

# THE INFRASTRUCTURE FORUM'S RESPONSE TO THE NIC'S FUTURE OF REGULATION STUDY

## INTRODUCTION

1. The Infrastructure Forum welcomes the National Infrastructure Commission's work on the future of regulation and its call for evidence.
2. The Forum brings together investors, operators, constructors and professional advisors in the development of Britain's critical national infrastructure.
3. Its Working Groups, discussions and policy proposals are informed by continuing constructive and informed discussions with the economic regulators who have over the years shown a welcome preparedness to engage with our network on their proposals, policies and operations.
4. The Forum's work also benefits from interaction with the Regulatory Best Practice Group of European Policy Forum, its parent body. It brings together the economic regulators in discussions with market participants on the theory and practice of efficient economic regulation. Engaging also with the competition authorities and the academic community, the Group seeks to facilitate the development of regulatory theory and practice for the benefit of public policy.
5. The Infrastructure Forum strongly supports the engagement of the National Infrastructure Commission in the development of economic regulation. The way in which regulated markets work is significant for infrastructure development, investment, and competitive markets.
6. We are grateful to BCLP for their support on this submission and producing the research in Appendix A which sets out the statutory duties, functions and constitutions of Ofcom, Ofwat and Ofgem.

## THE DEVELOPMENT OF ECONOMIC REGULATION

7. Post-privatisation economic policy recognised that an economic regulatory function is necessary to police markets, foster competition and protect consumers in the markets which had been shifted from government to private sector operation.
8. The roles of Ofgem, Ofwat and Ofcom in their respective sectors are crucial to the delivery of infrastructure in the UK. They can:
  - a. Strongly influence what and where infrastructure gets built, for example through the approval of regulated monopoly business plans;

- b. Provide expert input to Government deliberations on infrastructure priorities;
  - c. Can influence the flow of capital into infrastructure investment, such as by setting the regulated cost of capital for price-controlled entities.
9. Originally established as Directors General of telecoms, gas, electricity and water, the regulatory functions were transformed into authorities with Chairs, Chief Executives and Boards including non-executive members in order to strengthen continuity, long-termism and improved governance and interaction with stakeholders.
10. Broadly speaking the shift from Directors General to Boards has been welcomed and seen as successful against those objectives; some, however, believe that the change slowed decision making and made it less easy to take rapid and decisive action.
11. All agree, however, that the regulatory model is characterised by evidence-based approaches; careful consultation; outreach to stakeholders and statutory control in a legal framework which facilitates appeals and redress where regulatory decisions are challenged.
12. The way regulators work – with a greater focus on long-termism, evidence and research, engagement with stakeholders, specific expertise and skilled and specialised staff is often different from the way in which government departments operate.
13. In recent years departments have suffered from rapid rotation of staff leaving a perceived weakness of institutional memory. At the same time frequent changes of ministers, together with the operation of the electoral cycle, can make it difficult for departments to maintain long term approaches.
14. The fact that regulators operate at arm’s length from government and are not directly subject to voter pressures has led to the emergence in the UK’s unwritten constitution of different lines of accountability and control. Regulators are subject to detailed statutory requirements on their composition, the appointment of their Boards and senior executives, and their reporting and accountability requirements. Regulatory Chairs are now subject to pre-appointment confirmation hearings before Parliamentary Select Committees and regulators tend to regard their accountability to Parliament as paramount. In each case however they also have regard to the policies of their “sponsor departments” and engage with HM Treasury.
15. To maintain this evolving, complex and possibly fragile set of relationships requires care on all sides. That is why in 2011 the Government produced its Principles for Economic Regulation which sought to establish a sustainable approach to the future of economic regulation and in particular to:
  - a. “reaffirm the importance of, and the Government’s commitment to, stable and predictable regulatory frameworks to facilitate efficient investment and sustainable growth;
  - b. set the framework for delivering greater clarity about the respective roles of Government, regulators and producers, and greater coherence in an increasingly complex and interlinked policy context;

- c. set out the characteristics of a successful framework for economic regulation to guide policy makers in assessing future developments.”<sup>1</sup>
16. The Principles sought to achieve these objectives through a number of declared Government commitments. In particular commitments were made to preserving the independence of economic regulators and also to putting in place strategy and policy statements to provide context and guidance about priorities and desired outcomes.
17. A key question in the current inquiry is to seek to establish how well these commitments have been met since they were established in 2011, especially in terms of the effect of Government interaction with economic regulators on consumer interests and on investment.
18. Recently there have been indications that the harmonious relationship intended to be established by the Government’s Principles for Economic Regulation has been fraying at the edges.

## PROBLEMS IN ENERGY RETAIL MARKETS

19. In energy, Government began to take the view in 2010 that Ofgem as regulator was not acting with sufficient decisiveness to address high price rises by the Big 6 energy retail businesses.<sup>2</sup> With the benefit of hindsight, the regulator itself acknowledged to the BEIS Select Committee in January 2018 that it had failed to act sufficiently quickly to address these consumer concerns.<sup>3</sup>
20. In response, Ofgem launched the Retail Market Review to examine energy pricing, in particular by the Big 6 energy companies, due to concern that companies were not working effectively for customers.<sup>4</sup> Ofgem as a result recommended a ban on complex tariffs, a limit on the number of tariffs a supplier could offer at any one time to four and simplification of cash discounts,<sup>5</sup> in order to improve clarity around pricing and relieve price discrimination. These reforms were implemented in 2014.
21. Following the implementation of these reforms, there was, however, widespread concern from suppliers and commentators that consumer choice had been limited by reducing a number of innovative tariffs and discounts that consumers had benefitted from.<sup>6</sup> Overall, this distorted the market and reduced competition.
22. Continued dissatisfaction with the outcomes of Ofgem’s reforms lead to the regulator referring the issue to the Competition and Markets Authority in June 2014.

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<sup>1</sup> Department for Business, Innovation and Skill, [Principles for Economic Regulation](#), April 2011, p.2.

<sup>2</sup> See: <http://news.bbc.co.uk/1/hi/business/8528871.stm>;  
<https://www.telegraph.co.uk/finance/personalfinance/household-bills/8165704/How-to-beat-the-energy-price-rise.html>

<sup>3</sup> Business, Energy and Industrial Strategy Committee, [Oral evidence: Pre-legislative scrutiny of the draft Domestic Gas and Electricity \(Tariff Cap\) Bill](#), HC 517, Wednesday 10 January 2018, p.11.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

23. The CMA found, among other things, that “Average domestic electricity prices rose by around 75% between 2004 and 2014, and average domestic gas prices rose by around 125% in real terms over the same period.”<sup>7</sup>
24. The CMA published the provisional remedies from its investigation into the energy market in March 2016 which included the implementation of a temporary price cap on prepayment meter tariffs and the resetting of the relationship between Ofgem, the Department for Energy and Climate Change, and the industry to promote clearer decision making in the sector.<sup>8</sup>
25. Ofgem responded to these provisional remedies by announcing that it would deprioritise “taking enforcement action against any supplier”<sup>9</sup> that did not comply with the four-tariff rule because the provisional report by the CMA had shown this measure not to have delivered the intended outcomes. Ofgem formally changed the licence conditions to eliminate the four-tariff rule following the publication of the CMA’s full report on 24 June 2016.
26. The CMA made over 30 recommendations in its final report of which 26 proposed action by Ofgem. Ofgem outlined its strategy for implementation of these recommendations in August 2016, as well as immediately publishing a statutory consultation on the removal of the ‘simple tariff choice’ rules and ‘clearer information’ rules. Changes to the licence agreements to reflect this were published in October 2017.<sup>10</sup>
27. Notwithstanding the extensive analysis undertaken by both Ofgem and the CMA, the energy sector continued to be subject to political and consumer-led criticism. In February 2018 the Government passed legislation for a temporary price cap on Standard Variable and Default Tariffs, legislation which came into force in July 2018.
28. In November 2018, Ofgem implemented a Default Tariff Cap which came into force on 1 January 2019. This cap quickly drew criticism from suppliers on the grounds that it was not sustainable for the market.
29. In accordance with the decision on the Default Tariff Cap published on 6 November 2018, Ofgem expected that the cap would be updated every 6 months.<sup>11</sup> The first of these updates occurred on 1 April 2019, having been announced on 7 February 2019.<sup>12</sup>
30. Again, with the benefit of hindsight it appears reasonably clear that the regulator should have identified the public concern about Big 6 price rises at an earlier stage and designed a response which assuaged public concern whilst minimising interference in the markets. What actually transpired appeared to be heavy-handed decisions introduced under political pressure and then reversed.

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<sup>7</sup> CMA, [Energy Market Investigation: Summary of final report](#), 24 June 2016, p.41.

<sup>8</sup> Competition and Markets Authority, [CMA sets out energy market changes](#), 10 March 2016, [press release].

<sup>9</sup> R. Fletcher, [CMA provisional remedies: removal of certain RMR ‘simpler choices’ rules](#), Ofgem, 14 April 2016, [letter].

<sup>10</sup> N. Barnes, [Modification of the electricity and gas supply licences to allow suppliers to roll customers onto further fixed-term tariffs at the end of their existing fixed-term deals](#), 11 October 2017, [letter].

<sup>11</sup> Ofgem, [Decision – Default tariff cap – Overview document](#), 6 November 2018, p.5.

<sup>12</sup> Ofgem, [Higher wholesale costs push up default and pre-payment price caps from April](#), 7 February 2019.

## ISSUES IN WATER INVESTMENT

31. In the water sector, by contrast, political attention began to focus in 2017 on what were deemed to be excessive returns made by privatised water companies. The Environment Secretary, Rt Hon Michael Gove MP, wrote on 31 January 2018 to the Chair of Ofwat, Jonson Cox, setting out a number of concerning behaviours that were undermining trust in the sector: off-shore financial arrangements; securitisation; highly geared structures; high levels of executive pay; and high dividend payments.<sup>13</sup>
32. In its reply, Ofwat recognised these problems: “Some companies are seen as focused on financial engineering at the expense of public service.” Jonson Cox highlighted Ofwat’s efforts to address this issue which included:
- a. Ensuring water companies do not use financial engineering to inflate one-sided returns to investors or are rewarded at the expense of their customers. Measures would reduce the benefits for companies of high gearing and require them to share benefits with their customers in the form of lower bills.
  - b. Tightening standards to make sure financial structures are robust and that customers are protected if things go wrong, including ring fencing arrangements.
  - c. Requirements for Boards to set out clear, appropriate dividend policies and meet obligations to customers and other stakeholders before making dividend payments.
  - d. Boards would also be expected to win customer confidence by setting and explaining bonuses and performance pay for executives by reference to exceptional delivery for customers.
  - e. Water companies should put customers and their interests at the heart of what they do. Ofwat would reform companies’ licences to reflect this aim and strengthen work setting out how boards of these public service companies must adhere to exemplary standards of leadership and governance.<sup>14</sup>
33. It should be noted that this exchange came after Ofwat had published its methodology for PR19 in December 2017.<sup>15</sup> In May 2018, Moody’s outlined that there had been “a modest deterioration in the stability and predictability of the regulatory regime and companies will need to demonstrate stronger financial metrics if they are to maintain credit quality.”<sup>16</sup>
34. Most recently investors in the sector have said that they do not believe they will be able to continue engagement if there is a significant fall in the regulated rate of return. Investors in the Forum’s network have said that they are in “hold and retreat mode” in the water sector and that other investment opportunities have become more attractive, whether outside the UK or the classic regulated sectors. Equally it is not clear who will step forward to replace the significant investment required in the sector.

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<sup>13</sup> [Letter from Rt Hon Michael Gove MP to Jonson Cox](#), 31 January 2018.

<sup>14</sup> [Letter from Jonson Cox to Rt Hon Michael Gove MP](#), 9 April 2018.

<sup>15</sup> Ofwat, [Delivering Water 2020: Our final methodology for the 2019 price review](#), December 2017.

<sup>16</sup> Moody’s Investors Service, Regulator’s proposals undermine the stability and predictability of the regime, 22 May 2018, p.1.

35. Ofwat introduced a stricter regime for examining the business plans of water companies for the next control period in accordance with its commitments set out in the letter to Rt Hon Michael Gove MP. The approach led to only three out of seventeen companies across England and Wales having their plans approved first time, with the rest sent away to redo their work and improve outcomes for consumers. Some of those sent away have now resubmitted their plans for the next control period to improve outcomes for consumers which have been well received.
36. A picture is therefore beginning to emerge both in energy and in water of regulatory responses to political concerns which have had unanticipated consequences not necessarily compatible with a long-term approach to investment in infrastructure.

## GUIDANCE IN TELECOMS

37. In the third area considered by the present Inquiry, telecoms, the Government has issued a *Draft Statement of Strategic Priorities for Telecommunications, the Management of Radio Spectrum and Postal Services* on which the closing dates for comments in consultation was the 7 March 2019.
38. This document, which follows publication in 2018 of Government's Future Telecoms Infrastructure Review, is declared to reiterate the regulatory outcomes the Government thinks are necessary to create a pro-competitive and pro-investment environment – “from the importance of stable and long-term regulation of the delivery of full-fibre to an assessment of the feasibility of flexible spectrum licencing models”.
39. It says that there are “fundamental issues around the consumer experience in telecoms. Accordingly, the Government urges Ofcom to take action on a number of areas, including tackling harmful business practices, giving consumers access to better data, and removing barriers to switching.”
40. In fact many commentators consider that Ofcom has been proactive in consumer protection, making vigorous use of its fining powers for malpractice, publishing comprehensive data, and using its convening power to complement statutory tools to introduce innovative techniques such as alerts to customers that they are coming to the end of a contract and may have opportunities to switch.
41. The introduction by the Secretary of State to Ofcom's SSP seems to recognise that it may be treading close to the line in seeking to do Ofcom's job for it. It concludes by saying “Ofcom is the UK's independent regulator for telecommunications, and this is critical that it remains just that – independent. However, it is also important that the Government should set out clearly its strategic priorities and desired outcomes for the sector so that the regulator can have regard to these when it is making its detailed regulatory decisions”.
42. It may be no coincidence that the perception of increased Government intervention in the work of the economic regulators has taken place at a time when the traditional activity of governments – parliamentary legislation – has been disrupted by Brexit. Some serious commentators believe that the increased focus by Government Departments on the activities of regulators constitutes a form of displacement activity – without legislation to take forward

the Department and Ministers have time of their hands and are inclined to fill this by telling regulators what to do.

## CLARITY ABOUT STRATEGIC GOALS

43. Even if these suspicions are overstated, the call for evidence is right to ask whether there is sufficient clarity about Government's strategic goals. At a time when Government is functioning normally it tends to focus more on legislation than issuing statutory guidance to regulators and it has over the years since privatisation found it difficult, not least due to the electoral cycle, to develop a clear multi-annual strategic approach for regulated sectors.
44. As the Forum has shown in its discussion paper – *Rebuilding Partnerships in Infrastructure Investment* – Government has also found it difficult to deliver on the various targets it has established to promote investment in critical national infrastructure.<sup>17</sup>
45. Against this background it would seem wise to fix the strategic and policy priority questions by strengthening the role of the NIC's own long-term strategic priority setting work and its National Infrastructure Assessment and developing closer engagement between it and the economic regulators in the development of this work.
46. The Principles of Economic Regulation suggest that statements of priorities should be made no more frequently than once a Parliament and should “provide context and guidance about priorities and desired outcomes”.<sup>18</sup>
47. The Government should update statements of strategic priorities for sectors on a regular and predictable basis, after consulting regulators, stakeholders and the National Infrastructure Commission. Different sectors will naturally have different priorities suggesting the need for different and evolving boundaries between government and regulators.
48. The statements should be aligned with the National Infrastructure Strategy.

## ALIGNING TIME HORIZONS

49. One of the most important – and stable – aspects of the UK regulatory model has been the regular price review process. Price reviews – which typically occur every three, five or eight years depending on the sector – entail the relevant regulator scrutinising the business plans of regulated companies and setting the revenues that those companies can recover during the next price control period in order to fund the outputs or outcomes set out in the business plan.
50. The time horizon of the price review process differs across sectors. For example, the water sector applies a five-yearly cycle, whereas the telecoms sector has shorter, three-yearly, cycles for those remaining parts of the network which are subject to price regulation.
51. It should be noted that the EU Parliament issued a directive establishing the European Communications Code in December 2018 which proposes extending the current three year

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<sup>17</sup> G. Mather and C. Chase, [Rebuilding Partnerships in Infrastructure Investment](#), March 2019.

<sup>18</sup> Department for Business, Innovation and Skill, [Principles for Economic Regulation](#), April 2011, p.8.

regulatory review period for telecoms to five year periods.<sup>19</sup> The UK is yet to adopt this directive but has pledged to adopt this into national law.

52. The energy sector has moved from five year to eight year price control periods in an attempt to balance better longer-term investment in energy networks with shorter term cost pressures. However, finding that eight years may be too long, Ofgem is expected to revert to a default five-year price control for the forthcoming RIIO 2 price reviews.<sup>20</sup>
53. During a price review, regulators must strike the right balance between allowing too much investment to be recovered during the next price control (and thereby allowing companies to make unnecessary, or premature, investments – often referred to as ‘gold plating’), against allowing too little (and thereby risking the viability and/or resilience of the underlying asset base).
54. This balance may be stereotyped in basic terms as balancing the needs of current and future customers. An important feature of recent regulatory practice has been the increasing role of customers setting out the outcomes which they value (e.g. lower bills, or higher levels of network investment and so on) during the price review process.<sup>21</sup>
55. The Forum sees merit in the regulatory model doing as much as possible to ensure that the difficult balance between long-term investment and lowering bills in the immediate term, is struck. For example, seeking to identify ways to represent effectively the reasonably anticipated needs and interests of future customers, while also taking advantage of customer engagement in the business planning process.
56. Continuing to promote long-term investment and facilitating multi-price control period recovery of costs for appropriate long-term projects is of central importance in the view of the Forum. The NIC’s long-term outline for UK infrastructure investment could be helpful in this regard. Similarly, the existence of statutory duties in respect of near term and long term network resilience can be an important element in assisting regulated businesses and regulators to balance longer-term and shorter-term interests when determining the outcomes to be delivered and the funding envelope for the next price control period.

## A STRONGER ROLE FOR THE NIC

57. The NIC and the economic regulators should build medium- and longer-term strategic scenarios for regulated sectors. The benefit of regulators’ evidence, data, research and closeness to stakeholders should also be shared on a regular basis with the relevant Parliamentary Select Committees. The outcome of this joining up would be a beneficial shift towards a longer term and more predictable approach.

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<sup>19</sup> [DIRECTIVE \(EU\) 2018/1972 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL](#) of 11 DECEMBER 2018 establishing the European Communications Code, Official Journal of the European Union, p.34.

<sup>20</sup> Ofgem, [Decision - RIIO 2 Framework](#), July 2018.

<sup>21</sup> This has taken the form of customer challenge groups which entail a representative group of individuals participating in meetings and discussions with the relevant regulated company to help it to shape its business plan.

58. In such an environment Government Departments could pull back to a role in which they monitored developments and clarified Government's own resource and other commitments whether by public spending, specific sectoral schemes or the work of the various initiatives handled by the Infrastructure and Projects Authority. They would have less temptation to step into areas which are properly the responsibility of independent regulators.
59. There would be a quid pro quo for the regulators themselves. They would have to demonstrate that, especially in the field of consumer protection, they were meeting public expectations. This would require vigorous use of their competition and consumer protection powers, a careful focus on the needs of the vulnerable, a clear understanding of the potential but also the limitations of switching, and an ability hold market participants to high standards of customer service delivery. The effective use of complaints data and consumer communication strategies, using where necessary the relevant consumer sectoral bodies, should all be part of this approach.

## LONGER-TERM STEPS

60. Are there longer-term steps to protect regulatory independence and secure the right balance between Government policy setting and regulatory action?
61. Especially in this area it seems clear that any move towards a multi-utility regulator would be likely to diminish regulatory independence.
62. It would clearly reduce the opportunity to compare and contrast between the techniques and practices adopted by different regulators which have been constructive in comparing the energy, water and telecoms sectors' recent experiences.
63. By establishing a single point of sponsorship in government and a single relationship between HM Treasury and the multi-utility regulatory body would come the risk of strengthened Government interest and control both of its finances and of the appointments to its senior posts.
64. Because a multi-utility body would have significant economic power in the UK economy, the establishment of such an organisation would reopen questions on accountability and democratic control and would create an obvious new power centre which could blur lines of responsibility both vis-a-vis Departments and also in Parliament where it would complicate Select Committee accountabilities.
65. Just as competition in markets is desirable, so regulatory competition can be helpful in identifying best practice and ways forward and The Infrastructure Forum would not support the establishment of a multi-utility regulator for these reasons.
66. By contrast it would be better if Government restated its commitment to the Principles for Economic Regulation in this regard and especially to "commitments to ensure these Principles are enshrined in Government's policy-making on economic regulation".<sup>22</sup>

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<sup>22</sup> Department for Business, Innovation and Skill, [Principles for Economic Regulation](#), April 2011, p.2.

67. This is against the background of the first commitment made by Government which will also be reemphasised, namely the “commitment to stable and predictable regulatory frameworks to facilitate efficient investment and sustainable growth.”<sup>23</sup>

## IMPROVING REGULATORY STRUCTURES

68. A further means of strengthening regulatory independence and closeness to their sectors is to examine whether existing regulatory structures are fit for purpose. For example, are regulators structured in a way which allows them to hire the most capable staff, free from the constraints which apply to traditional Whitehall Departments? Does their governance system align with the private sector best practice? Are their statutory duties up to date and relevant?
69. The three regulators in energy, water and telecoms have different statutory structures: Ofgem and Ofwat are non-ministerial Government Departments, whereas Ofcom is a Statutory Corporation.
70. The statutory duties of the regulators vary considerably.
71. Ofgem has 2 statutory duties: to protect the interests of existing and future consumers of electricity and gas by promoting decarbonisation, security of supply, European harmonisation; and to promote effective competition where possible.
72. Ofwat has 4 statutory duties set out in the Water Industry Act 1991 which were transferred to the Water Services Regulation Authority under the Water Act 2003;
73. Ofcom has 2 statutory duties provided in the Office of Communications Act 2003. See Annex A for a detailed examination of these powers.
74. It would seem opportune, in the once-a-Parliament review of Government strategy and priorities in regulated sectors, to consider whether there are opportunities for legislative tidying up both of legal forms and of statutory duties and priorities.
75. The Government’s statement of priorities could include an assessment of whether regulatory structures are fit for purpose. This could be discussed with the relevant Parliamentary Select Committees and legislative opportunities, once they reappear, could be used to tidy up, clarify and update the legislation. This should have the benefit of the advice of Committees both of the House of Commons and of the House of Lords.
76. An initial suggestion would be that the Statutory Corporation model used to establish Ofcom has a number of advantages including flexibility in pay and recruitment over the non-ministerial government department and that this structure should be favoured in future.

## ENCOURAGING INNOVATION

77. Innovation is at the core of the private sector delivering better outcomes for consumers in regulated markets. Greater stability and long-termism across the regulated sectors examined here will provide the conditions to foster innovation.

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<sup>23</sup> Ibid.

78. Regulators could also open new channels for market participants and investors to propose innovative solutions by introducing guidance on Market-Led Proposals. Such proposals would bring the expertise and knowledge of the private sector to the forefront of the industry and unlock significant potential for efficiency gains and improved services for consumers.
79. Tentative steps have been taken by the Department of Transport to this end: it introduced guidance on Rail Market-Led Proposals in March 2018.<sup>24</sup>
80. The Infrastructure Forum's Procurement Working Group proposed a number of improvements to this guidance to extract the full potential of the scheme in its report *Sustainable Procurement: A vision for UK infrastructure*.<sup>25</sup> These recommendations included that Market-Led Proposals should be overseen by the Cabinet Office to drive progress on the schemes and that the guidance should be rolled out to other sectors to similar effect.
81. Implementing such guidance across bodies responsible for infrastructure procurement would provide huge opportunity to encourage and reward innovation.
82. Regulators should be statutory consultees on any Market-Led Proposals schemes to ensure that projects align with the Strategic Goals set by government for the sector and the overall regulatory framework.

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<sup>24</sup> See: Department for Transport, [Market-Led Proposals: guidance](#), March 2018.

<sup>25</sup> The Infrastructure Forum's Procurement Working Group, [Sustainable Procurement: A vision for UK infrastructure](#), February 2019, pp.29-32.

# ANNEX A: THE STATUTORY DUTIES, POWERS & FUNCTIONS OF OFCOM, OFWAT AND OFGEM

## OFCOM

### NATIONAL LEGISLATION

The UK Office of Communications (“Ofcom”) was established as a **body corporate (statutory corporation)** by the **Office of Communications Act 2002**.<sup>26</sup>

A summary of its history is available [here](#).

Ofcom operates under a number of Acts of Parliament and other legislation, including:

RELEVANT LEGISLATION	POWERS
<p><b>Enterprise Act 2002</b></p> <p>as amended by the <b>Enterprise and Regulatory Reform Act (ERRA) 2013</b> and <b>Postal Services Act 2011</b></p>	<p>Ofcom is statutorily required to conduct a “public interest test” in relation to certain media mergers. The Secretary of State for Culture, Media and Sport must then determine whether to require further investigation by the Competition and Markets Authority (“CMA”).</p> <p>Ofcom has concurrent powers with the CMA in relation to market investigations and super-complaints where these relate to communications matters.<sup>27</sup></p>
<p><b>Communications Act 2003</b></p>	<p>Sets out Ofcom’s principal duties (namely <b>section 3(1)</b>):</p> <p>(a) to further the interests of citizens in relation to communications matters; and</p> <p>(b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.</p> <p>This includes ensuring:</p> <ul style="list-style-type: none"> <li>the optimal use for wireless telegraphy of the electro-magnetic spectrum;</li> <li>that a wide range of electronic communications services is available throughout the UK;</li> </ul>

<sup>26</sup> ‘Statutory Duties and Regulatory Principles’, [\[https://webarchive.nationalarchives.gov.uk/20150106104457/http://www.ofcom.org.uk/about/what-is-ofcom/statutory-duties-and-regulatory-principles/\]](https://webarchive.nationalarchives.gov.uk/20150106104457/http://www.ofcom.org.uk/about/what-is-ofcom/statutory-duties-and-regulatory-principles/), accessed 4 April 2019.

<sup>27</sup> ‘Competition: telecoms’, Practical Law UK Practice Note w-015-4912, accessed 4 April 2019.

‘United Kingdom’, *The Technology, Media and Telecommunications Review* (9<sup>th</sup> ed., 2019) [\[https://www.lw.com/thoughtLeadership/technology-media-telecommunications-review-uk-latham-advice-2019\]](https://www.lw.com/thoughtLeadership/technology-media-telecommunications-review-uk-latham-advice-2019), accessed 4 April 2019, p. 390. The article also provides a general overview of Ofcom within the UK telecoms sector.

	<ul style="list-style-type: none"> <li>• that a wide range of TV and radio services of high quality and wide appeal are available throughout the UK;</li> <li>• that sufficient plurality in the providers of different television and radio services is maintained;</li> <li>• the application of standards that provide adequate protection for members of the public and others against: <ul style="list-style-type: none"> <li>• offensive or harmful material in television and radio services; and</li> <li>• unfair treatment in television and radio programmes and unwarranted infringements of privacy resulting from activities.</li> </ul> </li> </ul>
<b>Wireless Telegraphy Act 2006<sup>28</sup></b>	The Act provides Ofcom’s functions and duties in respect of managing the radio spectrum.
<b>Broadcasting Acts 1990 and 1996</b>	These statutes impose general duties on Ofcom in relation to broadcasting, which it performs by granting licences to radio and television broadcasters with any conditions appropriate and necessary to enable it discharge its duties.
<b>Digital Economy Act 2010<sup>29</sup></b>	The Act imposes a duty on Ofcom to report to the Secretary of State every three years on the UK’s communications infrastructure.
<b>Postal Services Act 2011</b>	Requires that Ofcom carry out its functions in relation to postal services in a way that will secure the provision of a universal postal service.
<b>STATUTORY INSTRUMENTS</b> (secondary legislation) amending or in addition to the above, principally:	
<b>Public Bodies (Modification of Functions of Ofcom) Order 2013</b>  modified the Communications Act 2003 in the following respects:	<ul style="list-style-type: none"> <li>• Some of Ofcom’s broadcasting duties relaxed: <ul style="list-style-type: none"> <li>• Public Service Broadcasting review will only be conducted at the discretion of the Secretary of State (who will also determine its scope), rather than every 5 years by default;</li> <li>• public sector broadcasters will no longer provide annual statements of programme policy;</li> <li>• automatic duty to review a change of control to ITV or Channel 5 no longer required.</li> </ul> </li> </ul>

<sup>28</sup> ‘The Wireless Telegraphy Act 2006’, [\[https://webarchive.nationalarchives.gov.uk/20150106114450/http://licensing.ofcom.org.uk/radiocommunications-licences/regulations-technical-reference/rules/policy-manual/wireless\\_teleact\]](https://webarchive.nationalarchives.gov.uk/20150106114450/http://licensing.ofcom.org.uk/radiocommunications-licences/regulations-technical-reference/rules/policy-manual/wireless_teleact), accessed 4 April 2019.

<sup>29</sup> ‘The UK Communications Infrastructure Report: Ofcom’s proposed approach to its new reporting duty’ (2010), [\[https://webarchive.nationalarchives.gov.uk/tna\\_la\\_nhs/20100913121416/http://stakeholders.ofcom.org.uk/binaries/consultations/uk-comms-infrastructure/summary/uk-comms-infrastructure.pdf\]](https://webarchive.nationalarchives.gov.uk/tna_la_nhs/20100913121416/http://stakeholders.ofcom.org.uk/binaries/consultations/uk-comms-infrastructure/summary/uk-comms-infrastructure.pdf), accessed 4 April 2019.

	<ul style="list-style-type: none"> <li>• Ofcom gets more flexibility to implement changes to its internal governance, subject to the Secretary of State’s approval;</li> <li>• Ofcom no longer required to promote development opportunities for training and equality of opportunity; and</li> <li>• Ofcom given powers to charge fees for satellite filings made to the International Telecommunications Union (ITU).</li> </ul>
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## EUROPEAN LEGISLATION

Ofcom currently observes the framework laid down by the EU Electronic Communications Framework, which in its original form was incorporated into the Communications Act 2003.<sup>30</sup> The Framework was updated in 2009 and subsequently transposed into UK law.

RELEVANT LEGISLATION	PROVISIONS
<b>Framework Directive (2002/21/EC)</b>	Sought to establish a harmonised framework for regulation of electronic communications networks and services, and defines Ofcom’s objectives in relation to this.
<b>Access Directive (2002/19/EC)</b>	Empowered regulators like Ofcom to impose access and interconnection obligations, and, under certain circumstances, to impose, as a last resort remedy, the functional separation of a vertically integrated operator.
<b>Authorisation Directive (2002/20/EC)</b>	Designed to facilitate cross-border market entry to stimulate competition in the EU market. It introduced a general authorisation system for all electronic communications networks or services, removing the need for individual licences to be delivered by national regulators.
<b>Universal Service Directive (2002/22/EC)</b>	Strengthened consumer protection by giving people the right to request an affordable telephone and internet service from a designated provider. The Directive also requires provision of phone directories and directory enquiries services, and the provision of phone boxes at Ofcom’s discretion.
<b>E-Privacy Directive (2002/58/EC)</b>	Mapped the provisions of the Data Protection Directive 1995 (now revised as GDPR) on to the electronic communications sector, addressing areas like consent, cookies, unsolicited marketing and security breaches.
The above amended by the <b>Better Regulation Directive (2009/140/EC)</b> and <b>Citizens’ Rights Directive (2009/136/EC)</b> .	

**Regulation 1211/2009** also established **BEREC**, the Body of European Regulators for Electronic Communications, which comprises regulators from each of the EU Member States as well as non-EU observers. BEREC Recommendations and Guidelines should be taken into account by national regulators such as Ofcom in their decision-making process.

<sup>30</sup> ‘Telecommunications Sector Report’ (2018), [<https://www.parliament.uk/documents/commons-committees/Exiting-the-European-Union/17-19/Sectoral%20Analyses/37-Telecommunications-Report.pdf> ], accessed 4 April 2019, p. 12.

## OFWAT

The Water Services Regulatory Authority (“Ofwat”, before 2006 the Office of Water Services) was established as a **non-ministerial government department**<sup>31</sup> by the **Water Act 1989** which privatised the 10 then-extant public water authorities.

A summary of its history is available [here](#).

### NATIONAL LEGISLATION

<b>Water Industry Act 1991</b>	<ul style="list-style-type: none"> <li>• set out the main powers and duties of the water and sewerage companies (replacing the Water Act 1989)</li> <li>• defined the powers and duties of the Director General of Water Services (Ofwat since April 2006).</li> <li>• <b>Ofwat’s duties</b> are specified in <b>sections 2 and 3</b>, whereby it must carry out its work so as to: <ul style="list-style-type: none"> <li>• protect the interests of consumers, wherever appropriate by promoting effective competition;</li> <li>• make sure water companies finance and properly carry out their statutory functions;</li> <li>• make sure water supply licensees and sewerage licensees properly carry out their licensed activities and statutory functions;</li> <li>• secure the long-term resilience of water companies’ water supply and wastewater systems and the steps taken to enable this.</li> </ul> </li> </ul>
<b>Water Resources Act 1991</b>	<ul style="list-style-type: none"> <li>• set out the functions of the National Rivers Authority (now the Environment Agency)</li> <li>• introduced water quality classifications and objectives for the first time</li> </ul>
<i>modified by</i>	
RELEVANT LEGISLATION	POWERS
<b>Competition and Service (Utilities) Act 1992</b>	increased Ofwat’s powers to determine disputes and increased the limited opportunities for competition in the industry.
<b>Environment Act 1995</b>	led to restructuring of environmental regulation and placed a duty on the companies to promote the efficient use of water by customers. It created a new body, the Environment Agency, which took over the functions of the National Rivers Authority, Her Majesty’s Inspectorate of Pollution, the waste regulation

<sup>31</sup> ‘Non-ministerial departments’, [<https://www.gov.uk/government/organisations>], accessed 3 April 2019. ‘Memorandum of Understanding between the Competition and Markets Authority and the Water Services Regulation Authority’, [[https://www.ofwat.gov.uk/wp-content/uploads/2014/06/prs\\_mou\\_cma.pdf](https://www.ofwat.gov.uk/wp-content/uploads/2014/06/prs_mou_cma.pdf)], accessed 4 April 2019, p. 6.

	functions of local authorities and certain elements of the Department of the Environment. Natural Resources Wales now exercises the functions of the Environment Agency in Wales.
<b>Competition Act 1998</b> as amended by the <b>ERRA 2013</b>	prohibits any agreements between businesses that prevent, restrict or distort competition. It also prohibits any abuse of a dominant market position.  Ofwat shares enforcement powers in relation to the water and sewerage sectors with the CMA, which was set up in 2013. The ERRA sets out Ofwat’s powers and duties relative to the CMA in their concerted aim of achieving more competitive outcomes for consumers.
<b>Water Industry Act 1999</b>	amended the Water Industry Act 1991 (see section 39 of the 1999 Act) by: <ul style="list-style-type: none"> <li>• removing a company’s right to disconnect domestic customers for non-payment of bills;</li> <li>• limiting the circumstances in which companies can start charging domestic customers on a metered basis;</li> <li>• securing that companies could continue to charge customers on the basis of rateable value.</li> </ul>
<b>Water Act 2003</b>	amended the framework for abstraction licensing, made changes to the corporate structure of economic regulation, and extended the scope for competition in the industry to large users.
<b>Enterprise Act 2002</b>	amended the Water Industry Act 1991 to update the regime for the compulsory reference of certain mergers between water companies to the Competition Commission (now the CMA).
<b>Flood and Water Management Act 2010</b>	encouraged the use of sustainable urban drainage systems (SUDs), amended the Water Industry Act to modernise the list of activities that can be restricted by water companies in a drought, and made it easier for water companies to offer lower tariffs to certain groups.
<b><u>Water Act 2014</u></b>	<b>set out a new framework governing the regulation of water and sewerage charges.</b>  enables greater competition for non-household customers (expected to be limited to customers of English water companies) and gives Ofwat new powers to make rules about charges and charges schemes, as well as making provisions for flood insurance and drainage boards.
<b>Consumer Rights Act 2015</b>	gives Ofwat the power, concurrently with the CMA, to approve a redress scheme in relation to an infringement of the Competition Act 1998. <sup>32</sup>
<b><u>STATUTORY INSTRUMENTS</u></b> (secondary legislation) amending or in addition to the above.	

<sup>32</sup> ‘Guidance on Ofwat’s approach to competition law in the water and wastewater sector in England and Wales: a consultation’ (November 2016) [[https://www.ofwat.gov.uk/wp-content/uploads/2016/11/prs\\_concompguidance20161121.pdf](https://www.ofwat.gov.uk/wp-content/uploads/2016/11/prs_concompguidance20161121.pdf)], accessed 4 April 2019, p. 53.

## EUROPEAN LEGISLATION

Article 35 of EU Regulation 1/2003 designated Ofwat as a national competition authority. Directives for the water and sewerage sectors with particular relevance to Ofwat are as follows:

RELEVANT LEGISLATION	POWERS
<b>Water Framework Directive 2000/60/EC</b>	<ul style="list-style-type: none"> <li>• single system of water management, based around a natural river basin (irrespective of administrative boundaries)</li> <li>• sets objectives and deadlines for improving water quality</li> <li>• looks overall at the ecology of the water and its chemical characteristics</li> </ul>
<b>Urban Wastewater Treatment Directive 91/271/EEC</b>	to protect the water environment from being damaged by urban waste water and certain industrial discharges.
<b>Marine Strategy Framework Directive</b>	<ul style="list-style-type: none"> <li>• establishes marine regions on the basis of geographical and environmental criteria.</li> <li>• member states must develop strategies to protect their marine waters, working with adjacent EU and non-EU states</li> </ul>
<b>Floods Directive 2007/60/EC</b>	member states must carry out flood risk assessments, create maps of flood risk and develop flood risk management plans.
<b>Drinking Water Directive (revised) 98/83/EC</b>	<ul style="list-style-type: none"> <li>• sets quality standards for drinking water</li> <li>• requires drinking water quality to be monitored and reported</li> </ul>
<b>Bathing Water Directive 2006/7/EC</b>	keeps coastal and inland bathing waters free from pollution, to protect public health and the environment
<b>Sewage Sludge Directive</b>	<ul style="list-style-type: none"> <li>• encourages the use of sewage sludge in agriculture</li> <li>• regulates the use of sludge so as to prevent harm to soil, flora and fauna</li> </ul>
<b>Groundwater Directive 2006/118/EC</b>	complements the Water Framework Directive by establishing a regime which sets groundwater quality standards and introduces measures to prevent or limit the level of pollutants being put into groundwater.

## OFGEM

The Office of Gas and Electricity Markets (“Ofgem”) was established as a **non-ministerial government department**<sup>33</sup> under the **Utilities Act 2000**, amalgamating the old Office of Electricity Regulation (Offer) and Office of Gas Regulation (Ofgas).

### NATIONAL LEGISLATION

Ofgem is governed by the Gas and Electricity Markets Authority (GEMA). Ofgem is GEMA’s executive branch. The Authority determines strategy, sets policy priorities and makes decisions on regulatory matters like price controls and enforcement. The Authority’s powers are provided for under the following:<sup>34</sup>

RELEVANT LEGISLATION	POWERS
<p><b>Gas Act 1986</b><sup>35</sup></p> <p><i>Ofgem’s duties in respect of gas are set out under <u>section 4AA</u>.</i></p>	<p>GEMA’s principal duties under these Acts are to:</p> <ul style="list-style-type: none"> <li>protect the interests of existing and future consumers of electricity and gas – that is to say, by promoting decarbonisation, security of supply, European harmonisation;</li> <li>promote effective competition where possible.</li> </ul> <p>These duties are discharged by reviewing and monitoring:</p> <ul style="list-style-type: none"> <li>generation, transmission and supply of electricity, including combined heat and power (CHP), microgeneration and small-scale low carbon generation;</li> <li>transportation and supply or shipping of gas, or participation in a gas interconnector, or ancillary activities (gas storage, metering, pre-payment activities);</li> </ul>
<p><b>Electricity Act 1989</b></p> <p><i>Ofgem’s duties in respect of electricity are set out under <u>section 3A</u>.</i></p>	<ul style="list-style-type: none"> <li>vertically integrated distribution network operators;</li> <li>transmission system operators’ (TSOs) investment plans;</li> <li>network security and physical safeguard measures;</li> <li>market transparency, market opening and competition and restrictive contractual practices;</li> <li>TSO and distribution network operator connections and repairs;</li> </ul>

<sup>33</sup> ‘Non-ministerial departments’, [<https://www.gov.uk/government/organisations>], accessed 3 April 2019.

<sup>34</sup> ‘Ofgem: roles, powers and duties – Key legislation’, Practical Law UK Practice Note w-002-4955, accessed 4 April 2019.

‘United Kingdom’, *The Energy Regulation and Markets Review* (7<sup>th</sup> ed., 2018) [<https://thelawreviews.co.uk/edition/the-energy-regulation-and-markets-review-edition-7/1171275/united-kingdom>], accessed 4 April 2019.

<sup>35</sup> ‘Ofgem Review – Final Report’ (July 2011) [[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/48134/21-51-ofgem-review-final-report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/48134/21-51-ofgem-review-final-report.pdf)], accessed 4 April 2019, pp.19-21.

	<ul style="list-style-type: none"> <li>• cross-border electricity exchanges and technical co-operation with third country electricity TSOs;</li> <li>• certification measures for electricity independent system operators (ISOs);</li> <li>• electricity generation capacity and smart metering;</li> <li>• gas storage access and access to the gas transmission network.</li> </ul>
<b>Utilities Act 2000</b>	<ul style="list-style-type: none"> <li>• established an overarching principal objective for energy regulation</li> <li>• defined the purpose of Ofgem’s activities as protecting the interests of existing and future consumers, wherever appropriate by promoting competition</li> </ul>
<b>Competition Act 1998</b>  <b>Enterprise Act 2002</b>  both as amended by the <b>ERRA 2013</b>	concurrent powers with the CMA to investigate suspected anti-competitive activity in respect of the GB gas and electricity sectors and take action for breaches of legislation.
<b>Energy Acts</b> of 2004, 2008, 2010, 2011 and 2013  amending and in addition to the above	<ul style="list-style-type: none"> <li>• The 2010 Act amended the principal objective in the Utilities Act 2000 to clarify that the interests of consumers should be taken as a whole, including their interests in the reduction of greenhouse gas emissions and ensuring security of supply.</li> <li>• The 2013 Act implemented some electricity market reform and an initiative to mobilise £110 billion of capital investment to ensure reliable and diverse low-carbon electricity supply ahead of 2020.</li> </ul>
<b>STATUTORY INSTRUMENTS</b> (secondary legislation) amending or in addition to the above.	

## EUROPEAN LEGISLATION

**Regulation 713/2008** created the EU-wide Agency for the Co-operation of Energy Regulators (**ACER**), of which GEMA is a part and with whose decisions it should comply.<sup>36</sup> In accordance with the **Third Energy Package (IME3)**, GEMA has (for now) an additional duty to promote the internal energy market and to remove restrictions to trade between EU member states. This involves implementing these IME3 measures:

RELEVANT LEGISLATION
<b>Gas Directive 2009</b>
<b>Electricity Directive 2009</b>
<b>Electricity Regulation 2009</b>

<sup>36</sup> ‘Ofgem: roles, powers and duties – Binding decisions of ACER and the European Commission’, Practical Law UK Practice Note w-002-4955, accessed 4 April 2019.

Gas Regulation 2009

ACER (Agency for the Cooperation of Energy Regulators) Regulation 2009