

Decision by the Rail Regulator under the Competition Act 1998

Alleged abuse of a dominant position by Network Rail

Introduction

1. The Regulator has made a decision that, on the basis of the evidence before him, Network Rail has not infringed the prohibition contained in Chapter II of the Competition Act 1998 (“the Act”) with regard to the procurement of rail welding services.

Background

Jurisdiction

2. The Regulator is an independent statutory office holder appointed by Government under the Railways Act 1993¹ (“the Railways Act”), to regulate the railways following privatisation. The Regulator exercises powers under the Act concurrently with the OFT in respect of agreements or conduct which relate to the supply of services relating to railways.^{2,3}

3. The Chapter II prohibition is defined in section 18 of the Act as follows:

“...any conduct on the part of one or more undertaking which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom.”

4. In order to find an infringement under the Act, including an infringement of the Chapter II prohibition, the Regulator must be satisfied that on the balance of probabilities there has been an infringement and must be so satisfied in relation to each element necessary to establish that infringement. Generally, this will be possible only where there is strong and compelling evidence available to the Regulator⁴. This reflects the serious nature of infringements under the Act and the potential penalties that may be imposed for such infringements.

The undertaking

5. When the rail industry in the UK was privatised in 1993, ownership and management of the railway infrastructure was vested with Railtrack plc. In 2002 Railtrack was replaced by Network Rail (“NR”) a private company limited by guarantee. NR operates, maintains and renews the UK’s rail infrastructure, which includes track, trackside equipment, bridges, tunnels, earthworks, stations and depots.

6. A key condition of NR’s network licence (under the Railways Act) is the requirement to operate, maintain and enhance the rail network in a timely, efficient, economic and safe manner.

¹ As amended

² As defined in section 67(3ZA) of the Railways Act

³ See the Office of Fair Trading “Application to services relating to railways”, A Competition Act 1998 guideline published with the ORR, OFT430, November 2002

⁴ See *Napp Pharmaceuticals and subsidiaries v Director General of Fair Trading* Case 100/1/01 [2002] CAT 5

The complainant

7. Mr Robin Cope, the complainant, is chair of the Sub Contractors Welding Federation, a trade association representing welding sub contractors.

The complaint

8. On the 7th July 2003, the Regulator received a complaint alleging to the effect that NR had abused a dominant position, through the implementation of a new system for the selection of welding suppliers to provide welding services to NR, whether directly or as subcontractors. The Regulator understands that the effect of the new system has been to reduce the number of welders approved to provide welding services to NR from in excess of 30 to, at present, 15.

9. On the basis of this complaint, the Regulator sent informal requests to NR for information regarding NR's revised tendering process for the procurement of rail welding services.

10. In order for there to be a breach of the Chapter II prohibition, the Regulator must demonstrate:

- (a) that an undertaking enjoys a dominant position on a relevant market;
- (b) that the undertaking has abused that dominant position; and
- (c) that such abusive conduct may affect trade within the United Kingdom.

11. In assessing whether the conduct of a dominant undertaking constitutes an abuse, the Regulator will consider any relevant evidence as to whether that conduct can be objectively justified.

12. For the reasons set out below it has not been necessary for the Regulator to reach any conclusions on market definition or on whether NR is dominant in any market.

Assessment of Network Rail's conduct

13. During 2003, NR carried out a review of how it procured rail welding services in order to improve the standard of rail welding and the manner in which welding services were delivered across the rail network. The review was in response to its concerns over an unacceptable level of rail weld failures and the poor management and delivery of welding services. NR concluded that improving both the management of safety and quality of rail weld services would best be achieved by:

- (a) The imposition of new performance standards for welding, whether carried out under direct contract to NR or by Infrastructure Maintenance Contractors ("IMCs") through in-house or contracted services; and
- (b) A competitive tender process to produce a shortlist of welding suppliers who would then be invited to provide welding services directly to NR or as subcontractors to the IMCs.

14. A key element of NR's strategy to improve the quality and safety of welding services was to reduce the number of sub-contractors that supplied rail welding services to the network. In May 2003 NR advised welding companies, through the

Link-Up scheme⁵, that it wanted to reduce the number of subcontractors. At the time there were in excess of 30 accredited welding companies to whom IMCs subcontracted welding work. The IMCs also have their own in-house welding teams.

15. To reduce the number of subcontractors, NR served notice that it was terminating all existing contracts with its welding subcontractors and that it would be re-tendering contracts under the revised procurement strategy. On 6 June 2003, it invited all accredited welding subcontractors to apply for pre-qualification status. This required welding companies to demonstrate that they met pre-set criteria covering commercial standing; operations; compliance with applicable standards and requirements of the specified services provided, commitment to training and development of personnel and safety.

16. The submitted applications were evaluated against the pre-qualification criteria and fifteen suppliers who scored above the benchmark score were short-listed and invited to bid for two-year contracts in any of NR's regions throughout the UK. These initial contracts also provide for the possibility of an extension of three years.

17. The Regulator considers that the decision by NR to rationalise its procurement of welding services as outlined in the preceding paragraphs is an appropriate and proportionate attempt by NR to address legitimate concerns held by NR relating to the quality of welding services the performance and delivery of welding services by welding suppliers and safety generally across the rail network as a whole. And to allow for an improved standard of quality and performance management by NR in the future.

18. Further, the Regulator is satisfied, having reviewed the pre-qualification criteria introduced by NR, that they are transparent, fair, non-discriminatory and objectively justified by these quality and safety concerns.

19. The Regulator does not, on the basis of the evidence laid before him, consider that the facts support the allegation made by the complainant that NR's revised tendering procedure constitutes abuse of any dominant position which NR might be said to hold. Consequently, he does not consider that there are reasonable grounds for suspecting that NR breached the Chapter II prohibition.

Network Rail's Network licence conditions

20. The Regulator also considered whether NR's revised procurement process breached Condition 10 of its licence, which requires NR '*not to unduly discriminate between persons or between any classes or descriptions of persons*', in carrying out its licensed activities. The Regulator, does not, on the basis of the evidence laid before him, consider that NR has breached Condition 10 of its network licence.

SARAH STRAIGHT
DEPUTY DIRECTOR
OFFICE OF THE RAIL REGULATOR
3 JUNE 2004

⁵ Link-up is a rail industry supplier qualification and verification scheme, designed to assure the quality of products and services bought by the rail industry