

MINUTES OF THE JOINT REGULATORS' MEETING

26 MARCH 2004

Present: Mr John Vickers (OFT) Chairman
Dr Harry Bush (CAA)
Mr Nigel Stapleton (Postcomm)
Mr Chris Bolt (PPP Arbiter)
Mr Philip Fletcher (Ofwat)
Mr Alistair Buchanan (Ofgem)
Mr Tim Martin (ORR)

In attendance: Mr Steve Lisseter (Secretary)

Apologies: Mr Steven Carter (Ofcom)
Mr Douglas Mcildoon (Ofreg)
Mr Tom Winsor (ORR)

I. Presentation from ICEAW

1. The Chairman and Ofgem welcomed the team from ICEAW to give a presentation on International Accounting Standards. Ofgem said that they had heard a previous presentation from ICEAW on this topic and had felt that it would be helpful for other regulators to hear what they had to say in a year of regulatory reviews.
2. Eric Anstee introduced his colleagues Robert Hodgkinson and Hazel Powling. Between them, they gave a presentation as per the attached slides. The Chairman invited questions and discussion beginning with an insight into the most important conclusion for regulators. Ofgem said they considered the three greatest impacts on regulators to be as follows:
 - Equity/debt – the proposals will raise the apparent debt levels of regulated companies;
 - The proposals would create differences according to whether companies had US or European parents. This may make regulation of International groups more complicated than at present;
 - IFRS will change the valuation of existing assets by virtue of removing renewals accounting. This will cause complications during the transition phase between accounting regimes.
3. ORR and others noted that the effect of the new accounting standards on financial ratios could be quite significant if they affected the financial ratios relied on by the ratings agencies. OFT noted the standards could also affect corporate planning decisions such as hedging policies and lease or purchase of assets. Ofgem said it proposed to review its regulatory accounting guidelines as did ORR. Five-year projections might need to be re-presented on IFRS equivalents. Ofwat noted the ICAEW's reference to the publication of a paper from the Accounting Standards Board the previous day which it had not digested. There were clear implications for Ofwat which could end

up in a nonsensical territory if renewals accounting ceased to be an option. It was agreed that regulators should pursue the matter further outside the JRG, perhaps through a working group at operational level. In the meantime, Mr Anstee indicated that any specific enquiries should be directed to Hazel Powling (Tel: 020 7920 8676) email: hazel.powling@icaew.co.uk

ACTION: ALL INTERESTED MEMBERS

II. Minutes of previous meeting

4. The minutes of the November meeting were accepted subject to two minor changes from Ofwat.

ACTION: Secretary to amend and re-circulate the minutes.

III. Matters arising

5. There were no matters arising.

IV Recent developments in UK merger law: Paper JRG(04)(01)

6. OFT introduced the paper. There were a number of learning points from the CAT appeal and the judgment by the Court of Appeal. The paper also covered working with sectoral regulators and some connected issues, but these were less relevant to the meeting in the absence of Ofcom. The appeal process had been quite informative about the CAT's approach. The appeal had also illuminated the nature of a judicial review process as distinct to the full appeals that are possible under the Competition Act 1998.
7. The appeal had concerned a merger involving healthcare software companies, where a disaffected third party had appealed against a clearance decision. OFT had always consider that type of appeal to be the greatest risk on a phase one merger decision. What had taken everyone by surprise that was that on the evening before the hearing, the CAT had produced fundamental points relating to legal opinion that had not been raised by the appellant party and which appeared to change the interpretation of reference test in the Enterprise Act 2002. The CAT had also asserted a role beyond normal judicial review in its appeal process. The OFT felt it essential to appeal against the CAT decision in order to clarify these important points of principle.
8. OFT noted that it had taken longer for the CAT to give permission to grant leave to appeal than the original decision itself on the appeal. The Court of Appeal had been impressive in their hearing of the case. What had happened in Parliament during the passage of the Enterprise Bill was largely regard as inadmissible in evidential terms. Technically, the OFT lost the appeal, but won on two key points of law. The Court of Appeal effectively lowered the bar on making merger references but clarified that the CAT should not depart from normal judicial review principles. The judgment itself was very interesting on the adequacy of reasoning required in such case. OFT concluded that it was clearly necessary to give more reasoning in case decisions at the present time than it had been a few years ago.

9. Members discussed the extent to which the judgment had implications for the quality of reasoning or depth of evidence. OFT considered that the judgment by Cornforth did not require publication of the evidence itself provided the reasoning was fully consistent with it. Such evidence might need to be disclosed to the Court of Appeal however, if a case should end up before it.
10. ORR said that they had been judicially reviewed last December and had won. A party had effectively used JR in order to appeal against a decision of the Regulator. ORR had approached that case fundamentally on the issues of due process or irrationality grounds but noted the Court of Appeal judgment indicated the goalposts may be shifting. The PPP Arbiter noted the attention given to processes and sharing of information. His own intent was to share information fully wherever possible in order to reduce such risks. OFT noted that sharing information was a big issue for the CAT. There was quite a dilemma in the mergers context due to the formal restrictions on disclosure of information under part 9 of the Enterprise Act.
11. Members discussed the implication of the Court of Appeal judgment that the attempt to clarify the meaning of the words in statute in the guidelines (which the OFT was obliged to publish!) had caused difficulties. OFT said they would have to rein in their desire to be helpful. OFT's guidance had sought to anchor itself to the clear statements that had been made during Parliamentary debate of the Enterprise Bill. But the Court of Appeal was not happy with such secondary interpretation. Ironically, if there had been Ministerial statements outside of Parliament they would have been admissible in evidence. OFT said that they had sought to argue from perversity that certain Ministerial statements ought to be allowed, as the contrary would lead to a nonsense. The judges had loved this kind of disputation. However, they had found the Government White Papers more significant than Hansard. ORR noted the importance of due diligence procedures and audit trails.
12. Members then discussed the competition between the CC and CAT as to which body would take appeals in the future. OFT noted that provision had been made in the Enterprise Act for the High Court to refer competition questions to the CAT and also that CAT had also just received their first claim for private damages under the Act so were not short of things to do. Ofwat said they were in touch with Peter Freeman and wondered whether it might be appropriate to invite him to a future meeting of the JRG to talk about process and common issues arising from regulators' interactions with the CC. Any such discussion would clearly need to exclude mention of any current cases. OFT agreed this would be a delicate issue given the CC's independence and its role both as second phase investigator and as an appeal body against licensing decisions. That said, OFT thought it would be a good idea to have a presentation from CC. Mr Vickers was also meeting Peter Freeman in the near future and would sound him out. It might be appropriate to consider the old MMC user committee as a model for the kind of discussion that would benefit members. **ACTION CHAIRMAN**
13. Members discussed whether there would be scope for a further structured discussion surrounding the issues that the judicial review cases had raised, including issues relating to processes, information exchange, and development of best practices. There might be lessons learnt and implications for case management and audit trails. OFT noted that certain groups met on a regular basis such as regulatory lawyers and economists. OFT also noted that the Concurrency Working Party (CWP) shares

information on procedural aspects, although membership was not as wide as JRG itself. The PPP Arbiter wondered if there was scope for a half-day event with presentations on recent cases for Senior Directors and those taking ultimate responsibility for case decisions. ORR suggested that the economists in regulation and competition working group might wish to look at this issue at a forthcoming one day conference. The Chairman concluded that all members should reflect on the areas that they might share to inform in thinking in these areas. OFT would then make some proposals on how this might be taken forward. **ACTION: MEMBERS TO CONTRIBUTE VIEWS TO THE SECRETARY; OFT WILL THEN MAKE PROPOSALS.**

14. OFT noted that public interest issues in the new merger regime might arise in the near future if there was scrutiny of a bid for the Daily Telegraph. This topic might be revisited in the light of experience in due course.

V. Relations with Government Departments

15. Ofwat introduced the item. There was a constant struggle to get Whitehall to appreciate that regulators are independent. The discussion was prompted by an MOU which DTI had proposed for signature by regulators. While the document itself was not particularly terrible, the tone appeared to be a little patronising in places.
16. Members agreed that there was a tension between the independence of the regulators and the legitimate interests of Government. OFT said they had never had any problems of political interference on case work. Tension arose in consulting DTI about published annual plans, where the DTI sought to harmonise OFT's words with its own published objectives. But they would normally give way when reminded about OFT's independent status. There was a similar tension with HMT in the debate with them over SDAs where OFT reminded them that agreement of the SDAs was a matter for the OFT board. On the whole, OFT tried to avoid significant contact with senior civil servants in Government Departments but there were some successes noted in recent cases. For example the DCMS had been able to recognise the independence of the competition authorities in the context of the EC's investigations into Premier League Football Agreements. Likewise there was a tension with the press at times - in OFT's report on Taxi regulation, the press had sometimes failed to understand that OFT's recommendations were not binding on Government.
17. Ofwat noted that Ministerial or political interventions, particularly in sensitive areas such as price reviews, could scare the City financiers and thereby affect the cost of capital with negative repercussions for the industry. Ofgem noted that the opposition amendments to the Energy Bill had introduced the possibility that the Government might have joint responsibility for security of energy suppliers. Government appeared not to wish to have this responsibility, preferring the independent regulators to have it!
18. ORR described the numerous problems experienced in the context of the rail industry – summarised in Tom Winsor's Robert Reid lecture.
19. Ofwat noted the forthcoming House of Lords report on Accountability of the Regulators. Publication was expected after Easter and regulators might receive advance copies under embargo. Ofwat proposed that members

should swap notes among their press offices and consider the scope for a common statement at the time of publication. **ACTION ALL MEMBERS**

VI. Any Other Business

20. The **CAA** said that they had received legal advice, shared with CWP, to the effect that NATS was not likely to be regarded as an undertaking for the purpose of the CA98. The argument was that this body was performing the functions of a public authority and therefore outside the scope of the legal definition of an undertaking. In particular, Air Traffic Control was performing a safety function.
21. OFT noted that there was a range of case-law on the definition on undertaking and the pathway between the different elements of case law was becoming increasingly narrow. The CAA noted that if they did not have the power to investigate NATS under the CA98 that would call into question whether they had concurrent powers at all under that legislation. Certainly a part of the operation of NATS was neither regulated nor apparently subject to CA98. The CAA will circulate the legal advice it has received. It will consider in parallel whether it has the ability to take action under the market investigation reference powers of the Enterprise Act. **ACTION CAA.**
22. **Ofwat** raised the issue of an annual report of the JRG, noting that this had not been produced last year. The question for consideration was whether the JRG should overlook last year or report on 2 years in this year's report. It was agreed to wait and see the outcome of the House of Lords report and make a response in the appropriate terms.
23. There was some discussion about a recent report on the efficiency of regulators. The authors had been selective in the data that they examined and there was a suggestion that they might have been disposed towards an aggressive agenda from the outset. Members agreed that there was no need to produce a formal rebuttal of the report concerned.

Lyons Review

24. Members discussed their views on the Lyons Review. Ofwat said that being based in Birmingham they had lower costs and higher retention rates. They accepted the suggestion that a London base was not entirely necessary for their own activity but appreciated that other regulators might have harder tasks. The PPP Arbiter noted that rail safety work might be shifted at some point in the future. If so, Derby might be a location worth consideration. Ofgem said they had an office in Glasgow and were happy to expand this over time because the overall costs of that office were 60% cheaper than London. Conversely the relocation of their main office to London from the Midlands had resulted in a loss of nearly 90% of OFFER staff. They had only been able to provide continuity of service by virtue of merging with Ofgas, whose staff were already working in London. Relocation out of London could therefore cost a heavy price in loss of current talent and knowledge. Ofwat noted that splitting staff between locations to save costs was probably too disruptive for a small organisation.

Gershon Review

25. OFT said its board felt that there was scope for efficiency gains from collaboration in back-office functions. OFT was talking to others about scale and scope in areas such as IT support, finance, property management etc. Ofgem considered that benefits could arise from working together: they believed they had strengths in some areas, but scope for improvement in others. ORR said they were looking at their IT strategy to see if this could be contracted out. The PPP Arbiter said that with an office of only 7 people he was reliant on others for services. However, he would welcome a shared resource among regulators in order to bolster his independence from Government. Ofwat noted the Atkins report for HMT. Ofwat would be interested in collaboration with other regulators, but being geographically distinct it might be difficult to participate to any great degree. OFT noted finally that there was scope for collaboration on wider issues that occurred occasionally such as contract law or employment law. The CC, OFT and Ofgem were already in close discussion of these issues but others were very welcome to join in. The OFT contact for such matters was David Fisher Tel 020 7211 8762 David.Fisher@oft.gsi.gov.uk. **ACTION: INTERESTED MEMBERS TO CONTACT DAVID FISHER DIRECT**
26. Members discussed possible agenda items for the 25 June meeting:
- Possible CC presentation on procedures.
 - Judicial Review revisited including possible presentations or perhaps a paper on Judicial review in general (see action at para 13)
 - Arising from BRTF report, a discussion of circumstances in which regulators should do RIA's and the process for doing so.
 - House of Lords report.
27. The intention would be to cover up to two of the first three topics, and the fourth to the extent there was a perceived need.

Steve Lisseter,
Secretary

29 March 2004