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D R A F T   S T A T U T O R Y   I N S T R U M E N T S

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**2017 No. \*\*\***

**WATER INDUSTRY, ENGLAND AND WALES**

**The Water Industry Designated Codes (Appeals to the Competition and Markets Authority) Regulations 2017**

*Made* - - - - - \*\*\*

*Coming into force* - - - - - \*\*\*

The Secretary of State makes these Regulations in exercise of the powers conferred by sections 207A, 207C, 213(2) and (2B) of, and Schedule 16 to the Water Industry Act 1991(a).

The Secretary of State has consulted the Welsh Ministers, the Water Services Regulation Authority and such other persons as appear appropriate in accordance with section 207A(8) of the Water Industry Act 1991.

A draft of these Regulations has been laid before, and approved by a resolution of, each House of Parliament in accordance with section 213(1A)(b) of the Water Industry Act 1991.

**Citation and commencement**

**1.**—(1) These Regulations may be cited as the Water Industry Designated Codes (Appeals to the Competition and Markets Authority) Regulations 2017.

(2) These Regulations come into force at the end of the period of 21 days beginning with the day on which they are made.

**Interpretation**

**2.**—(1) In these Regulations—

“the Act” means the Water Industry Act 1991;

“appellant” means an applicant for permission who has been granted permission to appeal under regulation 6(9);

“appointment” has the meaning given in section 36(2) of the Act;

“authorised member of the CMA”—

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(a) 1991 c. 56; sections 207A and 207C and Schedule 16 were inserted by section 37(1) and (2) of and Schedule 6 to the Water Act 2014 (c. 21).

(b) Section 213(1A) was inserted by section 58(1) and (8) of the Water Act 2003 (c. 37) and amended by section 37(1) and (3) of the Water Act 2014.

- (a) in relation to a power exercisable in connection with an appeal, means a member of the group that has been authorised by the chair of the CMA to exercise that power;
- (b) in relation to a power exercisable in connection with an application for permission to bring an appeal, or otherwise in connection with an appeal in respect of which a group is being constituted by the chair of the CMA, means—

- (i) any member of the CMA Board who is also a member of the CMA panel, or
- (ii) any member of the CMA panel authorised by the Secretary of State (whether generally or specifically) to exercise the power in question;

“Authority decision” means a decision taken by the Authority on or after the commencement date—

- (a) to revise a designated code, or
- (b) following consultation under section 207A(1)(b) of the Act, not to revise a designated code;

“the CMA” means the Competition and Markets Authority;

“CMA Board” and “CMA panel” have the same meaning as in Schedule 4 to the Enterprise and Regulatory Reform Act 2013(a);

“commencement date” means the day on which these Regulations come into force in accordance with regulation 1(2);

“designated code” means any of the codes listed in the table in Schedule 1;

“group” means a group constituted by the chair of the CMA under Part 3 of Schedule 4 to the Enterprise and Regulatory Reform Act 2013 for the purpose of carrying out functions of the CMA with respect to an appeal under regulation 4;

“intervener” means a person who has become a party to an appeal in pursuance of a direction under regulation 7(5);

“retail market” means the provision of services relating to the supply of water, in accordance with Chapter 2A of Part III of the Act, or the provision of sewerage services, in accordance with Chapter 2A of Part IV of the Act, to premises that are not household premises;

“sewerage licence” means a sewerage licence granted with a retail authorisation under section 17BA of the Act;

“undertaker” means either a water or sewerage undertaker;

“water supply licence” means a water supply licence granted with a retail authorisation or a restricted retail authorisation under section 17A of the Act;

“Wholesale-Retail Code” means the relevant designated code in the table in Schedule 1;

“working day” means any day other than—

- (a) Saturday or Sunday,
- (b) Christmas Day or Good Friday, or
- (c) a day which is a bank holiday in England and Wales under the Banking and Financial Dealings Act 1971(b).

(2) References in these Regulations to a party to an appeal are references to—

- (a) the appellant,
- (b) an intervener, or
- (c) the Authority.

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(a) 2013 c. 24.  
(b) 1971 c. 80.

### **Designation of codes**

3. The codes listed in the table in Schedule 1 are designated for the purposes of section 207A(2) of the Act.

### **Appeals to the CMA**

4.—(1) An appeal against an Authority decision lies to the CMA.

(2) An appeal against an Authority decision may be brought under this regulation only by one or more of the following persons, where their interests are materially affected by it—

- (a) a water supply licensee,
- (b) a sewerage licensee, or
- (c) an undertaker.

(3) The permission of the CMA is required for the bringing of an appeal under this regulation.

### **Determination of appeals**

5.—(1) This regulation applies to every appeal brought under regulation 4.

(2) In determining the appeal the CMA must have regard, to the same extent as is required of the Authority, to the matters to which the Authority must have regard in the exercise and performance of the powers and duties mentioned in section 2(1) of the Act<sup>(a)</sup> (general duties with respect to water industry).

(3) In determining the appeal the CMA may have regard to any matter to which the Authority was not able to have regard in the case of the Authority decision appealed against.

(4) In the exercise of the power in paragraph (3), the CMA must not have regard to any matter to which the Authority would not have been entitled to have regard in that case had it had the opportunity of doing so.

(5) The CMA may allow the appeal only if it is satisfied that the Authority 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 mentioned in paragraph (2);
- (b) that the Authority failed properly to have regard to the purposes, listed in column 3 of the table in Schedule 1, 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.

(6) Where the CMA does not allow the appeal, it must confirm the Authority decision appealed against.

(7) Where the CMA allows the appeal, it must do one or more of the following—

- (a) quash the Authority decision appealed against;
- (b) remit the matter to the Authority for reconsideration and redetermination in accordance with any directions given by the CMA;
- (c) where it quashes an Authority decision to not revise a code, give directions to the Authority as it considers appropriate for securing that the relevant designated code has effect as if it had been revised as proposed.

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(a) Section 2(1) as amended by sections 36(2), 39(1) and (2) or the Water Act 2003 and paragraphs 2, 3(1) and (2) of Schedule 7 to the Water Act 2014 (c. 21).

(8) The Authority must not be directed under paragraph (7) to do anything that it would not have power to do.

(9) The decision of the CMA on the appeal—

- (a) must be contained in an order made by the CMA,
- (b) must set out the reasons for the decision,
- (c) takes effect at the time specified in the order or determined in accordance with provision set out in that order,
- (d) must be notified by the CMA to the persons who were parties to the appeal, and
- (e) must be published by the CMA in such manner as it considers appropriate for bringing it to the attention of other persons likely to be affected by it.

(10) The CMA may exclude from what it publishes under sub-paragraph (9)(e) any information which it is satisfied is—

- (a) commercial information the disclosure of which would, or might, significantly harm the legitimate business interests of an undertaking to which it relates;
- (b) information relating to the private affairs of an individual the disclosure of which would, or might, in its opinion, significantly harm that individual's interests.

### **Application for permission to bring appeal**

**6.**—(1) An application for permission to bring an appeal may be made only by sending a notice to the CMA requesting the permission.

(2) Only a person who will be entitled under regulation 4 to bring the appeal, if permission is granted, may apply for permission.

(3) Where the Authority publishes an Authority decision to which regulation 4 applies, an application for permission is not to be made after the end of 15 working days following the day on which the decision was first published.

(4) An application for permission must be accompanied by all such information as may be required by appeal rules.

(5) Those rules may require information contained in the application to be verified by a statement of truth.

(6) The applicant must send the Authority—

- (a) a copy of the application, and
- (b) such other information as may be required by appeal rules.

(7) The applicant must also send a copy of that application and of that information to—

- (a) such persons (apart from the Authority) as appear to the applicant to be affected by the decision appealed against, and
- (b) such other persons as the Authority may require the applicant to keep informed about the appeal.

(8) The CMA's decision on an application for permission must be made before the end of 10 working days following the day on which it received it.

(9) The CMA's decision whether to grant or refuse permission is to be taken by an authorised member of the CMA.

(10) A decision to grant permission may be made subject to conditions.

(11) Those conditions may include—

- (a) conditions which limit the matters that are to be considered on the appeal in question,
- (b) conditions for the purpose of expediting the determination of the appeal, and
- (c) conditions requiring the appeal to be considered together with other appeals (including appeals relating to different matters or decisions and appeals brought by different persons).

(12) The CMA may refuse permission only on one of the following grounds—

- (a) that the appeal is brought for reasons that are trivial or vexatious;
- (b) that the appeal has no reasonable prospect of success.

(13) Where a decision is made to grant or to refuse an application for permission, an authorised member of the CMA must notify the decision to—

- (a) the applicant,
- (b) the Authority, and
- (c) each person who was sent a copy of the application in accordance with paragraph (7).

### **Addition of interveners**

7.—(1) This regulation applies if a person falling within paragraph (2) gives notice to the CMA asking to become an intervener—

- (a) before the end of 20 working days following the day of the making of an application for permission to bring an appeal, or
- (b) within such longer period as an authorised member of the CMA may allow.

(2) A person falls within this paragraph if the person is not the applicant for permission, but is a person who would have been entitled, at the time of the application, to make their own application to the CMA for permission to bring an appeal against the decision in question.

(3) A person who gives a notice asking to become an intervener must send to the Authority and the applicant—

- (a) a copy of the notice, and
- (b) such other information as may be required by appeal rules.

(4) That person must also send a copy of the notice and of that information to—

- (a) such persons (apart from the Authority) as appear to that person to be affected by the decision appealed against, and
- (b) such other persons as the Authority may require that person to keep informed about the appeal.

(5) An authorised member of the CMA may, on behalf of the CMA, give a direction that a person who has asked in accordance with this regulation to become an intervener is to be an intervener.

(6) An authorised member of the CMA is not to give a direction under this regulation if the member considers that it would prevent the determination of the appeal within the period allowed by regulation 11 to do so.

(7) Where a direction is given under this regulation—

- (a) the application for permission, and
- (b) if permission is or has been granted, the appeal brought by the applicant and any other appeals that are considered with it, are to proceed (subject to any direction under subparagraph (8)(b)) as if the intervener had joined with the applicant in making that application and bringing the appeal.

(8) A direction under this regulation—

- (a) does not allow the intervener to rely on grounds of appeal not contained in the appellant's application for permission to bring an appeal,
- (b) may allow the intervener to become a party to the appeal for the purpose of opposing it, and
- (c) may be given subject to conditions.

(9) The conditions of a direction under this regulation may include—

- (a) conditions which limit the matters that are to be considered on the appeal in question;

- (b) conditions for the purpose of expediting the determination of the appeal.

### **Suspension of Authority decision**

**8.**—(1) Where permission has been granted to bring an appeal against an Authority decision, an authorised member of the CMA may, on behalf of the CMA, direct that, pending the determination of the appeal—

- (a) the decision is not to have effect, or
- (b) the decision is not to have effect to such extent as may be specified in the direction.

(2) The power to give a direction under this regulation is exercisable only where—

- (a) an application for its exercise has been made by the appellant or by another person with interests or functions that entitle, or would have entitled, that person to appeal against the Authority decision,
- (b) the applicant for the exercise of the power would incur significant costs if the Authority decision were to have effect, or to continue to have effect, before the determination of the appeal, and
- (c) the balance of convenience does not otherwise require effect to be given to the Authority decision pending that determination.

(3) The power to give a direction under this regulation is exercisable at any time before the determination of the appeal.

(4) A person making an application under this regulation must notify the Authority.

(5) Before determining whether to grant an application under this regulation, the authorised member of the CMA must give the Authority an opportunity of making representations about the matter.

### **Time limit for representations and observations by the Authority**

**9.**—(1) Where the Authority wishes to make representations or observations to the CMA about—

- (a) an Authority decision in respect of which permission to bring an appeal has been granted,
- (b) the Authority's reasons for that decision, or
- (c) the grounds on which an appeal is being brought against that decision,

it must do so before the end of 15 working days following the day of the making of the application for permission to bring the appeal.

(2) Where more than one application for permission to bring an appeal was made in accordance with regulation 4 in respect of the same Authority decision, the period of 15 working days referred to in paragraph (1) begins to run from the end of the day of the making of the last of those applications to be made.

(3) The Authority must publish its representations and observations on its website and send a copy to any applicant for permission, appellant or intervener.

### **Consideration and determination of appeal by group**

**10.**—(1) A group must consist of three members of the CMA panel.

(2) A decision of the group is effective if, and only if—

- (a) all the members of the group are present when it is made, and
- (b) at least two members of the group are in favour of the decision.

### **Timetable for determination of appeal**

**11.**—(1) The CMA must determine an appeal before the end of 30 working days following the last day for the making of representations or observations by the Authority in accordance with regulation 9.

(2) If the CMA is satisfied that there are good reasons for departing from the normal requirements in respect of an appeal, it may, on one occasion only, extend that period of 30 working days by not more than 10 more working days.

(3) The CMA must ensure that an extension under paragraph (2) is notified to every party to the appeal.

### **Matters to be considered on appeal**

**12.** The CMA, if it thinks it necessary to do so for the purpose of securing the determination of an appeal within the period allowed by regulation 11, may disregard—

- (a) all matters raised by the appellant or an intervener that were not raised by the appellant at the time of the application for permission to bring the appeal or in the request under regulation 7, and
- (b) all matters raised by the Authority that were not contained in representations or observations made for the purposes of the appeal in accordance with regulation 9.

### **Production of documents**

**13.**—(1) The CMA may, by notice, require a person to produce to the CMA the documents specified or otherwise identified in the notice.

(2) The power to require the production of a document is a power to require its production—

- (a) at the time and place specified in the notice, and
- (b) in a legible form.

(3) No person is to be compelled under this regulation to produce a document that the person could not be compelled to produce in civil proceedings in the High Court.

(4) An authorised member of the CMA may, for the purpose of the exercise of the functions of the CMA, make arrangements for copies to be taken of a document produced under this regulation.

(5) A notice for the purposes of this regulation may be issued on the CMA's behalf by an authorised member of the CMA.

### **Oral hearings**

**14.**—(1) For the purposes of determining an appeal, an oral hearing may be held.

(2) Evidence may be taken on oath and oaths may be administered—

- (a) by a person considering an application for permission to bring an appeal,
- (b) by a person considering an application for a direction under regulation 7, or
- (c) by a group with the function of determining an appeal.

(3) The CMA may, by notice, require a person—

- (a) to attend at a time and place specified in the notice, and
- (b) at that time and place, to give evidence to a person or group mentioned in paragraph (2).

(4) At any oral hearing the person or group conducting the hearing may require the following persons to give evidence or to make representations or observations—

- (a) any applicant, appellant or intervener, if they are present at the hearing, or
- (b) a person attending the hearing as a representative of a person mentioned in sub-paragraph (a) or of the Authority.

(5) A person who gives oral evidence at the hearing may be cross-examined by or on behalf of any party to the appeal.

(6) If a person is not present at a hearing to be subjected to a requirement under paragraph (4), the person or group conducting the hearing may determine the application or appeal without hearing that person's evidence, representations or observations.

(7) No person is to be compelled under this regulation to give evidence which that person could not be compelled to give in civil proceedings in the High Court.

(8) Where a person is required under this regulation to attend at a place more than 10 miles from their place of residence, an authorised member of the CMA must arrange for that person to be paid the necessary expenses of their attendance.

(9) A notice for the purposes of this regulation may be issued on the CMA's behalf by an authorised member of the CMA.

### **Written statements**

**15.**—(1) The CMA may, by notice, require a person to produce a written statement with respect to a matter specified in the notice to a group with the function of determining an appeal.

(2) The power to require the production of a written statement includes power—

- (a) to specify the time and place at which it is to be produced;
- (b) to require it to be verified by a statement of truth.

(3) A statement produced in accordance with paragraph (2) must be disregarded unless it is so verified.

(4) No person is to be compelled under this regulation to produce a written statement with respect to any matter about which that person could not be compelled to give evidence in civil proceedings in the High Court.

(5) A notice for the purposes of this regulation may be issued on the CMA's behalf by an authorised member of the CMA.

### **Defaults in relation to evidence**

**16.**—(1) An authorised member of the CMA may certify a failure, or the fact that a false statement has been made, to the High Court if a person ("the defaulter")—

- (a) fails to comply with a notice or other requirement issued or imposed under regulation 13, 14 or 15,
- (b) in complying with a notice under regulation 15, makes a statement that is false in any material particular, or
- (c) in providing information required by appeal rules that is verified in accordance with a statement of truth, provides information that is false in a material particular.

(2) The High Court may—

- (a) inquire into a matter certified to it under paragraph (1), and
- (b) punish the defaulter as if the defaulter had been guilty of contempt of court if it is satisfied, after having heard any witness against or on behalf of the defaulter and any statement in the defaulter's defence, that the defaulter did, without reasonable excuse—
  - (i) refuse or otherwise fail to comply with the notice or other requirement, or
  - (ii) make the false statement.

(3) Where the High Court has power under this regulation to punish a body corporate for contempt of court, it may so punish any director or other officer of that body (either instead of or as well as punishing the body).

(4) A person who wilfully alters, suppresses or destroys a document that the person has been required to produce under regulation 13 is guilty of an offence and is liable—

- (a) on summary conviction, to a fine;
- (b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine, or to both.

### **Costs**

**17.**—(1) A group that determines an appeal must make an order requiring the payment to the CMA of the costs incurred by the CMA in connection with the appeal.

(2) Where the appeal is allowed, the order must require those costs to be paid by the Authority.

(3) Where the appeal is dismissed, the order must require those costs to be paid by the appellant but, if there is more than one appellant—

- (a) may provide that only such one or more of the appellants as may be specified in the order is to be liable for the costs, and
- (b) may determine the proportions in which the appellants so specified are to be so liable.

(4) In paragraph (3) references to an appellant do not include references to an intervener.

(5) The group that determines an appeal may also make such order as it thinks fit for requiring a party to the appeal to make payments to another party in respect of the costs incurred by that other party in connection with the appeal.

(6) A person who is required by an order under this regulation to pay a sum to another person must comply with the order before the end of the period of 28 days beginning with the day after the making of the order.

(7) Sums required to be paid by an order under this regulation but not paid within the period mentioned in paragraph (6) bear interest at such rate as may be determined in accordance with provision contained in the order.

### **Consequential amendments**

**18.**—(1) In the definition of “specialist utility functions” in paragraph 35(3) of Schedule 4 to the Enterprise and Regulatory Reform Act 2013<sup>(a)</sup>, insert after sub-paragraph (e)—

“(ea) an appeal under regulation 4 of the Water Industry Designated Codes (Appeals to the Competition and Markets Authority) Regulations 2017 (SI 2017/XXX).”.

(2) In paragraph 48(4)(c) of Schedule 4 to the Enterprise and Regulatory Reform Act 2013, insert after sub-paragraph (4)(c)(v)—

“(vi) the Water Industry Designated Codes (Appeals to the Competition and Markets Authority) Regulations 2017 (SI 2017/XXX).”.

### **Review**

**19.**—(1) The Secretary of State must—

- (a) carry out reviews of these Regulations, and
- (b) for each review, publish a report setting out the conclusions of the review.

(2) The reports must, in particular—

- (a) set out the objectives to be achieved by these Regulations,
- (b) assess the extent to which those objectives are achieved, and
- (c) assess whether those objectives remain appropriate, and if so, the extent to which they could be achieved with a system that imposes less regulation.

(3) The first report must be published before the end of the period of five years beginning with the commencement date.

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(a) 2013 c. 24.

(4) Subsequent reports must be published at intervals not exceeding five years.

Signatory text

[Name – TBC]  
[Minister – TBC]

Date

Department for Environment, Food and Rural Affairs

## SCHEDULE 1

Regulation 3

### Table of Designated Codes

<i>Designated Code</i>	<i>Description</i>	<i>Purpose</i>
<i>Market Arrangements Code</i>	<i>A code made under Condition [x] of an undertaker's conditions of appointment and Part B of the standard licence conditions of the water supply licence and the sewerage licence.</i>	<i>To provide for the establishment and operation of the arrangements for the retail market.</i>
<i>Wholesale-Retail Code</i>	<i>A code made under sections 66DA and 117F of the Act.</i>	<i>To provide for arrangements between undertakers and water supply licensees with retail authorisations and restricted retail authorisations.</i>  <i>To provide for arrangements between undertakers and sewerage licensees with retail authorisations.</i>

### EXPLANATORY NOTE

*(This note is not part of the Regulations)*

These Regulations set up a right of appeal to the Competition and Markets Authority (the “CMA”) against a decision (an “Authority decision”) by the Water Services Regulation Authority (the “Authority”) of a code that has been designated for the purposes of section 207A(2) of the Water Industry Act 1991 (the “Act”). An Authority decision is a decision by the Authority to either amend a designated code or, following appropriate consultation, a decision not to amend a code. The relevant codes are designated in regulation 3 and are listed in a table in Schedule 1.

Regulation 4 provides that only certain persons can appeal, with the permission of the CMA, where their interests are materially affected by the Authority decision. Applicants must apply to the CMA for permission to bring the appeal under regulation 6 and a decision to grant permission may be subject to conditions. Parties can also be added to the appeal by the CMA under regulation 7 provided that they would have been entitled, at the time of the application, to make their own application to bring an appeal against the Authority decision.

Regulation 9 provides that the Authority has 15 working days, following the day of the making of an application for permission to bring an appeal, to make representations and observations to the CMA about the application and the Authority decision.

The rules on the determination of appeals, including the grounds on which the appeal may be allowed by the CMA, are set out in regulation 5. If the appeal is not allowed, the CMA may quash the Authority decision, including directing that the designated code be revised as proposed, or remit the matter back to the Authority for reconsideration and redetermination. Regulation 11 provides that the CMA has 30 working days, following the last day for the making of representations or observations by the Authority under regulation 9, to determine the appeal unless it is satisfied that there are good reasons to extend that period by up to 10 working days.

Before the appeal is determined, the appellant (or another person who would have been entitled to bring an appeal) can apply to the CMA to have the Authority decision suspended under regulation 8 provided that certain conditions are met. Suspension of the Authority decision means that either the decision does not have effect until the appeal is determined or that it only has effect to the extent specified by the CMA. The Authority has an opportunity to make representations about any application for the suspension of the Authority decision.

The CMA may also require by notice, for the purposes of determining the appeal, the production of documents (under regulation 13), an oral hearing to be held (under regulation 14) or written statements to be produced (under regulation 15). Penalties for failing to comply with a notice, making false statements, providing false information or wilfully altering, suppressing or destroying documents are set out in regulation 16.

Regulation 17 permits the CMA to make orders for costs in relation to the costs incurred by the CMA in connection with the appeal, as well as the costs incurred by the parties to the appeal.

Regulation 18 sets out two consequential amendments to Schedule 4 of the Enterprise and Regulatory Reform Act 2013 to allow for the appointment of CMA panel members for the purposes of these Regulations.

A full impact assessment of the effect that this instrument will have on the costs of business, the voluntary sector and the public sector is available from the Water Services Team, Area 3D, Department for Environment, Food and Rural Affairs, Nobel House, 17 Smith Square, London SW1P 3JR. It is published on [www.legislation.gov.uk](http://www.legislation.gov.uk) alongside this instrument.