

# Fingleton insights

DDs: an appealing prospect?

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The upcoming publication of Ofwat's draft determinations (DDs) for water companies' business plans on 11 July, is generating a mixture of anticipation and trepidation in the sector.

Anticipation as Ofwat seems to be reluctantly recognising that bills need to increase to fund the higher levels of investment required by climate change, population growth and ageing water infrastructure. In a recent [interview](#), Ofwat's Director of Price Reviews, Chris Walters, acknowledged that the base cost allowances and cost of capital will be "more generous to investors than PR19" and that Ofwat will "err on the side of investability" when assessing plans. But this anticipation is tempered with a distinct sense of trepidation, with many water companies and investors fearing that the DDs may not go far enough.

As the water industry faces surging scrutiny from the public, many companies are struggling to deliver against their existing PR19 plans. When the DDs land, companies may find themselves grappling with a fundamental question: will appealing to the Competition and Markets Authority (CMA) improve their scope to deliver successfully on PR24, or will it simply add cost and distraction for limited benefit? Reaching the right decision means getting to grips with the appeals process and the factors that influence the chances of success.

### A shift in gear

The CMA appeals process is very different from the consultative, iterative approach adopted during the development and assessment of company business plans. The CMA's panel of independent decision makers is a diverse group of experts with limited water regulation expertise.

While the assessment remains grounded in economics, an appeal to the CMA follows a more legal structure with tight timelines that are challenging for both the appellant and the CMA. The CMA will primarily rely on the evidence and how it is presented: previous interactions between the company and regulator are less relevant to its decision-making.

### An independent view

Whilst the CMA is bound by the same duties as Ofwat, it has significant discretion on the lines of inquiry, interpretation of the evidence and conclusions. The CMA can redetermine the whole settlement, not just the areas of contention raised by the company, and may take a different view to the regulator or appellant on how to balance affordability, deliverability and financeability.

This time around, appeals will take place against a challenging backdrop. This includes slow [progress](#) in delivering on promised performance levels, high levels of public [dissatisfaction](#) and £4m in fines for pollution [offences](#) in 2022-23, as well as broader cost of living concerns. While the CMA prides itself on its independence, this context may still trigger a degree of scepticism and sympathy for a regulator trying to improve outcomes for customers.

We have three actionable takeaways for companies considering a CMA appeal:

#### 1. Agree a process to govern emotions

After an intense PR24 process, emotions might be running high and the board may not be aligned on next steps. Companies should identify the potential risks and opportunities of launching an appeal, and use a dispassionate framework to

facilitate clear-headed decisions. Understanding how the appeals process works in practice and being realistic about the potential risks and rewards will help ensure that companies make a robust go / no-go decision.

### 2. Choose your battles carefully

It is not a given that Ofwat's tough approach to allowances and the increased settlements awarded by the CMA in PR19 will be repeated. Each company has to be confident in the strength of its case.

While a company may disagree with multiple facets of Ofwat's settlement, focusing on areas with the strongest grounds for appeal will increase the chances of success. For example, if Ofwat has made a demonstrable error in reaching its decision, this is likely to carry more weight than if Ofwat has simply reached a judgement with which the company disagrees. Proving a case on appeal is not just about presenting a robust evidence base in written submissions. A clear narrative, demonstrably consistent with the approach and history of the company, can help improve understanding of the company's challenges and concerns. Advancing this narrative through the key interactions with the Panel members will also help build credibility and trust.

### 3. Respond to the draft determination with an appeal in mind

Appeals are time consuming and onerous. They rightly should be seen as a last resort. But companies should consider appealing Ofwat's decision if the final determination impedes their ability to deliver on their commitments to customers. Uniting the board on the key points of difference with Ofwat to enable a clear and

credible response to the DDs will both help influence the final determination - potentially avoiding having to appeal to the CMA - and increase companies' chances of success if an appeal is necessary.

#### Profile



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Eleanor helps businesses to strategically navigate and mitigate their regulatory risks by embedding regulatory thinking into their culture and governance procedures. She leads our utilities practice and has extensive experience advising clients on price review strategy (including CMA appeals). She also provides regulatory due diligence for transactions and helps industry shape future regulatory frameworks. Formerly at RWE npower, HM Treasury, the Office of Fair Trading and Oxera.