

# Water Codes Appeals: Competition and Markets Authority Guide

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## 1. Introduction

- 1.1 The appeal jurisdiction of the Competition and Markets Authority (CMA) under the Water Industry Designated Codes (Appeals to the Competition and Markets Authority) Regulations 2017<sup>1</sup> (the Regulations) represents a significant development in accountability in the regulation of water and sewerage markets. The CMA has published procedural rules, the *Water Codes Appeals: Competition and Markets Authority Rules* (the Rules), to govern these appeals. The guide is intended to complement those Rules and to assist parties concerned in appeals, and their advisers, to understand the procedural framework.
- 1.2 In normal cases, the CMA must determine an appeal within 12 weeks of the Water Service Regulation Authority (the Authority) making its decision subject to appeal. The procedural framework in the Rules is designed to enable the CMA and the parties to conduct a satisfactory appeal process within that short timescale. The framework is flexible, and will be adapted as necessary to enable the process to be conducted fairly and efficiently and at proportionate cost, having regard to the circumstances of the case.
- 1.3 In every case the CMA will look for a high degree of cooperation from the parties. The CMA expects applicants to be realistic in drafting their statements of case, and all parties and their advisers to present the technical issues in dispute with particular clarity. As part of their presentation of those issues, parties are also expected to make every effort to agree a glossary of any technical terms they believe the CMA should use in considering the appeal.
- 1.4 The CMA's understanding of the procedural requirements of such appeals will no doubt develop. This guide will be revised periodically in the light of experience. Parties that wish to make suggestions as to how the CMA's procedure might develop should write to the appeal administrator after the conclusion of their appeal.

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<sup>1</sup> SI 2017/477.

## 2. The scheme of this guide

- 2.1 The Regulations and the Rules contain the procedural provisions subject to which appeals will be conducted. Not every provision of the Regulations relevant to appeal procedure, and not every Rule, will be applied in every case. This guide explains the procedural framework that the CMA envisages will be followed in most appeals. Parties that follow this guide will normally be assisting the CMA to meet the overriding objective of Rule 3.1. Conduct that does not further the overriding objective may be reflected in the CMA's award of costs.
- 2.2 This guide is divided into four parts. Part 2 contains general observations about appeals. In Part 3, there is further guidance about the mechanism for each appeal. Part 4 gives guidance on *inter partes* costs.
- 2.3 In this guide:
- 'the Act'** means the Water Industry Act 1991;
- 'the Authority'** means the Water Services Regulation Authority;
- 'the CMA'** means the Competition and Markets Authority;
- 'designated codes'** means codes that have been designated for the purposes of the Act; and
- 'sensitive information'** means information which is either commercial information the disclosure of which would, or might, significantly harm the legitimate business interests of an undertaking to which it relates, or information relating to the private affairs of an individual the disclosure of which would, or might, in the opinion of the CMA, significantly harm the interests of that individual.
- 2.4 This guide is published on the [CMA webpages](#).

### 3. General observations on appeals under the Regulations

#### Approach to appeals

- 3.1 The CMA's role under the Regulations is to provide a quick and effective appeal mechanism.
- 3.2 Appeals are adversarial proceedings. The CMA will not act as an investigating body conducting an inquiry. Rule 11 nevertheless gives the CMA power to initiate lines of inquiry and to appoint experts. Because appeals are adversarial and because of the short time period in which the CMA must reach a decision, it is envisaged that the CMA will normally use its case management powers to request parties to produce further evidence, for example, rather than to appoint experts of its own.
- 3.3 In determining the appeal, the CMA must have regard, to the same extent as is required of the Authority, to the Authority's general duties with respect to the water industry mentioned in section 2(1) of the Act. The CMA will also consider all relevant matters, which the Authority may not have considered in its decisions to change or amend a designated code. The CMA will exclude in its determination any matter that the Authority was not entitled to consider.<sup>2</sup> The CMA will decide whether the appellant has shown that the Authority reached the wrong decision on one or more of the grounds provided in Regulation 18(2). In keeping with this approach, the CMA does not expect the issues raised in the appeal to be significantly different from those that the Authority had to consider before it made its decision. In most cases the CMA does not expect to be invited to consider evidence substantially different from that before the Authority.
- 3.4 The CMA recognises that the appeal will be the first occasion on which a dispute between the appellant and the Authority has crystallised and falls to be formally determined, and this will be considered by the CMA in its management of the case and in the exercise of its powers under the Regulations.

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<sup>2</sup> See Regulation 12.

## Appeals within the CMA's jurisdiction

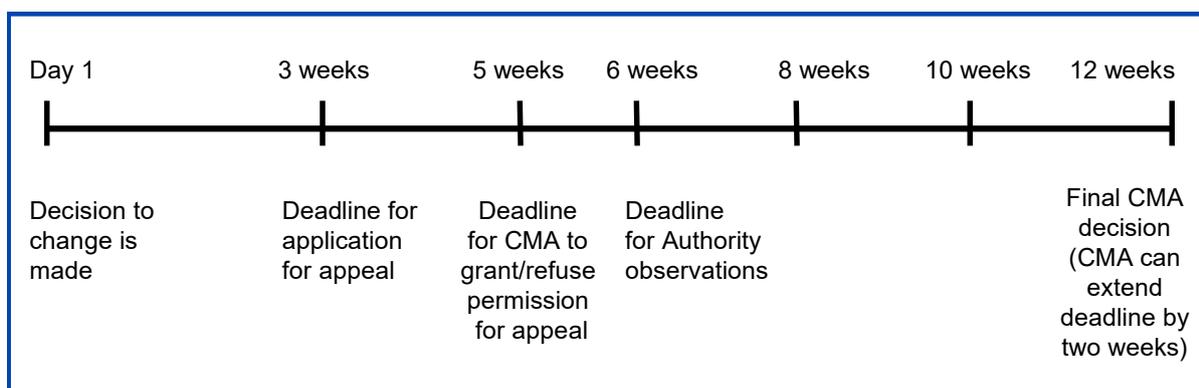
- 3.5 The codes over which the CMA has jurisdiction to hear appeals are designated in the Schedule to the Regulations.
- 3.6 The Schedule designates the following codes:
- (a) Market Arrangements Code.
  - (b) Wholesale-Retail Code.
- 3.7 Certain decisions in respect of minor or urgent revisions to the Wholesale-Retail Code are excluded from a right of appeal by regulation 5. 'Minor or urgent revisions' for these purposes are those in respect of which an Authority must give a notice under sections 66DC(3) or 117H(3) of the Act. These will be revisions to the code for which the Authority thinks consultation is unnecessary or that are necessary or desirable to make without delay: see section 66DC(1) and section 117H(1) of the Act.
- 3.8 The CMA may allow an appeal only if it is satisfied that the decision appealed against was wrong on one or more of the following grounds:
- (a) That the Authority failed properly to have regard to the matters to which it must have regard in the exercise and performance of its duties mentioned in section 2(1) of the Act.
  - (b) That the Authority failed properly to have regard to the purposes, listed in the third column of the table in the Schedule to the Regulations, for which the designated code in question was issued.
  - (c) That the Authority failed to give the appropriate weight to one or more of those matters or purposes.
  - (d) That the Authority's decision was based, wholly or partly, on an error of fact.
  - (e) That the Authority's decision was wrong in law.

## Timetable

- 3.9 Regulations 4, 5 and 6 of the Regulations provide for appeals to the CMA. An application for permission to appeal must be made before the end of 15 working days following the day on which the decision in respect of which an appeal it sought was first published, see Regulation 9(1).

- 3.10 The CMA will have 30 working days following the last day for the submission of the Authority's reply in which to determine the appeal. The CMA can extend this deadline by 10 working days, if it is satisfied that there are good reasons for doing so. Only one such extension can be granted. An early alert about the party's intention to appeal as early as possible in advance of the appeal is highly desirable.
- 3.11 Where this guide refers to 'the 30-day period', it is a reference to the aforementioned 30-working-day period allowed to the CMA in which to determine the appeal.
- 3.12 The CMA will issue a provisional timetable for the convenience of the parties and potential members as soon as it receives an application for permission to appeal. It will confirm that timetable if and when it has granted permission to appeal.
- 3.13 The CMA envisages that there will normally be at least one case management conference and two hearings within the 30-day period. Because of the short period of time available, and in order to assist the CMA and the parties to plan the conduct of the appeal, hearings will normally be held at the same stage of each appeal. The CMA will aim to hold a case management conference early in the proceedings. Further case management conferences will be convened as necessary to clarify particular points in dispute. The CMA may hold a clarification hearing in advance of the hearing on the substance of the appeal, with the latter taking place around day 20. Where the 30-day period includes the Christmas or Easter periods, special arrangements will be made.
- 3.14 Given the time scales involved, the CMA does not generally anticipate issuing provisional findings in Water Codes Appeals, but it is possible that in a particular case, the CMA may wish to do so to give the parties the opportunity to comment on the text of a proposed decision before it is finalised.
- 3.15 The timetable that will apply in most cases appears below.

### Timetable



- 3.16 Once the timetable has been issued, it will only exceptionally be the case that the CMA will depart from it. Parties and their advisers 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 counsel is a reason to depart from these dates.

## **Case management conferences**

- 3.17 The purpose of a case management conference is to consider how the appeal should be managed. In straightforward cases this may be no more than the CMA arranging site visits and hearings etc. But it may be more: for example, case management conferences will normally be the forum in which the CMA will give directions about the treatment of confidential information, and an opportunity for the CMA to discuss the case with the parties and, if necessary to indicate where it requires further evidence etc. Active case management will be an important tool in ensuring that the CMA makes the right decision in the time allowed.
- 3.18 In preparation for a case management conference the CMA will provide the parties with an agenda, and inform them of the issues in advance. At the case management conference the CMA will discuss the issues in the appeal, and the requirements of the CMA, with the parties. The CMA will give directions as necessary. Where possible, the CMA expects that parties will seek to agree in advance any direction to be made at, or any other action to be taken in consequence of, a case management conference.
- 3.19 One of the issues that the CMA may deal with in case management is the handling of sensitive information. Parties should note that the CMA expects parties seeking non-disclosure to be realistic and to tailor their non-disclosure requests to the recipient of the information. The CMA also expects parties to agree a basis for ensuring that those who will not see sensitive information are not thereby prejudiced. This will normally be through the use of confidentiality rings.<sup>3</sup>
- 3.20 The CMA expects that parties will cooperate promptly to produce bundles, chronologies, glossaries, issues lists and case memoranda where any or all of these are necessary.

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<sup>3</sup> A confidentiality ring is an arrangement under which sensitive information of one party is made available to, for example, the legal advisers of another party. The legal advisers are therefore able to prepare and present their client's case, but are obliged not to pass the sensitive information to their clients.

## Further procedural matters

- 3.21 The CMA will seek to narrow the issues and points in dispute during the course of the appeal. The case management conferences and clarification hearings are part of this process. The CMA may also give an interim evaluation of any ground of appeal at an early stage in the proceedings, for example after the clarification hearing.
- 3.22 A pre-hearing review may be held where the CMA wishes to review developments in an appeal before a hearing. It is likely to be necessary in cases of particular complexity. Hearings will not normally be conducted in public.
- 3.23 Orders relating to costs may be made on the day on which the CMA gives its decision, or later.

## Administrative matters

- 3.24 Within the CMA the administration of each appeal will be the responsibility of a designated appeal administrator. It is important that there is close liaison between parties, their advisers, and the CMA through the appeal administrator. Prior to making an application for permission to appeal, the applicant should contact the Regulatory Appeals Team at the CMA. The applicant will be given a reference number for the appeal and contact details of the appeal administrator.
- 3.25 All documents should be provided or sent to the CMA in writing and via email.
- 3.26 The address of the CMA for service is: Regulatory Appeals Team, Competition and Markets Authority, Victoria House, 37 Southampton Row, London, WC1B 4AD.
- 3.27 The CMA's email address for service is [appeals@cma.gsi.gov.uk](mailto:appeals@cma.gsi.gov.uk).

## Permission

- 3.28 The Regulations establish criteria for standing to bring an appeal. Because the permission of the CMA is required before an appeal can be brought, the first step in an appeal must be an application for permission to appeal.
- 3.29 Although the time available to an applicant to produce its permission application is short, the CMA considers that it is sufficient to produce a well-presented and selective application.

- 3.30 The CMA has 10 working days following the day on which it receives the permission application in which to decide whether to grant permission to appeal. It will normally decide on permission without a hearing. Where a hearing is necessary, notice of that hearing may be given to the Authority.
- 3.31 It is likely that notice of any such hearing will be given to the Authority where there is a dispute about whether the decision of the Authority is appealable to the CMA under the Regulations.
- 3.32 If a person wishes to intervene in the process by which an application for permission to appeal is made, for example to dispute the CMA's jurisdiction in relation to a decision, it should lodge an acknowledgement of service and make an application under Rule 8 for permission to intervene in the permission application.
- 3.33 Where an appeal lies against a decision of the Authority, and an application for permission to appeal is brought by a person with standing, the CMA may refuse permission if the appeal is brought for reasons that are trivial or vexatious, or if the appeal has no reasonable prospect of success.
- 3.34 Although the CMA may allow an amendment to an application for permission to appeal under Rule 9, the CMA will not allow Rule 9 to be used to circumvent the time limit by which an application for permission to appeal must be made. The CMA has power to disregard matters not contained in the application for permission to appeal, reply or intervention notice.
- 3.35 At the time that an application for permission to appeal is made, and before permission has been granted, there is not yet an appeal. If the CMA grants permission to appeal, it will treat the application for permission to appeal and supporting evidence as the appeal documents.

## **Other matters**

- 3.36 Rule 15 provides for applications, other than those for permission to appeal or for suspension of the Authority's decision, to be made to the CMA in respect of existing appeals. Because the proceedings are appellate, the CMA does not expect there to be numerous applications in any case. Rule 14 provides for suspension applications, pursuant to Regulation 8(1). The CMA will direct the procedure to be followed in suspension applications on a case-by-case basis, having regard to the issues in the case as well as when the suspension application is made. While there is no deadline in the Regulations by which the CMA must determine an application for suspension, the CMA nevertheless will deal with such applications promptly. The CMA will refuse to make a suspension direction where the determination of the appeal will be

made before the suspension direction could have effect. This means that any applications for suspension directions should be made as early as possible, ideally at the same time as the application for permission to appeal. Where it makes a suspension direction, the CMA will give appropriate directions to the Authority, which may include the Authority informing specified persons of the suspension direction.

- 3.37 The CMA may appoint counsel to assist it with any appeal. Should it do so, the advice received by the CMA will not be disclosed to the parties.

## 4. The Appeal procedure in detail

### Commencing an appeal

- 4.1 Every appeal will begin with an application for permission to appeal. Parties may file a joint application for permission to appeal in respect of the same decision of the Authority, though the joint notice must set out the information required by Rule 5.1(a), (b) and (d) in respect of each party.
- 4.2 The application for permission must be served by the applicant, in accordance with Regulation 6(3) and with Rule 5. When doing so, it is helpful if the appellant can draw the recipient's attention to the provisions of Rule 5.8.
- 4.3 The statement of case (and any statement in reply or statement of intervention) should bear the same reference number and heading. The description of the document should be inserted below the heading. The document should be set out in consecutively numbered paragraphs and paginated.
- 4.4 Each statement of case (and any statement in reply or statement of intervention) should be accompanied by a summary. The summary should be in a form suitable for publication on the CMA's website. It should not exceed four pages in length. It should include cross-references to the relevant statement of case, reply or intervention.
- 4.5 Rules 5, 7 and 8 indicate that the CMA expects parties to raise all matters in connection with their case at the outset. Note that Regulation 13 enables the CMA to disregard matters not so raised in certain circumstances.
- 4.6 The appellant should provide to the CMA a provisional glossary and chronology as part of an application for permission – see paragraphs 4.18 to 4.19.
- 4.7 As noted above at paragraph 3.24, all documents should be sent via email to [appeals@cma.gsi.gov.uk](mailto:appeals@cma.gsi.gov.uk).
- 4.8 The CMA is normally able to arrange encryption facilities for the exchange of confidential material.
- 4.9 The CMA has no power to extend the period within which an application is to be made. The CMA will, by prior arrangement with the appeal administrator, accept delivery of an application for permission at any time up to midnight on the last day in which it can be made. An applicant wishing to deliver documents to the CMA outside normal office hours (after 6pm or before 8.30am) should liaise with the appeal administrator to ensure delivery.

- 4.10 Each person who receives a copy of the application for permission should file an acknowledgement of service. The acknowledgement of service to the CMA may include submissions as to whether the CMA should refuse the permission to appeal on the grounds set out under Regulation 6(8).

## Responses

- 4.11 If the Authority wishes to make observations or representations pursuant to Regulation 9(1), it should submit a reply under Rule 7 within 15 working days after the day on which permission is applied for. If the Authority wishes to rely on its decision alone, it should, within the time frame specified in Regulation 9(1), submit a reply to this effect.
- 4.12 Any reply must be served by the Authority in accordance with Regulation 9(3) and Rule 7. Each person who receives a copy of the reply should file an acknowledgement of service.
- 4.13 The CMA expects that a reply made under Regulation 9, will, in addition to including the information set out in Rule 7:
- (a) identify the facts and reasons why it believes the appeal should not succeed and, or alternatively, why it believes the relief sought should not be allowed; and
  - (b) include a statement identifying which of the matters of fact relied upon by the appellant or any intervener were in its belief not known to it at the time of its decision and why they were not known.

## Interventions

- 4.14 A person considering whether to intervene will assist the CMA by advising it at the earliest opportunity that it is considering whether to intervene. This is particularly important where the intervener requires the permission of the CMA to serve an intervention notice.
- 4.15 Regulation 7 enables a person to ask the CMA for a direction allowing it to intervene in an appeal, either to support or oppose it. There are requirements as to standing. The direction must be sought within 20 working days following the day of the application for permission to appeal, though the CMA has discretion to consider a request for permission made later. Intervention in support of the appeal cannot raise new grounds of appeal. The CMA must not allow an intervention if it would prevent the determination of the appeal within the period required under the Regulations.

- 4.16 An intervention notice must be served by the intervener in accordance with Regulation 7 and Rule 8. Each person who receives a copy of an intervention notice should file an acknowledgement of service.

## **Amendments**

- 4.17 An application for permission to appeal, a reply or an intervention notice may be amended with the permission of the CMA. A party seeking permission to amend should normally seek consent of the other parties to the amendment. The amended document should show the original and the amended text. Where the amendments are extensive, a clean copy of the document should also be produced.

## **Other documentation**

- 4.18 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 be provided with a glossary of technical terms.
- 4.19 The purpose of a glossary of technical terms is to provide the CMA and the parties with a single reference point. The glossary should therefore be agreed if possible, and should as far as possible be consistent with the usage of technical terms by the Authority and others prior to the Authority's decision. Where there is disagreement between the parties about the use of a term, that disagreement should be stated and the competing understandings set out concisely.
- 4.20 The CMA will also expect to see a chronology of the proposal to amend a designated code from its inception to the Authority'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 code amendment proposal up to the point at which the Authority decided whether to approve it or not. The chronology should be uncontroversial and should be agreed if possible. Where there is disagreement between the parties about an event, or description of it, that disagreement should be stated and the competing versions concisely set out.

## **Case management**

- 4.21 All appeals will be subject to active case management by the CMA. It expects the parties to be represented at case management conferences and pre-hearing reviews.

- 4.22 As part of the management of the appeal, the CMA expects the parties to produce a case memorandum, a list of issues and, in cases with significant amounts of paper, a core bundle. These should be produced either by the time fixed for the first case management conference or as directed by the CMA.
- 4.23 The CMA may also direct the parties to:
- (a) update and revise the case memorandum, list of issues and core bundle on a running basis during the appeal; and
  - (b) produce and disclose interim statements of costs.
- 4.24 The case memorandum should be a concise and uncontroversial description of the case, including a brief and uncontroversial summary of the procedural history of the case.
- 4.25 The appellant is responsible for producing and maintaining the case memorandum.
- 4.26 The parties must produce an agreed list of the important issues in the case, including issues of fact and law. The issues list should contain cross-references to the Authority's decision and the statements of case, reply or intervention. The issues list should include both those matters that are common ground between the parties and those matters that are considered important only by one or the other of the parties.
- 4.27 Where it is necessary to produce a core bundle, it should contain:
- (a) the decision appealed;
  - (b) the statement of case, and any statement in reply or intervention statement;
  - (c) the written evidence, other than evidence which is relevant only to the permission stage of the appeal;
  - (d) the case memorandum;
  - (e) the list of issues; and
  - (f) the directions given in the appeal.
- 4.28 If the core bundle is updated or revised, it should be delivered to the CMA at least two days before the next hearing. It is the responsibility of the appellant to revise and update the core bundle as the appeal proceeds. The CMA

expects the parties to co-operate in the preparation of the case memorandum, the list of issues and the core bundle.

- 4.29 Parties should produce drafts of the directions they seek. In due course, the CMA may produce standard directions.
- 4.30 Where the CMA directs an act to be done by a certain date without specifying a time, it is to be done by 5.30pm on that day.

### **Consolidated cases**

- 4.31 Where the CMA has granted permission subject to a condition that an appeal is to be considered together with other appeals, in accordance with Regulation 6(7)(c) individual appellants in the consolidated cases will be given a full opportunity to state their own case respectively.<sup>4</sup> This will not apply however where the parties have appealed jointly, where they will ordinarily be expected to state their case jointly.

### **Applications under Rule 14 and 15**

- 4.32 Where the Authority has made a decision that is appealable under the Regulations, and there is an appeal, the CMA has power to may suspend that decision pending determination of the appeal (Rule 14). Before such a decision can be taken, the applicant must show that among other things the decision modification will lead to the applicant incurring significant costs, and that the balance of convenience does not otherwise require the decision consent to be given effect pending determination of the appeal.
- 4.33 Applications other than permissions to appeal or suspension applications are made under Rule 15, for example applications to amend an application for permission to appeal, reply or intervention notice or applications at case management conferences for directions under Rule 11. Such applications are served by the applicant, and not by the CMA.
- 4.34 Although Rule 15 contains no stipulations for evidence, the CMA may be unable to decide the application without evidence. If that is likely to be the case, and if the necessary evidence has not already been lodged with the CMA, the applicant should lodge a witness statement and serve it with its application.

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<sup>4</sup> See paragraph 4.56 below for the possibility of the parties in a consolidated hearing nevertheless to elect to be represented by a single representative.

- 4.35 Where an applicant believes that a hearing will be required, it should request one in its application form and give reasons for its request.

### **Interim evaluation**

- 4.36 After the clarification hearing and in case the appellant and the Authority so request, the CMA may give an interim evaluation of some or all of the issues in the appeal.
- 4.37 The CMA will provide an interim evaluation only if it appears that to do so is likely to assist in the determination of the appeal.
- 4.38 An interim evaluation will not be a fully reasoned provisional finding. It will not bind the CMA as to its final decision.

### **Witness statements**

- 4.39 Although the Regulations and the Rules make provision for oral evidence and cross-examination, the CMA expects that these provisions will be used very rarely, if ever. Rule 16 stipulates that evidence used in the appeal will normally be written evidence. Rule 17 requires written evidence to be in the form of a witness statement. A witness statement should be in the witness's own words and should contain only matters to which the witness could speak if cross-examined.
- 4.40 Witness statements should:
- (a) be paginated;
  - (b) be headed with the title of the appeal and the reference number;
  - (c) be clearly marked at the top right-hand corner with the name of the party on whose behalf the witness statement is made, the initials and surname of the witness, the number of the statement in relation to that witness, the identifying initials and number of each exhibit referred to and the date the statement was made;
  - (d) state the full name of the witness and their residence;
  - (e) state their place of residence or, if the statement is made in a professional, business or other occupational capacity, the address at which they work or the position held and the name of the firm or employer;
  - (f) state the occupation of the witness; and

(g) state the relationship of the witness to the party on whose behalf the evidence is given.

- 4.41 In a witness statement, the witness 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 should state the source of that information or belief.
- 4.42 A witness statement should be as concise as the circumstances allow. It should not contain long quotations from documents. Documents used in conjunction with a witness statement should be verified and identified by the witness and placed in an exhibit separate from the witness statement. The location of the document in the exhibit should be set out in the witness statement.
- 4.43 Where the witness refers in a witness statement to correspondence, the letters should be collected together and exhibited in chronological order with the earliest at the top.
- 4.44 Photocopies may be used instead of original documents provided the originals are available for inspection by the other parties and by the CMA if necessary.
- 4.45 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.
- 4.46 Witness statements and exhibits should be fully legible. Witness statements should be typed on one side of the paper only and should be divided into numbered paragraphs.
- 4.47 Documents within the core bundle should be repaginated in the bottom right-hand corner. However, the original pagination should not be deleted. The files in which the core bundle is presented should be numbered and named.

## **Expert evidence**

- 4.48 Parties to an appeal may be permitted to rely on expert evidence. The CMA will apply the same rules to determine the admissibility of expert evidence that it applies to the admissibility of any other evidence.
- 4.49 The CMA expects parties to ensure that expert witnesses provide assistance to the CMA by way of their objective opinion in relation to matters within their expertise.

- 4.50 Expert witnesses should consider all material relevant to their expertise. Their evidence should clearly state the limits of their expertise. Where an expert considers that they have not been provided with sufficient material to form a proper conclusion or view on any point, the evidence of the expert must indicate where that is the case, and what further material the expert needs to see in order to form a conclusion or view.
- 4.51 If, after seeing the submissions or evidence of any other party to the appeal, an expert witness wishes to change their view, that change should be communicated to the CMA and to the parties without delay.
- 4.52 Expert witnesses should expect the CMA to raise issues in writing that arise out of their evidence. The CMA will expect prompt responses (in the manner directed by the CMA) to the issues raised.
- 4.53 Where there is conflicting expert evidence in an appeal case, the CMA may direct that the respective experts should meet. The purpose of such a meeting will be to discuss the issues, and, consequently, to decide whether they can agree on any of the issues in dispute.
- 4.54 The discussions at a meeting between experts are private. Except to the extent the meetings result either in the experts resolving the issues in dispute, or in one of the experts wishing to change their evidence regarding the issues in dispute, they are not to be referred to the CMA.
- 4.55 Parties and their advisers are not eligible to attend an expert meeting without the permission of the CMA. Neither parties nor their advisers should put pressure on expert witnesses not to amend their position because of an expert witness meeting.
- 4.56 If after an expert meeting one or more of the experts wishes to change their view on any point, the parties are not bound by the change of view of their expert.

### **Skeleton arguments**

- 4.57 Prior to a hearing, the CMA may ask the representative of any party to produce a skeleton argument. A skeleton argument should be delivered to the CMA and to the other parties to the appeal by midday on the working day before a hearing. The CMA will expect a skeleton argument where the appeal raises a point of law that is to be dealt with at the next hearing.
- 4.58 The purpose of the skeleton argument is for the parties and the CMA to identify those points which are/are not in issue at a hearing and the nature of the argument in relation to the points in issue.

- 4.59 The skeleton should state concisely the background facts relevant to the particular issues and points, identify relevant submissions of fact with reference to the evidence, and identify propositions of law involved with reference to authority.

## Hearings

- 4.60 Hearings may be held to decide permission applications, intervention applications, suspension applications, and the appeal. Applications for permission, intervention and suspension can be heard by the chair of the CMA, a member authorised by the chair of the CMA for that purpose, or the chair of the group which will determine the appeal. However, the consideration and determination of the appeal is the function of a group of three members selected by the chair of the CMA. A decision of the group is only effective if all members of the group are present when it is made, and at least two members of the group are in favour of it. The group must normally reach its decision on the appeal within 30 working days after the Authority's reply.
- 4.61 Parties will be directed as to the issues on which the CMA wishes to hear their submissions, and the length of time that will be allowed them to make these submissions, normally before a hearing. The CMA will indicate the order in which it wishes to hear the parties. The CMA expects that parties (including in an appeal brought jointly) will normally be represented by one spokesperson or advocate only at each hearing, and that the same spokesperson or advocate will appear at each hearing. Where cases have been consolidated, the parties may elect to be represented in the hearing by a single representative. However, subject to prior agreement with the CMA, 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. At hearings, parties may present their submissions using, for example, a PowerPoint presentation, if they consider that it would assist the CMA. Parties who wish to employ technology during their submissions should make prior arrangements with the CMA. The CMA may permit the use of videoconferencing or teleconferencing facilities in a hearing.
- 4.62 Hearings will normally begin at 10am. There will be a break between 1pm and 2pm. The day's proceedings will normally end at 5pm. At the start of a hearing, the appellant and the Authority will normally be invited to make a short opening statement of no more than 20 minutes' duration. Interveners will not normally be invited to make an opening statement. Parties will then make submissions as invited, and answer questions from members of the CMA. At

the end of a hearing the appellant and the Authority will be invited to make a short closing statement. There will normally be no written closing statement.

- 4.63 A transcript will be taken of all hearings. Parties who wish to use a different transcription service to that used by the CMA should liaise with the appeal administrator.
- 4.64 At the end of the final hearing the CMA will usually reserve its decision. Where it does, the CMA will fix a date, normally day 28 to 30 of the 30-day period, on which it will give its decision, either orally or in writing.
- 4.65 Where a written decision will be given, a draft of the decision will normally be provided to the parties and their advisers the day before the decision is to be given.
- 4.66 The parties or their advisers should inform the CMA of typographical and similar errors as soon as possible.
- 4.67 Where the CMA discloses a draft in advance of giving a decision, the substance of the draft decision is disclosed by the CMA in confidence and the recipients of the draft may not disclose it or any part of it.
- 4.68 The CMA's draft decision is not its final decision, and distribution of a decision in draft does not bind the CMA.
- 4.69 Copies of the CMA's decision will be made available and will be published on the CMA's website.

## 5. Costs

### Inter partes costs

- 5.1 In Rule 21 the CMA states that it will normally order an unsuccessful party to pay the costs of the successful party, but may make a different order. Factors influencing the CMA's decision include the conduct of the parties, a party's degree of success, and the proportionality of the costs claimed having regard to the matters in issue and the resources of all the parties.
- 5.2 Where the CMA makes an order for costs in favour of one or more of the parties, 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 Authority first published its decision.
- 5.3 However, the successful party may not be awarded the entirety of their costs. For example, in cases in which a party succeeds on some, but not all grounds of appeal or all aspects within the grounds of appeal, the CMA will make an order in proportion of the appeal which has been successful.
- 5.4 At the first case management conference, each party may be directed by the CMA to file an interim statement of costs setting out the costs incurred by it up to that point and its prediction of the costs it will incur in the appeal. At the final hearing, each party may be directed by the CMA to file a second interim statement.
- 5.5 Each party should file a final statement of costs immediately after the day on which the CMA gives its decision. Each statement of costs should be disclosed to any party to the appeal who may become liable to pay those costs.
- 5.6 All interveners may be directed by the CMA to file an interim statement of costs and a prediction of their future costs within two days after their intervention is permitted, if later.
- 5.7 Each statement of costs should state:
- (a) the amount to be claimed in solicitor's costs by reference to:
    - (i) the number of hours claimed;
    - (ii) the hourly rate claimed;
    - (iii) the seniority of the solicitor or other fee earner; and

- (iv) the nature of the work performed, broken down by category including attendances on client, attendances on counsel, attendance at the CMA, the preparation of documents served on the CMA, contact with the CMA and contact with other parties to the appeal;
  - (b) the amount claimed in respect of disbursements other than counsel's fees; and
  - (c) counsel's fee for:
    - (i) hearings; and
    - (ii) other matters.
- 5.8 Each statement of costs should be signed by the party or its legal adviser.
- 5.9 Before making any order for costs, the CMA will provide the parties with a provisional determination on costs and a draft of the order for costs and give them a reasonable opportunity to make representations on each. The CMA will normally publish non-confidential versions of any final determinations on costs and orders for costs on its website.
- 5.10 The CMA may make an order for costs at the time that it gives its decision. However, the CMA may choose to reserve its position on costs and make a subsequent written order.

## **The CMA's costs**

- 5.11 Regulation 19(1) requires the CMA to recover its costs incurred in the appeal, and Rule 22 states that the CMA will make an order for the payment of its own costs incurred in connection with the appeal. Such an order must require those costs to be paid:
- (a) where the appeal is allowed, by the Authority;
  - (b) where the appeal is dismissed, by the appellant – but if there is more than one appellant, the order may specify that one or more of the appellants is to pay those costs, in such proportions as specified in the order.
- 5.12 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. The CMA will normally publish non-confidential versions of any final determinations on costs and orders for costs on its website.

## **Withdrawal**

- 5.13 The purpose of Rule 23 is to provide a mechanism by which a party may abandon its pursuit or defence of an appeal and thereby, for example, limit its liability to costs. Although this is a summary procedure it may nevertheless be the case that a hearing and detailed argument is necessary. This would be likely where the remedy is contentious, for example should the Authority agree that the appeal should be allowed but dispute the remedy or where there is to be argument about costs.