

Minutes of the Joint Regulators Group (JRG) meeting 12th February 2013

Ofgem, 9 Millbank, London SW1P 3GE

Present:

Sarah Harrison (Ofgem) (Chair)
Iain Osborne (CAA)
Steven Preece (OFT)
Keith Mason (Ofwat)
Matthew Conway (Ofcom)
Peter Culham (Ofcom)
Cathryn Ross (ORR)
Kelly Lin (Monitor)
Caroline Normand (BIS)
Sean Browne (BIS)
Philip Cullum (Ofgem)
Iain Morgan (Ofgem) – Part meeting only
Mark Wagstaff (Ofgem) (Secretariat)

1. Welcome

Sarah Harrison welcomed attendees to the first meeting of Ofgem's year hosting the JRG. Through the year, JRG should aim to build on the successes of 2012 and continue to demonstrate the value of collaborative working between regulators. JRG would look to develop a forward work plan, including a mixture of enhanced joint working and external speakers at Group meetings.

2. Minutes

Minutes of December 2012 were agreed, subject to any further drafting changes to be sent to the Secretariat.

3. BIS Review of regulatory appeals

Colleagues from BIS were welcomed to the meeting, and set out key priorities for the BIS agenda:

- Taking forward the Enterprise and Regulatory Reform (ERR) Bill
- Establishing the Competition and Markets Authority (CMA)
- Delivery of consumer landscape changes, including transition of Consumer Focus into the Regulated Industries Unit, and then into Citizens Advice; and transfer of consumer credit functions from OFT to FCA
- Taking forward the midata agenda, to open up to customers the data held on them by business
- Work on State Aid, alongside European Commission moves to reform State Aid rules.

The BIS review of regulatory appeals feeds into the set up of CMA.

Ofcom gave a short presentation on regulatory appeals. In general, Ofcom's decisions are appealable to the Competition Appeal Tribunal (CAT), giving effect to the EU Electronic Communications Framework. However, the duty in the Framework, that merits should be 'duly taken into account'

was translated in legislation as appeal 'on the merits'. In *T-Mobile v. Ofcom* (2008) the Court of Appeal had held that the standards applied on judicial review would be capable of satisfying EU law.

The Group considered that in sectors where full price control appeals are routed to the Competition Commission (CC) there tended to be fewer appeals. CAA commented that the new regime for airports allowed individual elements of decisions to be appealed on the merits. CAA also raised the question of how investors viewed the diverse appeals landscape.

Ofwat described the water sector as having a more traditional appeals structure, with no cherry-picking of issues and with prescribed timescales for appeals. Ofwat's decisions hold until appeals are determined. There are relatively few appeals in the sector.

In rail, to date, Network Rail has not refused to accept any settlement. Price control is implemented through changes to contracts, controls expire on a due date and so contingency arrangements are needed in the event that contracts expire because price controls have expired. The CC does not have a timetable for appeals in the rail sector, but will look to deal with appeals within six months.

In healthcare, Monitor designs a pricing methodology for agreement with the NHS Commissioning Board. Prices set according to this methodology are known as the National Tariff. Objections from commissioners or providers could lead to a referral to the CC from Monitor on its way of calculating prices. The CC has a maximum of one and a half months to respond to a referral, as prices are set every year. The new Tariff cannot apply until the CC makes its determination.

Ofgem works with different appeals regimes for different types of decisions. Potentially, there might be problems with expertise among appeals bodies, given the relative scarcity of appeals in the sector. The risk of appeal might possibly have an impact on the development of proposals.

BIS outlined next steps for the review. BIS would map different routes of appeal, and continue to collect evidence on the characteristics of effective appeals mechanisms. BIS aimed to have a second workshop for regulators in March. Proposals from the review were intended to feed into the Budget.

Action point: Members to input evidence to the review.

4. Competition enforcement and working with CMA

CAA gave a short update on concurrency and the work of the competition working group. The emphasis was on regulators to make concurrency work well and achieve greater transparency on the success of concurrency. Proposed work to:

- Identify success criteria for the operation of concurrency
- Consider any need for greater transparency on and reporting of competition work by regulators
- Give scrutiny to the processes by which regulators work together, including collaboration with CMA, and the operation of CMA's new powers.

The Group agreed the importance of making clear that regulators use Competition Act powers in various ways, including as part of wider regulatory engagement and not necessarily as separate processes. Ofcom gave the example of how the prospect of use of Competition Act powers could

help achieve regulatory outcomes. OFT concurred that seeking an ‘undertaking in lieu of reference’ equated to a tangible use of the mechanism.

BIS noted that discussions were ongoing at different levels, for example the Chairs group. How any secondary legislation or guidance worked in practice would need to be worked-through during the year, and would need to involve CMA. Arguments in favour of concurrency would also need to reflect the increasingly interlinked nature of markets.

Action Point: JRG agreed to reform the competition working group, following the proposal set out by CAA. Comments on the proposal to be sent to CAA. Working group to report back in **May**.

5. Update on the infrastructure working group

Ofgem reported that the working group had consulted stakeholders for views on potential barriers to shared services in regulatory frameworks. Overall, stakeholders perceived that, while there may have been issues in the past, none was insurmountable. However, the increased role of cross-sectoral investment placed emphasis on how to account for costs and benefits. Going forward, finding a method to express cross-sectoral CBA remained the most challenging issue.

The working group had met with Infrastructure UK, who challenged with the concept of how investors would negotiate regulatory requirements in any proposal to develop an infrastructure corridor. This is in context of the commitment in the National Infrastructure Plan 2011 that: ‘regulatory frameworks do not discourage shared works, shared facilities or revenue sharing and will support mechanisms for this where consistent with regulators’ statutory duties’.

The working group proposed production of guidance to set out different sectoral regulatory approaches to assessing infrastructure investment, with a description of current treatment of costs and benefits from infrastructure sharing.

BIS commented that it would be helpful for the working group to engage in detail on the practicalities of an infrastructure corridor, the scenario where an investor might want to deliver multiple utilities in one corridor, at one time. The emphasis was on helping to understand where the barriers were and how to deal with them. JRG considered it could be useful for regulators to reflect on whether their guidance might be aggregated, to address cross-sectoral development.

Ofcom suggested that an owner of infrastructure might not want others to use it, if they thought that a regulator might seek to capture any benefit from non-regulated revenues. This could be mitigated if a sharing factor was in operation, allowing the infrastructure owner to keep some of the benefits of non-core usage of assets. ORR asked whether all non-regulated revenues would be treated in this way, and if a scenario-based model might help to make clear the issues.

Action point: JRG asked the infrastructure working group to consider updated proposals to feed into future work, and to report back in **May**. Bids for further membership of the group were invited.

6. Update on working groups

- Charging working group: report finalised.
- WACC/Financeability working group: awaiting legal review of final report.
- Consumer working group: initial meeting had taken place. Priorities agreed up to April.

Action point: JRG agreed that the charging working group report should be published.

Action point: JRG agreed that the WACC report should be published as soon as available.

7. Tour de Table

Ofcom

- In December published seventh International Communications Market Report, comparing UK take-up, availability, price and use of comms with 16 major countries.
- Published draft annual plan 2013/14 for consultation.
- In January published Consumer Experience report 2012.
- Sky had applied for costs in respect of CAT findings on pay TV.
- 4G spectrum auction was underway.

Ofwat

- Draft methodology on next price control published for two month consultation.
- DEFRA consultation on water bills expected.
- Ofwat still negotiating strategic policy statement with DEFRA.

OFT

- OFT to produce guidance on concurrency later in the year, jointly drafted with the CC. This will be shared through the Concurrency Working Party
- Findings against Tesco on anti-competitive exchanges on dairy pricing substantially upheld by CAT. Awaiting fining appeal.
- Report on road fuels found that at national level competition was working well.

Monitor

- Licence about to be published for 145 foundation trusts. Over the next year, up to 3,500 providers may be licensed. Joint work with CQC.
- National Tariff of 2,000 prices to be published, linked to long-term strategy on pricing.
- Work ongoing on continuity of service when hospitals fail.
- Government response expected late March to the Independent Inquiry into Care Provided by Mid Staffordshire NHS Foundation Trust (the Francis Report).
- Consumer and competition policy responsibilities moving over from HMT on 1 April, in line with Monitor's enhanced focus on anti-competitive behaviour.

CAA

- New legislation now in place, to enable airports to be moved to a licence regime. Plus new information powers – looking at how to use informational remedies.
- Reviewing operational resilience regime.
- Considering a 'minded to' decision that Stansted should continue to be regulated.
- Gatwick had published a self-imposed price commitment, equivalent to a price control.

ORR

- Aim to publish draft determination on Periodic Review 2013 in June.
- Developing proposals for new charging methodology for freight usage.
- Talking with business about developing rail freight business plan.
- Has consulted on increased transparency for industry and ORR, and on ORR business plan with greater focus on consumer work.

Ofgem

- Deadline of 1 March for acceptance of price controls in RIIO-T1 and GD1.
- Strategy on RIIO-ED1, the next electricity distribution price control, to be published by the end of March.
- Decisions on Retail Market Review.
- Initial thinking on enforcement guidance due for publication by the end of March.
- Continuing to monitor progress of the Energy Bill.

8. A.O.B

This was Matthew Conway's final JRG meeting. The Group thanked him for his contribution and wished him well for the future.

The Group discussed the following AOB items:

Action point: JRG agreed to move to advance reporting of working group progress and also advance notification of Tour de Table items. Working group updates and items for Tour de Table to be forwarded to the Secretariat, for circulation with meeting papers.

Action point: Proposals for the forward work plan to be forwarded to the Secretariat.

Action point: The Chair to invite Alex Chisholm (Chief Executive, CMA) to the next meeting.

Action point: CAA to engage with the David Hume Institute on its work on regulation and competition policy, in context of Scotland's possible enhanced devolution or independence.

Action point: Ofcom to organise a workshop on devolved institutions.