



# **Report on competition complaints**

**1 April 2005 to 31 March 2006**

**APRIL 2006**

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### 1. Purpose

- 1.1 For the last four years, this report has focused on our work on Competition Act 1998 (CA98) complaints and enquiries. This year we have widened this to include our work on queries and disputes following the introduction of the water supply licensing (WSL) regime on 1 December 2005 under the Water Act 2003 (WA03). The WA03 gave us specific powers to determine queries and disputes and to respond to general enquiries about the WSL regime.
- 1.2 Sections 2 and 3 of this report focus on our work on issues arising from information we receive about potentially anti-competitive behaviour. Section 4 reviews the work that we have undertaken on appeals before the Competition Appeal Tribunal (the Tribunal). Section 5 looks at the issues arising from the new WSL regime. Section 6 briefly discusses developments since our last report and section 7 provides sources of further information.

### 2. CA98 complaints received and issues raised

- 2.1 The CA98 came into force on 1 March 2000. It gives the Water Services Regulation Authority (Ofwat)<sup>1</sup> concurrent powers with the Office of Fair Trading (the OFT) to apply and enforce the CA98 for commercial activities connected with the provision of water and sewerage services in England and Wales. Under the CA98, Ofwat has powers to investigate anti-competitive agreements and abuses of a dominant position<sup>2</sup>.

#### Complaints and cases

- 2.2 We receive various communications (mostly by post, but also by telephone and e-mail) that raise concerns of potentially 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 published in this report are not necessarily consistent with those published by other concurrent competition authorities.

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<sup>1</sup> The Water Services Regulation Authority assumed the economic regulatory powers of the Director General of Water Services on 1 April 2006.

<sup>2</sup> Section 2 of 'The Competition Act 1998 – The Application in the Water and Sewerage Sectors' (OFT 422) explains these powers. The guidance refers to the Director General of Water Services, the predecessor of the Water Services Regulation Authority.

## Assessing new complaints

- 2.3 When we receive a complaint we consider carefully, amongst other things:
- the consumer harm involved;
  - which of our powers would be the most appropriate to address the complaint;
  - the complainant's views;
  - the benefits of setting a precedent for the market;
  - the size of the market; and
  - our resource constraints.
- 2.4 We cannot investigate a complaint under the CA98 unless we have reasonable grounds for suspecting an infringement (the criterion specified in section 25 of the CA98) of either the:
- Chapter I prohibition, which 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, which 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.
- 2.5 We are unlikely to consider complaints unless they are supported by substantive 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, 'A guide to complaining to Ofwat under the Competition Act 1998', describes the type of information we expect complainants to submit.
- 2.6 Where a complaint raises issues which might fall within the scope of both the Water Industry Act 1991 (WIA91) and the CA98, Ofwat has discretion to decide on the most appropriate powers to use. We will consider starting an investigation under the CA98 in response to a complaint when the evidence is sufficient to fulfil the section 25 CA98 criterion, and when we deem it to be the most appropriate legislation to address the issues raised by the complaint. 'The Competition Act 1998 – The Application in the Water and Sewerage Sectors' (OFT 422) paragraphs 2.5 to 2.9 explains the relationship between the CA98 and the WIA91. When investigating a complaint under the CA98 we are obliged to apply Articles 81 and 82 of the EC Treaty<sup>3</sup> if there is a potential effect on trade between Member States.

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<sup>3</sup> Article 81 prohibits agreements which may affect trade between member states where their object or effect 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 in so far as it affects trade between member states.

- 2.7 It may not always be appropriate to investigate a complaint under the CA98. For example, we may be developing policy that will address the issues raised by the complainant and this may deal with the issues raised by the complaint in the most efficient way. We seek, where appropriate, to apply consistent policy principles to similar subject matter, regardless of the powers we are applying.
- 2.8 Table 1 sets out the number of complaints, analysed by area of complaint, which we received from 1 April 2005 to 31 March 2006. During this time we received 15 complaints and closed 14. In the previous year we received 13 and closed 13.
- 2.9 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 CA98 contains a general rule that no information that has been obtained under the CA98 should be disclosed without the consent of the person who gave the information and the person to whom the information relates. An important exception to this is where disclosure is made to allow us to carry out our functions (these include functions under Part 1 of the CA98 and the WIA91).
- 2.10 Information obtained or held by us with regard to investigations under the CA98 or the Enterprise Act 2002 is likely to be exempt from disclosure under the Freedom of Information Act 2000 (FOIA). Section 44 FOIA 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 under the FOIA on a case-by-case basis.

**Table 1:  
Areas of complaint between 1 April 2005 and 31 March 2006**

	Ongoing as of 01.04 05	Received	Closed	Ongoing as of 01.04. 06
Infrastructure	0	3	2	1
Tankered waste	1	3	4	0
Special agreements	0	1	1	0
Procurement procedures	0	2	2	0
Charges for abstraction	0	1	1	0
S47 <sup>4</sup> and appeals	2	2	2	2
Other	0	3	2	1
<b>Total</b>	<b>3</b>	<b>15</b>	<b>14</b>	<b>4</b>

*We received no complaints on common carriage or retail competition this year and have removed those rows from the table.*

<sup>4</sup> See section 4.

### 3. Outcome of complaints, investigations and decisions

3.1 We approach complaints in the most appropriate way depending on the specific nature of each complaint. Sometimes we have sufficient grounds to investigate the complaint with a view to making a decision under the CA98.

3.2 Table 2 sets out the outcome of complaints between 1 April 2001 and 31 March 2006. From 1 April 2005 to 31 March 2006 we closed 14 complaints (including complaints that were withdrawn).

**Table 2:  
Outcome of complaints between 1 April 2001 and 31 March 2006<sup>5</sup>**

Outcome	2001-02	2002-03	2003-04	2004-05	2005-06
No grounds for investigation	9	8	3	2	1
Company agreed to change its behaviour	6	3	2	1	0
Complaint outside the CA98	1	6	2	3	5
Negotiation between parties resolved the issue	0	1	0	3	3
Complainant pursued alternative solution/did not pursue the issue	0	0	0	0	2
Closed on grounds of administrative priority	0	7	0	0	0
Developing policy on relevant issue(s)	0	0	2	1	1
Appeal to the Tribunal / Tribunal gave judgment	0	0	5	0	1
Made a decision	0	1	0	3	1
<b>Total</b>	<b>16</b>	<b>26</b>	<b>14</b>	<b>13</b>	<b>14</b>

3.3 The following case study is an example of a complaint alleging abuse of a dominant market position where we made a 'no grounds for action' decision (this is included in the 'Made a decision' category).

<sup>5</sup> Data for 2000-01 are available in previous editions of this report.

## Case study

The Director General of Water Services (the Director) received a complaint under the CA98 from Quantum Waste Management Limited (QWM) on 17 December 2001. QWM collected and disposed of landfill leachate at waste water treatment works and other sites.

The complaint concerned Bioprocessing, then part of United Utilities Water plc (United Utilities), which received tankered waste on behalf of United Utilities at its waste water treatment works. QWM alleged that United Utilities was abusing a dominant position in the market for the treatment of tankered landfill leachate through:

- the prices it charged customers compared with the charges made to Bioprocessing;
- targeting certain customers to exclude competitors from the market; and
- denying third parties direct access to its waste water treatment works.

In autumn 2001, United Utilities approached QWM's largest customer and successfully offered to take over the transport as well as the on-going treatment of that customer's waste. QWM lost the haulage work for the three sites in question between January and March 2002.

We opened an investigation into the complaint on 18 January 2002. At the Director's initiative, the investigation went beyond the scope of QWM's complaint and included consideration of excessive pricing and discriminatory pricing. Our analysis showed that United Utilities was likely to have held a dominant position in this market at the time material to the complaint. However, United Utilities faced significant competitive constraints, which to some extent limited its market power. This is due to the nature of the market and the ability of customers to leave the market by building on-site leachate treatment plants.

After a thorough investigation, we found there were insufficient grounds for us to issue a Statement of Objections on any of the complaints raised by QWM. We also found that there were no grounds for action on any of the other issues considered on our own initiative.

The full decision can be found on our website at: [www.ofwat.gov.uk](http://www.ofwat.gov.uk)

## 4. Appeals to the Tribunal

- 4.1 Certain decisions that Ofwat takes under the CA98 may be appealed to the Competition Appeal Tribunal<sup>6</sup>. The Tribunal may confirm, set aside, or vary our decision, remit the case to us or make any other decision that we could have made. Further details on the Tribunal's role are available on its website ([www.catribunal.org.uk](http://www.catribunal.org.uk)).
- 4.2 We were involved in seven appeals before the Tribunal during 2005-06. Two appeals are active as at 31 March 2006.

**Table 3: Appeals to the Tribunal**

Appeal	Case number	Registered	Status
ALB v DGWS (Shotton)	1031/2/4/04	02.04.2004	Stayed <sup>7</sup>
ALB v DGWS (Shotton)	1034/2/4/04(IR)	28.05.2004	Stayed <sup>7</sup>
ALB v DGWS (Shotton)	1046/2/4/04	23.07.2004	Current
ALB v DGWS (Bath House)	1042/2/4/04	12.07.2004	Judgment 31.3.06
AQV v DGWS (Shotton)	1045/2/4/04	21.07.2004	Stayed <sup>7</sup>
AR v DGWS	1050/2/4/05	14.04.2005	Withdrawn
IWC v DGWS	1058/2/4/06	13.01.2006	Current

Key: ALB – Albion Water Ltd, AR – Aqua Resources Ltd, AQV – Aquavitae (UK) Ltd, DGWS – Director General of Water Services, IR – interim relief, IWC – Independent Water Company Ltd.

### Shotton

- 4.3 On 11 December 2000, Albion Water Limited (Albion Water) complained about the terms Dŵr Cymru Cyfyngedig Welsh Water (Dŵr Cymru) offered for access to its distribution and treatment infrastructure to supply water to Albion Water's customer, Shotton paper mill. Following our decision of 26 May 2004, Albion Water appealed to the Tribunal on 23 July 2004 (effectively replacing its earlier appeal of 2 April 2004). Dŵr Cymru, United Utilities Water Plc (United Utilities) and Aquavitae (UK) Limited (Aquavitae) were permitted to intervene in the case.
- 4.4 Albion Water applied to the Tribunal for interim relief on 28 May 2004. The Tribunal issued a consent order because the parties agreed that Dŵr Cymru would reduce the price of its bulk supply of water to Albion Water.
- 4.5 The first hearing took place in May 2005. On 22 December 2005, the Tribunal handed down an 'interim judgment' asking for more information on three main issues (bulk distribution costs of non-potable water, "standalone" costs of supplying Shotton and the Efficient Component Pricing Rule). The Tribunal stated that the issues in the case required further consideration.

<sup>6</sup> See sections 46 and 47 of the CA98 (as amended).

<sup>7</sup> The suspension or postponement of a legal action.

- 4.6 At present, the parties are providing additional evidence requested by the Tribunal and preparing their final submissions for the second hearing. This is scheduled to begin on 30 May 2006. The Tribunal will make its judgment after this hearing.

### **New Bath House/Albion Yard**

- 4.7 In January 2001, Enviro-Logic Ltd (Enviro-Logic), now called Peninsula Water Ltd, complained to us about Thames Water Utilities Limited'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.
- 4.8 Following an exchange of correspondence with Enviro-Logic, we closed our complaint file. We then received an application under the then section 47 of the CA98<sup>8</sup> 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 section 47 of the CA98 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 the decision that he had published on 31 March 2003.
- 4.9 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. Thames Water was permitted to intervene in the case. The main hearing took place on 20 and 21 June 2005.
- 4.10 The Tribunal handed down its judgment on 31 March 2006. The Tribunal set aside one part of the decision on the grounds of lack of reasoning but did not remit the matter to us. Further information, including the full judgment, can be obtained from the Tribunal's website.

### **Aqua Resources**

- 4.11 Aqua Resources Limited (Aqua Resources) wanted access to Severn Trent Water Limited's (Severn Trent) water network so it could introduce water to supply potential customers, but Aqua Resources did not want to be licensed (ie hold an appointment as a water or sewerage company). Severn Trent's access code said it required all network users to be licensed. Aqua Resources complained to us in November 2003 about this requirement in Severn Trent's access code.
- 4.12 Following intervention from the Parliamentary Ombudsman, we asked Severn Trent why its access code differed from our access code guidance. Severn Trent subsequently wrote to Aqua Resources to say

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<sup>8</sup> Section 47 of the CA98 has since been amended.

that it no longer insisted that companies had a licence as long as they could demonstrate that they have the necessary operational and technical ability and managerial experience. (Please note that the water supply licensing provisions in the Water Act 2003, implemented on 1 December 2005 have now changed the legal position (see section 5)).

- 4.13 Aqua Resources appealed to the Tribunal on 14 April 2005 on the grounds that Severn Trent had infringed CA98 by abusing its dominant position because it did not allow Aqua Resources access to its supply network.
- 4.14 Following a Case Management Conference on 18 May 2005, we submitted our defence on 31 May 2005. Aqua Resources was due to submit its reply by 28 June 2005, but it did not. Subsequently, Aqua Resources applied to the Tribunal for permission to withdraw its appeal. The Tribunal agreed on 11 July 2005.

### **Independent Water Company**

- 4.15 On 8 November 2005 Lanara Group (Lanara) complained to Ofwat about the behaviour of Bristol Water in relation to an inset proposal by Independent Water Company (IWC), a subsidiary of Lanara) for a housing development at Weston Road, Long Ashton, near Bristol. Lanara also sought interim measures. This followed an earlier complaint on 20 May 2005.
- 4.16 We refused Lanara's request for interim measures in a letter dated 25 November 2005 and decided not to open a CA98 investigation into Lanara's complaint. IWC appealed to the Tribunal on 13 January 2006. The issue of whether the appeal is admissible will be dealt with by the Tribunal as a preliminary issue.

## **5. Water supply licensing**

- 5.1 Since 1 December 2005, non-household customers who are likely to be supplied with at least 50 Megalitres (MI) of water per year at eligible premises have been able to choose whether to purchase water from their appointed water company or from a licensed water supplier (licensee). Any company that wants to become a licensee needs to obtain a Water Supply Licence from us. Our guidance 'Water Act 2003: Water supply licensing - Applying for a Water Supply Licence: guidance' (July 2005) provides more information. The WA03 gives us specific powers to make determinations on queries and resolve disputes relating to certain aspects of the WSL regime. Our 'Procedure for handling water supply licensing determinations' sets out our powers to determine queries and disputes, and our approach to handling determinations and enforcement powers. We also provide advice to stakeholders on all aspects of the WSL regime and respond to general enquiries. This section summarises our activity in relation to WSL determinations and general enquiries.

## **Disputes and queries**

5.2 We use the term 'dispute' to describe a situation where two parties cannot reach agreement on an issue. In some circumstances, the parties involved may decide to resolve their dispute informally without proceeding to a full determination. We use the term 'query' to refer to specific questions that we are asked on issues such as points of procedure or clarification of our guidance.

Our determination powers relate to the following specific issues:

- Eligibility – we can determine whether a proposed supply arrangement complies with the eligibility requirements of the WA03.<sup>9</sup>
- Access terms and conditions – if a licensee and appointed water company cannot agree the terms and conditions of a proposed access agreement, having followed our access code guidance, we can determine the terms for them.
- Conditions for refusing supplies – under sections 66A to 66C WIA91, the duties of primary and secondary undertakers to provide supplies of water do not apply if certain conditions are satisfied. A licensee can ask us to determine whether any of the conditions are satisfied.

5.3 We expect any party submitting a dispute or query to us for determination to have first read the relevant policy guidance and to have followed the procedures set out in that document as closely as possible. If it appears to us that a party has not followed the relevant guidance or procedures, we may decline to consider the matter until they have done so.

5.4 We will only consider making a determination where it is clear to us that the parties involved have followed the relevant guidance as far as possible.

5.5 To date we have not been asked to make a determination.

5.6 We wrote to all the Managing Directors of the appointed water companies on 20 April 2006 (MD215) to encourage them against any delays in negotiations with licensees. Where we have intervened in negotiations there has been swift progress.

## **General WSL enquiries**

5.7 A large part of our work on WSL involves responding to general enquiries on all aspects of the WSL regime including providing clarification on policy and explaining procedures. To date the largest block of enquiries (26%) has been from business customers about eligibility to switch supplier. This is followed by enquiries from the

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<sup>9</sup> These requirements were inserted in the WIA91 by the WA03.

appointed water companies about access codes and access code guidance (15%). All other categories are listed in table 4.

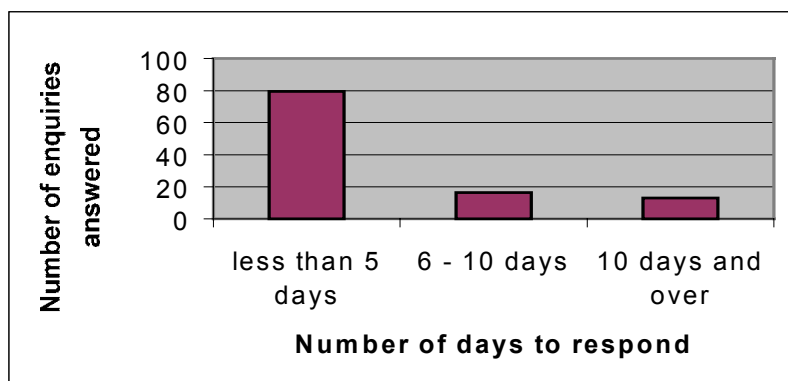
- 5.8 The table below sets out the number of enquiries by category received between May 2005 (when we received our first enquiry) and 31 March 2006.

**Table 4: Number of WSL enquiries by category**

	Appointed water company/ reporter	Potential licensee	Business customer	Private supplier	Other	Totals
Eligibility and applying for a licence	5	4	0	1	2	12
Water quality	0	0	0	0	1	1
Access pricing	7	1	0	0	1	9
Access codes and access code guidance	16	0	0	0	3	19
Legislative rules for supply interruptions	1	0	0	0	0	1
New licensee arrangements / prices	2	0	0	0	1	3
Powers to determine confidentiality agreements	1	0	0	0	0	1
How to switch supplier	0	0	6	0	0	6
Enquiries re eligibility to switch supplier	0	0	28	0	0	28
General	2	0	6	1	20	29
<b>Totals</b>	<b>34</b>	<b>5</b>	<b>40</b>	<b>2</b>	<b>28</b>	<b>109</b>

- 5.9 Our average response time to WSL enquiries is 5.3 days. Of the 109 enquiries received, we answered 73% within five working days and 15% of enquiries took us between six and ten days to respond to. Only 12% of the enquiries received took longer than ten days. The majority of WSL enquiries are received by email.

**Chart 1: WSL enquiry response rates**



## **6. Developments**

- 6.1 Implementation of the WA03 has led to the start of the WSL regime on 1 December 2005 (see 5.1 above). Also the Water Services Regulatory Authority assumed the economic regulatory powers of the Director General of Water Services on 1 April 2006. It has concurrent powers with the Office of Fair Trading (OFT) to apply and enforce the CA98 in the water and sewerage industry in England and Wales. Ofwat has a duty to protect the interests of consumers, wherever appropriate by promoting effective competition between persons engaged in, or in commercial activities connected with, the provisions of water and sewerage services.
- 6.2 We continue to develop and review our procedures for handling complaints under the CA98, building on our experience and that of other competition authorities. We are revising our leaflet 'How to make a complaint - A guide to complaining to Ofwat under the Competition Act 1998' which will now be called 'A guide to complaining to Ofwat under the Competition Act 1998'. It will provide an updated 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. We are also revising our information note 45 'Competition law in the water and sewerage industry'.
- 6.3 We aim to consult on a revised version of our guidance 'The Competition Act 1998 – The Application in the Water Industry and Sewerage Sectors' (OFT 422) by the end of March 2007.

## **7. Obtaining further information**

- 7.1 You can obtain the following publications from our library:
- A guide to complaining to Ofwat under the Competition Act 1998;
  - The Competition Act 1998 – The application in the water and sewerage sectors;
  - Information note 45: Competition law in the water and sewerage industry;

- Water Act 2003: Water supply licensing - applying for a Water Supply Licence: guidance (July 2005); and
- Water Act 2003: Water supply licensing – proposed procedure for handling water supply licensing determinations (June 2005).

You can find further information on our website ([www.ofwat.gov.uk](http://www.ofwat.gov.uk)) and on the OFT's website ([www.offt.gov.uk](http://www.offt.gov.uk)).

## Glossary of terms

**Access codes:** in September 2005 all appointed water companies published their access codes. These set out the terms and conditions on which they will grant access to their water supply systems.

**Concurrent competition authorities:** under the CA98 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 or make and amend the OFT's rules.

**Efficient component pricing rule:** The ECPR is a method of setting the price for access to infrastructure. In summary it is the access price equal to the infrastructure owner's retail price, less the infrastructure owner's avoided costs if it does not supply the retail service itself.

**Interim measures directions:** directions given by a competition authority before it has completed its investigation when it is necessary to act urgently to prevent serious, irreparable damage to a particular person (or group of people) or to protect the public interest.

**Leachate:** a product or solution formed by leaching, especially a solution containing contaminants picked up through the leaching of soil.

**Licensee:** a company holding either a retail licence or a combined licence. Also known as a 'licensed water supplier'.

**Primary water undertaker:** for the purposes of section 66A (wholesale water supplied by primary water undertaker) and section 66C of the Water Industry Act 1991 (wholesale water supply by secondary water undertaker), an appointed water company is the primary water undertaker of a licensee if its supply system is to be used for the purposes of making the supply to the premises of the licensee's customer.

**Secondary water undertaker:** an appointed water company other than a licensee's primary appointed water company (section 66C[1][a][i] of the Water Industry Act 1991).

**Section 25:** under section 25 of the CA98, Ofwat may conduct an investigation if there are reasonable grounds for suspecting that the Chapter I or II prohibitions of the CA98 or Articles 81 or 82 of the EC Treaty have been infringed.

**Statement of Objections:** a written statement to a party or parties against whom the OFT or a concurrent regulator proposes to make an infringement decision. The statement of objections sets out the facts relied on, the objections raised, the action proposed and the reasons for it.

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

**The Tribunal:** The Competition Appeal 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. (Appointed water companies fall within this general definition.)

**Water supply licensing (WSL):** from 1 December 2005, non-household customers who are likely to be supplied with at least 50 megalitres of water a year at each premises have been able to benefit from a new competition regime known as WSL. If eligible they may be able to choose their water supplier from a range of new companies entering the market, referred to as licensees.

**Water Services Regulation Authority:** assumed the economic regulatory powers of the Director General of Water Services on 1 April 2006.