Collaboration between economic regulators

Response to HM Government consultation

1 December 2014

About this document

This is a UK Regulators Network response to HM Government's consultation on collaboration between economic regulators, dated 6 October 2014[1].

This response is non-confidential.

If you have any questions on this response, please contact the UKRN Office [redacted]

About UKRN

UKRN is a network formed by the UK's economic regulators:

- The Civil Aviation Authority (CAA)
- The Financial Conduct Authority (FCA), including the Payment Systems Regulator (PSR)[2]
- Office of Communications (Ofcom)
- Office of Gas and Electricity Markets (Ofgem)
- Water Services Regulation Authority (Ofwat)
- Office of Rail Regulation (ORR)
- Northern Ireland Authority for Utility Regulation (Utility Regulator)

Monitor, the sector regulator for health, participates in the network and its projects as appropriate. The Water Industry Commission for Scotland (WICS) and Legal Services Board (LSB) are contributing members which generally participate in projects as observers.

Contributors to this document

This document has been produced by the UKRN Office, in consultation with UKRN members.

[1] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/360911/bis-14-940-options-for-embedding-joint-working-between-economic-regulators-consultation.pdf

[2] Although it has competition and consumer protection functions, the FCA is not classed by HM Government as an economic regulator

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1. Summary and introduction

1.1. The UK Regulators Network welcomes Government's enthusiasm for collaboration between economic regulators. UKRN was itself established to enable effective collaboration, through the pursuit of six objectives, all intended to maximise benefits for consumers in our sectors through better regulatory outcomes

1.2. Our objectives are: coherent and consistent economic regulation across sectors; affordability and empowerment; a positive environment for efficient investment; efficient regulation; promotion of competition in the interests of consumers; better understanding of the effectiveness of economic regulation.

1.3. In our view, statutory intervention to mandate cooperation would be disproportionate, particularly given that the UKRN has only relatively recently been set up, and has not had the chance to demonstrate its ability to deliver benefits.

1.4. At just eight months since UKRN's launch, we are still in the relatively early stages, but the UKRN has already resulted in a greater level of collaboration than in the past. UKRN has clear objectives, commitment from Chief Executives, an ambitious programme of joint work on the key cross-sector issues we face, and a commitment only to work on those areas where we are ready to propose acting on the findings to our Boards.

1.5. Now or at any point in the future, a statutory duty or guidance would have significant disadvantages. It would further complicate regulators' duties, creating an additional route for appeal and thereby delay and adding extra cost to regulators' decisions. It would result in 'two-speed' collaboration, excluding those bodies not considered to be economic regulators; unlike the current, more flexible voluntary system. And it would be extremely difficult to draft a duty or guidance that gave a clear steer on what Government wants to see in terms of collaboration, subject to regular review and updating for any evolution in the policy landscape.

1.6. In the rest of this response we describe the structure and activities of UKRN to date, before assessing the Government's three options.

2. Summary of UKRN activities

2.1. The UKRN was set up in March 2014 with nine members as a way of facilitating cooperation between the UK's economic regulators. A further tenth body, the Legal Services Board, joined in July, followed more recently by the Payment Systems Regulator.

2.2. In this section we describe UKRN's objectives, its structure and its projects for the first year of operation.

UKRN's objectives

2.3. Without cutting across the independence or specific goals of each regulator, UKRN will strengthen work across sectors. It will explain and take account of the differences between sectors, while maximising coherence and shared approaches in the interests of consumers and the economy.

2.4. UKRN has six objectives, also set out in our Memorandum of Understanding, signed by all Chief Executives[3].

- Coherent and consistent economic regulation across sectors: we will give a clear joint view where cross-sector regulatory agreement or consistency is needed and will ensure that our actions deal effectively with cross-sector issues.
- Affordability and empowerment: we will work to understand cross-sector issues related to affordability of services, and work on consumer empowerment to ensure that consumers in regulated markets have the information and other tools necessary to engage effectively in markets.
- A positive environment for efficient investment: we will work together to improve the environment for efficient investment in the UK's infrastructure.
- Efficient regulation: we will make better use of scarce expertise and resources in order to improve outcomes or reduce cost.
- Promotion of competition in the interests of consumers: we will work, including with the CMA and through the UKCN, to improve the use of competition and regulatory levers where appropriate, making markets work better to improve outcomes for consumers.
- Better understanding of the effectiveness of economic regulation: we will explain and make best use of economic regulation, helping to raise understanding of what independent economic regulation can achieve, when it works best and how we can improve.

2.5. In order to achieve these objectives, member regulators, led by their CEOs, will do the following.

- Work closely and cooperatively, meeting regularly to ensure our work programme is delivered.
- Improve efficient delivery of regulation.
- Address shared issues across sectors while recognising differences between sectors, including different powers and duties.

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[3] http://www.ukrn.org.uk/wp-content/uploads/2014/05/UKRN-Memorandum-of-Understanding.pdf

- Ensure provision of sufficient resources to deliver our work programme.

- Drive progress.

UKRN's structure

2.6. UKRN has been set up more formally than its predecessor, the Joint Regulators Group, with the intention of making it more accountable, ambitious and transparent. This starts with the CEOs, who lead UKRN, meeting regularly to discuss strategy and progress.

2.7. Each CEO has nominated a senior director to be part of a Senior Representatives Group, which meets regularly to oversee the delivery of UKRN's work. The CEOs and Senior Representatives are then supported by a small permanent staff in the form of the UKRN Office, jointly funded by UKRN's members, whose role is to drive progress.

2.8. There is a panel of expert advisors – senior figures who are familiar with the concepts and requirements of regulation – whose role is provide review and challenge to UKRN's work. The members of this panel are Colette Bowe, Catherine Waddams, Chris Bolt and James Wardlaw.

2.9. To aid transparency, UKRN has its own website – www.ukrn.org.uk – which it uses to share outputs from its work with stakeholders. To maximise accountability, UKRN will publish an annual plan, and will also report each year on progress. It published its work programme for its first year on 29 May 2014: http://www.ukrn.org.uk/wp-content/uploads/2014/05/UKRN-2014-15-work-programme.pdf.

Projects for the first year

2.10. The eight projects are as follows.

- Cross-sector infrastructure investment: provide regulatory solutions to enable multi-sector infrastructure investment.

- Consumer engagement and switching: approaches to engagement and switching across sectors.

- Understanding affordability across sectors: identify affordability pressures and establish scope for possible solutions.

- Cross-sector resilience: tools and approaches to understand and enable effective management of risks from cross-sector threats and dependencies.

- Explaining the benefits of economic regulation: help raise understanding of what independent economic regulation can achieve, when it works best, and how we can improve.

- Organisational development: share expertise and make better use of resources.

- Market returns and the cost of capital: analyse potential for and approaches to a common framework for financeability.

- Regulating for quality: support best practice in service quality standards.

2.11. First outputs on many of these projects are expected at around the time of this consultation response. On Monday 24 November, we published a report on infrastructure interactions as part of our cross-sector infrastructure investment project[4]. Further reports are expected imminently on this project, as well as on others, such as understanding affordability across sectors and consumer engagement and switching.

[4] http://www.ukrn.org.uk/wp-content/uploads/2014/07/UKRN-infrastructure-interactions-FINAL.pdf

3. Assessment of consultation options

3.1. The consultation presents three options. Of these, we most strongly support Option 1.

- Option 1: Monitor progress of the UKRN and review effectiveness of the UKRN in 2015.
- Option 2: Provide guidance to the regulators/UKRN on the Government's overall approach to cooperation.
- Option 3: Introduce a statutory duty on regulators to cooperate.

3.2. UKRN has now been up and running for little more than six months – too early to take a view whether it will achieve its objectives. We are confident in the structure we have established, but we can understand that Government would want to keep this under review. We suggest leaving sufficient time to determine whether it is successful before considering going down a statutory route.

3.3. In addition, before making statutory changes or imposing additional guidance, we would hope that Government would give a clear picture of the problem it is trying to solve, or the benefits it is trying to achieve.

3.4. Option 3 in particular presents a number of risks, which do not appear to be outweighed by the benefits. On the positive side, we can see the argument that it could "embed" cooperation between regulators. But that would only be necessary if cooperation was clearly not being effectively embedded through the newly established UKRN. We have identified a number of downsides.

- It risks adding more opportunities for legal challenge to regulators' decisions, potentially slowing down decision-making, adding disruption to regulated markets and increasing costs. All this is undesirable, particularly in the context of already-complex sets of duties for many regulators.
- There is a danger that a duty would make it difficult to produce definitive determinations where conclusions on one sector may be contingent on decisions about another, in separate processes and under separate regulatory frameworks.
- Each regulator would need to weigh up an additional duty to collaborate against their existing duties, and interpret it in light of their other priorities. This would result in regulators placing different levels of importance or different interpretations on what is meant by collaboration, leading to highly variable outcomes and potentially undermining the very collaboration it was designed to increase.
- Further duties could add to regulatory uncertainty, and in general could result in a more bureaucratic and legalistic approach. A generally framed duty would be very open to interpretation, but any attempt to prescribe more closely what is meant by collaboration could result in a large amount of detail.
- There would need to be clarity on the relative priority of cooperation between economic regulators and cooperation between regulators and other bodies.
- An unfortunate side-effect of splitting regulators into two or more groups – those with a duty to cooperate and those without, or utility regulators vs. others – would risk losing the flexibility of the existing voluntary approach. Currently, for example, a non-economic regulator like the Legal Services Board is able to participate in UKRN work as an observer; rather than being part of a second tier of collaboration, outside those organisations with a duty to collaborate. Each regulator participates in whichever projects are most relevant to its work. The consultation inadvertently

highlights this issue at paragraph 3.18, by stating the likely scope of a duty as being those regulators that carry out price controls. This would risk undermining the flexibility of the current approach, in that regulators not subject to a duty might choose not to cooperate.

3.5. Option 2 presents some of the same issues. It could also result in a lack of clarity between the push to collaborate and each regulator's other tasks, unless it was very fully set out. In particular the relationship between guidance on cooperation and other documents such as the relatively new Strategy and Policy Statements (where present) would need to be established. This would need clear agreement between BIS and individual regulators' sponsor departments.

3.6. Government might be inclined to use guidance to suggest the subjects that regulators should consider when collaborating with each other. However, it is not clear that this would improve upon the current arrangements. Views so far from a wide range of stakeholders – consumer bodies, industry participants and indeed Government departments – suggest that the current work programme meets the needs of most. Even without guidance, it is perfectly possible for regulators to have constructive discussions with Government, along with other stakeholders, about which areas we should cooperate on, without compromising our independence.