)(b) of the Act to decide to what extent it is reasonable to take into account in its determination of a redetermination reference costs incurred or borne by the disputing company in connection with such reference. We have therefore not made any changes to this provision in the Rules and Guide.
- 2.77 Paragraphs 7.1 to 7.8 of the Guide set out the factors the CMA may consider in determining the reasonableness of the costs recoverable by disputing companies, which will vary on a case-by-case basis. Nevertheless, the CMA sees the merit in including some additional guidance on this process and has therefore amended paragraph 7.4 of the Guide to clarify the components of the disputing companies' costs that the CMA may consider in determining the reasonableness of such costs. The CMA has also incorporated the possibility of comparing costs incurred by the parties in the round as one additional factor for consideration in paragraph 7.4 of the Guide. The CMA reiterates that it will provide the main parties with a provisional determination on costs and an opportunity to comment on the same pursuant to paragraph 7.7 of the Guide.

⁶² See response from MCC Economics.

⁶³ See response from Linklaters.

⁶⁴ The CMA acknowledges that, whilst cost orders are imposed directly on disputing companies rather than consumers, such cost orders may nevertheless have some indirect effect on consumers for instance through consumer bills.

3. List of respondents

1. Water Services Regulation Authority (Ofwat)
2. Freshfields Bruckhaus Deringer LLP
3. Linklaters LLP
4. Norton Rose Fulbright LLP
5. MCC Economics
6. Anglian Water
7. Northumbrian Water
8. Severn Trent
9. South West Water
10. Thames Water
11. Welsh Water
12. Yorkshire Water
13. United Utilities
14. Water UK
15. Consumer Council for Water (CCWater)