

Report on competition complaints

1 April 2004 to 31 March 2005

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1. Purpose

- 1.1 This report focuses on our work on issues arising from information we receive concerning potentially anti-competitive behaviour. We have various powers to deal with such issues. The report looks at our work in relation to the Competition Act 1998 (the Act) and explains the significance of the Water Act 2003 (WA03), the Freedom of Information Act 2000 (FOIA) and EU modernisation.
- 1.2 The Act came into force on 1 March 2000. It gives the Director concurrent powers with the Office of Fair Trading (OFT) to apply and enforce the Act for commercial activities connected with the supply of water, securing a supply of water, the provision or securing of sewerage services in England and Wales. Under the Act, the Director has powers to investigate anti-competitive agreements and abuses of a dominant position¹.

2. Complaints received and issues raised

Complaints and cases

- 2.1 We receive various communications (mostly by post, but also by telephone and e-mail) that give rise to potential concerns of anti-competitive conduct. We generically refer to these as complaints. When we decide to investigate a complaint we refer to this as a case. We have tried to keep the classification of complaints and cases consistent with our previous reports. The figures are not necessarily consistent with those published by other concurrent competition authorities.

Assessing new complaints

- 2.2 When we receive a complaint we consider carefully, amongst other things:
- the consumer detriment involved;
 - which powers would be the most appropriate;
 - the complainant's views;
 - the benefits of setting a precedent for the market;
 - the size of the market; and
 - resource constraints.

¹ Section 2 of 'The Competition Act 1998 – The Application in the Water and Sewerage Sectors' (OFT 422) explains these powers.

We cannot investigate a complaint under the Act unless we have reasonable grounds for suspecting an infringement (the criterion specified in section 25 of the Act) of either the:

- Chapter I prohibition – prohibits agreements between, decisions by or concerted practices of undertakings which prevent, restrict or distort competition and may affect trade within the United Kingdom; or the
- Chapter II prohibition – prohibits any conduct in a market by one or more undertakings which amounts to the abuse of a dominant position, and which may affect trade in the United Kingdom.

We are unlikely to consider complaints unless they are supported by substantial evidence and information, although we do take account of the resources available to the complainant. We are happy to speak to complainants before they make a complaint. Our leaflet, 'How to make a complaint: a guide to complaining to Ofwat under the Competition Act 1998', describes the type of information we expect complainants to submit.

- 2.3 Where a complaint raises issues which might fall within the scope of both the Water Industry Act 1991 (WIA91) and the Act, the Director has discretion to decide on the most appropriate powers to use. We will consider starting an investigation under the Act in response to a complaint when the evidence is sufficient to fulfil the section 25 criterion, and when we deem it to be the most appropriate tool to address the issues raised by the complaint. When investigating a complaint under the Act we are obliged to apply Articles 81 and 82 of the EC Treaty² if certain conditions are met (see section 6).
- 2.4 It may not always be appropriate to investigate a complaint under the Act. For example, we may be developing policy in relation to new legislation that will address the issues raised by the complainant (see section 5). The Director seeks, where appropriate, to apply consistent policy principles to similar subject matter, regardless of the powers he is applying.
- 2.5 Table 1 sets out the number of complaints that we received from 1 April 2004 to 31 March 2005. Last year we received 13 complaints and closed 13, the previous year we received 10 and closed 14 (including four complaints carried over from the previous year).
- 2.6 We have not put the names of complainants into the table because our normal practice is to keep the identities of the parties to a complaint confidential. Section 55 of the Act contains a general rule that no information that has been obtained under the Act should be disclosed without the consent of the person who gave the information and the

² Article 81 prohibits agreements which may affect trade between member states where there objective is to prevent, distort or restrict competition. Article 82 prohibits conduct by one or more undertakings, which amounts to an abuse of a dominant position.

person to whom the information relates. An important exemption to this is where disclosure is made for the purpose of facilitating the performance of relevant functions of the Director (these include functions under Part 1 of the Act and WIA91).

Table 1: Areas of complaint between 1 April 2004 and 31 March 2005

	Ongoing as of 1/4/04	Received 1/4/04 – 31/3/05	Closed 1/4/04 – 31/3/05	Ongoing as of 1/4/05
Infrastructure	1	6	7	0
Tankered waste	1	0	0	1
Common carriage/network access	1	1	2	0
Special agreements	0	1	0	1
Retail competition	0	0	0	0
Charges for abstraction	0	1	1	0
S47 ³ & appeals	1	2	1	2
Other	0	2	2	0
Total	4	13	13	4

3. Outcome of complaints, investigations and decisions

- 3.1 We have approached complaints in different ways to achieve the most positive outcomes possible. Sometimes we have sufficient grounds to investigate the complaint with a view to making a decision under the Act. In the past 12 months we have made two “no grounds for action” decisions⁴ (in the past these were referred to as non-infringement decisions). We, along with the OFT, now use this term for consistency with the European Commission following EU modernisation. We also decided not to withdraw or vary a previous “no grounds for action” decision in another case.
- 3.2 On three occasions in the last year, after receiving a complaint, the parties involved managed to negotiate a satisfactory outcome without our formal intervention using powers under the Act. The complainee either changed its behaviour of its own accord or the complainant decided to pursue a different course of action (before we began an investigation). If, after we have opened a case under the Act, a complainee offers to take action that the Director believes will address his concerns, and is appropriate, he may accept binding commitments to that effect.

³ See section 4.

⁴ The two cases were: Southern Water Services Limited/Provision of new infrastructure in East Kent, CA98/02/2004; and Complaint by Albion Water against Dŵr Cymru relating to common carriage for the supply of water to Shotton Paper, CA98/01/2004. The full decisions on both cases are available on the websites of Ofwat (www.ofwat.gov.uk) and the OFT (www.of.gov.uk).

- 3.3 Where a complaint raises issues which might fall within the scope of both WIA91 and the Act, the Director is able to decide whether it would be more appropriate to use his powers under WIA91 or the Act. 'The Competition Act 1998 – The Application in the Water Industry and Sewerage Sectors' (OFT 422) paragraphs 2.5 to 2.9 explains the relationship between the Act and WIA91. We intend to update our guidance after changes in water industry legislation are implemented.
- 3.4 Table 2 sets out the outcome of complaints between 1 March 2000 and 31 March 2005. From 1 April 2004 to 31 March 2005 we closed 13 complaints.

Table 2: Outcome of complaints 1 March 2000 – 31 March 2005

Outcome	1/3/00 – 31/3/01	1/4/01 – 31/3/02	1/4/02 – 31/3/03	1/4/03 – 31/3/04	1/4/04 – 31/3/05
No grounds for investigation	13	9	8	3	2
Company agreed to change its behaviour	10	6	3	2	1
Complaint outside the Act	4	1	6	2	3
Negotiation between parties resolved the issue	4	0	1	0	3
Complainant pursued alternative solution/did not pursue the issue	1	0	0	0	0
Closed on grounds of administrative priority	0	0	7	0	0
Developing policy on relevant issue(s)	0	0	0	2	1
Tribunal ⁵ judgement	0	0	0	5	0
Made a decision	0	0	1	0	3
Total	32	16	26	14	13

- 3.5 The case study below is an example of an infrastructure complaint we dealt with without commencing a CA98 investigation.

Case study

We received a complaint from a developer alleging that the Chapter II prohibition had been infringed. A site it was developing had a pipe in it which belonged to the appointed water company for the area. The appointed water company agreed a temporary build-over of the pipe to allow the development to take place, but as a permanent measure insisted that the pipe be diverted.

⁵ We refer to the Competition Appeal Tribunal (the CAT) as the Tribunal in this report.

The appointed water company appointed its own contractor to undertake the diversion work but the developer (who would pay for the work) said this was done without the work being put out to tender. The developer was offered the option of tendering for the work but the developer did not want to go down this route because it would result in delays and costs that it would have to pay the appointed water company. The developer asked us to consider this complaint because it thought the appointed water company was abusing its dominant position by appointing a contractor without putting the works out to tender.

We wrote to the developer suggesting that as it had been given the chance to tender for the works, it might wish to do so rather than pursue a lengthy investigation. The developer decided to follow our proposal so we closed the complaint.

The following case study is an example of where we made a no grounds for action decision.

Case study

Mid Kent Water Plc (Mid Kent) made a complaint against Southern Water Services Ltd (Southern Water). Both companies are appointed water companies under WIA91. The complaint related to the terms offered by Southern Water to a developer for the provision of water, wastewater and infrastructure services to a development site in Southern Water's supply area.

Mid Kent was competing with Southern Water for the provision of water, wastewater and infrastructure services to developers in Southern Water's supply area.

Mid Kent alleged that Southern Water had breached the Chapter II prohibition by making an offer to the developer to provide sufficient capacity to satisfy the entire water demand of the development site without making any charge for off-site works. It contrasted Southern Water's position in earlier correspondence with the developer, in which Southern Water had stated that the cost of the works to supply the site could be between £100,000 and £500,000, depending on the amount of water required. In particular Mid Kent alleged that Southern Water's offer was "effectively predatory" and appeared to be "discriminatory".

After an extensive investigation, we decided that Southern Water's conduct was not caught by the Chapter II prohibition, and there were no grounds for action.

Having reviewed the documents provided by Southern Water and having considered Southern Water's explanation, we had no sufficient reason to doubt that a dedicated water main (from service reservoirs further upstream) to the development site, which would have cost around £500,000 and had previously been suggested by Southern Water, was not actually needed. The suggestion of a dedicated main

seemed to have been based on a misunderstanding of how large a supply of water the developer needed for the development site.

There also appears to be no legal basis on which Southern Water could have sought a contribution from the developer towards its off-site works. Our investigation discovered that a water main had already been laid on the development site and that Southern Water's subsequent off-site work would ensure that sufficient water would be available through that main. From the information it appeared that the majority of the supply sought by the developer was for domestic purposes, as defined in section 218 of the WIA91. Under sections 45-51 of the WIA91, Southern Water is under a duty to connect a service pipe from its mains to any premises, provided that the purpose of the connection is to receive a supply of water for domestic purposes. There is nothing in those sections, or any other part of the WIA91, that permits Southern Water to make that connection conditional on a payment towards upgrading the network (because there was no need to lay a new main, the water main requisitioning provisions in section 41-44 of the WIA91 did not apply).

The only direct costs Southern Water can recover in such circumstances are the expenses it reasonably incurs in making the connection (section 45(6) of the WIA91). Appointed water companies are also entitled to make a general charge for connecting new premises, known as an infrastructure charge. But infrastructure charges are a contribution towards the overall costs of developing local networks to serve new customers and therefore bear no relation to any specific costs of upgrading the network that may be incurred as a result of making an individual connection.

4. Appeals under the Act

- 4.1 The Competition Appeal Tribunal (the Tribunal) hears and decides appeals and other applications or claims involving certain competition or economic regulatory issues. More precise details of the Tribunal's role are available on its website (www.catribunal.org.uk).
- 4.2 Certain decisions we take under the Act may be appealed to the Tribunal⁶. The Tribunal may confirm, set aside, or vary our decision, remit the case back to us or make any other decision that we could have made.
- 4.3 As at 31 March 2005 we are involved in five appeals before the Tribunal, two of which are active:

⁶ See sections 46 and 47 of the Act (as amended).

Table 3: Appeals to the Tribunal

Appeal	Case no.	Registered	Status
ALB v DGWS (Shotton)	1031/2/4/04	02/04/2004	Stayed ⁷
ALB v DGWS (Shotton)	1034/2/4/04(IR)	28/05/2004	Stayed
ALB v DGWS (Shotton)	1046/2/4/04	23/07/2004	Current
ALB v DGWS (Bath House)	1042/2/4/04	12/07/2004	Current
AV v DGWS (Shotton)	1045/2/4/04	21/07/2004	Stayed

Key: ALB – Albion Water Ltd, AV – Aquavitae (UK) Ltd, DGWS – Director General of Water Services, IR – interim relief.

Shotton

- 4.4 In December 2000, Albion Water Limited (Albion Water) complained to us about the terms offered by Dŵr Cymru Cyfyngedig Welsh Water (Dŵr Cymru) for access to its distribution and treatment infrastructure for supplying water to Albion Water’s customer, the Shotton paper mill. Albion Water alleged that Dŵr Cymru had breached the Chapter II prohibition of the Act for a number of reasons, relating to the price Dŵr Cymru had offered Albion Water for access to its network.
- 4.5 Albion Water lodged an appeal with the Tribunal on 2 April 2004, alleging that the Director had made an appealable decision in previous correspondence. The Director published his decision in this case on 27 May 2004 and Albion Water lodged a new appeal against the decision on 23 July 2004. The Tribunal stayed the original appeal, pending the outcome of Albion Water’s new appeal against the Director’s decision.
- 4.6 Aquavitae (UK) Limited (Aquavitae), a non-appointed water company, also lodged an appeal against the decision on 21 July 2004 by challenging the Director’s interpretation of the Costs Principle⁸ in the WA03. Subsequently, Aquavitae was granted leave to intervene in Albion Water’s appeal and Aquavitae’s own appeal was stayed pending the resolution of Albion Water’s appeal.
- 4.7 Albion Water applied to the Tribunal for interim relief on 28 May 2004. The Tribunal issued a consent order because the parties agreed bilaterally that Dŵr Cymru would reduce the price of its bulk supply of water to Albion Water by 2.05p/m³. The appeal continues and the Tribunal will make its judgement after the main hearing on 9-11 May 2005.

New Bath House/Albion Yard

- 4.8 In January 2001, Enviro-Logic Ltd (Enviro-Logic), now called Peninsula Water Ltd, complained to us about Thames Water Utilities Ltd’s (Thames Water) conduct in relation to providing a price for access to its network. Enviro-Logic wished to supply customers from boreholes at New Bath House and Albion Yard using Thames Water’s network.

⁷ The suspension or postponement of a legal action.

⁸ Section 66E Water Industry Act 1991 as amended by the Water Act 2003.

- 4.9 Following an exchange of correspondence with Enviro-Logic, the file on the complaint was closed. We then received an application under the original section 47 of the Act in relation to one point of the complaint. We concluded that the views put forward in a letter dated 8 March 2002 to Enviro-Logic and a letter dated 26 March 2002 to Thames Water amounted to a decision that the Chapter II prohibition had not been infringed. We published the letters on 31 March 2003. Enviro-Logic subsequently asked the Director under the original section 47 of the Act to withdraw or vary his decision in relation to other points of the complaint. In May 2004, the Director informed Enviro-Logic that he would not withdraw or vary his decision published on 31 March 2003.
- 4.10 Albion Water Ltd (a former subsidiary of Enviro-Logic) appealed the decision not to vary or withdraw the original decision to the Tribunal on 12 July 2004. The appeal continues and the Tribunal will make its judgements after the main hearing on 20 June 2005.

5. Developments

Procedures

- 5.1 We continually develop and review our procedures for handling complaints under the Act, building on experience and decisions made by ourselves and other competition authorities. We are revising our leaflet 'How to make a complaint: a guide to complaining to Ofwat under the Competition Act 1998'. It will provide a more comprehensive guide to the information and evidence we require before considering a new complaint. This will also help us evaluate which complaints to take forward, the powers we use and what the main issues are.

Common carriage and retail competition

- 5.2 The WA03 amends the WIA91 to extend opportunities for competition within England and Wales. Among other things, it provides a specific framework for access to the public water supply system within England and Wales. The relevant provisions within the WIA91 were included in the light of responses received by Defra⁹ and the Welsh Assembly Government to their joint consultation on 'Extending Opportunities for Competition in the Water Industry in England and Wales' (July 2002).
- 5.3 From autumn 2005, customers who are likely to be supplied with at least 50 Ml/yr in a set of premises will be able to purchase water from either their existing appointed water company or from a water supply licensee.
- 5.4 Extending opportunities for competition will increase customer choice and should lead to keener prices and the provision of new and

⁹ Department for Environment, Food and Rural Affairs.

improved services for customers. The new provisions in the WIA91 are set within the Government's wider objectives, which are:

- to protect public health, and ensure that the industry continues to deliver a safe and secure water supply;
- to protect and improve the environment;
- to meet the Government's social goals including affordability of water supplies; and
- to safeguard services to customer.

5.5 The WIA91 permits access to an appointed water company's supply system by a licensee for the purpose of supplying a customer's eligible premises. Prospective suppliers will need to obtain a Water Supply Licence from us in order to compete with appointed water companies in the supply of water through the appointed water companies' supply systems. Prospective suppliers can either apply for:

- a 'retail' Water Supply Licence, which entitles the holder to purchase a supply of water from an appointed water company and retail it to a customer's eligible set of premises; or
- a 'combined' Water Supply Licence, which is a retail licence with a supplementary authorisation that enables the holder to introduce water into an appointed water company's supply system and retail it to a customer's eligible set of premises.

5.6 The specific framework for water supply licensing that WA03 creates gives us specific powers to resolve disputes. However, where a particular agreement or practice falls within the scope of WIA91, as amended by WA03, as well as one of the provisions of the Act, the Director will use the power which he considers the most appropriate.

5.7 The latest information on the water supply licensing regime can be obtained from our website at www.ofwat.gov.uk under the Competition section.

Freedom of information and the Act

5.8 The provisions of the Freedom of Information Act 2000 (FOIA) came into force on 1 January 2005. We have a responsibility to provide a response to any written request for information, normally within 20 working days, subject to a number of exemptions set out in the FOIA. As a result of Part 9 of the Enterprise Act 2002 (EA02), information obtained or held by us with regard to investigations under the Act or EA02 is likely to be exempt under section 44 FOIA, which states that where the disclosure of information is "prohibited by another enactment" it is exempt information for the purposes of the FOIA. However, we will consider each request for information on a case by case basis.

5.9 Further guidance regarding the provisions of the FOIA can be found at www.dca.gov.uk.

6. EU modernisation

- 6.1 Regulation 1/2003 of the Council of the European Union came into force on 1 May 2004 (the Modernisation Regulation). It obliges national competition authorities (NCAs), comprising the OFT and concurrent regulators in the United Kingdom including us, to apply EC competition law (Articles 81 and 82) when applying national competition law where there is a potential effect on trade between Member States.
- 6.2 We are required to apply Articles 81 and 82 of the EC Treaty where two cumulative criteria are met:
- where we apply national competition law; and
 - where there is a potential effect on trade between Member States.
- 6.3 We consider that many of our regulatory functions predominantly pursue an objective different from that pursued by Articles 81 and 82 of the EC Treaty. In addition, we consider that the second criterion is unlikely to be met in the water and sewerage sectors due to the lack of interstate trade.

Obtaining further information

- 6.3 The following publications can be obtained from our library:
- How to make a complaint: a guide to complaining to Ofwat under the Competition Act 1998;
 - The Competition Act 1998 – The application in the water and sewerage sectors; and
 - Competition in providing new water mains and service pipes.

Glossary of terms

Appointed water company: A company appointed under the WIA91 to provide water and/or sewerage services to a defined geographical area.

Common carriage: This arrangement allows competitors to input water into an undertaker's network in order to supply customers on the network. When the relevant provisions of WA03 come into effect in autumn 2005, new entrants may apply for a combined licence, which is a retail licence with a supplementary authorisation which enables the holder to input water into an undertaker's supply system and to retail that water to an eligible customer (one consuming at least 50Ml/year).

Concurrent competition authorities: Under the Act the sector regulators have, with two exceptions, all the powers of the OFT to apply and enforce its provisions with respect to the sectors they regulate. The exceptions are that only the OFT may issue guidance on penalties and make and amend the OFT's Rules.

Non-appointed water company: A company that supplies water and/or wastewater services but does not hold an appointment under the WIA91.

Retail competition: A situation where a licensee purchases wholesale water from an existing appointed water company to supply eligible premises. When the relevant provisions of WA03 come into effect in autumn 2005, new entrants may apply for a retail licence, which entitles the holder to purchase water from an undertaker (a wholesale supply) and to retail it to the eligible customer (one consuming at least 50Ml/year).

Section 25: Under section 25 of the Act, the Director may conduct an investigation if there are reasonable grounds for suspecting that the Chapter I or II prohibitions of the Act or Articles 81 or 82 of the EC Treaty have been infringed.

Tankered waste: Wastewater that is conveyed by tankers rather than the sewerage system, often because premises are not connected to the sewerage network. Ofwat does not regulate charges for the transport or treatment of tankered waste under the Water Industry Act 1991.

The Tribunal: The Competition Appeals Tribunal is a specialist judicial body with cross-disciplinary expertise in law, economics, business and accountancy. The function of the Tribunal is to hear and decide appeals and other applications or claims involving certain competition or economic regulatory issues.

Undertaking: Any natural or legal person capable of carrying on commercial or economic activities relating to goods or services, irrespective of its legal status. (Undertakers fall within this general definition.)