

Independent Commission on the Water Sector Regulatory System: Call for Evidence

Response from the Competition and Markets Authority (CMA)

Introduction

1. The CMA is an independent non-ministerial UK government department and is the UK's principal competition and consumer protection authority. We help people, businesses, and the UK economy by promoting competitive markets and tackling unfair behaviour.
2. The CMA's responsibilities include carrying out investigations into mergers and markets and enforcing competition and consumer law. Of particular relevance to this review is the CMA's role in conducting regulatory appeals and redeterminations in relation to certain decisions by sector regulators, including Ofwat.
3. We are pleased to respond to the Independent Commission. Given our current role in carrying out redeterminations of Ofwat's PR24 price controls, the CMA will not provide views on issues in the water sector on which it may need to take decisions in the context of these redeterminations. Our response is therefore focused on the CMA's overall role in the regulatory system.
4. In summary, we recommend that government consider reform to deliver:
 - (a) **A consistent appeal process:** We recommend reform to drive consistency in regulatory appeals. Some decisions by sector regulators are subject to appeals, whereas others – including price controls in water – are subject to a 'redetermination' process. In a 'redetermination', the appellate body reconsiders the evidence and reaches its own conclusions on the decision taken by the sector regulator. We recommend that regulators' decisions should be subject to appeals, not redeterminations. A consistent appeal standard would deliver better outcomes than the patchwork of different procedures which has developed over time.
 - (b) **Judicially managed appeals:** We recommend transferring the function of hearing regulatory appeals from the CMA to an appropriately resourced

judicial body. The overall set of issues which are raised through an appeal process are better suited for resolution by a judicial body.

5. The government's action plan on regulation commits to reducing the complexity and burden of regulation.¹ Reforms to regulatory appeals are an opportunity to deliver on this goal. We stand ready to discuss these issues further, should the Independent Commission or the UK government wish to explore any of the points raised in this response in more detail.

The CMA's role in regulatory appeals and redeterminations

6. Certain decisions by economic regulators can be challenged under procedures which are distinct from the ordinary provisions of public law. The distinct forms of legal accountability are referred to as 'regulatory appeals and redeterminations', or 'regulatory appeals' for brevity.
7. There are variations in how regulatory appeals work between different sector regulators, and even between different types of decision taken by sector regulators. Regulatory appeals vary across a number of dimensions. These include:
 - (a) **Appeal vs. redetermination:** For some regulatory decisions, accountability is via a 'redetermination', where the appellate body reconsiders the evidence and reaches its own conclusions on the decision in question. For other regulatory decisions, legal accountability is via an 'appeal', where the appellate body decides whether the sector regulator was wrong on a number of specified grounds.
 - (b) **Process:** Different statutory timelines apply to different appeals. There are also variations in the type of organisations with a right to raise a challenge. For redeterminations, only the regulated companies may raise a challenge, whereas a broader range of organisations can potentially raise a challenge via an appeal process (including consumer groups).
 - (c) **Forum:** There is variation in the 'appellate body'; the body tasked with hearing and deciding an appeal. The CMA is an appellate body for most decisions by sector regulators where there is a specific appeal route. The Competition Appeal Tribunal (the 'CAT') is responsible for appeals against decisions by Ofcom in the communications sector, however the price control elements of those appeals are referred by the CAT to the CMA.

¹ [New approach to ensure regulators and regulation support growth \(HTML\) - GOV.UK](#)

8. The following table provides a high-level summary of different types of regulatory appeal and the variations between them.

| FUNCTION | REGULATOR | CMA FUNCTION | TIMESCALE (BEFORE ANY EXTENSION) |
|---|------------------|--|---|
| Water and sewage licence modifications | Ofwat | Redetermination | Six months |
| Water Codes | Ofwat | Appeal | 30 working days from receipt of Ofwat's reply |
| Gas and electricity licences | Ofgem; NIAUR | Appeal | Four/six months |
| Electricity codes | Ofgem | Appeal | Four months |
| Gas and electricity (non-licence) | Ofgem | Redetermination | Six months |
| Carbon dioxide transport and storage licence modification decisions | Ofgem | Appeal | Four/six months |
| Rail | ORR | Redetermination | Six months |
| Air traffic licences | CAA | Appeal | Six months from decision publication |
| Airport licences | CAA | Appeal | Six months from decision publication |
| Postal services | Ofcom | Appeal | Four/six months |
| Telecommunications | Ofcom | Review of price control on JR principles | Four-six months (assigned by the CAT) |
| Payment systems | PSR | Appeal | Six months |

Water redeterminations

9. In the water sector, some decisions by Ofwat can be appealed to the CMA and some referred to the CMA for a redetermination. One notable example is the fact that companies may ask Ofwat to refer price control decisions for a redetermination by the CMA.² In its reference, Ofwat must set the period in which the CMA is to make its redetermination and that period should be no more than six months. However, Ofwat may grant an extension to that deadline to allow the CMA a maximum of 12 months.
10. The CMA has carried out redeterminations of previous Ofwat price controls including its decisions on PR14 and PR19.³ Redeterminations of Ofwat's price

² The CMA's role in water price control redeterminations stems from section 12 of the Water Industry Act 1991 and associated provisions in water company instruments of appointment.

³ For PR24, see: <https://www.gov.uk/cma-cases/bristol-water-plc-price-determination> For PR19, see: <https://www.gov.uk/cma-cases/ofwat-price-determinations#:~:text=Published%20on%20%20April>

controls are made by a group of individuals drawn from the CMA's panel, which operates independently from the CMA's Board, with support from a CMA staff team.⁴ A group of independent panel members is currently carrying out redeterminations of Ofwat's PR24 price control decision for five water companies following referrals by Ofwat on 18 March 2025 (Anglian Water, Northumbrian Water, South East Water, Southern Water and Wessex Water).⁵

Recommendations for reform

Objectives for regulatory appeals and redeterminations

11. The aim of regulatory appeals is to support robust, fair and predictable decision making by sector regulators, through providing legal accountability and a mechanism to correct errors. In doing so, regulatory appeals can increase confidence in the quality of decision making and support investment in the regulated sectors.
12. However, appeals also create costs: for firms, that invest time and energy in pursuing them; and for regulators and the CMA in overseeing them; costs which are ultimately borne by the consumer and the taxpayer.
13. An effective appeals system is, therefore, one which fulfils these aims as effectively as possible at a proportionate cost. Achieving this depends on a number of factors. These include, amongst other things, the type of scrutiny the appellate body is required to give to regulators' decisions and the characteristics of the appeal body. We set out recommendations on these issues in the following sections.

Moving redeterminations to an appeal process

14. Under the current regime for water price controls, the CMA as the current appellate body is tasked with carrying out a 'redetermination'. This involves the CMA reconsidering the evidence, reaching its own conclusions and essentially retaking the decision already taken by Ofwat, but over a much shorter time frame. For companies seeking a redetermination, the CMA has a maximum of 12 months to retake a decision Ofwat has taken over a much longer period. In the case of PR24, Ofwat published a discussion paper on the price review in December 2020, before taking its final decision four years later in December 2024.

⁴ Members of the CMA's independent panel are appointed by the Department for Business and Trade for up to 8 years. They are appointed through open competition for their experience, ability and diversity of skills in competition economics, law, finance and business.

⁵ <https://www.gov.uk/cma-cases/water-pr24-price-redeterminations> Ofwat announced on 18 March that it would defer a possible reference of Thames Water's price control to the CMA for a period of up to 18 weeks. See: <https://www.ofwat.gov.uk/regulated-companies/price-review/2024-price-review/competition-and-markets-authority-references/>

15. In principle, a mechanism to provide legal accountability to Ofwat for its decisions and to correct for errors should not require a second body to be tasked with retaking its decision, on the same basis. A narrower appeal process, which is focused on errors in the first instance decision, would achieve these objectives more efficiently and promote consistency and certainty for businesses and investors across the regulatory landscape.
16. The increasing scope and complexity of water redeterminations has strengthened the case for this reform:
 - (a) PR14: One water company sought a redetermination. The CMA set out its final report in a 378 page document (with 529 pages of appendices), following a 7 month process.
 - (b) PR19: Four water companies sought a redetermination. The CMA set out its final report in a 1239 page document (with 71 pages of appendices), following a 12 month process.
 - (c) PR24: Five water companies have sought a redetermination, with the potential for a sixth. The process is ongoing.

Efficiency

17. If water was moved to an appeal process, the appellate body's focus would be on whether Ofwat's decision was wrong based on one or more statutory grounds of appeal. Ofwat would retain primary responsibility for developing the core elements of water price controls, consistent with its role as the primary source of public sector regulatory expertise in water. The appellate body would then carry out a check for errors that have been made by Ofwat on clear and precise statutory grounds of appeal. If the appellate body found an error, it would then decide whether to quash Ofwat's decision, remit the matter for reconsideration and/or give directions to the regulator to correct the error. At present, in some regulatory appeal regimes, the CMA can also directly substitute its 'corrected' decision for that of the regulator.
18. In contrast, a redetermination process presents a largely open-ended opportunity to re-open aspects of Ofwat's price control decisions. Even where there is found to be nothing wrong in the regulator's reasoning, the appellate body is nonetheless required to substitute its own view if it would have reached a different decision. For example, in the CMA's PR19 water redetermination, the CMA preferred a higher cost of capital as a result of a different balancing of the issues presented. In making that determination, the CMA did not look through the appeal lens of an 'error'; the redetermination involved the CMA taking a different view from the regulator rather than merely correcting any flawed reasoning or erroneous findings. The overall costs of the PR19 redeterminations were approximately £31.8m. This included the CMA's costs of £3.1m, but also Ofwat's costs of £2.8m,

and the combined costs of the four disputing water companies of £25.9m (a proportion of which is recovered through water bills).⁶

19. The differences between a redetermination process and an appeal process have become greater over time. Price controls have become much more complex, with regulators balancing a broader range of duties and objectives. For example, the final determinations document for PR94 issued by Ofwat in 1994 was 63 pages long.⁷ In 2024, Ofwat's price control was more than a thousand pages. As a result, the difference between being asked to redetermine Ofwat's decisions and hearing an appeal on alleged errors has grown correspondingly. The benefits to moving to an appeal process in terms of efficiency have therefore also grown stronger over time.

Expertise

20. In a redetermination process, the appellate body is asked to take a fresh look, and consider whether it would decide differently, even if the regulator made no obvious error. However, it is inevitably the case that an appellate body will lack expertise on several of the matters it is asked to decide when reviewing sector regulators' decisions. An appeal process – which is focussed on whether the decision was wrong on specific grounds – better reflects the differences between the type of expertise an appellate body can bring, relative to the sector regulator as the expert decision maker.
21. This is particularly challenging when the matters under consideration can be broad and wide-ranging. In the case of the CMA, for instance, our core functions do not require expertise in matters such as the appropriate level of spending on infrastructure projects or what investment is needed to meet new environmental standards applicable to water companies. In a redetermination standard, an appellate body is often required to answer these sorts of questions. For example, in previous water redeterminations, the CMA has needed to decide issues around enhancement projects, requiring specialist engineering knowledge to resolve.

Consistency

22. A number of redetermination processes have been converted into appeals processes in recent years. Adopting an appeal process for the reviews of Ofwat's price controls would therefore bring water in line with a similar standard applied in other regulated sectors, for instance in the 2023 Energy Licence Modification Appeal⁸ and the 2023 H7 Heathrow Airport Licence Modification Appeals.⁹ Removing these sorts of inconsistencies between regulated sectors is a clear way

⁶ See Chapter 11 of the [Final report](#) published by the CMA as part of the PR19 Redeterminations.

⁷ [PR94-final-determinations-document.pdf](#)

⁸ <https://www.gov.uk/cma-cases/energy-licence-modification-appeal-2023>

⁹ <https://www.gov.uk/cma-cases/h7-heathrow-airport-licence-modification-appeals>

to improve regulatory efficiency, predictability and certainty. Moreover, a clearer and more uniform approach to appeals across sectors can also help to bolster investor confidence, by making regulatory processes easier to navigate for the many prominent investors active across multiple sectors.

23. There are other benefits to the appeal standard that could also be explored. For instance, the government could choose to grant standing to appeal not only to regulated companies but also to other relevant players such as consumer bodies or customer groups. This is already the case in other regulated sectors, so would provide a further opportunity for regulatory consistency.

The forum for appeals

24. The CMA's view is that across all economic regulatory functions, including water, the overall system for regulatory appeals could achieve its objectives at more proportionate cost if the appellate functions were consolidated in a judicial body with the appropriate technical expertise, such as the Competition Appeal Tribunal (the 'CAT'), particularly where there is a consistent appeal process across regulatory decisions, as recommended in the previous section.
25. In contrast to the CAT, which is a specialist appellate body, the CMA has no judicial role outside of regulatory appeals. The CMA is an enforcement body, which plays a cross-economy role, with the majority of its functions not tied to a particular sector. The CMA's focus is on the promotion of competition, consistent with its primary statutory duty, and it does not have similar economic regulatory functions to those held by the sector regulators.¹⁰
26. To the extent scrutiny of regulators' decisions requires a degree of economic and financial expertise, there is no inherent reason why these cannot be vested in a judicial body such as the CAT, rather than an enforcement body such as the CMA. A judicial body would be better placed to resolve the overall set of issues which may be generated by a regulatory appeal, including questions of statutory interpretation, vires and the adherence by regulators to their legal duties. In short, we consider that the exercise of a supervisory jurisdiction is more closely aligned with judicial expertise, compared to the CMA.
27. Carrying out regulatory appeals and redeterminations is also a significant distraction from the CMA's core responsibility for promoting competition. The average case load for the CMA is 1-2 regulatory appeals/redeterminations per year (with the scale of these cases increasing over time), but this is variable, resulting in particular resourcing difficulties for the CMA during periods where it sees a higher frequency of appeals. The fact that it can be difficult to predict both whether and when any such appeals may be made to the CMA further

¹⁰ Section 25 of the Enterprise and Regulatory Reform Act 2013

exacerbates the challenges. This creates a considerable opportunity cost, and although regulatory appeals are conducted on a cost-recovery basis for the CMA, they still present significant cash-flow issues. For example, the total cost incurred by the CMA in PR19 was £3.1m. A large regulatory appeal could be equivalent to 2-3 CMA market studies.

28. For the reasons set out above, the CMA's view is that its regulatory appeals role should be transferred to a judicial body with the appropriate technical expertise, such as the CAT.

Conclusions

29. Reforms to regulatory appeals are an opportunity to reduce the complexity and burden of regulation, and to provide a clearer framework for investors to navigate. We therefore recommend a consistent appeal process, which would include making Ofwat's price control decisions subject to appeals, rather than a redetermination process. We recommend transferring these appellate functions from the CMA to an appropriately resourced judicial body, such as the CAT.
30. The CMA welcomes the opportunity to provide its views to the Independent Commission, and would be happy to discuss in more detail any of the issues set out in our response.

Competition and Markets Authority
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