



Making a positive difference
for energy consumers

Competition and Markets Authority
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Date: 22 November 2024

Dear Sir/Madam,

Consultation on further updated rules and guide for energy code modification appeals.

Thank you for the opportunity to respond to the above consultation dated 8 November 2024.¹

We set out below our responses to the questions for consideration set out at section 3 of the consultation document.

Overall, we think the suggested changes are useful and we look forward to working with the CMA to resolve these matters as soon as practicable as we believe it is in everyone's interest to have up to date Rules and Guidance for Energy Code Modification Appeals ("ECMAs").

Question 1- Overall, is the way in which the Rules and Guide have been amended to take account of changes to provisions relating to the statutory timetable and appeals of GEMA decisions to modify codes sufficiently clear and helpful?

We make one point in respect of Rule 12.4(f). The explicit reference to the overriding objective in this Rule differs from the other parts of Rule 12.4 which do not explicitly refer to the overriding objective. This could lead readers to believe that the furthering of the overriding objective is only considered in respect of Rule 12.4(f). We assume that the furthering of the overriding objective applies to, and is a relevant consideration for, all of Rule 12.4.

¹ [Further updated rules and guide for energy code modification appeals | Connect: Competition and Markets Authority](#)

Question 2 – What aspects of the Rules and Guide, if any, do you consider need further clarification or explanation, in light of these changes? In responding, please specify which Rule and or/part of the Guide each of your comments relates to.

We refer to paragraph 4.12 of the Guide which discusses the CMA’s discretionary power to extend the period in which GEMA should respond to the notice of appeal (“the Relevant Period”). Whilst we welcome this change and the example given as to when the CMA may extend the Relevant Period, we believe it would be useful to set out, within the Guide, some further examples of where the CMA may extend the Relevant Period or at least make it clear that the possibility of extension in the example given is not centred on the fact that there is more than one applicant. Clearly the challenge for GEMA to respond to multiple grounds of challenge (particularly when these are complex and / or multi-faceted) would similarly arise in circumstances where there is only one applicant. Further, whilst the applicant itself only has 15 working days following the earliest day on which GEMA’s decision is published to submit a notice of appeal, GEMA would note that (in reality in many if not most cases) the applicant is likely to have a significantly longer period of time to prepare any anticipated appeal given the workgroup and determination process that code modifications typically follow. These processes can often run for months and applicants will have an opportunity during these processes to form and refine their potential arguments. The first time that GEMA may see some form of an applicant’s potential arguments is when we receive the Final Modification Report (“FMR”) at the very end of the code modification process. Even at this stage, any potential arguments within the FMR are unlikely to be fully refined and drafted such that GEMA can fully consider and understand the arguments that may be submitted in any subsequent ECMA.

Another potential example of where an extension may be appropriate is where there is a reasonable prospect of permission to appeal being successfully resisted. Given that the 10 working days in which the CMA is required to make a decision on permission to appeal runs concurrently to the 15 working days for GEMA to respond to the notice of appeal, GEMA may find itself in a situation in which it is not possible (or pragmatic) to seek to resist permission in order to focus on its substantive response to the notice of appeal given the extremely tight timescales involved. Were GEMA to be provided with a meaningful period to seek to resist permission in a scenario where there is a reasonable prospect of success, this would appear to be more in keeping with the furthering of the overriding objective as GEMA may be able to provide representations pre-permission which make it clear that the CMA should refuse permission, therefore saving both time and costs.² It would also be more consistent with the position in licence modification appeals where the period of time for representations on

² We note that we have made this point in our previous response letter of 3 September 2024.

permission does not run concurrently with the period of time for representations on the notice of appeal.

Finally, allowing an extension of the Relevant Period (in appropriate cases) would more generally be consistent with the longer period of time now afforded to the CMA to determine ECMAs. Based on the explanatory notes to the Energy Act 2023, we understand that this extension was provided to bring ECMAs in line with appeals of other GEMA decisions, such as licence modifications. Whilst it is unclear why corresponding changes were not made to other aspects of the appeal process to explicitly provide for further alignment (including time for representations and indeed the explicit ability for the CMA to make split costs orders in respects of its own costs),³ as noted above the longer period afforded for CMA determination does seem consistent with similarly allowing GEMA further time to respond in appropriate cases (by granting an extension of the Relevant Period).

Question 3 - Is there anything else which you consider should be included in the Rules and/or Guide to reflect these changes?

Please see our answers above.

We hope the CMA finds these suggestions useful. We would be happy to discuss them in further detail if that would be helpful.

Kind regards,

[✂]

PP.

Joanne McDowall

Deputy Director, Energy Systems Legal

Office of the General Counsel

³ We note that both of these proposed changes were consulted upon by the Department for Business and Trade in its [consultation of 22 November 2023](#).