

# SLAUGHTER AND MAY

## Slaughter and May Podcast

### COVID-19: Energy, Water and Communications Sectors in Extraordinary Times

<b>Jessica Staples</b>	Hi. I'm Jessica Staples.
<b>Sarah Jackson</b>	I'm Sarah Jackson.
<b>Poppy Smith</b>	I'm Poppy Smith.
<b>Rosalind Kenward</b>	And I'm Rosalind Kenward. And we're from the Competition and Regulatory group at Slaughter and May.
<b>Jessica Staples</b>	Every time we turn on the radio or TV at the moment, all we hear about is COVID-19. But we don't hear too much about how individual sectors are responding to the chaos caused by the virus. So over the next 15 minutes or so, what we want to discuss with you is the steps that are being taken in the regulated UK energy, water and communications sectors to respond to the coronavirus. Sarah, Poppy and I will be discussing steps being taken to help consumers and utility suppliers and Rosalind is then going to share some thoughts about how the virus has affected regulatory priorities going forward. So Sarah let's start off with consumers, what steps are being taken in these sectors to protect them.
<b>Sarah Jackson</b>	Thanks Jessica, the Government and suppliers have been taking steps to protect consumers who may be struggling to pay their utility bills during the pandemic. Principles to support energy consumers have been agreed to by domestic energy supply companies and the Department for Business Energy and industrial strategy. Consumers with pre-payment meters who may not be able to add credit themselves, can now speak to their suppliers about the options that they have available. Consumers can also have their debt repayments or account repayments, reassessed, reduced or paused, and the disconnection of credit meters has been completely suspended. Other than in cases of theft, safety and vacant properties.
<b>Jessica Staples</b>	It's good to hear that the Government is being proactive about this, but are individual suppliers doing anything to help?
<b>Sarah Jackson</b>	Yes, individual energy suppliers are also extending a helping hand. Ovo Energy for example, has unveiled a hardship fund to assist consumers who are struggling to meet their financial obligations due to the pandemic. Challenger brand, Igloo Energy has also announced a price drop of 30% for its gas

	customers. The significant reduction in industrial demand has resulted in a lowering of wholesale gas prices, and this has allowed Igloo and other energy suppliers to pass on this cost saving to consumers. In addition to energy suppliers, many internet service and mobile providers like Vodafone, Virgin Media and Sky have made a number of commitments after discussions with the Digital Secretary and the UK's telecommunications regulator, Ofcom. All providers have agreed to work with consumers who are finding it difficult to pay their bills and will remove all data allowance caps on fixed broadband services.
<b>Jessica Staples</b>	You've been focussing quite a bit about what's been done to help individuals, but what about business customers? Are they also being protected?
<b>Sarah Jackson</b>	Yes, that's a good question Jessica. The UK water regulator, Ofwat, has made amendments to its consumer protection code of practice for non-household customers. Until the end of May, retailers cannot collect amounts owed by non-household customers, or request disconnections for the non-payment of charges. Late payment charges cannot currently be enforced.
<b>Jessica Staples</b>	So does that mean that these customers just don't have to pay their bills?
<b>Sarah Jackson</b>	No, unfortunately not. Non-household customers should not use this as an excuse to avoid paying their water bill. Ofwat has made it clear that business customers who are able to pay their water bills should do so. Once the prohibition set out by Ofwat have been lifted, retailers will be able to enforce their contractual rights to the payment as normal. So while it's clearly important and necessary that consumers, particularly vulnerable ones are protected during these times, that does potentially leave suppliers exposed. Jessica, is anything being done to protect them?
<b>Jessica Staples</b>	Across energy, water and communications we are starting to see supplier relief converging around two key issues. The enforcement of regulatory obligations and financial support. So I wanted to talk a little bit first about the enforcement of regulatory obligations, and the good news here is that regulators in energy water and communications have all signalled that they are willing to be pragmatic and flexible because they recognise the difficulties they are facing. But what exactly does this mean? So for energy suppliers, the UK regulators Ofgem has written open letters to network companies and retail suppliers, and in these letters Ofgem does give guidance on which works are high priority and which ones are lower priority and can be paused. For electricity or gas providers who are concerned about meeting the performance targets under the rear one incentive scheme because of Covid 19 there is also good news there. Ofgem has promised to provide relief about these penalties and other energy companies have also confirmed they are going to be taking a more pragmatic approach to compliance over the next few months. This includes the oil and gas authority and in Northern Ireland the utility regulator has indicated it will be keeping an eye on the impact of Covid 19 on suppliers and network companies.

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	We have also heard that the government is consulting on relaxing the capacity market rules.
<b>Sarah Jackson</b>	And what about in the water and communications sector?
<b>Jessica Staples</b>	I believe Ofcom has been quite active in recent months.
<b>Sarah Jackson</b>	So we have had similar messages from Ofwat and Ofcom. Both authorities have indicated that they will be a little more flexible and take the circumstances at the moment into account when enforcing. But you are right, Ofcom is still actively enforcing in broadcasting, although it is focusing its efforts on conduct that could harm audiences, so spreading misinformation about Covid-19 for example, and we have seen a few cases of this already. The ESTV was sanctioned recently after an interview where the speaker cast out on the motives behind the actual Coronavirus advice, and in this case the speaker actually went so far as to suggest that a cult was using Coronavirus to establish a global authoritarian state.
<b>Jessica Staples</b>	The other issue mentioned was financial support.
<b>Sarah Jackson</b>	Right if consumers aren't paying clearly this leaves suppliers short. We have heard concerns from many suppliers about their financial situation. In the energy sector government hasn't actually announced a loan scheme, although the electricity and gas trade body did approach the government and asked for this. There is however a point of suppliers instead from the direction of the loan package that is already available to all British businesses, and another option though which some suppliers are now calling for, is for government to review the retail price cap. So this cap includes a small proportion to cover bad debt and this cap could be increased.
<b>Jessica Staples</b>	That is an interesting solution but would that give suppliers relief now?
<b>Sarah Jackson</b>	No. That is the downside plus it could put an additional burden on consumers who may just end up paying more to cover the increased cap. And in water there are also measures being taken there. Retailers can now opt to defer wholesale arrangements which are expected to last until the end of July, and what this means is that wholesalers will continue to invoice retail suppliers for all of the charges that are due, but retail suppliers will only have to pay a portion of this and wholesalers will continue to be able to charge interest on these deferred payments.
<b>Jessica Staples</b>	That makes sense but surely this could lead to high levels of bad debt?

<b>Sarah Jackson</b>	It could but that is why Arthur Whites introduced a cap on water resale and exposure to bad debt, and they have also said they will be keeping an eye on levels of bad debt for retail suppliers. So I think the key takeaway is that these unusual times have required our regulators to be a little more flexible about the standards to which they usually hold suppliers accountable. But another area where they have had to re-examine their approach and rebalance is collaboration between competing suppliers. Poppy, can you tell us about the approach regulators are like to take to competitive collaboration in the next few months.
<b>Poppy Smith</b>	Yes certainly. So earlier on in the pandemic the CMA, that is the UK competition authority said it was conscious that businesses might be worried that competition law enforcement could hold back corporation that might be necessary to deal with the crisis, so things like making sure the products are still on the shelves and essential services can be delivered. Things like that. Even if they have a legitimate purpose collaborations between competitors can often raise serious competition issues. The most common being the need to exchange confidential information to actually make the collaboration work. Competition law of course prohibits collusion between competitors we know that. Things like price fixing and market sharing are obvious examples but when it comes to sharing information, the dividing line between anti-competitive information exchange and legitimate corporation can sometimes be a grey area.
<b>Sarah Jackson</b>	And the penalties for these types of infringement they can be quite substantial can't they?
<b>Poppy Smith</b>	Yes of course that is right. It goes without saying that breaching competition laws can have very serious consequences. Potential fines are up to 10% of annual turnover. There is a risk of being sued for damages, and in the UK there is also a risk of the company directors being disqualified. But UK and EU competition laws like lots of other jurisdictions around the world does exempt some agreements between competitors where the benefits to consumers outweigh the negative effects on competition. So at the end of March, the CMA said that it won't take action against coordination between competitors during the pandemic, provided that firstly it does not go further or last longer than what is strictly necessary to ensure security of supply or avoid shortages, and secondly provided that it is clearly in the public interest and for the benefit of consumers. It seems pretty clear to me that the corporation that is aimed at continued supplies of energy, water, telecoms and broadband would meet that test, and we are seeing the same reassuring messages at the European Commission as well.
<b>Sarah Jackson</b>	OK but what does this actually mean in practice? Surely this isn't a free pass by anti-competitive behaviour?
<b>Poppy Smith</b>	No definitively not. The CMA and the Commission have been very clear that they will not tolerate the pandemic being used as a cover for collusion that isn't necessary for the price to respond. The energy water and telecoms regulators have not formally responded to the CMA's guidance on capacity to

	collaboration, but we would expect them to take a similar pragmatic approach just as they have been in other areas.
	Sarah mentioned earlier that domestic energy suppliers in the UK work together with the government to agree how to support vulnerable customers, and Ofwat has been supportive of water companies cooperating to achieve legitimate objectives in other areas in non-Covid 19 context. A good example of that are its recent price control decisions in which it allowed nearly £500 million for collaboration between water companies to improve drought response.
<b>Sarah Jackson</b>	So given this guidance Poppy, what would your advice be to those businesses in regulated sectors that are looking to cross company cooperation to keep the lights on?
<b>Poppy Smith</b>	<p>Well first, getting together with competitors to agree best practices for a crisis response does seem low risk from a competition perspective, but if you are going further and planning cooperation initiatives they must be limited only what is strictly necessary. Second, if you are pooling resources into providing shared services, make sure that any charges for those services are reasonable and that excessive costs are not being passed on to customers. And then finally remember that relying on a government recommendation or support of the regulator doesn't mitigate the competition law risk but it doesn't take it away altogether. In cases of very service doubt, the CMA has set up a Covid-19 taskforce which may be willing to provide informal comfort on draft proposals. The government can even grant formal dispensation if there are exceptional policy reasons why the competition rules should not apply.</p> <p>It was those exceptional powers that the government relied in mid-March to temporarily relax the rules for supermarkets, so they could work together to keep food on the shelves and the shops open. As well as supermarkets it is also used them to allow cooperation between the NHS and private healthcare providers, and even between Isle of Wight ferry operators. If you are considering cooperative competitors, the first step should be of course to seek legal advice before exchanging any information or kicking off any corporation arrangements to avoid inadvertently breaching the law.</p>
<b>Jessica Staples</b>	Thanks Poppy, it seems really positive that regulators are being a bit more flexible in allowing vital cooperation but what about those projects that were in the pipeline before the lockdown started? Rosalind have all those been put on hold? Can you tell us a little about what regulators forward planning looks like at the moment?
<b>Rosalind Kenward</b>	Well Jess you know that many regulators are now reconsidering their future work plans, and what I think is at front of mind is making sure that energies are focussed on projects that will protect vulnerable consumers, and make sure there is security of supply in these uncertain times. So this means that things like planned price control reviews are going ahead but other items have been put on ice, and we could take an example like energy. So here last month Ofgem published some guidance of the impact Covid 19 has had on its near

	<p>term plans. Like I just said, as far as price controls are concerned its business as usual. Ofgem will still be publishing its new VO2 network price controls by the end of 2020 and that will apply from the 1<sup>st</sup> of April next year. That said, social distancing rules in the UK mean that there won't be any public hearings ahead of these determinations. Ofgem is also busy working on consultation of price controls for transmission, gas distribution and electricity distribution which we are expecting to see coming out in July. On the flip side though, lots of other initiatives are being postponed, one of which is the flagship smart meter roll out. On this, the regulators has given the suppliers the green light to deprioritise any non-essential installations, even though those supplies are currently obligated to take all reasonable steps to deliver those installations by the end of the year for their domestic and small business customers. You might also look at the oil and gas sector, where the oil and gas authority has postponed publishing its review of the industries compliance with regulatory obligations, but it does still expect to offer the 32nd offshore licencing rewards in the summer of this year as planned.</p>
<b>Jessica Staples</b>	<p>OK and are there other examples of regulators who are still pushing forward with their existing plans?</p>
<b>Rosalind Kenward</b>	<p>Yes, in water the headline is that it appears to be business as usual for Ofwat. The regulator has recognised the effects that Covid-19 might have on water companies but it has said that it will expect suppliers to submit their annual performance reports by the 15<sup>th</sup> July as well as their data submissions to feed into the next price review. It has invited suppliers to contact it to discuss a way forward if they think Covid 19 will get in the way of them being able to submit those documents on time.</p>
<b>Jessica Staples</b>	<p>Rosalind, the press has recently been reporting a lot on the 5G auctions in the UK. Are those still going ahead?</p>
<b>Rosalind Kenward</b>	<p>That does seem to be a hot topic, and it is true that at the end of April Ofcom issued a new white plan for 2020 and 2021 delaying the date of the upcoming 5G auction. This decision was apparently driven by a desire to ensure the personal safety of those involved in the auction, but also to safeguard the safety and resilience of the auction process itself. Importantly though the auction is still happening just on a slower timeline and it has now been confirmed that the earliest bidding can start in November this year, assuming there is no litigation of Ofcom's final auction decision. More broadly Ofcom is keeping things under review, and has promised to publish an updated white plan as for 2020 and 2021 in September, so a bit like all of us, it is waiting to see what the pandemic will hold and more detailed planning for projects on hold will come clear on that.</p>
<b>Jessica Staples</b>	<p>Thanks Rosalind. It will be very interesting to see what the next few months will bring. A few concluding thoughts as we wrap up. Suppliers have certainly had to adapt their business to ensure they can continue to deliver essential services and in particular deliver these to vulnerable consumers as Sarah has explained to us, but this means that Regulators have also had to be more pragmatic when</p>

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	<p>it comes to enforcement. This also applies to competitor collaboration. As Poppy has discussed, the European Commission and the CMA have indicated that collaboration may be acceptable, where it doesn't go further than what is needed to combat the virus. But despite all of this, as a provider of energy, water or communications, services at the moment it can be difficult to see what the path forward is. For example, what type of collaboration is likely to be acceptable and which regulatory regulations is it OK to put on ice? As Rosalind has explained, some priorities are on pause but others are going ahead. The important thing is that regulators have indicated they are willing to have frank discussions so this is going to be key to resolving questions like this.</p> <p>If you would like to know any more about the issues we have spoken about today or are considering having a conversation with a regulator about one of these topics, please feel free to reach out to any one of us or your usual Slaughter and May contact.</p>
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