Project on Benchmarking International Regulatory Processes and Practice

Country-based Research

Appendix to the Final Report to the Infrastructure Consultative Committee

5 June 2009

Explanatory Note and Caveat

The country-based review is presented as a resource for all those involved in the economic regulation of infrastructure. It is hoped that the information in the review will be of use whatever your role in the regulatory process – infrastructure providers, access seekers, end users, regulators and policy makers – all should find something in these pages.

Every reasonable effort has been made to present accurate and up-to-date accounts of the regulatory arrangements for the seven infrastructure areas across the eleven benchmark countries. Where material has not been attainable in full from websites and other primary and secondary sources, regulators, government agencies, academics and others have been contacted. Those providing information have usually been acknowledged in footnotes. While they are thanked for their generosity, they do not bear any responsibility.

In spite of this effort, it is likely that some errors of omission and commission have been made, nuances have been missed and developing events have not been fully assimilated. If you find an error, have a nuance or have an update, please contact the ACCC on this e-mail address:

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It is hoped that this review will be revised and updated on an annual basis, possibly with the gradual addition of more benchmark countries. In that regard, it is a matter of 'watch this space'!

ASIA

JAPAN

OVERVIEW

The economic regulation of infrastructure in Japan is either the exclusive responsibility of the national government (energy, telecommunications, posts and rail) or is shared between national and sub-national governments (water and wastewater, airports and ports). The Japan Fair Trade Commission (JFTC) generally regulates anti-competitive behaviour and issues industry-specific or sector-specific guidelines. Generally there has been a trend of deregulation in Japan, including the relaxation of price regulation and the removal of a supply-demand balancing requirement that controlled entry in industries such as telecommunications, railways and ports.

At the national level, regulation is mainly carried out by agencies within key ministries. The electricity and gas industries are regulated by the Ministry of Economy, Trade and Industry (METI), through the Agency for Natural Resources and Energy, on issues in relation to retail and wholesale pricing and capacity variations. The energy regulator has also been supplemented by the Electricity Utility Industry Council (EUIC) representing various stakeholders and the formation of Japan Electricity Power Exchange (JEPX).

Within the Ministry of Internal Affairs and Communications (MIC), there is a Telecommunications Business Dispute Settlement Commission (TBDSC). The operation of this body increases the transparency of access arrangements and the effectiveness of access negotiation while speeding up settlement of disputes. The body also makes recommendations on rule development to the Minister.

Since 2005, the postal industry has been subject to privatisation of the corporate structure and restructuring, motivated by unlocking massive financial assets in the former Japan Post. The process is accompanied by changes in the regulation being applied by the Postal Services Policy Planning Bureau (PSPPB) in the MIC.

There is strong government involvement in the water and wastewater industry, at all levels – national (centralised control of key river basins, through the Japan Water Agency (JWA) under the supervision of five ministries), prefectural (river management of class B rivers) and municipal (water and wastewater services are provided on a monopoly basis with prices determined in a limited process involving only the operator and the council).

In rail, the privatisation and division of the Japan National Rail (JNR) has created vertically integrated regional monopoly passenger companies and led to business diversification. There is limited competition in spite of mandatory rail-track access. There are permission systems for entry and exit, and for fares and rates.

Airports are generally owned by either national or local government, but major international airports have been fully or partially privatised in corporate structure. Decisions on capacity expansion and access price are controlled by the Ministry of Land, Infrastructure and Transport (MLIT).

For ports, the MLIT, through its Ports and Harbours Bureau, determines policy for Japan's ports while prefectural or municipally-operated port management bodies

operate the ports, being responsible for construction and maintenance, leasing, and setting and collecting of fees.

GEOGRAPHY, POPULATION, ECONOMY, POLITY AND LEGAL SYSTEM[1]

Japan is an archipelago comprised of over 3 000 islands, with the four largest (in order of size, Honshu, Hokkaido, Kyushu, and Shikoku) accounting for 97 per cent of the total land area (377 835 square kilometres). It ranges from subtropical climate in the south to cool temperate climate in the north (northern Honshu and Hokkaido). More than 70 per cent of the country is mountainous, leaving little arable land.

A large population (of 127.3 million) and a small total land area combine to produce a high density of population. Japan's four largest cities are Tokyo, Yokohama, Osaka and Nagoya. Population density is exacerbated by the mountainous nature of much of the country, forcing the vast bulk of the population into a quite small area. River basins covering only 15 per cent of the area account for over half of the population and economic activity. While water is plentiful, drought is not unknown and can affect some areas quite severely.

The population is extremely homogeneous ethnically, with 98.5 per cent of the population being 'Japanese'. Given that the death rate exceeds the birth rate and net migration is negligible, the population is static and possibly even declining slowly. This, together with Japan's longevity (the greatest in the world) means that the population is aging.

Japan is a highly-developed economy with the second-highest GDP in the world (US$4.29 trillion) after the United States. Japan's GDP per capita of US$33 600 is amongst the highest in the world, although its ranking has slipped in recent years as other countries have achieved substantially higher growth rates than Japan.

Japan's economic strength is based on its sophisticated manufacturing and services sectors, including highly developed physical and social infrastructure. It has very few natural resources and relies heavily on imports of fuels and raw materials for the production of manufactured goods and energy. It engages in technologically advanced manufacturing of products such as motor vehicles, electronics, machine tools, steel and non-ferrous metals, ships and chemicals. It has highly productive agriculture (including rice, poultry, pig meat, and dairy), but the small area of arable land available for agriculture combined with a large and rich population means that it is a heavy importer of foodstuffs. Fishing is a major industry, with seafood being a very important part of the Japanese diet. Banking, finance and insurance are all highly developed, with the Japan Post Bank being the largest in the world.[2]

Japan's infrastructure of roads, rail, ports, airports, energy, and communications, are all highly developed. Its energy production is almost totally reliant on imports of oil, liquefied natural gas (LNG) and coal. The communications network has achieved ubiquitous penetration of both fixed-line and mobile telecommunications, and the utilisation of advanced technologies. Water and waste water systems are also highly developed and the country's air transportation system and road and rail networks are

[1] This information is mainly from Central Intelligence Agency (CIA), *The World Fact Book – Japan*. Available at: https://www.cia.gov/library/publications/the-world-factbook/geos/ja.html [accessed on 20 June 2008].

[2] A. Porges and J.M. Leong, 'The Privatization of Japan Post – Ensuring both a Viable Post and a Level Playing Field', in M Crew and P Kleindorfer (eds) *Progress toward Liberalization of Postal and Delivery Sector*, 2006, p. 385.

very extensive and continually undergo further investment. As a major trading nation and an archipelago surrounded by water, Japan has constructed an extensive and modern sea transportation system.

Japan is a constitutional monarchy with a parliamentary government. The Parliament (known as the *Diet*) has two chambers, the lower house (House of Representatives or *Shugi-in*) with a mixture of single-seat constituencies and proportional representation; and the upper house (House of Councillors or *Singi-in*) with a mixture of multi-seat constituencies and proportional representation. The party with a majority of seats in the lower house forms government. The Liberal Democratic Party (LDP) has dominated government in Japan. Other major parties are the Democratic Party of Japan and Komeito. The Communist Party of Japan has a small representation in both houses of parliament.

Japan is not strictly a federation, although it does have sub-national governments at prefecture and municipal levels. There are 47 prefectures, often carrying the name of the major city in it – e.g. Tokyo, Kyoto, Hiroshima, Osaka, Fukuoka and Niigata.[3] Each prefecture has a legislature and an elected Governor, supported by an administration. While prefectures average a little under 3 million of population, some are much larger than the average (Tokyo has over 12 million population) while others are therefore much smaller than the average (seven have less than 1 million).

Prefectural and municipal governments are heavily involved in two areas of infrastructure – water and wastewater, and ports. Their roles in these two industries are considered in detail in the relevant sections of this chapter.

The legal system is modelled on the German civil law system but also displays other influences. The Constitution (promulgated on November 3, 1946, and enforced on May 3, 1947) provides for a democratic, fundamental separation of state powers – legislative power is vested in the Diet; executive power is vested in the Cabinet with the Prime Minister at its head, who is designated from among the members of the Diet by a resolution of the Diet (and in the exercise of this power, the Cabinet is collectively responsible to the Diet); and all judicial power is vested in the Supreme Court and in such lower courts as high courts, district courts, family courts, and summary courts. The courts are the final adjudicators of all legal disputes, including those between citizens and the State arising out of administrative actions.[4] Judicial reviews of legislation are heard in the Supreme Court. There are three tiers of lower courts below the Supreme Court. The main body of statutory law is known collectively as the 'Six Codes'.

APPROACH TO COMPETITION AND REGULATORY INSTITUTIONAL STRUCTURE

The approach to infrastructure regulation in Japan has traditionally revolved around the powerful economic ministries, specifically the Ministry of Economy, Trade and Industry (METI) (responsible for energy regulation); the Ministry of Internal affairs and Communication (MIC) (responsible for telecommunications and posts) and the

[3] There is one 'metropolis' (*to*), Tokyo; one 'Circuit' (*do*), Hokkaido; two urban prefectures (*fu*), Osaka and Kyoto; and 43 other prefetures (*ken*). Together the prefectures are known as *todofuken*. Information is available at: http://www.japan-101.com/geography/prefectures_of_japan.htm [accessed on 13 February 2009].

[4] Supreme Court of Japan, *Overview of the Judicial System in Japan*, 2006. Available at: http://www.courts.go.jp/english/system/system.html#01 [accessed on 4 November 2008].

Ministry of Land, Infrastructure and Transport (MLIT) (responsible for water, airports, ports and rail). Within the ministries reside key bureaus that consider matters relating to economic regulation of infrastructure, and make recommendations to the Minister.

In recent years the Japan Fair Trade Commission (JFTC), the entity that administers the *Antimonopoly Act* (1956), has become more active with respect to the regulation of infrastructure. It has done this in three main ways. First, it has convened study groups in key infrastructure industries, to bring public attention to the case for liberalisation.[5] Second, it has issued guidelines about appropriate behaviour of infrastructure owners in increasingly liberalised markets – specifically in energy and communications. This has been associated with promulgation of a 'Grand Design for Competition Policy'; describing itself as a 'Market Guardian'. Third, it has made specific interventions in markets where there have been breaches of the *Antimonopoly Act*. For example, this has occurred in the water and wastewater industry. Although the coordination between the JFTC and relevant industry or sectoral regulators has been largely informal, the respective industry or sectoral regulator is required to conduct sufficient prior consultation with JFTC when issuing or amending its administrative guidance.[6]

The procedures used in the economic regulation of infrastructure by the METI, MIC and MLIT tend to involve minimal consultation and transparency. However, the *Administrative Procedure Act* (Act No. 88 of 1993) requires the relevant Minister to give sufficient reasoning when an order unfavourable to the applicant is made. This Act also provides for public hearings, but the procedure is rarely utilised – a notable exception is the Telecommunications Business Dispute Settlement Commission.

The decisions of the regulatory entities can usually be appealed. Applicants may request administrative review under the *Law of Administrative Tribunals*. The Minister is required to conduct an investigation under the *Administrative Appeals Law* (Law No. 10 of 1962) upon receiving a request for review by any party who is dissatisfied with an administrative disposition made by a designated examination agency. In accordance with Articles 74 to 85 and Article 173, the Minister may commission a designated examination agency to conduct specified examination work.

Potential remedies include the invalidation of, or alteration of, the original decision.

REGULATORY ARRANGEMENTS BY INDUSTRY OR SECTOR

1. Energy[7]

In Japan, both electricity and gas are highly dependent on imported raw materials; particularly liquefied natural gas (LNG), oil and coal. Electricity is produced using – in order of importance – coal, oil, LNG, nuclear and hydro. Both the electricity and gas industries have been dominated by vertically integrated producers with regional

[5] Aiko Shibata, 'The Role of Competition Advocacy by Competition Authority', Paper presented at ICN Annual Conference, Naples, 28–29 September 2002.

[6] See Japan Cabinet, *Three Year Plan for Regulatory Reform and Opening to the Public-Private Partnership*, 19 March, 2004.

[7] A key reference for this section is International Energy Agency (IEA), *Energy Policies of IEA Countries – Japan 2008 Review*, OECD/IEA, Paris, 2008. Information has also been obtained from the Ministry of Economy, Trade and Industry (METI) (English language) website. Officials of METI have kindly responded to questions and provided further information.

monopolies, in each case represented by strong industry bodies. However, reforms in recent years have introduced a degree of competition in both industries.

Key legislative acts are the *Electricity Utilities Industry Law*, the *Gas Utilities Industry Law* and the *Gas Business Act*. The *Antimonopoly Act* (administered by JFTC) has had an increasing influence on both industries in recent years. The key regulatory role in relation to retail and wholesale pricing and capacity variations has been undertaken by the Ministry of Economy, Trade and Industry (METI);[8] specifically the Agency for Natural Resources and Energy. The Agency is divided into the following departments:

- Energy Conservation and Renewable Energy Department
- Natural Resources and Fuel Department
- Electricity and Gas Industry Department.

The Electricity and Gas Industry Department is further divided into the following divisions:

- Policy Planning Division
- Electricity Market Division
- Gas Market Division
- Electricity Infrastructure Division
- Nuclear Energy Policy Planning Division
- Nuclear Fuel Cycle Industry Division.

Electricity

Prior to the liberalisation of the electricity market beginning in 1995, the electricity industry in Japan had been divided into ten vertically integrated general power utilities, each with its own exclusive geographic area (regional monopoly). The ten incumbents are:

- Okinawa Electric Power Company
- Kyushu Electric Power Company
- Chugoku Electric Power Company
- Shikoku Electric Power Company
- Kansai Electric Power Company
- Chubu Electric Power Company
- Hokuriku Electric Power Company
- Tokyo Electric Power Company
- Tohoku Electric Power Company
- Hokkaido Electric Power Company.

There are big differences in size between these, with the largest (Tokyo Electric Power Company) being four times larger (in power generation) than the smallest. The

[8] The following information is from the METI's English website [accessed on 20 June 2008].

Tokyo supplier is the fourth largest electricity utility in the world.[9] Additionally there are two other important market participants, the Electric Power Development Corporation, and Japan Nuclear. These are all represented by an industry body, known as the Federation of Electric Power Companies.

The economic regulation applied to these vertically integrated electricity utilities related primarily to retail prices and was carried out by the METI's forerunner. The process involved the consideration of applications for price variations under specified criteria, without the explicit involvement of other parties.

The key legislation affecting electricity, the *Electricity Utilities Industry Law* has been amended over the years (beginning 1995) to reform electricity regulation in favour of greater competition and greater self regulation. The METI has been supplemented by the Electricity Utility Industry Council (composed of academics, utilities, new entrants, end users and social groups) and the formation of the Japan Electricity Power Exchange (JEPX). The JFTC has also assumed a stronger role with respect to the promotion of competition and the mitigation of anti-competitive practices in an increasingly competitive market. It has prepared (in conjunction with the METI) a *Guideline for Fair Electricity Trade*.

The first movement away from the system of independent regional monopolies came in 1995, when (i) an electricity procurement bidding system was set up among the incumbents, allowing a wholesale supply market to develop; (ii) 'special electric utilities' were allowed to conduct retail power sales (to very large users) within the designated service areas; and (iii) efforts were made to improve the operational efficiency of incumbent suppliers.

The next round of significant reforms in electricity regulation came into effect on 21 March 2000. The reforms introduced third-party access to transmission, where very large customers came free to choose their own supplier. The threshold size of customers that were free to choose their supplier was gradually lowered over time (2 MW to 500 KW in April 2004, and from 500 KW to 50 KW in April 2005). This meant that trade in electricity across the borders of the previous regional monopolies ('wheeling') became possible and pricing and non-price conditions relating to wheeling became an important issue. A system of charging additional wheeling fees when entering another network area (known as 'pancaking') was abolished in 2005.

With these steps towards greater liberalisation, it was decided to strengthen functional separation of the vertically integrated incumbents (sometimes called VIUs) and to enhance regulated third-party access through the formation of the Electric Power System Council of Japan (ESCJ), which commenced in 2004. The ESCJ has a broad membership encompassing the incumbents, new electricity providers and other interests. The ESCJ is establishing a set of evolving rules, involving:

- Construction of new and expanded network infrastructure
- Technical requirements for installation and connection
- Operation of transmission systems by VIUs
- Disclosure of information about network availability and use.

[9] Information from IEA, *Energy Policies of IEA Countries – Japan 2008 Review*, 2008, p. 131. See also Federation of Electric Power Companies of Japan, *Electricity Review Japan 2008*.

The 2003 reforms did not involve any 'unbundling' requirement for VIUs, but there are requirements for 'information firewalls' (a form of accounting separation) around network activities.

The next step in the electricity reforms was the establishment of a neutral organisation for wholesale power exchange, known as the 'Japan Electricity Power Exchange' (JEPX). This is a private and unregulated body, independent of the METI. It is comprised of nine VIUs and a number of new-entrant electricity industry participants. It operates physical spot and forward markets, but – according to the International Energy Agency (IEA) – these trades represent only a small proportion of total demand compared with most other OECD countries.

The amount of transmission capacity between the original regions supplied by VIUs is limited. According to the IEA, these 'bottlenecks' are allocated on 'first-come-first-served' basis and are subject to 'use-it-or-lose-it'.[10] Wheeling tariffs must be set in accordance with the METI Ordinance and must be reported to the METI. The METI can issue revision orders, but this is a form of *ex post* regulation that, according to the IEA, 'risks undermining transparency and leaves scope for cross-subsidisation'.[11] The IEA argues that current charges for imbalances 'are punitive and are not transparently related to real costs'.[12]

The METI and Alternative Processes in Electricity

Matters that come before the METI for settlement include applications regarding retail price variations, seeking of an order to vary the conditions of a wholesale price contract and applications regarding capacity adjustments. Such applications are considered by the METI, usually based only on the evidence put to it by the applicant. The *Administrative Law* and the first article of the *Electricity Utilities Industry Law* are followed, but no other parties are consulted. The *Administrative Procedure Act* (Act No. 88 of 1993) requires that the Minister gives sufficient reasoning when an order that is unfavourable to the applicant is made. Applicants may request administrative review under the *Law of Administrative Tribunals*. Possible remedies include invalidation of, or alteration of, the original decision.

The IEA argued that 'Japan could benefit from making the regulatory functions of the METI fully independent as well as able to issue binding orders'.[13] It also argued for a market monitoring role for the JFTC.[14]

Gas[15]

Gas accounts for about 14 per cent of energy use in Japan. Japan is the world's largest importer of liquefied natural gas (LNG) and is almost totally reliant on imports – domestic supply accounts for only 3 per cent of requirements. LNG is used to (i) produce electricity (75 per cent of all LNG is used for this purpose), (ii) supply directly to businesses (13 per cent); and (iii) supply directly to households (12 per

[10] International Energy Agency (IEA), *Energy Policies of IEA Countries – Japan 2008 Review*, 2008, p. 128.
[11] Ibid., p. 143.
[12] Ibid., p. 142.
[13] Ibid., p. 144.
[14] Ibid., p. 144.
[15] Key references are: IEA, op. cit., 2008; P. Davis and Y. Nagata, 'Chapter 16 (Japan)', *International Comparative Legal Guide to: Gas Regulation 2006*; Haruki Takahashi, 'Advancement of the Gas Industry in Japan', *GASEX2004 Member Economy Report*, 1 June 2004.

cent). There are 25 LNG facilities in Japan. There has been a rapid growth in importation and consumption of LNG over many years.

As in the case of electricity, gas was traditionally provided by vertically integrated regional monopolies. Not all areas in Japan are supplied with LNG – three large urban areas, Tokyo, Osaka and Nagoya, account for 75 per cent of the market, but there are over 200 of these suppliers in total. Given this regionalisation of supply and the high cost of building pipelines in Japan (costs may be four to six times higher than Europe or North America), a comprehensive national network of gas pipelines has not been established. Pipelines are privately owned under the *Gas Utilities Industry Law*.

Gas facilities and gas businesses are regulated under the *Gas Business Act* (revisions effective 1 May 2006).[16] Four types of gas business exist in Japan:

- General gas businesses – this is the category used for incumbent vertically integrated operators. The legislation requires that separate accounts be kept for large supplies, general demand and other services.
- Simplified gas businesses – or 'community gas utility businesses'.
- Gas transport businesses – or 'gas pipeline service businesses', a category created to promote pipeline construction.
- Major gas businesses – or 'gas supply businesses'.

METI authorisation (licensing) is needed for the first two types of business, but filing (notification) with the METI only is required for the other two types of business. Any mergers, sales or transfers of gas businesses or facilities require METI approval.

Liberalisation of the gas industry, like in the electricity industry, began in 1995 with the freeing up of supply options to very large users, and the threshold of competitive supply has been progressively reduced in the years since. As in electricity, this liberalisation has required there to be 'wheeling', and inter-regional trade must be allowed unless the METI can be satisfied otherwise. The terms and conditions are subject to an *ex post* approval procedure.

Amendments to the *Gas Utilities Industry Law* in 2003 extended third-party access obligations to all general gas utility companies. Third-party access must be provided unless the access provider can convince the METI that it should not. The possible grounds are not explicit, but Davis and Nagata (4.6) report that acceptable reasons are 'gas of a different quality; no extra capacity available on the pipeline; or if the requesting party's credit is not adequate'. The IEA asks (pp. 118-119) whether there is an adequate balance between customer protection and the long-term benefits of competition.

With respect to price and non-price conditions of access, the approval of particular wheeling arrangements is only required where a proposed arrangement will disadvantage users (essentially price increases). Reductions in price must be notified but do not need to be approved.

With respect to approvals for capacity deployments, the METI can refuse the construction of new gas pipelines, but there is no restriction on construction of new LNG terminals, except with respect to safety issues.

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[16] Asian Legal Information Institute, *Laws of Japan: Gas Business Act 1954 – Act No. 51 of March 31, 1954* (up to the revisions of Act No. 87 of 2005). Available at: http://www.asianlii.org/jp/legis/laws/gba1954an51om311954250/ [accessed on 28 October 2008].

Amendments to the *Gas Business Act* in 2003 (Article 22-3) introduced requirements that access providers keep separate accounts for transportation services, and to publish the accounting data. These requirements were aimed at establishing 'fair and transparent' accounting.

As in electricity, the JFTC and the METI issued joint guidelines,[17] establishing 'appropriate gas transactions' in relation to major gas supply, wholesale supply, consignment supply, retail, and third-party access to LNG facilities. Private monopolisation, unjust low prices, discrimination, restrictive or exclusive dealing, unjust customer inducement, abuse of dominance and tie-in sales are all covered. The JFTC has powers in order to conduct an investigation of anti-competitive practices, comprising a number of orders and the ability to enter premises to inspect accounting books, documents, and other conditions of business. However, the *Guidelines* suggest a different outcome:[18]

> By presenting the Guidelines, it may not be necessary to exercise direct administrative intervention against any act infringing the Gas Utility Industry Law and the Antimonopoly Act but to establish a market environment in which participants can enjoy their businesses with confidence in economic transactions.

Regulatory Development

In gas, the METI and the JFTC are the bodies involved in the economic regulation of the sector as it becomes more liberalised. Amongst other suggestions, the IEA in its 2008 Review recommends that the *Gas Business Act* be reviewed to ensure it 'requires sufficient transparency in the administration of regulations'.[19]

2. Telecommunications[20]

Japan has a highly developed telecommunications industry, with ubiquitous penetration of both fixed-line and mobile telecommunications, and the utilisation of advanced technologies. Japan is also a leading producer and exporter of telecommunications equipment. Prior to 1985, Nippon Telegraph and Telephone (NTT) had a statutory monopoly on the provision of telecommunications services in Japan. In 1985, the telecommunications industry was liberalised, with the establishment of Type 1 carriers (those with their own facilities) and Type 2 carriers (those that used the facilities of Type 1 carriers to provide services). This was the first step in removing NTT's legal monopoly, and necessitated the introduction of access arrangements between Type 1 and Type 2 carriers. As of March 1986, there were seven Type 1 carriers – NTT, KDD (Kokusai Denshin Denwa), Japan-Telecom and others – mainly providing PSTN (telephone) services.[21]

Regulations concerning foreign ownership of telecommunications companies were abolished in 1998, with the exception of NTT (at present, the foreign ownership in NTT is restricted to less than one-third).

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[17] JFTC and METI, *Guidelines for Proper Gas Trade*, dated 23 March 2000 and amended 6 April 2004. Available at: http://www.jftc.go.jp/e-page/legislation/ama/guidelines_gas.pdf [accessed on 12 October 2008].

[18] Ibid., p. 6.

[19] International Energy Agency (IEA), *Energy Policies of IEA Countries – Japan 2008 Review*, 2008, p. 119.

[20] This section has benefited from information provided by officials of the Ministry of Internal Affairs and Communication.

[21] Ministry of Internal Affairs and Communications (MIC), *New Competition Framework: Amendments to the Telecommunications Business Law etc* (PowerPoint presentation), April 2005.

Competition was further promoted by splitting NTT into NTT East and NTT West in 1999.[22] Both companies were designated with essential telecommunications facilities meaning that both NTT East and NTT West have obligations to provide interconnection on a cost basis. They are indirectly owned by the government through holding at least one-third of shares of the holding company – NTT Corporation – who is mandated by the *NTT Law* to always hold all shares of the two NTT companies. Under the *NTT Law*, the two NTT companies are obliged to provide universal fixed-line telephone services throughout Japan with cost compensated by the Universal Service Fund established in July 2002. Another entity – NTT Communications Corporation – was established to provide inter-prefecture (national long-distance) and international services.

Other pro-competitive measures to be introduced include local loop unbundling (LLU) and co-location for access networks of NTT East and West in 2000, long-run incremental cost model for interconnection charges in 2000, carrier pre-selection in May 2001, operator number portability in March 2001 and setting up a dispute settlement body for telecommunication carriers in 2001.

With respect to fixed-line telecommunications, the broadband market was a major beneficiary of these deregulatory measures, and Japan is now the second-ranked broadband country in terms of subscriber base (24 million as of 30 June 2006).[23] Currently, broadband technology in Japan reaches up to 100 Mbps.[24]

Mobile telecommunications is also highly developed in Japan, with the number of mobile subscribers reaching 105.3 million at the end of 2007, including cellular and personal 'handyphone' system (PHS) operators. As of the end of March 2008, NTT DoCoMo's combined market share in mobile and PHS contracts had fallen to less than 50 per cent of subscribers for the first time since December 1998, according to the Telecommunications Carriers Association.[25] KDDI Corporation (originally IDO, DDI, and KDD) has 29.5 per cent of mobile subscribers, followed by Softbank Mobile (formerly Vodafone KK) with 18.1 per cent, indicating that both are gaining on NTT DoCoMo. Mobile number portability was launched on 24 October 2006.

As for the broadband market, Softbank Group became a licensee of new 3G spectrum at the 1.7GHz band in December 2005. It acquired the third mobile operator in Japan, Vodafone KK, renamed as Softbank Mobile, in March 2006. In December 2007, the Ministry of Internal Affairs and Communications (MIC) granted licences to Wilcom and Wireless Broadband Planning KK for a broadband wireless access service (WiMAX), which will utilise the 2.5GHz spectrum band.

Regulatory Institutions and Legislation

The principal legislation is the *Telecommunications Business Law* (Law No. 86 of 25 December 1984; hereafter 'the TBL') that was last amended on July 24, 2003 (Law No. 125). Other relevant laws include the *Arbitration Law* (effective on March 1, 2004) that governs arbitration and the *Nippon Telegraph and Telephone Corporation*

[22] Japan Congress, *Law Concerning Nippon Telegraph and Telephone Corporation*, Law No. 85 of 25 December, 1984 and amended last by Law No. 87 of 26 July, 2005.
[23] OECD, *OECD Communications Outlook 2007*, p. 134.
[24] Ibid., p. 103.
[25] Telecommunications Carriers Association, *Number of Subscribers Download File – FY 2007 (2007.4 – 2008.3) Excel File*. Available at: http://www.tca.or.jp/eng/database/daisu/download.html [accessed on 2 September 2008].

Law that governs changes to the structure of NTT. The enforcement of the laws is through a series of cabinet orders and ministerial ordinance.

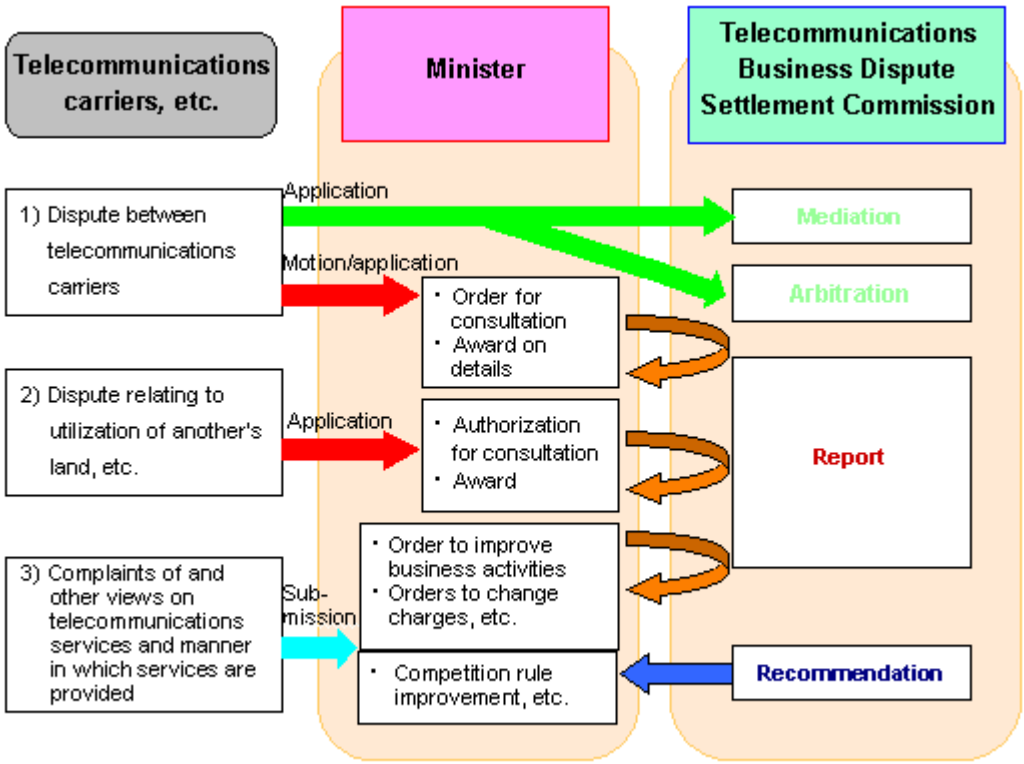
The Ministry of Internal Affairs and Communication (MIC) is responsible for regulatory supervision of telecommunications, and the Ministry of Finance is also involved as a shareholder in NTT. There are three bureaus within the MIC – the Global ICT Strategy Bureau, the Information and Communications Policy Bureau and the Telecommunications Bureau – responsible for promoting competition in the telecommunications market. The MIC has introduced annual competition reviews in the telecommunications field since fiscal year 2003 in order to deal with rapid changes caused by development of IP and broadband technologies. Basic principles of market reviews were established in November 2005.

Another key institution is the Telecommunications Business Dispute Settlement Commission (TBDSC), established within the MIC in 2001 to realise 'fair and effective competition' and to provide 'quick and smooth dispute settlement between carriers'.[26] The TBDSC conducts mediation or arbitration for telecommunications business disputes upon an application by a telecommunications carrier or submission in response to the MIC's inquiries on telecommunications services. The TBDSC also recommends on rule development such as directives for consultations to the Minister. As shown below, the TBDSC offers an alternative channel to the ministerial ordinances for consultation or award for dispute settlement. The TBDSC also provides inputs into the formalisation of ministerial ordinances.

By law, the TBDSC is composed of five commissioners appointed on a three-year term by the Minister of the MIC with consent from both the House of Representatives and the House of Councillors. The Commissioners are assisted by a designated Secretariat and other staff. For each mediation and arbitration case, some commissioners shall be assigned.

[26] See information at the Telecommunications Business Dispute Settlement Commission (TBDSC)'s website at: www.soumu.go.jp/hunso/english [accessed on 1 September 2008]; and infoDev and ITU, *Adjudication in Japan*; ICT Regulation Toolkit, *Practice Note: Adjudication in Japan*, 31 October 2008. Available at: http://icttoolkit.infodev.org/en/PracticeNote.aspx?id=1878 [accessed on 4 November 2008].

Outline of the Telecommunications Business Dispute Settlement Commission[27]



To improve information provision concerning dispute settlements and provide pre-lodgement consultations, the TBDSC set up the Consultation Window for Telecommunication Business Dispute Settlement in December 2004.[28]

Finally, there is the Japan Fair Trade Commission (JFTC) with its role of enforcing the *Antimonopoly Act*. The JFTC works towards eliminating anticompetitive practices in the communications market, mainly the interconnection and use-sharing services provided by Type I carriers.

In 2001, the JFTC, in cooperation with the MIC, published the guidelines for promoting competition in telecommunications, and these were subsequently revised in response to new developments.[29] The guidelines list both desirable and undesirable practices in the provision of telecommunications business or access to telecommunications facilities that may promote or restrict competition. Those anti-competitive issues that are not specific to telecommunications, such as shareholdings of carriers, mergers and acquisitions, are not specifically covered in the guidelines. However, there is no formal exemption from the *Antimonopoly Act* for telecommunication business.

Under the guidelines, the JFTC also cooperates with the MIC to set up a system for reporting, consultations and submission of opinions concerning promotion of competition. In particular, the JFTC provides consultations regarding the applicability of specific provisions of law and regulations to business activities

[27] See the TBDSC's website at: www.soumu.go.jp/hunso/english [accessed on 1 September 2008].
[28] MIC, *Information and Communications in Japan – White Paper 2006*, p. 49.
[29] Japan Fair Trade Commission (JFTC), *Guidelines for Promotion of Competition in the Telecommunications Business Field*, issued 30 November 2001 and amended 25 December 25 2002.

planned by telecommunications businesses. In general, the JFTC will respond in writing within 30 days after receiving an application for the consultation.[30]

In line with deregulation in telecommunications, governing regulations have moved from the *ex ante* system to the post-check system since 2003 to better adapt to rapid changes in the market.[31] The TBL was revised in April 2004 as follows:

- abolishing the business classification of facilities-based Type I carriers and service-based Type II carriers.
- abolishing the permission system for market entry, as well as suspension and discontinuation of business, with regard to Type 1 carriers.
- abolishing tariff regulations for non-dominant carriers.
- abolishing prior notification of interconnection agreement for non-dominant carriers.

However, asymmetric regulations over dominant carriers were maintained.

Under the current TBL, a registration/notification system is adopted for commencement of telecommunication business. The MIC is authorised to register telecommunication business and related changes upon receiving application relating to installing large-scale circuit facilities (that is, local loop beyond a city/town/village or transit circuits beyond a prefecture). The standard processing period is 15 days. Other businesses that require no facilities or only small-scale facilities to install are subject to notification to the MIC. Separate approval from the MIC is required for public utility privilege, that is, the rights of way to public water and private land for installing circuit facilities, for all or part of business. Such an application for approval may be filed at the same time or after the submission of registration or notification of business, and the processing time is a month.

Under the current TBL, all carriers are required to properly notify users and the MIC for suspension or discontinuation of business. Users can be informed in a reasonable advance time through sure methods, such as visiting, mailing written documents or email. The notification to the MIC can be conducted on an *ex post* basis.

Under the current TBL, a carrier providing universal services (NTT East and NTT West) is required to notify the MIC (through Telecommunications Bureau) of the establishment and amendments of tariffs concerning universal services seven days prior to their applications. The MIC may order changes to the said tariffs within a reasonable time period for reasons specified in Article 19 (2) of the TBL.

With respect to a dominant carrier carrying specified services, the MIC reviews annually the corresponding standard charge index specified under the 'CPI-minus-X' formula (Consumer price index minus expected future productivity gains plus exogenous factors)[32] that allows the recovery of efficient costs of providing specified services. A carrier is required to file a notification of setting or changing telecommunications charges no higher than the standard charge index prior to application, and seek approval of the MIC for charges that exceed the standard charge index (Article 21). The MIC can, within a reasonable time period, issue an order to

[30] JFTC, *Prior Consultation System*, 1 October 2001.
[31] MIC, *Information and Communications in Japan – White Paper 2007*, p. 45.
[32] MIC, *Regulations for Enforcement of the Telecommunications Business Law*, 11 December 2001, Article 19–5.

revise the charges on the ground of unfair discrimination against certain consumers or unfair competition or other reasons specified.

Certain consumer protection provisions are put in place, including:

- Telecommunications carriers have the obligations to explain important matters pertaining to the provision of telecommunications services to potential users through mail or electronic delivery of written document, brochure and catalogue, and follow-on verbal explanations offered (Article 26).
- Telecommunications carriers are required to publish the notified tariffs at its business offices and other workplaces or on the Internet.
- Telecommunications carriers are also required to process complaints and inquiries from users swiftly and properly.

The TBL mandates interconnection and share of using facilities. The agreement on accessing NTT's local loop is standard and is subject to authorisation by the MIC. The standard agreement is published to ensure transparency. Other agreements, such as access agreements on mobile telecommunication facilities and agreement on sharing of facilities, are subject to negotiation and notification to the MIC.

Process and Consultation

The standards for processing authorisation and permission are governed by the *Administrative Procedures Law* (APL). The TBL also establishes a system for public consultation and hearings, as well as filing complaints and opinions, in accordance with the APL (Articles 168–173).

The period for submission of Comments shall be 30 days or more from the date of public notice.

Any complaints on telecommunications matters shall be submitted to the Minister of the MIC in the form of documents describing the reasons. The Minister is required to handle it in good faith and notify the results to the complainants.

Any arbitration or decision on an investigation request or a lodged opposition with respect to an administrative disposition made in accordance with the provisions of TBL shall be effected after hearings, with a prior notice for a reasonable time period being given to the claimant for an investigation or the demurred (Article 171). As specified in Article 62 of the *Regulations for Enforcement of the Telecommunications Business Law*, the Minister of MIC makes an official announcement by no later than 10 days prior to the date of the hearing. The chair for the hearing is authorised to give permission for request made by interested parties for participating in the hearing. At the hearings, parties relevant for or interested in the case shall be presented evidence and be given opportunities for stating their opinions.

Role of Interested Parties

The MIC shall consult with the Telecommunications Council in relation to important matters, including establishing standard charges and authorisation of charges, applicable law and policy formation (Article 169 of the TBL). The Council is composed of representatives from different interest groups, but has often taken a compromising approach in favour of dominant carriers.

Study groups composed of experts are often established by the MIC or the Council in order to report professional knowledge on specific issues, upon which policy is

formed by the Minister. The MIC has also conducted public consultation with interested parties prior to forming new regulations.

Information Disclosure and Confidentiality

The MIC has the power to obtain business and financial information from business if, and to the extent, that is required for the enforcement of the Law. For example, the MIC may refuse the registration of a business whose application fails to include important information required (Article 12).

The telecommunications business is required to publish telecommunications charges and financial information at business offices and other workplaces, as well as on the Internet.

Decision-making and Reporting

The authority of the MIC over telecommunication business may be delegated to the Director-Generals of the Regional Bureaus of Telecommunications.

Any telecommunications business that violates the TBL (administered by the MIC) and/or the *Antimonopoly Act* (administered by the JFTC) may receive criminal or financial penalties. Appeal to the MIC is available for administrative decision under the *Administrative Appeals Law* (Law No. 160 of 1962).

Appeals

The Minister is required to conduct an investigation under the *Administrative Appeals Law* (Law No. 160 of 1962) upon receiving a request by any party who is dissatisfied with an administrative disposition made by a designated examination agency. In accordance with Articles 74 to 85 and Article 173, the Minister may commission a designated examination agency to conduct specified examination work.

Regulatory Development

The liberalisation of telecommunications over twenty years has introduced intensified competition. The MIC has revised its laws and regulations to conform with the innovation of the market. The establishment of a dispute settlement body for telecommunications carriers may encourage negotiations, increase transparency and speed up settlement of disputes. The JFTC is also playing a stronger role in communications since 2000.

3. Posts

Historically the postal service operator was a central government ministry, namely the Ministry of Communications from 1885 to 1949 and the Ministry of Posts and Telecommunications in subsequent years up to 2001. In fiscal year 2001, Japan ranked third in the world after the United States and China in terms of total mail volume.[33] In that year, the postal service operator was transformed into a government agency – the Postal Services Agency, along with the establishment of the Ministry of Public Management, Home Affairs, Posts and Telecommunications (MPHPT) to supervise it.[34]

[33] Ministry of Public Management, Home Affairs, Posts and Telecommunications, Information and Communications in Japan, *White Paper 2003*, p. 46.

[34] The English name of the Ministry of Public Management, Home Affairs, Posts and Telecommunications was subsequently changed to the Ministry of Internal Affairs and Communications.

Japan Post (JP) was established in 2002 as a public corporation responsible for matters concerning the operations of postal service, postal savings and insurance,[35] subject to supervision undertaken by the MIC. The MIC was assigned with full authority in postal matters – approving all changes in postage rates, setting service standards, and supervising postal operations and standards. It was also responsible for international affairs relating to postal services, such as Universal Postal Union (UPU) matters.

Competition in postal service was introduced through the permission system for entry into delivery business (see below). The number of operators engaged in the Special Correspondence Delivery business was 253 as of March 2008,[36] with Nippon Express as the only domestic company competing with JP on a nationwide basis. JP and Nippon Express are to set up a joint venture to integrate their parcel delivery operations in October 2008.[37] The joint venture will hold 19 per cent share of the domestic parcel delivery business, after Yamato Transport (37 per cent) and Sagawa Express (32 per cent). So far no private operator has entered the General Correspondence Delivery business.

JP is currently undergoing privatisation, motivated primarily by unlocking its immense financial assets.[38] A package of six Postal Privatisation and related bills was adopted on 14 October 2005, outlining a three-phase privatisation process – a preparation phase through the end of September 2007, a ten-year transition phase and the final phase from October 2017.[39] The privatisation process was largely overseen by two government-affiliated committees established under the Privatisation legislation – the cabinet-level Headquarters for Promoting Postal Privatisation (HPPP) and the Postal Privatisation Commission (PPC) – both began to operate in 2006 and will cease to exist on 1 October 2017.[40]

The HPPP consists of the Prime Minister and relevant cabinet ministers, responsible for advancing measures facilitating the implementation of postal privatisation laws. The PPC is an advisory body of five members, appointed by the Prime Minister for renewable three-year terms, responsible for making recommendations to the relevant ministers for changes in response to progress of postal privatisation in transit phase. It will review the privatisation process every three years and be consulted by the MIC about many decisions in the course of postal privatisation.

On 1 October 2007, JP was privatised in accordance with *JP Privatisation Law* and related laws, and split into the following four groups, held under a government-owned holding company – JP Holdings:[41]

- JP Service that assumed the postal business. As mandated by the *Postal Services Law*, it is obliged to provide universal postal services (see below).

[35] Japan Post (JP), *Annual Report – Postal Services in Japan 2007*, 2007, p. 64.
[36] The Postal Services Policy Planning Bureau (PSPPB), *Correspondence Delivery Business.* Available at: http://www.soumu.go.jp/english/psppb/index.html [accessed on 5 August 2008].
[37] 'Parcel Delivery Merger to Create No. 3 Courier', *The Japan Times,* 6 October 2007.
[38] Porges and Leong, op. cit., p. 385.
[39] The laws are primarily based on a Council on Economic and Fiscal Policy report – *Basic Policy on the Privatization of the Japan Post – completed in September 2004.*
[40] P. Maclachlan, 'Storming the Castle: The Battle for Postal Reform in Japan', *Social Science Japan Journal*, 9, 1, 2006, pp. 1–18.
[41] Postal Services Policy Planning Bureau (PSPPB), *Shifting Smoothly to the New Corporations after the Privatization*. Available at: http://www.soumu.go.jp/english/psppb/index.html [accessed on 5 August 2008].

- JP Network that inherited the postal office network to conduct postal and financial services upon receiving commissions from the other three companies. It is required by law to maintain the existing level of the post office network.
- JP Bank that assumed the banking business.
- JP Insurance that assumed the insurance business.

Under the *Privatisation Laws*, JP Service and JP Network are allowed to diversify its business. JP Bank and JP Insurance are expected to be fully floated on the stock market by 1 October 2017 when government ownership of JP Holdings is reduced to one-third;[42] however, the Government may still be able to indirectly invest in the two financial service companies since cross-holding among all the companies is allowed.

There were no changes to postage rates for mail items due to this privatisation. However, various small parcels were re-classified from mail category to freight category.

Regulatory Institutions and Legislation

The laws governing the postal business are the *Postal Law 1947* (Act No. 165) and related laws. The *Postal Law* governing the postal services originated in 1947 has been amended by a series of acts and was last amended in 2005 (by *Act No. 121*). The *Japan Post Law* was enacted in July 2002 for the establishment of JP and was revised by a package of *Postal Privatisation Laws* introduced in 2005 to facilitate the privatisation of JP.[43] Other relevant laws include the *Law Concerning Correspondence Delivery by Private-Sector Operators* enacted in April 2003.[44]

Under the revised *Japan Post Law*, the JP Holdings will continue to be held by the MIC (above one third of shareholdings) and the JP Services and JP Network will continue to be regulated by the MIC.[45] The MIC has the statutory power to approve major decisions on the postal businesses, after consulting with the PPC. The authority of the MIC includes:

- Approving discounted postal rates for third and fourth class mail
- Approving JP Service and JP Network's expansion into non-traditional businesses
- Approving all subcontracts of JP Service
- Enforcing JP Services' compliance with the legislation
- Having broad powers of audit and inspection of JP Services.

Under the *Law Concerning Correspondence Delivery by Private-Sector Operators* enacted in April 2003, correspondence delivery business further falls into two categories: general correspondence delivery business and special correspondence

[42] The minority ownership of the government over JP Holdings is to ensure that JP Postal Service meets its universal service obligation.

[43] The 2005 package of *Postal Privatisation Laws* include: *Postal Privatisation Law* (Act No. 97), *Japan Post Holdings Corporation Law* (Act No. 98), *Japan Post Service Corporation Law* (Act No. 99), *Japan Post Network Corporation Law* (Act No. 100), etc.

[44] The concept of 'correspondence' in Japan almost parallels that of 'letter' in most developed countries.

[45] Consumer Postal Council, *Index of Postal Freedom – Japan*. Available at: www.postalconsumers.org [accessed on 5 August 2008].

delivery business.[46] The former category of delivery is the delivery of correspondence items on a nationwide scale:

- within the length, width and thickness of 40 cm, 30 cm and 3 cm;
- weigh 250 g or less; and
- in principle are to be delivered within three days of being mailed.

The latter category of delivery is the delivery of items:

- with combined length, width and thickness of 90 cm or more;
- weigh over 4 kg;
- those are to be delivered within three hours of being mailed; and
- those bear a delivery charge that exceeds the amount specified by the ordinance of the MIC which is not less than 1,000 yen.

The purpose of this Law, in conjunction with the *Japan Post Law*, is to ensure universal service and to promote competition so that users will be offered a wider choice of services.[47] Entry to both general and special correspondence delivery businesses is subject to permission by the MIC.

The supervisory role of the MIC is primarily conducted through the Postal Services Policy Planning Bureau (PSPPB) that the MIC set up on 1 April 2003 in line with the inauguration of Japan Post.

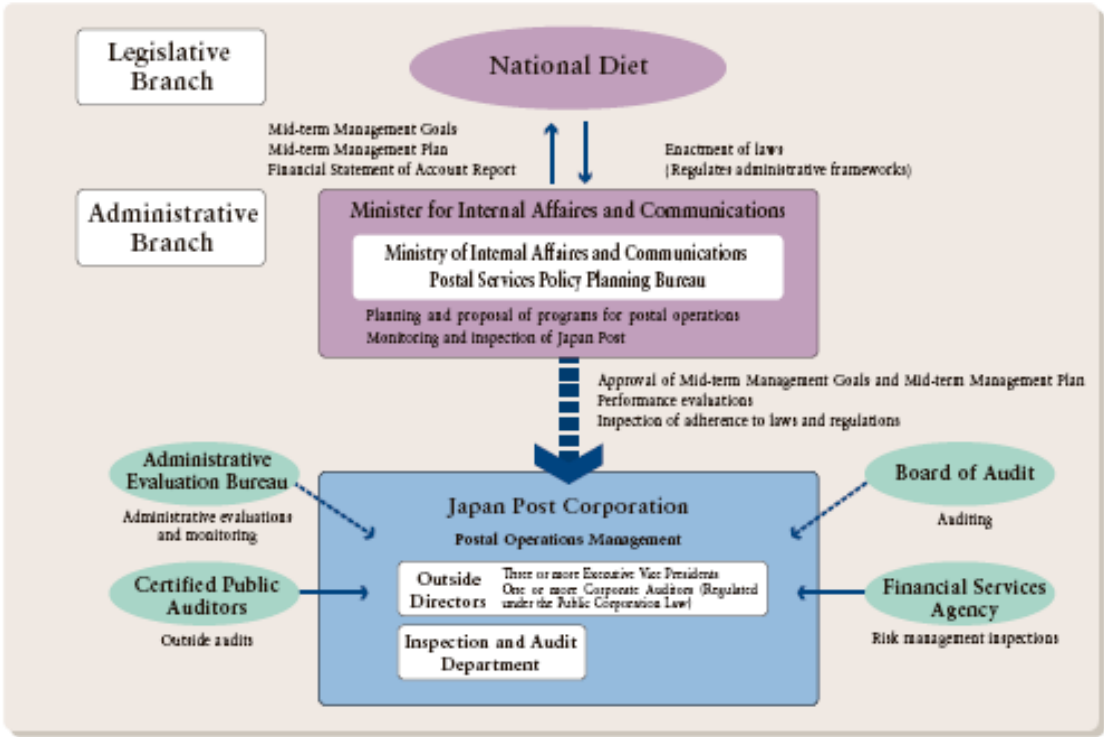
In relation to the former JP, the PSPPB's main functions were (see below):

- Approval of mid-term management goals and mid-term management plans
- Assessment of performance
- Inspection of compliance with laws and regulations.

[46] PSPPB, *Shifting Smoothly to the New Corporations after the Privatization*. Available at: http://www.soumu.go.jp/english/psppb/index.html [accessed on 5 August 2008].

[47] PSPPB, *Correspondence Delivery Business*. Available at: http://www.soumu.go.jp/english/psppb/index.html [accessed on 5 August 2008].

Administration and Operations of Postal Services[48]



The PSPPB's role over the course of postal privatisation includes:

- establishing the JP Holdings
- establishing and revising laws related to the new corporations
- instructing the JP Holdings to prepare the implementation plan that set forth the transfer of business, assets, employees, and other resources; and examining its appropriateness.

The PSPPB is also responsible for supervising correspondence delivery operators and considering measures to promote competition in the postal market.[49]

The PSPPB is composed of one director-general, one deputy direct-general, and one counsellor. The bureau is organised into five divisions:

- General Affairs Division
- Postal Policy Planning Division
- Postal Savings Policy Planning Division
- Postal Life Insurance Policy Planning Division
- Correspondence Delivery Business Division.

In addition, the Bureau maintains an independent office for its Director for Inspection.

[48] JP, *Annual Report – Postal Services in Japan 2007*, 2007, p. 64.
[49] PSPPB, *Correspondence Delivery Business*. Available at: http://www.soumu.go.jp/english/psppb/index.html [accessed on 5 August 2008].

Issue 1: Postal Rate Making

In accordance with the current *Postal Law*, JP Service can set and change postal rates for first and second class mail by simply notifying MIC in writing.[50] The notice should provide information with regard to:

- Types and rates of mail, period to apply, and how to apply;
- Date of implementation (which should be no earlier than 13 days after the submission of the notice);
- Reasons for the change in rates (if applicable).

The rates should be set to cover the cost (plus a reasonable profit) of an efficient postal operation, and should not be discriminatory to any specific person.[51]

MIC approvals are still required for discounted third and fourth class mail. There is no specified role for the PPC or private parties in postal ratemaking.[52]

Issue 2: Universal Service Obligation (USO)

JP Service is obliged to provide universal postal services for letters and postcards, involving the provision of mail services (e.g. six-day mail delivery) on a nationwide basis at a uniform regulated rate for each service. There are no statutory reserved service areas for JP to finance its USO; however, for reasons discussed below, JP has de facto monopoly in the general correspondence delivery business.[53] A new fund was set up for financing the USO, as well as maintaining the current post office network for postal and financial services, particularly in the rural areas. The source of the fund is primarily from share sales of the two JP financial companies.

Issue 3: Entry to New Business Areas by JP

In approving a proposal from JP to enter new business areas, the PPC is the first body to receive such a request from JP. Once the PPC gives its approval, it passes its recommendation on to the MIC, who will make its evaluation and recommendations to the HPPP, including the Prime Minster, for final approval. Each of the three bodies needs to give its approval for the proposal to go ahead. By law, the MIC should consider potential damage to the interests of private-sector competitors in the market that JP enters.[54]

Issue 4: Licensing of Entry to Postal Delivery Services by Private Operators

Entry to both general and special correspondence delivery businesses is subject to permission by the MIC. Obtaining a licence for engaging in special correspondence delivery requires evidence to show the company is fit to carry out the business, its business plan is appropriate and it is to comply with the confidentiality of correspondence requirement. Obtaining a licence to operate in the general correspondence delivery business has extra entry requirements, including providing

[50] *Postal Law* (Ordinance of the MIC No. 5 of 14 January 2003 amended by Ordinance of the MIC No. 2 of 28 November 2008).
[51] *Postal Law 1947* (Act No. 165), Article 76.
[52] Porges and Leong, op. cit., p. 398.
[53] Porges and Leong, op. cit., p. 395.
[54] R.B. Cohen, 'Policy Challenges and the Privatization of Japan Post', *Economic Strategy Institute Research Report*, 2006, p. vii. This paper argues that MIC's recent approval of the Joint Venture between JP and All Nippon Airways (ANA) showed that it failed to conduct detailed analysis of anti-competitive impact before reaching its findings of 'no unduly harm to the rival companies'.

all types of general mail items on a nationwide scale at least six days per week at regulated uniform rates, setting up about 1 000 000 of non-JP collection boxes and meeting service standards.[55] The MIC, through the PSPPB and the Regional Bureaus of Telecommunications, is in charge of licensing, approval and supervision related to correspondence delivery business.

So far no private-sector operator has applied for a licence to operate in the general correspondence delivery business since none is large enough to meet the entry requirements. In light of no entry into the general correspondence delivery business, the MIC set up the Study Group on Reserved Areas and Competition Policies in Postal Market in January 2006 to consider measures to promote competition in postal services. The group issued a report in June 2006. Subsequently, another Study Group was set up to review postal and mail delivery services, taking into account advances in postal reform domestically and internationally.

Other Key Issues arising from the JP Privatisation

A related issue to promoting competition through entry system is how to ensure a 'level playing field' for all postal operators. There is a concern over whether JP has advantage over other competitors in postal services and other potential markets, such as logistics.

First, the newly privatised JP Services and Network may still enjoy some discriminatory benefits that it used to receive as a government agency, including priority treatment in customs processing for international mail under the *Customs Law*, exemption from traffic regulations under the *Road Traffic Law* (enabling it to pick up mail and parcels where competitors cannot).

Secondly, JP is regulated by the MIC while private-sector parcels and express delivery operators are regulated by the MLIT. As a result, JP may be treated differently from other private operators in some areas. For example:

- JP is not subject to the Post-9/11 Security Enhancements regulations that require delivery firms to upgrade security at airport and ports.
- Entry to mail delivery is subject to permission from the MIC and entry to parcel delivery is subject to approval from the MLIT. Criteria used by the two regulators can differ.

Lastly, JP Services and JP Network may be cross-subsidised by the more profitable financial services business in the absence of independent oversight of all JP accounts and complete structural separation. All the four JP groups will continue to be jointly owned by JP Holdings until October 2017. Even after the completion of structural separation, JP Holding and the two postal companies are permitted to buy shares in the two financial companies.

Another related concern is that Japan may lack a framework to ensure that there will be no anti-competitive impact.[56] The Japan Fair Trade Commission (JFTC) administers the *Antimonopoly Law* in Japan, but historically has little regulatory authority over the postal market. Under the *Postal Privatisation Act*, the JFTC may play a more active role in antitrust issues as private postal operators can lodge complaints with the JFTC. Anti-competitive cases can also be taken directly to the

[55] Porges and Leong, op. cit., p. 395.
[56] Cohen, op. cit., p. viii.

courts. In September 2004, Yamato brought a lawsuit against JP for the latter's strategic alliance with Lawson department stores for mail collection from in-store post boxes to Tokyo district Court, accusing JP of breaching the *Anti-monopoly Law* by unfairly expanding parcel delivery service and predatory pricing. However, the court rejected Yamato's arguments on the basis of inadequate evidence from Yamato to substantiate the claims.

The JFTC's power is still not comparable to that in other countries in similar privatisation processes.[57] The United States and other countries, though its dialogue with Japan, has requested that the JFTC play a central role in overseeing the privatisation process. Concerned with anti-competitive impact of JP's international expansion strategy, they have also pressed Japan to comply with the pro-competitive undertakings for postal services that Japan proposed to the WTO.

Regulatory Development

Historically postal services were part of ministerial operation, and the MIC has had a senior management role as well as that of regulator, including during the course of privatisation.[58] The MIC remains responsible for approving major decisions on postal business, after consulting with the PPC and the HPPP. There is no evidence in the English-language sources of a public process (such as issues papers, submissions, and public hearings) for forming regulatory decisions that are jointly approved by the three bodies.

4. Water and Wastewater

Japan's mountainous terrain and other geographical features mean that water is overall plentiful, but there are issues with the distribution of water resources (river basins covering only 15 per cent of the land area account for over half of the population and economic activity) and drought can, at times, affect some areas quite severely. The allocation and overall management of water is marked by two features. First, it is heavily influenced by tradition – particularly the protection of traditional (irrigation) water rights (the 1896 *River Law* protected traditional water rights under a strict policy of 'First in time – first in rights') and the consideration of water as a 'public property' (meaning the absence of water trading). Second, there is strong government involvement in the water and wastewater industry in Japan, at all levels – national (centralised control, through the Japan Water Agency (JWA) under the supervision of five ministries, of multi-purpose river developments – water supply, hydroelectricity, flood control, etc., in the key river valleys since the early 1960s), prefectural (river management of class B rivers) and municipal (ownership and operation of water and wastewater facilities under essentially monopoly circumstances; organised as the Japan Water Works Association (JWWA)) levels.

Difficulties arose from uncoordinated water acquisition and wastewater disposal treatment in the 1950s as Japan was industrialised, leading to problems including difficulties in attaining adequate supplies, deciding allocation amongst competing claimants, pollution, and flooding. These were addressed by the 1961 *Water Resources Development Promotion Law* establishing the new principle of 'One river system – one administrator' and centralised control of key river basins. The Water

[57] Consumer Postal Council, op. cit, p. 4.

[58] J. Campbell and A. Porges, 'How Much Postal Reform in Japanese Postal Privatization', paper presented at the *15th Conference on Postal and Delivery Economics*, Semmering, Austria, 30 May – 2 June 2007.

Resources Development Basic Plan arrangements were initially administered through the Water Resource Development Public Corporation (WARDEC) eventually applying in seven key valleys accounting for one-half of Japan's population and economic activity.

The WARDEC was discontinued in 2003, and its functions transferred to the Japan Water Agency (JWA). The JWA is a semi-governmental body under the supervision of five ministries covering environment, economy and industries. The five ministries that supervise the JWA are:

- Ministry of Land, Infrastructure and Transport (MLIT) – Land and Water Bureau and River Bureau
- Ministry of Environment
- Ministry of Health, Labour and Welfare
- Ministry of Agriculture, Forestry and Fisheries
- Ministry of Economy, Trade and Industry (METI).

These ministries reflect the full diversity of interests involved in water and wastewater. The JWA is responsible for securing and supplying domestic, industrial and irrigation water. It also constructs, operates and maintains water infrastructure such as dams, estuary barrages, facilities for lake and marsh development, and canals. Projects to increase water supply are limited to those that were underway when the WARDEC was transformed into the JWA. Within the JWA, the ministry responsible for project implementation varies according to the objective of the project. The Minister of Land, Infrastructure and Transport manages personnel and finances.[59] The JWA now has approximately 1 650 staff.

Following the 1961 legislation there are four classes of river in Japan:

- Class A rivers (administered by MLIT) are in seven valleys or basins that occupy 17 per cent of Japan's land area but account for around 50 per cent of population and economic activity. These are Tone, Ara, Toyo, Kiso, Yodo, Yoshino and Chikugu river systems. The construction of multi-purpose river developments is carried out by MLIT itself or by the JWA under MLIT supervision. Activities range across procuring water, power generation, environmental conservation, and flood control.
- Class B rivers are administered by Prefecture Governors.
- Locally designated rivers.
- Some rivers are completely non-designated.

Regulatory Institutions and Legislation

The key institutions are the JWA and the five ministries that oversee it. MLIT contains the two bureaus – Land and Water Bureau and the River Bureau. The two key pieces of legislation are the *River Act* and the *Water Resources Development Promotion Law*.

[59] JWA, *Outline of the JWA*. Available at: http://www.water.go.jp/honsya/honsya/english/02.html [accessed on 11 November 2008].

Process for Permitted Water Rights and Drought Conciliation[60]

There are two exceptions to the 'first in time – first in rights' ruling inherent in the *River Law*. First, while no private transfers of water rights (that is, 'water trading') is allowed, the MLIT has the power to convert water rights, applying criteria for conversion of water rights relating to purpose, practicability, security and public benefit. Water rights are permitted for 30 years for hydroelectricity and ten years for other water rights.

The 'first in time – first in rights' principle has also to be modified during drought conditions. During droughts the stakeholders coordinate through a Drought Conciliation Council comprising the administrator, the water users and representatives of all levels of government). The administrator of the river basin concerned can make a direct intervention.

The process (as set out in Articles 35–43 of the *River Law*) involved in each case is as follows:

- Applicant submits applicant for river water use to the administrator (MLIT if Class A and Prefectural Governor if Class B).
- The river administrator investigates the application.
- The administrator consults with water-related national organisations (e.g. the Japan Water Forum, JWF, is an advisory council chaired by a former Prime Minister and having members covering a broad range of interests such as industry bodies, the housewives association; energy interests (hydroelectricity) and trade unions) and relevant local governments.
- The administrator coordinates between the stakeholders in the river basin.
- The administrator either issues or does not issue the permit. Where it is issued the administrator may order compensation for affected stakeholders.

Municipal Water and Wastewater Operations

Water and wastewater bodies at the local level are owned and operated by municipalities on a monopoly basis. Local operators often rely on terminal sewage treatment plants, jointly owned by two or more municipalities (see below). Key enactments here are the *Water Pollution Control Law* and the *Sewage Law*.

The Japan Water Works Association (JWWA) is an association of local government bodies operating water and wastewater utilities. According to its website, it engages in 'powerful lobbying' of government, including at special assemblies at national budget time to which Diet members and government officials are invited. It 'drives to obtain government budget allocations for water supply'. The JWWA holds a General Assembly annually.

The Japan Sewage Works Agency (JSWA) constructs and operates terminal sewage treatment plants based on contracts with municipal governments. JSWA is fully owned by local governments. Some large manufacturers have installed their own treatment plants.

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[60] Michitaro Nakai, *The Outline of the River Law*. Available at: http://www.narbo.jp/narbo/event/materials/twwa03/tw03_09_01-2.pdf [accessed on 26 May 2009]

The process of price setting involves only the water and wastewater utility and the city council, usually involving submission of financial plans, of between three and five years, to the mayor. Once approved by the mayor, the plan is referred to the council. There is apparently some interplay between the utility and the council over the tariff revisions contained in the plan, with the council usually modifying the plan.[61]

The Japanese Fair Trade Commission (JFTC) has attempted to apply the *Antimonopoly Law* to open the wastewater market to greater competition. In 2006 it filed a complaint relating to alleged bid rigging by eleven companies.[62]

Regulatory Development

The absence of competition and the centralisation of control of key river basins means there is no requirement for the application of regulatory processes such as declaration and pricing of third-party access. The JFTC has had only a minor role in the water and wastewater industry, although issues are beginning to emerge with respect to entry into wastewater treatment.

5. Rail

Railway transport is an important mode of transport in Japan, particularly in intra- and inter-city passenger services where rail ranked second (27.7 per cent of passenger-kilometres travelled) after automobiles (66.1 per cent) in 2005-06.[63] Since the opening of the first Japanese railway between Shimbashi (Tokyo) and Yokohama in 1872, the ownership of railway infrastructure in Japan has been a mix of public and private. At present, the railway business is conducted mainly by three groups based on their legal classification:

- Japan Railways Group (JR) consisting of six independent passenger railway companies (three mainland companies – JR East, JR Central and JR West; three island companies – JR Hokkaido, JR Shikoku and JR Kyushu) and one freight railway company (JR Freight).
- A large number of private railway companies offering passenger services on regional railways that are integrated to various degrees into the JR networks. They are generally concentrated in the more lucrative urban markets, with 16 major private companies carrying more passengers than the JRs in the three biggest cities, Tokyo, Osaka and Nagoya.
- Public railway companies controlled by local or national governments to run subways.[64]

The six JR passenger companies together carried about 40 per cent of rail passengers and 60 per cent in terms of passenger-kilometres travelled in fiscal year 2005-06.[65] JR Freight has access to railway tracks owned by the JR passenger companies for

[61] This is based on a description of the process by Mr Ikuo Mitake, President of the Japan Water Works Association, in personal communication of 31 August 2008.
[62] See US Commercial Service, *Japan: Water and Wastewater Industry Overview*. Available at: www.buyusa.gov/asianow/japanwater08.pdf [accessed on 12 August 2008].
[63] Japan East Railway Company, *Annual Report 2007*, p. 86.
[64] Railways (including subways other than Osaka Municipal Subway) are regulated by the *Railway Business Act* (Act No. 92 of 1986).
[65] Ministry of Land, Infrastructure and Transport (MLIT), *Monthly Statistical Report on Railway Transport*, Table 2–1 Summary of Table: Passengers Carried by Railways and Tramways, March 2008. Available at: http://www.mlit.go.jp/k-toukei/60/railway.html [accessed on 22 August 2008].

freight transportation. Their forerunner, Japan National Railways (JNR), was broken into these seven JR companies in 1987, marking the beginning of the rail liberalisation process.

The primary purpose of this rail reform was to revive the ailing JNR (with ¥37.1 trillion debts) by creating independent regional railway companies with enhanced management autonomy. This notwithstanding, unlike the mainland companies operating in densely populated urban and inter-city markets, the island companies and the freight company were not expected to make profits from their low-volume constrained rail businesses. Since their foundations, mechanisms for facilitating cross-subsidisation among JR companies have been put in place:

- The companies were jointly held by the government-owned Japanese National Railways Settlement Corporation (JNRSC).
- The three mainland companies were required to pay off 40 per cent of the former JNR's debts.
- The three island companies' operating deficits were financed by the interest income earned in the Management Stabilisation Fund operated by the JNRSC.
- The freight usage fees paid by JP Freight to the passenger companies were based on short-run incremental costs.

Prior to 1 December 2001, all the JR companies were subject to special *JR Law*, and their business and management were under the supervision of the Ministry of Land, Infrastructure and Transport (MLIT). The three mainland JR companies have since been released from the jurisdiction of the special law, but were still subject to guidelines issued by the MLIT in relation to railway operation management. They were eventually fully privatised. The other companies are still wholly government-owned through the holding company – the Japan Railway Construction, Transport and Technology Agency (JRTT) – an independent public corporation regulated by the *Basic Law on Reforming Government Ministries* of 1998.[66]

Historically private railway companies have actively pursued business diversification strategies, often entering into property development along their railway lines. In recent years, more investment in other non-rail business such as the hospitality industry has been made. The JR group generally has limited exposure to non-rail business because its predecessor, the JNR, was prohibited by law from diversifying its business or forming a group.[67]

The Association of Japanese Private Railways (AJPR) is a non-government association for private railway and subway operators.[68] It represents the industry in dialogue with the government, the unions and other parties on important issues in rail transportation relating to technology, industrial relations, safety management and others.

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[66] The JRTT assumed the responsibilities of its predecessors, the Japan Railway Construction Public Corporation (JRCC) – a public corporation responsible for the construction of railway lines, and the Corporation for Advanced Transport and Technology – a public corporation responsible for Maritime credit and Railway Development Fund (RDF), in 2003. The JRCC took over the assets and liabilities of the JNRSC in 1998.

[67] T. Saito, 'Japanese Private Railway Companies and their Business Diversification', *Japan Railway & Transport Review*, 10, January 1997, p. 3.

[68] See information at the Association of Japanese Private Railways (AJPR)'s website at: www.mintetsu.or.jp (in Japanese) [accessed on 23 August 2008].

Regulatory Institutions and Legislation

The railway industry is heavily regulated. A number of laws and regulations have been established to govern the railway industry including the *Railway Business Law* and the *Track Law*. They are enforced by the MLIT.

The *Railway Business Act* (Act No. 92 of 1986) came into effect on 4 December 1986 and a series of amendments have been made in subsequent years. The *Railway Business Act* applies to all railways, except for Japan Railway Construction, Transport and Technology or Japan Expressway Holding and Debt Repay Agency that may build railway tracks for other railway operators.[69] The Act requires a railway company to fall in one of the following categories:

- Type 1 Railway Business – provides transportation of passengers and/or freight by using its own railway infrastructure.
- Type 2 Railway Business – provides transportation of passengers and/or freight using the railway tracks constructed by other businesses.
- Type 3 Railway Business – constructs railway tracks for the purpose of assigning them to a Type 1 Railway Business operator or having a Type 2 Railway Business operator use them exclusively.

Although the majority of the railway companies are vertically integrated regional monopolies that fall in Type 1 category, the Act does permit operation and ownership separation for Type 2 and 3 operators respectively. Type 2 operators pay track usage fees to Type 3 operators for recovering track construction costs.

Under a policy introduced by the then Ministry of Transport in 2000 to encourage municipal governments' investment, the Type 3 Railway Business can be further divided into two sub-categories – for-profit operators and break-even operators who receive subsidies.[70]

Entry and Exit – Permission System

An amendment made in 2000 abolished the demand/supply balance restriction on company entry into the railway business. The MLIT is authorised to grant licences specifying the route and the classification of the railway business upon application. The Ministry shall examine the application against the following criteria:[71]

- The business plan is appropriate from the viewpoint of operation.
- The business plan is appropriate from the viewpoint of the safety of transportation.
- The applicant has an appropriate plan from the viewpoint of operating the business in addition to what is listed before.
- The applicant has a capability to properly conduct the business on its own.

Specifically, the Ministry permits the entry by checking the propriety of the safety and management of the business plans. The entry applications can be rejected for reasons

[69] See *Railway Business Act* (Act No. 19 of 2006), Article 59, Item 1.
[70] K. Terada, 'Railways in Japan – Public & Private Sectors', *Japan Railway & Transport Review*, 27, June 2001, p. 51.
[71] *Railway Business Act* (Act No. 19 of 2006), Article 5.

specified in the *Railway Business Law* (Article 6) that show the applicant is incapable of properly conducting the business on its own.

Prior notification of one year to the MLIT is required when the railway company intends to fully or partially withdraw from the business. When the railway company intends to suspend the whole or part of the business for no more than one year, it shall notify the MLIT to that effect in advance. Under certain circumstances, suspension of business and rescission of licence may be ordered by the MLIT.

Fares and Rates – Approval System

The legislation requires the ceiling price permission system, combined with the advanced notification system for price changes within the ceiling price, when setting and changing fares and surcharges (if applicable). The railway company is required to set forth or change the upper limits of the passenger fares such that they should be no higher than the amount of the efficient cost plus the appropriate profits for the railway operations only, and seek the approval of the MLIT. Subject to advance notice to the MLIT, the railway company can change the passenger fares within the approved upper limits.

'Yardstick regulation' was introduced in January 1997 to encourage indirect competition among respective railway operators. Under this approach, rail operators compete indirectly with each other to enhance their efficiency performance. Their relative performance is assessed by the MLIT at the end of each fiscal year and this is then used as the basis for measuring efficient costs in the consideration of the upper limits of fares. As fares are capped on the basis of efficient costs, an inefficient operator cannot pass on its higher operating costs to consumers in the form of higher fares.

The MLIT may order the railway company to change specific fares by setting the due date if it has concerns over unjustifiable discrimination against certain passengers or unjust competition.

The MLIT shall consult with the Council for Transportation in relation to both the approval of the upper limits of passenger fares and an order to change the passenger fares or to change the upper limits of the fares. [72]

The Director of the District Transport Bureau within the MLIT is authorised to summon interested parties to hear their opinions.

Access Regulation

Setting or changing access arrangements with a Type 2 operator (such as JP freight) needs approval from the MLIT (Article 15). The access fees paid by JP freight to other JP passenger companies are based on the avoidable cost principle. The fees have not changed materially since 1987, and currently cover short-term incremental costs.[73]

The MLIT has the power to obtain business and financial information from the business operator if, and to the extent, that is required for the enforcement of the *Railway Business Act*.[74] It is authorised to conduct on-site inspections. The MLIT

[72] *Railway Business Act*, Article 64-2. The MLIT must also consult on an order to suspend business, recession of licence and the formulation of basic policy.
[73] Yoshitaka Fukui, 'Twenty Years After', *Japan Railway & Transport Review*, 49, 2008, p. 10.
[74] *Railway Business Act*, Articles 55–56-2.

shall set forth the basic policy pertaining to obtaining reports on safety management or conducting on-site inspection.

The authority of the MLIT may be delegated to the Directors of the District Transport Bureaus.[75] Typically, a District Transport Bureau manages transport matters at the regional level. Its railway section typically contains:

- Planning division: new line planning and the improvement of existing lines, stations and railway crossing, revised measure of barrier free.
- Technical division: permission approval and inspection, audit and security measures.
- Safety directive division: reporting investigation findings.
- Railroad safety audit office: the audit regarding the circumstance of railway safety.

Any railway company that violates the *Railway Business Law* may receive criminal or financial penalties.

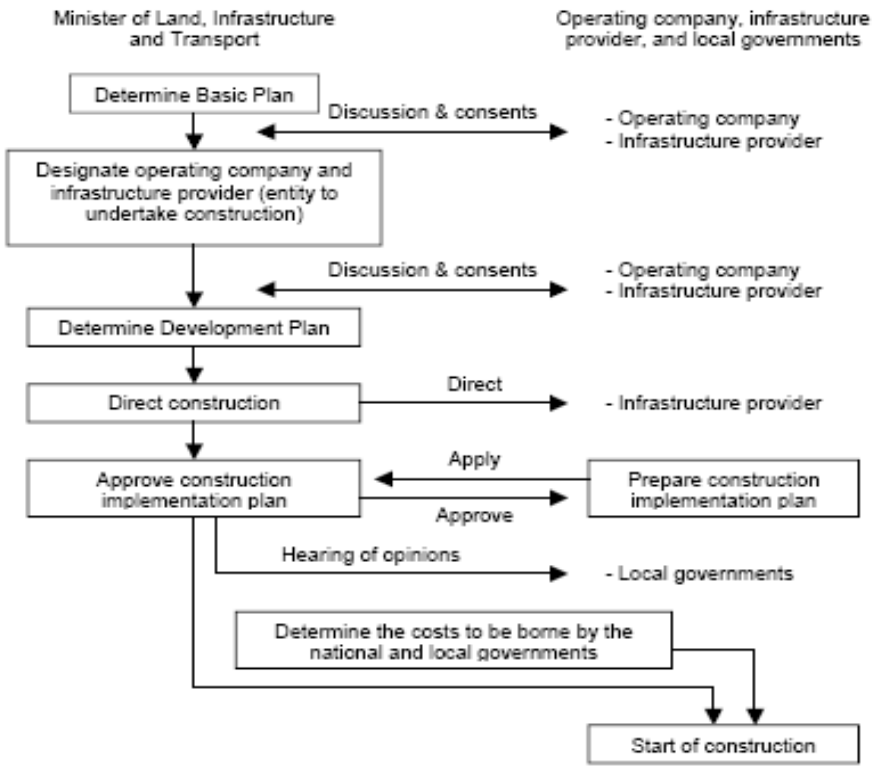
Railway Development

Railway development is comprised of two parts: Shinkansen (a network of high-speed railway lines) and conventional lines.

Under the *Nationwide Shinkansen Railway Development Law* enacted in 1970, the MLIT (on behalf of the National Government) is responsible for making Shinkansen's Basic Plan, Development Plan and other decisions, and gives permission to start construction of each railway line. The following figure sets out the procedure for authorising new Shinkansen lines.

[75] *Railway Business Act*, Article 64.

Procedure for Authorising Construction[76]



The construction costs are shared by the national government and the sub-national governments at a ratio of 2 to 1. The national government funding comes from the government budget as well as deferred payment from the three mainland JR companies for purchasing the existing Shinkansen lines. The JRTT is responsible for constructing and leasing the new rail tracks to the business operator (JRs) at a fee appropriate to the latter's projected profits from operating the line over a 30-year period (subject to the approval of the MLIT).

In areas not covered by the Shinkansen lines, conventional lines may be upgraded or expanded in accordance with the recommendations of the Council for Regional Transport. National and local governments also provide subsidies and interest-free loans for part of the projects. Other sources of funding come from private financial institutions and other private-sector sources.

The Japan Railway Construction Public Corporation and the Teito Rapid Transit Authority have used funding from the Fiscal Investment and Loan Program, targeting railway projects, to promote construction of new rail lines, expansion of existing lines and subway construction.

Regulatory Development

Both national and local governments are involved in the development of the railway network. Economic regulations have been relaxed over time through reduced direct control of the MLIT over rail operators' entry and pricing decisions. In relation to

[76] S.D. Gleave, High-speed Rail: International Comparison, *Final Report prepared for Commission for Integrated Transport*, February 2004, Appendix E.

fare setting, there is limited information about the criteria used and aspects of the process used in reaching decisions, including the extent of consultation.

6. Airports[77]

Japan has a large domestic and international air transport network. Tokyo and Ōsaka are the main centres of the nation's domestic and international air travel. South-western Japan is covered by a denser network of air transport than other regions, primarily because of the presence of many islands.

Airports in Japan are classified into three broad categories according to their main role in air transport. The vast majority of international passenger and cargo traffic traverses through five 'Class 1' airports – Narita Tokyo International Airport (60 per cent of international passenger traffic and 70 per cent of freight in Japan), Osaka Kansai Airport; Haneda International Airport (Tokyo's main domestic airport); Chubu Centrair International Airport (Nagoya – opened in 2005) and Osaka Airport. Class 2 airports, including 19 'Class 2(A)' and five 'Class 2(B)' airports, are the major airports mainly for domestic air transport. Another 53 'Class 3' airports are local airports mainly for domestic air transport.

These airports were established under government ownership; with the major airports owned either by the central government (through the MLIT or a government-owned corporation) and the local airports owned by sub-national governments. Class 1 airports are designated by the Minister (through a Cabinet Order) as necessary for international air transport services. The MLIT is then responsible for building and operating these airports. The same conditions apply for Class 2(A) airports. However, in the case of Class 2(B) and Class 3 airports, funding is split between the MLIT and the sub-national government concerned.

Administration of Class 1 and Class 2(A) airports is through the MLIT, and specifically through the Civil Aviation Bureau. Class 2(B) airports and Class 3 airports are administered by subnational government. A rare exception to government ownership is the Japan Airport Terminal Company, which operates the terminals at Haneda and is involved with retailing at Haneda, Narita and Kansai.[78] It is partly owned by the Australian Macquarie Bank.

Regulatory Institutions and Legislation

The general guiding legislation is the *Airport Development Law* (Law No. 80, 20 April 1956) (ADL) with exceptions of some airports under special legislation. The ADL covers matters concerning the establishment, management, and funding of airports. Some amendments in the ADL with regard to the funding scheme for upgrading the landing system of airports were made in 2003.

Under the ADL, development of airports needs approval from the MLIT. The costs of establishing and operating airports in Japan are funded by either joint financing by the central government and the sub-national government concerned for Class 2(B) and Class 3 airports, or exclusively by the central government for class 1 and 2(A) airports.[79] The national funds are budgeted and appropriated from a Special Airport

[77] Information on Japan's airports is available from the MLIT English-language website – go to 'Civil Aviation Bureau' at: http://www.mlit.go.jp/koku/english/index.html [accessed on 31 October 2008].
[78] Information is available from several websites by searching for 'Japan Airport Terminal Company'.
[79] Isaku Shibata, 'Japanese Laws Related to Airport Development and the Need to Revise them', *Journal of Air Law and Commerce*, 65, 1999.

Development Account set up by the Ministry of Finance. The monies from the applicable sub-national government are added to the special account according to the ratio stipulated for each airport in the ADL.

The ADL does not allow airports to be owned and operated by private companies. As a result, some exceptional airports were established through special legislation and are currently governed by respective special laws. There are also designated Fiscal Investment and Loan Program (FILP) agencies. The ownership structures of the three Class 1 airports are as follows:

- Kansai International Airport is currently privately operated and has been funded with private participation; only 30 per cent of its funding is shared among the central government (20 per cent), the sub-national government (5 per cent), and private enterprises (5 per cent) and the remaining 70 per cent was financed through loans.
- Chubu Centrair International Airport is currently privately operated in accordance with the *Law Regarding the Establishment and Management of Central Japan International Airport*. The central government provides support in capital investment and loan guarantee.
- New Tokyo International Airport was transformed into Narita International Airport on 1 April 2004 in accordance with the *Law for Privatising Narita International Airport Public Corporation* enacted in 2003 and is currently preparing for public listing some time from 2009. Narita Airport Authority is financed through direct government investment, through the issuance of bonds, and through its own funding.

The MLIT, through its Civil Aviation Bureau and many regional offices, administers the Class 1 and 2(A) airports and related aerodrome services.[80] The Civil Aviation Bureau, headed by its Director-General and Senior Deputy Director-General, is composed of four functional departments: Administration, Aerodrome, Engineering and Air Traffic Services. Within its Aerodrome Department, there is a designated Narita International Airport Division dealing with matters relating to the establishment, administration and other affairs of the newly privatised Narita International Airport. There is also a designated Director supervising Kansai International Airport and Chubu International Airport.

The Japan International Transport Institute (JITI) is a non-profit organisation established in 1991. It has experts considering international transportation issues, such as security, pollution and global warming caused and further liberalisation of international aviation, and makes recommendations to the public. Its activities are sponsored by the Nippon Foundation, which assists organisations that contribute to the public interest.

Issue 1: Processes in Airport Development

Some of the recent airport developments were implemented by the MLIT under its initiative to develop the international air transport network.[81] Specifically, the MLIT has taken a number of measures to increase international air transportation capacity, including developing Narita International Airport, internationalising Haneda Airport,

[80] Civil Aviation Bureau, *Organzation and Function*. Available at: http://www.mlit.go.jp/koku/15_hf_000031.html [accessed on 22 September 2008].
[81] MLIT, *Transport White Paper*, 2005.

promoting the second phase construction at Kansai International Airport (construction of a 4000 meters runway). The *Law for Developing Haneda International Airport* enacted in March 2004 specifies the funding scheme for developing the fourth runway in Haneda Airport, including the PFI Scheme. The MLIT plans to start the construction with commissioning set for October 2010.[82]

It appears that any capacity expansion requires intensive consultation with local community, including talks on compensation for land displacement. The Sub-Council for Transport Aviation within the Transport Policy Council may be consulted or be engaged to study important matters, such as five-year airport development plans. However, no detailed information in English about the processes involved has been found.

Issue 2: Access Fees

The level of airport charges (aeronautical revenue per air traffic movement) at Japan's main international airports has been high by international standards, with 2004 charges at Osaka Kansai being the highest of 33 international airports surveyed by UK-based Transport Research Limited (TRL), and those at Narita being the second highest in the same survey.[83] More recent data released by Narita – also from TRL – suggest reductions in Narita's charging relative to other airports.[84]

Access fees, such as landing charges, require approval from the MLIT, according to the *Aeronautical Law*. However, no information is available about the processes used, except that it appears to lack consultativeness and transparency. The International Air Transport Association (IATA) has stated that 'effective and transparent economic regulation is in the interest of everybody' and requested for 'prices that reflect efficiency'. Further, the US Government has raised the issue of higher landing fees at major Japanese airports in its bilateral Regulatory Reform talk with Japan and demanded to have a transparent formula used to calculate landing fees through disclosure and pubic comment.

Issue 3: Foreign Ownership

An issue arising from the privatisation process is that of foreign ownership. In 2008, the MLIT drew up a bill to cap foreign ownership of airports at 30 per cent after it emerged that Australia's Macquarie Airports Management Ltd. now owns nearly 20 per cent of the operator of buildings at Tokyo's Haneda Airport. Opponents of the bill, including some Cabinet ministers, feared that ownership restrictions would set back Japan's efforts to attract foreign investment.[85] The Cabinet eventually decided to adopt an Airport bill to amend the *Airport Development Law* without the provision on foreign ownership limit.[86] The final outcome may have a bearing on processes used going forward.

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[82] Airports Council International, *Airport Development News*. Available at: http://www.airports.org/aci/aci/file/Publications/June-2007.pdf [accessed on 3 September 2008].

[83] Reported in Productivity Commission, *Review of Price Regulation of Airport Services*, Inquiry Report No. 40, 14 December 2006, pp. 23-24.

[84] Narita Airport News Desk, *Narita Airport Charges Dropped Dramatically in Charge Rankings*, 15 June 2007.

[85] International Air Transport Assocation (IATA), *The IATA Chief warns Japan on Airport Privatization*. Available at: http://afp.google.com/article/ALeqM5iJvuDGMOr0pM7faU2Q6AX5MT7wcw [accessed on 24 August 2008].

[86] 'Airport Bill Drops Foreign Restriction', *The Japan Times*, 8 March 2008.

Regulatory Development

The development of airports in Japan follows the pattern of other 'national' infrastructure, with strong central government coordination and funding, largely precluding the use of transparent and consultative processes in decision making. The airport industry is predominantly government owned and operated, some requiring co-ordination among national and subnational governments.

7. Ports[87]

There are over 1 000 ports in Japan including the port of Nagoya which is the largest trading port, accounting for about 10 per cent of the total trade value of Japan.[88] Ports are divided in three categories comprising 128 'Major Ports' (which have an important bearing on national interest); 23 'Specially Designated Major Ports' (those ports particularly important in promoting foreign trade); and the remainder are 'Local Ports.'[89]

Regulatory Institutions and Legislation

The Port and Harbour Law (1950 and as amended) governs the development and administration of ports and harbours in Japan. At the national level, the Ministry of Land, Infrastructure and Transport (MLIT), through its Ports and Harbours Bureau, determines policy for Japan's ports; provides guidance on port administration; authorises development plans for major ports; provides development assistance for such projects; and itself implements construction projects for ports under direct central control. Port management bodies operate and plan the development of ports under their control, including construction and maintenance; leasing of port facilities and setting and collecting of fees. Most port management bodies are prefectural or municipal government operations. A Council for Ports and Harbours conducts two 'meetings' – one for planning and the other for management.

The financing of ports and harbours operations and developments is drawn from central funding (thus there is a role for the Ministry of Finance) and various fees for the use of facilities levied by port management bodies. The Priority Plan for Social Infrastructure Development now involves integrated planning with the transport interface and other related infrastructure. Article 42 of the Law stipulates that new construction cost be 'shared equally by the national government and the port management body'. However, Article 43 allows that the national government may contribute a greater share where 'assistance is deemed to be particularly necessary'.

The accounts of the port management bodies must be on a cash-accounting basis, rather than an accrual basis. The accounts must be kept so as the port management

87 Key references are MLIT, *Ports and Harbours in Japan*. Available at: http://www.mlit.go.jp/English/2006/k_port_and_harbors_bureau/17_p_and_h/index.hml; and http://www.mlit.go.jp/kowan/english/index.html; and Ayodeji Olukoju, 'Government and Port Administration in the Aftermath of the Port and Harbour Law of 1950', *Northern Mariner*, 7, 4, October 1997, pp. 65–80.

88 Port of Nagoya, *Japan's Biggest Trade Value for Cargo handled for 7 years in a Row*. Available at: http://www.port-of-nagoya.jp/english/news_2008.htm [accessed on 11 December 2008].

89 MILT, *Types and Number of Ports*. Available at: http://www.mlit.go.jp/english/ports/kowan3.html [accessed on 11 December 2008].

bodies are 'not to turn a profit'.[90] According to Article 4 of the Law, the 'port authorities are non-profit corporations, as established by public law'.

Fees are charged for services such as use of wharves; use of mooring, use of warehouses and the use of cranes. No firm information is available on the process used to set these fees, although it has been stated that fees are 'decided centrally and apply at each port'.[91]

The port authorities enter leasing arrangements with private entities, but in Japan there are no private ports *per se*. According to the MLIT:[92]

> The … Law forbids port management bodies to interfere with the ventures of the private sector or conduct any business that competes with the private sector.

Changes to land use must be authorised by the port manager under the supervision of the central government or the prefectural government. There is no information available on the processes used.

Regulatory Development

There is no evidence of JFTC involvement in the regulation of ports and harbours. As in some other areas of infrastructure provision in Japan, there is a strong role for the national government in the funding and operation of ports and harbours.

[90] MLIT, *Ports and Harbours in Japan*, 2006, p. 29. Available at: http://www.mlit.go.jp/English/2006/k_port_and_harbors_bureau/17_p_and_h/index.hml [accessed on 23 August 2008].
[91] Olukoju, op. cit., p. 75.
[92] MLIT, 2006, op. cit., p. 28.

AUSTRALASIA

AUSTRALIA

OVERVIEW

Under Australia's federal political system, the Commonwealth has principal responsibility for postal services, airports and telecommunications; and the States/Territories have principal responsibility for energy, water and wastewater, rail and ports. At the federal level, economic regulation is primarily the responsibility of two Commonwealth agencies, the Australian Competition and Consumer Commission (ACCC) and Australian Energy Regulator (AER). State and territory regulators are also responsible for aspects of economic regulation of energy, water and wastewater, rail and ports. In contrast to the other benchmark countries, the ACCC also enforces competition law and consumer protection law across all sectors.

The ACCC and AER are multi-member, statutory authorities, established by Commonwealth legislation, the *Trade Practices Act 1974*. ACCC staff assists both the ACCC and AER members. The policy functions are separated from the regulator, and are performed by the relevant Commonwealth, State and Territory departments.

In summary, in Australia, all the infrastructure areas reviewed are subject to three common regimes. First, they are all subject to the competition law provisions in Part IV of the *Trade Practices Act* (although telecommunications is subject to an additional regime in Part XIB of the *Trade Practices Act*).

Second, they are subject to an open access regime. However, only for airports is there principal reliance upon the economy-wide declare-negotiate-arbitrate model in Part IIIA of the *Trade Practices Act*. The other industry-specific or sector-specific regimes are based on the negotiate-arbitrate model but include more interventionist features. In particular, electricity and gas networks are subject to an *ex ante* determination of maximum revenue or price; telecommunications networks are subject to regulatory signalling (where the ACCC issues pricing principles and model terms and conditions); postal services are subject to Commonwealth ministerial direction; and services in railways, water and wastewater, and ports are subject to individual State/Territory access regimes.

Third, they are subject to some form of surveillance of prices and/or information gathering and monitoring (although the regimes significantly differ).

GEOGRAPHY, POPULATION, ECONOMY, POLITY AND LEGAL SYSTEM[93]

Australia is the sixth-largest country in the world in land area and is characterised by a very diverse geography. Much of the centre of Australia is low-lying desert, while a tropical climate pervades the northern part of the continent. These environments contrast significantly with the temperate climate of the southeast and southwest of the country. While water is plentiful in some parts of the country, the availability of water is becoming an issue in other parts.

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[93] Central Intelligence Agency, *The World Fact Book – Australia*. Available at: https://www.cia.gov/library/publications/the-world-factbook/geos/as.html [accessed on 21 August 2008].

Australia has only a quite small population (21.2 million).[94] Australia's vast and largely arid land mass and small population combine to produce the lowest population density in the OECD. Much of the country is desert and is largely uninhabited, the bulk of the population clustering along the south-eastern and south-western coastlines, mainly in quite large cities. Sydney, Melbourne, Brisbane, Perth and Adelaide are the five largest cities (in order) with populations ranging down from about four million to about one million. Canberra, the nation's capital, has a population of about 350 000.

The GDP on a PPP basis is US$760.8 billion; equivalent to US$36 300 per capita (2007 estimates). This is just in the upper third of per capita GDP in the OECD. Economic growth has been rapid in recent years while inflation has been low and national and most sub-national governments have consistently achieved budget surpluses. Unemployment has been consistently low by international standards.

The more arable parts of the country produce large agricultural outputs (wheat, sugar, meat, and wool are major exports) well in excess of domestic requirements, and there is large mineral wealth (coal, iron ore, bauxite, gold, natural gas and uranium are important exports). Australia tends to trade primary products for sophisticated manufactured goods – trade with the major trading partners of Japan, China and the United States exhibits a strong pattern of mineral and agricultural exports to these countries and manufactured imports from them. Like other developed economies, the service sector produces more than two-thirds of GDP and provides most of the employment. Employment in manufacturing is falling, but is still quite substantial.

Infrastructure is highly developed across all main areas – energy, telecommunications, posts, water and wastewater, rail, airports and ports. Electricity is mainly produced by thermal means, and gas is mined from natural sources. Fixed-line and mobile telecommunications are both advanced and with ubiquitous penetration, although broadband penetration is only around the OECD average. Postal services are highly developed, and the incumbent postal operator has broadened into related areas of counter services, express post and logistics. Urban water and wastewater systems are well developed, although availability of water is an issue in some cities. Irrigation systems are under stress in south-eastern Australia as a consequence of prolonged drought. Vast distances and wealth combine to drive a high degree of development of air transport relative to rail. Also in the transport sphere, there are issues with respect to export bottlenecks; particularly in coal.

Prior to British colonisation in 1788, Australia was inhabited by the Indigenous peoples. In 1901, by enactment of the United Kingdom Parliament (the Australian Constitution), the six colonies formed a federation. There are three levels of government in Australia: Commonwealth (also described as the Australian or Federal government); six States and two mainland Territories; and local. The Australian Constitution defines the responsibilities of the Commonwealth government. The States and Territories are responsible for all matters not assigned to the Commonwealth. Local governments are controlled by legislation at the State and Territory level. Since 1992, inter-governmental action has often been coordinated through the Council of Australian Governments (COAG) (a forum comprising the Commonwealth Prime Minister, State Premiers, Chief Ministers of the Territories, and the President of the Australian Local Government Association).

[94] See information at: http://www.pm.gov.au/australia/people.cfm [accessed on 17 July 2008].

Under the Australian Constitution, the Commonwealth government comprises: the parliament (House of Representatives, and Senate), executive (government departments and other bodies), and judiciary (High Court of Australia and other federal courts). Australia is a constitutional monarchy (in that the parliament and executive are formally headed by Queen Elizabeth II of the United Kingdom, represented by the Governor General) and a democracy (in that the parliament is elected by the people).

In practice, the party that has a majority of seats in the House of Representatives becomes the government, and determines the Prime Minister, ministers and cabinet (the key decision-making body of the government, consisting of the senior ministers). The executive is administered by the ministers who are accountable to parliament.

The Australian court system has two main arms – Federal and State/Territory. Within each jurisdiction, the courts are divided into levels. Decisions made at one level may be appealed against at a higher level (subject to certain rules). For example, at a federal level, a decision of the Federal Magistrates Court of Australia may be appealed to the Federal Court of Australia. Sitting over all the courts (both Federal and State/Territory) is the High Court of Australia.

The federal courts have such jurisdiction as is invested in them by laws made by the Commonwealth parliament. State/Territory courts decide cases brought under State/Territory laws and, where jurisdiction is conferred on these courts by the Commonwealth parliament, they also decide cases arising under federal laws.

At the federal level, the independence of the courts is protected by the Australian Constitution. Although judges are appointed by the government, the Constitution guarantees tenure and remuneration. The Constitution also provides for:

- the review by the judiciary of the legality of action taken by the legislature and the executive (judicial review); and
- the separation of the judiciary from the legislative and executive arms of government.

This means that merits review (where the review body considers the merits of the government action) is conducted by an executive body (usually called a 'tribunal'), and not a court. However, in practice, the presiding member of the tribunal is often also a member of the judiciary.

Australia is a common law system, in that the law (which was originally derived from England) is created by judges, and a lower court is bound to follow the precedent established by higher courts. However, common law is subject to statutory law made by parliament. Economic regulation is principally governed by Federal, State and Territory statutory law.

APPROACH TO COMPETITION AND REGULATORY INSTITUTIONAL STRUCTURE

The two main federal authorities of relevance to network sectors are the ACCC and the AER. The two main review bodies are the Australian Competition Tribunal and the Federal Court of Australia.

Australian Competition and Consumer Commission

The ACCC is responsible for promoting competition and protecting the rights of consumers. The ACCC does this by enforcing competition, fair trading and consumer

protection laws, in particular the *Trade Practices Act*. The ACCC also has a role in regulating markets where competition is less effective such as communications, water, post and transport.

The ACCC consists of a Chairperson, and a discretionary number of other members. All are appointed by the Governor-General on the advice of the Commonwealth Minister, who must be satisfied that the member has the support of the majority of the State and Territories. As at 18 July 2008, there were eight members – also known as 'Commissioners'.

Other than for arbitration determinations, in order for a decision to be made, there must be a quorum of at least three members, including the Chairperson or a Deputy Chair. Questions are decided by a majority of votes. However, in practice, matters rarely proceed to a formal vote.

Before a decision (other than an arbitration determination) is made by the Commission, it is considered by a committee consisting of a sub-group of the Commissioners. The committee is not, however, a decision-making body. In respect of economic regulation, there are two committees: Regulated Access, Pricing & Monitoring Committee (responsible for post, rail, water, airports and ports); and Communications Committee (responsible for telecommunications).

There is no general prohibition against the ACCC using information obtained under a statutory power for one purpose, for other statutory functions of the ACCC.[95]

The Commissioners are supported by staff and consultants. As at 24 February 2009, there were about 750 full-time budgeted staff positions. Staff is divided into four main divisions:

- Enforcement and Compliance (enforcement of competition law and consumer protection provisions in Parts IV and V of the *Trade Practices Act*) (265 positions)
- Regulatory Affairs (economic regulation) (260 positions)
- Adjudication (applications for approval of conduct that would otherwise breach Part IV of the *Trade Practices Act*) (20 positions)
- Mergers and Asset Sales (assesses if a proposed merger or asset acquisition breaches Part IV of the *Trade Practices Act*) (55 positions).

The Regulatory Affairs Division is divided into six main branches or groups: Australian Energy Regulator (electricity and gas) (115 positions); Communications (45 positions); Water (25 positions); Fuel (30 positions); and Transport and Prices Oversight and Monitoring (rail, airports, ports, posts and other areas not covered in this review) (25 positions).

Each paper (e.g. issues paper, draft decision and final decision) is drafted by staff in the relevant branch. Staff members prepare a covering minute recommending the decision to be made by the Commission. The documents are usually revised following consideration by the relevant Committee, and then submitted to the Commission for decision.

[95] ACCC, *Collection and Use of Information Guideline*, October 2000. Available at: http://www.accc.gov.au/content/index.phtml/itemId/263941 [accessed on 18 July 2008].

The matter may also be considered by the 'Financial Modelling and Economics Group' (a staff committee that is intended to assist consistency across the branches, although it is not a decision-making body).

The ACCC is supported by in-house lawyers (Legal Group) and economists (Regulatory Development Branch). There is no requirement to obtain the pre-approval of these groups. The Division also engages external solicitors and barristers,[96] and other economic and technical consultants.

The ACCC has offices in each State and Territory – although staff in the Regulatory Affairs Division is primarily based in Canberra, Melbourne, Sydney and Adelaide.

Australian Energy Regulator

The AER is responsible for the economic regulation of Australian energy markets, and compliance with the national electricity and gas regimes.

The AER is described as part of the ACCC. It consists of one Commonwealth member (who is also a member of the ACCC) and two State/Territory members (who are also associate members of the ACCC). Generally, in order for a decision to be made, there must be a quorum of at least two members. Questions must be determined by a unanimous vote. The AER is assisted by ACCC staff and consultants.

Australian Competition Tribunal

An application may be made to the Australian Competition Tribunal (Tribunal) for merits review of certain decisions made by the ACCC and AER.

The Tribunal is a Commonwealth statutory body established by the *Trade Practices Act*. It consists of a president and such deputy presidents and other members as are appointed by the Commonwealth Governor-General. The president and deputy presidents are required to also be a judge of a federal court. Other members (commonly known as 'lay members') are required to have knowledge of, or experience in, 'industry, commerce, economics, law or public administration'. For the purposes of hearing a particular matter, the Tribunal is constituted by a presidential member and two lay members. As at 1 June 2009, there were 15 members.

Although the Tribunal has the power to appoint counsel, consultants and staff to assist the Tribunal, in practice the Tribunal operates like a court – the Federal Court Registry provides the administrative support, and there are no other staff (except the Judge's associate, and one staff member with economic expertise).

The practice is for the ACCC/AER to provide to the other parties a list of the documents that were before the ACCC/AER. The parties then agree upon a 'Tribunal book' (an indexed list of documents that are provided to the Tribunal – usually this will be around 30 lever arch folders).[97] In 2006, the Council of Australian Governments (COAG) agreed that merits review should be limited to the information

[96] Subject to certain exceptions, federal government bodies are free to engage the Commonwealth's legal service provider (Australian Government Solicitor) or private law firms.

[97] The document index identifies documents containing confidential information (the usual practice is for these documents to be printed on yellow paper). In general, the parties (including the ACCC/AER) agree upon a confidentiality regime (including confidentiality undertakings, and the identification of who may have access to the material), which is then reflected in consent orders made by the Tribunal.

submitted to the regulator.[98] It is expected that Part IIIA of the *Trade Practices Act* will be amended in accordance with this intergovernmental agreement.

Federal Court of Australia

An affected party may apply to a federal court (in practice, usually the Federal Court of Australia) for review of the legality of an ACCC/AER or Tribunal decision.[99] The time limit for lodging an application for review is 28 days after decision (although this may be extended by the court).[100]

The parties to the proceeding are the applicant for judicial review, and the ACCC/AER (or Tribunal) (respondent). The court may order another person to be joined as a party, or give leave to a person to intervene in the proceeding.[101] The basic principle is that, ordinarily, the ACCC/AER/Tribunal should not contest proceedings for judicial review, and should maintain its impartiality.[102] However, where there is no other contradictor, the ACCC/AER will be more actively involved in making submissions and adducing evidence.

The court will usually require the ACCC/AER to give discovery of documents.[103] The ACCC/AER would be required to make available for inspection all relevant documents to the other parties, subject to privilege (in particular, legal professional privilege and public interest privilege). Confidentiality is not a ground for exempting a document from disclosure. However, in practice, where a document contains confidential information, orders are usually made which limit the persons that may inspect the document.

There is no time limit within which the court is required to make a decision. However, in practice, there is a general expectation that judges will not take longer than a year (from the conclusion of the hearing) to hand down their judgment.

The court may dismiss the appeal, or set aside the ACCC/AER/Tribunal's decision, and remit the matter back to the ACCC/AER/Tribunal to remake the decision in accordance with the law.

REGULATORY ARRANGEMENTS BY INDUSTRY OR SECTOR

1. Energy

Prior to the 1990s, the electricity and gas industries in Australia were generally regulated and operated on a State and Territory basis. The electricity industry (and, to a lesser extent, the gas industry) in each State and Territory was dominated by a single vertically integrated state-owned authority (like the State Electricity Commission of

[98] Council of Australian Governments (COAG), *Competition and Infrastructure Reform Agreement*, 10 February 2006, Clause 2.4.
[99] *Administrative Decisions (Judicial Review) Act 1977* (Cth). Judicial review may also be available under s. 75(v) of the Australian Constitution; s. 39B of the *Judiciary Act 1903* (Cth); and s. 163A of the *Trade Practices Act*.
[100] *Administrative Decisions (Judicial Review) Act*, s. 11. See also the other bases upon which judicial review may be sought.
[101] *Federal Court Rules*, Order 6.
[102] The principle derives from *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13.
[103] *Federal Court Rules*, Order 15.

Victoria) or a combination of state-owned authorities.[104] The Commonwealth Snowy Mountains Hydro-electric Scheme and Moomba-to-Sydney Pipeline were exceptions.

Regulatory Institutions and Legislation

In 1996, five States/Territories (New South Wales, Victoria, Queensland, South Australia and the Australian Capital Territory, excluding Western Australia and the Northern Territory) established a national electricity market (NEM) in which all electricity output from generators is centrally pooled and scheduled by the market administrator (NEMMCO) to meet electricity demand, with the price calculated by the NEMMCO using the price offers and bids. The regime (now called the National Electricity Law (NEL) and National Electricity Rules (NER)) also governs technical matters; underpins the NEM with an open access regime for the use of the electricity networks; and provides for the separation of electricity networks from generation and retail businesses. In addition, some States privatised their electricity industries.

In 1997, the Commonwealth and all States and Territories established a national gas regime (now called the National Gas Law (NGL) and National Gas Rules (NGR)) governing access to natural gas pipelines. The regime also provides for the separation of gas transmission and distribution networks from production and retail. In addition, almost all gas networks are now privately owned.

Electricity and gas are subject to the economy-wide competition law in Part IV of the *Trade Practices Act*.

The NEL and NGL provide for the regulation of electricity network and gas pipeline services by the Australian Energy Market Commission (rule maker) and the AER (economic regulator).[105] The Ministerial Council on Energy (which provides advice to COAG) is responsible for policy oversight. In addition, under the NGL, the decision on whether a pipeline should be regulated (covered) is made by the relevant minister on the advice of the National Competition Council (NCC).

Both regimes provide for the determination by the AER (or, in the case of electricity transmission, a commercial arbitrator appointed by the AER) of disputes between access seekers and access providers. However, the determination must be consistent with any *ex ante* regulation applying to the provider.

Broadly, the regimes provide for two categories of services: those which are subject to the dispute resolution mechanism but not upfront price/revenue control;[106] and those which are also subject to an upfront decision by the AER setting maximum revenue and/or price for a period of at least five years (under the gas regime, the access arrangement approved by the AER also determines non-price terms and conditions of access).[107]

Under the gas regime, service providers, who are not subject to upfront price/revenue control, are required to publish the terms and conditions of access (including price) on their websites, and report to the AER on access negotiations.

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[104] AGL was an exception in terms of ownership – it operated as the gas utility in New South Wales and the Australian Capital Territory fully under private ownership.

[105] The State regulator retains the role of economic regulator for gas in Western Australia.

[106] The services are known as: (electricity distribution) 'negotiated distribution service'; (electricity transmission) 'negotiated transmission service'; (gas) 'light regulation service'.

[107] The services are known as: (electricity distribution) 'direct control service' (which in turn is divided into two subclasses: 'standard control service' and 'alternative control service'); (electricity transmission) 'prescribed transmission service'; (gas) 'full regulation pipeline'.

Subject to jurisdictional agreement, separate legislation is proposed to establish a national framework for the transfer of electricity and gas regulation of distribution (non-economic) and retail (non-price) functions to the AER and the AEMC. Retail (price) will continue to be subject to individual State/Territory regulation. In addition, the COAG has agreed to establish a national energy market operator for both electricity and gas, encompassing a new national transmission planning function.

The remaining sections focus on two particular *ex ante* decisions made by the AER: first, a revenue determination in respect of an electricity transmission network service provider's 'prescribed transmission services'; and second, a full access arrangement in respect of a 'full regulation pipeline'.

Process and Consultation

Under both regimes, the access provider is required to submit a proposal to the AER. In the case of electricity, the proposal must be submitted 13 months before the start of the relevant regulatory period. In the case of gas, the proposal must be submitted within three months (extendable) after the pipeline is covered. In preparing a full access arrangement proposal, a service provider may request a pre-submission conference with the AER.

Upon receiving the proposal, the AER must:

First, publish the proposal (and, in the case of electricity, may also publish an issues paper) and invite submissions (at least six weeks in the case of electricity, and four weeks in the case of gas).

Second, make a draft decision and reasons (which are published):

- in the case of electricity, the draft decision must be published within six months of the proposal.[108] If the draft decision requires changes to the proposal, the provider may submit a revised proposal (if any) within six weeks. The AER must hold a hearing. All parties must then be given at least nine weeks to make submissions;[109]
- in the case of gas, the provider must be given at least three weeks to make revisions (if any). All parties must then be given at least four weeks to make submissions. The AER may hold a hearing.

Third, make a final decision and reasons (which are published):

- in the case of electricity, there must be at least two months between the final decision and the start of the regulatory period;
- in the case of gas, the final decision must be published within six months (extendable) of receiving the proposal. The six months excludes the time taken: by the proponent to revise the proposal; by any person to provide required information or make submissions; or to resolve court proceedings – although there is an overall time limit of 13 months from receiving the proposal.

If the final decision is not to approve the proposal, the AER must:

[108] For electricity distribution, there is no time limit on publication.
[109] For electricity distribution, parties must be given at least six weeks.

- in the case of electricity, make the transmission determination as soon as practicable after the final decision (this also applies where the AER's final decision approves the proposal); and
- in the case of gas, make the access arrangement within two months of the final decision.

To facilitate the process, the electricity regime prescribes certain financial parameters that apply to all AER revenue determinations. The parameters are reviewed by the AER every five years.

Timeliness

Timeframes for consideration of matters are stated under 'Process and Consultation' above.

Role of Interested Parties

The National Electricity Consumers Advocacy Panel was established in 2001 to grant funds to electricity consumer representatives for advocacy on the development of the national electricity market and the *National Electricity Rules*. In 2008, the Panel was reconstituted as the Consumer Advocacy Panel and given additional broader responsibilities for granting funds for consumer advocacy and research on electricity and natural gas issues.[110] In addition, the regimes expressly provide for intervention by user and consumer groups in Tribunal proceedings.

Information Disclosure and Confidentiality

Under both regimes, the AER is able to: apply to a magistrate for a search warrant; require a person to provide information or documents; and issue a 'regulatory information order' (which can require a regulated entity to collect and provide specified information on an annual basis). In addition, in order to facilitate the decision-making process, the regimes prescribe detailed information that must be submitted by the regulated entity with its proposal. The AER is able to release confidential information if it is of the opinion that the benefit would outweigh any detriment (although the decision is subject to merits review). The *Trade Practices Act* also provides for the sharing of information between the ACCC and the AER.[111]

Decision-making and Reporting

As previously described, the AER consists of one Commonwealth member (who is also a member of the ACCC) and two State/Territory members (who are also associate members of the ACCC). The chair of the AER must preside at all meetings of the AER and a quorum must include both the chair and the member of the AER appointed by the Commonwealth. Questions must be determined by a unanimous vote. The AER is assisted by ACCC staff and consultants.

Appeals

Under both regimes, in addition to judicial review, an aggrieved person (who made a submission on time to the AER) may apply to the Australian Competition Tribunal for review of the AER decision. The application must be made within three weeks of the decision. The parties are the applicant, the AER and any interveners (which may be the service provider, a minister or other persons who are granted leave to intervene).

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[110] *Australian Energy Market Commission (Consumer Advocacy Panel) Amendment Act 2007* (SA).
[111] *Trade Practices Act*, ss. 44AF and 157A.

Although the process is described as a merits review, the applicant must establish that the AER made an error of fact, exercised discretion incorrectly or made an unreasonable decision. For an error relating to revenue, it must exceed AU$5 000 000 or two per cent of the average annual regulated revenue. The Tribunal is limited to the information before the AER – although new information may be admitted once a ground of review is established.

The Tribunal may affirm, set aside or vary the AER's decision, or remit the matter back to the AER to remake the decision in accordance with the Tribunal's direction. The Tribunal is required to make a decision within three months (extendable).

2. Telecommunications

As of June 2008, Australia was ranked sixteenth of the thirty OECD countries in terms of broadband penetration.[112] Until 1991, the supply of telecommunications transmission infrastructure and the carriage of telecommunications over that infrastructure were a statutory monopoly, operated by the Australian Telecommunications Corporation (Telecom) and the Overseas Telecommunications Corporation (OTC). Telstra was formed in 1991 by the amalgamation of Telecom and the OTC. From 1991 to 1997, there was a statutory fixed-line duopoly (Telstra and Optus) and a statutory mobile triopoly (Telstra, Optus and Vodafone). In 1997, restrictions on the number of licences that could be issued were removed. The privatisation of the incumbent operator (Telstra) was completed in 2006. Telstra is vertically integrated but subject to operational separation (which is implemented as a statutory condition of Telstra's carrier licence).[113] This requires Telstra to maintain separate wholesale, retail, and network business units, and comply with internal wholesale pricing mechanisms to ensure that Telstra's retail businesses receive no more favourable treatment than its wholesale customers.

Regulatory Institutions and Legislation

The ACCC is responsible for economic regulation of telecommunications. The Australian Communications and Media Authority (ACMA) is responsible for technical regulation, consumer issues (including the universal service obligation) and radiocommunications. Telecommunications is subject to the economy-wide competition law in Part IV of the *Trade Practices Act*, and an additional telecommunications-specific regime in Part XIB of the *Trade Practices Act* (which is based on Part IV, and enforced by the ACCC).

A telecommunications-specific access regime is set out in Part XIC of the *Trade Practices Act*. Like the economy-wide access regime in Part IIIA of the *Trade Practices Act*, access to services under Part XIC begins with a declaration process. Access to facilities is governed by Schedule 1 to the *Telecommunications Act 1997*. However, unlike Part IIIA, the ACCC, rather than the NCC and relevant minister, decides whether the service should be 'declared' based on a long-term interests of end-users test. In addition, the ACCC was required to deem certain services to be

[112] OECD, *OECD Broadband Statistics*, June 2008. Available at: http://www.oecd.org/document/54/0,3343,en_2649_34225_38690102_1_1_1_1,00.html [accessed on 11 December 2008].

[113] The *Telecommunications Act 1997* (Cth) requires carriers to be licensed by ACMA (s. 42) and to comply with licence conditions specified in Schedule 1 to that Act (s. 61). Part 8 of Schedule 1 required Telstra to prepare and give to the Minister for approval a draft operational separation plan (OSP) which must be directed towards the achievement of the aim and objectives of operational separation.

declared services at the commencement of the regime.[114] Once a service is declared, a provider of that service is required to comply with 'standard access obligations' including an obligation to supply the service to an access seeker (subject to certain exceptions). In common with Part IIIA, failing agreement (and in the absence of an undertaking), the terms and conditions of access are determined by the ACCC acting as arbitrator. Part XIC also provides for the ACCC to determine pricing principles at the time a service is declared, and model terms and conditions for certain 'core services'.

Alternatively, access providers can voluntarily lodge written undertakings with the ACCC specifying the terms and conditions of access to a specified service that is currently declared or yet to be declared. The ACCC can accept or reject the undertaking. The access provider can seek to vary or withdraw an undertaking that is in force,

As at 1 January 2009, 144 telecommunications access disputes had been notified since the commencement of the regime in 1997.[115]

Part XIB of the *Trade Practices Act* allows the ACCC to: issue tariff filing directions to certain carriers and carriage service providers;[116] and make rules requiring carriers and carriage service providers to keep and retain records (s. 151BU). The ACCC is also required to report each year on competitive safeguards within the telecommunications industry (s. 151CL), and monitor charges for listed carriage services.[117]

Part XIB also specifies that a carrier or carriage service provider must not engage in anti-competitive conduct (s. 151AK). The ACCC may issue a Part A competition notice if it has reason to believe that the carrier or carriage service provider concerned has engaged, or is engaging, in at least one instance of anti-competitive conduct of the kind specified in Part XIB. A competition notice calls on the carrier to cease the relevant anti-competitive behaviour and authorises the ACCC to use its enforcement powers in relation to that conduct.

The regulation of wholesale infrastructure services is affected by the regulation of end-user services. Consumer safeguards include:[118] the universal service obligation (USO); access to untimed local calls; and retail price controls on Telstra.[119] The USO requires Telstra to provide reasonable access to basic telephone, payphone and digital data services, and the cost of providing the USO is calculated annually by the Commonwealth government, and all carriers are required to contribute to USO costs, in proportion to their revenues, as a condition of their licence. Retail price controls consist of price caps (CPI-minus-CPI or CPI-minus-0 per cent) applied to certain

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[114] See the list of services published in the ACCC's *Deeming of Telecommunications Services Statement*, 30 June 1997.

[115] In contrast, as at 1 January 2009, three access disputes had been notified in respect of airport, gas transmission and sewerage services.

[116] *Trade Practices Act*, s. 151BK. Telstra is also required to notify the ACCC of proposed changes to charges for basic carriage services (s. 151BTA).

[117] *Trade Practices Act*, s. 151CM. The ACCC is also required to monitor Telstra's compliance with Part 9 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth) (which deals with price control arrangements for Telstra).

[118] *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth).

[119] The current price controls determined by the Minister under Part 9 of that Act commenced on 1 January 2006 and expire on 30 June 2009: *Telstra Carrier Charges – Price Control Arrangements, Notification and Disallowance Determination No. 1 of 2005* (Cth).

'baskets' of services. Regulated services include local, international, trunk calls and line rental; basic line rental products for residential customers; basic line rental products for business customers; and connection services.

Parts XIB and XIC of the *Trade Practices Act* are intended eventually to be aligned with general trade practices law.[120] In 2005, the Commonwealth government announced a further review of the regulatory regime in 2009.[121]

The remaining sections relate to both the declaration process and the arbitration process under Part XIC of the *Trade Practices Act*.

Process and Consultation

The ACCC may declare services pursuant to a public inquiry into whether the declaration would promote the long-run interests of end-users. The ACCC may decide to conduct a public inquiry that gives interested parties the opportunity to comment, either on its own initiative or upon request from a person, most likely some service providers seeking access to an eligible service or from an industry forum such as the TAF. Requests to hold a public inquiry must be in writing and should include supporting information. The request for the public inquiry is generally treated as a public document. Confidentiality requests with stated reasons for seeking confidentiality will be considered on a case-by-case basis. All declarations are set for a fixed period of five years. Subsequent declaration, variation, and revocation are also subject to public inquiry.

The public inquiry procedures are governed under Part 25 of the *Telecommunication Act*, which require the ACCC to:

- publish notice of certain mattes relating to the inquiry;
- provide a reasonable opportunity, of at least 28 days, for submissions from the public; and
- publish a report on the inquiry.

In addition, the ACCC may:[122]

- publish a discussion paper;
- hold one or more hearings;
- undertake market inquires; and
- seek expert advice on particular issues.

The ACCC maintains a register of declared services, variations and revocations and copies of inquiry reports. The register is also available online.[123]

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[120] Second Reading Speech on the *Trade Practices Amendment (Telecommunications) Bill 1996*: Commonwealth, *Parliamentary Debates* (Hansard)*:* Senate, 25 February 1997, 895 (Senator Campbell, Parliamentary Secretary to the Treasurer).

[121] Explanatory Memorandum to the *Telecommunications Legislation Amendment (Competition and Consumer Issues) Bill 2005*, p. 13. See also s. 61A of the *Telecommunications Act 1997* (Cth) that requires a review of the conditions relating to the operational separation of Telstra.

[122] ACCC, *Telecommunications Services – Declaration Provisions: A Guide to the Declaration Provisions of Part VIC of the Trade Practices Act*, July 1999, p. 21.

[123] ACCC, *Declared Services Register (s. 152AQ). A*vailable at: http://intranet.accc.gov.au/content/index.phtml/itemId/323824 [accessed on 28 January 2009].

Similar processes are followed by the ACCC when making a decision to accept or reject an undertaking.

On making a declaration or as soon as practicable after, the ACCC is required to determine, in writing, pricing principles relating to the price of access to declared services, including price and non-price terms and conditions. The ACCC is also required to publish a draft determination and given the public the opportunity to make submission before making a final determination. The pricing principles (e.g. cost-based price in accordance with Total Service Long-Run Incremental Cost) will guide the ACCC in considering an access dispute or accessing an undertaking in relation to access pricing. So far, the ACCC has developed broad pricing principles for many declared services, including local carriage services, wholesale line rental, unconditional local loop services and mobile terminating access service.

Once a service is declared, if a party (access seeker) is unable to agree with the access provider on the terms and conditions of access, either party may notify the ACCC of the dispute. The ACCC may make an arbitration determination that binds the parties.

A principal objective of the regime is to promote the commercial resolution of access issues. A notification of a dispute may be withdrawn at any time prior to the final determination, and the ACCC may terminate the arbitration if it thinks that the party that notified the dispute has not engaged in negotiations in good faith. In addition, the ACCC may:

- before or after an access dispute is notified – give a procedural direction requiring a person to do something in order to facilitate negotiations (e.g. requiring the exchange of information, or attendance at a mediation); and
- at the joint request of the parties – attend or conduct a mediation.

In contrast to most ACCC decisions, for the purposes of a particular arbitration, the ACCC is constituted by two or more members nominated by the Chairperson. Any question before the arbitrators (other than for procedural matters) is decided by majority opinion. However, in practice, there have been no dissenting decisions.

The ACCC has a broad discretion as to the process it follows in the arbitration. In general, the ACCC follows the process set out below:[124]

- negotiating parties approach the ACCC staff on an informal basis for preliminary guidance on the arbitration process;
- the ACCC receives formal notice;
- the ACCC notifies certain other persons of the arbitration;
- (in some cases) initial case management meeting (ACCC staff and parties);
- (in some cases) initial hearing (ACCC Commissioners and parties);
- submissions (primarily written);
- the ACCC issues draft arbitration determination (and reasons);
- further submissions; and

[124] See guidelines to the ACCC's process: ACCC, *Resolution of Telecommunications Access Disputes – A Guide*, March 2004. Available at: http://www.accc.gov.au/content/index.phtml/itemId/753591 [accessed on 25 July 2008].

- the ACCC issues final arbitration determination (and reasons). The reasons for a final telecommunications arbitration determination can vary between 50 to 200 pages.

The parties to the arbitration are the access provider; the access seeker; and any other person who applies to the ACCC to be made a party and is accepted by the ACCC as having a sufficient interest. In contrast to Part IIIA, the ACCC may also make a person a party if the ACCC is of the opinion that the resolution of the access dispute may involve requiring that person to do something.

An arbitration is a quasi-judicial process in that all contact between ACCC Commissioners/staff, and the parties to the arbitration is formal (that is, all parties are present), except for minor procedural matters. It is common for the ACCC and the parties to the arbitration to obtain expert reports, and to be represented by lawyers.

Unlike most ACCC processes, arbitration is private unless the parties agree otherwise. Where issues arise that are relevant outside of a particular arbitration, the ACCC is able to: conduct joint arbitration hearings; use information from one arbitration in another arbitration; defer consideration of an undertaking or the arbitration; and establish an informal consultation process outside of the arbitration.[125] The ACCC may also publish its final arbitration determination (and reasons) (subject to issues of confidentiality) (in practice, the ACCC publishes it on its website). As in Part IIIA of the *Trade Practices Act*, where the ACCC proposes to publish its determination, it must give each party a notice inviting the party to make a submission within 14 days. In contrast to Part IIIA, in deciding whether to publish, the ACCC is required to have regard to certain matters including whether publication would be likely to promote competition or facilitate the operation of Part XIC.

Timeliness

On the commencement of a determination on declarations and undertakings, the ACCC will outline the period within which the inquiry is to be held (normally six months of commencing the inquiry), including the indicative timeframes for issuing a discussion paper, pubic submissions, public hearings, and releasing of the draft report and final report. In the case of determinations relating to major or complex issues where the ACCC considers the release of a draft report seeking submission on the proposed decision appropriate, it will endeavour to issue a draft report within six months and then release a final report within a further three months. When it is necessary to extend the timeframes in certain circumstances, the ACCC will inform interested parties of the extension and the reasons for doing so. The period of time delayed by the access providers for not fulfilling ACCC requests will not be included in the calculation of the timeframe.

In contrast to Part IIIA, there is no indicative timeframe within which the ACCC must make a final arbitration determination. The ACCC has sought to make decisions within six months of notification (excluding the time taken for consultation and to acquire information). The regime seeks to reduce the incentive a party may have to

[125] The ACCC will typically: publicly release a discussion paper, for submission, outlining the issue; release a draft report for submission; release a final report; and then incorporate the final report into the arbitration (subject to further submissions from the arbitration parties).

delay by allowing the ACCC to make an interim arbitration determination and backdate a final determination.[126]

Role of Interested Parties

At the time the regime was enacted (1997), the telecommunications industry was intended to be largely self-regulating.[127] The industry established two representative bodies – the Australian Communications Industry Forum (ACIF) (to develop technical standards and codes of practice) and the Australian Communications Access Forum (ACAF). Under Part XIC of the *Trade Practices Act*, ACAF was the declared Telecommunications Access Forum (TAF) with responsibility to produce telecommunications access codes and make recommendations in relation to declared services. In practice, the ACAF had difficulty reaching consensus, and the TAF provisions in Part XIC were repealed in 2002. To some extent, the role was taken on by the Service Providers Industry Association (SPAN) which developed an alternative dispute resolution mechanism (which some industry participants consider contributed to a reduction in access disputes from 2001). However, there is currently only limited industry resolution of access issues. In 2006, the ACIF merged with the SPAN to form the Communications Alliance Ltd.

The Australian Telecommunications Users Group Ltd (ATUG) represents business and residential users of telecommunications services. The ATUG is funded by its members and government sponsorship for individual initiatives. It holds formal positions on the Communications Alliance and a number of government advisory bodies, and is a member of the ACCC's Infrastructure Consultative Committee.

In order to represent consumers better, the Federal Government established the Australian Communications Consumer Action Network (ACCAN) as a non-profit company limited by guarantee on 15 October 2008.[128] The ACCAN is the peak body representing a diversity of telecommunications consumers in Australia, including people with disabilities, people from remote areas, low-income earners, seniors, youth, people of different cultural backgrounds, Indigenous, and small businesses. The ACCAN will begin its full operation in July 2009 with allocated annual funding of $2 million in the next four years, fully recoverable from annual carrier licence charges collected by the ACMA under the *Telecommunications (Carrier Licence Charges) Act 1997*. The Government expects that the ACCAN will, among other things, take a key role in the communications regulatory process, resulting in better outcomes for consumers and restoring the balance between consumer and provider interests.

In addition, the regime seeks to address the overlap between the competition functions of the ACCC and the technical and consumer affairs functions of the ACMA; including by the appointment of the ACMA Chairman as an associate commissioner of the ACCC, the appointment of the ACCC Chairman as an associate member of the ACMA, and by legislative arrangements for the co-ordination of issues.

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[126] In particular, an interim determination may require the provider to provide access to the service. The ability to backdate a final determination is of little practical relevance unless the access seeker is receiving the service.

[127] See *Telecommunications Act 1997* (Cth), s. 4.

[128] See information at the temperory website of the ACCAN at: http://sites.google.com/site/accantemp/ACCAN-Temp [accessed on 3 June 2009].

Information Disclosure and Confidentiality

The ACCC is not a court, and is not bound by the rules of evidence. The ACCC may issue directions requiring parties to provide submissions and evidence by specified dates (although it can be difficult to prevent late submissions); and has the power to summon a person to appear before the ACCC to give evidence or produce documents. The ACCC also obtains information on an annual basis under Part XIB of the *Trade Practices Act*.

In relation to information provided in an arbitration, the ACCC's guideline on the arbitration process states that the ACCC's 'starting point is generally that disclosing information to all parties will facilitate a more informed decision-making process'. However, the ACCC may decide not to give to the other party 'so much of the document as contains confidential commercial information that the Commission thinks should not be so given'.[129] The ACCC's standard practice is to:

- give a general confidentiality direction and order to all parties at the beginning of an arbitration. The direction requires parties to use information obtained in the course of the arbitration only for the purpose of the arbitration (subject to certain exceptions); and
- encourage the parties to agree on a confidentiality regime such as the exchange of a standard form confidentiality undertaking and the identification of persons to have access to all confidential information (usually consisting of limited internal regulatory personnel and external lawyers and consultants).

Decision-making and Reporting

The decision-making process is discussed under 'Process and Consultation'.

Appeals

Judicial review is available for all ACCC decisions. In contrast to Part IIIA of the *Trade Practices Act*, there is no merits review of an ACCC telecommunications arbitration determination.

Regulatory Development

Under the *Trade Practices Act* the ACCC has a broad power to make written rules to deal with the procedures to apply in matters arising under Part XIC of the Act (s. 152ELA). On 22 May 2008 the ACCC commenced a public consultation on the draft *Part XIC Procedural Rules 2008*, covering various telecommunications specific processes including access undertakings, access dispute resolution, declaration inquiries, pricing principles inquiries and exemption applications. A copy of the draft rules, together with an accompanying explanatory statement and a related discussion paper are available online.[130] The Federal Government has recently commenced consultation on *Regulatory Reform for the 21st Century Broadband*, seeking public comments on 'ways to improve telecommunications regulations to make it work more effectively in the interest of consumers and businesses'.[131]

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[129] *Trade Practices Act*, s. 152DK.

[130] ACCC, *Procedural Rules*. Available at: http://www.accc.gov.au/content/index.phtml/itemId/728733 [accessed on 28 January 2009].

[131] Prime Minister, *Joint Media Release with Treasurer, Minister for Finance and Minister for Broadband*, April 2009. Available at: http://www.minister.dbcde.gov.au/media/media_releases/2009/021 [accessed on 26 May 2009].

3. Posts

Postal services are provided by a government business enterprise – Australian Postal Corporation (trading as Australia Post) – established by the *Australian Postal Corporation Act 1989* (Cth). Under this Act, Australia Post is required to fulfil its community service obligation, that is, to carry standard letters within Australia at a single uniform basic postage rate (BPR) that meet prescribed performance standards. In return, Australia Post is granted an exclusive right for collecting and delivering reserved letter services within Australia and issuing stamps. In accordance with the *Postal Services Legislation Amendment Act 2004* (Cth), the scope of the reserved letter services has been reduced from letters up to 500 grams and ten times the BPR to letters up to 250 grams and four times the BPR. This provided greater opportunities for private mail operators to compete with Australia Post in non-reserved services, including upstream operations, such as mail houses, printers and mail aggregators, and downstream areas such as parcel delivery, express delivery and logistics. Large competitors in downstream operation include TNT, DHL, FedEx, Linfox and Toll.[132]

Australia Post is wholly-owned by the Australian Government, whose shareholder responsibilities are jointly shared by the Minister for Broadband, Communications and the Digital Economy and the Minister for Finance and Administration.

Regulatory Institutions and Legislation

The Department of Broadband, Communications and the Digital Economy (DBCDE) provides advice to the Government on postal policy and legislation and on issues affecting the postal industry, including setting broad strategic policy framework and goals for Australia Post and consultations with industry, consumer groups and other government agencies and stakeholders.[133] In particular, the Minister has the power to disapprove changes to the basic postage rates for the carriage of standard postal articles by ordinary post within Australia.[134]

The ACCC is the economic regulator for posts. Its responsibilities include:

- assessing proposed price increases for Australia Post's reserved services;
- inquiry into dispute on bulk mail services supplied by Australia Post;
- monitoring cross subsidies between Australia Post's reserved and non-reserved services.

The ACCC's role in assessing proposed price increase for Australia Post's reserved services falls within the scope of price surveillance regime in Part VIIA of the *Trade Practices Act*. Australia Post must notify the ACCC if it proposes to increase the price of a reserved service, or introduce a new reserved service, or change the terms and conditions for providing an existing reserved service.[135] The ACCC may accept or object to the proposed price increase. However, once the statutory period has expired, Australia Post is legally entitled to increase its price regardless of the ACCC decision. Australia Post may, however, voluntarily decide not to proceed with the price increase.

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[132] ACCC, *Australia Post's Draft Price Notification – Final View*, July 2008, Chapter 2.

[133] Department of Broadband, Communications and Digital Economy, *Post*. Available at: http://www.dbcde.gov.au/post [accessed on 26 November 2008].

[134] *Australian Postal Corporation Act*, s. 33.

[135] Declaration No. 75 under the *Prices Surveillance Act 1983* (Commonwealth of Australia Gazette, No. GN 6, 12 February 1992, p. 419).

Whilst Australia Post is exempt from the national access regime in Part IIIA of the *Trade Practices Act*, Part 4 of the *Australian Postal Corporation Act* provides for the ACCC to conduct an inquiry into bulk mail service disputes (Part 3 of the *Australian Postal Corporation Regulations 1996* (Cth)). A person who requests a 'bulk interconnection service' from Australia Post is able to notify the ACCC of a dispute. After conducting an inquiry, the ACCC must provide a report to the Commonwealth minister who may then direct Australia Post to act in accordance with a recommendation in the report. To date, no bulk interconnection access disputes have been notified.

To undertake its roles in regulating postal services, the ACCC is authorised under Part 4A of the *Australian Postal Corporation Act* to require Australia Post to keep specific records and provide them to the ACCC. In 2005, the ACCC released a record keeping rule that established a regulatory accounting framework for Australia Post. To date, the ACCC has released three cross-subsidy reports for the 2004–05, 2005–06 and 2006–07 financial years.

The postal services industry is also subject to the economy-wide competition law in Part IV of the *Trade Practices Act*.

Process, Consultation, Timeliness and Decision-making

This section outlines the process that the ACCC follows to assess Australia Post's proposed price increases for reserved services. In general, the ACCC follows the process set out in its guidelines, *Statement of Regulatory Approach to Assessing Price Notification*.[136]

- Declared company is encouraged to discuss the prospective price notification with the ACCC, and agree on a timetable for handling the price notification;
- Declared company lodges a draft notification and supporting submission;
- The ACCC undertakes a preliminary review of the notification to identify issues and assesses the adequacy of data provided;
- The ACCC publicly releases an issues paper seeking written submissions;
- The ACCC publicly releases a preliminary view (includes reasons), and call for comments;
- The ACCC considers written submissions on the preliminary view;
- Declared company gives the ACCC a formal notice soon after lodging written submissions;
- The ACCC publicly releases its final decision (and statement of reasons). A final decision on a price notification by Australia Post can vary between 15 and 230 pages, depending on the complexity of the issues; and
- The ACCC is required to keep a register of price notifications, including the notice and statement of reasons.

All submissions and other documents are placed on the ACCC website (subject to issues of confidentiality). The ACCC, in general, publicly releases for comment any consultancy reports obtained by the ACCC. It is common for at least the ACCC and

[136] ACCC, *Statement of Regulatory Approach to Assessing Price Notifications*, July 2005. Available at: http://www.accc.gov.au/content/index.phtml/itemId/700599 [accessed on 18 July 2008].

Australia Post to obtain between one to two expert reports. The ACCC requires submissions to be provided by the dates specified in the ACCC issues paper and preliminary view. However, in practice, it can be difficult to prevent parties from submitting material at any time up to the final decision.

The statutory period for the ACCC to make a final decision is 21 days of receiving the formal notice. The ACCC may extend the period but only with the consent of Australia Post. Once the statutory period of 21 days has expired, the declared company may increase its price to the price specified in the notice.[137] The process of submitting a draft notice was developed by the ACCC to overcome the difficulty of giving proper consideration to a notice within 21 days. However, declared companies have the right to lodge a notification without prior consultation with the ACCC (although this could lead to the ACCC requesting the Minister's approval to hold a public inquiry, during which prices may be frozen).[138] In practice, the time taken to complete the entire process has varied from two to six months, depending on the complexity of the issues.

Role of Interested Parties

The major bodies representing interested parties in the postal industry include:

- Major Mail Users Association – an organisation that is comprised of major mail users or suppliers.
- Postal Office Agents Associated Limited – a body for licensed post offices.
- Australian Direct Marketing Industry (ADMA) – a body with over 500 members operating in financial services, telecommunications, energy and etc. that use or supply direct marketing services.

In conducting a public consultation process, the ACCC seeks written submissions from interested parities in response to its issues paper and the preliminary view. The ACCC may also hold public forums (usually in each State/Territory) at which people may make oral submissions, and have meetings with interested parties.

Information Disclosure and Confidentiality

The ACCC guideline sets out the type of information that should usually be provided with a price notification. The guideline also sets out the approach for confidential information provided voluntarily to the ACCC. In summary:

- the provider must clearly indicate the parts of the submission it regards as confidential, and the reasons for the claim;
- if the ACCC denies the claim, the provider may withdraw the information;
- if the ACCC accepts the claim, the ACCC may give less weight to the material in its decision.

In addition, under s. 95ZK of the *Trade Practices Act*, the ACCC has the power to compel a person to provide information or documents relevant to a price notification (although, in practice, this power is rarely used). The information provider may claim that disclosure would damage the competitive position of the provider's business; and the ACCC must not disclose the information if the ACCC is satisfied that the claim is

[137] This description is subject to the process set out in the *Trade Practices Act* by which the ACCC may serve a response notice, which increases the period by 14 days.
[138] *Trade Practices Act*, ss. 95H and 95N.

justified and is not of the opinion that disclosure is necessary in the public interest. A decision to refuse to exclude information may be appealed to the Administrative Appeals Tribunal.[139]

Under Part 4A of the *APC Act*, the ACCC receives annual financial information from Australia Post. The ACCC may prepare and publish reports analysing the information. The report may include information that Australia Post claims to be commercial-in-confidence if the ACCC considers that the claim is not justified or that it is in the public interest to publish the information. The ACCC has issued principles as to how it will apply this test in determining public disclosure of record-keeping rule information provided by Australia Post.[140]

Appeals

Judicial review is available. Merits review is not available.

4. Water and Wastewater

While Australia is a dry continent, a particular issue seems to be the distribution of water resources, with water being plentiful in areas where population and economic activity is not concentrated. There is also an issue with the temporal reliability of rainfall and river flow, with droughts being frequent throughout the period of European settlement.

Water and wastewater services typically have been provided in Australia by vertically integrated State or local government enterprises that operate within regionally defined monopolies. There are two major national bodies representing interests of the industry. The Water Services Association of Australia (WSAA) is the peak body of the urban water industry with primary membership for water and wasterwater services providers and associate membership for other stakeholders in the industry.[141] The other major body is the Australian Water Association (AWA) that represents water professionals and organisations with a commitment in leadership in sustainable water management.

Until recently, the Commonwealth's role was mainly limited to research, providing financial assistance, and coordinating the management of water resources that crossed State boundaries. Attention has centered on the key Murray-Darling Basin which straddles Queensland, New South Wales, Victoria, South Australia and the Australian Capital Territory. The role of the Commonwealth has been expanded with the COAG agreement of 2004 and the *Water Act 2007* (Cth).

States and Territories

Water services are supplied by various water authorities within each State. As an example, in Victoria there are three retail suppliers operating the retail water distribution and sewerage systems for the Melbourne metropolitan area:

- Yarra Valley Water

[139] *Trade Practices Act*, s. 95ZC.

[140] ACCC, *Principles for the Public Disclosure of Record-keeping Rule Information Provided by Australia Post*, November 2006. Available at: http://www.accc.gov.au/content/index.phtml/itemId/771933 [accessed on 18 July 2008].

[141] See information at the WSAA's website at: https://www.wsaa.asn.au/. According to the WSAA, it has 33 members and 29 assoiciated members providing water and wastewater services to approximately 16 million Australians and to many large industrial and commercial enterprises.

- City West Water
- South East Water.

Melbourne Water supplies the three retail companies, controls major sewerage treatment plants and is responsible for drainage and waterways. In regional Victoria, these services are undertaken by eleven Regional Urban Water Authorities. Three Rural Water Businesses, namely First Mildura Irrigation Trust, Goulburn-Murray Water and Lower Murray Water, provide similar services in addition to supplying water for farm, irrigation, stock and domestic purposes.[142]

To the extent it is regulated, the States and Territories have responsibilities over urban water and wastewater, and rural water, outside the Murray Darling Basin:

- Victoria (Essential Services Commission): *Essential Services Commission Act 2001* (Vic), *Water Industry Act 1994* (Vic) Part 1A; and *Water Industry Regulatory Order* made under s. 4D of the *Water Industry Act*
- New South Wales (Independent Pricing and Regulatory Tribunal, IPART): *Independent Pricing and Regulatory Tribunal Act 1992* (NSW); *Hunter Water Act 1991* (NSW); *Sydney Water Act 1994* (NSW); *Sydney Water Catchment Management Act 1998* (NSW); and *Water Industry Competition Act 2006* (NSW): the IPART makes price determinations that set maximum prices for bulk water, metropolitan water and wastewater services.
- Australian Capital Territory (Independent Competition and Regulatory Commission): *Independent Competition and Regulatory Commission Act 1997* (ACT) and *Utilities Act 2000* (ACT)
- South Australia (Essential Services Commission of South Australia – ESCOSA): *Essential Services Commission Act 2002* (SA): ESCOSA conducts, at the direction of the Treasurer, inquires into the government processes for setting water and wastewater charges.
- Western Australia (Economic Regulation Authority): *Water Services Licensing Act 1995* (WA)
- Queensland (Department of Natural Resources and Water): *Water Act 2000* (Qld) and *Water Supply (Safety and Reliability) Act 2008* (Qld): The Queensland Competition Authority has price oversight powers, at the direction of the Premier and Treasurer, to conduct investigations on declared water and wastewater services and to determine water supply prices. It is directed to undertake a price monitoring investigation of South East Queensland Water.
- Northern Territory (Water Management Branch): *Northern Territory Water Act 1992* (NT)
- Tasmania: *Tasmanian Water and Sewerage Industry Act 2008* (Tas): From 9 July 2008, the Government Prices Oversight Commission assumed a new role of economic regulator of water and sewerage. Its main responsibilities include: regulating water and wastewater prices, licensing, monitor industry performance. In relation to pricing and licensing, the commission is currently preparing for its advice to the government.

[142] Waterwatch Victoria, *Victorian Water Authorities*. Available at: http://www.vic.waterwatch.org.au/inform.php?a=6&b=30&c=471 [accessed on 5 November 2008].

Note that although all states have independent economic regulators that oversight the water and wastewater industry, their roles and authorities vary.

The ESC's Water Role (Victoria)

The Victorian Essential Services Commission (ESC) regulates the prices and service standards of 20 businesses supplying water, sewerage and related services to residential, industrial and commercial, and irrigation customers throughout Victoria. The ESC's general regulatory powers are set out in:

- the *Essential Services Commission Act 2001* (Vic)
- Part 1A of the *Water Industry Act 1994* (Vic)
- Water Industry Regulatory Order (WIRO) made under s. 4D of the *Water Industry Act.*

The *Essential Services Commission Act* and relevant water and wastewater industry legislation set out the ESC's broad objectives, functions and powers in regulating the water and wastewater industry. In addition to the objectives set out in the *Essential Services Commission Act*, the ESC must pursue the following objectives:

- wherever possible, to ensure that the costs of regulation do not exceed the benefits
- to ensure that regulatory decision making and regulatory processes have regard to any differences between the operating environments of regulated entities
- to ensure that regulatory decision making has regard to health, safety, environmental sustainability (including water conservation) and social obligations of regulated entities.

The legislative framework provides the ESC with powers and functions to:

- make price determinations (s. 33 of the *Essential Services Commission Act*)
- regulate standards and conditions of service (s. 4E of the *Water Industry Act*)
- develop Codes in relation to its functions and powers (s. 4F of the *Water Industry Act*)
- require regulated businesses to provide information (s. 4G of the *Water Industry Act*).

More detailed requirements of the framework are set out in the WIRO under s. 4D of the *Water Industry Act*, including:

- the water services that are subject to price and service regulation by the ESC
- the approach to be taken by the ESC in approving or specifying prices and setting quality standards for water services and in monitoring the performance of businesses
- procedural requirements and regulatory principles to be adhered to by the ESC in assessing pricing proposals submitted by regulated businesses
- a role for the ESC in resolving disputes between regulated water businesses in relation to the supply of bulk water services.

The ERA's Water Role (Western Australia)

The Western Australian Economic Regulation Authority (ERA) licences providers of water, sewerage, drainage or irrigations services and monitors compliance with licensing conditions. Licences are required in virtually all residential areas across Western Australia and there are currently 30 licence holders. These include the Water Corporation, which is responsible for water services in the Perth metropolitan area, regional shires, and irrigation cooperatives. Charges for water services are set by the State government (assisted by the ERA that conducts inquires into the urban and rural water and wastewater prices) for the Water Corporation, Aqwest (Bunbury Water Board) and the Busselton Water Boards. Local governments operate their own sewerage schemes and set charges accordingly.[143]

The ERA's powers with respect to water are set out in:

- *Water Services Licensing Act 1995*
- *Water Services Coordination Regulations 1996*.

Commonwealth Role

In 2004, the COAG agreed to a National Water Initiative (NWI) which set up a consistent inter-state framework covering, amongst other things, access entitlements, full-cost recovery pricing for water, 'user pays' principle and independent regulators. A key commitment made by all signatory governments under the NWI is nationally to benchmark water utility performance in terms of pricing and service quality on an annual basis. There have been three annual reports (for 2005–06, 2006–07 and 2007–08 respectively) on urban water utilities and two annual reports (for 2006–07 and 2007–08 respectively) on rural water utilities, published with the assistance of the National Water Commission (and the WSAA for urban water).

The reports on urban water build on the industry's earlier work starting from 1996 that published annual information on benchmarking performance of major utilities. The third annual report on urban water is considered, by the authors themselves, as 'the world's most comprehensive and detailed document on the performance of urban water utilities'.[144] It contains a comprehensive comparative analysis of 82 urban water utilities over time on the basis of 'comparable size groups' and 33 indicators covering areas on water resources, asset, customers, pricing, health and finance. Contexts for the indicators are also provided to ensure an appropriate comparison. The data are considered to be accurate as the urban utilities are subject to independent auditing by a qualified third-party auditor for key indicators.[145]

The reports on rural water publish performance of 13 rural utilities across Australia on key areas such as characteristics, service environment and finance. The threshold for inclusion is that the compliance costs incurred by the utility for supplying the required data are less than one per cent of the total revenue (on a three-yearly cycle). Participation of other utilities is voluntary.

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[143] ERA *Frequently Asked Questions – Water*, 2008. Available at: http://www.era.wa.gov.au/2/290/1/water.pm [accessed on 5 November 2008].

[144] National Water Commission, *National Performance Report 2007–08: Urban Water Utilties*, Part A Comparative Analysis, 2009, p. 1.

[145] As noted in the *National Performance Report 2007–08*, approximately 80 per cent of indicators are audited.

In 2007, the Commonwealth enacted the *Water Act 2007* to enable the Commonwealth to oversight rural water management in the Murray-Darling Basin states – New South Wales, Victoria, Queensland, South Australia and the Australian Capital Territory. The *Water Act 2007* regulates the quantity of water that may be taken from Basin water resources; the operation of the rural water market; and bulk water and irrigation water charges. The key features include the establishment of the Murray-Darling Basin Authority to:

- The prepare a Basin plan for the adoption of the Commonwealth Minister (Minister for Climate Change and Water) including setting sustainable limits on water that can be taken from surface and groundwater sources across the Basin;
- advise to the Minister on the accreditation of State water resource plans; and
- develop a water rights information service which facilitates water trading across the Murray-Darling Basin.

ACCC has the following roles:

- advising the Minister for Climate Change and Water on the development of the water market rules and water charge rules;
- monitoring and enforcing compliance with the rules;
- advising the Murray-Darling Basin Authority on water trading rules.

On 11 February 2009 the Minister made the water market rules (which give irrigators the right to request irrigation infrastructure operators to transform their water shares into individual tradeable entitlements) and rules for termination fees (these rules are part of the water charge rules, and permit irrigation infrastructure operators to levy termination fees when irrigators opt to terminate their access to the operator's irrigation network).

The ACCC is consulting on water charge rules (excluding termination fees) for fees payable to irrigation operators, and for bulk water and water planning and management services. During this consultation the ACCC requested, and the Minister has granted, an extension of the deadline for the provision of advice to June 2009, in order to provide stakeholders more time to consider the draft rules.

Water and wastewater is subject to the economy-wide access regime in Part IIIA of the *Trade Practices Act* (see details in the Airport section of this chapter below), and to competition law in Part IV of the *Trade Practices Act*, administered by the ACCC. Sewage transmission and interconnection services provided by Sydney Water Corporation Ltd were declared under Part IIIA in 2005 upon application by Services Sydney. The access dispute between these two parties concerning the access pricing methodology was arbitrated by the ACCC in 2007.[146] An application from Lakes R Us for the declaration of water storage and transport services provided by Snowy Hydro was rejected in 2006.

5. Rail

Below-rail infrastructure for intrastate freight and metropolitan rail networks are provided by State/Territory governments and private corporations. There is one vertically integrated above-and-below-rail operator operating on a national scale –

[146] ACCC, *Access Dispute between Services Sydney Pty Ltd and Sydney Water Corporation: Arbitration Report*, 19 July 2007.

Queensland Rail (a corporation owned by the Queensland government)[147] – which is subject to 'ring-fencing' arrangements separating its infrastructure and operational functions. In 1997, Commonwealth and State/Territory transport ministers agreed to form a national track authority (Australian Rail Track Corporation (ARTC)) to provide access to the interstate standard gauge rail network.[148] The ARTC is a company under the *Corporations Act 2001* (Cth), owned by the Commonwealth.

Water and wastewater is subject to the economy-wide competition law in Part IV of the *Trade Practices Act*.

Intrastate Rail Access

Access to the intrastate rail network is governed by the State and Territory regimes. In particular:

- New South Wales: NSW Rail Access Undertaking established pursuant to the *Transport Administration Act 1988* (NSW)
- Queensland: Queensland Rail's access undertaking, approved by the Queensland Competition Authority in 2006 under the *Queensland Competition Authority Act 1997* (Qld)
- South Australia: *Railways (Operations and Access) Act 1997* (SA)
- Victoria: Access undertakings for Pacific National and Connex, approved by the Essential Services Commission in 2006 under the *Rail Corporations Act 1996* (Vic)
- Western Australia: *Railways (Access) Act 1998* (WA) and *Railways (Access) Code 2000*
- Across South Australia and the Northern Territory: *AustralAsia Railway (Third Party Access) Act 1999* (SA & NT)
- Rail Management and Maintenance Deed executed by Tasmania and Pacific National in 2006. The Tasmanian rail network reverted to State ownership in January 2007. Under the Deed, Pacific National continues to operate the rail network and act as the track manager on behalf of the Government.[149]

Access is also subject to Part IIIA of the *Trade Practices Act*. As at 18 January 2008, one rail service had been declared in respect of the Tasmanian network.

The Pilbara

The Treasurer decided on 27 October 2008 to declare the services provided by the Goldsworthy (BHP), Hamersley (RIO) and Robe River (RIO) railway lines in the Pilbara region of Western Australia. The declarations were made under s. 44H of the *Trade Practices Act* and are for a period of 20 years commencing on 19 November 2008. The declaration covers the use of all associated infrastructure necessary to

[147] In Australia, there are other vertically integrated railways operating on a state or local basis. These include: Freight Link (Adelaide-Darwin), Genesee & Wyoming Australia (South Australia), BHP Billiton and RioTinto (Palbara Rail).

[148] *Australian Rail Track Corporation Agreement* (14 November 1997) between the Commonwealth, New South Wales, Victoria, Queensland, Western Australia and South Australia.

[149] See Department of Infrastructure, Energy and Resources (Tasmania) Rail Management Unit. Available at: http://www.dier.tas.gov.au/major_projects/rail_management_unit [accessed on 11 December 2008].

allow third party trains and rolling stock to move along the railways including railway tracks and structures, bridges, passing loops, signalling, roads and other facilities which provide access to the railway line route. The railways are used almost exclusively for the haulage of iron ore from mining tenements located approximately 300km to 400km south and south-west of Port Hedland.

The decision to declare the rail services was based on the recommendations made by the National Competition Council (NCC) on 29 August 2008. In framing a recommendation, the NCC is required to consider and be satisfied of a number of matters, including whether:

- duplication of the service is uneconomical for anyone to develop another facility;
- the facility is of national significance;
- the importance of the facility to the national economy; and
- access would not be contrary to the public interest.

In his decision, the Treasurer accepted the recommendations of the NCC.

There are four separate rail networks in the Pilbara region that are the subject of declaration: Goldsworthy (BHP), Hamersley (RIO), Robe River (RIO), and Mount Newman (BHP).

Interstate Rail Access

There are currently eight major train operators using the ARTC network[150] – Queensland Rail (see above) and the followings;

- Asciano – the consolidated holding company of Pacific National and Patrick that was publicly listed in 2007. It provides nation-wide freight services.
- CityRail – the NSW government-owned operator providing passenger services the greater Sydney region.
- CountryLink – the NSW government-owned operator providing long-distance passenger services.
- Australian Southern Railroad – a subsidiary of Genesee and Wyoming Australia providing inter-state and intra-state freight services.
- Great Southern Railway – a subsidiary of Serco Asia Pacific that provides long-distance passenger services.
- Specialised Container Transport – provides the general non-container freight services along the East-West route and recently between Melbourne and Sydney.
- FreightLink – a company provides freight services on the Tarcoola-Adelaide line.

Access to the interstate rail network is governed by the national access regime in Part IIIA (summarised in the Airports section below) of the *Trade Practices Act*, and the Queensland and Western Australian state rail regimes. In practice, regulation of the

[150] ARTC, *About ARTC*. Available at: http://www.artc.com.au/Content.aspx?p=14 [accessed on 11 May 2009].

interstate rail network relies primarily on access undertakings under Part IIIA. In 2008, the ACCC accepted an undertaking under Part IIIA given by the ARTC in respect of its interstate rail network (the mainline standard gauge track linking Western Australia, South Australia, Victoria, New South Wales and Queensland).

The remaining sections focus on the undertaking process in Part IIIA of the *Trade Practices Act*.

Process and Consultation

Under Part IIIA of the *Trade Practices Act*, a person who is or expects to be a provider of a service of essential facilities may give an undertaking to the ACCC for approval. In practice, prior to giving a formal undertaking to the ACCC, the ARTC conducts industry consultation and provides a draft undertaking to the ACCC. In general, the ACCC follows the process set out below:

- access provider lodges undertaking with the ACCC;
- the ACCC publicly releases the undertaking and an issues paper for written submissions;
- the ACCC considers written submissions in response to issues paper;
- the ACCC publicly releases a draft decision (including statement of reasons and recommended changes) and seeks written submissions in response;
- the ACCC considers written submissions on the draft decision;
- the ACCC publicly releases its final decision and statement of reasons. A final decision on an access undertaking can vary between 85 and 300 pages, depending on the complexity of the issues and the number of issues dealt with comprehensively in the draft decision; and
- the ACCC is required to keep a register of undertakings.

All submissions and other documents are placed on the ACCC website (subject to issues of confidentiality). The ACCC usually publicly releases for comment any consultancy reports it obtains. It is common for at least the ACCC and the service provider to obtain between one to two expert reports. Informal consultation is restricted by the administrative law requirement to provide procedural fairness (natural justice), which, in general, requires the ACCC to give all affected parties an opportunity to respond to material, and to avoid the appearance of bias.

Timeliness

The ACCC is required to use its best endeavours to make a final decision on an undertaking within six months of receiving it. However, in 2006, COAG agreed to introduce requirements that regulators will be bound to make decisions within six months, subject to the regulator being given sufficient information, and consultation periods.[151]

Once an undertaking has been accepted, the party providing it must comply with the undertaking.

[151] COAG, *Competition and Infrastructure Reform Agreement*, 10 February 2006, Clause 2.6.

Role of Interested Parties

The legislation does not specifically recognise any particular representative body. In practice, there is one major body – the Australasian Railway Association (ARA) – representing a wide range of interests of the rail industry in Australia and New Zealand. Its members include rail operators, track owners and managers, and manufacturers of rolling stock and components.

Information Disclosure and Confidentiality

The ACCC has no power to compel a person to provide information in respect of a proposed undertaking. However, in practice, the ACCC indicates to the service provider the type of information that should be submitted in support of a proposed undertaking; and there is an incentive for parties to provide requested information as the absence of information may lead the ACCC to draw an adverse inference.

The ACCC requires submissions to be provided by the dates specified in the ACCC issues paper and draft decision. However, in practice, it can be difficult to prevent parties from submitting material at any time up to the final decision.

At the time of making the submission, a person may identify confidential commercial information in the submission. If the ACCC refuses the request that the information not be made publicly available, the ACCC must (if the provider requires it) return the information, and not have regard to that information (s. 44ZZBD of the Act). If the ACCC accepts the request, the ACCC may give less weight to the information as the information is untested. The ACCC's standard practice is to encourage interested parties to agree on a confidentiality regime, such as the exchange of a standard form confidentiality undertaking and the identification of persons to have access to all confidential information (usually consisting of limited internal regulatory personnel and external lawyers and consultants).

Decision-making and Reporting

The general requirements of a quorum and a majority decision by the ACCC have been discussed earlier, and apply to undertaking decisions under Part IIIA of the Act. The publication of undertaking decisions is discussed under 'Process and Consultation'.

Appeals

In addition to judicial review, an affected party may apply to the Australian Competition Tribunal for review of an ACCC undertaking decision. The application must be lodged in the Tribunal within 21 days after the ACCC made the decision.

The Tribunal may affirm the ACCC's decision or substitute a contrary decision. In effect, the function of the Tribunal is to remake the decision. The Tribunal may make its own inquiries, and may require the ACCC to give information and other assistance and to make reports for the purposes of the review. It is open to the parties to put material before the Tribunal that was not before the ACCC. The Tribunal must use its best endeavours to make a decision within four months of receiving the application for review.

Regulatory Development

Whilst the ARTC was intended to provide a 'one-stop shop' for access, interstate rail operators continued to be subject to multiple state regimes. In 2006, the COAG agreed, as part of the new National Competition Policy reform agenda, to:

- implement a 'simpler and consistent national system of rail access regulation' using the ARTC access undertaking as a model, to apply to certain nationally significant railways;
- ask the Productivity Commission to develop proposals for efficient pricing of road and rail freight infrastructure; and
- implement a nationally-consistent rail safety regulatory framework.

6. Airports

Because of its great size and concentration of population in a few large urban areas, Australia's domestic air transport system plays a significant role in facilitating the movement of people and freight between metropolitan localities. Regional air services are also of importance. Sydney and Melbourne airports are the two largest airports, and operate as the main links to the global air network. Perth's proximity to Southeast Asia and its location in the rapidly developing economy of Western Australia has seen its airport assume an increasingly important role in domestic and international air travel.

Following the enactment of the *Airports Act 1996* (Cth), the privatisation of Commonwealth-owned airports commenced through long term (99 year) leases, with the successful lessee determined by competitive tendering. The Act places limitations on airline ownership and cross-ownership of certain airports.

Regulatory Institutions and Legislation

Airports are subject to the economy-wide competition law in Part IV of the *Trade Practices Act*.

Airport services may be declared under the economy-wide access regime in Part IIIA of the *Trade Practices Act*. In summary:

- Any person may apply to the NCC for a recommendation that a service provided by means of a facility be declared;
- On receiving the NCC's view, the Commonwealth Minister (in the case of airports) may declare the service provided that certain criteria are satisfied;
- Declaration does not prevent the provider of the declared service and a party who requests access to that service from negotiating the terms and condition of access to the service. However, if the parties are unable to agree, the ACCC may, upon notification of the dispute by either party, conduct arbitration and make a determination that binds the parties.

A provider of a service may avoid the risk of declaration by giving an undertaking to the ACCC setting out the proposed terms and conditions of access. If the ACCC accepts the undertaking the provider must comply with the undertaking, and the service cannot be declared.

Currently one airport is declared under Part IIIA of the *Trade Practices Act* (an 'airside service' at Sydney Airport was declared in 2005 for a period of five years). To date, the ACCC has received one access dispute notification in respect of an airport, from Virgin Blue. However, the notification was withdrawn following a commercial settlement.

Airports may also be, upon the direction of the Minister, subject to price surveillance under Part VIIA of the *Trade Practices Act*, which sets out three mechanisms: price

notifications, monitoring, and inquiries. (The 'prices surveillance' regime is described in the 'Posts' section above.) In the move to privatisation from 1996, the industry was placed under a transitional (five year) price cap (CPI-minus-X) regime in respect of 'aeronautical services' and a monitoring regime in respect of 'aeronautical related services' administered by the ACCC under the former *Prices Surveillance Act 1983* (Cth). The price caps were removed in 2001 and 2002, except in relation to Sydney airport in respect of regional air services.

Regional air services at Sydney Airport were again declared under Part VIIA of the *Trade Practices Act* for the period 1 July 2007 to 1 July 2010.

The ACCC is also required under Part VIIA of the *Trade Practices Act* to monitor, and report on at the end of each financial year, the prices, costs and profits relating to the supply of aeronautical services and car parking services at Sydney, Brisbane, Melbourne, Perth and Adelaide airports.

Under Part 8 of the *Airports Act 1996* (Cth) and the *Airports Regulations 1997* (Cth), the ACCC is required to monitor and evaluate the quality of certain aspects of airport services and facilities at Sydney, Brisbane, Melbourne, Perth, Adelaide, Alice Springs, Canberra, Coolangatta, Darwin, Hobart, Launceston and Townsville airports However, in 2007 the former Australian Government proposed to limit quality of service monitoring to five airports: Sydney, Brisbane, Melbourne, Perth and Adelaide from 1 July 2007. This is yet to be reflected in the regulations, but the ACCC has confined its monitoring to these five airports.

In 2007, the former Commonwealth government announced that it reserved the right to re-impose price controls if 'airport operators are found to be misusing their market power by unjustifiably raising prices and/or imposing non-price conditions on access to aeronautical services and facilities in a manner inconsistent with the Government's Aeronautical Pricing Principles'. The Aeronautical Pricing Principles specify the Government's expectations on pricing behaviour for all airports, which are similar to the pricing principles specified in Part IIIA of the *Trade Practices Act* but also cover the negotiation process, the sharing of risks and returns, service-level outcomes, aeronautical asset revaluations, and peak period pricing. The Principles are not set out in any legislative instrument. An independent review of the airport regime is to be carried out in 2012 (or earlier, if airports act inconsistently with the Government's Aeronautical Pricing Principles).[152]

The following sections focus on the arbitration process under Part IIIA of the *Trade Practices Act*.

Process and Consultation

Once a service is declared, if a party (access seeker) is unable to agree with the access provider on the terms and conditions of access, either party may notify the ACCC of the dispute. The ACCC may make an arbitration determination that binds the parties.

A principal objective of the regime is to promote the commercial resolution of access issues. A notification of a dispute may be withdrawn at any time prior to the final determination, and the ACCC may terminate the arbitration if it thinks that the party that notified the dispute has not engaged in negotiations in good faith.

[152] This chapter does not cover the regulation of AirServices Australia, which provides air traffic control, air navigation support, and aviation rescue and fire fighting services at airports in Australia.

In contrast to most ACCC decisions, for the purposes of a particular arbitration, the ACCC is constituted by two or more members nominated by the Chairperson. Any question before the arbitrators is decided by majority opinion. However, in practice, there have been no dissenting decisions.

The ACCC has a broad discretion as to the process it follows in the arbitration. In general, the ACCC follows the process set out below:[153]

- Negotiating parties approach ACCC staff on an informal basis for preliminary guidance on the arbitration process;
- The ACCC receives formal notice;
- The ACCC notifies certain other persons of the arbitration;
- Initial case management meeting between ACCC staff and parties (in some cases);
- Initial hearing (ACCC Commissioners and parties) (in some cases);
- Submissions (primarily written);
- The ACCC issues draft arbitration determination (and reasons);
- Further submissions; and
- The ACCC issues final arbitration determination (and reasons).

The parties to the arbitration are the access provider; access seeker; and any other person who applies to the ACCC to be made a party and is accepted by the ACCC as having a sufficient interest.

Arbitration is a quasi-judicial process in that all contact between ACCC Commissioners/staff, and the parties to the arbitration is formal (that is, all parties are present) (except for minor procedural matters). It is common for the ACCC and the parties to the arbitration to obtain expert reports, and to be represented by lawyers.

Timeliness

The ACCC is required to use its best endeavours to make a final arbitration determination within six months of notification (extendable). In 2006, the COAG agreed to introduce requirements that regulators will be bound to make decisions within six months (subject to the regulator being given sufficient information, and consultation periods).[154] It is expected that Part IIIA of the *Trade Practices Act* will be amended in accordance with this intergovernmental agreement. The regime also seeks to reduce the incentive a party may have to delay by allowing the ACCC to make an interim arbitration determination and backdate a final determination.[155]

Role of Interested Parties

The legislation does not specifically recognise any particular representative body. In practice, there are two main airlines (Qantas and Virgin). International airlines

[153] See guidelines to the ACCC's process: *Arbitrations: A Guide to the Resolution of Access Disputes under Part IIIA of the Trade Practices Act,* July 2005. Available at: http://www.accc.gov.au/content/index.phtml/itemId/731775 [accessed on 24 July 2008].
[154] COAG, *Competition and Infrastructure Reform Agreement*, 10 February 2006, Clause 2.6.
[155] In particular, an interim determination may require the provider to provide access to the service. The ability to backdate a final determination is of little practical relevance unless the access seeker is receiving the service.

operating to and from Australia are represented by the Board of Airline Representatives of Australia Inc.

Information Disclosure and Confidentiality

The ACCC is not a court, and is not bound by the rules of evidence. The ACCC may issue directions requiring parties to provide submissions and evidence by specified dates (although it can be difficult to prevent late submissions); and has the power to summon a person to appear before the ACCC to give evidence or produce documents. In relation to information provided in an arbitration, the ACCC's guideline on the arbitration process states that the ACCC's 'starting point is generally that disclosing information to all parties will facilitate a more informed decision-making process'. However, the ACCC may decide not to give to the other party 'so much of the document as contains confidential commercial information that the Commission thinks should not be so given'. The ACCC's standard practice is to:

- Give a general confidentiality direction and order to all parties at the beginning of an arbitration. The direction requires parties to use information obtained in the course of the arbitration only for the purpose of the arbitration (subject to certain exceptions); and
- Encourage the parties to agree on a confidentiality regime such as the exchange of a standard form confidentiality undertaking and the identification of persons to have access to all confidential information (usually consisting of limited internal regulatory personnel and external lawyers and consultants).

Unlike most ACCC processes, arbitration is private unless the parties agree otherwise. Where issues arise that are relevant outside of a particular arbitration, the ACCC is able to: conduct joint arbitration hearings; defer consideration of an undertaking or the arbitration; and establish an informal consultation process outside of the arbitration. The ACCC may also publish its final arbitration determination and reasons, subject to issues of confidentiality. Where the ACCC proposes to publish its determination, it must give each party a notice inviting the party to make a submission within 14 days. In practice, the ACCC publishes it on its website.

The ACCC also has the statutory power to obtain information for its formal monitoring functions. Under Part VIIA of the *Trade Practices Act*, the ACCC has the power to compel a person to provide information or documents relevant to a price notification or a price monitoring (s. 95ZK). In addition, the operators of Sydney, Brisbane, Melbourne, Perth and Adelaide airports are required under Parts 7 and 8 of the *Airports Act* to prepare audited accounts and keep records on quality of service, and to give this information to the ACCC.

The ACCC collects information under Part VIIA of the *Trade Practices Act* and Parts 7 and 8 of the *Airports Act* on an on-going annual basis. The ACCC has issued a single document on information requirements for financial reporting and for quality of service reporting.[156] Information obtained in this regard is subject to the disclosure regime in s. 95ZN of the *Trade Practices Act* (*Airports Act* ss. 147 and 158). In relation to these monitoring roles, the ACCC issues an annual regulatory report covering both specific financial information and quality of service information. The

[156] ACCC, *Airports Reporting Guideline: Information Requirements under Parts 7 and 8 of the Airports Act 1996 and Section 95ZF of the Trade Practices Act 1974*, December 2007. Available at: http://www.accc.gov.au/content/index.phtml/itemId/671389 [accessed on 28 June 2008].

reports are made available to the public on the ACCC's website (subject to any confidentiality issues). These reports date back to 1997–98.

Decision-making and Reporting

The requirements of a quorum and a majority decision for arbitration determinations, and the publication of the reasons for the decision are discussed under 'Process and Consultation' and 'Information Disclosure and Confidentiality'.

Appeals

In addition to judicial review, an arbitration party may apply to the Australian Competition Tribunal for review of an ACCC arbitration determination. The application must be lodged in the Tribunal within 21 days after the ACCC made the final determination. The parties to a review are any party to the ACCC's determination who participates in the review, and any person permitted by the Tribunal to intervene.

The Tribunal may affirm or vary the ACCC's decision. In effect, the function of the Tribunal is to engage in a re-arbitration of the access dispute.

The Tribunal may make its own inquiries; has the same power as the ACCC to summon a person to give evidence or produce documents; and may require the ACCC to give information and other assistance and to make reports for the purposes of the review. It is open to the parties to put material before the Tribunal that was not before the ACCC. In 2006, the COAG agreed that merits review should be limited to the information submitted to the regulator.[157] It is expected that Part IIIA of the *Trade Practices Act* will be amended in accordance with this intergovernmental agreement.

The legislation provides that the hearing is private unless the parties agree otherwise.[158] However, in a similar case, the Tribunal's preferred approach has been to conduct public hearings, and to direct that part of the hearing take place in private where there is confidential evidence.

The Tribunal must use its best endeavours to make a decision within four months of receiving the application for review (extendable).

7. Ports

International trade is important to the Australian economy. In 2007-08, the values of imports and exports, respectively, were 22.5 per cent and 20.7 per cent of the economic activities measured by the Gross Domestic Product.[159] The seaports of Melbourne, Sydney and Brisbane are the largest ports, each handling substantial values of internationally traded goods. Port facilities are provided in Australia by State governments and privately owned enterprises. Australian ports are of two main kinds – those concentrating more on freight ('container ports') and those devoted to the handling of bulk commodities (minerals and/or agricultural commodities). For examples:

- Australia's largest container port is the Port of Melbourne. It is managed by the Port of Melbourne Corporation, established by the Victorian Government on 1

[157] COAG, *Competition and Infrastructure Reform Agreement*, 10 February 2006, Clause 2.4.
[158] *Trade Practices Regulations 1974* (Cth), reg. 28K.
[159] Australian Bureau of Statistics, *Australian System of National Accounts*, 5204.0, 2007–08, released on 31 October 2008.

July 2003 to be the strategic port manager for the Port of Melbourne.[160] The Corporation has the functions and powers to undertake the integrated management and development of both the land and water sides of the port.

- Sydney Ports Corporation was established in 1995, under the *Ports Corporatisation and Waterways Management Act 1995* (NSW), now known as the *Ports and Maritime Administration Act 1995* (NSW), to give a greater focus to commercial port operations.[161]
- Dalrymple Bay Coal Terminal (DBCT) is a port facility located in Queensland, which exports coal mined in the Bowen Basin region of Queensland. Already one of the largest coal terminals in the world, DBCT's capacity is being expanded to 85 million tonnes per annum (Mtpa) (from approximately 59Mtpa) to meet ongoing customer demand. Terms and conditions for access by customers to the services provided at DBCT (including tariffs that can be charged) are regulated by the Queensland Competition Authority (QCA).[162]
- Fremantle Ports is the largest port in Western Australia. It operates from two locations (Fremantle and Kwinana) and handles bulk commodities, containers, passenger vessels and naval vessels. Two container stevedoring companies operate at the port. It is a trading enterprise of the Western Australian Government.

Regulatory Institutions and Legislation

Ports are subject to the economy-wide access regime in Part IIIA (see the Airport section above), and competition regime in Part IV of the *Trade Practices Act*.

Further, the economy-wide prices surveillance regime in Part VIIA of the *Trade Practices Act* has been applied to Australian stevedoring since January 1999, following the Treasurer's direction. The ACCC is required to monitor, and report annually on, prices, costs and profits relating to the supply of services by stevedoring companies at the ports of Adelaide, Brisbane, Burnie, Fremantle, Melbourne and Sydney.[163] This monitoring role arose primarily as a result of a reform process during the late 1990s that was intended to increase the productivity of Australian stevedoring. The reform process involved a substantial reduction in the stevedoring labour force. Consequently, funds were provided to ensure that all stevedoring employees made redundant as part of the reform process received full redundancy entitlements. A levy on the loading and unloading of containers and cars for export and import was to be applied to repay these funds. The two major stevedores agreed to absorb the full cost of the levy.

The ACCC's monitoring program was initially designed to provide information to the Government and wider community about the progress of waterfront reform at Australia's major container terminals and to provide information to the community about the absorption of the stevedoring levy by the major stevedores. The levy ceased

[160] Port of Melbourne Corporation, *About Port*. Available at: http://www.portofmelbourne.com/business/aboutport/ [accessed on 29 October 2008].
[161] Sydney Ports Corporation, *Corporation*. Available at: http://www.sydneyports.com.au/corporation [accessed on 29 October 2008].
[162] Babcock & Brown Infrastructure, *Dalrymple Bay Coal Terminal*. Available at: http://www.bbinfrastructure.com.au/bbi-assets/dbct.aspx [accessed on 29 October 2008].
[163] The original monitoring regime was implemented under s. 27A of the *Prices Surveillance Act 1983*.

in May 2006 and the reform process is largely complete. However, the ACCC's monitoring role continues.

In addition, after 1 October 2009, wheat exporters who also operate grain storage and handling facilities at ports are required, in order to be accredited, to have an undertaking accepted by the ACCC under Part IIIA of the *Trade Practices Act* (unless there is an effective State/Territory port regime in place under Part IIIA). The undertakings will govern access to the port terminal facilities by other accredited wheat exporters.

The State/Territory regimes are:

- Victoria: *Port Services Act 1995* (Vic) and *Grain Handling and Storage Act 1995* (Vic)
- Queensland: *Queensland Competition Authority Act 1997* (Qld), *Transport Infrastructure Act 1994* (Qld), and *Transport Operations (Marine Safety) Act 1994* (Qld)
- South Australia: *Maritime Services (Access) Act 2000* (SA)
- New South Wales: *Ports and Maritime Administration Act 1995* (NSW)
- Northern Territory: *Darwin Port Corporation Act 2001* (NT)
- Tasmania: *Tasmanian Ports Corporation Act 2005* (Tas)
- Western Australia: *Port Authorities Act 1999* (WA).

Victorian Ports Monitoring

Under the Victorian ports price monitoring framework, port operators are required to maintain a published Reference Tariff Schedule, which provides a 'standing offer' of terms and conditions upon which prescribed services will be made available.[164] Port users may purchase regulated port services on the terms and conditions in the Reference Tariff Schedule, or seek to negotiate other terms and conditions with the port operator according to their requirements. To outline the regulatory framework for the ports industry and provide information on the ESC's role, the ESC prepared the Regulatory Framework for the Ports Industry brochure.

QCA – DBCT's Access Undertaking[165]

The Queensland Competition Authority (QCA) determines the fair and reasonable terms and conditions of access to terminals which have been declared for third party access under the *Queensland Competition Authority Act 1997* (Qld). The QCA's responsibilities in relation to ports are to assess and approve access undertakings for ports declared for Third Party Access; arbitrate access disputes; enforce breaches of access obligations; investigate and monitor prices for ports declared for monopoly prices oversight; and assess competitive neutrality.

The DBCT has been 'declared' for third party access under Part 5 of the *Queensland Competition Authority Act 1997*, which allows for the determination of fair and reasonable terms and conditions of access to the terminal.

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[164] Essential Services Commission, *Our Role*. Available at: http://www.esc.vic.gov.au/public/Ports/Our+Role.htm [accessed on 29 October 2008].

[165] Queensland Competition Authority (QCA), *DBCT 2006 Access Undertaking*. Available at: http://www.qca.org.au/ports/2006-dbct-dau/ [accessed on 29 October 2008].

On 20 June 2003, the QCA received a draft access undertaking (DAU) for the coal handling services at DBCT, submitted by Prime Infrastructure (DBCT) Management on behalf of DBCT Holdings.[166] This triggered the first substantial review of a bulk commodity port in Australian regulatory history. In July 2003, the QCA released a Request for Comments paper for its review of the DAU. The Request for Comments paper summarised the DAU and raised a number of issues upon which the Authority sought comments from interested parties.

On 15 October 2004, the QCA published its draft decision proposing not to approve the DAU for DBCT. On 26 November 2004, the QCA received a number of submissions in response to the Draft Decision. Given the complexity of issues involved, the Authority sought further information, and as a result Prime Infrastructure and the DBCT User Group (representing the users of the port facility) subsequently made a number of additional submissions. On 20 April 2005 the QCA published its final decision to refuse to approve the DAU. That decision set out the reasons for refusing to approve the DAU and outlined how it had to be amended in order to be approved by the QCA.

Following the release of the QCA's decision, DBCT Management and the DBCT User Group entered into discussions to resolve all outstanding matters in relation to the DAU and associated standard access agreement. Because of concerns about the time being taken to finalise these discussions, on 21 October 2005 the QCA issued DBCT Management with an initial undertaking notice in accordance with s. 133 of the *Queensland Competition Authority Act.* This notice required DBCT Management to submit a revised DAU which was consistent with the QCA's decision by 19 January 2006.

On 4 January 2006, DBCT Management submitted a revised draft access undertaking as well as an associated standard access agreement. The QCA sought and received submissions and supplementary submissions on the revised DAU. On 15 June 2006 the QCA published its decision approving the revised DAU.

Regulatory Development

In 2006, the COAG agreed to promote competition in the provision of port and related infrastructure facility services; and that, where economic regulation of significant ports is warranted, it should conform to a consistent national approach. Each party agreed to review the regulation and effectiveness of competition in significant ports within its jurisdiction.

[166] In July 2005, Prime Infrastructure (DBCT) Management changed its name to BBI (DBCT) Management Pty Ltd – or DBCT Management.

AUSTRALASIA

NEW ZEALAND

OVERVIEW

The Commerce Commission has a significant role in the economic regulation of infrastructure in New Zealand, enforcing industry-specific legislations – specifically, the *Electricity Industry Reform Act 1998* and the *Telecommunications Act 2001*. The Commerce Commission also enforces industry-specific regulatory regimes under Part 4 of the *Commerce Act 1986* in relation to electricity lines services, gas pipelines services and specified airport services. As a result of the amendments made by the *Commerce Amendment Act 2008*, these services are subject to information disclosure regimes and additionally for electricity and gas networks, the targeted price-quality regulation regimes. All industries and sectors reviewed are subject to the *Fair Trading Act 1986* and the provisions in the *Commerce Act* relating to the prohibition of anti-competitive practices, and mergers and acquisitions. These statutes are also enforced by the Commerce Commission.

The electricity industry is also subject to regulations under the *Electricity Act 1992* that provides a framework for access to transmission networks, including the development of a benchmark transmission agreement. The Act is enforced by the Electricity Commission.

Under the *Telecommunications Act*, a telecommunications commissioner is appointed by the Governor General and may decide certain matters in telecommunications.

Regulation of posts is based on a Deed of Understanding with New Zealand Post and water and wastewater is regulated at the local-government level. Some of the municipalities co-operate on a regional basis for water supply and wastewater disposal.

The rail network was privatised in 1993 and then was bought back by the Crown – the Auckland urban rail network in 2002 and the national rail network in 2004. Toll NZ has been granted, under the Rail Access Agreement with the Crown, the exclusive rights of rail network access, subject to 'use it or lose it' provisions.

The regulatory regime for airports is 'lighted-handed' and the privatised ports are not the subject of economic regulation.

GEOGRAPHY, POPULATION, ECONOMY, POLITY AND LEGAL SYSTEM[167]

New Zealand is an island country in the south-western Pacific Ocean. It is comprised of two main landmasses (the North Island and the South Island) and numerous smaller islands. Large areas of the country are very mountainous with mountain chains extending the length of both main islands. New Zealand has a largely mild and temperate climate. However, climatic conditions vary sharply across regions from a warm subtropical climate in the far north to cool temperate climates in the far south, and severe alpine conditions in the mountainous areas.

[167] Information is from the Central Intelligence Agency (CIA), *The World Factbook New Zealand*. Available at: https://www.cia.gov/library/publications/the-world-factbook/geos/nz.html [accessed on 28 July 2008].

New Zealand is one of the least populous of the 30 OECD countries. It has a population of 4 173 460 (in July 2008) living in a total land area of 268 021 square kilometres. Large areas of the country are sparsely populated. The overall population density is less than 16 per kilometre. This is relatively low by OECD standards, although much more dense than both Australia and Canada. New Zealand's people live mostly on two large islands, the North Island and the (larger but less populous) South Island. While having a strong agrarian base in the arable parts, the population is highly urbanised (80 per cent) with the largest cities (in order) being Auckland, Wellington (the capital), Christchurch and Dunedin. Maori, New Zealand's indigenous population make up approximately 15 per cent of the total population.

New Zealand's GDP in PPP terms is US$111.7 billion (2007 estimate). The country's GDP per capita of US$27 300 (2007 estimate) is in the top of the lower third of the OECD. Agriculture and forestry is one of New Zealand's largest industry areas, contributing to about 20 per cent of GDP. The country also has a sizeable manufacturing sector which accounts for approximately 14 per cent of real GDP (2007 estimate). As in other developed economies, services account for about 70 per cent of GDP and employment. Over the past 20 years successive governments have been transforming New Zealand from an agrarian economy dependent on concessionary British market access to a more industrialised, free market economy that is more competitive globally. New Zealand is not rich in natural resources except for natural gas; timber and water. This has possibly been a factor in New Zealand's GDP per capita slipping below that of the OECD leaders.

New Zealand has highly developed economic infrastructure with technically advanced communications, energy production and distribution, posts, water and wastewater, and transport infrastructure (roads, rail, airports and ports and harbours). Hydro is the principal source of electricity production (about 60 per cent).

New Zealand is a parliamentary democracy with a single house of Parliament (the House of Representatives) elected on a combination of single seat electorates and proportionality for a term of three years. It has 16 administrative regions and one territory. New Zealand is a constitutional monarchy, as such the chief of state is the monarch; represented in New Zealand by the Governor General, however this role is largely ceremonial. The head of government is the Prime Minister. The cabinet is the Executive Council appointed by the governor general on the recommendation of the Prime Minister.

At a regional level, there are 85 local authorities comprising 12 regional councils and 73 territorial authorities (city and district councils). Local authorities have powers to enact local laws, their jurisdiction includes traffic, building permits and waste water and solid waste regulation.

The legal system is based on English law. New Zealand accepts compulsory International Court of Justice (ICJ) jurisdiction with reservations. The top of New Zealand's general court system is the Supreme Court. Below it, in descending order, are the Court of Appeal, the High Court and the District Courts. The jurisdiction of the Supreme Court, the Court of Appeal and the District Courts are defined by statute. Appeals are to a higher court, with the Supreme Court as the final appellate court.

The High Court has both statutory jurisdiction and inherent common law jurisdiction. In general, it hears the more serious jury trials, the more complex civil cases,

administrative law cases and appeals from the decisions of courts and tribunals below it, based on judicial review.

Outside the pyramid for courts of general jurisdiction are specialist courts and tribunals. These include the Employment Court, the Environment Court, the Mäori Land Court, and the Waitangi Tribunal.

APPROACH TO COMPETITION AND REGULATORY INSTITUTIONAL STRUCTURE

The Commerce Commission is New Zealand's primary competition and regulatory agency and was established under s, 8 of the *Commerce Act 1986*. The Commission is an independent Crown entity and is not subject to direction from the government in carrying out its enforcement and regulatory control activities. The Commerce Commission enforces legislation that promotes competition in New Zealand markets and prohibits misleading and deceptive conduct by traders.

The Commission enforces industry-specific legislation in relation to the electricity industry, dairy industry and telecommunication services under the *Electricity Industry Reform Act 1998*, the *Dairy Industry Restructuring Act 2001* and the *Telecommunications Act 2001*. The Commission also enforces industry-specific regulatory regimes under the *Commerce Act 1986* in relation to electricity lines services, gas pipelines services and specified airport services.

The *Commerce Act* was recently amended by the *Commerce Amendment Act 2008*, which introduced new Part 4 provisions that provide for the economic regulation of goods or services where competition is limited. A key feature of the amendments is a new overall purpose statement common to all regulatory provisions. The purpose is to promote incentives for innovation and investment; promote incentives for improved efficiency and the provision of regulated services at a quality that reflects consumer demands; encourage regulated businesses to share the benefits of efficiency gains with consumers, including through lower prices; and limit the ability of regulated businesses to make excessive profits. Part 4 also requires the Commission to set up-front 'input methodologies' to apply to varying degrees to each of the regulatory instruments and regulated industries and sectors. The purpose of these methodologies is to provide certainty for regulated businesses and consumers.

As a result of these amendments, the regulatory regimes for electricity lines services, gas pipelines services and specified airport services are in a state of transition.[168]

The Commission has a variety of responsibilities and powers under the legislation it enforces. These include the ability to undertake investigations and, where appropriate, take court action; the consideration of applications for authorisation in relation to anti-competitive behaviour and mergers; making regulatory decisions relating to access to telecommunications networks; and setting, and assessing compliance with, price-quality paths for electricity lines and gas pipeline businesses. The Commission also administers information disclosure regimes in respect of electricity, gas and airports services.

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[168] Commerce Commission, *Regulatory Provisions of the Commerce Act 1986: Discussion Paper*, 19 December 2008. Available at: http://www.comcom.govt.nz//IndustryRegulation/ContentFiles/Documents/Regulatory%20Provisions%20of%20the%20Commerce%20Act%201986%20-%20Discussion%20Paper.pdf [accessed on 15 January 2009].

The Governor-General, on the recommendation of the Minister of Commerce, appoints Commission Members for their knowledge of, and experience in, areas relevant to the Commission's interests. At least one Commission Member must be a barrister or solicitor. The *Telecommunications Act* created the position of Telecommunications Commissioner, who is a member of the Commission and is appointed by the Governor-General on the recommendation of the Minister of Communications. The Minister of Commerce may appoint Associate Members.

Commerce Commission investigations are often assisted by the input of individuals and businesses. It considers that such co-operation should be encouraged. The effect of the Commission's agreement to proceed under its Leniency and Co-operation Policies is that the Commission will exercise its discretion to take a lower level of enforcement action, or no action at all, against an individual or business in exchange for information and full continuing and complete co-operation.[169]

Where the Commerce Commission's role meets or overlaps with that of another regulatory agency, the agencies may issue a memorandum of understanding, outlining their respective responsibilities and jurisdictions.[170]

Appeals against determinations of the Commission and applications for judicial review are heard by the High Court.[171] In particular, s. 52Z of the *Commerce Act* provides for a right of appeal to the High Court on the merits of the Commission's determinations on input methodologies (and not just on questions of law that arise in respect of such determinations). The High Court is a court of general jurisdiction, placed above the District Courts and beneath the Court of Appeal and Supreme Court. Regulatory bodies are considered to have equal judicial standing with the District Courts, hence decisions of the Commission are appealed to the High Court.

The Commission's determination will stand pending the outcome of an appeal or application for judicial review. Discovery and joinder rights are provided for by the *Judicature Act 1908*, to which amendments to Schedule 2 of the Act were last made in September 2008 in the *Judicature (High Court Rules) Amendment Act 2008*.[172]

According to the *High Court Rules*, a defendant must file a statement of defence within 20 working days of being served a notice of proceedings.

For appeals in the High Court, Clause 4.2 (Schedule 2) of the *Judicature Act 1908 – High Court Rules* states that:

> (1) Persons may be joined jointly, severally, or in the alternative as plaintiffs:
>
> > a. if it is alleged that they have a right to relief in respect of, or arising out of, the same transaction, matter, event, instrument, document, series of documents, enactment, or bylaw; and

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[169] Commerce Commission, *What We Do*, 2008. Available at: http://www.comcom.govt.nz/TheCommission/WhatWedo/whatwedo.aspx [accessed on 28 July 2008].

[170] Commerce Commission and Electricity Commission, *Memorandum of Understanding between the Electricity Commission and the Commerce Commission*, 2007. Available at: http://www.comcom.govt.nz//IndustryRegulation/Electricity/ElectricityLinesBusinesses/ContentFiles/Documents/EC,%20CC%20MOU%20-%20Final%20document%20signed%20by%20both%20Commissions%2016_08_07.PDF [accessed on 28 July 2008].

[171] *Commerce Act 1986*, ss. 91–97.

[172] *Judicature (High Court Rules) Amendment Act 2008* that came into force on 1 February 2009, Public Act 2008 no. 90, assented on 25 September 2008.

b. if each of those persons brought a separate proceeding, a common question of law or fact would arise.

(2) On the application of a defendant, the court may, if it considers a joinder may prejudice or delay the hearing of a proceeding, order separate trials or make any order it thinks just.

Clause 4.3 states that:

(1) Persons may be joined jointly, individually, or in the alternative as defendants against whom it is alleged there is a right to relief in respect of, or arising out of, the same transaction, matter, event, instrument, document, series of documents, enactment, or bylaw.

(2) It is not necessary for every defendant to be interested in all relief claimed or every cause of action.

(3) The court may make an order preventing a defendant from being embarrassed or put to expense by being required to attend part of a proceeding in which the defendant has no interest.

(4) A plaintiff who is in doubt as to the person or persons against whom the plaintiff is entitled to relief may join 2 or more persons as defendants with a view to the proceeding determining:

a. which (if any) of the defendants is liable; and

b. to what extent.

For an appeal in the High Court, the *High Court Rules* require appellants to specify, in their applications to the court, the relief or remedy sought (Clause 5.27). In its determination of any appeal, the Court may do any one or more of the following things:[173]

- confirm, modify, or reverse the determination or any part of it;
- exercise any of the powers that could have been exercised by the Commission in relation to the matter to which the appeal relates.

Instead of determining an appeal, the court may also direct the Commission to reconsider, either generally or in respect of any specified matters, the whole or any specified part of the matter to which the appeal relates.[174]

In posts, a *Deed of Understanding* between the Crown and the dominant ex-monopoly operator, New Zealand Post, effectively regulates service standards and access issues. Water and wastewater are regulated by local governments under the *Local Government Act 2002*.

The electricity industry is also subject regulation under the *Electricity Act 1992*, which is enforced by the Electricity Commission. The Electricity Commission is a relatively recent regulatory institution that shares regulation of the electricity industry with the Commerce Commission. Its structure and role are considered in detail below.

[173] *Commerce Act 1986*, s. 93.
[174] Ibid., s. 94.

REGULATORY ARRANGEMENTS BY INDUSTRY OR SECTOR[175]

1. Energy

Electricity

Around 60 per cent of New Zealand's electricity is generated from hydro stations, with the remainder generated from coal, gas, geothermal and wind.[176] There are five main generating companies, three of which are state owned. These five generation companies are also the dominant operators in retailing. The transmission services operator is state-owned Transpower, the owner and operator of the national high-voltage grid. The pricing methodology for grid connection services is contained in the *Electricity Governance Rules 2003*, which were issued under the *Electricity Act 1992*.

Local distribution networks are owned by 29 lines companies. The largest of these, Vector, has a third of the market by number of connections. Under the *Electricity Industry Reform Act 1998* lines businesses (distribution and transmission) are prohibited from owning retail or generation initiatives. The wholesale market, established in 1996, is administered by M-co, part of the financial group FirstRand Group, on behalf of the market regulator, the Electricity Commission (EC). Spot prices and quantities are determined half-hourly at each node.

The Comalco Agreements are certain agreements relating to the purchase of electricity for the operation of the aluminium smelter at Tiwai Point (the Smelter). The Smelter is owned and operated by New Zealand Aluminium Smelters Limited (NZAS), a company owned 79.36 per cent by Comalco New Zealand Limited and 20.64 per cent by Sumitomo Chemical Company Limited. The amount of electricity purchased is currently in excess of 5,000 GWh per annum, approximately 15 per cent of national demand.

Regulatory Institutions and Legislation

The *Electricity Governance (Connection of Distributed Generation) Regulations 2007* outline the obligations of distributors and generators in drawing up connection contracts. The regulations specify a framework to enable connection of distributed generation, including pricing principles, processes (including time frames) under which generators may apply to distributors for approval to connect and prescribed maximum fees. Individual contracts between generators and distributors are to be agreed under these regulations or the default regulated conditions shall apply. Disputes arising related to these regulated conditions (outside of individual contracts) will be treated as a breach of the regulations and considered as per s. 62 of the *Electricity Governance Regulations 2003*.

The Electricity Commission is a Crown entity responsible for regulating the electricity industry. It is established under the *Electricity Governance Regulations 2003*, which are developed under the *Electricity Act 1992*. These regulations outline the functions to be carried out by the Electricity Commission and the relevant processes required to fulfil those obligations.

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[175] The expert assistance of staff from the New Zealand Commerce Commission is acknowledged with respect to the finalisation of the energy, telecommunications and airport sections of this chapter.

[176] Ministry of Economic Development, *Electricity Industry*. Available at: http://www.med.govt.nz/templates/StandardSummary____393.aspx [accessed on 28 October 2008].

The Electricity Commission, under s. 2 of Part F of the Rules (developed under the *Electricity Governance Regulations, 2003*), must develop a benchmark Transmission Agreement that provides an appropriate structure from which designated transmission customers and Transpower will develop Transmission Agreements. Designated transmission customers refer to generators and customers that connect directly to the grid, as well as distributors.[177] The Electricity Commission is also responsible for approving infrastructure investment plans.

The Rulings Panel is an independent body corporate (associated with the Electricity Commission) appointed by the Electricity Commission. It was set up in 2003 to deal with dispute resolution and enforcement of the Rules and Regulations. Although the Rulings Panel is the body designated in the legislation for the resolution of disputes relating to the negotiation of transmission agreements, the website does not contain *any* decisions of the Panel relating to access issues.

Disputes arising related to the determination of agreements between Transpower and designated transmission customers may be referred to the Rulings Panel. The Rulings Panel must not determine disputes relating to the interpretation or enforcement of any transmission agreement including a benchmark agreement. Once entered into, transmission agreements will be considered voluntarily entered contracts and treated, accordingly, as legally binding.

With respect to notified breaches,[178] from March 2004 to July 2007 the Board of the Electricity Commission:

- Appointed investigators to formally investigate 50 (8 per cent) of notified breaches; and
- Declined to pursue 590 (92 per cent) of the notified breaches, of which formal warnings were issued for 177 notified breaches.

For the more serious breaches where investigators were appointed, the Board:

- Approved – 21 settlements covering 24 investigations;
- Decided not to lay a formal complaint for 16 investigations that were not resolved by a settlement;
- Laid three formal complaints to the Rulings Panel; and,
- Had eight investigations in progress.

The investigations concerned;

- Part G – Trading Arrangements (36 investigations);
- Part C – Common Quality (11 investigations); and
- Part E – Registry Information and Customer Switching (three investigations).

It should be noted that the establishment of the Commission, the implementation of the *Electricity Governance Regulations 2003* (including the obligation to enter into transmission agreements) and the provision of a benchmark agreement are all very recent occurrences (the benchmark agreement only came into force as of 1 April

[177] *Electricity Governance Rules*, 2008.

[178] 'Notified breaches' below include *all* complaints regarding a participant that is acting in breach of the Rules (issued pursuant to the conditions of the *Electricity Act 1992*). This information is not exclusive to access complaints and transmission agreements.

2008). There appears to be, therefore, somewhat limited information regarding the treatment of access disputes.

The Commerce Commission also has a role in regulating the electricity industry. In August 2001, Part 4A of the *Commerce Act 1986* established an industry specific regulatory regime for lines businesses. The Commerce Commission's Part 4A responsibilities cover issues relating to large electricity lines businesses (lines businesses) – Transpower and the distribution businesses. Part 4A provides for a targeted control regime and information disclosure regulation.

Under Part 4A, the Commerce Commission is required to set thresholds and assess the performance of lines businesses against those thresholds. In effect, the thresholds are a screening mechanism to identify lines businesses whose performance may require further examination. If one or more of the (price or quality) thresholds are breached by a lines business, the Commission can further examine the business through a post-breach inquiry and, if required, control their prices, revenue or quality.

Control has not been imposed on a lines business, but breaches of the thresholds have been resolved by an 'administrative settlement'. This has involved the identified lines business voluntarily reaching an agreement with the Commission on an appropriate course of action, followed by appropriate consultation. The Commission has agreed an administrative settlement with Unison Networks Limited in May 2007,[179] and in May 2008 the Commission agreed administrative settlements with Vector Limited[180] and with Transpower.[181]

From 1 April 2009, Part 4A of the *Commerce Act* is repealed and electricity lines services are subject to new provisions under Part 4 as a result of the *Commerce Amendment Act 2008*.

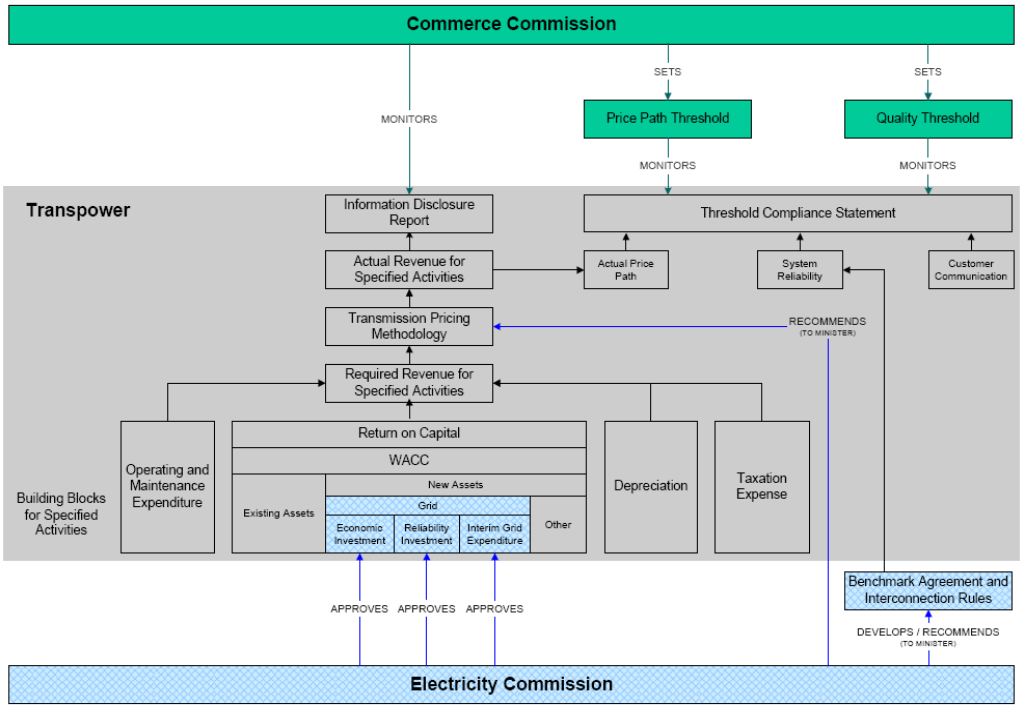
- Under the new Part 4 regime, lines businesses are subject to information disclosure and price-quality regulation. However, 'consumer-owned' distribution businesses (that is, where the business is fully owned by consumer trusts or cooperatives, has less than 150,000 ICPs, trustees or directors are elected, and at least 90 per cent of consumers benefit from income distributions) are exempt from price-quality regulation.
- With respect to price-quality regulation for electricity line businesses that are not consumer owened,[182] the Commerce Commission sets default price and quality paths – including initial prices, rates of change relative to the Consumer Price Index (CPI) and quality standards – for a regulatory period, and all regulated suppliers must comply with those paths. Individual businesses may, however, apply for customised terms and propose alternative price and/or quality paths. In this situation, the Commerce Commission may set customised paths that better meet the circumstances of the supplier. Any breaches of price-quality paths are subject to pecuniary and criminal penalties imposed by the Courts.

[179] Commerce Commission, *Reasons for Not Declaring Control, Unison Networks Limited*, 11 May 2007.
[180] Commerce Commission, *Reasons for Not Declaring Control of Vector Limited*, 30 May 2008.
[181] Commerce Commission, *Reasons for Not Declaring Control of Transpower New Zealand Limited*, 13 May 2008.
[182] *Commerce Amendment Act 2008*, Part 4, Sub-part 9, s. 54G.

- The administrative settlement between the Commission and Transpower – with thresholds for price and quality – expires on 30 June 2011, and Part 4 provides that it remains in force until it expires or is earlier revoked. The Commission is, however, required to make a recommendation to the Minister of Commerce on the form of regulation applicable to Transpower to take effect 1 July 2011.

For the period from 1 April 2009 to 31 March 2010, the thresholds set under the Part 4A regime are deemed to be the default price paths that apply each non consumer-owned line business. From the period from 1 April 2010, the Commerce Commission must re-set the default or customised price and quality paths in accordance with the process set out in the *Commerce Amendment Act 2008* (s. 53P). On 30 March 2009, the Commission released a Default Price Path Reset Process paper for consultation.[183] The determination setting out the default price paths is due on 1 December 2009.

All aspects of the electricity industry are also covered by the Commerce Commission's general powers and responsibilities under the *Fair Trading Act* and *Commerce Act.*[184]



Process and Consultation

Under the *Commerce Act 1986*, the Commission must consult with interested parties before making a material amendment to a determination made under the Act (including a determination relating to a regulatory instrument such as price-quality regulation and a determination relating to an input methodology).

[183] Commerce Commission, *Default Price Path Reset Process Paper*, 30 March 2009. Available at: http://www.comcom.govt.nz/IndustryRegulation/Electricity/PriceQualityPaths/20102015defaultpricepath.aspx [accessed on 22 April 2009].

[184] Commerce Commission, *Overview – Targeted Control*, 2008. Available at: http://www.comcom.govt.nz/IndustryRegulation/Electricity/ElectricityLinesBusinesses/TargetedControl/Overview.aspx [accessed on 25 July 2008].

Under the *Electricity Rulings Panel Procedures 2005*, if a dispute between Transpower and a Designated Transmission Customer concerning – (a) the customer specific terms of a Transmission Agreement being negotiated between those parties; or (b) a requested variation of the services described in a Benchmark Agreement – is not resolved within a reasonable time, either party may refer the matter to the Rulings Panel for determination.[185]

If any participant believes, on reasonable grounds, that another participant has breached the Regulations or the Rules, that participant must notify the Commission as soon as possible.[186]

As the infrastructure owner, Transpower must submit transmission development proposals to the Electricity Commission for approval. Costs incurred as part of approved infrastructure improvement may be recovered from designated transmission customers as provided for in the pricing methodology outlined in the benchmark transmission agreement.[187]

The *Electricity Governance Rules* oblige the Electricity Commission, among other things, to design a *Benchmark Transmission Agreement* and *Interconnection Rules*. The process for developing this *Benchmark Agreement* has spanned just over three years and has involved extensive consultation. The Process is outlined below:[188]

- In September 2004 the Electricity Commission published a consultation paper and received submissions from industry participants.
- In December 2004 the Electricity Commission published a preliminary decision regarding the consultations paper and the submissions received.
- In April 2005 the Electricity Commission decided that a high-level policy options investigation was necessary before the development of a draft benchmark agreement and published an options paper for industry consultation. It subsequently published a submissions summary document.
- In May 2006 the Electricity Commission published a benchmark agreement consultation paper and called for industry submissions.
- In June 2006 the Electricity Commission decided that interconnection rules should be separate from the transmission agreement and, so, published a draft interconnection rules consultation paper and called for industry submissions.
- Over three days in July 2006 the Electricity Commission held three seminars regarding information about proposal transmission and distribution contracts.

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[185] Electricity Commission, *Electricity Rulings Panel Procedures*, 2005. Available at: http://www.electricitycommission.govt.nz/pdfs/Rulings-panel/Procs-final.pdf [accessed on 16 July 2008].

[186] *Electricity Governance Regulations 2003*, New Zealand. Available at: http://www.legislation.govt.nz/regulation/public/2003/0374/latest/DLM230535.html?search=ts_regulation_electricity+governance&sr=1 [accessed on 16 July 2008], Part 4, s. 62.

[187] Electricity Commission, *Electricity Rulings Panel Procedures*, 2005. Available at: http://www.electricitycommission.govt.nz/pdfs/Rulings-panel/Procs-final.pdf [accessed on 16 July 2008].

[188] Electricity Commission, *Benchmark Agreement*, 2008. Available at: http://www.electricitycommission.govt.nz/opdev/transmis/Benchmark/index.html#implementation, [accessed on 29 July 2008].

- In February 2007 the Electricity Commission published a summary of the submissions and cross-submissions it had received in response to the consultations papers it had issued. It also held a public conference with presentations from eleven industry participants. The Electricity Commission subsequently asked for drafting comments and prepared a draft benchmark agreement (and related documents) for presentation to the Minister of Energy.
- In May 2007 the Electricity Commission issued a final decision paper for the benchmark agreement and the Minister for Energy gazetted the necessary regulation changes recommended by the agreement.
- In June 2007 the Electricity Commission requested a proposed Connection Code and Outage Protocol from Transpower.
- In July 2007 Transpower notified the Commission of the trouble it was having implementing the benchmark agreement and the Commission initiated a review of the benchmark agreement.
- In October 2007 the draft connection code and outage protocol were published for consultation and in November 2007 the Electricity Commission held a public briefing session to clarify the documents published. (The addition of these documents to the 'Rules' is a necessary condition for the implementation of the benchmark agreement).
- Finally in early 2008 the Electricity Commission nominated 1 April 2008 as the implementation date for the benchmark agreement.

When a complaint is made to the Electricity Commission regarding a breach of the Regulations, the Commission may apply to the High Court to have interim injunctions applied while the matter is investigated.[189] The Commission must appoint an investigator to investigate the alleged breach.[190] The investigator must notify the party accused of breaching the rules or regulations and inform the party of the nature of the complaint being made.[191] The investigation must be publicised and affected parties may apply to join the complainant.[192]

Within ten working days of receiving a notice given (or any longer period that the investigator may allow in writing), the recipient must respond to the allegations, in writing, to the investigator.[193] If the party alleged to be in breach of the Rules or Regulations does not respond, the Board may formally refer the complaint to the Rulings Panel.

The investigator must investigate the facts surrounding the alleged breach. The investigator must endeavour to reach an informal resolution (a settlement) of every matter under investigation by agreement between:

- the notifying participant; and
- the Commission; and

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[189] *Electricity Governance Regulations 2003*, New Zealand. Available at: http://www.legislation.govt.nz/regulation/public/2003/0374/latest/DLM230535.html?search=ts_regulation_electricity+governance&sr=1 [accessed on 16 July 2008], Part 4, s. 68.
[190] Ibid.
[191] Ibid., Part 4., s. 74.
[192] Ibid., Part 4., s. 75.
[193] Ibid., Part 4., s. 76.

- the participant allegedly in breach; and
- any other participants that have joined as parties to the dispute.

In effecting a settlement, the investigator may use any process that the investigator thinks fit, after consultation with the persons referred to above.[194] Such a settlement must be reviewed and approved by the Board. If the Board does not approve the settlement, it may formally refer the matter to the Rulings Panel.

If an informal settlement cannot be reached within 30 working days, the investigator must provide a report and recommendation to the Board sufficient that it may decide whether to make a formal complaint to the Rulings Panel.[195] If the Board decides not to lodge a formal complaint, the party which registered the alleged breach may, itself, make a formal complaint to the Rulings Panel.[196]

Where a formal complaint is made to the Rulings Panel, having received notice of a dispute, the Rulings Panel decides whether or not to undertake the determination of the dispute. If it decides it will, the Rulings Panel must request that the Electricity Commission publicise the dispute. Other interested 'Designated Transmission Customers'[197] may join with the complainant within ten days after publication of the dispute. The Rulings Panel then sets a date by which it will consider the dispute, decides whether the circumstances merit a hearing and deliver at least 20 business days' notice of the time and date of the consideration or hearing to all interested parties.

Each of the parties is entitled to submit written evidence. These submissions must be copied and forwarded to all the parties and the Commission no later than five days before the hearing. Parties have the opportunity to respond to any submissions up until two days before the hearing. Any party to the dispute is entitled to be heard at the hearing.[198]

Disputes and complaints usually involve the Transmission System Operator (TSO) (that is, Transpower) or the Transmission Grid Owner (also Transpower) and a designated transmission customer. Within ten days of a complaint being publicised, other affected designated transmission customers may apply to be joined as parties to a dispute.[199]

When a complaint is made to the Electricity Commission regarding a breach of the Regulations, consultations are varied in nature. The appointed investigator may collect written submissions, conduct interviews or visits and/or request documented evidence. The protocol outlined below applies to the actions of the investigator.

[194] Ibid., Part 4, s. 82.
[195] Ibid., Part 4, s. 88.
[196] Ibid., Part 4, s. 92.
[197] Electricity Commission, *Electricity Rulings Panel Procedures*, 2005. Available at: http://www.electricitycommission.govt.nz/pdfs/Rulings-panel/Procs-final.pdf [accessed on 16 July 2008].
[198] Ibid., Parts 4.4–4.5.
[199] Ibid., Part 4.2(2).

If a formal complaint is made to the Rulings Panel, consultations are in the form of written submissions, a hearing (where necessary) and any other consultations the Rulings Panel deems necessary/relevant.[200]

Generally, for decisions of the Electricity Commission outside the complaints process, a draft or proposal paper is made publicly available and submissions from interested parties are received and considered before a final decision is made. Often a conference is also called to hear, verbally, any comments from interested parties, before a Final Decision is published. After publication of a decision the Electricity Commission may hold a (or a series of) public information meetings to explain its reasoning and decision-making outcomes.[201]

The Electricity Commission website contains a document outlining the body's consultation protocol. The document requires the electricity Commission to use its discretion in choosing the relevant level of consultation from the table below:

[200] *Electricity Governance Regulations 2003*, New Zealand. Available at: http://www.legislation.govt.nz/regulation/public/2003/0374/latest/DLM230535.html?search=ts_regulation_electricity+governance&sr=1 [accessed on 16 July 2008], Part 5, s. 10.3.

[201] Electricity Commission, *Public Meetings - Proposed Upper North Island Transmission Grid Upgrade* (Media Release), 2008. Available at: http://www.electricitycommission.govt.nz/old_news/publicmeetingsfeb07 [accessed on 17 July 2008].

Consultation Protocol[202]

Level of consultation required in circumstances	Process
Low	• Telephone call with manager at relevant organisations (for example, regulatory managers), to discuss issues.
	• Email to relevant industry/stakeholder requesting written views.
Moderate	• Preparing consultation document, providing it to relevant direct stakeholders, and posting on website; • Allowing a set timeframe for submissions.
	• Preparing consultation document, providing it to relevant parties, and posting on website; • Seeking submissions from the public as well as industry stakeholders; • Allowing a set timeframe for submissions; • Meeting with parties making submissions prior to making a decision.
Extensive	• Preparing consultation document, providing it to relevant parties, and posting on website; • Requesting submissions from the public; • Allowing a set timeframe for submissions; • Holding public meetings prior to making a decision; • Issuing a preliminary view on the issues; • Requesting further submissions; • Making a final decision, and publishing reasons for that decision.

The focus of the regulatory framework is on resolution of issues outside of formal processes. Section 83 of the *Electricity Governance Regulations 2003* obliges the investigator to endeavour to reach an informal settlement on any matter brought before the regulator. In addition, the Electricity Commission maintains various Advisory Groups made up of industry and consumer representatives that act in an advisory capacity to the Commission. Each group has a particular focus –

[202] Electricity Commission, *Consultation Protocol*, 2007. Available at: http://www.electricitycommission.govt.nz/pdfs/opdev/consultation-protocol-Sep07.pdf [accessed on 17 July 2008].

transmission, wholesale markets, quality, etc. This allows for interaction and consultation between the regulator and industry outside of any formal processes.[203]

When a complaint is made to the Electricity Commission regarding a breach of the Regulations, submission timetables are set at the discretion of the appointed investigator.

If a formal complaint is made to the Rulings Panel, in the case of disputes regarding transmission agreements handled by the Rulings Panel, submissions must be made no later than five business days before the date of the hearing (or, if there is no hearing, the date on which the Rulings Panel will consider the dispute). Responses to those submissions may be made up to two days before the above-mentioned date.[204]

Generally, in the case of other consultations, the Electricity Commission will set and publicise reasonable time limits for the submission of evidence and opinions. These time limits may be altered subject to public notification.

When a complaint is made to the Electricity Commission regarding a breach of the Regulations, in carrying out an investigation, the investigator may appoint any external auditor, technical expert, or other persons that the investigator thinks fit to give advice or assistance to the investigator.[205]

The Electricity Commission may seek a costs order from the Rulings Panel in the event that the matter is taken to the Panel. For example, in the case of the Rulings Panel Decision of March 2006, the Electricity Commission sought a costs order to recover a fee to the amount of NZ$7 620 charged by the system clearing and pricing manager for information requested by a party to the dispute. The Panel did not order the costs to be paid in that case because the matter was the first to have been brought before the Panel and, so, constituted a 'learning experience' for all the parties involved. The Panel did, however, state clearly its ability and intent to do so in the future.[206]

If a formal complaint is made to the Rulings Panel, in carrying out its functions, the Rulings Panel may employ or otherwise seek advice or assistance from any external auditor, technical expert, or other person that the Rulings Panel sees fit.[207]

The regulatory approach in New Zealand is often regarded as 'light-handed' and focused on mediation and minimal intervention. There is a focus on the resolution of disagreements outside of the regulatory process and very rarely is a formal complaint to the Rulings Panel made. The parties are entitled to obtain legal representation and advice but the process does not involve formal, court-style proceedings.

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[203] Electricity Commission, *Advisory Groups*, 2008. Available at: http://www.electricitycommission.govt.nz/advisorygroups [accessed on 17 July 2008].

[204] Electricity Commission, *Electricity Rulings Panel Procedures*, 2005. Available at: http://www.electricitycommission.govt.nz/pdfs/Rulings-panel/Procs-final.pdf [accessed on 16 July 2008], Parts 4.4 – 4.5.

[205] *Electricity Governance Regulations 2003*, New Zealand, Part 4, s. 71. Available at: http://www.legislation.govt.nz/regulation/public/2003/0374/latest/DLM230535.html?search=ts_regulation_electricity+governance&sr=1 [accessed on 16 July 2008].

[206] Electricity Commission Rulings Panel, *Decision – March 2006*, 2006. Available at: http://www.electricitycommission.govt.nz/pdfs/Rulings-panel/Decision-March06.pdf [accessed on 28 July 2008].

[207] *Electricity Governance Regulations 2003*, New Zealand. Available at: http://www.legislation.govt.nz/regulation/public/2003/0374/latest/DLM230535.html?search=ts_regulation_electricity+governance&sr=1 [accessed on 16 July 2008], Part 5, s. 104.

The Government Policy Statement on electricity governance states that:[208]

> Whenever possible, the Commission should use its power of persuasion and promotion, provision of information and model arrangements to achieve its objectives rather than recommending regulations and rules.

The regulatory policies set out in the legislation seem to be preemptive, focused on providing the tools necessary to avoid conflict rather than promoting the intervention of third-party mediation – for example: the Electricity Commission provides a benchmark transmission agreement, including pricing methodologies, which can be used as a reference point for negotiations.

Timeliness

Matters are generally considered by the Commission Board before being passed for official consideration by the rulings panel. The Board encourages settlement and informal consultation as a means for resolving disputes rather than formal process. These discussions could be considered pre-lodgement.

When a complaint is made to the Electricity Commission regarding a breach of the Regulations, if an informal settlement cannot be reached within 30 working days, the investigator must provide a report and recommendation to the Board sufficient that it may decide whether to make a formal complaint to the Rulings Panel.[209]

If a formal complaint is made to the Rulings Panel, the *Electricity Governance Regulations* state that the Rulings Panel must use reasonable endeavours to make its decision within 40 days of receiving all written and oral submissions.[210]

The Rulings Panel Procedures document[211] states that upon notification the Rulings Panel must set a date and time for the hearing or consideration of the dispute. Submissions may be made up until five days before this date.

When a complaint is made to the Electricity Commission regarding a breach of the Regulations, there does not appear to be a formal process for altering prescribed time limits. However, the focus on informal settlement in the legislation implies that the Board may allow extensions of time limits in order to achieve a reasonable settlement outside of a formal complaint to the Rulings Panel.

If a formal complaint is made to the Rulings Panel, at any time, the Rulings Panel may alter its decision concerning the date and time for the consideration of the dispute and notify the parties concerned of the revised schedule.[212]

There is no apparent evidence of there being any consequences for the regulator for not reaching a decision within the specified time limits.

When a complaint is made to the Electricity Commission regarding a breach of the Regulations, the settlements achieved and published on the Electricity Commission's

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[208] Electricity Commission, *Commission Profile,* 2007. Available at: http://www.electricitycommission.govt.nz/aboutcommission/comprofile [accessed on 18 July 2008].

[209] *Electricity Governance Regulations 2003*, New Zealand, 2003. Available at: http://www.legislation.govt.nz/regulation/public/2003/0374/latest/DLM230535.html?search=ts_regulation_electricity+governance+regulations_resel&sr=1 [accessed on 16 July 2008], Part 4, s. 88.

[210] Ibid., Part 6, s. 88.

[211] Electricity Commission, *Electricity Rulings Panel Procedures*, 2005. Available at: http://www.electricitycommission.govt.nz/pdfs/Rulings-panel/Procs-final.pdf [accessed on 16 July 2008], Part 4.3 (1) (a).

[212] Ibid., Part 4.3 (2).

website vary in their timings. Complaints have taken anywhere between approximately five and 18 months to settle. This appears to be well outside the 30 working days stipulated in the Electricity Governance Regulations.

The Rulings Panel has published a total of four Decision papers in response to formal complaints. One was in relation to a costs order pursuant to a related claim. Thus, of the three matters considered, two were decided within three months of notification and one was decided over a period of ten months. It is unclear as to whether these decisions were made within '40 days of receiving all relevant submissions' as suggested by the *Electricity Governance Regulations*.

Role of Interested Parties

The Government Policy Statement on Electricity Governance states that the Electricity Commission,[213]

> should make extensive use of advisory groups wherever possible, to develop industry arrangements and make recommendations concerning regulations and rules. These advisory groups should have the necessary expertise and be appropriately representative of affected parties, including consumers. The Commission should consider providing limited funding assistance for consumer representatives where it considers that this may improve the quality of decision-making.

The Ministry of Consumer Affairs (part of the Ministry of Economic Development) deals with product safety and the administration and development of consumer legislation and policy.[214]

The Commerce Commission (established under the *Commerce Act 1986*) administers the *Fair Trading Act* and treats consumer and business complaints of anti-competitive or unfair trade practices.[215]

The Electricity Commission maintains various Advisory Groups and Project Teams. These discussion groups are made up of industry and consumer representatives and act in an advisory capacity to the Commission. Each group has a particular focus – transmission, wholesale markets, quality, etc. This allows for interaction and consultation between the regulator and industry outside of any formal processes.[216]

Public consultations for particular decisions are widely advertised and open to all industry participants.

The Government Policy Statement states that the Electricity Commission should consider providing limited funding assistance for consumer representatives where it considers that this may improve the quality of decision making.[217] However, there appears to be no evidence of this funding option being used by the Electricity Commission.

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[213] Ministry of Economic Development, *Government Policy Statement on Electricity Governance*, 2004. Available at: http://www.med.govt.nz/upload/13887/final.pdf [accessed on 26 May 2009], p. 5,

[214] Ministry of Consumer Affairs, *About Us*, 2008. Available at: http://www.consumeraffairs.govt.nz/aboutus/index-new.html [accessed on 17 July 2008].

[215] Ibid.

[216] Commerce Commission, *Airports*, 2008. Available at: http://www.comcom.govt.nz/RegulatoryControl/Airports/Overview.aspx [accessed on 24 July 2008].

[217] Electricity Commission, *Commission Profile*, 2007. Available at: http://www.electricitycommission.govt.nz/aboutcommission/comprofile [accessed on 18 July 2008].

Information Disclosure and Confidentiality

All industry participants are obliged to cooperate with any investigation by the Electricity Commission. When a complaint is made to the Electricity Commission regarding a breach of the Regulations, s. 172KB of the *Electricity Amendment Act 2004* states:

> Every industry participant must co-operate fully with any investigation carried out, for the purposes of monitoring or enforcing any electricity governance regulations or rules, by the Commission, or by an investigator appointed under those regulations;
>
> (a) by providing, within any reasonable time specified by the Commission or the investigator, all information, papers, recordings, and documents concerning the matter that are in the possession, or under the control, of the industry participant and that are requested for the purpose of the investigation; and
>
> (b) by permitting its officers or other employees to be interviewed (which interview may be recorded) and by ensuring as far as possible that they are made available for interview and answer truthfully and fully any questions put to them; and
>
> (c) by giving to the Commission, or any person authorised by the Commission, at all reasonable times, full access to any premises (subject to complying with any safety requirements that apply to visitors to those premises) at which the industry participant carries on business or maintains records; and
>
> (d) by giving all other assistance that may be reasonable and necessary to enable the matter to be fully investigated.

Information provided or disclosed to the Commission with regard to a reported breach of the Rules and Regulations must be kept confidential by the Commission.

The *Electricity Governance Regulations 2003* require parties who provide information to identify any information that they deem to be confidential or that they consider inappropriate for publication/inclusion in the investigator's report.[218]

If a formal complaint is made to the Rulings Panel, the Rulings Panel may request the investigator to collect any further information it may require to make its decision.

The Rulings Panel may prohibit the publication or communication of any information or document. It is also required to keep confidential any information supplied to it in relation to a complaint.

Any participant may request the Commission to make available to the participant (the requesting participant) any *Rulebook* information held by the Commission or by any other participant. The request must specify, with as much particularity as possible, the nature of the information sought and the name of the participant who is believed to hold the information.[219]

Rulebook information means all information that is supplied by one participant to another participant, or group of participants, under the rules (other than excluded *Rulebook* information). A requesting participant who is notified that another participant refuses to supply any *Rulebook* information may appeal that refusal by notice of appeal to the Rulings Panel.[220]

All participants and the Electricity Commission are also subject to the applicability of the *Official Information Act 1982*.

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[218] *Electricity Governance Regulations 2003*, Part 4, ss. 66 and 73.
[219] Ibid, s. 15.
[220] Ibid, s. 29.

Informaton Disclosure – Electricity Lines Services

Under Subpart 9 of Part 4 of *the Commerce Act 1986*, suppliers of electricity lines services are subject to information disclosure regulation. Electricity lines services are supplied by electricity distribution businesses (EDBs) and Transpower New Zealand Limited (Transpower).

The Commission is required to make a determination specifying how information disclosure regulation applies to each EDB and Transpower 'as soon as practicable' after 1 April 2009. The *Electricity Distribution (Information Disclosure) Requirements 2008* and the *Electricity Information Disclosure Requirements 2004* continue to apply until the determination takes effect.

The *Electricity Distribution (Information Disclosure) Requirements 2008* were gazetted on 31 October 2008. They relate primarily to EDBs; Transpower is subject to the *Electricity Information Disclosure Requirements 2004*. Some provisions of the previous *Electricity Information Disclosure Requirements 2004* remain applicable to EDBs, through transitional provisions incorporated in Part 4 of the *Electricity Distribution (Information Disclosure) Requirements 2008*.

Under the current requirements, suppliers are required to disclose certain specified information relevant to their performance (such as financial statements, prices and quality performance measures), including forward-looking information (such as forecasts and asset management plans).

Decision-making and Reporting

The board of the Electricity Commission is appointed by the Minister of Energy. The *Electricity Act 1992* allows between five and seven members. There are currently six members including the chairman. Members are appointed for up to three years and may be reappointed.

The members of the Rulings Panel are appointed by the Electricity Commission. The *Electricity Governance Regulations 2003* allow for no fewer than five and no more than seven members. Members may be appointed for up to five years. There are currently five members. The Chairperson of the Panel is also appointed by the Electricity Commission and may be appointed for up to five years. The regulations states that the Rulings Panel must be multi-disciplinary, have the requisite knowledge, skills, and experience to carry out the functions to be performed by the Rulings Panel and must act impartially in carrying out those functions.

The Electricity Commission operates with a staff of approximately 45 permanent employees. The Commission also uses project teams and specialist consultants for specific tasks as required.[221] The Electricity Commission website states:[222]

> Instead of hiring a large staff to detail with the immense numbers of issues it has to address, the Commission has established a strong core team and will use external advisers and advisory groups to progress most of its issues.

The Electricity Commission advises and makes recommendations to the Minister for Energy with regard to changes to the Regulations and Rules.

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[221] Electricity Commission, *Annual Report 2006/07*, 2007. Available at: http://www.electricitycommission.govt.nz/pdfs/publications/Annual0607.pdf [accessed on 18 July 2008].

[222] Electricity Commission, *Commission Profile*, 2007. Available at: http://www.electricitycommission.govt.nz/aboutcommission/comprofile [accessed on 18 July 2008].

In general, complaints must be assessed, in accordance with the procedure outlined in the first section, by the investigator and the Commission Board before reaching the Rulings Panel. Whether being considered by the Commission Board or by the Rulings Panel the investigator's report forms the basis of what information is before the panel making the decision. The Board or the Rulings Panel may also request more information from the investigator in addition to his/her report.

The board considers the report and recommendations of the investigator, including any third party investigations, interviews or documents collected by the investigator.

A quorum for Rulings Panel meetings is three members of the Rulings Panel. No business may be transacted if a quorum is not present. The Rulings Panel takes decisions according to a majority vote. The Chairperson holds the casting vote in the case of division.[223]

Once a dispute regarding a transmission agreement is resolved and an agreement entered into, it will be considered a legally binding contract making its conditions enforceable.

In general matters treated by the Electricity Commission – for example, in the creation of benchmark transmission agreements and approving infrastructure investment plans – decisions are broadly applicable and affect all industry participants. In the case of a dispute in relation to a breach of the rules or a dispute brought before the Rulings Panel, decisions are applicable to the specific conditions being contested. Also, the Electricity Commission may apply to the High Court for the grant of an interim injunction:

- restraining a participant from doing, or omitting to do, anything that is in breach of these regulations or the rules; or
- requiring a participant to do, or omit to do, something in accordance with these regulations or the rules.[224]

When a complaint is made to the Electricity Commission regarding a breach of the Regulations, when the Electricity Commission is deciding on a general matter – such as benchmark agreements, approval of investment programs or access codes – a draft decision paper will be issued and comments from interested parties will be received and considered before the publication of the final report.

If a formal complaint is made to the Rulings Panel, in any proceedings before it, the Rulings Panel may, if it thinks fit, prepare a draft decision or determination or award, and give a copy of that draft to such persons as it thinks fit. Any person to whom a copy of a draft decision or determination or award is given may comment in writing on the draft to the Rulings Panel within a period specified by the Rulings Panel for this purpose.[225]

The Electricity Commission Board is required to publicise details of every approved settlement reached and to publicise all other decisions.[226] The Electricity Commission

[223] *Electricity Governance Regulations 2003*, Part 8, s. 171F.
[224] Ibid, Part 4, s. 68.
[225] Electricity Commission, *Electricity Rulings Panel Procedures*, 2005. Available at: http://www.electricitycommission.govt.nz/pdfs/Rulings-panel/Procs-final.pdf [accessed on 16 July 2008], s. 1.14.
[226] *Electricity Governance Regulations 2003*, ss. 85 and 91.

must also publicise decisions of the Rulings Panel within ten days of receiving them.[227]

Rulings Panel decisions and Commission settlement documents are published on the Electricity Commission website and regularly updated. The website also contains a summary of the most recent cases and the progress of matters still being decided.

For settlements reached through consultation with the Commission, the settlement papers published online outline the parties to the settlement, the background/context of the dispute and the details of the settlement. These documents are of approximately six to ten pages in length.[228] Rulings panel decisions have been ten, twelve or fifteen pages in length. They each outline the context of the complaints, the decisions taken, the reasons for the decisions, details of the hearing and the member of the Panel involved in making the decision.[229]

Appeals

Decisions under the *Electricity Act* are not exempt from judicial review. An industry participant in respect of which a suspension order or termination order is made may appeal to the High Court against the order.[230] An appeal against a decision of the Electricity Commission to approve the investment plan of Transpower may also be appealed to the High Court. An industry participant affected by a decision of the Rulings Panel may appeal that decision to the High Court on the ground of lack of jurisdiction.

The Commission, and the following industry participants, may exercise a right of appeal:[231]

- an industry participant in whose favour or against whom a decision or order of the Commission or the Rulings Panel is made;
- an industry participant who was a party to a dispute that was determined by the Commission or the Rulings Panel;
- an industry participant who joined as a party to the investigation of the matter that is subject to the appeal.

Regulatory bodies are considered to have equal judicial standing with the District Courts; hence decisions of the Commission are appealed to the High Court. Appeals to the High Court will be considered on judicial grounds. The High Court of New Zealand is a court of general jurisdiction, placed above the District Courts and Beneath the Court of Appeal and Supreme Court of New Zealand.

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[227] Ibid, s. 135.

[228] Electricity Commission, *Settlements,* 2008, Available at: http://www.electricitycommission.govt.nz/rulesandregs/compliance/settlements [accessed on 28 July 2008].

[229] Electricity Commission, *Rulings Panel Decisions*, 2008. Available at: http://www.electricitycommission.govt.nz/rulingsp [accessed on 28 July 2008].

[230] *Electricity Amendment Act 2004* (New Zealand), s. 12.

[231] Ibid.

The High Court is also the appeal court for determinations made by the Commerce Commission (considered in the section on 'Approach to Competition and Regulatory Institutional Structure') and the details about the appeal are substantially identical.

An appeal on a question of law must be made by giving notice of appeal within 20 working days after the date of the decision appealed against or within any further time that the Court allows. Also, according to the *High Court Rules*,[232] a defendant must file a statement of defense within 30 days of being served a notice of proceedings.

The *Judicature Act 1908* requires appellants to specify, in their applications to the court, the relief or remedy sought (s. 114). The Act also provides for the right of joinder as plaintiffs or defendants. The discovery rights of parties are as contained in ss. 291–317A of the *High Court Rules*.[233]

In its determination of any appeal (other than an appeal to the High Court by way of case stated for the opinion of the Court on a question of law only), the High Court may do any one or more of the following:

- confirm, modify, or reverse the decision or any part of it;
- exercise any of the powers that could have been exercised by the Electricity Commission or the Rulings Panel in relation to the matter to which the appeal relates.

The High Court may, in any case, instead of determining any appeal, direct the Commission or the Rulings Panel to reconsider.[234]

The appeals process is independent from the decision process in that the appeal is dealt with through the normal legal channels and considered by a body other than the Electricity Commission. The process is also dissimilar in that it is more legally focused and judicially structured. Parties seek legal counsel and attend a formal hearing.

Gas

The two major suppliers of gas pipeline services are *Powerco* and *Vector*. Two other suppliers also subject to regulatory arrangements are *Wanganui Gas* and *Maui Development Limited*.

Powerco is New Zealand's second-largest electricity and gas distribution company, with gas and electricity networks throughout the North Island. In December 2004 Babcock & Brown Infrastructure (BBI), formerly known as Prime Infrastructure, completed a takeover of Powerco. As well as its controlled gas distribution and metering business, Powerco owns and operates electricity distribution networks in the North Island. It also has a gas network and retail business in Tasmania, Australia. The largest part of Powerco's business (by share of revenue) is its electricity distribution business (83 per cent of revenue in 2006). Powerco's controlled gas distribution and metering businesses (to which the Authorisation relates) accounted for only 17 per cent of Powerco's total revenue in 2006.[235]

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[232] Ibid.
[233] *Judicature Act 1908* (Schedule 2: The High Court Rules) (New Zealand).
[234] *Electricity Amendment Act 2004* (New Zealand), s. 12.
[235] Commerce Commission, *Authorisation for the Control of Supply of Natural Gas Distribution Services by Powerco Ltd and Vector Ltd*, Draft Decisions Paper, Network Performance Branch, Wellington, 2007. Available at:

Vector is New Zealand's largest energy infrastructure company and is listed on the New Zealand Stock Exchange. As well as its controlled natural gas distribution business, Vector's business activities include electricity distribution, natural gas transmission, natural gas distribution (through the network formerly owned by NGC Limited), liquefied petroleum gas (LPG) supply, gas and electricity metering services, and telecommunications. The largest part of Vector's business (by share of revenue) is the electricity distribution business in Auckland and Wellington (78 per cent of revenue in 2006). Vector's controlled Auckland gas distribution business (to which the Authorisation relates) accounted for only 6 per cent of Vector's total revenue in 2006.[236]

Regulatory Institutions and Legislation

Until August 2005, the gas pipeline regulatory regime in New Zealand comprised potential application of Part 2 of the *Commerce Act 1986* to prohibit anti-competitive behaviour; the threat of applying more 'heavy-handed' regulation, such as control of prices, revenue and/or quality under Part 5 of the *Commerce Act 1986*, following an inquiry by the Commission under Part 4; and an information disclosure regime set out in the *Gas (Information Disclosure) Regulations 1997*, administered by the Ministry of Economic Development (MED), pursuant to s. 55 of the *Gas Act 1992*.[237]

On 30 April 2003, the Minister of Energy made the formal request to the Commission to report on whether goods and services supplied in markets directly related to gas transmission and distribution systems should be subject to control and hence whether an Order in Council under s. 53 of the *Commerce Act 1986* should be made in relation to gas pipeline services.

In its Gas Control Inquiry, the Commission's work was governed by ss. 52 to 56 of the *Commerce Act 1986*. Section 52 of the *Commerce Act 1986* requires the Commission to consider two key issues in relation to whether or not control under Part 5 may be imposed. Goods or services may be controlled under s. 52 if:

- they are, or will be, supplied or acquired in a market in which competition is limited or is likely to be lessened; and
- control is necessary or desirable in the interests of persons who acquire or supply the goods or services in the affected market or markets.

Having determined whether control may be introduced under s. 52, the Commission conducted further analysis to determine whether an Order in Council imposing control should be made (s. 56(1)). The Commission reported to the Minister on 29 November 2004 and recommended:

- for the gas pipeline businesses of NGC Transmission, NGC Distribution, Wanganui Gas, and Maui Development Limited, although the requirements of s. 52 were met for the introduction of control, that an Order in Council pursuant to s. 53 should not be made; and
- for the gas pipeline businesses of Powerco and Vector, that the requirements of s. 52 were met and that an Order in Council pursuant to s. 53 should be made.

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http://www.comcom.govt.nz//IndustryRegulation/Gas/CommissionReportsandDocuments/ContentFiles/Documents/PUBLIC%2017%20OCT%202007%20-%20Draft%20Decisions%20Paper%20%20-624%20610.pdf [accessed on 16 July 2008].

[236] Ibid.

[237] Ibid.

Under s. 55 of the *Commerce Act 1986*, once control has been imposed by the Control Order the services can only lawfully be supplied pursuant to and in accordance with an undertaking, an authorisation, or a provisional authorisation. Therefore, in order to enable the continued supply of gas, the Commission issued a provisional authorisation to coincide with the commencement date in the Control Order of 25 August 2005 (the Provisional Authorisation).[238]

The Commission's draft decisions in respect of the Authorisation were outlined in a public paper for consultation with interested parties.[239] The Commission also released a public version of the model on which it based part of its draft decisions for the Authorisation (the Gas Control Model). Written submissions on the Commission's Draft Decisions for the Authorisation were received up until November 2007. Following the written submissions process, in February 2008, the Commerce Commission held a conference with interested parties on the Draft Decisions. Cross-submissions relating to the Draft Decisions discussed at the conference will be received up until July 24, 2008.[240]

On 20 June 2008 the Commission advised interested parties that the Commerce Commission had received an offer of undertaking from Vector Limited on 21 April 2008 and from Powerco Limited on 23 April 2008 in respect of their controlled gas distribution services (the Offers). The Commerce Commission has published the Offers on its website for the information of all interested parties. On 5 September 2008, the Commission formed a preliminary view not to accept the Offers.

On 31 October 2008, the Commission released the Authorisation for the Control of Supply of Natural Gas Distribution Services by Vector Limited and Powerco Limited, which will result in reductions in prices for gas distribution services.[241] Many network industries have also implemented their own *voluntary* industry codes – though these are not necessarily legally binding. The *New Zealand Gas Pipeline Access Code*, for example, defines standards of behaviour and information disclosure with respect to access to gas transport systems.

The *Commerce Amendment Act 2008* introduced changes to the regulatory regime for gas pipeline services – both distribution and transmission. From 14 October 2008, suppliers of gas pipeline services are subject to information disclosure regulation; and default/customised price-quality regulation under Subpart 10 of Part 4 of the *Commerce Act 1986*.

The Commerce Commission must make a determination specifying how information disclosure regulation applies to each supplier 'as soon as practicable' after 14 October 2008. Until such time as the Commission makes this determination, the information

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[238] Ibid.
[239] Ibid.
[240] Commerce Commission, *Further Opportunity for Submissions and Update on the Authorisation for the Control of Supply of Natural Gas Distribution Services by Powerco Ltd and Vector Ltd*, 2007, Available at: http://www.comcom.govt.nz//IndustryRegulation/Gas/ContentFiles/Documents/Update%20to%20the%20Timetable%20and%20Further%20Opportunity%20for%20Submissions%20on%20Asset%20Valuation%20(July%202008).pdf [accessed on 16 July 2008].
[241] Commerce Commission, *Gas Authorisation Will Further Reduce Prices*, Media Release no. 53, 31 October 2008. Available at: http://www.comcom.govt.nz/IndustryRegulation/Gas/gasauthorisationwillfurtherreducep.aspx [accessed on 16 December 2008].

disclosure requirements made under the *Gas Act 1992*, that is, *Gas (Information Disclosure) Regulations 1997*, continue to apply.

The Commerce Commission's determination may require suppliers to disclose certain specified information relevant to their performance (such as financial statements, prices and quality performance measures), including forward-looking information (such as forecasts and asset management plans).

In relation to default/customised price-quality regulation, the Commerce Commission must make a determination specifying how this regulation applies to each supplier 'as soon as practicable' after 1 July 2010.

The *Commerce (Control of Natural Gas Services) Order 2005* continues in force until it expires on 1 July 2012 or is revoked. Powerco's and Vector's controlled gas services remain subject to the authorisation made by the Commission under Part 5 of the Act until 1 July 2012, unless the authorisation is revoked earlier by the Commission. After this time, the controlled services will be subject to default/customised price-quality regulation.

Regulatory Development

On 2 March 2009, the Minister of Energy and Resources released a revised draft Government Policy Statement (GPS) for consultation, introducing changes to the electricity industry governance arrangements under the new National government.[242] The framework for electricity governance is set out in Part 15 of the *Electricity Act 1992*, which requires the Minister – by way of policy statements – to set the objectives and outcomes for the Electricity Commission to give effect to. The main issues covered in this statement include:

- The Commission's security of supply objective is stated according to the principle of 'winter energy margin' (the margin between forecast capacity and forecast demand), which is required to be 30 per cent for the South Island and 17 per cent for New Zealand overall.
- The Energy Efficiency & Conservation Authority (EECA) is likely to play a greater role both in coordinating energy efficiency across government agencies and in delivering outcomes on behalf of the Commission.
- Streamlining the Commission's approval process for grid projects less than $20m.
- Changes in rural distribution charges are expected to keep in line with changes to urban line charges.
- An expectation that the Electricity Commission and the Commerce Commission will continue to work closely together, including a request to revise the Memorandum of Understanding by 30 November 2008.
- An expectation that the Commission will investigate the provision of guidelines or standards for connecting domestic scale embedded generation.

[242] Ministry of Economic Development, *Draft Government Policy Statement on Electricity Governance*, 2 March 2009. Available at: http://www.med.govt.nz/templates/MultipageDocumentTOC____40361.aspx [accessed on 22 April 2009].

- An expectation that retail competition will place downward pressure on generation prices.

On 1 April 2009, the Minister of Energy and Resources launched the Ministerial review of the electricity market by releasing the Terms of Reference for the review and appointing six independent experts to a technical advisory group.[243] The review arises from government concerns about security of supply, the affordability of electricity, and duplication of electricity industry governance. The review is expected to be undertaken in two phases, with the first phase focusing on regulatory and governance issues, and the second phase addressing issues of electricity market performance.

2. Telecommunications

On 1 April 1987 a new state-owned enterprise (SOE), Telecom Corporation of New Zealand Ltd ('Telecom') was formed, by the separation of the telecommunications element of the Post Office from its postal and banking arms. The regulatory and policy advice functions of the former Post Office were transferred to the Department of Trade & Industry (subsequently the Ministry of Commerce, and then the Ministry of Economic Development). Between 1 October 1987 and 1 April 1989 the supply of customer premises equipment was progressively deregulated. On 1 April 1989, all legal restrictions on telecommunications services market entry were removed. Telecom was privatised in September 1990, and competition in telecommunications services developed from 1991 with the signing of the first interconnection agreement. The regulatory regime was reviewed in 2000, and the new system – featuring an access regime – commenced in 2001.[244]

Mobile telecommunications in New Zealand is now primarily based on a infrastructure-based duopoly. The two infrastructure-based mobile carriers are the fully-privatised incumbent, Telecom New Zealand,[245] and Vodafone New Zealand (formerly BellSouth NZ). A third entrant is expected to enter and there are at least two MVNOs operating in the market.

The fixed-line segment is dominated by Telecom New Zealand. However, TelstraClear has a strong presence in some geographically distinct areas, especially in terms of its cable network. There is now a growing number of competitors accessing Telecom's copper local loop (commonly referred to as Local Loop Unbundling ('LLU')) and providing services using LLU to end users. Broadband penetration – based almost totally on DSL services – is just below the OECD average and a little over half the penetration achieved in the leading countries of the Netherlands and Denmark.[246]

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[243] Minister of Energy and Resource (Gerry Brownlee), *Release on Ministerial Review of Electricity Market*, 1 April 2009. Available at: http://www.beehive.govt.nz/release/ministerial+review+electricity+market [accessed on 29 April 2009].

[244] Early history from Ministry of Economic Development, *Overview of the New Zealand Telecommunications Market 1987-1997*. Available at: http://www.med.govt.nz/templates/MultipageDocumentPage____4847.aspx [accessed on 13 October 2008].

[245] Defined under s. 5 of the *Telecommunications Act 2001* as Telecom Corporation of New Zealand including any of its subsidaries.

[246] OECD, *Broadband Statistics*. Available at: http://www.oecd.org/dataoecd/21/35/39574709.xls [accessed on 14 October 2008].

Regulatory Institutions and Legislation

In December 2006 the New Zealand Government amended the *Telecommunications Act 2001*[247] to require the operational separation of Telecom. In accordance with the amended Act, the Minister published a Determination and an Amendment Determinant in 2007[248] setting out the requirements for separation and Telecom provided Undertakings to comply in 2008. The three-way separation required the creation of separate business units and the Undertakings described the units as the access network services ('ANS') unit (branded in the industry as Chorus, which provides access to competitors to the copper local loop); wholesale services unit (Telecom Wholesale), which sell access to relevant wholesale services[249] and the retail services unit. Telecom has been required to draw up arrangements between the new units consistent with the Undertakings, amend staffing arrangements to ensure ANS employees providing legal or regulatory advice do not work for any other unit and has had to implement 'information walls' to prevent the flow of certain information between units as set out in the Undertakings).[250] The Undertakings also require Telecom to provide services to external parties on the same terms and conditions as the rest of Telecom in accordance with agreed timeframes. .

In addition to the operational separation of Telecom, the amended *Telecommunications Act* also mandates the accounting separation of Telecom's activities. Prior to the amended Act, accounting separation was not compulsory (aside from general accounting practice requirements). Part 2B (s. 69ZB1) requires NZ Telecom to disclose financial information as if 'any or all' of its network, wholesale and retail activities were operated as independent or unrelated companies. The Act gives discretion to the Commerce Commission as to what information is required and how it is to be prepared. The Commission has subsequently stated that the following business units will be required to report separately:

- Chorus (ANS)
- Other fixed network business units
- Wholesale (relevant services)
- Wholesale (non-relevant services)
- Telecom Retail.

In addition, services provided internally by the Technology and Shared Services unit will be required to be allocated to the relevant business unit for reporting purposes.[251] The Commission envisages that full accounting separation of reports will be in place by 1 July 2009.

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[247] *Telecommunications Amendment Act (No. 2) 2006*.

[248] Minister of Communications, *Telecommunications (Operational Separation) Determination 2007*, 26 September 2007; *Telecommunications (Operational Separation) Amendment Determinant 2007*, 24 December 2007, made in pursuant to Section 69F of the *Telecommunications Act 2001*.

[249] A list of relevant wholesale services can be found here: http://www.telecomwholesale.co.nz/wholesale_relevant_services [accessed on 2 December 2008].

[250] Telecom has indicated that it will take some time to amend its IT system which was not designed to partition information from employees in different divisions.

[251] Commerce Commission, *Draft Principles and Regulatory Reporting Requirements for the Accounting Separation of Telecom*, June 2008. Available at: http://www.comcom.govt.nz//IndustryRegulation/Telecommunications/AccSepofTelecom/ContentFiles/Documents/DraftRequirements20062008.pdf [Accessed on 2 December 2008].

The Commerce Commission regulates the telecommunications industry under the *Telecommunications Act 2001* in other ways. There are two levels of regulated services provided for in the legislation – designated and specified services. For designated services the Commission can determine the price of supply. In contrast, specified services do not allow for a determination of pricing arrangements and are limited to non-price terms and conditions.

The Commission has a range of regulatory 'tools' for the purpose of setting the terms of supply for a designated or specified service under the Act. An access seeker or an access provider may apply to the Commerce Commission for a determination of all or some of the terms on which the service must be supplied during the period of time specified in the application.[252] Bilateral determinations can be used to resolve particular disputes referred to in the application and arising between an access provider and an access seeker.

The *Telecommunications Act* enables the Commission to make, as an alternative to bilateral access determinations, a determination on which a designated or specified service must be supplied with reference to all access seekers and access providers of the service. Such a determination is referred to as a standard terms determination (STD). An access provider subject to such regulation must provide the described services to an access seeker in accordance with the standard terms determination. Further explanation about the process followed in these determination processes is addressed in the next section.

There are currently standard terms determinations (STDs) (in force or being determined) for the following designated services:

- Unbundled Copper Local Loop Service (access to the copper local loop between the end user and Telecom's telephone exchange);
- Unbundled Bitstream Service (access to a digital subscriber line enabled service);
- Three Sub-loop Services: Sub-loop Unbundled Local Loop (access to the copper line between the end user and Telecom's distribution cabinet), Co-location in the Distribution Cabinet and Sub-loop Backhaul (access to fibre between Telecom's Distribution Cabinet and Telecom's telephone exchange);
- Unbundled Local Loop Co-location Service;
- Unbundled Bitstream Backhaul Service (access to transmission capacity to complement the Unbundled Bitstream Service); and
- Unbundled Local Loop Backhaul Service (access to transmission capacity to complement access to the Unbundled Copper Local Loop Service).

In addition, the Commission has recently concluded a standard terms determination for the Mobile Co-Location Service – a specified service allowing access to co-location on cellular mobile transmission sites.[253]

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[252] *Telecommunications Act 2001* (New Zealand), s. 20.

[253] Commerce Commission, *Making and Reviewing STDs*, 2008. Available at: http://www.comcom.govt.nz/IndustryRegulation/Telecommunications/StandardTermsDeterminations/makingandreviewingstds.aspx [accessed on 22 July 2008].

National roaming on cellular mobile telephone networks is also a specified service under the *Telecommunications Act 2001*, but the Commission has not yet been required to determine the terms of access for this service.

When the Commission makes a determination that includes price using the relevant initial pricing principle, any party to that determination may apply for a review of the price using the relevant final pricing principle.

The Commission may also, on its own initiative, initiate the process for a determination of the functions that must be performed by a system for delivering a designated multi-network service and the formula for how the cost of delivering the service must be apportioned between the access seeker and all access providers of the service (s. 31AA(1)).

Part 3 of the *Telecommunications Act* requires the Commission to determine and allocate the net cost of contracts which have been declared by the Minister as Telecommunications Services Obligations. In addition to these roles, the Commission must also assess compliance with the declared instruments to the specified standard. There are currently two telecommunications services obligations; Telecom's obligations for local residential telephone service; and Sprint New Zealand's obligations for telecommunications relay service.

The Commission has a quasi-policy-role under Schedule 3 of the Act. The rules of this Schedule allow recommendations to be made to the Minister of Telecommmunications about currently regulated services or new services that could be designated and/or specified for the purposes of regulation.

Amendments made to the *Telecommunications Act* in 2006 allow access providers to submit undertakings as an alternative to regulation for services that the Commission is proposing to regulate. The decision on acceptance of any undertakings as an alternative to regulation is taken by the Minister of Communications. The Commission received its first access undertaking from Vodafone in 2007, as part of its mobile services review.

Aside from its enforcement and arbitration duties as economic regulator, the Commission publishes discussion reports on important issues in the industry incorporating submissions from industry participants and stakeholders. Since the 2006 amendments, the Commerce Commission is formally empowered to 'continuously monitor the performance and development of the telecommunications industry and its markets'.[254] It also facilitates workshops and holds conferences. It conducts inquiries, reviews and studies relating to the telecommunications industry, and publishes reports, summaries and information about these activities. The Commission publishes quarterly telecommunications Industry updates.

Process and Consultation

The Commission must follow consultation processes under the *Telecommunications Act* in relation to each of its regulatory decisions. In this section, a few of the processes are explained in relation to some of these decisions.

On the receipt of a bi-lateral determination application, the Commission must notify all parties to the determination and request the parties to forward their written

[254] Commerce Commission, *Making and Reviewing STDs*, 2008. Available at: http://www.comcom.govt.nz/IndustryRegulation/Telecommunications/StandardTermsDeterminations/makingandreviewingstds.aspx [accessed on 22 July 2008].

comments on the matter to the Commission within ten working days of notification (s. 24). The Commission must decide whether to investigate the matter. Section 22 sets out the conditions under which the Commission will not consider an application for a bi-lateral determination including a condition that the applicant has not 'made reasonable attempts to negotiate the terms of supply of the service with the person who would otherwise be a party to the determination'. This particular requirement allows industry participants to take initiatives to ensure that access contracts are arrived at through commercial negotiation rather than formal mediation. After considering the relevant conditions, the Commission must then make a public notification of the decision within ten working days from receipt of the parties' comments (s. 25). The matter cannot be investigated if the access provider or access seeker has not made reasonable attempts to negotiate the terms of supply of the service with each other.

If the Commission considers that persons, other than the parties to the bi-lateral determination, have a material interest in the matter to be investigated, the Commission must, before preparing a determination, either consult those persons or hold conferences in relation to the matter (s. 26).

The *Telecommunications Act* also contains instructions for STD development. Section 30C allows the Commission to initiate the standard terms development process for a designated access service or specified service. Section 30D requires that the Commission give public notice of the standard terms development process. It is also required, under s. 30E, to conduct one or more scoping workshops in relation to the designated or specified services. The purpose of a scoping workshop is to provide the Commission with information to assist it in specifying the period of time within which an access provider must submit a standard-terms proposal, and any additional requirements for that proposal.[255]

Section 30F sets out that, after the scoping workshop, the Commission must give written notice to one or more access providers of the service requiring them to submit to the Commission, by the date specified in the notice, a standard-terms proposal that complies with s. 30G. The access provider must comply with this request. If the access provider does not comply with the request, s. 30H provides that the Commission may either request another access provider or access seeker to submit a proposal, or prepare a draft standard-terms determination even though it has not received a standard terms proposal.[256]

Upon receipt of a standard-terms proposal the Commission is required under s. 30I to give notice of the proposal and specify a date for submissions on the proposal. After the consultation round, the Commission must then prepare a STD in accordance with s. 30K. The Commission must request submissions on the draft determination. Section 30L sets out that if the Commission considers that persons other than the parties to the determination have a material interest in a standard terms determination, it must consult those persons or hold a conference in relation to the matter.[257]

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[255] Commerce Commission, *Broadband Standard Terms Determination: Scoping Workshop*, 2007. Available at: http://www.comcom.govt.nz/IndustryRegulation/Telecommunications/StandardTermsDeterminations/UnbundledLocalLoopService/DecisionsList1.aspx#802 [accessed on 29 July 2008].
[256] Ibid.
[257] Ibid.

Conferences are publicised online and to any party who made a submission on the draft STD. Generally, the following procedures apply: [258]

> Oral statements will be made from a central table. Parties are not required to provide a statement of issues or written submissions prior to the conferences.
>
> Members of the Commission and staff will question the parties. The parties may only ask questions of the Commission for the purpose of clarifying a question. No party will have the right to cross-examine any other party during the proceedings. If necessary, closed sessions will be arranged where confidential information is discussed.
>
> All parties are required to provide 25 copies for attendees of any document (such as a PowerPoint presentation) produced during the conference. Following the conference, an electronic version of the document is also required (pdf format preferred) for publishing on the Commission's web site.
>
> A computer and data projector (for PowerPoint presentations) will be available for use by parties making statements.
>
> As is normal procedure, the conferences will be recorded on audiotape. A stenographer will also provide a transcript for conferences. Copies of transcripts will be made available on the Commission's website.

After completing consultation on the draft STD, the Commission must prepare a final STD that includes all the matters set out in s. 30O and the additional matters set out in s. 30P where appropriate. Most importantly, a standard terms determination must specify sufficient terms to allow, without the need for the access seeker to enter into an agreement with the access provider, the designated access service or specified service to be made available within the specified timeframe.[259]

This formal statutory process is summarised below:[260]

- The Commission initiates standard terms development process;
- The Commission holds scoping workshop;
- The Commission issues notice calling for standard terms proposal from the access provider(s);
- The access provider submits standard terms proposal by specified date;
- The Commission advises of the receipt of standard terms proposal;
- Interested parties provide submissions on standard terms proposal;
- The Commission issues draft STD;
- Interested parties provide submissions and cross-submissions on draft STD;
- The Commission may hold conference; and

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[258] Commerce Commission, *Broadband Standard Terms Determination: Conference Arrangements*, 2007. Available at: http://www.comcom.govt.nz//IndustryRegulation/Telecommunications/StandardTermsDeterminations/UnbundledLocalLoopService/ContentFiles/Documents/Conf%20arrangements.pdf [accessed on 29 July 2008].

[259] Commerce Commission, *Broadband Standard Terms Determination: Scoping Workshop*, 2007. Available at: http://www.comcom.govt.nz/IndustryRegulation/Telecommunications/StandardTermsDeterminations/UnbundledLocalLoopService/DecisionsList1.aspx#802 [accessed on 29 July 2008].

[260] Commerce Commission, *Making and Reviewing STDs*, 2008. Available at: http://www.comcom.govt.nz/IndustryRegulation/Telecommunications/StandardTermsDeterminations/makingandreviewingstds.aspx [accessed on 22 July 2008].

- The Commission issues standard terms determination.

During any determination process, the Commission may call on any expert or consultant it deems relevant to its investigations. Further, the parties may provide evidence prepared by experts and consultants as part of their submissions.[261]

The determination processes in the Act involve consultation, discussion and submissions by all interested parties. Although parties may opt to seek legal representation, cases are not considered in formal court-style conditions.

Timeliness

This section explains, using examples, how the Act promotes timeliness considerations throughout the Commission's processes.

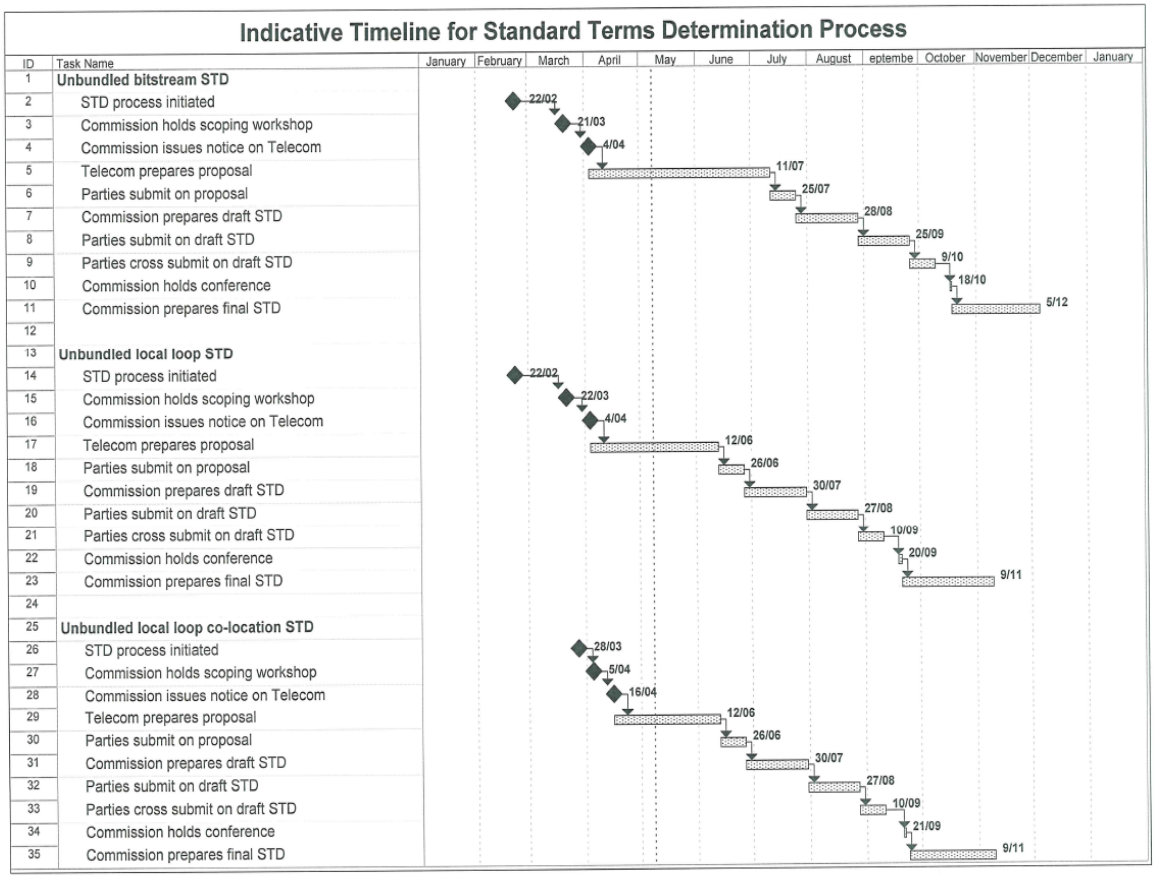
As part of the STD process, the access provider is required to prepare a standard terms proposal. The timeframe for delivery of the proposal is set by the Commerce Commission on the basis of discussions at an initial scoping workshop. The timeframe is set by the Commission and failure to comply can result in enforcement action under Part 4A of the Act.

Under s. 30K of the *Telecommunications Act 2001*, the Commerce Commission is required to make reasonable efforts to prepare a draft STD, and issue a public notice seeking submissions on that draft, within 60 working days of receiving the standard terms proposal.

The Commission determines and publishes an indicative timetable for the *Standard Terms Determination* (STD) development process. An example, taken from the 2007 Local Loop Unbundling STD process, is shown in the figure below.

[261] Telecom, *Telecom Submission on Draft Determination – Annex B*, 2006. Available at: http://www.comcom.govt.nz/IndustryRegulation/Telecommunications/InterconnectionDeterminations/InterconnectionDeterminations/telstraclear.aspx [accessed on 21 July 2008].

Timeline for STDs[262]



Section 28(1) of the *Telecommunications Act* stipulates the following timeframes for the preparation of bi-lateral determinations*:*

> The Commission must make reasonable efforts to prepare a determination:
>
> (a) if the determination does not include the price payable for the supply of the service, not later than 40 working days after it gave written notice (of its decision to investigate); or
>
> (b) if the determination includes the price payable for the supply of the service, not later than 50 working days after it gave written notice (of its decision to investigate)

More specifically, up until that point, the *Telecommunications Act 2001* also requires that:

- The Commission request the parties to the determination to comment on the matter by written notice to the Commission not later than ten working days after receipt of the initial notice from the Commission (s. 24).
- The Commission must make reasonable attempts to decide whether to investigate a matter brought before it no later than ten working days after the date by which the parties may comment on the application. (s. 25).
- The Commission must also give public notice of the decision to be given. (s. 25)

[262] Commerce Commission, *Broadband Standard Terms Determination: Indicative Timelines*, 2007. Available at: http://www.comcom.govt.nz//IndustryRegulation/Telecommunications/StandardTermsDeterminations/UnbundledLocalLoopService/ContentFiles/Documents/STD%20timeline0.pdf [accessed on 29 July 2008].

- The Commission request the parties to the determination to make submissions on the matter by written notice to the Commission not later than 10 working days after receipt of the notice to investigate from the Commission (s. 25).

If, despite making reasonable efforts, the Commission is unable to adhere to the relevant time limits set out in s. 28(1), the Commission must give to the parties concerned written reasons for not meeting the relevant time limit (s. 28(2)). The legislation requires that the Commission 'make reasonable efforts' (s. 28(1)) to make determinations within the time limits, implying there is no penalty for not doing so.

Role of Interested Parties

The Telecommunications Carriers' Forum (TCF) works collaboratively on the development of key industry standards and codes of practice. The TCF works with a wide variety of industry participants and government agencies to promote competition and investment, accelerate the introduction of new-generation services, and encourage excellence in customer service. The forum facilitates co-operation amongst telecommunications carriers to encourage the efficient provision of regulated services, not inconsistent with the *Telecommunications Act 2001*; and non-regulated telecommunications services.

The Telecommunications Carriers' Forum (TCF) may on its own accord or if invited to do so by the Commerce Commission, under Schedule 2 of the *Telecommunications Act 2001*, propose telecommunciations access codes to the Commission for approval. Under s. 4 of Schedule 2 of the *Telecommunications Act 2001,* the TCF must take all practical steps to ensure any stakeholder that is affected or likely to be affected by a draft code is invited to vote on its acceptance. The TCF also provides evidence, studies and opinions to the Commerce Commission for the purposes of advice on STDs.

The Telecommunications Users Association of New Zealand (TUANZ) is a not-for-profit organisation that promotes the needs of end users of telecommunications in New Zealand.

Information Disclosure and Confidentiality

Section 98 of the *Commerce Act 1986* allows the Commission to require a person to supply information or documents or give evidence where the Commission considers it necessary or desirable for the purpose of carrying out its functions and exercising its powers.

Parties may request that the Commerce Commission make an order of confidentiality (s. 100 of the *Commerce Act*).[263] The Commerce Commission may prohibit the publication or communication of any document or evidence submitted to it in relation to an application, under penalty of fines, for the duration of the Commerce Commission's deliberation. Such an order will expire after the delivery of the final decision of the Commerce Commission. After that time, the provisions of the *Official Information Act 1982* shall apply.

Information is stored electronically. In 2006 the Commission undertook a security review and risk treatment plan for confidential information. This included developing an information security policy, a new visitor log system and improved practices for

[263] Section 15(i) of the *Telecommunications Act* allows the Commission to exercise the s. 100 power.

handling electronic information. A secure electronic evidence environment and upgraded document management system were also put in place.[264]

Appeals

Decisions under the *Telecommunications Act* may be appealed to New Zealand's High Court on questions of law and are subject to judicial review through the normal legal channels. This process (as discussed previously under the section 'Approach to Competition and Regulatory Institutional Structure') is separate from the other processes with regard to access determinations.

However, no party may appeal against a determination while a clarification, reconsideration or STD review is pending (ss. 291-317A of the *High Court Rules*).[265]

If appeal against a determination is commenced, the determination continues to have effect and is enforceable until the proceedings are finally disposed of.

Other than judicial review or appeals on questions of law, determinations may be subsequently clarified, reconsidered, or reviewed in certain circumstances by the Commission.

For any determination, s. 58 of the *Telecommunications Act* allows the Commission to, at any time, on its own initiative or on the application of any person, amend a determination for the purpose of making a clarification, subject to no pending appeal against the determination.

Regarding reconsideration, under s. 59 of the *Telecommunications Act 2001*, the Commission may, at any time, on the application of a party to a determination, revoke or amend the determination or revoke the determination and make a further determination in substitution for it if the Commission considers that:

- there has been a material change of circumstances since the date on which a determination was made or last reconsidered; or
- the determination was made on the basis of information that was false or misleading in a material particular.

In reconsidering a determination, the Commission must follow the same process that was followed for the initial determination. To avoid doubt, a determination continues to have effect and is enforceable pending its reconsideration.

For a Standard Terms Determination (STD), the Commission can, on its own initiative, commence a review at any time of all or any of the terms specified in a STD (s. 30R of the *Telecommunications Act 2001*).

Although a review of the STD for a service can only be initiated by the Commission, parties are also encouraged to discuss with the Commission whether issues of concern could be dealt with by a review under s. 30R. If a party wishes to bring a matter to the Commission's attention for review, the party should provide sufficient

[264] Commerce Commission, *Annual Report*, 2006. Available at: http://www.comcom.govt.nz//Publications/ContentFiles/Documents/Commerce%20Commission%20Annual%20Report%202006_07%20web%20pdf.PDF [accessed on 21 July 2008], p. 27.
[265] *Judicature Act 1908*, Schedule 2: The High Court Rules, (New Zealand).

information to enable the Commission to make an informed decision regarding whether to initiate a review.[266]

For a Standard Terms Determination review, the Commission is required to:

- consult all parties to the determination on the review;
- give public notice2 of the commencement of the review;
- include in the public notice under (b) the closing date for submissions; and
- give public notice of the result of the review.

Apart from these requirements, the Commission may conduct the review in a manner and within a timeframe, as the Commission thinks fit. This enables the Commission to assess the appropriate form and degree of consultation on a case by case basis. However, the Commission will give notice in the Government Gazette and on its website.

In addition, if there is unanimous agreement of the TCF for a particular change, the consultation process may be very short and completed quickly. There is no specific requirement in the Act to issue a draft review determination but the Commission may or may not opt to do so, depending on the circumstances.[267]

After review, the Commission may replace or vary or delete any terms of the STD, if it considers necessary to do so. The review can also address aspects of a designated access service, or a specified service not covered in an initial STD, and update the terms of an STD to reflect regulatory or technological change. The Commission must give public notice of the result of the review.

3. Posts

New Zealand Post (NZP) has been a government-owned enterprise since 1987 when postal reform started. The *Postal Services Act*, taking effect on 1 April 1998, completely removed NZP's statutory monopoly on the carriage of letters and opened up the market to any company or individual for conducting a letter delivery business that meets the statutory requirements.

NZP remained the universal service carrier by signing a new *Deed of Understanding* that was established for an indefinite period, with the Crown in 1998. On a *quid pro quo* basis, NZP remains New Zealand's sole representative at the Universal Postal Union. If the government were to designate additional operator(s) in the future, the terms of the Deed would be reviewed.

NZP maintains a dominant position in the letter market and has expanded into the private sector through a portfolio of joint ventures and acquisitions, such as a joint venture (Express Couriers Limited) with DHL in 2005 on courier and logistics businesses. NZP is also very active in data management and direct mail processing (Datamail Group), competing against numerous other suppliers. The company has also become one of the largest postal consultancy companies in the world.

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[266] Commerce Commission, *Review of Standard Terms Determination*, 2007. Available at: http://www.comcom.govt.nz//IndustryRegulation/Telecommunications/StandardTermsDeterminations/ContentFiles/Documents/REVIEW%20OF%20STANDARD%20TERMS%20DETERMINATION.pdf [accessed on 29 July 2008].

[267] Ibid.

Under the *Postal Services Act*, all persons carrying out business as a postal operator must apply to the Chief Executive of the Ministry of Economic Development to be registered (except where a person is acting as an employee or agent of a postal operator).[268] The Ministry can not decline registration unless the applicant has been convicted of certain offences. A simple form is required to register on the Postal Register with the Ministry. By the end of 1998, there were 17 registered operators in New Zealand, and most were small and localised. Larger competitors emerged with Fastway Post (a subsidiary of Fastway Couriers) being the first to set up a franchised nationwide network of retail outlets, and with New Zealand Document Exchange Limited (DX Mail) providing regular business-focused deliveries in major cities. As of 1 April 2008, there were 29 licensed postal operators, and a handful of these have set up relatively broad delivery networks.

There is no designated postal regulator in New Zealand. NZP is subject to economy-wide competition law – the *Commerce Act 1986*.

The current Deed of Understanding concluded in 1998 requires NZP to carry basic letter post at prescribed service standards in terms of the frequency of deliveries and the number of postal outlets that NZP agrees to maintain.

The current Deed also requires NZP to provide access to its postal network to competitors on terms and conditions that are no less favourable than those offered to equivalent customers. Accordingly, the postal operators negotiate access arrangements with NZP privately, most of which have been updated in 2008. The terms and conditions are governed by clauses on the abuse of a dominant position in s. 36 of the *Commerce Act 1986*. There are no regulatory processes in place in relation to these arrangements. The Minster (for Economic Development) will refer any allegation of NZP's incompliance with the terms of the Deed to NZP for verifying the accuracy of the allegation and corrective action required.

The current Deed also prohibits NZP from re-introducing the rural delivery fees payable by rural delivery mail contractors. No other price regulation has been in place since 2001.

The *Postal Services (Information Disclosure) Regulations 1998* were introduced in May 1998 to facilitate postal liberalisation and to ensure compliance with the Deed. Under these regulations, NZP is required to disclose information in relation to the following:

- the number of delivery points and postal offices;
- the quality of services;
- separate profit and loss statements for letters carried within the country and other services;
- each set of standard terms of conditions, together with the price usually charged for the carriage of letters on that set of terms and conditions, and discounts of more than 20 per cent; and

[268] Ministry of Economic Development, *Postal Services in New Zealand*, 1998. Available at: http://www.med.govt.nz/templates/Page____1441.aspx [accessed on 24 July 2008].

- the full details of all access agreements reached with private postal operators with 15 working days.[269]

4. Water and Wastewater

New Zealand's geography and small population mean that water is plentiful and reliable, and issues of wastewater treatment and disposal are less pressing than in many other OECD countries. Responsibility for water and wastewater lies with municipalities, in some cases where municipalities are interconnected with regional supply and/or disposal operations. For example, six councils in the Auckland area (Metrowater, North Shore City Council, Manukau Water, United Water, Rodney District Council, Waitakere City Council), purchase their bulk water from the regional supplier, Watercare Services Limited. Watercare is also responsible for wastewater removal on a regional basis.

Watercare is a council-owned organisation under the *Local Government Act 2002* and it is a company registered under the *Companies Act 1993*. The city and district councils of Auckland, Manukau, North Shore, Waitakere, Papakura and Rodney own Watercare. The owners appoint a shareholders' representative group, appoint Watercare's board of directors and determine the company's overall objectives.[270] Watercare is New Zealand's largest company in the water and wastewater industry. The company supplies bulk water to the Auckland region, an area of approximately 340 square kilometres, through a regional water network. The water is supplied to six water retailers which in turn supply the water to their customers. Watercare also operates a regional wastewater network, receiving wastewater from four of the region's councils, treating an average of 288 000 cubic metres of wastewater a day at the Mangere Wastewater Treatment Plant.

Provision of new capital works is largely by independent contractors. Councils generally ceased to do any capital works with their own staff by the early 1990s. Similarly, provision of professional advice and design services is now very largely with private consultants.[271]

Regulatory Institutions and Legislation

The *Local Government Act 2002* (s. 130) puts an obligation on each local authority to maintain the water services that it has developed and the city council is unable to divest its ownership of these assets except to another local government organisation. In addition, the *Health Act 1956* requires local authorities to provide 'sanitary works', the definition of which includes drainage works and includes all lands, buildings, and pipes used in connection with any such works.[272]

Councils are guided in their decisions by Regional Policy Statements and Regional Plans. These lay out environmental objectives, policies, rules and processes, and sometimes set quality standards or specify how much water can be taken from particular water bodies.[273]

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[269] New Zealand Ministry of Economic Development, *Report on Postal Services in New Zealand*, 1998.
[270] See information at: http://www.watercare.co.nz/default,about-us.sm [accessed on 3 November 2008] and Water New Zealand, *Introduction to the New Zealand Water Industry*, 2004. Available at: http://www.waternz.co.nz/watind.htm [accessed on 25 July 2008].
[271] Ibid.
[272] Ministry for the Environment, S*ustainable Water Programme of Action*, New Zealand, 2008. Available at: http://www.mfe.govt.nz/issues/water/prog-action/index.html [accessed on 25 July 2008].
[273] Ibid.

The *Resource Management Act 2001* (RMA) obliges councils to consult Māori and the wider community on Regional Policy Statements and Regional Plans. Councils also determine social, economic, environmental and cultural outcomes for water quality through the 'long-term council community plans' that they are required to develop under the *Local Government Act*.[274]

Section 30 of the RMA allocates various functions to regional councils:

- surveillance and rule creation for water quality and water extraction;
- in conjunction with the Minister of Conservation, the taking, use, damming, and diversion of water;
- activities in relation to the surface of water;
- setting of maximum or minimum flows of water in any water body;
- setting of rules in a regional plan as to the use and discharge of water.

Resource Consents – Process

Resource Consents are also known as water permits for the use/diversion of water. Regional councils issue resource consents under the *Resource Management Act*. Water retailers and network operators must obtain resource consents. Guidelines on processes for applying for them are set out in the Act. Decisions of the council with regard to resource consents can be appealed. The regional council may hold a public hearing in relation to an application for a resource consent and (RMA, s. 39):

> shall establish a procedure that is appropriate and fair in the circumstances. In determining an appropriate procedure the authority shall avoid unnecessary formality, recognise Tikanga Maori where appropriate, not permit any person other than the chairperson or other member of the hearing body to question any party or witness and not permit cross-examination.

Under the *Resource Management Act*, Metrowater and Auckland City are required to renew their resource consents (currently existing use rights) for discharges from these networks and for elements of the infrastructure itself.[275]

5. Rail

The rail system in New Zealand has undergone considerable changes in ownership and regulation in the past fifteen years. In 1993 the Crown sold the rail network, but in 2002, the Crown repurchased the Auckland urban rail network. Then, in 2003, the Crown entered a Heads of Agreement to purchase the national rail network, which was effected in 2004. Since the repurchase of the national rail infrastructure in 2004, arrangements for the rail network (excluding the Auckland urban rail network) were set out under the *National Rail Access Agreement* between the Crown and Toll NZ. The Agreement granted Toll NZ exclusive access rights until 2070 (with limited exceptions) to the track for freight, passenger services on the Wellington urban rail network, and long-distance passenger rights. These rights were subject to 'use it or lose it' provisions.[276]

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[274] Ibid.

[275] Metrowater, *Network Consent Application*, 2005. Available at: http://www.metrowater.co.nz/environmental/nca.aspx [accessed on 25 July 2008].

[276] Controller and Auditor-General of New Zealand, *2008 Reports – Maintaining and Renewing the Rail Network (Part 2)*, 2008. Available at: http://www.oag.govt.nz/2008/ontrack/part2.htm [accessed on 24 July 2008].

Under the *National Rail Access Agreement*, Toll NZ was to pay ONTRACK a track access charge agreed for a period of three years at a time.[277]

In its *National Rail Strategy to 2015*, published in May 2005, the Ministry of Transport provided the following description of the Agreement:

> Toll NZ has exclusive access rights until 2070 for freight, existing long-distance passenger operations, and the Wellington metro passenger service. Auckland urban rail passenger services are provided by Connex New Zealand under contract to the Auckland Regional Transport Authority. Toll NZ freight and passenger rights are subject to 'use it or lose it' provisions. New operators will be able to operate long-distance passenger services on routes not serviced by Toll NZ from July 2007.
>
> Other operators can exercise their existing access rights on the network, and can be granted access rights to line segments where Toll NZ is unable to meet its 'use it or lose it' obligations, or does not take up its right to operate over new sections of the network. In such circumstances ONTRACK will grant access rights to new operators on a non-exclusive basis. Heritage operators will negotiate with ONTRACK for the use of the network.
>
> ONTRACK will be responsible for setting Track Access Charges (TAC) for all operators. In setting access charges, ONTRACK will be required to recover the costs of operating the network, beyond the initial funding of $200 million. The agreements with Toll NZ and Connex New Zealand (Veolia Transport Auckland – the Auckland passenger operator) provide a process for agreeing the TAC related portion of ONTRACK's budget, and the agreement with Toll NZ also provides for agreeing increases to ONTRACK's capital base, both of which will be key determinants of the level of the TAC.

ONTRACK and Toll NZ were unable to reach agreement about the track access charge for 2005-08. Therefore, in keeping with the terms of the Agreement, a track access charge was determined using an independent third party (Bill Wilson QC) in late 2006.

ONTRACK and Toll NZ did not consider that the track access arrangements were providing them with the certainty they would have liked. ONTRACK claimed that negotiations over the track access charge had prevented meaningful discussions with Toll NZ about future plans for the rail network. In its 2007 *Annual Report*, Toll NZ reported that it was:

> … ready to make the investment needed to lift rail performance levels and service delivery to customers. We require only the certainty of an access agreement, to allow us to proceed with these plans.

In May 2008, the Government announced an agreement with Toll NZ's parent company to purchase Toll NZ's rail and ferry operations.[278]

A New Zealand Government media release reported:[279]

> The government will pay a purchase price of $665 million for the rail and ferry business with settlement on 30 June 2008.
>
> 'The selling off our public rail system in the early 1990s and the running down of the asset afterward has been a painful lesson for New Zealand,' Dr Cullen said.
>
> 'The government will now avoid paying subsidies to third parties and we also avoid the on-going disputes over the implementation of the National Rail Access Agreement that

[277] Ibid.
[278] Ibid.
[279] H. Clark, *Rail Buyback Marks New Sustainable Era for Transport*, Official Website of the New Zealand Government – Media Release, May 2008, Available at: http://www.beehive.govt.nz/release/rail+buy+back+marks+new+sustainable+era+transport [accessed on 24 July 2008].

had the potential to destroy value in the business and erode the morale of the people who work in it.'

The New Zealand Railways Corporation (ONTRACK) owns and operates the national rail network on behalf of the Crown. ONTRACK provides rail operators (KiwiRail, Auckland TLAs and heritage operators) with access to the tracks.

Negotiating the track access charge and future rail network arrangements has been a major focus for ONTRACK's senior management team.

In February 2006, ONTRACK changed from using contractors for rail maintenance work to using its own staff to do the work. It did this by forming a subsidiary company – ONTRACK Infrastructure Limited (OIL) – and increasing total staff numbers (including OIL staff) from 150 to about 780.

Regulatory Institutions and Legislation

The Minister of Transport introduced the *Rail Network Bill* on 15 March 2005.[280] The Bill is an administrative bill and establishes the long-term structure of the New Zealand Railways Corporation (ONTRACK). The Bill intends to repeal ONTRACK's existing legislation (the *New Zealand Railways Corporation Act 1981* and the *New Zealand Railways Corporation Restructuring Act 1990*). The Bill aims to align the objective and functions of the entity with the New Zealand Transport Strategy without compromising its commercial focus. It provides for the entity's new objective and functions, and some principles concerning how it must perform its functions, and changes it from a State-owned enterprise to a Crown entity.

Important Clauses of that Bill include:[281]

- *Clause 6 Subclause 3* – provides that the entity's board must have at least five, but no more than eight board members.
- *Clause 12* – provides for the entity to prepare a rail network development plan, which must take into account any current national land transport strategy, the National Energy Efficiency and Conservation Strategy, and relevant regional land transport strategies.
- *Clause 36* – provides, with several minor exceptions, that no railway line that is under the control of the entity may be closed to traffic without the prior written consent of the Minister.

On 1 July 2008, Toll NZ's Rail operations became owned by the New Zealand Government and were renamed KiwiRail. KiwiRail is New Zealand's leading transport operator, providing linehaul services for the movement of bulk commodities or containerised freight. Tranz Link is the retail arm of KiwiRail and is retained under the control of Toll NZ.[282]

The Auckland Regional Transport Authority (ARTA) is New Zealand's only regional transport authority. It was set up in late 2004 to be the central coordinating agency for managing transport in the Auckland region. Auckland's rail system extends from

[280] Impliedly from the New Zealand Ministry of Transport website [accessed on 15 September 2008] the bill is still a bill, three and a half years after it was introduced.

[281] Ministry of Transport, *Rail Network Bill*, 2005. Available at: http://www.transport.govt.nz/assets/NewPDFs/rail-network-bill-20052511.pdf [accessed on 24 July 2008].

[282] KiwiRail, *Home*, 2008. Available at: http://www.kiwirail.co.nz/index.php?page=home [accessed on 24 July 2008].

Pukekohe in the south and from Waitakere in the west to the Auckland CBD (Britomart Transport Centre). Services are divided into three groups – Western Line, Southern Line and Eastern Line. ARTA has the key role of integrating the work of national transport agencies, local councils and ARTA itself to create a better transport system for Auckland.[283] ARTA is responsible for the planning and development of train services, stations and trains. It works with ONTRACK (which owns, maintains and controls the rail tracks) and Toll Rail Ltd (who maintain and refurbish rolling stock on ARTA's behalf) to plan the development of the rail corridor.[284] ARTA contracts the day-to-day running of the region's train services to Veolia Transport (Connex Auckland).[285]

Note that it has not been possible to categorise the regulatory process into the standard categories used in other industries. This is because New Zealand rail has not been subjected to economic regulations involving price controls, access to rail track, etc. that would necessitate putting in place a regulatory structure with associated processes and procedures in reaching decisions.

6. Airports

Mountainous terrain and long distances in New Zealand have facilitated the growth of domestic air travel; most provincial towns have airports, and all major urban centres are linked by air service. The three largest airports in New Zealand by total revenue and volume (aircraft movements, passenger numbers, and freight volumes) are Auckland, Wellington and Christchurch. These airports are the principal international airports.

Regulatory Institutions and Legislation

The current regulatory regime for airports in New Zealand is 'light handed'. Since 1986, airports have been subject to the generic pro-competitive and regulatory provisions in the Act, including the threat of control under Part 4 of the *Commerce Act*. In addition, they are also subject to the *Airport Authorities Act 1966* (AAA), which requires airports to operate as commercial undertakings. The AAA and associated regulations include provisions to address competition concerns and enhance the countervailing market power of airlines.[286]

Parts IV and V of the *Commerce Act* contain provisions providing for the control of the prices, revenues and quality standards of goods and services, where markets fail to deliver competitive outcomes and there is scope for the exercise of substantial market power (s. 52G).

Under s. 4A of the AAA, airport operators are required to consult airline customers when setting charges, and also when undertaking major capital expenditure. Section

[283] Ibid.

[284] Auckland Regional Transport Authority (ARTA), *Annual Report 2006*, 2006. Available at: http://www.arta.co.nz/assets/arta%20publications/publications%20page/ARTA%20Annual%20Report%202006-07.pdf [accessed on 24 July 2008]. In the report, the ARTA made appreciative mention of ONTRACK's decision to involve itself in the creation and implementation of the coordinating body's transport development plan, 'despite its legal right to develop its own plans separately'.

[285] Auckland Regional Transport Authority (ARTA), *Trains*, 2005. Available at: http://www.arta.co.nz/what-we-do/working-for-public-transport/deleted.html [accessed on 24 July 2008].

[286] Hon. Lianne Dalziel, *Regulatory Control Inquiry into Airfield Activities: Memorandum to Cabinet*, from the Minister of Commerce, May 2003, Paragraph 8.

4A allows an airport company – after consulting with substantial customers[287] – to set such charges as it thinks fit for the use of the airport and its services or facilities.

The *Airport Authorities (Airport Companies Information Disclosure) Regulations 1999* were issued pursuant to the AAA, in respect of the three major international airports at Auckland, Wellington and Christchurch. These regulations are administered by the Ministry of Transport. The airport companies are required to disclose: audited segmented financial statements for identified airport activities; passenger charges and charges for identified airport activities (and the methodology used to determine the charges); the basis for allocating assets to identified airport activities; details of asset revaluations; operating costs of identified airport activities; WACC and the methodology and calculations used to determine WACC; numbers of passenger and aircraft movements; interruptions to services; and the number of people employed in identified airport activities.[288]

Because of the light-handed approach taken to the economic regulation of New Zealand airports it is not possible to discuss the regulatory process using the six categories applied elsewhere in this report.

Legislative changes introduced by the *Commerce Amendment Act 2008* have transferred responsibilities for information disclosure regulation, in respect to Auckland, Christchurch and Wellington International Airports, to the Commerce Commission – effective from 14 October 2008. Under Subpart 11 of Part 4 of the *Commerce Act,* the Commission is required to make a determination specifying how information disclosure regulation applies to each of the airport companies no later than 1 July 2010. Until this determination is made, the *Airport Authorities (Airport Companies Information Disclosure) Regulations 1999* continue to apply.

Subpart 11 of Part 4 also requires that, as soon as practicable after any new price for a specified airport service is set in or after 2012, the Commission provide a report to the Ministers of Commerce and Transport as to how effective information disclosure is at promoting the purpose of Part 4 in respect of those services.

Regulatory Development

There has been considerable debate over the approach to the economic regulation of airports in New Zealand's, with airlines arguing for a stronger regime, and the airports defending the status quo, a requirement for airports to consult only, and the power of airports to set charges unilaterally.

In July 2001 the Minister of Commerce issued a request requiring the Commerce Commission to report whether an Order in Council under s. 53 of the *Commerce Act*, controlling certain airfield activities at the Auckland, Wellington and Christchurch international airports, should be made.[289] Airfield activities are the activities undertaken (including the facilities and services provided) to enable aircraft to land

[287] The AAA defines a *substantial customer* to be a person who pays (or is liable to pay) more than 5 per cent of an airport's annual revenues in relation to identified airport activities. In addition, a person who is authorised in writing to represent a number of persons who in aggregate pay (or are liable to pay) more than 5 per cent of an airport's annual revenues in relation to identified airport activities. For example, the Board of Airline Representatives of New Zealand Inc. (BARNZ) is deemed to be a substantial customer.

[288] *Airport Authorities (Airport Companies Information Disclosure) Regulations 1999*, regulations 6–7, and Clauses 2-8 of the Schedule.

[289] This request superseded an earlier request by the Minister made in May 1998, in light of the amendments made to the Act in May 2001.

and take-off. The inquiry was initiated following concerns over the lack of market competition for international airfield activities, and the possibility that this limited competition enabled the international airports to earn monopoly profits.[290] In particular, the Cabinet papers leading up to the Minister's original request indicated the Government's concerns that the AAA did not go far enough to protect against abuses of monopoly power.[291]

The Commission reported to the Minister in August 2002.[292] In its final report, the Commission recommended that:

- the airfield activities supplied by Auckland International Airport Limited should be controlled;
- the airfield activities supplied by Wellington International Airport Limited (WIAL) should not be controlled, but noted that if WIAL were to impose a significant increase in charges as a result of its ongoing consultation with the airlines, the Commission would likely be satisfied that it would be necessary or desirable for the airfield activities supplied by WIAL to be controlled; and
- the airfield activities supplied by Christchurch International Airport Limited should not be controlled.

In May 2003, after considering the Commission's recommendations, submissions on the Commission's report, and advice from the Ministry of Economic Development, the Minister decided that controls would not be imposed on airfield activities at either Auckland, Wellington or Christchurch international airports, largely on the grounds that the expected level of price reductions to passengers were not sufficient to merit the imposition of control.[293]

The International Air Transport Association (IATA) in its submission to the Ministry of Economic Development on the review of the regulatory provisions under the *Commerce Act* – initiated in April 2007 by the Ministry of Economic Development – also maintains that New Zealand's current regulatory system exhibits significant weaknesses. The IATA stated that Auckland Airport's unilateral announcement in 2007 to increase charges demonstrates that the current light-handed regulation in New Zealand is ineffective in curbing the abuse of market power by monopolistic airports. The IATA contends that, throughout the review's consultation process with airlines, AIAL failed to provide any justification for the increases, while airlines demonstrated a clear case of over-recovery by AIAL.[294]

The *Commerce Act* review found the regulatory control regime for the three major international airports – Auckland, Wellington and Christchurch – inadequate.[295] This led to the changes in the *Commerce Amendment Act 2008,* which had the objective of replacing the weak information-disclosure system under the AAA with a more

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[290] Hon. Lianne Dalziel (Minister of Commerce), *No Control Imposed on Airfield Activities*, Media Release, 23 May 2003.
[291] Commerce Commission, *Final Report, Part IV Inquiry into Airfield Activities at Auckland, Wellington, and Christchurch International Airports*, 1 August 2002, Paragraph 2.68.
[292] Ibid.
[293] Dalziel, loc. cit.
[294] The International Air Transport Association, *Economic Regulation of Airports and Air Navigation Service Providers*, 2007. Available at: http://www.iata.org/NR/rdonlyres/7A12B29A-0557-4146-8786-DA0F19BEEBB8/0/Economic_regulation_Feb07.pdf [accessed on 31 October 2008].
[295] L. Dalziel and A. King, *Cabinet Paper: Commerce Act Review – Airports*, 2007. Available at: http://www.med.govt.nz/upload/53122/cab-paper.pdf [accessed on 24 July 2008], p. 1.

meaningful disclosure regime under the *Commerce Act,* coupled with active monitoring of the disclosed information by the Commerce Commission.[296]

On 14 November 2007, the Ministry of Economic Development received a further request from the Cabinet Policy Committee to consider airport regulation:[297]

- whether the coverage of regulated airports should be widened beyond the three major airports subject to regulation under the *Commerce Act*; and
- whether other forms of regulation should apply to regulated airport companies under the *Commerce Act*.

The findings of this work are expected to be reported to the Cabinet Economic Development Committee by 30 June 2009. Any resulting legislative change would be implemented in time for the next five year pricing period due to commence on 1 July 2012.

7. Ports

At present, New Zealand has 13 commercial seaports handling goods exported and imported. The major seaports and terminals are Auckland, Lyttleton, Marsden Point, Taurunga, Wellington and Whangarei. The port industry has undergone corporatisation and privatisation introduced under the *Port Companies Act 1988* and the *Port Companies Amendment Act 1990*, which provided for the commercial port facilities of local authorities to be established as port companies. The principal objective of every port company should be to 'operate as a successful business'.[298]

The process of privatisation is fairly slow. For example, South Port is the only Southland-based port company listed on the New Zealand Stock Exchange. Its majority shareholder is Environment Southland – the region's local government and environmental agency. It provides pilotage, towage, berthage and full marine services to international and coastal vessels including the southern fishing fleet. Another example is Ports of Auckland. In 1988 the Harbour Board (elected by the public of Auckland and Waikato) was corporatised into Ports of Auckland Limited, with ownership retained by regional bodies in Auckland and Waikato. Subsequently, the Waikato Regional Council floated its 20 per cent shareholding, and the Company was listed on the New Zealand Stock Exchange. The other 80 per cent was retained by Auckland regional bodies, which later became Auckland Regional Holdings – the investment arm of the Auckland Regional Council. In July 2005 Auckland Regional Holdings moved to full ownership, buying out private minority shareholders, and the Company was de-listed from the stock exchange.[299]

Regulatory Institutions and Legislation

The Acts governing port companies are administered by the Ministry of Transport, who is responsible for the transport policy in New Zealand. The rules made by the

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[296] Ibid.

[297] MED, *Background*. Available at: http://www.med.govt.nz/templates/MultipageDocumentTOC____34439.aspx [accessed on 14 January 2009].

[298] The *Port Companies Act 1988,* s. 5.

[299] Ports of Auckland, *PortFolio – Annual Review*, 2006. Available at: http://www.poal.co.nz/newsroom/Publications/PortFolio%20ANNUAL%20REVIEW.pdf [accessed on 24 July 2008].

Minster in relation to maritime transport will be administered by Maritime New Zealand.

The port companies are subject to the economy-wide competition provisions under the *Commerce Act*, administered by the Commerce Commission. Many port functions are subject to industry-specific safety regulation, administered by Maritime Safety Authority.

Regulatory Development

In 2001, the Ministers of Commerce and Transport commissioned the independent consulting firm, Charles River Associates (CRA), to study the market power of New Zealand's seaports.[300] This was a response to concerns over ports' monopoly pricing raised in the report of the Shipping Industry Review.[301] The purpose of the study was to provide the Government with an overview of competition issues for seaports and the information necessary to make an informed decision about the merits of a Commerce Commission inquiry or other possible courses of action.

The commissioned report was produced on 29 April 2002. The report indicated that there was evidence of widespread inter-port competition, intra-port competition (particularly in the area of marshalling and stevedoring) and competition between different modes of transport (particularly land, rail and coastal shipping). After considering the public submissions in response to the report, the Ministry of Economic Development and the Ministry of Transport provided their advice to the Ministers in November 2002. In particular, the ministries reviewed the three regulatory intervention tools recommended by the CRA report (see below) in comparison with the alternative option – no intervention and relying on the generic regulatory environment and normal commercial dispute resolution mechanisms. The three regulatory interventions suggested by the CRA report were:

- a Ministerial directive to the Commerce Commission to undertake an inquiry into ports market power issues;
- an information disclosure regime; and
- a mandatory alternative dispute resolution (ADR) regime. Under an outcome-orientated ADR regime, an independent third party may, in addition to facilitating a negotiation process, determine the dispute by conferring a right of access to port facilities for customers of port companies. Such a regime would need to specify thresholds or criteria for determining the outcome of the dispute, and may also have a gatekeeper to focus the use of the regime on genuine disputes. The more technical the criteria, the greater the need for a specialist to facilitate negotiation and make the decision. At the extreme, the ADR may be part of an access regime administered by a regulatory body.

The Ministers of Commerce and Transport released their decision on 20 December 2002, concluding that the area is generally competitive and no government intervention is warranted.

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[300] Details of the CRA report titled *Port Companies and Market Power: A Qualitative Analysis* and the associated actions can be found on the Ministry of Economic Development website at: http://www.med.govt.nz/templates/MultipageDocumentTOC____8799.aspx [accessed on 10 October 2008].

[301] Shipping Industry Review (chaired by Ian Mackay), *A Future for New Zealand Shipping: Report of the Shipping Industry Review*, December 2000. Available at: http://executive.govt.nz/MINISTER/gosche/shipping/shipping.pdf [accessed on 10 October 2008].

EUROPE

EUROPEAN UNION

OVERVIEW[302]

The European Union (EU) has 27 Member States. Six of these Member States – France, Germany, Ireland, the Netherlands, Sweden and the United Kingdom – which are also members of the Organisation for Economic Cooperation and Development (OECD), are reviewed in detail for this project.

The formulation of regulatory policy in network industries is the responsibility of various Directorates within the EU's executive arm, the European Commission. Directorates of relevance to the regulation of networks are: the Directorate General of Transport and Energy (DG Tren); the Directorate-General of Competition (DG Comp) – telecommunications section; the Directorate-General Information Society and Media (DG Infosoc); the Directorate-General Internal Markets and Services (DG MARKTS): and the Directorate-General of the Environment. The DGs are required to work together closely and to coordinate in the preparation and implementation of Commission decisions.

The Commission is tasked with the development of Directives and the enforcement of Member States' compliance with them. While in principle the Commission must approve all the decisions, in practice some decisions are made by the respective Directorate-General(s).

BACKGROUND

The European Union (EU) is an economic and political union of 27 Member States: Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom (UK).

The Union is constituted by a series of treaties which set out the EU's legislative competence and institutional arrangements. It was established with the aim of, among other things, the creation of a single European common market. The EU's governing institutions are empowered to deal with regulatory matters in so far as they are necessary for the purposes of the treaties that constitute the Union, and cannot be adequately dealt with at a national (or lower) level. These restrictions are known as the principles of necessity, proportionality, and subsidiarity, and define the EU's legislative competence.

Legislative power is distributed between the European Union and its Member States in the form of: concurrent or shared powers (most common); exclusive Community powers; and supporting powers.[303] Two principles elaborate and regulate this

[302] The information contained in this chapter was compiled from a range of sources, principally interviews conducted by Dr Chris Decker with representatives of the European Commission's Directorate-General of Transport and Energy (DG Tren) in Brussels on 7 July 2008 and Directorate General of Competition (Telecommunications section) in Brussels on 25 July 2008. Other sources include information provided directly from the European Commission; materials available on the websites of the various Directorates of the European Commission; published consultancy reports, books and journal articles.

[303] The Community's sole task is to coordinate and encourage action by the Member States.

distribution. The first is the principle of subsidiarity which requires that decisions are taken as closely as possible to the citizen, and that checks are made as to whether action at Community level is justified in the light of the possibilities available at national, regional or local level. The second governing principle is that of proportionality which requires that any action by the Union should not go beyond what is necessary to achieve the objectives of the Treaty.

The principal legislative instruments of the EU are: Directives, Regulations and Decisions. Directives are binding on Members States as regards the objective to be achieved but leave it to national authorities to decide how the objective can best be incorporated into their legal systems. Regulations are directly applicable in all Member States, and do not have to be transposed into national law. Decisions confer rights or impose obligations on individual Member States or citizens.

The four principal institutions of government of the EU are: The European Parliament, The Council of the European Union, The European Commission and the European Court of Justice (ECJ).

The European Parliament shares with the Council of the European Union the responsibility for passing laws.[304] The Parliament is directly elected by the citizens of Member States (by proportion to population) every five years. The present parliament has 785 members from the 27 EU countries.

The Council of the European Union (formerly known as the 'Council of Ministers') shares legislative responsibility with the Parliament and also bears the main responsibility for EU foreign and security policy. Each Member State has a number of votes in the Council broadly reflecting the size of their population, but weighted in favour of smaller countries. Most decisions are taken by majority vote, although sensitive issues in areas like taxation, asylum and immigration, or foreign and security policy, require unanimity.

The European Commission acts as the EU's executive arm and is responsible for initiating legislation and the day-to-day running of the EU. It is intended to act solely in the interest of the EU as a whole (as opposed to the Council which consists of leaders of Member States who reflect national interests). The Commission drafts proposals for new European laws, which it presents to the European Parliament and the Council. It implements EU policies and administers EU funds. The Commission monitors compliance with European treaties and laws, and makes applications to the Court of Justice in response to infringements. The Commission consists of 27 members – one from each EU country – and is assisted by about 24 000 civil servants. The Commissioners do not represent their national governments.

The President of the Commission is chosen by EU governments and endorsed by the European Parliament. The other commissioners are nominated by their national governments in consultation with the in-coming President, and must be approved by the Parliament. Appointments are for five years. Each Commissioner has responsibility for a particular area of EU policy.

The European Court of Justice is responsible for ensuring that EU law is interpreted and applied in the same way in all EU countries. The Court also makes sure that EU

[304] EU legislation is adopted jointly by the European Parliament and the Council under a co-decision procedure.

Member States and institutions comply with European laws. The Court is located in Luxembourg and has one judge from each Member State.

APPROACH TO COMPETITION AND REGULATION BY THE EUROPEAN COMMISSION

Regulatory arrangements for network industries are typically set through high-level instruments (Directives) which outline objectives to be achieved but leave it to national authorities to determine the specifics of implementation. European Regulations may also be issued that are directly applicable in Member States, and must be complied with in the same way as national laws.

The principles contained in Directives are general in nature and discretion remains with NRAs in respect of the specifics of implementation. For example, while there are general high level principles in the Railways Directives and the Communications Directives that access charges should reflect marginal cost or be cost-based, the interpretation of this principle has differed across Member States. In railways, for example, in some cases the access charges have also included additional 'mark-up' elements to recover certain external costs. The only formal constraints on specific implementations of principles are the general requirements of European law.

As the EU's executive arm, the European Commission is principally involved in regulatory matters in regard to the development of high-level frameworks or common principles (laid out in Directives) which are then applied by national regulatory authorities (NRAs) in each Member State.

The Commission also has an enforcement role of taking action against Member States for incorrect transpositions of Directives. The Commission can issue infringement proceedings against Member States who fail to transpose Directives into national law correctly or within prescribed time periods, or who fail to comply with European Regulations. The determinative body in these proceedings is the European Court of Justice. The Commission cannot intervene in the individual decisions of national courts in relation to disputes under transposed laws.

The European Commission is divided into 26 Directorates-General (DGs) which are, in turn, divided into directorates and then further into units. The formulation of regulatory policy in network industries is the responsibility of various Directorates:

- The Directorate-General of Transport and Energy deals with energy and transport matters, with the latter covering rail, air, road and maritime transport.
- Regulation of telecommunications is the joint responsibility of the Directorate-General Competition (telecommunications section) and Directorate-General Media and Information Society.
- Postal services are the responsibility of the Directorate-General for Internal Market and Services.
- Water policy is dealt with by the Directorate-General for the Environment.

In addition, the Commission, through DG Comp, deals with competition matters, including enforcing the European merger regulation, prosecuting anti-competitive behaviour and monitoring State Aid to regulated sectors. DG Comp can also launch sector-wide enquiries into competition in specific regulated sectors, and recently completed such an investigation in the energy sector.

Regulatory Activities

The European Commission's primary role in the economic regulation of infrastructure is the formulation of regulatory policies. A key distinction can be drawn between the process for the development of policy and the process for the development of a common access framework.

In relation to specific policy initiatives – for example, the development of trans-European networks in energy – the Commission will generally publish a Green Paper which is put out for public consultation. Relevant user groups and other associations will have an ability to make submissions in relation to the paper. After consideration of these submissions, the Commission will finalise the policy proposal.

In relation to the development of a common access framework, the process begins with a public consultation with key stakeholders including representatives of Member States. The purpose of this consultation is to gather additional relevant information and to reach informal consensus among the various stakeholders. Following this consultation, an impact assessment of the proposed Directive is undertaken and published. According to the co-decision making process of Member State stakeholders, the policy must then be approved by a Committee which represents the experts of Member States.

A consultation process is also launched among the different Commission directorates in order to ensure that all aspects of the matter in question are taken into account (an Inter-service Consultation). Typically, relevant representatives in other Directorates have between two to three weeks to review the proposal. Three types of recommendations typically arise from the Inter-service Consultation: the proposal is satisfactory; the proposal is satisfactory but some comments are provided; the Directorate disagrees with the proposal and suggests that changes are made (and the consultation begins again). The process aims to achieve a high degree of consensus prior to submission of the proposed framework to the Cabinet of Commissioners for approval.

The Commission's proposal can be adopted by the College of Commissioners on the basis of either a written procedure (no discussion among Commissioners) or an oral procedure (the proposal is discussed by the College of Commissioners), and the decision is published in the Official Journal of the European Union. The proposed Directive is then forwarded simultaneously to the European Parliament and to the Council.

Enforcement Activities

The Commission can launch an *ex officio* investigation against a Member State if it forms the belief that there has been an incorrect transposition of European Law.[305] Such investigations can only be directed toward the Member State (and not to the relevant NRA or a specific company) because European law only applies to Member States.

[305] Under the Treaties the Commission is responsible for ensuring that Community law is correctly applied. Anyone may lodge a complaint with the Commission against a Member State about any state measure (law, regulation or administrative action) or administrative practice which he/she considers incompatible with Community law. However, the Commission decides whether or not further action should be taken on a complaint in the light of the rules and priorities laid down by the Commission for opening and pursuing procedures.

There are generally three steps in the process of assessing whether there has been an infringement of Community law. First a small team is assembled within the relevant section of the Directorate who have familiarity with the general issue (that is, if the alleged infringement relates to the charging methodology then it will be people from that section). This team will investigate and assess the matter before submitting it for Inter-service Consultation (see discussion above). In some cases, this process will be followed by an impact assessment. The final decision as to the existence of an infringement is approved by the Director General of the Directorate.

From this point, the Commission will typically draft a formal letter to the Member State, known as a 'letter of formal notice', setting out its view that the specific transposition of the Directive may not conform to European law. Generally, this initial step will be sufficient for the matter to be resolved.

If the matter is not resolved at this stage, the Commission can issue a formal notice of complaint stating its intention to begin an infringement procedure. This notice of complaint is intended to 'confront the Member State' with the facts surrounding the alleged infringement.[306] The European Commission sent letters of formal notice to twenty four Member States in 2008, regarding their failure to implement the First Railway Package legislation properly.[307]

If the Member State does not respond to the Commission's requests and align its policies to the Commission's interpretation of the Directive, a second formal letter of complaint is issued to the Member State containing a reasoned opinion prepared by the Commission that the State is in contravention of European Law and requiring the infringement be rectified within a prescribed time limit. Again, such reasoned opinions have recently been issued by the Commission to thirteen Member States that have failed to notify the Commission of the transposition of two key Directives of the Second Railway Package into domestic legislation.[308] Should the Member State fail to respond adequately to this request, the Commission can refer the matter to the European Court of Justice.

The Commission will also commence infringement proceedings where Member States fail to notify the Commission of their national transposition measures in respect of a Directive within prescribed timeframes. In 2006 the Commission sent reasoned opinions to thirteen Member States regarding their failure to notify transposition measures in relation to Directives under the Second Railway Package,[309] and in 2007, the Commission commenced infringement proceedings before the European Court of Justice in respect of ten of these states.[310]

The ECJ will investigate complaints and decide whether the Member State has contravened Community Law. The Court of Justice has no power to annul a national provision which is incompatible with Community law, nor to order the Member State to pay damages to an individual adversely affected by an infringement of Community Law. It is up to a Member State against which the Court of Justice gives judgment to

[306] Meeting with DG Tren on 7 July 2008.
[307] European Commission, *Press Release*, IP/08/1031, Brussels, 25 June 2008. Available at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1031 [accessed on 20 December 2008].
[308] European Commission, *Press Release*, IP/06/1383, 12 October 2006. Available at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1383 [accessed on 20 December 2008].
[309] Ibid.
[310] European Commission, *Press Release*, IP/07/368, 21 March 2007. Available at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/368 [accessed on 20 December 2008].

take whatever measures are necessary to comply with it, particularly to resolve the dispute which gave rise to the procedure. If the Member State does not comply, the Commission may again bring the matter before the Court of Justice (after repeating the same pre-referral steps) seeking to have periodic penalty payments imposed on the Member State until such time as it puts an end to the infringement.

Involvement with Access Matters in Member States

The Commission may receive complaints against specific access providers alleging the provider is not acting in compliance with a common access framework. In these cases, the Commission must forward the complaint to the NRA in the relevant Member State.

The Commission does not become formally involved in individual decisions relating to specific access matters in Member States. In energy matters the Commission has no ability to formally veto a decision of an NRA providing that it complies with European law. Any concerns the Commission may have regarding the implementation of the common access framework must be addressed through the European Court of Justice. This may, however, differ among other areas of regulation, and the Commission may have an ability to veto some of the proposed remedies of NRAs under the European electronic communications framework.

Although the Commission is not involved in the specific decisions of NRAs, it sees one of its principal roles as facilitating greater levels of cooperation among the NRAs. It regularly convenes meetings of NRA representatives and maintains an ongoing interest in the decisions taken by individual NRAs, of which it must be notified, and through participation in bodies such as the European Regulators' Group for Electricity and Gas (ERGEG).

Information Disclosure and Confidentiality

The powers of the Commission to collect information depend greatly on the purpose for which the information is being requested.

In the context of an infringement proceeding, the Commission has substantial powers to obtain information, however because information must, in most cases, be obtained through a Member State, the Commission rarely has to use its formal information gathering powers. Information required is usually provided by the Member State government, although the quality of such information is reported to be variable.[311] The Commission has no ability to fine a Member State for failing to provide information, but it can launch a separate infringement proceedings under European law where it forms the view that information is being withheld.

In relation to specific policy initiatives, such as the Trans-European Energy Network policy, Member States typically have only a broad duty to report any developments and the interpretation of this 'duty' can vary significantly across Member States. In most infrastructure areas, the Commission maintains and publishes some form of market monitoring report which is based on information and analysis that is provided by individual Member States.

The issue of when information should be classified as commercial in confidence is not highly significant. In part this is because most of the information is provided by Member State governments who typically make the decision themselves when

[311] Meeting with DG Tren on 7 July 2008.

supplying the information.[312] Where a conflict arises in respect of the classification of information, the Commission generally makes the final decision. This decisions will be based either on what is identified in the specific Directive or regulation or on the basis of the Commission's assessment of whether the disclosure of the information is likely to be in the public interest.

Decision-making and Reporting

As discussed earlier in relation to the development of the common access framework, the Commission, in principle, must approve all decisions of the Directorates. In practice, some decisions are taken by the respective Directorate-General while others need to be approved by the full college of commissioners.

The general approach to decision making is 'bottom-up' with agreement at the case team level being reached in the first instance, then proceeding up to the Director-General and finally to the Commissioners. All draft decisions also need to be reviewed to the Commission Legal Service before being sent to the college of Commissioners. In the event that two Directorates cannot agree, or agreement cannot be reached between a particular Directorate and the Legal Service, the President of the Commission will intervene and take the decision.

The high-level principle adopted by the Commission in respect of the publication of information and its underlying reasoning is to be as transparent as possible[313]. It seeks to publish as much information as possible on its website including any submissions received. However correspondence between the Commission and Member States on a specific decision is typically treated as confidential.

There are substantial rights for parties and citizens to obtain access to any proceedings or relevant materials which relate to specific initiatives of the Commission under general freedom of information laws. An important qualification to these rights relate to the ability to obtain access to communications between the Commission and the Member States.

Appeals

Two appeals processes are generally relevant in relation to the implementation of the Directives governing a network industry or sector. Firstly, appeals by Member States to the European Court against a decision of the Commission under the Framework Directives. Secondly, appeals before national courts in relation to regulatory measures proposed by an NRA under the access Directives.

Member States can appeal to the European Court of First Instance (CFI) against a decision of the Commission under a framework Directive, for example in relation to an infringement proceeding regarding the implementation of the framework Directives in gas and electricity. An appeal may be made from the ruling of the CFI to the European Court of Justice on points of law only.

As discussed above, the Commission does not become formally involved in individual decisions relating to specific access matters in Member States. Any concerns the Commission may have regarding the implementation of the common access framework must be addressed through the ECJ. The Commission can encourage the national court to refer the matter to the ECJ (or to request an opinion from the ECJ).

[312] Meeting with DG Tren on 7 July 2008.
[313] Meeting with DG Tren on 7 July 2008.

Where the matter is referred to the ECJ by a Member State, the Commission does not act as Intervener, however, in hearing the matter, the ECJ typically ask the Commission to comment or submit an opinion on the matter through the Legal Service.

EC REGULATORY ROLE BY INDUSTRY OR SECTOR

1. Energy

A number of Directives and regulations are the key pieces of legislation establishing the internal markets of electricity and gas in the EU.

The first stage of developing the internal energy markets came with the adoption of two Directives, one on the electricity market (96/92/EC) and the other on the gas market (98/30/EC), in 1996 and 1998 respectively.[314] The Directives place obligations on national regulators to monitor the development of competition, levels of investment and, where appropriate, the level of prices, in these markets. They also require Members States to legislate to impose public service obligations on energy companies.

The next move to liberalise the energy markets was the adoption of two new Directives (2003/54/EC and 2003/55/EC), repealing the two previous Directives.[315] Directive 2003/54/EC concerning common rules for the internal market in electricity states that, 'for competition to function, network access must be non-discriminatory, transparent and fairly priced'. Member States are directed to ensure that distribution and transmission systems are operated through legally separate entities. There is no requirement of separate ownership. The Directive aims to ensure that the management structures of distribution or transmission system operators are separate and independent from that of generation and supply companies. Directive 2003/55/EC concerning common rules for the internal market in natural gas introduced similar provisions to the gas industries. Under the Directives, the energy markets for non-household consumers would be open to competition by 1 July 2004; and the markets for all consumers by 1 July 2007.

The Directives were accompanied by regulations governing the energy sector. The *Regulations on Conditions for Access to the Natural Gas Transmission Networks* (1228/2005/EC) set rules for transmission of gas between Member States. These include service conditions for third party network access; criteria and methodologies for setting network access tariffs; capacity allocation mechanisms and balancing rules. The *Regulation on Cross-border Exchanges in Electricity* (1228/2003/EC) sets rules for transmission of electricity between Member States. The regulation establishes a compensation mechanism for cross-border electricity flows, sets harmonised principles on transmission charges and establishes rules on allocation of available capacities of interconnections between national transmission systems.

[314] They refer to: Directive 96/02/EC of the European Parliament and the Council of 19 December 1996 concerning common rules for the internal market in electricity; and Directive 98/30/EC of the European Parliament and the Council of 22 June 1998 concerning common rules for the internal market in natural gas.

[315] They refer to: Directive 2003/54/EC of the European Parliament and the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing directive 96/92/EC; and Directive 2003/55/EC of the European Parliament and the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC.

In September 2007, a new legislative package was proposed for EU gas and electricity markets (known as the 'third package of energy reforms'). Proposed measures include:

- separation of production and supply for transmission networks (ownership unbundling is preferred, however, an 'independent system operator' is also contemplated);
- establishing an Agency for the cooperation of National Energy Regulators, with binding decision powers, to aid co-ordination;
- strengthening the independence of national regulators in Member States;
- promoting cross-border collaboration and investment through a new European Network for Transmission System Operators (including developing joint market and technical codes).

At its second reading on 22 April 2009, the European Parliament voted to adopt the energy reform package.[316] The final agreement reached maintains key elements of the original proposal with some compromises made to strengthen the position of NRAs and to strengthen consumer protection and consumer rights. Some forms of vertical integration are permitted under strict rules. It is expected that the European Council will formally adopt the package in the next few months.

Since 1 July 2007, energy markets in the European Union (EU) have been fully opened to competition; that is, all customers, including households, are free to choose their supplies. However, some Member States continued to regulate retail prices, arguing that it was a tool to protect vulnerable consumers.

In 2007, the European Regulators Group for Electricity & Gas (ERGEG) published a position paper which concluded that retail price regulation should be abolished as it distorts the functioning of the market and jeopardises both security of supply and efforts to fight climate change.[317] In the ERGEG's view, the need to protect vulnerable customers should not be confused with regulated tariffs for all (or certain categories) of customers. Furthermore, the ERGEG contends that regulated retail energy prices are incompatible in the longer term with well-functioning, fully open markets. Thus the ERGEG called for Member States to publish (by July 2008) a plan for removing retail price regulation while protecting vulnerable customers.

On 27 March 2009, the ERGEG published a report showing some retail prices were regulated in a large number of EU countries (15 in electricity and 13 in gas) as of 1 July 2008.[318] More than 80 per cent of retail customers across all market segments

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[316] European Parliament, *MEPs Give Green Light to Further Liberalisation of EU Electricity and Gas Markets*, Press Release, 22 April 2009. Available at: http://www.europarl.europa.eu/news/expert/infopress_page/051-54057-111-04-17-909-20090421IPR54056-21-04-2009-2009-true/default_en.htm [accessed on 30 April 2009].

[317] ERGEG, *Position Paper on End-user Price Regulation*, E07-CPR-10-03, 18 July 2007. Available at: http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/CEER_ERGEG_PAPERS/Customers/2007 [accessed on 9 April 2009].

[318] ERGEG, *Status Review of End-User Price Regulation as of 1 July 2008*, E08-CPR-21-05, 11 March 2009. Available at: http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/CEER_ERGEG_PAPERS/Customers/Tab/E08-CPR-21-05_End-UserPrices_11%20Mar%2009.pdf [accessed on 9 April 2009].

remain on regulated prices. The ERGEG reiterated its call for plans to phase out regulated retail prices.

Regulatory Matters within the Scope of the Directorate-General for Energy

As discussed earlier, the Directorate-General for Transport and Energy (DG Tren) is a service unit of the European Commission. It has over 1 000 staff and is responsible for the development of Community transport and energy policies, including the development of common access frameworks. Other key responsibilities include investigating incorrect transpositions of community law by Member States, and managing financial support programs for the energy sector, in particular, the Trans-European Energy Network Project (TEN-E).

As noted in the section on 'Approach to Competition and Regulation by the European Commission', the Commission, in principle, must approve all decisions of the Directorates. In practice, some decisions are taken by the Director-General of Energy while others need to be approved by the full college of commissioners. The general approach to decision making is 'bottom-up' with agreement at the case team level being reached in the first instance, then proceeding up to the Director-General and finally to the Commissioners. The high-level principle adopted by the Commission in respect of the publication of information and its underlying reasoning is to be as transparent as possible.

Strategic Cross-border Infrastructure Planning

The Commission has identified a number of infrastructure projects where it is keen to foster greater levels of investment. In large part, these projects involve the addition of capacity at the borders between Member States (and therefore fall outside of the competency of any one Member State).

In respect of these projects, the Commission is usually allocated a general budget which it then directs toward specific projects. An example of this is the Trans-European Transport Energy Project (TEN-E), which aims, through a series of small projects and grants, to relieve cross-border congestion in energy networks.[319] The process of identification of projects which should be eligible for grants, and other impact assistance, occurs through a 'bottom-up' process where specific beneficial projects are identified by Member States or the Commission.

Sustainable Development in the Energy Sector

On 14 April 2009, the Council of European Energy Regulators (CEER) published a report on its first status review of sustainable development in the energy sector in the EU Member States.[320] Using a definition of sustainable development adopted by various institutions which encompasses economic, environmental and social perspectives, the report assesses the process that has been made in the European gas and electricity industries towards a low carbon economy by 2020. It finds that the energy sector has produced fairly stable greenhouse gas emissions and sourced about 15 per cent of energy from renewables. The report also considers energy issues

[319] See Trans-European Networks' website at: http://ec.europa.eu/ten/index_en.html [accessed on 25 July 2008].

[320] CEER, *Status Review of Sustainable Development in the Energy Sector*, C09-SDE-10-03, 1 April 2009. Available at: http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/CEER_ERGEG_PAPERS/Cross-Sectoral/2009/C09-SDE-10-03_01-Apr-09.pdf [accessed on 30 April 2009].

relating to prices, customer choice and the security and reliability of supply. It finds that:

- Electricity prices started to rise from 2004 while gas prices rose sharply between 2005 and 2007.
- Electricity and gas switching rates vary considerably across Member States, with the UK having the highest rate implying greater consumer choice.
- Half of the EU energy supply is imported, potentially giving rise to concern over security of supply.

Regulatory Development

In March 2008, the ERGEG published for public consultation draft guidelines on the procedures of exemptions from regulation for major new infrastructure under Article 22 of the EU Directive (2003/55/EC) concerning common rules for the internal market in natural gas.[321] Further consultation was launched in October 2008 after the ERGEG's release of an evaluation report considering the submissions received. On 23 April 2009, the ERGEG published its conclusions paper following the further consultation on draft guidelines on exemption procedures. It considers that:

- Open seasons should not be mandatory and an assessment of market demand is obligatory to an application for exemption.
- No *ex ante* preferences should be given to LNG terminals.
- Partial exemptions are preferable to full exemptions while exemption application from incumbents should not be excluded outright.
- A transparent, non-discriminatory and consistent system of rules for reviewing exemptions should be established.

Following the ERGEG work, the Commission is currently preparing new guidelines on Article 22 exemptions.

2. Telecommunications

A number of Directives are relevant to the regulation of telecommunications.

- The *Electronic Communications Framework Directive* (2002/21/EC) is the primary regulatory instrument and provides the general framework for the regulation of electronic communications infrastructure and associated services.
- The *Authorisation Directive* (2002/20/EC) harmonises authorisations for market access for providers across the EU.
- The *Universal Services Directive* (2002/22/EC) establishes a minimum level of availability and affordability of basic communication services.
- The *Access Directive* (2002/19/EC) deals with setting conditions of access to, and interconnection of, electronic communications networks and associated facilities.

[321] ERGEG, *Draft Guidelines on Article 22 – An ERGEG Public Consultation Paper*, 5 March 2008, Ref: E07-GFG-31-07.

- The *Privacy Directive* (97/66/EC) sets out rules for the protection of privacy and personal data processed in communications over public communication networks.

The *Authorisation Directive* abolished the system under which Member States issued individual licences to network and service providers as a means of regulating the communications sector. The Directive requires Member States to establish a general authorisation for all types of electronic communication services and networks, including fixed and mobile networks and services, data and voice services, broadcasting transmission networks and services. The Directive limits the type of conditions which may be included in general authorisations (to ensure service providers are treated in a non-discriminatory, objective, transparent and proportionate fashion by national regulatory authorities). The regulatory framework also requires Member States to encourage the use of standards as a means of ensuring interoperability of service. In addition, because providers of communication networks need to install infrastructure such as cables, antennas and masts, often on public buildings or land, the framework requires public authorities to consider all rights of way requests without delay and in a transparent and non-discriminatory manner.

The *Access Directive* requires NRAs to carry out regular market analyses in order to determine whether one or more operators have significant power on a market and to impose obligations on any operators identified, including obligations related to cost recovery and price controls as well as obligations of transparency, non-discrimination, and good faith in negotiating access. The Directive applies to all forms of communication networks carrying publicly available communications services. These include fixed and mobile telecommunications networks, networks used for terrestrial broadcasting, cable TV networks, and satellite and Internet networks used for voice, fax, data and image transmission. The *Access Directive* also gives NRA's the power to impose accounting separation in activities relating to interconnection/access.

Article 7 of the 2002 *Electronic Communications Framework Directive* (2002/21/EC) is the main EU regulatory instrument governing electronic communications infrastructure and associated services. It sets out Community consultation procedures that contribute to the development of a single market in telecommunications by ensuring a consistent and transparent application of the Directives across the Member States. The procedures require the NRAs in Member States to conduct national and Community consultation on any regulatory measures they intend to take, prior to their adoption. The NRAs must analyse their relevant electronic communications markets in consultation with the industry and propose appropriate regulatory measures to address market failures that might be hampering competition (for example, measures to address the existence of a significant market power in a particular market).[322] These findings and proposals of NRAs must be notified to the Commission and other national authorities. The Commission then assesses these findings and proposals. They may require the withdrawal of proposed regulatory measures if they are not compatible with EU law.

Therefore, the NRAs in Member States are obliged to notify all elements of regulatory measures, as part of their Community Consultation. The draft regulatory measure the German regulator, the Federal Network Agency, submitted to the Commission on 27 February 2009 only covered the general principles that it would follow in a special

[322] The starting point for NRAs' market analysis is the Commission's Recommendation on relevant markets and the Guidelines on market analysis and assessment of significant market power.

tariff authorisation procedure used to approve Deutsche Telecom's proposed fixed call origination and termination rates.[323] The Commission has made a written request to the regulator to notify the specific rates. Further action that can be taken by the Commission includes an infringement procedure for non-compliance with EU law, if the German regulator fails to comply with its obligation.

Note also that significant reform of regulatory arrangements in electronic communications is currently under consideration in legislation before the European Parliament (discussed further below).

Regulatory Matters within the Scope of the European Commission

DG Information Society (DG Infosoc) shares a joint competency with DG Competition in the application of the *ex ante* framework for regulation of telecommunications. It is the only unit within the Commission to share joint competency. Because of this structure, all decisions need to be approved by both the Director General of Competition and the Director General of Information Society.

When a NRA lodges a proposed regulatory measure, DG Infosoc and DG Competition have one month to assess the proposal. In practice, a case team will be set up internally comprising one case leader from each Directorate and a combination of staff from both Directorates. In big proposals, the team will typically comprise four members. In some cases, which raise complicated matters, the chief economist of DG Competition will also play a role. For example, in the Commission's recent review of Ofcom's proposal to designate four national broadband markets, the Chief Economist's team was apparently heavily involved.[324]

At the end of the month, the Commission can act in a number of ways. Firstly, it may approve and/or comment on the proposal. Secondly – where the Commission considers the proposal would create a barrier to the single market or has serious doubts as to its compatibility with Community law – it may open an in-depth investigation which lasts a further two months, in which time the relevant NRA must respond to the Commission's concerns. Finally, the Commission can veto the proposal (e.g. the proposed market definition or dominance analysis).

In addition to this role in the application of the *ex ante* framework, the Commission can also launch an *ex officio* investigation against a Member State if it forms the belief that there has been an incorrect transposition of European Law. Such investigations can only be directed toward the Member State (and not to the relevant NRA or a specific company) because European law only applies to Member States.

In June 2007 the Council of the European Union and European Parliament adopted an EU mobile roaming regulation that sets maximum price limits for wholesale and retail roaming charges up to 30 June 2010.[325] This Regulation also requires each operator to provide its customers with basic personalised pricing information (via SMS) when entering a new Member State. The European Commission is obliged to monitor the functioning of the Regulation. As part of this monitoring it launched a public

[323] Federal Network Agency, *Notification of a Draft Measure under Article 7(3) of the Framework*, 27 February 2009. Available at: http://circa.europa.eu/Public/irc/infso/ecctf/library?l=/germany/registeredsnotifications/de20090886-0887-0888&vm=detailed&sb=Title [accessed on 29 April 2009].

[324] Meeting with DG Competition Telecommunications Unit on 25 July 2008.

[325] EC, *Regulation No. 717/2007 on Roaming on Public Mobile Telephone Networks within the Community*.

consultation, closed on 2 July 2008, on the review of the adopted regulation and its possible extension to SMS and mobile data services or whether to extend the duration of the regulation. On the basis of this consultation, the Commission proposed on 23 September 2008 to bring down the prices for text messages sent while travelling in another EU country and to improve information transparency regarding charges on data roaming services.[326] The proposal has been tabled at the Council and European Parliament.

Additional Role of DG Competition's Telecommunications Unit

In addition to regulating network operators and service providers in telecommunications, the telecommunications unit at DG Competition is also responsible for:

- prosecuting anticompetitive behaviour infringing Articles 81 and 82 (or in combination with Article 86) of the EC Treaty;
- monitoring State aid, particularly for broadband and digital;[327] and
- enforcing the Merger Regulation in telecommunications markets under the European Community Merger Regulation.

In dealing with mergers, restrictive agreements and abusive conduct in telecommunications, DG Competition cooperates closely with national competition authorities through the European Competition Network and with the national regulatory authorities through the European Regulators Group (ERG).

Process and Consultation

Prior to formally notifying the Commission of a proposal, a NRA will send representatives to meet with the Commission to outline what the authority intends to do. In some cases, the National Competition Authority will also be present. The meeting is generally fairly high level and discusses the key issues associated with the proposed approach.[328]

Once formal notification has occurred, the Commission will have intense bilateral contact with the NRA within the month it has to take a decision. This may involve formal requests for information, in which the NRA has three working days to respond.

If the Commission expresses 'serious doubts' about a proposed measure, the NRA has a responsibility under the *Framework Directive* to take the 'utmost account' of the Commission's comments. However, if accommodation cannot be reached, the Commission will launch a second phase investigation and has a further three months in which it can consider the decision. In the circumstances where the Commission considers a veto, the Commission will prepare a draft veto decision which is submitted to the Communications Committee for approval (the Committee comprises representatives of Member States.) Any decision to veto an NRA proposal must be approved by the full College of European Commissioners.

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[326] EC, *Proposal for a Regulation of the European Parliament and of the Council*, COM (2008) 580 Final, Brussels, 23 September 2008.

[327] State aid is any aid granted by a Member State (or through State resources) which distorts competition by favouring certain undertakings and which affects trade between Member States. Examples of support given to the industry include preferential tax treatment, State guarantees and capital injections.

[328] Meeting with DG Competition Telecommunications Unit on 25 July 2008.

The *EU Framework Directive* requires NRAs to consult with relevant parties during their decision-making processes. In reviewing an NRA's proposal, the Commission will seek access to submissions made to the NRA during this consultation. The Commission does not consult directly with those parties affected by the NRA's proposed measure during its initial assessment process.

However, in the second phase of proceedings, that is, after the publishing of a 'serious doubts' letter, the Commission invites interested parties to provide written submissions which it will consider. The Commission may meet with individual companies during this second phase of proceedings. For example, if a NRA wants to remove regulation from a particular relevant market and the Commission raises serious doubts, then it would be typical for the Commission to meet with the companies concerned as well as any federations/associations representing alternative network operators during this time.

Despite this consultation, complaints have been raised by companies that the overall process is non-transparent, particularly in respect of the bilateral interaction between the NRA and the Commission. Companies such as Vodafone have pursued these complaints through the courts, however the complaints have generally not been upheld.

The Commission interacts with NRA's outside of these processes, for example, through the interactions within the European Regulators Group. These forums are seen as particularly important in relation to the discussion of current issues, such as broadband access issues.

Information Disclosure and Confidentiality

As the Commission only has powers to obtain information from regulatory authorities in Member States, not from regulators or regulated companies directly, there have been issues in relation to the quality of information provided by NRAs. The Commission has, in some instances, used the threat of a veto to try and obtain better information from a NRA on a specific issue. In fact, where the Commission has vetoed a proposal of a Member State in the past, it has tended to be, in part, related to the 'thin' information on which the regulation was being based.[329]

DG Competition is particularly careful not to use information obtained within a competition investigation in a regulatory context; the two processes are 'absolutely separate'.[330] As such, DG Information Society does not receive any information obtained as part of a competition investigation when considering a regulatory matter.

In relation to the issue of what information is treated as commercial-in-confidence, Article 7 of the *Framework Directive* requires the majority of documents submitted and relied upon in a decision of a NRA to be made accessible to the public.

Decision-making and Reporting

The Directors-General of Competition and of Information Society approve, in principle, all decisions of the Directorates. In practice, some decisions are taken by the Directors-General while others need to be approved by the full college of commissioners. For example, if there is a 'no comments' response to the proposal of

[329] Meeting with DG Competition Telecommunications Unit on 25 July 2008.
[330] Meeting with DG Competition Telecommunications Unit on 25 July 2008.

a NRA this decision will be taken by the Directors-General, while a veto decision must always be considered by the full College of Commissioners.

The general approach to decision making is 'bottom-up' with agreement at the case team level being reached in the first instance, then proceeding up to the Directors-General and finally to the Commissioners. The case team typically prepares a case note containing a description of the matter; an assessment of the market; a discussion of possible remedies; and a recommendation. This case note is considered first by the Directors-General, who prepares a second case note which is sent to the Commissioners.

All draft decisions involving matters relating to Article 7 also need to be reviewed to the Commission Legal Service.

In the event that two Directorates cannot agree, or agreement cannot be reached between a particular Directorate and the Legal Service, the President of the Commission will intervene and take the decision. However, in more than 800 cases considered by the joint case teams assembled between DG Competition and DG Information Society over the past five years, there has never been a disagreement between the two Directorates. [331]

Appeals

Two appeal processes are relevant in relation to the implementation of the *Framework Directive*. Firstly Member States can appeal a decision of the Commission under the Directive to the European Court in Luxembourg. Secondly, appeals before national courts in relation to regulatory measures proposed by a NRA under the Directive can also be relevant.

Member States can appeal to the European Court of First Instance (CFI) against the decision of the Commission, for example in relation to an infringement proceeding regarding the implementation of the *Framework Directive*. An appeal may be made from the ruling of the CFI to the European Court of Justice (ECJ) on points of law only.

The Commission cannot intervene in a dispute before a national court in relation to a regulatory measure proposed by an NRA under the *Framework Directive*. However, where the Commission has a concern about a specific matter it can encourage the national court to refer the matter to the ECJ (or to request an opinion from the ECJ). Where the matter is referred to the ECJ by a Member State, the Commission does not act as Intervener, however, in hearing the matter, the ECJ typically ask the Commission to comment or submit an opinion on the matter through the Legal Service.

The Commission has expressed strong concerns about consistency in judicial processes across Member States in regard to telecommunications.[332] There have been a number of cases, for example, where an NRA has adopted a specific measure which has not been challenged by the Commission and a national judge has then suspended the decision/ measure as part of a judicial review. The Commission considers this possibility a significant threat to the harmonised implementation of the *Framework Directive*.[333]

[331] Meeting with DG Competition Telecommunications Unit on 25 July 2008.
[332] Meeting with DG Competition Telecommunications Unit on 25 July 2008.
[333] Meeting with DG Competition Telecommunications Unit on 25 July 2008.

To address this issue, the Commission has initiated a training process for national judges in relation to various aspects of telecommunications regulation and economics, for example, the economic basis for the regulation of mobile termination charges and differences in cost classifications.

Proposed Reform of Communications Regulation

In 2007, the Commission launched a review of the current regulatory rules that apply in the communications sector. The proposed new electronic communications framework has principally been developed by DG Infosoc; however, DG Competition has played a role in relation to matters such as which markets are subject to *ex ante* regulation. On 13 November 2007, the European Commission announced its proposals to reform the EU telecommunications regulatory framework.[334] The proposals include:

- Measures to reform the Article 7 market review procedure, in particular by giving the Commission the power to oversee remedies proposed by national regulators. In addition, following a finding of significant market power in a market review, the national regulators will be given the opportunity to impose a functional separation remedy as a remedy of last resort.
- The Commission has also adopted a new recommendation, which reduces from 18 to seven the relevant products and service markets within the electronic communications sector that are susceptible to *ex ante* regulation (and so subject to market reviews).
- Creation of a European Communications Market Authority to help ensure communication services are regulated more consistently across the 27 EU Member States.
- Measures to protect consumer rights (such as in relation to number portability and transparency of price information).
- Formalisation of the current European Regulators Group into a single European-wide regulatory agency which is responsible to the European Commission.

On 24 September 2008, the European Parliament approved the proposal (subject to 164 amendments) at the first reading. The Commission adapted the original proposal, accepting 32 of the amendments.[335] Under the revised proposal the single EU regulatory agency would be called the 'Body of European Telecommunications Regulators' (BETR) responsible for cooperation among NRAs.

During the first reading by the European Council on the 27 November 2008, the ministers rejected the proposal for a single EU regulatory agency. Proposals regarding Internet monitoring and intellectual property have also been contentious. The Council conducted inter-institutional negotiations and reached a compromised position over the contentious issue in March and April 2009. In particular, the compromise requires no restriction on access without prior ruling by judicial authorities.

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[334] EC, *Electronic Communications: Common Regulatory Framework for Networks and Services, Access, Interconnection and Authorisation* ('Telecoms Package' [amend, Directives 2002/19/EC to 2002/21/EC]), COD/2007/0247, 13 November 2007.

[335] European Parliament, *Procedure File*. Available at: http://www.europarl.europa.eu/oeil/file.jsp?id=5563972 [accessed on 28 January 2009].

The second reading of the European Parliament on 21 April 2009 also failed to reach an overall agreement.[336] The Parliament managed to agree on certain key issues, including the establishment of BETA, co-operation on relation, functional separation as a last resort, harmonisaton of radio spectrum, investments in and access to next-generation networks. However, negotiations on the remaining issue relating to procedures for restricting a user's Internet access are still on-going after the members rejected access restrictions without prior ruling by judicial authorities.

The proposed reform package can only proceed if an agreement can be reached via conciliation between the European Commission and the Parliament by 12 June 2009. Otherwise, the entire package will have to be renegotiated.

3. Posts

The regulatory framework for postal services in the EU is currently provided by a *1997 Postal Directive* (as amended by a 2002 Directive and a 2008 Directive). The Directives provide for a Universal Service obligation,[337] and limit the extent to which Member States can restrict access for economic operators. The main elements of the regulatory framework set out:

- the minimum characteristics of the universal postal service which must be guaranteed by all Member States;
- the quality standards for universal service provision and the system to ensure compliance with them;
- tariff principles (particularly that tariffs should be related to costs);
- principles governing transparency of accounts for universal service provision;
- the separation of regulatory and operational functions in the postal industry;
- common maximum limits for those services which may be reserved by a Member State to its universal service provider(s) to the extent necessary to ensure the maintenance of the universal service.

These areas of reserved services have been progressively reduced, in 1999, 2003, and 2006. Currently, postal services reserved to national postal operators only apply to mail weighing under 50g. In February 2008, the third Postal Directive came into force, setting the final date for full opening of the internal market for Community postal services as 31 December 2010 with a further two-year transition period for eleven Member States. From that date there will be no further reserved areas. The Directive retains the current obligations on providers in relation to the Universal Service, and outlines measures Member States may take to safeguard and finance, if necessary, the Universal Service. The Directive also upgrades the independent role of national regulatory authorities.

Regulation of the postal industry is the responsibility of the Directorate-General Internal Market and Services (DG MARKT), who is assisted by approximately 500 staff. The main role of DG MARKT is to coordinate the Commission's policy on the

[336] European Parliament, *Telecom Markets: Still No Overall Agreement with Council Presidency*, Press Release, 21 April 2009. Available at: http://www.europarl.europa.eu/news/expert/infopress_page/058-54125-111-04-17-909-20090421IPR54124-21-04-2009-2009-false/default_en.htm [accessed on 30 April 2008].

[337] A minimum range of services of specified quality which must be provided in all Member States at affordable prices for the benefit of all users, irrespective of their geographical location.

European Single Market, which aims to ensure the free movement of people, goods, services and capital within the Union.

In this context, the DG MARKT is responsible for proposing to the European Parliament and Council and – once laws are adopted – controlling the implementation of a European Postal Service legal framework in accordance with the *Postal Directive*.

DG MARKT monitors the application of the *Postal Directive* (through Application Reports very two years) and can open infringement proceedings against Members States who fail to apply, or misapply the Directive. DG MARKT works closely with the Member State concerned to attempt to rectify the situation before commencing formal judicial proceedings, and infringement proceedings are generally settled in this way. However, where both parties do not agree on the meaning of certain provisions in the Directive, formal proceedings are brought in the European Court of Justice.

In parallel with this process of liberalisation and regulation undertaken by DG MARKT, the Commission (through DG Competition) applies competition rules to the European postal services markets according to the principles set out in the *Notice from the Commission on the Application of the Competition Rules to the Postal Sector* (98/C 39/02) and on the assessment of Member State measures relating to postal services.

Further, DG MARKT consults and negotiates and with the Universal Postal Union,[338] the Committee of European Postal Regulators, and the WTO to secure compatibility between the developing EC and international postal regulatory models.

Process and Consultation

DG MARKT may launch public consultation with key stakeholders, including representatives of Member States, on postal services. The purpose of public consultation is to gather additional relevant information and to reach informal consensus among the various stakeholders. In developing the third Directive, the Commission accompanied its proposal with a prospective study in the impact of full market opening.[339] Following the public consultation, an impact assessment of the proposed Directive was undertaken and published. According to the co-decision making process of Member State stakeholders, the policy must then be approved by a Committee which represents the experts of Member States.

Decision-making and Reporting

The Commission must approve all decisions of the Directorates. In practice, some decisions are taken by the Director-General while others need to be approved by the full College of the Commissioners.

The general approach to decision making is 'bottom-up', which involves three stages:

- Initial consultation among the different Commission directorates in order to ensure that all aspects of the matter in question are taken into account (an Inter-service Consultation). Typically, relevant representatives in other Directorates have between two to three weeks to review the proposal. Three types of

[338] With 189 member countries, the UPU is the primary forum for cooperation between States concerning postal services.

[339] Commission of the European Communities, *Prospective Study on the Impact on Universal Service of the Full Accomplishment of the Postal Internal Market in 2009*, October 2006.

recommendations typically arise from the Inter-service Consultation – the proposal is satisfactory; the proposal is satisfactory but some comments are provided; or the Directorate disagrees with the proposal and suggests that changes are made (and the consultation begins again).

- Once a high degree of consensus is reached across directorates, the proposal will be submitted to the Cabinet of Commissioners for approval. The approval can be made on the basis of either a written procedure (no discussion among Commissioners) or an oral procedure (the proposal is discussed by the College of Commissioners), and the decision is published in the Official Journal of the European Union.
- The proposal is then forwarded simultaneously to the European Parliament and to the Council.

4. Water and Wastewater

The Directorate General for the Environment is responsible for European water policy. On 23 October 2000, the 'Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for the Community action in the field of water policy' or, in short, the *EU Water Framework Directive* (WFD) was adopted. The WFD sets the standard for water management in Member States.[340] The website contains twelve 'water notes':

- Waternote 1: Joining forces for Europe's shared waters – Coordination in international river basin districts
- Waternote 2: Cleaning up Europe's waters – Identifying and assessing surface water bodies at risk
- Waternote 3: Groundwater at risk – Managing the water under us
- Waternote 4: Reservoirs, canals and ports – Managing artificial and heavily modified water bodies
- Waternote 5: Economics in Water Policy – The value of Europe's waters
- Waternote 6: Monitoring programmes – Taking the pulse on Europe's waters
- Waternote 7: Intercalibration – A common scale for Europe's waters
- Waternote 8: Pollution – Reducing dangerous chemicals in Europe's waters
- Waternote 9: Integrating water policy – Linking all EU water legislation within a single framework
- Waternote 10: Climate change – Addressing floods, droughts and changing aquatic ecosystems
- Waternote 11: From river to the sea – Linking with the new *Marine Strategy Framework Directive*
- Waternote 12: A common task – Public participation in river basin management planning.

[340] Water Framework Directive. Available at: http://ec.europa.eu/environment/water/water-framework/index_en.html [accessed on 13 October 2008].

The WFD should have been transposed into national legislation by 22 December 2003 (with the extension to 1 May 2004 for the ten new Member States).

The WFD focuses on ensuring the quality of drinking water and, to a lesser extent, dealing with scarcity issues. However, with particular relevance to the economic regulation of water and wastewater, Article 9 stipulates that all users should face appropriate water charges and these should reflect the full costs of the resource, including operational, environmental and resource costs.[341]

> The prices users pay for water should cover the operational and maintenance costs of its supply and treatment and the costs invested in infrastructure. The directive goes further and requires that prices paid by users also cover environmental and resource costs. … When a water resource is partly or fully depleted and less water is available for other users the cost of that resource goes up.

Environmental costs are aimed at addressing pollution concerns while resource costs are intended to reflect the scarcity of water resources.[342] Member States are required to introduce pricing policies that lead to efficient allocation of the water resources by the target date of 2010.[343]

The WFD stipulates that member countries must develop river basin district (RBD) plans for each substantial water body. Three features of this development are noteworthy:

- Under the WFD, consultation with interested parties is required in creating RBD plans. This can have an inter-member-state dimension where large river systems occupy two or more Member States, and an 'international' dimension when countries like Switzerland share a river basin with EU members. A map in Water Note 1 indicates the extent of inter-jurisdictional basins in Europe.
- Member countries are required to report to the European Commission regarding their progress on implementing water management plans. Water Note 1 states that these plans are 'to be completed by 2009' (p. 3).
- All significant water bodies are supposed to achieve 'good status' by 2015, but member states can take longer if they can demonstrate that this is 'disproportionately expensive'. Water Note 5 states that costs and benefits need to be evaluated in quantitative and qualitative terms, and that benefits need to exceed costs by a 'substantial margin' (p. 3).

Examples of compliance with the WFD are considered in some of the six specific chapters on EU Member States.

5. Rail

A number of Directives and regulations are relevant to the regulation of rail transport across Member States. A 1991 Directive laid down some important requirements with respect to separation of accounts and charging. Later directives for rail have been made in three 'packages'; in 2001, 2004 and 2007.

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[341] Water Note 5 'Economics in Water Policy'.

[342] European Commission, DG Environment, 2008.

[343] An OECD report finds that country experience on irrigation water shows that revenues from the so-called '3Ts' – tariffs, taxes and transfers (official development grants) – generated on the basis of 'sustainable cost recovery' is a more realistic and practical policy principle than 'full cost recovery' based on tariffs only (p. 13). It recommends that every country must find its own mix of the three sources of finance. See OECD, *Managing Water for All: An OECD Perspective on Pricing and Financing – Key Messages for Policy Makers*, 2009.

The first Directive (91/440 of July 1991) mandates separate accounts for activities relating to the provision of transport services and activities in managing the railway infrastructure. Thus (Article 6. (1)):

> Member States shall take the measures necessary to ensure that the accounts for business relating to the provision of transport services and those for business relating to the management of railway infrastructure are kept separate. Aid paid to one of these two areas of activity may not be transferred to the other.

The Directive also provides for the optional functional or operational separation of activities (Article 6. (2)).

Article 8 made the following stipulation with respect to charges:

> The manager of the infrastructure shall charge a fee for the use of the railway infrastructure for which he is responsible, payable by railway undertakings and international groupings using that infrastructure. After consulting the manager, Member States shall lay down the rules for determining this fee.
>
> The user fee, which shall be calculated in such a way as to avoid any discrimination between railway undertakings, may in particular take into account the mileage, the composition of the train and any specific requirements in terms of such factors as speed, axle load and the degree or period of utilization of the infrastructure.

The first package of directives, known as the Rail Infrastructure Package[344] (Directives 2001/12, 2001/13 and 2001/14), sets rules in relation to the European market for international freight transport by rail. Among these are the conditions under which railway undertakings can obtain licences and safety certificates; the framework for the allocation and charging of rail infrastructure capacity; the role and responsibility of regulatory bodies in the Member States, and the separation of accounts for subsidised and non-subsidised activities. In addition, the rules vest the Commission with responsibility for monitoring 'technical and economic conditions and market developments of European rail transport', which it proposes to do through a Rail Market Monitoring Scheme.

Directives issued under a Second Railway Package set out arrangements for the opening of the market for national freight transport by rail, establishment of a European Railway Agency and a framework for railway safety. According to the two packages of Railway Directives, the rail freight market should be opened up at least on the Trans European Rail Freight Network (TERFN – accounting for 50 per cent of EU railway network and 80 per cent of traffic) as of 15 March 2003 with progress to the whole network by 2006.[345]

In 2007, a Third Railway Package was adopted involving market opening for international rail passenger services, rail passenger rights and obligations, as well as the certification of train drivers. The Directives and regulations comprising the third package introduce a European driver licence, introduce open access rights for international rail passenger services including cabotage by 2010, and set out rail passengers' minimum quality standards. This legislation has yet to be implemented by Member States.

The Directorate-General for Transport and Energy (DG Tren) is a service unit of the European Commission, with a staff of over 1 000. It has responsibility for the development of Community transport and energy policies, including the development

[344] Also known as the 'First Railway Package Directives'.
[345] Official Journal L164 of 30 April 2004, including Regulation (EC) No. 881/2004 and Directives 2004/49/EC, 2004/50/EC and 2004/51/EC.

of common access frameworks. Other key responsibilities include investigating incorrect transpositions of community law by Member States, and managing financial support programs for the transport sector, in particular, the Trans-European Transport Network Project (TEN-T). The Trans-European Transport Network Executive Agency (TEN-T EA) was created in 2006 to implement and manage the TEN-T program on behalf of the European Commission.

The Commission and Strategic Cross-border Infrastructure Planning

The Commission has identified a number of infrastructure projects where it is keen to foster greater levels of investment. In large part, these projects involve the addition of capacity at the borders between Member States (and therefore fall outside of the competency of any one Member State). In respect of these projects, the Commission is usually allocated a general budget which it then directs toward specific projects. An example of this is the Trans-European Transport Network Project (TEN-T) which is administered by the Trans-European Transport Network Executive Agency.

Issues with Current Arrangements

There have been calls for the introduction of single European regulators' forum in various infrastructure areas. For example, proposals have been made to formalise the current 'Railnet Europe' forum into a European-wide regulatory agency. This may reflect perceived asymmetries in how Railnet Europe allocates capacity among different access users in Member States.

Calls for European-wide regulators in railways and energy more generally may be linked to a number of concerns.[346] Firstly, there are concerns about fragmentation and differences in regulatory approaches between Member States. For example, although all Member States have committed to full market opening in rail from 2010, the way this objective is being implemented, and the speed at which the market is being opened, appears to vary significantly across Member States. Secondly, concerns have been expressed about differences in the relative skills and resources of NRAs across the different Member States. Thirdly, concerns exist about specific aspects of current arrangements. For example, although there are often bilateral agreements between Member States, in some cases these can be drafted so as to be more favorable to the incumbent access provider in each Member State, which can lead to disproportionate impacts depending on the size of the Member State. Another example is the impact of legacy agreements operating in Member States; where differences in these agreements between access providers and access users in Member States can act to impede the development of an interoperable market environment across all Member States. Finally, there have been concerns raised about issues of extra-territoriality; with the suggestion that a single European regulator would be able to address impacts which extend beyond the border of one Member State.

6. Airports

The Directorate-General for Transport and Energy is responsible for matters in relation to European air transport, consisting primarily of airlines, airports and air traffic control services.

Historically air transport markets were governed nationally with heavy involvement of the government in ownership, operation and financing. In the 1990s the air transport industry was liberalised. The 'third air package' of 1992, which provided

[346] Based on meetings with DG Tren 7 July 2008.

for the Internal Market for Air Transport in the EU Member States[347] and removed all commercial restrictions for airlines flying within the EU, such as restrictions on routes, the number of flights and setting of fares. Since 2004, Air Navigation Services have been subject to regulation under the Single European Sky Initiative.

Airport infrastructure charges remain within the province of Member States, although a framework of common principles is currently before the European Parliament. In addition, access to groundhandling services at airports are now regulated at the European level. Directives in relation to air transport introduced by EU in the past are listed in the table below.[348]

[347] This consists of Regulations, EEC No. 2407/92 on Licensing of Air Carriers, 2408/92 on Access to Air Routes and 2409/92 on Fares and Rates for Air Services.

[348] Directorate-General for Energy and Transport, *Transposition of Directives*. Available at: http://ec.europa.eu/dgs/energy_transport/infringements/transport_directives_en.htm#air [accessed on 20 January 2009].

EU Directives on Air Transport

Reference	Titles	Date of publication	Transposition deadline
2006/93/EC	Directive on the Regulation of the Operation of Aeroplanes covered by Part II, Chapter 3 , Volume 1 of Annex 16 to the Convention on International Civil Aviation, second edition (1988)	27/12/2006	Codification
2006/23/EC	Directive on a Community Air Traffic Controller Licence	27/04/2006	17/05/2008 17/05/2010
2004/36/EC	Directive on the Safety of Third-country Aircraft using Community Airports	30/04/2004	30/04/2006
2003/42/EC	Directive on Occurrence Reporting in Civil Aviation	04/07/2003	04/07/2005
2002/30/EC	Directive on the Establishment of Rules and Procedures with regard to the Introduction of Noise-related Operating Restrictions at Community Airports	28/03/2002	28/09/2003
99/28/EC	Commission Directive amending the Annex to Council Directive 92/14/EEC on the Limitation of the Operation of Aeroplanes covered by Part II, Chapter 2, Volume 1 of Annex 16 to the Convention on International Civil Aviation, second edition (1988)	06/05/1999	01/09/1999
98/20/EC	Council Directive amending Directive 92/14/EEC on the limitation of the operation of aeroplanes covered by Part II, Chapter 2, Volume 1 of Annex 16 to the Convention on International Civil Aviation, second edition (1988)	07/04/1998	28/02/1999
97/15/EC	Commission Directive adopting Eurocontrol Standards and Amending Council Directive 93/65/EEC on the Definition and Use of Compatible Technical Specifications for the Procurement of Air-traffic-management Equipment and Systems	10/04/1997	01/12/1997
96/67/EC	Council Directive on Access to the Groundhandling Market at Community Airports	25/10/1996	25/10/1997
94/56/EC	Council Directive establishing the Fundamental Principles governing the Investigation of Civil Aviation Accidents and Incidents	12/12/1994	21/11/1996
93/65/EC	Council Directive on the Definition and Use of Compatible Technical Specifications for the Procurement of Air-traffic- management Equipment and Systems	29/07/1993	19/07/1994

92/14/EEC	Council Directive on the Limitation of the Operation of Aeroplanes covered by Part II, Chapter 2, Volume 1 of Annex 16 to the Convention on International Civil Aviation, second edition (1988)	23/03/1992	01/07/1993
91/670/EEC	Council Directive on Mutual Acceptance of Personnel Licences for the Exercise of Functions in Civil Aviation	31/12/1991	01/07/1992
89/629/EEC	Council Directive on the Limitation of Noise Emission from Civil Subsonic Jet Aeroplanes	13/12/1989	30/09/1990
83/206/EEC	Council Directive amending Directive 80/51/EEC on the Limitation of Noise Emissions from Subsonic Aircraft	04/05/1983	04/05/1984
80/51/EEC	Council Directive on the Limitation of Noise Emissions from Subsonic Aircraft	24/01/1980	01/01/1980

The legislation and related regulations in relation to air transport that have come into force can be broadly classified into the following subject areas;

- Economic policies governing regulations on licensing of air carriers, insurance requirements for airlines, access to air routes, slot allocation, air service pricing, code of conducts for computer reservation systems, access to groundhandling market;
- Air traffic management in relation to the 'Single European Sky' scheme introduced in 2004 and updated by a new legislative package on the single air transport market which was effective on 1 November 2008;[349]
- Safety and security matters, including Directives 94/56/EC and 2003/42/EC increasing aviation safety by learning from aviation accidents and incidents;
- Environmental and social issues;
- Passenger protection matters; and
- Other matters, including a regulation that requires Member States to establish statistical data on the carriage of passengers, freight and mail by commercial air services.[350]

A good summary of EU legislation in the field of civil aviation can be found in a 2007 study commissioned by Directorate-General for Energy and Transport.[351]

In addition, some parts of the industry are subject to competition rules specified under Articles 81 and 82 of the EU Treaty, and the industry is also subject to rules on State aid under Article 87 of the EU Treaty. In general, State aid is considered to distort or potentially distort competition by preferential treatment; however, State aid can be approved under certain circumstances, for example, regional development.

Airports

At present, pricing of airport infrastructure is regulated at national level. In 2007 the Commission proposed a Directive on Airport Charges,[352] which aims to establish a general framework of common principles for the levying of airport charges services'.[353] The proposal requires the determination of airport charges by certain airport operators to be transparent,[354] consultative[355] and non-discriminatory.[356] It

[349] Regulation of the European Parliament and of the Council No. 1008/08 of 24 September 2008, *Official Journal of the European Union L 239*, 31 October 2008.
[350] EC, Regulation No. 437/2003 of the European Parliament and of the Council, 27 February 2003.
[351] Booz Allen Hamilton Ltd, *Guide to European Community Legislation in the Field of Civil Aviation*, A Study commissioned by Directorate-General for Energy and Transport of European Commission, June 2007. Available at: http://ec.europa.eu/transport/air_portal/international/doc/brochures/2007_eu_aviation_acquis_handbook_en.pdf [accessed on 20 January 2009].
[352] EC, *Proposal for a Directive of the European Parliament and of the Council on Airport Charges, COM 2006:820*, Brussels, 24 January 2007.
[353] The propsed Directive followed many recommendations from the International Civil Aviation Organisation (ICAO) on 'Policies on Charges for Airports and Air Navigation Services' (7th Edition, 2004).
[354] Airport managing bodies must inform airport users of the services and infrastructure provided; how airport charges are calculated; the total cost of service; public financing of airport facilities and services; tariffs and traffic projections; and planned infrastructure projects and their impact on capacity. Airport users must provide the airport managing body with traffic forecasts; fleet composition and use; development projects; and aeronautical requirements.

also requires the creation of an independent regulatory authority in each Member State to ensure the application of the Directive, oversee the levying of charges, arbitrate and settle disputes. The proposed Directive has been amended by the European Parliament and the Council, who formed a common position on 23 June 2008 that is considerably different from the original proposal in the following elements:

- Scope of the Directive has been significantly reduced from 'all airports with an annual traffic of more than one million passengers or more than 25 000 tons of freight' to 'the largest airport in each Member State and to any other airport with an annual traffic of more than five million passengers'.[357]
- The introduction of an article on airport network – a groups of airports to which a common system of charges can be applied.
- The introduction of a provision to avoid unnecessary duplication of appeal procedures.
- The extension of the time period for transposing the Directive into national legislation from 18 to 36 months.

It should be noted that the Directive has not been adopted at this stage. Further the proposed Directive does not prescribe the basis on which airport charges should be set. The derivation of a charging system, including the method of calculation, will continue to lie with the individual Member States.

Ground-handling services[358]

Directive 96/67/EC of 15 October 1996 and subsequent regulations on access to the groundhandling market set out the requirement for European airports to open up access to the ground-handling market.[359] Under the Directive, there are two types of ground-handling services:

- restricted services –that is, baggage handling, ramp handling, fuel and oil handling, freight and mail between the air terminal and the aircraft – that can be reserved for a limited number of ground-handling service providers and self-handling users at airports that reach the following thresholds:
    - for third-party handling, all airports whose annual traffic is no less than two million passengers or 50 000 tonnes of freight

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[355] Airport managing bodies and airport users must carry out a consultation process on a regular basis which focuses on the operation of the charging system; the level of airport charges; the quality of the service provided; and future investments.

[356] Differences in airport charges may be justified by issues of public and general interest, including environmental issues.

[357] EC, *Communication from the Commission to the European Parliament pursuant to the Second Subparagraph of Article 251(2) of the EC Treaty concerning the Common Position of the Council on the Adoption of a Directive on Airport Charges*, COD 2007/0013, Brussels, 8 July 2008.

[358] Ground-handling services is defined as the services provided to airport users at the airports to ensure the proper flow of passengers and freight (check-in, baggage and freight handling) and ancillary services such as catering, cleaning, maintenance and towing of aircraft, fuelling, etc. See a list of ground-handling services described in the Annex of the Directive 96/97/EC.

[359] Council Directive (EC) No. 96/67, *Official Journal of the European Union L 302*, 26 November 1996, p. 28; Regulation No. 1882/2003 of the European Parliament and of the Council, *Official Journal of the European Union L 284*, 31 October 2003, pp. 1–53; and Regulation No. 2111/2005 of the European Parliament and the Council, Official Journal of the European Union.

- for self-handling, all airports whose annual traffic is no less than one million passengers or 25 000 tonnes of freight.

- all other services to which free access exists for ground-handling services providers or self-handling users (subject to licensing for safety and financial soundness etc).

For restricted services, the number of authorised ground services handlers at each airport concerned should be no fewer than two, with at least one being independent of both the airport operator and any airlines responsible for carrying more than 25 per cent of the air traffic. However, the Member States can grant exemptions for reasons such as capacity constraints. An Airport Users' Committee that represents airport users should be set up at each airport. The selection of ground handlers can be the responsibility of the government (or regulator on behalf of the government) or the airport operator if it is not directly or indirectly involved in the provision of ground handling services. An airline can be engaged to provide ground-handling services to itself and to other airlines.

EU Member States are required to transpose the Directive and related regulations into national legislation within one year of their official publication. However, the process of transposition has been fairly slow with most Member States not completing the transposition of the 1996 Directive before 1999.[360] The Directive requires the Commission to publish in the Official Journal of the European Communities each year a list of Community airports at which the groundhandling market must be opened. The latest list published on 17 November 2006 based on 2005 data shows that only 13 airports in the Member States meet the minimum threshold of one million passenger movements or 25 000 tonnes of freight per annum.

The EC has reported that the Directive 96/67/EC has resulted in the introduction of competition at many European airports and lower prices for ground handling services but only a modest 'shake-up' in market shares in ground handling at economically significant airports.[361]

Airspace / Air Traffic Management

European airspace is currently subject to regulation under the 2004 *Single Sky* legislation. The 2004 legislation requires European airspace to be restructured based on traffic flow rather than national borders and aims to increase capacity and efficiency in European air traffic management. The legislation comprises four regulations, in addition to a number of implementing rules/regulations.

- The *Framework Regulation* lays down the framework for the establishment of a Single European Sky. The Regulation restructures an EU airspace fragmented into 27 national air traffic control systems into an airspace divided into functional airspace blocks. Member States are responsible for identifying and establishing the institutions for these blocks.

- The *Service Provision Regulation* regulates the provision of air navigation services in the Single European Sky (including laying down a common charging scheme for air navigation services and common requirements for ownership/organisational structure, operating procedures and safety oversight).

[360] EC, *Report from the Commission on the Application of Council Directive 96/97/EC of 15 October 1996*, COM(2006) 821, Brussels, 24 January 2007.
[361] Ibid., p. 10.

- The *Airspace Regulation* regulates the organisation and use of the airspace in the Single European Sky.
- The *Interoperability Regulation* mandates the interoperability of the European Air Traffic Management Network.

With respect to charging for air navigation services, the following principles must be applied in the establishment of the cost-base for charges:

- the cost to be shared among airspace users is the full cost of providing air navigation services, that is, the costs assessed in relation to the facilities and services provided for and implemented under the ICAO Regional Air Navigation Plan for European Region;
- the cost of different air navigation services must be identified separately, and cross-subsidy between different air navigation services must be allowed only when justified for objective reasons;
- transparency of the cost-base for charges must be guaranteed.

The European Commission has to periodically review the application of the *Single European Sky* legislation and to report every three years to the European Parliament and the Council.

The second legislative package of the *Single European Sky* was adopted in 2008 and aims to address deficiencies identified in the existing legislation to facilitate the full achievement of the Single Sky.

7. Ports

The Directorate-General for Transport and Energy is responsible for European maritime transport including matters related to sea ports. There is currently no common European seaport access or charging framework. Where there is regulation or oversight of European ports, these are regulated at local, regional or national level.

Two successive proposals from the Commission for market access to port services (such as cargo handling, towage, pilotage and mooring) failed to establish a common framework regarding the provision of port services in major EU ports. An initial proposal was made in 2001 and later rejected in 2003. A revised proposal was submitted in October 2004, further considering competition in port services.[362] However, the proposed Directive on access to port services was defeated in the European Parliament in 2006. The draft Directive would have allowed several providers for services such as pilotage, towage,[363] mooring, cargo handling services and passenger services (with any limits on the number of service needing to be justified by limitations in space, available capacity, maritime traffic safety or development policies within the port).

[362] EC, *Proposal for a Directive of the European Parliament and of the Council on Market Access to Port Services*, COM/2004/654 Final – COD/2004/0240, Brussels, 13 October 2004.

[363] The Commission distinguishes pilotage from towing and mooring services as follows: pilotage is a mandatory technical-nautical service organised on a monopoly basis in most European ports, towing and mooring services are provided by either the public or private sector on a voluntary or mandatory basis, exclusively or in competition with other operators: .EC, *Port infrastructure: Green Paper*, (last updated in January 2008). Available at: http://europa.eu/scadplus/leg/en/lvb/l24163.htm [accessed on 22 January 2009].

A new European Port Policy consultation commenced in 2007. In the Commission's policy documents, the Commission notes that there is no common tariff structure or agreed methodology for tariffs. The Commission suggests a likely resistance to a Community framework for port tariffs based on costs, and proposes as an alternative the introduction of code of good practice aiming at enhancing transparency in charging methodology and tariff structures.[364] The Commission also proposes increasing transparency in respect of public financing/State Aid to ports. An existing Directive requires transparency in relation to State Aid but only for the small number of European ports whose annual earnings exceed €40 million per year.[365] The Commission plans to take measures towards extending the provisions on transparency to all merchant ports.

[364] EC, Port Policy Consultation 2006–2007, 2007. Available at: http://ec.europa.eu/transport/maritime/doc/2006_2007_consultation_brochure_en.pdf [accessed on 2 August 2008].
[365] EC Directive 80/723.

EUROPE

FRANCE

OVERVIEW

France has highly developed economic infrastructure, built predominantly by strong national incumbents. The liberalisation of economic infrastructure appears to have been slower than in many OECD countries. Consequently, processes for access to economic infrastructure are more recent, and not as developed as those observed in some other OECD countries.

Telecommunications, posts and energy tend to be most liberalised and have the most transparent and consultative processes of economic liberalisation. On the other hand, the transport areas (rail, airports and ports) display less of these characteristics. In many industries, regulation is the primary responsibilities of key ministries, such as the Ministry of Ecology, Energy, Sustainable Development and Planning (MEESDP) that is in charge of both energy and transport sectors and the Ministry for Economy, Industry and Employment that holds the telecommunications and posts portfolios.

In electricity and gas, the independent regulator, the Energy Regulation Commission (CRE), acts as an advisory body to the Minister who retains the ultimate decision-making power. Particularly, the CRE makes recommendations on energy tariffs for the Minister to consider. It also acted as a determinative body in relation to the creation of access contracts and access disputes (performed by the Dispute-Settlement and Sanctions Committee (CoRDiS)).

The respective incumbents in telecommunications and posts have their universal service obligations monitored by the sector-specific regulator, the Regulation Authority for Electronic Communications and Posts (ARCEP). In telecommunications, the regulator acts as an advisory body to the Minister on various issues and makes determinations on access disputes. In posts, the regulator approves pricing decisions and monitors price and quality of services.

Local governments have a key role in the provision of water and wastewater infrastructure and services. The industry is regulated under a decentralised model with six large water basins each managed a local water parliament.

In rail, the Mission for Control of Rail Activity (MCAF) acts as an advisory committee to the Minister. The network operator is required to publish a reference document that provides the framework for negotiating access contracts.

The MEESDP, through the Directorate-General for Civil Aviation (DGAC), also performs various regulatory functions over air transportation. A public airport, including the newly-privatised *Aéroports de Paris*, is statutorily required to draw up a specific economic regulation contract setting out price and quality objectives valid for a period of up to five years. The contract is subject to public consultation and ministerial approval.

Public port authorities are responsible for port infrastructure, development and pricing decisions. The port industry is currently under review, including a government commissioned report in 2007 finding a loss in competitiveness of public ports and a report to the senate in 2008 reviewing the lack of coherence and organisation in port regulation.

GEOGRAPHY, POPULATION, ECONOMY, POLITY AND LEGAL SYSTEM[366]

France is a large Western European country, occupying a land area of 547 030 square kilometres. It has large areas of plains and rolling hills, with mountainous areas to the south and east. A temperate climate is found in the west, while a continental climate prevails in the interior of the country. The south of France, bordering the Mediterranean Sea, is characterised by a climate of mild winters and hot summers.

France has a population of nearly 61 million. The major cities are Paris, Marseille, Lyon and Toulouse. The population is largely geographically dispersed, with approximately 30 per cent of the population residing in rural areas (2008 estimate). The country has a moderate population density by OECD standards of 111 people per square kilometre (2008 estimate). As with most OECD countries, France exhibits small population growth (0.574 per cent per annum, 2007 estimate) and an ageing population.

France is the fifth largest economy in the OECD with a GDP (on purchasing power parity (PPP) basis) of US$2.047 trillion. The GDP per capita of US$33 200 (2007 estimate) is towards the upper part of the lower half of OECD countries. It has large agricultural production (including wheat, beef, dairy, and wine), substantial (but not bountiful) natural resources (for example, very little oil and gas) and strong manufacturing (machinery, chemicals, cars, aircraft, electronics and food processing). Services employ more than 70 per cent of the labour force and account for around 77 per cent of GDP. Tourism is particularly important. Strong trades union, strong 'national' business organisations (previously state-owned) and subsidised agricultural production are features of the economy that have prevented the same degree of modernisation and liberalisation as is observed in many other OECD countries.

France has very highly developed infrastructure in telecommunications, energy, transport and water; with a strong engineering tradition. Fixed-line and mobile telecommunications are highly developed and exhibit high penetration. Electricity production includes strong contributions from nuclear and hydro. It has several major seaports like Bordeaux and Calais; an excellent road system and highly developed railways (including the TGV).

France is a presidential republic. The French Parliament is a bicameral system, comprises the National Assembly (elected by popular vote) and the Senate (elected by an electoral college). The President is France's Chief of State and presides over the government. The President is elected by direct popular vote for a five-year term. The Prime Minister is the head of government and the Council of Ministers (the key decision-making body of the government, consisting of the senior ministers). The President appoints the Prime Minister after nomination by a majority of the National Assembly.

The four leading French political parties are the Socialist party; the conservative Gathering for the Republic (RPR); the Union for the French Democracy (UDF); and the French Communist party.

At the local level, France is organised around 22 administrative regions and 96 metropolitan departments. Each department covers about 5 000 square kilometres and is administered by an elected departmental council. Within the departments there are

[366] The material for this sub-section is from Central Intelligence Agency (CIA), *The World Fact Book France*. Available at: https://www.cia.gov/library/publications/the-world-factbook/geos/fr.html [accessed on 21 August 2008].

approximately 36 000 communes, these refer to the lowest administrative division, headed by elected mayors.

The legal framework is based on civil law system with indigenous concepts. It allows the review of administrative but not legislative acts; and as a member of the EU, has accepted the authority of European legislation over national law; but has not accepted compulsory International Court of Justice jurisdiction. French law is divided into two principal areas – private law and public law. Private law includes, in particular, civil law and criminal law. Public law includes, in particular, administrative law and constitutional law. The courts are divided into the judicial branch (dealing with civil law and criminal law) and the administrative branch (dealing with appeals against executive decisions). Appeals for all cases are heard by the Court of Appeal, with criminal cases referred by the Court of Appeal to the Assize Court. The court of last resort for the judicial branch is the Supreme Court of Appeal, and the Council of State for the administrative branch.

APPROACH TO COMPETITION AND REGULATORY INSTITUTIONAL STRUCTURE

France does not have a long tradition of independent regulation. Historically, direct intervention by the administration was deemed sufficient to regulate the existing strong monopolies. The major trade union, General Confederation of Work (CGT), a former close ally of the French Communist Party (PCF), is opposed to privatisation in principle. It is very strong in some public companies like the electricity producer EDF.

The privatisation process in France has been influenced by ideology, as had been the case for nationalisation itself.[367] The reluctance to privatise had been especially salient due to the combination of three political ideologies:

- The Socialist ideology: state-ownership is in all cases superior to private ownership.
- The 'Dirigiste' (Colbertiste), Bonapartist, and Gaullist traditions all highlight the superior knowledge and vision of the state.
- A Christian inspired Social Doctrine advocates public property in the name of the public good and social solidarity.

This combination resulted in the inclusion of provisions for 'public ownership' in the 1946 Constitution. As stated in the *Preamble to the 1946 Constitution*:[368]

> All property and all enterprises that have or that may acquire the character of a public service or de facto monopoly shall become the property of society.

This factor constrains the French regulatory regimes, imbuing the relevant minister rather than independent regulator with decision-making power.

The Competition Council was created as an independent administrative authority by the Ordinance of 1 December 1986, which also established the general principle of

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[367] Michel Berne and Gérard Pogorel, 'Privatisation Experiences in France', *CESifo Working Paper No. 1195*, Institute for Economic Research, Munich, 2004.

[368] See *Preamble to the 1946 Constitution*. Available at: http://www.elysee.fr/elysee/anglais/the_institutions/founding_texts/preambule_to_the_27th_of_october_1946_constitution/preambule_to_the_27th_of_october_1946_constitution.20243.html [accessed on 2 February 2009].

free prices and competition. Acting in accordance with Part IV of the *Commercial Law* and Articles 81 and 82 of the EU Treaty, the Competition Council had the competency to penalise anticompetitive practices. As the main competition body in charge of consumer protection and effective maintenance of competition, it specialised in market analysis and the repression of anticompetitive practices. On 13 January 2009 the Competition Council merged with part of the Directorate-General for Consumption, Competition and Preventional Fraud (DGCCRF), the division of the Ministry for the Economy responsible for competition, to form Competition Authority. Under the *Law of Modernisation of the Economy 2008*, the new competition authority would not only assume existing functions of the Council, but have enhanced powers and a new role in charge of merger control (Articles 95–97).

French competition law applies to all economic activities. It is the nature of the economic activity concerned, not the status of the operator or the form of intervention, which dictates how competition rules apply. The laws relate to all production, distribution and service activities, including those carried out by public entities.

Proceedings before the competition authority are initiated by an act of referral. After examining the admissibility of the referral, the competition authority assesses the state of competition in the market or markets concerned.

It may receive requests for opinions regarding any competition-related issue, parliamentary bills, draft legislation regulating prices or restricting competition and matters relating to corporate mergers. The consultation may be compulsory or optional.

The competition authority must be consulted regarding draft decrees regulating prices or restricting competition and regarding any draft regulations that would introduce a new regime. The Minister of Economy has the option of requesting the competition authority's opinion regarding competition matters; however, the competition authority must be consulted when the Minister believes the transaction in question will adversely affect competition.

The competition authority may be consulted by parliamentary committees regarding parliamentary bills or any other competition-related issue.

The courts may also ask the competition authority to issue an opinion on any anticompetitive practices identified in the cases brought before them.

The competition authority has litigation powers in the field of anticompetitive practices, in order to repress them or to correct any anticompetitive situation. It also has acquired the power to control mergers since the transformation into Competition Authority.

Under the *Commercial Law*, abusive behaviours interfering with the free play of competition on a market are prohibited. Agreements and dominant positions are not prohibited *per se*, but may be declared illegal if they distort competition on a given market.[369]

[369] Competition Council, *Competition Council*. Available at: http://www.conseil-concurrence.fr/user/standard.php?id_rub=99 [accessed on 13 August 2008].

The competition authority's decision may be open to appeal by the parties in question and the government commissioner before the Paris Court of Appeal at most ten days after its notification. The Court shall rule within one month of the appeal.[370]

Additionally most decisions of the competition authority must be reported to the Minister for Economic Affairs, who then has a period of one month in which to make an application for cancellation or reversal to the Paris Court of Appeal.[371] The presiding judge may order that enforcement of the decision be deferred if it is likely to have manifestly excessive consequences or if exceptionally serious new facts have emerged since its notification.

Any appeal on points of law must be brought within one month of notification of the decision.

Appeals can also be made to the Paris Court of Appeal to cancel or modify decisions made by the CRE (energy) and the ARCEP (telecommunications and posts).

Information confidentiality of administrative documents is determined according to Article 6 of Law no. 78-753 of 17 July 1978.[372] Administrative documents cannot be published or communicated to another party if their communication or consultation could undermine: the deliberations of the government and/or executive authorities; the secrecy of national defence; foreign relations; State or public security; the currency; legal proceedings (except with the permission of the relevant authority); the investigation of financial or immigration fraud; and any secret protected by the law.

Administrative documents may be communicated solely to the party concerned if they could: undermine the secrecy of someone's private life, medical history or commercial/industrial secret; carry a judgement or valuation of a person named or easily identifiable; reveals details of a person's actions, where those actions could be subject to prejudice.

REGULATORY ARRANGEMENTS BY INDUSTRY OR SECTOR

1. Energy

Over 75 per cent of electricity in France is generated by nuclear energy.[373] In 1996 and 1998 the French electricity and gas markets, respectively, were officially opened to competition following the ratification of EU directives. However, the application of these Directives in French law was only achieved during the period 2000–2006. The gradual opening to competition was finalised with all consumers given free right to choose their own electricity and gas suppliers as of 1 July 2007.[374] The most recent EU Directives (2003) aim to create a European energy market with free choice of

[370] *Commercial Law*, Chapter IV, Article L464-7.
[371] *Commercial Law*, Chapter IV, Article L464-8.
[372] The *Act no. 78-753 on access to administrative documents of 17 July 1978* was amended by *Act no. 79-587* and *Act no. 2000-321*. 'Administrative documents' refers to 'any files, reports, studies, records, minutes, statistics, orders, instructions, ministerial circulars, memoranda or replies containing an interpretation of positive law or a description of administrative procedures, recommendations, forecasts and decisions originating from the State, territorial authorities, public institutions or from public or private-law organisations managing a public service' (Article 1).
[373] World Nuclear Association, *Nuclear Power in France*, May 2009. Available at: http://www.world-nuclear.org/info/inf40.html [accessed on 28 May 2009].
[374] *Energie-info, Généralités sur l'ouverture des marchés (General Information on the Opening of the Markets)*, (in French), 2008. Available at: http://www.energie-info.fr/questions-reponses/generalites [accessed on 13 August 2008].

supplier for consumers, free choice of transport and distribution provider for producers and objective, transparent, non-discriminatory access for all network users.

The deregulation of the retail French electricity market took place in several stages:

- In June 2000, all business customers with annual electricity consumption over 16 GWh were free to choose supplier.
- In February 2003, all business customers with annual electricity consumption over 7 GWh became free to choose supplier.
- In July 2004, all companies and local government agencies became eligible.
- In July 2007, all customers became eligible, including residential customers.

Each customer now has the choice of three types of contracts:

- Contracts with regulated tariffs (offered by incumbent suppliers only)
- Contracts with market prices (offered by incumbent suppliers and alternative suppliers)
- Transitory-regulated-tariff-for-market-adjustment (TaRTAM) contracts which are available to consumers who have a contract at market price. The TaRTAM is equal to the regulated retail tariff exclusive of tax, increased by 23 per cent for green tariffs, 20 per cent for yellow tariffs, and 10 per cent for blue tariffs.

Similarly, deregulation of the French gas industry also occurred in stages:

- from August 2000, all business customers with an annual gas consumption over 237 GWh and all electricity generators or simultaneous electricity and heat generators were free to choose supplier.
- from August 2003, all business customers with an annual gas consumption over 83 GWh were free to choose supplier.
- from July 2004, all companies and local government agencies were free to choose supplier.
- from July 2007, all customers were free to choose, including residential customers.

Each customer has the choice between two different types of contract:

- Contracts under regulated tariffs (offered by incumbent suppliers only)
- Contracts at market prices (offered by incumbent suppliers and alternative suppliers).

A quarterly Electricity and Gas Market Obsevatory covering the wholesale and retail electricity and gas markets in Metropolitan areas has been published by the Energy Regulation Commission.[375] The purpose of this publication is to provide the general public with indicators for monitoring market deregulation.

In spite of liberalisation, the traditional operators are still largely dominant in the gas and electricity markets. *Eléctricité de France* (EDF) and *Gaz de France* (GDF) represent the incumbent monopolies in electricity and gas respectively. They are still

[375] Energy Regulation Commission (CRE), *Electricity and Gas Market Observatory*. Available at: http://www.cre.fr/en/marches/observatoire_des_marches [accessed on 8 April 2009].

the dominant suppliers but have been forced to divide their distribution and transport arms into separate subsidiaries in line with the new laws. EDF is Europe's biggest power company. It accounts for around 95 per cent of electricity distribution with the remainder accounted for by around 160 local distribution companies.[376]

In relation to natural gas, in 2005 there were two transmission systems operators, although GDF operated the large majority of pipelines, and 23 distribution systems operators although the largest, *Gaz Réseau Distribution France* (GRdF), held 96 per cent of the market in terms of volume.[377]

Regulatory Institutions and Legislation

The regulatory body, which was established in 2000, is Energy Regulation Commission (CRE). For various decisions, the minister(s) retains the final decision-making power while the regulator acts solely as an advisory body. Decisions concerning tariffs for the use of transmission networks, distribution networks and LNG terminals must be jointly made by the Ministers for the Economy and Energy, upon CRE proposal. In the case of electricity, the Minister can only accept or reject tariffs recommended by the CRE – the Minister cannot amend the proposed tariffs.

In the case of access disputes and the creation of access contracts, however, the regulator is the determinative body. The Relevant Legislation is the Law no. 2000-108 of 10 February 2000 and the Law 2003-8 of 3 January 2003.

The CRE's main responsibilities are to:[378]

- ensure the smooth running of the electricity and natural gas markets.
- guarantee access to the public electricity network, natural gas infrastructures, LNG facilities and natural gas storage facilities. To this end, the CRE produces a model contract called the 'GRD-F' for use by distribution network operators and suppliers as a base access contract.[379]
- ensure that the public electricity network, natural gas infrastructures and LNG facilities are properly operated and developed.
- ensure that operators of electricity and natural-gas transmission and distribution networks are independent.
- guarantee that expenditure on public electricity services will be financed.
- write and use requirements specifications for invitations to tender for new generating capacity, as part of the on-going planning for electricity generation.
- monitor both transactions on the wholesale markets, whether organised or not, and cross-border trading.

In order to meet its responsibilities, the CRE is empowered to:

- propose access tariffs for public electricity and natural gas networks and for LNG facilities.

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[376] CRE, *Report sent to the DG TREN*, July 2008. Available at: http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/NATIONAL_REPORTS/National%20reporting%202008/NR_En/E08_NR_France-EN.pdf, [accessed 20 February 2009]
[377] Ibid.
[378] Ibid.
[379] CRE – *Commission de la Régulation de l'Energie*, *Rapports d'Activité*, (in French), 2007. Available at: http://www.cre.fr/fr/documents/publications/rapports_annuels [accessed on 13 August 2008].

- approve the transmission-network operators' annual investment programme for electricity and for gas.
- conduct all necessary inquiries and gather all the information necessary to perform its functions.
- comment, particularly on all proposed regulation relating to access to or use of the public electricity network, natural-gas infrastructures and LNG facilities; on proposed regulated tariffs; and on terms and conditions for purchasing electricity that involve an obligation to purchase.
- make regulatory decisions in electricity and gas in a number of areas:
    - the roles of operators of public electricity and gas transmission and distribution networks in operating and developing the networks;
    - the roles of operators of both LNG facilities and natural-gas underground storage facilities;
    - the terms and conditions for connecting to the public electricity and gas transmission and distribution networks;
    - the terms and conditions for access to and use of the networks;
    - the way planning schedules for energy tender, procurement and consumption are implemented and adjusted; and the financial compensation made for variances;
    - the way purchase contracts and protocols are finalized by operators of public transmission and distribution networks;
    - the scope of each activity that is accounted for separately, the book-keeping entries used to maintain the separate accounts and principles determining the financial relationship between these activities.
- calculate the charges associated with tasks carried out by the public electricity service.

The Dispute-Settlement and Sanctions Committee (CoRDiS) was created within the CRE by the French Law of 7 December 2006. The committee settles disputes between facilities operators and eligible users related to the access and use of public electricity grids, natural gas networks and LNG and natural gas storage facilities.[380] It also applies sanctions when access rules are broken or decisions on dispute settlement are not respected.

Process and Consultation

In order to draw up its tariff proposals, the CRE systematically consults market participants and holds public hearings. The categories of costs to be taken into account in requests for settlement of disputes concerning access and use of electricity and natural gas networks are submitted to the CoRDiS in the form of a letter of complaint or in person.[381] A complaint may be lodged by:

[380] CRE – *Commission de la Régulation de l'Energie*, *Réglements de Differends*, (in French), 2008. Available at: http://www.cre.fr/fr/acces_aux_reseaux/reglements_de_differends [accessed on 12 August 2008].
[381] CRE – *Commission de la Régulation de l'Energie*, *Rapports d'Activité*, (in French), 2007. Available at: http://www.cre.fr/fr/documents/publications/rapports_annuels [accessed on 13 August 2008].

- an electricity transmission or distribution system operator (DSO);
- a natural gas transport or distribution system operator;
- a liquefied natural gas plant operator; or
- a user of the above grids, systems and plants.

All documents must be submitted in French and in eight copies.

Other matters requiring only the provision of advice by the CRE, may arise through direct ministerial request or as required by the Commission's on-going responsibilities over monitoring the sector.[382]

When a matter arises, the president of the committee appoints a member (or members) of staff as a delegate (*le rapporteur)* responsible for the mediation of communication between the various parties and the coordination of the administration of the dispute resolution process. The *rapporteur* (on behalf of the Committee) then notifies all parties implied in the dispute, giving them notice of the complaint and inviting them to submit arguments and replies successively.

The parties then communicate their respective arguments in the form of a formal mediated debate. The complainant may respond to the defense of the other party, who may subsequently reply. This process continues with a delay of approximately two weeks between each party's submissions. These submissions constitute a form of negotiation, with each new communication outlining new arguments and also proposing adjustments to the demands of each party. This process may continue up to the date of the committee meeting and is summarised by the *rapporteur* at the meeting.

All consultation is in the form of written submissions and documented investigations, dated and collated by the designated *rapporteur*. Time restrictions for submissions are set by the committee and the parties are notified by the *rapporteur*.

A public committee meeting is held to hear the *rapporteur* the consultation it has undertaken, and the observations of the parties. Any informant/expert deemed relevant and competent by the Minister or the CRE[383] may appear. However, it seems that the CRE rarely relies on the support of external consultants as about 50 per cent of the CRE staff is previously employed in the industry.[384] Committee members may ask questions to those present before convening privately to make a decision.

The CoRDiS (as part of the CRE) acts as a mediator between the complainants in access disputes. It can only be approached after the failure of independent negotiations between the two organisations. Although the final decision and the powers of the regulator are officially judicial, up until the committee meeting the process is based on submissions and consultation. While the parties are entitled to legal representation, there is no compulsion for them to seek it. Meetings are consultative and give the regulator the opportunity to ask questions and the parties the opportunity to present information.

Appeals are made to the Court of Appeal (on judicial grounds) in Paris and the process is litigious in nature from that point.

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[382] Law no. 2000-108 (*CivL*), Law of 10 February 2000.
[383] Law no. 2000-108 (*CivL*), Law of 10 February 2000, Article 33.
[384] CRE – *Commission de la Régulation de l'Energie*, *Rapports d'Activité*, (in French), 2007. Available at: http://www.cre.fr/fr/documents/publications/rapports_annuels [accessed on 13 August 2008].

The CRE maintains a section on the website called Market Observatory. It also produces quarterly industry reports on the state of the Electricity and Gas markets in France and internationally. They are quite detailed – for example, the report for the third quarter of 2007 is 44 pages in length.[385]

The model GRD-F contract provides a basis from which parties are encouraged to negotiate fair access terms. It is only in the case of failed private negotiations that parties may approach the regulator for settlement as a last resort. Resolution outside of formal channels is also encouraged. If an amicable compromise can be found before the date of the committee meeting the complainant may withdraw its complaint and (subject to CRE approval) proceedings will be terminated.[386]

Timeliness

The regulator is approached after private negotiations have failed and the formal process of mediated debate is initiated immediately. The time limits for submissions are clearly stated and generally well adhered to. The regulator sets the date for its hearing and makes it known to the parties. It will consult any evidence and opinions presented up until that date. The parties are required, by law, to supply any information requested by the regulator in relation to the resolution of a dispute.

The committee is required to give decisions within two months of any matter being brought before it.[387] The two-month time limit can be extended, at the discretion of the CoRDiS (in particular to allow for further investigations necessary to resolve a dispute), to four months, subject to the agreement of the complainant.[388] In 2006, the CRE deliberated on three access dispute resolutions, each of which was dealt with within the two-month time limit.[389] The regulator only acts as adviser to the Minister in pricing decisions (these pricing changes would be the most common incentive for parties to cause delay).

Role of Interested Parties

The Superior Council for Energy (which replaced the Superior Council for Gas and Electricity in 2006) is an advisory body, established by the legislation, to the Minister composed of representatives from government, industry, workers' unions, consumer groups, regulators and members of parliament. It was set up specifically to provide an ongoing avenue for communication among the various industry participants.

There is a separate body – National Ombudsman of Energy – which is focused on consumer issues and handles disputes between providers and consumers.[390]

The CRE instigates, coordinates and facilitates the meetings of various 'work groups' to maintain dialogue with network operators, producers, distributors, suppliers,

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[385] CRE, *Commission de la Régulation de l'Energie*, *Observatoires des Marchés*, (in French), 2008. Available at: http://www.cre.fr/fr/marches/observatoire_des_marches [accessed on 13 August 2008].
[386] CRE, *Commission de la Régulation de l'Energie*, *Déliberations*, (in French), 2006. Available at: http://www.cre.fr/fr/documents/deliberations [accessed on 13 August 2008].
[387] Law no. 2000-108 (CivL), Law of 10 February 2000.
[388] CRE – Commission de la Régulation de l'Energie, *Réglements de Differends*, (in French), 2008. Available at: http://www.cre.fr/fr/acces_aux_reseaux/reglements_de_differends [accessed on 12 August 2008].
[389] CRE – *Commission de la Régulation de l'Energie*, *Déliberations*, (in French), 2006. Available at: http://www.cre.fr/fr/documents/deliberations [accessed on 13 August 2008].
[390] CRE, *Commission de la Régulation de l'Energie*, *Ouverture des marchés de l'électricité et du gaz; Généralités sur l'ouverture des marchés*, (in French), 2008. Available at: http://www.energie-info.fr/questions-reponses/generalites [accessed on 13 August 2008].

consumers. These work groups may be created for a specific consultation or ongoing forums. For example, the 'consumers', 'gas' and 'electricity' work groups were created in 2005 and given the task of providing consultation on the functioning of the small-scale electricity and gas markets. The CRE assigns specific issues for it to consider and it provides advice and recommendations to the CRE. This provides an ongoing forum for informal interactions between industry participants and the regulator.[391]

It does not appear that there is any government or regulator-arranged funding of user groups.

The Federal Union of Consumers (UFC) is the main French consumer advocacy group. The UFC regularly presents submissions in relation to access disputes and attends public hearings of the CoRDIS. It is funded through membership fees. Its council members are voluntary contributors.

Information Disclosure and Confidentiality

CRE proceedings are published on its website.

The CRE, as is necessary for the completion of its mission, has the right to access information from the relevant ministers, the bodies responsible for the management of the public transport and distribution networks and any operator in the energy market. The employees of the CRE, and those appointed by the CRE according to their expertise, are given the right to access any and all information they deem relevant and important to the investigation of a dispute. The agents of the CRE must be granted permission to enter and investigate any premises, and also be allowed to use any vehicle, of an energy supplier, distributor or producer between 8 a.m. and 8 p.m., and any time outside those hours when operation is taking place.[392]

Subject to the confidentiality restrictions on administrative documents specified in the section 'Approach to Competition and Regulatory Institutional Structure' above, any information collected as part of an inquiry must be documented and transcripts must be distributed to all the parties implicated in the dispute within five days of the inquiry being made.

Decision-making and Reporting

The CRE is composed of nine members known as the College; a Chairman appointed by decree, two Vice-Chairmen appointed respectively by the President of the French National Assembly and the President of the French Senate, two members appointed respectively by the President of the French National Assembly and the President of the French Senate, a member appointed by the Chairman of the French Economic and Social Council; a member appointed by Decree; and two representatives of electricity and natural gas consumers, appointed by Decree. Members are appointed for a non-renewable term of six years and are chosen on the basis of their qualifications in legal, economic and technical fields.

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[391] CRE, *Commission de la Régulation de l'Energie*, *Délibération de la Commission de régulation de l'énergie du 17 juillet 2008 sur les travaux des instances de concertation GTC, GTE, GTG relatifs au fonctionnement du marché de détail de l'électricité et du gaz naturel*, (in French), 2008. Available at: http://cre.search.pertimm.com/index.php?action=pertimmSearch&PHPSESSID=560c76f874bc4e63b285d92db82a8666 [accessed on 13 August 2008].

[392] Law no. 2000-108 (*CivL*), Law of 10 February 2000.

Many decrees and draft ministerial orders are submitted to the CRE for recommendation either:

- by an express measure (rate measures, purchase terms of electricity produced as part of the purchase obligation, specifications of the public transmission system operator, development outline of the public electricity transmission grid, refusal of direct lines, exemptions from rates and commercial terms for the use of natural gas facilities or LNG facilities); or
- by a general measure (recommendation on all texts relating to the access or use of public electricity grids, natural gas facilities and LNG facilities).

Regarding electricity generation, the CRE conducts calls for tenders intended for the implementation of the long term program of generation investments. However, the Minister for Energy is responsible for making decisions to carry out these calls for tenders. The CRE is responsible for the application and drafting of specifications; it sorts the results and issues a reasoned recommendation on the basis of which offers are selected. The Minister then appoints the selected applicant(s).

The Minister for Energy also consults the CRE when a request for a temporary exemption from third party access obligations to an LNG or natural gas storage facility or interconnection facility with a gas transmission network situated within another Member State of the European Community, is referred to the Minister.[393] The decisions of the CRE relating to advice to the Minister or recommendations are broadly applicable across the sector.

The CRE has approximately 130 staff, organised as follows:[394]

- President and Director-General
- Directorate of Infrastructure and Gas Research – three departments: Economics and Pricing, European Gas Industry, and Access to Infrastructure
- Directorate of Markets and the Public Service – four departments: Public Service and Regulated Prices, Regulation of Retail Prices, Surveillance of Retail Markets and Consumer Information, and Wholesale Prices
- Directorate of Access and Electricity Research – four departments: Economics and Pricing of Public Electricity Networks, Cross-border Electricity Exchange, Control of Conditions of Access to Public Networks, and Technical Department
- Directorate of Finance
- Legal Directorate
- Directorate of International Relations
- Administrative Directorate.

The Dispute-Settlement and Sanctions Committee (CoRDiS) was created in December 2006. The CoRDiS is distinct from the College of Commissioners and exercises the CRE's authority as regards access dispute settlement and sanctions. It comprises two Councillors of State appointed by the Vice-President of the French Council of State, and two Councillors from the Supreme Court of Appeal, appointed

[393] CRE – *Commission de la Régulation de l'Energie*, *Powers*, (in French), 2008. Available At: http://www.cre.fr/en/presentation/pouvoirs, accessed on 13 August 2008.

[394] CRE, *Les Services*, (in French), 2008. Available at: http://www.cre.fr/fr/presentation/organisation/les_services [accessed on 13 August 2008].

by the First President of the French Supreme Court of Appeal. All four Councillors are appointed for 6 years. The Chairman of the Committee is appointed by Decree from among its members.[395]

The committee meets and hears the report of the *rapporteur* (containing a summary of the arguments submitted by the parties prior to the committee meeting, any third party reports/opinions submitted and details of any other investigations made by the *rapporteur* and staff); hears the opinions of the representatives of each party implicated in the dispute; and is allowed to ask questions of those present.

The four members of the committee then meet in private to deliberate and make a decision. Decisions are made according to majority vote of those present. In the case of an equal split of the votes the president has the casting vote.[396]

Decisions apply to the specific service provider(s) concerned in the dispute. There may be circumstances where one supplier or a syndicate representative) may act on behalf of a defined group of industry participants (e.g. CRE decision of 5 October 2006) or where various applications to the CRE against the same network operator (usually ADF or GDF) may be joined and treated as one single complaint (e.g. CRE decision of 7 April 2008). The CRE has the power to impose sanctions for the non-compliance with dispute resolution decisions.

Subject to the approval of the CRE, the parties may reach resolutions departing from the decisions of the CRE. For example, in late 2005, a complaint pertaining to access refusal was made and a decision passed down.[397] The decision was appealed to the Paris Appeals Court that rejected the decision on judicial grounds and sent it back to the CRE for re-examination. The parties, however, were able to come to an agreement and design a suitable contract. They had the contract approved by the CRE and the complainant withdrew its complaint before the date of the CRE committee meeting.

Decisions are required to be explained.[398] To fulfil this requirement, a decision report (usually about 15 pages long) is prepared outlining the nature of the complaint, the information presented, the result of the deliberations undertaken, the name of those participating in the process, the legislation considered; and considerations and conclusions of the committee. These decision reports are submitted to the Official Gazette and delivered to the parties concerned, the Minister for Energy and the government representatives. Electronic versions are available on the CRE website.

While there is no distinction between interim and final reports, there can, however, be protective/interim measures enforced during the period leading up to a committee hearing, usually to protect the continued functioning of the market (and guarantee universal service).

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[395] CRE, *Report sent to the DG TREN*, July 2008. Available at: http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/NATIONAL_REPORTS/National%20reporting%202008/NR_En/E08_NR_France-EN.pdf, [accessed on 20 February 2009].

[396] Law no. 2000-108, Law of 10 February 2000.

[397] CRE, *Déliberations*, (in French), 2006. Available at : http://www.cre.fr/fr/documents/deliberations [accessed on 13 August 2008].

[398] Law no. 2000-108, Law of 10 February 2000.

Appeals

Appeals against decisions made by the CRE can be made to the Paris Court of Appeal (a civil court) on judicial ground (Article 38).[399] Decisions can be reformulated or cancelled. They may also be returned to the CRE for reconsideration after cancellation. A decision reconsidered by the regulator may be subject to merits review subsequent to a cancellation of the original decision by the Court of Appeal.[400]

Any appeal must be submitted within one month of notification of a final decision or within fifteen days of notification of a protective measure.[401] Appeals do not suspend the CoRDiS decision, but in special circumstances a request to suspend execution of the decision of the CoRDiS can be made to the President of the Paris Court of Appeal.[402]

The Paris Court of Appeal must deliver its decision within four months of the appeal against a final decision of the CRE being lodged and within one month of the appeal against an interim measure being lodged.[403]

The CRE is notified by the Court of Appeal when an appeal is lodged. It may be asked (as are the various parties concerned) to submit its observations/arguments. The CRE and the parties concerned are permitted to access any documents submitted in relation to the appeal via the court clerk. Either party and/or the CRE can choose to be represented by a lawyer.

The appeal process is entirely separate from the decision process. For dispute resolutions, the decision process involves the regulator (represented by the standing committee) and the parties. For other decisions the Minister is involved. For the Appeal process, however, the regular civil courts are approached and the process is treated as any other matter in those courts.

2. Telecommunications

The fixed-line and mobile telecommunications networks are both highly developed, with high penetration. The French mobile market is one of the largest in Europe. Broadband penetration is slightly above the OECD average, and is almost totally based on DSL.[404]

France Telecom is the traditional government-owned monopoly, which has been partially privatised since 1998. While it is now subject to competition, it is still the dominant force in French telecommunications, serving approximately 24.2 million customers at the end of 2007. Three network operators provide the full range of telephony and data services, while a growing number of MVNOs provide some competition in the low-cost segment. France Telecom's Orange and the Vodafone-

[399] Ibid.
[400] CRE, *Déliberations*, (in French), 2006. Available at: http://www.cre.fr/fr/documents/deliberations [accessed on 13 August 2008].
[401] Ibid.
[402] CRE, *CoRDiS*, (in French), 2008, Available at: http://www.cre.fr/fr/presentation/organisation/cordis [accessed on 13 August 2008].
[403] *Code de procédure civile*, consolidated version, (in French), 25 May 2008. Available at: http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070716&dateTexte=20080603 [accessed on 25 November 2008].
[404] OECD, *Broadband Statistics.* Available at: http://www.oecd.org/document/60/0,3343,en_2649_34225_39574076_1_1_1_1,00.html [accessed on 14 October 2008].

Vivendi-owned SFR dominate the market. All three network operators offer 3G services.

Regulatory Institutions and Legislation

The Ministry for the Economy, Industry and Employment is in charge of telecommunications regulation. The relevant legislation is the *Postal and Electronic Communications Law* (Last modified in June 2008).

The telecommunications industry was legally opened to competition in 1996 and the Telecommunications Regulation Authority (ART) was created. In May 2005, the ART was renamed as the Regulation Authority for Electronic Communications and Posts (ARCEP); the sectoral regulatory body for posts and telecommunications.[405]

The ARCEP is consulted for opinions on draft legislation, decrees and regulations concerning posts and electronic communications. It may also provide opinions to the Competition Authority when called upon to do so. The ARCEP issued 69 opinions in 2007:[406]

- 21 opinions on draft legislation, decrees and orders;
- nine opinions submitted to the Competition Authority;
- three opinions on La Poste tariff decisions;
- 23 opinions on France Telecom tariff decisions;
- ten opinions submitted to the National Frequency Agency (ANFr);
- three opinions on various requests submitted to the Authority.

One important activity for the regulator in the field of electronic communications is awarding operators numbering and frequency resources. This accounts for 49 decisions adopted by the Board (more than half of the total number of decisions). The ARCEP establishes and administers the national telephone numbering plan, and assigns numbers and blocks of numbers in an objective, transparent and non-discriminatory fashion to operators requesting these resources. Every number assignment results in an individual decision. The same is true of frequency allocations to operators. Of the 1,114 decisions adopted by the ARCEP in 2007: [407]

- 239 were decisions on numbering resources, of which three were of general application;
- 793 were decisions relating to frequency resources, of which four were of general application;
- ten were decisions relating to postal authorisations;
- three were decisions relating to dispute settlements, of which one concerned the postal industry.

Sixteen dispute resolution procedures were also opened in 2007.

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[405] Regulation Authority for Electronic Communications and Posts (ARCEP), *Introducing ARCEP/Presentation*, last updated on 13 May 2009. Available at: http://www.arcep.fr/index.php?id=13%22&L=1 [accessed on 27 May 2009].

[406] ARCEP, *ARCEP's Annual Report 2007*, July 2008. Available at: http://www.arcep.fr/index.php?id=1&L=1 [accessed on 13 August 2008], p. 49.

[407] Ibid., p. 50.

In 2004, the universal service obligations imposed by law were removed from France Telecom and a system of applications and delegations replaced them. France Telecom remains, however, the major service provider in France. ARCEP presents opinions to the Minister (whose final approval must be given) regarding France Telecom's tariffs.

The regulator also has the power to impose accounting separation for interconnection/access under the *EU Access Directive* as transposed it into national law.[408] At the time of privatisation ARCEP mandated that France Telecom implement accounting separation. This requirement was renewed in December 2006 in accordance with the new EU framework for telecommunications (ARCEP Decision No. 06-1007).

Process and Consultation

Matters arise in the form of complaints made, by letter or in person, by industry participants.[409] Upon registration of a complaint, the ARCEP announces the date by which it will meet and provide a decision. A *rapporteur* (staff member in charge) is appointed to the case by the president of the committee. The parties concerned are notified and given the opportunity to present observations/arguments successively – a form of mediated debate which takes place up until five days before the date of the committee meeting. The parties are called to meet before the committee. The *rapporteur* gives a summary of the submissions made up until that date, and the parties are given the opportunity to present their arguments and respond to questions from the committee members. The committee then deliberates privately and delivers its decisions.[410]

All communication is made through formal, written channels, including the lodgement of the complaint, submissions and notifications.

Any visit to a premises or other investigation, made in addition to formal submissions, must be documented and presented as part of the file summarised by the *rapporteur* at the committee meeting.

Exceptions are, first, that the parties may be called upon, by the *rapporteur*, to meet in person to decide on a provisional schedule for submissions directly after the official receipt of a complaint; and second, the various parties may present verbal arguments at the actual committee meeting.[411]

The regulator is required by law to notify the public of any decision which will have a significant impact on the market and receive and publish submissions of opinion/comment from the public.[412]

The system of successive submissions is based on the principle of a 'right of reply'. Thus, after each submission is received and dated, it is sent to the other party along

[408] A list of laws transposing the access directive into national law can be found at: http://ec.europa.eu/information_society/policy/ecomm/doc/library/transposition/france_2002_19.pdf.
[409] ARCEP, *Règlement Intérieur – Modification Decision No. 2007-0556*, (in French), 2006.
[410] Ibid.
[411] Ibid.
[412] *Code des Postes et des communications électroniques (Postal and Electronic Communications Law), consolidated version*, (in French), 1 June 2008. Available at: http://www.legifrance.gouv.fr/home.jsp [accessed on 1 June 2008].

with a notification of the date by which the ARCEP must receive a reply. Submissions can be made up to five days before the committee meeting.[413]

The parties can seek advice from any experts and consultants in preparing their submissions. They may also be assisted by experts and consultants of their choice during the committee meeting. The *rapporteur* is allowed to seek economic, legal or technical consultation at any time. Any consultations or investigations must be documented and forwarded to all the parties.[414]

The dispute resolution process is consultative and represents a form of mediated debate between the parties. While legal advice may be acquired, there is no compulsion for parties to be represented at hearings. Hearings follow a discussion/information format and are not court-style in their nature. Cases are presented according to their merits and points of view are considered before the regulator makes a final decision. Cases are not presented to a judge.

Appeals in relation to decisions concerning dispute settlements are made to the Paris Court of Appeal (on judicial grounds) and the process is litigious in nature from that point.

The ARCEP states analysis of the relevant markets as its primary objective.[415] As part of its policy of maintaining an ongoing dialogue with industry participants, the ARCEP facilitates meetings of a consultative committee for telecommunications and one for radio; facilitates meetings of the Interconnection Committee; regularly facilitates forums, meetings and public consultations; and publishes a newsletter with details of its deliberations but also with industry reports and articles.[416]

The ARCEP also maintains press releases, industry summaries, reference texts and industry monitors (observatories) on its website. It conducts, for example, quarterly industry surveys, the results of which are published on its website.

While it is stated that 'sector-based regulation will eventually be phased out and replaced by common competition law as competition on the various market segments of electronic communications becomes satisfactory',[417] there does not appear to be a strict policy with regard to alternative methods of dispute resolution or encouragement to make agreements outside the regulatory process.

Timeliness

There are no provisions made for consultation prior to the lodgement of a complaint, except in the form of general market surveys and reports and the meetings of the consultative committees.

The committee must announce its decision within four months of having received the complaint.[418] This time period may be extended to six months if deemed necessary by the Authority.[419] There do not appear to be any particular consequences for failure to reach a decision within the time limit. A consultation of the last five decisions (all

[413] ARCEP, *Règlement Intérieur – Modification Decision No. 2007-0556*, (in French), 2007.
[414] Ibid.
[415] ARCEP, *Introducing ARCEP/Presentation*, 2009.
[416] Ibid.
[417] Ibid.
[418] Ibid.
[419] Ibid.

decisions for the period October 2006 to January 2008) shows that they were all dealt with within the four-month time limit.[420]

Role of Interested Parties

The ARCEP participates in meetings of the Telecommunications Consultative Committee which hears reports from end users, producers, government and all other industry participants.[421] It also issues a call for public submissions with relation to research being conducted or general investigations being undertaken as part of its function as industry supervisor and information provider.

Other consumer groups, such as the consumer group UFC may present written submissions to *the rapporteur* in relation to a particular dispute. The UFC is funded through membership fees and donations.

The Interconnection and Access Committee, appointed by the ARCEP, is made up of representatives of network operators active in the interconnection market, telecommunications service providers and consumer associations. The Authority's Chairman presides over the committee, and the Authority itself ensures its secretarial duties. The Interconnection and Access Committee is a forum for discussion and exchange between the industry participants on current issues relating to fixed or mobile interconnection.[422]

In 2006, a 'Consumer Committee' was formed to provide consultation and act as a forum for discussion of consumer issues that fall within the portfolio of the ARCEP.

During the process of a dispute resolution the Competition Commission may be consulted (particularly to avoid overlap of functions).

There are not, however, any specific arrangements for consultation during the resolution of access disputes.

Information Disclosure and Confidentiality

Agents of the Minister or the ARCEP are given complete authority to access all documents and information held by any participant in communications and they are to be provided with access to properties and vehicles. They may conduct visits and interviews. Any information gathered must be documented and copies delivered to all parties concerned.[423]

Information confidentiality is decided according to Law no. 78 - 753 of 17 July 1978 (Article 6).[424] The essential features of this Article are summarised in the section on 'Approach to Competition and Regulatory Institutional Structure'.

Any information gathered in preparation for a committee meeting is documented, copies are sent to the parties concerned and copies are kept to be summarised by the *rapporteur* for presentation at the committee meeting.

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[420] ARCEP, *Textes de reference*, (in French), 2008. Available at: http://www.arcep.fr/index.php?id=recherchedecisions&L=1%2Faff_news.php%3Fchemin%3Dhttp%3A%2F%2Fwww.apnic.net%2Fi [accessed on 6 June 2008].

[421] Ministry of the Economy, Industry and Employment, *Acteurs français de la réglementation et de la régulation*, 2008. Available at: http://www.telecom.gouv.fr/rubriques-menu/acteurs/acteurs-francais-reglementation-regulation-365.html [accessed on 16 June 2008].

[422] ARCEP, *ARCEP's Annual Report 2007*, July 2008.

[423] *Code des Postes et des communications électroniques*, consolidated version, (in French), 1 June 2008.

[424] Law no. 78-753 (CivL), Law of 17 July 1978, Article 6.

The ARCEP may not pass on any information gathered from operators in the dispute resolution process to any third party.[425]

The ARCEP is constantly collecting information as part of their on-going market surveillance role. Most often during dispute resolution, the rapporteur issues a questionnaire, on behalf of the regulator, requesting all the required information. There is rarely an objection to completing these questionnaires.

Decision-making and Reporting

The ARCEP's Executive Board is composed of seven members. To guarantee the institution's independence, members of the Board cannot be dismissed and their six-year mandate is not renewable. This independence also applies to the way in which members are appointed to the Board: three of the members, including the chairman, are appointed by the President of the Republic; the other two are appointed by the President of the National Assembly and the President of the Senate.[426]

In the case of access and interconnection disputes the ARCEP is the determinative authority. However, ministerial responsibilities and powers are largely preserved in the French system. Several of the ARCEP's other functions require direct approval, by decree, from the relevant minister.

The ARCEP also acts as adviser to the Minister for matters such as the preparation of the French position in international negotiations and acts as the French representative in EU and international organisations.

The Authority is consulted for opinions on draft legislation, decrees and regulations concerning posts and electronic communications. It may also provide opinions to the Competition Authority when called upon to do so.

As summarised earlier, the ARCEP issued 69 opinions on posts and telecommunications in 2007.

The ARCEP's staff is divided into services (divisions): communications; human resources and administration; legal service; international service; economic research; operator issues and regulation of scarce resources; broadband regulation; fixed and mobile regulation; and postal regulation. The ARCEP's personnel is made up of approximately 50 per cent contractors (with particular expertise in telecommunications and posts) rather than permanent employees.

In the case of disputes a small team coordinates the transmission of the various submission documents and compiles a summary of the parties' various arguments to the committee – it does not appear to actually present a proposal or suggest a decision. The legal unit is responsible for communications and coordination of the whole process and so, presumably, has to 'approve' the documents that are distributed to the parties and the committee members prior to the meeting.

The committee meets and hears the report of the *rapporteur* (containing a summary of the arguments submitted by the parties prior to the committee meeting, any third party reports/opinions submitted and details of any other investigations made by the

[425] ARCEP, *Guide juridique pour les opérateurs locaux et les collectivités,* (in French), 2007. Available at: http://www.arcep.fr/uploads/tx_gspublication/guide-juridique-crip2007.pdf [accessed on 13 June 2008].
[426] ARCEP, *ARCEP's Annual Report 2007*, July 2008.

ARCEP staff), hears the opinions of the representatives of each party implicated in the dispute, and is allowed to ask questions of those present.

The seven members of the committee then meet in private to deliberate and make a decision. There must be at least five members of the committee present for a decision to be made. Decisions are made according to majority consensus. A vote may be requested by a committee member and is taken in the form of a show of hands unless a secret ballot is requested. Proxy votes are not allowed. In the case of an equal division of the votes, the decision is not adopted.[427]

Decisions apply to the specific service provider(s) concerned in the dispute. There may be circumstances where one complainant may act on behalf of a defined group of industry participants or where various applications to the ARCEP against the same network operator (often France Telecom) may be joined and treated as one single complaint.

Other decisions of the ARCEP, relating to advice to the Minister or recommendations, are broadly applicable across the industry.

The ARCEP has the power to impose sanctions for the non-respect of decisions made to resolve disputes.[428]

Decisions of the ARCEP are required to be justified.[429] A decision report (approximately 35 pages) is prepared outlining the questions considered, the information presented, the result of the deliberations undertaken, the name of those participating in the process and the decisions adopted. [430] These documents are kept and stored chronologically.[431] An electronic copy (with exceptions for confidential information) must be published on the ARCEP website and in certain cases submitted to the Official Gazette.

Interim measures can be requested only in relation to a pending the ARCEP decision (a dispute currently being resolved). A request for interim measures to be taken can be lodged at any point in the dispute resolution procedure and must be justified in writing. The head of the ARCEP forwards the request to all the parties concerned. Interim measures are instated to ensure the continued functioning of the network. They are generally reserved for use only in emergencies.[432] Otherwise, there is no distinction made between draft and final decisions.

Appeals

An appeal can be lodged within one month of an ARCEP decision being published. Appeals are made to the Paris Court of Appeal on judicial grounds.[433] A decision may be subject to merits review subsequent to a cancellation of the original decision by the Court of Appeal. This is the same court as the appeal court for Energy (considered above) and the details are substantially identical.

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[427] ARCEP, *Règlement Intérieur - Modification Decision No. 2007-0556*, (in French), 2007, Article 4.
[428] *Code des Postes et des communications électroniques,* consolidated version, (in French), 1 June 2008, Article L36-11.
[429] *Code des Postes et des communications électroniques*, consolidated version, (in French), 1 June 2008.
[430] ARCEP, *Règlement Intérieur - Modification Decision No. 2007-0556*, (in French), 2007.
[431] ARCEP, *Introducing ARCEP/Presentation*, 2009.
[432] ARCEP, *Règlement Intérieur - Modification Decision No. 2007-0556*, Article 14.
[433] *Code des Postes et des communications électroniques*, Article R11–3.

Regulatory Development

The new EU framework for electronic communications includes four measures – the Framework, Authorisation, Access and Universal Service Directives – which should have been applied from July 2003; and the other Directive on Privacy and Electronic Communications due by October 2003. France was found not to have met the deadlines for transposing these Directives into national legislation. After the EU launched infringement proceedings in 2003 and court action in 2004, France finalised its transposition of these EU Directives in 2005 and notified the EU accordingly.[434] According to the EU, France published several laws relating to electronic communications in 2007.[435]

3. Posts

La Poste is the state-owned incumbent postal operator in France, facing increasing competition from newly authorised operators. By the end of May 2008, there were 20 licensed postal operator, eleven providing domestic services and nine engaging in international services with *La Poste* in both areas.[436] The first entrant – Adrexo – entered the market in 2006, aiming at becoming the premier private French postal operator with businesses covering 50 per cent of the geographical regions by 2009. However, in early 2008, its parent company – Spir Communication group – announced a plan to abandon the Adrexo mail network, for reasons such as the two-year delay in fully deregulating the EU postal industry (1 January 2011 instead of 1 January 2009) and the setbacks experienced by private companies in Europe that operate in the addressed mail market.[437]

Regulatory Institutions and Legislation

The Ministry in charge is the Ministry for the Economy, Industry and Employment. The relevant legislation is the *Postal and Electronic Communications Law*, introduced on 20 May 2005, governing postal matters such as the reorganisation of the postal market, the creation of market specific regulation and the appointment of ARCEP as the sectoral regulator.

The 2005 law divides the postal industry in two – the reserved market segment (mail items weigh below 50 grams and are priced under 2.5 times the basic postage rate) and the market open to competition (courier services and other mail items). It obliges *La Poste* to meet the universal service requirement that establishes service quality standards. *La Poste* is also required to sign contracts with other service providers, setting objectively and fairly the prices and conditions of access to infrastructure.

The ARCEP has the responsibility of overseeing the gradual opening to competition and proper functioning of the postal market. In particular it must:

- issue licenses to operate in the postal market
- monitor tariffs and service quality

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[434] Details of the notified transposition measures are available at: http://ec.europa.eu/information_society/policy/ecomm/library/national_transposition/links/index_en.htm#france [accessed on 28 January 2009].

[435] EC, *Towards a Single European Telecoms Market – 13th Progress Repor*t, COM/2008/153, 2008. Available at: http://ec.europa.eu/information_society/policy/ecomm/ [accessed on 28 January 2009].

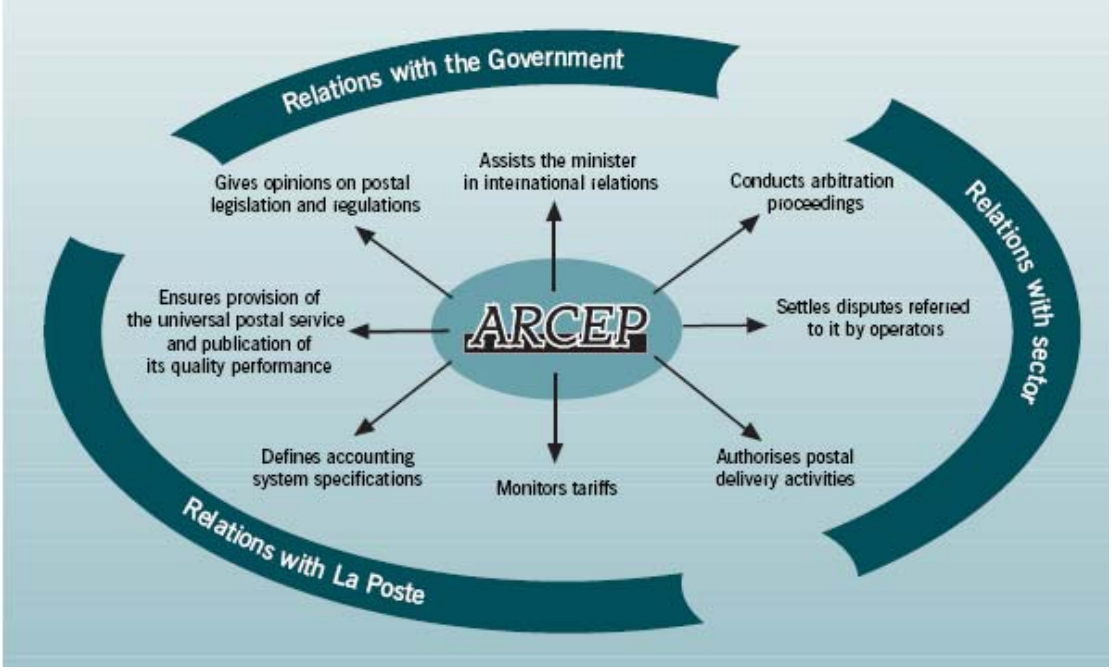
[436] C Gallet-Rybak, C Moreno, D Nadal, and J Toledano, 'Le marché postal français, trois ans après le vote de la loi postale' Paper presented to the 16th conference on Postal and Delivery Economics, *Centre for Research in Regulated Activities, Rutgers University*, Algarve, Portugal, 28 – 31 May 2008.

[437] ARCEP, *ARCEP's Annual Report 2007*, July 2008.

- approve pricing decisions.

The following figure outlines the ARCEP's various functions and its relationship with the Government and the industry.

ARCEP's Functions and Relations[438]



In relation to access dispute between *La Poste* and private operators, the ARCEP is only to be engaged to resolve a dispute that cannot be resolved during the negotiation of these contracts. The ARCEP has only, as at June 2008, received one access complaint. There has been very little friction in the market. Adrexo (the largest private enterprise) and *La Poste* have agreed various contracts for access and pricing without needing the aid of the ARCEP.[439]

The APCEP also has an advisory role in issues relating to competition when it is consulted by the designated national competition authority.

Process and Consultation

The process for access dispute resolution is very similar to that employed by the ARCEP for telecommunications disputes.

Either party in a dispute (usually the party attempting to make a service contract with La Poste) can approach the ARCEP for help in resolving the dispute. The complaint is registered and the ARCEP announces the date by which it will meet and provide a decision. A *rapporteur* (staff member in charge) is appointed to the case by the president of the committee.

The parties concerned are notified and given the opportunity to present observations/arguments successively – a form of mediated debate which takes place up until five days before the date of the committee meeting to deliberate.

[438] Ibid.
[439] Ibid.

The parties are called to meet before the committee. The *rapporteur* gives a summary of the submissions made up until that date and the parties are given the opportunity to present their arguments and respond to questions from the committee members. The committee then deliberates privately and delivers its decisions.[440] The sole decision published on the ARCEP website only involves the ARCEP and the two parties involved in the dispute (Decision 07-0635, 2007). The ARCEP can call on any person it deems suitable to give evidence. All communication is documented and presented at the committee hearing.

There seem to be no provisions for informal consultations prior to lodgement of a complaint.

The parties are notified of the date by which their submissions must be made and the date of the committee meeting.

The parties can seek advice from any experts and consultants in preparing their submissions. They may also be assisted by experts and consultants of their choice during the committee meeting.

The *rapporteur* is allowed to seek economic, legal or technical consultation at any time. Any consultations or investigations must be documented and forwarded to all the parties.[441]

The dispute resolution process is consultative and represents a form of mediated debate between the parties. While legal advice may be acquired there is no compulsion for parties to be represented at hearings. Hearings follow a discussion/information format and are not court-style in their nature. Cases are presented according to their merits and points of view are considered before the regulator makes a final decision. Cases are not presented to a judge.

Appeals are made to the court of appeal (on judicial grounds) in Paris and the process is litigious in nature from that point.

The ARCEP maintains press releases, industry summaries, reference texts and industry monitors on its website. It also conducts, for example, annual service quality assessments, the results of which are published on its website.[442]

Timeliness

There seem to be no provisions for informal consultations prior to lodgement of a complaint.

Incentives to delay would rest mostly with *La Poste*, as disputes concern the tariffs and conditions it has dictated in contracts with private service providers.

The legislation mandates that parties will grant access to information and make available their premises to the agents of the ARCEP. The ARCEP has the power to impose sanctions (access/activity restraints for private service providers and fines for

[440] *Code des Postes et des communications électroniques,* consolidated version, (in French), 1 June 2008, Article L5-5; and Decision 07-0635, 2007.
[441] ARCEP, *Règlement Intérieur(ii) – Modification Decision No. 2007-0705*, (in French), 26 July 2007.
[442] ARCEP, *L'actualité de l'ARCEP,* (in French), 2008. Available at: http://www.arcep.fr [accessed on 30 May 2008].

La Poste) in the case of their non-conformity with the requirements of the legislation.[443]

The regulator must publish a decision within four months of lodgement.[444] If, at the end of the four months, the ARCEP has not made a decision, the Court of Appeal can be approached directly.[445] The only decision published so far was dealt with within the four-month time limit.[446]

Role of Interested Parties

The ARCEP must notify the designated competition authority of matters pertaining to consumer protection or competition.[447]

The ARCEP issues a call for public submissions with relation to research being conducted or general investigations being undertaken as part of its function as industry supervisor and information provider.

Whenever applicable, the ARCEP will consult the user groups on postal matters. The UFC is the major consumer group. It is funded through membership fees.

Information Disclosure and Confidentiality

Agents of the Minister or the ARCEP are given complete authority to access all documents and information held by any participant in the communications industry and they are to be provided with access to properties and vehicles. They may conduct visits and interviews. Any information gathered must be documented and copies delivered to all parties concerned.[448]

Information confidentiality is decided according to Article 6 of *Law no. 78-753 of 17 July 1978*. This Article was summarised in the Energy section of this chapter.

Parties are required to supply any information requested by the ARCEP. The public disclosure of the information is then decided upon according to the above legislation by the ARCEP.

Any information gathered in preparation for a committee meeting is documented, copies are sent to the parties concerned and copies are kept to be summarised by the *rapporteur* for presentation at the committee meeting.

The ARCEP may not pass on any information gathered from operators in the dispute resolution process to any third party.

The ARCEP collects information on a regular basis and, in particular, it is responsible for monitoring the accounts and operations of *La Poste*, including reporting annually on the fulfillment of its service obligations and its pricing levels.

In the decision report publish in mid-2007 (the only postal dispute resolution the ARCEP has been engaged in so far) the ARCEP exercised their right to investigate

[443] *Code des Postes et des communications électroniques*, consolidated version, (in French), Article L 5-3.
[444] Ibid, Article 5-5.
[445] ARCEP, *Règlement Intérieur – Modification Decision No. 2007-0556,* (in French), 2007, Article 10.
[446] ARCEP, *Decision no. 07-0635,* 2007. Available at: http://www.arcep.fr [accessed on 13 June 2008].
[447] *Law in relation to the regulation of postal activities, Law of 20 May 2005*, Article L2.
[448] *Code des Postes et des communications électroniques*, consolidated version, Article 5-9.

and required *La Poste* to fill out a questionnaire in addition to the submissions it had already made.[449]

Decision-making and Reporting

At the end of 2006, the total number of staff at the ARCEP was 163.[450] Nine full-time staff members work on postal matters, with legal and economic support from other areas.

The mechanisms for decision making are identical to those used by the ARCEP in relation to telecommunications matters.

In contrast to the telecommunications cases dealt with by the ARCEP, no provisions are made with regard to interim measures for the treatment of complainants in posts.

As in telecommunications, decisions must be published, along with a justification for the decision. The only decision paper published so far was a total of 35 pages. The report summarises the complaint, details of the hearing, the submissions of the parties, the legislation considered, the decision reached and its justification.[451]

The ARCEP is required under the *Postal and Electronic Communications Law* (Articles L5–6) to justify its decisions.

Appeals

An appeal can be lodged within one month of an ARCEP decision being published. Appeals are made to the Paris Court of Appeal on judicial grounds. Either of the parties involved in the dispute may appeal the decision. A decision may be subject to merits review subsequent to a cancellation of the original decision by the Court of Appeal (that is, after judicial review, a decision may be returned to the regulator by the Court). Details are substantially similar to those relating to telecommunications and energy, and are not repeated here.

4. Water and Wastewater

France is a country reasonably rich in water resources, with water and wastewater treatment of good quality. Of total domestic water consumption at about 137 litres per capita per day, 62 per cent is sourced from groundwater and 38 per cent from surface water.[452] There are six major river basin districts, namely the Adour-Garonne, the Artois-Picardy, the Loire-Britanny, the Rhine-Meuse, the Rhone-Mediterranean and the Seine-Normandy. However, the allocation of water resources is not uniform across regions as certain areas suffer from temporary shortage of water. According to a UN study in 2006, the Rhone-Mediterranean river basin generated 64 per cent of the national hydroelectric production and eight per cent of the total national energy production (primarily in the form of nuclear- and hydro-power).[453] Numerous municipalities and associated organisations operate in water and wastewater.

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[449] ARCEP, *Decision no. 07-0635,* 2007.
[450] ARCEP, *Annual Report 2006*, July 2007.
[451] ARCEP *Decision no. 07-0635,* 2007.
[452] CIEAU, *Wate Resources in France*. Available at: http://www.cieau.com/ [accessed on 27 January 2009].
[453] United Nations Educational Scientific and Cultural Organisation, *The 2nd UN World Water Development Report: Water, A Shared Responsibility*, March 2006. Available at: http://www.unesco.org/water/wwap/wwdr/wwdr2/case_studies/pdf/france.pdf [accessed on 27 January 2009].

Unlike most other network-operated infrastructure in France, water and wastewater services were never the responsibility of a state-owned monopoly.[454] Water management in France uses a decentralised model, with the country divided into six large hydrographical basins. Each *basin* is managed by a *basin committee*, a local water parliament with representatives from all potential stakeholders in water management, which draws up a water policy document (SDAGE) providing a quality and management framework for the *basin*. A Water Board, a government agency, enforces the decisions of this committee.[455] Water management at this level is focused on the reduction of pollution and the responsible use of scarce water resources.

Each *basin* is further divided into local water communities (according to the local districts and local councils). The mayors of about 36 000 communes (local councils) are responsible for supplying drinking water to their inhabitants. They are also responsible for waste water collection and treatment. Generally, the communes amalgamate to form inter-communal bodies which deliver these services to several communes collectively.[456] The local government may choose to manage the resource themselves or, under a special 'public service delegation contract', entrust the exploitation of the resource to a private entity. This second way of operating the system supplies 75 per cent of France. In the market for provisioning the distribution of water, the public communities are on the demand side, and they seek a service provider who delivers water to the final consumer. The majority of the supply side of that market is shared by three big groups: *Vivendi* with 51 per cent, *Suez-Lyonnaise des Eaux* with 24 per cent and *Bouygues-Saur* with 13 per cent.[457]

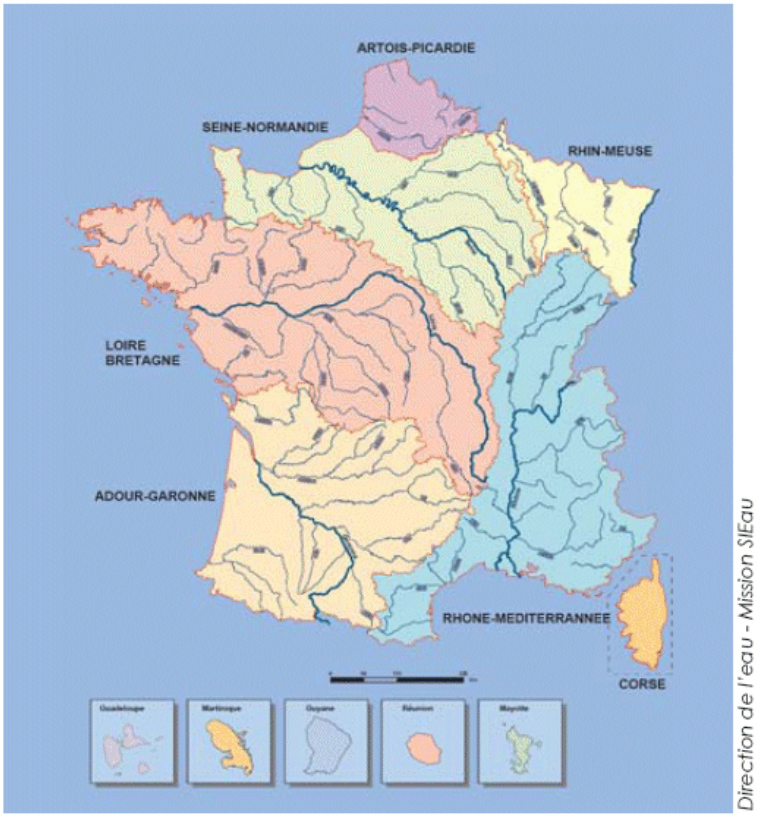
[454] French Documentation (*La Documentation Française*), *La politique de l'eau (1964-2004 - Modes de gestion de la distribution et de l'assainissement de l'eau*, (in French), 2004. Available at: http://www.vie-publique.fr/politiques-publiques/politique-eau/services-eau-assainissement/gestion/ [accessed on 13 August 2008].

[455] French Stakeholders in the Field of Water, *France: Water Pricing*, 2008. Available at: http://www.water-international-france.fr/article.php3?id_article=203&idRubSel=204&id_parent=181&id_rubrique=206&id_pere=181 [accessed on 13 August 2008].

[456] C Larrue and I Sangaré, *The Evolution of the National Water Regime in France*, 2002, Euwareness. Available at: http://www.euwareness.nl/results/France-cs-kaft.pdf [accessed on 13 August 2008].

[457] OECD, *Competition and Regulation in the Water Sector*, OECD Policy Roundtable, 2004, p. 200.

French Stakeholders in the Water Sector[458]



Regulatory Institutions and Legislation

The Ministry in charge of water is the Ministry for Ecology, Energy, Sustainable Development and Planning (MEESDP). The relevant legislation is the *Environment Law.* As a Member State of the European Union, France is subject to the *Water Framework Directive* (WFD), described previously in the chapter on the EU.[459]

The National Water Committee and the National Water Office determine the national strategy and provide financial oversight of the basins. They also provide consultation on national water projects, new legislation and environmental issues. The state is also responsible for ensuring the proper use of water resources. The National Water Office works in close contact with local representatives of the state, in each district, to police the correct use of water.

Water Policy Documents – SDAGEs and SAGEs

A SDAGE is drawn up by each basin committee, outlining a framework within which all water-related activities must be conducted. The SDAGE is created through a process of public consultations and reflects the unique nature of the *basin* for which it is created. The SDAGE must be approved by the Minister(s) in charge of water and the National Water Committee. The most recent SDAGEs were created in 1996 and

[458] Source: French Stakeholders in the Field of Water, Map - Bassins, 2008. Available at: http://www.water-international-france.fr/IMG/carte_agences.gif [accessed on 13 August 2008].

[459] The law transposing the WFD into national legislation was published on 21 April 2004, setting out requirements for participation, information and consultation. The *Law on Water and Aquatic Environments (no. 2006–1772 of 30 December, 2006)* has the main objective of achieving good water status.

modified in 2001. New SDAGEs will be drawn up in 2009.[460] Programs and administrative decisions adopted by local water authorities must not be in contradiction with the relevant SDAGE. The SDAGE, for example, outlines pricing methodologies and quality standards, but the local government representative (or the privately owned delegate) will be the one actually to decide on pricing and quality of water services.

The Water Boards employ a 'polluter-pays' philosophy and charge royalties proportional to the environmental impact of activities undertaken in their basin. They provide grants and assistance to projects for the development and improvement of the *basin*. These projects may be publicly or privately managed.

The local water bodies draw up SAGEs (similar to SDAGE but more specific geographically at sub-basin level) with the guidance of the SDAGE. They also create river contracts (rules for those wishing to exploit the local river systems), rural contracts, costal contracts, and action plans. They are, thus, responsible for pricing agreements and access rules. The SDAGE is legally binding and so decisions made by local water bodies may be challenged via the common legal channels – namely via the administrative courts (the highest of which is the Council of State). This process is purely judicial.

In accordance with the WFD, the State is responsible for approving the various SDAGEs and SAGEs and for regulating the relations between each of the participants in the water market.[461] Each local district supports a division of the water police. The water police are responsible for ensuring developments are in alignment with the relevant SDAGE and SAGE, prosecuting polluters, issuing authorisations for new developments and monitoring water treatment plants to ensure quality standards.

The *Environment Law* outlines the various sanctions the water police may enforce. They are entitled to collect information and to investigate reports of activities that are out of line with the relevant SDAGE.

In the case of water shortage or drought (as was the case in 2005) the Minister in charge and the national water committee has drawn up an action plan that has been distributed among the various local bodies. It is their responsibility to implement those plans and manage the resource effectively.

Mayoral Role

The local mayor approves domestic charges for water supply and wastewater management and also deals with disputes by customers. Both functions can be delegated to another person or body. Mayors are required to present an annual report on billing as well as financing, operations and developments. Where water supply responsibilities have been given to a private operator, that operator must also annually publish a report of its activities to the Mayor. Both reports must then be reviewed by a consultative commission, in accordance with the *Local Democracy Law* of 23 February 2002. A consultative commission of local public services is compulsory in any community with more than 10 000 residents.[462]

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[460] EauFrance, *La planification de la gestion de l'eau dans les bassins français*, (in French), 2008. Available at: http://www.gesteau.eaufrance.fr/sdage.html [accessed on 13 August 2008].
[461] French Stakeholders in the Field of Water, *France: Water Pricing*, 2008.
[462] Ministry for Ecology, Energy, Sustainable Development and Planning (MEESDP), *The French Water Policy*, 2006. Available at: http://www.enpc.fr/cereve/HomePages/thevenot/MEDD-Water-Policy-2006.pdf [accessed on 5 November 2008].

A reference survey for changes in water price is carried out annually by the DGCCRF.[463] It appears that these annual reports specify the various charges that make up a water bill, in percentage terms. For example, in 1999:

- 42 per cent of the bill was for water distribution services
- 31 per cent was for wastewater collection and treatment
- 17 per cent was pollution and 'preservation of resource' charges (collected by the Water Board)
- ten per cent was for taxes.

This breakdown supports the 'water pays for itself', 'polluter pays' and 'user pays' principles.[464] In particular, earmarked taxes at the river basin level levied by the Water Boards are used to fund a major programme of transfers for local water supply and sanitation. These transfers help to equalise affordability between urban and rural areas and are used mainly to support the achievement of environmental objectives within basin.[465]

While the mayor appears to have authority to determine charges for water supply and wastewater services, the Water Board levies pollution and abstraction taxes. These are to be proportional to the amount of water used and pollution generated. It is unclear whether the Water Board has the ultimate authority in determining such taxes, but it seems likely that they will be related to the SDAGEs and SAGEs outlined above.

Regulatory Development

The WFD has already been transposed into national legislation in France.

5. Rail

The *réseau ferré de France* (RFF) is a state-owned company that is entrusted with the ownership, development, maintenance and management of the national rail infrastructure.[466] The RFF has a staff of 761 and manages over 29 000 kilometres of track.

The RFF is an *EPIC* – a special classification of French public-service company created specifically for commerce and industry. The RFF was created in 1997 in an attempt to separate the operation and infrastructure functions of the *Société Nationale des Chemins de fer Français* (SNCF) (French National Railway Company) – the service provider and infrastructure owner and organiser at the time – and to allow for the entry of new operators.

In 2003 it was put in charge of capacity allocation on the French rail network and is a member of Railnet Europe. In 2006 freight rail transport in France was entirely opened to competition. The number of freight operators registered on the French rail

[463] Water International, France – Water Pricing. Available at: http://www.eau-international-france.fr/article.php3?id_article=203&idRubSel=204&id_parent=&id_rubrique=206&id_pere= [accessed on 5 November 2008].
[464] MEESDP, *The French Water Policy*, 2006.
[465] OECD, *Managing Water for All: An OECD Perspective on Pricing and Financing*, 2009, p. 31.
[466] *réseau ferré de France* (RFF), *Railway Infrastructure Manager*. Available at: http://www.rff.fr/pages/autre/accueil.asp?lg=en [accessed on 17 February 2009].

network had grown from six in 2006 to eleven as of December 2007.[467] Passenger rail services will be opened to competition in 2010.

Regulatory Institutions and Legislation

The Ministry for Ecology, Energy, Sustainable Development and Planning (MEESDP) is in charge of rail under the *Law no. 97-135 (13 February 1997)* – creation of the RFF and *Decree no. 2003-194 (7 March 2003)* – concerning the use of the national rail network. The Regulatory Body is the Mission for Control of Rail Activity (MCAF). Created in 2003, the MCAF acts as an advisory committee to the Minister for Transport.

The MCAF is charged with advising the Minister for Transport concerning network access complaints and monitoring the RFF network access conditions. The RFF is obliged to publish annually a reference document with details of its conditions of access to the network, prices, description of infrastructure, capacity allocations and services. This document must be presented to, and approved by, the Minister, the MCAF and to any rail operator using the rail network before its publication. It provides the framework for the formulation of contracts for access to the network. Complaints and objections concerning the conditions set out in this text are presented to the Minister, and the MCAF is charged with investigating and presenting a decision proposal to the Minister. The MCAF presents advice to the Minister for Transport regarding general access complaints and, annually, it presents a review to the RFF regarding its reference document.

Process and Consultation

The MCAF may be approached, via the Minister for Transport, by any person or organisation with a complaint regarding access to the French rail network. To date, the MCAF has dealt with two general access complaints since its creation in 2003. One of these complaints, in 2007, was made by a European passenger rail operator against the SNCF (the national passenger rail operator) regarding the tariffs for the use of a passenger terminal. While the train station infrastructure (access walkways, subways, platforms) falls under RFF control, waiting rooms and passenger terminals are property of SNCF and, thus, their access pricing is not controlled by the reference document. The other complaint was made in 2006 by a European freight rail company against SNCF regarding the use of a particular small section of rail.

After the MCAF is passed a complaint by the Minister for Transport, it has one month to provide the Minister with a report containing an opinion and its justifications. It may conduct any investigations and collect any information it deems necessary to produce its report. The President of the MCAF can appoint a *rapporteur* to collate and coordinate research. The Minister will then, within two months, provide a final decision. The complainant, the RFF, the MCAF and the Minister in charge of transport are usually involved. The MCAF collects the information it needs (see below) and reports to the Minister. There is no formal hearing or public meeting.

The role of the MCAF is purely consultative in that the Minister is, essentially, the determinative authority and the MCAF is only to consult the issue and provide the Minister with advice. This process is entirely outside of any judicial action and so, could be considered informal.

[467] Mission for Control of Rail Activity (MCAF), *Annual Report 2007*, February 2008, p. 7.

The MCAF is responsible for industry surveillance and therefore is in constant contact with all industry participants. It does not provide advice and consultation outside its role as adviser to the Minister.

The process of information gathering is determined and controlled by the MCAF. If it requires any more information than what was provided with the notification of the complaint it is entitled to collect it. There are no set restrictions except the time limits inside which the MCAF must deliver its opinion to the Minister.[468]

The MCAF can call on any consultant or expert it deems necessary and relevant to the formulation of its opinion.[469]

The process employed for reviewing the RFF reference document is broadly consultative. The document is prepared by RFF and then subject to examination by all relevant stakeholders before its final application. This process does not lend itself to the seeking of legal representation and does not entail a public hearing or court-style proceeding.

The process for resolving access disputes is a less consultative process but is also not litigious in nature. The determinative body is entrusted with the full responsibility of resolving the issues presented by the parties. There does not appear to be scope for extensive third party consultation and there does not appear to be an opportunity for the parties to present their cases orally to the regulator.

Role of Interested Parties

The legislation requires the RFF to draw up the reference document each year after consultation with the Minister, the MCAF, operators using the rail network and any national rail consumer organisations.[470] There do not appear to be any funding arrangements in place for user groups. A significant user group is the Freight Transport Users Association (AUTF). It is funded through membership fees.

Timeliness

Aside from its information gathering for annual reports and its general role of industry monitoring, there is little communication between the MCAF and the parties in a dispute before and after the lodgement of a complaint. It appears that there are not mechanisms in place for the alteration of time limits.

When providing its review of the reference document the MCAF must deliver its opinion to the RFF within two months of the project being presented to it.[471] If the MCAF has not provided an opinion within this timeframe, its silence will be considered as approval.

In the case of a general access or pricing complaint, the MCAF has one month from when the Minister notifies it of the complaint. The Minister has one month after that

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[468] *Les modalités de fonctionnement de la mission de contrôle des activités ferroviaires*, Ministerial Decree No. 114 of 6 May 2003 laying down the procedure of the MCAF, *Journal officiel de la république française*, (in French), 17 May 2003. Available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000787020&dateTexte= [accessed on 11 December 2008], p. 8496,

[469] Ibid., Article 8.

[470] *Decree No. 2003-194 of 7 March 2003 relating to the Use of the National Rail Network*, consolidated version 23 Novembeer 2008, (in French), Article 17. Available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000005634059&dateTexte=20090528 [accessed on 11 December 2008].

[471] Ibid.

to provide his/her decision.[472] There is no mention in the legislation of the possibility of extension of the statutory two-month time limit.

In the case of access disputes there does not appear to be a consequence of lateness.

For the two complaints the MCAF has dealt with, it has completed its investigations within the one month time limit.

Information Disclosure and Confidentiality

The legislation gives the MCAF the power to collect any and all information it may require to ensure the correct consideration of a complaint presented.[473] The MCAF is required to publish an annual report detailing its advice to the Minister for the year and thus it is involved in an on-going information gathering process. The MCAF also reviews the RFF reference document each year, which requires the collection of certain market information.

The existence of the RFF reference document is to provide a clear framework of pricing and conditions, decided upon after consultation each year, according to which RFF and private competitors can draw up agreements and contracts. This, therefore, avoids any real need for a strong regulatory presence. It places the emphasis on collaboration for the creation of that document and then resolution of issues outside of the formal complaints process.

The short nature of the dispute resolution process means that, as it appears, the parties are only minimally involved in the process. There are no submission timetables, hearings, conferences, and draft papers open for consultation; so the need and scope of discovery processes is limited.

Decision-making and Reporting

The determinative body is the Minister for Transport. Decisions are proposed by the MCAF and determined by the Minister for Transport. The MCAF is made up of six members including representatives from the Council of State (in particular the president of the MCAF), the Financial Court and the General Council for Bridges and Roadways.[474] This is the case for all matters before the MCAF.

The MCAF does not have a staff. It is housed within the Ministry of Transport and is assigned a secretary and treasurer from that department. The Minister for Transport and his ministry provide the resources to ensure the proper functioning of the MCAF.

It is not apparent that the MCAF has more than the filed complaint, the information it has gathered and the relevant legislation before it when determining the advice it will give to the Minister.

In the case of an access complaint, the decision of the Minister applies only to the specific dispute being resolved. In the case of the reference document, the decisions of the MCAF are, effectively, broadly applicable as it serves as a framework for contract development and a reference for prices.

The law requires the MCAF to supply the Minister with its opinion and a justification of that opinion. That information is not, apparently, publicly disclosed. However, some explanation must be given in the annual report. The MCAF is required to

[472] *Les modalités de fonctionnement de la mission de contrôle des activités ferroviaires*, Article 5.
[473] *Ibid.*, Articles 6, 7, 9, 12,
[474] *Ibid.*, Article 1.

publish an annual activity report outlining any complaints that were dealt with and the details of the MCAF opinion of the reference document (among other things).[475] These annual reports are available publicly, online. However, very little is published in support of decisions. The 2007 annual report contains just a few short paragraphs in explanation of the one complaint it dealt with during the year. They are of approximately 40 pages in length. Decision papers are not otherwise available for viewing via the website so it is unclear what other information is recorded regarding particular decisions.

There is no distinction made between draft, interim and final reports.

Appeals

After the Minister (and the MCAF) has considered a complaint, the complainant may make a judicial appeal, through the normal legal channels, to the Council of State. These are the same administrative tribunals and appeals courts as for any administrative decision of any government authority. The regulations concerning its functioning and processes are prescribed in the *Law for Administrative Tribunal and Administrative Appeal Courts*.[476]

Regulatory Development

While there are processes in place, the decision-making power rests with the Minister; not with an independent regulatory body. However, the MCAF does go through a series of processes and procedures in determining its advice to the Minister. Further, Ministerial decisions can be appealed. In 2007 the government announced a project to create an independent rail authority charged with the economic regulation and access monitoring of the rail industry.[477] A draft Bill for the establishment of an independent rail regulator – Regulation Commission for Rail Activities, consisting of seven commissioners and about 60 staff – was tabled on 19 September 2008.[478] If established, this body would possess, in contrast to the MCAF, certain judicial powers.

6. Airports

Air transport in France is centred on Paris. The capital's two major airports (Charles de Gaulle and Orly) represent the second largest airport complex in Western Europe (after London). Other French airports are far less important, though the country has a comprehensive network of local and regional airports. In addition to the airports in Paris (treated as a group), there are twelve airports that remain under the control of the government – in Nice, Toulouse, Lyon, Marseille, Bordeaux, Nantes, Strasbourg, Montpellier, Pointe-à-Pitre, Fort-de-France, Saint Denis de La Réunion and Cayenne.[479] These airports, traditionally administered by the regional chambers of

[475] Ibid., Article 10.

[476] *Code des tribunaux administratifs et des cours administratives d'appel*, consolidated version 1 Janauary 2001, (in French). Available at: http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006071344&dateTexte=20010101.[accessed on 5 November 2008].

[477] MCAF, *Annual Report 2007*, February 2008, p. 16.

[478] See information at: http://www.vie-publique.fr/actualite/panorama/texte-discussion/projet-loi-relatif-organisation-regulation-transports-ferroviaires-guides-portant-diverses-dispositions-relatives-aux-transports.html#onglet3.

479 Directorate-General for Civil Aviation (DGAC), *Décentralisation des aéroports*, (in French), 2008. Available at: http://www.aviation-civile.gouv.fr/html/actu_gd/actu_2007/031501.html [accessed on 12 June 2008].

commerce and industry (public establishments), are in process of being privatised. Since 2007 these mid-sized airports have been transferred to specially created companies (in which the state retains control of the capital but will soon reduce its holding to at least 60 per cent).[480]

For even smaller airports, a 2004 law decentralised the management of 150 airports previously under the control of the state. The 150 airports range from small grassed strips used for light aircraft to larger airports with more than a million passengers passing through each year. The new legislation transfers all property, development projects, maintenance responsibilities, and management obligations to the local governments (local districts and local councils). With this transfer of ownership, the local government becomes the authority responsible for the development of the airport, method and organisation of its operations and the airport's financing.[481] DGAC (see below) remains responsible for the provision of air-traffic control services and safety and security standards.

Regulatory Institutions and Legislation

The Ministry for Ecology, Energy, Sustainable Development and Planning is in charge of airports. The Directorate-General for Civil Aviation (DGAC), under the supervision of the Minister in charge of transportation, has the functions of overseeing safety and security; control and monitoring of pollution; regulation of the air transport market; acting as a service provider; guaranteeing the quality of service and training; and acting as partner for industry and operators. [482]

The DGAC was reorganised by a government decree in March 2005 due to the changes in the regulatory framework that accompanied the privatisation of the *Aéroports de Paris*. The authority was organised into three sections – regulatory and strategic activities, service activities and surveillance and certification activities. Within the regulatory and strategic division, the Directorate for Economic Regulation *(DRE)* was created and made responsible for legal, economic and social matters. This body is responsible for ensuring the elimination of any anti-competitive behaviour, as well as ensuring consumer protection.

The most recent version of the *Civil Aviation Law*[483] (last modified in May 2008) requires public airports (those that fulfil certain criteria in terms of volume of air traffic and national importance as according to the code) to draw up a specific economic regulation contract between themselves and the government.[484] This contract sets out price levels and quality objectives to be met by the particular airport. It is valid for a period of up to five years and then redrawn. The contract is subject to public debate and approval by the Minister before it enters into forces.

Process and Consultation

The first economic regulation contract, created in 2006, concerns the newly privatised *Aéroports de Paris*. The contract outlines quality of service obligations, pricing rules and an investment program. It covers the period 2006 to 2010. It institutes a Economic Consultative Commission to which *Aéroports de Paris* is required to

[480] Ibid.
[481] Ibid.
[482] DGAC, *Making the Sky Even Safer,* 2007. Available at: http://www.aviation-civile.gouv.fr/html/quisomme/brochure_uk.pdf [accessed on 8 August 2008], pp. 2–3.
[483] *Code de l'aviation civile (Civil Aviation Law)*, consolidated version, 25 May 2008.
[484] Ibid.

submit notification of any action that falls under the regulation of the contract (such as price changes and investment plans) for approval. The Economic Consultative Commission must meet at least once a year and *Aéroports de Paris* is required to supply it with all relevant pricing, financial, service quality and investments information.

Timeliness

Timeframes are inherent in the annual reporting and biannual meeting requirements that are discussed above under 'Process and Consultation'.

Role of Interested Parties

There are no explicit arrangements for user groups, although third-party appeals are possible (see below).

Information and Confidentiality

Each year *Aéroports de Paris* is required to provide a complete activity report – notably outlining pricing, quality of service and pricing information – to the DGAC and to the designated competition authority. Any information supplied by *Aéroports de Paris* is protected by the confidentiality clauses of the *Commercial Law* (protecting commercially sensitive information).

Decision-making and Reporting

A Follow-up Committee is created, with representatives from DGAC, *Aéroports de Paris*, and the Competition Authority, to oversee the adherence to the contract. This committee meets at least biannually.

Appeals

Disputes surrounding this contract are pursued through the administrative courts. A third party may appeal to the Council of State if it considers the actions of *Aéroports de Paris* in breach of the Economic Regulation Contract. For example, in 2007, a group of aviation syndicates approached the Council of State (the highest administrative court in France) to appeal a price change made by *Aéroports de Paris*. The Council of State ruled that the pricing decision was not properly justified (the Economic Regulation Contract requires the submission of particular documents to the economic consultation group) and therefore not allowable.

Note on Ground Services Regulation

Any person or establishment that holds a licence granted in accordance with the provisions of the civil aviation code may supply one or more ground handling services to an air carrier at any airport with an annual traffic of no less than 2 million passenger movements or 50 tonnes of freight. However, the number of suppliers of ground handling services may be limited by Ministerial decision at the request of the airport manager.[485] The request to the Minister must be justified on the grounds of: space availability; capacity of the airport's facilities; or safety.[486] This system has been criticised because of the unavoidable bias for the airport manager to apply for a limitation in the case where it also provides these services.[487]

[485] OECD, *Regulatory Reform in the Civil Aviation Sector*, 2004, p. 25.
[486] *Code de l'aviation civile*, consolidated version, 25 May 2008, France, Article R216-5.
[487] OECD, op. cit., p. 27.

Under the EU Directive 96/67,[488] in the case of selecting designated service providers, the airport manager is automatically included in the selection – for example, in Paris, *Aéroports de Paris* is included without having to submit a service proposal. For the remaining positions, the Minister makes a decision after consultation of an 'Airport Users' Committee' and the relevant decision-making body (in the case of Paris CDG and Paris-Orly – DGAC; for most others the Prefect).[489] The committee is made up of carriers using the airport and votes are allocated proportional to the amount of air traffic handled by the carrier in the last calendar year.[490] This system gives significant power to the major air carriers (most often Air France).

7. Ports

The major ports and terminals of France are Bordeaux, Calais, Dunkerque, Le Havre, Marseille, Nantes, Paris, Rouen and Strasbourg. In each port the public entity (independent port authority) is responsible for port infrastructure, port development and pricing/taxation policies. The private sector is, however, responsible for the unloading and loading functions of the port.

Regulatory Institutions and Legislation

The Ministry for Ecology, Energy, Sustainable Development and Planning (MEESDP) is in charge of seaports and harbours. The relevant legislation is the *Law for Maritimes Ports*.

Section 1 of the *Law for Maritimes Ports* states that the administration of the commercial ports of France is entrusted to designated port authorities. These port authorities are public establishments created by decree by the Council of State (the highest administrative jurisdiction in France) which preside over one or a collection of ports. They remain financially autonomous under the supervision of the Minister in charge of maritime ports.

Headed by an administration council, the 16 port authorities are responsible for expansion, improvement and rebuilding, as well as the operation, policing and maintenance of the ports in their particular geographical allocations. The administration council of each port authority is made up of 13 representatives of the state or personnel from the port and 13 representatives of the principal users of the port. This administration council elects a president. The Minister in charge of ports elects a government commissioner for each port authority to oversee the activities of the administration council. A financial controller is nominated by the Minister in charge of finance and economics.

The administration council may call for tenders and allocate public works to private contractors. It must be done as part of a specific work contract for public projects. The port authorities publish all current projects on their websites.

The administration council can only make decisions in the case of a majority vote. The president has the casting vote in the case of an equal separation of the votes. Decisions of the administration council are effective immediately, unless the commissaire du gouvernement objects within eight days.

[488] Council Directive (EC) No. 96/67, *Official Journal of the European Union L 302*, 26 November 1996, p. 28.
[489] OECD, op. cit, p. 27.
[490] OECD, op. cit, p. 27.

Process and Consultation

In the case of a decision concerning changes to pricing and tariffs, the administration council must display a public notification of the changes in a commonly frequented area of the port during a period of at least 15 days before approving the decision. Members of the public have one month to submit their opinions to be considered. Within eight days after the public consultation has closed, the director of the *port autonome* collates the submissions.

Timeliness

The times allowed at each stage of the process are set out immediately above.

Role of Interested Parties

These stakeholders' interests are reflected in the composition of the administration council – made up of 13 representatives of the state or personnel from the port and 13 representatives of the principal users of the port.

Information Disclosure and Confidentiality

No specific information on these aspects of the process has been found.

Decision-making and Reporting

In the case of objections, the project is returned to the administration council to be reconsidered and the subsequent deliberation is forwarded to the government commissioner for approval. If no objections are submitted, the proposed pricing scheme is forwarded directly to the government commissioner for approval.[491]

Appeals

Any offence against the *Law for Maritimes Ports* and any opposition to the decisions of the administration council are investigated and pursued via the administrative courts.[492] The nature of these processes is judicial. Parties seek legal representation and it is primarily the legality of the matters that is judged.

Regulatory Development

In July 2007 the *Gressier Report* (commissioned by the government) outlined the loss in competitiveness and activity in French ports and recommended a restructuring of the current regulation.[493] The Senate subsequently submitted a law reform to the National Assembly (lower house of parliament). The report and the suggested reforms to the *Law for Maritimes Ports* focused on some major changes, including renaming of the port authorities as Grand Martimes Ports and reinforcement of their public authority roles (development, promotion, improvement and management of the port); the reorganisation of the functioning of these bodies to realign them with the ambitions of the relevant ministers; and privatisation of all terminal handling operations such as loading, unloading, and crane operation. The *Law concerning the Port Reform* was enacted on 4 July 2008.[494]

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[491] *Law for Maritimes Ports (Code des ports maritimes)*, 2008. Available at: http://www.codes-et-lois.fr/code-des-ports-maritimes/toc-partie-reglementaire-decrets-en-conseil-d-etat-texte-integral [accessed on 14 October 2008].

[492] *Code des ports maritimes*, 2008.

[493] A Bolliet, M Laffitte, C Gressier and R Genevois, *Report on the Modernisataion of the Port Authority*, 2007.

[494] Law no. 2008-660 concerning the Port Reform of 4 July 2008.

In his report to the senate, reviewing the current state of port regulation and evaluating the new law reform, Senator Charles Revet outlined the lack of coherence and organisation in French port regulation. He noted the liberties that the autonomous nature of the current organisational structure allows port authorities to take, and therefore the great difference in development and management strategies between ports.[495]

[495] Charles Revet (on behalf of the Committee on Economic Affairs), *Report No. 331 (2007–2008)*, (in French), tabled on 14 May 2008. Available at: http:www.senat.fr/rap/l07-331/l07-331.html [accessed on 11 November 2008].

EUROPE

GERMANY

OVERVIEW[496]

Under Germany's federal political system, powers relating to regulatory matters are allocated between state and federal authorities as prescribed in the German constitution. As a member of the European Union, Germany's regulatory regime also reflects legislation issued at the European level, either directly applicable, or transposed into German law.

Economic regulation of network industries and sectors is primarily the domain of federal authorities, particularly the Bundesnetzagenteur (Federal Network Agency – FNA), which is responsible for infrastructure regulation in respect of gas, electricity, telecommunications, posts and rail, and the Bundeskartellamt (Federal Cartel Agency – FCA), which is responsible for the enforcement of the federal competition law.

The FNA is tasked with ensuring non-discriminatory third-party access to infrastructure and the regulation of efficient access prices. Its determinative bodies (Ruling Chambers) are organised along industry and sectoral lines and make decisions autonomously from the wider organisation. Pre-lodgement mediation of disputes is encouraged, and the process is widely used. Judicial review of administrative decisions is available in most cases.

Network areas in Germany are at varying points of liberalisation. Energy and telecommunications are the most advanced. Recent developments in regulation include the end of Deutsche Post's exclusive licence for the 'letter post market' on 31 December 2007 and the introduction of benchmarking-based incentive regulation in the energy sector from 2009. Strict notions of economic regulation are not generally applicable to water supply and wastewater disposal in Germany, which is the province of self-governing municipalities. In relation to railways, The FNA has a shared regulatory responsibility with two federal ministries. Specifically, it is responsible for monitoring compliance with the rules governing access to railway infrastructure and has the right to object to the infrastructure manager's decisions (for example, when it intends to reject an application for allocation of railway embankments or for access to service facilities). Federal responsibility for airports has been largely devolved to the states. Airport charges are generally subject to traditional cost-based regulation. Competence for ports is a state matter, with individual port authorities setting fees and charges.

GEOGRAPHY, POPULATION, ECONOMY, POLITY AND LEGAL SYSTEM[497]

Germany is located in Central Europe, bordering the Baltic Sea and the North Sea, between the Netherlands and Poland. Germany's terrain is characterised by lowlands

[496] Much of the information for this chapter was collected in an interview conducted by Dr Chris Decker with representatives from the Federal Network Agency (FNA) in Bonn in April 2008. Supplementary information has been gathered from a variety of primary and secondary sources, including the CIA *World Fact Book*, the FNA website and various EU and OECD sources.

[497] The information in this sub-section is drawn mainly from Central Intelligence Agency (CIA), *World Fact Book Germany*. Available at: https://www.cia.gov/library/publications/the-world-factbook/geos/gm.html [accessed on 9 October 2008].

in the north, uplands in the centre and (Bavarian) Alps in the south. It has a temperate climate with significant precipitation in both winter and summer.

Germany is the most populous nation in the European Union with an estimated population over 82 million and is the sixth largest country in Europe with a land area of 357 021 square kilometres. Population density is the sixth largest in the OECD (230 people per square kilometre). The major cities are Berlin (the capital), Hamburg, Stuttgart, Munich, Cologne and Frankfurt. Even the largest of these cities (Berlin) is not large by European standards. Physically, there are lowlands in the north, uplands in the centre and (Bavarian) Alps in the south.

Germany is the largest economy in Europe and (possibly) the third largest economy in the world. Its 2007 estimated GDP of US$2.807 trillion represents about US$34 100 per capita, which is around the middle range of the OECD (just above OECD average). Unemployment is quite high at around 9 per cent, and this is concentrated mainly in the east of the country.

The temperate climate yields a high proportion of arable land. As such Germany produces a wide variety of agricultural products including grains, meats and potatoes. Main natural resources are coal, lignite, natural gas, iron ore, copper, nickel and uranium; but none of these is plentiful. It has large water resources. Major manufacturing products are iron and steel, cement, chemicals, machinery, cars and trucks, ships and food and beverages. In recent years, the structure of German industry has undergone a transformation which has seen a contraction of more traditional sectors and industries, such as steel and textiles. Like other OECD countries, the majority of GDP and employment are provided by services (69 per cent). In terms of imports, raw materials and semi-manufactured goods constitute a large portion, which are then used to produce final services. According to the World Trade Organisation, Germany was the world's top exporter in 2005, particularly of technologically advanced goods. Its most important trading partners are France, the USA and Great Britain respectively. Trade with new European Union Member States has increased significantly in recent years and now accounts for almost a tenth of all exports, and this trend is expected to continue.

Germany has well-developed and technologically advanced infrastructure across energy, telecommunications, posts, water and wastewater and transport. Some further information about Germany's economic infrastructure is included in the discussion of each particular industry area.

Germany is a federal representative democracy consisting of 16 states (or Bundesländer). The basic structure of its political system is laid out in a constitution, which is known as the *Basic Law*.[498] Among other things, the constitution divides powers between the federal and state legislatures and between the legislative, executive, and judicial branches.

The federal legislature comprises a directly elected lower house (Bundestag) and an upper house (Bundesrat) which comprises representatives of the states. The federal chancellor is appointed by the Bundestag and heads the federal cabinet which is the executive branch of the federal government. Germany also has a federal President,

[498] See a copy of the official English translation at: German Bundestag, *Basic Law for the Federal Republic of Germany*. Available at: http://www.bundestag.de/interakt/infomat/fremdsprachiges_material/downloads/ggEn_download.pdf [accessed on 23 January 2009].

though this role is largely ceremonial.[499] The division of the powers between the federal government and the states is set out in the *Basic Law*. In principle, all legislative power resides with the states except where explicitly stated in the Basic Law. However, in practice, the state legislatures are primarily responsible for police, cultural affairs and education policies, as well as for the implementation of most federal policies. Most issues of economic policy fall within the domain of the federal government or EU institutions. The political systems of the individual states are set by state constitutions. The executive heads of each state are called Minister-President (with a few exceptions) and preside over a state cabinet.

The legal tradition in Germany is a civil law system where a key characteristic is that the laws are largely codified and there are no binding precedents set by judicial rulings (that is, case law). German law is contained in five codes – civil, civil procedure, commercial, criminal, and criminal procedure. In addition, as a Member State of the European Union, Germany is subject to, or required to transpose, relevant laws set in place at that level.

There are three types of courts in Germany – Ordinary Courts, Specialised Courts, and Constitutional Courts, and within each of these there are separate branches for administrative, tax, labour, and social security issues, each with their own hierarchies. Under German law, almost all decisions of the state are subject to judicial review.

APPROACH TO COMPETITION AND REGULATORY INSTITUTIONAL STRUCTURE

Economic regulation of network areas, such as energy, telecommunications, posts and rail transport, and the enforcement of competition law in these areas, is primarily within the domain of the federal government. In relation to other network areas, such as water, airports and ports, regulation occurs at the state level. Finally, as a Member State of the European Union, the regulatory arrangements for network activities are to some degree governed by any relevant regulations, common frameworks or Directives.

Regulatory Institutions

The two main federal authorities of relevance to network areas are the FNA (Bundesnetzagenteur) and the FCA (Bundeskartellamt). The FNA is responsible for infrastructure regulation in respect of the gas, electricity, telecommunications and posts, and has some responsibilities in rail regulation. The FCA is the Antitrust authority which is responsible for the enforcement of the federal competition law, including in network areas.

State authorities are responsible for the regulation of infrastructure in areas such as water and airports (in some cases). State regulatory authorities are also responsible for the regulation of end-user retail tariffs in energy, and are responsible for regulating energy distribution companies with less than 100 000 customers where the entire network is located within the state's borders; although increasingly these powers are being given to the FNA to improve consistency in administrative decision making.

[499] The President is elected by the Federal Assembly, a special body which comprises the entire Bundestag and an equal number of state delegates.

Role of the Federal Cartel Agency[500]

The FCA is an independent federal authority assigned to the Federal Ministry of Economics and Technology. It exists primarily to enforce the *Act against Restraints on Competitio*n (also referred to as the 'cartel law'), which came into force on 1 January 1958 and has since been amended numerous times. The FCA has a staff of about 320, half of whom are legal or economic experts. Apart from German competition law, the FCA also applies European competition law in certain circumstances.[501]

The FCA's decisions are made in a manner similar to judicial proceedings by a collegiate body consisting of the chairman of the respective 'Decision Division' and two associate members. 'Decision Divisions' are organised according to economic industry.[502] The 'Decision Divisions' are assisted by the General Policy Department which provides advice on special competition law matters and coordinates cooperation with other competition authorities, including the ECA (European Competition Authorities) and ICN (International Competition Network) forums.

Role of the Federal Network Agency[503]

The FNA is an independent authority within the responsibility of the federal Ministry of Economics. Its mandate under the *Telecommunications Act*, *Postal Act*, and *Energy Act* is to promote the liberalisation of telecommunications, posts, and energy through non-discriminatory third-party access to infrastructure and the regulation of efficient access prices. Under the *General Railway Act* it also has responsibility for monitoring compliance with the rules governing access to railway infrastructure.[504] The FNA has evolved from the Regulatory Authority for Telecommunications and Posts, whose authority was expanded to encompass regulation of energy and rail in July 2005 and January 2006, respectively.

The FNA has a President and two Vice Presidents, who are nominated by the German government, and appointed by the German President. Their primary functions are to liaise with the public and media and oversee the functions of the various departments. The FNA itself has over 2 300 staff and is funded by the federal government.

The agency is divided into six regulatory divisions (telecommunications regulatory economics; legal telecommunications regulation issues / frequency regulation; postal regulation; technical telecommunications regulation; energy regulation and rail regulation) that investigate matters of regulatory interest and advise the nine Ruling Chambers. In all areas but rail, final decisions are made, and sanctions determined by, the Ruling Chambers.

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[500] See the website of the Federal Cartel Agency (FCA) at: http://www.bundeskartellamt.de [accessed on 27 January 2009].

[501] For example: in cases where the European Commission is not competent under the *Merger Control Regulation* or, as far as Articles 81 and 82 EC are concerned, under Regulation 1/2003 and the case allocation criteria that have been developed.

[502] FCA, Organisational Chart. Available at: http://www.bundeskartellamt.de/wEnglisch/download/pdf/Organigramm/0806Organigramm-E.pdf [accessed on 20 November 2008].

[503] See the FNA's website (in English) at: http://www.bundesnetzagentur.de/enid/5c70efb70e6e35eef2dd09f3135de4d8,0/Federal_Agency/The_Agency_xj.html [accessed on 29 October 2008].

[504] Substantive supervision in railway regulation is the task of the Federal Ministry of Transport, Construction and Town Development (BMVBS), organisational responsibility remains with the Federal Ministry of Economics and Technology (BMWi).

The Nine Ruling Chambers

Each Ruling Chamber comprises one Chairman and two vice-chairmen, as well as around ten staff members. The Ruling Chamber Chairman and vice-chairman are typically senior staff from within the FNA who have become experts in their departments, and are appointed by the Minister of Economics based on a proposal from the FNA. The Ruling Chambers are organised according to different industries (electricity, gas, telecommunications, postal) and also according to specific activities within those industry areas such as system charges, general regulation and access issues, wholesale charges, and unconditioned local loop charges). The nine Ruling Chambers and their responsibilities are as follows:[505]

- Ruling Chamber 1 – President's Chamber: Universal Service in Telecommunications and Post, Radio Spectrum Resources
- Ruling Chamber 2: Regulation of Telecommunications Retail Markets, Regulation of Wholesale Leased Lines, Subscriber Data, Collection Services, Porting
- Ruling Chamber 3: Broadband Services Regulation of Telecommunications Wholesale Markets, Fixed and Mobile
- Ruling Chamber 4: Individual Use of System Charges Electricity, Pipe to Pipe Competition Gas, Investment budgets, Determining Equity Yield Rate
- Ruling Chamber 5: Rates Regulation, Network Access Regulation and Special Control of Anti-Competitive Practices in Postal Markets
- Ruling Chamber 6: Regulation of Access to Electricity Supply Networks
- Ruling Chamber 7: Regulation of Access to Gas Supply Networks
- Ruling Chamber 8: Regulation of Use of System Charges – Electricity
- Ruling Chamber 9: Regulation of Use of System Charges – Gas.

The Ruling Chamber in each area is the determinative body in relation to all matters within its remit; although, in telecommunications, the Minister has the right (never used in practice) to give directions to the FNA and can overrule the Ruling Chamber. The three governing members of each Ruling Chamber make decisions on all matters within the Chamber's sphere of competence and no sub-groups are formed to consider any decisions.

Decision-making and Reporting

The decision-making process typically involves a discussion and, if necessary, a vote on an issue.[506] There is no formal meeting time or place for this decision-making procedure, and decisions are made (and meetings of the Ruling Chambers convened) as and when they arise. Each of the Ruling Chambers has complete autonomy to manage and decide a case as it wishes, and no formal representations are made by staff in this decision-making process.

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[505] FNA, *Ruling Chambers*. Available at: http://www.bundesnetzagentur.de/enid/2a575b190ab22d4ee36f2acca6f53924,0/Federal_Agency/Ruling_Chambers_xs.html [accessed on 29 October 2008].

[506] There is no specific requirement to hold a vote in respect of each decision. Detailed minutes of the process of the discussion and decision making procedure are not maintained.

In highly controversial decisions, the President of the FNA will typically be notified. In energy and postal matters, the FNA advisory council and the Federal Ministry have no formal ability to influence or intervene in the decision-making process. However, as noted above, in telecommunications, the Minister has the right to give Directions to the FNA and can overrule the Ruling Chamber (although this has never occurred to date). In addition, the FNA Advisory Council (which is comprised of members of the German Parliament) must be consulted in relation to certain telecommunications decisions.[507]

There is no formal requirement for one Ruling Chamber to review, or even view, the decisions of other Ruling Chambers. Consistency between the decisions of the Ruling Chambers is achieved informally, with the members of chambers reviewing any relevant decisions of other chambers. Decisions may be reviewed by legal and economic staff within the FNA before finalisation, although there is no strict requirement for this. In undertaking their functions, the Ruling Chambers may call upon the expertise of the staff of the broader FNA who are organised according to the different areas of regulation. However, there is no requirement for the Ruling Chamber to consult staff on specific issues.

The organisational structure of the FNA is somewhat unique insofar as it effectively divides the general staff from the Ruling Chambers, who themselves are separated – in formal decision-making terms – from the President and Vice Presidents. According to the FNA, the design of the structure in this way allows for a greater focus on specialisation and a close relationship between the Ruling Chambers and the specific activities they are regulating.

Ruling Chambers are required to publish reasons for their decisions. The extent of reasoning published varies by type of decision but the FNA reports its typical approach as: to provide 'more rather than less' detail and to clearly outline the substantive reasoning underlying the decision. This is seen as important as, in many cases, the decisions will have a scope of application beyond the specific parties involved in the regulatory matter.

Appeals

Consistent with the European Convention on Human Rights, all decisions of the Ruling Chambers and the agency are subject to judicial review. .In the first instance, there is a 'merits' or substantive review by specialised courts, after which an appeal to a higher court is available on point of law only.

Appeals must be lodged within the times prescribed in the relevant acts. There are no specific time limits upon which an appeal must be heard and in general a decision can take between five to twelve months.

An applicant can only lodge an appeal if it is listed in the original decision, and therefore must have participated in the administrative process upon which the appeal is based. With regard to a third party's ability to intervene as part of the appeal process, the party must demonstrate that it has a 'legal right' to participate, which in essence means that it must show that it has been adversely affected by the decision.

[507] Under s. 120 Paragraph 2 of the *Telecommunications Act*: (a) in spectrum award proceedings that determine the relevant product and geographic market; (b) in determining the frequency usage conditions, including the degree of coverage with the frequency usage and the time required to achieve this degree of coverage; (c) in imposing universal service obligations.

REGULATORY ARRANGEMENTS BY INDUSTRY OR SECTOR

1. Energy

Electricity in Germany is produced mainly from coal (including lignite) (61 per cent) and nuclear (28 per cent) although there is a growing renewable contribution (14 per cent of gross production in 2007 with a goal of 20 per cent by 2010).[508] Although it has some natural gas (the third greatest amount in deposits in the EU after the UK and the Netherlands), it is also a large importer of natural gas and a large importer of oil. Four companies control the largest share of Germany's electricity generation, the result of consolidation over the past several years: RWE/VEW, E.ON, Energie Baden-Wuerttemburg (EnBW), and Sweden-based Vattenfall. These four companies also operate Germany's national transmission grid, as there is no unified operator for the entire country. There are numerous local distribution companies, many owned by state or municipal governments, which sell electricity to end users, though these companies often also own a small amount of generating capacity.[509] Private operators control Germany's natural gas production. BEB, jointly owned by Royal Dutch Shell and Esso (a subsidiary of ExxonMobil), control about half of domestic natural gas production. Other important suppliers include Mobil Erdgas-Erdoel (also a subsidiary of ExxonMobil), RWE, and Wintershall. The largest wholesale distribution company in Germany is E.ON Ruhrgas, controlling about one-half of that market. Germany's wholesale distributors also control most of the national natural gas transport network. In addition, there are thousands of small, independent companies active in retail distribution, many wholly- or partly-owned by municipal governments. [510]

Regulatory Institutions and Legislation

The FNA's powers in relation to gas and electricity networks are set out in the *Energy Industry Act 2005.* Its mandate is to establish the competitive supply of electricity and gas. This is achieved by unbundling the electricity and gas supply grids and regulating third party access prices to these networks. The FNA's mandate does not include regulation of retail prices, which are regulated by state competition authorities, unless the prices are levied nationwide. The FNA also monitors anti-competitive behaviour in the energy sector, in co-ordination with the FCA.

Three types of regulatory applications are considered by the FNA in the energy sector – matters relating to price of access; non-price issues relating to access; and *ex officio* matters relating to regulatory policy.

Process and Consultation

In relation to price matters, the prices for access are determined by the FNA *ex ante* for a set period of time. The process for setting access prices currently occurs not on individual application but periodically, as mandated in relevant legislation (currently every two years). There is therefore no need for individual access prices to be determined by the regulator on a case-by-case basis. The access pricing process typically occurs over a period of six months, with a number of hearings conducted

[508] Federal Statistical Office Germany (*Stastisches Bundesamt Deutschland*), *Renewable Energy Sources*. Available at: http://www.destatis.de/jetspeed/portal/cms/Sites/destatis/Internet/EN/Content/Publikationen/STATmagazin/Energy/2008__2/PDF2008__2,property=file.pdf [accessed on 11 October 2008].

[509] From 'Energy Profile of Germany', *The Encyclopedia of the Earth*, updated June 2008. Available at: http://www.eoearth.org/article/Energy_profile_of_Germany [accessed on 12 October 2008]

[510] Ibid.

with, and submissions received from, network participants. The introduction of incentive regulation in the energy sector in 2009 may affect the process of access pricing for the gas and electricity networks, though it is unclear at this stage what implications the change will have for individual tariff setting – that is, whether the regulator will determine the structure of tariffs as well as the overall revenue requirement.

In relation to non-price access issues – such as requests for new connections to the network – the FNA places a high priority on resolution through informal means. Parties are encouraged to seek a pre-lodgement mediation with the relevant Ruling Chamber. The mediation process is more streamlined than the formal process, with briefer submissions and the Ruling Chamber typically reaching a decision within three weeks. While the decision is non-binding, it sets out the Ruling Chambers thinking as to how it would address the matter if a formal application is made. The FNA reports a high willingness among parties to participate in this pre-lodgement mediation process.[511] Among the advantages for parties of using the process is that, unlike in formal proceedings, details of proceedings are not published in the public domain.

Formal applications on non-price terms of access issues must be decided by the relevant Ruling Chamber within two months.[512] During this time period there will typically be an oral hearing. Participation in this process is open to any party that can show its rights have been 'significantly affected' by the regulation and its implementation.[513] The FNA reports a preference for minimising the number of parties involved in proceedings because of tight timelines.[514]

In relation to regulatory matters instigated *ex officio* by FNA, there is no strict timeline for completion of the process, although a final decision is usually made within twelve months. The process of participation and consultation with interested parties in such matters can be extensive reflecting the fact such matters usually concern larger, structural issues that will affect all network participants.

Role of Interested Parties

In general terms, the FNA has a high-level statutory responsibility to take into account the views of, and impacts on, consumers. However, the legislation does not provide for the establishment of consumer bodies and, in practice, the role that users play in the regulatory process differs between industries and sectors. For example, because the FNA does not regulate retail prices in energy (it only regulates the network and access to the grid) the role for consumers is necessarily more limited than it is in other areas such as telecommunications, where end-user tariffs are regulated. In practice, the associations representing access users or shippers tend to be more involved in the regulatory process than end-user groups.

[511] Meeting with the FNA on 28 April 2008.
[512] The FNA can, in some circumstances, ask for an extension from the parties of between two to four months.
[513] In practice, this varies by industry or sector. For example, in Energy the FNA only regulates the network and not final prices, so consumers and consumer groups may fail to establish any direct effect.
[514] Meeting with the FNA on 28 April 2008.

Outside the scope of individual decisions there are not any organised forums in which the FNA interacts with interested parties. In general terms, interaction tends to occur only in relation to specific matters as and when they arise.

The role of external experts and consultants in the regulatory process varies by type of matter under consideration. In relation to tariff matters, cost models may be prepared by the parties and submitted to the Chamber. In relation to non-price matters, external experts play a minor role. The FNA has expressed the view that the use of economic experts is not (yet) as prominent in regulatory proceedings in Germany as elsewhere in Europe. The FNA does not itself appoint external economic experts to assist with particular matters, but rather relies on its internal capability. The role of technical consultants (e.g. engineers to review investment plans) is also minor. This may change as Germany moves toward incentive-based regulation in the energy sector.

Information Disclosure and Confidentiality

In fulfilling its functions, the FNA has broad information gathering powers including an ability to seize documents, undertake 'dawn-raids' and interview key staff of regulated companies. However, in practice, these powers have generally not needed to be used, with regulated companies providing information as requested. The FNA has, to date, not had to apply to the Courts to acquire information from regulated companies.

As FNA proceedings are conducted in the public domain, issues can arise in relation to information that regulated companies regard as confidential. The general approach adopted is to make a case-by-case assessment of what information is confidential, and there are no standard rules that are applied. The issue of what information should be considered to be confidential may be an increasingly important one in the energy sector as companies seek to examine how they have been 'benchmarked' against other operators under the system of incentive regulation being introduced. The ability of interested parties to use FOI legislation to access such information has not yet been tested.

Decision-making and Reporting

Decisions regarding specific gas or electricity matters are made by the relevant Ruling Chamber. As outlined in the 'Approach to competition and regulatory institutional structure' section above, separate Ruling Chambers are responsible for the use of system charges for gas, the use of system charges for electricity, issues relating to the regulation of gas transmission and issues relating to the regulation of electricity transmission. Also further discussed in the section above, the decision-making process is administrative rather than judicial in style. Where a matter is considered by a Ruling Chamber, lawyers have a substantial role in that process, including in terms of participation at oral hearings. However, the FNA describes the process as being 'not overly litigious'.[515]

The FNA reports that its relationship with parties in the energy sector has been largely cooperative and parties have not attempted to prolong or obstruct the decision-making process.[516] In part, this was attributed to the relative infancy of the FNA's involvement in this sector (only the last two years). However, the FNA reports having worked hard to establish the 'legitimacy' and independence of its decision

[515] Meeting with the FNA on 28 April 2008.
[516] Meeting with the FNA on 28 April 2008.

making in the energy sector. At this stage, participants in the energy sector are considered to broadly accept the role of the FNA and to be cooperative with the regulator.

Appeals

Appeals must be lodged within the times prescribed in the relevant acts. There are no specific time limits upon which an appeal must be heard and in general a decision can take between five to twelve months.

There are limited discovery rights in the appeals process for appellants. The FNA typically makes a submission to the relevant Court and this is the extent of information that the parties are able to access. To date, no appellant or court has requested access to FNA's internal materials (such as minutes and emails) in respect of a decision, and the right to such is therefore untested.

Appeals in relation to decisions in the energy sector are dealt with in the First Instance by the Higher Regional Court of Düsseldorf, where a full substantive ('merits') review is undertaken. The Chamber which hears the Appeal is the Cartel Senate, which is also the chamber that deals with appeals under General Competition law. This is a Civil Court which means that the Judges have full investigative rights – they can hear issues from the parties and call upon expert witnesses.

Appeals against the decisions of the Düsseldorf Court are heard by the Federal Court in Karlsruhe. These appeals are based only on the legality of the decision of the Court of First Instance, and do not involve a substantive review of the facts.

The remedies under the appeal process are set out in the *Energy Industry Act*.

The FNA reports that more than half of its decisions are currently appealed (noting that an appeal may subsequently be withdrawn).[517] An estimated 70 to 80 per cent of energy decisions are upheld on appeal.[518]

Regulatory Development

As is the case in a number of other jurisdictions, the issue of the role of the FNA in facilitating infrastructure investment is topical, and an issue in which the precise role of the FNA remains unclear. Currently, the FNA has an informal role in respect of planning and coordination of investment. In electricity, for example, the energy companies tend to produce their own investment plans – sometimes jointly among themselves (e.g. the four TSOs in Germany) – and then submit them to the FNA.

In April 2009, the FCA launched an inquiry into the national electricity market.[519] The investigation will cover considerably more than 90 per cent of the country's entire generation capacity to examine whether power generators are holding back generation capacity to keep prices artificially high. According to the FCA, the market investigation *per se* is not directed at individual generators as there is currently no concrete evidence of market manipulation; however, it could result in investigations into individual generators if they are found to be abusing their market positions. Information was requested from the four incumbent companies on the costs of power

[517] In the energy sector it was estimated that since 1995 there have been some 900 applications to review tariff proceedings on appeal. However, many of these applications deal with the same issue (and are therefore heard concurrently), or are subsequently suspended or withdrawn by the parties. Source: Meeting with the FNA on 28 April 2008.
[518] Meeting with the FNA on 28 April 2008.
[519] Peter Scott, 'Germany Lauches Power Probe', *Global Competition Review*, 20 April 2009.

generation, the operation and operating schedules of power plants, and data about supply of electricity to the wholesale market.

2. Telecommunications

Germany's large and affluent population supports Europe's largest telecommunications market with sophisticated fixed-line and mobile telecommunications networks, supported by leading manufacturers of telecommunications equipment. Penetration of both broadband and mobile telecommunications has reached the EU average, although in both cases penetration is not as deep as in the benchmark countries. The fixed network and broadband markets in Germany are dominated by Deutsche Telekom, although other notable market participants include Mobilcom-Freenet, BT Global Services, Arcor and Debitel, all of which have gained market share from Deutsche Telekom.[520] Broadband penetration is based almost totally on DSL, and is currently just above the OECD average.

Regulatory Institutions and Legislation

The FNA's powers to act in respect of telecommunications matters are set out in the *Telecommunications Act 2004*,[521] which transposed the 2002 EU Directives creating a framework for electronic communications.[522] The Act sets out the basic framework of the FNA's powers including its ability to regulate those undertakings with significant market power in a relevant market. Under this Act, the FNA controls anti-competitive practices, regulates the prices of carriers with significant market power through unbundling of incumbents' local loops, and regulates third-party access prices to these networks. In addition, the FNA ensures universal access to basic telecommunications services, promotes telecommunications in public institutions, ensures efficient use of broadcast and communications frequencies, and protects infrastructure and services that maintain public safety. Aside from its regulatory responsibilities, the FNA also has several non-regulatory functions, including the administration of telephone numbers.

Process and Consultation

Under the *Telecommunications Act*, the access prices for access providers with Significant Market Power are required to be submitted for *ex ante* approval by the FNA (that is, prior to their intended effective date). This approval is for a set period of time which can vary according to the access service. There is, therefore, no need for individual access prices to be determined by the FNA on a case by case basis. The FNA also has a role in the approval of retail tariffs for those carriers with Significant Market Power.

In relation to non-price access issues – such as requests for new connections to the network – the FNA places a high priority on resolution through informal means. Parties are encouraged to seek a pre-lodgement mediation with the relevant Ruling Chamber. The mediation process is more streamlined than the formal process, with briefer submissions and the Ruling Chamber typically reaching a decision within

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[520] Information from OECD and Paul Budde Communication Pty (*BuddeComm*). Available at: http://www.budde.com.au/buddereports/2151/Germany__Key_Statistics_Telecom_Market__Regulatory_Overviews.aspx?r=51 [accessed on 12 October 2008].

[521] The most recent amendment to the Act was adopted in 2007.

[522] The 2002 framework legislation comprised a package of Directives: *Framework Directive*; *Authorisation Directive*; *Interconnection Directive*; *Universal Service Directive*; and *Directive on Privacy & Electronic Communications*.

three weeks. While the decision is non-binding, it sets out the Ruling Chamber's thinking as to how it would address the matter if a formal application is made. The FNA reports a high willingness among parties to participate in this pre-lodgement mediation process.[523] Among the advantages for parties of using the process is that, unlike formal proceedings, details of proceedings are not published in the public domain.

Formal applications on non-price terms of access issues must be decided by the relevant Ruling Chamber within ten weeks.[524] During this time there will typically be an oral hearing. Participation in this process is open to any party that can show their rights have been 'significantly affected' by the regulation and its implementation.[525] The FNA reports a preference for minimising the number of parties involved in proceedings because of tight timelines.[526]

In relation to regulatory matters instigated *ex officio* by FNA, there is no strict timeline for completion of the process, although a final decision is usually made within twelve months. The process of participation and consultation with interested parties in such matters can be extensive reflecting the fact such matters usually concern larger, structural issues that will affect all network participants.

Role of Interested Parties

In general terms, the FNA has a high-level statutory responsibility to take into account the views of, and impacts on, consumers. However, the legislation does not provide for the establishment of consumer bodies and, in practice, the role that users play in the regulatory process differs between industries and sectors. For example, in telecommunications, where the FNA regulates final prices, consumers are more likely to be able to establish a right to participate than in energy matters where the FNA regulates the network and access to the grid (but not end-user tariffs). In practice, the associations representing access users or shippers tend to be more involved in the regulatory process than end-user groups.

Outside the scope of individual decisions there are not any organised forums in which the FNA interacts with telecommunications industry members or user groups. In general terms, interaction tends to occur only in relation to specific matters as and when they arise.

As noted in the preceding section on 'Energy', the role of external experts and consultants in the regulatory process varies by type of matter under consideration. In relation to tariff matters, it is not unusual for cost models to be prepared by the parties and submitted to the Chamber. In relation to non-price matters, external experts play a minor role. In addition, the FNA does not itself appoint external economic experts to assist with particular matters, but rather relies on its internal capability. The role of technical consultants in telecommunication matters (e.g. engineers to review investment plans) is also minor.

[523] Meeting with the FNA on 28 April 2008.
[524] The FNA can, in some circumstances, ask for an extension from the parties of between two to four months.
[525] In practice, this varies by industry or sector. In telecommunications, where end-user tariffs are regulated, greater participation for such groups is possible.
[526] Meeting with the FNA on 8 April 2008.

Information Disclosure and Confidentiality

In fulfilling its functions, the FNA has broad information gathering powers including an ability to seize documents, undertake 'dawn-raids' and interview key staff of regulated companies. However, in practice, these powers have generally not needed to be used, with regulated companies providing information as requested. The FNA has, to date, not had to apply to the Courts to acquire information from regulated companies.

As FNA proceedings are conducted in the public domain, issues can arise in relation to information that regulated companies regard as confidential. The general approach adopted is to make a case-by-case assessment of what information is confidential, and there are no standard rules that are applied. The issue of what information should be considered to be confidential has particularly been of importance in relation to proceedings for the determination of access prices and the cost basis for such determinations (the underlying cost models used), particularly in telecommunications.[527] The ability of interested parties to use FOI legislation to access such information has not yet been tested.

Decision-making and Reporting

A decision is taken by the relevant Ruling Chamber. The regulation of telecommunications wholesale markets and retail markets are undertaken by separate Ruling Chambers. The decision-making process is further discussed in the Background section above.

In terms of cooperation between the parties to a dispute and the FNA there has, at times, been difficulty in obtaining information in relation to cost documentation for cost models submitted. In addition, issues have arisen as to when the FNA should accept materials submitted – for example, where documents have been submitted a few days before a decision is due and there is insufficient time to review the materials.

Appeals

Appeals must be lodged within the times prescribed in the relevant acts. There are no specific time limits upon which an appeal must be heard and in general a decision can take between five to twelve months.

There are limited discovery rights in the appeals process for appellants. The FNA typically makes a submission to the relevant Court and this is the extent of information that the parties are able to access. To date, no appellant or court has requested access to FNA's internal materials in respect of a decision, and the right to such is therefore untested.

Appeals of FNA decisions in telecommunications are heard in the First Instance by the Administrative Court of Cologne. This is the district court of Cologne and therefore hears a range of other matters – that is, it is not a specialised Court. Appeals are heard by five judges, which include three full-time judges of the Court and two lay members (who may not have legal training) and involve a 'merits'/substantive review of the FNA decision. Appeals from the Administrative Court of Cologne are heard by the Federal Court in Leipzig, and are based only on the legality of the decision.

The remedies under the appeal process are set out in the *Telecommunications Act*.

[527] Meeting with the FNA on 28 April 2008.

The FNA reports that more than half of its decisions are currently appealed (noting that an appeal may subsequently be withdrawn).[528] The success rate of the FNA on appeal is good, with an estimated 80 per cent of telecommunications decisions being upheld on appeal.[529]

Regulatory Development

As is the case in the energy sector, the specific role of the FNA in facilitating telecommunications infrastructure investment remains unclear. In telecommunications, the FNA has, in the past, played an active but informal role in relation to proposed investments. For example, in relation to fibre broadband deployment, the FNA describes itself as playing a 'mediating role' in which it indicates the potential issues as different forms of proposal are developed.

On 13 May 2009, the FNA released two consultation papers on its proposed regulatory approach in response to the Government's broadband strategy announced earlier in 2009.[530] The papers sets out the aims of the proposed regulatory regime – to reduce regulatory risk, secure investment and innovation, provide planning certainty and transparency, and encourage the set up of broadband infrastructure – and the principles for consistent rates regulation in order to promote investment and competition. Submissions will be close on 1 July 2009.

3. Posts

The liberalisation of the German postal market started in 1989 when Deutsche Post was sub-divided to operate in three separate areas – postal service, postal banking and telecommunications. Those three corporations were corporatised as companies in 1995 under the second stage of postal reform. Deutsche Post, who went public in 2000, is one of the first incumbent postal service providers in the EU to be privatised. In 2007, Deutsche Post delivered 9.3 billion mail items in 2007, 87.2 per cent of market share in domestic mail communications.[531] Since the acquisition of DHL in 2002, Deutsche Post has become a major participant in the parcels, express and logistics markets. Deutsche Post also operates Postbank, a large retail bank.

Other postal service operators were allowed to operate under a so-called D-licence for delivering high-order mail (same-day delivery or pick-up of letters from the customer) from January 1998. By the end of 2007, there were about 2 370 licensed operators, a majority of them being small and operating at local level. On 1 January 2008, the postal market was fully opened to competition. Deutsche Post ceased to operate under a statutory exclusive licence, but continued to provide universal service.

Regulatory Institutions and Legislation

The *Postal Act 1997*, which became effective on 1 January 1998, governs primarily the 'letter post market' (mail items up to 1000 grams). The Act sets out basic

[528] In telecommunications it is estimated that there have been more than 2 000 applications to appeal aspects of the FNA's decisions. Much of this has been attempts by Deutsche Telekom to challenge specific aspects of decisions. Other appeals have been by access seekers in relation to tariffs.
[529] Meeting with the FNA on 28 April 2008.
[530] FNA, *Press Release*, 13 May 2009. Available at: http://www.bundesnetzagentur.de/media/archive/16292.pdf [accessed on 22 May 2009]. The two consultation papers are: *Key Elements for Progressing Modern Telecommunications Networks and Creating Powerful Broadband Infrastructures*; and *Notes on the Consistent Regualtion of Rates as Required under Section 27(2) of the Telecommunications Act*.
[531] Deutsche Post World Net, *Annual Report 2007*, 2008, p. 48.

framework to 'promote competition and to guarantee appropriate and adequate services in Germany'.[532] Regulation of postal services takes the form of licensing; price regulation of the prices of the dominant post provider, Deutsche Post; access regulation for competitors to the networks of Deutsche Post; and the USO provisions.

The *Postal Act* provides the FNA with the authority to regulate the following postal matters:

- Issuing postal licences to operators to deliver mail weighing no more than 1 000 grams
- Approving all rates charged for licensed postal services of a dominant post provider
- Enforcing non-discriminatory third party access to postal facilities; and
- Safeguarding the universal service that is required to be provided country-wide at a certain quality and at an affordable price.

The application of price and access regulation of letter post to Deutsche Post is conditional on its status as a dominant provider in the letter post market.

In practice, Deutsche Post's prices have been subject to prior authorisation by the FNA. This *ex ante* regulation of prices has occurred through a RPI-minus-X price-cap system, under which determination of the difference between retail price level (RPI) and the expected productivity growth (X factor) as the basis of annual price alignment is made in advance.[533] The current price cap regime sets the maximum annual price increase for a basket of mail products for private customers and small businesses for the regulatory period 2008 to 2011. The FNA will subsequently approve price increases for individual products proposed by Deutsche Post provided that the prices are within the ceiling price set by the price cap decision. Rates for bulk mail (volume of 50 letters or above) are no longer subject to prior authorisation; instead became a subject of *ex post* price control after 1 January 2008.

Deutsche Post is mandated to provide every competitor access to its postal network, under specific conditions. In principle, the access price should be set at the retail price minus the avoided costs by Deutsche Post due to worksharing activities performed by the competitor. On 1 January 2008, the workshare discounts switched from *ex ante* regulation to *ex post* control, under which the FNA will intervene when specific criteria are not met. There is also mandatory access to Deutsche Post's post-office boxes and to information on changes of address of postal customers,

The FNA also has a role in arbitration over access dispute between Deutsche Post and a (potential) user, where the two parties fail to reach a contract within a period of three months from the time the user first sought such contract. The parties concerned may defer to the FNA as the arbitration body. In this case, the FNA shall stipulate within a period of two months the conditions of the contract.

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[532] The *Postal Act*, Article 1, 22 December 1997.

[533] ECORY Nederland BV, *Main Development in the Postal Sector (2006 – 2008): Country Sheet Summaries*, 11 September 2008. Available at: http://ec.europa.eu/internal_market/post/doc/studies/2008-country_sheet_summaries.pdf [accessed on 20 December 2008].

Process and Consultation

In relation to access to the letter post market, an applicant shall lodge with the FNA a written request, specifying the intended scope of business that requires a licence for operation. Within a period of six weeks, the FNA shall grant the licence provided the applicant meets certain licensing requirements on technical qualification, reliability, public safety, working conditions and so on. The licence shall be granted in writing.

The process for price regulation is stipulated in the *Ordinance concerning Rates Regulation* issued on 22 November 1999. Applications for rates approval shall be submitted in writing. The FNA shall make a decision within a period of six weeks upon receipt of the application. It may extend the period by no more than four weeks by notifying the applicant accordingly. The price cap procedure involves:

- The FNA publishes its draft decisions on price cap procedure, as well as for the default of the respective measure sizes in its Official Gazette to enable competitors, consumer groups and other interested parties to comment on the intended decision.
- After the publication, the Deutsche Post will be given the opportunity to make its price cap decision and submit the prices for individual products to the FNA for approval.
- The FNA publishes it final decision in the official Gazette.

Information Disclosure and Confidentiality

In fulfilling its regulatory functions, the FNA has a broad range of information gather power, including an ability to request data from all postal operators. For example, in approving prices, the FNA may order the service provider to supply detailed information on sales and cost, and draw up the cost statement.

The FNA is obliged to publish its regulatory decisions on its official Gazette.

Decision-making and Reporting

As described earlier, Ruling Chambers are divided according to industry and sector and according to specific activities within those areas. Regulatory decisions in posts are made by the relevant Ruling Chamber (number 5).

The postal regulation section of the FNA (which is separate to the Postal Ruling Chamber) comprises six divisions, including a market watch division, an economic and legal policy division, interconnection compliance division and a market definition and market dominance division. The total number of staff working on postal matters is about 35.[534]

Appeals

Administrative appeal against FNA's regulatory ruling is available.

Appeals are dealt with in the First Instance by the Administrative Court of Cologne. This is the district court of Cologne and therefore hears a range of other matters – that is, it is not a specialised Court. Appeals are heard by five judges, which include three full-time judges of the Court and two lay members (who may not have legal training) and involve a 'merits'/substantive review of the FNA decision. Appeals from the

[534] ECORYS, *Main Developments in the Postal Sector (2006 – 2008), Annex II, Country Sheet: Germany*, p. 336.

Administrative Court of Cologne are heard by the Higher Administrative Court in Munster.

4. Water and Wastewater[535]

The quality of water and wastewater treatment in Germany is exceptionally high. There is a very high rate of connection to the water and wastewater networks (98.6 per cent) and a very low leakage level. Water supply and wastewater disposal are within the competence of municipalities, usually in separate entities for water and wastewater, and usually – but not always – under municipal ownership. There are approximately 7 000 of each kind of operation.

Regulatory Institutions and Legislation

In accordance with the competence rule of the German constitution or the so-called *Basic Law*, responsibilities over water and wastewater are shared among the federal government, federal states (*Länder*) and municipalities. At the federal level, the Ministry of Economics and Technology is responsible for national water legislation and policy. The *Federal Water Act* (*Wasserhaushaltsgesetz*, WHG) was enacted in 1996 to govern water management and has been amended since, including the incorporation of the *EU Water Framework Directive 2000*.[536] The Federal/State Working Group Water (LAWA) was established in 1956 in order to harmonise water laws at the federal and state level, consisting of representatives of the federal and the state authorities. The LAWA is currently a working committee of the Conference of Secretary of the Environment (UMK).

At the state level, the state governments are responsible for the regulation of water supply and wastewater disposal in their respective states though the state water laws.

The provision of water supply and wastewater disposal is under the authorities of the municipalities. Municipalities occupy a distinct position under German law. They are not part of the state in the usual sense (creations of or subordinates of the state), but have their own democratic legitimacy and autonomy in self-government for all local affairs, including the provision of water and wastewater services.[537] The right of self-government under the *Basic Law* guarantees financial autonomy; that is, the right of municipalities to a source of tax revenues based upon economic ability and the right to establish the corresponding tax rates.[538] The municipalities also have the right to decide on the institutional (subject to the public-law or the private-law) and contractual (self supply or third party supply) arrangements for the provision of water services. As a result, there are different organisational forms of water and wastewater operators; viz municipal department, municipal utilities, municipal enterprises, joint ventures, private enterprises, and contracted operators.[539]

Although there is no formal economic regulation conducted by municipalities, federal and state governments set a framework for municipal provision of water services, consistent with the EU Directives. For example, the predominant form of supplier –

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[535] Information for this section is especially from OECD, 'Competition and Regulation in the Water Sector', *OECD Policy Roundtable*, 2004, pp. 109–113.
[536] *Act on Managing Water Resources*, *Federal Law Gazette* I, p. 1695.
[537] RA Kraemer, B Pielen and C Roo, 'Regulation of Water Supply in Germany', *CESifo DICE Report 2/2007*, 2007, pp. 21–26.
[538] *The Basic Law*, Article 28 (2).
[539] Ministry of the Environment, Nature Conservation and Nuclear Safety, *The German Water Sector: Policies and Experiences*, 2006, p. 14.

the public-law utilities – is subject to the laws on municipal water charges (e.g. *Hesse Municipal Charges Act*) of the federal states. These laws require certain principles to be adhered to in the calculation of fees and charges. The two most important of these principles are:

- The principle of equivalence – the prices or charges must not be substantially above the value of the service for the citizen, irrespective of the costs of the service.
- The cost-coverage principle – all costs incurred for water supply or wastewater disposal, including water resources protection, abstraction and purifications and so on, must be covered by the price or the charge.

These principles must apply in the case of a public-law contractual relationship.[540] The water charges are subject to the supervision by the federal states (*Länder*).

In the only apparent instance of a process applicable in water and wastewater regulation, a review of the prices or charges (fees under public law) can be initiated by the customer lodging complaints against notices of water charges from public suppliers through a civil or administrative court.[541]

Supply utilities, either public or private, are subject to the additional supervision of the competition authorities (that is, the Federal Cartel Agency discussed above) as far as they charge for their services directly to the consumers (charges under private law). In particular, the abuse of a dominant position is prohibited under s. 19 of the *Act Against Restraints of Competition* as well as Article 82 of the EC treaty. In addition, public water supply under certain contracts such as demarcation and exclusive franchise agreements can be exempted from the German competition law.[542]

Regulatory Development

As with all Member States of the EU, Germany is subject to the *EU Water Framework Directive 2000*. Water legislation at the Federal, State and Municipal level has been amended accordingly. There is no evidence of any compliance issues relating to the Water Framework Directive, and the charging principles used would appear to be consistent with Water Note 5.

5. Rail

Germany has developed advanced urban, regional and inter-city rail systems, including the 'ICE' inter-city express system. To date, Germany has retained a vertically-integrated incumbent – Deutsche Bahn AG (DB) – under a holding-company corporate structure. The DB group consists of many subsidiary companies, such as DB Netze in infrastructure development and management, DB Stations in Stations and Services, and DB Railion in freight transport. According to one observer, the need for transparency to encourage on-rail competition was not considered as important as achieving an improvement in DB's financial and operational performance.[543]

[540] OECD, op. cit., p. 110.
[541] Ibid.
[542] The *Act Against Restraints of Competition* (*Gesetz gegen Wettbewerbsbeschränkungen* – GWB), s. 131 (8) in conjunction with the old *Act Against Restraints of Competition*, s. 103).
[543] Jeremy Drew, 'Market Reforms Revitalise European Rail Freight', *Railway Gazette International*, 12 October 2008, Available at:

Over time, DB's freight business has acquired all or part of rail freight operations in several other European countries, as well as buying a major international logistics company. It remains dominant in its home market, although the level of competition has increased with open-access operators carrying 17 per cent of total rail freight traffic in 2007.

The development of competition may have been assisted by Germany's position at the centre of Europe.[544] Germany has land borders with nine states and national railway networks from Switzerland, Italy and Poland run into Germany. The considerable volume of international transportation business, including transit traffic, is well-suited to being carried by other operators. Some private operators are based in other EU Member States.

Regulatory Institutions and Legislation

Substantive supervision in railway regulation is the task of the Federal Ministry of Transport, Construction and Town Development (BMVBS) and organisational responsibility lies with the Federal Ministry of Economics and Technology (BMWi). However, under the *General Railway Act 1993* as supplemented by the *Ordinance on Railway Infrastructure Usage Regulations*, the FNA has responsibility for monitoring compliance with rules regarding access to railway infrastructure, especially as regards the compilation of the train schedule, decisions on the allocation of railway embankments, access to service facilities, usage conditions, rates principles and rate levels. Unlike the telecommunications and postal industries, railway infrastructure is 'symmetrically' regulated – that is public operators are subject to regulation regardless of their market position.

In some instances the railway infrastructure operator will be obliged to notify the FNA in advance of planned decisions, for example, when it intends to reject an application for allocation of railway embankments or for access to service facilities. Within very short periods (scaled from one day to four weeks), the Agency will have the chance to withhold consent to the planned decision. This objection will include Agency specifications which will need to be taken into account in the new decision and may result in certain rules and conditions not being allowed to come into force, for example, rate levels. Apart from these preventive regulatory rights, there is also the possibility of subsequent verification of usage conditions for rail tracks and service facilities and of rules about the level or structure of route rates and other rates.[545]

Decision-making and Reporting

Decisions in rail regulation are made by the rail regulation section of the FNA (not, as in other areas, by a Ruling Chamber). The rail regulation section of the FNA comprises five divisions, including an economic and legal policy division, an access-to-rail-infrastructure-and-services division, an access-to-service-facilities-and-services

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http://www.railwaygazette.com/ur_single/article/2008/10/8843/market_reforms_revitalise_european_rail_freight.html [accessed on 12 October 2008]

[544] J Drew, 'Market Reforms Revitalise European Rail Freight', *Railway Gazette*, 6 October 2008. Available at: http://www.railwaygazette.com/industry-view-point-single/article/2009/01/9205/market_reforms_revitalise_european_rail_freight.html [accessed on 12 October 2008].

[545] FNA, *Rail Regulation: Tasks of the Federal Network Agency*. Available at: http://www.bundesnetzagentur.de/enid/105e810980ebe915463b290cdcb6ff1f,0/Areas/Railway_Regulation_29e.html [accessed on 12 October 2008].

division, a charges-for-networks-service-facilities-and-services division, and a division covering business aspects of charging, monitoring and statistics.

Appeals

Appeals are dealt with in the First Instance by the Administrative Court of Cologne, and can be appealed from there to the Higher Administrative Court in Munster.

Regulatory Development

While its regulatory processes are relatively transparent, Germany has not been timely in its compliance with the EU directives in relation to rail. It is one of the 24 Member States found by the EU Commission that failed to implement the first Railway Package properly.[546] It also failed to communicate its national implementation measures to transpose the second Railway Package, due on 30 April 2006. The Commission began infringement proceedings against Germany (and twelve other Member States) on this basis.[547]

6. Airports

Germany's position in central Europe makes it a hub for transport, including air transport, and Germany has a number of major international airports – particularly Frankfurt, Munich and Berlin. Domestic air transport is more limited given the excellence of rail and road transport.

Regulatory Institutions and Legislation

The economic oversight of airports is carried out by the transport authorities of the federal states under statutory supervision of the Federal Ministry of Transportation (BMVBS). The oversight function of the authorities includes the approval of charges. Under the *Air Traffic Licensing Regulations*, airport charges remain subject to traditional cost-based regulation with a single-till approach. State transport ministries do not publish public information with respect to the current processes and practices of regulating the airport industry in Germany. However, the approval process for charges is based on the recommendations of the International Civil Aviation Organisation (ICAO) as laid down in the latter's policy document on charges for airports and air navigation services.[548]

State Regulation of Airports

At a few airports involving private interests, incentive-based regulation, such as price capping, has been implemented.[549] Price cap arrangements are set out in public legal contracts between the various airports and state governments and have taken a variety of forms, some of which provide for a sharing of risk between the airport and airlines.

For example, the core of the public contract between Frankfurt Airport (Fraport) and the Ministry of Economic Affairs and Transport of Hesse is a revenue-sharing agreement, under which the average charge per passenger is coupled to the

[546] European Commission, *Press Releases*, 26 June 2008. Available at: http://europa.eu/rapid/ [accessed on 6 January 2009].
[547] European Commission, *Press Release*, 21 March 2007. Available at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1383 [accessed on 6 January 2009].
[548] International Civil Aviation Organisation (ICAO), *ICAO's Policies On Charges For Airports And Air Navigation Services*, Document no. 9082/7, 7th Edition, 2004. Available at: http://www.icao.int/icaonet/dcs/9082/9082_7ed_en.pdf [accessed on 6 January 2009].
[549] ICAO, *Airport Case Study: Germany*, 5 December 2008. Available at: http://www.icao.int/icao/en/atb/epm/CaseStudy_Germany.pdf [accessed on 6 January 2009].

development in passenger volume (actual and budget). If passenger volume grows faster than planned, one-third of the resulting higher revenue is to be returned to the airlines. On the other hand, should passenger figures fail to reach budgeted levels, Fraport can compensate for such shortfalls by higher charges, applying the same ratio. The economic risks and opportunities can thus be shared by both the airport and the airlines. In January 2007, a new but similar regulatory regime for airport charges came into force between Fraport and the Ministry of Economics, Transport, Traffic and Development of Hesse.[550]

There is also public legal contract between Hamburg Airport and the Ministry of Economic Affairs of Hamburg which covers landing fees, passenger handling fees, noise level charges and aircraft parking fees. The contract incorporates price cap regulation with the price cap originally characterized by a sliding-scale CPI-minus-X (consumer price index CPI minus a specific value X), set on a revenue yield basis. The objective of the sliding scale was to reduce the possibility of the airport achieving 'windfall profits'. However, the sliding scale was suspended because any temporary decrease of demand followed by higher growth would, on average, lead to a relatively high X. As well has being subject to a price cap, Hamburg airport must attain certain quality of service targets, including availability of aircraft, parking positions and availability and punctuality of passenger and baggage transport systems.[551]

Between 2004 and 2008 Düsseldorf Airport had a four-year pricing path with the Ministry of Transport and the airlines. Where annual passenger volume was within the range of 14.3 and 17 million, a constant Reference Quotient (RQ) was determined per passenger. The RQ was the maximum allowable revenue yield (average charge of all approval-required airport charges) per passenger. Passenger volumes above 17 million would result in a drop in RQ and therefore charges, while volumes below 14.3 million, would lead to an increase in RQ.

Regulation of Ground Handling Services at Airports

Ground Handling Services (GHS) at German airports are subject to national legislation transposing an EU Directive which requires airports with more than 2 million passengers to open the market to outside suppliers of GHS and to license at least one independent handler (EC Directive 96/67). GHS principally comprise ramp handling, baggage handling, freight/mail handling, fuel/oil handling, and passenger handling services.

Air Traffic Control

Deutsche Flugsicherung GmbH (DFS), a private company, is responsible for air traffic control in Germany. The MTBU reviews and approves any changes in air navigation services charges of DFS, but it does not independently evaluate DFS's price-setting process or pricing changes. DFS's charges for *en route* services are collected by the European Eurocontrol agency both for domestic as well as international air traffic. The terminal charges for arrivals and departures are levied directly by DFS. In April 2006, the Federal Parliament adopted an *Air Navigation Services Act*, stipulating the privatisation of DFS. Under the new Act, the Federal Supervisory Authority for Air Navigation Services (BAF) will be established to meet the Single European Sky requirement, that is, separation of regulatory and operational

[550] P. Forsyth, *The Economic Regulation of Airports: Recent Developments in Australasia, North America and Europe,* Ashgate, 2004.
[551] ICAO, *Airport Case Study: Germany*, 5 December 2008.

functions. BAF will supervise air navigation services providers including DFS and regulate their charges. Area control and aerodrome control at the international airports will continue to be handled for a transitional period (20 years for area control and 16 years for aerodrome control) exclusively by DFS, while competition is possible at regional airports.[552]

7. Ports

Germany has a number of major seaports, of which Hamburg is the largest – in fact it is the second-largest in Europe. Other main ports include Bremen and Lubeck. The three ports of Hamburg, Lubeck and Bremen were once the principal ports of the Hanseatic League, an association of port cities that controlled sea transport and trade in a wide band stretching from the Netherlands, through Scandanavia to Poland. The League formally existed from the twelfth century to 1669.[553] Duisburg, located on the Rhine, is the largest inland port in the world.

Regulatory Institutions and Legislation

In accordance with the competences stipulated by the *Basic Law,* responsibilities for seaports are concurrently shared between the federal and state governments. The authority of the states over the port companies lies primarily in ensuring the safeguard of fair conditions of competition. However, it is the joint task of the Federal Government and the coastal states, in their respective competences, to ensure that the port infrastructure is adapted to the functions of commercial seaports, as well as part of transport links. The duties of the Federal Government mainly result from investment and regulatory requirements and working with the EU. In particular, the Federal Government is responsible, under a Federal Transport Infrastructure Plan, for sea-bound access and hinterland links with German seaports.[554]

Individual port authorities issue regulations detailing fees and charges. There is no common European seaport access or charging framework, and the German government has expressed a preference for port services and access to remain a local matter, not subject to any EU-wide regulation.[555]

As detailed in the EU chapter, an EU draft Directive on market access to port services failed in 2006.[556] The draft Directive would have allowed several providers for services such as pilotage, towage, mooring, cargo handling services and passenger services. Any limit to the number of service providers operating in a port would have had to be justified by limitations in terms of space, available capacity, maritime traffic safety or development policies within the port. At the EU level there is on-going debate regarding a community framework for the imposition of infrastructure charges within the EU, which would apply to all transport modes including maritime transport infrastructure.[557]

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[552] International Civil Aviation Organisation, *Airport Case Study: Germany*, 12 July 2007.

[553] See, for example, 'Hanseatic League'. Available at: http://www.infoplease.com?ce6/history/A0822651.html [accessed on 20 October 2008].

[554] Joint Platform of the Federal Government and the Coastal States for a German Sea Port Policy, Federal Ministry for Transport, Building and Urban Affairs' website at: http://www.bmvbs.de/-,2079.2217/Joint-Platform-of-the-Federal-.htm.

[555] Ibid.

[556] European Commission, *Proposal for a Directive of the European Parliament and of the Council on Market Access to Port Services*, COM (2004) 654 Final, 2004.

[557] European Commission, *White Paper on Fair Payment for Infrastructure Use*, COM (1998) 466, July 1998.

EUROPE

IRELAND

OVERVIEW

Traditionally, economic infrastructure in Ireland has been dominated by vertically integrated government-owned utility operators with statutory monopoly powers.[558] Entry to the European Union has been associated with the restructuring of a number of utility industries to encourage competitive markets. Further liberalisation of industries is likely to occur in line with relevant EU Directives.

Regulatory arrangements are put in place at a national level or via applicable EU law. Economic regulation of networks industries and sectors is currently undertaken by both independent government bodies and government departments. The Irish Competition Authority deals with competition concerns and can therefore have a regulatory presence in infrastructure industries.

The Commission for Energy Regulation (CER) is responsible for the electricity and gas markets. Both the electricity retail and gas supply markets are fully open to competition, although the number of independent participants is small. Regulation of the telecommunications, broadcasting and postal industries is undertaken by the Commission for Communications Regulation (ComReg). The postal industry is expected to be fully open to competition by December 2010 in accordance with the EU Directive.

Water and wastewater services are primarily the concern of local governments, although the Environmental Protection Agency is responsible for regulating drinking water quality.

Considering transport, in the rail industry, services and fares are monitored and approved by the Minister for Transport, while the provision of infrastructure must be approved by an independent body, An Bord Pleanála (An Bord). There is no access regime, but third parties can participate in the provision of infrastructure through a joint partnership with the Railway Procurement Agency. The Commission for Aviation Regulation (CAR) is responsible for regulating charges at Dublin airport. Irish ports are owned by local governments, although port companies regularly lease infrastructure to private companies. As individual ports are managed by state owned port companies, the industry is effectively regulated by the Minister for Marine.

GEOGRAPHY, POPULATION, ECONOMY, POLITY AND LEGAL SYSTEM

The Republic of Ireland is located in Western Europe and occupies five-sixths of the island of Ireland in the North Atlantic Ocean, west of Great Britain. Ireland's interior terrain is predominately level to rolling hills. This is surrounded by rugged hills and low mountains. Sea cliffs are a prominent geographic feature of west coast of the island. The country exhibits a temperate maritime climate with largely mild winters and cool summers.

[558] Competition Authority, *Report on Bus and Rail Passenger Transport Sector*, Ireland, Dublin, 1999.

Ireland is a small country of 70 280 square kilometres, with an estimated population of 4 156 119 as of August 2008.[559] Ireland exhibits one of the lowest population densities by OECD standards of approximately 59 people per square kilometre with the majority of the population inhabiting rural areas of the country. However, around 40 per cent of the total population resides in or around the capital city of Dublin. Other major cities are Cork and Galway. All of these cities are small by European standards. Of the two official languages, English is the most widely used, although Gaelic is still spoken in some parts of the country. Government bodies are also often named in Gaelic.

GDP per capita in 2006, in PPP terms, is estimated at US$43 600, making it the fourth richest OECD country. Over the last ten years, the Irish economy has grown substantially, driven in large part by investment in high value-added businesses. The services sector now accounts for around 64 per cent of GDP, while manufacturing accounts for 29 per cent – this is high by OECD standards. There is little arable land, and Ireland's agriculture produces turnips, barley, potatoes, sugar beet, wheat, beef and dairy products. As such agriculture makes up 5 per cent of GDP. There are few natural resources – natural gas, peat, copper, lead and zinc are among those it does possess.

Ireland's economy is highly dependent on international trade. Its main trading partners are the UK, the US, Germany and France. Recent strong growth in GDP has also been accompanied by significant increases in property prices.

Much of the public infrastructure in Ireland is government owned and is at various stages of development. Ireland only generates a small amount of energy, mostly from peat and natural gas. Increasing energy needs have led to an increase in energy imports in recent years. Renewable energy generation is small, but increasing. Despite recent improvements in telecommunications services, broadband penetration is low, relative to other EU countries.[560] Water infrastructure is also moderately developed, as irrigation requirements are low and a substantial proportion of rural households are not connected to a water supply system. As Ireland is strategically located on major air and sea routes between North America and northern Europe, its transport infrastructure is more developed. Notably, the Republic of Ireland operates some utilities in conjunction with Northern Ireland. The wholesale electricity market, for example, occurs within the Single Electricity Market. Parts of the rail network are also operated in conjunction with Northern Ireland.

Ireland is a republic, parliamentary democracy, having declared independence from the UK in 1921. The parliament consists of a Senate (*Seanad Eireann*) and a House of Representatives (*Dail Eireann*). The head of government is the Prime Minister (*Taoiseach*). The President, elected directly by the people, is a largely ceremonial position. The President appoints the Prime Minister on the nomination of House of Representatives.

The legal system in Ireland is based on English common law, with the incorporation of equitable doctrines. As a member of the EU, Ireland has accepted the authority of

[559] Most facts are from the Central Intelligence Agency (CIA), *World Fact Book – Ireland*. Available at: https://www.cia.gov/library/publications/the-world-factbook/geos/ei.html [accessed on 2 September 2008].
[560] Commission for Communications Regulation (ComReg), *Response to Consultation and Decision – Rental Price for Shared Access to the Local Loop*, Document No 08/46, 2008.

European legislation over national law. It has not accepted compulsory ICJ jurisdiction.

Ireland's courts structure comprises of courts of first instance which include a High Court with full jurisdiction in all criminal and civil matters and courts of limited jurisdiction, the Circuit Court and the District Court. The central criminal court is the Criminal Division of the High Court. Appeals from the Central Criminal court are heard in the Court of Criminal Appeal. For all cases the Supreme Court is the court of final appeal.

APPROACH TO COMPETITION AND REGULATORY INSTITUTIONAL STRUCTURE

The Irish Competition Authority is an independent statutory authority administering the *Competition Act 2002*. It enforces competition law and regulates mergers and acquisitions. Market studies are also carried out to assess the level of competition in areas such as groceries, the private health market and professional services. Decisions are made by a chairperson and members of the authority, who are supported by internal case officers. The Competition Authority is divided into six divisions, namely corporate services, cartels, monopolies, mergers, advocacy and policy. Currently, there are four members, who each also act as director of one of these divisions.[561]

Since the functions of the Competition Authority can sometimes overlap with those of the industry-specific or sector-specific regulators, the CER, the ComReg and the CAR have each implemented co-operation agreements, pursuant to s. 34 of the *Competition Act*. These agreements provide for the exchange of information and provide guidance for situations in which both bodies are able to exercise their regulatory functions. They authorise one party to not act on a matter if it deems the other to already be exercising its functions in that area.[562]

In 2004 the government published a White Paper titled *Regulating Better*.[563] This paper sets out six principles of good regulation that will be considered in existing and future regulatory arrangements – necessity, effectiveness, proportionality, transparency, accountability, and consistency. Under 'Necessity', the government will require higher standards of evidence before instating a regulatory body and will aim to reduce existing red tape by systematically reviewing, and amending, regulated industries and sectors. To ensure effective and proportionate regulation, the government aims to regulate as lightly as possible and ensure that costs of compliance are, and remain, fair and reasonable. To achieve transparency, the government will consult widely and ensure regulations are straightforward, clear and accessible. The government also undertakes to ensure accountability by improving appeals processes. In particular, it means to instate specialised appeals panels, rather than the courts, to hear appeals. Finally, the government aims to improve consistency between different regulators and within sectors.

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[561] Competition Authority, *About Us*, Dublin, Ireland. Available at: http://www.tca.ie/AboutUs/AboutUs.aspx [accessed on 2 September 2008].

[562] See for example, Competition Authority and ComReg, *Cooperation Agreement between Competition Authority and the Commission for Communications Regulation* 2002, Dublin. Available at: http://www.tca.ie/NewsPublications/Co-OperationAgreements/Co-OperationAgreements.aspx [accessed on 2 September 2008].

[563] Irish Government, *Regulating Better: A Government White Paper Setting Out Six Principles of Better Regulation*, Dublin, Ireland, 2004.

The White Paper also approved the use of Regulatory Impact Analysis (RIA) in drafting legislation. The purpose of such analysis is to identify the potential impacts of new legislation, including costs of compliance, and to consider alternatives to state regulation. This approach is in line with the 'better regulation' principles of necessity and proportionality.

Regulation in Ireland is also governed generally by the *Freedom of Information Acts 1997* and *2003* (FOI). The FOI requires public bodies to publish a manual setting out the rules, procedures, guidelines and interpretations by which they operate. The manual is also required to include a list of precedents (s. 16). The FOI also gives citizens the right to access information pertaining to them. In general, the Act provides for the disclosure of reasons for a decision, factual and statistical information, scientific or technical advice and reports into the functioning of a public body. A record containing the deliberations of staff, which includes opinions, advice and recommendations, can be withheld if its release is considered to be contrary to public interest. This exclusion does not apply to expert advice, potentially even if given by internal staff (s. 18).

The FOI also establishes the Office of the Information Commissioner, under the direction of the Information Commissioner, to review decisions of public bodies regarding FOI requests of information. On application by a requesting party, the Commissioner will seek submissions from the public body concerned as to its decision and will consult with third parties who may be affected. The burden of proof is on the public body to show grounds for denying an FOI request. The Information Commissioner has the power to affirm, vary or replace the decision.[564]

Generally, merits based appeals are only available for certain regulatory matters, as set out in the legislation governing an industry. Whether such appeals are heard by a specialised appeals panel or the High Court varies across industries and sectors. However, in all industries judicial review is available by application to the High Court. The appeal process is then governed by the rules of the High Court. The Court has the power to affirm or set aside a decision, in whole or in part and can also remit a matter to be reheard by the relevant regulator. Where an EU Directive applies, a party can also refer any decision to the European Court of Justice on the basis of a misinterpretation of the Directive.

REGULATORY ARRANGEMENTS BY INDUSTRY OR SECTOR

1. Energy

Nearly all of Ireland's electricity is generated by burning fossil fuels, and it has no nuclear energy. The Electricity Supply Board (ESB) is the incumbent body in the electricity market. It is a statutory corporation and the government holds 95 per cent of its shares. The other five per cent are held by employees. The ESB is vertically integrated, but is separated into independently operating business units. In the generation market where entry is subject only to regulatory authorisation (see below), ESB Power Generation owns and operates generation facilities. The ESB Networks owns the high and medium voltage transmission systems. The high voltage system is operated by EirGrid, which is a separate, government-owned body. The distribution system is owned by the ESB and operated by the ESB networks. In the retail market,

[564] Office of the Information Commissioner, *About Us*. Available at: http://www.oic.gov.ie/en/AboutUs/RoleFunctionsandPowersoftheInformationCommissioner/ThereviewofFOIDecisionsofPublicBodies/ [accessed on 12 September 2008].

that is fully open to competition, ESB Customer Supply provides electricity for retail customers in its capacity as the Public Electricity Supplier.[565]

The Single Electricity Market (SEM) is the wholesale market for electricity for both the Republic of Ireland and Northern Ireland. It is operated by the Single Electricity Market Operator (SEMO) and operates in dual currencies.

In the gas market the relevant incumbent body is Bord Gáis Éireann (BGE), which is wholly owned by the government. BGE owns the distribution and transmission systems both operated by an independent company – GasLink. The market for gas supply was fully opened to competition in July 2007. However, the number of suppliers remains limited.

Regulatory Institutions and Legislation

The powers of the Commission for Energy Regulation (CER) to regulate electricity and gas are set out in the *Electricity Regulation Act 1999* and the *Gas (Interim Regulations) Act 2002*, respectively. The CER is an independent body and is funded by a levy on regulated industries.

The mission of the CER is described as:[566]

> In a world where energy supply and prices are highly volatile, the mission of the CER, acting in the interests of consumers is to ensure that:
>
> - the lights stay on,
> - the gas continues to flow,
> - the prices charged are fair and reasonable,
> - the environment is protected, and
> - electricity and gas are supplied safely.

The CER is also legally required to promote renewable energy forms.

The CER regulates retail prices charged by ESB Customer Supply. All independent suppliers can freely set tariffs. The CER also regulates annual transmission and distribution tariffs set by ESB Networks.[567] Tariffs must be based on the recovery of an appropriate proportion of costs incurred, and a reasonable rate of return. The generation market is also open to competition, but any provider intending to construct infrastructure and generate electricity must obtain an authorisation to do so from the CER.

In gas, the CER regulates retail prices charged by BGE as the dominant supplier. Transmission and distribution tariffs set by BGE are also regulated. To this end, revenues are reviewed every four years. The CER also grants licences (authorisations) for the construction of infrastructure.[568]

The CER has enforcement powers in the form of licences. Directions can also be issued requiring a holder of a licence or authorisation to cease an activity if such a direction is deemed to be necessary to protect the public, the security of supply or the

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[565] Electricity Supply Board (ESB), *About Us – ESB at a Glance*. Available at: http://www.esb.ie/main/about_esb/ataglance1.jsp [accessed on 2 September 2008].

[566] Commission for Energy Regulation (CER), *About Us – Overview*. Available at: http://www.cer.ie/en/about-us-overview.aspx [accessed on 12 August 2008].

[567] *Electricity Regulation Act 1999*, Act no. 23 of 1999, s. 35.

[568] CER, *Regulators' Annual Report to the European Commission*, Ireland, August 2007.

interest of other holders of licences and authorisations.[569] Where no direction has been made, the CER can make a determination that a licence holder has breached conditions of that licence.[570] Court orders can also be applied for to ensure compliance.[571]

In accordance with its legal requirement to promote renewable energy forms, the CER has a special group processing system in place for renewable generators seeking access to the transmission or distribution networks. Since December 2004, renewable generators seeking connection to the transmission or distribution systems have been processed within successive 'Gates'. Generation applications are placed within a gate depending on their date of application. Then the applications are divided into groups for processing. Individual applicants then gain connection to the system. Gate 1 was finalised in December 2004 and the principles and criteria for Gate 2 were finalised in 2006.

The CER argues the advantages of such a system to be: [572]

- Connection offers issued more quickly overall.
- Uncertainty resulting from interacting offers and applications is removed.
- Development of a more optimal network with minimum connection infrastructure.
- Earlier recognition and quicker resolution of network congestion problems.
- More efficient use of system operator resources.

A renewable generator may obtain an exemption from the group processing scheme if its Maximum Export Capacity is less than 0.5MW or if it can demonstrate that processing its application more quickly would be in the public interest (not just in the interest of the individual generator).

Process and Consultation

The CER undertakes annual pricing reviews for the regulated generation and supply arms of ESB and for the supply unit of BGE.[573] The CER regulates distribution and transmission tariffs to ensure proportional cost recovery and appropriate rates of return. To this end it engages in five-yearly reviews of allowable revenues for ESB Networks and four-yearly reviews for BGE. The CER is also responsible for resolving disputes that arise between consumers and suppliers, and between system operators and third parties.[574] The CER also regulates compliance with licences and authorisations, such that issues may arise on a case by case basis.

The CER places a strong emphasis on consultation and has recently undertaken a review of its public consultation process.[575] This is in line with the 'Better Regulation' principle of transparency and the fact that public consultation is required

[569] *Electricity Regulation Act 1999*, s. 23.
[570] *Electricity Regulation Act 1999*, s. 24.
[571] CER, *Regulators' Annual Report to the European Commission*, Ireland, August 2007.
[572] CER, *Group Connection Processing*. Available at: http://www.cer.ie/en/renewables-connecting-to-the-network.aspx?article=68c8fc68-4eab-4276-a7b8-4aa5113064f1 [accessed on 8 December 2008].
[573] CER, *Regulators' Annual Report to the European Commission*, Ireland, 2005.
[574] *European Communities (Internal Market in Electricity) Regulations*, Statutory Instrument (SI) 60 of 2005, ss. 24 and 31.
[575] CER, *Review of CER Public Consultation Process – A Consultation Paper,* CER/07/140, 2007.

under statute in the electricity market.[576] The CER has noted that some of the new procedures will increase the time taken to resolve disputes. As of July 2008, the procedures for consultation were as set out below.

Prior to the beginning of a formal consultation, the CER aims to hold discussion meetings with the relevant parties. In the case of major consultations, an open hearing is to be held before a consultation paper is produced. Such a hearing will require the regulated companies to present their submissions in an open setting and respond to questions by interested parties in attendance. Written proposals by the regulated companies will also be made available for two weeks before the consultation paper is produced, allowing parties to respond in the early stages of the matter.

A consultation paper is then published on the CER website and sent to parties listed on a voluntary distribution list. At this stage, a press release may also be published to stimulate public response. Submissions by interested parties can be received over the telephone, but the CER encourages written submissions to ensure transparency. There is now a minimum period of 28 days in which submissions will be received. However, the CER reserves the right to reduce this time period if a decision is required urgently. In the case of complex issues such as four or five yearly revenue reviews, it has been indicated that the consultation period is likely to exceed 28 days.[577] It is unclear how strict the submission timelines are.

A public hearing may also be called. Under s. 21(3)(c) of the *Electricity Regulation Act*, the CER may compel attendance at such a hearing and can require the production of documents. Witnesses are subject to the same immunities and privileges as before the High Court. It is unclear if the CER have the power to compel interviews and discovery outside of this 'public hearing' context.

In addition to the formal consultation procedures, the CER has also undertaken to hold an annual public seminar to keep the public up to date with regulatory developments. Some advisory/stakeholder groups also meet on a regular basis outside of this public consultation process and can provide expert advice to the CER (see below).

The use of open hearings suggests the operational culture to be more judicial than administrative in style.

Timeliness

Pre-lodgement discussions are held with the relevant parties as outlined above. The content and extent of such discussions is unclear.

The legislation prescribes the time period in which the CER must consider regulatory applications. In electricity, the CER is required to make a decision regarding the modification of a licence or authorisation within a 'reasonable time'.[578] An access dispute must be decided upon within two months from receipt of the complaint. However, this time period can be extended by two months if additional information is sought. Further time extensions are possible if a complainant consents to them or, without consent, if the issue relates to major new generation.[579]

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[576] SI 60 of 2005, s. 4.
[577] CER, *Review of CER Public Consultation Process – A Response and Decision Paper*, Dublin, CER/08/089, 2008.
[578] SI 60 of 2005, s. 22(1).
[579] SI 60 of 2005, s. 6(c).

Similarly, determinations with respect to gas must be issued within two months from the date of receipt of a complaint. This may be extended by two months if additional information is sought and further time extensions are possible if the complainant consents to them.

There do not appear to be any consequences for the CER in exceeding the allowable time period.

Role of Interested Parties

The role of consumers is implicitly recognised in the legislation via consultation requirements. However, no user groups are specifically recognised or established.

The CER does organise a number of regular advisory/stakeholder meetings and industry groups.[580] The Retail Electricity Market Industry Governance Group (IGG), for example, was created by the CER to facilitate input from retail participants in retail market governance. It acts as an advisory and discussion panel, but is not a decision-making body.[581] The IGG is chaired by the CER, while the ESB Retail Market Design Service holds position of secretariat. All retail market stakeholders such as suppliers, Eirgrid (the transmission system operator) and the assurance body are members. The IGG meets every six weeks. The CER also organises the Technical Advisory Group, which is comprised of technical and IT representatives from each IGG participant. The Electricity Suppliers Forum was formed by the CER to assist in its retail market policy making responsibilities. Other working groups include the Assurance Advisory Group and the Trading and Settlement Code Modification Panel.

Information Disclosure and Confidentiality

Under the *Electricity Regulation Act*, the CER can appoint an authorised officer for the purpose of obtaining information. An authorised officer has the power to enter the premises of a contravening party to inspect and make copies of documents and records. If a party refuses access, an officer can apply to the District Court for a warrant to search the premises. In order to obtain a warrant, the CER must show reasonable grounds for suspecting the party has contravened some condition of a licence or authorisation. A warrant enables an authorised officer to enter the premises without the consent of the occupier and allows the use of reasonable force to do so. Parties who refuse to comply with a warrant to obtain information may be guilty of an offence leading to a fine or jail time.[582]

The CER is subject to confidentiality requirements under the *European Communities (Internal Market in Electricity) Regulations* (SI 60 of 2005) and the FOI. Firstly, it is directed to exclude from publication, any information which could adversely affect a party's interests.[583] In addition, information received in confidence may not be able to be released to the public.

Under the FOI, information may be deemed to be obtained in confidence if there is a mutual understanding of confidence, the information is important and if its release

[580] CER, *Industry Working Groups*. Available at: http://www.cer.ie/en/electricity-retail-market-governance_.aspx?article=3f3ff60d-4f4a-43c3-9154-541b9e4e4182 [accessed on 1 May 2008].
[581] CER, *Governance Procedures for the Liberalised Retail Electricity Market – A Response and Decision Paper*, CER/05/08, 2008.
[582] *Electricity Regulation Act 1999*, ss. 11–12.
[583] SI 60 of 2005, s. 5(2).

would jeopardise future supply of information.[584] Additionally, information that is commercially sensitive cannot be released otherwise than provided for by the public interest exemption.[585]

Parties can access commercially sensitive information or that which is obtained in confidence, if the regulator deems it to be in the public interest to release it.[586] In making such a determination, the CER must notify the relevant party and provide them with an opportunity to respond. Third parties who may be impacted by the decision must also be notified and given a chance to respond. This stays the release of information. Either party also has the ability to appeal the decision to the Information Commissioner.[587]

Information may also be classified as confidential if it is subject to a common law duty of confidence. This form of confidentiality is not subject to a public interest exemption.

Decision-making and Reporting

The determinative body of the CER is comprised of up to three commissioners, although there are currently only two. The chairman and the commissioner split lead responsibilities for the different areas within the CER between them. The Commission is supported by staff, organised into four divisions:[588]

- The electricity markets and operations division is responsible for licensing new generators and overseeing the SEM.
- The electricity networks and retail division oversees regulation of the transmission, distribution and retail markets.
- The gas division deals with the distribution and supply of natural gas, as well as overseeing the All Islands Gas Project.
- The environment, safety and consumer affairs division deals with renewable energy, safety regulation and quality of service.

It is unclear whether there are specific legal or economic units who look over a proposal before it is presented to the commissioners.

The majority of CER decisions related to tariffs, and access terms and conditions. As such, decisions usually affect multiple parties. For example, s. 14(3) of the *Gas (Interim Regulation) Act 2002*, allows the CER to make regulations regarding the terms and conditions a pipeline operator can dictate to an access seeker and the method for determining the access price. The pipeline operator is then bound to comply with the regulations with respect to all access requests. In the event that an access seeker is refused, the parties must bring the matter to the Commission to be resolved; they cannot apply straight to the courts. It is unclear if parties can agree to depart from a decision.

Upon completion of the public consultation process, the CER publishes a final decision paper on its website. All decision papers, as well as consultation papers,

[584] FOI, s. 26.
[585] FOI, s. 27.
[586] FOI, s. 29.
[587] FOI, s. 26.
[588] CER, *Organisational Structure*. Available at: http://www.cer.ie/en/about-us-organisational-structure.aspx [accessed on 19 May 2008].

adhere to standard templates introduced since June 2008 upon the completion of a review of its public consultation process.[589] The CER also publishes all responses received during the consultation period. Parties who wish their responses to remain confidential will have to apply to and make their case before the commission. The CER will sometimes publish a 'proposed decision paper' prior to its final determination. Consultation is then held with respect to the paper and a final decision paper will be released once submissions have been considered.[590]

The CER has committed itself to publishing more information regarding the reasoning behind its decisions.[591] This is in addition to the requirement under s. 6 of the *Electricity Regulation Act* that such reasoning be included in the final decision paper, unless impractical. In the particular case of rejecting an application for a licence or authorisation without calling a public hearing, the statutory requirement is stronger, stating that the CER must notify the applicant of its reasoning for doing so.[592] Under the FOI, parties can also request further information about a decision which applies to them. Appeal to the Information Commissioner is possible if the CER denies access.

Appeals

Under Part IV of the *Electricity Regulations Act*, parties have the right to appeal a decision of the CER in the modification of, refusal to modify or refusal to grant a licence or authorisation. However, parties are no longer able to appeal network access dispute decisions on substantive grounds.[593]

Merit-based reviews regarding licences and authorisations are undertaken by an appeal panel of at least three people, appointed by the Minister in accordance with s. 29 of the *Electricity Regulations Act*. A request to the Minister for an appeal must be made within 28 days of the CER's decision and the appeal must be determined within six months. An appeal panel is imbued with all the powers of the High Court to compel the production of documents and the attendance of witnesses. In the case of a refusal to grant a licence, the appeal panel can confirm the refusal, or can direct the CER to grant it subject to any conditions it deems necessary. The remedies available for a modification or refusal to modify a licence are simply that the panel may direct the CER to overturn its decision.

Judicial review is possible under s. 32 of the *Electricity Regulations Act* and is undertaken by the High Court. A request for a judicial review must be made within two months of the CER or appeal panel decision. If the High Court finds substantial grounds for ruling in favour of the appellate, the original decision of the CER and/or the appeal panel will be declared invalid.

At the time the White Paper on *Regulating Better* was published, no appeals panels had been formed and their size and composition was therefore yet to be determined.[594]

No information could be found regarding the discovery rights of parties to the appeal. In the case of a judicial review, which is heard through normal legal channels, it is

[589] CER, *Decision on Review of CER Public Consultation Process*, CER08089, 2008.
[590] CER, *Review of CER Public Consultation Process – A Consultation Paper,* CER/07/140, 2007.
[591] CER, *Review of CER Public Consultation Process – A Response and Decision Paper*, CER/08/089, 2008.
[592] *Electricity Regulation Act,* s. 20.
[593] *European Communities (Internal Market in Electricity) Regulations*, SI 524 of 2006.
[594] Irish Government, *Regulating Better: A Government White Paper Setting Out Six Principles of Better Regulation*, Dublin, Ireland, 2004.

likely that discovery rights are as in normal court proceedings. However, this may not be the case when the appeal is heard by a specialised panel.

2. Telecommunications

Ireland's telecommunication market was liberalised in the 1990s. Eircom (previously Telecom Eireann) was once the vertically integrated and government-owned incumbent enjoying a statutory monopoly. It is now a privatised company and is exposed to competition. It owns the core fixed-line infrastructure and has responsibilities as the universal service provider of telephone lines, public payphones, directory services and services to users with a disability. It is also required to ensure affordability and must allow consumers to control their expenditure by providing itemised billing and call-barring facilitates.[595]

Eircom has lost some fixed-line market share to new entrants. There are several providers in the mobile market, and penetration has reached the equivalent of over 100 per cent of the population.

Ireland's broadband market remains under-developed by European and OECD standards, with penetration of 15.4 per hundred population, which is less than half that of the leading countries, the Netherlands and Denmark.[596] Government efforts to improve local loop unbundling and wholesale access have meant that growth in broadband subscription has been strong during the last two years. Research conducted by an independent consultancy company considered that low penetration in Ireland has partly been due to high wholesale costs, lack of competition, high retail prices, limited coverage in many non-urban areas, and general low market awareness.[597]

Regulatory Institutions and Legislation

The Commission for Communications Regulation (ComReg) was created by the *Communications Regulation Act 2002*, which was last amended in 2007 It has regulatory responsibilities under this act and subsequent EU acts either applicable to, or transposed into, Irish law. The ComReg regulates licensing and access terms and conditions to the fixed line infrastructure.[598] A price cap is imposed on the rental rate for the local loop, as well as on the price Eircom can charge for retail services. In setting price caps, the ComReg aims to ensure prices are aligned with forward looking long run incremental costs.[599] The ComReg therefore instigates matters to set the appropriate weighted average cost of capital (WACC) and to set the associated price caps. It also monitors compliance with price caps and access conditions. To this end, the ComReg investigates and resolves disputes between undertakings.

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[595] Commission for Communications Regulation (ComReg), *Universal Service*. Available at: http://www.askcomreg.ie/home_phone/universal_service.90.LE.asp#L412 [accessed on 23 September 2008].

[596] OECD, *OECD Broadband Statistics 2008*. Available at: http://www.oecd.org/document/60/0,3343,en_2649_34225_39574076_1_1_1_1,00.html [accessed on 13 October 2008].

[597] BuddeComm, *Ireland – Broadband Market – Overview, Statistics & Forecast*. Available at: http://www.budde.com.au/buddereports/3554/Ireland_-_Broadband_Market_-_Overview_Statistics__Forecasts.aspx?r=51 [accessed on 23 September 2008].

[598] ICT Toolkit, *Regulation and Convergence in Ireland*. Available at: http://icttoolkit.infodev.org/en/PracticeNote.aspx?id=1224 [accessed on 2 June 2008].

[599] *European Communities* (*Electronic Communications Networks and Services) (Access) Regulations 2003*, SI 305 of 2003.

The ComReg also has a responsibility to identify and correct situations of significant market power.[600] In this capacity, the ComReg monitors the retail and wholesale prices set by any operator deemed, through market analysis, to have significant market power. Pricing obligations can be in the form of retail minus control, cost orientation or a price cap.

The ComReg can investigate and prosecute the existence of anti-competitive behaviours and the abuse of market power in the provision of communications services. A cooperation agreement exists between the ComReg and the Competition Authority to facilitate the sharing of information. This agreement also outlines that each party may forebear to act where other party is carrying out its functions.[601]

The ComReg currently regulates network charges such as:[602]

- Eircom network charges for the provision of calls by other operators
- Wholesale line rental
- Wholesale broadband access
- Mobile termination rates
- Local Loop Unbundling
- Payphones
- Leased lines
- Number Porting
- Ancillary charges associated with the provision of wholesale network services by operators.

Process and Consultation

In regulating the telecommunications industry, the ComReg can choose to investigate issues by its own initiative or in response to an end user's complaint.[603] It also has monitoring responsibilities over retail and wholesale providers who have significant market power and conducts some regular reviews, such as of the maximum call handling fees for an ECAS contract.[604]

In determining a matter, the ComReg typically publishes a consultation paper and then a final decision paper. The ComReg also publishes its own responses to submissions received during the consultation period. This occurs either at the time of, or before, the publication of the final decision paper. The Competition Authority and the EU Member States have the potential to involve themselves in the decision-making process, in addition to interested companies and the general public.

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[600] ComReg, *Telecoms – Market Analysis*. Available at: http://www.comreg.ie/telecoms/market_analysis.563.html [accessed on 23 September 2008].
[601] ComReg, *Cooperation Agreement with the Competition Authority*, Document No 03/06, 2002.
[602] ComReg, *Telecoms – Wholesale*. Available at: http://www.comreg.ie/telecoms/wholesale.564.464.html [accessed on 12 August 2008].
[603] *Communications Regulation Act 2002* (Act 20 of 2002) as amended by *Communications Regulation (Amendment) Act 2007* (Act 22 of 2007), s. 10 (2).
[604] ComReg, *Telecoms – Pricing. A*vailable at: http://www.comreg.ie/telecoms/pricing.564.html [accessed on 26 May 2008].

The ComReg may resolve disputes between undertakings involved in the provision of communications services or networks via formal or alternative mechanisms where it decides that most appropriate approaches on a case-by-case basis. It may make mediation determination that binds the parties to the dispute if the parties agree to the use of mediation. It also encourages the use of other means that can resolve the dispute in a timely manner, such as informal contacts or negotiations, discussion at industry forum or public consultation.

The ComReg follows the following dispute resolution procedures set out in its published decision notice:[605]

- The complainant must give written notice of a dispute containing required information. The ComReg will access whether the criteria necessary for a dispute submission has been met and decide on the appropriate course of action.
- The ComReg notifies the other party of the dispute. The other party will be allowed to give submission within seven calendar days on whether an investigation should be undertaken by the ComReg.
- From the date of the ComReg's communication of its decision to use the dispute resolution procedure, the respondent will in general be required to respond within fourteen calendar days.
- Following a detailed analysis of all submissions, the ComReg may gather further information from the parties; meet with the parties, together or individually; or decide the use of alternative resolution channels for certain issues.
- The ComReg releases a draft decision, to which interested parties will have fourteen calendar days to comment. The decision may be published on its website, subject to the confidentiality requirement.
- The ComReg issues a final decision with stated reasons for the decision. The decision will be published on its website (subject to the confidentiality requirement). The determination shall not preclude either party from appeal.

The ComReg employs external consultants in examining a matter if it deems such advice to be required. In January 2008 the services of consultants in financial, strategic and accounting areas were employed to analyse a proposed structural separation of Eircom.[606] A consulting firm was also engaged during a matter to determine the appropriate return on capital for Eircom.

The focus on consultation and the fact that the ComReg actively provides its own responses to submissions, suggest the operational culture to be judicial in style.

No information could be found regarding informal avenues of consultation and interaction.

Timeliness

The legislation does not include any requirements regarding maximum mandatory timelines for regulatory processes. The ComReg has stated a four-month maximum

[605] ComReg, *Dispute Resolution Procedure*, ComReg 03/89, 2003, p. 22.
[606] ComReg, *About Us – What's New – ComReg Awards Consultancy Contracts*, 2008. Available at: http://www.comreg.ie/about_us/comreg_awards_consultancy_contracts.43.912.whatsnew.html [accessed on 26 May 2008].

timeframe starting from the date of notification of a dispute for dispute resolution determination. The ComReg may engage in pre-lodgement discussions with parties. No information has been found on the ComReg's performance with respect to the average time taken to reach a final decision.

Role of Interested Parties

There does not appear to be any recognition of user groups and industry bodies in the relevant legislation. However, the ComReg does oversee the operation of some industry and working groups such as the consumer group forum, the numbering advisory panel and the operations and maintenance forum.[607]

Information Disclosure and Confidentiality

The ComReg has the statutory power to obtain information.[608] The Commission may serve a notice requiring the giving of evidence or the production of documents if it has reasonable grounds for believing this to be necessary. A person required to appear before the Commission under such a notice, may choose to have a lawyer with them and is subject to the same privileges and liabilities as a witness before the High Court. Information gathered in this way is assumed to be private, although the Commission can make the information public if it deems this to be in the public interest.[609] The *Communications Regulation Act 2002* makes it an offence to not appear or produce documents if requested to do so by the commission (s. 38D). It is also an offence to refuse to swear an oath or to refuse to answer a question (s. 38E). Both duties are subject to a reasonable excuse exemption.

The ComReg may also appoint an authorised officer to enter premises and inspect documents as needed by the commission.[610] An authorised officer is able to obtain a warrant by showing reasonable grounds for suspecting information required by the Commission is on the premises. This will allow an officer to enter without consent by the occupier.

In addition to the above avenues for obtaining information, the ComReg can rely on its cooperation agreement with the Competition Authority to obtain information that may be in the latter authority's possession. The agreement allows either authority to request information from the other. In general, the requesting authority may only use the information for the purposes stated in its request. However it may be used for further purposes, subject to approval by the respondent party.[611]

Material submitted voluntarily may also be deemed to be confidential. In order to be satisfied that such material has the 'quality of confidence', the ComReg will consider whether the respondents believe that release of the information would disadvantage them or advantage others. The ComReg will also consider whether the respondent believes the information is confidential and the reasonableness of this belief. Common practice in the telecommunications market with respect to the material in question may also be informative to the assessment of confidentiality.[612] The ComReg

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[607] ICT Toolkit, *Regulation and Convergence in Ireland*. Available at: http://icttoolkit.infodev.org/en/PracticeNote.aspx?id=1224 [accessed on 2 June 2008].

[608] *Communications Regulation Act 2002*, s. 38A as amended by s. 10 of *Communications Regulation (Amendment) Act 2007*.

[609] *Communications Regulation Act 2002*, s. 38C as amended by s. 10 of the *Communications Regulation (Amendment) Act 2007*.

[610] *Communications Regulation Act 2002*, s. 39.

[611] ComReg, *Cooperation Agreement with the Competition Authority*, Document No 03/06, 2002.

[612] ComReg, *Guidelines on the Treatment of Confidential Information,* Document No. 05/24, 2005.

generally requests that confidential information be submitted separately to the main submission, which will be published on the website.

As in energy, the *Freedom of Information Acts* 1997 and 2003 allow access to information held by certain public bodies (including the ComReg). Information which is claimed to be confidential can be released to other parties if it is deemed to be in the public interest to do so.

It is unclear how gathered information is stored.

Decision-making and Reporting

Decisions are made by the Commission, which is comprised of between one and three members. The Minister appoints the members, following a selection process undertaken by the Civil Servants and Local Appointment Commissioners.[613] There are currently three commission members.

The determinative body is supported by internal staff who are organised into cross-functional teams. A senior legal adviser also exists to support these teams.[614] There are four divisions within the ComReg. The wholesale division is responsible for interconnection, dispute resolution and unbundling the local loop. It also provides financial advice. The retail division regulates some retail pricing, consumer rights and also provides economic advice to the commission. Both divisions also employ a legal team. The market framework division deals with authorisations, managing the radio spectrum (including licensing) and regulates the postal service. The fourth division manages corporate affairs.

In addition to internal staff, the ComReg may employ external consultants. For example, the ComReg has expressed an interest in employing external accounting consultants to help with An Post pricing approvals.

The ComReg will sometimes include a draft decision as part of the consultation process.[615] It is not binding and is subject to review based on the responses to the consultation. A final decision is published on the website after consultation has concluded and is the binding decision. The ComReg also publishes all submissions by interested parties on its website, unless they are deemed to be confidential. When publishing its final decision, the Commission also outlines its own responses to specific concerns raised through the consultation process. Further to making reasons for decisions publicly available, s. 18 of the *FOI Act* gives a party who is affected by a ComReg decision the right to be provided with reasons for that decision, on request. A party is sufficiently affected by a decision if it confers or withholds a benefit to them, but not to the public, or a sufficiently large class of persons, in general.[616]

Appeals

Any user affected by an electronic communications related decision may appeal the decision on its merits.[617] Previously, an Electronic Communications Appeal Panel (ECAP) was formed by the Minister to hear merits-based appeals. The ECAP was to

[613] *Communications Regulation Act*, 2002, ss. 14–15.
[614] ComReg, *About Us*. Available at: http://www.comreg.ie/about_us/about_us.472.html [accessed on 26 May 2008].
[615] ComReg, *Rental Price for Shared Access to the Unbundled Local Loop* (08/23), 2008.
[616] FOI, s. 18(5).
[617] References include: Irish Government, *Better Regulation*, 2006; EU, *Framework Directive – Coms*, Article 4.

consist of three members; one of which must have at least seven years of legal experience and the other members were to have technical, economic or financial experience as deemed appropriate by the Minister. ECAP panels were directed to make a decision within four months, but this timeline was rarely adhered to.[618]

However, new provisions are now in place for all appeals to be heard by the High Court.[619] ECAP panels are no longer used. Judicial appeals are possible and are also heard by the High Court. In addition, a party can refer any decision to the European Court of Justice on the basis of a misinterpretation of the EU Directives.

In accordance with the rules of the High Court, a party has 28 days from the publishing of a ComReg decision in which to register intent to appeal. The ComReg then becomes the respondent party and is required to submit all documents that it had before it in making the decision on appeal. These documents are to be returned after the appeal has been determined.

The appeal process is governed by the rules of the High Court. The Court has the power to affirm or set aside a decision, in whole or in part. It can also remit a matter to be reheard by the ComReg, with or without the hearing of further evidence.

A ComReg decision stands pending an appeal and can be implemented during this time. However, the High Court may make an order to stay the operation or implementation of a decision, where it deems this necessary for the effectiveness of the appeal. Such an order will exist until the appeal is determined, or earlier if this is deemed appropriate.[620]

No information could be found regarding the discovery rights of parties to the appeal.

Regulatory Development

The new EU framework for electronic communications includes four measures – the *Framework Directive*, the *Authorisation Directive*, the *Access Directive* and the *Universal Service Directive* – which should have been applied from July 2003, and the other *Directive on Privacy and Electronic Communications* due by October 2003. Ireland has met both deadlines for the transposition of respective directives into national legislation.

The *Communications Regulation (Amendment) Act 2007* that amended existing communications and competition laws came into operation in May 2007. The Act has enhanced the ComReg's investigative and enforcement powers in several aspects, including broader powers of information gathering and new powers to investigate anti-competitive behaviours in the communications sector. Subsequent to the introduction of the new Act, amendments to the existing regulations implemented under the 2002 EU framework for electronic communications were made to create a wide range of new offences and higher penalties for certain offences.

3. Posts

The Irish postal industry is dominated by the incumbent, An Post, which is a limited liability company whose shares are held by the government through the Minister for Communications, Marine and Natural Resources and the Minister for Finance. As the

[618] ComReg, *ComReg's Response to the Consultation Paper on Regulatory Appeals*, Dublin, 2006.
[619] *European Communities (Electronic Communications Networks and Services) (Framework) (Amendment) Regulations 2007*, SI No 271 of 2007.
[620] *Ibid.*, s. 7.

designated universal service provider, An Post must ensure the provision of basic postal services across all of Ireland at an affordable price. In return, the provision of some universal services is reserved to An Post. At present, reserved services cover national and incoming international mail weighing less than 50 grams and priced less than €1.375.[621] An Post also engages in other postal services, such as parcels and logistics. With its nationwide post office network, it also provides a range of banking and agency services.

Any other postal service provider can compete over non-reserved postal services, subject to authorisation by the ComReg for those with annual turnover greater than €500 000.[622] There are currently 35 authorised postal service providers competing with An Post.[623] However, so far competition in addressed mail market has been limited as An Post controls more than 99 per cent of this market segment. Two providers other than An Post operate end-to-end delivery services – DX in a niche market of document exchange service and DEPS in registered mail services in major urban areas.

Regulatory Institutions and Legislation

The main postal law and regulations are the *Postal and Telecommunications Services Act 1983* that established An Post as a government-owned postal service provider, and the *Communications Regulation Act 2002,* that established the ComReg as economic regulator for posts and telecommunications. The *European Communities (Postal Services) Regulations 2002* gave legal effect in the Irish Postal market to the first and second *European Parliament and Council Postal Directives* (97/67/EC of 15 December 1997 and 2002/39/EC of 10 June 2002 respectively) on common rules for the development of EU postal market and the improvement of quality of postal service.

In relation to posts, the ComReg has a statutory objective of promoting

> the development of the postal sector, and in particular the availability of a universal post service within, to and from the State at an affordable price for the benefit of all users.[624]

The ComReg has a number of other regulatory responsibilities:

- The ComReg must approve any proposed increase in prices of reserved services by An Post.
- The ComReg monitors the prices of non-reserved universal services provided by An Post to ensure that prices are cost-based, affordable, transparent and non-discriminatory. A revised direction on accounting procedures was issued by the ComReg in December 2006.[625]
- The ComReg sets the quality of universal postal services and monitors An Post's compliance with it.

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[621] ComReg, *Regulation of An Post*. Available at: http://www.comreg.ie/postal/regulation_of_an_post.521.html [accessed on 7 June 2008].
[622] Clause 7 (1) of the *Postal Services Regulations 2002*.
[623] ComReg, *Licensing and Services*. Available at: http://www.comreg.ie/licensing_and_services [accessed on 9 December 2008].
[624] Clause 12(1)(c) of the *Communications Regulations Act 2002*.
[625] ComReg, *Regulation of Universal Postal Services – Accounting Separation and Costing Methodology,* Accounting Direction to An Post Document No. 06/63, 8 December 2006.

- The ComReg must authorise postal service providers operating in non-reserved services with annual turnover greater than €500 000. Authorisation requires the provider to draw up a code of practice for dealing with customer complaints and redress.

Process and Consultation

Matters can arise before the ComReg in a number of ways. An Post must seek approval to increase prices for reserved services. For universal services, the ComReg monitors compliance with tariff principles in price setting and matters may therefore arise by its own instigation. In addition, the ComReg is responsible for authorising other postal service providers (for non-reserved services) whose annual turnover is greater than €500 000. Interested parties can also bring industry issues to the ComReg themselves.[626]

Under the *Postal Services Regulations 2002*, the ComReg is legally required to consult with interested parties before making a determination on postal issues. The interested parties include 'representatives of postal service providers, users, consumers and manufacturers'.[627]

The Competition Authority and the EU states have the potential to involve themselves in the decision-making process. The ComReg has a memorandum of understanding with the Competition Authority for formal or informal cooperation between the two agencies on postal matters.

The ComReg may employ external consultants, having expressed an interest to do so to help with An Post pricing approvals.

As in communications, the ComReg publishes consultation papers and seeks submissions in response. All documents are published on its website. When publishing a decision paper, the ComReg will summarise the submissions received, and state its own position explicitly responding to the views expressed in submissions.

Role of Interested Parties

While the ComReg is required to act in the interest of all users, there is no explicit recognition of specific user groups and industry bodies in the relevant legislation. However, representatives of end users and industry operators participate in the regulatory decision making in relation to postal matters through a public consultation process.

Information Disclosure and Confidentiality

The ComReg has the power to obtain information in order to carry out its statutory responsibilities, for example, in fulfilling its monitoring role in universal service obligations, the ComReg can request information on pricing, quality of services, accounting system from An Post. However, the ComReg has no similar power to request data from other postal service operators.

The ComReg's confidentiality guidelines and information disclosure requirements under the FOI are set out in the Telecommunications section (immediately preceding).

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[626] ComReg, *Postal – Alerting Industry Issues*. Available at: http://www.comreg.ie/postal/alerting_industry_issues.581.html [accessed on 1 August 2008].
[627] *Postal Services Regulations 2002*, s. 16 (1).

Decision-making and Reporting

The ComReg, through its Market Framework Division, regulates the postal industry. The commissioners are responsible for the final decision on a postal matter. The average number of staff working on postal matters was about six in 2005-06.[628] In addition to internal staff, the ComReg may employ external consultants. For example, the ComReg has expressed an interest in employing external accounting consultants to help with An Post pricing approvals.

Under the *Postal Services Regulations 2002*, the ComReg requires ministerial consent to set uniform tariffs, which apply across the state, and to issue directions to An Post for failing to comply with these uniform tariffs.[629] The ComReg is also required to consult with the Minister before issuing directions to An Post for failing to comply with tariff principles in its reserved services.

Appeals

Under the *Postal Services Regulations 2002*, refusals to grant authorisations in the postal industry and pricing decisions applying to An Post may be appealed on their merits. Appeals of this type are heard through normal legal channels. Application must be made to the High Court within 28 days of the decision being published. The regulator's decision will stand pending the outcome of an appeal. In deciding the appeal, the High Court can direct the ComReg to grant the authorisation, rather than remitting the decision back for reconsideration. A High Court decision on this matter is final, save for an appeal to the Supreme Court on a point of law. Judicial review is available for all postal ComReg decisions. Such appeals are heard by the High Court. In addition, a party can refer any decision to the European Court of Justice on the basis of a misinterpretation of the EU Directives.

Regulatory Development

As a member of the EU, Ireland has agreed to fully open up the postal industry to competition by December 2010, which will see the abolition of the reserved service area.[630]

4. Water and Wastewater

Water is plentiful in Ireland due to the geographic conditions (including high and reliable rainfall) and small population. Over-abstraction from water bodies is not a high priority, with only 4.5 per cent of river water bodies considered to be at risk from excess abstractions.[631] Irrigation use is minimal, with the majority of water being taken for domestic or industrial use, rather than for irrigation.

Local governments own and operate water authorities that are responsible for water supply and sanitation. The main concern of Irish water management is to ensure the quality of water supplies. In some rural areas, homes are not connected to a water supply system operated by local government. Rural households may join a Group

[628] ComReg, *Annual Report Year Ended June 2006*, 2007, p. 56.
[629] *Postal Services Regulations 2002*, s. 9.
[630] ComReg, *Postal Strategy Statement*, Document No 08/17, 2008.
[631] Shannon International RDB (ShiRBD), *Shannon River Basin District Booklet*, 2007. Available at: http://www.corkcoco.ie/co/pdf/573547797.pdf [accessed on 1 June 2008].

Water Scheme to organise their own water access.[632] However, the quality of water under such schemes has sometimes failed to meet drinking water standards set by the EU.[633]

Regulatory Institutions and Legislation

There is no economic regulation undertaken by the national government, although the Minister for Environment, Heritage and Government is responsible for policy making. The Environmental Protection Agency (EPA) regulates the quality of drinking water. The right to abstract water is given under the *Water Supplies Act 1942* and the majority of current abstractions are therefore governed by historical water rights agreements. In the future, abstraction limits may be set by government.[634]

The *EU Water Framework Directive* (WFD), as previously discussed in the Chapter on the EU, sets the standard for water management in Ireland. The WFD focuses on ensuring the quality of drinking water and, to a lesser extent, dealing with scarcity issues. Article 9 stipulates that all users should face appropriate water charges and these should reflect the full costs of the resource, including operational, environmental and resource costs.[635] Environmental costs are aimed at addressing pollution concerns while resource costs are intended to reflect the scarcity of water resources.[636]

Regulatory Development

The WFD stipulates that member countries must develop river basin district plans for each substantial water body. In Ireland, some 400 river basins have been grouped into eight RBDs, one of which is the Shannon International RDB (ShiRBD).[637] The Department of Environment, Heritage and Government is to oversee the establishment of water authorities for each district and the Environmental Protection Agency is to monitor water quality. However, it could be said that the EU Commission is the real regulatory body to whom Water Authorities are required to report their detailed progress on putting water management plans in place.[638]

Under the WFD, consultation with interested parties is required in creating RBD plans. In developing the characterisation report for Shannon RBD, public consultation consisted of public meetings, an information booklet, graphic display panels, setting up a website and participating in seminars and conferences.[639] A six-week consultation period was also announced and submissions received during this

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[632] Citizen's Information, *Water Supply in Ireland*, 2008. Available at: http://www.citizensinformation.ie/categories/environment/water-services/water_supply [accessed on 1 June 2008].

[633] Department of Environment, *Review of the Rural Water Program 2003-6,* Value for Money and Policy Review Initiative, 2007.

[634] ShiRBD, *Shannon River Basin District: Characterisation & Analysis Summary Report*, 2005, p. 35. This report is a summary of the findings of a full report titled *Characterisation & Analysis of Ireland's River Basin Districts*, which was submitted to the European Commission on 22 March 2005.

[635] *EU Water Framework Directive*.

[636] European Commission, DG Environment, *Water Note 5: Economics in Water Policy: the Value of Europe's Waters*, 2008. Available at: http://ec.europa.eu/environment/water/water-framework/pdf/water_note5_economics.pdf [accessed on 1 June 2008].

[637] ShiRBD, 2005, p. 2.

[638] Ibid.

[639] Ibid.

time were published on the website. Advisory councils are also to be established for each RBD to involve interested parties.[640]

Contrary to the EU Directive, domestic water use is not charged in Ireland.[641] It has been suggested that this is for 'political reasons'.[642] Under s. 105 of the *Water Services Act 2007*, water authorities are allowed to charge customers for non-domestic usage only. The Minister for Environment, Heritage and Local Government oversees water charges and has stipulated they are to be levied to fully recover costs of supply infrastructure, treatment plants and metering/billing of users.[643] A 2004 report estimated full cost recovery values for five Irish counties.[644] However, there do not appear to be guidelines in place for other counties. The inability of a water authority to charge for domestic use may limit the use of full cost recovery as a pricing principle.

To date, it does not appear that any formal charging disputes have been dealt with by the department. However, the Department of Environment, Heritage and Local Government's website indicates that procedures for dealing with customer complaints are currently being developed.[645]

5. Rail

Responsibilities for rail transport in Ireland are divided between two state agencies of the Department of Transport – Railway Procurement Agency (RPA) and Iarnrod Eireann (IE). Under the *Transport (Railway Infrastructure) Act 2001*, RPA is responsible for light railway and metropolitan infrastructure provision and maintenance, while IE manages the mainline railway system.

The Railway Procurement Agency is responsible for providing light railway infrastructure and monitoring safety. It also enters into joint ventures and public-private partnerships (PPPs) to secure the provision of infrastructure.

IE is the monopoly provider of railway services, including operating the Dublin Area Rapid Transit (DART) network, mainland rail services and freight transport. It also jointly operates the Dublin-to-Belfast network with Northern Ireland Railways.[646] IE is a subsidiary company of Coras Iompair Eireann (CIE), a state-owned statutory authority with overall responsibility of all land transport in Ireland through its three operating companies in bus and rail business. CIE also reports to the Minister for Transport.

The Department of Transport is responsible for developing public transportation policies. At present, there is no independent regulator in rail. Instead ministerial approval is required for any changes to the standard single fares while rail

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[640] Ibid., p. 4.
[641] OECD, *Competition and Regulation in the Water Sector*, OECD Policy Roundtable, 2004, p. 26.
[642] S. Scott, *Abolition of Domestic Water Charges in Ireland*. Part of a World Bank (Agricultural and Rural Development) Initiative on Economic Incentives and Water Resources Management, 2003.
[643] Department of Environment, Heritage and Local Government, *Water Charges/Metering*, 2007. Available at: http://www.environ.ie/en/Environment/Water/WaterServices/WaterChargesMetering/ [accessed on 7 June 2008].
[644] S. Blacklocke, *Economic Analysis of Water Use in Ireland – Final Report*, CDM (Camp Dresser and McKee) Report to Department of Environment, Heritage and Local Government, Ireland, 2004.
[645] Department of Environment, Heritage and Local Government, *Water Charges/Metering*. Available at: http://www.environ.ie/en/Environment/Water/WaterServices/WaterChargesMetering/ [accessed on 7 June 2008].
[646] Competition Authority, *Report on Bus and Rail Passenger Transport Sector*, Ireland, 1999.

infrastructure development is subject to the approval of need to an independent planning authority – An Bord Pleanala (An Bord), who assumed the responsibility of authorisation to construct, maintain, improve or operate a railway under the *Planning and Development (Strategic Infrastructure) Act 2006*. Such an authorisation is referred to as a railway order. In granting a railway order, the An Bord must follow procedures for consultation and rules for appeal set out in the *Transport (Railway Infrastructure) Act 2001* and amended by the *Planning and Development (Strategic Infrastructure) Act, 2006*.

As of 16 July 2008, the *Dublin Transport Authority Act 2008* that will establish an Authority with overall responsibility for coordinating transport in the Greater Dublin Area was enacted. Within this area, the Authority will take over the responsibilities of the Railway Procurement Agency in developing infrastructure projects and as such applying for railway orders. It will also be responsible for regulating public transport fares.[647] The Act also gives the Minister for Transport the power to appoint the directors of the subsidiary companies instead of the chairman of the CIE.

The following discussion on regulatory processes will focus on An Bord's role as an independent planning body that grants railway orders.

An Bord: Process and Consultation

In accordance with the amended *Transport (Railway Infrastructure) Act*,[648] any party wishing to construct, maintain, improve or operate a railway must apply to An Bord for a railway order. Applicants may include the Railway Procurement Agency, another person with the approval of the Railway Procurement Agency, or the CIE acting on behalf of Iarnrod Eireann.[649] Railway orders may, for example, refer to railway lines, platforms or park–and-ride facilities. The regulator does not gather information on a regular basis.

Before applying for a railway order, parties are required to consult with An Bord.[650] It is usual to hold at least two pre-application consultation meetings. In these consultations the Board may give advice regarding the procedures to be followed in making an application. It may also advise the potential applicant of what considerations will impact its decision to grant (or not) the order.

An applicant for a railway order submits an application to An Bord and publishes the application in the newspaper.[651] The applicant is required to specify the location at which material relevant to the application will be publicly displayed. Material must be displayed for at least six weeks and must include the draft railway order, a book of reference, a plan of the proposed works and an environmental impact statement. The applicant must also serve the proposal and the other relevant information on local authorities and owners/occupiers in the area.[652]

Any interested party may make a submission within the six-week inspection period.[653] There appears to be some flexibility about this timeline. For example, in a matter

[647] *Dublin Transport Authority Act 2008*, ss. 11 and 46.
[648] This refers to the *Transport (Railway Infrastructure) Act 2001* as amended by the *Planning and Development (Strategic Infrastructure) Act 2006*.
[649] The amended *Transport (Railway Infrastructure) Act*, s. 37.
[650] Ibid., s. 47B.
[651] Ibid., s. 40.
[652] Railway Procurement Agency, *Railway Orders*. Available at: http://www.rpa.ie/luas/railway_orders [accessed on 19 August 2008].
[653] The amended *Transport (Railway Infrastructure) Act*, s. 40(1)(b)(iii).

involving the extension of the Dunboyne railway, An Bord appears to have accepted late submissions in the two weeks following the deadline. However, two submissions received the following month were returned to their senders.[654]

After the period for written submissions has closed, it is at the An Bord's discretion whether to then hold a public inquiry.[655] If an inquiry is held, the An Bord appoints an inspector to hear evidence. The inspector may require witnesses to attend (by summons) and to give evidence. The inspector can also compel the production of documents.[656]

An Bord: Timeliness

Pre-lodgement discussions are legally required to be held. Usually, at least two pre-lodgement meetings occur between the applicant and the An Bord. It is unclear is there is a maximum mandatory period in which An Bord must hear applications.

An Bord: Role of Interested Parties

There is no explicit recognition of specific consumer groups or industry bodies in the legislation.

An Bord: Information Disclosure and Confidentiality

The An Bord can appoint an inspector for the purposes of holding a public inquiry. The inspector is able to compel the production of documents. Information is stored in hard copy and electronically, to facilitate access by interested parties. Planning appeal files are held open to the public for five years after a determination has been made.[657] Confidentiality and information access requirements under the FOI Acts apply to An Bord.

An Bord: Decision-making and Reporting

The board of the An Bord determines matters and consists of a chairperson, a deputy chairperson and nine other board members. Members of the board are appointed by the government. Together, they must be drawn from industries relating to physical planning, engineering or architecture; economic development or construction; local government or farming and trade unions; and charitable or environmental organisations.[658] The board is supported by internal staff, from which an inspector will be appointed to hear a public inquiry. The inspector makes a report to the board, which can include recommendations. The board will then have the inspector's report, recommendation and relevant supporting information before it in coming to a decision.

A board decision applies only to the applicant and any other third parties involved. An order gives the Railway Procurement Agency or the CIE the right to compulsorily acquire land on which a proposed railway or other relevant infrastructure is to be

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[654] An Bord, *Schedule of Correspondence – Dunboyne Railway Order Application*, Case Reference: PL17 .NA0001, 2008. Available at: http://www.pleanala.ie/casenum/NA0001.htm [accessed on 19 August 2008].

[655] Prior to the enactment of the *Planning and Development Act 2006*, the Minister for Public Enterprise was responsible for assessing railway order applications and was mandated to conduct a public inquiry into the application. Changes were made in accordance with s. 49 of the *Planning and Development Act 2006* amending s. 42 of the *Transport (Railway Infrastructure) Act 2001*.

[656] *Transport (Railway Infrastructure) Act 2001*, s. 42.

[657] *Planning and Development Act 2000*, s. 146 (4).

[658] An Bord, *Board* Members, 2008. Available at: http://www.pleanala.ie/about/members.htm [accessed on 26 August 2008].

built.[659] A failure to comply with any part of an order will allow the Board, at its discretion, to revoke it.[660]

The An Bord is required to publish documents relating to a matter (as well as the decision itself) within three days of making the decision. These must be made available for no less than five years, either electronically or at the office of An Bord.[661]

An Bord: Appeals

Under the *Transport (Railway Infrastructure) Act 2001*, a decision to revoke a railway order may be appealed on its merits. Such an appeal is made to the High Court, which can either confirm the decision or declare it invalid and prohibit the order from being remade.

Alternatively, the validity of a railway order or 'any act done by the board in the performance or the purported performance of its functions' can only be challenged by way of judicial review.[662] A judicial appeal is heard by the High Court. The *Transport Act* states that leave to appeal will only be given if there are substantial grounds for doing so and the appellant has a substantial interest in the matter. A substantial interest is not limited to a financial interest or an interest in land.[663] The court can also require an applicant to give an undertaking as to damages before granting leave to appeal.

Application for a judicial appeal must be made within eight weeks of the order being made. This may be extended by the High Court if there is 'good and sufficient reason' for doing so and if it can be shown that the circumstances causing failure to apply in time were out of the control of the applicant.[664] The actual appeal procedure is governed by Order 84 of the Rules of the Superior Court.[665]

In deciding the case, the High Court may quash the entire order, preventing the same order from being made again. It may also quash part of the order and make consequential amendments to the rest of the order to reflect this.[666]

Regulatory Development

The regulatory structure for rail in Ireland involves an independent planning body – An Bord – and ministerial approval for price changes. There is virtually no competition in providing rail transport services, and, as a result, no access regulation is required. Despite the government's recent move to establish a transport regulator in the Greater Dublin Area, there is still a long way to go before the creation of a national independent regulatory body as required under the First Railway Package Directives. Ireland has transposed both the first and second railway package Directives; however, it has not implemented them in a timely manner by taking further measures to set up an effective regulatory framework.

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[659] The amended *Transport (Railway Infrastructure) Act*, s. 45.
[660] Ibid., s. 43.
[661] *Planning and Development Act 2000*, s. 46 (4).
[662] The amended *Transport (Railway Infrastructure) Act*, s. 47 (1).
[663] Ibid., s. 47A.
[664] Ibid., s. 47 (5).
[665] SI No. 15 of 1986.
[666] The amended *Transport (Railway Infrastructure) Act*, s. 47A (9).

6. Airports

The Republic of Ireland has two major international airports – Dublin and Shannon. Both are government-owned. The Dublin Airport is operated by the Dublin Airport Authority (DAA).[667] The DAA also operates the Shannon and Cork airports. Dublin Airport handles over 22 million passengers annually. There are also several substantial regional airports (e.g. Cork, Knock and Kerry), some of which handle international traffic.

Regulatory Institutions and Legislation

The Commission for Aviation Regulation (CAR) was created by the *Aviation Regulation Act 2001*. Under the Act, the CAR is responsible for the determination of maximum airport charges and aviation terminal service charges. The CAR is also responsible for licensing tour operators and agencies.

The *State Airports Act 2004* provided for the regulation of airport charges to apply with respect to airports that had in excess of one million passengers in the previous calendar year. At present, the CAR only regulates the Dublin airport in this manner. Airport charges apply to runway landing and takeoff, aircraft parking, air bridge use and passenger processing. They are subject to price-cap regulation on a single-till basis, that is, the price cap is set in anticipation of both the regulated revenues from aeronautical services (such as the provision of landing and takeoff) and the unregulated revenues from commercial services (such as retailing and car parking services).

Aviation terminal charges are levied by the Irish Aviation Authority in its provision of air traffic control services. Regulation of this type occurs at the Cork, Dublin and Shannon airports. Aviation terminal charges are also subject to price cap regulation.[668]

Process and Consultation

Matters arise before the regulator on a regular basis, as it is required by statute to review maximum allowable charges for airports and terminals every five years.[669] Once two years have elapsed, the CAR can review such charging determinations, on its own initiative or at the request of users or the airport authority.[670] Matters may also arise after being remitted from an appeal panel to be reconsidered by the commission. Annual compliance checks are also undertaken to ensure the price cap has been adhered to.

The *Aviation Regulation Act 2001* sets out the basic procedure to be followed in making determinations.[671] Firstly, the CAR must give notice to the concerned party and place a public notice in newspaper. This notice specifies the period in which representations from the public will be received. Under the Act, the consultation

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[667] Dublin Airport Authority (DAA), *Company History*. Available at: http://www.dublinairportauthority.com/company-profile/company-history.html [accessed on 22 October 2008].

[668] Commission for Aviation Regulation (CAR), *Freedom of Information Acts 1997 to 2003 – Section 15/16 Manual*, 2004. Available at: http://www.aviationreg.ie/_fileupload/Image/ABOUT_FOI_MANUAL.pdf [accessed on 22 October 2008].

[669] *Aviation Regulation Act 2001*, ss. 32 (2) and 35 (2).

[670] *Aviation Regulation Act 2001*, ss, 32(14) and 35 (12).

[671] *Aviation Regulation Act 2001*, ss. 32 and 35.

period must be at least one month long. It is unclear how strictly the submission timelines are enforced. The CAR is then directed to take submissions into account in making its final determination. The CAR may also engage consultants in undertaking its regulatory role. Its website indicates that expert advice has been sought in the past.[672]

A notice stating that a determination has been made must be published in the newspaper. The final decision paper must include the reasons for determination as well as the reasons for accepting or rejecting any representations by the public.

In practice, the CAR undertakes two consultation periods. One follows the initial consultation paper, and the second, which satisfies the statutory requirement, follows the publication of a draft decision.[673] There is therefore a distinction between draft and final decisions, in that the latter is binding while the former is open to amendment pending the response of interested parties. To stimulate public response, the CAR may also hold information meetings and may send letters out to airport users.[674]

The CAR may engage consultants in undertaking its regulatory role. Its website indicates that expert advice has been sought in the past.[675]

Timeliness

In 2007 the CAR undertook an interim review of airport charges at Dublin Airport (the maximum charges having been set in 2005). Overall the matter took around five and a half months to complete. Each consultation period was one month in duration, and it took the CAR just over a month from the close of the final consultation period to make its final decision.

No information could be found to suggest pre-lodgement discussions occur, and no evidence was found of any 'stop the clock' provisions or mechanisms for expedition.

Role of Interested Parties

There is no recognition of specific consumer groups and industry bodies in the legislation, and there is no evidence of special arrangements for consumer groups or industry bodies outside of the normal consultation procedures.

Information Disclosure and Confidentiality

As in other Irish statutes, s. 42 of the *Aviation Regulation Act* allows authorised officers to be appointed in order to enter premises and seize information from parties, either with their consent or a warrant.

The confidentiality and disclosure of information obtained by the CAR is governed by the *Freedom of Information (FOI) Acts*.

Decision-making and Reporting

The Commission, comprised of one to three members, is the determinative body in airport charging matters. Members of the Commission are appointed by the

[672] See for example, the publication of the technical procedure that an independent adviser will use in assessing the capacity of Dublin airport.
[673] CAR, *Process Paper for Second Determination of ATSCs*, CP7/2006, 2006.
[674] As in the Interim Review of Airport Charges at Dublin Airport. See: CAR, *Draft Determination*, 2007.
[675] See for example, the publication of the technical procedure that an independent adviser will use in assessing the capacity of Dublin airport.

Minister.[676] In 2003 there were 15 staff members, six of which were engaged in airport charges.[677] The CAR is comprised of four divisions. However, it does not appear that any of these divisions provide economic advice to the Commission in making determinations on maximum airport/terminal charges.[678] Economic analysis may instead be undertaken by external consultants.[679]

The CAR publishes all consultation and decision papers on its website. It also publishes submissions received by interested parties in so far as they are not confidential. The *Aviation Regulation Act* requires the CAR to provide reasons for its decisions in publishing the final decision paper.[680] The *FOI Act* also requires the CAR to make this information available by request.

The settings of maximum charges applies to all users, however it is unclear from available information whether or not this can be departed from by agreement between user and the airport. No information could be found to suggest that disputes over charges have occurred in the past.

Appeals

Under s. 40 of the *Aviation Regulation Act 2001*, airport authorities, airport users or the Irish Aviation Authority are able to appeal an airport/terminal charge decision on its merits. A special appeal panel, comprised of three to five members, is formed, by the Minister, to hear such appeals. The panel has three months in which to accept the decision or to reject it, remitting the matter back to the CAR for review. The Commission is then given two months in which to affirm or vary its original decision.[681]

The *Aviation Regulation Act* also allows judicial appeals, under the Rules of the Superior Court.[682] An application for judicial review must be made within two months of the commission publishing its decision. However, the High Court, who hears judicial appeals, can extend this timeframe as it sees fit.

In 2008, the CAR undertook an interim review of maximum airport charges at Dublin airport. After making a determination on this matter, a notice was published on the Department of Transport website inviting relevant parties, as defined above, to appeal the decision under s. 40 of the *Aviation Regulation Act*.[683] On 29 September 2008, the Minister for Transport established an Appeal Panel to hear the appeals from four interested parties. The Panel decided to refer the determination on certain matters raised by two of the appellants, the Dublin Airport Authority and Ryanair Limited, back to the CAR for review. In January 2009, the CAR released a consultation paper

[676] *Aviation Regulation Act 2001*.
[677] *High Level Review of State Commercial Ports*, 2003.
[678] CAR, *FOI Manual*.
[679] See for example, the 2007 Interim Review of Airport Charges at Dublin Airport, where the CAR employed a number of external consultants.
[680] *Aviation Regulation Act 2001*, ss. 32 and 25.
[681] Irish Government, *Better Regulation*, 2006.
[682] Order 84, i.e., SI No. 15 of 1986.
[683] Department of Transport, *Notice – Submission of Appeals on Maximum Levels of Airport Charges at Dublin Airport*, 2008. Available at: http://www.transport.ie/upload/general/10892-0.pdf [accessed on 19 August 2008].

on the referral, seeking the views of interested parties.[684] The CAR is required to reach its decision on the referral by 23 February 2009.

7. Ports

Major ports in Ireland are Dublin, Cork, New Ross, Shannon Foynes, and Waterford. Ports are managed by wholly government-owned, commercial bodies referred to as port companies. For example, the largest port, Dublin, is owned by the Dublin Port Company.[685] In all, there are ten port companies operating in Ireland, the majority of which follow a 'landlord' governance model, under which the port company leases infrastructure to private companies, which then construct and maintain buildings and equipment.[686]

Regulatory Institutions and Legislation

Because they are subject to Ministerial control, and because the ports are owned by the government, there is no independent regulation of port activities in Ireland. Individual port companies are responsible for 'regulation' at their own port, but have no place in regulating the wider industry. The Minister for Marine effectively regulates port companies. The Minister can make directions with respect to harbour charges, safety, the development of the harbour, acquisition and disposal of land and any other matter affecting the functions of the company.[687]

Process and Consultation

Under the *Harbour Act*, any person can dispute charges set by a port company by applying to the 'person nominated by the Minister'.[688]

Regulatory Development

A 2003 report commissioned by the Department of Communications, Marine and Natural Resources reviewed the system of governing ports in Ireland.[689] During consultation, concerns were raised that the process of rate setting by port companies was not sufficiently transparent. However, it was concluded that an independent regulator was not needed at the time. The 2003 High Level Review recommended that

> a Ports' Ombudsperson should be appointed to provide an independent conciliation and appeals, including binding arbitration, service which would hear and decide on cases where a port user believes that the costs of either a port service or a port charge is unfair or discriminatory. The Ombudsperson will be reimbursed by the parties to the dispute.

However, no evidence was found that this recommendation had been followed.

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[684] CAR, *Consultation on the Decisions of the 2008 Aviation Appeal Panel*, Commission Paper 1/2009, 7 January 2009. Available at: http://www.aviationreg.ie/Current_consultations/Default.249.html [accessed on 8 April 2009].
[685] DAA, *Corporate Information*. Available at: http://www.dublinport.ie/about-dublin-port/corporate-information/ [accessed on 22 October 2008].
[686] *High Level Review of the State Commercial Ports*, 2003.
[687] *Harbour Act 1996*, s. 44(1).
[688] *Harbour Act 1996*, s. 13(10).
[689] Raymond Burke Consulting, Posford Haskoning Consulting Engineers, and Farrell Grant Sparks Corporate Finance were jointly commissioned by the Department of Communications, Marine and Natural Resources to carry out a *High Level Review of the State Commercial Ports operating under the Harbours' Acts, 1996 – 2000*.

As outlined in the chapter on the EU, an EU Directive on market access to port services failed to pass in 2006.[690] The aim of this Directive was to expose the provision of port services to increased competition. It would have allowed multiple providers of piloting, leading and unloading services to operate in a port.

[690] European Commission, *Proposal for a Directive of the European Parliament and of the Council on Market Access to Port Services*, COM, 2004.

EUROPE

NETHERLANDS

OVERVIEW[691]

The Netherlands is a unitary state with regulatory arrangements set at the national level or, where authority is devolved, by province administrations. As a Member State of the European Union, the regulatory regime in the Netherlands also reflects legislation issued at the European level, either directly applicable, or that has been transposed into the law.

The economic regulation of network areas, such as energy, telecommunications, posts and transport is within the domain of two national agencies; the Netherlands Competition Authority (*Nederlandse Mededingingsautoriteit* – NMa) and the Independent Post and Telecommunications Authority (*Onafhankelijke Post en Telecommunicatie Autoriteit* – OPTA).

The NMa enforces the Netherlands and EU competition law, and, through separate chambers – the Office of Energy Regulation and Office of Transport Regulation – is also responsible for the regulation of the energy and transport sectors. Transport regulation is principally focused on railways, but also includes the Netherlands' main airport, Amsterdam Schiphol. The NMa also monitors pilotage charges.

Telecommunications and posts are regulated by the OPTA that undertakes sector-specific, *ex ante* regulation, to promote competition in the markets for electronic communications and posts in the Netherlands.

Water and wastewater is a matter of province or municipal concern, although the national government produces policies and co-ordinates national initiatives involving providers. A new national *Water Supply Act* will impose obligations directly on water supply companies to introduce benchmarking based on some key performance indicators.

Airports other than Schiphol are currently regulated by the national government, however devolution of responsibilities to province governments is proposed for these airports. Ports are generally operated by municipalities, with individual port authorities setting fees and charges.

GEOGRAPHY, POPULATION, ECONOMY, POLITY AND LEGAL SYSTEM[692]

The Netherlands is a small western European country bordered by Belgium, Germany and the North Sea. It is very flat, situated at the mouths of three of Europe's main rivers and with the highest point being only 322 meters above sea level. The Netherlands has a maritime climate, with cool summers and mild winters. Precipitation occurs throughout the year.

An estimated population of 16.5 million combined with a small land area of 33 883 square kilometres (about 20 per cent of its area is water) means that the Netherlands

[691] Information for this chapter was obtained in part by interviews conducted by Dr Chris Decker with representatives of OPTA on 8 July 2008 and with representatives of NMa on 24 July 2008.

[692] Central Intelligence Agency (CIA), *World Fact Book – Netherlands*. Available at: https://www.cia.gov/library/publications/the-world-factbook/geos/nl.html [accessed on 4 September 2008].

has a high population density (estimated at 491 per square kilometres of land area as of July 2008). The three largest cities are Amsterdam, Rotterdam and The Hague.

The Netherlands has a prosperous and open economy, which depends heavily on foreign trade. The estimated GDP per capita on a PPP basis is US$38 500, which is in the upper quarter of OECD countries. It has few natural resources apart from natural gas (it has the second largest deposit of natural gas in the EU after the United Kingdom). It has considerable arable land producing grains, potatoes, sugar beets, fruits, vegetables and livestock. This highly mechanised agriculture accounts for only about 3 per cent of employment. The key manufacturing activities in the Netherlands are food processing, chemicals, petroleum refining, transport equipment and machinery, but like other highly developed countries the services sector accounts for about three quarters of employment and GDP. An estimated 80 per cent of exports go to EU countries, amounting to a quarter of the Netherlands' national income. The Netherlands' most important European trading partners are Germany, Belgium, the UK and France. The Netherlands is one of the leading European nations for attracting foreign direct investment and is one of the five largest investors in the United States of America.

The Netherlands has a highly developed infrastructure in energy, transport, telecommunications, posts and water and wastewater. Most energy production is thermal, but there is one nuclear power plant supplying about 4 per cent of the total. Telecommunications is highly advanced with high penetration of fixed-line and mobile telecommunications. Broadband penetration is amongst the very highest in the world. In transport it is a hub for many large European economies, and this is reflected in its large ports of Rotterdam and Amsterdam.

There are three levels of government in the Netherlands – central government; 12 province authorities; and 443 municipalities (as at 1 January 2007). Central government is a constitutional monarchy and a parliamentary democracy, with a two-tier parliament, the Staten Generaal. The First Chamber of 75 members is elected by the province councils every four years and has powers only to accept or reject legislation (not initiate or amend it). The Second Chamber of 150 members is directly elected every four years.

The national government comprises a Council of Ministers headed by the Prime Minister, responsible to parliament. The Monarch serves as official head of State.

The twelve province parliaments oversee regional government and have the power to raise regional taxes. Their responsibilities include land-use planning; transport; the economy; agriculture; environmental management; recreation and overseeing the work of the water boards and the financial affairs of the municipalities. The governing executive of each state is directly elected, but is presided over by a commissioner appointed by the Crown.

Municipalities form the lowest tier of government in the Netherlands. Each municipality has its own council and executive (mayor and aldermen). They all apply national legislation on matters such as social security benefits. Around 90 per cent of municipalities' funding comes from central government, although municipalities also have the power to levy taxes. The main responsibilities of municipalities are to maintain the housing stock, and the local transport network. In recent years, many central government powers and responsibilities have devolved to the municipalities.

The Constitution contains the rules for the political and legal structure of the Netherlands and establishes the fundamental rights of citizens. Laws made by the central government and by lower legislative bodies such as the province executives and local councils must conform to the Constitution's provisions.

The legal tradition in the Netherlands is a civil law system where a key characteristic is that the laws are largely codified and there are no binding precedents set by judicial rulings (case law). The law is contained in a number of codes such as a *Civil Law Code, Code of Civil Procedure*, and *Commercial Code*. In addition, as a member state of the European Union, the Netherlands is subject to, or required to adopt, relevant laws set in place at that level.

The Netherlands court system is divided into 19 districts, each with its own court. The district courts are made up of a maximum of five sectors, including an administrative sector, civil sector, criminal sector and subdistrict[693] sector. The 19 districts are divided into five areas of Court of Appeal jurisdiction. The Court of Appeal can review the decisions of district courts on merits and reach different conclusions. Appeal from the Appeal Courts to the Supreme Court of the Netherlands is possible on points of law only.

As discussed below in more detail, appeals of regulatory decisions are generally considered by a specialised chamber of the Court of Appeal, known as the College of Appeals for Business.

APPROACH TO COMPETITION AND REGULATORY INSTITUTIONAL STRUCTURE

The two main regulatory authorities are the Netherlands Competition Authority (NMa) and the Independent Post and Telecommunications Authority (OPTA). The NMa is responsible for the enforcement of competition law, and the sector-specific regulation of network activities in energy and transport. It enforces the prohibition against cartels and abuse of a position of economic power in all markets, and determines whether a violation of the *Competition Act* has taken place. The NMa also approves mergers, and works closely with the OPTA in relation to telecommunications and posts mergers under a Cooperation Protocol. The OPTA regulates posts and telecommunications, performing *ex ante* regulation to promote competition in the markets. Water and wastewater and ports are matters of province or municipal concern, although in both cases the national government produces policies and co-ordinates national initiatives involving providers.

The NMa is an autonomous administrative agency responsible for enforcing the *Competition Act 1997* and applying Articles 81 and 82 of the EC Treaty in the Netherlands. The NMa also undertakes sector-specific regulation of the energy and transport sectors under the *Electricity Act 1998*, the *Gas Act 2000*, the *Passenger Transport Act 2000*, the *Railways Act* 2005, and the *Aviation Act 2006*.

The NMa is funded by the Ministry of Economic Affairs and employs around 400 staff. The NMA is divided into four principal departments – the Competition Department; the Legal Department; the Office of Energy Regulation (OER); and the

[693] The sub-district sector deals with minor criminal offences and 'small claim'-type civil matters.

Office of Transport Regulation (OTR). Its structure is represented by the following organisational chart.[694]

Organisation Chart of the Netherlands Competition Authority

The OER is responsible for regulation of gas and electricity markets. The OTR regulates the rail networks and tram, bus and metro services. The OTR also regulates the Netherlands' main airport, Amsterdam Schiphol. In 2008, the responsibilities of the OTR was extended to the regulation of pilotage services in ports under the *Market Monitoring Registered Pilotage Services Act 2007*.

The NMa is governed by a Board of three directors consisting of a Chairman and two other members, who are appointed by the Minister of Economic Affairs. The Board's decisions are based on the principle of collegiate decision making. Members of the Board each have a portfolio of responsibilities, for example competition, energy or transport.

Each of the four principal departments have their own directors, who are civil servants appointed with the approval of the NMa Board and Ministry of Economic affairs. Most significant decisions are taken by the NMa Board – including those related to energy and transport matters – however the directors of the OER and OTR are powerful and have some authority to take lower profile decisions under the relevant Acts in which they operate.[695] The NMa's Legal Department and its Office of the Chief Economist generally deal with competition law matters. Both the OER and the OTR have their own internal economic and legal functions.

The Office of Post and Telecommunications (OPTA) supervises compliance with legislation relevant to the electronic communications and postal markets. OPTA is

[694] Source: NMa, *Organisation Chart*. Available at: http://www.nma-org.nl/engels/home/About_the_NMa/Organisation/Organisation_chart.asp [accessed on 22 October 2008].
[695] Meeting with the NMa on 24 July 2008.

divided into three departments (Markets, Operations, and the Consumers, Numbering and Chairs Office) overseen by the Commission. The Commission, which is the determinative body, consists of three independent experts from various disciplines, who are appointed by the Crown by recommendation of the Minister of Economic Affairs for a period of four years. The chair of the Commission is effectively the CEO of the OPTA, and also acts as the chair of the management team. Associate Members of the Commission may be appointed. Associate Members are chosen on the basis of specific qualifications and expertise, and advise the Commission on matters within their expertise. One appointment has been made to date. The OPTA employs approximately 150 full-time staff, the majority of whom work on telecommunications matters.[696]

Avenues of appeal for decisions in key industry areas are discussed in the specific sections. All decisions can be appealed in a first instance court and then a second instance court. Market analysis decisions are appealed in the Trade and Industry Appeals Tribunal (the *College van Beroep voor het bedrijfsleven*), based in The Hague. It is a special administrative court which rules on disputes in the area of social-economic administrative law. In addition this appeals tribunal also rules on appeals for specific laws, such as the *Competition Act* and the *Telecommunications Act*. Although it is not a specialised competition court, it is an independent court with its own pool of judges who have a specialisation in commercial matters. General decisions are dealt with in a similar fashion to other administrative proceedings in the Netherlands. The OPTA uses its internal lawyers – or lawyers in the public legal service – to run the case.

REGULATORY ARRANGEMENTS BY INDUSTRY OR SECTOR

1. Energy

The Netherlands is the second largest producer of natural gas in the EU (after the United Kingdom). It uses gas (64 per cent), coal (imported; 23.5 per cent), nuclear power and oil to produce electricity.[697] Prior to market reform, the electricity market was dominated by four generating companies, namely EPON, EZH, EPZ and UNA, forming the so-called 'centralised' market. They co-operated through an organisation called SEP (Samenwerkende Elektriciteits-Produciebedrijven) which was a joint stock company owned by its members. SEP's most important role was to own and operate the high-voltage transmission grid (380 kV and 220 kV levels) and it enjoyed a statutory monopoly on imports until 1998. SEP stopped coordinating the centralised market after the establishment of the Transmission System Operator, TenneT, in October 1998. However, SEP continued to own TenneT until November 2001 when TenneT, together with its transmission assets, was purchased by the State and SEP was dissolved. [698] TenneT does not undertake generation or retail activities such that the industry exhibits full structural separation. Despite market reform and several

[696] The full-time equivalent number of OPTA staff working on postal matters was 2.7 in 2007: ECORYS, *Main Developments in the Postal Sector (2006–2008),* Annex II: Country Sheet: the Netherlands, 2008.

[697] European Commission, *Netherlands – Energy Mix Fact Sheet*, January 2007. Available at: http://ec.europa.eu/energy/energy_policy/doc/factsheets/mix/mix_nl_en.pdf [accessed on 22 October 2008], p. 1.

[698] International Energy Agency (IEA), *Energy Policies of IEA Countries: The Netherlands – 2004 Review*, 2004. Available at: http://www.iea.org/textbase/nppdf/free/2004/netherlands.pdf [accessed on 22 October 2008].

recent ownership arrangements, a few generators still dominate the domestic market.[699]

There are currently 63 electricity distribution companies. The four large electricity producers, Electrabel, E.ON Benelux, Essent and Nuon, are active in both the generation and retail markets. These four companies control around 65 per cent of generation. A number of smaller companies also operate in generation and retail.[700]

The gas transmission network is operated by Gas Transport Services B.V (GTS), a subsidiary of Gasunie, the dominant gas infrastructure company in the Netherlands. Under the *Gas Act*, GTS is required to operate independently of Gasunie so that the transport and trade of gas are separate. Trade in gas occurs within the Title Transfer Facility (TTF). Gas Terra is an international gas trading company and has a significant share (80 per cent) of the Dutch wholesale gas market. The retail gas market is comprised of three major suppliers controlling around 29 per cent of the market. There are also 16 small independent suppliers.[701]

Regulatory Institutions and Legislation

The Office of Energy Regulation (OER), a chamber within the NMA, is charged with regulating the *Electricity Act 1998* and *Gas Act 2000*. It employs around 70 staff and is divided into four service units – a consumer market unit, wholesale market unit, network companies unit, and enforcement unit. The OER is responsible for the following matters under the relevant *Gas Act* and *Electricity Act*:

- issuing supply permits for the supply of electricity or gas to captive consumers and small-scale users;
- determining the tariff structures and conditions for the transmission of electricity;
- determining guidelines for tariffs and conditions with regard to access to gas transmission pipelines and gas storage installations;
- determining connection, transmission and supply tariffs for electricity, including the discount (price cap) aimed at promoting the efficient operation of the electricity grid operators;
- determining transmission and supply tariffs for gas, including the discount (price cap) aimed at promoting the efficient operation of the gas network operators;
- assessing, every other year, whether operators sufficiently/ efficiently meet the total supply demand for transmission capacity, as calculated on the basis of estimates submitted by the network operators;
- assessing, every other year, whether licence holders sufficiently/ efficiently meet demands, as calculated on the basis of estimates of the total supply demand of captive consumers, submitted by the relevant license holders;
- supervising compliance with the *Electricity Act* and the *Gas Act*;

[699] Ibid.
[700] European Commission, *Netherlands – Internal Market Fact Sheet*, 2007. Available at: http://ec.europa.eu/energy/energy_policy/doc/factsheets/market/market_nl_en.pdf [accessed on 11 November 2008].
[701] ibid.

- monitoring developments in the markets for gas and electricity closely, with a view to transparency, non-discrimination, competition and effective market operations;
- advising the Minister of Economic Affairs on applications for approval with regard to instructions issued by an electricity/gas network operator; and
- advising the Minister of Economic Affairs on applications for exemption from the statutory appointment of an electricity network operator.

Process and Consultation

Tariffs for the use of energy transmission and distribution networks are set on an *ex ante* basis for a period of three years. These price determinations set the maximum tariffs for this period for the two transmission system operators (one in electricity and one in gas) and for the large number of distribution companies (there are currently 63 electricity distribution companies).

In addition to setting tariffs and adjudicating in matters related to non-price access, the OER conducts a major annual monitoring exercise. This involves monitoring the wholesale gas market, the wholesale electricity market and the retail markets, and includes a review of day-to-day movement in prices, and other issues in each of the markets that have been identified either by the OER or by participants in these markets. The output of this monitoring exercise is a major report published each year which presents the key areas of focus in the sector in the following year.

In undertaking its market monitoring exercise, the OER meets with relevant companies and other key stakeholders, such as user groups and consumer associations, and seeks to identify the key issues/ areas of concern of these groups.

Role of Interested Parties

The role of end users and user groups in the regulatory process depends upon the matter under consideration. The main area of activity where end users and user groups get involved is in the development of network codes in energy networks. As discussed above, end users and user groups tend to play an important role in the annual market monitoring exercises that are undertaken in each of the relevant areas. They are generally consulted – and invited to participate – in those processes. The Association for Energy, Environment and Water (*VEMW* is the Dutch acronym) represents the industrial users of electricity, gas and water in the Netherlands and is part of the so-called 'user platform' being consulted by the energy industry and the regulator on defining tariff and non-tariff supply conditions.[702] The Consumer Council (*Consumentenbond*) represents consumer interests in a wide range of sectors in the economy, including the water and wastewater areas.

The role of external experts and consultants in the regulatory process varies by type of matter under consideration. It is, however, not uncommon for external economists to assist parties in relation to tariff matters, including cost estimates. The NMa does not itself appoint external economic experts to assist with particular matters, but rather relies on its internal capability.

[702] Association for Energy, Environment and Water (VEMW), *About VEMW*. Available at: www.vemw.nl/cms/showpage.aspx?id=24 [accessed on 18 May 2009].

Information Disclosure and Confidentiality

The OER has wide ranging powers to obtain information from parties. These include powers to demand information, obtain access to inspect business data and a right to enter places (including residential properties and cars).

These powers are provided under the *General Administrative Law Act 1994*, which places an obligation on companies to cooperate with administrative agencies where there is a reasonable suspicion of an infringement of a legal Act. The OER also has an ability to fine a company for not supplying information, although, in practice, this is generally only used as a threat.

In the interests of transparency, the NMa publishes operational protocols which set out its methods of operation in respect of the 'interaction' between market participants and the NMa. This includes, for instance, protocols in relation to company visits, accessibility and the submission of documents. The NMa also publishes its method of operation for investigating digital data, that is, how it exercises its power to inspect and copy digital data.[703]

The annual market monitoring report requires a range of information gathering activities to be undertaken. Publicly available data are collected – including changes in daily electricity prices as recorded on the Amsterdam Power Exchange. Information requests are made to specific companies. Private information, such as details of generation supply, including bid data to the pool and information on marginal costs, is collected and analysed.

The working rule adopted in the NMa is that 'everything is open unless it is confidential'.[704] Accordingly there is a tendency to keep as much information as possible accessible and open to the public. In practice, the NMa will typically ask the parties to block out any information they consider to be confidential in their submissions.

The precise definition of what constitutes confidential information is open for both objection and appeal. However, this is not an area of much activity, particularly in relation to energy or transport regulation.[705] Such issues generally only arise in competition law matters, such as merger decisions.

Decision-making and Reporting

All significant decisions relating to the regulation of the energy sector are taken by the full Board. The Board's decisions are based on the principle of collegiate decision making, and all decisions must be unanimous. The Director of the OER is, however, empowered to take certain specific decisions – generally of a more procedural nature – under the relevant legislation.

The NMa reports no general areas of concern relating to the regulatory processes in respect of access regulation across the NMa.[706] In energy, some problems have arisen in relation to the collection of information. In particular, the quality of the

[703] NMa, *Procedure in Relation to the Inspection and Copying of Digital Data and Documents 2007*, 12 December 2007. Available at: http://www.nmanet.nl/engels/home/Legislation/30_Guidelines/Index.asp [accessed on 22 October 2008].
[704] Meeting with the NMa on 24 July 2008.
[705] Meeting with the NMa on 24 July 2008.
[706] Meeting with the NMa on 24 July 2008.

information received voluntarily has sometimes been poor. The major obstructions have tended to come from the larger (and still publicly owned) energy companies. The cause of these problems may be a perceived lack of legitimacy of the OER in regulating their activities. In response to this, the OER has decided to adopt a more 'enforcement-style' approach to the collection of information.[707]

Appeals

All decisions of the NMa may be appealed, consistent with administrative law and the requirements under the European Convention of Human Rights.

A unique feature of the appeals process is the so-called 'Objections Procedure' which allows for the NMa to reconsider a decision prior to any action being taken to court.

If a party to a decision is not satisfied with the NMa's finding it may, within six weeks of the decision being released, request an 'Objections Procedure'. The Objections Procedure involves a full substantive review of the NMa's decision and is undertaken by a separate team within the NMa. Unlike the initial decision, the process is managed by the Legal Department of the NMa.

During the Objections Procedure, a public hearing is conducted in which interested parties can present their views. 'Interested Parties' are parties who are directly affected by the decision or who can otherwise prove an interest in the decision. In some cases, competitors and user groups are automatically defined to be 'Interested Parties'.

The NMa has six weeks to undertake an Objections Procedure, although a decision can be delayed by up to four weeks with the consent of the parties, and it is possible to 'stop the clock' in certain circumstances.

It is possible for parties to bypass the Objection Procedure and appeal directly to the relevant Court. In most circumstances, however, the Court will dismiss the application and send the decision back to the NMa for an Objections Procedure.

The Objections Procedure is reported to be a relatively effective means of challenging decisions, and in roughly 50 per cent of decisions the NMa has altered or changed its view as a result of this process.[708]

Should the Objections Procedure not resolve a dispute, parties may apply for judicial review of the NMa's decision. The Court in the first instance is the Trade and Industry Appeals Tribunal (*College van Beroep voor het bedrijfsleven*).[709] Appeals that are heard through these channels follow strict judicial procedures.

When the appeals process involves the NMa, it is typically led by the internal solicitors, although the NMa may, on occasion, use lawyers in the public legal service.

The *General Administrative Law Act 1994* contains provisions regarding access to information used by administrative agencies in making decisions. This allows any party to access all documents relied on during an administrative process, excluding those that are deemed 'confidential' for certain strategic reasons (such as national security). These rights are incorporated into the daily practice of the NMa, and in

[707] Meeting with the NMa on 24 July 2008.
[708] Meeting with the NMa on 24 July 2008.
[709] Described earlier under the section 'Approach to Competition and Regulatory Institutional Structure'.

investigating and making decisions it is generally the case that both an internal and a public file are maintained. In some cases, parties may be able to obtain access to the internal file of the NMa.

Formally, the Appeal Court is able to substitute its own decision, but it only will do this when it has discovered a manifest error in the assessment. The most likely outcome is that the Court will take issue with a particular part of a decision and send it back to the NMa for reconsideration.

In energy, most of the decisions proceed to the Objections Procedure phase, and 75 per cent or so of decisions are then appealed.[710] In terms of tariff methodology decisions, almost 100 per cent of those decisions have been appealed. This high ratio of appeals is not considered surprising by the agency, as the market rules in energy are relatively 'young' and it is considered useful by both the NMa and the parties to go to the Courts to test the various implementations of the rules.[711]

2. Telecommunications

Fixed-line and mobile telecommunications in the Netherlands are highly advanced both technologically and with respect to market penetration. There are five network-based mobile operators, with mobile penetration (number of subscriptions divided by total population) above 100 per cent. Broadband penetration is the second highest in the OECD, at more than one subscriber for every three inhabitants. Broadband provision is approximately two-thirds on DSL and one-third on cable.[712]

Progressive privatisation of the state-owned monopoly, KPN, began in 1994. The government sold its last shares in 2006. KPN continues to provide the majority of fixed-line services, although there are a number of other providers. KPN has also entered the mobile communications market, along with four other carriers – Vodafone, Telfort, Orange and T-mobile.

Regulatory Institutions and Legislation

OPTA supervises compliance with legislation relevant to the electronic communications and postal markets, particularly the *Postal Act 2000*, *Telecommunications Act 2004*, and relevant European regulations. In 2005, the OPTA imposed accounting separation in relation to KPN's unbundled access, fixed telephony, leased line and wholesale broadband access activities in wholesale markets.[713] This was undertaken in accordance with the *EU Access Directive*, which was transposed into Dutch law by the *Telecommunications Act 2004*.

The OPTA is involved in three main regulatory matters – price of access issues, non-price access issues, and the enforcement of the telecommunications law. The enforcement of the telecommunications law includes a broad range of matters such as Internet security, issuing phone numbers, and consumer related issues. The OPTA does not have any power to deal with possible anti-competitive practices under general competition law. These are dealt with by the NMa.

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[710] Meeting with the NMa on 24 July 2008.
[711] Meeting with the NMa on 24 July 2008.
[712] OECD, *OECD Broadband Statistics*, June 2007. Available at: http://www.oecd.org/document/60/0,3343,en_2649_34225_39574076_1_1_1_1,00.html [accessed on 13 October 2008].
[713] KPN, *Annual Reports and Accounts 2007 – Market Analysis Decisions Fixed Markets*. Available at: http://www.kpn.com/reporting07/report07/company_profile/regulatory_developments/market_analysis_decisions_fixed_markets_netherlands.html [accessed on 3 December 2008].

Process and Consultation

In terms of access price matters, the OPTA formerly dealt with individual disputes, which resulted in a large number of disputes over access price appearing before the regulator. In 2004, the position changed, and the OPTA now publishes a 'market analysis decision' in which it sets out its broad approach to pricing as well as the access prices for a range of regulated services.

The market analysis process generally begins with information gathering and research into structural matters, along with the formulation of proposed changes to the relevant market. A set of detailed questionnaires are then issued to a range of market participants. The consultation process is intended to be as open and informal as possible – that is, the parties can respond in any form or length that they wish. The responses may result in some additional research or modeling being undertaken, after which a 'concept document' is developed (similar to a draft decision) which is sent out for consultation both domestically and internationally (to the European Commission and other NRAs). Interested parties, including consumer organisations as well as access users/providers, are invited to make submissions. Following the receipt of submissions, a formal administrative process begins, which runs over six weeks. During this time an oral hearing is held. The participation in the oral hearing is generally restricted by law to 'Interested Parties' (defined above). Following this consultation, a final decision is taken. A market analysis decision can (and has) been challenged on appeal.

In non-price access matters, the OPTA does play a role in resolving disputes. However, its market analysis decisions often set out a range of approaches and terms of access which have minimised the number of such disputes.[714] In addition, in respect of access to existing services, the incumbent provider (KPN) is subject to a transparency requirement in relation to how it provides access to its services. As a result, non-price access matters tend only to arise in respect of new forms of access.[715]

In relation to non-price disputes, or matters that fall outside the market analysis decision process, the general approach is informal and involves employing a range of mediation techniques. To date, most disputes have not involved major parties, and have been able to be resolved in this informal way.

Role of Interested Parties

No consumer groups or industry bodies are specifically recognised in relevant legislation. The role of end users in the regulatory process is not substantial, with involvement tending to be limited to individual disputes or to submissions made in the context of the market analysis decisions. Unlike some other EU countries (e.g. UK), there is no consumer panel for telecommunications in the Netherlands. On some occasions, there have been roundtables organised, which focus on specific issues and in which end users can be involved, for example, in relation to number porting and switching. Market participants have a voluntary forum designed to deal with issues on access and interconnection outside the OPTA regulatory process. The forum is operated entirely by market participants (although the OPTA can be invited to participate) and is sometimes led by an independent chair. Its decisions are not legally binding; however, in most cases where agreement is reached, the access arrangements are implemented. This voluntary forum has had variable success in

[714] Meeting with the OPTA on 8 July 2008.
[715] Meeting with the OPTA on 8 July 2008.

resolving disputes, and much has depended on the composition of the group and the specific issue being discussed. For example, the forums have proven useful in relation to issues such as pre-carrier selection or MDF (Main Distribution Frame) access terms.[716]

In the market analysis process, some parties engage external consultants to assist with the preparation of their submissions. The OPTA has also employed external consultants to undertake specific modelling exercises that then feed into the market analysis decision process. For example, the OPTA commissioned an econometric study to examine the welfare effects of reducing mobile termination access prices.

Information Disclosure and Confidentiality

The OPTA has broad information gathering powers. This includes an ability to conduct an inspection or site visit (without a notice) to check with compliance with existing regulations. Where there is a presumption of infringement, the powers of the OPTA are broadly the same as the NMa, described above.

Under the *Telecommunications Act*, market parties are obliged to cooperate with OPTA. If parties do not supply information requested, OPTA can fine the company (although this has occurred relatively infrequently), or make a submission to the Court to require the production of the information.

Parties will generally make a submission as to any information they consider as commercial-in-confidence (c-i-c); however, the final decision rests with OPTA. If the OPTA proposes to publish information that a party considers c-i-c, that party can appeal to the court for a temporary order against such publication.

Issues relating to public access to information are reported to arise relatively frequently.[717] In these cases, the general administrative law (described above) governing freedom of access to information of government agencies (subject to confidentiality requirement) applies and there is nothing special about telecommunications.

Decision-making and Reporting

The determinative body in all matters before the OPTA is the Commission, and all matters are brought before the full commission (no-sub groups are appointed to consider individual matters). The Commission typically receives decisions at the draft stage for consideration; it is very rare for a commissioner to become involved in the specific investigation or development of a matter. There is no formal requirement to vote on decisions taken.

There is no formal requirement for Commission decisions to be reviewed by legal or economic staff within the OPTA, although this often occurs in practice.[718] There is also no formal requirement for the OPTA to consider the views of the NMa in relation to a decision, however in practice all draft decisions of relevance are sent to the NMa. In response, the NMa will provide its thoughts on the decision, including any substantive concerns or reservations. Final decisions are often lengthy documents, containing detailed reasoning and evidence.

[716] Meeting with the OPTA on 8 July 2008.
[717] Meeting with the OPTA on 8 July 2008.
[718] Meeting with the OPTA on 24 July 2008.

The key deadlines for decisions are consistent with those prescribed in the *EU Communications Framework Directive*. In relation to market analysis decisions, the key deadline is that a new decision must be published before the expiration of the existing one. Currently this is every three years. There is no maximum timeframe placed on the undertaking of a market analysis decision. In regard to other matters, the maximum time for a decision is four months. However, the OPTA can 'stop the clock' if it asks for new information from parties, and the OPTA may postpone a decision with the approval of all parties. If a decision is not made within prescribed timeframes, parties can seek a court order requiring the OPTA to make the decision.

The OPTA reports that the main area in which parties have tended to delay the decision-making process is in respect of supplying information; specifically providing information on the due day of submission. Information-related issues have also been reported in the past because the incumbent telecommunications access provider (KPN) owns the cost model. However, these issues have been partially addressed as over the years the OPTA has become more familiar with the model.

Appeals

All decisions of the OPTA can be appealed including market analysis decisions and specific applications of decisions. All decisions are subject to substantive review as applied to administrative proceedings. This means that a decision is appealed to a first instance Court and then to a second instance Court. There is a period of six weeks in which an appeal can be lodged. The Court has no strict time restrictions on hearing an appeal. It typically takes around one year for an appeal on a market analysis decision to be considered by the Court.

As previously discussed, market analysis decisions are dealt with by the Trade and Industry Appeals Tribunal (*College van Beroep voor het bedrijfsleven*).

There is a broad discretion in the courts in terms of available remedies. This can include quashing the decision outright, sending it back to the OPTA for further consideration, or substituting its own decision for that of the OPTA. The most common remedy is for a decision to be sent back to the OPTA for reconsideration having regard to the findings of the court.

Almost all substantive decisions of the OPTA have been appealed. In general the Court may approve the majority of a decision, but send back certain elements for reconsideration by the OPTA. It is estimated that some 70 per cent of market analysis decisions of the OPTA are successfully upheld on appeal.[719]

Regulatory Development

The role of the OPTA in strategic infrastructure planning and development is gradually changing over time. In general terms, the OPTA tends to delegate all strategic investment issues to the market. Nevertheless, in recognition that some investment decisions can have effects on a range of market participants, it has taken a proactive role in some matters. For example, in relation to the shift to the NG IP network, the OPTA has played an active role in examining the possible effects of such an investment, including publishing an Issues Paper based on KPN's plans. This was followed by a Position Paper which outlined the OPTA's likely actions and approach in the event that the network was built in the way proposed. In addition, since 2005, the OPTA and KPN have had informal discussions on a regular basis. Some

[719] Meeting with the OPTA on 8 July 2008.

discussions have also included access seekers, particularly in relation to the process for phasing out MDFs. Should KPN and the access seekers come to an agreement on the way to phase out MDFs, this is likely to be reflected in any final regulation issued by the OPTA.

3. Posts

The Netherlands has been one of the EU leaders in the liberalisation of mail services.[720] The country's primary mail carrier, TNT Post, has been privatised since 1994 and is now majority owned by private interests. Restructuring of the former state-owned statutory monopoly began in the early 1980s when the Postal Giro Service and the National Savings Bank were split off in 1983 and an independent company, Postkantoren BV, was set up to operate counter services in both savings and mail. As of 1 January, 1989, the postal service operator was restructured as PTT Netherlands, a private company whose shares were wholly owned by the state. In 1994 the company was listed under the name of Royal PTT Netherlands (KPN) on the Amsterdam stock exchange and, in 1996, its majority ownership passed from the Dutch government to private hands. In that same year the company acquired TNT, a world-wide delivery service from Australia. The company became an important participant in global mail and logistics. In 1998, its postal division was split from the telecommunications arm of the business to become TNT Post Group (TPG), a publicly listed company. In 2005, TPG was renamed as TNT Post (TNT). Its corporate parent, TNT Group, has used strategic partnerships and acquisitions to become a major participant in nearly every European mail market that allows competition.

In the domestic market, only two postal companies – Sandd and Selekt Mail (Deutsche Post Selekt Mail Nederland) – actively compete with TNT Post, but they concentrate on business mail (pre-sort bulk mail). In the residential market, there is still virtually no competition to TNT. The two main competitors have developed their own delivery network on a nation-wide scale, and together they occupy about 13 per cent of the total addressed mail market.[721]

Regulatory Institutions and Legislation

The Office of Post and Telecommunications (OPTA) supervises compliance with legislation relevant to the postal markets, particularly the *Postal Act 1989* and related decrees,[722] and relevant European regulations. The OPTA is an independent economic regulator. The Minister of Economic Affairs, who holds the postal portfolio, may issue general directives, but will not intervene in individual cases.

The *Postal Act 1989* (and related decrees) requires TNT Post to perform universal postal services. It also defines the scope of the reserved postal services exclusive to TNT (that is, letter items up to 50 grams). The combination of these mandates and exclusive rights is commonly called the 'Postal Concession'. As the concession

[720] Consumer Postal Council, *Index of Postal Freedom – Netherlands*. Available at: http://www.postalconsumers.org/postal_reform_index/Netherlands_-_TNT_Post.shtml [accessed on 13 October 2008].

[721] ECORYS, *Main Developments in the Postal Sector (2006–2008), Annex II: Country Sheet: the Netherlands*, 2008, p. 637.

[722] Postal law and regulations include *General Postal Guidelines Decree 1988* concerning obligations for the Universal Service Provider, *Decree on Remittances Postal Act 1997* concerning the remittances of OPTA, *Postal Decree 2000* concerning universal service obligations, and Decree *on Delivery Letterboxes 1989* concerning requirement on letter boxes.

holder, TNT is obliged to comply with various regulatory obligations, including those related to quality of service; tariffs; cost and revenue accounting; financial administration and reporting. In particular, TNT is obliged to:

- provide a level of service that complies with modern standards;
- set postal rates for the universal services that are cost-based, transparent, non-discriminatory and uniform;
- give its competitors access to its Post Office boxes on reasonable, objectively justified and non-discriminatory terms and conditions, which are set by negotiations between TNT and a competitor;
- give its competitors access to information on post code system (including change of address).

Third-party access to the mail network at a discount is not mandatory but negotiable.

As the sectoral regulator, the OPTA supervises TNT's compliance with these obligations. Its statutory supervisory duties are:

- auditing TNT's financial and quality reports to assess whether universal postal services obligations are met
- reviewing any rate changes proposed by TNT to assess whether the proposed changes are in accordance with the price cap system where rate increases are capped by a ceiling based on the general wage index
- arbitrating access disputes
- investigating consumer complaints
- advising the Ministry of Economic Affairs on postal matters, such as full liberalisation of the Dutch postal market.

Full liberalisation of the postal market (ending the last reserved postal services) was initially proposed for implementation, under a new *Postal Act*, on 1 January 2008. However, these measures were postponed in January 2008 and again in July 2008. Under the liberalisation measures, TNT is to be assigned as the universal service provider, and compensated on the basis of net cost, for an undefined period. Other key changes include a price cap system linked to inflation using the consumer price index, and the OPTA setting initial postal rates for the universal services. However, full market opening is now in deferral for an indefinite period.[723]

Role of Interested Parties

The role of end users in the regulatory process tends to be limited to access disputes or consumer complaints. The OPTA does not deal with individual consumer complaints; however, it will investigate end-user complaints that indicate large-scale anti-competitive behaviours.

Information Disclosure and Confidentiality

The OPTA has information gathering powers in order to carry out its supervisory duties in relation to TNT's compliance with the *Postal Act*. For example, TNT is

[723] Reasons for delay cited by the Dutch government include: a high minimum wage and value added taxes in Germany (argued to affect the level playing field), and labour conditions in non-TNT competitors in the Netherlands.

required to submit one concession and two quality reports to the OPTA on an annual basis. However, the TNT is not obliged to provide all the information requested.[724]

OPTA does not have the power to enforce the provision of information by TNT. However, it may notify the State Secretary for Economic Affairs accordingly.

The OPTA has an ability to levy fines in cases of noncompliance with the *Postal Act*.

Under the *Postal Act*, the OPTA does not have the power to request information from non-TNT postal service providers. However, the information-gathering power of the OPTA may be enhaned under the proposed *Postal Act* that authorises the OPTA request all the necessary information for carrying out its statutory duties.

In relation to TNT's accounting system, the OPTA will publish a declaration of an independent auditor (appointed by the OPTA) that TNT has complied with the accounting separation obligation in the Government Gazatte (*Staatscourant*).

The general administrative law of the Netherlands that governs freedom of access to information of government agencies (subject to confidentiality requirement) applies to the postal industry.

Decision-making and Reporting

The full-time equivalent number of the OPTA staff working on postal matters is two in 2006 and 2.7 in 2007.[725]

As described above in relation to telecommunications, regulatory decisions in the postal industry are made by the full commission of OPTA. The Commission typically receives decisions at the draft stage for consideration; it is very rare for a commissioner to become involved in the specific investigation or development of a matter. There is no formal requirement to vote on decisions taken.

Appeals

As described in the telecommunications section, all decisions of OPTA can be appealed, including specific applications of decisions. All decisions are subject to substantive review as applied to administrative proceedings. This means that a decision is appealed to a first instance Court and then to a second instance Court. There is a period of six weeks in which an Appeal can be lodged. In hearing an appeal the Court has no strict time restrictions.

4. Water and Wastewater[726]

The Netherlands has a water area of 7 643 square kilometres and water pipes of 116 000 km. Being low, flat and wet, the Netherlands has a long history of water management. It has developed a strong reputation for its high-quality supply of household and industrial water, and of its treatment and disposal of wastewater.

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[724] See court ruling of a lawsuit between TNT and the OPTA (Judgements 24/9/2005 and 8/12/2006).

[725] ECORYS, *Main Developments in the Postal Sector (2006–2008), Annex II: Country Sheet: the Netherlands*, 2008.

[726] Key references include: OECD, *Competition and Regulation in the Water Sector*, OECD Policy Roundtable, 2004, pp. 135–39; Netherlands Water Partnership, 'Waterland' website. Available at: http://www.waterland.net/index.cfm/site/Water%20in%20the%20Netherlands/pageid/82F77A67-F8E6-0465-01179B9CD26816FF/index.cfm [accessed on 3 November 2008]; Wikipedia: The Free Encyclopedia, *Water Supply and Sanitation in the Netherlands*. Available at: http://en.wikipedia.org/wiki/Water_supply_and_sanitation_in_the_Netherlands [accessed on 15 January 2009].

Water supply is provided by ten regional water companies, nine of which are public limited companies (PLCs) whose shareholders are municipalities or provinces.[727] The only private company N.V. Bronwaterleiding Doorn operates in the area of Doorn and is to be taken over by a larger public water company VITENS operating nearby in accordance with the *Netherlands Water Law* (*Waterleidingwet 2004*) that bans the private provision of drinking water. However, in spite of their public ownership, water companies tend to contract out many services – such as customer service and repairs – to the private sector.

The Dutch water supply companies are considered to be highly efficient as a result of the industry benchmarking which has been conducted every three years since 1997. The Netherlands is the first EU country to apply benchmark technique to water and wastewater, carrying out consecutive studies in 1997, 2000, 2003 and 2006, with water companies participating on a voluntary basis.[728] Comparative analysis for the participating water companies is primarily based on four types of indicators – water quality; customer service; environment; and finance and efficiency. Participation in the benchmarking studies will become compulsory for water companies under a proposed new *Water Act* (see below).

Municipalities are also generally responsible for collecting and discharging wastewater (via sewerage). Treatment of urban wastewater is provided by the 27 Water Boards (*Waterschappen*). Public-private partnership is commonly adopted as the private sector is contracted to design, build, finance and operate (DBFO) wastewater treatment plants for a period of 30 years.[729]

In the area of Amsterdam, the local water supply company and the local Water Board merged in January 2006 to form a public institution – Waternet – the first Dutch company that offers integrated services over the water chain from drinking water supply to wastewater treatment.

Regulatory Institutions and Legislation

Key legislation governing water and wastewater in the Netherlands consists of a number of acts in relation to specific water issues, including the *Water Management Act 1989*, the *Water Boards Act 1995* (that sets out the responsibilities of the Water Boards), the *Pollution of Surface Water Act 1970*, the *Marine Pollution Act 1975*, and the *Groundwater Act 1981*.

Regulation of water and wastewater is shared among a number of institutions at different levels and with specific functions. Within the national government, two ministries share the portfolios – the Ministry of Housing, Spatial Planning and Environment (*VROM* is the Dutch acronym for this ministry) and the Ministry of Transport, Public Works and Water Management (*VenW* is the Dutch acronym for this ministry). The VROM is responsible, in particular under the *Environmental Management Act*, for the national water supply policy, such as setting water quality and emission standards. The *VenW* is responsible for overall water resources management, with two key executive departments being heavily involved – the

[727] PLCs are incorporated as private companies and are also subjects to the rules and regulations governing commercial business. The majority of their shares are owned by local, provincial or national governments.

[728] Association of Dutch Water Companies (*Vewin*), *Benchmark*. Available at: http://www.vewin.nl/publicaties/Benchmark/Pages/default.aspx [accessed on 15 January 2009].

[729] For example, Veolia Water won the 30-year, €1.5 billion DBFO contract on wastewater treatment in the Hague.

Directorate-General for Public Works and Water Management is in charge of water resources policy and managing surface water, in cooperation with the Water Boards; the Inspectorate for Transport, Public Works and Water Management is in charge of monitoring compliance with regulations.

At the regional level, the 12 provincial governments are responsible for groundwater management. There does not appear to be any formal regulatory framework, but in principle regional policies formulated should take account of national directives. The main regulatory activities of provincial governments are the licensing of groundwater extraction and the supervision of tariffs. Tariffs are set by water companies based on a 'not-for-profit and full cost recovery basis' and are subject to the supervision of 'the local authorities through shareholders meetings and the Board of Directors'.[730] The tariff contains two parts – a fixed component and a variable component. Tariffs can vary within the service area of a water company, depending on local costs.

The District Water Boards are also key regional public authorities in charge of water resources management. Under the *Water Boards Act 1995*, the Water Boards are responsible for flood control, management of regional water resources (quantity and quality), and treatment of urban wastewater. All District Water Boards jointly form the Association of Dutch Water Boards (*Unie van Waterschappen – UVW*) to promote the members' interests at a national and international level.[731]

The Association of Dutch Water Companies (*Vewin* is the Dutch acronym) is the industry body that represents the common interests of water companies in The Hague and Brussels. In order to identify and address common interests, *Vewin* constantly seeks to collaborate with its stakeholders, including consumer organisations, industry users, conservation and environmental organisations and other associations. The *VEMW* (discussed earlier in the section on 'Engery') represents the industrial users of electricity, gas and water in the Netherlands.

Competition in public water supply infrastructure, as well as third-party access, is not permitted, so there are no processes and procedures required for this.

Regulatory Development

In 2007, drinking water companies, municipalities, water boards, *VROM* and *VenW* signed the Water Cycle Administrative Agreement. The Agreement introduces performance benchmarking of sewerage providers (usually municipalities) and water treatment providers (usually water boards); promotes projects aimed at co-operation between providers; and enable consumers to obtain information on costs within the supply chain and how they can influence outcomes.[732] Within three years, the Agreement aims to make the sewage charges/levies cost-effective. The Agreement provides for direction at national level; the parties are then free to agree regional administrative agreements to respond to specific circumstances.

The National Administrative Agreement on Water, signed on 2 July 2003, was evaluated in 2006 in relation to the impact of climate change on the water system. It has linked water management to spatial planning at national, provincial and municipal

[730] OECD, *Policy Roundtables: Competition and Regulation in the Water Sector*, 18 August 2004, p. 136.

[731] See information at the website of the Association of Water Boards (*UVW*) at: http://www.uvw.nl/engels/index.html [accessed on 15 January 2009].

[732] Minister for the Netherlands Ministry of Housing, Spatial Planning and the Environment, *Speech*, 8 October 2007.

levels. The Delta Committee's report on *Working with Water*, delivered on 3 September 2008, further examined the issue of climate change, which confronts the Netherlands with many urgent problems such as raising sea level, overflow of river and a shortage of fresh water.[733] The Dutch government is currently considering the Committee's recommendations for measures that ensure the Netherlands has a climate-proof future.

The Dutch Government is in the process of finalising a new integrated *Water Act*, expected to become effective (including implementation legislation and setting-up law) in the middle of 2009.[734] The Act aims to achieve an integrated system of water management by the authorities. There are three main areas of amendments:

- One single permit will replace the current six separate permits, for carrying out all water activities impacting on the environment.
- Compensation payments for claims by individuals and companies for damage caused by water management policies will be limited to those damages that: are disproportionate; affect a limited group of interested parties; and are claimed within five years of their occurrence.
- Designated authorities will have enhanced powers to acquire land or property rights over land for the purpose of designation of 'recovery areas' for temporarily storing sea or river water.

In the process of the introduction of the new law, a number of groups have been engaged to advice on or actively consulted on policy and implementation issues concerning water system and water management.[735]

The proposed new Act is considered to be a move to implement the *EU Water Framework Directive*,[736] and will consolidate existing Acts on water,[737] and provide for new water protection measures in the Netherlands. The EU Directive is based on a river basin district approach to make sure that neighbouring Member States assume joint responsibility for managing the rivers and other bodies of water they share. The goal of the Directive is to ensure that the quality of the surface water and groundwater in Europe reaches a high standard ('good ecological status') by 2015. To meet the 2015 deadline, water authorities in each river basin district in Europe must have agreed on a coherent programme of measures by 2009.

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[733] The Delta Committee, *Working with Water*, (chaired by Dr. C.P. Veerman), 3 September 2008. Available at: http://www.deltacommissie.com/ [accessed on 15 January 2009].

[734] Helpdeskwater, *Legislation and Policy* (in Dutch) (translated into English via BabelFish). Available at: http://babelfish.yahoo.com/translate_url?doit=done&tt=url&intl=1&fr=bf-home&trurl=http%3A%2F%2Fwww.helpdeskwater.nl%2Fwaterwet&lp=nl_en&btnTrUrl=Translate [accessed on 15 January 2009].

[735] Helpdeskwater, *Consultation*. Available at: http://babelfish.yahoo.com/translate_url?doit=done&tt=url&intl=1&fr=bf-home&trurl=http%3A%2F%2Fwww.helpdeskwater.nl%2Fwaterwet&lp=nl_en&btnTrUrl=Translate [accessed on 15 January 2009].

[736] That is, 2000/60/EC of 23 October 2000.

[737] It aims to combine the following eight existing laws into a single *Water Act*: the *Water Management Act*, the *Flood Protection Act*, the *Groundwater Act*, the *Surface Water Pollution Act*, the *Seawater Pollution Act*, the *Polders and Land Reclamation Act of 14 July 1904*, the *State Managed Infrastructure Act* and the *Water Administration Act*. See: Pieter Jone, The Water System and Water Chain in Dutch Water and Environmental Legislation, *Law Environment and Development Journal*, 3/2, 2007. Available at: http://www.lead-journal.org/content/07202.pdf [accessed on 8 January 2009], pp. 202–16.

5. Rail

A number of private railways which operated different routes throughout the country were merged in 1938 to form the Nederlandse Spoorwegen (NS). NS had a statutory monopoly over all train transport in the Netherlands until the liberalisation in 1992 and retains a monopoly over passenger transport until at least 2015.[738] Since liberalisation, however, a number of different companies offer freight rail transport services on a number of lines. Arriva took over the northern secondary lines, and a central line, Syntus, took over the eastern secondary lines, while Veolia took over the southern secondary lines. Connexxion took over a single central line. However, NS is still the operator of the core inter-city network. The state-owned company, Prorail, manages the rail infrastructure with the exception of a dedicated freight line, Betuweroute, which is managed by Keyrail. Keyrail is a private company formed by the Port of Rotterdam, Port of Amsterdam and Prorail. Betuweroute connects Rotterdam Harbour with the German border.[739]

Regulatory Institutions and Legislation

The Office of Transport Regulation (OTR), a chamber of the NMa, is responsible for regulation of railways, Amsterdam's Schiphol airport (see the next section on 'Airports'), and certain passenger transport matters. Its authority derives from the *Railway Act 2005*, the *Aviation Act 2006*, and the *Passenger Transport Act 2000*. In all of these areas it is purely responsible for economic regulation and does not deal with safety issues. Its major area of activity to date has been in respect of the implementation of the *Railway Act* which transposes, among other things, the EU Directives on railway access and fair pricing into Dutch law. In particular, the *Railway Act* transposes *EU Directive 91/440/EC* which provides for the independent management of railways, the separation of infrastructure management and operation from provision of transport services (accounting separation is compulsory, operational separation is optional) and ensures access to Member networks of international railway transport operators. The *Railway Act* also transposes *EU Directive 2001/14/EC* which concerns principles and procedures to be applied with regard to the setting of, and charging for, railway infrastructure charges and allocation of network capacity. Among other things, Directive 2001/14/EC requires the development and publication of a 'network statement' that sets out the conditions of access to available infrastructure.

The OTR has a general supervisory role in relation to railways. This includes supervising the:

- Content of Network Statements
- Content of Access Agreements and Framework Agreements
- Non-discriminatory access to infrastructure
- Fair and non-discriminatory capacity allocation
- Infrastructure charges

[738] NMa, *The Dutch Railway Act*. Available at: *http://www.nmanet.nl/engels/home/Legislation/50_Sectorspecific_regulations/The_Dutch_Railway_Act.asp* [accessed 2 February 2009]

[739] Keyrail, *Key-up*. Available at: http://www.keyrail.nl/viewer/file.aspx?FileInfoID=1 [accessed 2 February 2009].

- Facilities and services.

Thus, a key role of the OTR is to supervise the setting of price and non-price terms of access in relation to Prorail. The setting of the price and non-price terms of access under the *Railways Act* involves an access agreement being concluded between Prorail (the access provider) and each of the access seekers (including NS, the main transport user, and freight users). The access provider is responsible for negotiating charges and capacity allocation with all access seekers. In terms of charges, the access agreements set a price level for a minimum access package which is required to be cost-based. However, it is possible for the access agreement to include additional charges which reflect factors such as a scarcity charge; environmental costs; and reservation/booking charges. In addition, charges are often levied for associated service facilities maintained by the access provider. This can include station cleaning and fuelling station costs.

In practice, the access provider publishes a network statement each year which includes, as an annex, a standard access agreement. Each access agreement is set for a period of one year and is concluded in December. To this end, the principal role of the OTR in access regulation is the *ex post* supervision of the price and non-price arrangements.

To date there has been no *ex ante* supervision by the OTR of the terms of these access agreements. It is possible, however, under the *Railway Act*, for a Framework Agreement to be submitted to the OTR *ex ante* which sets out the terms of agreement for a period of five years. These Framework Agreements allow for the allocation of capacity for a period greater than one year and do not relate to a specific path or timetable. In such a case, the OTR would have a role in approving the terms of the Framework Agreement and in the supervision of the implementation of these agreements. To date, however, no Framework Agreements have been submitted.

Process and Consultation

The OTR can undertake *ex officio* investigations into specific aspects of the functioning of the market. In practice, this typically follows a 'tip' (or signal) from the market, or occurs through the annual market monitoring process. The annual market monitoring process is a similar exercise to that which occurs in the Office of Energy Regulation (OER), described above, and involves sending out a questionnaire to all market participants regarding various aspects of the market and any specific issues that they encounter on a day-to-day basis. The most recent annual market monitoring exercise identified capacity allocation and high access charges as key issues, and these will now form the basis of the OTR's activities in the coming year.

The second main trigger for regulatory activity by the OTR is in response to complaints. For example, where individual disputes arise in relation to an access agreement concerning the behaviour of a contracting party. In such circumstances, the OTR has two months to reach a decision. During this period, the OTR will conduct a public hearing and send out information to each of the parties on which they can respond.

Timeliness

Because the access agreements are renewed annually, there is a need for new negotiations each year which can be cumbersome and time consuming for all

parties.[740] Network statements can be published late and may miss key information, and this has led some access users to complain of being pressured to sign-up to the agreement.

Role of Interested Parties

The main area of activity where end users and access seekers tend to get involved is in the development of the annual network statement. However, this occurs through consultation with the access provider itself.

Information Disclosure and Confidentiality

The OTR has wide-ranging powers to obtain information from parties. These include powers to demand information, obtain access to inspect business data and a right to enter places (including residential properties and cars). These powers are provided under general administrative law which places an obligation on companies to cooperate with administrative agencies where there is a reasonable suspicion of an infringement of a legal act. The OTR also has an ability to fine a company for not supplying information, although, in practice, this is generally only used as a threat.

As previously noted in the section of energy, to promote transparency, the NMA publishes operational protocols which set out its methods of operation in respect of company visits, accessibility, the submission of documents by market participants and its inspection of digital data.

The working rule on information confidentiality adopted in the NMa is that 'everything is open unless it is confidential'.[741] Accordingly there is a tendency to keep as much information as possible accessible and open to the public. In practice, the NMa will typically ask the parties to block out any information they consider to be confidential in their submissions. The precise definition of what constitutes confidential information is open for both objection and appeal. However, this is not an area of much activity in transport regulation.[742] Such issues generally only arise in competition law matters, such as merger decisions.

Decision-making and Reporting

The OTR was established within the NMa's structure in 2004. There are 13 members of the OTR, including twelve staff and one Director. The OTR is independent of both the Ministry of Economic Affairs and the Ministry of Transport, although the salaries of OTR staff are paid through the Ministry. All significant decisions relating to the regulation of the transport sector are taken by the full NMa Board, in particular where there is the possibility of the imposition of a sanction. The Board's decisions are based on the principle of collegiate decision making, and all decisions must be unanimous. The NMa reports no general areas of concern relating to the regulatory processes in respect of access regulation across the NMa.[743] In rail, the parties are reported to be generally cooperative. The OTR has not experienced problems gaining required information, nor have parties attempted unduly to delay or obstruct the regulatory process. However, rail is a relatively new area of regulatory activity in the Netherlands and the process is still evolving.

[740] Meeting with the NMa on 24 July 2008.
[741] Meeting with the NMa on 24 July 2008.
[742] Meeting with the NMa on 24 July 2008.
[743] Meeting with the NMa on 24 July 2008.

Appeals

All decisions of the NMa may be appealed, consistent with the general administrative law and the requirements under the *European Convention of Human Rights*.

A unique feature of the appeals process is the 'Objections Procedure' which allows for the NMa to reconsider a decision prior to any action being taken to court. If a party to a decision is not satisfied with the NMa's finding, it may, within six weeks of the decision being taken, request an 'Objections Procedure'. The Objections Procedure involves a full substantive review of the NMa's decision and is undertaken by a separate team within the NMa. Unlike the initial decision, the process is managed by the legal department of the NMa.

During the Objections Procedure, a public hearing is conducted in which parties with an interest in the matter can present their views. 'Interested Parties' are parties who are directly affected by the decision or who can otherwise prove an interest in the decision. In some cases, competitors and user groups are automatically defined to be Interested Parties.

The NMa has six weeks to undertake an Objections Procedure, although a decision can be delayed by up to four weeks with the consent of the parties, and it is possible to 'stop the clock' in certain circumstances.

It is possible for parties to bypass the Objections Procedure and appeal directly to the relevant Court. In most circumstances, however, the Court will dismiss the application and send the decision back to the NMa for an Objections Procedure.

The Objections Procedure is reported to be a relatively effective means of challenging decisions, and in roughly 50 per cent of decisions the NMa has altered or changed its view as a result of this process.[744]

Should the Objections Procedure not resolve a dispute, parties may apply for judicial review of the NMa's decision. The Court in the first instance is the specialised chamber of the Court of Appeal known as the Trade and Industry Appeals Tribunal (*College van Beroep voor het bedrijfsleven*). As previously described, appeals that are heard through these channels follow strict judicial procedures.

When the appeals process involves the NMa, it is typically led by the internal solicitors, although the NMa may, on occasion, use the Government lawyer.

There is general law in the Netherlands regarding access to information used by administrative agencies in making decisions. This allows any party to access all documents relied on during an administrative process, excluding those that are deemed 'confidential' for certain strategic reasons (such as national security).

These rights are incorporated into the daily practice of the NMa, and in investigating and making decisions it is generally the case that both an internal and a public file are maintained. In some cases, parties may be able to obtain access to the internal file of the NMa.

Formally, the Appeal Court is able to substitute its own decision, but it only will do this when it has discovered a manifest error in the assessment. The most likely outcome is that the Court will take issue with a particular part of a decision and send it back to the NMa for reconsideration.

[744] Meeting with the NMa on 24 July 2008.

To date, the OTR has ruled on four *ex officio* investigations, two of which were subsequently appealed (by Prorail). Additionally, the OTR decided upon nine dispute settlement matters between Prorail and access seekers in 2008. These predominantly related to capacity allocation and infrastructure charges. Three of the decisions have been appealed, one of which was appealed directly to the District Court of Rotterdam and then to the Trade and Industry Appeals Tribunal.[745]

Regulatory Development

Economic regulation of the structurally separated rail infrastructure/operation system in the Netherlands is conducted by the OTR within the Competition Authority, the NMa. The primary role of the OTR is the *ex post* supervision of access arrangements. There is a unique appeal channel – Objections Procedure – that allows for the NMa to reconsider a regulatory decision prior to other appeal action. This gives the regulator an opportunity to remedy its own decision and can be less time-consuming. The Netherlands appears to have correctly implemented the First Railway Package Directives. As such, it has developed a fairly competitive railway market and an effective regulatory framework. However, it failed to transpose the Second Railway Package Directives into national legislation before the due date of 30 April 2007.[746]

6. Airports

The small geographic size of the Netherlands means that domestic air travel is of minor importance. However, the importance of the Netherlands in international trade in goods and services and its strategic location mean that international air travel is important. There are major international airports at Amsterdam (Schipol), Eindhoven and Rotterdam. Schipol Airport is operated by N.V. Luchthaven Schiphol (under the tradename Schipol Group), an unlisted public liability company jointly owned by the Dutch Government (69.77 per cent), the Municipality of Amsterdam (20.03 per cent), the Municipality of Rotterdam (2.20 per cent) and *Aeroports de Paris S.A.* (Class B shares – 8.00 per cent). The Schipol group also owns Rotterdam Airport, Lelystad Airport and Eindhoven Airport (jointly owned with the North Brabant Provincial Authority and the Eindhoven Municipal Authority) in the Netherlands. In addition, it is a minority shareholder at both Brisbane Airport in Australia and John F. Kennedy International Airport in the US.

Regulatory Institutions and Legislation

Under the *Aviation Act 2006*, the NMa regulates tariffs and conditions for 'aviation activities' provided to airline companies by the operator of Amsterdam's Schiphol airport – that is, N.V. Luchthaven Schiphol. In practice, such regulation is practised by the OTR, a specific chamber of the NMa. 'Aviation activities' include landing, take off, boarding, disembarking, parking planes, baggage transport and security. The OTR is charged with ensuring that tariffs and conditions in respect of these activities are cost-based and are not unreasonable or discriminatory. Schiphol is required to base its tariffs on an attributive system of costs and benefits, which is also subject to the approval of the OTR.[747] Tariffs for 'non-aviation activities', such as car parking

[745] NMa, *Overview of Decisions and Informal Opinions NMa – Dutch Railway Act*, 2008. Available at: http://www.nmanet.nl/Images/Decisions%20OTR%202008%20document_tcm16-121356.pdf [accessed on 15 December 2008].
[746] European Commission, *Press Release*, 21 March 2007.
[747] NMa, 'NMa: starts regulation Schipol', *Press Release*, 19 July 2006.

tariffs and rents for shops and offices used at airports, are not covered by the *Aviation Act*, but fall within the scope of the *Competition Act*.

A different regulatory framework applies to other airports in the Netherlands. The national Ministry of Transport, Public Works and Water Management is responsible for the regulation of regional airfields. All airfields have to meet certain rules and regulations, laid down by the Ministry in a designation order. A designation order sets out matters such as the geographic borders of an airfield, the pattern of the runways, noise zone(s), use specification, preferential runway use, runway allocation, departure and arrival procedures and access policy, depending on the settlements for noise production. A 2006 draft bill proposed the delegation of responsibilities and powers in relation to regional airfields to the provinces.[748]

Airport Coordination Netherlands (SACN) is responsible for the allocation of available slots at the coordinated airports in the Netherlands (Amsterdam Airport Schiphol, Eindhoven Airport and Rotterdam Airport).

Air Traffic Control Netherlands (LVNL) is an independent administrative body, empowered under the *Aviation Act*, with responsibility for the control of civil airspace. It reports to the Ministry of Transport, Public Works and Water Management. Air traffic control services are provided at Schiphol and three regional airports.

The following discussion on regulatory process focuses on the OTR's role in regulating Amsterdam's Schiphol airport, which follows the categorisation used widely throughout this country-based report.

Process and Consultation

Inter alia, the OTR oversees the process of consultation prior to the annual tariff changes.

Role of Interested Parties

The role of end users and user groups in the regulatory process depends upon the matter under consideration. They are generally consulted – and invited to participate – in those processes.

Information Disclosure and Confidentiality

The OTR has wide-ranging powers to obtain information from parties. These include powers to demand information, obtain access to inspect business data and a right to enter places (including residential properties and cars). These powers and procedures are described in more detail in the previous section on rail.

The working rule on information confidentiality adopted in the NMa and thus relevant for the OTR is that 'everything is open unless it is confidential'.[749] See the previous section on Rail for details.

[748] The Lower House has postponed its decision making on the bill (submitted on 10 February 2006) until there is a new government. See Ministry of Transport, Public Works and Water Management, *Regional Airport*. Available at: http://www.verkeerenwaterstaat.nl/english/topics/aviation/regional_airports/index.aspx [accessed on 21 January 2009].

[749] Meeting with the NMa on 24 July 2008.

Decision-making and Reporting

As described in the previous section, all significant decisions relating to the regulation of the transport sector (including Schiphol Airport) are taken by the full NMa Board, including, in particular, decisions where there is the possibility of the imposition of a sanction. The Board's decisions are based on the principle of collegiate decision-making, and all decisions must be unanimous. The NMa reports no general areas of concern relating to the regulatory processes in respect of access regulation across the NMa.[750]

Appeals

See the detailed discussion of appeal provisions applying to transport decisions in the previous section on Rail.

7. Ports

The Netherlands is heavily reliant on international trade and is strategically placed in Europe, with a border around the North Sea. According to the Ministry of Transport, Public Works and Water Management,[751] Dutch ports can be classified by areas as follows:

- Rotterdam Rhine-Meuse delta – the largest national port area incorporating the ports of Rotterdam, Schiedam, Vlaardingen, Dordrecht, Moerdijk and Scheveningen;
- North Sea Canal area (also referred to as Amsterdam Ports) – second-largest port area comprising the ports of Amsterdam, Velsen/IJmuiden, Beverwijk and Zaanstad;
- Scheldt basin;
- Northern seaports;
- Other (Scheveningen).

In 2006, 388 million tonnes of cargo were transmitted through the ports of the Rotterdam Rhine-Meuse Delta, accounting for 76.5 per cent of the total cargo in Dutch ports, while 84 million tonnes of cargo was handled by the port of Amsterdam. These two major ports – Rotterdam and Amsterdam – are two of the largest ports in Europe.

Port administration is generally delegated to the corresponding municipalities.[752] For example, the ports of Rotterdam, Schiedam, Vlaardingen and Maassluis are jointly managed by the Port of Rotterdam Authority (*Havenbedrijf Rotterdam, HBR*), which is a public limited company whose majority shareholder is the municipality of Rotterdam and the other shareholder is the Netherlands State. The Port of Amsterdam is directly owned by the municipality of Amsterdam. For smaller ports, port administration is incorporated in the municipal administration as a whole. Port authorities in the Netherlands offer port basins and quays for seaborne and inland waterway shipping and industrial sites near those port basins.

[750] Meeting with the NMa on 24 July 2008.

[751] The key reference is: Ministry of Transport, Public Works and Water Management, *Freight Transport*. Available at: http://www.verkeerenwaterstaat.nl/english/topics/freight_transportation/ [accessed on 16 January 2009].

[752] National Ports Council, *Netherlands*. Available at: http://www.havenraad.nl/english/ [accessed on 16 January 2009].

In principle, port authorities are responsible for investment in the port, with the exception of access infrastructure. The costs of investment and maintenance of ports in the Netherlands have to be covered by the revenues derived from harbour dues and the hiring out or sale of sites. The ports have their own rules and regulations and individually determine port dues (see below). The state is responsible for funding basic infrastructure for accessing ports (that is, the network of highways, railways, inland waterways and the maritime entrances of the ports), which are deemed to fall under the 'public scope' of the port or to benefit the country as a whole, or are necessary for market failure considerations.[753] To this end, the Government finances major capital investment in ports, aiming to:[754]

> maintain and, where necessary, improve accessibility and hinterland connections of seaports, to guarantee accessibility and physical space for logistic or industrial activities.

In the seaports, services like towing, mooring and unmooring, stevedoring and storage are offered exclusively by private companies.

Regulatory Institutions and Legislation

The National Ports Council (*Nationale Havenraad*) is a consultative body for seaports, the national government and the interest groups representing businesses in ports. The NHR issues recommendations both upon request and independently on matters concerning seaports. The port authorities however are autonomous, and the NHR is an advisory board that aims at co-ordination.

In 2004, the Ministry of Transport, Public Works and Water Management issued a policy document *Seaports: Anchors of the Economy* outlining the national seaport policy for the period 2005–2010.[755] The policy is aimed at 'streamlining government interventions to encourage the port industry to operate quickly, effectively and without upsetting competition'.[756]

The structure of the charges, dues and fees that can be collected in the ports of the Netherlands is discussed at national level. The actual levels of charges, dues and fees are autonomously decided by each port. Some charges are paid to port authorities, while others (pilotage, towage, mooring and unmooring) are paid to private operators.[757]

Finally, the *Market Monitoring of Registered Pilotage Services Act 2007* came into force at the beginning of 2007. The focus of this legislation is the cost allocation model for the piloting of vessels and the supervision by the NMa (through the OTR) of pilotage services.

Apart from the NMa's role in monitoring pilotage charges, there is no independent economic regulation of ports in the Netherlands; they are owned, run and 'regulated' at the municipal level.

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[753] Institute of Shipping Economics and Logistics, *Public Financing and Charging Practices of Seaports in the EU*, Final Report commissioned by DG TREN (Directorate G – Maritime and Inland Waterway Transport; Intermodality, Short Sea Shipping, Inland Waterways, and Port) – of European Commission, June 2006, p. 78.

[754] Ministry of Transport, Public Works and Water Management, *Ports and Policy*. Available at: http://www.verkeerenwaterstaat.nl/english/topics/freight%5Ftransportation/seaports/080%5Fports%5Fand%5Fpolicy/ [accessed on 19 January 2009].

[755] Ministry of Transport, Public Works and Water Management, *Seaports: Anchors of the Economy*, (in Dutch), 2004.

[756] Ministry of Transport, Public Works and Water Management, *Ports and Policy*.

[757] Institute of Shipping Economics and Logistics, June 2006.

EUROPE

SWEDEN

OVERVIEW

Economic regulation in Sweden is the responsibility of national regulatory institutions in most sectors of the economy, with the exception of water and wastewater which is governed by five district water authorities. As a member of the European Union, the regulatory regime in Sweden also reflects Directives issued at the European level, either directly applicable, or that have been transposed into Swedish legislation. Sweden also has close relations with the other 'Nordic' countries (Finland, Denmark, Norway), that have similar objectives in their legislation and often have a similar regulatory approach. In addition, the regulatory bodies of these four countries often engage in information transfers and disclosure. In addition to industry- or sector-specific regulators (see below), a major regulatory institution in Sweden is the Swedish Competition Authority (*Konkurrensverket*) which enforces Swedish and EU competition law.

Economic regulation is structured into three sector-specific regulators; the Energy Markets Inspectorate that evolved from the Swedish Energy Agency to become an independent authority responsible for regulating the electricity, natural gas and district heating markets; the Swedish Post and Telecom Agency (PTS) that monitors the electronic communications (telecommunications and radios) and postal services; the Swedish Transport Agency (STA) that has an overall supervisory and regulatory responsibility over the rail, airport, road and port industries. The STA started its operation on 1 January 2009, replacing the former industry-specific regulators. One of the former regulators in ports – the Swedish Maritime Administration (SMA) – has a primary role in promoting security and environmental standards, rather than economic regulation.

The water and wastewater industry is regulated in a decentralised system. Since 2004, Sweden has been divided into five water districts, with one water authority (the *Vattenmyndigheterna*) in each appointed as the water authority for the district. There are concurrently County Administrative Boards and 90 Municipal Boards. These organisations operate within a three-tier system in which the water authority has primacy.

GEOGRAPHY, POPULATION, ECONOMY, POLITY AND LEGAL SYSTEM

Sweden is a large country with a comparatively small population (approximately nine million) and a sometimes severe winter climate. Geographically, Sweden is the third largest country in Western Europe with an area of 450 000 km², and the small population and large area combine to produce a low population density by European and OECD standards. It is characterised by its long coastlines, large forests and numerous lakes.

The Capital city is Stockholm. The most densely populated areas lie in the triangle formed by the three largest cities – Stockholm, Göteborg and Malmö – and along the Baltic coastline north of the capital. The Norrland interior is very sparsely populated,

which creates problems in supplying adequate services and transportation facilities to its inhabitants.

The GDP on a PPP basis is US$334.6 billion (2007 estimated). This is equivalent to approximately US$36 500 per capita, placing Sweden close to the top third of OECD countries. In recent years the Swedish economy has undergone rapid restructuring and adjustment to more intensive international competition and freer markets and thus is now heavily oriented toward foreign trade with more than half of everything manufactured in Sweden being exported. However, the Competition Authority, the European Commission and international observers such as the OECD, have noted that competitive shortcomings remain. According to Sweden's Ministry of Enterprise, Energy and Communications (MEEC): [758]

> there are a number of reasons for this, including inadequate pressure to restructure, oligopolistic competition, inadequate implementation of EU directives, insufficient familiarity with the internal market among Swedish enterprises, various entry barriers and obstacles to establishment, trade barriers and a lack of import competition.

Sweden is characterised by sophisticated infrastructure with a high degree of development in energy, communication, water and wastewater, and transportation systems. Energy, communications and transportation infrastructure are strongly integrated with other Scandanavian countries, and increasingly more broadly with other Member States of the European Union.

Sweden is a constitutional monarchy, although these duties are limited to official and ceremonial functions. The Swedish public sector operates the the national, regional and local levels. National parliament is a unicameral system (*Riksdag*), with 349 members. The Prime Minister is the head of government and is elected by the parliament

Sweden is divided into 21 regional elected county councils and county administrative boards. The county councils are responsible for overseeing tasks that cannot be handled at the local level by municipalities but require coordination across a larger region, such as health care. The county administrative boards are the central government's representatives at the regional level. The head of the county administrative board, the county governor, is appointed by the Government for a six-year term. The county administrative boards decide on such issues as land use and traffic regulation.

At the local level, Sweden is divided into 290 municipalities, each with an elected assembly or council. Municipalities are responsible for a broad range of facilities and services including housing, roads, water supply and wastewater processing, schools and public assistance. The municipalities are entitled to levy income taxes on individuals and charge for various services.

The Swedish legal system does not appear to fit neatly into either the civil or common law traditions, but rather sits somewhere in between the two, being adversarial with no binding precedence by judicial ruling (although the Supreme court creates legal precedents) and possessing substantial room for interpretative court judgments on

[758] Ministry of Enterprise, Energy and Communications (MEEC), *Government Commission to Propose Specific Action for Enhancing the Competitive Situation in Sweden*, August 2008. Available at: http://www.kkv.se/upload/Filer/ENG/Competition/Regeringsuppdrag_assignment/Uppdrag_till_KKV_aug_08_SLUTLIG_eng.pdf [accessed on 19 September 2008].

codified law.[759] In addition, as a member state of the European Union, Sweden is subject to, or required to adopt, relevant laws set in place at that level.

Sweden has two parallel types of courts – general courts, which deal with criminal and civil cases, and administrative courts, which deal with cases relating to public administration. The general courts are organised in a three-tier system of district courts, courts of appeal and the Supreme Court. Judges are appointed to the Supreme Court by the Prime Minister and the cabinet. The administrative courts also have three tiers – county administrative courts, administrative courts of appeal and the Supreme Administrative Court. In addition, a number of special courts and tribunals have been established to hear specific kinds of cases and matters.

In general, a party is free to lodge an appeal against a decision with the court that presides above it in the hierarchical structure, outlined above. In certain cases, a case can only be given a full review by a court of appeal after the court has granted leave to appeal. The Supreme Courts are the court of last resort.

APPROACH TO COMPETITION AND REGULATORY INSTITUTIONAL STRUCTURE

The main authorities of relevance to network areas are the sector-specific regulators for the energy (gas and electricity), the communications (telecommunications and post), and the transport (rail, road, airports and ports) sector. In addition, the water and wastewater industry is regulated by five water district authorities, regional county councils and local municipalities. The Swedish Competition Authority (*Konkurrensverket*) is the other major regulatory institution, whose mandate it is to enforce Swedish and EU competition law.

The latest regulatory development is the establishment of a transport sector regulator – Sweden Transport Agency (*Transport Styrelsen* – STA) – which assumed regulatory responsibilities of the former industry-specific regulators in rail (Sweden Rail Agency), airports (Sweden Civil Aviation Authority), ports (Swedish Maritime Inspectorate), and road (Swedish Road Traffic Inspectorate and parts of the Swedish Road Administration that is in charge of vehicles, vehicle import, traffic regulations as well as taxes and charges) on 1 January 2009.[760] As a government agency that has an overall responsibility for the four modes of transport, the STA is authorised to prescribe and apply regulations in the transport sector. All the regulations developed by the STA (including amendments to earlier regulations) are required to be published in the Transport Board *författningssamlin*g (TSFS), which is available in both hardcopy and online at the agency's website.

The newly established STA works, under the direction of its Director General, with six principal division/departments – Rail Division; Civil Aviation Department; Maritime Division; Road Department; Transport Register; and Development Department. It also has five administrative departments – Finance, Information, IT, Legal and Human Resources departments. In 2009, STA has 1 200 employees and its budget is sourced from appropriations (44 per cent), direct charge (32 per cent), record-keeping fees (13 per cent) and regulatory fees (11 per cent).

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[759] V. Thampapillai, 'Water Governance in Sweden', *Working Paper Series,* 2, Swedish University of Agricultural Sciences, Uppsala, Sweden, 2007.

[760] Information on the newly-established STB is mainly sourced from its website at: http://www.transportstyrelsen.se/en/ [accessed on 16 January 2009]. The website is currently under construction to make it accessible to more people.

Another important public agency in the transport sector is the National Public Transport Agency (*Rikstrafiken* – NPTA) which is responsible for coordinating a long-distance public transport system in Sweden integrated by all modes of transportation. The NPTA also acts, on behalf of the government, to develop long-distance public transport that benefits the society but is not commercially viable. To this end, it conducts market investigations and tenders, decides on and monitors traffic agreements with transport operators who agree to carry out the services. The Board of the NPTA consists of not less than five and no more than seven members and decides on rules of procedure, operations and management.

Three are three key consumer authorities. First, the Swedish Consumer Agency (*Konsumentverket* – SCA) is a government agency in charge of the interests of consumers. Second, the Swedish Consumer Association (*Sveriges Konsumenter*) is a politically independent Association, which promotes the interests of consumers. Third, the ARN is a government agency that operates like a court with the primary role of impartial dispute resolution between consumers and entrepreneurs. However, the ARN's recommendations are advisory in nature and, as such, are not binding on the parties.

The Swedish Competition Authority (*Konkurrensverket*) is a state authority that operates to safeguard and increase competition and supervise public procurement in Sweden. The goal of Swedish competition policy is well functioning markets. In addition to applying the *Competition Act*, the Authority provides proposals for changes to rules and other measures to eliminate obstacles to effective competition. It also plays a role in informing the public and promoting awareness about competition issues.[761] The Authority's main tasks are:

- Controlling notified mergers. Taking action against infringements of the prohibitions in the *Competition Act*;
- Supervising compliance with the *Public Procurement Act*;
- Submitting proposals for changes in the rules concerning competition policy and their application.
- Initiating and supporting relevant research within the field of competition and public procurement.

In August 2008 the authority was mandated to undertake a broad review of the competitive situation in Sweden, dealing comprehensively with both new and existing proposals for competition-enhancing reforms and presenting them in concrete form.[762] The competitive advantages that the EU internal market presents for Sweden were also to be addressed. On 31 March 2009, the Competition Authority delivered its report, titled *Action for Better Competition*,[763] containing an analysis of competition in Sweden and a wide range of proposals on how to improve competition.[764] The

[761] Swedish Competition Authority (*Konkurrensverket*), *About Us*, Stockholm, 2008. Available at: http://www.konkurrensverket.se/t/SectionStartPage____219.aspx [accessed on 11 July 2008],

[762] MEEC, *Government Commission to Propose Action for Enhancing the Competitive Situation in Sweden*, August 2008.

[763] Swedish Competition Authority, *Action for Better Competition: Executive Summary*, Report 2009:4, May 2009. Available at: http://www.kkv.se/upload/Filer/ENG/Publications/rap_2009-4_summary.pdf [accessed on 3 June 2009].

[764] Swedish Competition Authority, *Press Release*, 31 March 2009. Available at: http://www.kkv.se/t/NewsPage____4820.aspx [accessed on 29 April 2009].

analysis was conducted by the Competition Authority and commissioned researchers and consultants, using data and documentation provided by regulatory authorities and data collected directly by the Competition Authority. The proposals include an integrated consumer portal site and the introduction of measures that improve consumer choice and public procurement.

Once a case has been registered at the Swedish Competition Authority, the process is as follows for a final decision to be made:

- Registration of a case.
- The case is assigned to a department and group of case officers.
- The case is prepared.
- The department's proposed decision is circulated internally within the Authority.
- The proposed decision on a specific case is presented by the case officers to the Director-General and discussed in the presence of a Competition Counsellor and the Head of Department.
- The final decision is issued and the case file is closed.

Where information on appeal avenues for regulatory decisions is available – in telecommunications, posts and rail – appeals can be made to the County Administrative Court. Appeals against the rulings of the County Administrative Court can be made to the Administrative Court of Appeal.

REGULATORY ARRANGEMENTS BY INDUSTRY OR SECTOR

1. Energy

The generation of electricity in Sweden is dominated by a small number of companies. In 2005, three companies (Vattenfall, Fortum and E.ON Sweden) accounted for 88 per cent of generated electricity. Almost all electricity is generated from nuclear or hydro sources. The Swedish TSO, *Svenska Kraftnät*, is unbundled in terms of ownership, whereas the distribution companies are required to unbundle in legal and functional terms. In 2005, there were 175 distribution companies and 130 supply companies. The largest electricity suppliers, Vattenfall, E.ON and Fortum, had a market share of about 50 per cent, which is the equivalent of about 2.5 million customers. With deregulation in 1996, Sweden together with Norway formed the wholesale market Nord Pool, which now also includes Denmark and Finland. Nord Pool sets the price of electricity in every hour, based on supply and demand bids. Nord Pool is jointly owned by *Svenska Kraftnät* (the public authority which operates the transmission system for electricity in Sweden) and Statnett (Norwegian TSO). The wholesale power market is more competitive (the three largest Swedish generators only held an aggregate 41 per cent of the Nordic market). Since the liberalisation of the market in 1996, 55 per cent of all Swedish households have switched energy providers or renegotiated their contracts.[765]

The Swedish gas market is relatively small. In May 2006, there were eight natural gas companies in Sweden, of which six were also involved in the retail market. Of the natural gas consumed in Sweden, about half is imported by *E.ON Sverige* and half

[765] European Commission, *Internal Market Fact Sheet*, Brussels, 2007. Available at: http://ec.europa.eu/energy/energy_policy/doc/factsheets/market/market_se_en.pdf [accessed on 11 July 2008].

by Dong Sverige. E.ON Sverige is the dominant company in the retail market accounting for just over half of the natural gas sold in 2005. The gas transmission system is operated by *Svenska Kraftnät* (also the electricity TSO) and there are seven distribution companies. Since July 2005, all non-household customers (accounting for about 95 per cent of Sweden's total natural gas consumption) have been free to choose their supplier. The remaining market was only opened in July 2007.[766]

Regulatory Institutions and Legislation

The regulatory authority for the economic regulation of Swedish energy is the Energy Markets Inspectorate (EMI). The Inspectorate has evolved from the Swedish Energy Agency. The Agency was formed in 1998 to work 'towards transforming the Swedish energy system into an ecological and economically sustainable system through guiding state capital towards the area of energy'.[767] The Inspectorate commenced as an autonomous department within the Swedish Energy Agency, established in 2005 to encourage a more vigorous supervision of electricity and natural gas markets. Then, commencing on 1 January 2008, the Inspectorate became an 'authority on its own' with a 'more autonomous role'.[768] This new role also brought greater resourcing, increasing from the approximately 70 people (mostly economists, lawyers and engineers) and an executive body made up of six people in 2007.[769] It administers three acts – the *Electricity Act*; the *Natural Gas Act* and the *Pipelines Act*.

The inspectorate makes regulatory decisions, acts as market surveyor, issues licences, coordinates information to the public and participates in international cooperation. In more detail its functions are:

- Supervision of network providers in electricity and natural gas for compliance with the legislation. The Inspectorate supervises network tariffs and grants licences (known as 'network concessions') for the construction of power lines and gas pipelines. Tariff regulation is conducted on an *ex post* basis, where network operators set and charge prices which are subsequently assessed by the regulator for reasonableness. There are no binding rules for network connection fees.[770] If, after investigation, the Inspectorate deems that a network company's tariff was too high, the company is obliged to lower the tariff and repay money to its customers.
- In addition to access issues, the Swedish Energy Markets Inspectorate must approve the standardised balance agreement for electricity. This agreement is drawn up each year by Svenska Kraftnät, which is the public authority responsible for operating the electricity transmission system. The inspectorate examines the agreement for compliance with the objectivity and non-

[766] ibid.
[767] Swedish Energy Markets Inspectorate (EMI), *Our Organisation*, Stockholm, 2008. Available at: http://www.energimarknadsinspektionen.se/Energy-Markets-Inspectorate/About-us/Our-role/Our-Organization/#Chief%20Executive%20Office [accessed on 11 July 2008].
[768] The website of the Energy Markets Inspectorate is at http://www.energimarknadsinspektionen.se/Energy-Markets-Inspectorate/ [accessed on 19 January 2009]
[769] EMI, op. cit.
[770] Swedish Energy Agency, *The Swedish Energy Markets Inspectorate's Report in accordance with the EC Directives for the Internal Markets for Electricity and Natural Gas 2007*, Stockholm, 2007. Available at: http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/NATIONAL_REPORTS/NR_2007/NR_En/E07_NR_Sweden-EN.pdf [accessed on 25 September 2008].

discrimination requirements of the *Electricity Act 1997*. The Network Regulation Department has three units – the Network Company Unit; the Network Tariffs Unit and the Network Quality and Licences Unit.

- Monitoring of markets for efficient operation and an operational role in electricity trading. When needed, the Inspectorate can suggest changes in the regulatory framework. The Market Monitoring Department has two units; one for market surveillance and the other for market analysis.
- The inspectorate cooperates with the Swedish Consumer Agency and the industry association, Swedenenergy, in operating the Swedish Consumer Electricity Advice Bureau.
- The inspectorate is responsible for international collaboration, including the EU's creation of a single EU market for electricity and gas, and the integration of energy markets between the Nordic countries.

Process and Consultation

Electricity

The EMI makes an annual assessment of the reasonableness of network tariffs.[771] It uses a simulation model called the Network Performance Assessment Model (NPAM) to perform this evaluation. Each year the network companies are obligated to send in data concerning their business to the inspectorate. The data are input into the model, creating a reference network. The model then calculates a financial value of what the network company has done, known as the network performance. Performance relates to operation and management of electricity distribution and quality of distribution, for example, in terms of the number of power cuts during the year and their length. The network performance is then compared with what the company has invoiced its customers and a debiting rate is created. If the debiting rate exceeds 1.0 this indicates that the network tariff may have been too high and the company will be subject to an extended evaluation. If overcharging is ultimately assessed, then EMI can be ordered to low repayment of network tariffs to customers.

The NPAM is also used by the EMI as a benchmarking tool in the incentive regulation of electricity distribution companies. The EMI uses the NPAM to oversee and benchmark the performance of electricity distribution utilities against efficient reference networks.[772] Firms that exhibit significant inefficiency will be selected for further regulatory scrutiny and may be subjected to efficiency improvement requirements.[773]

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[771] EMI, *Annual Report*, 2005. Available at: http://www.energimarknadsinspektionen.se/upload/ENGLISH/Engelska%20rapporter/The%20Energy%20Markets%20Inpectorate%202005.pdf [accessed on 11 December 2008].

[772] The NPAM calculates customer values for a fictive electrical distribution system, with a total cost referred to as the network performance assessment (NPA). The debiting rate for a DSO is defined by the quotient of the revenue and the NPA. If the debiting rate is higher than a certain value, the DSO is placed under review and could be forced to pay back revenue to customers. A lawsuit is currently in progress on this use of the NPAM. See, for details, C.J. Wallnerstrom and L. Bertling, 'Investigation of the Robustness of the Swedish Network Performance Assessment Model', *IEEE Transactions on Power Systems*, 23, 2, May 2008, pp. 773–780.

[773] T. Jamasb and M. Pollitt, 'Reference Models and Incentive Regulation of Electricity Distribution Networks: An Evaluation of Sweden's Network Performance Assessment Model (NPAM)', Working Paper CWPE 0747 and EPRG 0717, September 2007. Available at: http://www.electricitypolicy.org.uk/pubs/wp/eprg0718.pdf [accessed on 10 July 2008]. Note that the

It is of note that EU Directive 2003/54/EC requires all Member States to regulate electricity tariffs *ex ante*. To implement this European legislation, Sweden is considering the introduction of ex-ante regulation of the revenue cap variety.[774]

Gas

In gas, the EMI must approve the *method* of calculation of transmission tariffs *ex ante*. The EMI has drawn up guidelines for assessing the applications made by pipeline owners with regard to their methods. These guidelines do not appear to be available in translation, but incorporate principles of non-discrimination and objectiveness.[775] The *reasonableness* of the tariff level is, as in electricity, assessed *ex post*.

Role of Interested Parties

Swedenergy (*Svenske Energi*) is an industry body representing state-owned, municipal and private companies producing, distributing or trading electricity in Sweden.[776] It acts as an advocate for its member companies in dealing with regulators and government on a local, national and international level.

The Market Surveillance Committee is responsible for supervising consumers' rights regarding access to the networks and network tariffs. This body is invited to give its opinion on matters relating to policy, regulation and issues of greater importance. The members of the Market Surveillance Committee are appointed by the government and include representatives from parliament, consumer groups and energy companies.[777]

Information Disclosure and Confidentiality

The EMI shall, upon request, be given access to all information and documents necessary for conducting supervision of network companies in electricity and natural gas markets.[778] In making its information request, the EMI can specify fines for non-compliance.

One core activities of the EMI is to provide information to consumers to ensure their position in the energy markets. To this end, the EMI addresses relevant information to interested parties and their representatives, and cooperate with the Swedish Consumer Agency and Swedenergy in running the Swedish Consumer Electricity

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regulatory approach based on reference models combined with ex-post assessments has led to serious conflicts between the regulator and a number of utilities resulting in lengthy legal proceedings involving court rulings and appeal cases.

[774] EMI, *Publications*. Available at: http://www.energimarknadsinspektionen.se/Energy-Markets-Inspectorate/Library/Publications-in-English/ [accessed on 20 December 2008].

[775] International Energy Regulation Network, *Region Associations – Sweden*. Available at: http://www.energy-regulators.eu/portal/page/portal/IERN_HOME/REGIONAL_ASSOC/REGULATOR_FACTSHEET?pId=3070043&pPath1=NORDREG&pPath2=Sweden [accessed on 10 August 2008].

[776] Swedenergy, *Swedenergy*. Available at: http://www.svenskenergi.se/sv/In-English/ [accessed on 21 May 2009].

[777] Swedish Energy Agency, 2007, op. cit.

[778] See the translated version (from Swedish to English) of the relevant Acts governing the EMI. Available at: http://www.energimarknadsinspektionen.se/Energy-Markets-Inspectorate/ENGLISH-TOPPMENU/Laws-and-regulations/ [accessed on 3 June 2009]. Specifically, the information-gathering power is specified in the *Electricity Act 1997*, Chapter 12, s. 2, SFS 1997:857, amended up to SFS 2008:265; and the *Natural Gas Act*, Chapter 10, s. 2, SFS 2005:403, amended up to SFS 2006: 646.

Bureau, an independent bureau in providing advice and guidance to electricity consumers.

The EMI, as a government agency, is bound under the *Freedom of the Press Act* to give public access to official information held by the agency, to any party requesting them. However, in accordance with the laws governing information confidentiality and secrecy, information that is deemed to be commercial-in-confidence may not be provided to third parties.

Decision-making and Reporting[779]

The Board of the EMI is appointed by government. Members are appointed for six years, and can be reappointed. Apparently this board acts more as a chief executive, rather than as a decision-making board.

Appeals

Parties may appeal the regulator's decision to the County Administrative Court within three weeks of a decision.[780] Further appeals to administrative courts of appeal, cumulating in the Supreme Administrative Court, are then possible. However, special leave to appeal is required and is usually only granted where a hearing is deemed necessary for creating or considering precedent.[781] It would therefore appear that the system allows judicial appeals. No information could be found regarding merits based appeals.

2. Telecommunications

The Swedish telecommunications industry was liberalised beginning in the early 1990s and, has achieved very high penetration of fixed-line, mobile and broadband.[782] All market segments continue to be dominated by the incumbent, TeliaSonera, which is active in traditional fixed-line (67 per cent), mobile communications (43 per cent), and Internet markets (41 per cent of broadband directly). It is still partially owned by the Swedish Government which retains a 37 per cent market share.[783]

Its extensive nationwide network means that alternative operators need to enter into interconnection and access agreements with the incumbent in order to provide a broad geographic service. Most competitive operators in the fixed-line businesses are either unbundling local loops from TeliaSonera or are relying on carrier-selection agreements. Most prospective fixed-line operators would have to compete with the

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[779] International Energy Regulation Network, *Swedish Energy Market Inspectorate*. Available at: http://www.iern.net/portal/page/portal/IERN_HOME/REGULATION_COUNTRY/REGULATOR_FACTSHEET?pId=3070043&pPath1=Europe&pPath2=Swedish%20Energy%20Market%20Inspectorate [accessed on 19 January 2009]

[780] See, for example, Swedish Energy Agency, Press Release. Available at: http://www.swedishenergyagency.se/WEB/STEMEx01Eng.nsf/PageGenerator01?OpenAgent&MenuSelect=7238C01AAC636561C1256EFD003A96DA&FuncArtSelect=38C4CCD4EC1C8F17C1257037002C0F67&FuncParm1=11&FuncParm2=2 [accessed 11 November 2008].

[781] Sveriges Domstolar, *Appeal to the Administrative Court of Appeal*, 2007. Available at: http://www.dom.se/templates/DV_InfoPage____3990.aspx [accessed on 11 November 2008].

[782] See the summary of the *Mindreach Sweden Telecommunications Report 2008* at http://www.mindbranch.com/Sweden-Telecommunications-R302-4139/ [accessed on 12 November 2008].

[783] TeliaSonera, *Annual Report 2007*, 2007. Available at: http://www.teliasonera.com/investor_relations/shareholder_information/financial_year_2007 [accessed on 29 January 2009].

equally-extensive infrastructures of principal alternative operators Tele2 and Telenor, and cable operator Com Hem.

The mobile market is mature, supporting a total of six network operators, although fifth operator Spring Mobile is an affiliate of existing GSM/UMTS operator Tele2. The number of subscribers implied by TeliaSonera's subscriber number of 4.807 million and 43 per cent market share is 11.18 million subscribers at the end of 2007, which brought apparent mobile penetration to approximately 124 per cent. Mobile broadband services have also been launched.

There were approximately 2.34 million broadband customers at the end of 2007, the majority (70 per cent) of which were accounted for by xDSL connections. Cable modem users are increasing in number faster than xDSL users, even though they account for a much smaller proportion of broadband connections (22 per cent). OECD data place Sweden as eighth for broadband penetration amongst the 30 OECD countries.[784]

Regulatory Institutions and Legislation

The Swedish Post and Telecom Agency (PTS) monitors the electronic communications (telecommunications, the Internet and radio) and postal services in Sweden. The PTS is a public authority that reports to the Ministry of Enterprise, Energy and Communications. However it is an independent agency according to the Swedish public authority model and the government cannot intervene in how PTS applies acts or decides in particular matters relating to the exercise of official power.

The PTS is governed by the *Electronic Communications Act 2003* and EU Directives relevant to the communications (telecommunications and postal services) sector. In particular, the PTS must draw up decisions *ex ante* concerning the obligations (including access obligations) that operators with significant market power must comply with. PTS is also the determinative body for disputes between those who provide electronic communications networks or associated services and third parties seeking access to these networks or associated services.[785] Matters, such as licensing applications and treatment of behaviour that is deemed to be anti-competitive, come before the regulator as a result of its own research and supervision of the market. Specifically, s. 4 of the *Electronic Communications Act* states that if the PTS has reason to suspect that a party is acting contrary to the conditions and regulations set out in the *Electronic Communications Act* then the PTS will notify the party and give it one month to rectify the situation and state its views.

Accounting separation has been imposed by the PTS in all markets exhibiting SMP in accordance with EU Directives. As of February 2008, the PTS had its own accounting separation team. While no explicit methodology is set out by the PTS, organisations with SMP are directed to consider both the EC recommendation and ERG common position on accounting separation.[786]

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[784] OECD, *OECD Broadband Statistics*, 2007. Available at: http://www.oecd.org/document/60/0,3343,en_2649_34225_39574076_1_1_1_1,00.html [accessed on 14 October 2008].

[785] *Electronic Communications Act 2003*, Chapter, 7, s. 10.

[786] *Fondazione Ugo Bordoni, Annex XVIII – Sweden*, Amended Version 25 February 2008. Available at: http://www.fub.it/files/Sweden%20NEW.pdf [accessed on 18 August 2008].

Process and Consultation

The PTS publishes its process in relation to SMP decisions.[787] The steps, as described, are:

- The PTS draws up a draft decision concerning the relevant sub-markets, having examined whether there are any stakeholders that have significant power in the respective market and which obligations it would be appropriate to impose on these undertakings.
- The PTS consults with the operators, the Swedish Competition Authority and the European Commission in relation to the draft decision. The consultation peiod can vary depending on whether new issues arising and whether there is a need for meetings with the European Commission. The operators have one month to express their views on the draft decision concerning market definition, SMP assessment and the obligations that the PTS intends to make a decision on.
- The views of the operators will be published on the PTS's website and the PTS will incorporate these views into the draft decision. The draft decision will be sent to the Swedish Competition Authority (SCA). The SCA has one month to issue a statement of views.
- The views of the SCA will be published on the PTS's website and the PTS will incorporate the views into the draft decision.
- The operators have a further month to express an opinion about the draft decision in a second round of consultations.
- The views of the operators will be published on the PTS's website and the PTS will incorporate these views into the draft decision.
- The proposed decision will be submitted to the European Commission and other European regulatory authorities. The European Commission has one month to submit a statement of views concerning the proposed decision.
- The PTS will publish the decision on its website and any revisions to the draft decision based on the European Commission's statement of views will be made.
- PTS will send the final decision to the recipients, and the obligation decision will be published on the PTS's website.

In the case of a request for resolution of a dispute, the PTS has four months from the date of the the request to resolve the dispute unless there are special circumstances or the scope of the dispute demands further time.[788] The PTS can refer the dispute for mediation where it deems this suitable, however if mediation has proceeded for four months without agreement, a party can request that the PTS resolve the dispute through the formal process.[789] This alternative dispute resolution mechanism suggests that some emphasis is placed on resolution outside of the regulatory process. A decision issued by the PTS to resolve a dispute will only regulate the terms between the parties in the specific dispute.

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[787] See the website of the Swedish Post and Telecom Agency (PTS) at: http://www.pts.se/en-gb/Industry/Telephony/SMP---Market-reviews/Method/.
[788] *Electronic Communications Act 2003*, Chapter 7, ss. 10–11.
[789] *Electronic Communications Act 2003*, Chapter 7, ss. 10–11.

The PTS's supervisory activities can result in decisions that are generally applicable. In these decisions the PTS is required to publish a proposal and give those affected and other interested parties 'reasonable time (typically not more than four weeks) to express their views'.[790] These consultations are made publicly available except where information is legally protected.[791] In addition, the regulator, as industry supervisor, publishes, annually, a half and full year Market Review.[792]

Role of Interested Parties

The economic regulation of telecommunications in Sweden does not involve any particular arrangements for interested parties.

External experts and consultants may be involved in the regulatory process. Parties may use consultants' studies and/or expert opinions as evidence to support their claims in disputes.[793] In some cases the regulator may invite external experts/consultants to conduct investigations into the systems and processes of parties being investigated.[794]

Timeliness

As above, consultation periods typically run for four weeks. The PTS has a four month time limit for the consideration of disputes unless there are special circumstances. Of the decisions on telecommunications published on the website (ten decisions) all appear to have been dealt with within the four-month time limit.[795]

Information Disclosure and Confidentiality

The PTS is given information gathering powers in order to police compliance with the Act.[796] The legislation obliges any party that conducts operations subject to the *Electronic Communications Act* to supply information and documents as requested by the PTS. The PTS is also granted permission to gain access to the premises of operations subject to the *Electronic Communications Act* for the purpose of supervision.[797] The PTS also constantly collects information in order to fulfil its role as industry supervisor.

The authority can issue fines and further orders to parties who fail to fulfil its requests for information or other orders.[798] However, if the regulator deems there to be 'special circumstances',[799] having regard to the scope of the dispute, the time limit may be extended.

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[790] *Electronic Communications Act 2003*, Chapter 8, ss. 8–10
[791] *Electronic Communications Act 2003*, Chapter 8, s. 14.
[792] PTS, *Reports*, Stockholm, 2008. Available at: http://www.pts.se/en-gb/Documents/Reports/ [accessed on 26 June 2008].
[793] PTS, *Beslut 03-15622 (Decision 03-15622)*, Stockholm, 2004. Available at: http://www.pts.se/upload/Documents/SE/*Kaskadbeslut040930_med_bilaga.pdf* [accessed on 27 June 2008], pp. 7–8 and 12.
[794] PTS, *Föreläggande till Telia Sonera om information kring tillträde till kopplingsskåp - 08-1844 (Injunction under Chapter 7, Section 5 of the Act, No. 08-1844)*, Stockholm, 2008. Available at: http://www.pts.se/upload/Beslut/Telefoni/2008/Forelaggande-information-kopplingsskap-08-1844.pdf [accessed on 1 July 2008].
[795] PTS, *Telefoni & Internet*, Stockholm, 2008. Available at: http://www.pts.se/sv/Dokument/Beslut/Tele/?p=0 [accessed on 30 January 2009].
[796] *Electronic Communications Act 2003*, Chapter 7, s. 4.
[797] Ibid., Chapter 7, s. 2.
[798] ibid., Chapter 7, s. 3.
[799] ibid., Chapter 7, s. 10.

Information disclosure in the *Electronic Communications Act* is subject to the standard Swedish laws of information confidentiality and secrecy (*Secrecy Act 1980*). The PTS may supply the information it collects to the Commission of the European communities or other competent authorities within the EEA upon justified request by these authorities.[800]

Decision-making and Reporting

The PTS is headed by a board appointed by the Government, consisting of not less than five, and no more than ten, members.[801] The Director-General is the executive manager. The Board of the PTS determines matters.

The PTS has a staff of around 250, most of whom are economists, lawyers or engineers. The departments are organised into areas of responsibility such as frequency management, competition, consumer affairs and telecommunications access regulations, and then further into economic, legal and administrative groups. There is also a strategic affairs department.[802] The PTS's ongoing activities are funded through charges imposed on operators and undertakings and parties who hold licences subject to the PTS's supervision.[803]

The decision-making process is not litigious, but could be considered 'closed' or non-participatory. The regulator considers and decides on a dispute without the participation of the parties, past the point of their initial submissions outlining the dispute. That is, in the case of a request for resolution of a dispute, parties' views are gauged entirely from their initial submission and no further consultation takes place.

PTS dispute determinations apply specifically to the parties in the dispute.[804] A decision made under Chapter 7, s. 4 of the *Electronic Communications Act* which entrusts the PTS with supervisory and enforcement responsibilities is, on the other hand, broadly applicable.[805]

Reasons for decisions are published on the agency's website.

Appeals

Appeals against PTS decisions can be made to the County Administrative Court. Appeals against the rulings of the County Administrative Court can be made to the Administrative Court of Appeal.[806] Since 1 January 2008, the Administrative Court of Appeal is the court of last instance for the determination of cases involving the *Electronic Communications Act* (prior to this, decisions could be appealed further to the Supreme Administrative Court).

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[800] ibid., Chapter 8, s. 2.

[801] *PTS instruktion*, SFS 2007:951, Stockholm, 22 November 2007. Available at: http://www.riksdagen.se/Webbnav/index.aspx?nid=3911&bet=2007:951 [accessed on 1 July 2008].

[802] PTS, *Om kommunikations-myndigheten PTS (Brochure)*, Stockholm, 2008. Available at: http://www.pts.se/upload/Ovrigt/Om-PTS/infomaterial/pts-presentation.pdf [accessed on 25 September 2008].

[803] PTS, *Introducing the Swedish Post and Telecom Agency*, Stockholm, 2008. Available at: http://www.pts.se/upload/Ovrigt/Om-PTS/infomaterial/introducing-pts.pdf [accessed on 14 August 2008].

[804] PTS, *PTS Decisions*, Stockholm, 2008. Available at: http://www.pts.se/en-gb/Regulations/PTS-decisions/ [accessed on 1 July 2008].

[805] PTS, *Tvistlösning*, Stockholm, 2008. Available at: http://www.pts.se/sv/Regler/Tvistlosning/ [accessed on 1 July 2008].

[806] PTS, *PTS Decisions*, 2008, loc. cit.

Regulatory Development

In a recent document outlining proposals for a new national broadband strategy, the PTS has provided strong support for the functional and/or legal separation of the incumbent operator, TeliaSonera, into its retail and wholesale arms.[807] The fixed-network wholesaler, TeliaSonera Network Sales AB ('*Skanova*') has voluntarily been a separate legal entity for a number of years. Despite this, the PTS is concerned about potential discrimination in relation to information flows. Concerns have also been raised regarding the presence of different installation and maintenance procedures for the affiliated retail organisation as compared to alternative operators.

The PTS's preferred model of separation entails:

- 'principles of equal treatment' in the nature of the UK's 'equivalence of input' concept;
- Complete workforce separation and it is suggested that all wholesale human resources be separated from the rest of the company;
- Elimination of the exchange of information;
- Creation of a compliance monitoring body.

However, the PTS considers the current regulatory law to give it only limited scope to impose separation as an industry-specific remedy. It is therefore encouraging TeliaSonera to separate its functions voluntarily.[808] Alternatively, the PTS is eager to secure powers to order separation through the EU communications review process.

3. Posts

The Swedish postal system operates in one of Europe's first and most liberalised mail markets. The incumbent, Posten AB, is 100 per cent state owned, although it was 'privatised' in terms of its corporate structure. Posten AB lost its monopoly privileges on letter mail in 1993, well before all of its European counterparts, with the exception of Finland. Before then, the government already allowed competition in parcels and bulk mail. However, in spite of this exposure to competition, as of 2007, Posten AB had retained roughly 91 per cent of the addressed letter market (about 3.15 billion items).[809] It is also dominant in the unaddressed mail market and has engaged in a variety of other postal and related services, such as logistics. The Swedish and Danish governments announced in April 2008 that they would be merging their state-owned postal operations in response to increased competition in the postal markets.[810]

As of 2007, there were 33 other licensed postal operators in Sweden. The majority operate actively in the local market of mail conveyance. Some are involved in the delivery of international mails. CityMail, owned by Norwegian Post, is one major competitor to Posten AB in the delivery of addressed mail. CityMail's market share in terms of volume was stated in 2007 to be 13 per cent of the bulk mail and 8.6 per cent

[807] The full document is only available in Swedish, but news item summary by T-Regs can be found at: http://www.t-regs.com/content/view/375/86/ [accessed on 3 December 2008].
[808] The PTS is also encouraging the government, as a shareholder in TeliaSonera, to consider such an option. See, T-Regs, *Sweden: PTS Puts Forward New Broadband Strategy, Advocates Functional Separation and Fibre Access*, February 2007. Available at: http://www.t-regs.com/content/view/375/86/ [accessed on 3 December 2008].
[809] Consumer Postal Council, *Index of Postal Freedom Sweden – Posten*.
[810] 'Sweden and Denmark to Create a Postal Giant', *International Herald Tribune*, 1 April 2008. Available at: http://www.iht.com/articles/2008/04/01/business/post.php [accessed on 13 October 2008].

of all addressed mail). It was also reported in 2007 to be running at a profit for a 'couple of years'.[811]

Regulatory Institutions and Legislation

The items of legislation governing the postal services are the *Postal Service Act 1993* and related acts such as the *Postal Services Ordinance 1993* and the *Act on Basic Counter Services 2001*, as well as relevant EU Directives. The latter act is due to be abolished by the end of 2008. The *Postal Service Act* stipulates the rules on universal service obligations and licensing. A universal service provider is obliged to provide a daily and national postal service that meets prescribed minimum service standards. Pricing needs to be reasonable, cost-based, and geographically uniform. A price cap is imposed on mail items weighing up to 500 grams, whose annual price increases are capped by the Consumer Price Index change.[812] Provision of postal services is subject to a licence, which can be granted if the applicant satisfies certain criteria such as the capability of the applicant to ensure reliability and integrity.

Posten AB, as the universal service provider obliged by its licence, receives no compensation for this service provision, commonly in other countries taking the form of reserved services or government subsidy. Through past investigation, the Swedish Government formed the view that competitive advantage of providing full postal service was embedded with a universal service provider.

The Post and Telecom Agency (PTS, see previous section for details) is the independent government agency responsible for the enforcement and administration of the *Postal Service Act* and related legislations. Its, regulatory duties include:

- licensing and supervising all postal operations
- supervising the quality of service in the provision of universal services by Posten AB
- supervising the prices for universal services provided by Posten AB
- settling access disputes between postal service providers
- issuing regulations necessary for the application and implementation of the *Postal Services Act*
- taking charge of undeliverable letters.

Competition issues are dealt by the Swedish Competition Authority, which has heard more than a hundred cases concerning Posten AB. Some cases relate to whether Posten AB's 'customer loyalty programs' – discounts offered to big and well-established companies to keep their business with Posten are anti-competitive or not. Other cases include investigations of allegations of below-cost pricing,

As the PTS has a collective role in regulating telecommunications and posts, the regulatory process may have common elements in consultation, information disclosure and decision-making mechanism. Therefore, the following section focuses

[811] ECORYS, *Main Developments in the Postal Sector (2006–2008), Annex II: Country Sheet: Sweden*, 2008, p. 935. See also PTS, *The Liberalised Swedish Postal Market*, March 2007. Available at: http://postinsight.com/files/PTS_-_The_Liberalised_Swedish_Postal_Market.pdf [accessed on 21 February 2009].

[812] It is possible to use any unused price increase in a year during one of the three following years (s. 9 of the *Postal Services Ordinance 1993*).

on components of the process that are unique to the postal services industry. It may be considered concurrently with the previous section on telecommunications.

Process and Consultation

In conducting its price regulation duties, the PTS specifically studies the cost and product allocation method used by Posten AB. It is required to report annually to the Ministry of Industry, Employment and Communications whether Posten AB has complied with the price regulation.

The PTS is also required to report on the compliance with the postal regulatory framework, Posten AB's compliance with universal service obligations, as well as the market situation.

In assessing requests for changes in the postcode system, the PTS is required under the *Postal Services Act* to consult other licence holders, authorities responsible for national registration, the real estate directory and local authorities concerned.

When a matter pertaining to the application of the *Postal Services Act* needs to be regulated generally, the PTS has the option of issuing regulations.

Role of Interested Parties

The PTS is required to act in the best interests of consumers. To this end, it continually collects information about the market to make consumers better informed. The PTS regularly publishes reports on the development of the market.[813] Quality of service in the provision of universal services by Posten AB is audited by an independent auditor.

Information Disclosure and Confidentiality

The PTS shall, upon request, be given access to all information necessary for conducting supervision. This covers requiring data and information on accounting system (for example, cost allocation methodology) from Posten AB. The PTS is entitled to have access to non-residential areas where operations subject to supervision are conducted. The PTS, in its 1999 report, indicated that the unwillingness of Posten AB to reveal cost-allocation data and other verifiable documentation had caused substantial delay and left the regulator less time in examining the information.[814]

As a government agency, the PTS is bound under the *Freedom of the Press Act* to give the right of public access to official information. All documents, including personal data submitted to the PTS, may be provided to any party requesting them. However, in accordance with the laws governing information confidentiality and secrecy, information that is deemed to be commercial-in-confidence may not be provided to the third parties.

Decision-making and Reporting

The PTS has its Postal Affairs Department that is responsible for supervising the postal industry and licences for postal operations. The department is organised into three areas of responsibilities, viz Postal Supervision, Undeliverable Letters, and

[813] Examples include *Service and Competition* 2008 and *Postal Services in Sweden* 2006.
[814] PTS, *Implementing a Price Regulation in a Deregulated Letter Mail Market – The Swedish Experience in Brief,* August 1999, p. 11.

Office of Public Records and Archives. The number of full-time equivalent staff working on postal supervision was nine in 2007.

The PTS also has the powers to issue orders necessary for compliance with the Act and related regulations, which may be imposed under penalty of a fine, and to revoke licences.

Appeals

The PTS's licensing decisions on alterations of postcodes system may not be contested by appeal. Appeals against other rulings handed down by the PTS can be made to the Administrative Court of Appeal.

4. Water and Wastewater[815]

Water resources are generally abundant in Sweden, except the south-eastern part and some islands. However, the quality of water is not uniform and in some cases water treatment is needed to provide high-quality drinking water. There are over 2 000 municipal water supply works and 67 000 km of municipal water pipes. The household water consumption is about 200 litres per person and day. There are also some more than 2 000 wastewater plants and 92 000 km of sewers of which 32 000 km are drainage pipes.

Public water and sanitation utilities (the VA service) have traditionally been managed by municipalities in Sweden. A co-ordinating and research body, Swedish Water (Svenskt Vatten; formerly the Swedish Water & Wastewater Association), was set up by the municipalities in 1962 to assist with technical, economic and administrative issues and to represent the interests of the municipalities in negotiations with authorities and other organisations on regulations.[816]

Swedish Water has several *ad hoc* working groups with experts from member municipalities covering the fields of municipal water and wastewater activities. Swedish Water publishes a journal, newsletters and reports. The association is a member of the European Union of National Association of Water Supplies (EUREAU) and administers the national secretariat for the International Water Association (IWA). At present, Swedish Water has all 290 municipalities as its members.[817]

In addition, in 1996 the water and wastewater industry founded the Swedish Water Development company (SWD). The SWD is jointly owned by Swedish Water, the Stockholm Water Company and the Water and Sewage Works in Gothenburg and Malmö. The SWD's board is composed of municipal politicians and civil servants. The SWD is mandated to co-operate with counties to develop Sweden's water and

[815] The general information on the water and wastewater in Sweden is drawn from the Swedish Water and Wastewater Association, *Facts on Water Supply and Sanitation in Sweden (in English)*. Available at: http://www.svensktvatten.se/web/english.aspx [accessed on 27 January 2009]. See also: Jan-Erik Gustafsson, *Public Water Utilities and Privatisation in Sweden*, Paper presented at EPSU Public Service Conference, Brussels, 12 December 2001. Available at: www.psiru.org/epsuconference/Jan-ErikPresentationPaper.doc [accessed on 27 January 2009].

[816] SWWA – Swedish Water, *About SWWA,* Stockholm, 2008. Available at: http://www.svensktvatten.se/web/english.aspx [accessed on 4 July 2008].

[817] Ibid.

wastewater industry. The SWD projects are financed through funds and grants from the Swedish Government and or the participating municipalities.[818]

A new trend in the 1990s for some municipalities was to establish limited companies, multi-utility or sole water companies. Beginning in 1998, Sweden has experienced a trend toward some privatisation of facilities through private ownership, public-private partnerships and a multinational management contract. However, only two private water companies operate in Sweden – Norrköping and Karlskoga. Concurrently Sweden has a well-developed market where subcontractors support the municipal owners. In addition six purely private management contracts exist. However, *Vivendi Environment* is the only multinational operating in Sweden with a ten-year management contract with Norrtälje, the fortieth largest municipality. According to one authority, given the continued public and political resistance to private ownership the transition to greater private sector involvement in urban water management is unlikely.[819]

Regulatory Institutions and Legislation

Overall water policy in Sweden is administered by the Ministry of the Environment and the Swedish Environmental Protection Agency (*Naturvardsverket*).[820] Since 2004, under the EU Directive requiring bodies of water to be managed according to river basins, Sweden has been divided into five water basin districts, with one water authority (the *Vattenmyndigheterna*) in each, appointed as the water authority for the district. Hence, the water and wastewater industry operates within the regulatory framework of a three-tier system in the following hierarchy: at the district level, five Water Authorities; at the regional level, 21 County Administrative Boards and five Environmental Courts; and at the local level, 90 Municipal Boards.

At the district level, the Water Board in each of the five districts is the regulatory authority. Under the EC Directive, water authorities are granted the power to establish district water programs which will include: [821]

- Water quality objectives which will take the form of statutes that bind sectoral, regional and municipal authorities and individual stakeholders;
- Water quantity objectives, and;
- Establishment of programs for monitoring and measurement.

At the regional level, the 21 County Administrative Boards and the five Environmental Courts are the corresponding government bodies acting in the national interest with respect to the environment, who have the right to issue non-tradable pollution permits. An Environmental Court operates to deal with applications for permits for water operations (such as permits for discharges of treated waste water) with the exception of land drainage, which is dealt with by the County Administrative Board. Consultation with the County Administrative Board, the supervisory authority

[818] Department of Land and Water Resources Engineering, *Working Paper EPSU Public Service Conference: Public Water Utilities and Privatisation in Sweden,* Stockholm, 2001. Available at: http://www.psiru.org/epsuconference/Jan-ErikPresentationPaper.doc [accessed on 19 September 2008].
[819] M. Lannerstad, *Water Supply and Sanitation in Sweden: A Public Trust,* AQUALIBRIUM - European Water Markets between Regulation and Competition, Berlin, 2002. Available at: http://www.siwi.org/documents/Resources/Water_Front_Articles/2002/WF4-02_Water_Supply_and_Sanitation_in_Sweden.pdf [accessed on 19 September 2008].
[820] V. Thampapillai, 2007, op. cit.
[821] Ibid.

for water operations, is compulsory before applying for a permit. The County Administrative Board also ensures that permit holders comply with water regulations and other orders. The County Administrative Board may change or stop operations that are non-compliant with the regulations governing actors with an issued permit.

At the local level, municipalities retain responsibility for provision of water and sanitation services. The municipalities own the infrastructure (including supply, sanitation and waste water facilities) and are responsible for its operation and for determining fees and tariffs. The municipalities may jointly form inter-municipal companies or contract operations to non-governmental companies. If water supply and sewerage treatment facilities are inadequate to meet the health needs of the municipality, the county administrative board, under penalty of fine, can order the Municipal Board to fulfil its obligations.[822] Several stakeholders have a voice at the municipal level, such as the Swedish Farmer's Federation, landowners and the Swedish Local Authorities Association.

The three most important laws regulating urban water supply and sewage disposal are the *Environmental Code 1999*, the *Food Act*, and the *Public Water and Wastewater Plant Act*.

The *Food Act* states that drinking water is to be considered a foodstuff and must be handled with equal standards as other food products. The *Environmental Code* regulates environmental standards and stipulates measures to prevent and minimise environmental impacts caused by water abstraction and sewage effluent. However, in accordance with the *EU 2000 Water Directive*, the Environmental Protection Agency, in co-ordination with various user groups and industry participants, drew up more detailed environmental regulations in the *Ordinance on Management of the Quality of the Aquatic Environment 2004*.[823]

The *Public Water and Wastewater Plant Act* states that it is a municipal responsibility to arrange sufficient water supply and sewage treatment services to assure the municipal population's good health. The law also mandates that water charges are not to exceed necessary costs to provide the services, and that charges only can be used within the water and wastewater industry. Consequently, municipalities cannot generate funds from water charges to be used in other areas, and potential private owners cannot pay profit-based dividends to their shareholders.

Regulatory Development

The provision of water and wastewater services comes under a myriad of municipal, county, national and supranational (EU) influences, constituting both technical and economic 'regulation'. The influence of the *2000 EU Water Directive* will increase over time, and should result in a greater clarity of economic regulation than is currently observed.

5. Rail

There are currently a total of approximately 500 rail infrastructure companies operating in Sweden. They are classified into five groups according to size and

[822] T. Katko, *D10I: WaterTime National Context Report – Sweden,* European Commission – WaterTime, Brussels, 2004. Available at: http://www.watertime.net/docs/WP1/NCR/D10l_Sweden.doc, [accessed on 26 September 2008].

[823] Geological Survey of Sweden, *Radical Overhaul of Water Management in Sweden*, Uppsala. Available at: http://www.sgu.se/sgu/eng/samhalle/grundvatten/sgu_ramdirektiv_e.html [accessed on 4 July 2008].

importance. Group one is the only group subject to regulation and includes *Banverket*, *Arlandabanan*, *Göteborg Port*, *Öresund Bridge* (a bridge-tunnel link between Sweden and Denmark) and Inlandsbanan. All but Banverket are privately owned companies.

Starting from 1988, Sweden was one of the first countries to establish a separately owned railway infrastructure authority (owned by the state). *Banverket*, is now the National Rail Administrator and main infrastructure manager. It coordinates development in the railway industry, assists Parliament and the Government with railway issues, is responsible for the operation and management of state track installations, co-ordinates the local, regional and inter-regional railway services, and provides support for research and development in the rail industry. It owns 14 000 kilometres of track, has 5 000 employees and is a member of RailNet Europe.[824]

In 2001, the State-owned incumbent in railway services operation was split into two companies – SJ AB and Green Cargo – operating in passenger services and freight service respectively. Despite the entry of several other operators offering passenger and/or freight services, the incumbents still dominate the passenger and freight markets.

Regulatory Institutions and Legislation

Prior to 2004, industry regulation was the responsibility of the Swedish Rail Inspectorate, a division of Banverket. The *Railway Act 2004* and associated regulations, which implemented the 2001 EU Directives on rail transport, are the key items of legislation governing Sweden's rail industry.[825] In accordance with the Act, the Swedish Rail Agency (*Järnvägsstyrelsen* – JVS) was formed in July 2004 as the regulatory body and the safety authority.[826] The JVS also acted as adviser to the Minister with respect to the national position for EU discussions and international relations.

The supervisory and regulatory responsibilities of the JVS were taken over by the Swedish Transport Agency (*Transport Styrelsen* – JTA) that incorporated the former rail, airport, port and road authorities on 1 January 2009.

The statutory duties of the regulator responsible for rail include:[827]

- monitoring the operation of rail infrastructure companies in terms of their charges, capacity allocation and service provision to ensure that these are determined in a competition-neutral and non-discriminatory manner.
- monitoring the markets for railway services to ensure that the markets work effectively from the point of view of competition.
- licensing and maintaining a register of Swedish railway rolling stock and a register of the Swedish railway infrastructure.

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[824] See RailNet Europe (RNE), *Country Information – Sweden*. Available at; http://www.railneteurope.com/cont/country_detail.aspx?comid=14 [accessed on 17 February 2009].

[825] *Rail Regulation* (*Svensk författningssamling* – SFS No. 2004:526), issued by the Ministry of Industry, on 3 June 2004 is the regulation specified under the *Railway Act*. For texts in the Act and the related regulation (in Swedish), see SFS's website at: http://www.riksdagen.se/webbnav/index.aspx?nid=3910 [accessed on 19 January 2009].

[826] Swedish Rail Agency (JVS), *About the Agency*, 2008. Available at: http://www.jvs.se/en/Information/About-the-agency.sapx [accessed on 2 July 2008].

[827] Ibid.

- dealing with access disputes between railway services operators and infrastructure managers that may be referred to the Agency. If the parties fail to agree, conditions in track access agreements may also be set by the regulator.

An infrastructure manager is statutorily required to draw up an annual network statement for the rail network it manages. The network statement must contain details of available infrastructure; information about the conditions for access to it and information about procedures and criteria for the distribution of infrastructure capacity. The statement must be drawn up after consultation with all parties concerned by the document. The statement must be published, regularly updated and amended as necessary.[828]

Process and Consultation

The *Railway Act 2004,* Chapter 6 ss. 10–13, requires the infrastructure manager to settle disputes concerning capacity allocation through coordination and consultation. The infrastructure manager is mandated to try to resolve possible conflicts of interest that arise in connection with the allocation of capacity through the provision of a procedure for the resolution of the disputes. Most often, disputes arise between the infrastructure manager (usually *Banverket*) and those operators wishing to contest its conditions and prices for access to the network. If co-ordination fails (that is, no compromise can be made), the infrastructure manager must declare the section of rail congested and resume discussions with the complainant.

Any railway services operator, infrastructure manager or party that is authorised to organise rail transport may refer a dispute concerning whether an infrastructure manager's decision is in accordance with the *Railway Act 2004* to the regulator. However, only if the operator contests the validity of the infrastructure manager's decision under the *Railway Act 2004* (or under the regulations made in accordance with the Act) can it approach the regulator to resolve its dispute. Matters may arise from the review of the network statement submitted to the regulator for approval by the infrastructure manager.

Examination of the limited dispute cases listed in English on the previous regulator's (JVS's) website and the *Railway Act* indicates that the regulatory process does not, generally, involve a wide range of external consultation. The parties may submit their arguments, which may contain the opinions of experts or consultants procured by the parties themselves, but after submissions have been made, the regulator does not seem to call on the support of external consultants.

Timeliness

The regulations governing the rail industry require the infrastructure manager to coordinate an adequate dispute resolution within ten days of the conflict being presented.[829] The *Railway Act 2004* mandates that the regulatory decision on an access dispute is made no later than within two months from when all relevant information regarding the dispute has been submitted to the regulator. However, there are no consequences for not complying with these statutory time limits. Examination

[828] JVS, *Decision 2006-1473/22,* Stockholm, 2007. Available at: http://www.jvs.se/dokument/English/Decisions/Decision-BV-2007-09-21.pdf [accessed on 2 July 2008].

[829] JVS, *The Swedish Rail Agency's Regulations concerning Access to Railway Infrastructure (JvSFS 2005:1)(in English)*, The Statute Book of the Swedish Rail Agency, 2005. Available at: http://www.jvs.se/dokument/Foreskrift/2005-1-eng.pdf [accessed on 14 August 2008].

of the few documents published in English by the previous regulator (JVS) with respect to access disputes suggests that they are generally dealt with well within the two-month time limit.[830]

There may be an incentive for the infrastructure manager to cause delay if the regulatory decision will require an adjustment (lowering) of access charges or adjustment of timetables previously finalised. As a result, there appear to be avenues in which an applicant successfully requests expedition of the process. For example, in the case of Dispute 2008-245831, in which the applicant disputed the decision of Banverket regarding capacity allocations, the decision paper states: '*Tågkompaniet* (the applicant) has requested a speedy handling of the matter, because otherwise the company will lose traffic to other traffic types'.

Role of Interested Parties

The legislation specifically assigns the National Public Transport Agency (NPTA – for detail, see the section on 'Approach to Competition and Regulatory Institutional Structure'), in addition to other designated service operators (such as SJ AB), the legal right to organise passenger traffic on the state-owned networks.[832] However, consultation during regulatory process with the NPTA is not mandated by the legislation.

Specific arrangements for consultation with industry syndicates, consumer groups, or unions, are not identified by the legislation. However, in general the regulator, as industry supervisor, has shared information and has actively sought consultation with users and industry participants.[833]

Information Disclosure and Confidentiality

The *Railway Act 2004* (Chapter 8, s. 3) requires the infrastructure manager and any party undertaking negotiations with respect to price or capacity allocations to notify the regulator of the negotiations underway, so that it is usually aware and informed about any negotiations that may potentially require mediation.

The *Railway Act* also entitles the regulator to obtain any information, documents, and access to premises that are associated with operations subject to the Act. It may call upon the police and customs authorities: first, to aid in the execution of a decision that relates to gathering information for fulfilling the statutory supervision activities, and second, to ensure the cooperation of the parties.[834]

In addition, it publishes annual industry analysis reports, records the details of ownership for railway undertakings, monitors competition-limiting phenomena, and works collaboratively with the Swedish Competition Authority.[835]

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[830] The only dated dispute resolution (of the four listed in English on the website) appears to have been dealt with well within the two-month time limit. See JVS – The Swedish Rail Agency, *Decision 2008 - 245*. Available at: http://www.jvs.se/dokument/English/Decisions/Decision-BV-TKAB-080226.pdf [accessed on 2 July 2008].
[831] JVS, *Decision 2008 - 245*, 2008, op. cit.
[832] *Railway Regulation 2004*, Chapter 4, s. 2.
[833] JVS, *JVS Annual Report*, Stockholm, 2006. Available at: http://www.jvs.se/dokument/English/Annual-report/Annual-report-2006.pdf [accessed on 3 July 2008].
[834] *The Railway Act 2004*, c. 8, s. 3.
[835] JVS, *Competition Monitoring*, Stockholm, 2008, Available at: http://www.jvs.se/en/Ga-direkt-till/Market-monitoring/Competition-monitoring.aspx [accessed on 2 July 2008].

As with other regulatory institutions in Sweden, the public disclosure of information gathered by the regulator is subject to the conditions of the *Secrecy Act 1980*. The *Railway Act 2004*, Chapter 6 s. 1, also states that information supplied to the infrastructure manager (usually *Banverket*) as part of capacity allocation applications may not be utilised for other purposes or forwarded to a third party, and is subject to the confidentiality conditions set out in the *Secrecy Act 1980*.

Information held by the regulator is stored in a digital case management system (Diabas). This system consists of two main parts, a document part and a case part. Documents that are received or drawn up on paper are scanned. This has increased the regulator's capabilities for rapid and correct information.[836]

Decision-making and Reporting

The previous regulator (JVS) has a 'supervisory board' consisting of no more than five government-appointed members including the Director-General as head of the authority and chair of the board. This acts also as the decision-making body. Decision reports list the members of this board and any other agents involved in the final decision-making process – usually four or five members.[837] According to the general rules for public authorities, there must be a quorum of the director General and at least half the other members for decisions to be made.[838]

The previous regulator (JVS) was staffed by approximately 50 people of whom about 30 are employed in technical roles and about ten in supporting roles.[839] Some work was contracted out.[840] The agency was divided into five divisions – Legal; Infrastructure (infrastructure licensing, market monitoring, and safety supervision); Technical (interoperability); Railway Company (operational licences and financial viability monitor) and Administration.[841]

There is a role of the rapporteur as a prelude to disputes reaching the regulator. In making its decision the regulator considers the rapporteur's report containing the parties' submissions and any other information gathered by the rapporteur. Its decisions are applicable only to the parties involved in the specific dispute. However, a decision regarding the network statement of an infrastructure manager is more widely applicable because that document provides a framework for negotiations between the manager and operators.

There does not appear to be a process of consultation and a formal hearing; rather, parties concerned in the dispute are given time to submit their respective points of view and most consultation with consumer groups is undertaken by the operators themselves. In addition, the infrastructure manager (in most cases Banverket), as part of drawing up its network statement, must consult any interested parties and receive their submissions of opinion. This process involves written submissions within a time limit (not less than one month) defined by the infrastructure manager.[842] As a result

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[836] JVS, *JVS Annual Report 2006*, op. cit.
[837] JVS., *Decision 2008-245*, Stockholm, 2008.
[838] Ministry of Finance, *Myndighetsförordningen 2007:515*, 2007. Available at: http://www.notisum.se/rnp/SLS/LAG/20070515.htm [accessed on 25 September 2008].
[839] JVS, *About the Agency*, Stockholm, 2008. Available at: http://www.jvs.se/en/Information/About-the-agency.aspx [accessed on 2 July 2008].
[840] id., *JVS Annual Report 2006*.
[841] id., *JVS Organisation (in English)*, Stockholm, 2008. Available at: http://www.jvs.se/en/Information/About-the-agency/Organisation.aspx.[accessed on 2 July 2008].
[842] *Railway Act 2004*, Chapter 6, s. 9.

the process is fairly 'closed' in that the regulator receives the claims of each party, reviews them and then hands down a decision.

The regulatory body concurrently encourages the resolution of disputes through more consultative means outside of the regulatory process before approaching the regulator.

The general legislation regarding the functioning of government authorities requires the regulator to publish a document containing the date of a decision, its content, who made the decision, who was the assigned rapporteur, and who was involved in the final decision-making process. As a result, decision reports are published on the website. While the English translations provided on the website seem to be, generally, only brief outlines of decisions made (1 to 2 pages), the full Swedish decision papers appear to contain more information about background, reasoning, applicable legislation and those present at the time of taking a decision.[843]

Appeals

An appeal may be made by any interested party.[844] To appeal a decision a written submission (outlining the changes/points of disagreement) must be made to the regulator, who will consider the appeal.[845] If the regulator does not amend the decision in the first instance following an appeal being registered, the appeal is forwarded to the County Administrative Court where it is subject to judicial review.[846]

It appears that an appeal based on the merits of the decision would be accepted and considered by the regulator. The decision may potentially be amended following the registration of an appeal.

Appeals by those involved in the dispute must be forwarded to the regulator within three weeks of being notified of the decision. For members representing the public, appeals must be received within three weeks of the publication/announcement of the decision.[847]

Regulatory Development

While Sweden was a leading EU country with respect to structural separation in rail, the role of the incumbents in both infrastructure and services has remained strong. In particular, the incumbent infrastructure manager, Banverket, had been responsible for industry regulation until 2004, when a sector-specific regulator – Sweden Rail Agency (JVS) – was formed. On 1 January 2009, the Sweden Transport Agency (*Transport Styrelsen*), was established with broader responsibilities across transport modes. In relation to the rail industry, the new regulator is responsible for drawing up regulations,[848] licensing, and supervising access arrangements.

6. Airports

Airports in Sweden are allocated as either primary, main or regional. There are three main international airports, all owned by the government. Stockholm-Arlanda

[843] Ministry of Finance, 2007, op. cit.
[844] JVS, *Decision 2008-245*, op. cit.
[845] Ibid.
[846] Ibid.
[847] Ibid.
[848] The Transport Agency itself is a central government authority that has the right to draw up regulations in the fields of railway, road, aviation and shipping. The regulations issued by Transport Board are published in the Transport författningssamling (TSFS) and its website. All regulations issued by the Transport Board's precedents will be managed by the Transport Board.

International Airport is the largest in Scandinavia, with approximately 20 million passenger movements per year. Gothenburg International Airport on the southwest coast is smaller than Arlanda, yet it still handles four million passengers a year to 30 destinations across Europe. Malmö-Sturup International Airport handles about the same amount of passengers as Gothenburg, and is a cheaper alternative for reaching Copenhagen from Stockholm or elsewhere.[849] Because of its large geographical size, domestic air transport is important in Sweden. There are 35 regional airports, which can be divided into two sub-categories – major regional airports with between 1 and 5 million passengers per year; and small regional airports with fewer than 1 million passengers per year.[850]

Airports in Sweden are generally owned by the government (operated by the LFV Group), a county or by a municipality. There are also a large number of small private airports.

As for airlines, Scandinavian Airlines System (SAS) is the dominant carrier in both domestic and international services. There are a large number of smaller airlines operating in the domestic market, often providing flights on a specific route. Low-cost carriers, such as Ryanair, have entered the international market.

Regulatory Institutions and Legislation

Sweden has historically had a largely unique system of regulating its airports, in which, prior to 2005, the Swedish Civil Aviation Administration (formerly *Luftfartsverket*) existed as a government agency that acted as both the operator and economic regulator of all aspects of aviation in Sweden. On 1 January 2005, *Luftfartsverket* was split up into two agencies:

- the Swedish Civil Aviation Authority (*Luftfartsstyrelsen* – SCAA) that regulates the aviation market and oversees safety:
- the LFV group (retained the name *Luftfartsverket*) manages state-owned airports and air traffic control.

Luftfartsstyrelsen was later renamed as the LFV Group, coincident with the further narrowing of its role. At present, the LFV Group operates as a public limited company that is required to generate revenues from its commercial activities (mainly managing airports and providing Air Navigation Services) and pay a set dividend to the government.[851] As the managing body that is mandated to administer airport infrastructure, the LFV Group operates 16 state-owned airports. These are the three largest ones (Stockholm-Arlanda; Goteborg Landvetter; and Malmo) plus Angelholm Helsingborg; Karlstad; Are Ostersund; Kiruna; Lutea; Skelleftea; Umea; Ornskoldsvik; Sundsvall Harnosand, Stockholm-Bromma; Jongoping; Visby and Ronneby. [852]

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[849] See the website at: http://parking.essentialtravel.co.uk/worldairport/sweden/sweden.htm [accessed on 13 October 2008].

[850] These correspond to groups C and D as per EC's classification of types of airports in Communications from the Commission of 9 December 2005, *Community Guidelines on Financing of Airports and Start-up Aid to Airlines Departing from Regional Airports, Official Journal of the European Union* 2005 / C312/01.

[851] LFV Group, *About the LFV Group*, Norrköping, 2008. Available at: http://www.lfv.se/templates/LFV_InfoSida_Bred____37383.aspx [accessed on 7 July 2008].

[852] LFV Group, *Flygplatser*, Norrköping, 2008. Available at: http://www.lfv.se/templates/LFV_InfoSida_Bred____47687.aspx [accessed on 7 July 2008].

Traffic charges, comprising *en route* charges, passenger charges, take-off charges, route charges and so on, account for about two thirds of the LFV's total revenue.[853] According to the LFV Group, its charges are in line with international practice, under which 'charges should not be of a discriminatory nature and not exceed the actual costs involved and include a reasonable profit for the owner'.[854]

As the industry-specific regulator, the SCAA's main functions were air safety, environment, market efficiency and accessibility.[855]

On 1 January 2009, the SCAA was transferred to the Swedish Transport Agency (STA) as the Civil Aviation Department of the agency. The Civil Aviation Department prescribes regulations, issues licences, and examines the civil aviation with a special focus on security, in response to the development of the aviation market. The Development Department of the STA is responsible for strategic business development and also oversees some aviation matters.

In relation to regulations governing the aviation industry, the newly established STA is currently reviewing existing regulations and has initiated consultations on new regulations in certain areas. For example, as part of the review, the regulations previously published in the format of the LFS (Civil Aviation Administration *forfattningssamling*) will be revised to conform to the SFS format (Swedish *forfattningssamling*) – the format used in Swedish laws – by the end of 2009.[856] The regulations will be divided into series (classified into the provision of areas, such as OPS (Operations), PEL (Personnel Licensing), AIR (Airworthiness), SEC (Security), AGA (Airport) and ANS (Air Navigation Services)), allowing users to have easy access to historically related information on the areas governed by a particular theme of constitution. A number of consultations for draft regulations and general advice on regulatory issues relating to aviation are also being undertaken.

In relation to airports, the STA controls and monitors airport operations to ensure that air safety is maintained. The supervision is also used the basis for its review of the airport operator carried out at regular intervals or in response to changes at the airport. The STA is responsible for issuing licences (instrumental or non-instrumental depending on the landing system) to public airports. Sweden notified the ICAO on 5 July 2001 that it has adhered to the principles set in Paragraphs 22 and 23 (cost basis for airport charges and airport charging system), 38–42 (cost basis, allocation and charging system for air navigation services charges) of the ICAO's policies on *Charges for Airports and Air Navigation Service*.[857] In principle, airport charges and air navigation services should be cost-based, non-discriminatory and transparent. The STA is also responsible for regulating groundhandling services.

In relation to air carrier services, the STA is responsible for issuing three types of licences that an air carrier operating in Sweden must hold each of an air operator

[853] See information under the section 'Industry Partners /LFVs Charges' of LFV's website at: http://www.lfv.se/en/ [accessed on 20 January 2009].
[854] Ibid.
[855] Swedish Civil Aviation Authority (SCAA), *About Us,* Stockholm, 2008. Available at: http://www.luftfartsstyrelsen.se/templates/LS_InfoSida_70_30____38853.aspx [accessed on 7 July 2008].
[856] For more information, see the section 'Rules/ Ongoing regulatory work / New rule format' in the STA's website at: http://www.luftfartsstyrelsen.se [accessed on 20 January 2009].
[857] International Civil Aviation Organisation (ICAO), *ICAO's Policies on Charges for Airports and Air Navigation Services*, Document 9082/7, last amended on 24 August 2007.

certificate, an operating licence for carrying air transport business, and a traffic licence for operating particular routes.

The key legislation governing aviation includes the *Civil Aviation Act 1957* (subject to a series of amendments)[858] and *the Act on the Ground Services at Airports* (originated in 2000 and amended subsequently in 2004 and 2008).[859] The *Civil Aviation Act* contains provisions on access to the air transport services, as either airlines, airport or air navigation service providers. The *Act on the Ground Services at Airports*, which transposed the EU Directive 96/67/EC, contains provisions on market access to groundhandling services at commercial airports. The Act states that decisions in relation to limiting ground services provision must be objective, transparent and non-discriminatory.

Process and Consultation

Consistent with EC Directive 96/67/EC, access to the market for ground handling services must be open (according to limitations of capacity, space or for security reasons), with the exception to restricted services, namely baggage handling services, ramp services, fuel and oil services and fright/mail services. For restricted services, the managing body may apply to the SCAA to have the number of service providers limited to no fewer than two for each service. At least one of the suppliers must be independent of the managing authority.

If the SCAA limits the number of service providers, the managing body will call for competitive tenders and engage in consultation with the users' group to select the providers. If the managing body provides similar services, or is otherwise related to the companies tendering applications, the selection will be left to the SCAA. Selections are made for a maximum period of seven years. The managing body is responsible for informing users of the selection made. In specifying conditions and contract terms with suppliers the managing body is required to consult with the users' group. Impendent of contract negotiations, the managing body must consult at least once a year with the users' group and the companies providing ground-handling services.

Section 11 of the Act concerns the right of the managing body to provide ground-handling services without being subject to the procedure described above. The publication of law is entirely in Swedish. Hence it is unclear as to the specifics of this provision.

The designated ground service providers must be given access to the infrastructure necessary for them to provide the particular service. This access may be subject to charges as compensation for use. A ground services provider may have its licence to operate revoked by the SCAA if it is found to be acting outside of the provisions of the law. The managing body may apply to the SCAA to have an operator's licence revoked.

Role of Interested Parties

There is a statutory requirement on the managing body of the airports (usually the LFV) to set up a Users Committee consisting of representatives of all users of the airport concerned. The Committee shall be consulted by the managing body or the

[858] See the *Civil Aviation Act* under the reference code of SFS 1957: 297 9 (enacted on 6 June 1957).
[859] See laws prescribed under the references of SFS 2000: 150 (enacted on 6 April 2000), SFS 2004: 1095 (effective on 1 January 2005) and SFS 2008:1374 (effective on 1 January 2009).

regulator, either on a regular basis or when matters such as selection of ground-handling service providers arise.

Information Disclosure and Confidentiality

As a government agency, the regulator is required to act in accordance with the 1986 *Administrative Procedure Act* that govern procedures of public authorities and the 1981 *Secrecy Act* that grants public access to information concerning matters within the scope of the authorities' functions (subject to the confidentiality requirements).

Decision-making and Reporting

The head of the STA is the Director-General. The Civil Aviation Department is headed by its director. Regulations and general advices of the regulator are published in the regulator's Statute Book. As described before, the existing regulations are currently being revised from LFS format by item to SFS format by series.

Appeals

Decisions of the SCAA or the managing body may be appealed in the county administrative courts.[860] The regulator's refusal to grant a traffic license may be brought before the government.

7. Ports

Sweden has the longest coast line of all EU countries. There are approximately 50 public ports and a number of industry-owned loading quays along the Swedish coastline, handling essentially all Swedish foreign trade. In 2003, Swedish ports handled 161.5 million tons of cargo, about 85 per cent of which is import and export, and more than half of the rest is domestic cargo carrying petroleum products.[861] The Port of Göteborg is Sweden's and Scandinavia's largest public port.

According to national significance for transportation and general interest, more than 50 ports are classified as general ports.[862] Given their importance in sea transportation, general ports are subject to universal access obligations (and therefore are 'public ports) and regulation of certain fees and charges for use.[863]

Public ports in Sweden are mainly municipally owned and are increasingly run by joint port and stevedoring companies on market conditions and in competition with each other and with overseas ports.[864] A small number of public ports retain a traditional structure with the municipality responsible for port administration and infrastructure management and with legally separate entities, either wholly owned by the municipality or co-owned with private interests, operating cargo handling services. The majority of ports, however, are organised as limited liability companies (owned by the municipality or a combination of municipal and private interests) with integrated operations. The port companies are responsible for the management and

[860] Information was extracted from a rough translation of law 2000:150 and may not be comprehensive or completely/reliably accurate. (Law 2000:150 (Google translation), 2008)

[861] R.P. Nilsson, 'Sweden: Maritime Transport – A Winner in a New Policy?' *Scandinavian Shipping Gazette*. Available at: http://www.shipgaz.com/magazine/issues/2004/20/2004_artikel.php [accessed on 8 July 2008].

[862] Swedish Maritime Adminstration (SMA), *författningssamling* (SJOFS) 1988:5 and 1992:9.

[863] Environmental Protection Agency (EPA), *General Ports Handbook 2003:7*, Stockholm, 2003. Available at: http://www.naturvardsverket.se/Documents/publikationer/620-0126-4.pdf (Roughly translated using Google Translate) [accessed on 8 July 2008].

[864] SMA, *Swedish Maritime Administration*, *Norrköping*, 2008. Available at: http://www.sjofartsverket.se/templates/SFVXPage____5603.aspx [accessed on 7 July 2008].

development of the infrastructure of the port (land, docks, terminals and water area) and provide cargo handling services. Some of them own the infrastructure, while others lease the land from the owner, which is usually the municipality.[865]

Regulatory Institutions and Legislation

Public ports are subject to a number of laws, including the *Swedish Act 1981* concerning certain fees in general port;[866] the *Swedish Act 1986* on the movement of ships in general port;[867] the *Swedish Act 1983* on the establishment, expansion and suspension of the fairway and the general port;[868] the *Swedish Act 1998* on special arrangements for water activities.[869] In general, the establishment of a public port is a decision of the Swedish government. A designated public port must be open (subject to capacity and other constraints) and may charge fees for services provided.

Each public port is independently administered by its own authority for the operation, management and development of the port itself. They together play an important role in the transport system. Development and maintenance of port infrastructure is the responsibility of the port company (municipal or private) and is subject to the *Planning and Building Act 1987*.[870] This Act requires each municipality to establish a master development plan for the entire municipality (encompassing port areas).[871] The County Administrative Board (or the municipality if the port is wholly-owned by them) issues regulations concerning safety and security measures applicable to activities carried out in the port.[872]

The Swedish Maritime Administration (SMA) has been established to promote favorable conditions for the maritime industry in Sweden.[873] It has the power to dictate regulations for the implementation of the applicable laws on maritime administration and management. Its main roles include:[874]

- The promotion and policing of safe and environmentally sustainable shipping practices;
- Dealing with port facilities disputes;
- Promoting the competitiveness of the Swedish maritime industry; and
- Promoting the appropriate development of infrastructure, provision of advice on matters with respect to the location or expansion of ports and coordination of relations between the ports.

The SMA's board makes decisions after hearing a brief prepared by the staff of the Ports of Sweden (see below).[875] The Board may request any further investigation into

[865] EPA, 2003, op. cit.
[866] SFS 1981:655.
[867] SFS 1986:371.
[868] SFS 1983:293.
[869] SFS 1998:812.
[870] The *Planning and Building Act* (1987:10).
[871] EPA, 2003.
[872] ibid.
[873] *Ordinance No. 589 of 1995 Respecting Instructions for the Swedish Maritime Administration*.
[874] Swedish Maritime Administration (SMA), *Annual Report 2008*, 2008. Available at: http://www.sjofartsverket.se/upload/Pdf-Gemensamma-Eng/AnnualReport2008.pdf [accessed on 3 June 2009].
[875] The information has been taken from a Google translation of the *Swedish law 1965:600 concerning Maritime Administration*, Law 1965:600, 2008.

a matter that is brought before it as it sees fit. In making a decision the Board must have quorum which requires the Director General and at least two other members to be present.

The majority of the SMA's work appears to relate to safety regulations, inspections of shipping vessels, navigation regulation, icebreaking, lighthouses and management of traffic on Swedish waterways. It cooperates with the port industry in several areas related to initiatives related to maritime traffic and transport policies, as well as relevant EU initiatives. A Port Council has been established for the purpose of maintaining regular contact between the SMA, the ports and their representatives.[876]

The Ports of Sweden is an industry and employers' organisation representing 50 port companies (in charge of managing and developing infrastructure) and over 4 000 employees. As an industry organisation, Ports of Sweden also represents approximately 15 port administrations through co-operation agreements. Its aim is to defend the interests of ports, to establish cooperation between ports (including in other 'Nordic' countries); to support maritime transport and shipping interests in general; and to further the interests of customers and the community.[877]

Responsibility for the supervision of maritime safety rests with the Maritime Safety Inspectorate, which was transferred from the SMA to the newly-established Sweden Transport Agency (STA) on 1 January 2009.

Regulatory Development

There is no national legislation specifying a common tariff structure or agreed methodology for tariffs charged by public ports. However, the board of directors of Ports of Sweden has issued the following opinion regarding pricing:[878]

> In the pricing of infrastructure, market prices shall apply. The cost basis of the calculation shall be the replacement cost of the investment, as well as its long-term degree of utilisation. In addition, extensive future renovation expenses and environmental investments that are needed in order to maintain and develop the port as an environmentally safe and efficient transportation link may be factored into the price. The municipal at-cost principle is not applicable since the ports are conducting commercial operations in a deregulated international market subject to intense competition.

[876] SMA, *Shipping and Ports*. Available at: http://www.sjofartsverket.se/templates/SFVXPage____5603.aspx [accessed on 7 July 2008].
[877] Transprtgruppen, *Ports of Sweden*, Stockholm, 2008. Available at: http://www.transportgruppen.se/templates/MultiMaster.aspx?id=31769 [accessed on 7 July 2008].
[878] Ports of Sweden (*Sveriges Hamnar*), *Policy Documents – Port Infrastructure*. Available at: http://www.transportgruppen.se/templates/MultiMaster.aspx?id=31758 [accessed on 14 August 2008].

EUROPE

UNITED KINGDOM

OVERVIEW

The United Kingdom (UK) has highly developed economic infrastructure across the areas of energy, communications, water and wastewater and transport. The introduction of competition in key areas commenced in the 1980s, and the range of economic regulation expanded to include the regulation of access to incumbents' monopoly infrastructure networks. Economic regulation of network industries is performed by regulatory bodies specific to a sector or an industry: the Office of Gas and Electricity Markets (Ofgem) that regulates the energy sector, the Office of Communications (Ofcom) that regulates businesses providing telecommunications, television, radio and spectrum services; the Postal Services Commission (Postcomm); the Water Services Regulation Authority (Ofwat), the Office of Rail Regulation (ORR) and the Civil Aviation Authority (CAA). The regulators generally have UK-wide jurisdiction although there are exceptions. For instance, gas, electricity and water are regulated separately in Northern Ireland by the Northern Ireland Authority for Utility Regulation (NIAUR). Similarly, in Scotland, water and wastewater is regulated by the Water Industry Commission for Scotland (WICS) rather than the Ofwat. Some of the regulators also enforce competition laws concurrently with the Office of Fair Trading (OFT). In addition, the Competition Commission (CC) has a role in promoting competition in network industries.

GEOGRAPHY, POPULATION, ECONOMY, POLITY AND LEGAL SYSTEM

The UK is an island nation in Western Europe just off the coast of France. It consists of Great Britain (England, Scotland and Wales) and Northern Ireland. Much of the country has terrain of rolling hills; however, there are mountainous regions in Scotland and Wales and low-lying terrain in many coastal areas. The UK has a temperate maritime climate consisting of mild temperatures and few extremes. Rain is fairly well distributed throughout the year.

As at July 2008, the population of the UK was estimated to be 60.9 million. Given a small land area of 241 590 square kilometres, the population density is one of the highest in the OECD. London is the capital and the largest city. Other large cities are Birmingham, Leeds, Glasgow and Sheffield.

The UK is the world's fifth largest economy.[879] In 2007, its GDP was around US$ 2.137 trillion, equating to approximately US$ 35 100 per capita (just above OECD average).[880] The available arable land is highly productive (major products are cereals, oilseeds, potatoes and vegetables). Fishing is important and the UK has large coal, natural gas, and oil reserves. Primary energy production accounts for 10 per cent of GDP. The largest share of GDP is represented by services (around two-thirds of GDP and employment), particularly banking, insurance, and business services. As with many OECD countries, manufacturing is declining in importance. The UK's key exports are machinery and transport equipment, fuels, chemicals; food, beverages and

[879] UK Trade and Investment, *The UK Economy at a Glance, Information Sheet*. Available at: http://www.ukinvest.gov.uk/Information-sheets/4018290/en-GB.html [accessed on 2 September 2008].
[880] Central Intelligence Agency (CIA), *The World Fact Book: United Kingdom*. Available at: https://www.cia.gov/library/publications/the-world-factbook/geos/uk.html [accessed on 14 July 2008].

tobacco. Its main trading partners are the US, Germany, France, Ireland, the Netherlands, Belgium, Spain, China, Norway and Italy.

The UK has an extensive road and rail networks and a large number of airports. Fixed line and mobile communication is highly developed. Broadband penetration is also significant, but still lags behind North America, Scandinavia and Japan. Because it is a very large economy that is heavily dependent on international trade, the UK has a number of large ports. The UK water and sewerage supply industry is also extensive.

The UK is a constitutional monarchy and parliamentary democracy. It has been a member of the European Union since 1973. Under this 'Westminster system', the Monarch (currently Queen Elizabeth II) is the head of State and the Prime Minister is the head of government. Executive power is exercised by the Monarch, the Prime Minister and Cabinet Members who are appointed by the Prime Minister. The Prime Minister is usually the leader of the majority party or the leader of the majority coalition following an election. The UK has a multi-party system with the two largest parties being the Conservative Party and the Labour Party. Legislative power is vested in both the government and the two chambers of Parliament – the (elected) House of Commons (646 seats) and the (unelected) House of Lords (618 seats).

The UK Parliament has the power to legislate for the UK as a whole, and has responsibility for defence, foreign affairs, economic and monetary policy, social security, employment and equal opportunity. The parliament also has powers to legislate for any parts of the UK separately but will not usually legislate on devolved matters in Scotland and Northern Ireland without the agreement of the Scottish Parliament and the Northern Ireland Assembly.

UK devolution created a national Parliament in Scotland, a national Assembly in Wales and a national Assembly in Northern Ireland. This process transferred varying levels of power from the UK Parliament to the UK's nations including education, health and prisons,

At a local level government bodies include county councils, metropolitan district councils, English unitary authorities, London boroughs, shire district councils and Welsh unitary authorities.

The UK does not have a written constitution. The unwritten constitution consists of statutes, common law and practice. The UK Parliament also has a legal duty to comply with the EU law. UK Courts must apply the EU law where there is a conflict with the UK law.

The UK does not have a single judicial system. England and Wales have one system, consisting of the Supreme Court of England and the Supreme Court of Wales. In Scotland, the Superior Courts consist of the Court of Session and the High Court of Justiciary. The Court of Session is the supreme civil court in Scotland. The High Court of Justiciary deals with criminal appeals and serious criminal cases.[881] The Northern Irish system comprises the Courts of Appeal, the High Courts of Justice and the Crown Courts. The Court of Appeal hears appeals in civil matters from the High Court and in criminal matters from the Crown Court which handles ordinary criminal

[881] Scottish Courts, *Crown Copyright 2005*. Available at: http://www.scotcourts.gov.uk/index.asp [accessed on 2 September 2008].

matters. The Court of Appeal also hears appeals on points of law from the county courts, magistrates' courts and certain tribunals.[882]

APPROACH TO COMPETITION & REGULATORY INSTITUTIONAL STRUCTURE

Regulatory bodies in the UK are specific to an industry or a sector. The Ofcom, the CAA, the ORR and the Postcomm are the sole regulator in communication, aviation, rail and postal infrastructure services respectively. In the gas and electricity sector, Ofgem is the primary regulator over all jurisdictions except for Northern Ireland. In the water and wastewater industry, Ofwat regulates all jurisdictions other than Northern Ireland and Scotland. NIAUR are the regulator responsible for gas, electricity and water in Northern Ireland while WICS regulates water in Scotland.

These regulatory bodies were set up at different times as different types of organisation (for example, public corporation *versus* non-ministerial government department) with different funding models. They are supposed to be independent from the government. The regulators have formed the Joint Regulators' Group (JRG) that meets four times a year at CEO level to discuss issues of mutual concern and to report on recent developments in their own particular industry or sector.

Some of the regulators also act as competition authority in their respective industries or sectors, concurrently with the Office of Fair Trading (OFT), applying and enforcing competition laws. These include the regulators for communications, gas, electricity, water and sewerage, railway and air traffic services.

Other regulators that do not have concurrent powers may form a memorandum of understanding with the OFT on co-operation in promoting competition in their respective industry or sector. For example, the regulator for postal services (Postcomm) does not have concurrent powers under the *Competition Act*. The Postcomm is, however, required to enforce provisions in Royal Mail's licence that prohibit anti-competitive behaviour. Consequently, the Postcomm has entered into a Memorandum of Understanding with the OFT which seeks to clarify the two organisations' respective roles in enforcing the competition provisions of Royal Mail's licence.[883] The Civil Aviation Authority (CAA) has also entered into a Memorandum of Understanding with the OFT with respect to its power under s. 41 of the *Airports Acts 1986* to handle certail conducts of airports.[884] This sets of the matters to be considered in deciding whether the OFT or the CAA will deal with a particular case affecting airports.

The OFT is the UK's consumer and competition authority. It is a non-ministerial government department established by statute in 1973. The OFT aims to improve the welfare of consumers by working to bring about competitive and efficient markets, by deterring deceptive and coercive trading practices, and by empowering consumers

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[882] Northern Ireland Court Service, *A Guide for Users of the Northern Ireland Court Service, Who's Who in the Courtroom*. Available at: http://www.education.courtsni.gov.uk/keystage3_4/downloads/Jwhoswhobooklet.pdf [accessed on 2 September 2008].

[883] Postcomm, *Postcomm: A Self-Assessment,* 2008. Available at: http://www.psc.gov.uk/postcomm/live/legal-framework/codes-and-policies/postcommselfassessment2003.pdf [accessed on 10 July 2008].

[884] Civil Aviation Authority, *The CAA's Use of Section 41 of the Airports Act 1986: The CAA's Policy and Processes. Appendix* 5, 2006. Available at: http://www.caa.co.uk/default.aspx?catid=78&pagetype=90&pageid=68 [accessed on 12 August 2008].

with the knowledge and skills they need to make rational and informed buying decisions.[885] The OFT achieves its goals by using both the competition law regime and the consumer law regime. The OFT is led by a Board consisting of a chairman, an executive director and five non-executive members.

The OFT has the power to apply and enforce the *Competition Act 1998*.[886] Since 1 May 2004 the OFT, along with the European Commission, also has the power to apply and enforce EC Competition Law in the UK.[887]

The *Competition Act 1998 (Concurrency) Regulations 2004* set out the collaborative framework under which the concurrent powers are exercised.[888] The regulations require the competition and regulatory agencies to advise each other when they are considering an issue which falls within the jurisdiction of more than one institution. The regulations also mandate that it must be determined which institution will deal with the matter before any action is undertaken. Once this determination has been made, no other regulator is able to exercise formal powers in respect of that matter unless the matter has been transferred formally to it.[889]

The Concurrency Guidelines issued by the OFT govern the concurrency procedures in practice.[890] These guidelines specify that matters will generally be investigated by the authority which is best placed to undertake the investigation. It is generally considered that the competent industry-specific or sector-specific regulator is better placed than the OFT to investigate agreements or conduct relating to its industry or sector while the OFT may be better placed to undertake an investigation relating to matters relating to more than one industry or sector. Other factors relevant include prior experience of dealing with similar issues.

The OFT and each concurrent regulator is represented on the Concurrency Working Party (CWP). The CWP was formed in 1997 to coordinate among the OFT and the concurrent regulators in developing a consistent approach of performing their functions and powers under the competition laws. The CWP meets about six times a year, chaired by the OFT. Without concurrent powers in its industry, the Postcomm attends the meetings as an observer.

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[885] Office of Fair Trading, *Benefits of Our Work*. Available at: http://www.oft.gov.uk/about/benefits [accessed on 23 September 2008].

[886] *The Competition Act 1998* prohibits anti-competitive agreements (for example, cartels) between businesses (Chapter I) of *the Competition Act 1998* (CA98), abuse of a dominant position in a market (Chapter II of CA98). Anti-competitive agreements are also prohibited under Article 81 of the EC Treaty while abuse of a dominant position is prohibited under Article 82 of the Treaty. The UK and EC laws are similar but not the same: the CA98 prohibits anti-competitive behaviour that affects trade in the UK. Articles 81 and 82 prohibit anti-competitive behaviour that affects trade in the EU.

[887] See for example, Articles 81 and 82 of the EC Treaty.

[888] The *Competition Act 1998 (Concurrency) Regulations 2004*, SI 2004 No. 1077. Available at: http://www.opsi.gov.uk/SI/si2004/20041077.htm [accessed on 14 December 2008].

[889] OFT, *DTI/HMT Report on Concurrent Competition Powers in Sectoral Regulation – Response of the Concurrency Working Party*, 2007. Available at: http://www.oft.gov.uk/shared_oft/reports/oft_response_to_consultations/oft900b.pdf [accessed on 14 July 2008].

[890] The key guideline 'Concurrent Application to Regulated Industries' and other concurrency-related publications are available at: http://www.oft.gov.uk/advice_and_resources/resource_base/legal/competition-act-1998/Concurrency/Publications [accessed on 14 December 2008].

The OFT also reports to the Joint Regulators Group on an annual basis, providing an overall view about whether competition law is being applied consistently and proactively across all regulated industries.[891]

The OFT's decisions under competition law, including those made under the *Competition Act 1998* and decisions on Competition Commission references of mergers or markets, are subject to appeal to the specialist Competition Appeal Tribunal (CAT), an independent body established under the *Enterprise Act*. A further appeal above the CAT may also be possible and will be held in the Court of Appeal, Court of Session or Court of Appeal in Northern Ireland, depending on whether the CAT sat as a tribunal in England and Wales, Scotland or Northern Ireland respectively.

Competition Commission

The Competition Commission (CC) was established by the *Competition Act 1998* and replaced the Monopolies and Mergers Commission in 1999. The CC is an independent public body whose functions are to decide substantial economic questions in three areas – mergers inquiries, market investigations, and regulatory references and appeals in relation to price controls or modification to licence terms.

However, the CC is a reference body in the sense that it can only act on matters that are referred to it by either the OFT, the Secretary of State for Business, Enterprise and Regulatory Reform (the Secretary of State),[892] the CAT or a regulator specific to an industry or a sector. The decision is made by a panel consisting of at least three independent members of the CC (out of a total of over 40 members), assisted by professional staff. When making a reference, the referee must have reasonable grounds for suspecting that one or more features of a market prevents, restricts or distorts competition in relation to the supply or acquisition of goods or services in the UK (or a part of the UK). A recently established joint working group between the OFT and the CC has worked on improving the market investigation regime in operation, particularly in relation to the timescale of references to the CC, information sharing and closer partnership working.[893] The target time period for the OFT to make a reference to the CC is within six months of launching a market study. The CC has agreed to complete future market investigations in 18 months instead of the statutorily required 24 months, and less in the case of smaller markets.

The Competition Commission also hears appeals in relation to price control decisions made by the Ofcom, the Ofwat and the ORR, as well as proposals to modify operating licences by the ORR, the Ofwat, the ORR and the Postcomm and decisions made by the ORR under the *Competition Act*. The Commission must complete an appeal of price control matters within four months.

The CC has a unique relationship with the CAA with respect to regulatory price determination. Although there is no appeal against the CAA's price determinations, the CC may conduct a judicial review of conditions imposed on airports by the CAA under the *Airports Act 1986*. The CAA is also statutorily required to make a reference

[891] Office of Fair Trading (OFT), *Advice and Resources, Concurrency*. Available at: http://www.oft.gov.uk/advice_and_resources/resource_base/legal/competition-act-1998/Concurrency/ [accessed on 2 September 2008].

[892] The Department for Business, Enterprise and Regulatory Reform was created on 28 June 2007, replacing the former Department of Trade and Industry.

[893] OFT, *Press Releases 2009*, 8 April 2009. Available at: http://www.oft.gov.uk/news/press/2009/41-09 [accessed on 29 April 2009].

to the CC every five years in relation to the designated airports. The CC will make recommendations to the CAA on the future price caps and report on whether any of the airports has, over the past five years, engaged in conducts that is against the public interest.

Competition Appeals Tribunal

The Competition Appeals Tribunal (CAT) was created by the *Enterprise Act 2003*. It is a specialist independent Tribunal with the power, among other things, to:

- hear appeals on the merits in respect of decisions made under the *Competition Act 1998* by the OFT and the regulators in the telecommunications (non-price control decisions), post, electricity, gas, water, railways and air traffic services;
- review decisions made by the Secretary of State, the OFT and the Competition Commission in respect of merger and market references or possible references under the *Enterprise Act 2002*;
- hear appeals against certain decisions made by the Ofcom and the Secretary of State relating to the exercise by the Ofcom of its functions under Part 2 (networks, services and the radio spectrum) and ss. 290 to 294 and Schedule 11 (networking arrangements for Channel 3) of the *Communications Act 2003* [the CAT may in turn ask the CC to decide on price control aspects of such appeals]; and
- hear appeals in respect of decisions made by the OFT under the EC Competition Law (Articles 84 and 85) Enforcement Regulations 2001.

An appeal to the CAT may be made by any party to an agreement in respect of which the OFT, or sectoral or industry regulator has made a decision. Similarly any person in respect of whose conduct the OFT or sectoral or industry regulator has made a decision may also appeal to the CAT. The CAT may allow an appeal from any third party whom the CAT considers has a sufficient interest in a decision made by OFT or a sectoral or an industry regulator. A person who considers he has sufficient interest in the outcome may make a request to the CAT for permission to intervene in the proceedings.

Parties have a time limit of two months from notification or publication of a decision to make an appeal to the CAT. The Tribunal may not extend the time limit unless it is satisfied that the circumstances are exceptional.

The CAT is headed by the President who is a senior lawyer appointed by the Lord Chancellor. Cases are heard before a panel consisting of three members; either the President or a member of the panel of chairmen and two ordinary members. Cases purely concerned with interim measures may be heard by the President or a member of the panel of chairmen sitting alone. The members of the panel of chairmen are judges of the Chancery Division of the High Court and other senior lawyers. The ordinary members have expertise in law and/or related fields.

Appointments to the panel of chairmen are made by the Lord Chancellor for a period of eight years. The ordinary members are appointed for a period of eight years by the Secretary of State and come from a variety of backgrounds. Currently there are 19 ordinary members.

In making its decisions, the CAT may:

- Confirm or set aside all or part of the decision

- Remit the matter to the OFT (or the regulator)
- Impose, revoke or vary the amount of any penalty
- Give such directions, or take such other steps as the OFT or sectoral or industry regulator could have given or taken, or
- Make any other decision which the OFT or sectoral or industry regulator could have made.

The CAT's decisions may be appealed to the Court of Appeal, in relation to proceedings in England and Wales, on either on a point of law or in penalty cases as to the amount of any penalty. In relation to CAT proceedings in Scotland, the Court of Session is the body to which appeals against the CAT's decisions are made. In Northern Ireland, appeals are made to the Court of Appeal in Northern Ireland. Such a further appeal may only be made with the permission of the CAT or the relevant appellate court.

REGULATORY ARRANGEMENTS BY INDUSTRY OR SECTOR

1. Energy

The gas and electricity transmission and distribution sectors in the UK primarily consists of regional monopoly companies, including four companies that own and operate the energy transmission networks, four companies that own the local gas distribution networks (GDNs) and fourteen licensed regional electricity distribution network operators (DNOs). The four energy transmission providers are:

- National Grid Electricity Transmission (NGET), which owns the network in England and Wales
- Scottish Hydro-Electric Transmission Limited (SHETL), which owns the northern Scotland networks
- Scottish Power Transmission Limited (SPTL), which owns the southern Scotland network
- National Grid Gas (NGG), which owns and operates the national gas transmission network.

The fourteen electricity DNOs, each responsible for a regional area, are owned by seven different groups.[894] In addition, four independent network operators run smaller networks embedded in the DNO networks. The transmission and distribution systems remain fully separated through independent ownership. The *Utilities Act 2000* prohibits one legal person from holding both a supply and a distribution licence for electricity.[895]

The gas distribution sector was restructured on 1 June 2005, following the sales of four of the eight GDNs by NGG. At present, there are four GDNs – NGG, Scotia Gas Network, Northern Gas Networks, and Wales & West Utilities – each operates in a separate geographical region. A number of smaller independent networks are also in operation. NGG also owns and operates the gas transmission network.

[894] Energy Linx, *Electricity Distribution Network Operators*, 2007. Available at: http://energylinx.co.uk/distribution_network_operators.htm [accessed on 11 November 2008].
[895] Section 6(2) of the *Electricity Act 1989* as amended by s. 30 of the *Utilities Act 2000*.

Six vertically integrated companies (the 'Big Six') have 99 per cent of the retail market in energy. These companies are also active in electricity generation. They are: Centrica (with three retail brands – British Gas, Scottish Gas and Nwy Prydain – in England, Scotland and Wales respectively), E.ON UK, Scottish and Southern Energy (SSE), RWE npower, EDF Energy and ScottishPower.

Regulatory Institutions and Legislation

These monopoly network companies are regulated by the Office of Gas and Electricity Markets (Ofgem), whose regulatory powers are primarily derived from legislations governing the gas and electricity industries, such as the *Gas Act 1986*, the *Electricity Act 1989* and the *Utilities Act 2000*. Other legislations include the *Competition Act 1986*, the *Enterprise Act 2002* and the relevant EC laws.

The Ofgem's principal objective is to protect the interests of gas and electricity consumers, where possible through the promotion of effective competition and the regulation of companies with market power that operate the gas and electricity networks. The Ofgem also has a general duty of implementing the UK Government's social and environmental policies, including securing national energy supplies, curbing climate change and considering the needs of vulnerable consumers (rural, elderly and low income consumers and people with disabilities). Under s. 4AB of the *Gas Act* and s. 3B of the *Electricity Act*, the Secretary of State is required to give the Ofgem guidance as to the contribution that the Ofgem should make towards the attainment of those policies. The Ofgem is required to have regard to that guidance when discharging its statutory functions.[896]

The Ofgem recognises that its ambit to reduce fuel poverty for vulnerable consumers is in conflict with its environmental objectives. The Ofgem therefore emphasises the necessary role of the government in providing affordable housing and support.[897]

The Ofgem is primarily responsible for introducing competition in wholesale and retail markets, as well as regulating gas and electricity networks. Its functions include:

- administering a price control regime that takes the form of RPI-minus-X (retail price index minus an X factor), under which the maximum amount of revenue that network operators can earn is capped at an annual growth rate of RPI-minus-X for five years.
- monitoring quality of services by setting a set of guaranteed standards of performance, covering a range of measures. Incentives for the regulated companies to improve service quality are put in place through financial rewards and penalties.
- regulating the operation and licensing of cables networks (through tender) that connect offshore wind farms to the onshore grids.
- deciding upon proposed industry code changes, although it cannot raise a proposal itself.

[896] See Minister of State for Energy, e-Commerce and Postal Services, *Social and Environmental Guidance to the Gas and Electricity Market Authority*, 23 February 2004. Available at: http://www.ofgem.gov.uk/About%20us/Documents1/file37517.pdf [accessed on 10 September 2008].
[897] Ofgem, *Sustainable Development Report*, Report 163/08, 17 December 2008, p. 6.

As part of the price control settlement and in accordance with sustainable development objectives, the Ofgem has given allowances to transmission operators that invest in significant volumes of renewable generation. Within the price control regime, the Ofgem has also offered financial incentives to NGET and SHETL to reduce their greenhouse gas emissions (SF6). Similar incentives have been given to gas DNOs to reduce methane leakage and an exception from the Climate Change Levy has also been granted to Combined Heat and Power (CHP) generators.

The Ofgem is also implementing a corporate-responsibility reporting framework to address environmental and social objectives.[898]

In recognition of the challenges that energy companies face in a changing world towards renewable, low carbon energy and network integration in Europe, the Ofgem has opened reviews in the following areas:

- The appropriateness of the RPI-minus-X price control regime.
- The appropriateness of rules for having access to transmission networks.

Process and Consultation

The Ofgem has statutory duties under the *Gas Act* and the *Electricity Act* to consult when exercising its statutory powers. In practice, the Ofgem endeavours to keep its operations transparent through full and thorough consultation in developing decisions.[899] The Ofgem may also consult on behalf of other bodies, such as the Office of Fair Trading (OFT), in merger cases.

In relation to consultation regarding policy development, the Ofgem usually publishes a consultation document at the start of a particular project. Each consultation document will include a timetable and sets out the issues, discusses possible options and invites views on the issues and options. Additional consultation documents may also be published as a policy develops. These may be supplemented by seminars and briefings with interested parties. The Ofgem publishes advance notices of consultations on its website.

A consultation period is typically a minimum of six weeks. However, the consultation period may be altered if:

- The issues being consulted on are complex and/or likely to be controversial
- Policy is at a very early stage of development
- Consultation follows a timetable set by other bodies, or
- The issue needs urgent attention.

The Ofgem usually endeavours to accept late submissions, but this may not always be feasible.[900]

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[898] Ofgem, *Sustainable Development Report, 2007*. Available at: http://www.ofgem.gov.uk/Sustainability/Documents1/Sustainable%20Development%20Report%20-%20Master%202007-10-30.pdf [accessed on 8 December 2008].

[899] Ofgem, *About Us*. Available at: http://www.ofgem.gov.uk/About%20us/Pages/AboutUsPage.aspx [accessed on 23 September 2008].

[900] Ofgem, *Ofgem's Consultation Policy*, 2002. Available at: http://www.ofgem.gov.uk/About%20us/CorpPlan/Documents1/1331-46pvconsultation_draft.pdf [accessed on 16 May 2008].

The Ofgem is generally required to carry out a Regulatory Impact Assessment (RIA) or publish reasons for not doing so.[901] This requirement applies to Ofgem's functions under Part 1 of the *Electricity Act* or *Gas Act*, or for any other proposal it considers to be important.

Environmental Impact Assessments (EIAs) are also undertaken to satisfy statutory environmental objectives. While Ofgem expects that EIAs will usually form a part of its RIA, it has noted that a separate environmental statement may be prepared for large matters such as price control reviews.[902] The Ofgem published four impact assessments in the 2007-08 year, relating to system charges, code modifications and an entry baseline review.[903]

The Ofgem must justify its regulatory decisions. On the basis of information collected through consultation, as well as its own research, the Ofgem will ultimately issue a decision document that will contain the Ofgem's response to issues raised by interested parties during the consultation period.

Timeliness

The time permitted for the Ofgem to respond to initial consultation with either a further consultation document or a decision document depends on the breadth and complexity of the issues raised through the consultation. Extension of time by the Ofgem is possible on the basis of unforeseen work or circumstances. In the case of any delay in the decision-making process, the Ofgem will notify relevant stakeholders.[904] Sometimes delays may be caused by late submissions. The Ofgem usually endeavours to accept late submissions but this may not always be feasible.[905]

Role of Interested Parties

The Gas and Electricity Consumer Council ('EnergyWatch') was established under the *Utilities Act 2000* to represent consumers and act as a consumer advocate to protect and promote the interests of existing and future gas and electricity consumers in the UK. Section 7 of the *Utilities Act* required Ofgem and Energywatch to enter into a Memorandum of Understanding (MOU) that sets out the agreed arrangements. The first MOU was reached in November 2000 and would be subsequently reviewed every two years. A copy of the MOU was sent to the Secretary of State who lays a copy before each House of Parliament.[906]

On 1 October 2008, EnergyWatch was merged with Postwatch and the Welsh, Scottish and National Consumer Councils to form a new statutory National Consumer Council known as 'Consumer Focus'. Consumer Focus has three core functions – to

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[901] Under s. 5A of the *Utilities Act 2000* as amended by the *Sustainable Energy Act*.

[902] Ofgem, *Ofgem's Introduction of Environmental Impact Assessments*. Available at: http://www.ofgem.gov.uk/Sustainability/Environmnt/Policy/Documents1/3348-env_impact_ass.pdf [accessed on 8 December 2008].

[903] Ofgem, *Annual Report 2007-08*, 2008.

[904] Ofgem, *Ofgem's Consultation Policy*, 2002. Available at: http://www.ofgem.gov.uk/About%20us/CorpPlan/Documents1/1331-46pvconsultation_draft.pdf,[accessed on 16 May 2008].

[905] Ofgem, *Ofgem's Consultation Policy*, 2002. Available at: http://www.ofgem.gov.uk/About%20us/CorpPlan/Documents1/1331-46pvconsultation_draft.pdf [accessed on 16 May 2008].

[906] Ofgem, *Memorandum of Understanding between Ofgem and Energywatch*, 2003. Available at: http://www.ofgem.gov.uk/Consumers/Complain/Documents/Memorandum%20of%20Understanding%20between%20energywatch%20and%20Ofgem%20(24.05.07).PDF [accessed on 22 April 2008].

represent the views of consumers to Ministers, the European Commission, regulatory bodies etc; to research consumer matters and views; and facilitate the dissemination of advice and information to consumers. Consumer Focus has powers to investigate any consumer complaint that is of wider interest, rights to open up information from providers, conduct research and make an official 'super-complaint' to Ofgem about failing services.[907]

Information Disclosure and Confidentiality

The Ofgem has statutory powers to acquire any documents or information from a person whom it considers may have contravened either or those acts. However, this does not apply if the person can not be compelled to produce such a document in civil proceedings in the UK High Court.

The Ofgem generally publishes the information that it collects on its website and may publish confidential information if such publication is in the public interest and facilitates the carrying out of its regulatory role. The Ofgem will, however, exclude as a far as practical, the publication of commercially-sensitive information that relates to an individual or body. In line with other UK regulators, information collected by the Ofgem is generally subject to the *Freedom of Information Act 2000* and the *Data Protection Act 1998*.

Historically, stakeholders commented that the Ofgem issued an excessive volume of consultation documents. Consequently, in 2005 the Ofgem implemented measures to improve the length and readability of its documents. As a result there were 20 per cent fewer documents published in 2005–06 than in 2004–05.[908]

Decision-making and Reporting

The Ofgem is governed by the Gas and Electricity Markets Authority (GEMA). The GEMA consists of a Chairperson, Chief Executive, six non-executive members and three managing directors. There are also two advisers to the GEMA; a legal adviser and secretary. The Chairperson is appointed by the Secretary of State for a term of five years. Reappointment is possible.

The GEMA is supported by a senior management team and various sub-committees and advisory bodies, including the audit committee, the remuneration committee and the enforcement committee.[909] It operates under the prescribed Rules of Procedure that set out, among other things, the conduct of the GEMA's meetings, delegations and committees, and conflicts of interest.[910]

The GEMA's decisions are made by majority voting of board members present at a board meeting. If the vote is tied, the Chairperson has a second or casting vote.[911]

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[907] See the website of Consumer Focus at: www.consumerfocus.org.uk [accessed on 7 January 2009].

[908] Ofgem, *Networks*. Available at: http://www.ofgem.gov.uk/Networks/Pages/Ntwrks.aspx [accessed on 10 September 2008].

[909] Ofgem, *Ofgem Annual Report 2006-07*, 2007. Available at: http://www.ofgem.gov.uk/About%20us/annlrprt/Documents1/Ofgem%20Annual%20Report%202006-07.pdf [accessed on 16 May 2008].

[910] Ofgem, *Rules of Procedure of the Gas and Electricity Markets Authority*, 2005. Available at: http://www.ofgem.gov.uk/About%20us/Documents1/Ofgem%20Rules%20of%20Procedure.pdf [accessed on 10 September 2008].

[911] Ofgem, *Rules of Procedure of the Gas and Electricity Markets Authority*, 2005. Available at: http://www.ofgem.gov.uk/About%20us/Documents1/Of[gem%20Rules%20of%20Procedure.pdf [accessed on 10 September 2008].

Under s. 5A of the *Utilities Act 2000*, the GEMA is required to undertake impact assessments (IAs) of important policy proposal. Otherwise, it needs to publish a statement setting out its justifications for not carrying out an IA.[912] An IA must set out an assessment of the cost and benefits, as well as the social and environmental impacts of implementing the policy proposal. The Ofgem has published a revised guidance document on IA since 31 March 2008.

The Ofgem publishes all decision documents on its website. For major policy initiatives, the Ofgem may also send a copy of the decision document to interested parties. It maintains a free email news service which notifies subscribers when new documents are published.[913]

Appeals

Appeals are heard by the CAT as outlined in the section on 'Approach to Competition and Regulatory Institutional Structure'.

Regulatory Development

In February 2008, the Ofgem launched an investigation into the retail energy supply markets. The initial findings, published in October 2008, suggested that competition had not yet been fully effective in all areas of the market.[914] Subsequent to consulations on initial findings and proposed remedies, in April 2009 the Ofgem released a further consultation paper, proposing a package of remedies to improve the functioning of the market.[915] The package includes information provision obligations on suppliers, protection measures for small business, and rules designed to prevent cross-subsidisation in vertically-integrated businesses. In particular, under the new rules, the six vertically-integrated businesses are required to submit separate information on profits, costs and revenues for their supply and generation businesses, for gas and electricity consumers and for domestic and non-domestic consumers. To this end, the Ofgem would annually publish aggregate information. The Ofgem expects to introduce licence changes by Northern summer time (and implement the package in the autumn) upon reaching an agreement on an acceptable package of reform. If an agreement cannot be reached, the Ofgem will consider making a market investigation reference to the CC.

In addition, the energy supply market investigation also identified a number of unjustified price differentials. To address the issue, the Ofgem separately proposes two new licence conditions for domestic suppliers:[916]

- A requirement of any difference in the terms and conditions offered by suppliers in respect of different payment methods being cost reflective; and
- A ban of undue discrimination in any terms and conditions offered to consumers.

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[912] Ofgem, *Guidance on Impact Assessments*, March 2008. Available at: http://www.ofgem.gov.uk/About%20us/BetterReg/IA/Documents1/GUIDANCE%20ON%*20IMPCT*%20ASSESSMENTS.pdf [accessed on 10 September 2008].

[913] Ofgem, *Ofgem's Consultation Policy*, 2002. Available at: http://www.ofgem.gov.uk/About%20us/CorpPlan/Documents1/1331-46pvconsultation_draft.pdf [accessed on 16 May 2008].

[914] Ofgem, *Energy Supply Probe – Initial Findings Report*, Report No. 140/08, 6 October 2008.

[915] Ofgem, *Energy Supply Probe – Proposed Retail Market Remedies*, Report No. 41/09, 15 April 2009.

[916] Ofgem, *Addressing Undue Discrimination – Final Proposals*, Report No. 42/09, 15 April 2009.

On 28 November 2007, the Ofgem launched a review of the governance arrangements for the industry codes that set out many of the technical and commercial rules and obligations of network operators. In the process of code governance review, the Code Administrator's Working Group (CAWG) was formed in June 2008 to explore the simplification and convergence of code modification processes without structural changes. Following the delivery of the CAWG interim report drawing out its recommendations on issues relating to ownership, code of practice, code administrators and so on,[917] the Ofgem, on 20 April 2009, consulted on key issues relating to its code governance review.[918] In particular, it has requested interested parties' views on the CAWG recommendations, including the form of a Code of Practice to apply to code administrators.

2. Telecommunications

The telecommunications industry in the UK has continuously grown in recent years, with increasing penetration and use of both mobile telecommunications and broadband. While broadband penetration in the UK has risen greatly since 2000, it has still not reached the levels of North America, Scandinavia and Japan.[919]

There are a large number of telecommunication service operators providing telecommunication services in the UK. Major telecommunications service providers operate in all or some of the segmented markets, broadly classified into traditional fixed-line telephone services, mobile services and Internet services. [920]

In the fixed-line market, British Telecom (BT), successor of the former state monopoly Postal Office Telecommunications, was privatised in 1984 and remains a major provider of fixed-line network. The company has recently been separated operationally into one providing fixed-line connectivity and another providing content and other value-added services. Openreach is the independently operating business owned by BT and created to manage the network infrastructure. BT had 62.8 and 50.6 per cent of markets in fixed-line rental business and fixed-line call business, respectively, in 2007. Virgin Media is the second largest company in this market. There are more than 100 fixed-line business operators using BT network.

In the mobile communications market, there are five major network operators – Vodafone, O2, T-Mobile, Orange, and Hutchinson 3G – and a large number of mobile virtual network operators (MVNOs) and other service providers, serving a growing number of consumers. Population penetration exceeds 100 per cent.

In the Internet market, about 50 per cent of unbundled local exchanges had no less than four service providers operating on it by the end of June 2008. BT's retail share of broadband connections was 26.5 per cent in 2007. While BT continued to deploy 8

[917] Code Administrator's Working Group (CAWG), *Code Administrators Working Group Interim Report*, April 2009. Available at: http://www.ofgem.gov.uk/Pages/MoreInformation.aspx?docid=41&refer=Licensing/IndCodes/CGR/CAWG [accessed on 30 April 2009].
[918] Ofgem, *Review of Industry Code Governance – Code Administrators' Working Group – Open Letter*, 20 April 2009. Available at: http://www.ofgem.gov.uk/Pages/MoreInformation.aspx?docid=41&refer=Licensing/IndCodes/CGR/CAWG [accessed on 30 April 2009].
[919] Ofcom, *Final Statement on Strategic Review*, September 2005, p. 6.
[920] Ofcom, *Telecommunications Market Data Tables* Q2 2009, December 2008.

Mbit/s service across its network, both BT and Virgin have planned investment in fibre-based next-generation access networks offering speeds in excess of 30 Mbit/s.[921]

Regulatory Institutions and Legislation

The enactment of the *Communications Act* in July 2003 has seen a substantial deregulation in the communications market. This Act moves the UK away from a licence-based authorisation system to one where companies are operating under a 'general conditions of entitlement' regime. These general conditions constitute a set of rules that operators are obliged to comply with.

The Office of Communications (Ofcom) is the regulator for the UK communications market, spanning television, radio, telecommunications and wireless communications services. It was established under the *Office of Communications Act 2002* to assume the duties and responsibility of the four existing regulators, namely the Broadcasting Standards of Commission, the Director General of Telecommunications (Oftel), the Independent Television Commission and the Radio Authority.

The Ofcom's powers derive from the *Communications Act 2003* and the *Telecommunications Act 1984*. The Ofcom is responsible for both content and infrastructure regulations in pursuing a range of economic and social objectives with a prime focus on consumer protection.[922] It is also required to research markets constantly and to aim to remain at the forefront of technological understanding.

The performance of the Ofcom's regulatory functions is subject to regulatory principles set out in the *Communications Act 2003*.[923] These principles require the Ofcom to:

- regulate with a clearly articulated and publicly reviewed annual plan.
- intervene only when markets alone can not achieve a particular public policy goal.
- be willing to intervene firmly, promptly and effectively where required.
- strive to ensure its interventions are evidence-based, proportionate, consistent, accountable and transparent in both process and outcome.
- use minimum regulation to achieve the particular policy objective.
- conduct wide consultation and assessed the impact of its proposed regulatory actions before imposing the regulations.

The Ofcom is also under a statutory duty to consider the needs of vulnerable consumers. Vulnerable consumers are taken to include rural, elderly, low income consumers and people with a disability.

Under the *Communications Act*, the Ofcom has the power to impose rules on communications providers who have significant market power (SMP) in particular markets, and rules on all providers as general conditions. Access conditions may be imposed on providers of communications networks if the provider is found to have

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[921] Ofcom, *Key Points: the Market Context. A*vailable at: http://www.ofcom.org.uk/research/cm/cmr08/keypoints/ [accessed on 28 September 2008].

[922] Ofcom, *Annual Report 2005/06*, 2006.

[923] Ofcom, *Statutory Duties and Regulatory Principles*. Available at: http://www.ofcom.org.uk/about/sdrp/ [accessed on 15 September 2008].

SMP in certain markets through a market review carried out under the EU Directives (imposed by the *Communications Act*).

In 2005, the Ofcom completed its two-year process in strategic review of the UK telecommunications markets. The review focused on assessing the prospects for maintaining and developing effective competition in the UK telecommunications markets, having regard to investment and innovation. Following the review, the Ofcom accepted a legally enforceable undertaking from BT in lieu of making a reference to the CC under the *Enterprise Act 2002*.[924] Previously, BT, as the monopoly provider of the UK fixed-line network, had been subject to RPI-minus-X retail price regulation since the early 1980s. The undertaking committed BT to substantial changes in its operation and behaviour, including the offering of a wholesale line rental product (equivalent between itself and its customers) as the operational separation of its wholesale and retail functions. As a consequence, the Ofcom replaced retail price regulation with access regulation to achieve equality of access to BT's natural monopoly wholesale services. The Ofcom is currently undertaking a review of BT network charge controls (NCC) to establish new controls to replace of the current ones when they expire on 30 September 2009.

In relation to mobile communications, the Ofcom determine disputes between providers of electronic communications networks and services. It is accountable to the EU for its responsibilities in relation to competition at the European level. These accountabilities include the regulation of mobile numbering and portability, international roaming and mobile termination rates (see the EU chapter). Mobile operators with SMP must publish interconnect agreements; however the Ofcom does not regulate interconnection to competing networks. Instead, interconnection is achieved by commercial negotiation with the Ofcom resolving access disputes if asked to do so. The Ofcom does regulate mobile termination rates, setting them to cost-oriented levels.

The Ofcom conducted a second-round review of the mobile termination market in 2007 and concluded that each of the five MVNOs had significant market power (SMP) in wholesale mobile voice calls. It therefore decided to impose charge controls of 'RPI-minus-9' on each of the five mobile network operators for four years from 1 April 2007. This decision has subsequently been appealed to the Competition Appeal Tribunal (CAT) by H3G on the findings of SMP and imposition of price control, and BT on the price control, respectively. The CAT has referred various 'price control matters' arising in H3G's and BT's appeals to the Competition Commission for resolution (see the section on 'Regulatory Development' for details), but made a judgement about the 'non-price control matters' in May 2008, which dismissed the matters arising in H3G's appeal.[925] On 23 July, the CAT granted H3G permission to appeal to the Court of Appeal on certain aspects of its judgement, including the impact of Ofcom's dispute resolution powers and BT's end-to-end connectivity obligation.[926] That judgement has been appealed to the Court of Appeal by H3G.

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[924] Ofcom, *Final Statement on the Strategic Review of Telecommunications and Undertakings in lieu of a Reference under the Enterprise Act 2002*, 22 September 2005. Note that the *Enterprise Act 2002* is a piece of competition law.

[925] Competition Appeal Tribunal (CAT), *Judgement on Non Price Control Matters* (Non-confidential version), Case no. 1083/3/3/07, 20 May 2008. Available at: http://www.catribunal.org.uk/files/Jdg_CAT11_1083_H3G_200508.pdf [accessed on 8 April 2009].

[926] CAT, *Ruling (Permission to Appeal)*, Case no. 1083/3/3/07, 23 July 2008. Available at: http://www.catribunal.org.uk/238-2157/Ruling-Permission-to-appeal.html [accessed on 8 April 2009].

Process and Consultation

The Ofcom has powers to investigate complaints about breaches of conditions imposed on providers and a duty to resolve disputes relating to conditions imposed under the EU Directives. Its dispute resolution powers (set out in s. 190 of the *Communications Act*) are limited to resolving disputes about electronic communication networks and services and spectrum. A dispute is defined as the failure of commercial negotiation about a matter that falls within the scope of s. 185 of the *Communications Act*. This may include the provision of network access and/or other regulatory conditions imposed by the Ofcom.

Issues that do not fall within Ofcom's dispute resolution powers may still be referred to the Ofcom as a complaint. A complaint is an allegation that the *Competition Act* (and/or Articles 81 and 82 of the EC Treaty), or a specific *ex ante* condition, has been breached.

As *ex ante* conditions are imposed following a market review and the finding of SMP in a market, the Ofcom will not usually impose rights or obligations in the context of a dispute about the provision of new forms of access that have not been subject to a market review. However, if the dispute raises significant regulatory issues, the Ofcom may undertake a market review into whether or not an access obligation should be imposed before resolving the dispute.

The Ofcom will only invoke its dispute resolution powers where there is evidence to back up the allegation and to demonstrate that 'best endeavours' have resulted in failed commercial negotiation.

The Ofcom only consults on the outcome of a dispute when the issue is of interest to a large number of stakeholders. Otherwise, consultation is limited to the parties involved in the dispute. Where consultation is to occur, the Ofcom engages in pre-consultation with stakeholders to ensure it has a clear understanding of the issues before commencing the formal consultation process. During the formal consultation process interested parties are able to make written submissions in response to a consultation document. In 2007–08, 75 per cent of communications consultation papers included an impact assessment.[927]

The Ofcom has formal information gathering powers to pursue investigations and will take enforcement action against companies that fail to respond to formal requests for information. Where time permits, or if the information request is complex, the Ofcom will issue a draft information request and allow three days for identification by stakeholders of the practicality of providing the information within the specified deadline.

The dispute will be considered by an internal sub-committee which summarises the information gained through consultation and market research.

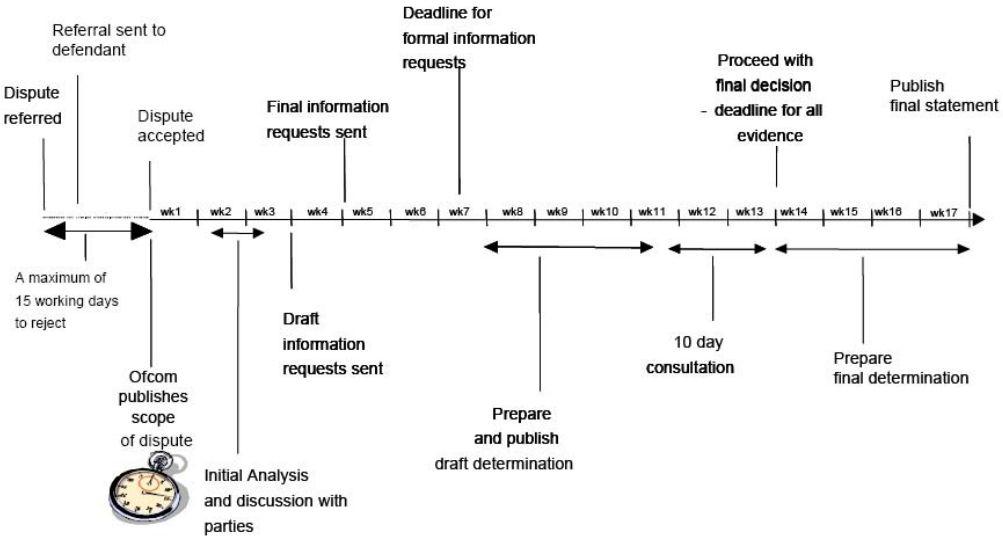
The summary is to be completed two weeks after the completion of the consultation process. The summary is provided to the Board, which has ultimate decision-making authority. The Ofcom may issue a consultation document outlining a draft determination, the course of action being considered and seeking further comments

[927] Ofcom, *Annual Report 2007–08*, 2008. Available at: http://www.ofcom.org.uk/about/accoun/reports_plans/annrep0708/nonboard/ [accessed on 28 September 2008].

before making a final decision. Figure one illustrates the process where consultation occurs.

In contrast to disputes, the Ofcom's decisions on complaints result in a decision that the *Competition Act* or a specific *ex ante* condition has, or has not, been breached, rather than a direction of the arrangements that should apply between two parties to a dispute. Where the Ofcom reaches a decision that there has been a breach of a condition or the *Competition Act*, it must follow procedures set out in either the *Competition Act* or the *Communications Act*.

Steps and time frames for the decision-making process involving consultation[928]



Timeliness

Once the Ofcom has accepted a dispute or complaint, it will publish details of the dispute in its Competition Review (unless confidential) and seek to resolve the issue as quickly as possible. It seeks to resolve disputes within four months, complaints within six months and make an infringement decision within twelve months. If the deadlines are not met, the Ofcom will publish the reason for the delay. Recognising that incumbents may have incentives to delay determinations of access disputes, the Ofcom will not usually agree to extend a consultation deadline and enforces parties' obligations to respond to information requests in a timely manner.

Final decisions are usually published within ten weeks from the close of the consultation period.[929]

Role of Interested Parties

The Ofcom has statutory duties under the *Communications Act* to further the interests of citizens and consumers in relation to communications matters (s. 3(1)). The Communications Consumer Panel (previously the Ofcom Consumer Panel) was established in 2004, as required by s. 16(2) of the *Communications Act,* replacing its two predecessors – Advisory Committees on Telecommunications and Telecommunications Advisory Panel. A non-executive member of Consumer Focus

[928] Ofcom, *Guidelines for the Handling of Competition Complaints, and Complaints and Disputes about Breaches of Conditions imposed under the EU Directives*, July 2004, p. 16.
[929] Ibid.

(the new National Consumer Council) may be appointed as a member of the Consumer Panel. Panel members are appointed by the regulator but retain full independence by operating at full arm's length and with their own budget. The Panel's budget for the year ending March 2008 was £895 958.[930] The Ofcom's total income in the same year was over £142 million.[931]

The Panel's function is to advise the Ofcom on the consumer interest in the markets that the Ofcom regulates, with particular attention paid to vulnerable consumers (for example, Rural consumers, older people, people with disabilities and those who are on low incomes or otherwise disadvantaged). The Panel states that it works closely with the Ofcom on policies early in their development – before public consultation – to build consumer interests into the Ofcom's decision making right from the start.[932] Ofcom has entered into a Memorandum of Understanding with the Consumer Panel.

The Ofcom has also established, as required by the *Communications Act*, an Advisory Committee for Older (over 60) and Disabled People to provide advice and comment on consultations affecting older (defined as over 60 by the Ofcom) and disabled people living in the UK. This Advisory Committee is appointed by the Ofcom and reports directly to the Ofcom Board. It has provided specific advice to the Ofcom on its consultations on Future Broadband, Participation TV, proposals for the Co-Regulation of Equal Opportunities and the Ofcom's Annual Plan for 2008/9.[933] The Chairman of this Advisory Committee meets formally with the Ofcom's Chairman and Chief Executive Officer each year. The Committee's Chairman also meets periodically with Chairs of other Ofcom advisory committees.

There are also four Advisory Committees for the Nations (one committee each for England, Northern Ireland, Scotland and Wales) established under the *Communications Act*. The Committees' members report direct to the Ofcom Board and are appointed by an open public process. The Committees are tasked with identifying aspects of the Ofcom's work, and of communications in general, that are particular importance to their nation and to offer advice to the Ofcom accordingly. The Committees may also be asked to provide advice on non-metropolitan issues even if there is not a relevant national issue.

Information Disclosure and Confidentiality

The Ofcom has information gathering powers under the *Communications Act*. A party that fails to provide requested documents or information in their custody to aid the Ofcom's investigations, or intentionally alters or destroys information will be subject to a fine on conviction. However, a body or individual is not required to produce any documents that they would not be compelled to produce in civil proceedings in the High Court.

The Ofcom publishes public documents on its website. It has the power to publish any information if it considers publication to be in the public interest by facilitating the performance of the Ofcom's regulatory role. The Ofcom has commented that a blanket marking of a document as confidential is unhelpful and time consuming for

[930] Communications Consumer Panel, *Annual Report 2007–08*, 2008.
[931] Ofcom, *Annual Report 2007–08*, 2008.
[932] Communications Consumer Panel, *About Us*. Available at: http://www.communicationsconsumerpanel.org.uk/smartweb/about-us/about-us [accessed on 7 January 2009.
[933] Ofcom, *Annual Report 2007–08*, 2008.

both the Ofcom and the submitter. This suggests that the Ofcom has experienced issues with the treatment of some information over which confidentiality has been claimed.

Disclosure of information obtained by the Ofcom may also be subject to the *Freedom of Information Act*, the *Code of Practice on Access to Government Information* and the *Data Protection Act 1998*, subject to exemptions to disclosure. The Ofcom generally does not release third-party information that has been obtained under a statutory power, confidential or commercially sensitive information as such information.

Decision-making and Reporting

The Ofcom's governance structure marks a departure from those of previous regulatory regimes applied to the UK communications services, which had included oversight by Government-appointed Commission, by Director-General and by Government Agency.

The Ofcom is governed by a Board which consists of a Chairman and both executive and non-executive members. There may be up to nine members of the Board in addition to the Chairman. The Chairman and non-executive members are appointed by the Secretaries of State for the Department of Culture, Media and Sports and the Department of Trade and Industry. Appointments are not for a fixed period.[934] The Board provides strategic direction for the Ofcom and has oversight of the Ofcom's overall funding and expenditure. It meets at least once a month (except for August). Its agendas and notices of meetings are published on the Ofcom's website.

There are a number of committees and advisory bodies which may exercise delegated powers or offer advice to the Board. These committees and advisory bodies include the Consumer Panel, the Content Board, the Nations and Regions Advisory Committees and the Older Persons and Disabled Persons Advisory Committee.

Appeals

Appeals against the merits of the Ofcom's decisions are heard at the CAT. The composition and processes of the CAT are contained in the section on 'Approach to Competition and Regulatory Institutional Structure'.

Regulatory Development

The new EU framework for electronic communications includes four measures – the Framework, Authorisation, Access and Universal Service Directives – which should have been applied from July 2003, and the other *Directive on Privacy and Electronic Communications* due by October 2003. The UK has met both deadlines for the transposition of respective directives into national legislation. The Ofcom consistently scores highly in the *ECTA Regulatory Scorecard* that identifies areas of best practice and weakness in the regulatory frameworks for electronic communications in EU countries. In 2008 it received the highest score of the 18 countries surveyed.[935] The UK leads in accounting separation, competition in fixed-line telecommunications and other specific areas.

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[934] Ofcom, *Functions and Roles*. Available at: http://www.ofcom.org.uk/about/csg/ofcom_board/role/ [accessed on 4 April 2008].

[935] European Competitive Telecommunications Association, *ECTA Regulatory Scorecard*, 28 January 2009. Available at: http://www.ectaportal.com/en/basic651.html [accessed on 13 February 2009].

The Ofcom has actively engaged in a series of consultations on the telecommunications industry. One being currently undertaking is the strategic review of the mobile telecommunications market.[936] The review was conducted in response to significant changes in the industry in recent years. The Ofcom has noted, however, that although evolution continues to be rapid, entry is still difficult and not all citizens and consumers have benefited from mobile services in the same way. It considers that continuing success of mobile telecommunications will require regulation to change as the industry changes. In this regard, the review is particularly interested in how the regulatory regime applying to mobile termination charges should change when the current control ends. On the closing of public consultation on 6 November 2008, the Ofcom moved to the next stage of assessment.

This assessment could be influenced by the recent CC determination on price control matters in appeals brought against the Ofcom's March 2007 decision on wholesale mobile voice termination charges by Hutchison 3G (H3G) and British Telecom (BT).[937] This determination was sent by the Competition Appeal Tribunal (the Tribunal) to the CC in March 2008. The CC was asked to determine a number of questions relating to elements of the price controls. The CC found that two of the price control matters raised in BT's appeal were well founded – spectrum costs and the network externality allowance – but rejected the price control matters raised in H3G's appeal. As a result, the CC has determined that the charges for connecting to the O2, Orange, T-Mobile and Vodafone networks should be reduced to 4.0 pence per minute (ppm) by 2010-11, rather than to 5.1ppm as decided by the Ofcom. The CC has also determined that the charge for connecting to the H3G network should be reduced to 4.4ppm by 2010-11, 1.5ppm less than the price control under the Ofcom's decision. On 2 April 2009, the Tribunal made a final ruling that accepted the CC's determination and directed the Ofcom to adopt a revised price control conditions that are consistent with the CC's determination.[938] Following the Tribunal's decision, the Ofcom published an Amendment to the SMP Service Conditions for mobile voice termination.[939]

In recognisition of the postal services being increasingly integrated into the wider communications sector, a recommendation for a communications-wide regulator has been made by an independent panel that reviewed the postal services industry.[940] Under a draft *Postal Services Bill* introduced by the Government on 26 February 2009, the Ofcom is to take the role of Postcomm in regulating the postal services (see

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[936] Ofcom, *Mobile Citizens, Mobile Consumers*, 2008. Available at: http://www.ofcom.org.uk/consult/condocs/msa08/ [accessed on 12 December 2008].

[937] CAT, *Ruling on the Reference of Specified Price Control Matters to the Competiton Commission*, Case Nos. 1083/3/3/07 and 1085/3/3/07, 18 March 2008. Available at: http://www.catribunal.org.uk/files/Ruling1083_85Hutch_BT180308.pdf [accessed on 8 April 2009].

[938] CAT, *Judgment on the Disposal of the Appeals*, Case Nos. 1083/3/3/07 and 1085/3/3/07, 2 April 2009. Available at; http://www.catribunal.org.uk/files/Judgment_1083_1085_MCT_02.04.09.pdf [accessed on 8 April 2009], pp. 31–33.

[939] Ofcom, *Mobile Call Termination – Amendment to SMP Services Conditions*, 2 April 2009. Available at: http://www.ofcom.org.uk/consult/condocs/mobile_call_term/CTMAmendment2009final.pdf [accessed on 9 April 2009].

[940] This is the Independent Review of the UK Postal Service Sector, chaired by R. Hooper, in 2008.

the section on Posts for details). In anticipation of the new regulatory responsibilities, the Ofcom published its approach to postal service regulation.[941]

The newly-established consumer group, Consumer Focus, has released a report on digital division between those who can and cannot afford broadband.[942] The report warns of growing 'digital divide' among UK consumers as many consumers have financial, educational or other barriers to the use of broadband technologies. As identified by the report, a significant proportion of non-users are: older people, low-income people, mobile-only households and those with disabilities. Consumer Focus considers that the Government's Universal Service Commitment for broadband focuses too narrowly on physical provisions and underestimates the barriers of affordability and usability. Consumer Focus makes a number of policy recommendations, including:

- having one government body to develop a coherent and comprehensive digital framework; and
- developing practical options for achieving universal and affordable broadband by the joint work of the Government and the Ofcom.

3. Posts

Royal Mail, in its 350 year history, had been a statutory monopoly until the phased opening-up of the UK mail market for competition commenced in 2003. Its current licence was revised on 3 April 2006, setting out obligations on universal postal service and service standards. It remains fully government-owned.

The mail market was fully liberalised on 1 January 2006. As a result, newly licensed operators can now compete with Royal Mail in all parts of the mail market. At present, 20 newly licensed operators can provide mail services either end-to-end or using Royal Mail's network for final delivery. In 2006–07, mail delivery made through access agreement with Royal Mail was 2.4 billion items compared with 35 million end-to-end delivery made by new operators. The two major competitors to Royal Mail in the upstream mail market are UK Mail and TNT. Competition in end-to-end delivery comes from DX's operation in a niche market of document exchange service and TNT's trial delivery in Liverpool. Royal Mail still dominates the market, delivering 99 per cent of addressed letters, totalling 21.9 billion items in 2006–07.[943]

The key legislation governing the UK mail market is the *Postal Services Act 2000*, which also gives effect to the *1997 Postal Services Directive* (as amended) that sets out common rules governing the provision of postal services across Europe. The Act has been amended by the *Enterprise Act 2002* and a series of orders and regulations that oversee the mail market, such as the *Postal Services (EC Directive) Regulations 2002*.

In accordance with the Act, the Postal Services Commission (Postcomm) was established in 2001 as a non-ministerial government department that regulates postal

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[941] Ofcom, *Statutory Duties and Regulatory Principles*. Available at: http://www.ofcom.org.uk/about/sdrp/ [accessed on 8 April 2009].

[942] Consumer Focus, *The Digital Divide: Universal Service and Broadband*, 8 May 2009. Available at: http://www.consumerfocus.org.uk/en/content/cms/Publications___Repor/Publications___Repor.aspx [accessed on 22 May 2009].

[943] Royal Mail, *Report and Account Year Ended 25 March 2007*, 2007. Available at: ftp://ftp.royalmail.com/Downloads/public/ctf/rmg/RandA_2006-07_26-10-07_FINAL_revised.pdf [accessed on 28 September 2008].

services. Its prime responsibility is to ensure the continued provision of a universal postal service by Royal Mail. It also has the responsibility of further the interests of postal users wherever appropriate through the promotion of effective competition. In fulfilling these duties, the Postcomm performs the following main regulatory tasks:

- Price and quality of services regulations: Price control and service standards are put in place to regulate Royal Mail's operation in areas where established or prospective competition is insufficient to protect consumers' interests using a competition-based test. Price control takes the form of RPI-minus-X on two baskets of products – captive and non-captive.
- Access arrangements regulations: Royal Mail is required to negotiate access agreements on using its network for final delivery with mail users and competing postal operators on transparent and non-discriminatory ground. Access agreements are commercial agreements negotiated between access seekers and Royal Mail. If other postal operators are unable to agree with Royal Mail on a fair term and condition for access, the Postcomm can intervene to ensure that access is made available on appropriate terms.
- Postal operators licensing and enforcing: Companies planning to carry addressed mail items weighing less than 350 grams and costing less than £1 to post are required to obtain a license from the Postcomm, who will check the suitability of applicants through a minimum of 28 days consultation with mail operators, customers and other interested parties. The Postcomm will enforce licence requirements that postal operators are not meeting through provisional or final order. The Postcomm is also able to instigate criminal or civil proceedings where postal operators are working without a licence.
- Advisory role: The Postcomm has an advisory role to the Secretary of State, with respect to the development of the Post Office network and other postal service matters.

Process and Consultation

The Postcomm released a final statement on its consultation procedures in March 2004.[944] Consultation period may change depending on the materiality and the complexity of the issues consulted.

The full three-stage consultation on regulatory policy framework issues such as market opening or Royal Mail's price control, may take a full three-stage consultation, under which stage one and two each taking two to three months, and stage one month. This generally involves:

- Stage one consultation setting out issues and possible approaches and the proposed timetable;
- Stage two consultation on the Postcomm's proposals that have taken account of the interested parties' comments made during the first consultation;
- Stage three consultations on the Postcomm's proposed decision which summaries responses received so far, setting out the Postcomm's conclusions.

[944] Postcomm, *Postcomm's Consultation Procedures: Review and Modification – a Decision Document*, March 2004.

Consultation of significant changes to Royal Mail's product and licence, generally last for at least 90 days and involves two stages – stage one consultation (ranging from one to three months) followed by a statutory notice period on the proposed decision.

Consultation of changes to the Postcomm's policies and procedures should be conducted over a minimum period of three moths for interested parties to comment.

Consultation on routine work conducted by the Postcomm, such as licence issuance and enforcement, has corresponding statutory minimum consultation periods between 21 or 28 days.

Condition 9 of Royal Mail's licence mandates negotiated access to its postal network and assigns the Postcomm to make an access determination when it is sought (most likely the request is made by the access seeker rather than Royal Mail). The process involves:[945]

- The initial stage, where, upon receiving a determination request, the Postcomm will establish both parties' positions and then publish a consultation document identifying the proposed terms of its determination and seeking written comments by interested parties with a specified time period (likely to last for around three months).
- Following consultation, the Postcomm will publish its preliminary decision, which may direct that access should be granted on specific terms and conditions or that compulsory access is not necessary. The Postcomm will further seek responses from interested parties.
- Following responses to the proposals, the Postcomm will reconsider the issues for a final determination. If only minimal changes are required, then it is likely that the Postcomm will issue a 28-day notice to Royal Mail of the final terms of the determination. If significant changes are required, then the Postcomm may have to consult on revised proposals before proceeding to the stage of issuing a notice to Royal Mail.

During the consultation process, various stakeholders as discussed below may be consulted. The Postcomm also makes extensive use of consultants and experts from the private sector in reaching its final decisions and has established a panel of economists and regulatory experts. Outside specific regulatory decisions, the Postcomm organises industry and public forums, 'Roadshows' around all regions in the UK, seminars and workshops on specific issues. The Postcomm also arrange face-to-face meeting with relevant stakeholders on a regular basis.

The *Postal Services Act 2000* does not impose any duty on the Postcomm to publish reasons for its decisions. However, the Postcomm seeks to publish as much of material used in making the decision, including in-house analysis, consultation papers and final decisions covering reasons for these decisions, subject to some exceptions. Information that the Postcomm considers would or might seriously and prejudicially affect the person's interests is not made publicly available. In addition, in order to encourage collective decision making, and frank advice and debate, the Postcomm will not publish the policy advice given by its staff or consultants.

[945] Postcomm, Annex 4: Access Determination Process in *Competitive Market Review: Proposals for Tackling Barriers to Entry in Postal Services*, November 2005.

Timeliness

The Postcomm engages in pre-lodgement discussion with relevant parties to determine the details of the disputed regulatory issue and to determine whether mandating such access as desired by the access seeker is appropriate before engaging in formal dispute resolution. However, there is no mandatory period in which the Postcomm has to complete its investigation. In addition, there are no consequences if the regulator does not reach a decision within a specified time.

Information on the past performance of the Postcomm in terms of the average time it takes to reach a final decision is difficult to determine as it requires examination of the timeliness of a number of specific determinations.[946]

Role of Interested Parties

Under the Act, the Consumer Council for Postal Services (Postwatch), an independent consumer body that replaced the Post Office Users' National Council, was established in 2001. The Postwatch had nine committees across the UK with offices in Scotland, Wales, Northern Ireland and six regions across England. It represented all mail customers (business or individual) in all postal matters to ensure that consumers get the best possible service from postal service operators.

The *Postal Services Act 2000* also required the Postcomm to consider the interests of specified vulnerable consumer groups, whose interests were particularly represented by the Postwatch, in making its determinations.[947]

On 1 October 2008, the Postwatch was merged with energyWatch and the Welsh, Scottish and National consumer councils to form a new National Consumer Council known as 'Consumer Focus', a statutory consumer body established by the *Consumers, Estate Agents and Redress Act 2007*. Among other things, Consumer Focus has the legislative ability to make an official 'super-complaint' to the Postcomm.[948]

Other stakeholders, commercial consumers and their trade associations include:

- Mail User Association representing major mail users
- Direct Marketing Association – trade organisation in the marketing communications businesses
- Envelope Makers' and Manufacturing Stationers Association
- Periodical Publisher Association – representing publishers and associated members.

Information Disclosure and Confidentiality

The *Postal Services Act 2000* provides the Postcomm with the power to access any information from relevant stakeholders. A person commits an offence if, without reasonable excuse, he/she fails to do anything required of him/her by a notice under s. 47. Further, the Postcomm has powers to seek and seize documents under the *Postal*

[946] See Postcomm's news releases website at: http://www.psc.gov.uk/news-and-events/news-releases/2008.html [accessed on 7 January 2009].
[947] Chapter 26, s. 5.
[948] House of Commons, *Consumers, Estate Agents and Redress Bill, Explanatory Notes*. Available at: http://www.publications.parliament.uk/pa/cm200607/cmbills/061/en/07061x-a.htm [accessed on 7 January 2009].

Services Act 2000, if the articles are required for an investigation. However, parities are not required to provide documents which they would not be compelled to do so in civil proceeding before the court.

Under the *Postal Services Act 2000*, the Postcomm is required to compile and maintain a public register listing certain documents it produces when fulfil its regulatory functions relating to issuing and enforcing licences. The Postcomm may also publish information it considers necessary to fulfil its regulatory functions in its public register or website. In doing so, it should exclude, where practical any matter relating to the affairs of a person if the Commission considers that its publication would or might seriously and prejudicially affect the person's interests.

Third parties can access information held by the Postcomm under the *Postal Services Act 2000*.[949] However, as far as possible the Postcomm shall not provide information if it considers that its disclosure would or might seriously and prejudicially affect the interests of the person to whom it relates.

Decision-making and Reporting

The Postcomm's work is steered by its commissioners, who meet once a month. Commissioners are appointed by the Secretary of State and have experience in business, competition, consumer issues, regional matters, mail operations, trade union work, regulation and policy-making. The Commission consists of the Chairperson, the Chief Executive and five other commissioners. All commissioners except for the Chief Executive work on part-time basis. Commissioners can only be dismissed for incapacity or misbehaviour.

The Postcomm is organised into four main directorates, which provide information and advice to the Commission:

- Universal service and customer protection, which ensures that postal operators comply with their licence conditions and that the Royal Mail meets it obligations to customers;
- Regulatory finance, which develops policy on the Royal Mail's pricing framework;
- Economic policy, which formulates the regulatory frameworks; and
- Legal, which advises the Commission on policy and process.

As of March 2008, there was 66 staff working at the Postcomm.[950]

Commissioners collectively approve all decision documents which are written by the directorates based on consultations with relevant stakeholders and internal analysis. All important decisions must be agreed unanimously. If it is not possible to achieve unanimity, decisions will be taken by simple majority voting with each Commissioner having a single vote. Proxy votes are not permitted. In the case of an equal number of votes being cast for and against a resolution, the Chairperson of the meeting shall have a second casting vote. The Postcomm's code of practice indicates that when the exercise of functions is delegated, the decision of the person or committee is the decision of the Postcomm rather than a decision taken with limited authority which may be appealed to the full commission.

[949] Chapter 26, ss. 52 and 53.
[950] Postcomm, *Annual Report 2007–08*, 2008, p. 33.

The Postcomm is funded by the industry it regulates and therefore mainly through licence fees paid by Royal Mail.

Appeals

The Postcomm's regulatory decisions are subject to appeals. As outlined in the Background section on 'Approach to Competition and Regulatory Institutional Structure', appeals in relation to licence modification are heard by the Competition Commission and appeals on the merits of regulatory decisions are heard by the CAT.

Regulatory Development

The UK government has conducted an independent review of the postal industry. Specifically, the review examines three issues: first, the impact of liberalisation of the UK postal market; second, the trends in future market development and the likely impact on postal service providers and consumers; and third, the continued provision of universal services. The initial report from the independent review panel considers that there is a compelling case for action given the presence of substantial threats to the Royal Mail's financial stability and therefore the universal service.[951] The final report delivered in December 2008 concludes that 'sustaining the universal service depends fundamentally on modernising Royal Mail' and recommends a package of changes.[952] In response to the recommdenations, the Government introduced the *Postal Services Bill* on 26 February 2009, proposing the following changes to the postal services:

- Restructuring the Royal Mail for a monority shareholder from the private sector;
- The Government will be liable to any deficit in the Royal Mail Pension Plan;
- Postcomm will be merged into Ofcom with assumed primary responsibility of ensuring the provision of the universal services.

The bill successfully cleared its third reading before the House of Lords on 20 May 2009,[953] with a number of amendments including a new requirement for the Ofcom to report on the Universal Service Obligation cost, and enhanced power of the Ofcom to ensure Royal Mail's access price for using its mail network is cost-reflective. The amended bill will be debated in the House of Commons in early June. Finalisation of the new arrangements will also be subject to obtaining state aid and competition clearance from the EC. This is unlikely before 2010.

4. Water and Wastewater

The quality of water supply and wastewater treatment and disposal in the UK is generally at a high level. Approximately 96 per cent of households are connected to the sewer system. The UK water and sewerage supply industry is comprised of 23 local and regional monopoly providers that were privatised in 1989.

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[951] An Independent Review of the UK Postal Service Sector, (chaired by R. Hooper), *The Challenges and Opportunities Facing UK Postal Services: An Initial Response to Evidence*, May 2008, p. 7.

[952] An Independent Review of the UK Postal Services Sector, (chaired by R. Hooper), *Modernise or Decline: Policies to Maintain the Universal Postal Service in the United Kingdom,* 16 December 2008, pp. 12–16.

[953] Department for Business Enterprise and Regulatory Reform (BERR), *Postal Services Bill Clears Lords*, News, 20 May 2009. Available at: http://nds.coi.gov.uk/environment/fullDetail.asp?ReleaseID=401875&NewsAreaID=2&NavigatedFromDepartment=True [accessed on 3 June 2009].

With the exception of Scotland, market competition is very limited and is confined to servicing eligible non-household customers who require at least 50 megalitres of water per year. This element of competition was introduced in 2005 through a water supply licensing (WSL) regime. This enables water supply licensees to seek access to a water distribution network operated by a monopoly water and sewerage company in order to compete to provide water to eligible large users of water. Non-eligible customers are not allowed to switch suppliers.

In Scotland, competition in water supply to all non-household customers was introduced in April 2008 in accordance with the *Water Services etc (Scotland) Act 2005*. There are currently four licensed water suppliers in Scotland – Business Stream, Ondeo Industrial Solutions, Osprey Water Services and Satec – all buy wholesale services from Scottish Water.

Regulatory Institutions and Legislation

The Water Services Regulation Authority (Ofwat), established in 1989 under the name of Director General of Water Services, is the economic regulator of water and sewerage industry in the UK other than Northern Ireland (by NIAUR) and Scotland (by WICS). The Ofwat is an independent non-ministerial government department accountable to the UK Parliament (delegated to the Secretary of State for the Environment, Food and Rural Affairs) and the National Assembly for Wales who is responsible the development of policy for the water and sewerage industries in England and Wales respectively. The Ofwat's statutory responsibility and powers are set out in the *Water Industry Act 1991* and the *Water Act 2003*. Its main duties include:[954]

- protecting the interests of consumers by promoting effective competition wherever appropriate. The Ofwat is specifically required to take into account the interests of vulnerable consumers in making decision.
- regulating appointed water and sewerage companies to ensure they properly carry out and finance their functions, in particular by securing a reasonable rate of return on capital.
- regulating licensed water supply companies to ensure that they properly carry out their functions.

The Ofwat also has a general duty when exercising its powers to consider sustainable development and environmental effect. Having regard to the principles of best regulatory practice, the Ofwat considers that best regulatory practice requires its activities to be transparent, accountable, proportionate, consistent and targeted only at cases. To this end, a paper was published by the Ofwat in 2009 updating its approach to performing the duty of sustainable development.[955]

The Ofwat is funded by water and sewerage customer through an annual licence fee. It is also subject to scrutiny by the National Audit Office and appears before the Public Accounts Committee following publication of its audit reports.

The main functions of the Ofwat are implementing and enforcing price regulation and access regulation. The Ofwat sets retail price caps every five years for regulated water companies, under which price limits are set according to future efficient costs

[954] See s. 2 of the *Water Industries Act 1991*.

[955] Ofwat, *Water Today, Water Tomorrow – Ofwat and Sustainability*, 2009. Available at: http://www.ofwat.gov.uk/sustainability/sustainabledev/ [accessed on 9 April 2009].

derived from benchmarking monopoly companies. The current caps were set in 2004 for the period covering 2005–2010. Price review for aligning prices with efficient costs can be made at earlier times for a limited number of reasons. The next review is due in 2009, for which the Ofwat also intends to review how charges can promote water efficiency and whether a five-year period is the appropriate timeframe.

The Ofwat issues a guidance document about the appropriate way to grant access to the water supply system.[956] All water and sewerage companies have published access codes which set out how they will offer to provide access to their water supply systems in compliance with the guidance.

The Ofwat has also recently taken on the responsibility of setting and enforcing leakage and water efficiency targets as part of its Water Supply and Demand Policy.[957] This policy also covers metering requirements and with the climate change management plans of water companies.

The Ofwat also holds a formal advisory role for government.

How Matters Arise for Consideration by the Ofwat

The licensed water supply companies must negotiate the terms and conditions of access with the monopoly water company. If the two parties are unable to reach agreement, a dispute may be referred to the Ofwat, which can then determine the terms and conditions of access to the water supply system.[958]

The Ofwat has enforcement powers under s. 18 of the *Water Industry Act 1991* in relation to regulating water and sewerage companies and licensees. The Ofwat can take enforcement action to ensure that a water company's access code complies with the Ofwat's guidance, or that the company complies with its own access code. In relation to its determination on water supply arrangement disputes, the Ofwat can, among other things, take enforcement action if it considers that a water company or licensee is not complying with the terms of a determination.

The Ofwat has power to determine some disputes that arise as a consequence of the WSL Scheme. For example, the Ofwat can determine questions of a customer's eligibility to be supplied by a licensee if referred by the potential customer or the licensee. Water companies are not able to refer an eligibility dispute to the Ofwat.

The Ofwat is also able to determine disputes about terms and conditions of access. Once determined, the licensee can decide whether to proceed with the access agreement. If accepted, the terms and conditions determined by the Ofwat become binding on both the licensee and water company and the company must make access available to the licensee on those terms and conditions.

The Ofwat has noted that it does not expect regulated companies to use disputes as a means of preventing or delaying access to water supply systems and will be concerned if either party has not made a serious attempt to reach agreement.

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[956] Ofwat, *Access Codes Guidance*, July 2007. Available at: http://www.ofwat.gov.uk/competition/wsl/gud_pro_accesscodes310707.pdf [accessed on 30 January 2009].

[957] Water companies in England and Wales have a statutory duty to promote the efficient use of water by consumers under s. 93A of the *Water Industry Act 1991*.

[958] Ofwat, *Licensees and Potential Licensees*. Available at: http://www.ofwat.gov.uk/competition/wsl/wsllicensees/ [accessed on 15 September 2008].

Generally, the Ofwat will not consider making a determination unless it is satisfied that the parties have tried unsuccessfully to reach an agreement.[959]

Process and Consultation

A typical determination process may consist of the following stages:

- Pre-investigation: The Ofwat decides whether to accept the dispute. Ofwat seeks to complete this stage within five working days of receiving an initial submission but may repeat this stage until it has all of the information that is required to consider a dispute.
- Information gathering: Information may be requested from potential customers, licensees and water and sewerage companies depending on the nature of the dispute. The Ofwat aims to request information within ten working days of accepting a dispute and to give parties ten working days to respond. Further information requests may be also be made with similar response times until the Ofwat has all of the facts that it needs to make a determination.
- Draft determination: a draft report will be prepared at the conclusion of the information gathering stage. This draft determination will set out the facts of the case, interested parties' views and the Ofwat's draft conclusions. The Ofwat aims to issue a draft determination within 15 working days of completing the information gathering stage.
- Further submission: Interested parties will be given ten working days to respond to the Ofwat's draft determination before a final determination is issued. The Ofwat will take account of comments received before issuing the final determination within another ten working days. The Ofwat has noted that written consultation, while important, may not be the best or only way of undertaking consultation. Meetings, workshops or seminars are sometimes held to explain the issues and to better understand the various points of view. The Ofwat will also consider publishing leaflets and contributing articles to journals.
- Final determination: a final report will be published in the Ofwat's library within 15 days of issuing the determination.

In public consultations for major issues in policy development, the Ofwat will usually allow 12 weeks for submissions in accordance with the Government's code of practice.

Timeliness

The determination process involves a number of stages and involves consultation with relevant parties and the publication of those parties' non-confidential submissions. In order to resolve disputes as quickly as possible, the Ofwat has set targets for dealing with each of these stages of a disputes. However, the targets are not binding on the Ofwat and may not be met if parties to the dispute do not respond to requests within the Ofwat's deadlines, if the facts of the dispute are not clearly established or the matter is complex. In order to deter regulatory 'gaming', the Ofwat has stated that, if

[959] Ofwat, *Water Act 2003, Water Supply Licensing, Proposed Procedure for Handling Water Supply Licensing Determinations*. Available at: http://www.ofwat.gov.uk/aptrix/ofwat/publish.nsf/AttachmentsByTitle/wsl_determinations_cons270605.pdf/$FILE/wsl_determinations_cons270605.pdf [accessed on 15 September 2008].

parties do not provide information within its timescale, it may decide to proceed on the basis of available facts.

Role of Interested Parties

If the dispute relates to drinking water quality, the Ofwat may seek external advice from the Drinking Water Inspectorate (DWI). The Ofwat has entered into a Memorandum of Understanding with DWI. Similarly, the Ofwat will consult with the Environment Agency if the dispute involves issues such as pollution control.

If the dispute involves consumer protection issues, the Ofwat will consult with the relevant Consumer Council for Water (CCWater) committee. The CCWater has been established since 2005 under the *Water Act* to represent customer's interest, deal with complaints about water companies and monitor the services companies provide.[960] Unlike its predecessors – Watervoice and Ofwat Customer Service Committees – the CCWater is an independent consumer council external to Ofwat. However, the Ofwat provides support to CCWater under Service Level Agreements.

In competition issues, the Ofwat seeks advice from standing advisory groups comprised of customer representatives, market entrants and water companies.

Ofwat may also engage consultants and other outside parties to help it consider technical or financial issues.

Information Disclosure and Confidentiality

The Ofwat monitors and reports on the regulated companies on an annual basis. As part of its monitoring it obtains information about levels of customer service, security of supply and efficiency, financial performance, and unit costs. This information enables the Ofwat to compare the performance of companies and to ensure they are meeting the outputs assumed in the price caps.

The Ofwat has powers under the *Water Industry Act* to gather documents and information from companies where the Ofwat considers that a company may have contravened the statutory requirements of the Act. However, an individual or organisation can not be required to produce any documents which it could not be compelled to produce in civil proceedings in the High Court.[961]

In practice, information gathered from the incumbent bodies is minimal and consists mainly of two annual returns. The first covers a company's charges for the forthcoming year and the second reports a company's performance and expenditure for the previous year. In order to ensure the validity and relevance of this information, the Ofwat requires water companies to appoint an independent professional to examine, test and provide an opinion on annual reports. The Ofwat has, with the Department for Environment, Food and Rural Affairs (Defra) and others, reviewed the scope for reducing annual reporting requirements and improving data sharing with other regulators.[962] From the information submitted by companies in June returns, the Ofwat publishes annual comparative reports on their performance in areas such as financial performance, services and delivery, price and relative efficiency. An international comparision with water companies from Canada, Portugal, the Netherlands, Australia and the US is also conducted.

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[960] Ofwat, *Water Act 2003*, 2003. Available at: http://www.opsi.gov.uk/acts2003/ukpga_20030037_en_1.htm [accessed on 17 April 2008].
[961] *Water Industry Act 1991*, Chapter 56, s. 201.
[962] Communication with the Ofwat (Phillip Dixon) in 2008.

All information gathered by the Ofwat is stored in its library. In 2005 the Ofwat launched a long-term project, Project Reservoir, to restructure the office-wide software suite used to collect, process and store regulatory information. This project is being developed in-house and uses open source software to make the Ofwat's systems transparent and freely available to stakeholders.[963]

In addition, the Ofwat publishes its determination and consultation documents on its website. The Ofwat will generally not publish information that relates to an individual or body that may seriously and prejudicially affect the interests of that individual or body. However, it may publish such information if it considers publication is in the public interest in that it facilitates the carrying out of the Ofwat's regulatory role.

As with other regulators, third parties may also be able to access information as required by the *Freedom of Information Act 2000* (FOIA) and the *Data Protection Act 1998* unless that information is covered by exemptions under those Acts. The FOIA is retrospective and therefore applies to both old and recent records. It requires Ofwat to provide information in response to a written request, within 20 working days.

The Ofwat has duties to provide information under the Revised Environmental Regulations similar to those under the FOIA. These regulations provide a right of access to environmental information and requests need not be in writing.[964]

Decision-making and Reporting

The Ofwat became a corporate body governed by its board from 1 April 2006. The Board of the Ofwat is responsible for deciding how the Ofwat carries out its functions and effectively meets its statutory duties. The Board consists of a Chairperson, a Chief Executive, two executive and four non-executive directors. Board members typically have a regulatory background. The Chairperson is appointed by the Secretary of State for Environment, Food and Rural Affairs. The heads of each of the Ofwat's operating divisions along with the Chief Executive make up the Management Team. Some decisions may be made by this team without input from the Board. However, the division heads are not able to vote on Board decisions.

Decisions by the Board are generally made by consensus rather than by formal vote. However, a vote will be taken if a clear consensus has not emerged or a board member requests that a vote be taken. When a vote is taken, a decision will be determined by majority vote. If a vote is tied, the Chairperson has a casting vote, in addition to his/her original vote. All decisions, including minority views, are recorded in Board minutes.

The Board's operations are set out in its Rules of Procedure.[965] An agenda and papers for Board meetings are normally circulated, via email, five working days before a meeting is to be held. Papers may be tabled at the Board meeting with the Chairman's permission.[966]

A draft report is prepared at the conclusion of the information gathering stage. This draft determination will set out the facts of the case, interested parties' views and the

[963] Communication with the Ofwat (Phillip Dixon) in 2008.
[964] Communication with the Ofwat (Phillip Dixon) in 2008.
[965] Ofwat, *Rules of Procedure for the Water Services Regulation Authority (Ofwat*). Available at: http://www.ofwat.gov.uk/aptrix/ofwat/publish.nsf/AttachmentsByTitle/Ofwat_RoP.pdf/$FILE/Ofwat_RoP.pdf [accessed on 15 September 2008].
[966] Communication with the Ofwat (Phillip Dixon) in 2008.

Ofwat's draft conclusions. The Ofwat aims to issue a draft determination within 15 working days of completing the information gathering stage. Following further submission (see above) and consideration, the Ofwat issues the final determination within another ten working days. The final report is published in the Ofwat's library within 15 days of issuing the determination.

The Ofwat will also sometimes make an interim determination when a regulated company requests changes to their price limits before the normal five-year review period has elapsed. Interim changes will only be allowed in the case of a material and relevant change of circumstances since the last review.[967]

Explanations for all decisions are provided by the Ofwat, in aiming to communicate effectively and to operate transparently. Responses to consultations are also published to the extent that they are non-confidential.

Appeals

The Ofwat's decisions are subject to judicial review before the High Court (Administrative Court). Companies can also refer the Ofwat's decisions on price caps and changes to licence conditions to the Competition Commission. Its decisions under the *Competition Act 1998* can be appealed to the Competition Appeals Tribunal.[968]

Regulatory Development

An independent review of competition and innovation in UK water markets, headed by Professor Martin Cave (the Cave Review) was commenced in February 2008. The Cave Review's interim report was published in November 2008.[969] It contains a number of recommendations for increasing retail competition in the industry. These recommendations aim to reduce costs and increase service levels for all customers; support the more efficient use of water; and help companies better to meet the challenges facing the industry including climate change, containing costs, rising consumer expectations, and water efficiency.

On 19 January 2009, the Ofwat published its response to the Cave Review's interim report.[970] The response, jointly with the UK Environment Agency, is based on a report commissioned from Synovate in examining the potential barriers to participation in water rights trading.[971] The Ofwat's response begins by setting out an overarching context within which its subsequent comments on the interim report's specific consultation questions are set. Critically, Ofwat considers that

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[967] Communication with the Ofwat (Phillip Dixon) in 2008.

[968] Ofwat, *How We Do Our Job – A Code of Practice Governing the Discharge of Ofwat's Functions*, 2003, Available at: http://www.ofwat.gov.uk/aptrix/ofwat/publish.nsf/AttachmentsByTitle/cop_110903.pdf/$FILE/cop_110903.pdf [accessed on 17 April 2008].

[969] Department for Environment, Food and Rural Affairs (DEFRA), *News Release*, 2008. Available at: http://www.defra.gov.uk/news/2008/081118b.htm [accessed on 3 February 2009].

[970] Ofwat, *Ofwat's Response to the Independent Review of Competition and Innovation in Water Markets*, 19 January 2009. Available at: http://www.ofwat.gov.uk/competition/review/res_ofw_caverpt20090122.pdf [accessed on 3 February 2009].

[971] Synovate, *Exploring Views on the Potential for More Active Water Rights Tradings: Report prepared for Ofwat/Environment Agency*, 5 December 2008. Available at: http://www.ofwat.gov.uk/aboutofwat/submissionsresponsesevidence/pap_rsh_syndovatedec08.pdf [accessed on 9 April 2009].

> The current regulatory system is insufficiently flexible to ensure the water and sewerage sectors meet the new challenges [climate change, rising population, environmental standards etc.] in the most innovative and efficient way possible.

According to the Ofwat,

> Meeting the future challenges successfully and efficiently will require a more flexible approach to regulation than in the past if we are to continue to protect consumers now and in the long term. This includes greater use of market mechanisms both at the retail and, most importantly, upstream levels.

In this regard, the Ofwat urges the Cave Review's final report to concentrate particularly on introducing upstream market mechanisms in the water and sewerage industry, including necessary legislative amendments.

On 22 April 2009, the Cave Review's final report was published.[972] In recognition of the new challenges facing the industry, particularly climate change and population growth, the review recommends changes to both the regulatory and legislative frameworks governing the industry to improve competition and support innovation. It proposes a step-by-step approach to reform over time based on cost-benefit analysis, with the introduction of competition in upstream markets as earlier as practical. Other key recommendations include:

- Introducing retail competition for, potentially, all non-household customers;
- Mandatory legal separation of retail and network businesses (with exceptions);
- Reforming the special merger regime, including the removal of retail only mergers and the lifting-up of the threshold for other mergers; and
- Amendments to the regime of inset appointments.

The UK and Welsh Assembly Governments and relevant bodies are currently considering these recommendations.

On 22 December 2008, the UK Environment Agency launched its six-month consultation on the eleven draft River Basin Management Plans in accordance with the EU *Water Framework Directive*. Each plan on a river basin district identifies the main issues and proposes key actions to address the issues. To date, the Ofwat has published its responses to ten of the draft plans and will respond to the remaining one shortly.[973]

5. Rail

The UK railway system is structurally separated. The separation of national rail network and services occurred at the time of privatisation introduced under the *Railways Act 1993*. The British Railways Board (BRB) was first broken up and sold off. Railtrack was placed into railway administration in 2001 and, the following year, its functions as the track owner were taken over by Network Rail.

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[972] Martin Cave, *Independent Review of Competition and Innovation in Water Markets: Final Report*, April 2009. Available at: http://www.defra.gov.uk/environment/water/industry/cavereview/pdf/cavereview-finalreport.pdf [accessed on 30 April 2009].

[973] Ofwat, *Ofwat's Responses to the Environment Agency's Consultation on Draft River Basin Management Plans*. Available at: http://www.ofwat.gov.uk/sustainability/sustainabledev/res_ofw_eadftriverbas [accessed on 29 April 2009].

Consequently, the rail industry primarily consists of two groups of operators, the network operator and the rail service providers. The first is the national rail network (including track, signalling, bridges, tunnels, stations and depots) operated and maintained by a single provider – Network Rail. It operates under a network licence issued by the Secretary of State but enforced and amended by the Office of Rail Regulation (ORR). Network Rail is a not-for-dividend company with members, whose profits are required to be re-invested into the railway. It is financed by debt fully guaranteed by government.

The second group is the train operating companies (TOCs) who run passenger and/or freight trains on the rail network. TOCs are franchisees granted by the Department of Transport. Their operating licences are issued by the ORR. In order to operate trains, a TOC must negotiate access terms and conditions with Network Rail. Parties to an access negotiation are required to consult with potentially affected stakeholders, prior to reaching an access agreement that will be submitted to the ORR for approval. So far, the extent of competition in the rail industry is limited.

The remainder of the industry contains those operating on the underground rail (London Underground), light rail (including tramways) and other rail (including Channel Tunnel).

Regulatory Institutions and Legislation

The Secretary of State for Transport and the Scottish Ministers are responsible for the development of public policies in rail industry in England and Wales, and in Scotland, respectively.

The ORR is the independent statutory body responsible for safety and economic regulation of rail in the UK. It was established in July 2004, replacing the predecessor in economic regulation of rail – Rail Regulator. In accordance with the *Railways Act 2005*, it assumed the responsibility of the Heath and Safety Executive in governing the health and safety issues in rail. It is also the competition authority in this industry, who share concurrent power with the OFT.

The ORR has a range of statutory duties set out in the *Railways Act 1993,*[974] *Railways and Transport Safety Act 2003*, *Competition Act* and so on. The duties are not prioritised under the laws, but are balanced by the ORR in order to promote the public interest (that is, the interest of the society as a whole).

As both a regulatory and competition authority, the ORR has heavily relied on regulatory tools to perform its duties. These include:

- Licensing network providers and train services operators.
- Approving access agreements, where the ORR relies on information provided by the parties in making its determination whether or not to accept an access agreement.[975]
- Conducting periodical reviews of access charges: Access charges review is normally undertaken every five years but an interim review can be carried out more frequently if certain conditions are met. The ORR completed a periodic

[974] Understood as amended most recently in the *Railways Act 2005*.

[975] Office of Rail Regulation (ORR), *Industry Code of Practice for Track Access Application Consultations*, 2008. Available at: http://www.rail-reg.gov.uk/upload/pdf/candp-CofP-120608.pdf [accessed on 15 September 2008].

review in 2008 that sets Network Rail's outputs, revenue requirement and access charges for the five years from 1 April 2009 to 31 March 2014.

- Monitoring and enforcement.

Process and Consultation

The ORR has set out a framework for access negotiation between Network Rail and TOC. Network Rail and TOCs are encouraged to hold informal discussions with stakeholders prior to entering into draft access arrangements. Formal consultation must take place once a draft arrangement has been made. Consultation may include hearings, oral representation, written submissions and informal meetings. Network Rail and the TOC must aim to resolve concerns raised during consultation where possible. A consultee must advise Network Rail and/or the TOC whether they are satisfied with the response within two working days.

The ORR mandates that parties' consultation periods shall be 14 days for changes to freight track access contract and 28 days for all other proposed changes to track access arrangements, unless an application is urgent or particularly complex.

When Network Rail and the TOC have agreed on the terms of an access arrangement, and consultation with stakeholders has been exhausted, the arrangement may be submitted to the ORR for determination. If all stakeholders' concerns have been resolved, the arrangement may be amended without approval from the ORR.

An access seeker is able to appeal to the ORR if it believes that it has been unfairly treated, discriminated against or is in any other way aggrieved in connection with its entitlements under an access arrangement. Such an appeal may be made at any stage of the negotiation process. The ORR will then undertake its own consultation to determine the outcome of the dispute.[976]

Similarly, where there are unresolved objections to the access arrangements made by third parties, these will be considered by the ORR in making its final determination. The ORR may request further information from third parties or arrange a meeting to obtain further information.

The ORR publishes an application to determine a dispute on its website as well as a list of parties that have already been consulted. If a party has not already been consulted, or is unhappy with the proposal but has not been listed as a consultee with outstanding objections, it is able to notify the ORR of its interest at this stage.[977]

Timeliness

There are no mandatory timeframes for access agreement negotiation and determinations to be completed. However, the ORR has set a target of 12 to 18 weeks for determination, depending on complexity of the agreements. For example, it considers that a determination of a straightforward agreement should be finalised within 12 weeks, including five weeks for the ORR to review the agreement. A contentious agreement may be finalised within 18 weeks, including eleven weeks for

[976] ORR, *Guidance on Appeals to ORR under the Railways Infrastructure (Access and Management) Regulations 2005*, 2006. Available at: http://www/rail-reg.gov.uk/server/show/nav.1775 [accessed on 20 June 2008].
[977] ORR, *Industry Code of Practice for Track Access Applications*, 2008. Available at: http://www.rail-reg.gov.uk/server/show/nav.204 [accessed on 20 June 2008].

consideration by the ORR.[978] There are no consequences for the ORR if these indicative timeframes are not met although it appears that the ORR's past performance in adhering to its benchmark timeframes has been satisfactory. In 2005, the ORR managed to meet the target for 102 out of 115 cases on determining access agreement. In 2006–07, only 88 out of 124 cases were completed within the target timeframe, 36 cases were delayed due to complexity or delay by parties.[979]

The ORR also aims at making decisions on licence applications and licence exemption applications within three months of receiving the application. Both are fully met in 2005–06 and 2006–07.

Role of Interested Parties

The ORR has the statutory requirement of protecting specified vulnerable groups. The Rail Passengers Council (Passenger Focus), established in 2005, is an independent consumer body in the railway industry, which is external to the ORR.

Information Disclosure and Confidentiality

The ORR has powers under the *Railways Act 1993* to obtain information and documents from any person or organisation that it considers may have contravened that Act. However, no person shall be required to produce any documents which they could no be compelled to produce in civil proceedings in the court.[980]

As with other regulators, access by third parties to information supplied to the ORR may be subject to the *Freedom of Information Act 2000* and the *Data Protection Act 1998*. However, the ORR may not release information covered by exemptions under those acts, including information that may be considered commercial-in-confidence.

Decision-making and Reporting

The ORR is led by a Board which is responsible for setting the ORR's strategy. The Board meets monthly and consists of a mix of executive and non-executive directors. The Board's members are appointed for a fixed term of up to five years.

The Board has four committees covering Audit, Remuneration, Periodic Review and Safety Regulation. Other committees may be appointed to deal with specific areas of work, such as investigating access arrangements.

The Board is independent of the UK Government. The Board is also required under the *Railways Act 2005* to comply with a reasonable requirement of the Secretary of State to provide him/her with information or advice about a matter connected with a function or other activity of the Secretary that relates to railways or railways services.[981]

The *Railways Act* mandates that the ORR maintain a register of all decisions - including full written reasons for such decisions, consultation documents, annual reports, hearing and seminar transcripts – that must be published on the ORR's

[978] ORR, *Industry Code of Practice for Track Access Application Consultations*, 2008. Available at: http://www.rail-reg.gov.uk/upload/pdf/candp-CofP-120608.pdf [accessed on 15 September 2008].
[979] ORR, *Annual Report 2006-07*, 2007. Available at: http://www.rail-reg.gov.uk/server/show/nav.1240 [accessed on 8 July 2008].
[980] *The Railways Act 1993*, Chapter 43, s. 71.
[981] ORR, *Corporate Governance*, 2008. Available at: http://www.rail-reg.gov.uk/server/show/nav.76 [accessed on 20 June 2008].

website.[982] Information should not be published if it seriously and prejudicially affects the interest of the party.

Appeals

Appeals are heard by the CAT as outlined in the section on 'Approach to Competition and Regulatory Institutional Structure'.

6. Airports

Three UK airports – Heathrow, Gatwick and Stansted – are currently designated by the Secretary of State for Transport as 'designated airports'. In particular, Heathrow Airport and Gatwick Airport, both located in London, are amongst the top ten busiest airports in the world for international passenger traffic. Manchester Airport was 'de-designated' in 2007 on the ground that it experienced sufficient competition from other airports. Non-designated regional airports are smaller, but have experienced fast growth in recent years due to the successful entry of 'no-frills' airlines.

The British Airport Authority (BAA) was established in 1965 as a public body that operated some major airports. It was privatised in 1987 in accordance with the *Airports Act 1986* and was acquired by the Ferrovial Group in 2006. At present, the BAA owns and operates all the three designated airports and some smaller regional airports in South-Eastern England and Scotland.

Regulatory Institutions and Legislation

The aviation industry in the UK is regulated by the Civil Aviation Authority (CAA). The legislative framework for the economic regulation of airports is contained in the *Airports Act 1986* and the *Civil Aviation Authority (Economic Regulation of Airports) Regulations 1986*. Law governing airports in Northern Ireland is the *Airports (Northern Ireland) Order 1994*, setting up a similar regime.

The CAA has a range of statutory duties, including:

- Regulating airlines, airports and air traffic control services;
- Ensuring civil aviation standards are set and achieved;
- Protecting consumers (end users rather than intermediate suppliers);
- Planning and regulating airspace; and
- Advising government on aviation issues and conducting economic and scientific research.

Key functions of the CAA in airport regulation include:

- Applying five-year price cap control to all designated airports. Each airport is subject to a different price cap, with price controls closely linked to the airport's specific circumstances and the needs of airlines and customers at that airport. Prices charged by other airports are more loosely regulated with the government

[982] ORR, *Publication Scheme: As Required by Section 19 of the Freedom of Information Act 2000*, 2004. Available at: http://www.rail-reg.gov.uk/upload/pdf/Publication_scheme.pdf [accessed on 8 July 2008].

holding reserve powers to determine prices if direct negotiations between airports and airlines fail.[983]

- Referring public interest matters in respect of designated airports in the context of setting price control to the Competition Commission (CC) and implementing remedies for public interest issues identified by the CC. The CAA is required to make a reference to the CC every five years in relation to the designated airports. The CC will make recommendations to the CAA on the future price caps and report on whether any of the airports has engaged in conduct over the past five years that is against the public interest. The scope of any adverse public interest findings by the CC is wide.[984]
- Investigating and remedying anti-competitive behaviours by airports. Under s. 41 of the *Airports Act*, the CAA is entitled to impose conditions on regulated airports which are found by the CAA to be engaging in anti-competitive conduct. If an airport operator objects to a condition that the CAA intends to impose upon it, the CAA must make a reference to the CC who will determine whether the airport is pursuing a course of conduct contrary to the public interest and if so, how this might be remedied by the CAA.

In addition, the CAA is able to set the maximum revenue yield per passenger to be levied by an airport operator in connection with aircraft landing, parking or taking off and passengers' arrival or departure.[985]

Process and Consultation

Price controls are set every five years following a process that involves consultation, research and analysis by the CAA and negotiation between airports and airlines. For instance, the parties rather than the CAA determine volume and capacity requirement, service quality, capital investment and operating expenditure efficiency. These determinations will result from meetings and consultation between the airlines and airports. These negotiated outputs will form inputs to financial modelling provided to the CAA. The CAA will determine the operating and capital expenditure allowance, the cost of capital allowance and total regulated revenues.[986]

Although the CAA's powers under s. 41 of the Act are not limited to an investigation in response to an access dispute, the CAA will normally only investigate access issues when a party has complained to the CAA.

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[983] Better Regulation Task Force, *Economic Regulators*, 2001. Available at: http://archive.cabinetoffice.gov.uk/brc/upload/assets/www.brc.gov.uk/econreg.pdf [accessed on 16 July 2008].

[984] Better Regulation Commission, *Government Response: Economic Regulators Letter from Patricia Hewitt to Better Regulation Task Force Accompanying Government Response,* 2007. Available at: http://archive.cabinetoffice.gov.uk/brc/government_responses/regulatorsresponse.html [accessed on 10 July 2008].

[985] Civil Aviation Authority (CAA), *Economic Regulation of Airports-General Guidance*, 2008. Available at: http://www.caa.co.uk/default.aspx?catid=78&pagetype=90&pageid=68 [accessed on 20 June 2008].

[986] See CAA, *Airport Regulation: The Process for Constructive Engagement May 2005*, 2005. Available at: http://www.caa.co.uk/default.aspx?catid=78&pagetype=90&pageid=68 [accessed on 10 July 2008]; CAA, *CAA Response to Ofgem's February 2009 'RPI–X@20' Consultation*, 7 May 2009. Available at: http://www.ofgem.gov.uk/Networks/rpix20/publications/CD/Documents1/CAA.pdf [accessed on 29 May 2009].

The CAA engages in a three-stage process when analysing a dispute. On receipt of a complaint, the CAA carries out a number of tests to determine whether it should launch an investigation, reject the complaint or refer it to another regulatory body. These tests would normally be finalised within three weeks of receiving a compliant. However, if the complaint is particularly complex or there is insufficient information, the process may take longer.[987]

If the CAA accepts a complaint, it will then request information from the airport operator and carry out internal analysis to determine whether there is substantial evidence that the operator is abusing its market power. This process normally takes around three months from the receipt of a complaint unless the issue is particularly complex. If substantial evidence is found, the CAA will proceed to a formal investigation.

In pursuing a formal investigation, the CAA usually consults with interested parties and invites written submissions within a set timeframe which is published on its website. The CAA concurrently gathers further evidence from, and holds meetings with, interested parties. The CAA may hold an oral hearing if either the complainant or the airports requests such a hearing. At a hearing, each party gives evidence and may cross-examine other parties. The CAA may also seek input from experts and consultants.

An investigation will be concluded by the publication of a written report that sets out the CAA's final decision and its analysis and reasons for reaching that decision. If the CAA intends to impose a condition on an airport operator, it must give the operator one month's notice of the proposed condition and invite a response. The operator may offer an undertaking instead of the remedy proposed by the CAA. If so, the CAA must inform the complainant of the proposed undertaking and whether the CAA considers it to be an effective remedy. The complainant then has two weeks to provide comment to the CAA.

If the airport objects to the proposed condition and does not offer an undertaking in its place, the CAA must refer the matter to the CC.

Timeliness

The legislation does not mandate a timeframe for resolving disputes. Some airlines, however, have told the CAA that they are reluctant to use s. 41 to address complaints because the anticipated length of time taken to resolve a dispute imposes significant costs and increases the risk of worsening relationships with the BAA, the airport owner. Furthermore, the uncertainty of a given outcome further increases costs and risks of engaging in formal dispute resolution with the CAA. Consequently, the CAA has undertaken to set an indicative timetable for each individual case based on its complexity.[988] To improve the timeliness of its decision making, the CAA also enters into pre-lodgement discussions with relevant parties to determine whether it should launch a formal investigation.

There is no direct discussion in available documents of the mechanisms that the CAA uses to mitigate incentives that airports have to delay regulatory determinations.

[987] CAA, *The CAA's Use of Section 41 of the Airports Act 1986: The CAA's Policy and Processes*, 2006. Available at: http://www.caa.co.uk/default.aspx?catid=78&pagetype=90&pageid=68 [accessed on 10 July 2008].
[988] Ibid.

Further, there is little information on the CAA's past performance in time taken to reach a final decision.

Role of Interested Parties

End users, user groups and industry bodies are not specifically recognised in the legislation governing the regulation of airports and airport services.

As previously described, airports and airlines have been involved in a constructive engagement process in negotiating key inputs into financial modelling provided to the CAA for the purpose of determining five-year price cap control.

The CAA has a statutory duty to 'further the reasonable interests of users of air transport services'.[989] To fulfil this duty, the CAA established the Air Transport Users Council (ATUC) as an independent consumer group for the airline industry. The two organisations have entered into a Memorandum of Understanding in 2004, which shall be reviewed every three years.[990] The council members (between 12 and 20, including a chairman) are volunteer consumer representatives. The ATUC is funded by, and shall report to, the CAA. As an integrated part of the CAA, the ATUC promotes the wider interests of airline passengers with the regulatory authorities and service providers.

Information Disclosure and Confidentiality

The CAA has information-gathering powers under the *Airport Act 1986*. These powers require parties to produce any information to the CAA that may be reasonably required for the purposes of performing the CAA's functions. This may include a situation where the CAA felt that an airport was deliberately delaying the supply of relevant information. However, parties can not be compelled to produce any documents that they would not be required to produce in civil proceedings before the High Court.

As with the other regulators in the UK, access by third parties to information from the CAA supplied by another stakeholder, may be allowed under the *Freedom of Information Act 2000* and the *Data Protection Act 1998*. However, the CAA may not release information covered by exemptions under the act, including information that may be regarded as commercial-in-confidence. In addition, as a 'Public Corporation', the CAA maintains and provides Records to the National Archive. The CAA also publishes all information not commercial in confidence on its website.

The frequency in which the CAA uses its information-gathering powers is not detailed in any documents published on the CAA website. General trends in use of these powers may be obtained by examination of specific case documents or via information requests directly to the regulator.

Decision-making and Reporting

The CAA is directed by a Chairperson and Board. The four sub-committees are the Safety Regulation Group, the Economic Regulation Group, the Directorate of Airspace Policy and the Consumer Protection Group. Each sub-committee has a

[989] *Civil Aviations Act 1982*, s. 4(1)(b).
[990] The Air Transport Users Council & the Civil Aviation Authority, *Memorandum of Understanding*, December 2004. Available at: http://www.auc.org.uk/docs/306/Termsof.pdf [accessed on 21 May 2009].

director who oversees the committee's functioning. The Chairperson has ultimate oversight of the CAA's committees and the Board.

If a formal investigation is to be conducted, a panel of (normally three) CAA members will be set up to decide the issue. The panel would normally be chaired by the Group Director of Economic Regulation.

Appeals

Appeals are heard by the CAT as outlined in the section on 'Approach to Competition and Regulatory Institutional Structure'.

Regulatory Development

A reference to the CC was recently made by the OFT over a concern of the BAA's ownership of major London-based airports (under the *Enterprise Act 2002*).[991] The CC found there to be competition problems relating to the BAA's seven airport holdings. The CC's final decision on this issue, released on 19 March 2009, orders the BAA to sell the three airports (both Gatwick and Stansted as well as either Edinburgh or Glasgow) within two years.[992] The CC also made other remedies to the identified competition problems. It also made recommendations to the Government on better airport regulation and on aspects of public policy on relating to airports.

The Department of Transport is consulting until 1 June 2009 on the UK Government's proposals to reform the legislative framework for the economic regulation of the UK airports industry to make it more targeted, flexible and efficient.[993] In formulating its proposal, the Government has consulted with various stakeholders who expressed considerable criticism over the current framework that has remained unchanged since the privatisation of the BAA over 20 years ago. The Government has also sought the advice of an Independent Panel chaired by Professor Martin Cave. The panel provided advice to the Government in January 2009.[994] The major changes introduced in the Government's proposals, delivered on 9 March 2009, include:[995]

- A three-tiered licence-based scheme of economic regulation:
    - Tier 1 airports (those with substantial market power – Heathrow, Gatwick and Stansted Airports) would be subject to price and/or service quality regulation.

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[991] All information relating to this inquiry can be found at: http://www.competition-commission.org.uk/inquiries/ref2007/airports/index.htm [accessed on 10 July 2008].

[992] Competition Commission, *News Release: BBA Ordered to Sell Three Airports*, 19 March 2009. Available at: http://www.competition-commission.org.uk/press_rel/2009/mar/pdf/11-09.pdf [accessed on 9 April 2009].

[993] UK Department for Transport, *Reforming the Framework for the Economic Regulation of UK Airports*, 9 March 2009. Available at: http://www.dft.gov.uk/consultations/open/ukairports/consultationdocument.pdf [accessed on 9 April 2009].

[994] Independent Panel (Chaired by Martin Cave), *Report of the Independent Panel on Airport Regulation*, 27 January 2009. Available at: http://www.dft.gov.uk/pgr/aviation/airports/reviewregulatioukairports/independentpanelreport.pdf [accessed on 9 April 2009].

[995] Secretary of State for Transport (Mr Geoff Hoon), *Minister Statement: Economic Regulation of Airports*, 9 March 2009. Available at: http://www.dft.gov.uk/press/speechesstatements/statements/airporteconomicregulation [accessed on 9 April 2009].

- Tier 2 airports (with more than five million passengers per annum) would be required to consult on airport charges, provide financial information of certain kinds and meet other obligations.
- Tier 3 airports would not require an economic licence to operate.

- Appeals could be made to the Competition Appeal Tribunal on licence modifications, including the imposition of Tier 1 licence arrangements.
- The CAA would be given a primary duty towards the passengers but would also have a duty to consider the environmental consequences of its decisions while maintaining its existing focus on air safety regulation.
- The consumer representative for air passengers (through the transfer of the Air Transport Users Council to Passenger Focus) would be given legislative status.

7. Ports[996]

Because it is a very large economy that is heavily dependent on international trade, the UK has a number of large ports accounting for 95 per cent of freight trade and employing over 70 000. The three biggest ports in the UK are Felixstowe, Tilbury (London) and Southampton. British ports are either under private ownership, municipal control, or are operated by a trust. Whether private, trust or municipal, all ports in the UK operate as commercial entities and receive no systematic national funding assistance from the government. In comparison, the majority of continental ports operate on the landlord/tenant model with publicly owned and maintained infrastructure.

Regulatory Institutions and Legislation

Each port has local legislation regulating the port's environmental and safety requirements. However, ports are not currently subject to economic regulation at either the national or local level – the only industry in the UK that is not supervised by an industry-specific or sector-specific regulator.

Regulatory Development

As previously discussed in the chapter on the EU, in October 2004 the European Commission issued a second proposal to remove restrictions that hamper access for existing or potential port service operators.[997] The Directive would have introduced a common framework for entry into competition for the provision of commercial port services, including cargo-handling, pilotage, towage, mooring, storage and passenger services. The Directive would have ensured that the market is aware of the opportunities that exist for the provision of such services and would have required ports to allow competing service providers to enter the market should they wish to do so.

This Directive, if introduced, would have impacted on all UK ports with an average annual throughput of more than 1.5 million tonnes or 200 000 passenger movements over the previous three years, and would have established a formal framework for competition in provision of commercial port services. In order to determine the impact of this proposed Directive, in October 2005 the UK Department for Transport

[996] See British Ports Association, *Market Overview*. Available at: http://www.britishports.org.uk/public/uk_ports_industry/market_overview [accessed on 20 October 2008].

[997] An initial proposal was issued in 2001 and later rejected in 2003.

undertook its own informal consultation with major UK ports, other Government Departments and organisations representing the interests of port service providers, their customers and workforce.[998] Based on the extensive consultation and its own econometric analysis, the Department concluded that the proposed one-size-fits-all solution could inappropriately have a negative effect on the UK ports and small ports in general.

In the event, the proposed Directive was not passed by the European Parliament and the Council.

[998] Department for Transport, *Initial Regulatory Impact Assessment: Market Access to Port Services Directive*, 2005. Available at: http://www.dft.gov.uk/pgr/shippingports/ports/modern/modernportsaukpolicy?page=4 [accessed on 10 July 2008].

NORTH AMERICA

CANADA

OVERVIEW

Economic regulation of infrastructure industries is currently undertaken by both independent government bodies and a government department. A major regulatory institution is the Competition Bureau which enforces Canadian competition law.

The independent federal regulators in Canada are the National Energy Board (NEB), the Canadian Radio-television and Telecommunications Commission (CRTC), and the Canadian Transportation Agency (CTA). The NEB's authority is limited to inter-province gas pipelines and national and international trade. Sub-nationally, governments of provinces regulate intra-province energy producers and providers. The CRTC regulates telecommunication, radio and television services. The CTA regulates both the rail industry and large privately operated ports in the shipping industry.

The postal industry is regulated in a largely inactive capacity by the Minister for Transport, Infrastructure and Communities. The water and wastewater industry is operated by municipalities. Regulation of this industry is shared between the federal government and the respective provincial government. While the former primarily focuses on environmental issues, the latter, through its water department, regulates and administers the allocation and pricing of water. The airport industry has undergone significant changes since the government instituted its divestiture policy in 1994. The largest airports are owned by the government but operated by independent airport authorities and the smaller regional airports retained both government ownership and control. Other than the above-mentioned major ports, the public ports are regulated by Transport Canada in accordance with the *User Fees Act 2004*.

GEOGRAPHY, POPULATION, ECONOMY, POLITY AND LEGAL SYSTEM

Located in northern North America, Canada is a country of significant land mass. Spanning over almost ten million square kilometres, it is the world's second largest country. Canada's terrain consists mostly of plains with mountains in the west and lowlands in the southeast. Its climate varies from temperate in the south to subarctic in the north. Continuous permafrost in the north is a serious obstacle to development.

Its population is small relative to geographical size, totalling a mere 33.2 million people, and making Canada one of the least densely populated countries in the world. Nearly one-third of the population lives in the three largest cities of Toronto, Montréal and Vancouver. This reality greatly affects the interests and goals of the provision and regulation of economic infrastructure.

Canada is a country rich in natural resources, particularly; oil, zinc, uranium, gold, nickel, aluminium, and lead. Its key industries are agriculture, transportation equipment (aeronautics, automobiles), chemicals, processed and unprocessed minerals, petroleum and natural gas, food products, wood and paper products and fish

products.[999] It is a rich country with an estimated GDP of US$1.266 trillion or US$38 200 (PPP) per capita, placing it in the upper quarter of OECD countries. Since World War II, the country has experienced significant growth in the manufacturing, mining, and service sectors which has transformed the economy from largely rural to primarily industrial and urbanised. The various trade agreements between Canada and the United States, specifically the 1994 North American Free Trade Agreement (NAFTA) have resulted in increased trade and economic integration with the US. Exports account for roughly a third of Canada's GDP, 80 per cent of which are absorbed by the US. Canada is the US's largest foreign supplier of energy, including oil, gas, uranium, and electric power.

Canada has strong air transport and rail systems. It also has extensive and sophisticated fixed-line and mobile telecommunications and high-quality water and wastewater infrastructure. However, some argue that Canada's water treatment and municipal waste systems exhibit significant infrastructure deficiencies (see below) in the more densely populated parts of the country.

Canada remains a member of the Commonwealth, and as such is a constitutional monarchy. Its governmental system is very similar to the Australian system, being both a parliamentary democracy and federation. Its Federal Parliament consists of two houses; an elected House of Commons and an appointed Senate. The Queen of England, represented by the appointed Governor General is its official head of state. The Prime Minister, the leader of the political party with the majority of seats in the lower house, holds the position of head of government. Whilst constitutionally empowered with executive authority the Governor General performs a mostly ceremonial role, deferring the exercise of the power to the Cabinet comprised of Ministers appointed by the Prime Minister.

Sub-nationally, there are ten provinces. Additionally there are three territories – Northwest Territories; Nunavut and Yukon Territory. Responsibilities are divided between the federal parliament and the provinces parliaments, which consist (unlike Australia) of unicameral legislatures. The Territories' legislatures are also bestowed with certain responsibilities, of a less significant nature.

The Constitution of Canada is the supreme law in Canada. It is a combination of both codified acts and unwritten conventions. It determines which areas the federal government is empowered to legislate upon, and which areas remain under province jurisdiction.

Both the federal and province legal systems are based upon the English Common Law, apart from Quebec where a hybrid system prevails whereby common law is used for public law matters and private law matters follow a civil law tradition.

The Federal Judiciary's highest court and final arbiter is the Supreme Court of Canada, to which nine Judges are appointed by the Prime Minister through the Governor General. Three of these positions must be held by Judges from Quebec so as to ensure that the judicial body has sufficient experience with the civil law system to adjudicate cases involving Quebec laws. The lower courts are the Federal Court of Canada, and the Federal Court of Appeal.

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[999] Central Intelligence Agency (CIA)'s Fact Book website at: https://www.cia.gov/library/publications/the-world-factbook/geos/ca.html [accessed on 15 September 2008].

The province courts include the Court of Appeal, the Court of Queen's Bench, the Superior Court, the Supreme Court, and the Court of Justice.

APPROACH TO COMPETITION & REGULATORY INSTITUTIONAL STRUCTURE

The *Competition Act* governs most business conducts in Canada. It contains both criminal and civil provisions aimed at preventing anti-competitive practices in the marketplace. Its purpose is set out in s. 1.1 of the legislation:

> The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

Part VII.1 (ss. 74.01 to 74.19) of the *Competition Act* deals with deceptive marketing practices. Part VIII (ss. 75 to 107) deals with restrictive trade practices including refusal to supply, consignment selling, exclusive dealing, tied selling, market restriction, abuse of dominant position, delivered pricing, foreign judgments and laws, foreign suppliers, specialisation agreements, and mergers.

Canada's federal competition regulator is the Competition Bureau (the Bureau). It is an independent agency empowered to administer and enforce the *Competition Act 1986, Consumer Packaging and Labelling*, the *Textile Labelling Act* and the *Precious Metals Marking Act*. In doing so, it aims to protect and promote both competitive markets, and consumers.

The Competition Bureau is comprised of a commissioner, appointed by the Governor-in-council,[1000] and supporting staff. The organisation is divided into seven sections: Compliance and Operations Branch, Criminal Matters Branch, Fair Business Practices Branch, Economic Policy and Enforcement Branch, External Relations and Public Affairs Branch, Legislative and Parliamentary Affairs Branch and Mergers.

Following receipt of a complaint, the Bureau may launch inquiries into price fixing, bid-rigging, abuse of dominant position, potential mergers and deceptive marketing practices. Having investigated a complaint, the Bureau decides whether to file an application under Parts VII.1 and VIII of the *Competition Act* to the Competition Tribunal. If the Bureau determines that the complaint is a criminal matter, it may refer the case to the Attorney-General who then has the prerogative to prosecute.

The Competition Tribunal was created in 1986 under the *Competition Tribunal Act* when the Canadian Parliament enacted major reforms of Canada's competition laws and replaced the *Combines Investigation Act* with the *Competition Act*. It is an independent quasi-judicial adjudicative body, without investigatory or advisory functions. The Tribunal is composed of up to six judicial members appointed from among the judges of the Federal Court and not more than eight lay members. Its judicial members have specialised expertise in law and business and are appointed by the Governor-in-council to hear applications and make orders.

The Tribunal hears and decides all applications made by the Competition Commissioner under Parts VII.1 (Deceptive Marketing Practices) and VIII (Reviewable Matters by the Tribunal) of the Canadian *Competition Act*. The Tribunal

[1000] *Competition Act 1986*, s. 7.

also hears references filed pursuant to s. 124.2 of the *Competition Act* regarding questions of law, mixed law and fact, jurisdiction, practice or procedure in relation to the application or interpretation of Part VII.1 or VIII. Private individuals may seek leave to file an application directly with the Tribunal with regards to refusal to deal (s. 75 of the *Competition Act*) and exclusive dealing, tied selling, and market restrictions (s. 77 of the *Competition Act*).

Its judicial members have specialised expertise in law and business and are appointed by the Governor-in-council to hear applications and make orders. If the Competition Bureau determines that the complaint is a criminal matter, it may refer the case to the Attorney-General who then has the prerogative to prosecute.

Section 16 of the *Competition Tribunal Act* provides that the Competition Tribunal may make general rules for regulating its practice and procedure with the approval of the Governor in Council. On 14 May 2008, the new *Competition Tribunal Rules*, SOR/2008-141, came into effect. They set out the framework for informal and expeditious proceedings.[1001]

Private parties have the the right to initiate proceedings before the Tribunal in certain cases. The Tribunal also hears references filed pursuant to s. 124.2 of the *Competition Act* and award costs of proceedings before it.

Economic regulation in Canada is governed by national regulators and/or province or federal ministries. Both telecommunications and rail industries are regulated by independent federal agencies, the CRTC and the CTA, respectively. The CTA also regulates ports with a large traffic base. The energy sector is regulated by both federal (the National Energy Board) and province regulators. The postal industry is regulated by the federal Minister for Transport, Infrastructure and Communities and the water and wastewater industry is regulated by province governments. No economic regulation occurs in the airports industry as all airports in Canada are owned and controlled by the Federal Government.

REGULATORY ARRANGEMENTS BY INDUSTRY OR SECTOR

1. Energy

Canada is the fifth largest energy producer in the world. It is also one of the highest per capita consumers of energy, reflecting its geography and climate, its industrial structure and income level.

In 2007, the energy sector accounted for 5.6 per cent of Canada's gross domestic product (GDP) and 19.7 per cent ($90.0 billion) of the total value of Canadian exports. In 2007, the energy sector's capital and repair expenditure totalled $68.9 billion – about 35 per cent of total private sector investment.[1002] The large majority of investments in Canada's energy sector come from the private sector – the exception being in the electricity industry where provinces rich in hydro-electric power own their publicly funded and publicly managed utilities.[1003]

[1001] Competition Tribunal, *Rules of Procedure*, 2008. Available at: http://www.ct-tc.gc.ca/Procedures/RulesProcedure-eng.asp [accessed on 12 February 2008].

[1002] National Energy Board (NEB), *Canadian Energy Overview 2007*, May 2008. Available at: http://www.neb.gc.ca/clf-nsi/rnrgynfmtn/nrgyrprt/nrgyvrvw/cndnnrgyvrvw2007/cndnnrgyvrvw2007-eng.pdf [accessed on 12 February 2009].

[1003] NEB, *Energy Regulation in Canada: Lessons Learned from the Past - the Way Forward*, Speech by Chair and Chief Executive Officer of National Energy Board to 12th Annual Meeting of the Asociación

Canada's energy policy is guided by a series of principles, agreements and accords. The main principles are a commitment to markets as the most efficient means of determining, supply, demand, prices and trade; respect for the jurisdictional authority and role of the provinces; targeted intervention in market processes where necessary to achieve specific policy objectives including issues of health and safety (e.g. pipeline regulation) and environmental sustainability. Agreements and accords include the Western Accord between the Governments of Canada, Alberta, Saskatchewan and British Columbia on oil and gas pricing and taxation; the Agreement on Natural Gas Markets and Prices between the same western provinces; Atlantic Accords with Newfoundland and Labrador and with Nova Scotia, including the establishment of jointly managed Offshore Boards; the North American Free Trade Agreement (NAFTA) which is the cornerstone of Canadian energy policy with regard to trade.[1004]

Natural Gas

Canada is the third largest producer of natural gas in the world. The Canadian and US natural gas markets operate as one large integrated market. Canadian gas production is connected to the North American gas market through a network of thousands of kilometres of pipelines.

In 2007, estimated Canadian natural gas consumption was about 233 million m^3/day, or 46 per cent of Canadian production. Over one-third of domestic natural gas consumption was for residential and commercial use, primarily for space and water heating.

Canadian natural gas exports were estimated to be 293 million m^3/day in 2007, slightly higher than in 2006. Net exports were estimated to increase by 4.4 per cent per annum to about 260 million m^3/day in 2007.

The price of natural gas is determined in the competitive North American natual gas market. However, charges for transmission and distribution of gas are regulated at both the federal and provincial level. For instance, the National Energy Board (NEB) is responsible for regulating inter-provincial and international gas transmission pipelines. Provincial regulators are responsible for regulating transportation charges. For example, the rates charged for transporting natural gas to Ontario and delivery costs in Ontario, as well as storage, are regulated by the Ontario Energy Board.

Electricity

Coal, nuclear, natural gas and hydro generation are the main sources of electricity generation in Canada. In 2007, total electricity generation was 600 terawatt hours, with net exports of 30.6 terawatt hours, or $2.1 billion in net export revenue.

According to an OECD report, electricity regulation in Canada reflects a range of disparate situations across provinces. In most cases, electricity markets are exposed to only limited competition, suppliers are vertically integrated, public ownership remains prevalent, and there is open access to the grid only for generators and

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Iberoamericana de Entidades Reguladoras de la Energía (ARIAE) San Luis Potosi, México, 13-16 April 2008. Available at: http://www.neb.gc.ca/clf-nsi/rpblctn/spchsndprsnttn/2008/nrgrgltncndpstfrwrd/nrgrgltncndpstfrwrd-eng.html [accessed on 10 February 2009].

[1004] Natural Resources Canada, *Overview of Canada's Energy Policy*. Available at: http://www.nrcan.gc.ca/eneene/polpol/owevue-eng.php [accessed on 10 February 2009].

wholesale purchasers.[1005] Only Alberta and Ontario have competitive wholesale electricity markets and have introduced some amount of retail competition. The transmission system in Alberta is operated by an independent system operator, the Alberta Electric System Operator (AESO). Québec, Manitoba and British Columbia have also introduced wholesale competition. Other provinces and territories continue to be supplied by one utility. Often, government-owned utilities also own and operate the transmission system.

Since 2001, consumers in Alberta may choose to purchase electricity from a retailer that is regulated by the Alberta Utilities Commission (AUC), called the Regulated Rate Option (RRO) provider, or from a Competitive Retailer. Electricity from a Competitive Retailer is supplied on the basis of an agreed contract price structure. The AUC does not regulate the rates or the service of Competitive Retailers. The RRO will continue to be available until 2010, with a blend of short term purchases at the market price- and long-term hedges. Distribution charges are fully regulated by the AUC. Terms and conditions of service of regulated distribution companies and retailers are determined by the AUC in rates applications.[1006]

Similarly, since 1998, Alberta's consumers may choose to purchase natural gas from a default retailer that is regulated by the AUC, the Regulated Retailer, or from a Competitive Retailer, where they sign a contract agreeing to a set price structure for the natural gas commodity with a Competitive Retailer of their choice. The AUC only reviews the rates charged by Regulated Retailers. The AUC does not regulate the rates of Competitive Retailers or have any jurisdiction over the service provided by them. However, gas distribution charges are fully regulated by the AUC.[1007]

Ontario's electricity market was opened to competition on 1 May 2002. However, the government continued to set electricity prices for low volume consumers and other designated consumers until 2004. In 2004, the Minister of Energy asked the Ontario Energy Board to develop an electricity price plan for those consumers to better reflect the price paid to generators (Regulated Price Plan prices, or RPP). The latest RPP prices came into effect on 12 April 2006. Eligibility for RPP prices will be limited to residential and low volume consumers after 1 May 2009.

Consumers that are eligible for RPP price may choose not to participate. They may instead choose to enter into a contract with an electricity retailer. If eligible consumers have an interval meter, they may also choose to pay the 'spot market' price. [1008]

Since 1995, the Agreement on Internal Trade (AIT) has aimed at reducing internal trade barriers for the main economic sectors. However, only little progress has been made so far in the energy chapter for which negotiations are still underway, though Ontario and Quebec have agreed to build a new interconnection of 1 250 megawatts starting in 2009. By contrast the bilateral Trade, Investment and Labour Mobility

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[1005] Mourougane Annabelle, *Achieving Sustainability of the Energy Sector in Canada*, Economics Department Working Paper No. 618, OECD, 27 June 2008. Available at: http://www.olis.oecd.org/olis/2008doc.nsf/LinkTo/NT00003436/$FILE/JT03248408.PDF [accessed on 10 February 2009].

[1006] Alberta Utilities Commission (AUC), *Electricity*. Available at: http://www.auc.ab.ca/utility-sector/rates-and-tariffs/Pages/Electricity.aspx [accessed on 11 February 2009].

[1007] AUC, *Natural Gas*. Available at: http://www.auc.ab.ca/utility-sector/rates-and-tariffs/Pages/NaturalGas.aspx [accessed on 11 February 2009].

[1008] Low-volume consumers include residential consumers and small business customers. 'Designated consumers' include municipalities, hospitals, schools, colleges and universities.

Agreement (TILMA) signed in 2006 by the provinces of Alberta and British Columbia has dismantled non-tariff barriers to trade across major sectors including energy.[1009]

Regulatory Institutions and Legislation

The regulation of energy is divided between federal and provincial regulators.

National Energy Board (NEB)

The NEB is the independent federal agency that regulates inter-province gas pipelines and energy development and national and international trade. It is empowered under the *National Energy Board Act* to enforce and administer the *Canada Oil and Gas Operations Act* and certain provisions of the *Canada Petroleum Resources Act*, which include crude oil and natural gas exploration and production on frontier lands and certain areas offshore Canada's east, west and arctic coast.

The NEB has a number of roles including the promotion of safety and security, environmental protection and efficient energy infrastructure and markets in the Canadian public interest. It is accountable to Parliament through the Minister of Natural Resources Canada.

The NEB's main responsibilities include:

- regulating the construction and operation of interprovincial and international oil and gas pipelines as well as international and designated interprovincial power lines.
- regulating pipeline tolls and tariffs for pipelines under its jurisdiction.
- regulating exports and imports of natural gas as well as exports of oil, natural gas liquids (NGLs) and electricity.
- regulating oil and gas exploration, development and production in frontier lands and offshore areas not covered by provincial or federal management agreements.

Apart from its determinative role, the NEB also acts as an advisory body to the Minister upon request, in relation to 'energy matters, sources of energy and the safety and security of pipelines and international power lines'.[1010] The Act does not require the Minister to follow the advice provided.

The NEB also has an advisory function which requires it to keep under review matters over which Parliament has jurisdiction relating to all aspects of energy supply, transmission and disposal of energy in and outside Canada.

The *National Energy Board Act 1959* is the key piece of legislation that sets out the NEB's role in the economic regulation of energy. Under this Act all tolls must be 'just and reasonable' and be non-discriminatory.[1011]

In addition to the requirements of the legislation, the NEB has enunciated a number of regulatory principles and case-specific rulings. For example, it requires that tolls should be, to the greatest extent possible, cost-based and that users should pay the

[1009] Annabelle Mourougane, *Achieving Sustainability of the Energy Sector in Canada*, Economics Department Working Paper No. 618, OECD, 27 June 2008. Available at: http://www.olis.oecd.org/olis/2008doc.nsf/LinkTo/NT00003436/$FILE/JT03248408.PDF [accessed on 11 February 2009].
[1010] *National Energy Board Act*, s. 26.
[1011] *National Energy Board Act*, ss. 62 and 67.

costs caused by transportation of their product through the pipeline. In addition, tolls should promote price signals that maximise the utilisation of the pipeline system and promote efficient costs.

Provincial Regulators

Each province has a separate regulator. Provincial regulators in some cases operate at arms-length from the government, in other cases they are part of the policy branches of their respective governments [1012]

It is beyond the scope of this report to examine the practices and procedures of each of these provincial regulators in detail. However, the Albertan energy regulators are reviewed with the aim of indicating the processes and scope of province-level regulation more generally. Alberta has been chosen because it is abundant in natural resources.[1013]

In Alberta, the regulatory function has been divided between two bodies – the Energy Resources Conservation Board (ERCB), which regulates the safe, responsible, and efficient development of Alberta's energy resources of oil, natural gas, oil sands, coal, and pipelines; and the Alberta Utilities Commission (AUC) which approves infrastructure and tariffs for electricity and natural gas facilities.

Energy Resources Conservation Board

The ERCB is a quasi-judicial branch of the government of Alberta. The ERCB answers directly to the Executive Council (Cabinet) of Alberta through the Minister of Energy. However, its formal decisions are made independently of government. The ERCB's mission is to ensure that the discovery, development, and delivery of Alberta's energy resources take place in a manner that is fair, responsible, and in the public interest.

In 2006, the ERCB was responsible for the regulation of:

- 159 500 operating natural gas and oil wells
- 33 700 oil and gas batteries, plants and other facilities
- 392 000 km of pipelines
- 12 producing coal mines
- 38 commercial oil sands plants.[1014]

Regulation is done through two core functions – adjudication and regulation; and information and knowledge.

The ERCB is led by a Board that consists of a Chairman and up to eight Board Members. Supporting the Chairman and Board Members are the Executive Committee, and approximately 850 staff. The majority of the ERCB annual budget is funded through an administrative levy applied to each producing gas or oil well in the

[1012] International Energy Authority, *Canada*, Paris, 2004. Available at: http://www.iea.org/textbase/nppdf/free/2004/Canada%20_comp04.pdf [accessed on 26 September 2008].

[1013] Energy Resources Conservation Board (ERCB), *About the ERCB*. Available at: http://www.ercb.ca/portal/server.pt/gateway/PTARGS_0_0_299_260_0_43/http%3B/ercbContent/publishedcontent/publish/ercb_home/about_the_ercb/what_we_do/ [accessed on 10 May 2008].

[1014] Ibid.

Alberta. The remainder is financed by the provincial government and revenues from application and licensing fees and information sales.[1015]

Alberta Utilties Commission[1016]

The AUC is a quasi-judicial independent agency established by the Government of Alberta. It is responsible to ensure that the delivery of Alberta's utility service takes place in a manner that is fair, responsible and in the public interest.

The AUC regulates investor-owned (private) natural gas, electric, and water utilities and certain municipally owned electric utilities to ensure that customers receive safe and reliable service at just and reasonable rates. It also deals with inquiries and complaints respecting utility matters. In addition, the AUC ensures that electric facilities are built, operated, and decommissioned in an efficient and environmentally responsible way. The AUC also provides regulatory oversight of issues related to the development and operation of the wholesale electricity market in Alberta as well as the retail gas and electricity markets in the province.

The AUC also has the responsibility to provide the an adjudicative function with respect to the contravention of specific electric and gas utilities legislation; AUC Decisions and Orders; Independent Systems Operator (ISO) Rules; as well as and agency and market participant conduct. The AUC also hears objections and complaints regarding market rules and standards.

In addition to the AUC, a Market Surveillance Administrator (MSA) has also been established under the *Alberta Utilities Commission Act.* The MSA has a broad mandate including surveillance, investigation, and enforcement to help ensure fair, efficient, and openly competitive electricity and natural gas markets in Alberta.[1017]

Inter-agency Cooperation

There is some interaction and cooperation between federal and provinciale regulators. In particular, the *Alberta Utilities Commission Act 2007* (Alberta) empowers the AUC to conduct proceedings in cooperation with other Alberta regulators and federal regulatory bodies, provided they have obtained the approval of the Lieutenant Governor in Council.[1018]

In addition, the NEB cooperates with other federal and provincial agencies to reduce regulatory overlap and improve the efficiency of regulation. Its members also sit on the executive committee of the Canadian Association of Members of the Public Utility Tribunals (CAMPUT). The NEB also provides staff support to CAMPUT.

The NEB also has relationships with other North American regulatory bodies. For example, Board members participate in meetings of the US National Association of Regulatory Utilities Commissioners (NARUC) under which the agencies meet to share perspectives on regulatory approaches and to work to eliminate inconsistencies in regulation. Furthermore, the NEB has entered into a Memorandum of

[1015] ERCB, *Enerfaqs*. Available at: Gateway, [accessed on 10 February 2009]

[1016] Information on AUC was sourced from the agency's web site at: http://www.auc.ab.ca/Pages/Default.aspx. Subsquent references have been made with respect to the Internet addresses at the time of access. Note that the agency's website has recently been updated and as a result, some information may no longer be located at the reported Internet address.

[1017] Market Surveillance Administrator, *About the MSA.* Available at: http://www.albertamsa.ca/2.html [accessed on 12 February 2009].

[1018] *Alberta Utilities Commission Act* 2007 (Alberta), s. 16(1).

Understanding (MOU) with the FERC to enhance inter-agency coordination and there is a trilateral agreement between the NEB, the FERC and the *Comisión Reguladora de Energía* (Mexico) under which the agencies meet to share perspectives on regulatory approaches and to work to eliminate inconsistencies in regulation.

Where North American jurisdictions overlap, the NEB is working with province and territory regulatory agencies to ensure that the regulatory issues are dealt with in a co-ordinated manner.[1019]

Process and Consultation (Federal – National Energy Board)

Matters arise before the regulator when parties make an application or complaint. Under the legislation, the NEB may make rules relating to procedures for making applications, representations and complaints. as well as the conduct of hearings. However, the NEB is able to dispense with or vary these Rules during a proceeding where public interest considerations or procedural fairness require such a course of action. A dispensation or variation of the Rules may be made by the NEB of its own volition or in response to a motion by any party. The NEB's current Rules are set out in *National Energy Board Rules of Practice and Procedure 1995*.[1020]

Matters may arise before the NEB when a complaint is filed. For the purpose of economic regulation of tolls and tariffs, pipelines under the NEB's jurisdiction are divided into two groups – Group 1 consists of ten major oil and gas pipeline companies and Group 2 encompasses the remaining smaller pipeline companies. To reduce the regulatory burden on smaller companies, the NEB regulates three of the Group 1 pipelines and all of the Group 2 companies on a complaint basis. Under this approach, the parties are encouraged to work out any problems with the pipeline company. If this is unsuccessful, a complaint may be filed with the NEB. This approach is considered to have resulted in few complaints.[1021]

This method of regulation is described in its application to each company's tariff. The pipeline company is responsible for providing shippers and other interested persons with sufficient information to enable them to determine whether the tolls are reasonable. Once filed with the NEB, the tariffs containing new tolls automatically become effective. If a complaint is filed, the NEB may establish a procedure to examine tolls. In the absence of a complaint, the filed tolls will be presumed to be just and reasonable.

Major toll applications (that is, establishing tolls for the Group 1 companies) normally warrant a public hearing, which may be written or oral. The parties usually involved in the formal hearing process include the energy provider as well as affected third parties who are often landowners, particularly in cases related to pipelines. The hearing process is placed on the public record and the NEB is bound by the rules of natural justice.

However, in order to reduce the length and cost of such hearings, the NEB has introduced negotiated multi-year settlements. In 1994, the NEB published its *Guidelines for Negotiated Settlements of Traffic, Tolls and Tariffs*, which were revised in 2002. The guidelines are intended to facilitate a negotiated settlement

[1019] International Energy Authority, 2004, op. cit.

[1020] NEB, *National Energy Board Rules of Practice and Procedure 1995*, 1995. Available at: http://laws.justice.gc.ca/en/N-7/SOR-95-208/index.html [accessed on 10 February 2009].

[1021] NEB, *The Regulation of Traffic, Tolls and Tariffs*. Available at: http://www.neb.gc.ca/clf-nsi/rthnb/whwrndrgvrnnc/rgltntrffctllstrffs2007-eng.html#s8 [accessed on 10 February 2009].

process which will allow pipeline companies, producers, shippers, consumers, governments and other interested parties to resolve toll and tariff matters through consensus building and negotiation rather than the hearing process. Any negotiated settlements must still be approved by the NEB. However, if these guidelines are followed, in most cases, the NEB would be able to determine that the resultant tolls were just and reasonable without a public hearing.[1022]

The need for a public hearing has also been reduced by the NEB's generic multi-pipeline cost of capital proceeding in 1994–95. As a result, the capital structure and rate of return on equity for some Group 1 companies are set based upon an adjustment mechanism established in this proceeding.

The NEB conducts compliance audits as part of its monitoring responsibility.

NEB procedures are further streamlined by pre-application meetings. These meetings give prospective applications the opportunity to fully understand the regulatory processes and regulatory requirements. According to the NEB, these meetings can lead to more complete applications, which facilitate the review process and improve response times. To assist prospective applicants in determining whether a pre-application meeting would be beneficial, the NEB has prepared *Pre-Application Meeting Guidance Notes*. [1023]

The NEB provides and encourages Alternative Dispute Resolution (ADR) for parties as an alternative to regulatory or litigated decision making. It published *Appropriate Dispute Resolution Guidelines* in July 2003.[1024] These indicate that ADR processes may be appropriate in toll and tariff issues such as complaints about access or annual toll applications.

After an application is made with respect to certificates (issuance, revocation or suspension), licence (exportation of gas or electricity or importation of gas) and permission (leave to abandon the operation of a pipeline), the NEB holds a public hearing in which any member of the public may make a submission, following which, the board makes a determination.[1025] Prior to the hearing, the NEB may hold information sessions in potentially affected communities, as well as pre-hearing planning conferences so as to obtain public input into the hearing process.[1026] For other applications no public hearing is necessary.[1027]

In considering to make, amend or revoke a declaration of significant or commercial discovery, the NEB must give at least 30 days notice of its intention to make a decision to whomever is affected, after which any person to whom notice was given may request a hearing. If such a request is made, the NEB will conduct a hearing, and

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[1022] NEB, *Guidelines for Negotiated Settlements of Traffic, Tolls and Tariffs*, 2002. Available at: https://www.neb-one.gc.ca/ll-eng/livelink.exe/fetch/2000/90463/157025/208496/A0E4C1_-_Letter_Decision.pdf?nodeid=208497&vernum=0 [accessed on 10 February 2009].

[1023] NEB, *Pre-Application Meetings Guidance Notes*, Notice, 13 November 2007. Available at: http://www.neb.gc.ca/clf-nsi/rpblctn/ctsndrgltn/rrggnmgpnb/prpplctnmtng/prpplctnmtng-eng.pdf [accessed on 10 February 2009].

[1024] NEB, *Appropriate Dispute Resolution Guidelines*, 2003. Available at: http://www.neb.gc.ca/clf-nsi/rpblctn/ctsndrgltn/rrggnmgpnb/pprprtdsptrsltn/ADRGuidelines2003_e.pdf [accessed on 10 February 2009].

[1025] *National Energy Board Act*, s. 24(1).

[1026] NEB, *2006 Annual Report*, 20 March 2007. Available at: http://www.neb.gc.ca/clf-nsi/rpblctn/rprt/nnlrprt/2006/nnlrprt2006-eng.html [accessed on 10 February 2009].

[1027] *National Energy Board Act*, s. 24 (2).

when it has made a decision it must give notice of that decision to anyone who had requested hearing, and must provide reasons if they are requested.[1028]

The parties usually involved in the formal hearing process include the energy provider as well as affected third parties who are often landowners, particularly in cases related to pipelines. Outside of the formal hearing process, the applicant is expected to undertake adequate consultation with all relevant stakeholders at all stages of the application and construction process. It is intended that this consultation process will influence the design and construction of facilities.

The procedures conducted by the NEB appear judicially styled in that it acts as a Court of Record, only deciding issues on the basis of submissions and evidence gathered, through a process of hearing and notice. Before a hearing, individuals, interest groups, companies and other organisations have an opportunity to register as intervenors or interested parties and thus may actively participate in the proceedings. The hearing process is placed on the public record and the NEB is bound by the rules of natural justice.

Outside of specific cases, the NEB conducts research and gathers information about how to best protect the interests of Aboriginal communities. Additionally, the NEB tries to educate Aboriginal communities on ways to promote and defend their interests in the course of application procedures through the 'Aboriginal Engagement Program'.

Process and Consultation (Provinces)

In Alberta, parties make a submission to the ERCB, and then may apply for a hearing. For some applications, the ERCB conducts a hearing after a period of thirty 30 days notice and then makes a final determination.[1029] A pre-hearing meeting may be conducted with the applicant, public interest groups (discretionary participants) and intervenors (interested parties with standing) to establish the relevant issues to be considered at the hearing.[1030] Additionally, the ERCB often organises an information session for interested parties to inform them of the hearing process so as to convey to the public how to engage effectively in that hearing process.[1031] Alternatively, if a hearing is not requested, a decision may be made by the ERCB without hearing.

The procedure of the AUC is essentially the same where regulated companies submit an application to increase tariffs or build infrastructure. The regulatory process in Alberta can be considered judicial as the procedure and the powers vested in the AUC mimic those of the judiciary.[1032]

[1028] *National Energy Board Act*, s. 28.2.

[1029] *Oil and Gas Conservation Act* (Alberta), s. 99(2).

[1030] As was done, for example, in Petro-Canada Application for Wells and Associated Pipeline and Facility Licences Sullivan Field. See: ERCB, *Prehearing Meeting*, Decision 2008-029, 16 April 2008. Available at: http://www.ercb.ca/portal/server.pt/gateway/PTARGS_0_0_304_264_0_43/http%3B/ercbContent/publishedcontent/publish/ercb_home/industry_zone/decisions/decisions/2008/2008_029.aspx [accessed on 12 February 2009].

[1031] Ibid.

[1032] *Alberta Utilities Commission Act 2007* (Alberta), s. 11. It states that: 'In addition to any other powers conferred or imposed by this Act or any other enactment, the Commission has, in regard to the attendance and examination of witnesses, the production and inspection of records or other documents, the enforcement of its orders, the payment of costs and all other matters necessary or proper for the due exercise of its jurisdiction or otherwise for carrying any of its powers into effect, all the powers, rights, privileges and immunities that are vested in a judge of the Court of Queen's Bench'.

The AUC is required to monitor the electricity and gas market and report findings to the Minister. The AUC establishes mandatory requirements and standards of practice for the retail electric and natural gas markets through the use of a rule-making procedure involving a consultative process with stakeholders and interested parties. Additionally, the AUC holds regular consultation with utility stakeholders such as utilities, municipalities and intervener groups in order to refine the regulatory process, and make parties more aware of the regulatory scheme.[1033]

The AUC's regulatory functions are carried out through both written and oral proceedings. Representative groups are encouraged to participate in the process. Participation helps to ensure that the AUC is informed of the issues and decisions are made in the public interest.

The AUC provides and encourages Alternative Dispute Resolution for parties as an alternative to regulatory or litigated decision making. This may include a pre-hearing meeting, the design and goals of which are created to suit the particular dispute. The AUC facilitates such meetings because, even when they do not result in a final resolution, they further define and narrow the disputed issues and raise awareness of the hearing process. However, sometimes a dispute may be completely resolved in mediation, concluding with a signed agreement, without the need for hearing.[1034]

Outside of specific regulatory decisions, the AUC appoints a Market Surveillance Administrator (MSA) that engages in a range of activities. For instance, under the *Code of Conduct Regulation AR160/2003* market participants may request exemption from any or all provisions of that regulation. To do so they must make an exemption application to the MSA, who will then conduct a form of hearing to deal with the request. In addition, the MSA has the mandate to carry out surveillance and investigation of services and activities under its jurisdiction. Its published investigations procedures set out the broad processes that it will follow during its surveillance and investigation activities.[1035]

Timeliness (Federal)

The statute does not specify any maximum period for which the regulatory agency has to consider applications. However, the NEB has a number of procedures put in place that are intended to reduce the time taken for regulatory decision making.

The NEB has developed a *Filing Manual* to provide direction regarding the information that is typically sought in a filing. The goal is to provide applicants with a clear definition of the NEB's expectations for complete filings. Complete filings

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[1033] AUC, *Utilitites Stakeholder Consultation*. Available at: http://www.auc.ab.ca/portal/server.pt/gateway/PTARGS_0_0_329_273_326_43/http%3B/aucContent/publishedcontent/publish/auc_home/regulatory_process/working_with_stakeholders/utilities_stakeholder_consultation/ [accessed on 15 May 2008].

[1034] AUC, *Preliminary Meeting*. Available at: http://www.auc.ab.ca/portal/server.pt/gateway/PTARGS_0_0_329_273_326_43/http%3B/aucContent/publishedcontent/publish/auc_home/regulatory_process/working_with_stakeholders/appropriate_dispute_resolution__adr_/prelim_meeting/ [accessed on 15 May 2008].

[1035] Market Surveillance Administrator (MSA), *MSA Investigation Procedures*, 9 July 2008. Available at: http://www.albertamsa.ca/files/MSA_Investigation_Procedures_07-09-08.pdf [accessed on 12 February 2009].

should allow the Board to carry out more consistent assessments with fewer information requests and therefore, shorten timelines required to make a decision.[1036]

Prospective applicants may request a pre-application meeting with the NEB in which the process of application is elucidated.[1037] Pre-application meetings give both the regulator and the prospective applicant the opportunity to share process information and establish contacts, discuss filing requirements and identify resources. The Board's staff present in the meeting cannot, however, give any substantive advice about the project. The meeting's proceedings are documented, and the agreed minutes are available to the public thereafter together with any other documents presented in the meeting. The experience of the NEB shows that these meetings improve the completeness of applications, which in turn facilitate the review process and hasten response times.[1038]

The NEB also encourages negotiated settlements which reduce the need for public hearings. In addition, its generic multi-pipeline cost of capital proceedings in 1994–95 has reduced the need for a public hearing. Instead, the capital structure and rate of return on equity for some Group 1 companies are set based on an adjustment mechanism established in this proceeding.

In reviewing some recent applications, time taken to make final decisions is approximately nine to twelve months. Examples include:

- Application for authorisation for the construction and operation of a pipeline:
    - Emera Brunswick pipeline Company Ltd Brunswick Pipeline Project: one year.[1039]
    - Encana Corporation Deep Panuke Offshore Gas Development Project: eleven months.[1040]
- Application for leave to transfer certain pipeline facilities:
    - TransCanada Pipelines Limited and TransCanada Keystone Pipeline GP Ltd: nine months.[1041]

[1036] NEB, *Filing Manual*. Available at: http://www.neb.gc.ca/clf-nsi/rpblctn/ctsndrgltn/flngmnl/fmchptr1-eng.html [accessed on 12 February 2009].

[1037] NEB, *Pre-Application Meetings (Revised)*, 4 December 2008. Available at: http://www.neb-one.gc.ca/clf-nsi/rpblctn/ctsndrgltn/rrggnmgpnb/prpplctnmtng/prpplctnmtng-eng.html [accessed on 12 February 2009].

[1038] Ibid.

[1039] NEB, *Reasons for Decision: Emera Brunswick Pipeline Company Ltd*, Decision GH-1-2006, May 2007. Available at: https://www.neb-one.gc.ca/ll-eng/livelink.exe/fetch/2000/90464/90550/408788/408789/466317/465027/A0Z1F4_-_Reasons_for_Decision_-_Emera_Brunswick_Pipeline_Company_Ltd._-_GH-1-2006?nodeid=465121&vernum=0 [accessed on 12 February 2009].

[1040] NEB, *Reasons for Decision: Encana Corporation*, Decision GH-2-2006, September 2007. Available at: https://www.neb-one.gc.ca/ll-eng/livelink.exe/fetch/2000/90464/90550/189912/441384/477267/477089/A1A3I9_-_Reasons_for_Decision,_GH-2-2006.pdf?nodeid=477090&vernum=0 [accessed on 12 February 2009].

[1041] NEB, *Reasons for Decision: TransCanada Pipelines Limited and TransCanada Keystone Pipeline GP Ltd*, Decision MH-1-2006, February 2007. Available at: https://www.neb-one.gc.ca/ll-eng/livelink.exe/fetch/2000/90464/90550/409774/410106/453446/452396/A0X8A0_-_Reasons_for_Decision_for_MH-1-2006.pdf?nodeid=452261&vernum=0 [accessed on 12 February 2009].

Timeliness (Provinces)

The ECRB also conducts pre-hearing meetings between applicants, interested third parties and Board members when deemed helpful to determine the issues and scope of matters to be considered at hearing.[1042]

For applications presented by the MSA, the AUC must make a decision within 90 days of the date of the hearing.[1043] However, for other applications the AUC has discretion to set any time frame it wishes, and extend it as required.[1044]

Past performance indicates that the AUC takes approximately one year to make a final decision regarding regulated rate tariff applications. For example, the EPCOR Energy Alberta application took the AUC eleven months to decide.[1045]

Role of Interested Parties (Federal)

There is a clear role for interested parties in Canadian energy regulatory processes. In particular, in the conduct of public hearing, individuals, companies and other organisations that have an interest have an opportunity to become interveners or interested parties and thus participate directly in proceedings.

As noted previously, the NEB conducts a public hearing for certain applications, including:

- applications for the construction and operation of pipelines that are either international or inter-province, and international power lines;
- applications to set the tolls and tariffs of pipeline companies under the Board's jurisdiction;
- applications to abandon a pipeline;
- export applications for natural gas, oil or electricity or import applications for natural gas; and
- landowner oppositions to the detailed route of an approved pipeline.[1046]

In these hearings submissions may be made by any member of the public. In some cases these submissions are only written, and others involve an additional oral submission.

In addition, the *National Energy Board Act* recognises the interests of landowners with regard to the creation and routes of pipelines. For applications relating to such issues, the board must give notice and grant hearing to all affected landowners.[1047]

[1042] As was done for example in Petro-Canada Application for Wells and Associated Pipelines Prehearing Meeting, Decision 2008-029. Available at; http://www.ercb.ca/portal/server.pt/gateway/PTARGS_0_0_304_264_0_43/http%3B/ercbContent/publishedcontent/publish/ercb_home/industry_zone/decisions/decisions/2008/2008_029.aspx [accessed on 12 February 2009].

[1043] *Alberta Utilities Commission Act* 2007 (Alberta), s. 56 (1).

[1044] *AUC Rules of Practice*, Rule 6.

[1045] AUC, *EPCOR Energy Alberta Inc.: 2007-2009 Regulated Rate Tariff Non-Energy Charge*, Decision 2008-031, 30 April 2008. Available at: http://www.auc.ab.ca/applications/decisions/Decisions/2008/2008-031.pdf [accessed on 12 February 2009].

[1046] NEB, *The Public Hearing Process – Your Guide to Understanding NEB Hearings*. Available at: http://www.neb.gc.ca/clf-nsi/rthnb/nvlvngthpblc/pblchrng/pblchrngpmphlt-eng.html [accessed on 12 February 2009].

[1047] *National Energy Board Act*, s. 34.

The interests of Indian communities are also specifically recognised in the *National Energy Board Act.*[1048]

A landowner making a submission as a part of a hearing may be reimbursed for reasonable costs incurred, either payable by the pipeline company or as the NEB otherwise fixes.[1049] The NEB itself is not empowered to fund the participants of a hearing. When the Canadian Environmental Assessment Agency is involved in NEB hearings, it may provide participant funding**.**

The NEB also engages in informal consultation with potentially affected parties. The NEB established the Land Matters Consultation Initiative (LMCI) which provides a forum for all interested parties and the NEB to engage in general dialogue related to pipelines, with the intention of devising solutions for the development of the energy sector with consideration to all those affected. Industry groups (like the Canadian Association of Petroleum Producers), landowners (like Brasswood Farms) and aboriginal groups (like the Union of New Brunswick Indians) actively participate in the forum.[1050]

Role of Interested Parties (Provinces)

The Office of the Utilities Consumer Advocate (UCA) was established in 2003 by the Albertan government to represent the interests of consumers (residential, small business and agriculture) during regulatory proceedings. This collaboration helps to reduce duplication of intervener efforts and regulatory hearing costs. The UCA also has a role in providing information to consumers to help them make informed choices about enery suppliers, as well as mediating disputes between consumers and utilities. The UCA reports directly to the Minister responsible for consumer affairs. The UCA is assisted by an advisory committee which consists of members of the public who are appointed for a one year term.[1051]

The interests of people who would be affected by a determination of the ERCB are explicitly recognised in the legislation. All parties that are found to have a legally recognised right that may be affected by the application have the right to 'intervene' and provide evidence in the hearing process. A party that has 'standing' as determined by the ERCB may claim costs, which will be compensated when the ERCB deems it appropriate.[1052]

Aside from interveners, other interested parties without standing may still be involved in a public hearing, and are able to provide relevant information to the Board.[1053]

Additionally, the ECRB conducts pre-hearing meetings in which interested user-groups and public interest groups can be involved in what matters are to be considered in the hearing. In particular, environmental and indigenous interest organisations are consulted and contribute to the application process in this way.

[1048] *National Energy Board Act*, s. 78.
[1049] *National Energy Board Act*, s. 39.
[1050] As noted, however. the forum is not sufficiently consultative with the Aboriginal interest group, but rather the forum is directed towards sharing research and information.
[1051] Utilities Consumer Advocate (UCA), *Government of Alberta*. Available at: http://www.ucahelps.gov.ab.ca/4.html [accessed on 10 February 2009].
[1052] *Energy Resources Conservation Act* 2000 (Alberta), s. 28.
[1053] Petro-Canada Application for Wells and Associated Pipelines Prehearing Meeting, Decision 2008-029. Available at: http://www.ercb.ca/portal/server.pt/gateway/PTARGS_0_0_304_264_0_43/http%3B/ercbContent/publishedcontent/publish/ercb_home/industry_zone/decisions/decisions/2008/2008_029.aspx.

The AUC specifically encourages the public to get involved in the application process to assist the Commission in arriving at decisions that are in the best interest of Alberta. For instance, members of the public are able to apply to become an intervener in rates hearings.

Additionally, the AUC holds regular consultation with utility stakeholders such as utilities, municipalities and intervener groups in order to refine the regulatory process, and make parties more aware of the regulatory scheme.[1054]

The MSA has a mandate to engage with stakeholders about 'public projects'.[1055] To fulfil this mandate, the MSA has published Principles for Stakeholder Engagement on Public MSA Projects.[1056]

Information Disclosure and Confidentiality (Federal)

The *Access to Information Act* is a federal law that provides access to information under the control of the Canadian Government. In this regard, all documents relating to a NEB public hearing must be made available for public inspection in its library. In addition, the NEB maintains an electronic and accessible record on its website of all applicant and intervener submissions, letters of comment and hearing transcripts. All interim reports and compiled procedure and the final detailed reasons for decisions are publicly available.[1057]

The *Access to Information Act* also sets out limited and specific exceptions to the right of access and provides for independent review of decisions on the disclosure of government information. Among other reasons, information may be excepted from disclosure if that information was obtained in confidence from a foreign government or institution, an international organisation or institution of states, a provincial government or institution, a municipal or regional government, or an aboriginal government unless the party who provided the confidential information agrees to its disclosure.

Information may also be exempted from disclosure if its publication would be likely to harm law enforcement and investigations, or security, or if it relates to an individual or third party who has not consented to its disclosure.

A decision on disclosure may be referred to the Information Commissioner.

Notwithstanding information disclosure laws, an applicant may request that the NEB treat a filing as confidential in accordance with s. 16.1 of the *NEB Act*. The NEB may take any measures and make any order that it considers necessary to ensure information confidentiality if it is satisfied that:

- disclosure of the information could reasonably be expected to materially affect a person or prejudice the person's competitive position; or

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[1054] AUC, *Utilities Stakeholder Consultation*. Available at: http://www.auc.ab.ca/portal/server.pt/gateway/PTARGS_0_0_329_273_326_43/http%3B/aucContent/publishedcontent/publish/auc_home/regulatory_process/working_with_stakeholders/utilities_stakeholder_consultation/ [accessed on 15 May 2008].

[1055] According to the MSA, to be a 'public project' there must be some foreseeable possibility that the outcome will be a new standard of broad application.

[1056] MSA, *Principles for Stakeholder Engagement, and a Common Framework, for MSA Public Projects,* January 2008.

[1057] See documentations at: https://www.neb-one.gc.ca/ll-eng/livelink.exe?func=ll&objId=90550&objAction=browse&sort=-name [accessed on 26 September 2008].

- the information is financial, commercial, scientific or technical information that is supplied to the NEB on a confidential basis and
    - the information has been consistently treated as confidential information; and
    - the NEB considers that the person's interest in confidentiality outweighs the public interest in disclosure.
- there is a real and substantial risk that disclosure of the information will impair the security of pipelines, international power lines, buildings, structures or systems, including computer or communication systems, or methods employed to protect them; and
- the need to prevent disclosure of the information outweighs the public interest in disclosure.

Information Disclosure and Confidentiality (Provinces)

The AUC and the MSA have broad rights of information gathering which includes the inspection of property and documents. When information is purported to be lawyer–client privileged, the material may be seized by the MSA, but the court must then determine whether the material is in fact privileged.[1058]

Decision-making and Reporting (Federal)

The National Energy Board is composed of up to nine Board Members, appointed by the Governor in Council.[1059] The Governor in Council appoints a Chairman and vice-Chairman. The Chairman has supervision of, and directs the work of, the staff of the NEB. Each member is appointed initially for a seven-year term, and may be reappointed for periods of seven years thereafter. Additionally, up to six temporary board members may also be appointed by the Governor in Council.[1060] The board members are supported by 280 staff members. The Board may also appoint experts to assist it in an advisory capacity.

At least three board members must be present at a Board meeting to constitute a quorum. The Board may authorise one or more members to report to the Board on any question or matter for which it has jurisdiction. That member(s) has all the power of the Board for the purposes of taking evidence or acquiring information.

Apart from its determinative role, the NEB also acts as an advisory body to the Minister upon request, in relation to 'energy matters, sources of energy and the safety and security of pipelines and international power lines'.[1061] The *National Energy Board Act* does not require the Minister to follow the advice provided.

In the course of making a determination, the board members hear all the relevant information provided by the applicant and any intervenors at the hearing, and then decides accordingly. The NEB does not necessarily create a draft decision, but an interim decision may be made pending a final decision.[1062]

[1058] *Alberta Utilities Commission Act* 2007 (Alberta), s. 50.
[1059] *National Energy Board Act*, s. 3(1).
[1060] *National Energy Board Act*, s. 4(1).
[1061] *National Energy Board Act*, s. 26.
[1062] *National Energy Board Act*, s. 19(2).

The NEB has the power to make decisions applying to specific providers and more generally.[1063] The decision made by the Board creates enforceable rights as if it was an order of the Federal Court and is final except as to the appeal rights provided in the Act.[1064]

Under the Act, the NEB must provide reasons for decisions upon request in the case of Declarations of Significant Discovery and Commercial Discovery.[1065]

In practice however, the NEB provides publicly accessible reasons of decisions for each and every determination. Significant detail is published in support of decisions. Often the reasons for decisions can amount to hundreds of pages.

Decision-making and Reporting (Provinces)

Up to nine members of the ERCB are appointed by the Lieutenant Governor in Council for terms of five years.[1066]

The AUC is also comprised of not more that nine members, each appointed by the Lieutenant Governor in Council for terms of five years. Additional acting members may be appointed.

The ERCB has the responsibility to prepare reports and conduct general investigations and make any recommendations to the Lieutenant Governor in Council that it thinks relevant.[1067]

Similarly the AUC may be required by the Lieutenant Governor in Council to inquire into, hear or determine any matter or thing for which it has jurisdiction.[1068]

Appeals (Federal)

A party dissatisfied with a decision of the NEB may apply for leave to appeal to the Federal Court of Appeal on matters of law or jurisdiction. Leave applications must be made no more than 30 days after the NEB has made its decision and if leave is granted, an appeal must be entered within 60 days.[1069]

If the court finds a jurisdictional error, the original decision of the Board is invalid and unlawful.

Alternatively, the applicant can apply for a review of the original decision or a rehearing by the Board. This may be done if the applicant believes that:

- There was an error of law or jurisdiction.
- There are changed circumstances from the time of the original decision which have since arisen.
- Facts were not placed in evidence in the original hearing because they were not discoverable in the course of due diligence.[1070]
- The correctness of the Board's original decision is doubtful.

[1063] *National Energy Board Act* s. 18.
[1064] *National Energy Board Act*, ss. 17 and 23.
[1065] *National Energy Board Act*, s. 28.2 (7).
[1066] *Energy Resources Conservation Act* (Alberta), s. 5.
[1067] *Energy Resources Conservation Act* (Alberta), s. 21.
[1068] *Alberta Utilities Commission Act 2007* (Alberta), s. 8(4).
[1069] *National Energy Board Act*, s. 22.
[1070] NEB, *National Energy Board Rules of Practice and Procedure*, 1995. Available at: http://laws.justice.gc.ca/en/ShowTdm/cr/SOR-95-208///en [accessed on 10 February 2009].

Appeals (Provinces)

In general, the original decisions made by the ERCB are all final and not subject to merits review.[1071] However, if a decision has been made by the ERCB without hearing, the disenchanted party may apply within 30 days for hearing and associated re-determination.[1072]

Any questions of jurisdiction or law from ERCB determinations provide grounds of appeal to the Alberta Court of Appeal.[1073] The appellant has the right to be provided with materials that they have requested from the Board for the purposes of applying for leave to appeal, within 14 days. The Board is not required to provide a transcript of the hearing, unless directed by the Court of Appeal.

The appeal must be lodged within 30 days of the Board's determination, or within a further time at the Judge's discretion. This appeal process is entirely independent of the original decision. It is held in the Court of Appeal and the regulator is an ordinary party without special powers or rights. If the appellant is successful, the issue is returned to the ERCB for re-determination. No costs are awardable.

With regard to AUC determinations, rights to appeal are specifically excluded in the Act, apart from appeal on matters of jurisdictional error, or error of law.[1074] An applicant may appeal to the court on these bases within 30 days of the determination.[1075]

2. Telecommunications

The telecommunications industry plays a prominent role in Canada, with over 98.4 per cent of households having fixed-line telephone access.[1076] Broadband penetration is high relative to other OECD countries, particularly the US. Unlike other countries, there are six incumbent companies in Canada, each serving different provinces, and 43 independent companies providing mostly local service.[1077]

Over the past twenty years, the telecommunications industry in Canada has migrated from a monopolistic service-delivery model (with regional monopoly providers) to a more competitive sector with multiple suppliers. Since the early 1980s, Industry Canada (IC) has licensed many suppliers of mobile and fixed telecommunications services, and the Canadian Radio-television and Telecommunications Commission (CRTC) has opened most telecommunications markets to competition. In addition, the CRTC has held back from economic regulation of many telecommunications services, including terminal equipment; toll; mobile wireless; interexchange private lines; retail Internet; international services; wide area networking; local exchange services in most urban areas; and certain other data services.

Regulatory Institutions and Legislation

The regulating body of the Canadian telecommunications industry is the CRTC, which is an independent body governed by both the *Telecommunications Act 1993* and the *Broadcasting Act 1991*. The *Telecommunications Act 1993* places specific

[1071] *Energy Resources Conservation Act* 2000 (Alberta), s. 25.
[1072] *Energy Resources Conservation Act* 2000 (Alberta), s. 40.
[1073] *Energy Resources Conservation Act* 2000 (Alberta), s. 41.
[1074] *Alberta Utilities Commission Act* 2007 (Alberta), s. 30.
[1075] *Alberta Utilities Commission Act* 2007 (Alberta), ss. 29(1)–(2).
[1076] OECD, *Regulatory Reform in the Telecommunications Industry*, 2002, p. 6.
[1077] Ibid, p. 10.

emphasis on universal service and affordability.[1078] This is of general concern across global telecommunications regulation, but particularly important in Canada due to its large land mass and relatively sparse population, of only three people on average per square kilometre.[1079]

As service providers often rely upon having access to components of a competitor's network to enable them to provide an end-to-end service to their customers, the CRTC has a regulatory framework under which certain facilities, functions and services are made available by incumbents to competitors at regulated rates. At the same time, suppliers are often fully-integrated service providers able to offer the same range of service and competing for the same customers. As technical innovations are introduced, suppliers are finding niches to provide selective services, while others are integrating packages or bundles of services together to attract customers.

The telecommunications industry is in transition from being governed by industry-specific regulation to laws of general application. As part of the Competition Bureau's continuing effort to maintain a transparent and predictable enforcement policy, it has published a Bulletin.[1080] It describes the Bureau's approach under the abuse of dominance provisions (ss. 78 and 79) of the *Competition Act* with respect to conduct in the telecommunications industry to the extent that the CRTC has made a determination to refrain from regulating such conduct.

Process and Consultation

Matters arise before the regulator when regulated parties, subscribers and potential subscribers make applications to the CRTC.[1081] The steps in the process of making a decision, particularly in the context of a general rates increase, are:

- The company makes an application.
- Letter of intervention filed, notices of intention to participate are disseminated.
- Interrogatories are conducted.
- Hearing is conducted.
- Decision is made.

Timeliness

If an amendment to the proceedings is proposed by either party, the Commission has the power to strike it out if it considers that the amendment would embarrass, prejudice or delay a fair hearing.[1082]

A maximum mandatory period within which the CRTC must make a decision exists with regard to tariff applications. Under the *Telecommunications Act*, within forty-five business days after a tariff is filed, the Commission shall:[1083]

[1078] *Telecommunications Act 1993*, s. 7.
[1079] OECD, 2002, p. 7.
[1080] Competition Bureau, *Information Bulletin on the Abuse of Dominance Provisions as Applied to the Telecommunications Industry*, Bulletin, 6 June 2008.
[1081] Canadian Radio-television and Telecommunications Commission (CRTC), *CRTC Rules of Procedure: Rules Respecting the Procedure of the Canadian Radio-Television and Telecommunications Commission*, C.R.C. Chapter 375. Available at: http://beta.canlii.org/en/ca/laws/regu/crc-c-375/latest/crc-c-375.html [accessed on 29 January 2009], Article 3.
[1082] CRTC, *CRTC Telecommunications Rules of Procedure*, s. 27(b).

- either approve the tariff (subject to certain amendments or substitution); or
- disallow the tariff; or
- make public written reasons why the Commission has not acted in accordance with the above two options and specify the period of time within which the Commission intends to do so.

There is also a specific time-line required for accepting or rejecting retail tariff applications. Within ten days the applicant must receive:[1084]

- an order granting the application interim approval,
- a letter stating that it intends to dispose of the application within 45 business days of receipt of the application, setting out the reasons why interim approval was not granted,
- a letter either with interrogatories included or confirmation that interrogatories are to follow within 5 business days, and an indication that it still intends to dispose of the application within 45 business days, or
- a letter indicating that the file is being closed due to deficiencies in the application, identifying the specific deficiencies.

In spite of these stipulated time-lines, under the *Telecommunications Act* the Commission may extend the time of delivering its decisions under certain circumstances.[1085]

Recently, the CRTC has put efforts into streamlining processes. In assessing inter-company transaction cases in 2007, it took the CRTC less than 40 days to issue their decision on each case.[1086]

Role of Interested Parties

Section 9(1) of the *Telecommunications Act* specifically recognises the role of the public in the regulatory process. When the CRTC is deciding upon exemption of any class of Canadian carriers from the application of the Act, it must hold a public hearing.[1087] Additionally, the *Telecommunications Rules of Procedure* stipulate that, in applications for general rate increases, 'any interested person or association may intervene'.[1088]

There are two processes that the CRTC uses which allow interested parties to participate in proceedings – public hearings and public notices.[1089] When the CRTC

[1083] *Telecommunications Act*, s. 26.

[1084] CRTC, *Telecom Circular CRTC 2005–06*. Available at: http://www.crtc.gc.ca/archive/ENG/Circulars/2005/ct2005-6.htm [accessed on 26 September 2008].

[1085] *Telecommunications Act*, s. 50.

[1086] Len Katz (Vice Chairman of CRTC), *Notes to an address 'to the E-Commerce and Telecommunications Committee of the Canadian Chamber of Commerce'*, 11 December 2007. Available at: http://www.crtc.gc.ca/eng/NEWS/SPEECHES/2007/s071211.htm [accessed on 29 January 2009].

[1087] *Telecommunications Act*, s. 9 (1).

[1088] CRTC, *CRTC Telecommunications Rules of Procedure: Rules of Procedure of the Canadian Radio-Television and Telecommunications Commission in regard to Telecommunications Proceedings, SOR/79–554*. Available at: http://beta.canlii.org/en/ca/laws/regu/sor-79-554/latest/sor-79-554.html [accessed on 29 January 2009], s. 40.

[1089] CRTC, *CRTC Public Process*. Available at: http://www.crtc.gc.ca/eng/publicpar_1.htm [accessed on 26 September 2008].

is considering a policy issue, or amending regulations it holds a public hearing, whereby members of the public can submit written comments by an announced deadline. They also have an opportunity to express their views in an oral process, which may occur by teleconference. The public notice process only allows for written submission and is used when the CRTC wishes to obtain submissions on telecommunications issues that do not require in-person discussions as well as applications for renewal or amendment of broadcasting licences.

The Office for Consumer Affairs, empowered by the *Department of Industry Act*, allocates funding for research projects to eligible non-profit consumer and voluntary organisations.[1090] The maximum contribution per project is CA$100 000 and the maximum amount that can be awarded to a single organisation per year a total of CA$500 000 for all projects undertaken.

Information Disclosure and Confidentiality

The CRTC has some powers with respect to information gathering that may require any Canadian carrier to submit information the Commission deems necessary, in the form it specifies.[1091] Where the CRTC deems that information held by any person other than a Canadian carrier is necessary for the operation of the Act, it may require that person to provide the information, unless the information is 'a confidence of the executive council of a province'.[1092]

Information is treated as commercial-in-confidence (c-i-c) if the information discloser designates it as such because it is:[1093]

- trade secret information;
- financial, commercial, scientific or technical information that is confidential, and treated as such by the person submitting the information;
- information the disclosure of which would reasonably be expected to result in material loss or gain to any person; or prejudice the competitive position of any person; or affect contractual or other negotiations of any person.

Parties holding confidential information must still supply the required information, and if they designate it as confidential, and the CRTC agrees, the information will not be disclosed unless it determines that disclosure is in the public interest.[1094]

Generally where it is determined that information is confidential, the CRTC is permitted to take the following actions:[1095]

- order that the document not be placed on the public record;
- order disclosure of an abridged version of the document; or
- order that the document be disclosed to parties at a hearing to be conducted in camera.

[1090] Canada's Office of Consumer Affair, *A Guide to Submitting Proposals to the Contributions Program for Non-profit Consumer and Voluntary Organization*. Available at: http://www.ic.gc.ca/epic/site/oca-bc.nsf/en/ca02313e.html#2_1 [accessed on 26 September 2008].
[1091] *Telecommunications Act*, s. 37 (1).
[1092] *Telecommunications Act*, s. 37 (2)
[1093] *Telecommunications Act*, s. 39 (1).
[1094] *Telecommunications Act*, ss. 39 (2), (4) and (5).
[1095] CRTC, *Telecommunications Rules Of Procedure*, s. 19 (11).

In practice, the CRTC has permitted parties to enter into an agreement to share confidential information on terms such as: [1096]

- Using the confidential information solely for purposes related to the course of performance of the Agreement;
- Promptly returning to the disclosing party, upon its request, or certify as destroyed, any material concerning confidential information, including all copies and notes;
- Taking all reasonable precautions to maintain the secrecy of all confidential information disclosed; and
- Disclosing the confidential information only to those personnel with a need to have access to it, provided that they are bound to observe the set confidentiality requirements.

In 2007, the CRTC issued a proposed *Practice Direction on the Provision of Confidential Access to Confidential Information (the Practice Direction)* to extend the availability of providing confidential access to parties of other party's c-i-c information. After considerable opposition from industry groups, the CRTC rejected the proposal.[1097]

Decision-making and Reporting

The CRTC is comprised of up to 13 full-time and six part-time commissioners for renewable terms of up to five years, all appointed by the Governor in Council.[1098] Only full-time commissioners are involved in actual decision making.[1099]

The Determinative body is supported by 400 employees specialising in broadcasting and telecommunications who respond to immediate and long-term responsibilities concerning legislation, the public, government and industry.[1100]

Staff is divided into divisions specifically engaging in: Broadcasting; Telecommunications; Strategic Communications and Parliamentary Affairs; and Policy Development and Research.

Appeals

There are three types of appeals:

- Appeals to the CRTC. The CRTC has the power to review, rescind or vary its prior decision, on application or on its own motion.[1101]
- Appeals to the Federal Court of Appeal.[1102] This is a form of judicial review, and only relates to questions of law or jurisdiction. Leave to appeal is required, and when obtained, the court can only alter findings or policy decisions as they relate to law and not to fact.

[1096] CRTC, *Telecom Order*, CRTC 97-288, 4 March 1997. Available at: http://www.crtc.gc.ca/eng/archive/1997/O97-288.HTM [accessed on 26 September 2008].
[1097] CRTC, *Telecom Public Notice CRTC 2007–20*, 15 November 2007. Available at: http://www.crtc.gc.ca/eng/archive/2007/pt2007-20.htm [accessed on 26 September 2008].
[1098] *Canadian Radio-television and Telecommunications Commission Act (Cth)*, s. 3.
[1099] *Canadian Radio-television and Telecommunications Commission Act*, s. 12 (2).
[1100] CRTC, *Background*. Available at: http://www.crtc.gc.ca/eng/BACKGRND/Brochures/B29903.htm [accessed on 26 September 2008].
[1101] *Telecommunications Act*, s. 62.
[1102] *Telecommunications Act*, s. 64 and *Federal Court Act*, s. 28 (1) (c).

- Appeals to Government. This is form of merits review. The government may rescind or alter the CRTC decision and is required to publish reasons for its decision. This right of appeal has only been used sparingly.[1103]

The time limits which apply in appeals to the Federal Court are the following:[1104]

- An application for leave to appeal must be lodged within 30 days of the Commission's decision or within such further time as the Judge permits.
- Notice must then be served on the Commission and each of the parties to the original proceeding.
- An appeal must be brought within 60 days after leave is granted.

In appeals to the Federal Court, relief may be granted, provided the court is satisfied that the CRTC:[1105]

- acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
- failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
- erred in law in making a decision or an order, whether or not the error appears on the face of the record;
- based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;
- acted, or failed to act, by reason of fraud or perjured evidence; or
- acted in any other way that was contrary to law.

The remedies available to the Federal Court are writs of *certiorari*, prohibition, *mandamus*, *quo warranto*, declaratory relief or other relief of that nature as contemplated by the statute.[1106] For example, it may order the CRTC to correct or re-consider its decisions or set aside the CTRC's decisions.[1107]

3. Posts

Canada Post is experiencing new challenges as the postal industry adapts in response to the increasingly popular technologies of email and the Internet. Over the past few years, the number of addresses to which Canada Post must deliver has increased, but traditional mail volume has decreased. Canada Post has over 72,500 employees who process and deliver 11 billion pieces of mail to 14 million addresses, annually.[1108] Canada Post also operates in the competitive parcel and courier segments of the postal industry. Purolator, a subsidiary of Canada Post, has the largest market share (by revenue),[1109] followed by Canada Post, FedEx, UPS and DHL.

[1103] OECD, 2002, op. cit., p. 13.
[1104] *Telecommunications Act 1993*, ss. 64 (2)–(4).
[1105] *Federal Court Act*, s. 18 (4).
[1106] *Federal Court Act*, ss. 18 (1) (a) and (b).
[1107] *Federal Court Act*, s. 18 (3).
[1108] Canada Post, *Annual Report* 2007. Available at: http://www.canadapost.ca/corporate/about/annual_report/pdf/financial_performance_en_fr/Financial_Performance/Financial_Performance_eng.pdf [accessed on 5 September 2008],
[1109] Ibid., p. 42.

Regulatory Institutions and Legislation

The key legislations governing the postal industry are the *Canada Post Corporation Act 1981*, and related regulations, including Letter Mail Regulations, Letter Definition Regulations and so on. Under the Act, Canada Post was transformed from a government department to a Crown Corporation that is required to financially self-sustain for the provision of universal service, that is, to provide postal service to every location within Canada five days a week. To finance universal service obligations, Canada Post is given the sole and exclusive privilege in Canada of collecting, transmitting and delivering letters to the addressee. This exclusive privilege extends to letters weighing up to 500 grams mailed in Canada for delivery within Canada or outside Canada, or mailed outside Canada for delivery within Canada.[1110] This exclusive privilege was reaffirmed by the Ontario Court of Appeal in 2005 with regard to both internal and international mail collection and delivery,[1111] however the federal government introduced Bill C-14, an 'Act to amend the *Canada Post Corporation Act*' in November 2007. If passed, the Bill will partially deregulate the market, excluding outgoing international mail from the exclusive privilege, thereby legalising the remailing competitive market.[1112]

In accordance with the Act, Canada Post may make regulations in relation to postal matters, subject to the approval of the Governor in Council. The development of postal regulation has changed over the past 30 years. When Canada Post was originally corporatised, it was initially regulated by direct ministerial control. A third party regulator, the Postal Services Review Committee (PSRC) was briefly introduced. It acted in an advisory capacity, reviewing all proposed changes to rates and providing non-binding recommendations to the Governor-in-Council. The PSRC was then disbanded because – as argued by one commentator – its non-coercive nature left it powerless and irrelevant.[1113] The regulatory system reverted to inactive ministerial regulation.

The Corporation is now granted ostensible autonomy in proposing regulations in postal matters. With the approval of the Governor in Council, Canada Post may prescribe rates of postage,[1114] subject to being

> fair and reasonable and consistent so far as possible with providing revenue from other sources sufficient to defray the costs incurred by the corporation.[1115]

Domestic basic letter rate (applied to the standard mail weighing up to 30 gm) is the subject of a price cap.

The Canada Post must comply with the ministerial directives. The Minister responsible for Canada Post is the Minister for Transport, Infrastructure and

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[1110] *Canada Post Corporation Act 1985* s. 14; See the Canada Post Corporation's Website at: http://www.canadapost.ca/Tools/pg/manual/PGcpc-e.asp [accessed on 5 September 2008].

[1111] Canada Post, *News*. Available at: http://www.postescanada.ca/AboutUs/news/pr/archive-e.asp?prid=1109 [accessed on 5 September 2008].

[1112] Mark Mahabir, *Legislative Summary: Bill C-14 an Act to Amend the Canada Post Corporation Act*. Available at: http://www.parl.gc.ca/39/2/parlbus/chambus/house/bills/summaries/c14-e.pdf [accessed on 5 September 2008].

[1113] Robert M. Campbell, 'Symbolic Regulation: The Case of Third-party Regulation of Canada Post,' *Canadian Public Policy*, 19, September 1993, pp. 325–339.

[1114] *Canada Post Corporations Act 1985*, s. 19 (1) (d).

[1115] *Canada Post Corporations Act 1985*, s. 19 (2).

Communities, who has ultimate regulatory control over the postal industry.[1116] The role of the Minister in postal maters includes:[1117]

- The Minister has established, under the 1998 Multi-Year Policy and Financial Framework, a policy of limiting basic letter rate increases to two thirds of annual CPI increases, implemented no more than once annually.[1118] The policy has been enforced by the Minister who used its regulatory power to reject some proposed rate increases.
- The Minister issues directives governing the operation of Canada Post, such as the continuous provision of rural mail delivery.
- The Minister is responsible for the appointment of the Board of Directors of Canada Post, subject to the approval of the Governor in Council.

Regulatory Process

The regulatory process involves a gazetting system, whereby proposed changes to regulations or postal rates would be published in the Canada Gazette.

Any proposed increase to the basic letter rate, if warranted, shall come into effect in January, subject to a notice in the Canada Gazette six months in advance.[1119]

The publication of proposed changes to regulation, including increases in rates of postage for mail items other than the basic letter rate, initiates a public consultation period of 60 days. During the period, members of the public would have an opportunity to object to the Minister. These public submissions will then be considered by the Board of Canada Post before finalising the proposals. The final proposals will be submitted to the Minister for ultimate approval or disapproval by the Governor in Council. The proposals are deemed approved 60 days after submission, unless the Governor in Council previously makes the decision.

Regulatory Development

Since the enactment of the *Canada Post Corporation Act* in 1981 there have been two reviews, in 1985 and 1995, and the Canadian postal system is currently undergoing a strategic review.[1120] The terms of reference for the strategic review, beginning in 2008, are:

> In light of the aforementioned [market] developments, and similar in approach to the federal government's decision to conduct strategic reviews for all departments over the next few years, a strategic review of Canada Post will be conducted to ensure it remains focused and is well positioned to continue to serve Canadians in the future.
>
> The purpose of the strategic review is to examine Canada Post's public policy objectives, its ability to remain financially self-sustaining, and the continued relevancy of the 1998 Multi-Year Policy and Financial Framework.

[1116] *Canada Post Corporations Act 1985*, s. 22.
[1117] *Canada Post Corporation Act 1985*, s. 6(2)
[1118] Dale Clark and Geoff Bickerton, 'Evaluation of a Public Post Office: A Canadian Experience', Chapter 15 *Postal and Delivery Service: Pricing, Productivity, Regulation and Strategies* (edited by Michael A Crew and Paul R Kleindorfer), 2002.
[1119] Canada Post, *Annual Report 2007*, 2007, p. 99.
[1120] See Canada Post Corporation Strategic Review website at; http://www.cpcstrategicreview-examenstrategiquescp.gc.ca/index-eng.html [accessed on 2 December 2008]. Also see Canadian Post Workers Union, *Canada Post Corporation Strategic Review Fact Sheet*. Available at: http://www.cupw.ca/multimedia/website/publication/English/PDF/2008/strv2008_fs2_cpc_strat_rev_en.pdf [accessed on 2 December 2008].

The outcome may affect the future regulatory design of the Canadian postal industry.

4. Water and Wastewater

Canada has an abundant water supply relative to population, with approximately seven per cent of the world's renewable water supply in its territory, but with only about half of one per cent of the world's population. Nevertheless, there are challenges facing water supply, wastewater treatment and disposal and regulation in Canada, including because almost 85 per cent of the nation's population lives in the south, distant from the main sources of fresh water.[1121] Canadians are high per-capita consumers of water, partly because they face prices that do not reflect the economic cost of the water consumed. Further, approximately one-quarter of the population is not connected to a sewerage system.

Water and wastewater services are generally provided by operators owned and operated by municipalities and funded by charges on users and taxes. These are organised into associations such as the Canadian Water and Wastewater Association (CWWA).[1122] The CWWA is a non-profit national body representing the common interests of Canada's public-sector municipal water and wastewater services and their private sector suppliers and partners. According to its website, the CWWA is recognised by the federal government and national bodies as the national voice of this public service sector.

Regulatory Institutions and Legislation

Regulation of the water and wastewater industries is divided between federal and province ministries. The Federal government has jurisdiction to regulate:

> fisheries, navigation, federal lands, and international relations, including responsibilities related to the management of boundary waters ... It also has significant responsibilities for agriculture, health and the environment, and plays a significant role supporting aquatic research and technology, and ensuring national policies and standards are in place on environmental and health-related issues.[1123]

Environment Canada has responsibility for this jurisdiction, and its website contains many interesting facts and figures about Canada's water and wastewater industry.[1124] However, this is largely not the sort of economic regulation that is the focus of this report, which is primarily found at the province level.

Province governments, through their respective Environment Ministries' water departments, regulate and administer the allocation and pricing of water. Below is a table of province jurisdictions, their relevant acts and regulations:[1125]

[1121] Environment Canada, *Frequently Asked Questions*. Available at: http://www.ec.gc.ca/water/en/info/misc/e_FAQ.htm [accessed on 15 May 2008].

[1122] Canadian Water and Wastewater Association (CWWA), *About the Canadian Water and Wastewater Association*. Available at: http://www.cwwa.ca/about_e.asp [accessed on 3 November 2008].

[1123] Environment Canada, *Water Policy and Legislation: Introduction*. Available at: http://www.ec.gc.ca/water/en/policy/federal/e_intro.htm [accessed on 15 May 2008].

[1124] See information at Environment Canada's website at: www.ec.gc.ca [accessed on 3 November 2008].

[1125] Linda Nowlan, *Buried Treasure, The Walter and Duncan Gordon Foundation*, 2005. Available at: http://www.buriedtreasurecanada.ca/Buried_Treasure.pdf [accessed on 3 November 2008], p. 36.

Provincial Jurisdications, Acts and Regulations

Jurisdiction	Act	Regulation
BC	*Water Act*	*Ground Water Protection Regulation 2004*
AB	*Water Act*	*Water (Ministerial) Regulation*
SK	*Saskatchewan Watershed Authority Act*	*Ground Water Regulations*
MB	*Water Rights Act*	*Water Rights Regulation*
ON	*Water Resources Act*	*Water Transfer and taking Regulation*
QC	*Environmental Quality Act*	*Groundwater Catchment Regulation*
NB	*Clean Water Act; Clean Environment Act*	*Environmental Impact Assessment Regulation, Water Quality Regulation*
NL	*Water Resources Act*	*Water Resources Act*
NS	*Environment Act*	*Activities Designation Regulation*
PEI	*Environmental Protection Act*	*Water Well Regulations*
YK	*Waters Act*	*Waters Regulation*
NWT	*Northwestern Territories Water Act; Mackenzie Valley Resource Management Act*	*Northwest Territories Waters Regulation*
NUN	*Nunavut Waters and Nunavut Surface Rights Tribunal Act*	*Nunavut Water Board By-Laws*

While the processes used in making decisions about water and wastewater are unsophisticated, they nevertheless can be summarised under the same headings used throughout this report. Examples and details are drawn from a number of provinces and relate particularly to licensing.

Process and Consultation

In order for matters to arise before a regulator, the applicant submits an application. For example, in British Columbia, a water licence application can be submitted to FrontCounterBC, the Integrated Land Management Bureau or the Ministry of Environment. The proposal is checked to identify potential impacts, which include existing licence holders or earlier applicants, minimum in-stream flow requirements, landowners or Crown land tenure holders, other agencies, and the interests of First Nations.

Timeliness

No specific information has been discovered on timeframes for regulatory processes.

Role of Interested Parties

In British Columbia, licensees, riparian owners and applicants for licenses are specifically recognised in the legislation and may file an objection to the granting of an application.

In Newfoundland, end users and user groups are considered indirectly by the legislation. In this province the Minister may issue a public notice of a licence application.[1126]

Information Disclosure and Confidentiality

In British Columbia the applicant of a licence must provide any plan specifications and other information that the comptroller or regional water manager requires.[1127] The same requirement applies in Manitoba in relation to the Chief Engineer.[1128]

Decision-making and Reporting

In British Columbia, the determinative body is the Water Stewardship Division of the Ministry of the Environment, and decisions are made by the Comptroller of Water Rights, a person employed by the government and designated for the position by the Minister of the Environment.[1129]

Once all potentially affected licensees or other interests have been notified and comments or objections received, a technical assessment of the application is performed by staff of the Water Stewardship Division (Ministry of Environment) to determine if there is sufficient water available in the source to issue a new water licence.

A Regional Water Manager or the Comptroller of Water Rights will review the assessment of the application, consider potential impacts and the availability of water, and will either grant a water licence or refuse the application.[1130]

In Manitoba the Water Licensing Branch of Manitoba Water Stewardship grants licences. In Alberta and Newfoundland[1131] power to grant licences is reposed in the relevant Minister.

In most provinces, power is ultimately vested in the Minister, and decisions tend to be made by either the Minister or a delegate appointed by the Minister. British Columbia has a slightly different structure, whereby power is vested in a comptroller, designated by the Environment Minister. The Act provides that this employee has discretion over decision making, without ministerial intervention. Correspondingly, in the case of British Columbia, greater provision appears to have been made to ensure the accountability of this official, through extensive hearing and notice requirements as well as detailed appeal possibilities.

[1126] *Water Resources Act* [S. N. L 2002], s. 14(4).
[1127] *Water Act* [RSBC 1996], s. 10(1).
[1128] *Saskatchewan Regulations 906/68* 'Regulations Governing the Administration of Provincial Water Powers and the *Water Powers Act*', Rule 5.
[1129] Manitoba Water Stewardship, *Water Use Licensing – Obtaining a Water Rights License*. Available at: http://www.gov.mb.ca/waterstewardship/licensing/wlb/obtaining.html [accessed on 15 May 2008].
[1130] Pursuant to s. 12 (2)(c) of the *Water Act* [RSBC 1996], if the application fits the 'quick licensing procedure' requirements, the requirements of notice and consideration otherwise applicable do not apply.
[1131] *Water Resources Act* [S.N.L 2002], s. 14.

Where the ultimate power for decisions is reposed in the Minister, it is the processes of responsible government that ultimately ensure accountability of exercised power, and perhaps that could explain why a rigid system of notice, hearings and appeals is not always prescribed for the other provinces.

Appeals

In British Columbia, an order of the Comptroller, regional water manager or engineer can be appealed to the Environment Appeal Board (EAB),[1132] which has jurisdiction granted under the *Environmental Management Act* to review orders made under the *Water Act* as well as decisions made under other acts.[1133]

An order of the comptroller, the regional water manager or an engineer may be appealed to the appeal board by:

- the person who is subject to the order,
- an owner whose land is or is likely to be physically affected by the order, or
- a licensee, riparian owner or applicant for a licence who considers that their rights are or will be prejudiced by the order.

However, a licensee may not appeal an order of the comptroller or a regional water manager to cancel in whole or in part a licence and all rights under it because of a failure of the licensee to pay the fees or rentals payable for a period of time.[1134]

The appeal must be lodged within 30 days after notice of the order being appealed has been delivered.[1135] After sixty days of receiving notice of appeal, the chair must decide on the suitable hearing process-oral or written.

In Newfoundland, a person 'aggrieved' by a decision of the Minister may appeal to the Minister.[1136] Having done so, any other party who may be affected by the granting of a licence may submit a statement of objection. If that party's objection is considered worthy of a hearing, the Minister will hold a hearing, and the objector may appear if desired.[1137]

If however, the decision or order of the Minister relates to

- terms or conditions of a licence or permit issued under the Act;
- amendment, addition or deletion of terms and conditions of a licence or permit;
- cancellation of a licence or permit,

the person aggrieved may, within 30 days of the order or the decision appeal, on a question of law or on a question of mixed law and fact, to the Trial Division and the decision of the Trial Division is final.[1138]

In Manitoba, any person who is affected by an order or decision of the Minister under the *Water Rights Act* may lodge an appeal within 30 days of the decision to the

[1132] *Water Act* [RSBC 1996], s. 92(1).
[1133] Environment Appeal Board (EAB), *Environmental Appeal Board Procedure Manual*, 10, 2007. Available at: http://www.eab.gov.bc.ca/fileAppeal/EAB_Proc_Manual_2007.pdf [accessed on 3 November 2008].
[1134] *Water Act* [RSBC 1996], s. 92 (1.1).
[1135] *Water Act* [RSBC 1996], s. 92 (4).
[1136] *Water Resources Act* [SNL 2002], s. 86 (1).
[1137] *Water Resources Act* [SNL 2002], ss. 86 (4) and (5).
[1138] *Water Resources Act* [SNL 2002], s. 87.

Municipal Board empowered under the *Municipal Board Act.*[1139] The decisions of the Municipal Board are final and conclusive.

5. Rail

The rail industry in Canada mainly consists of privately owned companies. Canadian National (CN) and Canadian Pacific (CP) are the largest two railways. Additionally there are over eighty railway companies including those which own track, and rail operators and carriers. The freight traffic operators primarily transport forest products and large volume low-value commodities such as iron ore, coal, grain and potash. Whilst road is the main form of freighting between major cities, freight traffic on the railways has continued to grow modestly. [1140] The Canadian government established VIA rail in 1977, to retain passenger services. It now mostly operates along its own track and CN track. There are a few other passenger service companies, all experiencing a decline in patronage.[1141]

Regulatory Institutions and Legislation

The Canadian Transportation Agency (CTA) is an independent, quasi-judicial tribunal empowered by the *Canadian Transportation Act 1996* to regulate the rail, air and marine transport industries. With regard to rail, the Agency's regulating operations and activities are varied where the CTA:

- deals with rate and service complaints, as well as disputes between railway companies and other parties over railway infrastructure matters;
- processes applications for certificates of fitness for the operation of railways, and approves construction of railway lines;
- determines regulated railway inter-switching rates;
- administers the railway revenue caps for the movement of western grain and determines amounts to be returned to shippers where a cap is exceeded;[1142]
- regulates rail track access (running rights);
- develops costing standards and regulations; and
- audits railway companies' accounting and statistics-generating systems, as required.

Since the 1980s Canadian railways have been increasingly regulated, and since 1996, any rate prescribed by the CTA must be 'commercially fair and reasonable to all parties'.[1143] Effective 1 August 2000, the CTA was no longer responsible for establishing price caps for the rail transportation of western grains. The amended Act, instead, provided for a revenue cap on wester grains carried by a prescribed railway company (currently, CN and CP) and a penalty mechanism for exceeding the cap. The CTA is responsible for the annual determination of the revenue cap, for CN and CP respectively, and for ensuring compliance. After each crop year, the CTA

[1139] *Water Rights Act* [RSM 1988], s. 24 (1).
[1140] D. Hackston and C. Schwier, *Railway Industry Profile*, Industry Canada, 2002. Available at: www.ic.gc.ca/epic/site/rsi-itc.nsf/vwapj/2002englishdch.pdf [accessed on 3 February 2009], p. 6.
[1141] Ibid., p. 26.
[1142] For the Canadian Transportation Agency (CTA)'s latest decision (628-R-2008 of 30 December 2008), see: http://www.cta-otc.gc.ca/rulings-decisions/decisions/2008/R/628-R-2008_e.html [accessed on 3 February 2009].
[1143] D. Hackston and C. Schwier, op. cit., p. 4.

determines the revenue cap on each company, using a complex formula that adjusts the company's base year revenue for actual tonnage moved and average length of haul in the year and allows for cost increases based on forecasted rail inflation. It also determines whether each company's actual revenue is above its entitlement or not. The railway company found to exceed its revenue cap shall pay out the excess amount and any applicable penalty.[1144]

The CTA has power to make determinations in relation to disputes and is required by statute to report annually on its operations to the Minister for Transportation.[1145] As part of the report the CTA must assess how well the agency has operated. This, together with the provisions for the appeal and review of decisions, promotes the accountability of the agency.

Process and Consultation

Matters arise when a complaint is made by users and others regarding poor service or abuse of market power. After a complaint is made, the CTA ensures that each interested party has an opportunity to submit a written response to the complaint. They must do so within 30 days, after which the complainant has ten days to reply.

In more complex cases submissions may be made by way of public hearing. The Agency then reviews all evidence and relevant legislation and regulations in arriving at a decision.[1146]

Part IV of the *Canada Transportation Act* provides for a system of Final Offer Arbitration as an alternative method of resolving rate and service disputes between carriers and shippers or between carriers and railway companies engaged in passenger rail services. FOA uses either a single arbitrator or a panel of three arbitrators. Under these confidential processes, parties may choose their arbitrators and can benefit from procedural flexibility. The arbitrator's decision is enforceable as a decision of the Agency.

Alternatively, the parties to a dispute may elect to undergo mediation supported by the CTA.[1147] Mediation must be completed within thirty days.[1148]

In general, disputes that proceed to mediation tend to be resolved without the necessity of enduring a formal process. In its *Annual Report*, the CTA wrote that a recently completed analysis of rail mediations conducted over the last five years shows that the success rate of cases wherein both parties agree to mediate is over 90 per cent. Twenty-nine of 31 completed mediations were resolved to the satisfaction of both parties. Moreover, over 90 per cent of all mediation clients surveyed reported that they were 'fully satisfied' with the mediation process.[1149]

Additionally, the CTA claimed in the Annual Report that it does place some priority on the use of informal facilitation, in order to resolve disputes before they officially arise in complaints:

[1144] CTA, *Western Grain: Railway Revenue Cap*. Available at: http://www.cta-otc.gc.ca/doc.php?did=992&lang=eng [accessed on 7 April 2009].
[1145] *Canadian Transportation Act* (1996), s. 42.
[1146] CTA, *The Process for Making Decision*. Available at: http://www.cta-otc.gc.ca/doc.php?sid=1173&lang=eng [accessed on 7 April 2009].
[1147] *Canadian Transportation Act* (1996), s. 36.1.
[1148] *Canadian Transportation Act* (1996), s. 36.1(5).
[1149] CTA, *Annual Report 2006*, 2007. Available at: http://www.cta-otc.gc.ca/aux_bin.php?auxid=413 [accessed on 7 April 2009].

> In addition to the formal decision and mediation processes offered by the Agency, staff members also use informal facilitation to resolve many transportation issues affecting air, rail, marine and accessible transportation, often before a formal complaint is filed.[1150]

Timeliness

The CTA must complete its decision-making process within 120 days of receiving the initial complaint.[1151] However, the agency may postpone the delivery date of a final decision if the parties agree to an extension. The regulator may also extend the time limit if parties undergo mediation.[1152]

If parties require a hastier resolution of the dispute they may choose Final Offer Arbitration. The FOA process must be completed within 60 days, or 30 days for disputes involving freight charges of less than CA$750 000, unless the parties agree to a different time frame.

Information Disclosure and Confidentiality

The regulator is empowered to:[1153]

> enter and inspect any place, other than a dwelling-house, or any structure, work, rolling stock or ship that is the property or under the control of any person the entry or inspection of which appears to the inquirer to be necessary.

It is also empowered to:[1154]

> exercise the same powers as are vested in a superior court to summon witnesses, enforce their attendance and compel them to give evidence and produce any materials, books, papers, plans, specifications, drawings and other documents that the inquirer thinks necessary.

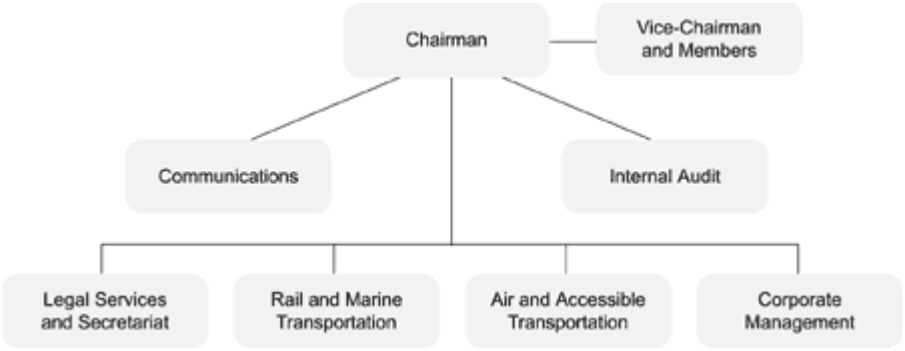
Decision-making and Reporting

The CTA is comprised of five full-time members including a Chairman and Vice Chairman.[1155] In the case of a dispute, a panel of at least two members is assigned to make a decision.[1156]

The members of the CTA are supported by approximately 270 employees who provide operational support and assistance. The organisational structure presented below shows that it includes divisions supporting the main areas of responsibility for accessible, air, rail and marine transportation as well as a Legal Services and Secretariat Branch, the Corporate Management Branch and the Chairman's Office, which includes Internal Audit and the Communications Directorate.[1157]

[1150] Ibid.
[1151] CTA, *The Process for Making Decision*. Available at: http://www.cta-otc.gc.ca/doc.php?sid=1173&lang=eng [accessed on 7 April 2009].
[1152] *Canadian Transportation Act* (1996), s. 36.1(6).
[1153] *Canadian Transportation Act* (1996), s. 39.
[1154] *Canadian Transportation Act* (1996), s. 39
[1155] *Canadian Transportation Act* (1996), s. 7(2).
[1156] *Canadian Transportation Act* (1996), s. 16(1).
[1157] CTA, *Annual Report 2006*, 2007.

Organisational Structure of the CTA



Apart from the determinative role of the CTA, there are circumstances in which it operates in an advisory capacity. The Minister of Transportation has the power to make policy determinations in relation to the operation of the *Canadian Transportation Act.* Before tabling the policy before the two houses of parliament, the Minister must consult with the Agency with respect to the subject matter.[1158]

The decisions made by the Agency are binding on parties, can be made an order of the Federal Court and are enforceable in the same manner as such an order.[1159]

Decisions are recorded in reports, which contains detailed discussion of the process and deliberations that occurred prior to the final determination. Considerable detail is published in support of decisions including the background of the dispute, relevant issues, facts, legislation, position of parties, analysis of all information in addition to findings.[1160]

There is no publicly accessible folder for each party's submissions; however the website publishes interlocutory decisions, final decisions and orders.[1161]

Draft decisions are not recognised by statute, however interim decisions may be made:[1162]

> The Agency may, instead of making an order final in the first instance, make an interim order and reserve further directions either for an adjourned hearing of the matter or for further application.

Appeals

Parties involved in a complaint who are dissatisfied with the agency's decision may appeal to the Federal Court on a matter of law or jurisdiction within one month of the decision.[1163] Once leave has been granted by the court, the party must enter the appeal within sixty days.[1164]

[1158] *Canadian Transportation Act* (1996), s. 46.
[1159] *Canadian Transportation Act* (1996), s. 33.
[1160] *See, for example, CTA Decision No. 514-R-2007*. Available at: http://www.cta-otc.gc.ca/rulings-decisions/decisions/2007/R/514-R-2007_e.html [accessed on 15 May 2008].
[1161] CTA, *Rulings*. Available at: http://www.cta-otc.gc.ca/decision-ruling/index.php?lang=eng [accessed on 15 May 2008].
[1162] *Canadian Transportation Act* (1996), s. 28(2).
[1163] *Canadian Transportation Act* (1996), s. 41.
[1164] *Canadian Transportation Act* (1996), s. 41(2).

Alternatively, parties may appeal at any time to the Governor in Council. Following an application of one of the parties, another interested person or of its own motion, the Governor in Council may 'vary or rescind any decision, order, rule or regulation of the Agency'.[1165]

Decisions of non-jurisdictional facts are final and conclusive.[1166] However, an applicant may seek internal review of decisions if there has been a change in the facts or circumstances related to the decision or order.[1167] The Agency may then review, rescind or vary any decision or order made by it or may re-hear any application before deciding it.

Regulatory Development

Rail infrastructure in Canada is regulated by the Canadian Transportation Authority (CTA) under the *Canadian Transportation Act*. The scope of economic regulation includes dealing with disputes over rates, administering revenue caps for grain haulage, and access to tracks. Processes are consultative and transparent, including the use of public hearings on more complex matters. There is also an alternative dispute resolution procedure. The CTA makes binding decisions but these are subject to a number of appeal avenues.

6. Airports

Until 1994, the airports in Canada were all owned and operated by the federal government.[1168] Although two airports made modest profits, as a group, airports in Canada were unprofitable. For some airports, under-investment in the maintenance and development had occurred in the past. On the other hand, the system as a whole was overbuilt and over-subsidised with 94 per cent of all air passengers and cargo using only 26 of 726 airports.

In 1994 the government instituted its National Airports Plan (NAP), whereby all the airports were divided into four distinct groups.

- National Airports System (NAS). This included 26 of the main airports who are located in a national, provincial or territorial capital and/or who has annual traffic of no less than 200 000 passengers. Operation of these airports was devolved to Canadian airport authorities (CAAs), with the government retaining ownership.
- Regional and local airports with fewer than the 200 000 passenger threshold – ownership transferred to province governments, airport commissioners or other interest.
- Smaller airports (mainly used for recreational flying) would be transferred to local interests or closed.
- Remote or arctic airports would continue to be operated and or supported by the federal government.[1169]

[1165] *Canadian Transportation Act* (1996), s. 40.
[1166] *Canadian Transportation Act* (1996), s. 31.
[1167] *Canadian Transportation Act* (1996), s. 32.
[1168] Transport Canada, *National Airports Policy*, 1994. Available at: http://www.tc.gc.ca/programs/airports/policy/menu.htm [accessed on 5 May 2008]. Note that the website of Tranport Canada has undergone substantial changes since the time of last access.
[1169] Ibid.

With regard to the NAS airports, the benefit of transferring larger airports on long-term leases to local CAAs was perceived to be increased cost-effectiveness, responsiveness to local needs, and matching service to demand. However, ownership was retained by the Government for these airports to ensure 'the integrity and long term viability of the NAS'.[1170] The airport divestiture process is not uniform across the NAS airports. Five airports – Vancouver, Calgary, Edmonton, Montreal Dorval and Montreal Mirabel – had been transferred to Local Airport Authorities (LAAs) in 1992, prior to the NAP implementation. The majority of the airports were transferred to CAAs between 1995 and 2003. Further, there are currently four airports owned and operated by the local governments – Iqaluit, Yellowknife, Whitehorse and Kelowna – which Transport Canada will continue to operate until a suitable airport authority assumes responsibility.

Both LAAs and CAAs are private-self-financing, not-for-profit, non-share-capital corporate entities that do no pay income tax. As a general rule, airports within the NAS will be required to become financially self-sufficient (operating and capital costs) within five years beginning 1 April, 1995. Their leases on the federal land are for 60 years with an option to renew for an additional 20 years.

As the landlord of airports, the government, through Transport Canada (a government Department in charge of transportation policies), may audit the managing bodies of the airports' records and procedures at any time and subject them to performance review every five years. Public disclosure provisions in the ground lease require that certain documents be made available to the public and that public meetings be held at fiscal year end. A Community Consultative Committee, comprising airline industry representatives, must meet twice a year to discuss matters relating to the airport. The CAAs, under the *Public Accountability Principles* introduced in 1994, are required to publish 60-days' advance notice and justification for price increases in the local media. They are also required to make more documents, including the transfer agreements, available to the public. Any contracts over $ 75 000 must be put to public tender.

It appears that the government, through the ground lease document, controls some business practices of the NAS airport. However, there is no economic regulation of the NAS airports. In the process of airport divestiture, regulations of airport charges (parking, terminal services) and regulation of ground-handling services were removed. Instead, the airport operators have the authority to make their own decisions.

Regulatory Institutions and Legislation

The legislation governing various aspects of the air transport services includes the *Aeronautics Act 1985*, the *Airport Transfer (Miscellaneous Matters) Act 1992*, the aviations provisions under *the Canadian Transportation Act 199.* However, the legislation does not provide any framework over economic regulation of the NAS airports.

Each of the 26 airports is able to determine its own fees and tariffs, and has no formalised and enforced legislative system for dispute resolution or regulation. The Federal Government retains both ownership and control over setting safety and security standards for all Canadian airports.

[1170] Transport Canada, *National Airport Policy – the National Airports System (NAS)*. Available at: http://www.tc.gc.ca/programs/airports/policy/NAS.htm [accessed on 5 May 2008].

Two of the more prominent airports within the NAS are those servicing Toronto and Vancouver. The Greater Toronto Airport Authority (GTAA) controls and operates the Toronto Pearson International Airport. It was incorporated in 1993 as a non-share capital corporation.[1171] The GTAA is governed by a 15-member board, whose members are drawn from regional municipalities, and the business and professional community.[1172]

The Vancouver Airport Authority (VAA) is a community-based not-for-profit organisation that operates the Vancouver International Airport (YVR).[1173] The VAA is controlled by a board of directors who are appointed by nominating government entities and professional associations.[1174] Its primary method of ensuring accountability is through its annual report and online sustainability report.[1175] Its revenues generated from aeronautical services decreased by CAN$4.7 million in 2007, mainly due to the VAA's decision to lower international landing fee rates to the same level as domestic rates. Fees and Charges over both aeronautical services and commercial services are published on the VAA's website.[1176]

Regulatory Development

Airports in Canada are owned and operated by government, and decision making is not conducted according to the categorisation applied elsewhere in this country-based report. A bill was introduced to the House of Commons on 15 June 2006, proposing potential changes to Canadian airport governance.[1177]

7. Ports

As a mode of transportation suitable for commodity movements, marine transportation plays an important role in Canada's domestic and international trade.

Prior to 1995, Canadian ports had been entirely owned and operated by the Government. In December 1995, the Government of Canada announced the National Marine Policy outlining the federal government's intention to modernise and rationalise the Canadian marine transportation system. As per the National Marine Policy, Transport Canada's ports were classified into three operational categories:

- Ports to be operated by Canada Port Authorities (CPAs) comprising the largest ports that are financially self-sufficient and serve a diversified traffic base;
- Ports designated as Regional/Local – ports that have been slated for divestiture; and

[1171] Greater Toronto Airport Authority (GTAA), *Annual Report 2007*. Available at: http://gtaa.com/local/files/en/Corporate/Publications/2007AnnualReport-2008.pdf [accessed on 5 May 2008].
[1172] GTAA, *Board of Directors*. Available at: http://www.gtaa.com/en/gtaa_corporate/board_of_directors/ [accessed on 5 May 2008].
[1173] Vancouver Airport Authority (VAA), *Annual Report 2007*, 2008. Available at: http://www.yvr.ca/pdf/authority/2007_AR_Print.pdf [accessed on 5 May 2008].
[1174] VAA, *Board of Directors. A*vailable at: http://www.yvr.ca/authority/whoweare/board.asp [accessed on 5 May 2008].
[1175] VAA, *Annual Report 2007*, 2008.
[1176] VAA, *Tariff of Fees and Charges*. Available at: http://www.yvr.ca/business/tariff/index.asp. [accessed on 21 January 2009].
[1177] Bill C-20: *Canada Airports Act*, First reading at the House of Commons on 15 June 2006.

- Ports designated as 'Remote' – ports that provide the only means of access to isolated communities which continue to be operated by Transport Canada unless local stakeholders express an interest in acquiring them.

A key element of the National Marine Policy is the Port Divestiture Program, which seeks to transfer the ownership and operation of Regional/Local ports from Transport Canada to other federal departments, provincial/territorial governments, or local interests, including municipalities. As of 31 December 2008, Transport Canada had divested 472 of the 549 public ports originally identified under the program. Only 83 public ports remained administered by Transport Canada as of that date.

Nevertheless, ports that are of strategic importance to trade are category one ports operated by CPAs. There are currently 17 CPAs: Belledune Port,[1178] Halifax Port Authority, Hamilton Port Authority, Montreal Port Authority, Nanaimo Port Authority, Port Alberni Port Authority, Prince Rupert Port Authority, Quebec Port Authority, Saguenay Port Authority, Saint John Port Authority, Sept-Îles Port Authority, St. John's Port Authority, Thunder Bay Port Authority, Toronto Port Authority, Trois-Rivières Port Authority, Vancouver Fraser Port Authority,[1179] and Windsor Port Authority. Together these 17 ports handle more than half of all Canadian marine cargo at approximately 280 million tons annually, valued at more than CA$140 billion dollars.[1180] They are located around three regions: the East coast, the West coast, and the Great Lakes region.

The Vancouver Fraser Port Authority (VFPA) was formed in January 2008, combining three existing CPAs, namely Fraser River Port Authority, North Fraser Port Authority and Vancouver Port Authority. The integrated authority is 'governed by a diverse board of directors representing government and industry, able to make independent and timely decisions on business plans and capital spending'.[1181] The Vancouver Port is claimed by its Authority to be:

- a dynamic gateway for domestic and international trade and tourism;
- Canada's largest and busiest port, trading more than CA$53 billion in goods with more than 100 trading economies annually and generating an estimated CA$6.3 billion in GDP; and
- a major economic force that strengthens the Canadian economy.[1182]

Regulatory Institutions and Legislation

The CPAs are independent federal agencies empowered by the *Canada Marine Act 1998*.[1183] In general, these authorities are non-share-capital not-for-profit corporations accountable to the federal Minister of Transport. Each of these port authorities is granted certain powers with corresponding responsibilities in accordance with the *Canada Marine Act 1998* and letters patent (the official grant of authority).

[1178] Belledune Port Authority was formed in 2000 to take over Canada Ports Corporation.
[1179] The Vancouver Fraser Port Authority (VFPA) has recently been renamed to Port Metro Vancouver.
[1180] Association of Canadian Port Authorities, Industry Information – Canadian Port Industry. Available at: http://www.acpa-ports.net/industry/industry.html [accessed on 10 February 2009].
[1181] VFPA, *About VFPA*. Available at: http://www.vfpa.ca/aboutus/aboutvfpa.aspx [accessed on 10 May 2008].
[1182] VFPA, *Port Facts*. Available at: http://www.vfpa.ca/Media/PortFacts.aspx [accessed on 5 May 2008].
[1183] *Canada Marine Act 1998*.

The *Canada Marine Act 1998* streamlined the regulatory regimes of the CPAs and public ports. The former group of ports are regulated under Part I of the Act while the latter group of ports are regulated under Part II of the Act.

In accordance with Part I of the *Canada Marine Act 1998,* the Canadian Transportation Agency (CTA) is empowered to regulate the port authorities. Specifically the Agency investigates whether fees fixed by port authorities and other agencies are unjustly discriminatory.[1184] Other operational decisions are determined independently by the relevant CPA.

Process and Consultation

When a CPA proposes to increase its fees, it must provide notice. The CPA may change its fees sixty days after notice has been publicised if nobody challenges the proposed fee changes.

Any interested person may, at any time, file a complaint with the Canada Transportation Agency that there is unjust discrimination in a fee fixed under s. 49(1) of the *Canada Marine Act,* and the Agency shall consider the complaint without delay and report its findings to the port authority, who must govern itself accordingly.[1185]

Some of the independent authorities do have continuing processes for gathering information outside of specific regulatory decisions. The Toronto Port Authority (TPA) liaises biannually with the Community Advisory Committee which includes in its membership city councilors and relevant community stakeholders. This interaction facilitates awareness of community concerns.

In general the TPA consults before making any changes far more extensively than would be required by statute, but these consultations are apparently not very effective or meaningful, and do not result in greater community satisfaction.[1186]

The other CPAs do not appear to follow the example of the TPA, and provide very little information about consultation on their respective websites (except for a person to contact in relation to change in tariff pricing).

The CPAs are required by the *Canada Marine Act* to hold an annual meeting where they present the annual report and the CEO is available to answer questions about the operation of the port, and respond to queries.[1187] This is the most significant way in which the port authorities interact with the public, and are made accountable for their operations.

Role of Interested Parties

The TPA states in its policy that, when contemplating initiatives that will have a significant impact upon port users or surrounding communities, it will provide sufficiently detailed notice to them of the proposed changes, and give them an opportunity to submit their thoughts. The TPA at its discretion will also allow those with relevant interests to present their thoughts to the Board of Directors.[1188]

[1184] Canadian Transportation Agency (CTA), *Marine Mandate*. Available at: http://www.cta-otc.gc.ca/marine/mandat/index_e.html [accessed on 5 September 2008].
[1185] *Canada Marine Act 1998*, s. 52(1).
[1186] Roger Tasse, *Review of Toronto Port Authority Report*, 2006. Available at: http://www.tc.gc.ca/pol/en/Report/torontoPortAuthority/tpa.pdf [accessed on 5 May 2008], pp. 95–100.
[1187] *Canada Marine Act* 1998, s. 35.
[1188] Generally speaking, the Board will give an opportunity to be heard to any presenter having legitimate interest to appear before the Board, or before the designated Board Committee in the Board's

Other CPAs all allow for public submissions in relation to proposed changes in tariffs. For most there is no readily available information showing what is done with the submissions, and whether they are seriously considered.

Decision-making and Reporting

The composition of the CTA has been previously described in relation to its regulation of the rail industry.

According to the *Canada Marine Act,* between seven and twelve directors are to be appointed to the CPAs. One is nominated by the Minister for Transportation and appointed by the Governor in Council, one individual appointed by the municipalities mentioned in the letters patent, one individual appointed by the province in which the port is situated, and, in the case of the Port of Vancouver, another individual appointed by the Provinces of Alberta, Saskatchewan and Manitoba acting together, and the remaining individuals nominated by the Minister and appointed by the Governor in Council in consultation with the users selected by the Minister or the classes of users mentioned in the letters patent. [1189]

Take the Vancouver Fraser Port Authority as an example. The Board of Directors is composed of eleven members – one federal appointee nominated by the Minister for Transportation; one British Columbia appointee; one appointee for the prairie provinces (Alberta, Saskatchewan and Manitoba) nominated by each of them respectively; one municipal appointee; and, seven port user appointees as nominated by the Nominating Committee which consists of appointments representative of port users.

Appeals

Under the *Canada Marine Act* there is a provision made for review of fees, any interested person may at any time file a complaint with the CTA that there is unjust discrimination in a fee fixed under s. 49(1) of the *Canada Marine Act*, and the CTA shall consider the complaint without delay and report its findings to the port authority, and the port authority shall govern itself accordingly.[1190]

Public Ports

Canada's public ports are regulated under Part II of the *Canada Marine Act 1998*. The designated public ports are public owned, and operated and regulated by the Transport Canada (Department of Transportation).[1191] The Minister of Transportation is empowered to determine fees and tariffs for ships, vehicles, aircraft and persons coming into or using a public port or public port facility; goods loaded on ships, unloaded from ships or transhipped by water within the limits of a public port or stored in, or moved across, a public port facility; and any service provided by the Minister, or any right or privilege conferred by the Minister, in respect of the operation of a public port or public port facility; with regard to all public ports.[1192]

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discretion. See: TPA, *Toronto Port Authority Consultation Policy*. Available at: http://www.torontoport.com/PortAuthority/Corporate_reports_content.asp?id=74 [accessed on 5 May 2008].

[1189] *Canada Marine Act 1998*, s. 8(2)(f).

[1190] *Canada Marine Act* 1998, s. 52(1).

[1191] References include: *Canada Marine Act* 1998, s. 64; *Public Ports and Public Ports Facilities Regulations*, 2001.

[1192] *Canada Marine Act 1998,* s. 67.

The *User Fees Act 2004* applies to all user fees fixed by a regulatory authority. As a result, a public port is required, in considering a change in tariff pricing fixed by the Minister, to give all service users a reasonable opportunity to provide ideas or proposals for ways to improve the services to which the fees relate. In addition, an impact assessment must be conducted to identify relevant factors which must be taken into account in a decision to fix or change the user fee.[1193]

Anyone may bring a complaint in relation to a proposed change in fees or tariffs to the regulatory authority. When the complaint is received, the regulatory authority must make an attempt to resolve it and give the complainant notice in writing of proposed resolution. If it is not resolved in 30 days, the complainant may request that the issue be referred to an independent advisory panel set up by the regulatory authority.[1194] The Panel is mandated to send a report in writing of its findings and proposed resolution to the authority and the complainant within 30 days.

[1193] *User Fees Act* 2004, ss. 4(1)(b) and (c).
[1194] *User Fees Act* 2004, s. 4.1.

NORTH AMERICA

UNITED STATES OF AMERICA

OVERVIEW

The regulatory institutional structure in the United States (US) is complex; drawing upon a long history of experiment and pro-competitive reforms dating back to the early twentieth century. In the broadest sense, the United States has mature and well developed regulatory institutions at the federal and state levels that conduct the economic regulation of its key infrastructure. Regulation tends to be organised on a sectoral or industry basis, with separate agencies for competition and antitrust – the Federal Trade Commission and the Department of Justice (Antitrust Division). However, within this broad structure, the regulators are involved with merger issues, and there is a certain level of overlap between the functions of a sectoral or industry regulator, the FTC and the DoJ. While this overlap can be seen as confusing, alternatively it can be seen as part of a system that values competition, even amongst regulators.

In energy, regulation at the national level is conducted by the Federal Energy Regulatory Commission (FERC), but state public utility commissions also play a role. There is also some degree of integration of the Canadian and US energy industries, leading to the necessity for some coordination of regulation in the two countries.

The responsibility for telecommunications regulation is shared by the Federal Communications Commission (FCC) and the state public utility commissions. The state regulators also have a strong role in relation to water and wastewater, rail and airports.

The US has a dedicated regulatory body – the US Postal Regulatory Commission (PRC) – for the postal industry. The PRC, *inter alia*, determines which services have market dominance; establishes pricing rules for these market-dominant services; administers access (workshare discounts) and the universal service obligation. Rate-making procedures are formal and legalistic.

The economic regulation of water and wastewater industry is generally in the form of rate regulation, market monitoring and service quality monitoring, and is usually the responsibility of state public utility commissions.

The federal rail regulator in the US is the Surface Transportation Board (STB) created by the *Interstate Commerce Commission Termination Act 1995*. The STB serves as both an adjudicatory and a regulatory body, with the primary function being the economic regulation of the rail industry. Its work is advised by councils of rail providers and users in specific areas (e.g. grain).

For airports, the Department of Transport is authorised to review the reasonableness of airport fees charged to airlines if it receives a complaint or request for determination and a finding of a significant dispute. The National Plan of Integrated Airport Systems (NPIAS) identifies airports that are significant to national air transportation and thus are eligible to receive Federal grants under the Airport Improvement Program (AIP).

The regulation of ports is the responsibility of the Federal Maritime Commission (FMC) that has detailed processes and extensive functions in relation to ports. Its role

is more one of a competition body than a traditional utility regulator. In particular, the FMC's role does not involve setting port authority fees; providing for access to terminals or promoting competition between terminals.

GEOGRAPHY, POPULATION, ECONOMY, POLITY AND LEGAL SYSTEM[1195]

The United States is situated in North America, bordering both the North Atlantic Ocean and the North Pacific Ocean, between Canada and Mexico. It is the fourth largest country in the world in area and consists of a highly varied geography including: the vast interior lowland, two extensive mountain systems and deserts in the south west. The Mississippi-Missouri River, the world's fourth-longest river system, runs through the centre of the country

The climate in the US also varies considerably, the climate ranges from tropical in a small part of southern Florida to arid climatic conditions in the Great Basin in the west. Extreme weather conditions are not uncommon in several parts of the country.

As at July 2008, the population of the United States was estimated to be 303.8 million. This population occupies a total area of 9 826 630 square kilometres, yielding a population density of about 31 per square kilometre. However, this population is unevenly spread with large concentrations in areas such as the northeast corner; eastern Texas and southern California, with other areas being mountainous or desert and very sparsely populated. Major cities (including associated areas) in order are New York (almost 19 million), Los Angeles, Chicago; Dallas-Fort Worth; Philadelphia; Houston, Washington DC (the nation's capital); Atlanta; Boston; Detroit; San Francisco and Phoenix. All of these cities have populations in excess of four million.

The US has the largest economy in the world with a GDP of US$13.84 trillion in 2007. This is equivalent to US$45 800 per capita in 2007, approximately the third-highest in the OECD. It is the leading industrial power in the world, with technologically advanced petroleum, steel, motor vehicles, aerospace, telecommunications, chemicals, electronics, food processing, consumer goods, lumber, and mining sectors. It is rich in agricultural land (producing including wheat, corn, fruit, vegetables, cotton, dairy and meat) and has many natural resources (including coal, copper, lead, bauxite, and natural gas), but is heavily reliant on imported oil which accounts for about two-thirds of its consumption. Like other rich OECD countries, the US has a very high proportion of its labour force and GDP in services (around 80 per cent). The US maintains a current account balance estimated at US$738.6 billion in 2007. Its main exports are agricultural products (soybeans, fruit, corn), industrial supplies (organic chemicals), capital goods (transistors, aircraft, motor vehicle parts, computers, telecommunications equipment), and consumer goods (automobiles, medicines). It main trading partners are Canada, Mexico, China, Japan, the UK and Germany.

The US has very highly developed infrastructure in all main areas – energy, telecommunications, posts, water and wastewater, and all forms of transport infrastructure. Electricity production is nearly half thermal with 20 per cent for each of gas and nuclear, and 10 per cent from renewable (mainly hydro). The US produces about a third of the world's electricity. Broadband penetration is above the OECD average, but still substantially below that achieved in the small rich European

[1195] Central Intelligence Agency (CIA), *The World Fact Book – United States*, updated on 4 September 2008.

countries and Korea.[1196] Air travel is very highly developed, and this is reflected in the United States having some of the largest airports in the world – including Chicago; Los Angeles; Newark and Atlanta.

The US is a constitution-based federal republic with a strong democratic tradition. It consists of 50 states and one district.

The political structure consists of an executive and legislative branch. The executive branch includes the chief of state known as the President. The president is also the head of government. The branch also includes a cabinet which is appointed by the president with approval from the Senate. The President and Vice President are elected on the same ticket by a college of representatives who are elected directly be each state. The President and Vice President serve four-year terms.

The executive branch also consists of 15 Cabinet-level Departments which oversee a number of Bureaus, Agencies, and other entities. All of these bodies exercise executive power delegated by the President. These powers can include the authority to promulgate rules that define with precision more general statutory terms. The courts will invalidate a statute that grants an agency too much power. The *Administrative Procedure Act* explains the procedures agencies must follow when promulgating rules, judging violations, and imposing penalties.[1197] It also lays out how a party can seek judicial review of an agency's decision.

The legislative branch is known as Congress. It consists of the 100 seat Senate – which includes two members elected from each state by popular vote for six-year terms, with one third elected every two years – and the 435 seat House of Representatives whose members are directly elected by popular vote to serve two-year terms.[1198] Congress's ability to pass legislation is limited by the Constitution. If a majority of each house of Congress – two-thirds should the President veto it – votes to adopt a bill, it becomes law.

As a federal system, the US is regionally divided into 50 states and one district. State governments enjoy extensive authority. The Constitution outlines the specific powers granted to the national government and reserves the remainder to the states. Powers left to the states include public health, social security, education, transport and intrastate economic regulation. Both the state and federal governments both have the power to tax. There are some 85 000 local government units in the United States established by state governments to assist it in carrying out of their constitutional powers.

The American legal system has several layers reflecting, in part, the division between federal and state law and the US's legal history. It rests upon the legal principles of English Common Law and the courts continue to apply unwritten common law principles to fill in the gaps where the Constitution is silent and Congress has not legislated.

The US Constitution fixes the boundaries between federal and state law and divides federal power among legislative, executive, and judicial branches of government. Where the federal Constitution speaks, no state may contradict it although the role of

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[1196] OECD, *Broadband Growth and Policies in OECD Countries*, 2008.
[1197] *United States Code*, Title 5, s. 551, et. seq.
[1198] Central Intelligence Agency (CIA), *The World Fact Book*. Available at: https://www.cia.gov/library/publications/the-world-factbook/geos/us.html#Govt [accessed on 17 September 2008].

the individual state legal systems in areas that are not addressed by the Constitution remains unclear. The Constitution also delineates the kinds of laws that may be passed by Congress and forbids the states from adopting certain kinds of laws. In addition, in some areas, Congress authorises administrative agencies to adopt rules that add detail to statutory requirements.

The powers of the US judiciary are also delegated by the Constitution which extends federal jurisdiction only to certain kinds of disputes, including questions of federal law and disputes between citizens of two different states. The judiciary also has the power to determine whether a statute violates the Constitution, and if so, to declare the statute invalid.

Federal Courts

The federal court system consists of the trial courts (Federal District Courts), the appellate tribunals (US Courts of Appeal), and the US Supreme Court.

The federal district courts have original jurisdiction in federal criminal and civil cases, and in diversity of citizenship disputes (disputes between parties from different states or between an American citizen and foreign citizen or country).

The US Courts of Appeals, also known as circuit courts, do not have original jurisdiction but have appellate jurisdiction over ordinary civil and criminal appeals from the federal district courts as well as appeals from certain federal administrative agencies and departments and from independent regulatory commissions.

The US Supreme Court has original jurisdiction in relation to disputes between two or more states. It also shares original jurisdiction (with the US district courts) in certain cases brought by or against foreign ambassadors or consuls, in cases between the United States and a state, and in cases commenced by a state against citizens of another state or another country.

The majority of its work, however, is in relation to its appellate jurisdiction. Appeals may be made from all lower federal constitutional and territorial courts and from most federal legislative courts. The Supreme Court may also hear appeals from the highest court in a state if there is a substantial federal question.

Jurisdictions and Policy-making of State Courts

The jurisdictions of the 50 separate state court systems in the United States are established in virtually the same manner as those within the national court system. Each state has a constitution that sets forth the authority and decision-making powers of its trial and appellate judges. Likewise, each state legislature passes laws that further detail the specific powers and prerogatives of judges and the rights and obligations of those who bring suits in the state courts. Because no two state constitutions or legislative bodies are alike, the jurisdictions of individual state courts vary from one state to another.

APPROACH TO COMPETITION & REGULATORY INSTITUTIONAL STRUCTURE

The complex regulatory institutional structure in the US has evolved over more than one hundred years with key events being the passing of antitrust legislation in the late nineteenth and early twentieth centuries; the establishment of the Federal Trade Commission (FTC) in 1914; the formation of the state regulatory bodies in the early twentieth century; the establishment of the Federal Communications Commission

(FCC) in 1934 and the establishment of the Federal Energy Regulatory Commission (FERC) in 1973. The United States has mature and well-developed regulatory institutions at the federal and state levels that conduct the economic regulation of its key infrastructure. Regulation tends to be organised on an industry-specific or sector-specific basis, with separate agencies for competition and antitrust – the Federal Trade Commission (FTC) and the Department of Justice (Antitrust Division)). However, within this broad structure, the sectoral or industry regulators are involved with merger issues, and there is some overlap between the functions of a sectoral or industry regulator, the FTC and the DoJ.

Antitrust Legislation and the Formation of the Federal Trade Commission

The key US antitrust laws are:

- Section 5 of the *Federal Trade Commission Act*, which prohibits 'unfair methods of competition'.
- Section 1 of the *Sherman Act*, which outlaws 'every contract, combination ... or conspiracy, in restraint of trade'.
- Section 2 of the *Sherman Act*, which makes it unlawful for a company to 'monopolize, or attempt to monopolize', trade or commerce.
- Section 3 of the *Clayton Act*, which proscribes certain types of tying and exclusive dealing arrangements.
- Section 7 of the *Clayton Act*, which prohibits mergers and acquisitions the effect of which 'may be substantially to lessen competition, or to tend to create a monopoly'.
- Section 7A of the *Clayton Ac*t, which requires companies to notify antitrust agencies before certain planned mergers.
- Section 8 of the *Clayton Act*, which proscribes interlocking directorates and officers.
- Other provisions of the *Clayton Act*, including prohibitions against certain forms of anti-competitive price discrimination.

These antitrust laws are enforced by both the FTC's Bureau of Competition and the Antitrust Division of the Department of Justice. The industry-specific or sector-specific regulators also have some concurrent powers to enforce the antitrust laws.

The Federal Trade Commission

The FTC was created in 1914 with the mandate to engage in a range of antitrust activities. Since then, the FTC has been given additional powers to enforce the broad prohibition against 'unfair and deceptive acts or practices' and has been directed to administer a number of consumer protection laws. The FTC also has the authority to adopt trade regulation rules.

The FTC is an independent agency that reports to Congress. It is headed by five Commissioners, nominated by the President and confirmed by the Senate. The President appoints one of these Commissioners as Chairman. Each Commissioner is appointed for a seven-year term. In order to prevent political bias, no more than three Commissioners may belong to the same political party. The FTC is the only federal

agency that has both consumer protection and competition jurisdiction in broad sectors of the economy.

The FTC's anti-trust work is performed by the Bureau of Consumer Protection and the Bureau of Competition. The Bureau of Competition seeks to prevent anti-competitive mergers and other ant-competitive business practices by reviewing proposed mergers and other business practices for possible anti-competitive effects, and, when appropriate, recommending that the Commission take formal law enforcement action to protect consumers. The Bureau also serves as a research and policy resource on competition topics and provides guidance to business on complying with the antitrust laws.

The Bureau of Consumer Protection is responsible for protecting consumers from unfair, deceptive or fraudulent business practices. The work of both Bureaus is supported by the Bureau of Economics which provides economic analysis and support to the FTC's antitrust and consumer protection investigations and rulemakings. It also analyses the impact of government regulation on competition and consumers and provides Congress, the Executive Branch and the public with economic analysis of market processes as they relate to antitrust, consumer protection, and regulation.

The Bureau's work is also supported by nine offices, including the Office of Administrative Law Judges. That office adjudicates litigation brought by the Bureaus. Its administrative law judges issue orders, resolve pre-trial litigation, conduct administrative hearings and issue Initial Decisions (see below). As well as its head office in Washington DC, the FTC has seven regional offices. Among other things, the regional offices work with the Bureaus of Competition and Consumer Protection to conduct investigations and litigation, recommend cases for litigation and provide advice to state and local authorities on the competitive implications of their proposed actions.

FTC Actions

FTC actions may be initiated by complaints from consumers or businesses, pre-merger notification filings, Congressional inquiries or articles on consumer or economic subjects. FTC investigations are not generally publicised in order to protect both the investigation and the companies involved.

If the FTC believes that a person or company has violated the law or that a proposed merger may violate the law, it may seek to enter into a consent order with the relevant parties in order to gain voluntary compliance. A consent order does not require an admission that the law has been broken but does require an agreement to stop the conduct outlined in an accompanying complaint or to undertake certain actions to resolve the anti-competitive aspects of a merger.

If voluntary compliance cannot be achieved, the FTC may issue an administrative complaint or seek injunctive relief in the federal courts. The FTC's administrative complaints initiate a formal proceeding before an administrative law judge. The judge will make an initial decision based on evidence and testimony, including examination and cross-examination of witnesses. Initial decisions by administrative law judges may be appealed to the full Commission which has the ultimate power to make a final decision. Final decisions may be appealed to the US Court of Appeals and ultimately to the US Supreme Court.

The FTC can issue *Trade Regulation Rules* if there is evidence of industry-wide unfair or deceptive practices. *Trade Regulation Rules* may result from a rulemaking

proceeding during which the public has the opportunity to attend hearings and file written comments. An FTC rule may be challenged in any of the US Courts of Appeal, but has the force of law once issued.

Department of Justice (DoJ) Antitrust Division

The Department of Justice (DoJ) is a national regulatory authority. The DoJ was established under the *Department of Justice Act 1870* as an executive department with the Attorney General as its head. The Act gave the department control over all criminal prosecutions and civil suits in which the US had an interest. It also gave the Attorney General and the department control over federal law enforcement.

The DoJ consists of 61 agencies/divisions covering the entire spectrum of federal law enforcement. The Antitrust division (the division) is the agency of most direct relevance to economic regulation. Its mission is to promote and protect the competitive process through the enforcement of the antitrust laws. It is supervised by an Assistant Attorney General (AAG), who is nominated by the President and confirmed by the Senate. The AAG is assisted by five Deputy Assistant Attorneys General and several special counsels.

The Antitrust Division consists of five key sub-divisions: Economic Analysis; International Enforcement; Criminal Enforcement; Civil Enforcement; and Regulatory Matters. There are 16 sections within these sub-divisions.

Of relevance to economic regulation are the:[1199]

- Economic Regulatory Section which works with the Transportation, Energy, and Agriculture, Networks and Technology, and Telecommunications and Media Sections, on all enforcement matters through to final resolution. The section also participates in regulatory, competition advocacy, and legislative matters by providing economic analysis of the economic issues and positions advocated.
- Telecommunications and Media Enforcement Section which is responsible for enforcing antitrust laws in the communications and media industries, investigating and litigating violations of the antitrust laws, and providing competition advocacy in the sector. It also participates in proceedings before the Federal Communications Commission.
- Transportation, Energy, and Agriculture Section which enforces antitrust laws and investigates and litigates violations of antitrust laws within the transportation, energy, and agriculture industries. It participates in proceedings before the Federal Energy Regulatory Commission, Environmental Protection Agency, and Department of Agriculture.

The division may institute criminal proceedings against 'serious and wilful' violations of the antitrust laws, potentially leading to fines and imprisonment. Alternatively, the division may undertake civil proceedings seeking a court order that forbids future violations of the law and requires steps to remedy the anti-competitive effects of past violations.

The division may also issue guidance to the business community in conjunction with the FTC. Such guidance is intended to lower the costs to business of complying with the law by reducing uncertainty about the types of conduct that may breach the law.

[1199] Department of Justice, *Sections and Offices in Antitrust Division*. Available at http://www.usdoj.gov/atr/sections.htm#aag [accessed on 22 September 2008].

Coordination with Regulatory Bodies

The DoJ and FTC have concurrent powers and jurisdiction and generally divide their regulatory role by industry or sector. For example, the FTC has traditionally regulated disputes concerning the oil industry. Nevertheless, significant discussion and negotiation may be involved in determining which body investigates a particular case. The DoJ and the FTC effectively compete for cases and employ agents whose specific role is to negotiate and gain authority over certain cases. Some commentators suggest that this 'competition for cases' makes investigations more efficient.[1200]

In addition to the antitrust laws enforced by the FTC and the DoJ, most US economic regulators have competition law powers under their enabling legislation. In addition, the economic regulators often have powers to approve mergers within their jurisdiction. Therefore, the regulatory and antitrust agencies may concurrently engage in their own independent investigation and in some instances, a matter may require approval from all relevant authorities before being allowed to proceed.[1201]

Furthermore, in some instances, the regulator is required to consult with the antitrust agencies in the course of their work. For example, s. 271 of the *Telecommunications Act 1996* requires the Federal Communications Commission to consult with the DoJ before handing down its final determination. The antitrust agencies may also play an advisory role to the industry-specific or sector-specific regulators with respect to non-merger issues that impact competition.

This collaborative work may lead to the transfer of information from the FTC and the DoJ to the regulatory institution. However, information can only be exchanged with the approval of the party under investigation.[1202]

State Regulatory Functions and Processes

State regulatory bodies date back to the early twentieth century in most states, when they were set up following the emergence of concerns about the existing system of direct political control of public utilities by municipal or state legislatures.[1203] Often named the 'public utilities commission' (PUC), these independent bodies are mandated to regulate aspects of telecommunications, energy, and rail; with major responsibilities in water and wastewater, ports and airports industries. They are also involved with the enforcement of antitrust law. For example, the California Public Utilities Commission (CPUC) was established in 1911 (as the Railway Commission) and was given broader jurisdiction over other utilities in 1912. The functions, operations and processes of this Commission are treated in detail in the chapter on 'State Regulatory Arrangements in the United States'.

In addition to the typical state regulatory activities, the state PUC may monitor the federal agencies where those activities may in some way impact upon state stakeholders. PUCs can also participate in federal regulatory proceedings: for example, they can participate in the FCC and the FERC proceedings through intervention and the filing of comments.

[1200] Meeting with Russell Pittman, Director of Economic Research, Department of Justice, Antitrust Division, 22 July 2008.
[1201] ibid.
[1202] International Competition Network, *Antitrust Enforcement in Regulated Working Groups: Subgroup 2: Interrelations between Antitrust and Regulatory Authorities*, June 2004, p. 66.
[1203] Mark Jamison, 'The Regulator's Challenge: Providing Stability While Leading Change', *Network*, 30, December 2008, pp. 1–7.

In some States, notwithstanding federal approval processes, merger proposals must be approved by the independent state regulators, and state Attorneys General. For example, in Texas, there is a requirement for merger proposals to be approved by the PUC.[1204] Furthermore, the Consumer Protection Division of the Office of the Attorney General of Texas may investigate proposed mergers to evaluate their potential effect on market competition. This office may investigate matters in conjunction with the Department of Justice. Recently, the DoJ along with seven Attorneys General, representing California, Kentucky, Michigan, North Carolina, Ohio, Pennsylvania, and Texas, filed a civil antitrust lawsuit in the US District Court in Washington, D.C., to block a proposed transaction that would have reduced competition in the collection and disposal of waste.[1205]

Freedom of Information

Under the *Freedom of Information Act* (FOIA) any person has the right to request public access to federal agency records or information. An agency must release the records upon receiving a written request unless the records fall within the nine exemptions and three exclusions outlined in the Act.[1206] Specifically, records held by federal agencies that can be exempted from disclosure include: information that must be kept secret in the interest of national defence or foreign policy; and information that is privileged, confidential, or would constitute an unwarranted invasion of personal privacy.

REGULATORY ARRANGEMENTS BY INDUSTRY OR SECTOR

1. Energy

The United States is the world's largest consumer of energy (in absolute terms). Most energy consumed comes from fossil fuels (coal, natural gas and crude oil). In addition, in 2007, the US imported 35 quadrillion Btu (British thermal units) of energy (mainly petroleum) and exported 5 quadrillion Btu.[1207]

The United States oil markets are fully open to competition, and, according to the International Energy Agency (IEA), the country's natural gas market is a regulatory model within the IEA for what liberalisation can achieve. Since 2001, however,

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[1204] American Electric Power, *Newsroom Public Utility Commission of Texas Approves Merger Between American Electric Power and Central and South West*. Available at: http://www.aep.com/newsroom/newsreleases/?id=638 [accessed on 11 January 2009].

[1205] Department of Justice, 2008, *Justice Department Requires Divestiture in Republic's Acquisition of Allied Waste, Settlement Preserves Competition in 15 Metropolitan Areas*, Press Release, 08-1061, 3 December. Available at: http://intranet.accc.gov.au/content/item.phtml?itemId=346392&nodeId=92a37da06bf2106937533c982c03a03a&fn=ACCC%20style%20guide%20October%202008.pdf [accessed on 11 January 2009].

[1206] These nine exemptions cover: (1) classified national defence and foreign relations information; (2) internal agency rules and practices; (3) information that is prohibited from disclosure by another Federal law; (4) trade secrets and other confidential business information; (5) inter-agency or intra-agency communications that are protected by legal privileges; (6) information involving matters of personal privacy; (7) records or information compiled for law enforcement purposes, to the extent that the production of those records could reasonably be expected to interfere with certain legal proceedings; (8) information relating to the supervision of financial institutions; and (9) geological information on wells.

[1207] The US Energy Information Administration defines 'Quadrillion' as the quantity 1,000,000,000,000,000 (10 to the 15th power).

energy market reform in the United States has slowed in the electricity industry, where the potential for reform still exists. [1208]

Electricity

Total electricity net generation increased from 0.3 trillion kilowatt hours (kwH) in 1949 to 4.2 trillion kwH in 2007. Of this, 72 per cent was from fossil fuels, 19 per cent was nuclear and 8 per cent was from renewable energy sources (mainly hydroelectric power).[1209]

The northern United States transmission network systems are closely integrated with parts of the Canadian network. Transmission networks are owned by private or public utilities, and operated either by vertically integrated utilities, or by independent system operators (ISOs), which may combine several networks to form a regional transmission operator (RTO).

Participants in the electricity industry in the United States include investor-owned (private) utilities and electric cooperatives; federal, state, and municipal utilities, public utility districts and irrigation districts; cogenerators and onsite generators; and nonutility independent power producers (IPPs), affiliated power producers, power marketers, and independent transmission companies that generate, distribute, transmit, or sell electricity at wholesale or retail.

The US electricity industry is regulated at the local, state and federal levels, with some exemptions. Intra-state activities are regulated by the PUCs, which approve plant and transmission line construction as well as retail prices for electric utilities within their jurisdiction. For example, the CPUC sets the rates that electricity utilities may charge Californian consumers. The CPUC also investigates customer complaints and has rulemaking powers relating to intra-state matters, as set out in Californian law. The procedures of the CPUC are discussed in the Chapter on 'State Regulatory Arrangements in the United States'.

Inter-state activities, including wholesale prices are regulated by the Federal Energy Regulatory Commission (FERC). The FERC has effective responsibility for all transactions on the transmission grid, including prices. The major federal legislation dealing with the electricity industry is the *Federal Power Act*[1210] and the *Energy Policy Act 2005*.

Among other things, the *Federal Power Act* provides for the regulation of electric utility companies engaged in interstate commerce. It requires that all rates and charges for the transmission or sale of electric energy shall be just and reasonable, and non-discriminatory. Advance notice (60 days) of rate changes must be given to the FERC. The *Federal Power Act* sets out the FERC's powers to deal with such notices of rate changes, including the power to determine rates that are 'just and reasonable'. These are discussed in more detail below.

[1208] International Energy Agency (IEA), *Energy Policies of OECD Countries – the United States of America*, 2007. Available at: http://www.iea.org/Textbase/publications/free_new_Desc.asp?PUBS_ID=1926 [accessed on 11 January 2009].

[1209] Energy Information Administration, *Annual Energy Review 2007*, 2008. Available at: www.eia.doe.gov/aer/pdf/aer.pdf [accessed on 12 January 2009].

[1210] *United States Code*, Title 16, Chapter 12. s. 824(e) of the *Federal Power Act* defines 'public utility' as 'any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter (other than facilities subject to such jurisdiction solely by reason of ss. 824e(e), 824e(f), 824i, 824j, 824j–1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title'.

In relation to the *Energy Policy Act*, three of its principal policy goals relate to the FERC: a reaffirmation of a commitment to competition in wholesale power markets as national policy; strengthening the FERC's regulatory tools; and providing for development of a stronger energy infrastructure. The *Energy Policy Act* granted the FERC new responsibilities and authority to discharge these responsibilities by modifying the *Federal Power Act*, the *Natural Gas Act* and the *Public Utility Regulatory Policies Act* of 1978 (PURPA).[1211]

Given the jurisdictional division of regulatory responsibilities between state and federal regulators, participants in the electricity industry may be regulated at a number of levels:[1212]

- Investor-owned utility operating companies (IOUs) are private, shareholder-owned companies ranging from small local operations serving a retail customer base of a few thousand to multi-state holding companies serving millions of customers. Most IOUs are vertically integrated into generation, transmission, and distribution although many IOUs do not own generation assets and thus must procure electricity from wholesale markets.
    - The services provided by IOUs to retail customers are regulated by state regulators.
    - The Federal Energy Regulatory Commission (FERC) regulates wholesale electricity transactions and unbundled transmission activities of IOUs as 'public utilities' engaged in interstate commerce, except where the IOU does not operate across state borders.
- The regulation of publicly owned power systems, including local, municipal, state, and regional public power systems varies among states. In some, the public utility commission exercises jurisdiction in whole or part over operations and rates. However, in most states, public power systems are regulated by local governments or are self-regulated.
- Electric cooperatives are privately-owned, non-profit electric systems that are owned and controlled by the members they serve. Regulatory jurisdiction over cooperatives varies among states. Some states exercise authority over rates and operations, while others exempt cooperatives from regulation. In addition, cooperatives that have repaid loans under the *Rural Electricification Act* and thus were previously regulated by the Rural Utilities Service, Department of Agriculture, are regulated by the FERC.
- There are also a number of federally-owned or chartered power systems. Wholesale power from federal facilities (primarily hydroelectric dams) is marketed through four federal power marketing agencies (PMAs). The PMAs own and control transmission to deliver power to wholesale and direct service customers. They also may purchase power from others to meet contractual needs and may sell surplus power as available to wholesale markets.

[1211] Federal Energy Regulatory Commission (FERC), *Energy Policy Act – Fact Sheet*, 8 August 2006. Available at: http://www.ferc.gov./legal/fed-sta/epact-fact-sheet.pdf [accesed on 11 January 2009].
[1212] The Electric Energy Market Competition Task Force, *Report to Congress on Competition in wholesale and Retail Markets for Electric Energy, Pursuant to Section 1815 of the Energy Policy Act of 2005*, 2007.

- Nonutilities are entities that generate, transmit, or sell electricity but do not operate regulated retail distribution franchises. They include wholesale nonutility affiliates of regulated utilities, merchant generators, and qualifying facilities (QFs), as well as power marketers that buy and sell power at wholesale or retail but do not own generation, transmission, or distribution facilities. Independent transmission companies that own and operate transmission facilities but do not own generation or retail distribution facilities or sell electricity to retail customers are also included in this category.
    - Non-QF wholesale generators engaged in wholesale power sales in interstate commerce are subject to the FERC regulation under the *Federal Power Act*. Power marketers selling at wholesale are also subject to FERC oversight. Power marketers selling only at retail are subject to state jurisdiction and oversight in states where they operate. The FERC regulates interstate transmission services of independent transmission companies under the *Federal Power Act*. Such companies also may be organised and regulated as utilities where they are located for planning, siting, permitting, and other purposes.

Competition was introduced into wholesale electricity markets in 1992, when deregulation was initiated at the federal level with the passage of the *Energy Policy Act 1992*. This Act gives the FERC powers to require electricity utilities to provide access to their transmission grids for wholesale electricity transmission. The regulatory arrangements for third party access to electricity transmission networks are detailed in the FERC's 'landmark' Orders 888, 889 (of April 1996) and 890 (of July 2008).[1213]

Order 888 (the *Open Access Rule*) establishes the right of third party access to transmission networks and the pricing arrangements for those networks. It has two central components: the first requires all public utilities that own, operate or control interstate transmission facilities to offer network and point-to-point transmission services (and ancillary services) to all eligible buyers and sellers in wholesale bulk power markets, and to take transmission service for their own uses under the same rates, terms and conditions offered to others. In other words, it requires non-discriminatory (comparable) treatment for all eligible users of the monopolist's transmission facilities.

The open-access requirement is reflected in:

- a *pro forma* open access tariff contained in the Rule. The *pro forma* tariff sets out the details of the minimum non-price transmission terms and conditions required to provide non-discriminatory access. Utilities are able to propose their own pricing terms.
- A requirement for the functional separation of the utilities' transmission and power marketing functions (also referred to as functional unbundling). There is no requirement for corporate unbundling or divestiture of assets.
- the adoption of an electricity transmission system information network.

The second central component of Order No. 888 addresses whether and how utilities will be able to recover costs that could become stranded when wholesale customers

[1213] The FERC uses the term 'landmark' to describe orders that set precedent in establishing the manner in which the FERC will regulate a certain area within its jurisdiction.

use the open-access tariffs to switch suppliers. Order No. 888 also clarifies whether and when the FERC may address stranded costs caused by retail wheeling[1214] and clarifies that the FERC has exclusive jurisdiction over the terms, rates and conditions of unbundled retail transmission in interstate commerce up to the point of local distribution. Nevertheless, the orders do not usurp the authority of the state regulators who maintain their jurisdictions in regulating most of generation asset costs, the siting of generation and transmission facilities and decisions regarding retail service territories.[1215]

Order 889 recommended the creation of Independent System Operators (ISOs) to manage transmission activities. Under these arrangements, a utility would retain ownership of transmission assets but relinquish control of transmission services. Order 889 also requires utilities to implement Open Access Same-time Information Systems (OASIS) which is an Internet based system that allows utilities to search for transmission services to view each provider's availability and cost information in real time. Reservations for access can be made nearly instantaneously.

Order No. 890 ensured that transmission service is provided on a non-discriminatory basis by requiring that public utilities develop consistent methodologies for calculating available transfer capability and publish those methodologies to increase transparency. Order 890 reforms Orders 888 and 889 to ensure that transmission services are provided on non-discriminatory, just and reasonable basis as well as providing for more effective regulation and transparency in the operation of the transmission grid.

In 1999, the FERC issued Order 2000 which required utilities to submit plans for participation in a Regional Transmission Organisation (RTO). The objective was to encourage vertically-integrated electricity utilities to cede give operational control of their transmission lines to a limited number of unaffiliated RTOs. The FERC considered that regional institutions could address the operational and security issues confronting the industry. In addition, with access to the grid controlled by independent RTOs, there would no longer be an economic incentive to discriminate between competing suppliers.

Since the issue of Order 2000, the FERC has approved RTOs or ISOs in several regions including the Northeast (PJM, New York ISO, ISO-New England), California, the Midwest (MISO) and the Southwest (SPP).

However, in other states, wholesales trades may still occur as a result of bilateral sales negotiated directly between suppliers and scheduled through individual, non-regionalised transmission owners. This approach predominates in the Northwest and Southeast regions.

Despite support at the federal level, the progress of retail electricity reforms varies from state to state. Liberalisation has occurred in 16 states and the District of Columbia, but has been suspended in eight states and decided against in a number of other states.

[1214] Retail 'wheeling' is the term used to describe the sale of electricity from a generator (or a power marketer) to a home or business over transmission and distribution lines.

[1215] FERC, *Summary of FERC Order 888*. Available at: http://www.converger.com/fercnopr/888_889.htm [accessed on 7 October 2008].

Natural Gas

According to the IEA, the US natural gas market is dynamic and highly competitive, with a very active spot and futures market, having been deregulated for several decades.[1216] The US market is integrated with those of Canada and Mexico in the North American gas market.

The US natural gas industry has a high degree of private ownership with little vertical integration. The only public ownership in the US gas industry is found in gas distribution with publicly-owned gas distributors accounting for about seven per cent of all domestic gas sales.

Currently only the services provided by interstate gas pipelines and local gas distribution companies (LDCs) are directly regulated. Producers and marketers are not subject to regulation of rates or services.[1217]

LDCs' rates are regulated by PUCs such as the CPUC. Although the general aims of state-based regulation are similar, there are inter-state differences in processes and regulation. Regulation of distribution is also undergoing change with several states introducing retail competition.

The FERC's powers in relation to the interstate gas pipelines are contained in the *Natural Gas Act*.[1218] The current regulatory environment for natural gas relies much more heavily on competitive forces than in the past. The introduction of mandated access to the gas industry occurred gradually by means of Orders developed by the Federal Power Commission (predecessor to the FERC) and the FERC. The transition to open access was completed in 1992 with the FERC Order 636. This mandated separation of pipeline transportation services from the sale of natural gas and required pipeline owners to offer open access to their pipelines to enable sellers to compete on an equal and unbiased basis.

Oil Pipelines

The FERC's jurisdiction over the rates, terms and conditions of transportation services provided by interstate oil pipelines derives from the *Interstate Commerce Act*.

Regulatory Institutions and Legislation

The FERC was created in 1973 by the *Energy Organisation Act*. The FERC is responsible for:

- Regulating the *interstate transmission* of natural gas (including LNG import terminals), oil, and electricity
- Regulating the *wholesale* sale of electricity
- Licensing and inspecting hydroelectric projects
- Approving the construction of interstate natural gas pipelines, storage facilities, and Liquefied Natural Gas (LNG) terminals

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[1216] IEA, *Energy Policies of OECD Countries – the United States of America*, 2007. Available at http://www.iea.org/Textbase/publications/free_new_Desc.asp?PUBS_ID=1926 [accessed on 11 January 2009].

[1217] Natural Gas, *Government Oversight*. Available at: http://www.naturalgas.org/regulation/government_oversight.asp [accessed on 11 January 2009].

[1218] *United States Code*, Title 15, Chapter 15B.

- Monitoring and investigating energy markets
- Reviewing mergers and certain corporate transactions involving public utilities and public utility holding companies.

The FERC does not have a role in:

- Regulation of retail electricity and natural gas sales to consumers. This role is undertaken by state regulatory authorities.
- Approval for the physical construction of electric generation, transmission, or distribution facilities. This role may be undertaken by PUCs.
- Regulation of activities of the municipal power systems, federal power marketing agencies and most rural electric cooperatives.
- Regulation of nuclear power plants. These are the responsibility of the Nuclear Regulatory Commission.
- Mergers and acquisitions between oil companies.
- Responsibility for pipeline safety or for pipeline transportation on or across the Outer Continental Shelf.
- Regulation of local distribution pipelines of natural gas.
- Development and operation of natural gas vehicles.[1219]

Process and Consultation

In exercising its delegated executive powers, the FERC has the power to introduce new regulations, developed through its rulemaking process. A petition for a rulemaking can arise from the energy sector, specific companies, stakeholders and the public.[1220]

There are two ways a rulemaking process can begin. First, a petition for rulemaking may be filed with the FERC by the energy sector, specific companies, stakeholders or a member of the public. The FERC's Office of General Counsel reviews the petition and recommends an action to the FERC which may be a Notice of Inquiry (NOI), an Advanced Notice of Proposed Rulemaking (ANOPR), or a Notice of Proposed Rulemaking (NOPR). The FERC then issues an order that dismisses the petition or takes further action.

Alternatively, the FERC can initiate its own investigations in one of three ways:

- Where there is preliminary evidence that parties are not complying with licences and permits issued by the FERC.[1221]
- The FERC's Audit Division may open an audit of a utility company to determine whether its transmission practices are in compliance with the FERC's rules, regulations and tariff requirements. If the audit finds any evidence of non-

[1219] FERC, *What FERC Does*, 2008. Available at: http://www.ferc.gov/about/ferc-does.asp [accessed on 18 July 2008].
[1220] FERC, *Ruling Making,* 2008. Available at: http://www.ferc.gov/help/processes/pro-rule.asp [accessed on 18 July 2008].
[1221] FERC, *Enforcement,* 2008. Available at: http://www4.law.cornell.edu/uscode/16/usc_sec_16_00000823---b000-.html [accessed on 21 July 2008].

compliance, the FERC will open a formal investigation into the perceived violation (the initial course of action may be a preliminary, non-public investigation).

- The instituting of formal hearing procedures under the *Federal Power Act* to investigate, among other things, the justness and reasonableness of rates.

Prior to opening an investigation, FERC staff will review the information received and conduct a preliminary examination of the issue. Staff may consult publicly, seek commercially available sources of data, obtain input from other staff with expertise in the subject matter, or contact the entity involved for an explanation of its actions.

To determine whether there is a substantial basis for opening an investigation, staff considers the following factors:

- Nature and seriousness of the alleged violation and harm (if applicable)
- Efforts made to remedy the violation
- Whether the alleged violations were widespread or isolated
- Whether the alleged violations were wilful or inadvertent
- Importance of documenting and remedying the potential violations to advance Commission policy objectives
- Likelihood of the conduct reoccurring
- Amount of detail in the allegation or suspicion of wrongdoing
- Likelihood that staff could assemble a legally and factually sufficient case
- Compliance history of the alleged wrongdoer, and
- Staff resources.

In some situations, this preliminary examination may establish an adequate justification for the conduct or otherwise indicates that no further inquiry is needed. The cases would be closed by staff without any further action being taken.

An investigation will be opened where staff determines that a fuller inquiry into the conduct is required, and an investigation will be opened. Staff will advise the outcome to the company against whom allegations have been made.

Once opened, an investigation involves fact-gathering by enforcement staff through discovery methods such as data and document requests, interrogatories, interviews, and depositions. The time to complete an investigation depends on many factors, including the complexity of the conduct involved and the nature of the alleged violations. During this process, staff maintains frequent contact with the company under investigation.[1222]

If staff reaches the conclusion that a violation occurred that warrants sanctions, the relevant company will be advised and given the opportunity to respond and to provide additional information. If after considering the response and further information, staff continues to believe that sanctions of some sort are warranted, the company and

[1222] FERC, *The Process,* 2008. Available at: http://www.ferc.gov/enforcement/investigations/process.asp [accessed on 21 July 2008].

enforcement staff will either agree on a settlement, or the company may contest the conclusion.[1223]

Staff will attempt to reach a settlement with the company in the first instance before recommending an enforcement proceeding. Once a settlement is agreed between staff and the party, the settlement agreement is submitted to the Commission for its consideration. Upon approval, the settlement is released publicly. The FERC considers settlement to be a much better mechanism than litigation to serve the public interest because compliance problems are remedied faster and fewer enforcement resources are required.[1224]

If a settlement cannot be reached an administrative hearing before an administrative law judge (ALJ) at the FERC will take place. The ALJ will issue an Initial Decision and determine whether a violation or violations occurred. If a violation is found, the Initial Decision will recommend any appropriate penalty. The initial decision is based on the evidence provided at the hearing and the briefs filed by the parties. The FERC will then consider the initial decision and any exceptions filed. If the FERC determines that there is a violation, it will issue an order and may assess any appropriate penalty. The ALJ's initial decision becomes the final FERC decision ten days after briefs on exceptions to the initial decision are due, unless exceptions are filed or the FERC issues an order staying the effectiveness of the initial decision pending review.[1225]

A Request for Rehearing may be filed with the FERC. The Office of General Counsel reviews the petition and recommends action to the FERC, which then issues an order to deny or grant the rehearing. A party who has requested a rehearing may file a petition for review (within 60 days) of issuance of the rehearing order.

Within this context, the FERC's regulatory work may focus on company-specific or industry-wide issues.

The process followed for company-specific issues (classified into three types – applications for rate changes; applications for changes in access arrangements; and complaints) is broadly similar. The process is initiated when an application or complaint is given to, or 'filed' with, the FERC. The application or complaint is then posted on the FERC's website with interested parties invited to comment. The FERC staff then analyses the information obtained and makes a recommendation to the FERC, although minor matters may be delegated to a FERC staff member. The FERC may make a decision without any further procedures or it may hold a trial-type hearing before an ALJ. Alternatively, the FERC may hold a technical conference, or 'paper' hearing. Alternative dispute resolutions processes, such as mediation and arbitration, may also be used.

The process for industry-wide issues is more complex, reflecting the greater number of interested parties and the likely divergence of views amongst those parties. The process is typically started when the FERC issues a Notice of Inquiry or a Notice of Proposed Rulemaking. A NOI usually means that the FERC is collecting information, ideas and opinions whereas a NOPR generally indicates that the FERC is proposing a new regulation or policy change. Then the FERC will seek comment, which it then

[1223] Ibid.
[1224] Ibid.
[1225] FERC, *Legal Resources: Administrative Litigation*, 2008. Available at: http://www.ferc.gov/legal/admin-lit.asp [accessed on 21 July 2008].

reviews and considers before making a formal decision. The final outcome could be the issue of a NOPR, to propose new regulation or policy changes or issue new regulations or policy changes in the form of a FERC Order, policy statement or rule making. The FERC can also abandon the initiative altogether.

Matters may also arise before the FERC when a complaint is filed. A complaint filed with the FERC may be dealt with through the following channels:

- The FERC may assign a case to be resolved through alternative dispute resolution (ADR) procedures, in cases where the affected parties consent.
- The FERC may issue an order (a final decision) on the merits based upon the pleadings.
- The FERC may establish a hearing before an Administrative Law Judge (ALJ) where the parties do not consent. Parties are able to elect to enter into ADR procedures even after a case has been set for hearing.[1226]

In addition, a party may directly contact the FERC's Dispute Resolution Service (DRS) about a potential alternative dispute resolution (ADR) process, without filing a formal complaint to the FERC.[1227] Parties who elect an ADR process do not relinquish the right to pursue their matter through a more formal and traditional approach. If an agreement is reached as a result of ADR processes, the parties will file a copy of the agreement with the FERC, if required.

The DRS has been active in a wide variety of issues such as environmental matters, contractual disagreements, landowner disputes, and billing discrepancies in all areas of the FERC's regulatory responsibilities. The DRS may address a dispute at any time – prior to or after a matter is filed with the Commission. The DRS staff is not subject to rules prohibiting off-the-record communications between and among parties. However, it is subject to separation of functions rules; that is, the DRS staff may not communicate substantive matters in any of its proceedings with non–DRS staff.

The dispute resolution process involves both formal and informal consultation, dependent on the proposed dispute resolution process being pursued. Consultation may also include technical conferences and workshops.

Parties involved in the ADR processes may include those directly involved in the dispute, third parties that hold relevant information, a FERC administrative law or chief judge, a neutral third party (conciliator, mediator or facilitator) from the private sector, and a mediator from the DRS. Experts on technical, scientific or legal questions may also be consulted in the dispute resolution process. Staff members from the Office of Enforcement serve as trial staff at administrative hearings. Trial staff includes attorneys as well as technical staff that serve as expert witnesses.[1228]

As discussed in more detail in the following section, 'Fast-track' processing is available as a complement to the standard complaint resolution paths in limited circumstances. There are also simplified procedures for complaints involving 'small

[1226] FERC, *Complaint Resolution Paths and Target Timeframes*, 2005. Available at: http://www.ferc.gov/legal/complaints/form-comp/comp-resolution.asp [accessed on 21 July 2008].
[1227] FERC, *Dispute Resolution Service*, 2005. Available at: http://www.ferc.gov/legal/adr/brochure.pdf [accessed on 21 July 2008].
[1228] FERC, *Legal Resources: Administrative Litigation*, 2008. Available at: http://www.ferc.gov/legal/admin-lit.asp [accessed on 21 July 2008].

controversies' – in other words, if the amount in controversy is less than US$100 000 and the impact on other entities is minimal.

Timeliness

Unless otherwise ordered by the FERC, answers, interventions, and comments to a complaint must be filed within 20 days after the complaint is filed. In cases where the complainant requests privileged treatment for information in its complaint, answers, interventions, and comments are due within 30 days after the complaint is filed. In the event there is an objection to the protective agreement (the agreement enabling certain information to be treated as confidential) the FERC will establish when answers will be due.[1229] The FERC would usually expect to make a decision on the merits, based on the pleadings within 60 to 90 days after an answer is filed.

When a complaint is set for hearing before an ALJ, the aim will be for the ALJ to render an initial decision no later than 60 days after the case is set for hearing. Briefs on exceptions to an initial decision would be due, under the FERC's rules, 30 days after the initial decision, and briefs opposing exceptions, 20 days thereafter. The FERC would expect to issue an order on the exceptions no later than 90 days after their filing.[1230]

The FERC also establishes clear time standards for discovery although the ALJ has the discretion to adjust these time frames as required to meet the needs of the case.[1231]

'Fast-track' processing is available as a complement to the standard complaint resolution paths in limited circumstances. It is used to address disputes that require quick relief and is available upon request by a complainant who can present a highly credible claim that standard procedures are not appropriate. Fast-track procedures may include expedited action on the pleadings by the FERC, expedited hearing before an ALJ, or expedited action on requests for stay, extension of time, or other relief by the FERC or an ALJ.

Hearing procedures may be compressed into only a few days if the circumstances warrant. For cases resolved based on the pleadings, it is expected that the FERC could issue an order on the merits within 20 days after the answer is filed.[1232]

There are also simplified procedures for complaints involving small controversies. These are available to complainants if the amount in controversy is less than US$100 000 and the impact on other entities is minimal.

A complainant filing under simplified procedures is required to simultaneously serve the complaint on the respondent and any other entity referenced in the complaint. The FERC will issue a public notice of the complaint promptly, usually within two days. An answer to a complaint filed under the simplified procedure must be filed within 10 days after the complaint is filed, or within 20 days if the complainant requests privileged treatment for information in its complaint. Because of the less complex

[1229] FERC, *Time Period for Answers, Interventions, and Comment*, 2005. Available at: http://www.ferc.gov/legal/complaints/form-comp/time-period.asp [accessed on 2 July 2008].
[1230] FERC, *Time Period for Answers, Interventions, and Comments*, 2005. Available at: http://www.ferc.gov/legal/complaints/form-comp/time-period.asp [accessed on 2 July 2008].
[1231] FERC, *Time Standards*. Available at: http://www.ferc.gov/legal/admin-lit/time.asp [accessed on 2 July 2008].
[1232] FERC, *Fast Track Procedures,* 2005. Available at: http://www.ferc.gov/legal/complaints/form-comp/fast-track.asp [accessed on 21 July 2008].

nature of complaints filed under the simplified procedure, the FERC is usually able to issue an order within 30 days of the filing of an answer.[1233]

The time period in which a complaint is resolved via alternative dispute resolution is largely in the control of the affected parties, as the process is voluntary. The FERC, however, treats ADR resolution like uncontested settlements, and therefore expects to issue any subsequent orders no later than 45 days after the ADR resolution is rendered.[1234]

Role of Interested Parties

In performing its regulatory role, the FERC regularly consults and conducts investigations to ensure that interested parties have an appropriate opportunity to contribute to the performance of its duties. Such consultations may include technical conferences and workshops designed to explain and explore issues related to the development and implementation of its policies.

Persons who think that they might be affected by a proposed natural gas or hydroelectric project that is regulated by the FERC have certain rights to participate in the decision-making process. These rights are:[1235]

- Accessing and inspecting via eLibrary all public documents associated with the proposed project
- Making concerns known to the FCC via eFiling
- Participating in public meetings
- Participating in site visits
- Efiling comments on draft Environmental Assessments and Environmental Impact Statements
- Intervening on specific proposed projects[1236]
- Having FERC decision reviewed in federal court, and
- Filing a Critical Energy Infrastructure Information Report.

In addition, the FERC regularly meets with state and other federal regulators, industry officials and the public to discuss electricity market and reliability issues and holds regional conferences to identify local concerns, conditions and needs.[1237]

[1233] FERC, *Simplified Procedure for Complaints Involving Small Controversies*, 2005. Available at: http://www.ferc.gov/legal/complaints/form-comp/simplified.asp [accessed on 21 July 2008].

[1234] FERC, *Fast Track Procedures*, 2005. Available at: http://www.ferc.gov/legal/complaints/form-comp/fast-track.asp [accessed on 21 July 2008].

[1235] FERC, *For Citizens*, 2008. Available at: http://www.ferc.gov/for-citizens/get-involved.asp [accessed on 3 February 2009].

[1236] Intervenors have the right to participate in hearings before FERC's Administrative Law Judges; file briefs; file for rehearing of FERC decisions; have legal standing in Court of Appeals if they challenge FERC's final decision; and placed on service list to receive copies of case-related FERC documents and filings by other intervenors.

[1237] FERC, *Annual Report,* 2006. Available at: http://www.ferc.gov/about/strat-docs/fy06-an-rpt.pdf [accessed on 2 July 2008].

The FERC's relationships with a number of external bodies has been formalised by Memorandums of Understanding between the FERC and the external body. These include: the Department of Energy, the Department of Agriculture, the Department of Defence, the Department of Commerce, the Department of Transportation, the Environmental Protection Agency, and the Council on Environmental Quality.[1238]

Information Disclosure and Confidentiality

Unless exempt from disclosure, information collected, and decisions made by, the FERC are available from a number of sources:[1239]

- Documents created by or received by the FERC on or after November 1981 are available on the FERC's Web site through its document management system.
- Descriptions of the FERC's organisation, methods of operation, statements of policy and interpretations, procedural and substantive rules, and amendments are published in the *Federal Register*.
- Press releases that explain major applications, decisions, opinions, orders, rulemakings, new publications, major personnel changes, and other matters of general public interest. News releases may be obtained by the public through the Public Reference Room.
- Copies of FERC opinions, orders in the nature of opinions, rulemakings and selected procedural orders, and intermediate decisions which have become final are published in the *Federal Energy Guidelines* and may be obtained from the Commerce Clearing House.[1240]
- Furthermore, media (including television, radio and photographic) coverage of FERC proceedings is permitted.

The treatment of information varies according to whether the matter is being handed by ADR facilitated by the Dispute Resolution Service, or Settlement facilitated by Administrative Law Judges. In ADR proceedings parties agree on the level of confidentiality during dispute resolution discussions. In addition, all inquiries and discussions with the DRS are privileged and confidential, unless otherwise agreed.[1241] In the course of Settlement proceedings, parties may seek privileged treatment for any documents that are submitted, via a protective order issued by the presiding judge, as required under s. 388.112 of the *Code of Federal Regulations* (CFR). A Protective Order applies to materials, which customarily are treated by that participant as sensitive, which are not available to the public, or which, if disclosed freely, would subject that participant or its customers to risk of competitive disadvantage or other business injury. A protective agreement preserves the privileged status of the information, but at the same time, makes it available to other parties to assist them in

[1238] FERC, *Memoranda of Understanding,* 2008. Available at: http://www.ferc.gov/legal/maj-ord-reg/mou.asp [accessed on 22 July 2008].

[1239] Records that are exempt from disclosure include information that must be kept secret in the interest of national defence or foreign policy, and information that is privileged, confidential, or would constitute an unwarranted invasion of personal privacy.

[1240] *Electric Code of Federal Regulations*, *Title 18: Conservation of Power and Water Resources: Part 388 – Information and Requests*, 2008. Available at: http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr;sid=14ab972dd97e8309c0a1d7ccbc64d719;rgn=div5;view=text;node=18%3A1.0.1.21.86;idno=18;cc=ecfr [accessed on 7 August 2008].

[1241] FERC, *Legal Resources: Dispute Resolution*, 2008. Available at: http://www.ferc.gov/legal/adr/drs.asp [accessed on 21 July 2008].

preparing their case. Any person may file an objection to the proposed form of protective agreement.[1242]

Public access to information known as Critical Energy Infrastructure Information (CEII) is restricted through specific arrangements. CEII is defined as specific engineering, vulnerability, or detailed design information about proposed or existing critical infrastructure (physical or virtual) that:[1243]

- Relates details about the production, generation, transmission, or distribution of energy;
- Could be useful to a person planning an attack on critical infrastructure;
- Is exempt from mandatory disclosure under the *Freedom of Information Act*; and
- Gives strategic information beyond the location of the critical infrastructure.

The FERC has established procedures for gaining access to CEII that would otherwise not be available under the *Freedom of Information Act*.[1244]

Under the *Freedom of Information Act* any person has the right to request public access to federal agency records or information unless the records are subject to the nine exemptions and three exclusions set out in the Act (see the previous sub-section on 'Freedom of Information') including CEII. Parties may make a written request for information under the Act to the FERC's Public Reference Room.[1245]

Decision-making and Reporting

The FERC is composed of up to five commissioners.[1246] Commissioners are appointed by the President with the advice and consent of the Senate. Commissioners serve five-year staggered terms, and have an equal vote on regulatory matters. One member of the Commission is designated by the President to serve as Chairperson and the FERC's administrative head. To avoid any undue political influence or pressure, no more than three commissioners may belong to the same political party. As the FERC is an independent regulatory agency, its decisions are not reviewable by either the President or Congress.

The FERC is funded through costs recovered by the fees and annual charges from the industries it regulates.

The FERC has eight functional offices made up of multi-disciplinary teams of economists, engineers, attorneys, auditors, data management specialists, financial

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[1242] *Electric Code of Federal Regulations*, *Title 18 – Conservation of Power and Water Resources*, 2008. Available at: http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=4fa6ecccdca43c295c2b87249e546645&rgn=div8&view=text&node=18:1.0.1.21.85.2.46.6&idno=18 [accessed on 1 August 2008].

[1243] FERC, Legal Resources, *Critical Energy Infrastructure Information*. Available at: http://www.ferc.gov/legal/ceii-foia/ceii.asp [accessed on 3 February 2009].

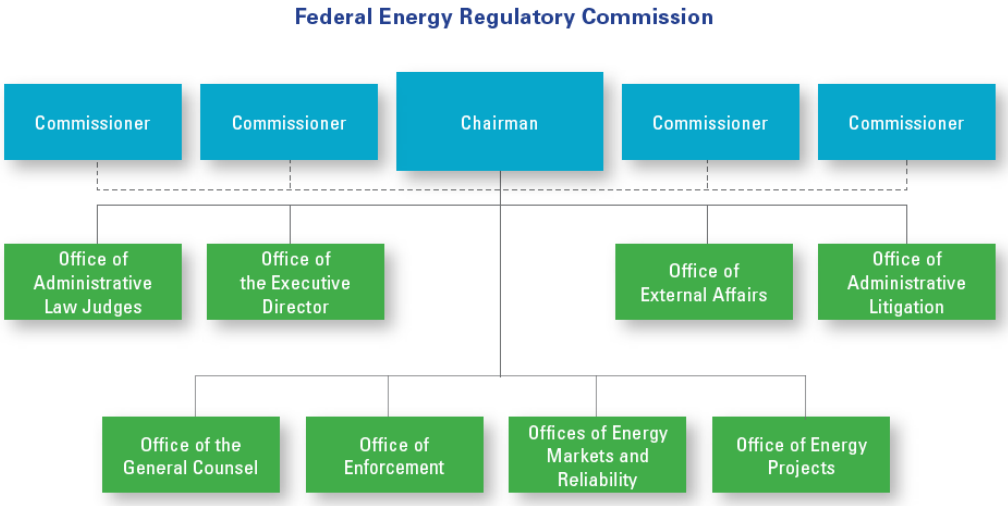
[1244] FERC, *Guidelines for Filing Critical Energy Infrastructure Information (CEII)*, 2007. Available at: http://www.ferc.gov/help/filing-guide/file-ceii/ceii-guidelines/guidelines.pdf [accessed on 3 February 2009].

[1245] *Electric Code of Federal Regulations*, *Title 18 – Conservation of Power and Water Resources: Part 388 - Information and Requests,* 2008. Available at: http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr;sid=14ab972dd97e8309c0a1d7ccbc64d719;rgn=div5;view=text;node=18%3A1.0.1.21.86;idno=18;cc=ecfr [accessed on 7 August 2008].

[1246] FERC, *About FERC*, 2008. Available at: http://www.ferc.gov/about/com-mem.asp [accessed on 18 July 2008].

analysts, regulatory policy analysts and energy analysts. This organisational structure is depicted graphically below.

Organisational Structure of the FERC



The Office of Enforcement acts as principal adviser to the Chairman and Commissioners on regulatory issues and oversight of energy market structure, energy market performance, and compliance of market participants with the FERC's rules for market activity. This office initiates and executes investigations of possible violations of the FERC's rules, orders, and regulations relating to energy market structures, activities, and participants and recommends remedies to address violations. Where authorised, the office pursues remedies through negotiation or litigation.[1247]

The Office of Administrative Law Judges performs a number of roles; namely resolution of contested cases as directed by the Commission either through impartial hearing and decision or through negotiated settlement; conduct of investigations as directed by the Commission; performance of various ADR procedures as directed by the Commission, including mediation, arbitration, facilitation, and acting as settlement judge, and presiding over ADR procedures at the request of the parties in cases assigned for hearing.

In performing any of these roles, the functions of the presiding judge include managing and presiding over hearings and investigations on-the-record; issuing orders; issuing initial decisions; issuing reports to the Commission; overseeing discovery; acting on motions filed in a case; making findings of fact; certifying questions to the Commission; reviewing and certifying settlements to the Commission; and summarily disposing of cases.

The Office of Administrative Litigation undertakes litigation and conducts or participates in settlement processes.[1248]

[1247] FERC, *About FERC: The Office of Enforcement*, 2008. Available at: http://www.ferc.gov/about/offices/oe.asp [accessed on 7 August 2008].
[1248] FERC, *Administrative Litigation Function*, 2006. Available at: http://www.ferc.gov/legal/admin-lit/functions.asp [accessed on 20 July 2008].

Appeals

Appeals against FERC decisions can be applied internally by requesting rehearing of the dispute (see above) or externally by requesting rehearing in the US Court of Appeals, and ultimately the US Supreme Court.

The *Federal Rules of Appellate Procedure* apply to petitions for review of FERC orders in the Courts of Appeals. Each Court of Appeals also has local rules that must be followed.[1249]

In addition, the judicial review provisions of the *Natural Gas Policy Act*, the *Natural Gas Act* and the *Federal Power Act* govern review of FERC orders. All three Acts require that an application for rehearing be made to the FERC before a petition for review of a FERC order may be brought. However, the *Interstate Commerce Act*, applicable to the transportation of oil by pipeline, contains no such express statutory rehearing requirement.

2. Telecommunications

Historically the US telecommunications industry was operated under a private monopoly 'Bell System', that is, a number of Bell local operating companies, controlled by American Telephone and Telegraph Company (AT&T), provided telephone services. On 8 January 1982, AT&T reached a settlement with the United States Department of Justice of an antitrust case, under which AT&T would divest its local operating companies. AT&T's local operations were eventually split into seven independent Regional Bell Operating Companies known as 'Baby Bells'. Since the breakup, these companies have merged over time to form the present three major regional companies in the US:

- AT&T Inc. – a major provider of Internet, wireless and telecommunications services
- Verizon Communicatiions – a major provider of broadband and telecommunications services operating mainly in the eastern United States;
- Qwest – a Denver-based fiber optics long-distance company, providing Internet, wireless and local telephone services.

In 2008, AT&T is the largest telecommunications company in the world with annual sales revenue of US$118.93 billion and assets of US$275.64 billion and Verizon is the second-largest communications company in the US based on annual sales of US$93.47 billion, and assets of US$186.96 billion.[1250] As of March 2008, there were 112.2 million US households having accessed to telephone service.

As for the broadband market, the US is characteristic of having multi-platform competition.[1251] By the end of 2007, high-speed Internet access (200kbps) was available on 121.2 million high-speed lines, of which cable technology represented 47.8 per cent, ADSL connections 35.8 per cent, and fiber connections 2.3 per cent. Most households have access to both DSL and cable networks. As of March 2008,

[1249] Both sets of rules are in Title 28 of the *United States Code*.

[1250] Forbes, *Special Report: The Global 2000 for 2008*, 2008. Available at: http://www.forbes.com/lists/2008/18/biz_2000global08_The-Global-2000_Rank.html [accessed on 03 October 2008].

[1251] Federal Communications Commission (FCC), *Fifth Report on the Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, FCC 08–88, 2008.

there were about 1,360 broadband service providers.[1252] According to the most recent OECD report on Broadband Statistics, the US ranked in the middle among 30 OECD member countries, with 25.0 broadband subscribers per 100 people.[1253]

Regulatory Institutions and Legislation

The US telecommunications industry is regulated federally by the Federal Communications Commission (FCC). The FCC is an independent government agency that regulates interstate and international communications by radio, television, wire, satellite and cable. It also develops (and administers the implementation of) policies concerning interstate and international communications.[1254]

The FCC was established by the *Communications Act 1934*.[1255] The federal sources of authority for economic regulation are the *Telecommunications Act 1996* and FCC rules, which are codified in Title 47 of the *Code of Federal Regulations*.[1256] The *Telecommunications Act 1996* deals with restructuring of the industry as well as access provisions. Access is also dealt with in Title 47 Parts 59 and 69 of the *Code of Federal Regulations*. The FCC's rules on tariffs (the initial establishment of and subsequent revisions to) are set out in Title 47 Part 61 of the *Code of Federal Regulations*.

The tariff-setting framework requires that all tariffs filed with the FCC must confirm to the rules set out. This includes a prohibition on the provision of any interstate or foreign communication service until all tariffs for each communication service have been filed with the FCC and are in effect.

Tariffs should be filed annually. Filed tariffs are required to comply with rate-of-return price caps applied to baskets of services and be just, reasonable and non-discriminatory. Specifically, s. 61.40 of the *Code of Federal Regulations* framework provides guidance on the structure of tariffs that is likely to be just, reasonable and non-discriminatory and thus reduces a regulated company's burden of cost-justification.[1257] The guidance provides rate structures for the same or comparable services should be integrated and consistent with each other; rate elements should be selected to reflect market demand, pricing convenience for the carrier and customers, and cost characteristics; a rate element which appears separately in one rate structure should appear separately in all other rate structures; rate elements should be consistently defined with respect to underlying service functions and should be consistently employed through all rate structures; and rate structures should be simple and easy to understand.

The *Telecommunications Act* introduced new regulatory and institutional arrangements for the telecommunications industry, mandating interconnection

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[1252] FCC, *Statistical Data*, March 2008.

[1253] OECD, *OECD Broadband Statistics to June 2008*, 2008. Available at: http://www.oecd.org/dataoecd/21/35/39574709.xls [accessed on 29 January 2009].

[1254] FCC, *About the FCC*, last updated 08 May 2009. Available at: http://www.fcc.gov/aboutus.html [accessed on 11 March 2009].

[1255] FCC, *Fiscal Year 2006 Performance and Accountability Report*, 2006. Available at: http://www.fcc.gov/Reports/ar2006.pdf [accessed on 11 May 2009], p. 88.

[1256] FCC, *Rules and Regulations*, last updated 20 February 2009. Available at: http://wireless.fcc.gov/index.htm?job=rules_and_regulations [accessed on 11 May 2009].

[1257] *Code of Federal Regulations*, Title 47, Part 61.40 – *Private Line Rate Structure Guidelines*. Available at: http://edocket.access.gpo.gov/cfr_2007/octqtr/47cfr61.40.htm [accessed on 11 May 2009].

through the unbundling of networks and the resale of services provided by local exchange operators. The arrangements provide for negotiated agreements between parties on interconnection and resale, with provision for State regulators to arbitrate if parties cannot agree on price and conditions. To facilitate a consistent approach to pricing by State regulatory commissions, the FCC has established national pricing principles.[1258]

Whereas the FCC regulates interstate and international telecommunications, each state has a body to regulate intra-state telecommunications. In general, telecommunications will be one of multiple industries regulated by an independent agency, often named the Public Utilities Commission, or PUC. Each PUC is empowered by state legislation to perform certain activities, and to hold certain responsibilities, and these may vary somewhat across the states. However, typically, the PUC will have jurisdiction to:

- Regulating rates and services for incumbent local exchange carriers that have not elected incentive regulation.
- Certification of competitive local exchange carriers.
- Registration of inter-exchange carriers, automatic-dial-announcing devices, payphone providers and other non-dominant carriers.
- Monitoring quality of service of local telecommunications providers.
- Oversight of wholesale and telecommunications markets.
- Adopting and enforcing rules relating to telephone competition.
- Monitoring access line reporting for certificated telecommunications providers.
- Administering a discount low-income telephone service program.
- Oversight of the 911 service program.

As an example of a state regulatory authority, the processes of the CPUC are discussed in the Chapter 'State Regulatory Arrangements in the United States'.

Process and Consultation

Regulatory issues arise before the FCC via two main avenues – complaints lodged by external parties or self-initiated investigations. The FCC adjudicates formal complaints and determines whether the conduct is unlawful. If so, the FCC makes a ruling and an order which may award compensation or damages.[1259] Any person may file a complaint to the FCC alleging that a common carrier (wireline, wireless or international) has violated its obligations under the *Communications Act* or the FCC's rules.

A dispute between two parties may also be referred to the FCC by a court pursuant to the doctrine of primary jurisdiction. These referrals are known as Primary Jurisdiction Referrals.[1260] Courts invoke the primary jurisdiction doctrine where the court has

[1258] Productivity Commission, *Review of National Access Regime: Inquiry Report*, 2001. Available at: http://www.pc.gov.au/projects/inquiry/access/docs/finalreport [accessed on 23 July 2008].
[1259] FCC, *Firm, Fast Flexible and Fair: The FCC Enforcement Bureau After Three and a Half Years*, 2003. Available at: http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-236939A1.doc [accessed on 23 July 2008].
[1260] FCC, *EB - Market Disputes Resolution Division*, 2008. Available at: http://www.fcc.gov/eb/mdrd/ [accessed on 22 July 2008].

jurisdiction over the case, but the case requires the resolution of issues which, under a regulatory scheme, have been placed in the hands of a regulatory agency. The procedures by which the FCC handles a common carrier matter referred by a court pursuant to the primary jurisdiction doctrine may vary according to the nature of the matter referred. Generally, primary jurisdiction referrals involving common carriers are appropriately filed as formal complaints with the Enforcement Bureau pursuant to s. 208 of the *Communications Act*.[1261]

Alternatively, the FCC has authority under the *Communications Act* to initiate its own investigation into whether a regulated company has violated the Act or the FCC's rules.[1262] The FCC has discretion to determine whether and what it will investigate, as well as the manner and time period of the investigation.[1263]

There are three mechanisms that the FCC may use to resolve a dispute depending on the nature of the complaint. The FCC may:

- adjudicate and make a final decision
- refer the dispute to informal dispute resolution leading to mediation and settlement if the parties agree, or
- initiate investigations and forfeitures.[1264]

Formal complaints are adjudicated by the FCC via an administrative hearing presided over by a designated administrative law judge (ALJ), subject to the 'granting' by the Enforcement Bureau. That means the Enforcement Bureau recommends to the Commission that it accept the formal complaint and pursue its formal dispute resolution process. This process involves examination of the preliminary facts and detailed legal analysis.[1265]

Formal complaint proceedings involve a written record consisting of a complaint, answer, and joint statement of stipulated facts, disputed facts and key legal issues, along with all associated affidavits, exhibits and other attachments. Commission proceedings may also require or permit other written submissions such as briefs, written interrogatories, and other supplementary documents or pleadings.

When filing a formal complaint, parties must provide as much factual support for their case as possible. This can be in forms such as sworn affidavits and documentary evidence. If a complainant wishes to recover damages, the complaint must contain a clear request for damages. Any party who is served a formal complaint must answer

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[1261] FCC, *Primary Jurisdiction Referrals Involving Common Carriers,* 2000. Available at: http://www.fcc.gov/eb/Public_Notices/da002606.html [accessed on 8 August 2008].

[1262] FCC, *FCC's Local Competition Enforcement Policy*, 2008. Available at: http://www.fcc.gov/eb/LoTelComp/ [accessed on 22 July 2008].

[1263] FCC, *Firm, Fast Flexible and Fair: The FCC Enforcement Bureau After Three and a Half Years*, 2003. Available at: http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-236939A1.doc [accessed on 23 July 2008].

[1264] Ibid.

[1265] FCC, Before the Federal Communications Commission: In the Matter of Bright House Networks, LLC, et al.,(Complainants) v. Verizon California, Inc., *et al.*, (Defendants): Memorandum Opinion and Order, 2008. Available at: http://www.fcc.gov/eb/Orders/2008/FCC-08-159A1.html [accessed on 8 August 2008].

the complaint outlining the facts, disputed facts and legal issues of the matter within twenty days of service of the formal complaint by the complainant.[1266]

At the initial stages of any complaint proceeding, the FCC may direct the attorneys and/or the parties to appear before it for a status conference. A status conference may include discussion of the issue to narrow the dispute, settlement of all or some of the disputed matters by an agreement, determination of the necessity and the scope of discovery.[1267]

The pre-trial discovery (fact-finding) process permits the complainant to file with the FCC and serve on a defendant, concurrently with its complaint, a request for up to ten written interrogatories (questions to be answered under oath by the defendant). These may be used as evidence in the administrative hearing. A defendant may also file with the Commission and serve on a complainant, a request for up to ten written interrogatories. Within three days of receiving the defendant's answers, a complainant may serve on a defendant a further five written interrogatories.

Requests for interrogatories may be used to seek discovery of any non-privileged matter that is relevant to the material facts in dispute in the pending proceeding. Requests for additional interrogatories by a complainant after the defendant has submitted it response to the initial interrogatories must be limited in scope to specific factual allegations made by the defendant in its response. This procedure may not be employed for the purpose of delay, harassment or obtaining information that is beyond the permissible scope.[1268]

The FCC may allow additional discovery, including, but not limited to, document production, depositions and/or additional interrogatories. In its discretion, the FCC may modify the scope, means and scheduling of discovery in light of the needs of a particular case and the requirements of applicable statutory deadlines.[1269]

At the conclusion of the evidentiary phase of a proceeding, the Presiding ALJ writes and issues an initial decision, which may be appealed to the FCC.[1270] This initial decision becomes the final decision 50 days after its release if exceptions are not filed within 30 days thereafter, unless the FCC elects to review the case on its own motion.[1271]

Throughout the formal complaint process, the parties to a complaint action may file motions requesting FCC orders addressing a wide variety of procedural and substantive issues. Generally, the parties may file oppositions to such motions within ten days after the motion is served. [1272]

[1266] FCC, *Rules*, 2008. Available at: http://www.fcc.gov/eb/mdrd/rules/cmpl.html [accessed on 23 July 2008].
[1267] FCC, *Code of Federal Regulations: Procedural Rules – 47 C.F.R. ss. 1.721-1.736*, 2008. Available at: http://www.fcc.gov/eb/mdrd/rules/cmpl.html [accessed on 23 July 2008].
[1268] Ibid.
[1269] Ibid.
[1270] FCC, *Office of Administrative Law Judges*, 2008. Available at: http://www.fcc.gov/oalj/html [accessed on 29 July 2008].
[1271] FCC, *Before the Federal Communications Commission: In the Matter of Florida Cable Telecommunications Association, Inc.; Comcast Cablevision of Panama City, Inc.; Mediacom Southeast, L.L.C.; and Cox Communications Gulf, L.L.C., (Complainants) v. Gulf Power Company, (Respondent)*, 2007. Available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07D-01A1.doc [accessed on 8 August 2008].
[1272] FCC, *In the Matter of Implementation of the Telecommunications Act of 1996: Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers:*

In certain circumstances, disputes may be resolved under an accelerated schedule called the 'Accelerated Docket' which leads to a written staff-level decision within 60 days from the filing of the complaint. The Accelerated Docket rules set out the procedures that must be followed if a fast-track process is to be used. Among other things, staff must engage in pre-filing settlement discussions with the parties. As a result many disputes are settled without the need to file a formal complaint. Accelerated Docket decisions are subject to FCC Approval. If parties to the proceeding file comments in relation to the recommended decision,[1273] the FCC will issue its decision adopting or modifying the recommended decision within 30 days of the filing of the final comments.[1274]

Alternative dispute resolution (ADR) is authorised under the *Administrative Dispute Resolution Act* and *Negotiated Rulemaking Act*.[1275] Where appropriate, the FCC uses ADR as an alternative to litigation to resolve complaints and has been placing increased emphasis on this mechanism as a way to resolve formal complaints. The use of ADR may include the use of consent decrees (a judicial decree expressing a voluntary agreement between parties in a dispute) that avoid the delay and expense of litigation. If a party is interested in a consent decree, it can approach the FCC at any stage in the process. However, there is no right to a consent decree and the FCC will only enter into one if it considers that it is in the public interest to do so.[1276]

The FCC encourages parties to contact its Markets Dispute Resolution Division (MDRD) staff before filing a formal complaint to describe the issues raised in the dispute and to discuss the appropriateness of pre-complaint mediation. The MDRD has a mediation program specifically set up to encourage settlement of disputes withour a formal complaint. According to the FCC, this program has been successful in resolving many cases that would otherwise have become formal complaints.[1277]

The MDRD's mediation process is a prerequisite before a complaint can be resolved using the Accelerated Docket procedures.[1278]

An investigation initiated by the FCC is commenced with a letter of inquiry to the company under investigation seeking information regarding compliance and may include questions that must be answered under oath and a request for documents.

Notice of Proposed Rulemaking, 1996. Available at: http://www.fcc.gov/Bureaus/Common_Carrier/Notices/1996/fcc96460.txt [accessed on 8 August 2008].

[1273] Comments Challenging Recommended Decision, File No. EB-08-MD-002 (filed Apr. 28, 2008); Comments of Verizon in Support of Recommended Decision, File No. EB-08-MD-002 (filed May 13, 2008); Complainants' Reply Comments Challenging the Recommended Decision ('Reply Comments'), File No. EB-08-MD-008 (filed May 23, 2008).

[1274] FCC, FCC No. 08–159A, 23 June 2008. Available at: http://www.fcc.gov/eb/Orders/2008/FCC-08-159A1.html [accessed on 8 August 2008].

[1275] FCC, *Code of Federal Regulations: Title 47 – Telecommunications Part 1-Practice and Procedure*, 2008. Available at: http://www.access.gpo.gov/nara/cfr/waisidx_07/47cfr1_07.html [accessed on 23 July 2008].

[1276] FCC, *Firm, Fast Flexible and Fair: The FCC Enforcement Bureau After Three and a Half Years*, 2003. Available at: http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-236939A1.doc [accessed on 23 July 2008].

[1277] FCC, *EB – Market Disputes Resolution Division*, 2008. Available at: http://www.fcc.gov/eb/mdrd/ [accessed on 22 July 2008].

[1278] FCC, *Local Telephone Competition and Other Common Carrier Market Violations*, 2007. Available at: http://www.fcc.gov/eb/LoTelComp/ltcoccmv.html#FS208 [accessed on 22 July 2008].

FCC staff will then evaluate the response and may issue follow-up questions before deciding whether to recommend or take enforcement action. The investigations are confidential unless and until enforcement action is taken. If the facts indicate a potential violation of law, the agency may initiate enforcement action or seek a consent decree. In the circumstance in which a party fails to comply with the FCC Order, an interim injunctive relief will automatically take effect, suspending the party's contentious action until a final decision is set down. The matter will then be set for hearing.[1279] In extreme cases, the Enforcement Bureau may recommend to the Commission that it initiate hearing proceedings to revoke a license or authorisation.

The FCC may begin a rulemaking with a Notice of Inquiry (NOI) or a notice of proposed rulemaking (NPRM) for the purpose of gathering information on a broad subject or as a means of generating ideas on a specific issue. NOIs are initiated either by the FCC or an outside request. After reviewing comments from the public, the FCC may issue a Notice of Proposed Rulemaking (NPRM). An NPRM contains proposed changes to the FCC's rules and seeks public comment on these proposals. After reviewing comments on the NPRM, the FCC may also choose to issue a Further Notice of Proposed Rulemaking (FNPRM) regarding specific issues raised in comments. The FNPRM provides opportunity for further comment on a related or specific proposal. After considering comments on a NPRM or an FNPRM, the FCC will issue a Report and Order (R&O). The R&O may develop new rules, amend existing rules or make a decision not to do either. Parties can appeal decisions by filing a Petition for Reconsideration within 30 days from the date the R&O appears in the *Federal Register*. In response to the Petition for Reconsideration, the FCC may issue a Memorandum Opinion and Order or an Order on Reconsideration amending the new rules or stating that the rules will not be changed. The FCC's specific procedures are delineated in Title 47 of the *Code of Federal Regulations* ss. 1.399–1.430.

Timeliness

Any carrier upon which a copy of a formal complaint is served must answer the complaint within 20 days of receiving the complaint, unless otherwise directed by the Commission.[1280] Failure to do so may result in financial penalties.

Answers or objections to interrogatories are due within 30 days after service of the interrogatories, or the defendant may respond within 15 days after its answer to the complaint is filed, whichever date is later.[1281]

Role of Interested Parties

The Consumer Advisory Committee (CAC) was chartered by the FCC in November 2000 under the *Federal Advisory Committee Act*.[1282] The CAC is a federal

[1279] FCC, *Commission Orders Comcast to End Discriminatory Network Management Practices*, 2008. Available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-284286A1.doc [accessed on 8 August 2008].
[1280] FCC, *Firm, Fast Flexible and Fair: The FCC Enforcement Bureau After Three and a Half Years*, 2003. Available at: http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-236939A1.doc [accessed on 23 July 2008].
[1281] FCC, *In the Matter of Implementation of the Telecommunications Act of 1996: Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed against Common Carriers: NOTICE OF PROPOSED RULEMAKING*, 1996. Available at: http://www.fcc.gov/Bureaus/Common_Carrier/Notices/1996/fcc96460.txt [accessed on 8 August 2008].

advisory committee whose mission is make recommendations to the FCC regarding consumer issues within the FCC's jurisdiction and to facilitate the participation of consumers (including people with disabilities, and under-served populations such as Native Americans and people in rural areas) in proceedings before the FCC, including rulemaking processes.

Under the Federal legislation, the CAC's charter must have a termination date, although the CAC can be re-chartered prior to that date. The CAC was most recently re-chartered for a two year period in November 2008.

As of 6 January 2009, the CAC had 28 members representing consumers, state, local and Native American tribal governments, and the telecommunications and media industries.[1283] The CAC reports to the Chairman of the FCC. It is located within the FCC's Consumer and Governmental Affairs Bureau and the FCC provides facilities and support staff (estimated at 2.25 full-time equivalents) necessary to conduct the CAC's meetings. The CAC must meet at least twice a year. Meetings are open to the public and must be advertised in advance in the *Federal Register* and on the Internet.

The United States Telecom Association (USTelecom) is the trade association for broadband service providers and their suppliers.[1284] The Association's members offer a wide range of services across the communications platforms, including voice, video, wireless, and broadband services. The Association represents the broadband industry before Congress, federal courts and the White House.

Experts and consultants play a prominent role providing advice at the investigative stage and appearing as expert witnesses at administrative hearings.[1285]

Information Disclosure and Confidentiality

Information gathering largely occurs during the pre-trial discovery (fact-finding) process. This process permits the complainant and the defendant to file with the FCC and serve on a defendant ten interrogatories (questions to be answered under oath by the defendant).

Requests for interrogatories may be used to seek discovery of any non-privileged matter that is relevant to the material facts in dispute in the pending proceeding. Requests for additional interrogatories by a complainant after the defendant has submitted it response to the initial interrogatories answer must be limited in scope to specific factual allegations made by the defendant in its response. This procedure may not be employed for the purpose of delay, harassment or obtaining information that is beyond the scope of permissible inquiry related to the material facts in dispute in the pending proceeding.[1286]

[1282] *United States Code*, Title 5, App. 2. The *Federal Advisory Committee Act* is the legal foundation defining how federal advisory committees operate. It has a special emphasis on open meetings, chartering, public involvement and reporting.

[1283] Consumer Advisory Committee, *Charter*. Available at: Consumer Advisory Committee, [accessed on 3 February 2009].

[1284] The United States Telecom Association, *General Information*. Available at: http://en.wikipedia.org/wiki/United_States_Telecom_Association [accessed on 3 October 2008].

[1285] FCC, *Federal Communications Commission Regulation Experts*, 2003. Available at: http://www.intota.com/experts.asp?strSearchType=all&strQuery=Federal+Communications+Commission+regulation [accessed on 23 July 2008].

[1286] FCC, *Code of Federal Regulations: Procedural Rules – 47 C.F.R. ss. 1.721-1.736*, 2008. Available at: http://www.fcc.gov/eb/mdrd/rules/cmpl.html [accessed on 23 July 2008].

Any materials generated in the course of a formal complaint proceeding may be designated as confidential if the party believes in good faith that the materials fall within an exemption to disclosure contained in the *Freedom of Information Act (FOIA)* (see the nine exemptions identified previously). If this is challenged, the party claiming confidentiality must demonstrate that the material falls under the standards for nondisclosure as stated in the FOIA.

Materials commercially in confidence (c-i-c) may, however, be disclosed to counsel, officers of the opposing part, consultants or expert witnesses, court reports and the FCC for use in prosecuting or defending a party to the complaint action, and only to the extent necessary to assist in the prosecution or defence of the case. These individuals shall not disclose confidential information to any person who is not authorised to receive this information, and shall not use the information in any activity or function other than the prosecution or defence in the case before the FCC.[1287]

The *Freedom of Information Act 1966* governs public access to Federal records, excluding information pursuant to the exemptions and exclusions outlined previously.[1288] When one of these FOIA exemptions applies, the FCC may, in some circumstances, release the records, depending upon the exemption at issue and the circumstances of the FOIA request.

Publicly available FCC records, including records from docketed cases, broadcast applications and related files, petitions for rulemakings, various legal and technical publications, and legislative history compilations, are usually available on the FCC's website. Documents may also be viewed in the FCC's Reference Information Centre at the FCC's Headquarters.[1289] In addition, *Daily Digest*, which is released via email and on the FCC website, provides a brief summary of the FCC's opinions, orders, policy statements, news releases, speeches and public notices.

Decision-making and Reporting

The FCC is directed by five commissioners appointed by the President and confirmed by the Senate for five-year terms, except when replacing another commissioner whose term had not expired. The President designates one of the Commissioners to serve as Chairperson. Normally, one Commissioner is appointed or reappointed each year.[1290] Only three Commissioners may be members of the same political party. None of them can have a financial interest in any Commission-related business**.**[1291]

Pursuant to s. 5(c) of the *Communications Act*, the Commission may delegate authority to its staff to act on matters which are minor, routine or settled in nature and those in which immediate action may be necessary. Actions taken under delegated authority are subject to review by the Commission. Except for the possibility of

[1287] Ibid.
[1288] United States Department of Justice, *Freedom of Information Act*, 2008. Available at: http://www.usdoj.gov/oip/ [accessed on 23 July 2008].
[1289] FCC, *FCC Freedom of Information Act*, 2008. Available at: http://www.fcc.gov/foia/ [accessed on 23 July 2008].
[1290] FCC, *Code of Federal Regulations: Title 47 –Telecommunications Part 0 – Commission Organisation*, 2008. Available at: http://www.access.gpo.gov/nara/cfr/waisidx_07/47cfr0_07.html [accessed on 23 July 2008].
[1291] FCC, *About the FCC*, 2008. Available at: http://www.fcc.gov/aboutus.html [accessed on 22 July 2008].

review, actions taken under delegated authority have the same force and effect as actions taken by the Commission.[1292]

Matters that require or warrant Commission action are dealt with by the Commission at regular monthly meetings, or at special meetings called to consider a particular matter. Notices of meetings are placed on the Federal Register and made available to the press.[1293] Commission meetings are open to the public except in circumstances set out in the legislation.[1294] In some instances, Commission action may be taken between meetings 'by circulation'. This involves the submission of a document to each of the Commissioners for his/her approval.[1295]

A complete transcript or electronic recording is made available unless the meeting has been closed to the public. If the meeting is closed, the FCC may maintain minutes in lieu of a transcript or recording. The minutes should include a full and accurate summary of actions taken and the reasons for such actions, including the different views expressed and a record of any roll call vote. The Office of the Secretary maintains a public record of transcripts or minutes. Copies of transcripts may be obtained without charge.[1296]

The FCC's staff is organised by function into seven operating Bureaus and ten Staff Offices. Of most relevance to economic regulation of telecommunications services are:[1297]

- The Consumer & Governmental Affairs Bureau (CGB) develops and implements the Commission's consumer policies.
- The Enforcement Bureau is responsible for enforcing the relevant legislations, rules and orders. Within the branch, the Market Disputes Resolution Division (MDRD) handles formal complaints against common carriers and common carrier mediation efforts as well as pole catchment complaints. The Office of General Counsel is the chief legal adviser and represents the Commission in litigation in federal courts, makes recommendations in adjudicatory matters before the FCC and assists the FCC in its decision making.[1298]
- The Wireless Telecommunications Bureau (WTB) handles all matters, including licensing, enforcement, and regulatory functions, pertaining to domestic wireless telecommunications.
- The Wireline Competition Bureau (WCB) handles all matters pertaining to communications common carriers and ancillary operations.
- The Office of Administrative Law Judges (OALJ) is responsible for conducting the hearings ordered by the Commission.

[1292] *Code of Federal Regulations*, Title 47.05. Available at: http://edocket.access.gpo.gov/cfr_2007/octqtr/47cfr0.5.htm [accessed on 22 July 2008].
[1293] *Code of Federal Regulations*, Title 47.0605. Available at: http://edocket.access.gpo.gov/cfr_2007/octqtr/47cfr0.605.htm [accessed on 22 July 2008].
[1294] *Code of Federal Regulations*, Title 47.0602. Available at: http://edocket.access.gpo.gov/cfr_2007/octqtr/47cfr0.602.htm [accessed on 22 July 2008].
[1295] *Code of Federal Regulations*, Title 47.05, op. cit.
[1296] *Code of Federal Regulations*, Title 47.0607. Available at: http://edocket.access.gpo.gov/cfr_2007/octqtr/47cfr0.607.htm [accessed on 22 July 2008].
[1297] FCC, *About the FCC*, op. cit.
[1298] FCC, *Code of Federal Regulations: Procedural Rules – 47 C.F.R 1.721-1.736*, 2008. Available at: http://www.fcc.gov/eb/mdrd/rules/cmpl.html [accessed on 8 August 2008].

- The Office of Media Relations (OMR) is responsible for the dissemination of information on Commission issues.

Formal complaints are adjudicated by an administrative hearing presided over by a FCC-appointed ALJ. Judges are assigned to cases in rotation so far as practicable, and may not perform duties inconsistent with their duties and responsibilities as ALJs (the *Federal Administrative Procedure Act*, s. 3105).

The information in front of the ALJ in making his/her decision includes the complaint, answer, and joint statement of stipulated facts, disputed facts and key legal issues, along with all associated affidavits, exhibits and other attachments. Commission proceedings may also require or permit other written submissions such as briefs, written interrogatories, and other supplementary documents or pleadings.

The Presiding ALJ issues an Initial Decision which may be appealed to the FCC.[1299] This Initial Decision becomes the final decision 50 days after its release if exceptions are not filed within 30 days thereafter or the FCC elects to review the case on its own initiative.[1300]

The FCC only makes decisions with respect to dispute resolution when the case has been initiated by the FCC (some of these decisions may still be determined in an administrative hearing); an initial decisions by an ALJ is appealed to the Commission[1301] or a fast-track decision is made by the Market Disputes Resolution Division.[1302]

All US government decisions and announcements are published daily in the *Federal Register*. In addition, FCC's rulemakings, timelines for proceedings, licensing decisions, and announcements are available on its website. The FCC's decisions are also available in hard copy in the FCC Record. A summary document may be published as a public notice if the original decision document contains confidential material.[1303]

In addition, the official record of all actions taken by an ALJ, including initial and recommended decisions, public information used in making the decisions, and actions taken, is contained in the original docket folder, which is maintained in the Reference Information Centre of the Consumer and Governmental Affairs Bureau. [1304]

The FCC publishes reasons for its decisions and each commissioner publishes a statement of dissent from, or support for, a commission decision, outlining their individual position on the issue.

[1299] FCC, *Office of Administrative Law Judges,* 2008. Available at: http://www.fcc.gov/oalj/html [accessed on 29 July 2008].

[1300] FCC, Before the Federal Communications Commission: In the Matter of Florida Cable Telecommunications Association, Inc.; Comcast Cablevision of Panama City, Inc.; Mediacom Southeast, L.L.C.; and Cox Communications Gulf, L.L.C., (Complainants) v. Gulf Power Company, (Respondent), 2007. Available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07D-01A1.doc [accessed on 8 August 2008].

[1301] FCC, *Office of Administrative Law Judges,* 2008. Available at: http://www.fcc.gov/oalj.html [accessed on 29 July 2008].

[1302] FCC, *FCC–08–159A1*. Available at: http://www.fcc.gov/eb/Orders/2008/FCC-08-159A1.html [accessed on 29 July 2008].

[1303] FCC, *Code of Federal Regulations: Title 47 –Telecommunications Part 1-Practice and Procedure*, 2008. Available at: http://www.access.gpo.gov/nara/cfr/waisidx_07/47cfr1_07.html [accessed on 23 July 2008].

[1304] Ibid.

Appeals

The *Administrative Procedures Act* sets out a review and appeal process for all government agencies, and requires that all decisions be justified. The Act sets out an entitlement for judicial review for a person who suffers legal wrong because of agency action, or is adversely affected or aggrieved by an agency's action within the meaning of a relevant statute.

A petition for reconsideration, which relies on facts that have not previously been presented to the FCC, will be granted only under the following circumstances:

- The facts relied on relate to events which have occurred or circumstances which have changed since the last opportunity to present them to the FCC;
- The facts relied on were unknown to the petitioner until after the last opportunity to present them to the FCC, and could not have been learnt prior to such opportunity through the exercise of ordinary diligence, or
- The FCC determines that consideration of the facts relied on is required in the public interest.

The FCC may grant a petition for reconsideration in whole or in part or may deny the petition. Its order will contain a concise statement of the reasons for the action taken. Any order disposing of a petition for reconsideration which modifies rules adopted by the original order is, to the extent of such modification, subject to reconsideration in the same manner as the original order.

Regulatory Development

In relation to telecommunications market, the FCC has actively promoted the deployment of advanced technologies such as wireless broadband and multi-platform competition. For example, regulations over certain broadband services, as well as infrastructure investment, have been removed over time. The FCC's fifth report on the inquiry of new telecommunications technologies concluded that broadband had been deployed in a reasonable and timely fashion, and restated its broadband policy to promote investment in multiple broadband platforms, to promote greater speeds and to promote complementary technologies and services that stimulate demand for broadband.[1305]

3. Posts

The United States Postal Service (USPS) is an independent establishment of the executive branch of the United States government, responsible for providing postal services in the US. It is governed by the eleven-member Board of Governors, nine of them are presidentially appointed.

USPS has an exclusive legal right to deliver non-urgent first-class, outbound US international letters and to put mail into private mailboxes. Competition in 'extremely urgent letters' is allowed under certain conditions. . USPS has 700 000 employees, and recorded in 2007 a net income of US$1.6 billion. As compared to 1971, in 2007 the USPS delivered over 244 per cent more mail to double as many addresses.[1306] The USPS now delivers mail to approximately 148 million delivery points. As of 2007, postage prices were amended to include shape-based postage pricing.

[1305] FCC, 12 June 2008, op. cit., p. 38.
[1306] United States Postal Service (USPS), *Annual Report 2007*, 2007, p. 13.

The alternative media of Internet and television continue to change the communications market. Of greatest impact to USPS revenue are electronic alternatives to correspondence and transactions, particularly for first-class mail items such as business correspondence, bills, statements, and customer payments. First-class mail volume has been affected by the Internet, automatic deductions, direct deposit, telephone, fax machines, and other electronic communications. On the other hand, the Internet and electronic commerce also have some positive effect on mail volume, by stimulating new uses of postal services, such as package delivery and targeted advertising mail.

There is now emerging competition in priority mail, express mail, bulk parcel post and bulk international mail. FedEx and DHL obviously have the substantial market share in express, priority mail and package delivery. Foreign postal operators have established operations in the United States, offering express delivery, logistics, financial, and electronic services. USPS feels it is at a disadvantage in competing with these other post operators because international air transportation rates are set by the US government and are not subject to more favourable market-driven rates available to foreign posts. This may have contributed to an increase in the outbound market share of the foreign postal operators.

Regulatory Institutions and Legislation

USPS is regulated by the Postal Regulatory Commission (PRC), an independent federal regulator with the power to set postal rates. In comparison, its predecessor, the Postal Rate Commission only had the power to make recommendations on rates and mail classifications to the Board of Governors in USPS and to hear complaints.[1307]

This change is in accordance with the enactment of The *Postal Accountability and Enhancement Act* (PAEA), an amendment to the *Postal Law* (Title 39 of the *United States Code*), on 20 December 2006. The *Postal Accountability and Enhancement Act* introduced some significant regulatory development in the postal industry, giving the PRC considerably enhanced regulatory power and change the way USPS can operate.

The legislation classifies postal products into two categories based on a market power criterion: market dominant or competitive product.[1308] It grants USPS greater price flexibility because of the move from rate-of-return regulation to price-cap regulation. That is, the annual rate of increase for each class of market-dominant products is capped at the CPI-U which is 'the seasonally unadjusted Consumer Price Index for All Urban Consumers over the most recent annual period preceding the date USPS files notice of its intention to increase rates'.[1309] Each product must cover its attributable costs plus a reasonable contribution to cover institutional costs. USPS is required to adopt a profit-loss model instead of the previous break-even model.

Accordingly, the PRC is required to establish a modern system of rate and mail class regulation for market dominant products that provides transparency and

[1307] Postal Regulatory Commission (PRC), *About the Postal Regulatory Commission*. Available at: http://www.prc.gov/prc-pages/about/default.aspx [accessed on 28 July 2008].
[1308] US Congress, *Postal Accountability and Enhancement Act*, *Public Law* 109–435, 20 December 2006, s. 3642 (b) (1).
[1309] *United States Code*, Title 39, s. 3622, d (1)(A).

accountability of the postal service.[1310] The PRC also has an enhanced oversighting responsibility over USPS-specific issues, including annual compliance determinations, development of accounting practices and procedures for the review of the Universal Service requirement, and assurance of transparency through periodic reports. New enforcement tools include subpoena powers, authority to direct the USPS to adjust rates and to take other remedial actions, and power to levy fines in cases of deliberate non-compliance with applicable postal laws. The PRC issued its first Annual Compliance Determination on March 2008 based on USPS's Annual Compliance Report (ACR) for financial year 2007.[1311]

Since its establishment, the PRC has started the process of fulfilling its obligation of rule-making. It has finalised a number of rules, including:

- Final rules on regulating rates and mail classifications, issued in October 2007 and came effective on 10 December 2007.[1312]
- Final rules on complaints and rate of service inquires, issued on 24 March 2009.[1313]
- Final rules on periodic report with respect to financial and operating cost information, issued on 16 April 2009.[1314]

It is yet to finalise its rules for periodic reporting of service performance and the cost of the Universal Service Obligation.

As required, the PRC submitted a report to the President and Congress on universal service and the postal monopoly in December 2008, after consulting with the public and soliciting written comments from the USPS.[1315] In the report, the PRC reviews the current scope and the historical development of universal service and the postal monopoly in the US, as well as some other countries. While there is no recommendation on changes to either the universal service or the monopoly, the PRC suggests some policy considerations if the changing economic situation merits changes.

Other advisory roles of the PRC include:

- report to Congress as part of the latter's five-year review to determine if the institutional cost contribution requirements specified in the rule applicable to

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1310 US Congress, *Postal Accountability and Enhancement Act*, *Public Law* 109–435, 20 December 2006.

1311 PRC, *Annual Compliance Determination – US Postal Service Performance Fiscal Year 2007*, 27 March 2008.

1312 PRC, *Order Establishing RateMaking Regulations for Market Dominant and Competitive Products*, *Docket No. RM2007–1*, 29 October 2007 and Postal Regulatory Commission, *Rules of Practice and Procedure – 39 CFR (Code of Federal Regulations) 2001, 3010, 3015, 3020*, 10 December 2007.

1313 PRC, *PRC Issues Final Rules for Complaints and Rate of Service Inquires*, Press Release, 24 March 2009. Available at: http://www.prc.gov/prc-docs/home/whatsnew/PRC%20Issues%20Final%20Rules%20for%20Complaints%20and%20Rate%20or%20Service%20Inquiries%20(AK%20AF%20SS)_4.pdf [accessed on 28 May 2009].

1314 PRC, *PRC Issues Final Rules on the Form and Content of Periodic Reports*, Press Release, 16 April 2009. Available at: http://www.prc.gov/prc-docs/home/whatsnew/4%2016%2009%20Periodic%20Reports%20Update%20Final%20Rule%20release%202_6.pdf [accessed on 28 May 2009].

1315 PRC, *Report on Universal Postal Service and the Postal Monopoly*, 19 December 2008. Available at: http://www.prc.gov/Docs/61/61628/USO%20Report.pdf [accessed on 28 May 2009].

competitive products should be retained in its current form, modified, or eliminated.[1316]

- report to Congress as part of the latter's ten-year review on the modern system for regulating rates and classes for market-dominant products to determine whether the system is achieving the *Postal Accountability and Enhancement Act*'s objectives.[1317]

The US has broadly adopted the regulatory approach which views the postal network as an essential public infrastructure that is uneconomic to duplicate. To this end, downstream access regulation, which governs 'worksharing activities', has been established by law as part of rate and mail class regulations. Postal worksharing activities generally involve mailers preparing, barcoding, presorting, or transporting minimum volumes of mail to qualify for reduced postage rates. These bulk-mailing activities allow mailers to bypass some USPS mail processing and transportation operations.

Historically workshare discounts have been considered in successive postal rate and reclassification cases, dating back to 1976, when the first workshare discount of 1 cent was determined in a mail reclassification case. The structure of workshare discounts has evolved over subsequent years and the PRC has developed a guideline for recommending workshare discounts under the efficient component pricing rule.[1318]

Title 39 of the *United States Code* provides the primary legal basis for workshare discounts. It specifies that one of the statutory factors considered by the PRC in recommending or determining rates is 'the degree of preparation of mail for delivery into the postal system performed by the mailer and its effect upon reducing costs to the USPS'.[1319] It is a statutory requirement that workshare discounts do not exceed the cost that USPS avoids as a result of worksharing activity unless justified by at least one of four exceptions.[1320]

Two subsections of the *Postal Accountability and Enhancement Act* make specific references to workshare discounts:

- s. 3622 (e) refers to workshare discounts relating to modern rate regulation. It defines workshare discounts as 'rate discounts provided to mailers for the pre-sorting, pre-barcoding, handling, or transportation of mail (and further defined by the PRC)'.
- s. 3652 (b) refers to information relating to a workshare discount for each market-dominant product that the USPS is required to report in its annual compliance report, including the per-item avoided costs by USPS in absolute and percentage value and the per-item contribution made to institutional costs.

[1316] *United States Code*, Title 39, s. 3633(a)(3).
[1317] *United States Code*, Title 39, s. 3622(d)(3).
[1318] United States General Accounting Office, *US Postal Service – Key Elements of Comprehensive Postal Reform*, Testimony before the Special Panel on Postal Reform and Oversight, Committee on Government Reform, House of Representatives, 28 January 2004, p. 18.
[1319] *United States Code*, Title 39, s. 3622(b)(6).
[1320] US Congress, *The Postal Accountability and Enhancement Act*, *Public Law* 109–435, 20 December 2006, s. 3622 (e) (2).

Process and Consultation

As discussed before, the PRC has a role in a number of postal service matters, such as changing rate and mail classification, hearing complaints, changing workshare discount, and annual compliance assessment. The PRC also has an advisory role in regard to industry-wide issues such as the development of postal services.

Rate change and mail reclassification (covering worksharing activities) matters may arise through the following channels:

- formal request made by USPS that the PRC submits a recommended decision on whether the proposed rates comply with the CPI-U regulation
- complaints lodged by other parties
- the PRC's annual determination of compliance
- mail re-classification proposed by the USPS or initiated by the PRC.

The process for implementing rate changes has been streamlined from previously litigation of an omnibus rate case that may have take ten months to a minimum of 45-day advance notice. By law, USPS is required to give public notice of any rate adjustment for a market dominant product no later than 45 days before the implementation of the adjustment (subject to exceptions).[1321] The process for assessing the proposed rate adjustments from the USPS involves:

- Notice of intention to adjust: USPS must file with the PRC a formal request for a recommended decision on its proposed rate changes. The request must be accompanied by a schedule of the applicable workshare discounts, a companion schedule listing the corresponding avoided costs and a separate justification for all proposed workshare discounts that are set substantially below avoided costs.
- Dockets: The PRC will establish a docket for each rate adjustment filing and publish notice of the filing in the *Federal Register*. The filing will be posted on its website.[1322] The PRC also designates an officer of the PRC to represent the interests of the general public.
- Public comment: The public comment process continues for 20 days from the date of the filing.[1323]
- Determination: The PRC makes its determination on the compliance of the proposed rates with the price cap by issuing an order within 14 days of the conclusion of the public comment period.
- Amendments if applicable: If the PRC determines that all or part of the proposal is not in compliance with the price cap, USPS must respond to the PRC's notice of non-compliance and describe the action to be taken to comply with the price-cap requirement. In this case, there will be another ten-day period for public comment and a 14 day review period. If the amended rate adjustments are still found by the PRC to be non-compliant, the PRC shall explain the basis of its determination and suggest a remedy.

[1321] *United States Code*, Title 39, s. 3622 d (1)(C).
[1322] Within five days after the filing, the Secretary (of the PRC) shall lodge a notice with the Director of the *Federal Register* for publication in the *Federal Register*.
[1323] PRC, *Order Establishing Ratemaking Regulations for Market Dominant and Competitive Products, Docket No. RM2007–1*, p. 38.

- Rate adjustment. Rates cannot be implemented until at least 45 days after the USPS files a notice of rate adjustment that is consistent with the price cap regulation.

The process followed for settling a rate and service complaint, lodged by any interested person (including an officer of the PRC representing the interests of the general public) seeking an order granting remedial relief,[1324] is similar. The statutory period for determination is 90 days after receiving the complaint. The determination must be in writing and will depend on whether the PRC finds that such a complaint raises material issues of fact or law.[1325] If the complaint is found to be justified, the PRC shall order USPS to take appropriate corrective action. In cases of deliberate non-compliance by USPS, the PRC may order a fine (the amount is determined on the basis of the extent of non-compliance) for each incidence of non-compliance. District courts have jurisdiction specifically to enforce any order issued by the PRC.

The PRC encourages the resolution and settlement of complaints by informal *ex parte* communications procedures, including correspondence, conferences between parties, and the conduct of proceedings off the record with the consent of the parties. A summary of *ex parte* communications is placed in a public file shortly after its occurrence. The PRC is expected to soon issue proposed rules regarding *ex parte* procedures to ensure *Postal Accountability and Enhancement Act* -mandated transparency.[1326]

In its final ruling on complaints, the PRC adopts a two-tier system that separates formal complaints from informal complaints for rate or service (referred as 'rate or service inquires').[1327] The new system is considered by the PRC as 'enabling the Commission to process complaints in a more streamlined and efficient manner'.[1328] For a complaint not resolved or settled under informal procedures, the PRC considers whether or not, in its discretion, to conduct a proceeding on the record with an opportunity for hearing. The PRC shall issue a notice of proceeding in accordance with its Rules of Practice (s. 3001.17).

Similar to price regulation, downstream access regulation can either be specified *ex ante* by advance determination of workshare discounts based on pricing principle and cost calculation methodology or is performed *ex post* by acting upon *complaints* if the parties fail to come to an agreement. If USPS establishes a workshare discount rate it must submit to the PRC a detailed report that:[1329]

- explains the reasons for establishing the rate;
- presents the data, economic analyses, and other information that justify the rate; and

[1324] *United States Code*, Title 39, s. 3662.
[1325] *Ibid.*
[1326] PRC, *Order Establishing Ratemaking Regulations for Market Dominant and Competitive Products*, Docket No. RM2007-1, p. 19.
[1327] PRC, *Order Establishing Rules for Complaints and Rate or Service Inquries*, Docket No. RM 2008-3, 24 March 2009. Available at: http://www.prc.gov/Docs/62/62762/Order195.pdf [accessed on 28 May 2009].
[1328] PRC, *PRC Issues Final Rules for Complaints and Rate or Service Inquires*, Press Release, 24 March 2009.
[1329] *United States Code*, Title 39, s. 3622, e (4).

- certifies that the discount will not adversely affect rates or services provided to mail users who do not take advantage of the discount rate.

The PRC has indicated that it will elicit remedies if the present ratemaking regulations governing workshare discounts prove to be inadequate.[1330]

The statutory period for the PRC's annual compliance assessment is within 90 days after receiving USPS's annual compliance report on costs, revenues, rates, quality of service and workshare discounts.[1331] The first stage in the annual determination is a public comments process whereby the PRC seeks interested parties' comments on compliance of USPS. The PRC may hold public hearings during this process and give notice of such a hearing in its original notice of the proceeding or in a subsequent notice issued. However, in practice it is difficult to conduct a full evidentiary hearing because of the statutory timeframe.

The process for mail re-classification due to a change in the nature of postal services offered by the USPS that has a nationwide effect generally requires that:

- USPS submits a proposal, within a reasonable time prior to the effective date of such proposal, to the PRC requesting an advisory opinion on the change.[1332]
- The PRC provides an opportunity for hearing on the record to USPS, mail users, and an officer of the PRC who represents the general public prior to issuing a written opinion that is certified by each Commissioner.

The PRC may, on its own initiative, change mail classifications between the market-dominant and competitive categories in accordance with criteria specified under s. 3642 (b) of the *Postal Accountability and Enhancement Act*. A new list of products shall be prescribed and published in the *Federal Register*.

Timeliness

The statutory period for implementing rate changes is a minimum of 45 days while the statutory period for other regulatory work is generally 90 days.

Under the *Postal Accountability and Enhancement Act*, if the PRC fails to act in a timely manner in handling a complaint, it shall be treated in the same way as if it had been dismissed by an order issued on the last day allowable; that is, failing to identify non-compliance.

Role of Interested Parties

The role of interested parties is stipulated in the legislation as follows:

- The PRC is required to designate an officer in all public proceedings (such as developing rules, regulations and procedures) to represent the interests of the general public (s. 505 of the *Postal Accountability and Enhancement Act*).
- The PRC may not issue any order unless USPS, mail users, other affected parties and a designated officer representing the general public have been given an opportunity for a hearing on the record in accordance with the *Administrative Procedure Act.*[1333]

[1330] PRC, *Order Establishing Ratemaking Regulations for Market Dominant and Competitive Products*, Docket No. RM2007–1, p. 38.
[1331] *United States Code*, Title 39, s. 3653.
[1332] *United States Code*, Title 39, s. 3661.
[1333] Ibid.

- In relation to its annual review of USPS's compliance, the PRC is required to provide an opportunity for comments from all the interested parties, on the ACR submitted by USPS (s. 3653 (a) of the *Postal Accountability and Enhancement Act*).

Information Disclosure and Confidentiality

The PRC has the power to disclose relevant information in fulfilling its duties, provided that it has established a procedure for according appropriate confidentiality to information identified by USPS as c-i-c.[1334] In determining what information is treated as c-i-c, the PRC balances the nature and extent of the likely commercial injury to USPS against the public interest in maintaining the financial transparency of a government establishment competing in commercial markets.

Where the PRC has accepted information is c-i-c, it is not able to (subject to exceptions):[1335]

- use the information for purposes other than the purposes for which it is supplied.
- permit anyone who is not an officer or employee of the PRC to have access to the information.

Non-confidential information is published on the web and filed with *Federal Register*. All information other than those being determined to be confidential may be accessed remotely via the PRC's website or viewed at the PRC's dockets section during regular business hours.

The PRC's intermediate and recommended decisions, advisory opinions, public reports and orders are released to the press and promptly made available to the public by posting on the PRC's website. The public records include:[1336]

- All submissions and filings
- All other part of the formal record in any matter or proceeding set for hearing and any related PRC correspondence
- Any proposed testimony or exhibit filed with the PRC but not yet offered or received in evidence.

Decision-making and Reporting

The PRC consists of five Commissioners who are appointed by the President with the advice and consent of the Senate for six-year terms.[1337] A Commissioner may continue to serve after the expiration of his/her term for up to one year or until a successor is confirmed. The Chairman is designated by the President and usually is a member of the President's political party. Only three Commissioners may be members of the same political party. The Vice Chairman of the PRC is elected by majority vote of the Commissioners and acts as Chairman in the Chairman's absence.

The Commissioners are chosen solely on the basis of their qualifications and expertise in economics, accounting, law, or public administration, which are necessary for

[1334] *United States Code*, Title 39, s. 504, g (3).
[1335] *United States Code*, Title 39, s. 504.
[1336] PRC, *Rules of Practice and Procedure*, s. 3001.42.
[1337] US Congress, *Postal Accountability and Enhancement Act*, *Public Law 109–435*, 20 December 2006, s. 3238.

carrying out their responsibilities prescribed under the *Postal Accountability and Enhancement Act*. They may be removed by the President only for cause.

The PRC is assisted by a staff of around 70 who have expertise in law, economics, finance, statistics, and cost accounting.[1338] It is organised into four operating offices:[1339]

- Accountability and Compliance
- General Counsel
- Public Affairs and Government Relations
- Secretary and Administration.

In addition, the PRC maintains an independent office for its Inspector General.

The PRC obtains the following information prior to making a decision:

- Reports relating to the USPS's statistical cost, revenue and outputs
- Witness material such as transcript of testimony
- Reference material consisting of previously published material
- Material provided in response to discovery
- Material filed at the request of another
- Other, including documents and detailed data and information. Data analyses in electronic form are also offered in evidence.

Appeals

Judicial review on PRC's decisions is available. Any party adversely affected or aggrieved by a final order or decision of the PRC may, within 30 days after the order or decision becomes final, file a petition in the United States Court of Appeal for the District of Columbia (the US District Court of Appeal in Columbia).[1340] The Court shall review the order or decision on the basis of the record before the PRC in making the order or decision.

Findings of whether a planned rate adjustment is in compliance with the CPI-U price cap rule are subject to subsequent merit review.[1341] Findings of whether a planned rate adjustment does not contravene other policies specified in Title 39 of the *United States Code*, Chapter 36, Subchapter 1, is provisional and subject to subsequent review.

4. Water and Wastewater

The US has highly developed infrastructure in water and wastewater, and is internationally prominent in expertise in water and wastewater technology. However, in the terms of penetration, only 85 per cent of the population was connected to public water supplies in 2000. Water and wastewater infrastructure systems include surface and ground water used for residential and other purposes; facilities that contain and transport raw water; treatment facilities for drinking water; reservoirs; water

[1338] PRC, *Performance Budget Plan*, Fiscal Year 2008.
[1339] PRC, *General Information*. Available at: http://www.prc.gov/prc-pages/about/default.aspx [accessed on 8 August 2008].
[1340] *Postal Accountability and Enhancement Act*, s. 3663.
[1341] PRC, *Rules of Practice and Procedure*, s. 3010.13 (j).

distribution systems; and wastewater collection and treatment facilities. Across the US, these systems comprise approximately 77 000 dams and reservoirs; tens of thousands of miles of pipes, aqueducts, water distribution, and sewer lines; 168 000 public drinking water facilities (some serving as few as 25 customers); and about 16 000 publicly owned wastewater treatment facilities. Ownership and management are both public and private. The federal government has ownership responsibility for hundreds of dams and diversion structures, but the vast majority of the nation's water infrastructure is either privately owned or owned by non-federal units of government (mainly public ownership).[1342]

The Water Infrastructure Network (WIN) is an organisation comprised of members that are local government officials, drinking water and wastewater service providers, state environmental and health administrators, engineers and environmentalists.[1343] It engages in activities that encourage support for adequate infrastructure funding at federal, state and local government levels. It reported that households and businesses paid about 90 per cent of the total costs to build, operate and maintain water and wastewater system, and the rest were financed by the state and federal governments.[1344] Public subsidy is provided in the form of annual federal grants combined with state revolving funds and bond issues.

Regulatory Institutions and Legislation

Regulation of water and wastewater in the US is split between the Federal and state governments, with the main responsibility for economic regulation being at the state level.

Federal regulation occurs through the United States Environmental Protection Agency's Office of Wastewater Management (OWM) that oversees a range of programs contributing to the well-being of the nation's waters and watersheds. The Office of Water consists of five main offices:

- American Indian Environmental Office
- Office of Wetlands, Oceans and Watersheds
- Office of Science and Technology
- Office of Wastewater Management (OWM)
- Office of Ground Water and Drinking Water.

Through its programs and initiatives, the OWM promotes compliance with the requirements of the *Federal Water Pollution Control Act*. The OWM states that cleaning and protecting the nation's water is an 'enormous task'. Under the *Clean Water Act*, the OWM works in partnership with Environmental Protection Agency (EPA) regions, states and tribes to regulate discharges into surface waters such as wetlands, lakes, rivers, estuaries, bays and oceans. Specifically, the OWM focuses on

[1342] Facts and figures are from OECD, *Managing Water for All: An OECD Perspective on Pricing and Financing*, 2009, p. 39; Congressional Research Service, *Terrorism and Security Issues Facing the Water Infrastructure Sector*, 2007. Available at: http://ftp.fas.org/sgp/crs/terror/RL32189.pdf [accessed on 5 August 2008]; and OECD, *Competition and Regulation in the Water Sector*, OECD Policy Roundtable, 2004, pp. 175–178.

[1343] Water Infrastructure Network, *Water Infrastructure Now,* 2001. Available at: http://www.win-water.org/reports/winow.pdf [accessed on 5 August 2008].

[1344] Ibid., p. 2.

control of water that is collected in discrete conveyances (also called point sources), including pipes, ditches, and sanitary or storm sewers.

At the state level, the economic regulation of the water and wastewater industry is generally in the form of rate regulation, market monitoring and service quality monitoring. Consider, for example, the regulatory institutions in California.

The California Department of Water Resources (CDWR) has the mission to:[1345]

> manage the water resources of California in cooperation with other agencies, to benefit the State's people, and to protect, restore, and enhance the natural and human environments.

It is responsible for flood protection, water management, water planning management, public safety and security, and water projects.

The California EPA was established in 1991 as a single State Cabinet level environmental authority unifying the Air Resources Board (ARB), State Water Resources Control Board (SWRCB), Regional Water Quality Control Boards (RWQCBs) and the Integrated Waste Management Board (IWMB).[1346] It assists the federal EPA (see above) in environmental protection.

The California PUC (CPUC) has the following responsibilities over water and wastewater under the state's *Public Utilities Act*:[1347]

- investigating water and sewer system service quality issues
- analysing and processing utility rate change requests
- performing auditing, accounting and financial services and running water public program to track and certify water companies' compliance with CPUC requirements.

Details about the regulatory process and practice of the CPUC are discussed in the Chapter 'State Regulatory Arrangements in the United States' in the context of state PUCs' general role in economic regulation of all utilities industries, such as energy, communications, transport and water. It appears that regulatory processes and practices followed by the CPUC are not specific to an industry or a sector. The rest of this section summarises the six elements of the CPUC's regulatory process and practice relating to water and wastewater.

Process and Consultation

Matters arise before the CPUC through complaints lodged by any parties, applications of rate increases by a regulated company, or the CPUC's own initiatives to investigate or make rules.

Timeliness

Timelines applicable to the completion of various stages of the regulatory process are clearly specified, but can be extended except for statutory deadlines. There is no

[1345] California Department of Water Resources, *Mission and Goals*. Available at: http://www.water.ca.gov/about/mission.cfm [accessed on 6 October 2008].
[1346] California Environmental Protection Agency, *About Us*, 2008. Available at: http://www.cepa.ca.gov/ [accessed on 6 October 2008].
[1347] California Public Utilities Commission (CPUC), *Water and Sewer*. Available at: http://www.cpuc.ca.gov/PUC/water/ [accessed on 6 October 2008].

statutory requirement for pre-lodgement discussion, but informal resolution channels may be used.

Role of Interested Parties

The Division of Ratepayer Advocates (DRA) within the CPUC is the designated body representing the interests of public utilities consumers, that is, to 'obtain the lowest possible rate for services consistent with reliable and safe service levels'.[1348]

Information Disclosure and Confidentiality

Third parties can have access to information that is not of commercial-in-confidence (c-i-c) in nature.

Decision-making and Reporting

Regulatory decisions over water by the CPUC and ALJs are assisted primarily by the Water Division.

Appeals

The court's review on CPUC's decisions relating to water companies shall not be extended further than to determine whether the CPUC has regularly pursued its authority, including a determination whether the decision under review violates any right of the petitioner under the federal or state constitution.

5. Rail

Regional vertically-integrated railways have been in operation in the US. The major rail operator was the Consolidated Rail Corporation (Conrail). It began operations in 1976 as a government-funded company, taking over all major railroad companies (rail infrastructure and rolling stock) in North-eastern United States. Conrail became a privately owned company in 1987. In 1998 this company was acquired by Norfolk Southern Corporation and CSX Corporation. These companies split Conrail's rail infrastructure and rolling stock while Conrail Shared Assets Operations continued to operate on behalf of its new owners in Northern New Jersey, Southern New Jersey/Philadelphia, and Detroit.[1349] In the 1970s, the Federal government created Amtrak to take over intercity passenger service from the nation's freight railroads.[1350]

Regulatory Institutions and Legislation (Federal)

The federal rail regulator in the US is the Surface Transportation Board (STB). The STB was created by the *Interstate Commerce Commission Termination Act 1995* and is the successor to the Interstate Commerce Commission (ICC). The STB serves as both an adjudicatory and a regulatory body. Its primary function is the economic regulation of the rail industry, including resolving railroad rate and service disputes, regulating third party access to infrastructure, reviewing proposed railroad mergers and the construction, acquisition and abandonment of rail lines.[1351] The STB also has responsibilities regarding road transport, ocean transport and some pipelines that are not regulated by the FERC.

[1348] CPUC, *Division of Ratepayer Advocates*, 2008. Available at: http://www.dra.ca.gov/dra/ [accessed on 6 October 2008].
[1349] Conrail, *A Brief History of Conrail*, 2008. Available at: http://www.conrail.com/history.htm [accessed on 24 July 2008].
[1350] Ibid.
[1351] *United States Code*, Title 49, ss. 10101–11908.

The STB is affiliated with, but is independent of, the Department of Transport. Rules governing the STB and its powers are set out in the *United States Code (USC)*.[1352] The STB has the authority to formulate regulations and these are codified in Title 49, Chapter X of the *Code of Federal Regulations*.

Railroads have a common carrier obligation to provide transportation or rail service upon reasonable request as required under Title 49 of the USC, s. 11101(a). The track owner must accept traffic from an origin carrier willing to pay a rate that covers the cost of access.[1353] They can provide that service under rates and service terms agreed to in a confidential transportation contract with the shipper[1354] or under openly available common carriage rates and service terms.[1355] Rates and services terms established by contract are not subject to STB regulation, except for limited protections against discrimination involving agricultural producers. Businesses may gain access to a prescribed new rail route under the 'competitive access' provisions of Title 49 of the USC s. 10705 in certain circumstances where the network carrier is found to have abused its market power.[1356]

The STB can adjudicate complaints challenging the reasonableness of a common carriage rate only if the railroad has market dominance over the traffic (goods transported) involved.[1357] Market dominance refers to 'an absence of effective competition from other rail carriers or modes of transportation to which a rate applies'.[1358] As a result, in considering a complaint the STB first considers whether the railroad has market dominance, or whether there is significant competition in the market or if the shipper has an alternative to paying the rate under dispute.

The STB also has authority to investigate and resolve disputes with respect to the adequacy of the service provided by a railroad to its shippers and connecting carriers. In doing so, the STB can require a railroad to meet its service obligations; compel a railroad to provide an alternative through route with another railroad for specific traffic; provide switching for another railroad; or provide another railroad with access to terminal facilities.

The STB has limited regulatory authority over the National Railroad Passenger Corporation (Amtrak) under Title 49 of the USC s. 24308(c). Amtrak-owned railroad include 363 miles of the 456-mile Northeast Corridor railroad from Washington to Boston. Amtrak concurrently owns commuter trains. However, 70 per cent of the train-miles travelled by Amtrak trains are on tracks owned by external freight and commuter railroads. Amtrak receives federal investment to support its operating and capital needs.[1359] This authority mandates the STB to ensure that Amtrak may operate over the track of the nation's freight railroads, and to adjudicate disputes between Amtrak and individual freight railroads concerning shared use of tracks and other facilities, and to set the terms and conditions of such use if Amtrak and the freight railroad fail to reach a voluntary agreement.[1360]

[1352] Rules governing the STB are Title 49, Subtitle I, Chapter 7, Subchapters I and II, and Title 49, Subtitle IV, Part A of the *United States Code*.
[1353] *United States Code*, Title 49, s. 10742.
[1354] *United States Code*, Title 49, s. 10709.
[1355] *United States Code*, Title 49, s. 11101.
[1356] See Productivity Commission, *Review of National Access Regime: Inquiry Report*, 2001.
[1357] *United States Code*, Title 49, s. 10701.
[1358] *United States Code*, Title 49, s. 10701(a).
[1359] See Amtrak, *Annual Report 2007*.
[1360] *United States Code*, Title 49, ss. 24308(A) and 24904(c).

The STB has statutory authority in regulating competition law in the rail industry. Rail carriers must gain STB's approval before seeking to merge as required under Title 49 of the USC ss. 11323–25. The STB's authorisation exempts the transaction from all other laws (including anti-trust laws).[1361]

Regulatory Institutions and Legislation (State)

State rail regulation is either conducted by the State departments of transportation, or independent agencies. In New York, for example, the Department of Transport is responsible for coordinating state transportation policy, facility development, public safety, as well as directing state regulation of such carriers in matters of rates and service.[1362] In Texas and California, rail is regulated by independent agencies, namely the Rail Road Commission of Texas and the California Public Utilities Commission respectively. The CPUC has regulatory responsibilities relating to Californian law or under its own rules, but does not appear to be responsible for approving the sale of carriers in the manner of energy, water and telecommunications. The processes of the CPUC are discussed in the Chapter 'State Regulatory Arrangements in the United States'.

The remainder of this section surveys the regulatory processes and procedures used by the federal rail regulator – the STB.

Process and Consultation

Regulatory investigations may arise for STB determination via a complaint submitted by an aggrieved party. Alternatively, the STB may conduct investigations on its own initiative.

For complaints, detailed information must be submitted with a complaint, including history of the traffic, transport alternatives and the parties' relevant financial records. The complainant must also provide to the defendant all documents relied upon in formulating its assessment of the dispute. Complaints cannot be brought before the STB without a prior consideration of using the voluntary arbitration process. In all complaint proceedings, the parties must discuss discovery and procedural matters. Facts disclosed in the course of the pre-hearing conference are privileged and, except by agreement, will not be used against participating parties either before the STB or elsewhere, unless fully corroborated by other evidence. It is possible for parties to issue a cross complaint, where relevant.

The STB will convene a technical conference for its staff and the parties prior to the filing of any evidence in a stand-alone cost rate case,[1363] for the purpose of reaching agreement on variable cost calculation methodology and resolving certain factual disputes between the parties. In addition, parties may be directed to appear before an officer for a conference, prior to or during the course of a hearing, to discuss issues of the dispute including the simplification of issues; the necessity or desirability of amending the pleadings; and the procedure at the hearing. Informal conferences

[1361] The *Antritrust Enforcement Bill* 2009 removes antitrust exemptions protecting freight railroads from competition. The bill has been approved by the US Senate Judiciary committee and is on a legislative calendar. See information on: http://www.maplight.org/map/us/bill/79045/default/links.html [accessed on 8 April 2009].

[1362] New York State Department of Transportation, *Responsibilities and Functions*. Available at: https://www.nysdot.gov/portal/page/portal/about-nysdot/responsibilities-and-functions [accessed on 8 April 2009].

[1363] Large rail rate cases are those that are reviewed under what is known as the 'stand-alone cost' (SAC) methodology.

among STB staff and the parties also enable the narrowing of issues in dispute and discovery disputes/conflicts.[1364]

These initial conferences and submissions involve a collaborative determination of the schedule of proceedings by the parties and the regulator. However, the final determination of this schedule must be approved by the STB.[1365]

A decision by the STB to institute an investigation will be served upon respondents. If a respondent fails to comply with any requirement specified in the decision within the stated time period, the respondent will be deemed in default and to have waived any further proceedings and the investigation may be decided immediately. Examination of decision documents indicates that further proceedings usually involve a public hearing in which aggrieved and interested parties may make statements. The STB then makes a tentative agreement before seeking further written comments from relevant parties. Based on this additional information the STB makes a final decision.[1366]

Alternative Dispute Resolution – Arbitration

The STB strongly encourages private-sector agreements rather than dispute resolution in a formal litigation process.[1367] It has adopted a voluntary alternative dispute resolution (ADR) process and provides assistance to parties in a dispute informally.

Complainants bringing cases before the STB must first consider using the agency's voluntary arbitration process. The complainant must consequently include a statement that arbitration was considered, but rejected, as a means of dispute resolution.[1368] Further, for all rates disputes, participation in a nonbinding mediation process is mandatory.[1369]

Evidence of the success of private-sector resolutions of disputes is seen in the number of requests for voluntary dismissal or discontinuance of a variety of proceedings in each fiscal year since the establishment of the STB.

[1364] Surface Transportation Board (STB), *Surface Transportation Board Requests Comment on Proposed Procedures to Expedite Resolution of Large Rail Rate Challenges*, 2002. Available at: http://www.stb.dot.gov/newsrels.nsf/0/936af2d2b302774285256c2a0051ecb5?OpenDocument [accessed on 25 July 2008].

[1365] STB, *Dairyland Power Cooperative v. Union Pacific Railroad Company*, 2008. Available at: http://www.stb.dot.gov/decisions/readingroom.nsf/51d7c65c6f78e79385256541007f0580/f07a9882f757563085257494005 63cb2?OpenDocument#_ftn6 [accessed on 15 August 2008].

[1366] STB, *Surface Transportation Board Proposes Removing Product and Geographic Competition as Factors in Market Dominance Determinations*, 1998. Available at: http://www.stb.dot.gov/newsrels.nsf/0/20c0e2cfa4cf8a6d852565f500627404?OpenDocument [accessed on 15 August 2008].

[1367] STB, *Surface Transportation Board Summarizes Private-Sector Dispute Resolution of Pending Proceedings*, 2001. Available at: http://www.stb.dot.gov/newsrels.nsf/0/762c72576f120efd85256a020056c692?OpenDocument [accessed on 24 July 2008].

[1368] STB, *Surface Transportation Board Issues Decision on Use of Arbitration to Resolve Disputes in Railroad Matters*, 2002. Available at: http://www.stb.dot.gov/newsrels.nsf/0/0d95aae6a00950f385256bc1005696d9?OpenDocument [accessed on 24 July 2008].

[1369] STB, *Surface Transportation Board Simplifies Issues Decision on Use of Arbitration to Resolve Disputes in Railroad Matters*, 2001. Available at: http://www.stb.dot.gov/newsrels.nsf/219d1aee5889780b85256e59005edefe/8382be432599e2c28525734d005bb616?OpenDocument [accessed on 15 August 2008].

Submissions to the STB that a dispute is to be arbitrated must be accompanied by a written complaint that details the nature of the dispute; the statutory basis of STB jurisdiction, a statement of each issue as to which arbitration is sought and the specific relief sought.

Any defendant willing to enter into arbitration must, within 30 days of the date of a complaint, answer the complaint in writing, addressing each factual allegation, and making affirmative defences, and any counterclaims.[1370]

Discovery will be available only if the parties agree. Evidence will be submitted under oath either in writing or orally, at the direction of the Arbitrator who may also require additional evidence. Hearings for the purpose of cross-examining witnesses may be permitted by the Arbitrator.

The dispute-resolution process may involve parties directly involved in the dispute; industry bodies and consumer groups such as shipper associations, railroad associations, freight railroads and agricultural shippers; government departments, and; other interested parties.

The evidentiary process should be completed within 90 days from the start date established by the arbitrator. The arbitrator's decision will be issued within 30 days from the close of the record and shall contain findings of fact and conclusions. The Arbitrator is not bound by formal rules of evidence, but avoids basing a decision entirely or largely on unreliable proof.

An Arbitrator may grant monetary damages, to the extent available under the *Interstate Commerce Act* and require specific performance of statutory obligations (including the prescription of reasonable rates) for a period not to exceed three years from the effective date of the Arbitrator's award.

The decision and award of the Arbitrator is binding and enforceable, subject to a limited right of appeal to the STB.[1371] A party may petition an Arbitrator to modify or vacate an arbitral award, based on materially changed circumstances or the criteria for vacation of an award contained in Title 9 of the USC Chapter 10.[1372]

Timeliness

There was previously significant controversy regarding smaller rail rate case dispute resolution procedures. In 1995, Congress directed the STB to establish a simplified and expedited method for resolving smaller rail rate disputes.[1373] The STB's dispute resolution procedures include an expedited procedural schedule that calls for a decision within approximately eight or 17 months of filing a complaint (dependent on the nature of the dispute). More specifically, the simplified *Three Benchmark* process (established in 2007), enables freight rail customers to obtain an award of up to US$1 million in relief within eight months of filing a complaint. This process involves

[1370] *Code of Federal Regulations*, *Title 49 – Transportation; Subtitle B – Other Regulation Relating to Transport (continued) Chapter X – Surface Transportation Board*, 2007. Available at: http://www.access.gpo.gov/nara/cfr/waisidx_07/49cfrv8_07.html#1000 [accessed on 24 July 2008].
[1371] Ibid.
[1372] Ibid.
[1373] STB, *Surface Transportation Board Simplifies Issues Decision on Use of Arbitration to Resolve Disputes in Railroad Matters,* 2001. Available at: http://www.stb.dot.gov/newsrels.nsf/219d1aee5889780b85256e59005edefe/8382be432599e2c28525734d005bb616?OpenDocument [accessed on 15 August 2008].

technical procedures that must be followed such as use of the Revenue Shortfall Allocation Method benchmark formula.

Mid-sized rail shipments are eligible to utilise the 'Simplified Stand Alone Cost' process, in which freight rail customers can obtain an award of up to US$5 million in relief within 17 months of filing a complaint.[1374] Freight rail customers can choose which rate dispute resolution process they would like to use.

Any proceeding may be held in abeyance for 90 days while ADR procedures (such as arbitration and mediation) are pursued and an additional 90 day periods can be requested. The period while any proceeding is held in abeyance to facilitate ADR will not be counted towards the statutory deadlines.[1375]

With respect to alternative dispute resolution, the arbitrator will establish the rules and timetables for each arbitration proceeding. The parties may agree to vary these timetables subject to the Arbitrator's approval. Matters handled through arbitration under these rules are exempted from any applicable statutory time limits.[1376]

An answer to a complaint by the defendant must be filed within 20 days after the service of the complaint or within a longer time if the STB agrees. The answer should fully advise the STB and the parties of the nature of the defence.[1377]

An answer to a complaint may be accompanied by a motion by the defendant to dismiss the complaint or a motion to make the complaint more definite. A motion to dismiss can be filed at anytime during a proceeding, but is rarely granted. Under Title 49 of the *United States Code* s. 11701(b), the STB may dismiss a complaint if it 'does not state reasonable grounds for investigation and action'.[1378]

A complainant may, within ten days after an answer is filed, file a motion to make the answer more definite. Any motion to make more definite must specify the defects in the particular pleading and must describe fully the additional information or details thought to be necessary.

Delays in resolving large rate cases continue to be a concern to the STB. Many of the delays have traditionally been a consequence of discovery disputes (in terms of attempts to access particular documents and information), which are ultimately brought to the STB for resolution.[1379] Incumbents will also have incentives to cause delay to the proceedings by failing to provide information in a timely fashion. These incentives are mitigated by the STB mandating that failure to respond to complaints in time results in the claims made in a complaint being admitted.[1380] In addition, in the interest of facilitating discovery and the prompt and efficient resolution of a

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[1374] Ibid.
[1375] *Code of Federal Regulations*, *Title 49 – Transportation; Subtitle B – Other Regulation Relating to Transport (continued) Chapter X-Surface Transportation Board*, 2007.
[1376] Ibid.
[1377] STB, *Surface Transportation Board Announces Results of February 23 Voting Conference*, 2005. Available at: http://www.stb.dot.gov/newsrels.nsf/0/c5334a770c91b7eb85256fb1005e18f9?OpenDocument [accessed on 24 July 2008].
[1378] STB, *Dairyland Power Cooperative v. Union Pacific Railroad Company*, op. cit.
[1379] STB, *Surface Transportation Board Requests Comment on Proposed Procedures to Expedite Resolution of Large Rail Rate Challenges*, 2002. Available at: http://www.stb.dot.gov/newsrels.nsf/0/936af2d2b302774285256c2a0051ecb5?OpenDocument [accessed on 25 July 2008].
[1380] STB, *February 23 Voting Conference*, op. cit.

proceeding, the STB may issue an order allowing the limited disclosure to parties to the case of certain confidential, proprietary, or commercially sensitive information.

Role of Interested Parties

Industry participants are represented by the Railroad-Shipper Transportation Advisory Council (RSTAC). The RSTAC was established after the termination of the Interstate Commerce Commission in 1995. The RSTAC consists of 15 private sector senior officials representing large and small shippers, and large and small railroads, the Secretary of the US Department of Transportation and the three STB members. Its functions are to advise the STB on regulatory, policy and legislative matters relevant to small shippers and small railroads.[1381]

In addition, in November 2000, the STB's Rail Consumer Assistance Program was established. This program provides the public with access to informal assistance with any type of transportation problem related to rail service. The program is administered by the STB's Office of Public Assistance, Governmental Affairs and Compliance (OPAGAC), is nationwide in scope, and allows anyone with a problem involving a railroad subject to the STB's jurisdiction to contact the STB informally.

The National Grain Car Council (NGCC) assists the STB in addressing problems concerning rail transportation of grain. The NGCC is established under the *Federal Advisory Committee Ac*t and is comprised of representatives from Class I, II and III railroads, grains shippers and receivers and rail car owners and manufactures, and STB members. The purpose of the Council is to convene meetings at least once a year that allow the members to discuss openly the issues affecting the grain transportation industry.

The Rail Energy Transportation Advisory Committee (RETAC) was established by the STB in July 2007 for advice and guidance, and for serving as a forum for discussion of emerging issues, regarding the transportation by rail of energy resources (including, but not necessarily limited to, coal, ethanol, and other biofuels). The RETAC is comprised of 23 voting members, representing a balance of stakeholders with an interest in energy transportation by rail, including large and small railroads, coal producers, electric utilities, the biofuels industry, and the private railcar industry. The three members of the STB serve as *ex officio* members of the RETAC, along with representatives of the Departments of Agriculture, Energy, Transportation, and the Federal Energy Regulatory Commission.

Expert panels may be constructed in the alternative dispute resolution process to resolve issues.[1382] In investigations on its own initiative, the STB may seek comments from relevant expert consultants.[1383]

[1381] STB, *Rail Consumers-Railroad-Shipper Transportation Advisory Council,* 2001. Available at: http://www.stb.dot.gov/stb/rail/railshipper_council.html [accessed on 25 July 2008].

[1382] STB, *Surface Transportation Board Responds to Shipper Requests to Modify Procedures for Discussing Revenue Adequacy, Competitive Access Issues with Railroads*, 2005. Available at: http://www.stb.dot.gov/newsrels.nsf/0/d697dbb0931ac0c7852565fa004f3efb?OpenDocument [accessed on 15 August 2008].

[1383] STB, *Methodology to be Employed in Determining the Railroad Industry's Cost of Capital*, 2005. Available at: http://www.stb.dot.gov/decisions/readingroom.nsf/WebDecisionID/37949?OpenDocument [accessed on 15 August 2008].

A preliminary examination of the STB website and relevant legislation did not find evidence of specific funding arrangements in place for user groups or other relevant bodies.

Information Disclosure and Confidentiality

The parties, rather than the STB, have the responsibility for gathering sufficient information to prove unlawful conduct by the defendant.[1384] The incumbent has incentives to cause delay to the proceedings by extending discovery procedures. To ensure this procedure is not employed for the purpose of delay, the STB has established clear standards for obtaining discovery.[1385] The standards are more restrictive in large rate cases, so that parties would know in advance that they should not attempt to obtain certain types of information.[1386]

Discovery is to be complete 75 days after the complaint is served. Parties then both file opening evidence to the STB – that is, a formal statement based on internal information and the information collected in the discovery process. This is followed by rebuttal evidence from both parties. Simplified procedures may be used if the STB deems that the case is less complex.

The Arbitrator shall take neccssary measures to ensure that any matters are treated confidentially where a party to an arbitration proceeding wishing this to be the case. If the Arbitrator regards any confidential submission as being essential to the written decision, such information may be considered in the decision, but the Arbitrator will make every effort to omit confidential information from the written decision.[1387]

In all ADR matters involving the STB, whether under the *Administrative Dispute Resolution Act* or not, the confidentiality provisions of that Act (Title 5 of the USC s. 574) shall bind the STB and all parties and neutrals in those ADR matters.[1388]

With respect to formal complaints in answering interrogatories, a party may request a protective order.[1389] If granted by the STB, the Arbitrator must maintain the confidentiality of certain proprietary or commercially sensitive information.

In addition, facts disclosed in the course of the pre-hearing conference are privileged and, except by agreement, will not be used against participating parties either before the STB or elsewhere, unless fully corroborated by other evidence.

The frequency of STB's use of its information-gathering powers is not detailed in any documents published on the STB's website.

Parties may access information held by the STB under the *Freedom of Information Act* subject to the nine exemptions outlined previously. The STB's website publishes documents including Agency decision and notices; reports and major decisions; all filings (other than confidential documents) on all proceedings; and audio archives of STB meetings, transcripts of hearings and statements by members and staff at voting conferences. Hard copy access to these documents is available from the *Federal*

[1384] STB, *Dairyland Power Cooperative v. Union Pacific Railroad Company*, op. cit.
[1385] STB, *February 23 Voting Conference*, op. cit.
[1386] At the board's discretion, information may also be obtained through an oral argument, in which parties present their positions in a public forum. It is unclear in what cases this process is utilised.
[1387] *Code of Federal Regulations*, *Title 49 – Transportation; Subtitle B – Other Regulation Relating to Transport (continued) Chapter X – Surface Transportation Board*, 2007.
[1388] Ibid.
[1389] *Code of Federal Regulations*, Title 49, s. 1104.14.

Register. STB decision and relevant filings are also available from the agency's reading room.

Decision-making and Reporting

The STB Board is comprised of three members, who are appointed by the President and confirmed by the Senate for five-year staggered terms. The STB's Chairman is designated by the President from the members. The Chairman coordinates and organises the agency's policies, resolution of regulatory matters and acts as its representative in relations with other government bodies. The Vice Chairman is elected by the Board for a one-year term. All heads of offices report to the Chairman.

The Board considers all rulemaking, investigations, matters submitted for decision (except where assigned to an individual employee or commissioner), administrative appeals in a matter previously considered by the STB, determines whether to reconsider a decision being challenged in court and all appeals of initial decisions issued by the director of Office of Proceedings.

Information before the Board predominately involves the information brought by the parties in the dispute in making and answering their complaint and via the pre-trial discovery (fact-finding) process.[1390] The Office of Proceedings provides legal research and prepares draft decisions for cases before the STB and prepares the decision made by the Board.

The Board, having considered all the evidence, issues a final decision to resolve the dispute. This is determined by a majority vote by Board members.[1391] The *Code of Federal Regulations* mandates that the STB must provide and publish reasons for its final decision.

The Chairman may reassign related proceedings to a board of employees and may remove a matter from an individual Board Member or employee or employee board for consideration and disposition by the Board. In addition, the Chairman may authorise any officer, employee, or administrative unit of the Board to perform a function vested in or delegated to the Chairman.[1392]

The STB is a determinative body. However it concurrently liaises and provides advice to Congress. In particular the Office of Governmental and Public Affairs works with Members of Congress, state, local and municipal governments and provides them with information about the STB's procedures and actions and about transportation regulation more generally.[1393]

The Board is supported by approximately 140 staff consisting of lawyers, economists, transportation industry specialists and administration that are organised into four offices: [1394]

- The Office of Compliance and Enforcement monitors the activities of companies that are regulated by the STB and assists the resolution of informal complaints against companies;[1395]

[1390] STB, *February 23 Voting Conference*, op. cit.
[1391] Ibid.
[1392] STB, *About STB – Overview*, 2008. Available at: http://www.stb.dot.gov/stb/about/overview.html [accessed on 23 July 2008].
[1393] STB, *About STB: OGPA Office*, 2008. Available at: http://www.stb.dot.gov/stb/about/office_ogpa.html [accessed on 21 August 2008].
[1394] Ibid.

- The Office of Economics, Environmental Analysis, and Administration conducts economic and financial analyses of the railroad industry; and other studies;
- The Office of General Counsel provides legal advice to the STB and defends STB decisions challenged in court;
- The Office of Proceedings provides legal research and prepares draft decisions for cases before the STB.

The arbitration process is voluntary. An arbitrator (or panel of arbitrators) is selected from a roster of persons (other than active government officials) experienced in rail transportation or economic issues similar to those capable of arising before the STB. Alternatively, the parties to a dispute may select an arbitrator. Any person designated by a party who is not already on the roster, if found to be qualified, will be added to the roster and may be used as the arbitrator for that dispute.

If the parties cannot agree upon an arbitrator (or panel of arbitrators), then each party shall, using the roster of arbitrators, strike through the names of any arbitrators to whom they object, number the remaining arbitrators on the list in order of preference, and submit its marked roster to the Chairman of the STB. The Chairman will then designate the arbitrator (or panel of arbitrators, if mutually preferred by the parties) in order of the highest combined ranking of all of the parties to the arbitration.[1396]

Arbitrators are not bound by any procedural rules or regulations adopted by the STB for the resolution of similar disputes. However, arbitrators are guided by the *Interstate Commerce Act* and by STB and ICC precedents.[1397]

The decision and award of the Arbitrator is binding and judicially enforceable in law and equity in any court of appropriate jurisdiction, subject to a limited right of appeal to the STB.[1398] Decisions made by arbitrators have no precedential value.

Appeals

An arbitration decision may be appealed to the STB within 20 days of service of such decision. Any such appeal shall be served by hand delivery or overnight mail on the parties and on the STB, together with a copy of the arbitration decision. Replies to such appeals may be filed within 20 days of the filing of the appeal with the STB. The filing of an appeal automatically will stay an arbitration decision pending disposition of the appeal. The STB will decide any such appeal within 50 days after the appeal is filed. Appeals from arbitration decisions are limited to clear errors of general transportation importance, and not issues of causation or fact. Arbitration awards can be challenged on the basis that they do not take their essence from the *Interstate Commerce Act*, or are not limited to the matters the parties have referred for arbitration.[1399]

[1395] STB, *Surface Transportation Board FY 2002–2004 Report*, 2004. Available at: http://www.stb.dot.gov/stb/about/annual.html [accessed on 24 July 2008].
[1396] *Code of Federal Regulations*, *Title 49 –- Transportation; Subtitle B – Other Regulation Relating to Transport (continued) Chapter X – Surface Transportation Board*, 2007.
[1397] Ibid.
[1398] Ibid.
[1399] Ibid.

Arbitration decisions will become effective in 30 days unless a party seeks a stay of the decision within ten days of its issuance, and the stay is granted. Appeals and stay petitions should be limited to extraordinary circumstances.[1400]

Alternatively, parties may apply or 'petition' for discretionary review; that is a reconsideration of the STB's decision if there was evidence of the STB committing a material error in its prior decision.[1401] Parties may also request the STB to issue a declaratory order clarifying a particular decision.[1402]

Judicial review of most STB decision is available in the US District Court of Appeal in Columbia.[1403] Review is available from Federal district courts for STB orders that are solely for the payment of money and for certain matters referred to the STB by district courts.[1404] Under Title 49 of the USC s. 703(d), the STB defends its own decisions against challenges in court and may appear in any civil court action matters within its jurisdiction.[1405]

Regulatory Development

The regulation of rail in the US is administered by the STB and by state regulators. The STB regulates competition law in the rail industry. Competitors can gain access to rail infrastructure in particular ways, but access regulation is subject to a 'market dominance' test. Regulatory processes are transparent and consultative, advised by bodies such as RSTAC and RETAC. Alternative Dispute Resolution procedures operate, but where the STB makes arbitration decisions they can be appealed to the STB under limited circumstances or to the Court.

In 2007, the STB commissioned an independent research team to conduct a rigorous study of the competitive state of the US freight railroad industry, in response to a call by the US Government Accountability Office.[1406] With assistance from the STB and various stakeholders through intensive consultation over the course of this year-long study, the team found that increases in railroad rates are not a result of an abuse of market power. Nevertheless, it made several rail-specific policy recommendations on increasing competitiveness in the industry. It also suggested that regulatory oversight is necessary in areas whether competition is not viable.

6. Airports

Commercial airports in the US are virtually all owned and operated by local or state governments. The largest and busiest airports in the United States include Atlanta Airport, Dallas-Fort Worth, Chicago O'Hare Airport, John F Kennedy airport in New York, and Los Angeles Airport. Public-use general aviation airports are both publicly and privately owned.

[1400] Ibid.
[1401] STB, *February 23 Voting Conference*, op. cit.
[1402] Ibid
[1403] *United States Code*, Title 28, ss. 2321 and 2342(5).
[1404] *United States Code*, Title 28, ss. 1336 and 2321.
[1405] STB, 2004, op. cit., p. 66,
[1406] Christensen Associates, *A Study of Competition in the U.S. Freight Railroad Industry and Analysis of Proposals that Might Enhance Competition*, Final Report prepared for the Surface Transportation Board, November 2008. Available at: http://www.stb.dot.gov/stb/elibrary/CompetitionStudy.html [accessed on 10 February 2009].

Regulatory Institutions and Legislation

Title 14 of the *Code of Federal Regulations*, titled Aeronautics and Space, contains regulations governing the airport industry. In particular, Part 16 relates to the compliance of federally funded airports (any airport included in the NPIAS – see below) with the obligations in their funding contracts (called grant assurances), such as non-discriminatory access to infrastructure built with federal funding or a prohibition against granting exclusive operational rights for infrastructure.

The Department of Transport is authorised to review the reasonableness of airport fees charged to airlines if it receives a complaint or request for determination and a finding of a significant dispute.[1407]

The National Plan of Integrated Airport Systems (NPIAS) identifies more than 3 300 airports that are significant to national air transportation and thus are eligible to receive Federal grants under the Airport Improvement Program (AIP). When airports receive Federal grant funds or the transfer of Federal property for airport purposes, their owners or sponsors must accept certain obligations and conditions. These obligations may be incurred by contract (Grant Assurances) or by restrictive covenants in property deeds. Anyone concerned about an airport's compliance with these obligations may file informal or formal complaints with the Federal Aviation Administration (FAA).

The FAA is responsible for the safety of civil aviation and was created by the *Federal Aviation Act 1958* (as the Federal Aviation Agency). The FAA is part of the Department of Transportation. Its major roles include regulating civil aviation to promote safety; encouraging and developing civil aeronautics, including new aviation technology; developing and operating a system of air traffic control and navigation for both civil and military aircraft; researching and developing the National Airspace System and civil aeronautics; developing and carrying out programs to control aircraft noise and other environmental effects of civil aviation; and regulating US commercial space transportation.

Process and Consultation

Matters arise before the FAA in two ways. The FAA may accept formal complaints in writing under Title 14 of the *Code of Federal Regulations* Part 16 (Part 16), *Rules of Practice for Federally-Assisted Airport Enforcement Proceed*ings. Parties filing under Part 16 must be substantially affected by the alleged non-compliance. The FAA may also consider informal complaints about 'small matters'. Alternatively, the FAA may initiate its own investigation of any matter.[1408]

The FAA accepts informal complaints either verbally or in writing under Title 14 of the *Code of Federal Regulations* Part 13.1, *Investigative and Enforcement Procedures*. FAA regional staff usually looks into these complaints and determine what course of action to take. Part 13 imposes no time deadlines for issuing decisions regarding informal complaints.

The FAA accepts formal complaints in writing under Part 16 from the parties substantially affected by the alleged non-compliance. Part 16 imposes strict deadlines

[1407] Federal Aviation Administration (FAA), *Federal Register / Notice*, 73, 12, 17 January 2008, Available at: https://employees.faa.gov/documentLibrary/media/2120_AF90.pdf [accessed on 10 February 2009].
[1408] *Code of Federal Regulations (CFR)*, Title 14, s. 16.101.

for filing, adjudication, and appeal. It also lists specific requirements for filing a Part 16 complaint.

The process for handling formal complaints can be divided into four broad stages: pre-filing; director's consideration; hearing and appeal. The first two stages are consultative and discussion-centred. As matters progress to the hearing stage, the process becomes more litigious. Cases are presented in a court room style setting and the regulator becomes a party in the hearing, with a burden of proof of non-compliance.

Prior to filing a formal complaint (the pre-filing stage), the complainant must try to resolve the disputed matter informally with the relevant party(ies). Efforts at informal resolution may include mediation, arbitration, or the use of a dispute resolution board, or other form of third party assistance. The Airports District Office, Airports Field Office, or Regional Airports Division within the FAA are available upon request to assist the parties with informal resolution.[1409] At any time in the informal dispute resolution process, the parties and the FAA may agree to resolve the complaint by consent order.[1410]

Unless the complaint is resolved informally or dismissed, the complaint will be considered by a director and an initial decision will be made on the basis of the respective points of view of the parties.

A person subject to a proposed compliance order as a result of a Director's determination may within 20 days:

- Request a hearing
- Waive a hearing and appeal the Director's determination in writing to the Associate Administrator
- File, jointly with a complainant, a motion to withdraw the complaint and to dismiss the proposed compliance action
- Submit, jointly with the agency attorney, a proposed consent order.[1411]

If the respondent fails to request a hearing or to file an appeal in writing within the time periods, the Director's determination becomes final and is not judicially reviewable.[1412]

If the complaint progresses to the hearing stage it will be preceded by a pre-hearing conference. A pre-hearing conference will be held to address matters raised in the pre-hearing conference notice and other matters that will assist in a prompt, full and fair hearing of the issues.[1413]

At the close of the pre-hearing conference, the hearing officer rules on any requests for evidence and the production of documents in the possession of other parties, responses to interrogatories, and admissions. The pre-hearing officer also rules on any requests for depositions, on any proposed stipulations, and on any pending applications for subpoenas as permitted by s. 16.219 of Title 14 of the *Code of Federal Regulations*. In addition, the hearing officer establishes the schedule which

[1409] *CFR*, Title 14, s. 16.21(a).
[1410] *CFR*, Title 14, s. 16.243(a).
[1411] *CFR*, Title 14, s. 16.109(c).
[1412] *CFR*, Title 14, ss. 16.33(e) and 16.109(d).
[1413] *CFR*, Title 14, s. 16.211(b).

will provide for an initial decision to be issued not later than 110 days after the Director's determination.[1414] Parties may incorporate witness accounts and expert opinions in their written submissions to the agency.

The parties to the hearing are the respondent(s) named in the hearing order, the complainant(s), and the FAA. In accordance with the provisions on intervention and other participation, [1415] a person may submit a motion for leave to intervene as a party no later than ten days after the notice of hearing and hearing order. The motion may be granted if the hearing officer finds that intervention will not unduly broaden the issues or delay the proceedings and, if the person has a property or financial interest that may not be addressed adequately by the parties. Other persons may also petition the hearing officer for leave to participate in the hearing. However, such participation is limited to the filing of post-hearing briefs and reply to the hearing officer and the Associate Administrator.

During a hearing, parties may call on experts and consultants as witnesses, subject to the approval of the hearing officer. However, an employee of the FAA or Department of Transportation may not be called as an expert or opinion witness for any party other than the FAA.[1416]

Each party adversely affected by the hearing officer's initial decision may file an appeal with the Associate Administrator no later than 15 days after the initial decision is issued. Each party may file a reply to an appeal within 10 days after it is served on the party. If an appeal is filed, the Associate Administrator will review the entire record and issue a final agency decision no later than 30 days after the due date of the reply. The Associate Administrator may take review of the case on own motion. In this case, the parties may file one brief on review to the Associate Administrator. If the Associate Administrator finds that the respondent is not in compliance with the Act, the final order of the FCC will include a statement of corrective action (if appropriate) and identify sanctions for continued non-compliance.

If no appeal is filed, and no review is initiated on the Associate Administrator's own motion, then the initial decision will become the final decision of the FAA on the sixteenth day after the initial decision was issued.

The failure to file an appeal is deemed a waiver of any rights to seek judicial review of an initial decision that becomes a final decision. A person may seek judicial review of a final agency decision and an order of an Associate Administrator in a United States Court of Appeals.

In addition to handling complaints, the FAA may initiate its own investigation of any matter where it considers an airport may not be in compliance with its regulatory obligations. The investigation may include a review of written submissions or pleadings from relevant parties as well as additional information requested by the FAA. However, the FAA may make an initial decision solely on the basis of a complaint and responses in reply to that complaint. Alternatively, an FAA-initiated investigation may involve the audit of airport financial records and transactions by either the FAA or a party appointed by the FAA.

Once an investigation is initiated, the FAA notifies the persons subject to investigation of the details of the investigation, the date of service and the

[1414] *CFR*, Title 14, s. 16.211(c).
[1415] *CFR*, Title 14, s. 16.207.
[1416] *CFR*, Title 14, s. 16.223(g).

opportunities that are available to resolve the matter, including through informal processes.[1417]

If the matters addressed in the FAA notices are not resolved informally, the FAA may issue a Director's determination,[1418] from which point the same processes as for formal complaints (discussed above) will be applicable.

Timeliness

The formal decision-making and consultation process is structured around explicit and detailed timeframes. However, the informal dispute resolution process does not exhibit a timeframe within which processes must be completed. Indeed, such resolution continues to be available at any time throughout the formal complaint-resolution process.

With respect to the formal complaint process the key timeframes are as follows:

- Persons subject to an investigation initiated by the FAA are given 30 days to respond to the FAA's concerns.
- Where a formal complaint is lodged, the respondent and complainant must be notified within 20 days of the complaints filing.
- The respondent must file an answer within 20 days of service of the notification.
- The complainant may file a reply within ten days of the date of service of the answer.
- The respondent may file a rebuttal within ten days of the date of service of the complainant's reply.
- The Director will make an initial determination within 120 days of the date the last pleading was due.[1419]
- If a hearing is not required or provided for, an appeal of the Director's determination must be made within 30 days of the determination.
- A reply to an appeal must be filed within 20 days of the date of service of the appeal.
- The Associate Administrator must issue a final decision within 30 days of the due date of reply.[1420]
- If a hearing is provided for in the Director's determination, a person subject to a proposed compliance order has 20 days to respond, otherwise the Director's determination becomes final.[1421]
- If a hearing is held, an initial decision must be issued by the hearing officer no later than 110 days after the Director's determination unless otherwise provided for in the hearing order.

[1417] *CFR*, Title 14, s. 16.103.
[1418] *CFR*, Title 14, s. 16.105.
[1419] *CFR*, Title 14, s. 16.31(a).
[1420] *CFR*, Title 14, 16.241(c).
[1421] *CFR*, Title 14, 16.109(d).

- Each party may file an appeal with the Associate Administrator no later than 15 days after the initial decision is issued. Each party may file a reply to an appeal within ten days after it is served on the party.[1422]
- If an appeal is filed, the Associate Administrator will review the entire record and issue a final agency decision no later than 30 days after the due date of the reply.[1423]

A review of the five most recent decisions published on the FAA website shows that a final decision from a director's determination is usually reached within anywhere between eight and 12 months. The single determination to progress through the hearing stage to final decision was decided upon within 12 months of the formal complaint.

If the parties agree, the timelines may be extended by the hearing officer for a reasonable time to allow a document to be filed for a hearing.[1424] However, only one extension of time will be granted to each party. A written request for an extension of time should be made no later than seven days before the document is due unless good cause for the late filing is shown.

Role of Interested Parties

The FAA is not required to consult any particular consumer group, user group or industry association in relation to Part 16 disputes regarding access and regulatory compliance. Disputes are handled between the parties involved without, necessarily, outside consultation.

Nevertheless, the FAA hosts various conferences and forums related to Airports and the various other functions of the FAA (such as safety, aviation, and aircraft). In particular, the FAA hosts annual airport conferences for each region joining industry participants, users and the regulator. The major industry body is the American Association of Airport Executives (AAAE). The AAAE is a not-for-profit organisation funded through membership fees and donations. The FAA website contains an extensive news and information section including research derived from consultation with industry and other interested groups.

Information Disclosure and Confidentiality

The FAA has the power to compel production of oral and documentary evidence. Its statutory authority to do so has been delegated to the Chief Counsel, the Deputy Chief Counsel, the Assistant Chief Counsel for *Airports and Environmental Law*, and each Assistant Chief Counsel for a region or centre.

In relation to investigating complaints,[1425] the FAA has the authority to compel production of additional oral and documentary evidence under s. 313 *Aviation Act*,[1426] and s. 519 of the *Airport and Airway Improvement Act*.[1427]

During a hearing, the parties have an obligation to supply information requested by the hearing officer and may be the subject to discovery orders. Discovery is limited to requests for admissions, requests for production of documents, interrogatories, and

[1422] *CFR*, Title 14, s. 16.241(b).
[1423] *CFR*, Title 14, s. 16.103.
[1424] *CFR*, Title 14, s. 16.209.
[1425] *CFR*, Title 14, s. 16.29(b)(2).
[1426] *United States Code*, Title 49, ss. 40113 and 46104.
[1427] *United States Code*, Title 49, s. 47122.

depositions. The hearing officer shall limit the frequency and extent of discovery permitted by this section if a party shows that:[1428]

- The information requested is cumulative or repetitious;
- The information requested may be obtained from another less burdensome and more convenient source;
- The party requesting the information has had ample opportunity to obtain the information through other discovery methods permitted; or
- The method or scope of discovery requested by the party is unduly burdensome or expensive.

The parties or their witnesses may also be the subject of a subpoena sought by the other party.

The hearing officer may order that any information contained in the record be treated as confidential and not disclosed to the public if the hearing officer determines that disclosure would be in violation of the *Privacy Act*, would reveal trade secrets or privileged or confidential commercial or financial information, or is otherwise prohibited by law.[1429] Any person may request such treatment in writing, giving specific reasons for non-disclosure.

The FAA maintains a 'statistics and data' section on the airports section of its website which contains statistics about all aspects of the industry. There is also a 'publications' section of the website containing up-to-date information on the latest legislative changes, industry updates, research studies and other relevant publications.

Third party may have access to information gathered by the FAA, subject to exemptions under the *Freedom of Information Act* (discussed previously).[1430] Documents are lodged and stored in an electronic database called the Federal Docket Management System (FDMS).[1431] The FAA also maintains an electronic reading room with all FAA records accessible to the public. Proprietary information is not placed in the Docket but held in a separate file to which the public does not have access. A note, however, is placed in the docket that the information has been received.

Decision-making and Reporting

The FAA is an administration under the US Department of Transportation. The FAA administrator is appointed by the president. The Administrator is assisted by a number of advisory committees whose charters are approved by the Secretary for Transportation. It is also assisted by a number of rulemaking committees whose charters are approved by the Administrator. The FAA is divided into nine geographical regions and two major centres.

For access-related disputes and regulatory enforcement, the FAA is the determinative body and does not require approval of its decisions by another authority. However, the FAA also has an advising role to policy makers and conducts industry research.

[1428] *CFR*, Title 14, s. 16.213(b).
[1429] *CFR*, Title 14, s. 16.225.
[1430] *CFR*, Title 14, s. 11.35(b).
[1431] US Department of Transportation, *Frequently Asked Questions*. Available at: http://docketsinfo.dot.gov/FAQ.cfm [accessed on 11 Deceber 2008].

Decisions may be taken by a number of administrative officials including a Director, Associate Administrator and hearing officer.

A director's determination is made after the submissions of complaint, answer, reply and rebuttal by the parties and any further investigations undertaken by the agency. Each party adversely affected by the director's determination may appeal this determination to the Associate Administrator. The Director's determination will include a concise explanation of the factual and legal basis for the determination on each claim made by the complainant and will include notice of opportunity for a hearing in the case of an appeal being lodged. Notwithstanding any appeal the director's determination becomes the final agency decision.[1432]

A decision without hearing is given in cases where the director's determination does not provide the opportunity for a hearing or the respondent has waived the opportunity for a hearing and the determination is appealed by the adversely affected party. The Associate Administrator will consider the appeal and the reply to that appeal and give a final decision within 60 days of receiving them.

A hearing officer's decision and any order must be based solely on the transcript of hearing testimony, all exhibits received into evidence, all motions, applications requests and rulings, and all documents included in the hearing record.[1433] Notwithstanding appeals within 15 days of this decision, it will become the final decision.

A final decision refers to the final decision of the FAA arrived at by default through no appeal from the director's determination and/or the hearing officer's initial decision or by decision of the Associate Administrator after consideration of appeals from the hearing officer's initial decision. Final decisions arrived at through the latter avenue only may be appealed on judicial grounds to the Court of Appeals.

Decision reports are generally 30 to 40 pages in length for a director's determination and 20 to 30 pages in length for a final decision. The reports appear to follow a standard format.[1434]

Appeals

Any party adversely affected by a director's determination may lodge an appeal to the Associate Administrator (see the previous 'Process and Consultation' sub-section).

Appeals against final hearing decisions are made to the Court of Appeals and are considered on judicial grounds only.

The following do not constitute final decisions subject to judicial review:

- An FAA decision to dismiss a complaint without prejudice;
- A Director's determination;
- An initial decision issued by a hearing officer at the conclusion of a hearing;

[1432] *CFR*, Title 14, s. 16.31(b).
[1433] *CFR*, Title 14, s. 16.233(a).
[1434] The format includes Introduction, Description of the Parties, Background and Procedural History, Issues, Applicable Laws, Analysis and Discussion, Findings and Conclusions, Order and Right of Appeal.

- A Director's determination or an initial decision of a hearing officer that becomes the final decision of the Associate Administrator because it was not appealed within the applicable time periods.

The opportunity to seek merits review of a decision is given at two points in the decision-making process. First, a merits review may be requested by appealing the director's determination to the Associate Administrator and in the absence of such an appeal becomes a final decision of the Associate Administrator. Second, a merits review may be requested by appealing the hearing officer's initial determination (after a hearing) to the Associate Administrator and in the absence of such an appeal becomes a final decision of the Associate Administrator. An appeal to the Court of Appeals must be made within 60 days of the decision order being made.[1435]

7. Ports

There are more than 300 ports in the US with South Louisiana, Houston and New York the largest by tonnage.[1436] Ports may be operated by a state, a county, a municipality, a private corporation, or a combination. Many ports are complex entities, involving facilities for transportation by several modes of transportation: water, rail, road, or even air. Ports are an important part of the nationwide Marine Transportation System, which includes not only ports, but also inland and coastal waterways, and the inter-modal connectors. Currently, there are more than 150 deep-draft seaports under the jurisdiction of 126 public seaport agencies located along the Atlantic, Pacific, Gulf and Great Lakes coasts, as well as in Alaska, Hawaii, Puerto Rico, Guam, and the US Virgin Islands.

Public port agencies are established under state laws to develop, manage and promote the flow of waterborne commerce and act as catalysts for economic growth. These agencies include port authorities, special-purpose navigation districts, bi-state authorities and departments of state, county and municipal government. Many of these seaport agencies are governed by an elected and/or appointed body, such as a port commission. Seaport authorities develop and maintain the terminal facilities for intermodal transfer of cargo between ships, barges, trucks and railroads. Port authorities also lease land, and in some cases build and maintain facilities, for the cruise, excursion and ferry passenger industry.

Regulatory Institutions and Legislation

The Federal Maritime Commission (FMC) was established as an independent regulatory agency by Reorganization Plan No. 7, effective 12 August 1961. The FMC is responsible for the regulation of ocean-borne transportation in the foreign commerce of the US.

Under the *Shipping Act* of 1984,[1437] the FMC regulates certain practices of the entities that operate marine terminals. These designated 'marine terminal operators' (MTOs) are defined as parties that offer terminal services to ocean common carriers in foreign commerce. In practice, this definition covers three types of MTOs:

- Public port authorities

[1435] *CFR*, Title 14, Part 16,

[1436] US Army Corps of Engineers, *Tonnage for Selected U.S. Ports in 2003*. Available at: http://www.iwr.usace.army.mil/ndc/wcsc/portton03.htm [accessed on 11 December 2008].

[1437] *The United States Code*, Title 46, ss. 40101–41309 (previously codified as Title 46, Appendix, ss. 1701–1719). A copy of the *Shipping Act* of 1984 is available at: http://www.fmc.gov/about/ShippingAct.asp [accessed on 11 August 2008].

- Private terminal operators – companies that, typically, lease terminals from a public port authority (which acts as landlord) and operate those terminals as a private business that serves ocean common carriers calling at the port
- MTO Conferences – regulated organisations of multiple MTOs (port authorities, private MTOs, or both).

The FMC's regulations apply to two particular MTO activities:

- The publication of MTO rates, regulations, and other practices in MTO Schedules; and
- Agreements among MTOs, or between MTOs and ocean carriers, to discuss, fix, or regulate rates or other conditions of service in foreign commerce.[1438]

The FMC is responsible for the approval of *ocean common carrier agreements* relating to fixing transportation rates; pooling or apportioning traffic; restricting sailings; engaging in exclusive, preferential, or cooperative working arrangements among themselves or with one or more MTOs; preventing competition in international ocean transportation; or discussing and agreeing on any matter related to service contracts.

The FMC is also responsible for the approval of *MTO agreements*. This part applies to agreements among MTOs and among one or more MTOs and one or more ocean carriers to discuss, fix, or regulate rates or other conditions of service; or engage in exclusive, preferential, or cooperative working arrangements, to the extent that such agreements involve ocean transportation in the US foreign commerce.

The *Shipping Act* also enhances the role of the FMC as a monitoring agency.

Neither the FMC's role – nor that of any other federal body – involves setting port authority fees; providing for access to terminals or of promoting competition between terminals.

Process and Consultation

The FMC carries out its regulatory duties by reviewing agreements and conducting investigations (on a formal or informal basis) into certain practices of marine transportation in foreign trade.

The process for the approval of an agreement (ocean carrier or MTO) involves several of the following steps:[1439]

- Notice: The FMC is required to publish the filing at the *Federal Register*; covering required information including notice will include the final date for filing comments.
- Preliminary review: The FMC shall make a preliminary review of each filed agreement to determine compliance with the requirements of the Act. It shall reject any agreement that otherwise fails to comply substantially with the Filing and Information Form requirements. The FMC shall notify the filing party in writing of the reason for rejection of the agreement. The original filing, along with any supplementary information or documents submitted, shall be returned to the filing party.

[1438] Federal Maritime Commission (FMC), *Introduction to Marine Terminal Operators (MTOs)*, 2008. Available at: http://www.fmc.gov/home/MTOInformation.asp [accessed on 6 August 2008].
[1439] *CFR*, 2008, ss. 535.601–604 – Action on Agreements.

- Comment: Persons may file with the Secretary, with the specified time limits in the Notice, written comments regarding a filed agreement. Late-filed comments will be received only by leave of the FMC and only upon a showing of good cause.
- Request for additional information: the FMC may request from the filing party any additional information necessary for making a decision. Where the FMC has made a request for additional information, the agreement's effective date will be 45 days after receipt of a satisfactory response. The FMC may, upon notice to the Attorney General, request the US District Court of Appeal in Columbia to further extend the effective date until there has been substantial compliance.
- Waiting period: The agreement becomes effective, either 45 days after the agreement is filed with the FMC, or on the thirtieth day of the publication of notice of the filing in the *Federal register*, whichever is the latter.

Investigations may be instituted by the FMC, under s. 11(c) of the *Shipping Act* 1984, upon complaints or upon its own motion. A Formal Docket Complaint ('formal complaint') may be filed with the FMC under s. 11 of the Act. When a complaint is lodged, the Respondent shall file with the FMC an answer to the complaint within 20 days after the date of service of the complaint by the FMC or within 30 days if such respondent resides in Alaska or beyond the Continental US. The respondent may additionally file a counter-complaint. Replies to answers are not permitted.

Prior to any hearing, the FMC (or presiding officer) may direct all interested parties, by written notice, to attend one or more pre-hearing conferences for the purpose of considering any informal settlement, formulating the issues in the proceeding and determining other matters to aid in its disposition.[1440]

The FMC encourages the use of alternative means of dispute resolution (ADR) in lieu of or prior to initiating a proceeding, through its Office of Consumer Affairs and Dispute Resolution Services (CADRS). In accordance with the provisions governing informal settlement,[1441] all parties to dispute matters are required to consider use of a wide range of alternative means to resolve disputes at an early stage. That is, all parties are directed, as soon as practical after the commencement of a proceeding, to consider and consult with the FMC's ADR Specialist the use of any or a combination of procedures (including but not limited to mediation), as an alternative mean to formal litigation towards reaching settlements. In the process, upon request of any party, a mediator (or other neutral third party) acceptable to all parties will be appointed by the presiding officer to conduct mediation or other ADR within the prescribed time. Similarly, a settlement judge may be appointed to oversee settlement negotiations. Both of them shall report to the presiding officer on the outcomes and make recommendations as to future proceedings. The presiding officer shall issue an appropriate decision.

With the concurrence of the FMC's ADR Specialist, binding arbitration may be used as an alternative means of dispute resolution whenever all parties consent (subject to exceptions).[1442] Such concurrence may be withheld if the FMC's General Counsel objects to use of binding arbitration.[1443] The ADR Specialist will appoint an

[1440] *CFR*, 2008, 502.94 – Pre-hearing Conferences.
[1441] *CFR*, 2008, s. 502.91 – Opportunity for Informal Settlement.
[1442] *CFR*, 2008, s. 502.406 – Arbitration.
[1443] *CFR*, 2008, s. 502.403 – Provisions governing Gernal Authority.

arbitrator, who shall be a neutral third party meeting the criteria of Title 5 of the *United State Code*, s. 573. The arbitration agreement that specifies a maximum award and other conditions limiting the range of possible outcomes that can be issued by the arbitrator shall be submitted to the arbitrator in writing. The arbitrator has authority to settle a dispute through binding arbitration pursuant to the arbitration agreement, provided that the decisions shall not have precedential value with respect to decisions by Administrative Law Judges or the FMC.

Except with respect to arbitration, the provisions regarding *ex parte* communications do not apply to dispute resolution proceedings, and mediators are expressly authorised to conduct private sessions with parties.[1444]

General regulatory processes at the FMC are consultative and place emphasis on resolution of disputes outside of the formal process. However, having filed a formal complaint, the parties to a matter are treated as parties in a legal dispute and a court-style hearing before an administrative judge is called. This section of the process is litigious in nature and parties seek legal counsel before the judge.

All designated parties (e.g. 'proponents', 'protestants', 'intervenor')[1445] and the FMC are parties in the hearing process. Written arguments are submitted by the parties and a hearing is held before an Administrative Law Judge. Parties can be joined as respondents under certain circumstances, such as through-transportation cases. A party may appear in person or by a representative (an officer, partner, or regular employee of the party, or by or with counsel or others duly qualified) in any proceeding. Experts and consultants may be introduced as witnesses or asked to provide evidence to the judge in a proceeding. Any party or the representative may testify, produce and examine witnesses, and give oral argument, if granted.[1446] Anyone appearing before the FMC shall be accorded the right to be accompanied, represented, and advised by counsel.

The FMC may call informal public hearings, not required by statute, to be conducted for the purpose of rulemaking or to obtain information necessary or helpful in the determination of its policies or the carrying out of its duties, and may require the attendance of witnesses and the production of evidence to the extent permitted by law.[1447]

Timeliness

The party that files for the approval of an agreement may request for expedited approval. In support of a request, the filing party should provide a full explanation, with reference to specific facts and circumstances, of the necessity for a shortened waiting period. Requests for expedited review will be granted only on a showing of good cause, which include, but is not limited to, the impending expiration of the agreement; an operational urgency; Federal or State imposed time limitations. A request for expedited review will be also considered for an agreement whose 45-day waiting period has restarted after being stopped by a request for additional information.[1448] In reviewing requests, the FMC will consider the parties' needs and

[1444] *CFR*, 2008, s. 502.11 – *Ex Parte* Communications.
[1445] 'Proponents' are the parties to the agreement; 'Protestants' are the parties protesting the agreement; 'Intervenor' is the person who has been permitted to intervene.
[1446] *CFR*, 2008, s. 502.21 – Appearance.
[1447] *CFR*, 2008, s. 502.141 – Hearings not Required by Statute.
[1448] *CFR*, 2008, s. 535.605 – Requests for Expedited Approval.

its ability to complete its review of the agreement. The FMC may shorten the waiting period to no less than 14 days after the publication of the notice in the *Federal Register*, or deny the request, to which the normal 45-day waiting period will apply.

In the order instituting a proceeding or in the notice of filing of complaint and assignment, the FMC is required to establish dates by which the initial decision and the final FMC decision will be issued. These dates may be extended by order of the FMC for good cause shown.[1449] For undue delays caused by a party to the proceedings, the FMC may impose sanctions, including entering a decision adverse to the delaying party. Time extension for the filing of documents can also be extended for good cause shown. [1450]

By consent of the parties and with approval of the FMC or presiding officer, a complaint proceeding may be conducted under shortened procedure without oral hearing.[1451]

In proceedings referred to the Office of Administrative Law Judges, the FMC shall specify a date, no more than six months from the date of publication in the *Federal Register* of its order instituting the proceedings or notice of complaint, on or before which hearing shall commence. Hearing dates may be deferred by the presiding officer only in the public interest or to prevent undue prejudice to a party.[1452] Such motions must be received, whether orally or in writing, at least five days before the scheduled date for hearing.[1453]

At any time after the conclusion of a hearing in a proceeding, but before issuance by the presiding officer of a decision, any party to the proceeding may request for reopening the proceeding for the purpose of receiving additional evidence.[1454]

The past performance of the FMC with respect to timeliness is varied. It appears that time limits are generally adhered to but the process can often take between one and two years to complete. Details of recent decisions show a variety of different response times – one decision took a total of two years and five months to complete because it included complaint filings, dismissals, hearings, decisions of the ALJ, orders, appeals for injunctions in the district courts and court of appeals hearings.[1455] Available research has not revealed the consequences of the regulator not reaching a decision within a specified time.

Role of Interested Parties

There is no evidence of specific user groups or industry bodies that has been recognised in the legislations governing the FMC.

However, interested parties do have a right in participating in the FMC regulatory process. Persons who have a substantial interest in the matters covered in a FMC proceeding can apply for intervention and request for affirmative relief.[1456] If

[1449] *CFR*, 2008, s. 502.61(c) – Proceedings.
[1450] *CFR*, 2008, s. 502.102(a) – Enlargement of Time to File Documents.
[1451] *CFR*, 2008, s. 502.181 – Selection of Cases for Shortened Procedure: Consent Required.
[1452] *CFR*, 2008, s. 502.61(b) – Proceedings.
[1453] *CFR*, 2008, s. 502.104 – Postponement of Hearing.
[1454] *CFR*, 2008, s. 502.230(a) – Case Re-opening by presiding officer or FMC.
[1455] FMC, *Docket No. 06-03 Order*, 2008. Available At: http://www.fmc.gov/file.asp?F=FB5E3DBE4E2246A897D41CF0E9BB092C%2Epdf&N=06%2D03%2Dorder+dismissing+the+proceeding%2Epdf&C=docket_activity [accessed on 18 August 2008].
[1456] *CFR*, 2008, s. 502.72 – Petition for Leave to Intervene.

permitted, they become the designated 'intervenors', who have the rights of discovery and presenting evidence or arguments, subject to limitations imposed by the presiding officer in his discretion.

Information Disclosure and Confidentiality

The FMC collects industry information through various avenues including FMC-initiated investigations, reporting obligations imposed on industry participants, annual reports and research for congressional reports.

The *Shipping Act of 1984* requires MTO agreements or ocean common carriers agreements to be lodged with the FMC for processing and review.[1457] At any time after the filing of an agreement and prior to the conclusion of judicial injunctive proceedings, the filing party may submit additional evidence for an agreement or may propose modifications of an agreement. Other third parties cannot engage in such negotiations between FMC personnel and filing parties.[1458] The FMC may also make requests from the filing party for additional information and documents necessary to complete its review.[1459] The request can be made orally with a follow-up confirmation letter within seven days or in writing. A notice will also be published in the *Federal Register*, serving as a notice on any commenting parties. The notice will indicate only that a request was made and will not specify what information is being sought. Interested parties will have 15 days after publication of the notice to file further comments on the agreement.

A failure to comply with a request for additional information results when a filing party fails to respond or substantially respond to the request or does not file a satisfactory statement of reasons for non-compliance, within a specified time. In such an event, the FMC may, pursuant to s. 6(i) of the *Shipping Act*, request reliefs from the US District Court of Appeal in Columbia:

- Order compliance with the request; and
- Extend the review period until there has been substantial compliance; or
- Grant other equitable relief that under the circumstances seems necessary or appropriate.

In conducting inquiries and non-adjudicatory investigations, the FMC determines which information is required for the purposes of rulemaking or is necessary or helpful in the determination of its policies or the carrying out of its duties, including whether to institute formal proceedings directed toward determining whether any of the laws which the FMC administers have been violated.[1460] The *Shipping Act* has enhanced the FMC's role as a monitoring agency by giving it the power to impose certain reporting and information requirements on participants in order to ensure the fulfilment of its monitoring obligations.

With respect to information confidentiality,[1461], all information submitted to the FMC by the filing party (except for an agreement filed under s. 5 of the *Shipping Act*) will be exempt from disclosure under Title 5 of the *United States Code*, s. 552. This applies to information provided in the Information Form, voluntary submission of

[1457] *CFR*, 2008, s. 535.901 – Fail to File.
[1458] *CFR*, 2008, s. 535.609 – Negotiations.
[1459] *CFR*, 2008, s. 535.606 – Requests for Additional Information.
[1460] *CFR*, 2008, s. 502.282 – Initiation of Investigations.
[1461] *CFR*, 2008, s. 535.608 – Confidentiality of Submitted Material.

additional information, reasons for non-compliance, and replies to requests for additional information. However, the confidential information may be disclosed to the extent that it is relevant to an administrative or judicial action or proceeding; or it is disclosed to Congress. Parties may voluntarily disclose or make information publicly available. They shall promptly inform the FMC.

As for comments and any accompanying material in relation to the approval of an agreement, they shall be accorded confidential to the fullest extent permitted by law. Where a determination is made to disclose all or a portion of a comment, notwithstanding a request for confidentiality, the party requesting confidentiality will be notified prior to disclosure.

Transcripts of testimony will generally be available in any proceeding, and will be supplied to the parties and to the public, except when required for good cause to be held confidential.[1462]

Decision-making and Reporting

The FMC is composed of five commissioners (including the Chairman), each appointed by the President and officially appointed after the approval of the Senate.[1463] As of March 2009, there were three Commissioners holding their offices and about 180 full-time equivalent staff positions.[1464] There are a number of functional offices, including:

- the Office of the Secretary and its affiliation, the Office of Consumer Affairs and Dispute Resolution Services. The latter is responsible for developing and implementing the Alternative Dispute Resolution program.
- the Office of Operations that comprises Bureau of Certification and Licensing, Bureau of Trade Analysis, Bureau of Enforcement. The Bureau of Trade Analysis is primarily responsible for monitoring certain regulated activities within the jurisdiction of the FMC.
- the Office of the General Counsel that provides legal counsel to the Commission and represents the Commission before courts and Congress
- the Office of Administrative Law Judges that is authorised to administer formal proceedings.

The administrative law judges is delegated the authority to make and serve initial or recommended decisions. All initial and recommended decisions will include a statement of findings and conclusions, as well as the reasons, upon all the material issues presented on the record, and the appropriate rule, order, sanction, relief, or denial. Initial decisions should address only those issues necessary to a resolution of the material issues presented on the record. A copy of each decision when issued shall be served on the parties to the proceeding.[1465]

Within 30 days, the initial decision shall become the decision of the FMC, unless within such a period, or a period extended by the FMC for good cause shown, request

[1462] *CFR*, 2008, s. 502.165 – Official Transcript.
[1463] FMC, *Federal Maritime Commission Organization Chart*. Available at: http://www.fmc.gov/about/OrganizationalChart.asp [accessed on 18 August 2008].
[1464] FMC, *47th Annual Report for Fiscal Year 2008*, March 2009.
[1465] *CFR*, 2008, s. 502.223 – Decision – Adminstrative Law Judges.

for review are made or a determination to review is made by the FMC on its own initiative.[1466]

The FMC will issue a final decision including a statement of findings and conclusions, as well as the reasons, upon all the material issues presented on the record, and the appropriate rule, order, sanction, relief, or denial. A copy of each decision when issued shall be served on the parties to the proceeding. The decisions of the FMC are not subject to ministerial approval. The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision.[1467]

The FMC is required to produce a written report of every statutory investigation made in which a hearing was held stating its conclusions, decisions, findings of fact, and order. A copy of this report shall be furnished to all parties and made publicly available.

In the case of dispute resolution, the decisions of the FMC are applicable only to the parties involved in the dispute. This is also the case for approval of terminal agreements and investigations initiated by the FMC. The process provides numerous opportunities for parties to apply to the FMC for a consent order to proceed on terms separately negotiated with the other party – thus departing from the decision-making processes of the FMC.

Appeals

Within 30 days after issuance of a final decision or order by the FMC, any party may file a petition for reconsideration to the FMC.[1468] Such petition shall be limited to 25 pages in length and shall be served in conformity with some specified requirements. Any party may file a reply in opposition to a petition for reconsideration or stay within 15 days after the date of service of the petition.[1469] The reply shall be limited to 25 pages in length and shall be served in conformity with some specified requirements. The FMC may order a rehearing; otherwise the final decision stays.

Although it is not stated anywhere in the sources consulted, it appears that decisions of the FMC may be appealed to the district administrative courts and, subsequently, the US court of appeals. Information about these courts is similar to that for the other regulatory authorities.

Regulatory Development

A 2007 report to Congress states that, while ports do not advocate a national port system due to potential competitive impacts, they welcome Federal assistance in such areas as port-to-transportation system interfaces and security funding.[1470] It argues that Federal assistance to coordinate and assist in the development of transportation resources is clearly needed and desired by the port and terminal operators. It also

[1466] *CFR*, 2008, s. 502.227 – Exceptions to Deciions or Oders of Dismissal of Adminstrative Law Judge; Replies thereto; and Review of Decision or Oders of Dismissal by Commision.
[1467] *CFR*, 2008, s. 502.169 – Record of Decision.
[1468] *CFR*, 2008, s. 502.261 – Petitions for Reconsideration or Stay.
[1469] *CFR*, 2008, s. 502.262 – Reply to Petition for Reconsideration or Stay.
[1470] US Maritime Administration, *Report to Congress on the Performance of Ports and the Inter-modal System*, 2005. Available at: http://www.marad.dot.gov/Publications/05%20reports/Report%20to%20Congress-Ports%20%20Intermodal%20Efficiency%206-21-05%20final.pdf [accessed on 7 August 2008].

observes that, currently, there is no central forum or publication where new ideas and developments in the port industry may be discussed.

NORTH AMERICA

STATE REGULATORY ARRANGEMENTS IN THE UNITED STATES

OVERVIEW

State regulatory authorities often have a role in the economic regulation of communications, energy, transport and water infrastructure. The roles, functions, processes and practices of each of the 50 state regulators vary. It is beyond the scope of this review to survey each of the state regulators. However, the role, functions and processes of the California Public Utilities Commission has been reviewed to provide an indication of the way in which state regulators may operate. California has been chosen for further research due to the size and importance of its economy, the sophisticated nature of its regulatory institutions and the relative abundance of available information. The regulatory authority of the California Public Utilities Commission (CPUC) covers all utility industries, including energy, telecommunications, water and rail areas. However, the regulatory processes and practices followed by the CPUC in performing its various functions do not appear to be industry-specific or sector-specific.

BACKGROUND

California has an estimated population of just over 38 million people, as of 2008.[1471] In 2006, California's gross state product was over US$1.6 trillion, with exports totalling US$94 billion in 2003.[1472] It is one of the largest economies in the world. The state is home to a number of important economic regions, such as Hollywood for films and entertainment and Silicon Valley for computers and high tech electronics. There is also a significant agriculture industry located in the California Central Valley. In addition, California has been among the pioneers of environmental policies aimed at combating air pollution and climate change.

The US Constitution fixes the boundaries between federal law and state legislation, and forbids the states from adopting certain kinds of laws. However the role of the California's state legal system in areas that are not addressed by the Constitution remains unclear. The state legal system is comprised of Trial courts, which reside in each of the state's 58 counties, Courts of Appeal and the Supreme Court. There are six Courts of Appeal, each of which operates in a different geographical location within the state, as drawn up by the state legislature. The Supreme Court is the final authority within the state legal system.

CALIFORNIA PUBLIC UTILITIES COMMISSION

The California Public Utilities Commission (CPUC) is the state regulatory agency for electricity, gas, water, telecommunications and rail. It has a number of regulatory functions including:

[1471] State of California, Department of Finance, *E-1 Population Estimates for Cities, Counties and the State with Annual Percent Change — January 1, 2007 and 2008*. Sacramento, California, May 2008. Available at: http://www.dof.ca.gov/research/demographic/reports/estimates/e-1_2006-07/ [accessed on 6 October 2008].

[1472] Legislative Analyst's Office, *Cal Facts 2004*, Sacramento CA Available at: http://www.lao.ca.gov/2004/cal_facts/2004_calfacts_econ.htm [accessed on 6 October 2008].

- Approval or sale, lease or encumbrance of facilities owned by private-sector electricity, gas, telecommunications and water utilities. The CPUC may approve, deny or conditionally approve these activities by using two processes known as environmental evaluation and general proceedings.[1473]
- The regulation of the electricity, gas, telecommunications, water and rail industries with respect to intra-state enforcement investigations into possible violations of any provision of statutory law or order or rule of the CPUC; and
- Investigation of complaints against regulated entities, including those complaints that challenge the accuracy of a bill, but excluding those complaints that challenge the reasonableness of rates or charges, past, present, or future.[1474]

The CPUC was established in 1911 by *Constitutional Amendment* as the Railroad Commission. In 1912, the Legislature passed the *Public Utilities Act*, expanding the Commission's regulatory authority to include natural gas, electric, telephone, and water companies as well as railroads and marine transportation companies. In 1946, the Commission was renamed the California Public Utilities Commission.[1475]

The CPUC's jurisdiction is set out in the *California Public Utilities Code* which has been adopted by the California legislature.[1476]

The CPUC also publishes its 'Rules of Practice and Procedure', setting out the administrative rules to be followed in formal proceedings. These rules are consistent with the CPUC's powers and obligations under the *California Public Utilities Code.*

Process and Consultation

Matters Considered by the CPUC

Matters may arise before the CPUC in a number of ways:

- An application may be made by a regulated entity to increase rates or to implement changes that would result in increased rates.
- A complaint may be filed by any party claiming that the *Public Utilities Act* has been violated. However, a complaint as to the reasonableness of the rates or charges of any gas, electrical, water, or telephone corporation shall not be accepted by the CPUC unless it has been lodged by a legislative body of the city

[1473] Califonia Public Utilities Commission (CPUC), *CPUC Decision and Review Process,* 2008. Available at: http://www.cpuc.ca.gov/PUC/energy/electric/Environment/Current+Projects/Montebello/Review+Process.htm [accessed on 21 August 2008].

[1474] CPUC, *Annual Report and Work Plan 2006.* Available at: http://docs.cpuc.ca.gov/published/Graphics/64335.PDF [accessed on 21 August 2008].

[1475] CPUC, *PUC History and Structure,* 2008. Available at: http://www.cpuc.ca.gov/PUC/aboutus/puhistory.htm [accessed on 21 August 2008].

[1476] For a copy of the *California Public Utilities Code*, see the website at: http://www.legaltips.org/california/california_public_utilities_code/ [accessed on 29 May 2009].

or city and county within which the alleged violation occurred, or by at least 25 actual or prospective consumers or purchasers of such service.[1477]

- The CPUC may initiate investigations.
- The CPUC may institute rulemaking proceedings to:
  - adopt, repeal, or amend rules, regulations, and guidelines for a class of public utilities or of other regulated entities;
  - amend its *Rules of Practice and Procedure*, or
  - modify prior decisions which were adopted by rulemaking.
- A person may petition the CPUC to adopt, amend, or repeal a regulation. The proposed regulation must apply to an entire class of entities or activities over which the CPUC has jurisdiction and must apply to future conduct.

The process that is followed to determine an *application to increase rates* is set out in Rule 3.2 of the CPUC's *Rules of Practice and Procedures*. The rule sets out the types of information that must be submitted with an application for authority to increase rates. This includes: financial documents; current prices; proposed increases or changes; a statement of the estimated gross revenue to result from the increase (in dollar amount and percentage change), justification of cost increases.

Applicants are required by the CPUC's rules to notify interested parties of the proposed rate changes. Within ten days of filing an application, the applicants must notify the Attorney General and Department of General Services, each County and any other person deemed appropriate, of the application.

Applicants for increases in gas, electricity, telephone, water or heating services must also publish notice of the application at least once in a newspaper and must show proof of compliance within ten days of publication. Applicants for electricity, gas, heat, telephone, water, or sewer system rate increases must also notify their customers affected by the proposed increases within a timeframe that depends on the billing cycle (45 days, if the corporation operates on a 30-day billing cycle, or within 75 days, if the corporation operates on a 60-day or longer billing cycle). Applicants shall file proof of compliance within ten days after mailing.

Rule 4.2 sets out the procedures to be followed in responding to a *complaint*. A complaint must contain full details of the act complained of, the facts constituting the grounds of the complaint, the injury complained of and the relief that is desired. The complaint should also state the proposed category for the proceeding and whether a hearing is required, the issues to be considered and a proposed schedule. The schedule must include a deadline for resolving the proceeding within 12 months or less for an adjudicatory proceeding, or 18 months or less for a rate setting or quasi-legislative proceeding.

A complaint may initially be referred to staff to attempt to resolve the matter informally.

When a complaint or amendment is accepted for filing, the Docket Office will serve on each defendant a copy of the complaint or amendment, questions to be answered and a date when answers must be filed and served. The defendant will also be notified of the Administrative Law Judge assigned to the proceeding and the

[1477] CPUC, *Rules of Practice and Procedure,* July 2007, Rule 4.1.

preliminary determination of the need for a hearing as determined by the Chief Administrative Law Judge in consultation with the President of the CPUC.

The respondents' answers must:

- admit or deny each allegation in the complaint and include any new matter that constitutes a defence.
- include any defects in the complaint which require amendment or clarification.
- state any comments or objections to the complainant's statement on the need for hearing, issues to be considered, and proposed schedule.

An expedited compliant procedure is available for complaints against any electricity, gas, water, heat or telephone company where the amount of money claimed does not exceed the jurisdictional limit of the small claims court referenced in the *Public Utilities Code.*

Under these proceedings there shall be no legal representation and no pleading other than a complaint and answer. A hearing will be held within 30 days of the answer being filed.

A decision may include a brief summary of the facts but a separate finding of fact and conclusions of law will not be made. Such a decision is not considered as precedent or binding on the CPUC or the Californian courts.

The parties have the right to file applications for rehearing. If the Commission grants an application for rehearing, the rehearing will be conducted under the Commission's regular hearing procedure.

The Commission may at any time institute investigations *on its own motion* under s. 1702 of the *California Public Utilities Code*.[1478] Orders instituting investigation shall indicate the nature of the matters to be investigated. Investigations directed at specific utilities or regulated entities will be served on them. However, investigations affecting as a class of railroads, pipelines, passenger stage corporations, charter-party carriers, or vessels may only be noticed on the CPUC's Daily Calendar.

A response to an investigatory order is not required unless so directed. However, if a response is filed it must include any objections to the preliminary scoping memo regarding the need for hearing, issues to be considered, or schedule. Any recommended changes to the proposed schedule shall be consistent with the category of the proceeding, including a deadline for resolving the proceeding within 12 months or less (adjudicatory proceeding) or 18 months or less (rate setting or quasi-legislative proceeding).

Rulemaking proceedings initiated by the CPUC shall be noticed on the Daily Calendar and orders instituting rulemaking shall be served on all respondents and known interested persons.

Comments on an order instituting rulemaking may be filed and should include any objections to the preliminary scoping memo regarding the category, need for hearing, issues to be considered, or schedule. Any recommended changes to the proposed schedule should be consistent with the proposed category, including a deadline for resolving the proceeding within 18 months or less (rate-setting or quasi-legislative proceeding).

[1478] *California Public Utilities Code.*

A petition for rulemaking by a third party must concisely state the justification for the requested relief, and if adoption or amendment of a regulation is sought, the petition must include specific proposed wording for that regulation. In addition, a petition must state whether the issues raised in the petition have, to the petitioner's knowledge, ever been litigated before the CPUC, and if so, when and how the issues were resolved. The CPUC will not consider a petition for rulemaking on an issue that it has acted on or decided not to act on within the preceding 12 months.

Petitions must be served upon the Executive Director, Chief Administrative Law Judge, Director of the appropriate industry division, the Public Adviser and any additional persons identified by the Public Adviser. If a petition would result in the modification of a prior Commission order or decision, then the petition must also be served on all parties to the proceeding or proceedings in which the decision that would be modified was issued. The assigned Administrative Law Judge may also direct the petitioner to serve the petition on additional persons.

Responses to a petition must be filed and served on all parties who were served with the petition within 30 days of the date that the petition was served, unless the assigned Administrative Law Judge sets a different date. The petitioner and any other party may reply to responses to the petition. Replies must be filed and served within ten days of the last day for filing responses, unless the Administrative Law Judge sets a different date.

Categorisation of Filed Matters

The CPUC's Commissioners meet regularly, at least once and usually twice a month.[1479] Under Rule 7.1, the CPUC must at each meeting make a preliminary determination by resolution, for each proceeding initiated by application filed after the last meeting, of the category of the proceeding and whether a hearing is required. The preliminary determination is not appealable, but may be confirmed or changed by the assigned Commissioner's ruling. Such ruling is subject to appeal under Rule 7.6.

There are three proceeding categories:

- Quasi-legislative cases are cases that establish policy, including, but not limited to, rulemakings and investigations which may establish rules affecting an entire industry;
- Adjudication cases are enforcement cases and complaints except those challenging the reasonableness of any rates or charges as specified in s. 1702;
- Rate setting cases are cases in which rates are established for a specific company.[1480]

The CPUC, upon initiating a hearing, shall assign one or more commissioners to oversee the case and an Administrative Law Judge.

For a complaint, the Chief Administrative Law Judge, in consultation with the President of the CPUC, preliminarily determines the category of the proceeding and the need for hearing of proceedings initiated by complaint.

[1479] CPUC, *Listing of Commission Meeting Dates,* 2008. Available at: http://www.cpuc.ca.gov/PUC/aboutus/2008MeetingDates.htm [accessed on 7 October 2008].
[1480] *California Public Utilities Code*.

An order instituting investigation shall determine the category of the proceeding, preliminarily determine the need for hearing, and attach a preliminary scoping memo. The order, only as to the category, is appealable under the procedures in Rule 7.6.

Similarly, an order instituting rulemaking shall preliminarily determine the category and need for hearing, and shall attach a preliminary scoping memo. The preliminary determination is not appealable, but shall be confirmed or changed by the assigned Commissioner's ruling pursuant to Rule 7.3. This ruling as to the category is subject to appeal under Rule 7.6.

An appeal may be made to the CPUC within ten days of; the assigned Commissioner's categorisation in a scoping memo, the instructions to answer pursuant to a complaint or an order instituting an investigation of the CUPC's own-initiative. The appeal should state why the designated category is wrong as a matter of law or policy.

Responses to the appeal may be filed and served no later than 15 days after the date of categorization from which the appeal has been taken. The CPUC is not required to withhold a decision on an appeal to allow time for responses. Replies to responses are not permitted under Rule 7.6.

Parties in the Process

Any person named as a defendant to a complaint, or as a respondent to an investigation or a rulemaking, is a designated party to the proceeding.

A person may become a party to a proceeding by:

- filing an application, petition, or complaint;
- filing (i) a protest or response to an application or petition, or (ii) comments in a rulemaking;
- entering an appearance at a pre-hearing conference or hearing; or
- filing a motion to become a party.

The assigned Administrative Law Judge will determine whether a person becomes a party to a proceeding and may, where circumstances warrant, deny party status or limit the degree to which a party may participate in the proceeding.

Presiding Officer

When evidence is to be taken in a hearing, the assigned Commissioner or assigned Administrative Law Judge shall preside as the presiding officer, where appropriate.

In an adjudicatory proceeding, the scoping memo will designate either the assigned Commissioner or the assigned Administrative Law Judge as the presiding officer.

In a rate-setting proceeding, the presiding officer will be either the assigned Commissioner or the assigned Administrative Law Judge, as designated by the assigned Commissioner prior to the first hearing. A party may request, at least five days before the date when the hearing begins, the presence of the assigned Commissioner at a hearing or a specific portion of a hearing. The assigned Commissioner has sole discretion to grant or deny, in whole or in part, any such request. The assigned Commissioner shall be present at the closing argument, if any, and, if designated as presiding officer, shall be present for more than one-half of the hearing days

In a quasi-legislative proceeding, the presiding officer will be the assigned Commissioner. The assigned Commissioner shall be present for hearing on legislative facts (general facts that help the Commission decide questions of law and policy and discretion), but need not be present for hearing on adjudicative facts (facts that answer questions such as who did what, where, when, how, why, with what motive or intent).

Hearing Schedule

The hearing schedule varies but may be as follows;

- Complaints testimony to be served
- Defendant's Reply to be served
- Complaint's Rebuttal to be served
- Mediation discussions
- Opening Briefs
- Presiding Officer's Decision Issued
- Commission Decision[1481]

The schedule may also include evidentiary hearings. An evidentiary hearing involves the presentation of proposals in testimony by each party. Parties are then subject to cross-examination before an Administrative Law Judge. Only those who are parties of record can present evidence or cross-examine witnesses during evidentiary hearings. The presiding officer shall hear the case.

Discovery and Information Provision

Any party may obtain discovery from any other party regarding any matter, not privileged, that is relevant to the subject matter involved in the pending proceeding unless the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence.

A party may request the issuance of a subpoena to direct the attendance of a non-party witness or to direct the production of documents or anything else under the non-party witness's control. Requests may be made to the Administrative Law Judge assigned to the proceeding. If no Administrative Law Judge is assigned to the proceeding, requests may be made to the Executive Director.

An oral argument before the Commission may also take place, if recommended by the presiding officer or requested by a party.

Experts and Consultants

Technical experts many be employed to provide advice to the CPUC to aid their regulatory decision making.

[1481] CPUC, *Before the Public Utilities Commission of the State of California: CommPartners, LLC vs. Pacific Bell Telephone Company, doing business as AT&T California*, Scoping Memo and Ruling of Assigned Commissioner, 2008. Available at: http://docs.cpuc.ca.gov/efile/RULC/80554.pdf [accessed on 29 July 2008].

Final Decision Process

After considering all the evidence presented at a hearing, the presiding officer submits a proposed decision to the Commission setting forth recommendations, findings, and conclusions.[1482] The proposed decision must be served upon all parties to the action no later than 60 days after the matter has been submitted for decision. The decision becomes the decision of the Commission if no further action is taken within 30 days.[1483]

The CPUC may itself initiate a review of the proposed decision on any grounds. Appeals and requests for review must specify the grounds on which the appellant or requestor believes the presiding officer's decision to be unlawful or erroneous.

The CPUC may grant and hold a rehearing on those matters, if it considers there is sufficient reason to do so. Applications for rehearing shall set forth specifically the grounds on which the applicant considers the order or decision of the CPUC to be unlawful or erroneous, and must make specific references to the record or law. A response to an application for rehearing is not necessary but may be filed and served within 15 days after the application for rehearing was filed.[1484] It will issue its decision and order on rehearing within 20 days after the filing of that application. If the CPUC grants an application for rehearing, the rehearing shall be conducted under its hearing procedure.

Any party may file a response no later than 15 days after the date the appeal or request for review was filed. Replies to responses are not permitted. The CPUC is not obligated to withhold a decision on an appeal or request for review to allow time for responses to be filed.

In the event that a rehearing of an adjudication case is granted the parties will have an opportunity for final oral argument. However, the CPUC has complete discretion to determine the appropriateness of oral argument in any particular matter and arguments must be based only on the evidence in the record.[1485]

The Commission may meet in closed session to consider the decision. However, the vote on the appeal takes place in a public meeting and shall be accompanied by an explanation of the Commission's decision, which shall be based on the record developed by the presiding officer or administrative law judge. If the decision is different from that of the assigned commissioner or the administrative law judge it should be accompanied by a written explanation of each of the changes made to the decision. The decision becomes effective 20 days after issuance, unless otherwise provided therein.[1486]

Filing of an application for rehearing shall not excuse compliance with an order or a decision. An application filed ten or more days before the effective date of an order suspends the order until the application is granted or denied. Absent further Commission order, this suspension will lapse after 60 days. The Commission may extend the suspension period.

[1482] PG&E, *April 2007 Bill Inserts*. Available at: http://www.pge.com/mybusiness/myaccount/explanationofbill/billinserts/previous/2007/apr.shtml [accessed on 21 August 2008].

[1483] *California Public Utilities Code*.

[1484] Rule 16.1.

[1485] *California Public Utilities Code*.

[1486] CPUC, *Rules of Practice and Procedure*, 2007. Available at: http://docs.cpuc.ca.gov/published/Rules_prac_proc/70731.htm [accessed on 29 August 2008].

Pursuant to s. 1701.2 of the *Californian Public Utilities Code*, the Commission shall vote on its final decision in a rate-setting or quasi-legislative proceeding not later than 60 days after issuance of a proposed or draft decision. The Commission may extend the deadline for a reasonable period under extraordinary circumstances. The 60-day deadline shall be extended for 30 days if any alternative decision is proposed. Decisions shall become effective 20 days after issuance, unless otherwise provided therein.[1487]

In relation to a rate hearing, the Commission may act on an alternative proposed decision by the assigned commissioner or Administrative Law Judge. In doing so the CUPC may adopt all or part of the proposed decision or amend, modify, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.[1488]

CPUC public notices suggested that in conjunction with the proposed decision of the presiding officer, the assigned commissioner and/or Administrative Law Judge (dependent on who is selected to sit at the hearing) concurrently submit a proposed decision to the Commission. The Commission then considers all proposed decisions and all the evidence presented during the hearing process and will issue a draft decision. Parties then have the opportunity to file written application to the CPUC commenting on the draft decision. The CPUC may adopt all or part of requests made by relevant parties, or alternatively amend, modify or deny the application.

Petition for Modification

A petition for modification asks the CPUC to make changes to an issued decision. Filing a petition for modification does not preserve the party's appellate rights; an application for rehearing is the vehicle to request rehearing and preserve a party's appellate rights.

A petition for modification of a Commission decision must concisely state the justification for the requested relief and must propose specific wording to carry out all requested modifications to the decision.

A petition for modification must be filed and served within one year of the effective date of the decision proposed to be modified. However, a petition for modification may be accepted if more than one year has elapsed but the petition adequately explains why the petition could not have been presented within one year of the effective date of the decision. If the CPUC determines that the late submission has not been justified, it may on that ground issue a summary denial of the petition.

Unless otherwise ordered by the CPUC, the filing of a petition for modification does not stay or excuse compliance with the order of the decision proposed to be modified. The decision remains in effect until the effective date of any decision modifying the decision.[1489]

[1487] CPUC, *CommPartners, LLC vs. Pacific Bell Telephone Company, doing business as AT&T California. Scoping Memo and Ruling of Assigned Commissioner*, 2008. Available at: http://docs.cpuc.ca.gov/efile/RULC/80554.pdf [accessed on 29 July 2008].

[1488] CPUC, *Notice of Availability of Proposed Decision on Opinion on Base Rate Revenue Requirement and Other Phase 1 Issues with the Alternate Proposed Decision of Commissioner Wood*, 2004. Available at: http://docs.cpuc.ca.gov/Published/Graphics/34051.PDF [accessed on 29 August 2008].

[1489] *California Public Utilities Code.*

Prehearing Conferences

A pre-hearing conference will be held in any proceeding in which it has been preliminarily determined that a hearing is needed. The pre-hearing conference will be held as soon as possible after the preliminary determination.[1490] It addresses the proceeding schedule and discusses the potential for a mediated settlement. Parties then may agree to meet with a mediator to discuss settlement terms (see later discussion on ADR).[1491]

A scoping memo may be issued at or after the pre-hearing conference by the assigned Commissioner. This memo will set out the schedule and issues to be addressed. The memo also sets out the presiding officer if the matter is an adjudicatory proceeding. In an order initiated by application or instituting rulemaking, the scoping memo will also determine the category and the need for hearing.[1492]

A scoping memo may not be issued if it is preliminarily determined that a hearing is not needed and timely filing has been followed.

Settlement

Parties may, by written motion, any time after the first pre-hearing conference and within 30 days after the last day of hearing, propose settlements on the resolution of any material issue of law or fact or on a mutually agreeable outcome to the proceeding. Settlements need not be joined by all parties, however settlements in applications must be signed by the applicant and, in complaints, by the complainant and defendant. The motion shall contain a statement of the factual and legal considerations adequate to advise the CPUC of the scope of the settlement and of the grounds on which adoption is urged.

Settlements would ordinarily not include deadlines for CPUC approval; however, if delay beyond a certain date would invalidate the basis for the proposal, the timing urgency must be clearly stated and fully justified in the motion.

Parties may file comments contesting all or part of the settlement within 30 days of the date that the motion for adoption of settlement was served.

The CPUC is the decision-making body in respect of settlements. It will not approve settlements, whether contested or uncontested, unless the settlement is reasonable in light of the whole record, consistent with law, and in the public interest. If the CPUC rejects a settlement it may take various steps, including the following:

- Hold hearings on the underlying issues, in which case the parties to the settlement may either withdraw the settlement or offer it as joint testimony;
- Allow the parties time to renegotiate the settlement;
- Propose alternative terms to the parties to the settlement which are acceptable to the Commission and allow the parties reasonable time within which to elect to accept such terms or to request other relief.

[1490] CPUC, *Rules of Practice and Procedure.* 2007, Rule 7.2.

[1491] CPUC, *Before the Public Utilities Commission of the State of California: CommPartners, LLC vs. Pacific Bell Telephone Company, doing business as AT&T California.* Scoping Memo and Ruling of Assigned Commissioner, 2008. Available at: http://docs.cpuc.ca.gov/efile/RULC/80554.pdf [accessed on 29 July 2008].

[1492] CPUC, *Rules of Practice and Procedure,* 2007, Rule 7.3.

If the CPUC adopts a settlement it is binding on all parties to the proceeding in which the settlement is proposed. Unless expressly stated otherwise, such adoption does not constitute approval of, or precedent regarding, any principle or issue in the proceeding or in any future proceeding.

No discussion, admission, concession or offer to settle, whether oral or written, made during any negotiation on a settlement will be subject to discovery, or admissible in any evidentiary hearing against any participant who objects to its admission. Discussions, admissions, concessions, and offers to settle between the parties and their representatives are confidential and shall not be disclosed without the consent of the parties participating in the negotiations.[1493]

Informal Consultation

In addition to the ADR process discussed below, the CPUC provides for informal communications during formal proceedings. Rule 8.2 sets out the scope for *ex part* communications[1494] with CPUC's decision makers[1495] and advisers:

In any quasi-legislative proceeding, *ex parte* communications are allowed without restriction or reporting requirement.

Ex parte communications are prohibited in any adjudicatory proceeding.

In any rate-setting proceeding, *ex parte* communications are subject to the reporting requirements set out in Rule 8.3. In addition, the following restrictions apply:

- Oral *ex parte* communications are permitted at any time with a Commissioner provided that the Commissioner involved invites all parties to attend the meeting or sets up a conference call in which all parties may participate, and gives notice of this meeting or call as soon as possible, but no less than three days before the meeting or call.
- If a decision maker grants an *ex parte* communication meeting or call to any party individually, all other parties shall be granted an individual meeting of a substantially equal period of time with that decision maker. The party requesting the initial individual meeting shall notify the other parties that its request has been granted, at least three days before the meeting or call. At the meeting, that party shall produce a certificate of service of this notification on all other parties. If the communication is by telephone, that party shall provide the decision maker with the certificate of service before the start of the call.

[1493] CPUC, Before the Public Utilities Commission of the State of California: CommPartners, LLC vs. Pacific Bell Telephone Company, doing business as AT&T California. Scoping Memo and Ruling of Assigned Commissioner, 2008. Available at: http://docs.cpuc.ca.gov/efile/RULC/80554.pdf [accessed on 29 July 2008].

[1494] 'Ex parte communication' means a written or oral communication that: (1) concerns any substantive issue in a formal proceeding, (2) takes place between an interested person and a decisionmaker, and (3) does not occur in a public hearing, workshop, or other public forum established in the proceeding, or on the record of the proceeding. Communications regarding the schedule, location, or format for hearings, filing dates, identity of parties, and other such nonsubstantive information are procedural inquiries, not *ex parte* communications.

[1495] 'Decisionmaker' means any Commissioner, the Chief Administrative Law Judge, any Assistant Chief Administrative Law Judge, the assigned Administrative Law Judge, or the Law and Motion Administrative Law Judge.

- Written *ex parte* communications are permitted at any time provided that the party making the communication serves copies of the communication on all other parties on the same day the communication is sent to a decision maker.

Ex parte communications may be prohibited by the Commission for a period beginning not more than 14 days before the Commission Business Meeting at which the decision in the proceeding is scheduled for Commission action.

If a Rate Setting Deliberative Meeting has been scheduled, *ex parte* communications are prohibited from the day of the Rate Setting Deliberative Meeting through to the conclusion of the Business Meeting at which the decision is scheduled for Commission action.

Ex parte communications regarding the assignment of a proceeding to a particular Administrative Law Judge, or reassignment to another Administrative Law Judge, are prohibited.

Ex parte communications are not a part of the record of the proceeding.

Alternative Dispute Resolution (ADR)

The CPUC places a strong emphasis on resolution of a dispute outside the formal regulatory process, and has an alternative dispute resolution unit as part of its organisation. Use of ADR is facilitated by the pre-hearing conferences discussed above, in which parties informally explore the possibility of alternative dispute resolution.

Alternative Dispute Resolution approaches are administered by the Administrative Law Judge Division. The Division maintains a panel of 27 Administrative Law Judges (ALJs) who have been trained, and who have served, as ADR neutrals. Alternatively, parties may hire an independent contractor to help them resolve their dispute.

ADR involves processes, such as facilitation, negotiation, mediation, and early neutral evaluation to help disputants resolve a conflict without a formal decision by a court or agency. Facilitation involves a workshop conducted by an ALJ to identity stakeholder views and to facilitate informal negotiations between parties. Alternatively, with parties' consent, a case can be referred to a trained ALJ mediator who holds joint and separate confidential meetings with parties to identify underlying interests and settlement approaches for resolving a dispute. Early neutral evaluation involves the presentation of parties' abbreviated versions of their case to one or more trained ALJ neutrals that provide early, nonbinding opinions on the merits of the controversy. Both parties must provide their consent before early neutral evaluation procedures are conducted. The ALJ also holds settlement conferences with parties to help them negotiate by narrowing issues and exploring settlement options.

ADR processes are usually confidential, although parties can agree to negotiate in public. ADR processes are generally voluntary. An ALJ, however, may require parties to attend facilitated workshops, settlement conferences, or meet with a neutral third party to explore the feasibility of mediation.

In general, ADR resolves disputes quicker than the formal dispute resolution processes discussed above. Most ADR sessions are completed in half a day to two days. Some ADR sessions continue over several weeks, with the parties meeting for a day or two at a time.

Normally, ADR requests should be made early in a formal proceeding. However, ADR may also be requested at any time in a formal proceeding if parties believe ADR will assist in promptly resolving the dispute. ADR also may be available for disputes that are likely to be filed as formal proceedings before the CPUC.

ADR is not appropriate for all CPUC proceedings. Disputes over purely legal issues do not lend themselves to ADR. Also, ADR may not help in many rule-making proceedings where the CPUC must make a policy decision. Even in these cases, ALJs may facilitate workshops and conferences to identify and evaluate policy options.[1496]

The following describes the typical steps in ADR:

- After receiving an ADR request from parties, the ADR Coordinator will discuss the ADR request with the Assigned Commissioner and the Assigned ALJ. If ADR appears promising, the ADR Coordinator will determine which ALJ neutrals may be available. The parties will have a limited time to disqualify the proposed ADR neutral third party for a 'good cause' reason and request another neutral. Early neutral third party evaluations may use a panel of three ALJ neutrals.
- The ALJ neutral third party may require the parties to prepare for ADR by, for example, preparing a summary of the dispute. The ADR neutral third party may require the presence of party representatives who have authority to commit to a settlement.
- If an ADR process has produced a partial or complete settlement, the agreement may still need to be submitted to the Commission for its approval. In that event, the parties must formally present the settlement to the Commission with sufficient documentation.[1497]

Timeliness

The CPUC's rules do not require pre-lodgement discussions between the regulator and parties; however, a complaint may initially be referred to staff to attempt to resolve the matter informally.

The Rules set out clear timelines that apply to the various matters that may be considered by the CPUC. These were discussed above. For interested parties, for example, there are timelines for providing information, and for objecting to various decisions by the CPUC prior to the issuing of a final decision.

Despite the timelines, motions for extension of time limits may be made unless the time limit is a statutory deadline.[1498]

In addition, the rules provide that the CPUC may reduce or wave the period for public review and comment on proposed decisions, draft resolutions and alternates in certain 'unforeseen emergency situations' or where all the parties so stipulate. The period for public review and comment on draft resolutions and on proposed decisions issued in proceedings in which no hearings were conducted may also be reduced or waived in certain circumstances. However, the CPUC may reduce, but not waive, the period for

[1496] CPUC, *Alternative Dispute Resolution Program, 2008.* Available at: http://www.cpuc.ca.gov/PUC/ADR/index.htm [accessed on 29 August 2008].
[1497] CPUC, *Rules of Practice and Procedure*, 2007, Rule 13.7.
[1498] CPUC, *Article 12.5 Motions, Petitions, and Other Requests,* 2008. Available at: http://docs.cpuc.ca.gov/published/Rules_prac_proc/26592-16.htm [accessed on 29 August 2008].

public review and comment on alternates to any such draft resolutions and proposed decisions, under Rule 14.6.

The CPUC is also subject to timelines that set targets for the completion of various stages of the decision-making process, and for the resolution of proceedings. For example, pursuant to the *California Public Utility Code*, adjudicatory proceedings should be resolved within 12 months or less, while rate setting or quasi-legislative proceedings should be resolved within 18 months or less. However, the Code does not detail the consequences for the regulator if it does not reach a decision within the regulatory timeframe. Instead, if the Commission foresees it will be unable to reach a decision within the regulatory timeframe, it will issue an order extending that deadline.[1499] Timelines that are applicable to actions by interested parties help to mitigate incentives for parties to cause delay. In addition, the presiding officer over a hearing may limit the number of witnesses or the time for testimony upon a particular issue.[1500] This practice helps to expedite the process.

Information on the past performance of CPUC in terms of the average time it takes to reach a final decision is difficult to assess as it requires examination of the timeliness of a number specific determinations.

Role of Interested Parties

The Division of Ratepayer Advocates (DRA) is an independent division of the CPUC. Its role is to advocate on behalf of the customers of regulated public utilities. The DRA participates as a party representing consumers in CPUC proceedings, including rate settings, investigations, and rulemakings. DRA also participates in CPUC-sponsored working groups, advisory boards, workshops, and other forums. The DRA also evaluates utility proposals, investigates issues, presents findings and formal testimony, litigates complaints, and makes recommendations to CPUC and to other forums.[1501]

DRA's statutorily designated mandate, is to 'represent and advocate on behalf of the interests of public utility customers and subscribers, …to obtain the lowest possible rate for service consistent with reliable and safe service levels'.[1502]

The DRA also has statutory rights to obtain information from utilities through discovery and other means.[1503]

The DRA function was codified in 1985 and included the provision of an independent budget. The Commission is required to provide sufficient legal support for DRA, and provide DRA with its own lead counsel. The Director of the DRA is empowered to independently control DRA's budget.[1504]

[1499] *Californian Public Utilities Code*, s. 1701.2.

[1500] CPUC, *CommPartners, LLC vs. Pacific Bell Telephone Company, doing business as AT&T California*, Scoping Memo and Ruling of Assigned Commissioner, 2008. Available at: http://docs.cpuc.ca.gov/efile/RULC/80554.pdf [accessed on 29 July 2008].

[1501] CPUC, *Annual Budget and Staffing Report of the Division of Ratepayer Advocates,* 2007. Available at: ftp://ftp.cpuc.ca.gov/resources/about/dra+report+to+the+legislature+2007.doc [accessed on 29 August 2008].

[1502] *California Public Utilities Code*, s. 309.5,

[1503] *California Public Utilities Code*, s. 309.5(e).

[1504] CPUC, *Consumer Protection and Safety Division*, 2008. Available at: http://www.cpuc.ca.gov/PUC/aboutus/Divisions/Consumer+Protection/index.htm [accessed on 29 August 2008].

Information Disclosure and Confidentiality

General Order No 66-C defines confidential material as:[1505]

- Records of investigations and audits made by the CPUC, except to the extent disclosed at a hearing or by formal commission action;
- Reports, records and information requested by the CPUC which if revealed would place the regulated company at an unfair business disadvantage;
- Intra-agency notes, drafts, memoranda and other communications not otherwise made public by the CPUC;
- Non-public communications with other public agencies where the public interest of withholding this information outweighs the public interesting of disclosure;
- Personnel records;
- Information obtained in confidence from businesses not regulated by the CPUC where disclosure would be against the public interest. [1506]

Motions to file documents or portions of documents under seal shall attach a proposed ruling that clearly indicates the relief requested. Motions to seal the evidentiary record or portions thereof may be made at hearing, unless the presiding officer directs otherwise.

The Administrative Law Judge or presiding officer, as applicable, may require the production of further evidence upon any issue. Upon agreement of the parties, the presiding officer may authorise the receipt of specific documentary evidence as a part of the record within a fixed time after the hearing is adjourned, reserving exhibit numbers therefore.

A motion to compel or to limit discovery or access to prepared testimony prior to its admission into evidence is not eligible for resolution unless the parties to the dispute have previously met and conferred in a good faith effort to informally resolve the dispute. The motion shall state facts showing a good faith attempt at an informal resolution of the discovery dispute presented by the motion, and shall attach a proposed ruling that clearly indicates the relief requests.[1507]

Any party may obtain discovery from any other party regarding any matter, not privileged, that is relevant to the subject matter involved in the pending proceeding, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence, unless the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence (Rule 10.1).

General Order No 66-C also mandates that the third party access to any documents, publications and reports held by the CPUC, with the exception of records or

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[1505] CPUC, *General Orders No 66-C: Procedures for Obtaining Information and Record in the Possession of the Commission and Its Employees and Commission Policy Orders Therein*, 1982. Available at: http://162.15.7.24/PUBLISHED/Graphics/644.PDF [accessed on 29 August 2008].

[1506] CPUC, *General Orders No 66-C: Procedures for Obtaining Information and Record in the Possession of the Commission and Its Employees and Commission Policy Orders Therein*, 1982. Available at: http://162.15.7.24/PUBLISHED/Graphics/644.PDF [accessed on 29 August 2008].

[1507] CPUC, *Rules of Practice and Procedure, 2007*. Available at: http://docs.cpuc.ca.gov/published/Rules_prac_proc/70731.htm [accessed on 29 August 2008].

information precluded from disclosures by statute, or records or information of a confidential nature.

All draft orders, proposed and draft decisions and their alternates, draft resolutions and their alternates, and written reports appearing on the agenda, except those documents relating to items the Commission considers during its closed session, by publishing them on the CPUC's Internet web site. A hard copy of these documents can be obtained from the Commission's Central Files Office.

Computer Model Documentation and Access

CPUC's Rules include procedures for the provision of computer model documentation if a computer model is used as testimony or exhibits as part of a proceeding, such as under Rule 10.1.

The information must include:[1508]

> (1) A description of the source of all input data;
>
> (2) The complete set of input data (input file) used in the sponsoring party's computer run(s);
>
> (3) Documentation sufficient for an experienced professional to understand the basic logical processes linking the input data to the output, including but not limited to a manual which includes:
>
> > (A) A complete list of variables (input record types), input record formats, and a description of how input files are created and data entered as used in the sponsoring party's computer model(s).
> >
> > (B) A complete description of how the model operates and its logic. This description may make use of equations, algorithms, flow charts, or other descriptive techniques.
> >
> > (C) A description of a diagnostics and output report formats as necessary to understand the model's operation.
>
> (4) A complete set of output files relied on to prepare or support the testimony or exhibits; and
>
> (5) A description of post-processing requirements of the model output.

The rules also state that a sponsor party, if makes further modifications to the model and data and uses the results in a proceeding, shall provide the modified model or data to any requesting party who has previously requested access to the original model or data base.

Parties shall maintain copies of computer models and data bases in unmodified form until 90 days after the date of issuance of the Commission's last order or decision in the proceeding, including order or decision on application for rehearing, to the extent that those computer models and data bases continue to provide the basis, in whole or in part, for their showing.

Rule 10.4 provide procedures to enable a party to access a computer model or data base used as testimony or exhibits by another party. This rule provides:

> (a) Any party seeking access to a computer model or data base shall serve on the sponsoring party a written explanation of why it requests access to the information and how its request relates to its interest or position in the proceeding.
>
> (b) Any sponsoring party shall provide timely and reasonable access to, and explanation of, that computer model or data base to all parties complying with subsection (a).

[1508] CPUC, *Rules of Practice and Procedure,* Rule 10.3(a).

(c) If a party requests access to a data base, the sponsoring party may, at its election, either

(1) provide such access on its own computer,

(2) perform any data sorts requested by the requesting party,

(3) make the data base available to the requesting party to run on the requesting party's own computer, or

(4) make the data base available through an external computer service.

(d) If a party requests access to a computer model, the sponsoring party may, at its election, either

(1) make the requested runs on its own computer,

(2) make the model available to the requesting party to run on that party's own computer, or

(3) have the requested model run produced for the requesting party by an external computer service.

(e) The sponsoring party is not required to modify its computer model or data base in order to accommodate a request, or to install its model on the requesting party's computer, or to provide detailed training on how to operate the model beyond provision of written documentation. The sponsoring party is not required to provide a remote terminal or other direct physical link to its computer for use by the requesting party. The sponsoring party may take reasonable precautions to preclude access to other software or data not applicable to the specific model or data base being used.

(f) Within five business days of receipt of a request from a requesting party pursuant to this rule, the sponsoring party shall indicate whether the request is clear and complete and shall provide the requesting party a written estimate of the date of completion of the response.

Decision-making and Reporting[1509]

Organisational Structure

The CPUC consists of five Commissioners appointed by the Governor and confirmed by the Senate, for six year staggered terms. The Governor appoints one of the five to serve as Commission President.

The CPUC's decisions are determinative. However, concurrently, the Office of Governmental Affairs represents the Commission before the State Legislature and Executive Branch and oversees representation of the PUC and State of California before the United States Congress and federal agencies.

The CPUC is assisted by around 35 Administrative Law judges, trained as attorneys, engineers and accountants, who hear cases and develop an evidentiary record for the Commission. ALJ's appear to be appointed via the internal employment procedure of the CPUC.

Commissioners and the Administrative Law Judges are supported by staff consisting of lawyers, economists, industry specialists and administration. The four key divisions of the CPUC that provide support with respect to dispute resolution include:

The Energy Division, which provides technical support to the Commissioners and their offices, and the Administrative Law Judges. The Energy Division drafts resolutions for formal consideration by the Commission. Resolutions generally result

[1509] CPUC, *About Us*, 2008. Available at: http://www.cpuc.ca.gov/PUC/aboutus/ [accessed on 25 July 2008].

from informal utility requests called Advice Letters, which are submitted by utilities to request rate and tariff adjustments.

The Water Division supports the Commission by investigating water and sewer system service quality issues and analysing and processing utility rate change requests. Water Division auditors, engineers, analysts and financial experts prepare testimony and analytical reports and work directly with utility management to track and certify compliance with Commission requirements.

The Communications Division assists the Commission in developing and implementing policies to promote competition in all telecommunications markets and to address regulatory changes required by state and federal legislation.

The Administrative Law Judges Division supports Commission decision making by processing formal filings, facilitating alternative dispute resolution, conducting hearings, developing an adequate administrative record, preparing timely proposals for Commission consideration, and preparing and coordinating Commission business meeting agendas. The ALJ Division also administers the Commission's Alternative Dispute Resolution Program.

Commission Meetings

Rule 15.1 sets out the procedures for Commission meetings. It states that Commission Business Meetings should be held on a regular scheduled basis. The purpose of these meetings is, among other things, to consider and vote on decisions and orders. Notice of the time and place of these meetings will appear in the CPUC's Daily Calendar.

Business Meetings are open to the public. However, the Commission may hold closed sessions as part of a regular or special meeting. Similarly, a Rate Setting Deliberative meeting may be held in closed session to consider a decision arising from a rate setting proceeding where a hearing was held.

A Commission meeting's agenda will be published on the CPUC's website at least 10 days prior to the meeting. The agenda is also available for viewing and photocopying (for a fee) at the Process Office. Members of the public may also subscribe to receive hard copies of the agenda. A matter that is not on the agenda of a meeting cannot be decided except in the special circumstances set out in Rule 15.2.

An agenda item will be voted upon, withdrawn or held over to a future Commission meeting. A 'held list' (a list of items appearing on the public agenda that are held to future meetings) will be published the day before each Commission meeting along with the date of the meeting to which the items (except for executive session items) are continued. A statement of the reason for the hold will also be published if the items are held at the behest of an individual Commissioner. An individual Commissioner may hold any public agenda or executive session item for no more than two successive Commission meetings or, if not successive, a total of two one meeting continuances. Any one item cannot be held more than six times as a result of requests by individual commissioners. However, for stated extraordinary circumstances, a majority may vote to hold an item for additional meetings. No hold may violate any applicable legislative deadlines.

The held list may be updated as a result of public discussion (or non-public discussion, in the case of executive session items) during the course of the Commission meeting.

All draft orders, proposed and draft decisions and their alternates, draft resolutions and their alternates and non-confidential written reports appearing on the agenda will also be published on the CPUC's website and made available for viewing at the Commission's Central Files in San Francisco and at its Los Angeles office.[1510]

Commission decisions are determined by a vote. The vote on the appeal or a request for review shall be in a public meeting and shall be accompanied by an explanation of the Commission's decision, which shall be based on the record developed by the presiding officer.

All executive session meetings are recorded electronically, or by tape recorder. The recordings are maintained for at least one year and will be made available to a Commissioner on request.

Decisions

The preceding discussion has highlighted that there are a number of decision-making stages prior to the issuing of a final CPUC decision.

The presiding officer's decision is a recommended decision that is proposed by the presiding officer in an adjudicatory proceeding in which evidentiary hearings have been conducted.

A proposed decision is a recommended decision, other than a presiding officer's decision in an adjudicatory proceeding in which hearings have been conducted, that is proposed by the presiding officer or where there is not a presiding officer, the Administrative Law Judge or the assigned Commissioner, in a rate setting, quasi-legislative, or adjudicatory proceeding.

A draft resolution is a recommended resolution that is proposed by a CPUC director.

An 'alternate' is a substantive revision by a Commissioner to a proposed decision or draft resolution not proposed by that Commissioner where revision either:

- materially changes the resolution of a contested issue, or
- makes any substantive addition to the findings of fact, conclusions of law, or ordering paragraphs.

Alternate also means a recommended decision prepared by the assigned Administrative Law Judge in a rate setting proceeding where the assigned Commissioner is the presiding officer.

The Commission's rules set out timelines that should be met for the filing of recommended decisions.[1511]

> (a) A proposed decision should be filed with the Commission and served on all parties without undue delay, not later than 90 days after submission.
>
> (b) A presiding officer's decision shall be filed with the Commission and served on all parties without undue delay, no later than 60 days after submission.
>
> (c) A draft resolution shall not be filed with the Commission, but shall be served as follows, and on other persons as the Commission deems appropriate:
>
> > (1) A draft resolution disposing of an advice letter shall be served on the utility that proposed the advice letter, on anyone who served a protest or response to the advice letter, and any third party whose name and interest in the relief sought appears on the

[1510] CPUC, *Rules of Practice and Procedure,* Rule 15.3.
[1511] CPUC, *Rules of Practice and Procedure,* Rule 14.2.

face of the advice letter (as where the advice letter seeks approval of a contract or deviation for the benefit of such third party);

(2) A draft resolution disposing of a request for disclosure of documents in the Commission's possession shall be served on (A) the person who requested the disclosure, (B) any Commission regulatee about which information protected by Public Utilities Code Section 583 would be disclosed if the request were granted, and (C) any person (whether or not a Commission regulatee) who, pursuant to protective order, had submitted information to the Commission, which information would be disclosed if the request were granted.

(3) A draft resolution disposing of one or more requests for motor carrier operating authority shall be served on any person whose request would be denied, in whole or part, and any person protesting a request, regardless of whether the resolution would sustain the protest;

(4) A draft resolution establishing a rule or setting a fee schedule for a class of Commission-regulated entities shall be served on any person providing written comment solicited by Commission staff (e.g., at a workshop or by letter) for purposes of preparing the draft resolution.

The Commission shall vote on its decision in a rate setting or quasi-legislative proceeding not later than 60 days after issuance of a proposed or draft decision. The Commission may extend the deadline for a reasonable period under extraordinary circumstances. The 60-day deadline shall be extended for 30 days if any alternate decision is proposed. Under Rule 15.4, decisions shall become effective 20 days after issuance, unless otherwise provided therein.

In an adjudicatory proceeding in which a hearing was held:[1512]

(a) The decision of the presiding officer shall become the decision of the Commission if no appeal or request for review is timely filed pursuant to Rule 14.4. The Commission's Daily Calendar shall notice each decision of a presiding officer that has become the decision of the Commission, the proceeding so decided, and the effective date of the decision.

(b) The Commission may meet in closed session to consider the decision of the presiding officer that is under appeal pursuant to Rule 14.4. The vote on the appeal or a request for review shall be in a public meeting and shall be accompanied by an explanation of the Commission's decision, which shall be based on the record developed by the presiding officer. A decision different from that of the presiding officer shall include or be accompanied by a written explanation of each of the changes made to the presiding officer's decision. The decision shall become effective 20 days after issuance, unless otherwise provided therein.

Decisions rendered pursuant to the Expedited Complaint Procedure (when the amount of money claimed does not exceed the jurisdictional limit of the small claims court) are not to be considered as precedent or binding on the CPUC or the courts of California.[1513]

Preliminary analysis of General Orders, Rules and Procedures and the *California Public Utilities Code* does not clearly define the reach or scope of a decision. However it does appear decisions should be consistent with Commission precedent unless adequate explanation for departing from precedent is provided.[1514]

[1512] CPUC, *Rules of Practice and Procedure,* Rule 15.5.

[1513] CPUC, *Rules of Practice and Procedure: Article 4. Complaints and Commission Investigations,* 2008, Rule 4.5 Available At: http://docs.cpuc.ca.gov/published/rules/44887-04.htm [accessed on 29 August 2008].

[1514] *Californian Public Utilities Code*, s. 1701.

Appeals

Rule 14.4 allows for the appeal and review of a presiding officers decision, in accordance with s. 1701 of the *California Public Utilities Code*. The rule states:

> (a) Any party may file an appeal of the presiding officer's decision within 30 days of the date the decision is served.
>
> (b) Any Commissioner may request review of the presiding officer's decision by filing a request for review within 30 days of the date the decision is served.
>
> (c) Appeals and requests for review shall set forth specifically the grounds on which the appellant or requestor believes the presiding officer's decision to be unlawful or erroneous. Vague assertions as to the record or the law, without citation, may be accorded little weight.
>
> (d) Any party may file its response no later than 15 days after the date the appeal or request for review was filed. In cases of multiple appeals or requests for review, the response may be to all such filings and may be filed 15 days after the last such appeal or request for review was filed. Replies to responses are not permitted. The Commission is not obligated to withhold a decision on an appeal or request for review to allow time for responses to be filed.

Section 1756 of the *California Public Utilities Code* states that within 30 days after the CPUC issues its decision denying the application for a rehearing, or, if the application was granted, then within 30 days after the CPUC issues its decision on rehearing, or at least 120 days after the application is granted if no decision on rehearing has been issued, any aggrieved party may petition for a writ of review in the Court of Appeal or the Supreme Court for the purpose of having the lawfulness of the original order or decision, or of the order or decision on rehearing, inquired into and determined.

Under s. 1756.2, in any review of an order or decision of the CPUC by the Supreme Court or Court of Appeal, the CPUC and each party to the CPUC proceeding may appear and be heard as a party. However, no new or additional evidence shall be introduced upon review by the court. The findings and conclusions of the CPUC on findings of fact shall be final and shall not be subject to review (exceptions apply). The questions of fact shall include ultimate facts and findings and conclusions of CPUC on reasonableness and discrimination.[1515]

In a complaint or enforcement proceeding, or in a ratemaking or licensing decision of specific application that is addressed to particular parties, the court's review shall not extend further than to determine, on the basis of the entire record certified by the CPUC, whether any of the following occurred:

- The order or decision of the CPUC was an abuse of discretion
- The CPUC acted without, or in excess of, its powers or jurisdiction
- The CPUC has not proceeded in the manner required by law
- The CPUC's decision is not supported by the findings
- The findings in the CPUC's decision are not supported by substantial evidence in light of the whole record
- The CPUC's order or decision was procured by fraud

[1515] *Californian Public Utilities Code,* s. 1757.

- The CPUC's order or decision violates any right of the petitioner under the US or California Constitutions.

In reviewing decisions relating solely to water corporations, however, the review shall not be extended further than to determine whether the CPUC has regularly pursued its authority, including a determination whether the order or decision under review violates any right of the petitioner under the US or California Constitutions.

The Supreme Court shall grant expedited consideration to any party or the CPUC petition alleging that the Court of Appeal has assumed jurisdiction to review a CPUC decision pertaining solely to water corporations over which the Court of Appeal has no jurisdiction.

In any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the US or California Constitution, the Supreme Court or Court of Appeal shall exercise independent judgment on the law and the facts, and the findings or conclusions of the CPUC material to the determination of the constitutional question shall not be final.[1516]

The Supreme Court or court of appeal may grant a temporary stay restraining the operation of the CPUC order or decision, other than an order or decision authorising an increase or decrease in rates or changing a rate classification, at any time before the required hearing.[1517]

Upon the hearing the Supreme Court or court of appeal shall enter judgment either affirming or setting aside the order or decision of the CPUC.[1518]

The Supreme Court may review decisions of the Court of Appeal. The procedure for this review follows the manner provided for other civil actions.[1519]

[1516] *Californian Public Utilities Code,* s. 1760.
[1517] *Californian Public Utilities Code*, s. 1762.
[1518] .*Californian Public Utilities Code*, s. 1758.
[1519] *Californian Public Utilities Code*.