Linklaters

Draft rules of procedure and guidance for water redetermination references (CMA17)

Linklaters' Response

12 September 2024

1 Introduction

(1) We are pleased to respond to the Competition and Markets Authority's ("**CMA**") consultation on the draft rules of procedure ("**Draft Rules**") and guidance for water redetermination references ("**Draft Guidance**"), (together "**Draft CMA17**").

(2) By way of general comment, we welcome the CMA's willingness to engage with practitioners and other stakeholders on the development of special rules and guidance to clarify and set out the CMA's role in the UK water price determination process.

(3) However, as detailed below, there are some areas where we consider that the CMA could go further to ensure robust and fair decision-making. There are also some sections of Draft CMA17 that we consider would benefit from greater clarity and / or detail.

(4) In this response, we comment in particular on the Draft Rules including (1) the overriding objective of the Draft Rules; (2) the proposed inclusion of a member of the CMA's specialist utility panel in the group hearing; (3) the need for clarity and due process in the rules relating to administrative procedure; (4) the handling of sensitive information; and (5) the situations where a provisional determination would be dispensed with.

(5) We also comment on the Draft Guidance, including the: (1) proposed deprioritisation, (2) proposals to deal with certain issues at meetings rather than formal hearings, and (3) costs.

2 Rules

(6) Replacing the existing special reference group rules with bespoke rules and guidance is a welcome change, considering the complexity and specific nature of water redeterminations.

(7) While the Draft Rules remain consistent with the Water Industry Act 1991 (the "**Act**"), we welcome the additional clarity that is set out in relation to the CMA's role in a redetermination and the procedural framework which underpins the process.

(8) To further improve usability, there are some sections of the Rules which could benefit from refinement and our suggestions in this regard are set out below.

2.1 Overriding objectives

(9) Draft Rule 4 explains the overriding objective of the Rules and requires the CMA to apply the Rules in a manner which gives effect to that overriding objective. While we agree in general with this proposal, we suggest an express caveat is included in the language of the Rule to specify that the 'overriding objective' will not in itself 'override' the CMA's obligation to comply with the requirements set out in Part I of the Act.

2.2 Inclusion of a member of the CMA's specialist utility panel in the group hearing

(10) Draft Rule 5.3 requires that, where the CMA has received a redetermination reference from the Authority (i.e. Ofwat), the group appointed to conduct the redetermination (the "**Group**") must include at least one member of the CMA's 'specialist utility panel'.

(11) We agree that utility specialists should be used for CMA's price control redeterminations, where possible. Water redeterminations are complicated and bound by strict statutory time limits, and it is clearly aligned with the overriding objective to ensure that the individuals appointed to the Group (including the chair) and who will make a decision on such redetermination have sufficient expertise and experience in the legislative and economic framework of regulated utilities.

(12) In particular, the CMA could seek to enhance this Rule by outlining a preference for members of the Group to have some experience with the water sector (even if this is in a merger capacity) or otherwise for the CMA team supporting the panel to have sufficient experience and expertise to fill this knowledge gap.

2.3 Administrative timetable

(13) Price controls are fundamental to the operation of a water company. In a situation where a company seeks to dispute Ofwat's determination, it is vital that that company and its customers have clarity as to the expected timeline of the CMA's redetermination process.

(14) While we generally agree with the proposals outlined in Draft Rules 6-8 (which track the provisions in the Act), there is scope to use Draft CMA17 to provide further granular detail about the steps and timeline in the CMA redetermination process. In relation to Draft Rule 6.2, we consider that it would be informative for a definition of "special reasons" to be drafted and included within the Rules or Guidance. It is in the interests of all parties for flexibility to be built into the CMA's redetermination timeline (i.e. by way of the extension provision), but it is appropriate for a disputing company to (1) understand on what basis this may be agreed between Ofwat and the CMA and (2) be able to make a request (or at the very least, a representation) if it believes that granting or prohibiting an extension request would be in accordance with the overriding objective and Part I of the Act. This is important because, while a CMA redetermination would not suspend the application of Ofwat's final determination, the timing of a CMA decision may affect when any adjustments to the price control can take effect within the five-year price control period (also called asset management period or "**AMP**") by virtue of when charges need to be set for every year of the AMP.

2.4 Hearings and submissions

(15) CMA redeterminations are fact specific and require fulsome consideration of all relevant data on a company-by-company basis. It is in the best interests of all stakeholders (including consumers) to ensure that a disputing company is afforded the opportunity to present all relevant evidence to the CMA so as to receive a determination which is both accurate and reasonable in light of the various duties in the Act.

(16) While we welcome the proposals outlined in Draft Rules 9-10 (such as codifying the ability of third parties to participate in main party hearings and to make submissions to the CMA), there is a need also to enshrine certain rights of a disputing company. We note that the Draft Rules permit the CMA to reject unsolicited submissions or the provision of supplementary evidence from disputing companies (Draft Rule 8.5) and also to determine the form and structure of the hearings such that main party arguments may not be heard in full (Draft Rule 9.7). We consider that the CMA should explicitly state in the Rules that the Group will (notwithstanding these provisions) seek to ensure that all relevant evidence and arguments put forward by a disputing company will be considered as part of its redetermination *where possible*, in line with the overriding objective *as well as* the statutory duties that would apply to the CMA in making its redetermination.

2.5 Handling of sensitive information

(17) The Draft Rules make provision for parties and third parties to mark sensitive information in submissions (Draft Rule 10.5) and to identify information in other documents that should be treated as sensitive information (Draft Rule 15.1). However, Draft Rule 8.2(m) provides that the CMA can make directions if it considers it necessary "as to the treatment of sensitive information".

(18) This creates some uncertainty as to how sensitive information will be treated, and could create some reluctance by both parties and third parties to provide evidence which might be necessary for making a fair and efficient redetermination. This is particularly relevant where the CMA is considering multiple redeterminations of the same price control by a number of water companies in parallel. In addition, the Rules should clarify how sensitive information should be identified and handled as between main parties. It is not clear how Draft Rule 10.5 will be applied in practice - such as in relation to the exchange of information between disputing parties where there are multiple disputing companies in preparation for a joint hearing - in the context of comments contained in paragraph 6.1 of the Draft Guidance.

(19) To ensure that disputing companies are able to provide sensitive information to the CMA and Ofwat with confidence, the Draft Rules should also include specific provisions prohibiting the onward sharing of sensitive information or the collateral use of any information that the CMA agrees should not be made public. Such an approach would be consistent with rules relating to civil procedure.[1]

2.6 Dispensing with provisional determination

(20) Draft Rule 11.1 provides that, where the Group considers that it would not be appropriate to issue a provisional determination, it will determine an alternative procedure.

(21) Redeterminations under the Act are by definition complex given all aspects of the price control are potentially being considered (unlike the narrower appeal framework applicable in the energy sector). As a result, we do not consider it would be appropriate to dispense with the requirement to issue a provisional determination. If the CMA maintains these provisions, the CMA should additionally set out (possibly in the Guidance): (1) the situations where the Group would consider it appropriate to not issue a provisional determination; and (2) what types of alternative procedures might be appropriate in such a situation.

(22) In the context of a redetermination, it is important for the disputing companies and Ofwat to be able to fully engage with the evidence and put forward their submissions following an understanding of the CMA's position. Accordingly, the provisional findings/determination step is of critical importance. We also note that, unlike for energy networks appeals, the statutory period for water redeterminations can be extended to up to 12 months, and this provides additional time to allow for a draft/provisional determination into the process.

3 Guidance

(23) We consider that the Draft Guidance is a positive (and necessary) complementary addition to Draft CMA17, and we have set out below some suggestions that we consider could further enhance and refine this document.

3.1 The CMA's approach to prioritisation and deprioritisation of issues

[1] See Civil Procedure Rules 2024 at Rule 31.22 and Competition Appeal Tribunal Rules 2015 at Rule 102.

(24) Paragraph 3.13 of the Draft Guidance permits the CMA to prioritise or deprioritise certain issues in a redetermination reference, and to scrutinise those areas that would have the largest effect on customer prices, other outcomes, and on the disputing companies. Given the significant amount of work and expertise that goes into making a redetermination, we agree that it is pragmatic to permit the CMA to consider certain issues at a high level (for instance those where there appears to be little in dispute), and to prioritise some items over others where the main parties have been able to make representations on this approach.

(25) However, in keeping with our comments at paragraph (16) of this response, we suggest that the CMA states in the Draft Guidance that the Group will seek to consider all relevant evidence and arguments put forward by a disputing company. Such a clarification would be in line with the CMA's obligations under Part 1 of the Act and would help ensure the parties have confidence in the redetermination procedure.

3.2 Key Stages in the CMA's process

(26) While we generally agree with the proposals at sections 4, 5 and 6 of the Draft Guidance, we refer to the comments made in Section 2 of this response above and in particular with reference to (1) the right of a disputing company to make all relevant arguments and to present all relevant evidence to the CMA and (2) the treatment of sensitive information.

3.3 Hearings and meetings

(27) Paragraph 5.17 of the Draft Guidance provides that specific technical and modelling issues may be dealt with at meetings attended by CMA staff and individual disputing companies, as opposed to the standard formal hearings and submissions process. While we appreciate that a more informal procedure may provide scope for dialogue and potentially more timely resolutions, we reiterate our concerns around ensuring that each disputing company's right to be heard, and also the sensitivity of its information, is protected. This is also important when it comes to Ofwat's views and submissions being heard.

(28) As an overarching comment, we consider that the CMA should further clarify the situations in which it would consider that staff meetings would be more appropriate than a hearing or otherwise state that it will only use staff meetings where this is aligned with the overriding objective as opposed to a general substitute for hearings (given the important opportunity that hearings provide disputing companies and Ofwat in putting forward and explaining their arguments).

(29) In addition, given the technical nature of the evidence being provided and discussed, it is likely that some of the information the CMA would wish to receive and discuss at a staff meeting would be considered sensitive information. Given the comments made at paragraph 6.1 of the Draft Guidance in relation to transparency, we consider that it would be useful for the CMA to outline a specific process by which sensitive information can be identified and handled in relation to staff meetings (and also more generally, as per our comments above, at paragraph (18) of this response). It is possible that a failure to codify such a framework could result in the CMA not receiving the evidence that it requires to make a fair redetermination and could potentially impede the efficiency of the redetermination process.

3.4 Costs

(30) Section 7 of the Draft Guidance provides some helpful context for a disputing company to understand the basis on which the CMA will allow its costs to be recoverable. Paragraphs 7.2 and 7.3 make reference to only "reasonably incurred" costs being recoverable by the disputing companies, in alignment with Draft Rule 13.

(31) We consider that further detail as to what would constitute a "reasonably incurred" cost, and whether this can be ascertained by reference to the costs incurred in the round by other disputing companies, would be beneficial. In particular, at PR19, we understand that only a small proportion of the external costs incurred by each of the disputing companies were deemed to be reasonably incurred. It would be helpful to understand if the CMA will consider external costs in the round (e.g. benchmarked against the costs incurred by other disputing companies), and if not, why not. We consider that this would be an efficient and proportionate factor for the CMA to consider in making its assessment.

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