

An improved standard of review for regulatory appeals

- A1. This Annex has been prepared for Water UK in support of its response to the Government's consultation on 'Swifter and Simpler Competition Redress, Regulatory Appeals and Competition Enforcement'¹ (the 'Consultation'). It sets out, at a high level, the case for a clearer, harmonised standard of review to be applied in all regulatory appeals, and offers an illustrative example of how such a standard might be drafted.
- A2. The Consultation proposes carrying across into a harmonised regime the standard of review currently applied in telecoms appeals — a judicial review standard supplemented by consideration of whether the regulator's decision was materially wrong on the merits, an enhanced judicial review standard or "judicial review plus" (JR+).
- A3. Our starting point is a series of objectives which we consider should be uncontroversial: any future harmonised standard be drafted so that it:
 - a. sets out plainly what the appeal body is required to do;
 - b. is written in plain English, rather than relying on technical shorthand;
 - c. draws on the strongest features of the existing standards — including the energy standard, the discretion-based ground found in the civil aviation standard, and the proportionality requirement recently introduced in digital markets; and
 - d. gives proper effect to the Consultation's stated policy intent that the appeal body's role should extend beyond questions of law to include scrutiny of the economics underlying the decision under appeal.
- A4. The drafting set out in this Annex is offered as one illustration of how these principles could be given legislative effect. It is not put forward as a finished or definitive text, but as a starting point for further consultation and stakeholder input on the right standard for a harmonised regime.

The case for a clearer, harmonised standard of review

- A5. It is worth highlighting up-front that the JR+ standard used in telecoms is not a settled or well-understood concept. What it actually requires in practice is genuinely contested, including among specialists, and it does not provide a stable basis for a cross-sectoral standard.
- A6. The legal foundation for JR+ is uncertain; it does not itself appear in statute, but is instead derived by reading a "plus" element into the Communications Act 2003, a reading that is only available because of retained/assimilated EU law applying solely to the telecoms sector. Any harmonised standard, therefore, could not simply adopt "JR+" by reference - an entirely new statutory formulation would have to be drafted in any event.

¹ <https://www.gov.uk/government/consultations/smarter-regulation-regulating-for-growth>. Note that this report responds specifically to the proposals in Chapter 2 of the Consultation.

- A7. A clearly expressed statutory standard, by contrast, offers a more predictable and stable basis for decision-making — for the regulators applying the standard in the first instance, for the appeal body applying it on appeal, and for regulated entities and investors who need confidence in how decisions may be reviewed and, where necessary, corrected. This is particularly important for parties making long-term capital commitments on the strength of regulatory decisions.

What could a harmonised standard of review be based on?

- A8. Rather than being drafted in the abstract, the standard of review illustrated in this Annex is grounded in the standards already operating in other regulated sectors.
- A9. The energy sector's appeals standard in the Gas Act 1986 and the Electricity Act 1989 is a useful starting point. It has a relatively settled meaning and has recently been clarified judicially, in *Wales & West Utilities Ltd v Competition and Markets Authority* [2026] EWHC 99 (Admin).
- A10. Under the energy standard, an appeal is not a fresh run through the issues that were before Ofgem. Rather, the task of the Competition and Markets Authority (CMA) is confined to the specific errors an appellant alleges, and to asking whether, on one of the prescribed statutory grounds, Ofgem's decision was "wrong". Those grounds, set out in section 23D(4) of the Gas Act 1986 (mirrored in section 11E(4) of the Electricity Act 1989), can be summarised as:
- a. failure to have proper regard (s. 23D(4)(a)), or give appropriate weight (s. 23D(4)(b)), to Ofgem's statutory duties and principal objective;
 - b. error of fact (s. 23D(4)(c));
 - c. failure to achieve the stated effect (s. 23D(4)(d)); and
 - d. error of law (s. 23D(4)(e)).
- A11. In *Wales & West*, the Court held that the CMA had set the bar too high by requiring appellants to show a "clearly superior" alternative before it would intervene; a "materially better" alternative is sufficient.² In other words, Ofgem's decision can be found "wrong" wherever an alternative approach is materially better, once its advantages and disadvantages are weighed against Ofgem's own approach.
- A12. That judgment confirms the energy standard occupies a deliberate middle ground: more searching than judicial review, but stopping short of a full *de novo* hearing. On questions such as proper regard and appropriate weight, the appeal body must reach its own independent conclusion, rather than confine itself to a rationality check.
- A13. The energy standard is only one point of reference, and other sectors offer useful refinements. The aviation standard adopts the energy grounds of factual and legal error and offers fewer

² At para 156

grounds overall but adds a further, distinct ground - error in the exercise of a discretion³. The standard governing certain regulatory powers in digital markets, meanwhile, builds in an express proportionality requirement⁴. Both refinements, in our view, would merit inclusion in a harmonised standard.

- A14. The standard formerly applied in telecoms is a further relevant precedent. Before the 2017 reforms, telecoms appeals were determined "on the merits". That standard drew on a substantial body of case law, remains in use for appeals against Secretary of State decisions in telecoms, and mirrors the standard applied in competition law appeals.

Minimum requirements for a harmonised standard

- A15. At its core, the appeal body's task should be to assess whether the regulator's decision contains a material error, guided by a statutory test that sets out both the intensity of scrutiny required and the circumstances in which the appeal body may go further and substitute its own decision. Save where a substituted decision is sought, an appellant should not have to show that a "better option" exists.
- A16. As explained above, setting the standard out clearly in legislation removes the need to rely on a body of case law whose boundaries are uncertain, and gives regulated entities, regulators, and the appeal body itself a more predictable basis to work from.
- A17. An example of how this might look in legislative drafting follows on the next page. As noted above, this is offered only as one possible illustration, not a finished text, and is intended as a starting point for further consultation and stakeholder input on the right standard for a harmonised regime.

³ Note that the standard in airport price control appeals does not capture the full scope of the energy grounds – e.g., it does not mirror grounds in respect of statutory duties or the effects stated by the authority.

⁴ See the Digital Markets, Competition and Consumers Act 2024, which introduced proportionality as a requirement for regulatory rules (see for example s.19(5) DMCCA). A Ministerial Statement on 14 November 2023 explained that "This will mean that eligible tech firms can challenge regulatory decisions on proportionality grounds through this process."

Section X – determination by the [Appeal Body] of the appeal

- 1) The Appeal Body must allow the appeal if and to the extent that it determines that there is a material error [the regulator “has got something materially wrong”] in the decision which is the subject of the appeal (“Decision”);
- 2) The Appeal Body must decide that there is a material error if (without limitation):
 - a. It is satisfied that the decision does not properly give effect to the Authority’s statutory duties or any guidance to which the Authority is required or entitled to have regard;
 - b. That the decision was based, wholly or partly, on an error of fact;
 - c. That the decision was wrong in law;
 - d. That the decision will not have the effect stated by the Authority;
 - e. That an error was made in the exercise of a discretion [or “that an error of judgement was made”]; and/or,
 - f. That the decision was disproportionate.
- 3) In making a determination under subsection (1), the Appeal Body must:
 - a. Make its own assessment of the errors alleged in the Notice of Appeal, in detail and on the evidence;
 - b. Ensure that the merits of the case are duly taken into account so that there is an effective appeal; and
 - c. Apply those statutory duties which were applicable to the Authority when it made the Decision.

Describes the task of the Appeal Body in plain language

a non-exhaustive list of reasons why the Appeal Body may decide there is a material error.

a. - d. are taken from the Energy Sector

e. is from civil aviation

f. is from digital markets

This combines aspects of (a) the Admin Court's decision in WWU; (b) the merits requirement of the telecoms standard, and (c) wording adopted from the energy standard