

20 Years of Market Reviews: Experience and Lessons

- 2003 marks the 20th anniversary of regulators' *ex ante* market reviews
- SPC Network has worked on countless reviews since then and has learned four important lessons:
 - Get your response in before the consultation
 - Evidence matters
 - Language matters
 - Learn for experience

Twenty years ago this month, National Regulatory Authorities launched the first market reviews under the European Union's new regulatory framework. SPC Network was also launched in 2003 and worked for a group of UK based telcos on their joint responses to Oftel's market reviews. In this issue of Hexagon, we reflect on the lessons we have learned about responding to market reviews and how best to influence regulators.

How time flies! On Friday 17th March 2023 it will be 20 years since Oftel, as it was then, issued its first set of market reviews as required by what we then called the New Regulatory Framework, a set of five EU Directives now merged and expanded into the European Electronic Communications Code (EECC). SPC Network had just been established and was awarded a contract by a group of UK telcos to prepare their joint responses to 17 of the 18 market reviews - yes there were 18 markets susceptible to *ex ante* regulation back then.

Since 2003, we have worked on market reviews and other consultations across Europe and internationally, mostly preparing responses for challenger operators and new investors, but we have also drafted market reviews for a regulator and occasionally worked for a company with Significant Market Power.



Review of the fixed narrowband wholesale exchange line, call origination, conveyance and transit markets

A consultation document issued by the Director General of Telecommunications

17 March 2003

So, it seems like a good time to reflect on what we've have learned and drawing the most valuable lessons, which are applicable to all consultations a regulator or government undertakes, not just market reviews.

If you wait till the Consultation Document is released, it's too late

First and foremost, regulators have pretty well made up their mind by the time they issue a consultation document and it becomes very difficult to get them to change their mind. They may say that their findings are “provisional”, but they now have something to defend so need to be presented with very strong arguments and evidence to reverse their provisional findings. That’s a very high hurdle to cross. There have been few occasions when we’ve persuaded regulators to make significant changes between a market review consultation and their final decision.

Where we’ve had most success is working with clients between reviews to set out the evidence and the arguments for the findings in the next review. This allows you to get your view and supporting evidence across whilst the regulator is coming to its own opinion. The benefit is you don’t have to change a mind that is already made up.

Don't wait for a consultation document to be released. Get your messages to the regulator before they have a position to defend

It’s also very satisfying to read a review that you could have written yourself because the regulator has taken on board what you’ve said. So, when preparing a response to a market review, have more than half an eye on setting out the position for the next review. If you get any wins, it’s likely to be next time around. And keep working on the regulator between reviews.

Evidence Matters

Did you notice that we used the word “evidence” several times just now? Arguments are good, economic theory is good, but evidence is powerful. Showing the regulator that the market is changing, that competition is effective and/or that their proposed

regulations will damage your investment case or further protect the SMP operator’s position is much better.

We have seen many consultation responses that say “we believe...” or “in our view...” (and we may be guilty of writing this ourself), but when we were on the other side reviewing responses on behalf of a regulator we thought “all well and good, but where’s the evidence?”

Provide hard evidence. It's more persuasive than opinions or theory.

Regulators have, or should have, a lot of data themselves on market structure and shares. Respondents need to go beyond that and bring the regulator data, even confidential data, that they would not usually have. You can always redact confidential data from non-confidential responses.

Even before the first market review, a senior manager at the European Commission used the expression “new entrant whinge”. This has stuck with us.

Regulators don’t just want to *hear* how bad things are for competition, they want to be *shown* it. That means producing hard evidence.

Language Matters

Remember that, even now, your response will be read by a human not a machine, and human beings have emotions. They don’t want to be told that what they’ve written is rubbish (even if it is). Instead, they want any engagement to be constructive, even when you’re offering advice on how their findings and proposals could be improved.

Clients have often wanted us to get more aggressive in the language we use and we’ve had to politely decline to do so, pointing out that overly critical language will only make the regulator defensive and less willing to listen to

our arguments and analyse our data, so making us less likely to get the wins we want.

Regulators are human too. If your language is too aggressive, they will be less willing to listen to what you have to say.

This may sometimes mean being disingenuous, but remember, you’re trying to win an argument here and get the best for your company.

Learn from what you’ve done

One final lesson: use each response to any consultation as a learning opportunity. Usually, we’re all so busy that as soon as a document is written and submitted, we’re on to the next thing and we lose any lessons we may have learnt. So, when the process is over, take some time to sit down and ask yourselves “what did we do well?”, “did we win on any points?”, but

most of all ask “what could you do better next time?”

It’s been an interesting twenty years seeing how market reviews have developed. National markets have given way to geographic markets; the micro-management of prices has given way to anchor pricing; and of course, regulation of retail markets has disappeared altogether.

Despite all that, the lessons we’ve learnt still apply today and for all types of consultation.



SPC Network