### Articles

**The Future of the Railways: Sir Robert Reid Memorial Lecture 2004**  
Tom Winsor  

The UK Railway sector has been going through a turbulent period post privatisation, highlighted by a series of major railway accidents at Hatfield and Paddington and by the protracted evolution of a post BR world with the emergence of Network Rail and the Strategic Rail Authority. Tom Winsor in the 2004 Sir Robert Reid memorial lecture reviews these developments and the pointers they should for future developments.

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*Antitrust and Regulatory Group, Sherman and Sterling LLP*

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The Future of the Railways: Sir Robert Reid
Memorial Lecture 2004

Tom Winsor
Rail Regulator and International Rail Regulator

Sir Robert Reid
I should like to begin by paying tribute to the man in whose honour I am giving this lecture. Sir Robert Reid died on 17 December 1993, a few months after my association with the railway industry began. I did not know him, but in my 11 years in the railway industry – and particularly since 1999 as Rail Regulator – I have met many of the senior and talented railwaymen who worked with him, liked him, respected him and learned so much from him.

He was a railwayman of the old school. After war service as a tank commander in the battles of the Western desert and four years as a prisoner in Italy and Germany, he took his degree in 1947 and then began work as an assistant yardmaster with LNER in Edinburgh. For almost half of his 42 years’ service in the railways, he did relatively humdrum jobs throughout the system. But when he ascended the management peak, this enabled him to know who the pretenders and the fantasists were. As Chairman, he set about pruning and reshaping BR’s outdated and over-manned management structure. He negotiated with government and then exceeded tough targets for the railway’s performance – both operational and financial. And he knew well the truth – reiterated so necessarily years later by Lord Cullen – that safety and good performance are two sides of the same coin.

To Sir Robert, personal accountability and strong financial discipline were very important. And I will come back to accountability and financial discipline in this lecture.

Sir Robert understood and respected the relationship between government and the Board, and he was determined to put an end to the public discord between the two. To him, policy-making was for government and then exceeded tough targets for the railway’s performance – both operational and financial. And he knew well the truth – reiterated so necessarily years later by Lord Cullen – that safety and good performance are two sides of the same coin.

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The politicisation of the railways, the focus on the customer and the need for sound and competent stewardship are matters to which I shall return.

Realities of the modern railway
Railways are complex assets. Their operation is a complex business. Although they operate on the foundation of a national network which is, by its nature, a monopoly, their resemblance to other regulated industries diminishes sharply. They are not transporting electrons, gas or water molecules. They are moving people and goods, and that makes life considerably more complicated.

Our Victorian ancestors bequeathed to us a precious system of narrow land corridors in a country of scarce land and jealously-protected private property rights which crowd and press in on the network we have today. The intensity of the interactions of the assets and the interfaces of the operational components of the system – whether in separate or the same hands – adds to the richness and the difficulty of the mix. When the system is under the pressure of being full or nearly full, the need for optimal use of its available capacity, and resilience for when things go wrong, becomes very great. And if things go badly wrong, as they did with Railtrack at Hatfield, the consequences can be severe and long-lasting.

The railway industry is a marvellous way of transporting large numbers of people into major urban areas. Given the configuration of our modern British cities, it may be the only feasible means of doing this in the concentrations we now have, without tearing up colossal parts of the urban environment for the building of roads. And because of the railway’s ability safely and reliably to do this, and properly to meet the transport needs of other areas in less intensive or the same hands – adds to the richness and the difficulty of the mix. When the system is under the pressure of being full or nearly full, the need for optimal use of its available capacity, and resilience for when things go wrong, becomes very great. And if things go badly wrong, as they did with Railtrack at Hatfield, the consequences can be severe and long-lasting.

This is the railway of today. And it is a railway which, in the last 10 years, has gone through a period of considerable upheaval, turmoil and uncertainty. It has been through a highly complex restructuring and contentious privatisation, three major pieces of primary legislation, five serious accidents, the destructive stewardship of Railtrack, the disintegration of the integrity of the network after Hatfield, the financial collapse of the infrastructure provider, a remarkable and unconstitutional threat to independent

1 10 February 2004.
economic regulation, the restructuring of the network provider on an entirely unforeseeable basis, an explosion in costs, intense politicisation and sustained assaults by the artillery of the media.

One of the themes of this lecture is that the industry has probably had enough. What it now needs is stability, predictability, clarity of responsibility and accountability, sound incentives and an environment which is friendly to investment. It is bruised and battered, reorganised and restructured, sold off and (some say) brought back, pressed and criticised. But the professionalism and dedication of the people who work in the railway industry has not been suppressed, let alone wrung out of them. The contrary is true. They have hung on and intensified their efforts to provide a service of which they and we can be proud, and they deserve our support and our thanks for their work.

Role of government and of business

Transport is the business of government. And, in a private sector industry, it is just as much the concern of business. It is both their jobs. That must be recognised immediately.

It is the role of government to make decisions about what kind of transport we want for the benefit of the community – and that includes the wider community which benefits from transport links. It is the role of business to deliver transport services within that overall policy. Business will do this, provided it can have the confidence and certainty necessary to come in, and provide, quality transport services at a fair and affordable price.

Transport is, therefore, a truly public-private partnership. Getting the terms of that partnership clearly and properly established so as to meet the legitimate objectives and interests of both partners is essential. For, when the partnership is not placed on such a secure foundation, it will become unstable and the partners will eventually fall out. Serious harm to the public interest and commercial interests may well follow, as we have seen in this country after Hatfield.

So how do we establish a fair and sustainable partnership for the railways? From my former – and future – career as a commercial lawyer, I know that, to make the partnership work, you have to know, respect and as far as possible accommodate the essential objectives of both partners. It is no good the private sector complaining that governments are political. And it is equally pointless for government to complain that business wants to make a profit and avoid a loss. If the public sector and the private sector are going to get along, they have to acknowledge and accept the fundamental nature of the other partner in the relationship.

If the partnership is going to prosper and deliver the things which are wanted of it, neither partner can be allowed to behave in an uncontrolled, arbitrary or destructive way which will do serious harm to the interests of the other partner. There have to be some restraints, some ground rules, some fundamental precepts which must not be violated. And the way in which you establish those basic rules for living and getting along together is a compact or contract between the state and the private sector, sometimes policed by an independent institution which respects the terms of the contract and serves as a breakwater between the forces at work on either side to ensure stability. In the British railway industry, as far as infrastructure provision is concerned, we have the Rail Regulator to do that job.

Business wants to be able to make money. If the business in question is the monopoly provision of infrastructure services, left to its own devices it will tend to abuse that position by charging unreasonably high prices, unduly discriminating against users, unreasonably denying access to the system and providing a poor quality of service. This is unacceptable, and so the entity is licensed and must abide by conditions which hold in check the propensity to these excesses. The Regulator enforces the licence and may, on good cause, modify it. He also supervises the allocation of capacity of the infrastructure, ensuring fair treatment for users and efficient use of the system. He does this under the authority of Parliament – the Railways Act 1993 – according to clear and conspicuous public interest duties. His decisions can be challenged in the courts, and he depends for his legitimacy on the respect for his actions which the industry and the public are prepared to accord to them.

Governments want other things. They know that they cannot – or should not – run the operation in question. When government runs something, no-one really knows what it costs. This is because governments do not manage according to profit incentives; they manage to administrative budgets. They often operate on unreliable information and, not knowing what something ought to cost, will usually decide to pay what they want and accept what comes back for that money. So, having given up on the idea of running the railway, government needs to know that its objectives – politically accountable and politically determined – will be respected.

In the contract between the state and the private sector, if there is subsidy to be paid – as there almost always will be – there has to be clarity about what the state expects for that subsidy. The contract between the two must be one in which the private sector can have confidence. Will it be honoured in all political circumstances? Will it withstand every political shock? Will government not try inappropriately to circumvent it, interfere with it or otherwise undermine or destroy it? It comes down to the sanctity of contract between the state and the private sector. That contract must be well-designed so that both parties want to stay in the relationship and make it work. For that to happen, both parties must go into it with their eyes open and be good for the promises they make.

Governments work according to political cycles. Business does not want to, and proper and efficient transport planning and investment decisions find it extremely hard to, as John Armitt said, in the Robert Reid memorial lecture of 2003:

[In the railway industry in Britain,] there has been no consistency or continuity of political thought and
investment or business policy, which in turn [has] prevented either any long term planning or the completion of plans made in good faith.1

And so there is a need for long-term vision which outlives the political cycle. How can the system be insulated from this to the appropriate extent?

To put it another way:

- how do you give government the confidence that the public interest will be protected and promoted in transport decisions; but
- avoid an intensity of political intervention which will deter investment or drive its costs up; and
- allow long-term planning and consistency, so getting away from government’s stop-start policies on direction, structure or funding; and
- allow government not to get a disproportionate amount of blame when things go wrong?

Governments can so easily interfere to a damaging extent in the day-to-day affairs and operation of transport concerns, causing damage to confidence and raising the cost of finance. Yet when things are thought to be dysfunctional or perhaps where there is simply a serious problem which is causing political grief, governments often feel both so powerless and so afraid of the blame that they barge in, trying to impose their own solutions, sometimes ending up making the position much worse. In the case of Britain, I have in mind the interventions of October 2000 when government tried to supervise the recovery of the national network after Hatfield, then in April 2001 when Railtrack was publicly forced to appoint a public interest director in return for an acceleration of government funding, and then the collapse of Railtrack on the petition of the Secretary of State for Transport in October of that year. These sorts of intervention can have serious and unintended consequences.

But we must also recognise that politics and the railway are inseparable. They always have been. In the 19th century, public opinion and the frequency of railway accidents led to insistent pressure for legislative change, and the first major incursions by Parliament into the railway were the Railway Regulation Acts 1840, 1842 and 1844.

The railway mania of 1845 and the financial crisis which followed in 1847 were intense. Blame was laid at the doors of the railway companies and their greedy promoters – the true robber barons of the railway era – and at government for not regulating the position. In English Railways: Their Development and their Relation to the State, Cleveland-Stevens says:

‘It would appear a plausible theory to attribute the financial crisis of 1847 to the Government’s reluctance to interfere. One is tempted to find in the crash of that year a merciless judgment on the inconsistencies of Parliament in railway matters.’ 2

The railway journals of the 19th century expressed themselves in colourful and dramatic terms at the rise of the power of the railway companies: one legal journal, in an article entitled ‘Railway regulation’ in 1874, spoke of the railway as a ‘political Frankenstein ... conjured into existence by Parliament, but, once in being ... no longer amenable to control’. 3

RW Kostal in Law and English Railway Capitalism 1825–1875 says:

‘In the early 1840s, an era of boundless optimism in the future prosperity of their industry, railway capitalists steadfastly resisted direct regulation by the English state. In 1868, after forty years of ceaseless and demoralising engagement with private law and lawyers, it was noted that “the interference of the State is demanded chiefly in the interests of the railway companies themselves”. After decades of de facto regulation by lawyers and judges, railway capitalists were beginning to consider the virtues of a Prussian-style alliance between private corporations and the central state.’ 4

And through nationalisation and privatisation the debates raged. The Railways Act 1993 has the honour of being the second most-heavily amended piece of legislation ever to reach the statute book. In its passage, it had 1435 amendments, almost all of them government amendments. And the circumstances of its passing were ones of fiery controversy and high drama on the last night.

So, in relation to railways, governments have always cared, and they have always attracted blame, while of course being not averse to taking credit. In the partnership with the private sector, government therefore needs to be clear about what it expects from the bargain. And the private sector needs that to be clear too. The balance between the two partners needs to be fair and durable. At present and for the foreseeable future, that balance and that clarity of specification are provided by independent economic regulation. And if both partners engage conscientiously and competently with it, the system will work well.

It is sometimes objected that under our present system of regulation, the Regulator can do what he likes with government’s money, that there are no constraints and that, if he wished to, he could order the doubling of the size of the network and force government to pay for it. This is not true. It never was true. And it is important that people do not mislead themselves in this respect.

One of the Regulator’s most important tasks is the setting of the financial framework in which the infrastructure provider – Network Rail – will deliver infrastructure services for five years at a time. This requires him to assess what are the reasonable requirements of Network Rail’s customers and funders, its obligations under its access contracts and the commitments it is likely to make. The Regulator then sets access charges (or offsetting grants) accordingly. To make that judgment about reasonable requirements, the Regulator of course needs to know what they are.

3 Railway Regulation, Law, (1874) 75.
Franchised passenger train operators have access contracts, usually of five or seven years' duration; some are longer. Freight train operators have similar lengths of contract. Together these contracts provide for the extent and intensity of usage by train operators of the national network belonging to Network Rail. There are other open access operators, but not many. They too have contracts. And there are other funders who also put money into the railway and buy services. None of these commitments is perpetual. All must end some time, but there is an expectation that they will be replaced by something. The vast majority of these services are subsidised in one way or another.

In setting the network outputs which Network Rail is required to deliver in the next control period, the Regulator has to make a judgement as to what will be the pattern of services – the extent and intensity of use – of and on the network in that period and beyond. The most important factor which the Regulator has to take into account is the settled intention of the government and its agency – the Strategic Rail Authority – for the franchising and subsidising of services in the future. The Regulator needs to know what those services are likely to be. He can then translate that expected and projected service pattern into network outputs for Network Rail to deliver, apply the appropriate efficiency assumptions and set access charges accordingly.

In the access charges review which ended in October 2000, very little of this went entirely according to plan. The degree of engagement by the Strategic Rail Authority in that review was not strong, and I was compelled to conclude that, broadly, the existing pattern of services should be rolled forward, with some improvements in performance. I set access charges accordingly. At the same time, Railtrack's knowledge of its assets and its judgement of its needs remained very poor.

In the access charges review which ended in December 2003, although Network Rail's engagement in the process was of a much higher quality and was very open and constructive, the engagement from government – the SRA – was perhaps not as it should have been.

In the 2000 review, Railtrack had been allowed £16 billion over five years (an increase of 50 per cent on the first control period allowance). It was apparent from Railtrack's financial position was secure – it is committed to unlimited indemnities of the train operators in respect of the outcome of an access charges review and has a AAA credit rating as an emanation of central government – and it would and could meet the higher charges. If charges went up, the indemnities would be engaged and government would have to pay.

If government had wanted to prevent the Regulator raising access charges in the 2003 review, it had to decide – early and publicly – that the existing pattern of services was not to be maintained. Moreover, because some of the access contracts had some time to run, if the network outputs were to be reduced to prevent charges going up, it would have been necessary for government to try to negotiate output reductions with the holders of those contracts – both sides: Network Rail and the train operators – and no doubt the payment of compensation for doing so. If it had done these things, access charges may not have increased to the level they did in the 2003 review. But these output reductions take time to negotiate, and the process should have begun much earlier, if it was to begin at all.

It is not much good government deciding these things when an access charges review is just around the corner, or, worse, already underway, because there simply will not be enough time. When, in 2002–03, I asked the SRA what its intentions were in relation to the pattern of services which it intended to contract for and subsidise, in effect the answer I received was the existing pattern. No reductions were contemplated. This was inevitably to lead to the Treasury facing a higher bill than it wanted.

But the strength of this system of independent economic regulation is that government cannot easily do what it did in the days of Sir Robert Reid and other chairmen of the British Railways Board. It cannot obscure the economics of the industry and it cannot hide cost, or require, year by year, gradual reductions in the quality or capacity of the infrastructure to save money here and there. Under the present system, government must face up to the fact that it cannot have 100 per cent of the existing network for half its efficient cost. In a sense, government is forced to be honest about the consequences of its decisions.

If such reductions are to be made, they will almost always need to be planned well in advance, so that the regulatory authority knows, at the beginning of the process of an access charges review, what is likely to be required in terms of network outputs. Of course, the access charges review can – and should – contemplate an iterative process so that government can make some adjustments to its strategies in the light of emerging information, but these will not usually be material adjustments once the review is underway, in view of the long lead-times for transport planning and the possible need to negotiate changes and compensation with freight, open access and other operators and stakeholders.

Government has recently said that it wishes to have more influence or control over how much money goes into the railway industry. In a statement to Parliament yesterday, government has now explicitly ruled out of the present rail review – announced on 19 January 2004 – 'any change in the rights of third parties', which are to be "protected". It
has said that there ‘is no question of weakening the effectiveness of economic regulation’, and it has recognised that ‘the maintenance of fully effective and independent economic regulation is critical for retaining investor confidence’. It has also now said that there ‘will be no diminution in the regulatory protection of the private sector investors in the railway’. Having given these important and immensely valuable assurances, it is clear that government will not ask Parliament to intervene and curtail the powers of the ORR to carry out an access charges review. Indeed the constitutional significance of such a step would be immense, and the adverse effects on the relationship between the state and the private sector in the railways and in other industries would be so severe as to be unthinkable.

Instead, government needs to make no change to the institutional structure of the railways other than to ensure that its agent, the Strategic Rail Authority, or the Department for Transport acting in its own right, engages – and is allowed to engage – in the planning of railway services in sufficient detail, and in sufficient time, to ensure that the ORR has the information it needs to translate a decided-upon service pattern, together with other contractual rights, into a set of network outputs which government is content it can afford, without doing unnecessary damage to its other priorities. This may well require five- and ten-year planning horizons for government and, once made, they should be adhered to. That is what transport planning needs anyway, and the present system works to encourage even corral government into doing it. This is the antithesis of the annualised financial settlement which BR had to endure almost throughout its existence and which drove railway professionals to the point of distraction.

The system requires political courage and commitment. If shown – as they must be – they will be more than repaid in the lower cost of finance, its availability and the quality of what the money buys. An American acquaintance of mine – a transport professional from New York – said to me the other day: ‘Political honesty in transport planning is a concept of the future, and always will be’. But the system we have in Britain encourages honesty and realism, and does not allow things to be swept away into dark corners until another government or politician comes along and discovers the unpleasant things which have been left behind.

With the indemnification of the private sector franchisees established in long-term contracts between the SRA and the private sector operators, it must be said that the present system also recognises that, in privatising the infrastructure, the state has not completely transferred to the private sector the risk of the condition and performance of the infrastructure. This is because at five-yearly price reviews, the state can be required to meet a new round of costs objectively established by the regulatory authority. And so the state only really leases the risk to the private sector for five years at a time. That is, unless government chooses to scale back on the quality and performance of the assets by devising long-term policies and plans which contemplate a decline in the infrastructure but which will not violate the rights of third parties.

The protections which the present system provides to private-sector participants are assurances that network outputs and charges will be set objectively and fairly, according to established, transparent processes, having regard to the long-term sustainability of the network and the contracts for its use which must always be honoured. And who would buy or finance new fleets of rolling stock if they knew that the network on which they may have to run could be allowed to decline in quality, capacity or capability?

The contract between the state and the private sector contains these checks and balances, these stabilising factors and the fairness of an open and objective system. It is a contract which is right for both sides, and which requires and properly expects both sides to play their parts to the fullest extent. For these reasons, it is a durable contract.

It is abundantly clear to me that public interest regulation of private-sector interests – of all kinds – is absolutely necessary to deal with abuses of power – market power and other kinds of power, especially monopoly power. It is necessary to ensure the efficient and proper operation of competitive markets. And it is there to ensure that dependent users of essential facilities can get access to them on fair and affordable terms, and that these facilities are maintained and operated to the correct efficient standards at all times. All this is essential, to ensure that the big players play properly, and that legitimate private and public interests are protected. Government needs this to be so, and in the case of the infrastructure it is provided by ORR.

But I do say regulation is not there to micro-manage private enterprise, to stifle commercial flair and innovation, to have public officials telling commercial companies whether they can breathe in and to give or withhold approval as to whether or not they are allowed to breathe out. Such intrusive regulation of commercial companies – whether by licence or by contract – turns them into nothing more than the unthinking managers of public or quasi-public assets, with most, if not all, of the risks of their stewardship and operation – including the financial risks – passing back to the public purse. It will drive away or deter the most talented people from the enterprise in question. And it runs too great a risk that bit by bit, slowly the activity will become nationalised – in economic terms if not in formal legal form – with control reverting to the inexpert and sluggish hand of the state. Costs will rise, performance will fall, and everyone will suffer. It is no way to run a modern industrial country, Yet there are too many people today who simply do not understand the operation of markets – commercial markets and capital markets – and who will applaud every additional encroachment of the state into private enterprise until much of our national life has gone back to the bad old ways of rigid state control, and people of energy, ideas and ability have shaken the dust from their feet and left for better and more enlightened places. I believe that the railway industry has come too far since the end of nationalisation to go backwards like that.

If regulation in the public interest is to work efficiently and effectively, and to assure both government and private sector interests that their protections are sound, it must be properly understood and, if possible, not subject to unjustified assaults. I know of no company in Great Britain
which ever became successful as a result of fighting its regulator. There are plenty which did well in regulatory arguments through robust and constructive engagement, but none I believe which prevailed in an open battle. Yet that is what Railtrack did, and when, in October 2001, they could have used regulation to resist and possibly prevent the loss of the company, they turned away.

And regulation should be respected by government too, as the Secretary of State’s four recent statements to Parliament have emphasised. The darkest days of October 2001 — June 2002 are behind us, and I believe no-one has

**Accountability and empowerment**

As I said at the beginning of this lecture, Sir Robert Reid regarded personal accountability and financial discipline as important. Accountability and financial discipline can apply at company level as well as individual level.

Since taking office in 1999, I have been determined to carry out a programme of reform of the accountability and financial framework of the railway companies, in particular those of the infrastructure provider, now Network Rail. These reforms were necessary because, when we restructured and privatised our railway in this country, we got things the wrong way round.

The right approach in restructuring an industry in preparation for getting private sector skills and money into it – through privatisation, commercialisation or whatever you choose to call it – is to get the design right at the beginning and then avoid making material changes afterwards, when the private sector has come in. In Britain in 1993–97, we did things differently. Through a combination of neglect, inability and political pressure, the railway industry was endowed with a contractual and regulatory matrix of extraordinary weakness. The company’s network licence was made deliberately weak, and was in no fit state for a private-sector Railtrack. And the contracts and industry-wide codes were in too many respects unspecific in their requirements, lacking in their procedures and weak or uncertain in their remedies.

If the railway was to be able confidently and competently to do its job – the day job of operation, maintenance and renewal of the infrastructure and the punctual and reliable provision of passenger and freight train services – it needed a sound framework which was capable of providing the answers and the remedies when questions arose or things went awry. It did not have that. And so in 1999 we set about improving and enhancing the accountability of the railway companies to the public interest and to one another, using the flexibility and utility of the existing system – the mechanisms for evolutionary change built into the matrix by its architects 10 years ago when they saw the shortcuts which were being taken and the weaknesses which were being established in the initial regime. And now, four years on and after many humps and diversions on the road, we have almost finished that work.

The principal focus of the reform programme was on the monopoly provider of infrastructure services – Railtrack, now Network Rail. When the central core of any apparatus – on which everything else depends – underperforms, everybody is affected. When it works well, it is a catalyst for improvement in all parts of the industry. Network Rail is showing that it is responsive to its new accountabilities and is establishing credible plans for tackling so much that was wrong with Railtrack’s stewardship of the network and its relations with its train operator customers.

In the original blueprint for the railway, Railtrack was meant to have been the powerhouse of the railway industry. It squandered that role. In the years after privatisation, it underperformed in too many respects. Track quality declined and broken rails rose. Its investment in new capacity was sluggish, and its performance on infrastructure-caused delays and cancellations to passenger trains was poor. Its relationships with its dependent customers – train operators, local authorities, freight facility developers and others – were marred by frustration and unresponsiveness. That record and that culture needed to be turned around quickly, to make the company responsive, competent and effective. Although there were some encouraging signs that progress was being made in the way Railtrack managed its business, the company fell back after the Hatfield derailment and the struggle was lost.

The financial framework of the railway industry needs to provide the companies concerned with a stable and sound environment for investment. That means improving the incentives to invest in new capacity and better services, and ensuring that they have certainty and predictability in how that investment will be treated in future regulatory reviews. This is essential if the industry is to raise the finance needed to deliver the required level of investment in the network.

In the 2003 access charges review, I determined that Network Rail should be required to deliver significant improvements in outputs. In particular, the review conclusions require the company to secure that delays caused to operators will fall from 14.7 million minutes in 2002–03 to 9.1 million minutes in 2008–09. At the same time, the company is required to ensure that asset condition improves across a broad range of measures contained in a new asset stewardship index. The index includes measures for broken rails, temporary speed restrictions, signalling, structures and track geometry. I have provided a direct financial incentive to deliver these improvements. Furthermore, I have required that there should be no deterioration in the capability of any route for broadly existing use other than through established contractual mechanisms.

To secure these outputs, I have allowed Network Rail £22.2 billion for the operation, maintenance and renewal of the network and a further £2.2 billion for enhancements, together with an appropriate return on capital. This is substantially less than Network Rail at first sought. However, the regulatory settlement has now been accepted by Network Rail as a challenging and realistic requirement. In total, the company will need revenues over five years – in addition to its income from other sources – of over £28 billion. This amount is to be provided from a mixture of
borrowings from the capital markets, grants and access charges.

The amounts established for Network Rail in 2003 represent expenditure on the fabric of the railway not seen in the history of the industry. It is imperative that the money is spent wisely and well, on the right things at the right times. In this, it is not purely commercial considerations which will apply. Very many people and organisations rely on our transport systems working well, even if they do not use them themselves. The public interest responsibilities of the railway companies, shaped and enforced under the authority of Parliament, are owed to all these people, passengers and non-passengers alike, freight customers and consumers as well.

Through the introduction of nine new network licence conditions, new accountabilities have been established for the infrastructure provider for the proper and timely use of this money, with the ability to check on the progress and quality of spending and work and the ability to correct shortcomings before they become serious. These reforms involve the use of independent reporters on Network Rail’s stewardship of the network, restraints on the disposal of its assets (including land) which may be needed for railway uses in the future, and the establishment of a reliable and comprehensive register of the condition, capacity and capability of the company’s assets. They also involve much better, clearer and stronger relationships between Network Rail and its train operator and other customers, to ensure clarity, stability and empowerment, with mutual interest and a clear drive for success.

With considerable amounts of highly constructive and positive industry participation, we have devised new model access contracts for passenger services, and are close to finalising a new model for freight. In both cases, the objectives of the work have been clarity, simplicity, streamlining and strengthening. The industry has worked for over four years to get to this point, and the new generation of access contracts is now beginning to be established. The first is the contract for the Trans-Pennine Express. It is closely followed by the contracts for Arriva Trains Wales and Chiltern. And the system we have established provides for the new model contract’s provisions to be retrofitted into the contracts for a number of other train operators over the next few months.

The enthusiasm which the industry – all sides of it – showed in the joint work to establish the new contractual arrangements was very encouraging. The industry seized the opportunity to simplify and clarify what were complex and often ambiguous relationships. Operating a multi-user railway on which capacity is full or near to full is no easy matter. There are many interdependent things which need to be done to ensure that the railway operates well on a day-to-day basis. This is especially so for one which is having to cope with both current and future demands, including those associated with considerable maintenance and renewal programmes. The new contracts between Network Rail and its train operator customers acknowledge that fact – and the necessity of railway companies working together, not against one another. They recognise the intensity of the interdependence of the infrastructure provider and the infrastructure user, and create a true joint venture of aligned objectives, clarity of specification and simplicity of remedies so that, when things go wrong, recovery can be achieved as quickly and efficiently as possible.

Long-term relationships of this kind which are properly established and clearly understood, with a fair balance of risks and responsibilities between the parties, are far more likely to succeed than those which are one-sided or inequitable. That is as true in the railway industry as it is for other transport infrastructure, power projects, telecommunications systems, chemical plants, oil and gas projects and so on. If anything, given the operational complexities of the railway which I described at the beginning of this lecture, it is all the more true.

We are now on the point of finishing these necessary reforms, by reviewing and then making necessary amendments to the network code, particularly in the areas of operational disruption, network change, the introduction of new rolling stock, adjustments to access rights and the provision of information. We have already established a new regime of local output commitments, giving individual train operators contractually binding commitments from Network Rail as to what the company will deliver at a local level to improve performance and the quality of infrastructure services it provides. For too long, this code has lain dormant and neglected, and it is impossible to count the opportunities for performance and asset improvements, at fair, efficient and affordable cost, which have been lost because of its weaknesses.

Through the access charges review, stronger and fairer contracts and a reformed network licence for Network Rail, the framework has been made fit for purpose. With more money for the industry – and the amounts now made available are considerable – goes increased accountability – accountability to one another and accountability to the public interest through the network licence. These reforms are the antithesis of a doctrine of command and control of the industry. Nor do they contemplate any transfer of management responsibility of the companies concerned. They are the opposite. They are about establishing a better, clearer and fairer balance of responsibility and obligation in the industry, to allow the companies to deal with one another from positions of broad equality of bargaining position, in a co-operative and mature way, as commercial companies, dependent on one another, do in other fields of activity.

What we have created is a virtuous circle of effective incentive-based regulation, strong and empowered management, clear contracts and sound accountability. These things are necessary for a long-term framework for sustained improvement in performance. The weaknesses of the privatisation settlement and the initial matrix have been corrected.

These reforms are about empowerment – empowerment of both sides of the relationship, so as to ensure co-operative working and shared understandings. But with empowerment goes the need for commercial maturity and competences. It is not for any public authority to run the railway. Regulatory authorities are there to facilitate and to support mature commercial operations and
investment according to clear public interest criteria, not
tell everyone what to do. If the companies fail to acquire
these competences and the necessary maturity, and therefore
to make the relationship work as well as it can be made to, I
fear they will find that the impatience of the state will take
control and the freedoms they have squandered will be taken
away. They should not allow this to happen, and I believe
the industry recognises this.

To secure the rights of the private and public interests
involved in the railway, governing principles have been
established, as well as certain rules and procedures, for the
protection and promotion of those rights. They involve
careful checks and balances in a system of administration
and internal government of the industry. They derive from
the consent of the participants in the industry, and that
consent is enshrined in law and commercial practice. It is
not appropriate for these things to be torn up for light or
transient reasons. Rather they should be understood, and
given a chance to show that they can work. I believe with
these reforms, sound finance, clear specifications and fair
accountabilities, the railway industry could well have a
system which will endure for the next 20 or 30 years, or
even longer. The industry is eager to make them work. It is
not eager for its work to be cast aside and another solution
designed, taking yet more years and holding people back.

The future of the railway industry is a bright one. It is
brighter because we have done the work to repair and reset
the essential framework for co-operation and accountability,
and we will educate and encourage so that the companies
which work within that framework understand it and are
comfortable with it. And when that is so, let us see what
opportunities can be exploited, what better ways of doing
things can be devised, how well this industry can work
together in an integrated and competent way.

Conclusion

The railway industry has had czars, supremos, controllers
(fat and thin, old and young), papal power and even Alistair
Morton’s vicar on earth! I believe these models did us very
little good, and their notions of commercial companies
which have been established to provide services to the public
coming as supplicants to pay homage at an altar of centralist
state power did quite a lot of harm.

Instead what the railway needs is co-operation, aligned
interests, maturity and competence, clarity of roles and
accountabilities and a framework which encourages
improved performance and delivery of safe, quality services
at a fair and affordable price to the user and the taxpayer. It
should have a partnership with government which is fair,
balanced, understood and respected by both sides. By July 2004,
we should have all these things. They are within our grasp.

And Sir Robert Reid, no fan of upheaval for its own
sake, would, I believe, have wanted to knuckle down and
make work a system which has been hammered out over
10 years on an anvil of professionalism and dedication by
the whole industry, for the benefit of the public. And after
all, that is who we are here to serve.
The Court of Appeal’s IBA Health Ruling: Victory for the OFT?

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The Court of Appeal’s ruling1 on 19 February 2004 in the appeal brought by the Office of Fair Trading (‘OFT’) against the Competition Appeal Tribunal’s (‘CAT’) judgment in IBA Health2 was welcomed by the OFT even though, as a formal matter, the court dismissed the OFT’s appeal as to whether the CAT had been entitled to set aside the OFT’s decision not to refer the (proposed) merger between iSoft Group plc (‘iSoft’) and Torex plc (‘Torex’). The court, on the key legal issue, unanimously held that the two-part test formulated by CAT for determining whether the OFT had a duty to refer a case to the Competition Commission (‘CC’) was not the correct test required under section 33(1) of the Enterprise Act 2002 (the ‘Act’). In line with the OFT’s arguments, the court ruled that the correct test was whether the OFT itself believes that it is or may be the case that the merger may be expected to result in a substantial lessening of competition, without requiring the OFT also to consider what the CC might believe. The mere fact that there may be ‘room for two views’ on the competitive effects of a merger is not, as the CAT had determined, sufficient to trigger a CC reference.

Under the CAT-formulated test, the OFT would have lost much of its discretion and have been required to refer any ‘grey area’ mergers that raised ‘material and complex issues’ automatically to the CC for in-depth investigation rather than retaining the ability to clear such transactions with or without undertakings or to request undertakings in lieu of a referral. The business community and many competition law practitioners also hailed the OFT’s retained discretion, as they feared reliance on the CAT-formulated test would have dramatically increased the number of merger references and stagnated UK merger activity.

Other elements of the court’s ruling, however, suggest this ‘victory’ for the OFT may prove bittersweet. This article reviews the CAT’s decision and the subsequent Court of Appeal judgment to explain why.

The court held that the OFT’s reference test based on a ‘significant prospect’ of anti-competitive effects ‘tends to put the requisite likelihood too far up the scale of probability’. The judgment, therefore, lowers the threshold for referrals in borderline cases, albeit not by the same degree expected by the CAT-formulated test. The court also upheld the CAT’s finding that either the ‘OFT applied too high a test of likelihood’ when formulating its belief about possible anti-competitive effects of the proposed merger or ‘failed adequately to justify’ its conclusions. This suggests the OFT may, in future, subject mergers to more rigorous scrutiny and information requests in order to justify its referral decisions. But greater scrutiny could be coupled with less substantive transparency. The increased likelihood of third-party challenges to OFT referral decisions under the new merger control regime could have the negative effect of leading the OFT to adopt a more circumspect approach to its substantive investigative hypotheses and its decision findings, despite the OFT’s commitment to increasing the openness and transparency of the merger review process. Such a loss of transparency would be a most unwelcome side effect of this case.

The CAT Case

By a notice of application dated 21 November 2003, IBA Health Limited (‘IBA’) applied, pursuant to section 120 of the Act, for judicial review of the OFT’s decision not to refer the proposed merger between iSoft and Torex to the CC for in-depth investigation. The CAT heard the case on 28 November 2003 with iSoft and Torex as interveners in support of the OFT. On 3 December 2003, the CAT granted IBA’s application for judicial review and ordered that the proposed merger between iSoft and Torex be referred back to the OFT with a direction for the OFT to reconsider its referral decision. This was the first case to arise under the new merger control provisions in part 3 of the Act and the first to come before the CAT for judicial review under section 120 of the Act. Section 120(1) gives any person aggrieved by a merger decision of the OFT, the CC or the Secretary of State, in connection with a reference or possible merger reference, the right to apply to the CAT for a review. Under the Fair Trading Act 1973 (the ‘FTA’), the former regime, there had been only one challenge by way of judicial review to a decision by the Secretary of State under his discretionary power to refer or not to refer a merger for in-depth investigation.3

Background

On 22 July 2003, iSoft announced a public offer to acquire the issued share capital of Torex in exchange for iSoft shares. The proposed acquisition was notified to the OFT on 1 August 2003. The OFT’s analysis focused on the parties’

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2 Under the CAT-formulated test, the OFT would have lost much of its discretion and have been required to refer any ‘grey area’ mergers that raised ‘material and complex issues’ automatically to the CC for in-depth investigation rather than retaining the ability to clear such transactions with or without undertakings or to request undertakings in lieu of a referral. The business community and many competition law practitioners also hailed the OFT’s retained discretion, as they feared reliance on the CAT-formulated test would have dramatically increased the number of merger references and stagnated UK merger activity.

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6 Background

On 22 July 2003, iSoft announced a public offer to acquire the issued share capital of Torex in exchange for iSoft shares. The proposed acquisition was notified to the OFT on 1 August 2003. The OFT’s analysis focused on the parties’
activities in relation to the supply of certain software systems to hospitals, in particular Electronic Patient Record (‘EPR’) systems and Laboratory Information Management Systems (‘LIMS’). The parties are the two leading UK providers in these areas with a combined share of 44 per cent of the EPR installed base in the UK public sector and 56 per cent of the LIMS installed base. In Scotland and Wales, their systems account for 100 per cent of the LIMS installed base.

In its decision, the OFT concluded that ‘the installed base is not the best guide as to whether the parties will have market power in the future’. It based this decision on the fact that as this is a bidding market, where a new procurement strategy called the National Programme for Information Technology (‘NPfIT’) was being introduced for the National Health Service (‘NHS’) in England. The OFT also pointed to the pace of innovation in healthcare systems. In its issues letter, however, the OFT speculated that the strength of this combined share showed that the merger would ‘result in a significant structural change in the market where the presence of the next competitor is significantly smaller, and [would be] likely to result in a substantial lessening of competition’.

IBA Healthcare Limited (‘IBA’), an Australian public company that describes itself as a ‘global supplier of IT solutions to the healthcare industry’, complained to the OFT about the effects of the anticipated merger on 15 August 2003. Under a distribution agreement dated 31 March 2003, Torex serves as the exclusive distributor of IBA products in the United Kingdom. During the review process, IBA alleged that its resulting ‘close links’ with Torex would mean that IBA would be unable to act as an effective constraint on the merging parties and that the merged group would favour its own products over IBA products.

On 30 September 2003, the OFT sent an issues letter to the merger parties that set out nine ‘key potential competition concerns’ relating to the proposed merger. This issues letter was not seen by IBA prior to the CAT proceedings. Among the OFT’s hypotheses were concerns about the loss of direct and regular bidding competitors and the high combined shares of iSoft and Torex in both EPR and LIMS systems. The merger could reduce incentives ‘to invest and innovate and develop new products’, and ‘[t]here appear[ed] to be high barriers to entry’ given that these software systems are ‘UK specific with high conversion costs for systems developed overseas’. The OFT was ‘not clear’ whether the two major US players, Cerner and IDX, or any other providers, would be capable of exercising a significant competitive constraint over the merged business given the low success rate of these competitors winning contracts. The merged company’s ‘broad portfolio of products … may also raise costs and deter entry’. Individual hospitals purchasing IT systems were unlikely to exert countervailing buyer power; even though the local service provider (‘LSP’) programme in England would increase the size of contracts, the requirement ‘to specify a preferred partner may make it difficult for the LSP to exercise any buyer power’.

The OFT in its issues letter also acknowledged there was uncertainty as to the likely effect of the NPfIT in terms of future changes and timing. The proposed system would cover only England and not Wales, Scotland or Northern Ireland. ‘[I]n addition[,] hospitals in England [would] continue to be able to purchase IT systems outside the NPfIT programme’. This uncertainty led to conclude provisionally that ‘[i]t is not appropriate therefore to judge the effects of the merger solely in relation to the proposed NPfIT’.

The OFT held a meeting with iSoft and Torex, on 2 October 2003, to discuss its issues letter. A detailed submission was made on behalf of iSoft/Torex on 6 October 2003, and IBA replied to certain questions from the OFT on 7 October 2003. The decision meeting within the OFT was held on 8 October 2003. Although the chairman of the OFT gave guidance in this meeting as to the drafting of the decision, the formal drafting took almost a further month. The chairman of the OFT formally approved the decision on 6 November 2003.

The OFT decision

The OFT, in its decision, concluded that the merger should not be referred to the CC under section 33(1) of the Act because ‘the OFT does not believe that it is or may be the case that’ the proposed merger ‘may be expected to result in a substantial lessening of competition’ within any market(s) in the United Kingdom. Central to the OFT’s conclusion was the expected future role of the NPfIT programme. The OFT confirmed its earlier hypotheses that as the two leading suppliers of IT software to the UK healthcare sector, iSoft and Torex had strong legacy bases that may give the parties a large presence. However, it added that this, in itself, was unlikely ‘to confer significant market power in view of the changes being brought about by the NPfIT’. Such a fundamental change has altered the future competitive landscape with the effect that the competitive constraints must be viewed under a new scenario.

Even though the OFT reiterated its scepticism about the scope for supply-side substitutability expressed in its issues letter and continued to acknowledge the likelihood of high barriers to entry, it determined that the increased availability of significant funding for updating the NHS IT systems in England had attracted bidders from outside the United Kingdom, particularly from major US suppliers. The presence of such suppliers in England was likely to have a ‘knock-on effect on competition elsewhere in the United Kingdom’. The NPfIT programme would also offer smaller companies the opportunity to enter as suppliers to nominated sub-contractors. These factors led the OFT to play down concerns raised by IBA about any potentially

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4 Paras 14-5, OFT’s iSoft/Torex decision as quoted at para 27, CAT judgment; point 5, para 89, CAT judgment; and para 108, CAT judgment.
5 Paras 16 and 26, OFT’s iSoft/Torex decision as quoted in para 95, CAT judgment.
6 See the OFT’s issues letter as quoted in para 89, CAT judgment.
7 Ibid.
8 Paras 32-4, OFT’s iSoft/Torex decision, as quoted in paras 5 and 95, CAT judgment.
9 Paras 19-20, OFT’s iSoft/Torex decision, as quoted in para 95, CAT judgment.
detrimental effects on competition resulting from its close links with Torex through their exclusive supply agreement. Contrary to the OFT’s hypothesis in its issues letter concerning buyer power, the OFT concluded that the creation of five new LSPs under the NPfIT to purchase IT requirements in England was likely to lead to a relative increase in buyer power. Elsewhere in the United Kingdom, where contracts are awarded on a national basis, the OFT considered the ‘awarding bodies are likely to possess and exercise buyer power’. The OFT did not appear to substantiate in any communications how it had rebutted or withdrawn many of the hypotheses set out in its issues letter.

IBA’s Appeal

On 21 November 2003, IBA applied as a ‘person aggrieved by’ an OFT decision, to the CAT, under section 120 of the Act, for judicial review of the OFT’s decision on two principal grounds: first, that ‘the OFT made material errors of law and fact in concluding that there was insufficient likelihood of a substantial lessening of competition’ and, therefore, no duty to refer the proposed merger to the CC under section 33 of the Act; and, secondly, ‘that the OFT made material procedural errors by failing to conduct an appropriate or adequate investigation before adopting the Decision’. In addition, the CAT invited the parties, including iSoft and Torex as interveners in support of the OFT, to address the question of the proper construction of section 33(1) of the Act and the appropriate balance between the roles of the OFT and the CC.

Section 33(1) of the Act provides that:

‘the OFT shall, subject to subsections (2) and (3), make a reference to the Commission if the OFT believes that it is or may be the case that:

(a) arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation; and
(b) the creation of that situation may be expected to result in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services.’

Section 22(1) confers a similar duty on the OFT in relation to completed mergers. Where the OFT refers a merger to the CC, section 36 of the Act requires that the CC must ‘decide’, on the balance of probabilities, whether the merger may be expected to result in a substantial lessening of competition.

The CAT ‘unpacked’ the test in section 33(1) into three elements:

(i) ‘the OFT believes’;
(ii) ‘that it is or may be the case’; and
(iii) ‘may be expected to result’.

In the CAT’s view, ‘may be expected to result’ denoted an expectation that is more than a possibility; put crudely, this denoted ‘a more than 50 per cent chance’. The phrase ‘the OFT believes’, in the CAT’s view, must be based on ‘reasonable grounds … which in turn presupposes that a sufficient investigation has been carried out’. The CAT added that this phrase should be contrasted with the obligation under section 36(1) that the ‘Commission shall decide’. Referring to excerpts from the OFT’s own guidelines, the CAT considered that this difference ‘reflect[ed] the fact that, in cases meriting a fuller investigation, the decision maker is the Commission, not the OFT’. The OFT’s role, instead, was ‘primarily that of a first-stage screen’.

The ‘Double May’

The CAT considered the third element, ‘it is or may be the case’, to be central to the proceedings. IBA contended that the double use of ‘may’ in considering whether ‘it is or may be the case’ that the merger ‘may be expected to result in a substantial lessening of competition’ emphasised the ‘precautionary’ nature of the OFT’s reference test. Where a case raised ‘grey issues’, the OFT had a duty to make a reference to the CC and the CC had a duty to ‘decide’ the merits of what the OFT ‘believed is or may be the case’. The OFT, in contrast, alleged that the double use of ‘may’ was simply a grammatical requirement, rather than a substantive one, and did not lower the reference threshold.

In line with IBA’s reasoning, the CAT interpreted the ‘double may’ as signifying that even if the OFT itself is of the view that a merger may not be expected to result in a substantial lessening of competition, it still ‘may be the case’ that there is ‘an alternative credible view that cannot be reasonably rejected by the OFT on the basis of a “first screen”’. Therefore, ‘if there is genuinely “room for two views” … the statutory duty of the OFT is to refer the matter to the Commission, whose duty is to decide’.

Where the OFT does not make a reference, it means that ‘the merger does not even reach the “grey area” … where there may be room for more than one view’.

Two-Part Test

‘Grey area’ mergers, according to the CAT, import a two-part test. The OFT must ‘satisfy itself not only (i) that in its own mind there was no significant prospect of a substantial lessening of competition, but also (ii) there was no significant prospect of the Competition Commission reaching an alternative view on the basis of a fuller investigation’. Where there are ‘real issues’, in particular in cases with a ‘complex factual matrix’, only in ‘exceptional’ cases should the OFT...

References

10 Paras 11 and 21-3, OFT’s iSoft/Torex decision, as quoted in para 95, CAT judgment.
11 Para 97, CAT judgment.
12 Paras 183-2, 184-188, CAT judgment; see also para 3.2, OFT 516, as quoted in para 186, and para 2.5, OFT 526, as quoted in para 187.
13 Para 189, CAT judgment.
14 Para 124, CAT judgment.
15 Para 125, CAT judgment.
16 Paras 180-2, CAT judgment.
17 Paras 194-5, CAT judgment.
18 Para 228, CAT judgment; see also para 197, CAT judgment.
seek to resolve the matter itself rather than making a reference to the CC.\(^{19}\) Specifically, in a sector of national importance ‘where it is clear there are material and complex issues’, such as in the case at hand, the CAT did ‘not think it likely that Parliament intended that those issues were to be resolved at the stage of the OFT’.\(^{20}\)

**Scope of the CAT’s Judicial Review**

Section 120(4) of the Act requires that the CAT, in determining an application for a review of an OFT decision, ‘shall apply the same principles as would be applied by a court on an application for judicial review’. The CAT conceded that in this, its first judicial review case under section 120, it did not ‘find it easy to interpret the duty imposed on itself by section 120(4). The OFT and iSoft submitted that the applicant must show the OFT’s decision was so unreasonable, in the Wednesbury sense, that no reasonable decision-maker in the OFT’s position could have arrived at it. The CAT considered that unlike Wednesbury, this case did not involve controlling the exercise of a discretion; rather, the issue was whether the OFT had complied with its duty under section 33(1) of the Act, ‘and in particular whether the OFT acted unlawfully in taking the view that the underlying circumstances giving rise to the duty were not present’. The ‘broad question’ according to the CAT considered it needed to answer was whether it was satisfied that ‘the OFT’s decision was not erroneous in law, and was one which it was reasonably open to the OFT to take, giving the word ‘reasonably’ its ordinary and natural meaning’.\(^{21}\)

**The CAT Judgment**

Under the principles of judicial review appropriate to this case, the CAT considered the OFT’s decision ‘was erroneous in point of law and/or was not a decision which was reasonably open to the OFT to take on the true construction of the Act’.\(^{22}\) There was no indication that the OFT had considered the second limb of the two-part test as to whether there was a significant prospect of the CC reaching an alternative view following a fuller investigation.\(^{23}\) Yet in the CAT’s opinion, the competitive concerns set out in the OFT’s issues letter, which took the OFT two months to prepare, left ‘little doubt that there was an alternative view to which the OFT … could reasonably have come’. The CAT found it ‘somewhat surprising’ that the OFT decided ‘in the period of slightly over a week between 30 September 2003 and 8 October 2003 that all the matters set out in the issues letter were successfully dealt with or rebutted, so that [they] … did not even give rise to a reasonable alternative view’. If each point in the issues letter had been dealt with or rebutted, the CAT would have expected to see ‘a detailed point by point rebuttal’ in the OFT’s decision as well as the material relied upon to support that decision.\(^{24}\)

The CAT also considered it relevant that the underlying factual matrix in this case was ‘extremely complicated’. Given that matters both inside and outside the NPfIT programme were complex and involved large sums of money, the OFT needed to be ‘particularly confident’ that it could exclude the possibility of the CC taking a different view. However, in this case, the CAT considered that ‘the description of the market is so scanty, and expressed at such a level of generality, that it is extremely difficult for the Tribunal to be satisfied that all material considerations have been taken into account and all material facts ascertained’. Given that the material upon which the OFT acted was not apparent from, or referred to in, the OFT’s decision and was not made available to the CAT, the CAT considered it was ‘simply not in a position to find that the OFT has discharged the burden of satisfying the Tribunal that there was material on the basis of which it could reasonably have come to the conclusion that it did in the decision’. The CAT added:

‘If a material element is not set out in the decision, it is very difficult for the reviewing court or tribunal to be satisfied that the matter was properly investigated or that the other supplementary reasons did in fact form part of the decision making process.’\(^{25}\)

Although specific issues could not ‘be resolved, or even gone into, on application for judicial review’, the CAT contended that the ‘resulting picture the Tribunal has is one of considerable confusion, in which the exact nature of the competitive process … is far from clear’. The CAT also noted that ‘the OFT apparently considered a single ‘new scenario’, without apparently assessing whether there were a range of conceivable future outcomes [even though] considering … a number of different possible scenarios is an important part of the “may be the case” test’.\(^{26}\)

The CAT concluded it was not satisfied that the OFT had applied the correct test in this case in assessing its duty under section 33(1) nor had the OFT reached a conclusion reasonably open to it.

‘We are not satisfied that the facts are sufficiently found in the decision or that all material considerations have been taken into account. We are unable to verify whether there was material on which the OFT could reasonably base important findings in the decision.’

On this basis, the CAT quashed the OFT’s contested decision under section 120(5) of the Act and referred the matter back to the OFT with a direction to reconsider the matter.\(^{27}\)

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19 Para 198-9, CAT judgment; see also paras 213 and 267, CAT judgment.
20 Para 267, CAT judgment.
21 Paras 216-7, 223 and 225, CAT judgment.
22 Para 226, CAT judgment.
23 Para 232, CAT judgment.
24 Para 235-7, CAT judgment.
26 Para 265 and 265, CAT judgment.
27 Para 266-9, CAT judgment.
OFT’s appeal to the Court of Appeal

The OFT greeted the CAT decision with great dismay, in large part because the CAT’s two-part test threatened to leave the OFT as a largely powerless ‘first-screen’ body, eliminating much of its discretion to clear ‘grey area’ mergers with or without undertakings. Correspondingly, the CAT’s two-part test also threatened to increase the number of merger references.

The CAT ruling also seemed to render the OFT’s power to accept undertakings under section 73 of the Act largely unworkable, even though section 73(2) states that the OFT may accept undertakings from the parties in lieu of referring a proposed or completed merger to the CC ‘for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned’. The CAT conceded in its ruling that ‘the OFT should be slow to deprive itself of the possibility of obtaining undertakings under section 73, by coming too readily to the belief that even the relatively low “may be the case” threshold is not met’. The CAT cautioned, however, that the OFT should ‘only exceptionally’ attempt to resolve the matter itself where it is confronted with a ‘real question’ as to whether a merger may result in a substantial lessening of competition. Yet the CAT judgment seemed to eliminate the OFT’s ability to accept undertakings under section 73 even in ‘exceptional’ circumstances, given the duty on the OFT to refer a merger to the CC if the OFT considered there to be ‘room for two views’. The CAT’s harsh criticism of the OFT’s procedural handling of the case, regardless of the correct interpretation of section 33(1) of the Act, seemed more justifiable given that it was not clear from materials put before the CAT how the OFT’s reasoning had evolved from the views set out in its issues letter to the often contrary conclusions reached in its decision meeting only eight days later.

The Appeal

On 18 December 2003, the OFT, iSoft and Torex applied for permission to appeal the CAT decision, with the permission of the CAT, under section 120(6) of the Act. Such an appeal can lie on a point of law only. The appeal was based on two grounds:

(i) whether the CAT correctly interpreted and applied section 33(1); and
(ii) whether the CAT properly applied the principles of judicial review as set out in section 120(4).

No Room for Two Views

The OFT, supported by iSoft and Torex, submitted that the CAT’s ‘room for two views’ test was wrong in that it was inconsistent with the wording of section 33(1) when read alone and in the context of other parts of the Act. The OFT also considered the CAT formulation was ‘impracticable and contrary to the evident intention of Parliament’. The Vice Chancellor had ‘no hesitation in preferring’ the appellants interpretation on this issue and in rejecting the CAT’s two-part test formulation.

[‘T]he relevant belief[,] he stated[,] is that the merger may be expected to result in a substantial lessening of competition, not that the Commission may in due course decide that the merger may be expected to result in a substantial lessening of competition. Further, the body which is to hold that belief is [the] OFT not the Commission.’

If it was not the OFT that must hold the ‘relevant belief’, the OFT would have no power to accept undertakings in lieu of a reference as provided for in section 73 and ‘so could not refuse to make a reference as permitted by Section 33(3)(b),’

Similar problems would arise in relation to completed mergers under section 22 of the Act, and in relation to interventions on public interest grounds by the Secretary of State under section 42. The Secretary of State’s jurisdiction to make a reference to the CC under section 45 depends on the OFT holding the relevant belief and documenting that in a report under section 44. The Vice Chancellor commented: ‘It would be absurd if the jurisdiction of the Secretary of State to make a reference to the Commission should depend on the belief of the OFT as to what the Commission might decide’. Analogous problems would arise in relation to market investigations.

The Correct Section 33(1) Test

The Vice Chancellor held that the test to be applied in section 33(1) should be in accordance with its ‘ordinary meaning’. However, he further elucidated upon the test by a series of propositions in view of its importance and the range of interpretations of the word ‘may’.

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28 Para 205, CAT judgment.
29 Para 229, CAT judgment.
30 Para 7, Court of Appeal judgment. The iSoft/Torex merger was completed on 23 December 2003, just after the merger parties and the OFT applied for permission to appeal the CAT decision, and undertakings were given by iSoft under section 71 of the Act.
31 Para 20, Court of Appeal judgment.
32 Paras 35 and 38-9, Court of Appeal judgment.
33 Paras 29 and 40-1, Court of Appeal judgment.
34 Paras 43-9, Court of Appeal judgment.
1. The OFT must form the relevant belief. This requires some sort of ‘mental assent ... as opposed to the less positive frame of mind connoted by the ‘suspicion’ the OFT must have in making a market investigation reference under section 131 or the Secretary of State has when intervening on public interest grounds under section 42.35

2. That belief must be reasonable and objectively justified by relevant facts.36

3. The words ‘may be expected to result’ in sections 33(1)(b) and 36(1)(b) ‘involve a degree of likelihood amounting to an expectation’.37 The view expressed in the CAT judgment that they, crudely, expressed the idea of an expectation of more than a 50 per cent chance ‘is right when applied to the single question’ the CC must answer under section 36(1)(b).37

4. The belief the OFT must hold under section 33(1)(b) is ‘that it is or may be the case that’, ‘[T]he words ‘may be the case’ exclude the purely fanciful [but] in between the fanciful and a degree of likelihood less than 50 per cent there is a wide margin in which [the] OFT is required to exercise its judgment.’ Furthermore, although ‘may’ appears in the opening phrase of section 33(1) and in sections 33(1)(b) and 36(1)(b), ‘it is clear that the opening phrase ‘believes that ... may be the case’ imports a lower degree of likelihood than sections 33(1)(b) and 36(1)(b) would by themselves involve. This ‘lower of degree of likelihood’, the Vice Chancellor elaborated, might exist, for example, where the OFT’s work did not justify any positive view, but left some uncertainty; and where the OFT ‘believed that ... may be the case’ exclude the purely fanciful [but] in between the fanciful and a degree of likelihood less than 50 per cent there is a wide margin in which [the] OFT is required to exercise its judgment.’ Furthermore, although ‘may’ appears in the opening phrase of section 33(1) and in sections 33(1)(b) and 36(1)(b), ‘it is clear that the opening phrase ‘believes that ... may be the case’ exclude the purely fanciful [but] in between the fanciful and a degree of likelihood less than 50 per cent there is a wide margin in which [the] OFT is required to exercise its judgment.’ Furthermore, although ‘may’ appears in the opening phrase of section 33(1) and in sections 33(1)(b) and 36(1)(b), ‘it is clear that the opening phrase ‘believes that ... may be the case’ exclude the purely fanciful [but] in between the fanciful and a degree of likelihood less than 50 per cent there is a wide margin in which [the] OFT is required to exercise its judgment.’

5. The requisite likelihood in the OFT’s advice of ‘a significant prospect that a merger may be expected to lessen competition substantially’ open to criticism for substituting ‘significant prospect’ for ‘may’. Furthermore, ‘the word “significant” tends to put the requisite likelihood too far up the scale of probability.’ Lord Justice Carnwath added that ‘[n]o doubt the possibility must be more than fanciful, but subject to that [he preferred] not to qualify the statutory wording’.39

Judicial review principles

The court clarified that the principles to be applied by the CAT under section 120(4) were the ordinary principles of judicial review, regardless of CAT’s position as a specialist court or otherwise. The question before the court was whether the CAT erred in this respect in relation to two specific points:

(i) the reversal of the burden of proof; and
(ii) failure to apply the Wednesbury test of reasonableness.40

The court acknowledged that the legal onus of proof for judicial review rests on the applicant, but the court did not accept the OFT’s criticism that the CAT had reversed the onus of proof onto the OFT in its review. Although the onus may fluctuate from time to time in the course of a hearing, the onus which ‘shifts to the defendant is only that unless he can displace the prima facie case by evidence or argument that claimant is likely to discharge the legal onus which rests on him’. The court found the CAT’s comments ‘readily understandable in the light of the OFT’s apparent change of view in the course of a few days. ... CAT was entitled and bound to examine with care why such hypotheses were rejected in so short a time and whether their rejection was justified, particularly in view of the statutory duty to give reasons imposed by s. 107’.41

The Vice Chancellor also rejected that the CAT had wrongly applied the Wednesbury test of unreasonableness. The CAT had asked itself if the OFT’s decision was ‘one which was reasonably open to the OFT to take, giving the word ‘reasonably’ its ordinary and natural meaning.’ In Lord Justice Carnwath’s view, the CAT’s more flexible approach than Wednesbury to ‘reasonableness’ in administrative law was wrong. The Vice Chancellor conceded that if the CAT was seeking to apply the ordinary meaning in assessing Wednesbury unreasonableness, the CAT was wrong to do so, but he did not consider a fair reading of the CAT judgment led to that conclusion. Both agreed, as the CAT itself observed, that the CAT was not concerned with questions of policy or discretion, which would be the normal subject matter of the Wednesbury test. Rather, the CAT considered ‘whether the material relied on by the OFT could reasonably be regarded as dispelling the uncertainties highlighted by the issues letter.’ Such a question was suitable for evaluation by the CAT and did not involve any policy judgment that could be regarded as inappropriate for review by an administrative court.42

Court of Appeal judgment

Notwithstanding the CAT’s mistaken adoption of the two-stage test under section 33(1), the court dismissed the appeal and determined that the CAT’s conclusion to quash the OFT decision should be upheld. The CAT was right to conclude that the OFT applied too high a test of likelihood when forming its belief or failed adequately to justify the belief it formed in accordance with the proper test.43 The Vice Chancellor further elucidated:

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35 Para 44, Court of Appeal judgment.
36 Para 45, Court of Appeal judgment.
37 Para 46, Court of Appeal judgment.
38 Para 47-8, Court of Appeal judgment.
39 Para 49 and 86, Court of Appeal judgment.
40 See paras 50-3, Court of Appeal judgment in relation to paras 215-220, CAT judgment.
41 Para 57, Court of Appeal; see, more generally, paras 54-7, Court of Appeal judgment, commenting on paras 214, 210, 253 and 176-7, CAT judgment. On the shifting onus point, see Plattsfield’s Minister of Agriculture, Fisheries and Food [1968] AC 397, as referred to in the Court of Appeal judgment at para 57.
42 Paras 61, 64, 90, 93 and 100, Court of Appeal judgment; see also paras 223 and 225, CAT judgment.
43 Para 65, 70 and 75-6, CAT judgment.
‘Seemingly some eight days … [after] … the Issues Letter set out 10 matters in respect of which a significant lessening of competition might be expected to result from the proposed merger[,] … all these hypotheses had been rejected or discounted to such an extent that OFT felt able reasonably to believe that there was no likelihood that the proposed merger would lead to a significant lessening of competition.’

The OFT had expressed its conclusions in its decision in terms of likelihood, but ‘[n]one of these conclusions excludes a likelihood to the opposite effect so as reasonably to justify the belief that the anticipated merger “may” result in a significant lessening of competition’. Although the OFT was right to conclude that the NPfIT was such a fundamental change that it would alter the future competitive landscape, that did not, in the Vice Chancellor’s view, ‘justify the further conclusion that such a scenario overcomes the anti-competitive features which do exist to such an extent as to remove the requisite likelihood of a significant lessening of competition.’

Lord Justice Carnwath stipulated that while there is no statutory requirement for all of the evidence to be set out in an OFT decision letter,

‘[W]hen a challenge is made, there is … an obligation on a respondent public authority to put before the Court the material necessary to deal with the relevant issues … . The question for the Tribunal was not whether the reasoning was adequately expressed in the decision, but whether the material ultimately before it, taken as a whole, disclosed grounds on which the Tribunal could reasonably have reached the decision it did.’

Conclusion

The Court of Appeal’s clarification regarding the proper test under section 33(1) of the Act and the striking down of the CAT’s seemingly unworkable two-part test formulation is a welcome outcome for the OFT and the business community alike. Even though the OFT’s reference test must now be based on its own belief as to whether the merger ‘may’ be expected to result in a substantial lessening of competition rather than if there is a ‘significant prospect’ of that, the OFT will retain much of its discretion on referral decisions even with ‘grey area’ mergers. The speed with which IBA Health’s challenge to the OFT’s decision went through the CAT and the Court of Appeal also is good news. Notwithstanding the fact that the merger was first notified to the OFT on 1 August 2003 and the final OFT decision (which called for undertakings in lieu of a referral) was not rendered until 24 March 2004, it took just under three months for the case to progress from the IBA’s judicial review application to the CAT to the Court of Appeal judgment on the CAT ruling.

Other repercussions of the case may be less encouraging for the OFT and for parties considering a merger. The case suggests that at a time when the United States seems to be raising the bar for third parties to intervene in competition law cases, as evidenced by Trinko, 47 the United Kingdom seems to be following the European Union in lowering the thresholds for such intervention. The greater powers to challenge OFT merger decisions under the new Enterprise Act regime, as indicated by this case and a subsequent judicial review challenge to the OFT’s Tesco/Adminstore decision, mean that the OFT must better equip itself to defend or avoid such challenges. However, the stratagems and ammunition with which it arms itself may jeopardise the more open and transparent approach the OFT has so strongly advocated recently. Both the CAT and the Court of Appeal severely chastised the OFT for its procedural handling of the iSoft/Torex case in terms of its failure to give reasons for its seeming reversal of view on a number of substantive issues in the eight days between the issues letter and the decision meeting, despite the statutory duty on the OFT under section 107 of the Act to publish reasons for a decision (not necessarily in the decision itself). A better equipped OFT in this new regime is likely to require more detailed submissions from relevant parties during a merger investigation while releasing more circumspect communications that comply with the OFT’s statutory duties but which provide fewer insights into the OFT’s uninhibited reasoning.
Regulatory Update in New Zealand

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Introduction

New Zealand’s adoption, in the 1980s, of a light-handed regulatory regime for utilities, coupled with the corporatisation and/or privatisation of Crown interests in various utility industries, resulted in a relatively ‘hands-off’ approach by government to utilities for a decade and a half. This has started to change in the last few years, due both to dissatisfaction with the performance of various utility industries and a wider acceptance of regulation as a potential solution to industry issues. However, there has not been a unified approach to regulation and, as a result, the level of regulatory intervention differs markedly between utility industries. This article provides a brief update of regulatory progress in relation to five main utilities – gas, electricity, telecommunications, airports and ports.

Electricity

Electricity has been at the forefront of the move to greater regulatory intervention in utilities. As detailed elsewhere, electricity reform has gone through many stages and is still not complete.

The most recent, and arguably most significant, change has been the establishment of a Crown-led electricity regulator (the Electricity Commission) to control many aspects of the industry, including the operation of the spot market and investment in the national transmission grid. This became necessary when, in May 2003, the industry failed to implement a self-regulatory model, despite more than two years’ development. New Zealand is now in a period of stronger government control over the electricity industry than it has experienced since electricity reform began nearly two decades ago.

The Electricity Commission has also been given responsibility for purchasing reserve generation capacity which is intended to ensure security of supply in a dry year.2

Despite the establishment of the Electricity Commission, the Commerce Commission continues to play a significant role in the regulation of lines businesses through its role in price control. The Commerce Commission took responsibility for price control of lines business in 2001 after a Ministerial inquiry exposed concerns over excessive prices set by lines businesses. Accordingly, the Commerce Act 1986 was amended to require the Commerce Commission to set thresholds which, if crossed by a lines company, would enable the Commission to step in and control pricing by that lines company.

The Commerce Commission has now determined the relevant price and quality thresholds. Although the formal assessment of lines companies is only just beginning, the Commission has already determined that greater price reductions will be required from certain specified lines companies with below average productivity. This effectively puts those companies on notice that their performance must improve to avoid price control.

Gas

The gas industry in New Zealand was, like most of New Zealand’s economy, fundamentally changed by the adoption of ‘new right’ economic reforms starting in 1984. The most significant reforms were the introduction of retail competition through termination of local gas franchises and the removal of price controls. The most significant upstream development was the exit of the Crown from its central role – including the sale of its interest in the Maui gas field, production from which has dominated New Zealand’s gas industry for 30 years.

Unlike the electricity industry, development of comprehensive market arrangements has not been a feature of gas reform. However, electricity reform appears to have been a catalyst for recent review and reform of the gas industry.

Following a government-commissioned review, the government issued a Government Policy Statement in March 2003, setting out its programme for reform. This included trading arrangements for production and wholesale markets, open access to all transmission pipelines, customer switching and a range of consumer issues. The government’s preference is for industry-led solutions where possible and industry was invited to set up a governing entity to develop appropriate market arrangements. However, the government has stated it is prepared to use regulatory solutions if the industry fails to self-regulate. This threat of regulation must be regarded seriously following the establishment of a Crown regulator for the electricity industry and the introduction of legislation putting in place backstop regulation-making powers should the gas industry fail to deliver the government’s objectives via self-regulation.

The gas industry, perhaps having learnt from electricity’s unhappy attempts to self-regulate, has recognised the limitations inherent in self-governance, especially in relation to enforcement on all participants.

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1 Refer to the authors’ other ULR articles on the subject, ‘Reform of the New Zealand Electricity Industry: 15 Years and Still Counting’, Volume 12, Issue 5; and ‘Reform of the New Zealand Electricity Industry: the Continuing Story’, Volume 2003/13 UtilLR 130.

2 61% of New Zealand’s electricity generation is hydro generation with storage capacity at around three months’ supply.
Balancing this realism is the industry’s not unexpected desire to maintain some control. As a result, industry favours a co-regulatory model.

At the same time as industry-specific regulations are being proposed, the Commerce Commission is conducting an inquiry into gas pipeline services. The inquiry follows concerns raised in the government-commissioned review of the gas sector, that gas pipeline prices were excessive. The Commerce Commission’s draft report (released May 2004) recommends that gas services provided by most of the major transmission and distribution companies should be controlled. The final report to the Minister of Energy is expected in November 2004. The Minister could (if the Commission recommends), impose price control on pipeline services.

Airports

The New Zealand approach to airport regulation has been consistent with overall reliance on the light-handed regulatory model adopted throughout the economy – reliance on information disclosure (and consultation with airlines on charges), the Commerce Act (New Zealand’s competition legislation) and the threat of price control. This appears unlikely to change in the near future, despite significant tension between the airlines and airports, resulting in litigation and several government-commissioned reviews. The most recent review was commenced in May 1998, with the Minister of Commerce requesting that the Commerce Commission report on whether the supply of airport activities at the three major airports should be placed under price control. An extremely lengthy review resulted, in August 2002, with the Commission recommending that regulatory control be imposed on the largest of the three airports.

The government was then left with a stark choice of either regulating charges or disregarding the Commerce Commission’s recommendations. In May 2003, the government announced it had chosen the latter option and no price controls have been introduced. The justification was that the negative aspects of control outweighed the relatively small net benefits to airline passengers. This decision may, in part, reflect the blunt nature of the control regime which means the government was faced with an ‘all or nothing’ decision. From a regulatory perspective, the Ministerial decision to override the Commission’s four-year consideration of the issue may be undesirable. However, there has been little public reaction to the decision, possibly because the public has little sympathy for the airlines (the main potential beneficiaries of price control).

Telecommunications

Telecommunications has undergone a radical shift in the last three years from a largely unregulated sector to being subject to extensive regulatory powers under an industry-specific Crown regulator, the Telecommunications Commissioner.

The adoption of the industry-specific regulator followed dissatisfaction from some industry participants with the light-handed regulatory regime’s ability to provide a sufficient framework for the development of competition at all levels of the market. In particular, competitors to Telecom, the incumbent network provider, argued that duplication of Telecom’s network would be uneconomic and impracticable, but that existing avenues were insufficient to ensure third-party access to the network.

The Telecommunications Act 2001 gives the Telecommunications Commissioner extensive regulatory powers, including:

- the power to make determinations as to the terms, including price, on which designated access services and designated multi-network services are to be provided;
- establishing processes by which disputes over regulated services can be resolved and new services can be regulated, if necessary;
- reporting to the Minister of Communications on the desirability of regulating additional services; and
- the power to assess and apportion the cost of telecommunications service obligations, in particular the requirement that Telecom provide free local calling. Telecom is required to continue providing those services under the Telecommunications Act, with the cost being apportioned between Telecom and other carriers such as TelstraClear and Vodafone.

One of the most significant decisions made by the Telecommunications Commissioner to date is its access determination, in which it mandated that Telecom provide access for a range of wholesale services, and specified the price (based on a ‘retail-minus’ formula) for such access. Unsurprisingly, industry players have sought to use the access determination process tactically, with the Commissioner’s decision being subject to appeals and cross-appeals. While the Commissioner understandably shows a preference (as required by the Telecommunications Act) for solutions that open up the market to a wider range of providers, its decisions have not focused solely on this. Late last year the Commissioner recommended against local loop unbundling, on the basis that the costs of unbundling would outweigh the benefits.

Ports

Since central government divested its direct interest in most aspects of the port industry in the 1980s, there has been a largely hands-off approach to regulation and the market has been autonomous in respect to pricing and service provision decisions. However, market power has long been a contentious issue. This is partly due to the nature of the industry, where geographically isolated ports have a natural monopoly and are also vertically integrated, providing stevedoring, tugboat and other potentially contestable services in addition to their monopoly services. There have been several cases taken against port companies under the Commerce Act (New Zealand’s competition legislation), including one resulting in a fine of several million dollars for one port for abuse of market power.
Ongoing concerns about monopoly pricing led the government to commission a review of market power issues in the port industry in 2002. Despite the concerns of port users and providers of contestable services, the independent review concluded that the New Zealand port industry is generally competitive and that intervention would only distort the market and serve no real purpose. This finding was consistent with international benchmarking studies which indicate New Zealand ports are generally efficient and performing well. The report found evidence of extensive inter-port and intra-port competition (particularly in stevedoring and marshalling) as well as vigorous competition between different modes of transport – particularly road, rail and coastal shipping. Anti-competitive behaviour is also constrained by relatively low barriers to entry in some aspects of port operations and the countervailing power of large shipping players.

The report did however identify a number of potentially ‘captive’ customer groups. Ports may be in a position to charge prices above competitive levels where the cost of transport to an alternative port is prohibitive, where the port users have invested in specific assets, or where it is essential to receive and deliver cargo close to the point of destination.

Following the review, the government considered three regulatory intervention options:

- a ministerial directive to the Commerce Commission to undertake an inquiry into market power issues;
- an information disclosure regime; and
- a mandatory alternative dispute resolution regime.

All of these options were rejected as being inappropriate and expensive. This, combined with the report finding that geographic capture is diminishing, led to the decision by the government late in 2002 not to intervene in the market.

Conclusion

There has much debate over the years regarding the effectiveness of regulation. It appears that the extent of regulatory control over individual utilities has been largely driven by political agendas. As a general trend, those utilities with greatest immediate consumer impact are more likely to be controlled, while others have been left largely unscathed. It is too soon to tell whether the recent increase in industry-specific regulation will succeed in enhancing the efficient delivery of services, or result in the over-policitation and inefficiency that drove initial deregulation 20 years ago.
Russian Railways

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Introduction

Russia has four recognised principal utilities/infrastructure monopolies:

(1) electricity;
(2) gas;
(3) water; and
(4) rail.

The state has been looking at ways to invigorate each of these monopolies – principally by opening them to private investment – and, while water is not seen as particularly problematic, the other three, potentially, are. It seems, therefore, that the state has decided to deal, in turn, with electricity; then gas; and, finally, rail. However, given recent complications with Gazprom, at some stage it looks likely that rail may be promoted above gas in the pecking order.

The railway system is state-owned and, until recently, operated by the Russian Ministry of Railways (the ‘RMR’). It is traditionally very conservative (Russian rail transport accounts for 80 per cent of total freight turnover and 43 per cent of passenger turnover). However, the Russian government has recently embarked on a major restructuring programme for the railway network, aimed at creating greater commercialisation in the sector and offering private sector players the opportunity of an increased role. The Russian government recently approved a US $3.7 billion investment program for the rail system to upgrade infrastructure and replace obsolete rolling stock. The EBRD and the World Bank have also become involved in financing rail reform and have made loans for the acquisition of rail vehicles and to support the continuing modernisation of track maintenance and renewal. There is also talk of international bond financing.

It is important to recognise the state of Russian railways. In particular it must be understood that traditionally Russian railways have not simply owned and operated the track, rolling stock and stations, but also all developments along the railway lines. It is not uncommon to discover whole towns (houses, shops, schools, universities, hospitals etc.) owned and managed by the railway. This highly integrated structure has meant real opportunities to reform have, so far, been scarce.

However, the position has now changed, and there is a real chance to see, in the short term:

- the opening of potentially lucrative markets for supplying equipment (especially rolling stock and components), track maintenance, telecommunications/
  information technologies, rail management systems and safety equipment; and
- the opportunity for investors (both local and foreign) to invest in Russian railways.

Reform of Russia’s railway system

In May 2001, the Russian government approved a three-stage plan (2002–2010) to restructure and open up the rail system. The plan aims to transform the monolithic and heavily bureaucratic railway system into several entities more responsive to the demands of market economy and better able to attract much needed, including foreign, investment.

(1) The first stage of the plan (2002-2004) involved creating a legislative basis for restructuring, separating the regulatory function of the RMR from the commercial operations. This involved forming a 100 per cent, state-owned, open joint stock company, Rossiyskie Zheleznie Dorogi (‘RZhD’), with a charter capital of US $56 billion, to undertake the commercial operations. RZhD became operational on 1 October 2003. The Railway Ministry has been absorbed into the Transport Ministry.

(2) The second stage of the restructuring plan (2004–2006), involves separating the operational divisions handling cargo and passenger traffic within RZhD, creating a new traffic structure and privatising various railway construction and repair companies. To date, a number of operating companies have been created under the umbrella of RZhD (the exact number of these is unclear but appears to be almost 100), which are being prepared for privatisation. The sell-off will be carried out over the next seven years.

(3) In the final stage (2006–2010) of restructuring RZhD, the sell-off will be completed, but the track infrastructure and centralised dispatch system, considered critical to the country’s economy and security, will remain under government control.

Some of Russia’s largest companies are positioning themselves to take advantage of the railway system reforms. Some major metals, mining and oil companies are creating operating companies, some (especially in the oil industry) with their own rolling stock, to transport their products. Many of these firms have already been operating their own limited rail systems to carry their products to the national rail network. Significant increase in rail freight volumes is
expected. In 2003 alone, there was an increase of approximately 10 per cent in freight turnover.

Currently, the RMR has certified about 80 private sector companies to transport cargo by rail. The RMR reported that private operators invested US $200–250 million to develop their rolling stock in 2002. According to RMR estimates, by 2010 there will be around 200 private companies operating in Russia, capable of transporting up to 50 per cent of Russia’s freight.

Prospects for foreign companies

The consequences of the dissolution of the USSR and changes in Eastern Europe have severely affected machine building and the manufacture of equipment for the rail transport sector. Prior to the USSR break-up, Russia had imported approximately 60–70 per cent of passenger cars (mostly from East Germany), 40 per cent of freight cars (Romania and Poland) and electric locomotives (Czechoslovakia). The latest rejuvenation of Russian railways has seen significant rolling stock orders. Present domestic capabilities are not sufficient to meet demand — Russian rolling stock manufacturers currently have over two years worth of orders. In addition, while there is a preference to use domestic suppliers, there is also a realisation that they cannot compete with western manufacturers in terms of quality. Solutions to meet equipment needs may come from integrating foreign technologies into Russian manufacturing process and management techniques in freight and passenger transportation.

According to many observers, the United States offers Russia a good model for efficient freight railroading. Both countries transport freight over comparatively long distances, volumes transported are similar and the climatic conditions are equally varied and occasionally severe. US technologies and equipment (in particular, freight rolling stock and diesel locomotives) could, therefore, find a ready market in Russia over the next five to 10 years. On the other hand, the proposed sell-off — albeit that its mechanics have not yet been finalised — does bear some of the hallmarks of the British Railways Board privatisation — although there is a willingness to learn from some of the mistakes of that privatisation.

To date, however, foreign companies have experienced more frustration than success in entering the Russian market. Obstacles include an onerous equipment certification process, the conservative mentality and bureaucracy of the RMR and other railway officials, complex and comparatively high freight tariffs, and uncertainty surrounding the restructuring programme.

Moreover, as mentioned above, when making procurement decisions for upgrading the rail system, preference is likely be given to those foreign companies that have, or are developing, domestic Russian production capabilities or have joint venture partners in Russia — something which is now beginning to happen. It was recently announced that the investment company Brunswick Capital Ltd had become the first Western company to invest in the domestic rail cargo sector. Brunswick Rail Leasing is a joint venture set up between Brunswick and Transgroup AC, one of Russia’s largest private railway operators. The new company plans to invest US $200 million over five years in acquiring its own rolling stock. If it succeeds, the company will become the country’s top rail leasing firm. The Railways Minister, Gennady Fadeyev, commented to the effect that leasing arrangements are, by themselves, not enough to solve the problem; the emphasis is on the need to build new rolling stock.

There is clearly a growing opportunity for Western companies to become involved in Russian railways. The immediate interest is in rolling stock leasing and production, but undoubtedly other opportunities will present themselves as restructuring plans develop and RZhD commence the privatisation and sale process.
CURRENT SURVEY

Current Survey

UNITED KINGDOM

edited by Philippa Young, Solicitor, Oxford

GENERAL
PRESS RELEASES

OFFICE OF FAIR TRADING

www.oft.gov.uk

MERGER GUIDANCE
(PN 65/03) 21 May 2003
The OFT has published merger guidance explaining how its responsibilities will be carried out under the new merger provisions of the Enterprise Act 2002 which came into force on 20 June 2003. From that date onwards, the examination of mergers by the competition authorities in the United Kingdom will be subject to two changes which ensure that future mergers are assessed by independent competition authorities applying a clear competition test in a transparent, accountable manner:

• The OFT, rather than the Secretary of State for Trade and Industry, will decide directly which mergers are referred to the Competition Commission in the vast majority of cases, and Commission Conclusions will be determinative.
• In assessing mergers, both the OFT and Commission will apply a 'substantial lessening of competition test' (replacing the current 'public interest' test).

Two guidance documents (which may be downloaded from the OFT website) explain the substantive test for merger assessment and the procedures to be used by the OFT in examining mergers.

ENTERPRISE ACT
(PN 78/03) 16 June 2003
The new Enterprise Act (in force from 20 June 2003) has wide-ranging implications for businesses and consumers. A number of important reforms designed to stamp out abuses that are harmful to customers and fair-trading businesses and encourage enterprise and productivity have been made. The changes cover competition law and also the enforcement of consumer legislation.

• Mergers: The act brings in a competition test for merger decisions and removes politicians from the merger process unless there are defined public interest issues such as national security. In future, almost all decisions will be taken by the OFT and Competition Commission acting as independent authorities. The test for a merger to be referred to the Commission is if there is, or is expected to be, a 'substantial lessening of competition'.
• Cartels and director disqualifications: Inter alia, criminal penalties are introduced for individuals dishonestly engaging in cartels such as horizontal price fixing, limiting supply or production, market sharing or bid rigging. The Serious Fraud Office will prosecute with the possibility of five years imprisonment and an unlimited fine on conviction.
• Consumer law enforcement: Greater power is given by the act to obtain court orders against businesses breaking consumer laws. A consistent enforcement regime is established by the Act with a more efficient procedure resulting in speedier action.
• Super complaints: Designated consumer bodies may make a 'super complaint' to the OFT if they believe one or more features of the market is significantly harming consumer interests. The OFT must then respond within 90 days.
• Market investigation references: The OFT is given a revised power to refer to the Competition Commission when it has reasonable grounds for suspecting that one or more features of a UK market prevent, restrict or distort competition.

BROADCASTING
PRESS RELEASES

COMPETITION COMMISSION

www.competition-commission.org.uk

MERGER OF GRANADA AND CARLTON COMMUNICATIONS
(13-03) 30 April 2003
Issues letters have been sent to Granada plc and Carlton Communications plc as part of the Commission’s inquiry into their proposed merger. Issues letters are always sent before the Commission has reached any conclusions and are intended to highlight matters identified for further consideration. Before reaching any conclusion in this case, as to whether the merger could be against the public interest, issues for consideration were as listed below.

(1) The appropriate definition of the economic markets affected by the proposed merger and, in particular, whether:
television advertising (rather than ITV advertising or all display advertising) is the relevant market and whether its geographic extent is the United Kingdom or England and Wales;

- the geographic market for programme production is the United Kingdom or a wider market;
- the geographic market for studio facilities is regional or part of a wider market.

(2) Whether a merger is likely to affect competition in any of the identified markets and, in particular, whether:

- the companies currently compete for advertising revenue in London and the regions and, if so, whether a merger would substantially lessen that competition;
- a merger would be likely to lead to a significant rise in prices or reduction in quality or levels of service for advertisers and/or media buying agencies;
- practices such as price discrimination, bundling airtime sold to media buying agencies and/or advertisers or greedy pricing could be expected to come into being or be exacerbated as a result of a merger. This would include:
  (a) the ability of the merged entity to manipulate station average prices to its own advantage;
  (b) the possibility that the merged entity would impose new arrangements for selling time, thereby disadvantaged media buying agencies or advertisers;
  (c) likely barriers to entry or expansion in the relevant markets;
  (d) identifiable trends in the development of relevant markets that might affect competition in the future;
  (e) any increased influence that the merged company might have within the ITV network;
  (f) the possibility of the position of other broadcasters being weakened;
  (g) any constraint on future competition for ITV licences; and
  (h) whether the proposed merger could be expected to operate to the detriment of advertisers, viewers, and users of studio facilities, competitors or other participants in the relevant sectors in any other way.

(3) Whether negative consequences of any proposed merger could be sufficiently constrained to avoid harming the public interest in any way.

(4) Whether there are likely to be any benefits from the proposed merger.

Should the findings be that any merger is likely to operate against the public interest, remedies that might be considered could include:

- a complete ban; or
- allowing both of the advertising sales houses currently operated to be run, in future, either as independent entities or observing a code of conduct designed to protect the position of the independent production companies or smaller ITV licensees.

The Commission issued a formal Statement of Hypothetical Remedies on 19 May (16/03) and a Further Statement of Hypothetical Remedies 17 June 2003.
a clear and transparent process for independent programme commissioning;
• defining a minimum set of primary rights, their duration, and how negotiations for primary rights will be conducted separately from secondary and tertiary rights negotiations;
• a list of tariffs relating to the fees for primary rights by genre and day part;
• proposals for development funding and cash flow of productions;
• procedures for broadcasters to provide periodic reports to Ofcom to monitor the Codes’ application;
• a dispute resolution mechanism to cover disputes between broadcasters and producers.

**DEPARTMENT OF CULTURE, MEDIA AND SPORT**
www.culture.media.uk

**ITC/BBC REPORT ON DIGITAL SWITCHOVER**
(41/03) 4 April 2003
A joint ITC/BBC report entitled ‘Progress towards Digital Switchover’ has been published showing that the take-up of digital television, (currently at 40 per cent) could double over the next five years. The report lists government policy interventions that could be taken to increase take-up, should progress be slow. These include announcing a firm switchover date, the mandating of digital decoders in new televisions, a co-ordinated public information campaign, a public commitment to high levels of DTT coverage after switchover, and the growth of a ‘free’ satellite market as a result of public service channels broadcasting on digital satellite. The government aims to switch over to digital television by 2006–2010.

**SWITCH TO DIGITAL TELEVISION**
Consumer organisations including the Consumer’s Association, the National Consumer Council, the Voice of the Listener and Viewer, ACRE, Age Concern, Dear Broadcasting Council, RNIB and RNID have been invited to be part of an expert group formed to ensure that the public has a say in the changeover to digital television. The group will assist government ministers in deciding when to commence switchover and was formed to ensure the public’s concerns remain a continuing and integral part of the decision-making process. It will help to review the criteria towards switchover, prepare a report on consumer concerns, bring together evidence on consumer awareness, attitudes and needs in relation to digital broadcasting, and give its views on communications with consumers, equipment and installation issues, issues relating to the transitional stages and implementation of switchover, and any regional issues.

**RADIO AUTHORITY**
www.radioauthority.org.uk

**LOCAL LICENCES**
Licenses have been awarded as follows:

• (25/03) Middlesex Broadcasting Corporation Ltd has been given the licence to provide a local television service for Leicester. The licence is to commence on 27 May 2003.
• (26/03) Oxford Broadcasting Ltd, the current licensee, was awarded the licence (to commence on 6 June 2003) to provide a local television service for Oxford.
• (51/03) The new Independent Local Radio licence on the FM waveband for West Lothian was awarded to the sole applicant, River FM (Almond Radio Ltd.). The licence will come into effect as soon as River FM begins broadcasting.
• (52/03) The new independent local radio licence on the FM waveband to serve Maidstone was granted to 20/20 (Maidstone Radio Ltd.). The licence will come into effect as soon as 20/20 begins broadcasting.
• (53/03) Capital Radio Digital Ltd., a wholly owned subsidiary of Capital Radio plc, has been awarded the local digital multiplex licence to serve most of the county of Kent. Capital Radio Digital is a wholly-owned subsidiary of Capital Radio plc. The service will commence in April 2004 and the licence will initially run for 12 years from commencement of broadcasting.
• (58/03) The Radio Authority is to renew the East Lancashire local licence held by Asian Sound Radio Ltd. It will run for eight years from 3 June 2003 until 2 June 2011. Asian Sound Radio is the provider of a digital sound programme service on the Manchester local multiplex.
• (63/03) The new independent local radio licence on the FM waveband to serve North Norfolk has been awarded to North Norfolk Radio Ltd. The licence will come into effect when North Norfolk Radio begins broadcasting.
• (64/03) Now Digital (East Midlands) Ltd, the sole applicant for the local digital multiplex licence to serve Nottingham, has been awarded a licence to run initially for 12 years. It proposes to commence its service by April 2004.
• (65/03) Milton Keynes Broadcasting Company Ltd (a wholly-owned subsidiary of GWR Group plc) which broadcasts as FM 103 Horizon, has been re-awarded an FM local radio licence to serve Milton Keynes for a further eight years from 1 January 2005. The licence was re-awarded under the ‘special application procedure’ introduced in the Broadcasting Act 1996.
• (66/03) The existing licence holder, Orchard FM Ltd (a wholly-owned subsidiary of the GWR Group plc) has been awarded a local radio licence on the FM waveband to serve Taunton and Yeovil for eight years from 1 January 2005.
• (68/03) The two Tyne and Wear local licences currently held by Metro Radio Ltd (a wholly-owned subsidiary of Emaph Performance Ltd, which broadcasts as Metro
Radio FM and Magic 1152 AM) have been renewed for eight years, to run from 15 July 2003 until 14 July 2011. Metro Radio is the provider of two digital sound programme services on the Tyne and Wear multiplex.

- (74/03) Radio Borders Ltd, the existing licence holder and a wholly-owned subsidiary of Scottish Radio Holdings plc, was awarded a local radio licence on the FM waveband to serve the Borders area for a further eight years from 1 January 2005.

- (76/03) The new local licence for Helensburgh in Argyll and Bute has been awarded to Castle Rock FM Dumbarton Ltd and will come into effect as soon as Castle Rock FM begins broadcasting.

- (78/03) Fifteen local licences were re-awarded for a further eight years as follows:
  - Brighton/Eastbourne & Hastings FM to Southern FM (Capital Radio);
  - Brighton/Eastbourne & Hastings AM to Capital Gold 1323/945 (Capital Radio);
  - Great Yarmouth & Lowestoft FM to 103.4 The Beach (Tindle Radio);
  - Kent FM to Invicta FM (Capital Radio);
  - Kent AM to Capital Gold 1242/603 (Capital Radio);
  - Liverpool FM to Radio City (Emap Performance);
  - Liverpool AM to Magic 1548 (Emap Performance);
  - South Hampshire FM to Ocean FM/103.2 Power FM (Capital Radio);
  - South Yorkshire FM to Hallam FM (Emap Performance);
  - South Yorkshire AM to Magic AM (Emap Performance);
  - Stoke on Trent FM to Signal 1 (The Wireless Group);
  - Stoke on Trent AM to Signal 2 (The Wireless Group);
  - Swansea FM to 96.4 The Wave (The Wireless Group);
  - Swansea AM to Swansea Sound (The Wireless Group).

Under the terms of the Broadcasting Act 1996, a local radio licence holder is entitled to apply for an automatic renewal of its licence if it provides a programme service on a ‘relevant’ digital radio multiplex, ie, one which provides digital coverage of at least 25 per cent of the population already covered by the analogue licence in question.

**ENERGY–GENERAL**

**PRESS RELEASES**

**BRITISH NUCLEAR FUEL**

www.bnfl.com

**PUBLICATION OF GOVERNMENT’S DRAFT NUCLEAR BILL**

24 June 2003

BNFL has welcomed the draft Nuclear Sites and Radioactive Substances Bill which is to be introduced into Parliament before the end of 2003. This is intended to pave the way for the creation of the Nuclear Decommissioning Authority (NDA). The NDA is being established to focus on the management and clean-up of the United Kingdom’s public sector civil nuclear liabilities. The government has stated that it is committed to ensuring that the arrangements for managing UK nuclear liabilities are open, transparent and will give confidence to the public.

**HEALTH AND SAFETY COMMISSION**

www.hse.gov.uk

**CLARITY IN REGULATION**

(C015:03) 9 May 2003

The HSC has published a report expressing the need for greater clarity in nuclear regulation. The ‘Review of the Regulation of Nuclear Safety and the Management of Radioactive Materials and Radioactive Waste within the United Kingdom: Structures and Principles of the Regulation of Civil Nuclear Licensed Sites’ was produced jointly by the Nuclear Safety Advisory Committee and the Radioactive Waste Management Advisory Committee. The report sets out, both for nuclear safety and for the management of radioactive materials and radioactive wastes, the legislative bases of regulation, the principles on which regulation is founded and current regulatory policy and practice. It compares the present regulatory arrangements with those which the two committees regard as ideal, drawing out any aspects that fall short of ideal. Steps that could be taken to introduce greater clarity to the regulatory arrangements and remove the potential for conflict between the requirements of the different regulatory bodies have been recommended to the government.

**OFFICE OF GAS AND ELECTRICITY MARKETS**

www.ofgem.gov.uk

**SIMPLIFICATION OF LICENCE PROCESS**

(R/36) 15 April 2003

Any company wanting to distribute or transmit electricity, transport or ship gas or supply gas and electricity is required to obtain a licence from OFGEM. Following a review of licence application procedures, OFGEM has announced that it is to simplify the process involved in obtaining a licence in the gas and electricity markets.

**ZONAL TRANSMISSION LOSSES – JUDICIAL REVIEW PROCEEDINGS**

(R/38) 17 April 2003

OFGEM has received papers for judicial review proceedings of its decision to introduce zonal transmission losses to England and Wales. The proceedings were commenced by AES Drax Power Ltd, Scottish Power Generation Ltd, SSE Energy Supply Ltd and Teeside Power Ltd. It will defend the proceedings since it believes that the correct decision on zonal transmission losses was made, on economic and environmental grounds, and all due process was followed.
CONCORDAT BETWEEN OFGEM AND FSA  
(R/41) 12 May 2003
Due to the introduction of more competitive markets for wholesale gas and electricity, the interaction between the Financial Services Authority (‘FSA’) and OFGEM has increased. OFGEM has therefore published an agreed concordat with the FSA, setting out a framework for communication and co-operation between the agencies. The aims of the concordat are: to foster mutual understanding and effective relations between the agencies; to assist in the more efficient performance of the agencies’ statutory functions; to ensure liaison and the sharing of information where relevant; to limit duplication of investigatory effort by prior consultation; and, to co-ordinate enforcement action in relevant cases and subject to statutory and any other limitations.

MISSELLING CODE  
(R/43) 27 May 2003
The Association of Energy Suppliers (‘AES’) has announced a new Code of Practice for the Face to Face Marketing of Energy Supply as well as the appointment of Enstra Energy Services as the ‘Code Administrator’. The code is aimed at stamping out misselling of gas and electricity contracts and, OFGEM believes, is an important step towards encouraging more customers to switch energy suppliers to save money. The code, which has been developed in consultation with OFGEM, Energywatch and the industry, commits all major energy suppliers to higher standards in energy sales and includes a commitment to pay compensation to customers affected in specified circumstances.

COMPETITION FOR DOMESTIC CUSTOMERS  
(R/49) 16 June 2003
OFGEM’s latest research has shown that there are still high levels of supplier switching in the gas and electricity markets. Approximately 19 million customers have now switched from the ex-monopoly suppliers – British Gas and the former electricity boards, and millions more claim that they are likely to switch. Vulnerable groups such as single parent families are benefiting from competition and are switching more quickly than average. (Meanwhile, Energywatch stated, on 10 April, that competitive pricing is becoming seriously eroded. SEEBOARD customers have faced a second gas price rise in eight months and, in May, gas bills for LE, SEEBOARD and SWEB all rose by 4 per cent while electricity bills increased by 1.5 per cent).

VOLUNTARY COMPENSATION SCHEME  
(R/54) 20 June 2003
Major domestic gas and electricity suppliers have signed up to a voluntary compensation scheme for domestic customers. Customers who have been transferred in error will receive £20 compensation if the supplier fails to meet their promise to confirm, within 20 working days, that they have been transferred in error and will be returned to their previous supplier.

MONOPOLY PRICE CONTROLS  
(R/55) 24 June 2003
A framework for how OFGEM will approach price controls for monopoly gas and electricity networks has been set out. It will improve incentives on companies to run their business more efficiently and operate more cost-effectively. The framework also addresses the issues involved with pension costs and proposes guidelines for how these costs may be treated under forthcoming price controls.

ELECTRICITY PRESS RELEASES

OFFICE OF GAS AND ELECTRICITY MARKETS
www.ofgem.gov.uk

SCOTTISH RENEWABLES INDUSTRY  
(R/33) 9 April 2003
ScottishPower and Scottish and Southern Energy plc have started work in preparing the transmission network for the expansion of the Scottish Renewables Industry. They will identify areas where investment is needed to support renewable generation and all work will be carried out to meet OFGEM investment criteria.

ELECTRICITY BILLS  
(R/40) 9 May 2003
OFGEM has taken action to develop and enhance domestic competition in the electricity industry and powers exist to penalise firms who act to damage competition. Nevertheless, a report by the National Audit Office has found that 60 per cent of domestic customers pay up to 22 per cent more than they could if they switched supplier. Savings of about £50 could be available to domestic customers who switch supplier. Meanwhile bills for businesses, schools and hospitals in England and Wales fell by 25 per cent.

CHANGES FOR ELECTRICITY NETWORKS  
(R/48) 12 June 2003
Companies running the country’s regional electricity distribution networks are to receive improved incentives to reduce the £600 million worth of electricity lost annually on their networks. An average of 7 per cent of electricity (enough to power five million homes) is lost as it travels along the wires and transformers, which adds more than £12 to the average domestic customer’s bill. Therefore OFGEM is to encourage efforts by the 14 price-regulated distribution companies to reduce these losses by increasing improving and simplifying the incentives they face under their price controls. This will bring the losses in line with the revenue benefits companies receive for achieving other efficiency gains. OFGEM has also published proposals to make it easier and more cost reflective for smaller generators, like renewables, to connect to and use the local electricity networks. Current charges for connection and use of local networks are based on principles established in the 1980s.
Distribution costs make up between 25 and 30 per cent of domestic customers’ bills and the way distribution companies charge for connection can affect these costs.

**CHP exemption system**
(R/53) 20 June 2003
OFGEM has launched a database for the new Combined Heat and Power Climate Change Levy exemption certificates. The government announced in the 2002 Budget that electricity generated by ‘good quality’ Combined Heat and Power (CHP) stations would be classified as exempt from the Climate Change Levy. Under the scheme, CHP Levy Exemption Certificates are issued to CHP generators each month in respect of a CHP station electricity output. The LECs can then be used by suppliers who supply the output to business customers. Business customers buying CHP-generated electricity from the supplier will then avoid paying the levy. The new database — the CHP Information Management System — will allow generators and suppliers to view and manage their accounts on line.

**STATEMENT ON ELECTRICITY LOSSES**
(R/58) 27 June 2003
OFGEM is disappointed by the Trade and Industry Secretary’s rejection of plans to extend cost-reflective charging arrangements for losses on the electricity transmission network in England and Wales. OFGEM believes this to be against the interests of consumers, the environment and development of the electricity market generally. In making its decision in January, OFGEM was aware that cost-reflective charging for transmission losses would: be consistent with the Secretary of State’s Social and Environmental Guidance to the Authority; benefit consumers; make a contribution to meeting Britain’s CO2 emissions targets; and, be consistent with proposals which have long had support within government and the industry.

**DECISION ON NGC COSTS**
(R/59) 27 June 2003
OFGEM has announced its decision that the National Grid Company (NGC) can pass on the costs of a contract struck with AES Drax in November 2002. NGC entered the contract with AES Drax to secure its operating reserve (i.e., the amount of plant NGC keeps available to cover plant breakdown on the system) at a time of market uncertainty. NGCs actions were, at the time, consistent with its statutory duties and licence obligations. Under its System Operator Incentive Scheme, NGC can usually only under exceptional circumstances pass on in full the costs of keeping the system in balance, known as Income Adjusting Events (IAEs). However, OFGEM has decided to approve the Drax contract as an IAE.

**GAS PRESS RELEASES**

**HEALTH AND SAFETY EXECUTIVE**
www.hse.gov.uk

**REVISED GUIDANCE ON GAS TURBINE SAFETY**
(E085:03) 3 June 2003
The Guidance Note ‘Control of Safety Risks at Gas Turbines (GTs) used for Power Generation’ has been reissued by the HSE. The guidance is aimed at manufacturers, suppliers and operators of gas turbines used for generating electrical power, but is also applicable to their use in oil and gas pumping and compression plant and similar applications. The new edition has been extensively revised since the original 2000 publication. It draws attention to hazards associated with GTs and describes ways in which the associated risks can be eliminated or reduced to an acceptable level. New information includes the design of enclosure ventilation, further guidance on selecting equipment to be used in potentially explosive atmospheres, and risks from the use of liquid fuels. At the same time, a free information document ‘Health and Safety Risks from small Gas Turbines used for Power Generation’ has been produced. This gives guidance on choosing locations for small GTs, together with suitable risk reduction measures. Small GTs are used to provide electricity and hot water for medium-sized buildings such as leisure centres, nursing homes, hospitals, etc. Larger, purpose-built units provide electricity for towns and cities. GTs are also used in the gas and petroleum industries to provide pumping and compression facilities and to generate electricity, e.g., on offshore production platforms.

**OFFICE OF GAS AND ELECTRICITY MARKETS**
www.ofgem.gov.uk

**GAS BALANCING**
(R/34) 10 April 2003
OFGEM has set out reasons for retaining daily gas balancing. OFGEM has a duty to ensure security of supply and started the process of investigation and consultation in 2000 after Transco expressed concerns that security could be threatened by the action of shippers — firms that flow gas through the pipeline network. By not flowing gas through the system in a smooth predictable manner over the day, shippers were forcing Transco to draw on gas stored in the pipeline system which has led to increasing difficulties in keeping the system in balance and could pose a threat to security of supply.

**BRITISH GAS TRADING fined**
(R/37) 16 April 2003
After British Gas Trading incorrectly objected to 5,000 customers switching supplier, OFGEM is to fine the company £200,000. Direct debit customers had been prevented from...
switching supplier because BGT claimed that they were in debt. Under their licences, gas and electricity suppliers are allowed, in certain circumstances, to stop customers from switching to another company if they owe money, but in this case the direct debit customers were technically not in debt.

**PURCHASE OF ROUGH GAS STORAGE**
(R/39) 28 April 2003 and (R42) 19 May 2003
OFGEM has published its concerns that the purchase of a Rough gas storage facility by Centrica is likely to reduce competition substantially. Originally, OFGEM believed that Centrica should agree to undertakings preventing it from using ownership of Rough to manipulate the market. It now, however, supports the Competition Commission suggestion that the divestment of all or part of Rough is a more appropriate way to address the issues arising from the transaction.

**REGULATION OF GAS DISTRIBUTION**
(R/47) 5 June 2003
Customers are to be protected from the potential sell-off of regional distribution networks by Transco under final price control plans. OFGEM has set out proposals as to how Transco’s eight regional distribution areas will, in future, be subject to separate price controls. These would:

- protect customers if Transco sells off one or more of its regional networks;
- create greater management focus and promote efficiency savings;
- provide opportunities to compare the performance of the regional networks and thereby enable more effective regulation.

At present, OFGEM sets a single price control for Transco which runs the eight regional distribution networks.

**EXPANSION OF GAS IMPORTATION TERMINALS AND INTERCONNECTORS**
(R/60) 30 June 2003
OFGEM and the DTI have set out initial views on a new regulatory framework for all new Liquefied Natural Gas (‘LNG’) importation terminals and interconnectors. The proposals anticipate EU legislation to help create a European energy market and will clarify the regulatory rules for developers intending to build LNG terminals and gas and electricity interconnectors to and from Britain. It is hoped that regulation will protect customer’s interests but not stifle development.

**POSTAL SERVICES PRESS RELEASES**

**Office of Fair Trading**
www.oft.gov.uk

**MAIL CONSOLIDATION COMPLAINT**
41/03) 16 April 2003
The OFT has referred a complaint from Postwatch to Postcomm. The complaint related to the Royal Mail’s Mailsort service which provides a discount for businesses carrying out their own initial mail sorting for large volumes of mail, and alleged that Royal Mail was abusing its dominant position in the market for delivering letters by favouring its own mail consolidation business over its Mailsort service. Postcomm will investigate whether the matters raised in the complaint constitute a breach of Royal Mail’s licence.

**MISLEADING STATEMENTS**
(67/03) 23 May 2003
Following action by the OFT, two companies in Kent, (Franking Solutions Ltd and Mailroom Supplies (Labels) Ltd) have given written assurances to the OFT not to make misleading oral statements. The assurances were obtained under the Control of Misleading Advertisements Regulations 1988. To come within the scope of the Regulations, an advertisement (oral, written or pictorial) must be misleading (ie, must deceive or be likely to deceive and affect economic behaviour) and be published in connection with a trade, business, craft or profession to promote the supply or transfer of goods and services. The OFT is only able to act when it has received a complaint. In this case, complaints were made that the companies had telephoned businesses and made misleading claims that orders for franking labels had been placed with them when they had not, that they were the current suppliers of franking labels for the businesses when they were not, and that signing and returning an order form would be relied on for information purposes only, when the documents were relied on as an order for franking labels.

**Postcomm**
www.postcomm.gov.uk

**LONG-TERM LICENCE ISSUED TO UK MAIL**
(16/03) 12 June 2003
Postcomm has issued its fourth long-term licence to UK Mail Ltd. The licence is for a minimum of seven years and will allow the company to provide consolidation services for business customers.

**Working arrangements with OFT**
(18/03) 27 June 2003
Following a three-month consultation, a Memorandum of Understanding (‘MoU’) has been published, setting out how Postcomm will work with the Office of Fair Trading (‘OFT’) on issues affecting competition. The OFT enforces the
Competition Act 1998, (and more recently the Enterprise Act 2002) which prohibits anti-competitive behaviour in the United Kingdom, while Postcomm is responsible for enforcing Royal Mail’s licence which, inter alia, requires it not to act anti-competitively. Thus Postcomm and OFT overlap in this area. The MoU comes into immediate effect and clarifies the respective roles of the two offices when investigating cases of anti-competitive behaviour; so that duplication does not occur.

**POSTCODE ADDRESS FILE CODE OF PRACTICE**
(19/03) 30 June 2003
Postcomm has published its first review of the Code of Practice introduced in 2002 on changes to the Postcode Address File (‘PAF’) — the list of postal addresses of all 27 million households in the United Kingdom, which is maintained by Royal Mail. For the first time, rules have been set out for people wishing to ask Royal Mail to make changes to parts of their postal address.

**TELECOMMUNICATIONS PRESS RELEASES**

**COMPETITION COMMISSION**
www.competition-commission.org.uk

**MOBILE PHONES**
(23/03) 27 June 2003
The claims for Judicial Review brought by Vodafone, Orange and T-Mobile against the Competition Commission’s report into the charges made by mobile network operators for terminating calls from fixed and mobile networks was rejected at the High Court by Moses J on 27 June 2003. The judgment was welcomed both by the Commission and by OFTEL.

**OFTEL**
www.oftel.gov.uk

**INTERNET ACCESS CHARGES**
(17/03) 4 April 2003
Prices for consumers could fall if BT cuts its wholesale unmetered internet access prices, as proposed by OFTEL. OFTEL’s view is that BT should cut its wholesale charges by 17 per cent because it is charging operators for call routing and call management measures that have, since December 2001 no longer been technically necessary. If the suggested changes are implemented, BT would have to backdate the refund to that date.

**REVIEW OF LEASED LINES AND MOBILE MARKET**
(20/03) 11 April 2003
As part of its work to implement the new EC Directives on electronic communications networks, OFTEL has published market reviews for the leased lines and calls from mobile phones markets. It proposes lifting all remaining wholesale regulation from the mobile market related to access and outgoing calls due to the increased level of competition in the market. In the leased lines market, OFTEL proposes to continue with most current regulation to support competition and, in particular, the requirement on BT to provide partial private circuits to other operators for leased line services. Under the implementation process for the new Directives, OFTEL is under an obligation to review the telecommunications market before deciding the appropriate level of regulation to protect and support competition.

**MOBILE CALL TERMINATION MARKED REVIEW**
(26/03) 15 May 2003
OFTEL has taken action to promote competition and reduce the price of calling a mobile phone as part of its work to implement the new EC directives on electronic communications networks. This is necessary because consumers pay too much for making calls to mobile phones and have no choice but to incur the high connection charge set by the operator of the network they are calling. OFTEL’s review of calls made to mobile phones is a separate review from the Competition Commission’s investigation into call termination rates. The key proposals set out in OFTEL’s review of the calls to the mobile phones market are to:

- protect consumers from excessive call termination charges and to reduce the amount mobile operators charge to connect calls to their networks;
- promote competition between operators by ensuring equal access and no undue discrimination against other operators for terminating calls onto the mobile networks; and
- not impose regulation on the 3G market as these are innovative services and regulatory controls would be disproportionate in a developing market.

**BREACHES OF OPERATING LICENCES**
(27/03) 21 May 2003
A final order was issued against 1st Rate Telecom for breaching its operating licence. OFTEL concluded that the company had allowed chat services to be run on number ranges in a manner that contravened the National Numbering Conventions. Consumers calling the chat services paid up to 75 pence per minute rather than the advertised rate of ten pence. 1st Rate Telecom is now under a duty to comply with the National Numbering Conventions. Should the duty be breached, anyone sustaining resultant loss or damage may take the company to court. ICSTIS has recently taken action against E1 Rentals to whom 1st Rate Telecom sub-allocated numbers. E1 was fined £10,000 and was ordered to recompense fully all affected consumers.

**FUNDING ARRANGEMENTS**
(28/03) 21 May 2003
After 25 July 2003, OFTEL will raise money from the communications industry in a new way. Under existing arrangements, licence holders under the Telecommunications Act contribute a fee to the funding of OFTEL. Under the new EU Directives, however, after 25 July, telecommunications...
licences and the payment of fees will be replaced by administration costs charges and companies in the electronic communications sector with an annual turnover of £5 million or more will pay these charges. A number of service providers such as large internet service providers (ISP’s) will in future contribute to the regulator’s running costs. However, the turnover limit means that approximately 100 companies currently paying fees will no longer have to do so. OFTEL will not require advance notification from those companies providing electronic communications services provided that they meet the requirements of the general conditions of entitlement.

**CONDITIONAL ACCESS REGULATION**
(33/03) 5 June 2003
OFTEL has set out proposals to continue with the present arrangements for the provision of conditional access services under the new EC regulatory regime. OFTEL requires providers of conditional access services to do so on a fair, reasonable and non-discriminatory basis. The EC communications directives to be adopted by 25 July 2003 have similar requirements. Conditional access services allow broadcasters to supply their television programmes only to customers entitled to watch them. They can include encryption, subscriber authorisation and subscriber management services.

**NUISANCE CALLS**
(35/03) 17 June 2003 and (38/03) 26 June 2003
OFTEL has taken action to prevent Kummel making nuisance calls to mobile phones using automatic calling equipment. The company has been making such calls to mobiles giving the recipients of the calls no time to answer. Charges are then incurred when the number is rung back to see who called. OFTEL has deemed this behaviour a ‘blatant misuse of automatic calling equipment to trick consumers into calling the number back and incurring unnecessary charges’. Individuals or companies making nuisance calls could, in future, face fines of up to £5,000 and be required to pay compensation. The type of call that could be addressed by the new powers set out in the Communications Bill include silent calls or short calls which are abruptly terminated before they can be answered, calls that mislead the user into returning a call which may be charged at high rates, and automated calls that contain recorded messages for marketing purposes.

**CHEAPER CONNECTIONS FOR VODAPHONE**
(37/03) 24 June 2003
BT’s charges to Vodafone for providing links to connect up parts of its mobile network are to become cost oriented. Vodafone uses the links provided by BT to connect its radio base stations to the rest of its network. Until now, Vodafone has purchased the links at retail prices, but as a result of OFTEL’s action, BT will be required to reduce its charges in line with European legislation.

**TRANSPORT–AIR PRESS RELEASES**

**BRITISH AIRWAYS AUTHORITY**
www.baa.co.uk

**STANSTED AIRPORT – NOISE REDUCTION**
28 April 2003
Airlines that fail to use noise preferential routes on departing from Stansted Airport are in future to be penalised, and fines of £500 per incident, incurred for off-track flying, will be invested in local community projects. The noise preferential route at Stansted consists of a three-kilometre band which aircraft must fly within, until they reach a designated altitude. Planes flying more than 750 metres either side of the band will be regarded as off track. Stansted has six noise preferential routes. So far, Egyptair, Danish Air Transport, Westair, Star Air, Aviavilsa and two private owners have been penalised.

**CIVIL AVIATION AUTHORITY**
www.caia.co.uk

**ATOL REGULATIONS**
1 April 2003
The airspace over the North Sea has been re-organised to expand airspace capacity and reduce air traffic delays. National Air Traffic Services and the Ministry of Defence planned the changes through their joint Future Airspace Design Team process while the changes were processed in accordance with the CAA’s Airspace Charter. The new arrangements support a re-sectorisation and transfer of areas of responsibility between the London Area Control Centre, Manchester Area Control Centre and Scottish Area Control Centre. The changes will meet the requirements of the Ministry of Defence to accommodate the Typhoon and, in due course, the Joint Strike Fighter. Both planes require large functional blocks of airspace for training.

**FLIGHT DELAYS**
12 June 2003
Flight delays attributable to the National Air Traffic Services (‘NATS’) will, in future, lead to fines which are to be doubled. The main changes to the penalty system for delays are:

- to increase the immediacy of the penalty payment;
- to enhance the rate at which NATS is penalised for delay;
- to amend the level of bonuses so that, as with penalties, they take effect one year after the performance to which they relate rather than two.

These modifications will take immediate effect.
National Air Traffic Services
www.nats.co.uk

Future Strategy
7 April 2003
NATS is proposing to join a three-nation alliance to develop a flight data processing system common to England, Germany and Spain. The European Commission has contributed €16 million of funding to the project which is intended to contribute to the convergence of systems and concepts in line with its Single European Sky initiative. NATS’ objectives are to maintain and enhance safety, increase capacity, minimise delays and reduce costs. The project underpins NATS’ strategy of rationalising en route operations, currently at four centres, to two facilities — one at Swanwick and one at Prestwick.

Press Releases

Network Rail
www.networkrail.co.uk

Annual Report and Accounts – Report I
(PRO3019) 23 June 2003
Network Rail’s Report and Accounts has recorded good performance in key areas, with a reduction in temporary speed restrictions. Incidents of broken rails fell by 17 per cent, while signals passed at danger were down 7 per cent. However, the increase in train delays attributable to infrastructure was disappointing and Network Rail is targeting a 20 per cent improvement over the next three years. The 2003/4 Management Incentive Plan which has been published is intended to ensure that executive remuneration is directly linked to improvements in railway performance. (Network Rail is required to publish two Annual Reports — Network Rail Infrastructure Ltd (which provides a comparison with Railtrack plc) and Network Rail Ltd (which covers only the six months since it took ownership of Britain’s rail infrastructure).

Maintenance in the Reading Area
(PRO3020) 24 June 2003
Network Rail took over responsibility for maintaining the infrastructure in the Reading area (which includes depots in Reading, Paddington, Swindon and Didcot and 400 miles of track) from Amey on 22 June. Amey had held the Reading contract since 1 April 1994. Train operators in the area include First Great Western, Virgin, Thames Trains, Eurostar, Heathrow Express and various freight train operators. This represents the first time since the privatisation of the railways that maintenance has been carried out by the infrastructure owner. Network Rail’s responsibilities will include all inspection work, together with the planning and implementation of the day-to-day, on-track, maintenance work. Network Rail is currently introducing its new maintenance programme which is intended to improve efficiency. It involves Network Rail determining the scope and timing of all maintenance activity and carrying out frequent inspections.

Office of the Rail Regulator
www.rail-reg.gov.uk

Access to St Pancras
(ORR/09/03) 14 April 2003
Directions have been issued to London and Continental Stations and Property Ltd requiring the company to enter into a new station access contract with Midland Main Line Ltd to provide Midland Main Line’s trains with continued access to St. Pancras Station. Directions for a new contract were issued under s.17 of the Railways Act 1993. The new contract will run from 29 April 2003 until 2008 or until international services commence operating at the station, whichever is the earlier. The new contract includes the terms under which London and Continental will compensate Midland Main Line for the disruption to its business at the station, caused by construction work for the international terminal of the Channel Tunnel Rail Link.

Track access contract
(ORR/12/03) 25 June 2003
In order to cover the relationship between passenger train operators and Network Rail, the Rail Regulator has published a new model track access contract. This is intended to provide a firm foundation for refranchising and improved rail performance. The new template contract has been refined following widespread consultation with the Strategic Rail Authority, the Health and Safety Executive, the train operators and Network Rail.

Strategic Rail Authority
www.sra.gov.uk

Rail Freight Survey
26 February 2003
The results of the second national rail freight survey were published by the Rail Regulator and Strategic Rail Authority on 26 February 2003. The survey was designed to measure perceptions of rail freight amongst users and potential users, and to identify any barriers to growth. The findings of the survey have suggested that users expect more from rail freight as a transport mode but that, overall, the freight operating companies deliver a reasonable service with less than 20 per cent of respondents to the survey expressing dissatisfaction. An important finding has been the effects of price on supply. The report suggests that it is relatively easy for customers and service providers to switch from rail to road but difficult to switch from road to rail. Even a modest price increase would prompt a majority of rail users to consider changing to road, while a similar increase in the price of road transport would produce a more modest shift to rail. Rail continues to be the preferred mode for the movement of traditional bulk traffic such as coal and...
aggregates, with 88 per cent of the primary bulk and 85 per cent of the manufactured bulk shippers saying they use rail. The survey has shown that there is an opportunity for rail to increase its share of non-bulk traffic since 77 per cent of non-bulk shippers stated that they did not use rail at all.

**Greater Anglia Franchise**
1 April 2003

Three parties have qualified as bidders for the new Greater Anglia franchise under the terms of the new franchise policy. They are Arriva Trains Ltd, GB Railways plc and National Express Group plc. The SRA’s new franchising policy provides train companies with clear guidelines and incentives on customer service and business priorities. It will incorporate existing Anglia Railways, Great Eastern and West Anglia rail services after the end of the current franchises in 2004. This is in line with the SRA policy of one operator for major London termini. The franchise will last up to ten years, depending on final bids. A preferred bidder will be announced in spring 2004.

**Northern Rail Franchise**
1 April 2003

Five parties have qualified as bidders for the new Northern Rail franchise. They are Arriva Trains Ltd, Euralico UK Ltd, FirstGroup plc, GB Railways plc and Serco Rail/Netherlands Railways. The franchise will provide inter-urban commuter and rural services through the North of England. It is expected to commence in late summer 2004 and will last up to seven years.

**Improvements for South Central’s trains**
12 May 2003

The SRA has signed a new franchise agreement with GOVIA Ltd to deliver major improvements on South Central Trains. The contract to operate busy commuter routes between London and Surrey, Sussex and the South Coast, and will bring over £1 billion of improvements. These include:

- 700 new carriages to replace slam door stock and increase passenger capacity;
- investment in 36 new Turbostar diesel carriages to replace slam door diesel stock, with further Turbostar vehicles scheduled during 2005;
- over £100 million private investment in depots at six sites to support the new trains;
- an extensive rolling programme of refurbishment for Class 455 (metro) trains;
- new hourly through services between Uckfield and London Bridge from 2004, and between Ashford and Brighton from late 2005;
- practical measures to achieve continued improvement in performance and an improved passenger compensation regime.

The new franchise will run from 25 May 2003 until December 2009 with an SRA option to terminate on 12 months notice expiring at any point after May 2008.

**Connex Franchise Terminated**
27 June 2003

Connex Transport UK Ltd has been placed on six months notice that their South Eastern rail franchise will terminate no later than 31 December 2003. Connex has failed to meet a detailed action programme of improvements which was a requirement of the SRA before they were prepared to consider any increase in subsidy for 2004–06. The SRA is now bringing forward the competition for a new Integrated Kent Franchise incorporating South Eastern services and the planned high-speed domestic services on the Channel Tunnel Rail Link.

**SEA Press Releases**

**Department for Transport**
www.dft.gov.uk

**Port products**
(2003/0051) 30 April 2003

A new blueprint (‘Project Appraisal Framework for Ports’) has been published to help port developers to present proposals for new port projects. It is designed to provide guidelines for promoters of port projects to follow when they are seeking planning permission and other approvals. The Framework provides advice but is not intended to be legally binding.

**Tracking system at MCA Dover**
(2003/0055) 12 May 2003

The Maritime and Coastguard Agency’s newly refurbished Dover base (MCA Dover) is to house a state-of-the-art Vessel Traffic Management Information System for tracking ships in the Dover Strait. The Dover Strait, which is one of the busiest shipping lanes in the world, will in future be one of the safest. The MCA site’s Channel Navigation Information Service is one of the first of its kind and MCA Dover will have the facilities to train maritime professionals from all over the world. HM Coastguard and the Marine Survey Office, which carries out inspections on vessels in the South East, also operate from Dover, making it one of the most advanced coastguard centres in the United Kingdom.
WATER PRESS RELEASES

OFFICE OF WATER SERVICES
www.ofwat.gov.uk

TARIFF STRUCTURE AND CHARGES 2003–2004 REPORT
(PN 21/03) 20 May 2003
OFWAT has published its ‘Tariff Structure and Charges 2003–2004 Report’ showing that water companies are maintaining a fair balance of charges between measured, unmeasured, trade and household customers. The report summarises the water companies’ regulated charges for the coming year and sets out OFWAT’s policy on tariff issues and its approach to approving the companies’ charging schemes. The combined water and sewerage bills for most customers in 2003–2004 continued to be lower, in real terms, than they were at the last price review in 1999–2000. All companies have kept the tariff differential between measured and unmeasured household charges within OFWAT’s limit of £34 for the combined bill, and all ten sewerage companies have a fair balance between charges for trade effluent customers and household sewerage charges. Three companies have reduced the threshold at which their customers become eligible for intermediate user tariffs (which offer a slight reduction) for commercial users.

LICENSE MODIFICATIONS FOR SOUTHERN WATER
(PN 25/03) 20 June 2003
Following last year’s Competition Commission inquiry into Vivendi’s bid for Southern Water, OFWAT has published proposals to modify its licence. (It was concluded that Vivendi’s proposed takeover of Southern Water would be against the public interest, since Vivendi already owned a number of other companies. Vivendi therefore decided to divest its stake in South Staffordshire Water and to acquire a minority stake in Southern Water, provided it supplied additional data for Hampshire). The modification will require Southern Water to provide extra information on the water services it supplies to Hampshire and the Isle of Wight. The extra data will help OFWAT to continue to be able to make comparisons of companies’ costs and performance when it sets water price limits.
EUROPEAN UNION
edited by Daniel Kanter and Peter Alexiadis
Dibson Dunn & Crutcher LLP, Brussels

EUROPEAN COMMISSION

GAS

EU supports historic energy agreement between Israel and Palestinian Authority
(IP/03/1645) 2 December 2003
On 12 December, an agreement on energy co-operation was signed between Israel and the Palestinian Authority, under the auspices of the European Union. This new framework aims to create the concrete basis for an energy dialogue between Israel and the Palestinian Authority by identifying and promoting interconnection projects of common interest to be integrated into the Euro-Mediterranean Energy Partnership. Several concrete measures were agreed: building of a joint electric generation plant, development of electricity interconnection between Gaza and Netivot and gas interconnection between Ashkelon and Gaza, definition of a joint framework for bilateral and regional exchange and trade in electricity, development of co-operation on renewable energy and the establishment of a common platform in order to be able to follow-up on these measures of Israeli-Palestinian energy co-operation.

COMMISSION CLEARS STATOIL STAKE IN BP-SONATRACH IN SALAH NATURAL GAS JOINT VENTURE
(IP/03/1785) 19 December 2003
The European Commission has granted approval under the Merger Regulation to the proposed acquisition by Norwegian oil company Statoil ASA of a stake in the In Salah Joint Venture, active in the exploration, development and production of gas. The Commission’s analysis showed that the entry of Statoil in the In Salah JV will not significantly alter the competitive situation of the European gas market as the expected supplies from the In Salah fields will represent a fraction of the volume of gas consumed in the EU.

POSTAL SERVICES

France before the court over the non-implementation of two postal directives
(IP/03/1754) 17 December 2003
The European Commission has decided to refer France to the European Court of Justice to ensure that it fully implements the two EU postal services Directives. According to Article 22 of the first Postal Directive (97/67/EC), Member States must ‘designate one or more national regulatory authorities for the postal sector that are legally separate from and operationally independent of the postal operators’, while remaining free to choose between a public authority or an independent body appointed for the task. France has opted for a public authority by appointing the Minister for Economic Affairs as the national regulatory authority for the postal sector. However, the Minister is also responsible for certain tasks in connection with state property in ‘La Poste’, as well as for its economic and financial performance. France is therefore considered to have failed to comply with Article 22 of the first Postal Directive.

The second Directive (2002/39/EC) commits Member States to further open postal services to competition in a gradual and controlled way, while allowing for the safeguarding of quality ‘universal services’ (ie, the services required to be provided to all members of the public at an affordable price). The Commission considers that France has also failed to implement this Directive.

COMMISSION APPROVES AID TO THE GREEK POST
(IP/03/1525) 11 November 2003
The European Commission has authorised, under EU state aid rules, grants and capital injections to the Greek Post Office amounting to a total sum of €415 million. These different financing measures were destined to foster the modernisation of the Greek Post Office. In particular, the aid has allowed the Post Office to purchase automation equipment, upgrade its fleet of delivery vehicles and equip its offices with information technology. These improvements were necessary as the quality of the universal postal service in Greece was below EU standards. As the aid is limited to meeting costs of modernisation and does not lead to an undue distortion of competition, the Commission decided to approve the aid.

TELECOMMUNICATIONS

Commission suspects TeliaSonera of having abused its dominant position
(IP 2003 1797) 19 December 2003
The European Commission has sent a Statement of Objections to Sweden’s TeliaSonera AB. The statement concerns a contract for the construction and operation of
a fibre-optic broadband network for the provision of high speed Internet access and other services on behalf of HSB Malmö, a regional housing association. The Commission takes the view that TeliaSonera’s bid for that contract was intentionally set below cost and did not allow the operator to recover the investments and expenses derived from the provision of infrastructures and services contained in the contract. The measure taken by TeliaSonera has allegedly prevented the development of alternative infrastructure and the entry of competitive service providers. TeliaSonera thereby strengthened its dominant position in the markets for the provision of local broadband infrastructure and the provision of high-speed Internet access.

**Commission takes action against seven Member States**
(IP 2003 1750) 17 December 2003
The deadline for the EU-wide application of the Directives establishing a new regulatory framework for electronic communications expired on 25 July 2003. Eight Member States had been notified by the Commission on 8 October for failing to fully implement the new framework.

The Commission is now taking action against seven Member States (Spain has complied with the Directive in the meantime) for their continued failure to transpose the Framework, Authorisations, Access, and Universal Service Directives into their national legal frameworks. The seven EU countries concerned are Belgium, Germany, Greece, France, Luxembourg, the Netherlands and Portugal.

**BSKYB forced to share football rights**
(IP/03/1748) 16 December 2003
The European Commission has reached a provisional agreement with the United Kingdom’s Football Association Premier League regarding the joint selling of the media rights to Premier League matches. The Commission has also reached a provisional agreement with BSkyB regarding its recent acquisition of TV rights to those matches. The agreements will be submitted for third party comments, and will then take effect in two stages. Some changes will be introduced for the start of the 2004/5 season, while the new system would come into place in 2006 when the rights are next tendered. BSkyB has agreed to offer to sub-license a set of up to eight Premier League matches each season to another broadcaster.

**Commission launches infringement proceedings against nine Member States**
(IP/03/1663) 5 December 2003
The European Commission said, on Friday, it had started legal action against Germany, France, Belgium, the Netherlands, Portugal, Greece, Sweden, Luxembourg and Finland for their failure to implement into national law a new Directive to boost electronic privacy for digital networks and services (Directive 2002/58/EC).

**New EU audiovisual policy**
(IP/03/1732) 16 December 2003
The European Commission has just adopted a new policy document on regulation in the audiovisual sector. This follows a wide public consultation on the 'Television without frontiers' Directive, as well as a comprehensive debate with the Member States, which has helped to identify those areas where further action is necessary. As a result of the consultation process, the Communication on the future of European regulatory audiovisual policy proposes an approach whereby: the rules on television advertising and on the protection of minors will be subject to new initiatives in the first quarter of 2004. For other issues, where further reflection is required, work with experts in focus groups and independent studies will take place in 2004 as a preparation for any legislative proposal concerning an update of the Directive that could be put forward in 2005.

**Commission launches sector inquiry into the sale of sports rights to internet and 3G mobile operators**
(IP/2004/134) 29 January 2004
The Commission has decided to launch a sector inquiry regarding the conditions of provision of audiovisual content from sport events to the Internet and other new media as well as 3G mobile telecommunication networks. The aim of the Commission’s inquiry is to establish whether current commercial practices infringe the European competition rules, in particular the prohibition of restrictive practices and abuses of dominant position (Articles 81 and 82, EC Treaty).

**Communication from the Commission on unsolicited commercial communications**
(EC Information Society) 22 January 2004
The Commission has adopted a Communication on unsolicited commercial communications ('spam'), which identifies a series of actions that are needed to complement the EU rules and make the ‘ban on spam’ as effective as possible. The Communication identifies a series of actions that are needed to complement the EU rules and thereby make the ‘ban on spam’ a reality. The series of actions, identified in the Communication, focus in particular on effective enforcement by Member States and public authorities, technical and self-regulatory solutions by industry, and consumer awareness.

**Contribution of wide-screen and high-definition to the global roll-out of digital television**
This Commission Staff Working Paper argues that the wide-screen (16:9) format can help accelerate the transition to digital television. Broadcasters can use wide-screen to differentiate the quality of digital television from analogue TV, with its traditional ‘old movie’ screen format using the 4:3 ratio. The document also notes that the time is ripe for a revival of high-definition television (HDTV) in Europe.
COMMISSION/ ECJ/CFI CASES

ARTICLE 81

Commission clears deal between Telenor and Canal+ (IP/04/2) 5 January 2004
The European Commission has cleared a number of agreements regarding the exclusive co-operation between Norway’s Telenor, its satellite TV platform Canal Digital and Canal+ Nordic for the satellite distribution of Canal+’s premium pay-TV channels in the Nordic region. The agreements, as initially notified, raised a number of competition concerns under Article 81 of the EC Treaty, particularly in respect of the long duration of certain exclusive arrangements. After the parties had substantially shortened the duration of the agreements, the Commission concluded that the restrictive effects of the exclusive arrangements were largely outweighed by the benefits provided. The notified agreements were exempted for a period of five years.

ARTICLE 82

Commission fines Deutsche Telekom for predatory pricing (OJ L 263) 14 October 2003
The European Commission has adopted a decision against Deutsche Telekom AG (DT) for abusing its dominant position through its charging of unfair prices for the provision of local access to its fixed telecommunications network (local loops). The Commission has found that DT charges new entrants higher fees for wholesale access to the local loop when compared to what DT’s subscribers pay for fixed line subscriptions. This discourages new companies from entering the market and reduces the choice of suppliers of telecoms services, as well as price competition for consumers. The Commission’s action stems from complaints by numerous new entrants in the German telecommunications market. In line with the gravity and duration of the abuse, the Commission has levied a fine of €12.6 million.

NOTIFIED CONCENTRATIONS

GE/Vivendi Universal entertainment Case COMP/M.3303
On 20 November 2003, the Commission received notification of a proposed concentration by which General Electric Company acquires control of the whole of Vivendi Universal Entertainment, which produces and distributes feature films, operates cable television networks, produces and distributes television programming, and operates a movie studio and theme park.

Telenor/Sonofon Case COMP/M.3339
On 5 January 2004, the Commission received notification of a proposed concentration by which Telenor acquires control of the whole of Sonofon, which provides mobile telephony and telecommunications services in Denmark.

APPROVED CONCENTRATIONS

The European Commission has approved the following notified concentration under the Merger Regulation:

• Case COMP/M.1636 — MMS/DASA/Astrium
• Case COMP/M.3303 — GE/Vivendi Universal Entertainment

EUROPEAN COURT OF FIRST INSTANCE DECISIONS

Wanadoo Interactive v Commission Case T-340/03 29 November 2003
The applicant challenges the Commission’s decision imposing a fine to Wanadoo Interactive for abuse of a dominant position in the form of predatory pricing in ADSL-based Internet access services for the general public.

TRANSPORT–AIR

Commission rejects Swiss request to overturn Germany’s overflight rules (IP/03/1664) 5 December 2003
The Commission has decided not to support the Swiss request to prevent Germany from applying measures regulating, at certain times of the day, the use of its airspace near Zürich airport with the side-effect of preventing landing approaches over its airspace. The Commission finds the German measures to be compatible with the EC–Swiss Aviation Agreement (Regulation 2408/92) and with the relevant rules on access for Community air carriers to intra-Community air routes. Germany may thus continue to apply the measures.

In early 2003, Germany imposed measures for the use of its airspace close to the Swiss border, which essentially prevent the overflight in low altitude over German territory between 21h and 7h on weekdays and between 20h and 9h on weekends and public holidays. This reduces the levels of noise to which the local population is exposed. As a result, the landing approaches from the North are no longer possible during these hours. Instead, planes landing at Zürich airport must use East, South East or South approaches entirely over Swiss territory.

APPROVED AID FOR ROLLING MOTORWAY SERVICE BETWEEN LYON AND TURIN (IP/03/1696) 10 December 2003
France and Italy will be allowed to grant financial support of up to 23.5 million euros each to the new rolling motorway service between Aiton and Orbassano over the experimental phase from 2003 to 2006. Under the rolling motorway system, lorries are loaded onto shuttle trains which carry them and their drivers over distances of 200 to 300 kms.
This offers a viable alternative for crossing natural obstacles, such as the English Channel or, in this case, the Alps, where it provides a means of reducing road congestion and environmental impact.

**ITALIAN AID SCHEME TO ENCOURAGE COMBINED TRANSPORT**
(IP/03/1697) 10 December 2003

The European Commission has authorised an Italian aid scheme which intends to reduce the competitive disadvantages suffered by rail freight and combined transport in comparison with road transport. The two transport modes are characterised by a different degree of internalisation of external costs, which works to the detriment of rail. The aid measures include:

- aid awarded to companies which undertake to make use of a minimum annual quantity of block trains for combined transport or for the transport of dangerous goods;
- investment aid for the development of the transport of goods by rail;
- aid awarded to railway undertakings which commit themselves to realising a certain number of train kilometres within the national territory for combined transport and the accompanied transport of goods; and
- tariff reductions for passenger transport by rail.

**UK AID SCHEME TO ENCOURAGE MOVEMENT OF INTERMODAL CONTAINERS BY RAIL**
(IP/03/1739) 10 December 2003

The European Commission has cleared an aid scheme to encourage the movement of intermodal containers by rail in the United Kingdom. The grant will provide continued support for the deep-sea and short-sea intermodal container business that currently uses rail. The Commission believes that the aid scheme will contribute to securing growth in this sector and in the domestic intermodal freight business.

**FRENCH STATE AID TO AIR CARAIBES**
(IP/03/1741) 16 December 2003

The European Commission has authorised state aid to the airline Air Caraïbes (formerly Caraïbes Air Transport), to purchase an eight-seater Cessna Caravan to replace an older plane. This aid measure is part of a general investment development scheme for the French Overseas Departments. The aid will enable Air Caraïbes to reduce operating costs on its regional services.

**INTERNATIONAL SAFETY MANAGEMENT CODE TO ALL SHIPS**
(IP/03/1751) 17 December 2003

The Commission proposed that port state control of International Safety Management ('ISM') Code certificates be extended to cover all ships. In practice, this means that Member States of the Union will be able to deny access to, or refuse the departure of any ship not in possession of ISM certificates. In addition, classification societies and the bodies responsible for carrying out ISM compliance audits of shipping companies and vessels will have to meet the quality criteria laid down in this new proposal.

**AIRCRAFT**
(IP/04/59) 16 January 2004

The Commission has adopted a Regulation laying down a non-exhaustive list of articles that are clearly prohibited from being carried by passengers onto all flights from European Union airports. The new legislation also requires national authorities to inform passengers of the content of this list before the check-in procedure is completed. The primary purpose of the legislation is to give clear and unambiguous information to passengers flying from EU airports as to which objects will be confiscated at airport security checkpoints.

**GERMAN REGIONAL AID FOR BUS TRANSPORT**
(IP/04/80) 21 January 2004

The Commission has approved an aid scheme where transport companies in Saxony benefit from financial support for the acquisition of low noise and low emission buses, diesel cars and locomotives and for the drawing up of plans to ensure the environmentally efficient use of the subsidised vehicles. The objectives of the German regional scheme are the control of the air pollution and the protection of the climate.

**NEW RIGHTS FOR AIR PASSENGERS**
(C/04/14) 26 January 2003

The European Council has adopted the proposal of a Regulation to protect the rights of air passengers when facing denied boarding, cancellation of their flight or a long delay. The new regulation will cover both scheduled and non-scheduled flights (including air transport sold as part of a package holiday).

The new Regulation intends to reduce the frequency of denying boarding against a passenger’s will, by a combination of two measures:

1. Before doing anything else, airlines will be obliged to call for volunteers to surrender their seats in exchange for advantages; in other words they would try to strike a deal with passengers interested in giving up their seats. Only if insufficient volunteers came forward, would they be allowed to deny passengers boarding against their will.
2. If/when airlines or tour operators deny passengers boarding, they have to pay compensation:
   - €250 for flights of less than 1500 km;
   - €400 for intra-Community flights of more than 1500 km and for other flights 1500 and 3500 km;
   - €600 for all other flights.
WATER

Water policy: Commission action against Member States
(IP/04/39) 13 January 2004

France
The Commission has decided to refer France to the Court of Justice for failing to provide sufficient information on how the Urban Wastewater Treatment Directive (Council Directive 91/271/EEC) is implemented. This relates in particular to the lack of information on sensitive areas.

Portugal

Spain

Ireland
The Commission has sent Ireland a final written warning for contravening the Shellfish Directive (Directive 79/923/EEC) by designating and protecting too few shellfish waters. Although there are several hundred commercial shellfish operations around the Irish coast, Ireland has designated only 14 shellfish waters under the Directive. There is also evidence of a decline in water quality in a number of places as a result of coastal development and a lack of effective waste water treatment.

Belgium
On 16 January 2003, the Court of Justice ruled that Belgium had failed to notify the national legislation needed to implement the EU’s 1998 Drinking Water Directive (Case C-2002/122). The Walloon Region still does not have any legislation. The Commission has, therefore, sent Belgium a final written warning. Failure by Belgium to adopt the necessary legislation could result in substantial fines being imposed.

Germany
The Commission has sent Germany a final written warning because of shortcomings in its national legislation to implement the Nitrates Directive (Directive 91/676/EEC). The national legislation in question, the Düngeverordnung, allows manure to be spread on grassland up to a limit of 210 kg of nitrogen every year, whereas the Directive sets a limit of 170 kg.

Greece
On 25 May 2000, the Court of Justice ruled against Greece (Case C-384/97) because it had failed to adopt and communicate the pollution-reduction programmes for 99 dangerous substances under the Dangerous Substances in the Water Directive (Council Directive 76/464/EEC). Since then, the Greek authorities have not enacted the new necessary legislation. The Commission has, therefore, sent Greece a final written warning. Failure to comply with the Court ruling could result in substantial fines.

EUROPEAN COMMISSION

http://europa.eu.int/comm/energy/

Commission supports energy markets integration in the Balkans and promotes its connection with the EU
(IP/2003/1672) 8 December 2003
On 8 December 2003, a Memorandum of Understanding was signed which sets down the agreed rules and objectives aimed at establishing an integrated regional energy market in South East Europe by 2005 and progressively ensure its integration into the European Community’s Internal Energy Market. The regional energy market in South East Europe will be achieved by progressively approximating state policies in the energy sector, particularly with respect to the electricity and natural gas markets, with a view to promoting harmonised rules throughout the region.

Commission proposes decisive action on infrastructure and security of supply
(IP/03/1694) 10 December 2003
On 10 December 2003, the Commission proposed a new legislative package to promote investment in the European energy sector both to strengthen competition and to help prevent the re-occurrence of the blackouts that took place in the summer of 2003. In particular, it highlights the major importance attached to clear demand management, through the development of a more oriented energy efficiency policy. It also emphasises the need for a clear EU legislative framework for the proper functioning of a competitive internal market for electricity, by safeguarding the security of electricity supply and ensuring an adequate level of interconnection between Member States, through general, transparent and non-discriminatory policies.

Proposal for a directive on energy efficiency and energy services
(IP/03/1694) 10 December 2003
The Commission has proposed a new directive to boost energy efficiency in the EU and to promote the market for energy services such as lighting, heating, hot water, ventilation, etc. The proposal sets forth a framework with common definitions, tools, methodology targets and obligations, both for the public and for the private sectors.
CONTROL OF RADIOACTIVE SOURCES – NEW LEGISLATION
(IP/03/1805) 23 December 2003
The Council has adopted a proposal for new legislation (COM (2003) 18, Proposal for a Council Directive on the control of high activity sealed radioactive sources) that will enhance controls of, and prevent accidents involving, radioactive sources. The purpose of the new Directive is to better protect the population and workers, by reducing the likelihood of their being accidentally exposed to ionising radiation as a result of a lack of control on radioactive sources, in particular when sources are no longer being used. The new Directive harmonises and sets out specific requirements to ensure that every single high activity radioactive source in Europe is always kept under control.

COMMISSION REFERS MERGER REVIEW TO THE BELGIUM COMPETITION AUTHORITIES
(IP 2003 1803) 19 December 2003
The European Commission has accepted the request of the Belgian Ministry of Economic Affairs to refer to the Belgian authorities the examination of the entire merger transaction arising from the agreements between Sibelgaz and Electrabel on the supply of electricity and gas to eligible customers in the Brussels region. The European Commission found that the transactions would threaten to strengthen Electrabel’s dominant position on the markets in the supply of gas and electricity to eligible customers. Having concluded that these markets are national or local, the Commission decided to accept the request of referral.

NOTES FOR THE IMPLEMENTATION OF DIRECTIVES ON ELECTRICITY AND GAS
(Directorate General for Energy and Transport) 22 January 2004
The Commission has published a series of informal documents to help implement the new Electricity (2003/54/EC) and Gas (2003/55/EC) Directives, as well as the Regulation on cross-border exchange in electricity. The notes concern key regulatory issues, such as unbundling, distribution, exemptions from the third-party access regime for new gas and electricity infrastructure, public service obligations, the role of the regulators, security of power supply and access to gas storage. Unlike the ‘follow-up-groups’ of the first energy liberalisation directives, these notes leave little room for dialogue between the industry and regulators.

EUROPEAN PARLIAMENT
www.europarl.eu.int
EUROPEAN PARLIAMENT SUPPORTS NUCLEAR PACKAGE DIRECTIVE
In a consultative opinion on 13 January, the European Parliament gave its support to two European Commission draft directives on the harmonisation of nuclear safety standards and the management of radioactive waste.

COUNCIL OF THE EUROPEAN UNION
http://ue.eu.int/

CO-GENERATION DIRECTIVE
‘General Affairs’ presenting the report of 2558 Council meeting, 26 January 2004
On 26 January 2004, the European Council adopted the Directive on promoting the combined production of heat and power (co-generation). The Directive sets up a regulatory framework for the promotion of development of this kind of energy production, which, under some conditions, permits savings in primary energy and the reduction in CO2 emissions compared with the separate production of heat and electricity, for the same amount of fuel. It urges the Member States to facilitate the access of co-generation to the network, in particular by proposing preferential tariffs which take into account the advantages of this technology.

COMMISSION/ECJ/CFI CASES

NOTIFIED CONCENTRATIONS

NORSK HYDRO/DUKE ENERGY EUROPE NORTHWEST
Case COMP/M.3297
On 20 November 2003, the Commission received a notification of a proposed concentration by which Norsk Hydro Energy acquires control of the whole of Duke Energy Europe Northwest, which sells gas, mainly in the Netherlands.

NORSK HUDRO/WINGAS/HYDROOWINAS/JV
Case COMP/M.3350
On 22 December 2003, the Commission received notification of a proposed concentration by which Norsk Hydro UK Ltd and WINGAS GmbH acquire joint control of Hydro Wingas Ltd, which supplies and trades natural gas.

APPROVED CONCENTRATIONS

The European Commission has approved the following notified concentrations in the energy sector under the Merger Regulation:

- Case COMP/M.3268 — Sydkraft/Graninge
- Case COMP/M.3306 — E.ON/Midlands Electricity
- Case COMP/M.3230 — Statoil/BP/Sonatrach/In Salah JV
- Case COMP/M.3288 — TNK-BP/Sibneft/Slavneft JV
- Case COMP/M.3294 — ExxonMobil/BEB
- Case COMP/M.3293 — Shell/BEB
- Case COMP/M.3306 — E.ON/Midlands Electricity
- Case COMP/M.3297 — Norsk Hydro/Duke Energy Europe Northwest