

Minutes of the Joint Regulators Group (JRG) meeting 15th May 2013

Ofgem, 9 Millbank, London SW1P 3GE

Present:

Sarah Harrison (Ofgem) (Chair)
Alex Chisholm (CMA) – Part meeting only
Iain Osborne (CAA)
Paul Taylor (CAA)
Steven Preece (OFT)
Sheldon Mills (OFT)
David Mahoney (Ofcom)
Balwinder Dhoot (Ofcom)
Cathryn Ross (ORR)
Tanya Hedley (UREGNI)
Catherine Davies (Monitor)
Amy Caldwell-Nichols (Monitor)
Kristy Domitrovic (Monitor)
Peter Andrews (FCA)
Caroline Normand (BIS) – Part meeting only
Tom Kiedrowski (BIS)
Chris Jenkins (BIS)
Sean Browne (BIS)
Philip Cullum (Ofgem)
Iain Morgan (Ofgem) – Part meeting only
Anthony Pygram (Ofgem)
Mark Wagstaff (Ofgem) (Secretariat)

1. Welcome

Sarah Harrison welcomed attendees to the second JRG meeting of 2013. Members briefly discussed forward work for the remainder of the year and concluded that the focus on concurrency, infrastructure and consumer work should continue. Members agreed that regulatory independence was a key theme through all aspects of the Group's work.

2. Minutes

Minutes of February 2013 were agreed, subject to any further drafting changes to be sent to the Secretariat.

3. BIS conference on economic regulation

Colleagues from BIS were welcomed to the meeting and set out BIS's aims for the conference on 27 June. The conference provided an opportunity to bring together regulators and government to take stock of whether the Principles for Economic Regulation might need to evolve to meet the changing agenda. The conference also provided a forum to improve understanding of current issues by both policy-makers and regulators.

Minister of State Michael Fallon MP and Parliamentary Under-secretary of State Jo Swinson MP would open the conference, which suggested that regulators' presentations should reflect JRG's three key themes for the year.

4. Working with CMA

Alex Chisholm, Chief Executive Designate of the Competition and Markets Authority (CMA) was welcomed to the meeting. Alex set out his overall priorities for CMA:

- Creation of an integrated organisation
- Redouble enforcement efforts
- A redefined role in the consumer landscape
- Sectoral Regulation

Alex noted an appetite in government for CMA to step up the role of competition in areas subject to sectoral regulation. This entailed a need to create a new and more productive partnership between the CMA and sector regulators.

Alex identified six key aspects of this partnership:

- 1) Advocacy – it was important for CMA to process and represent learning overall from the experience of others. A wider public dialogue was needed to help plan the evolution of competition within a regulated context.
- 2) Enforcement – competition powers were formidable but complex, and delivering a successful case could be a long, resource-intensive process. It was not efficient for every agency to maintain the same amount of resource. This was an area where joint working between CMA and sector regulators was especially valuable, to share resources, expertise and advice. CMA would aspire to make a common infrastructure available, including guidance and procedural steps. The approach between concurrent authorities did not necessarily have to be identical, but it should be consistent. The prospect of appeals made consistency in investigation, procedure and analysis necessary to withstand challenge.
- 3) Best practice – there should be greater sharing of best practice in both consumer and competition work. Rather than regulators undertaking separate studies it could be more fruitful to develop shared projects.
- 4) Strategic dialogue – CMA had to understand key developments in other sectors, in particular the objectives of sector regulators in promoting or enabling competition. CMA might encourage regulators to open their sectors to more competition, and also challenge where regulators may be regulating more intensively or for longer than strictly necessary. Alex would write to the heads of sector regulators to arrange a meeting and expected to hold a workshop on concurrency in the autumn.
- 5) Accountability – public reporting was essential to maintain confidence. The annual report on the operation of concurrency was an opportunity to present outcomes from regulatory interventions and to publicise achievements, as well as providing some protection against inappropriate interference or unfair criticism.
- 6) Resources – Alex noted that FCA was creating a new competition unit and that Monitor had acquired new competition powers. CMA would rise to the challenge and would also start a sectoral regulatory unit, to strengthen the working of the concurrency regime.

In the subsequent Q&A Alex made these additional points:

- At the inception of economic regulation it was widely regarded as time-limited. There has been some rollback but not generally. There is a need to question whether the current scope

of activities is right for all sectors and whether there are areas where regulation might be constraining the space for competition. Ex-ante rules can be effective to promote competition, but can outlive their usefulness.

- The approach between CMA and sector regulators does not have to be identical. A common set of principles is essential, including to protect from confirmation bias.
- The annual report on concurrency needed to have substance to be viewed by consumers as legitimate and should demonstrate ways of working together. For example, the European regulators group in telecoms produced peer analysis and there could be ways to develop this approach.
- CMA had to understand the contextual factors to each regulator's work. Coordination in bringing cases would be important. Comparisons were made between cases and so if something was not done well in one case that could send ripples through the regulatory community. CMA and regulators needed to develop the thought process to make the concurrency regime as effective as possible.

Members thanked Alex for his contribution and agreed it was important to keep in touch.

Action point: Agreed to invite Alex Chisholm to attend either the **September** or **December** meeting.

5. Concurrency working group update

CAA gave an update on the concurrency and competition working group. The group had done initial thinking on case management and information sharing, as well as providing input to BIS on draft statutory instruments. The working group's thinking had necessarily got a little ahead of development of CMA and the group wanted to explore how best to take forward the shared approach. For example, a dummy run of the annual report on concurrency. There was also further work to do on consumer concurrency, alongside OFT's Consumer Concurrency Group.

JRG recorded its appreciation for the working group's work. To maintain momentum, JRG asked the working group to build out work already done, including on standardised procedures and documentation for secondments and loans of staff. The working group should also explore development of IT solutions for information exchange with OFT.

Alex noted that until its board is appointed in late September, CMA would have limited decision-making power in relation to working group products.

Action point: Concurrency working group report agreed for publication. Comments to be made to working group chair by 22 May. Report to be published by the start of **June**.

Action point: Concurrency working group to continue development of work on how concurrency will operate in practice, including in agreeing new work strands with CMA transition team and OFT on operational issues. To report back in **September** or **earlier** if required by full JRG.

6. Infrastructure working group update

Ofgem gave an update on the infrastructure working group. The February meeting asked the working group to take forward development of principles for non-core use of assets, including treatment of costs and benefits from infrastructure sharing. The working group was on target to meet the end-May deadline to provide proposals for review and publication.

The working group had met with colleagues from BIS and HMT to discuss Ministerial concerns about infrastructure access charges and asset replacement costs apparently inhibiting investment in new projects. Government colleagues confirmed that Ministers expected to see progress on this issue so that there could be an announcement in the 2013 Autumn Statement and that further meetings would be scheduled over the summer.

JRG noted that regulatory frameworks focused on delivery of core business and that rules about cost reflectivity of other revenue were not generally central to the requirements placed on regulated bodies. Some of the issues raised by HMT were also apparent in stakeholder responses to the working group's call for evidence in December 2012. The working group would meet with network companies to discuss further. Although some issues might be related to licence conditions, the working group reiterated its earlier thinking that barriers could arise from constraints outside of regulatory frameworks.

UREGNI noted that in Ireland principles had been agreed on cost sharing and that ACER had also considered the issue. Ofcom reminded the meeting that the EU had mandated access for broadband in energy and transport infrastructure. A shared view among regulators was needed how to respond.

Action point: Infrastructure working group to continue work with industry and government. Principles for non-core use of assets to be available for JRG review by end of **May**. Working group to meet further with HMT/BIS on access charges and asset replacement costs and also meet with network companies to discuss issues. Further update to JRG on these aspects in **June**.

7. NIPSEF

JRG agreed to engage with the National Infrastructure Plan Strategic Engagement Forum.

Action point: Members agreed that the Chair should respond to HMT's invitation to join NIPSEF as set out in the meeting papers.

8. Consumer working group update

Ofgem gave an update on the consumer working group. The working group had produced two draft papers, on Alternative Dispute Resolution (ADR) and on use of information for reputational regulation. The ADR paper required further revision, given ongoing work on related issues at CAA and Ofwat.

Work on reputational regulation linked to initiatives across sectors to improve transparency, both of regulators and of regulated businesses. JRG considered that more could be achieved within the paper, for example on the costs of reputational regulation and management of unintended consequences of the way that data was used externally. FCA and OFT had produced material on behavioural economics and there were wider issues such as use of reputational regulation as a compliance driver and in support of economic growth that could usefully be explored.

The working group was keen to continue, either formally or as an informal network, to consider other aspects of consumer protection. These might include switching, consumer engagement and consumer landscape changes.

Action point: Consumer working group report on ADR to be published, subject to final comments, as soon as ready. Working group to continue to refine report on Reputational Regulation.

Action point: Consumer working group to continue. Working group chair to scope next phase of work.

Action point: Agreed to invite Consumer Futures to either the **September** or **December** meeting.

9. Tour de Table

UREGNI

- Updated on the CC's Determination into the Phoenix price control. The decision had not changed since the Provisional Determination (notified to JRG in September 2012) but the rationale had changed. A new price control was being undertaken.
- Also updated on reference of the Northern Ireland Electricity Ltd (NIE T&D) RP5 price control to the CC. A six month investigation was anticipated. The issues were not regarded as complex.

FCA

- Had received its statutory competition objective in April, along with power to refer issues to OFT for review. Approach to competition would be published.

CAA

- About to make proposals on its new powers to publish information about matters that passengers might want in order to compare market offerings; and environmental impacts of aviation. Likely to prioritise comparative information in areas where consumers have rights.
- Published proposals for 2014-19 for the three large London airports. This work relates to regulation of aeronautical charges to airlines.
- In May, National Air Traffic Control Service (NATS) would publish its business plan, which signalled development of its next price control for 2015-19. Under the EU framework, the UK adopts a plan, which is then approved by the EU, and then the CAA set out price control proposals. CAA proposals are then subject to CC review in the usual way, but NATS' view is that in practice this arrangement restricts its opportunity for appeal.

OFT

- In March, published details of its role in review of NHS mergers.
- Programme of work to establish CMA continues. Proposals on mergers and markets due to the Concurrency Working Party on 27 May, and draft concurrency guidance on 12 June.
- In April, issued statement of objections to certain pharmaceutical businesses alleging competition infringements arising out of alleged 'pay for delay' agreements.
- In March, issued statement of objections alleging that a manufacturer of mobility scooters and some of its retailers had infringed competition law.

ORR

- Preparing draft determination on rail freight charges (freight operators currently paid 5% of charges and generated 35% of costs).
- EU fourth package on railways proposing greater liberalisation of cross-border freight.

- Had approved Network Rail's management incentive plan.

Monitor

- Had received its new competition powers in April. Previous policy rules on anti-competitive behaviour had now been placed on a statutory basis.
- Licensing powers for foundation trusts had also come into effect in April.
- A review was due to start on incumbency advantages.

Ofcom

- In February, announced winners of the 4G mobile spectrum auction. Almost the whole UK population will be able to receive 4G mobile services by the end of 2017 at the latest.
- Annual Plan for 2013/14 published in March. Priorities for the year: promote effective competition and informed choice; secure optimal use of spectrum; promote opportunities to participate; protect consumers from harm; maintain audience confidence in broadcast content.
- In April, announced plans for a pilot of innovative 'white space' technology in the UK, among the first of its kind in Europe.

Ofgem

- In April, the RIIO price control framework came into effect. The RIIO framework is intended to deliver around £30bn investment to upgrade and renew energy infrastructure at a fair price to consumers.
- In May, confirmed SSE's £10.5 million fine for numerous breaches of obligations relating to telephone, in-store and doorstep sales activities. Failings found at all stages of SSE's sales processes.
- Also in May, launched investigations into companies that failed to achieve targets in Carbon Emissions Reduction Target (CERT) and Community Energy Saving Programme (CESP) initiatives.
- In the Retail Market Review (RMR) consultation on final proposals for the domestic package had closed. The proposals were due for statutory consultation in May with a decision in June/July. Non domestic proposals already out to statutory consultation.
- Consultation due to close on enforcement vision and strategic objectives. Part of the enforcement review, aimed at establishing a more transparent strategic framework for enforcement activities.

10. A.O.B

Action point: Members agreed that given the pace and weight of current work, an additional JRG meeting might be required before September. The Chair to monitor and convene if necessary.

Action point: Members agreed to share comments on any emerging proposals on regulatory reform and to liaise on the 2015-16 spending round.