

# PREPARING FOR A REGULATORY APPEAL: KEY CONSIDERATIONS FOR COMPANIES

Decisions made by regulators can have significant financial and operational implications for regulated companies. It follows that the scope and nature of any rights of appeal against these decisions will be a key focus, both for the companies themselves and their investors.

In some sectors that are subject to economic regulation, such as water and energy, provision is made for key decisions to be subject to an appeal to the Competition & Markets Authority (CMA).

This is particularly relevant in the context of price control reviews, such as the recently announced determinations in relation to RIIO-3 and the ongoing appeals of Ofwat's 2024 price review determinations (PR24). Similar principles may also apply in other sectors with price control regulation such as aviation, and in relation to other types of licence amendment. These types of appeals are resource-intensive and subject to strict procedural requirements. Early and strategic preparation is therefore essential.

## Regulatory appeals - key issues to consider:

1. **Is the decision appealable - and through which route, by whom and on what grounds?** The answers to these questions will dictate the extent and nature of resources required to prepare any appeal.
2. **What points can / should I challenge?** The temptation to "see what sticks" should often be resisted. A disciplined approach - prioritising points with the greatest financial and strategic impact, along with the strongest case - is usually best.
3. **How long do I have to start the appeal process and what materials do I need to get ready?** As a general rule, you should start preparing well in advance of the final relevant regulatory decision being published.
4. **What evidence will be required to support my appeal?** You will want to consider whether expert evidence is needed from economists or other specialists, and whether this needs to be presented in the form of a witness statement.
5. **What remedies are available to me if I win?** The likely remedy may be a remittal of the decision to the regulator to take again.
6. **What could the impact be on my other strategic goals?**

## 1. Is the decision appealable - and through which route, by whom, and on what grounds?

The relevant legislation or licence provision(s) will specify the decisions that are appealable to the CMA, who is entitled to appeal the decision, and the grounds of appeal:

- In an energy context, and in relation to most appeals to the CMA under the water appointment modification regime, appeals require the appellant to show that the regulator's decision was wrong, whether because of a material error of fact, an error of law, a failure to take account of relevant considerations (or taking into account irrelevant considerations), a material flaw in

economic or technical assessment, or an unreasonable exercise of discretion.

- The CMA's task in these cases is evaluative and can involve close scrutiny of the regulator's methodology and evidence; it gives the CMA wider discretion than the High Court would have in a judicial review but, unlike a full redetermination, the CMA's assessment is limited to the grounds of challenge raised by the appellant.
- In water price control appeals (but not other water appointment modification appeals), the CMA conducts a full redetermination. This process places the CMA in

the regulator's shoes and requires it to set the price control afresh, applying its own judgment to the evidence and the discharge of applicable statutory duties.

- The CMA in redetermination cases is not confined to identifying errors in the original decision; it performs its own end to end assessment and may reach a different outcome even absent a demonstrable error in the regulator's approach.

Decisions that are not covered by the statutory appeal rights will be subject to the normal principles of judicial review.

## 2. What points can / should I challenge?

This will vary to some extent depending on the legal basis for challenge: redeterminations of water price control decisions will tend to be broader in scope than appeals based on whether a decision is "wrong". However, there are normally strong incentives for companies to focus their appeal on the most material issues:

- **Strategic focus:** Pursuing every possible argument can dilute the strength of the case and distract from the most significant issues.
- **Time constraints:** Regulatory appeals are generally subject to strict time limits. It is likely to be a better use of time to prepare a limited number of targeted points.
- **Cost implications:** The ability of the CMA to make orders in relation to costs of the appeal may impact the decision as to how many appeal grounds to pursue.
  - In some (but not all) cases there is provision made for inter partes costs orders which mean that a successful party may be able to recover some of the costs associated with those grounds from the losing party. In water redeterminations the CMA has the ability to allow costs to be recovered through the price control.
  - There is typically also a mechanism for the CMA to recover its own costs.
  - Where there are multiple grounds of appeal, and the appellant is successful on some but not all grounds of appeal, the CMA may require the costs of the appeal to be split evenly between the different grounds (and allocated to the loser on each ground), irrespective of whether the costs and value of the different issues are the same.

## 3. How long do I have to start the appeal process and what materials do I need to get ready?

The window for launching an appeal is often short, and the groundwork required is substantial.

- For energy licence modifications and water licence modifications prospective appellants have 20 working days from publication of the relevant Ofgem decision to apply for permission to appeal, and when doing so submit their full notice of appeal with all accompanying evidence.
- In the PR24 water redetermination applications, the CMA required each of the appellants to submit their Statements of Case (detailing their grounds for appeal) within 5 business days of Ofwat referring the appeals to the CMA.

These initial submissions are detailed documents that need to contain all of the facts and evidence that the party wishes to rely on: opportunities to supplement materials later may be limited. It is therefore important for companies to start preparing early. Typically, this will mean starting work before the regulator's final decision is published to identify possible grounds of appeal based on available information (e.g., from provisional decisions or other discussions) and commence preparatory work on any supporting witness or expert evidence that may be required.

Early preparation can also assist in ensuring that data and internal documents relevant to disputed points are collated and stored securely. In particular, correspondence with the regulator throughout its decision process should be kept to hand. In many cases the CMA requires appellants to identify whether the evidence or matters being relied on in an appeal are ones that would have been available to the regulator in making its determination (and that it would have been entitled to have regard to had it had the opportunity to do so). It is therefore important that the parties have a clear record of communications with the regulators to ensure that this can be done.

## 4. What evidence will be required to support my appeal?

Appeals are evidence-driven and the burden is often on the appellant to demonstrate why the decision should be changed. This may require:

- **Detailed economic and technical analysis:** This may be needed, for example, to challenge methodologies or assumptions and may require the engagement of economists or other external experts.

- **Witness statements:** Regulatory appeals (but not water price control redeterminations) normally require evidence that is not included in existing documents to be presented in the form of witness statements. The same is true in any application for judicial review to the High Court. These take time to prepare to the appropriate standard and early consideration is therefore required on both the nature of the evidence required and the individuals that are best placed to assist.

The regulator will also have the opportunity to respond to points that are raised in an appeal by providing further explanation or justification for its approach. It is important to try to anticipate how the regulator may respond to ensure that the grounds of appeal and supporting evidence are sufficiently robust to withstand this process. In practice, this requires careful framing of arguments and supporting evidence to address not only the decision as published but also the likely lines of defence the regulator may adopt.

## 5. What remedies are available to me if I win?

Before committing to an appeal, you should be clear on what a successful outcome would mean - is the objective to overturn the decision entirely, secure a partial adjustment, or achieve a specific financial or operational benefit? A well-defined objective will help focus resources and arguments on what matters most.

In the case of a successful appeal, available remedies will depend on the nature of the appeal.

- On an application for redetermination of a water price control decision, the CMA takes its own position and substitutes its view for the decision of the regulator.
- For price control decisions in the energy sector the CMA when it allows an appeal has the option, but is not obliged, to substitute its own decision.
- In other appeals the CMA's choice of remedies may be to quash the decision or remit it back to the regulator for reconsideration (or both), either with or without specific directions.

Whether an appeal will achieve a better commercial outcome may depend on the exact nature of the CMA decision. In some circumstances it is possible for the process to result in either the same or a less favourable position than the original decision.

## 6. What could the impact be on my other strategic goals?

An appeal does not suspend day-to-day engagement with the regulator and will need to be managed alongside business-as-usual interactions. However, regulators are familiar with the appeals process and understand the role that it plays. A well-managed relationship can help mitigate any residual tension and support future engagement.

If you would like to discuss our experience with regulatory appeals or how you can prepare for an upcoming regulatory decision, please get in touch with our key contacts below.

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