



OFFICE OF RAIL REGULATION

COMPETITION ACT 1998

COMPLAINT FROM NTM SALES AND MARKETING LTD AGAINST PORTEC RAIL PRODUCTS (UK) LTD CONCERNING THE SUPPLY OF GREASE FOR USE IN ELECTRIC TRACKSIDE LUBRICATORS

DECISION OF THE OFFICE OF RAIL REGULATION

12 AUGUST 2005

This is a non-confidential version of the decision. Confidential information and data have been redacted. Redactions are indicated by the “[]”.

SUMMARY

The Office of Rail Regulation (“ORR”) has decided to close its investigation into complaints made under the Competition Act 1998 (the “Act”) and under Articles 81 and 82 of the EC Treaty (the “Treaty”) by NTM Sales and Marketing Ltd (“NTM”) regarding the supply of grease for use in electric trackside lubricators on railway infrastructure in Great Britain. Following its investigation of this complaint, ORR has concluded that Portec Rail Products (UK) Ltd (“Portec”) and RS Clare and Company Limited (“Clare”) did not breach either the Chapter I prohibition of the Act/Article 81 of the Treaty or the Chapter II prohibition of the Act/Article 82 of the Treaty. This document sets out ORR’s conclusions following its investigation and also describes the relevant factual background and the conduct of its investigation.

BACKGROUND

Jurisdiction

1. ORR is an independent statutory body appointed by Government under the Railways Act 1993¹ (the “Railways Act”). ORR has a range of statutory powers under the Railways Act which include the approval of the contracts between owners of railway facilities (track, stations and light maintenance depots) and those requiring access to those facilities. ORR also issues licences (or, if appropriate, licence exemptions) to those wishing to operate railway assets (passenger or freight trains, networks, stations or light maintenance depots). In addition, ORR is the competent competition authority, concurrently with the Office of Fair Trading (“OFT”), under the Act with the responsibility for investigating and examining possible breaches of the prohibitions in that Act of (i) anti-competitive agreements (the “Chapter I prohibition”) and (ii) abuses of a dominant position (the “Chapter II prohibition”) which relate to the supply of services relating to railways².

Application of the Competition Act 1998

2. The Chapter I Prohibition as set out at section 2 of the Act states:
- “...agreements between undertakings, decisions by associations of undertakings or concerted practices which-
- (a) may affect trade within the United Kingdom, and
 - (b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom,
- are prohibited unless they are exempt in accordance with the provisions of this Part.”
3. The Chapter II Prohibition as set out at section 18(1) of the Act states:
- “...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. Under section 25 of the Act, ORR may exercise its formal powers of investigation only if there are reasonable grounds for suspecting that the Chapter I prohibition or the Chapter II prohibition has been infringed. Whether this test is met will depend upon the information available and the judgment of ORR³. The types of information that can provide reasonable grounds for suspicion are wide-ranging but can include documents provided by employees and complaints by third parties⁴. Where the section 25 test has been met,

¹ As amended.

² Section 67(3) Railways Act 1993. Section 67(3ZA) Railways Act 1993 provides that “services relating to railways” means: “railway services” (as defined in section 82 of the Railways Act 1993); the provision or maintenance of rolling stock; the development, maintenance or renewal of a network, station or light maintenance depot; and the development, provision or maintenance of information systems designed wholly or mainly for facilitating the provision of railway services.

³ OFT guideline 404, “*Powers of Investigation*” paragraph 2.1.

⁴ *ibid.*

ORR may require *any* person to produce a specified document or specified information which it considers relates to any matter relevant to its investigation under section 26(1) of the Act.

Application of Articles 81 and 82 of the EC Treaty

5. On 1 May 2004, the EC Modernisation Regulation⁵ came into force. This decentralises the application of Articles 81 and 82 of the EC Treaty⁶ to National Competition Authorities (NCAs) and the courts of the Member States. Article 35 of the Modernisation Regulation requires each of the Member States to designate NCAs for the purpose of applying Articles 81 and 82. ORR has been designated as a NCA for this purpose⁷. ORR exercises its Competition Act powers concurrently with the OFT in respect of agreements or conduct relating to the supply of services relating to railways⁸.

6. Article 81 as set out in the Treaty prohibits:

“All agreements between undertakings, decision by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.”

7. Article 82 as set out in the Treaty prohibits:

“Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.”

8. In respect of Article 81, The European Commission *Guidelines on the effect on trade concept*⁹ state at paragraph 77:

“When agreements or abusive practices cover the territory of a single Member State, it may be necessary to proceed with a more detailed inquiry into the ability of the agreements or abusive practices to affect trade between states. It should be recalled that for there to be an effect on trade between Member States it is not required that trade is reduced. It is sufficient that an appreciable change is capable of being caused in the pattern of trade between Member States. Nevertheless, in many cases involving a single Member State the nature of the alleged infringement, and in particular, its propensity to foreclose the national market, provides a good indication of the capacity of the agreement or practice to affect trade between Member States”.

⁵ Council Regulation EC 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty 16 December 2002 (OJ L1, 4.1.2003 p1).

⁶ The Treaty establishing the European Community.

⁷ Regulation 3 of the amending regulations (v. footnote 1).

⁸ Section 67(3) of the Railways Act 1993 (as amended by The Railways Act 2005).

⁹ OJ C101/81, 27 April 2004.

9. In respect of Article 82, the aforementioned EC *Guidelines*¹⁰ state:

“Where an undertaking, which holds a dominant position covering the whole of a Member State, engages in exclusionary abuses, trade between Member States is normally capable of being affected. Such abusive conduct will generally make it more difficult for competitors from other Member States to penetrate the market, in which case patterns of trade are capable of being affected¹¹...” (Paragraph 93.)

“Exclusionary abuses that affect the competitive market structure inside a Member State for instance by eliminating or threatening to eliminate a competitor, may also be capable of affecting trade between Member States. Where the undertaking that risks being eliminated only operates in a single Member State, the abuse will normally not affect trade between Member States...” (Paragraph 94.)

However,

“An effect on trade may arise from the dissuasive impact of the abuse on other competitors. If through repeated conduct the dominant undertaking has acquired a reputation for adopting exclusionary practices towards competitors that attempt to engage in direct competition, competitors from other Member States are likely to compete less aggressively, in which case trade may be affected, even if the victim in the case at hand is not from another Member State.” (Paragraph 94.)

10. In order to find an infringement of either the Chapter I prohibition/Article 81 or Chapter II prohibition/Article 82, ORR must be satisfied that there is strong and compelling evidence of an infringement and must be so satisfied in relation to each element necessary to establish that infringement. This reflects the serious nature of infringements under the Act and the potential penalties that may be imposed for such infringements. In its judgment in *Napp Pharmaceuticals Holdings Limited and subsidiaries v Director General of Fair Trading*, the Competition Appeal Tribunal held as follows:

“the standard of proof in proceedings under the Act involving penalties is the civil standard of proof, but that standard is to be applied bearing in mind that infringements of the Act are serious matters attracting severe financial penalties. It is for the Director to satisfy us in each case, on the basis of strong and compelling evidence, taking account of the seriousness of what is alleged, that the infringement is duly proved, the undertaking being entitled to the presumption of innocence, and to any reasonable doubt there may be.”¹²

The complaint

11. On 15 July 2004, ORR received a complaint from NTM. The complaint concerned the supply of grease for use in electric trackside lubricators. NTM alleged that Portec had refused to carry out a pumpability test of NTM’s grease, XL Rail Curve, in its new electric trackside lubricator, the Portec

¹⁰ OJ C101/81, 27 April 2004.

¹¹ See e.g. paragraph 135 of the judgment in *BPB Industries and British Gypsum* cited in footnote.

¹² *Napp Pharmaceuticals Holdings Limited and subsidiaries v Director General of Fair Trading* - Case 100/1/01 [2002] CAT 5 paragraphs 108 to 109.

Protector IV (“PIV”). This prevented NTM from gaining the necessary product acceptance from Network Rail that would allow it to supply grease for use in the PIV on Network Rail’s infrastructure. NTM also alleged that this refusal might be in agreement with Clare, a rival supplier of grease and sales agent for Portec, which had had a number of its grease products tested and approved for use in the PIV.

12. NTM claimed that Portec’s refusal to allow it to test its grease in the PIV was preventing it from competing in the market for the supply of grease for use in electric trackside lubricators. It was also concerned that because it considered that Network Rail – the main purchaser of trackside lubricators and lubricator grease in Great Britain – would tend to source its grease from suppliers whose grease products could be used in the full range of trackside lubricator types, it would increasingly be excluded from supplying grease for use in all trackside lubricator types for a major proportion of the market. NTM added that it was already beginning to lose market share.

13. NTM explained that it had made repeated requests to Network Rail, between February 2003 and July 2004, that it require Portec to test NTM’s grease, but received no reply. Network Rail eventually replied to NTM on 26 July 2004 explaining that correspondence from NTM had been redirected to Network Rail’s Engineering Function following an internal re-organisation, which would consider NTM’s concerns.

14. During the course of the investigation, it emerged that Portec required, in addition to the pumpability test, an extended year long trial of NTM’s grease in the PIV before it would give approval for its use in the PIV on Network Rail’s infrastructure. NTM alleged further that an extended trial was not necessary and was merely an attempt by Portec to foreclose the market to NTM for as long as possible. NTM also alleged that the requirement for an extended field trial and associated charges were discriminatory as other grease manufactures, most notably Clare, had not been required to undergo a year long trial or pay any charges for securing approval to use their grease in the PIV.

The main parties to the complaint

NTM Sales and Marketing Ltd

15. NTM supplies specialist lubricants to the rail industry. NTM designs and specifies its lubricant products which are blended and manufactured by Ironsides Lubricants, an independent toll manufacturing company that develops and manufactures lubricants, greases and compounds. It has supplied XL Rail Curve for treating rail curve wear since 2003.

Portec Rail Products (UK) Ltd

16. Portec is the UK subsidiary of Portec Rail Products Incorporated based in the United States of America and established in 1906. Supplying products to the UK and Europe it is, along with a Canadian based subsidiary, part of the parent company’s worldwide distribution of specialist rail infrastructure maintenance equipment, including trackside lubricators.

RS Clare & Company Ltd

17. Clare was founded in 1748 and has supplied lubrication grease for major oil companies over the past 80 years. It currently operates a traffic safety division (making and applying anti-skid surfaces and markings) and a specialist lubricant division (which markets to the rail, offshore oil and gas, steel, marine, automotive and food industries worldwide). Clare manufactures and supplies a number of specialist lubricants for use in the rail industry, including clamp lock lubricants, curved rail lubricants and fishplates. It is one of Network Rail's approved suppliers of grease and lubricants and lubricant applicators.

The products and services concerned

The Products

Trackside lubricators

18. Network Rail requires lubrication across a wide range of its track and trackside infrastructure e.g. curved rails, switch rails, rail joints etc. and for different purposes e.g. for protection against rail wear, anti-seize, anti-freeze etc. Meeting these different requirements involves the use of different types of lubricant and means of applying the lubricant, ranging from automatic to manual application.

19. Trackside lubricators are designed specifically to apply grease to curved sections of track in order to reduce wear of the rail caused by a train's wheels as it travels around the curve. The grease is applied to the rail automatically by grease pumps actuated by the trains: as a train approaches the curve, grease is dispensed and is then carried by the wheels along the length of the curve. This increases the service lives of both train wheels and the rail.

20. There are three principal types of trackside lubricators in use¹³, distinguished by whether the grease pumps are operated hydraulically, mechanically or electrically. The use of electrically operated trackside lubricators is relatively new to UK railway networks and they are used predominately on Network Rail's infrastructure.¹⁴ Portec first introduced the PIV electric lubricator to the UK in 2001, which as a result, initially gained a significant share of the market for the supply of electric lubricators¹⁵. Recently, Quay Head Rail International Ltd ("QHi), the other main supplier of trackside lubricators on the UK, introduced its own model of electric lubricator, the Lubricurve 10 ("L10") in 2002, and has enjoyed relatively strong growth.

¹³ Two further types in operation are cartridge lubricators and electro-mechanical lubricators; essentially these are derivatives of hydraulic and mechanical lubricators respectively.

¹⁴ Trackside lubricators are also used on other rail networks including London Underground Ltd, DLR and other light rail schemes.

¹⁵ Portec had previously supplied an early model of electric lubricator, the PL (E), however this model operated under a different design concept to the PIV and has since been withdrawn.

These two undertakings are currently the only suppliers of electric trackside lubricators in the UK.

21. The majority of lubricators in use on Network Rail and other rail infrastructures are of the hydraulic type, followed by mechanical (although these are increasingly regarded as an outdated means of applying grease for treating rail curve wear). Whilst electric lubricators account for a relatively small proportion of all lubricators supplied currently, this proportion has grown rapidly over the past three years and is set to continue. This is an important factor in this case, as NTM was concerned that it might be excluded from a new but growing market in which the majority of future sales will be of electric lubricators.

Trackside lubricator usage trends

22. Demand for trackside lubricators for use on Network Rail's infrastructure increased significantly following the Hatfield crash when it was identified that increased rail lubrication at curves helped to reduce the risk of 'gauge corner cracking' and 'rolling contact fatigue'. Network Rail implemented its Infrastructure Improvement Programme (IIP) in 2001/02, which involved the installation of additional trackside lubricators throughout all regions of its network. Recent anecdotal and sales evidence from Portec (see below) suggests there has been a significant tail-off in demand by Network Rail for the installation of new trackside lubricators, most likely as its IIP is largely complete.

23. Over the longer term demand may increasingly be driven more by the need to replace life expired models rather than by the need to actually augment the trackside lubricator asset base. Future demand will continue to comprise a mix of lubricator types, although mechanical lubricators are likely to be phased out as they are now regarded as less effective than hydraulic and electric lubricators. The proportion of electric lubricators in use is also likely to increase.

Electric trackside lubricators

24. QHi supplies only mechanical and electric lubricators. The proportion of its sales accounted for by electric lubricators had increased to []% by 2004 (value and volume).

25. Portec's sales are dominated by hydraulic lubricators but its own forecast suggests that future demand will see a significant increase in the proportion of electric lubricators, increasing to a [] of total supplies by 2007/08. See Table 1 below.

Table 1. Portec's forecast of future demand by lubricator type

Lubricator Type	2005/06			2006/07			2007/08		
	H	M	E	H	M	E	H	M	E
Customer									
Network Rail	[]	[]	[]	[]	[]	[]	[]	[]	[]
Other Rail	[]	[]	[]	[]	[]	[]	[]	[]	[]
Others	[]	[]	[]	[]	[]	[]	[]	[]	[]
Percentage of total Sales (Unit sales)	[]%	[]%	[]%	[]%	[]	[]%	[]%	[]%	[]%

Key: H=Hydraulic; M=Mechanical and E=Electric. Source: Portec's response to section 26 Notice dated 25 November 2004.

Network Rail's purchasing of trackside lubricators

26. Network Rail's purchases of lubricators are predominantly made at the area level. Prior to taking its maintenance work back in house, lubricators were purchased by Infrastructure Maintenance Companies (IMCs) on Network Rail's behalf. Table 2 below sets out the suppliers from which Network Rail purchases its lubricators.

Table 2. Suppliers of trackside lubricators to Network Rail

Manufacturer	Product	Type
Portec	PW	Hydraulic
	WECO	Hydraulic
	PL(M)	Mechanical
	PAMMEK (now obsolete)	Mechanical
	C4	Mechanical
	PL (E) (now obsolete)	Electrical
	PROTECTOR IV	Electrical
QHi	L'Curve	Mechanical
	L'Curve (electric)	Electrical
Square 2	Memolube	Cartridge (this requires a power supply)
R.S. Clare	Jumbo Lub[er]	Cartridge ¹⁶

Source: Network Rail's response to question 3 of Section 26 Notice dated 25 November 2004

Grease for use in trackside lubricators

27. The rail industry uses a wide range of different grease products for the lubrication and protection of infrastructure and rolling stock, however grease products used in trackside lubricators are designed specifically for this purpose.

28. Each grease product used in trackside lubricators must first meet the infrastructure operator's approval process to ensure that it provides effective protection of rail and wheel surfaces. The grease is required to meet certain technical and quality control criteria e.g. pumpability, performance during varying weather conditions, environmental standards, conductivity, consistency etc. The infrastructure operator carries out this approval process and issues a certificate of approval. Network Rail's approval process is explained in more detail below.

29. In addition to this first stage of approval, the grease product must also demonstrate that is compatible for use in the particular model of lubricator in which it is to be used. This stage of the approval process is a requirement of

¹⁶ Better described not as a lubrication system, but as a cartridge that is attached to a system with a battery, that dispenses at a pre-determined rate.

Network Rail to ensure that if the lubricator should fail, its failure cannot not be blamed on the grease. This compatibility test is carried out by the lubricator manufacturer who, if the grease passes the test, issues a 'letter of no objection' confirming that the grease product is suitable for use in the particular model of lubricator.

30. However, it is important to note that an individual grease product can be approved, and indeed many are, for use in a range of different lubricator types and models.

31. Some grease manufacturers have agreements and commercial relationships with lubricator manufacturers whereby they act as agents promoting the sale of lubricators. This is the case with Clare, a grease manufacturer and supplier, which has an agency agreement with Portec to promote Portec's lubricators in return for a commission on any sales made. It also has exclusive rights to supply the Clare/ATS Jumbo Luber (a form of lubricator) in the UK on behalf of ATS Electro-Lube (UK) Limited, a Canadian based company. By contrast, QHi has an agreement to promote Shell UK's grease; but also supplies other grease manufacturers' products, although not under any form of contractual agreement.

Network Rail's grease acceptance procedures¹⁷

32. The specification of how a particular grease product designed to treat rail curve wear must perform at the wheel-rail interface was originally laid down in British Rail specification BR672. This specified the required standards across a range of parameters such as worked penetration, oil separation, drop point, extreme pressure lubricating properties, water wash off, spread-ability and pumpability.

33. Following privatisation Railtrack reviewed the specification for all track lubricants, reassessing and approving lubricants against these specifications and issuing approval certificates. Greases approved for use prior to 1994 were issued with 'grandfather' rights that continued their approval. With the formation of IMCs, responsibility for ensuring that greases for treating rail curve wear were 'fit for purpose' fell largely to the IMCs until Network Rail began the process of bringing its rail maintenance back in-house.

34. More recently, Network Rail has required, for environmental reasons, that lubricants for use on its network should be biodegradable. This has required slight modification to some greases, although most manufacturers' greases are now bio-degradable in any case.

35. Network Rail purchases its grease from three main sources: directly from grease manufacturers, from lubricator manufacturers or from logistics companies, although the majority of its purchases are via the latter. All decisions on grease purchasing are taken locally. Network Rail only permits grease for use in trackside lubricators that meet its acceptance procedures based on the technical properties of the grease and its performance in acting on the rail surface. Network Rail also requires that trackside lubricator

¹⁷ London Underground Ltd operates a similar approval process.

manufacturers confirm that each grease product is compatible with the particular model of trackside lubricator in which it is to be used. Specifically, the grease manufacturer requires a 'letter of no objection' from the lubricator manufacturer to this effect. Network Rail has described its grease acceptance procedures thus:

'Stage 1: In response to a proposal for product acceptance form being submitted (with sponsorship) by a manufacturer, the Network Rail acceptance procedure requires the grease provider to obtain a 'letter of no objection' from the manufacturer(s) of rail lubrication machines. Network Rail currently only requires the grease to be able to pump through a given lubricator type. A letter of no objection from the lubricator manufacturer confirms this.

Stage 2: Once the manufacturer has completed a pump test and provided a 'letter of no objection' (for specific types of lubrication machines), the manufacturer of the grease will provide a copy to Network Rail together with all the other information/evidence requested in the Network Rail acceptance requirements letter. Following a review by Network Rail Engineering and if all the data submitted is acceptable, trials will then be required.

Stage 3: Trials will be carried out according to the trial criteria laid down by Network Rail Engineering. Upon completion of the trials, a trial report will be submitted to Network Rail for review. Following a review by Network Rail Engineering (and if all the data submitted is acceptable) a Certificate of Acceptance will be issued.'¹⁸

36. Network Rail will in principle purchase any grease that meets its approval criteria and has a 'letter of no objection'

Network Rail's future grease purchases

37. Network Rail is currently reviewing, from an engineering perspective, its existing grease acceptance process and specification of rail lubricants. The aim is to provide grease manufacturers with detailed specification tolerances to which suppliers must adhere. However, Network Rail does not at this stage indicate whether this will impact on future purchasing decisions between different manufacturers.

The Services

The supply of testing services of grease for use in trackside lubricators

38. As mentioned above, Network Rail requires that each individual trackside lubricator grease product must be compatible with the particular model of lubricator in which it is to be used. This involves the grease undergoing a workshop based 'pumpability test' to verify that the grease operates effectively through the lubricator and without any adverse effect on its machinery. The manufacturer of the respective lubricator carries out the test and if the grease performs to the required standard, the manufacturer will issue a 'letter of no objection', confirming that it approves its use in the particular model of lubricator in question. This testing process is thus an

¹⁸ Network Rail response to question (12) of section 26 Notice dated 17 May 2005.

essential route to market for the supply of grease for use in trackside lubricators for use on Network Rail's infrastructure. Currently, Portec and QHi as the only suppliers of trackside lubricators in the UK are the only suppliers of such testing services. Both manufactures have recently introduced charges for carrying out this test.

ORR Investigation

Preliminary and formal investigation

39. ORR initially carried out its investigation into NTM's complaint on an informal basis. The information gathered during this preliminary stage led ORR to conclude that it had reasonable grounds to suspect that a breach of competition law may have occurred. On 8 November 2004 ORR informed the OFT¹⁹ that it wished to exercise its concurrent jurisdiction to investigate the complaint. Agreement by the OFT was given in a letter from the OFT dated 16 November 2004.

40. ORR, initially, considered that the abuses alleged in this case were capable of having an effect on trade between Member States of the European Community (EC) and thereby infringing Article 81 and/or Article 82 of the Treaty. ORR therefore informed the European Competition Network (ECN) of the investigation in accordance with the principles for allocation as set out in the European Commission's *Notice on Cooperation within the Network of Competition Authorities*²⁰

Information gathering

41. Section 26 notices were sent to Portec, Clare, NTM and Network Rail on 25 November 2004 in order to gather market data and in respect of Portec to seek a response to NTM's accusation that it had refused to test NTM's grease in its PIV. Follow up notices were then sent to NTM on 9 February 2005 and Portec and Clare on 10 February 2005.

42. QHi and the London Underground Infraco²¹ –Tube Lines Ltd ("TLL") were issued with section 26 notices on 14 February 2005. The remaining London Underground Infracos, Metronet Rail Bakerloo, Central and Victoria Lines Ltd (MRBCV) and Metronet Rail Sub-Surface Lines Ltd (MRSSL) Ltd were served section 26 notices on 17 February 2005.

43. Further section 26 notices were sent to Network Rail, Portec and QHi on 17 May 2005 in order to clarify Network Rail's acceptance process for approving lubricator greases for use on its network and, in respect to electric trackside lubricators, the justification for an extended field trial and details of any associated charges.

¹⁹ Regulation 4(1) (Concurrency) Regulations 2004 of the Competition Act 1998.

²⁰ OJ C101, 27.04.04, p43.

²¹ The three Infracos are Metronet Rail Sub Surface Lines limited ('MRSS'), Metronet Rail Bakerloo Central and Victoria Lines Limited ('MRBCV') and Tube Lines Limited ('TLL').

44. ORR also conducted interviews with representatives from Network Rail on 28 January 2005, QHi on 10 March 2005 and NTM on 6 April 2005 in order to gain clarification on their section 26 responses.

RELEVANT MARKET AND DOMINANCE

Legal context

45. Section 60(1) of the Act sets out the principle that, so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising in EC law in relation to competition within the Community. In particular, under section 60(2) of the Act, the OFT²² must act (so far as is compatible with the provisions of the Act) with a view to ensuring that there is no inconsistency with either the principles laid down by the Treaty and the European Court or any relevant decision of the European Court²³.

46. The European Court of Justice, in *United Brands v Commission*²⁴, concluded that dominance refers to,

“...a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.”

47. In order to assess whether an undertaking holds a dominant position, it is first necessary to define the relevant market on which that position might be held. The need to define a relevant market before assessing dominance has been established in European case law²⁵.

48. For the purposes of Community competition law the relevant market usually comprises a relevant product market and a relevant geographic market. As stated in the Commission Notice on the definition of the relevant market for the purposes of Community competition law (OJ C372, 3.12.1997, p5):

“a relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products’ characteristics, their prices and their intended use... the relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.”

This definition reflects the case law of the European Court.

First principles of market definition

49. Market definition is an important first step in any competition assessment as it sets the stage on which competition takes place and hence informs any assessment of market power. While market definition is only a means to an end and not an end in itself, it provides the appropriate starting

²² And the Sectoral regulators given concurrent powers under the Act.

²³ The European Court is defined as the Court of Justice of the European Communities and includes the Court of First Instance (section 59(1) of the Act).

²⁴ Case 27/76 [1978] ECR 207, [1978] 1CMLR 429.

²⁵ For example, in *Continental Can Co Inc*, JO [1972] CMLR 199, see Para 32.

point for identifying potential competitive constraints and thus what, if any, market power may exist.

50. The standard approach to market definition – which is described both in UK and EC competition law guidelines²⁶ – is to consider demand-side and supply-side substitution which would arise following a small but significant non-transitory increase in price (SSNIP) above the competitive level. This test is also known as the hypothetical monopolist test since the SSNIP is hypothesised to be imposed by a single supplier of the product in question.

51. If customers would switch to another product in response to a SSNIP so as to undermine the profitability of the price rise for the hypothetical monopolist, this other product should be included in the relevant market. Such switching should be relatively quick (less than one year) and not involve significant costs. The exercise is then repeated for the two products in question – i.e. could a hypothetical monopolist of this wider product group profitably impose a SSNIP for the focal product without being undermined by customers switching to a third product? The group of products forming the relevant market is that for which a SSNIP for the focal product could be profitably imposed.

52. Similarly, if suppliers of other products would switch to producing the product in question in a short period of time (less than one year) without incurring significant or sunk costs then it is appropriate to widen the market definition on the supply-side and repeat the test based on this wider market.

53. Once the product market has been defined, the hypothetical monopolist test is then applied to define the geographic market.

Market definition in the present case

54. In principle, the first relevant market to consider is that for the provision of testing services for greases used in trackside lubricators for the purpose of meeting Network Rail's acceptance process, since the alleged concern is over an abuse of dominance in that market.²⁷

55. However, the existence of a testing market derives from the demand for grease for use in trackside lubricators (i.e. access to testing is a necessary input to enter the latter market) and hence one possible conclusion could be that the breadth of the testing market is no wider than the breadth of the market for grease for trackside lubricators. This is discussed further in the section regarding the market definition for the supply of testing services.

56. The route to market for the supply of grease (i.e. the provision of testing) depends on the relative size of competing lubricator manufacturers in the relevant trackside lubricator market. In other words, the potential foreclosure effect (in the market for the supply of grease for use in trackside

²⁶ OFT 403: *Market definition*, December 2004; Commission Notice on the definition of relevant market for the purposes of Community competition law (97/372/03).

²⁷ EC case law precedents regarding product testing include *General Motors v Commission* (OJ [1975] L 29/14, [1975] 1 CMLR D20) and *British Leyland v Commission* (Case 226/84 [1986] ECR 3263, [1987] 1 CMLR 185).

lubricators) arising from refusal to test will depend on the number and size (both in terms of installed lubricator-base and expected future lubricator sales) of competing suppliers in the relevant trackside lubricator market.

57. With regard to the market for the supply of grease for use in trackside lubricators a further reason for considering this market is that any agreement between Clare and Portec is only likely to have an appreciable effect on competition if one or both parties has market power. As part of the analysis of the agreement between Clare and Portec, it is necessary therefore to consider whether Clare might be found to have market power such that an agreement between these parties was capable of having an appreciable effect on competition even if Portec was not found dominant or did not have market power in the supply of electric trackside lubricators or the provision of testing.

58. The European Commission's *Notice on Agreements of Minor Importance*²⁸ considers that agreements between undertakings which do not compete (i.e. are not actual or potential competitors in the relevant markets concerned) and where neither party has more than a 15% share on any relevant market affected by the agreement, is unlikely to result in an appreciable restriction of competition. Further, as noted in the OFT guideline *Agreements and concerted practices: OFT 401*, even if the parties' market shares were to exceed this threshold, this,

“[...] does **not** mean that the effect of an agreement on competition is appreciable. Other factors will be considered in determining whether the agreement has an appreciable effect.²⁹ Relevant factors may include for example, the content of the agreement and the structure of the market or markets affected by the agreement, such as entry conditions or the characteristics of buyers and the structure of the buyers' side of the market (see the competition law guideline *Assessment of market power (OFT 415)*).”

Product market definition: demand-side

59. Unlike most other forms of track related lubrication, which are applied manually, trackside lubrication is an automated system of grease application. Furthermore trackside lubricators have to meet distinct performance and reliability criteria to ensure the grease is applied in the correct manner and that the lubricators operate safely and reliably.

60. The complaint by NTM concerns the supply of grease for use in electric trackside lubricators. Electric trackside lubricators provide the narrowest feasible product market definition. Abstracting from geographic issues, one must consider what other products customers might switch to in response to a SSNIP in electric trackside lubricators. The most obvious potential alternatives would be hydraulic and mechanical lubricators.

61. Demand-side substitution occurs where customers switch from one product to another in response to a change in the relative price of the products under consideration. There are a number of empirical methods for

²⁸ OJ C368, 22.12.01.

²⁹ See the Commission *Guidelines on the application of Article 81(3) of the Treaty*, OJ C101, 27.04.2004, p.97.

determining the degree of demand-side substitution including surveys of customers and suppliers which can be a useful means of gauging propensity to switch.

62. ORR, during the course of this investigation, sent formal information requests to the principal purchasers (Network Rail and the London Underground Infracos) and manufacturers (Portec and QHi) of trackside lubricators. Evidence from both purchasers and manufacturers supports the more narrow market definition of electric trackside lubricators. The prevailing view amongst the respondents was that whilst mechanical and hydraulic trackside lubricators were seen as readily interchangeable, electric lubricators were regarded as a separate product line due to differences in their technical characteristics and levels of performance and as such are not seen as readily substitutable with hydraulic/mechanical lubricators.

63. For the purposes of market definition consideration of demand-side substitution should begin with the focal product and consider switching to other potential substitutes – i.e. what is relevant is the competitive constraint provided by these other potential substitutes on the focal product and not switching the other way round. However, because electric trackside lubricators are a relatively new technology, the majority of the experience of switching and hence the evidence gleaned by ORR from respondents, typically relates to substitution to electric trackside lubricators not substitution away from electric trackside lubricators.

Evidence from Network Rail³⁰

64. Network Rail stated that operational, performance and locational issues play a more important role in its decision as to which type of lubricator to purchase than price alone. Indeed, Network Rail has stated that an increase in the asset price of electric lubricators of between 5-10% is unlikely to significantly affect its decision to purchase³¹. Even though an individual electric lubricator is more expensive to purchase and is more expensive to maintain than a hydraulic/mechanical lubricator, price is but one factor used to inform a business case concerning any decision to purchase an electric lubricator. It is the nature of the section(s) of track to be treated that is the main determinant in the choice of lubricator.

65. In fact Network Rail's internal guidelines for the installation of trackside infrastructure provides guidance on any decision as to which particular lubricator type is selected, for example in its own internal draft good practice guide³² states,

'A one for one replacement regime is not commercially viable when replacing one hydraulic unit or one mechanical unit with one electrical unit.'

³⁰ Taken from section 26 notice dated 25 November 2004.

³¹ Response to question 6 of section 26 notice issued 25 November 2004.

³² Instruction on Installation and Management of Rail Mounted Lubricators Ref. RT/CE/PWSI/006, supplied in response by Network Rail to question 5 of section 26 notice sent 25 November 2004.

66. Network Rail draws a distinction between hydraulic/mechanical and electric lubricators in terms of competing products as hydraulic/mechanical lubricators are seen to have similar operating and performance characteristics and are therefore regarded as close substitutes, whereas against these criteria Network Rail does not regard electric lubricators as readily interchangeable with hydraulic/mechanical lubricators.

67. Network Rail highlighted a number of distinct operational and performance advantages that electric lubricators have over hydraulic/mechanical lubricators. Electric lubricators, unlike mechanical or hydraulic lubricators, are able to lubricate both rails (near and far side) at a particular curve; this means that a single electric lubricator can lubricate a series of left-handed and right-handed curves whereas hydraulic/mechanical lubricators require a separate lubricator on each facing rail. Also electric lubricators can spread the grease along the track for much greater distances, of up to four miles, whereas hydraulic/mechanical lubricators can only achieve a maximum spread of up to half a mile. Taken together these features mean that one electric lubricator can replace a number of hydraulic/mechanical lubricators.

68. Electric lubricators also have a more reliable pumping system for dispensing grease and larger grease reservoirs, which means they generally require much less maintenance and site visits to replenish grease supplies. Therefore, although electric lubricators are initially more expensive to purchase, over their lifetime, significant savings can be made as a result of the requirement for fewer lubricators and lower maintenance levels. These costs savings are confirmed in Network Rail's internal draft good practice guide,

'An electrical unit has a pay back in terms of maintenance when replacing three or more conventional units over a period of approximately one year (dependent on use).'³³

69. Network Rail also cited³⁴ locational issues as a key determinant in its choice of lubricator. Given that electric lubricators are more expensive than hydraulic/mechanical lubricators but have higher performance characteristics, electric trackside lubricators tend to be used in areas of high rail curve wear – i.e. areas with high traffic levels and/or on high speed lines.

Evidence from the London Underground Infracos

70. Trackside lubricators are also used extensively on the London Underground Ltd ('LUL') network, although these are predominately of the mechanical type, with lesser use made of hydraulic lubricators. Apart from the need in some cases for a slight modification to parts of the lubricator's mechanism these are essentially the same products as used on Network Rail's infrastructure. Currently there are no electric lubricators in use on LUL's network. However, MRSSL is in discussion to conduct field trials on electric lubricators. TLL uses only mechanical lubricators on its Jubilee, Northern and

³³ *ibid.*

³⁴ Taken from section 26 Notice dated 25 November 2004.

Piccadilly lines (JNP) network. MRBCV and MRSSL use mainly mechanical and to a lesser extent hydraulic and electro-mechanical lubricators³⁵.

71. All three Infracos tend to regard electric lubricators as less interchangeable with hydraulic/mechanical lubricators. The Infracos' ability to readily substitute between different types of lubricator (at least those not currently approved for use on LUL's network) is constrained by the requirement that lubricators must meet LUL's safety standards and have an approved Safety Case. Currently, LUL approval exists only for mechanical, hydraulic and Jumboluber canisters³⁶.

72. Evidence supplied by the Infracos indicates that operational restrictions are particularly binding on many parts of the LUL network, in particular the sections that are underground where space constraints mean that electric lubricators, which are larger than mechanical/hydraulic lubricators cannot be fitted to the network.

73. TLL, for example, states that whilst electric lubricators would in theory be a preferable choice to mechanical lubricators (because they have a better grease spreading capability and larger reservoirs leading to less maintenance), 'physical and technical constraints'³⁷ on TLL's JNP network mean that electric trackside lubricators are not suitable for its infrastructure. The constraints in question include a lack of space in tunnels and the requirement to install a suitable power source which in turn would require extensive re-cabling or the continuous supply of heavy duty batteries.

74. MRBCV and MRSSL, currently use only mechanical and electro-mechanical lubricators on their networks. Whilst both Infracos state that from a technical perspective mechanical, electrical, hydraulic and electro-mechanical lubricators are interchangeable they admit that they have not had any experience of substituting between electrical and mechanical/hydraulic lubricators³⁸.

Evidence from trackside lubricator manufacturers: Portec and QHi³⁹

75. Both manufacturers endorse the view that electric lubricators form a distinct product line. Portec has stated that,

'The Protector IV lubricator and its application concept are very different to mechanical and hydraulic types.'⁴⁰

76. QHi endorsed the view that price should not be the main factor involved in choice of lubricator type and that it would be used as part of a business

³⁵ NB these are essentially hybrid mechanical/electric lubricators but are not the same as the electric lubricators under consideration in this case.

³⁶ A model of cartridge lubricator.

³⁷ Response to question 11 (d) of Section 26 notice dated 14 February 2005.

³⁸ MRBCV and MRSSL responses to section 26 notices dated 17 February 2005.

³⁹ Responses to section 26 notices dated 25 November 2004 and 10 February 2005 in the case of Portec and 14 February 2005 in the case of QHi.

⁴⁰ Portec response to question 15 (a) of Section 26 notice dated 10 February 2005.

case rather than the single determining factor, emphasising that choice of lubricator is heavily dependent on the nature of the particular site at which lubrication is required i.e. line speed, number of curves, distance of curve series etc.

77. Indeed, QHi stressed that simply to replace mechanical and hydraulic lubricators with electric lubricators would not make good operational or business sense and if any investment programme is not thought through carefully it could lead to the overuse of electric lubricators⁴¹. In its guidance note, 'Selection of Effective Sites for Electric Trackside Lubricators',⁴² it states,

'...there is also a requirement to select sites, which can justify the increased capital expenditure, by maximising the benefits specific to ETL [electric trackside lubricators]. To merely place ETL at every existing or new site would be costly and inefficient, providing no advantage, indeed, negating any potential financial advantage available from their more judicious use.'

78. In summarising its views, QHi stated,

'If ETL are merely used to replace conventional mechanical/hydraulic lubricators at new or existing sites, it will prove hugely expensive, provide no tangible benefits, and leave many curves unprotected... Capital cost savings per site are thus unlikely. The main source of savings is likely to be on long term savings on maintenance, where units can be filled/maintained less frequently without requirement for access to track.'⁴³

79. QHi's assessment is that since electric lubricators do not automatically replace mechanical/hydraulic lubricators and that choice of lubricator is very site specific it is likely that a mix of the different lubricator types will continue to be used along any particular line of route.

Customer switching costs

80. Network Rail states⁴⁴ that switching costs between life-expired mechanical and hydraulic trackside lubricators are minimal. (Based on using a previously accepted lubricator model).

81. Switching costs involving a change from hydraulic/mechanical to an electrical trackside lubricator may be higher and would need to be considered within the light of an overall business case needed to justify the additional capital expenditure associated with electric lubricators.

82. In terms of switching costs between different lubricator manufacturers e.g., between Portec and QHi, Network Rail states that on a like-for-like basis the costs are similar, although it would very much depend on the supporting package, installation costs and spare/replacement part costs. Switching barriers for Network Rail may be more significant where it involves switching

⁴¹ QHi response to section 26 notice dated 14 February 2005.

⁴² Included with response to section 26 notice dated 14 February 2005.

⁴³ *ibid.*

⁴⁴ Network Rail response to section 26 notice dated 25 November 2004.

to a supplier not already approved for use on Network Rail's infrastructure, which would take at least six months to achieve excluding holding field trials.

83. TLL states⁴⁵ that significant switching costs are involved with the introduction of a new type of lubricator that has not undergone LUL's approval and acceptance processes for installing new equipment for use on its network. For example, TLL's approval process starts with a comprehensive laboratory test to assess whether a field trial would be of benefit. Then, a Safety Case must be compiled before it can be approved for use on the LUL network and finally a field trial to assess performance.

84. The process of switching, therefore, involves significant implementation and installation costs and the fact that the Infraco is required to bear any performance risks adds further to the overall potential outlay.

85. MRBCV and MRSSL⁴⁶ would need to undertake a similar process and have estimated the costs of switching to another lubricator type at £[]; £[] for the preparation of a Safety Case and £[] per week labour cost, replacing 1-2 units per week (6 team basis). Preparation of a submission for a Safety Case takes between six to fourteen weeks followed by field trials of between six and twelve months.

Relative prices

86. Price data suggests that electric lubricators are in a separate market to that for mechanical/hydraulic lubricators. The asset price of electric lubricators is significantly above that of hydraulic and mechanical. Portec supplies two PIV models, the PIV priced at around £[] and the PIV Dual Track priced at around £[], an average price of around £[]. In contrast, a Portec hydraulic lubricator averages £[] per unit, around [] of the price of a Portec electric lubricator, whereas the average price of a Portec mechanical lubricator at £[] per unit is just under []% of the average price of a Portec electric lubricator.

87. QHi's Lubricurve 25 mechanical lubricator (for use on the LUL network) ranges in price from £[] to £[] and the Lubricurve 50 mechanical lubricator (for use on Network Rail's track) has an average price of £[]. QHi's L10 electric lubricators have an average price of £[] (the most expensive being £[]) and is therefore approximately between [] and [] times more expensive than its two mechanical types.

88. The fact that the difference in prices between the electric and other lubricator types of a given manufacturer are so large lends support to the view that electric lubricators are in a separate market.

Other technologies

89. Train mounted lubrication is an alternative way of reducing rail curve wear, whereby the grease is applied to the rail directly from train mounted dispensers or alternatively a lubricant is applied to the wheel of a train by an on-board applicator. This method has been tried in other countries and the UK

⁴⁵ TLL response to section 26 notice dated 14 February 2005.

⁴⁶ MRBCV and MRSSL responses to section 26 notices dated 17 February 2005.

with mixed results. However, both Network Rail⁴⁷ and QHi⁴⁸ have stated that the possibility of its use in this country has been reduced because of difficulties in agreeing contractual arrangements between train operating companies and Network Rail regarding the responsibility for the payment of installing equipment on trains and on-going operational costs. Both were of the view that the prospect of any significant use of this technology in the UK in the near future remains low.

Product market definition – demand-side

90. On the demand-side, ORR considers that the available evidence suggests that relevant product market is no wider than electric trackside lubricators.

Product market definition: Supply-side

Substitutability

91. It is usual only to consider supply side substitution if supply can be switched relatively quickly and without the need for significant investment. OFT guidelines state that in order to conclude that an undertaking is in the same market, such a switch in production should be possible within one year.⁴⁹

The introduction of a new lubricator type involves an extensive development programme requiring, in addition to developing the product itself, the completion of a safety case and field trials to gain acceptance for use on the relevant network. All respondents confirmed that the time taken to introduce a new model of lubricator once designed, whether hydraulic, mechanical or electrical averages between 12-18 months. Therefore, a hypothetical monopolist of electric trackside lubricators would not be constrained by a supplier of hydraulic or mechanical lubricators switching into the production of electric trackside lubricators within the timescale typically considered for the purposes of market definition.

Product market definition: conclusion

92. ORR considers that the available evidence points to a relevant product market no wider than electric trackside lubricators.

Geographic market: demand-side

93. Despite its GB-wide track infrastructure, Network Rail states that the distribution of trackside lubricators reflects local purchasing decisions. There may, on some parts of the network, currently exist an historical legacy arising from the IIP that has resulted in one manufacturer being the predominant supplier in a particular region. This has come about as a result of the high level of demand created at the time of the IIP that caused supply-side bottlenecks to build up leading to individual manufacturers concentrating their

⁴⁷ Stated by Network Rail in meeting with ORR of 28 January 2005.

⁴⁸ Stated by QHi at meeting with ORR of 10 March 2005.

⁴⁹ OFT Guidelines Market definition, December 2004, Para. 3.15.

supplies in particular regions and therefore becoming the main supplier to that region (e.g. Portec was the only supplier of new units to the Great Eastern Zone). Although this has continued in some regions to the present day it is likely only to be a transient feature as demand levels return to trend.

94. Overall there are no geographical factors that affect Network Rail's purchasing decisions of trackside lubricators either by manufacturer or by type. This is also the case for the LUL Infracos. Decisions regarding the purchase of a particular lubricator type and manufacturer are taken by local Network Rail engineers. In most cases local purchasers source from the two leading manufacturers and a range of lubricator types are used to meet the infrastructure requirements within a particular region.

95. Portec and QHi state⁵⁰ that prices are uniform throughout the UK and volume discounts are rare as per unit sales are generally low. Portec supplies lubricators either as a one-off sale or as part of an on-going service contract. Although Portec supplies and maintains lubricators under contracts that operate on a regional basis it states that product prices do not vary between regions. Regional contracts tend to reflect the de-centralised purchasing arrangements and zonal structure of Network Rail, however for the most part the terms and conditions of these contracts do not differ between regions.

96. In light of the above, it seems that on the demand-side alone, a good case for a Great Britain-wide market can be made.

Geographic market: supply-side

97. Both Portec and QHi⁵¹ supply electric trackside lubricators throughout the GB.

98. Portec currently has two formal maintenance agreements in place with Network Rail covering Network Rail's Southern Zone and London and North East (LNE) Zone. These agreements are not specific to trackside lubricator model and relate to labour rates for the installation and maintenance of lubricators generally.

99. Portec also has around 20 regional supply contracts covering the following asset management territories: Scotland; London and North West; London and North East; Great Western and Southern. Within each territory there are numerous purchaser supply contracts.

100. Both Portec and QHi state that there are no significant barriers in switching between different geographical areas⁵².

⁵⁰ Responses to section 26 Notices dated 25 November 2004 (Portec) and 14 February 2005 (QHi).

⁵¹ Responses to section 26 Notices dated 25 November 2004 (Portec) and 14 February 2005 (QHi).

⁵² *ibid.*

Geographic market definition: conclusion

101. ORR considers that evidence from both the demand-side and supply-side points to a Great Britain-wide geographic market for electric trackside lubricators.

Market definition for trackside lubricators: conclusion

102. In light of the available evidence, the relevant market is taken to be the supply of electric trackside lubricators in Great Britain.

Assessment of dominance

103. Assessing whether an undertaking has market power is useful in the consideration of whether that undertaking is dominant on the relevant market. OFT guidelines state that an undertaking will not be dominant unless it has substantial market power.⁵³

104. However, market power is not an absolute concept but a question of degree and is dependent upon the circumstances of each case. Relevant factors involved when assessing market power include market shares, entry conditions and the degree of buyer power exercised by the undertaking's customers.

Market shares

105. Calculating market shares is an important part of the assessment as to whether an undertaking has market power for competition law purposes. Although there are no thresholds for defining dominance under Article 82 or the Chapter II prohibition, the European Court has stated that dominance can be presumed in the absence of evidence to the contrary if an undertaking has a persistent market share above 50%.⁵⁴ The OFT guidelines indicate that a single undertaking is unlikely to be found dominant with a market share of below 40%, although dominance could be established below this figure if other relevant factors (such as the weak position of other competitors in that market or high entry barriers) provided strong evidence of dominance.⁵⁵

106. Portec and QHi are the principal suppliers of trackside lubricators in Great Britain. Looking at shares of the relevant market, namely electric trackside lubricators, ORR aggregated data provided by Portec and QHi to generate Table 3 below. As can be seen, this table indicates that in the period 2001-2004, Portec's annual market share fluctuated significantly but averaged []% on a volume basis and []% on a value basis.

⁵³ OFT Guidelines Assessment of Market Power, December 2006, para 2.9

⁵⁴ Case C62/86 AKZO Chemie BV v Commission [1993] 5 CMLR 215.

⁵⁵ OFT Guidelines Assessment of Market Power, December 2004, para 2.12

Table 3. Portec and QHi market shares for the supply of electric trackside lubricators

	2001		2002		2003		2004		2001-2004	
	Volume share	Value share								
QHi	[]%	[]%	[]	[]%	[]%	[]%	[]%	[]%	[]%	[]%
Portec	[]%	[]%	[]%	[]%	[]%	[]%	[]%	[]%	[]%	[]%

Sources: Portec/QHi

Relative market shares

107. In QHi, there appears to be a significant competitor. As can be seen from Table 3 above, QHi appears to have accounted for all sales in the relevant market in its first year of entry (on account of Portec having not made any sales that year) and has since accounted for around [] of sales by value and slightly more by volume.

108. Network Rail’s estimation of the relatively low cost of switching between lubricator manufacturers where each has been approved for use on its track infrastructure, as is the case for both Portec and QHi, suggests that Network Rail and others on its behalf are in a relatively good position to play these two suppliers off against one-another.

Barriers to entry

- *Sunk costs*

109. The production of electric trackside lubricators is a highly specialized area: many respondents attest to the need for a considerable degree of knowledge and experience in this area in order to develop and manufacture trackside lubricators. Furthermore any undertaking wishing to enter the market would face considerable design and development costs. Such costs could not be recouped if a trackside lubricator manufacturer were forced to exit the relevant market.

- *Lead times*

110. Portec has stated that the overall development time to introduce its PIV into the UK was 76 weeks and this was a bespoke model imported from the USA.

111. Network Rail estimates that the time needed for a new manufacturer seeking to enter the market that is not a member of the Link-up scheme⁵⁶, would be between 6-12 months.

112. LUL Infracos put the time to compile a Safety Case for a new model of lubricators to meet LU’s safety standards at six weeks and a subsequent field trial at six-months to one-year.

⁵⁶ 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.

- *Future demand*

113. The current and potential size of the market for electric trackside lubricators may also act as a deterrent to new entry. QHi and Portec's combined sales in 2003 were £[] increasing to £[] in 2004. These figures are set against a background of a recent fall in the annual demand for trackside lubricators as a whole⁵⁷. The decline in demand for trackside lubricators was due to the tail-off in Network Rail's IIP with future demand based mainly on a replacement of life-expired lubricators. As a result it would seem that demand for electric trackside lubricators is unlikely to be at a level sufficient to induce new entry.

Conclusion on the prospects for entry

114. Taking together the development time and costs of entry, the relatively small size of the market and limited prospects for demand growth suggests that future returns are unlikely to be sufficient to encourage significant new entry. QHi commenting on the prospects for new entry stated,

"...the attraction for someone to enter the market is small. It is not a big market and is risky for small companies, not enough business for large companies. There is a declining market and the business case for new entrants is hard to see."⁵⁸

115. Finally, while it remains open to suppliers from abroad to enter the GB market in principle, there have been no recent examples of such entry. In addition to the barriers noted above, a foreign entrant with no established trackside lubricator sales in GB would also need to establish a sales and technical support network. Both Network Rail and significantly QHi (as a supplier) do not regard the prospect of overseas competition as a significant threat to existing suppliers.

Buyer power

116. The presence of significant countervailing buyer power may militate against the possibility of Portec having significant market power. Currently, the only purchaser of electrical trackside lubricators is Network Rail.

117. However, with respect to all trackside lubricator sales (rather than sales in the relevant market per se), there has been a dramatic change in Portec's customer base⁵⁹ with Network Rail's share of purchases declining in the recent past:

- (a) In 2001/02 Railtrack (now Network Rail) was by far Portec's main customer accounting for []% of all sales (by value).

⁵⁷ Portec's total sales of trackside lubricators fell from £[] in 2001/02 to £[] in 2002/03 to £[] in 2003/04 and QHi's total sales of trackside lubricators fell from £[] in 2002 to £[] in 2003 and £[] in 2004. Although other suppliers also supply trackside lubricators, Portec and QHi account for the majority of sales.

⁵⁸ Stated by QHi in meeting with ORR of 10 March 2005.

⁵⁹ All figures taken from response to question 11(b) of Section 26 date 14 November 2004.

- (b) In 2002/03 Network Rail's purchases fell dramatically to around []% with First Engineering and BBRM also on []%, closely followed by Jarvis on []% and Exel Carilion on []%.
- (c) In 2003/04 BBRM became Portec's major customer at []% of sales, followed by Exel Amey on []%, Metronet []%. The next two largest are Exel Carilion at []% and Metronet BCV at []%.

118. However, Network Rail's policy of bringing maintenance back in house, completed in July 2004, will reverse this trend and it is likely to become once again the major purchaser of trackside lubricators – except in cases involving large-scale renewals where the contractor purchases the lubricators. However, even where this is the case, purchases are made largely on behalf of Network Rail. As such it is likely to provide a constraint to the market power suppliers of electric trackside lubricators would otherwise have.

Conclusion on assessment of dominance

119. Portec has a high market share in the supply of electric trackside lubricators and there remain significant barriers to entry that looked at in isolation could give rise to a presumption of dominance. However, this is mitigated by the following factors:

- there appears to be a significant alternative supplier in the form of QHi which in 2004 accounted for around [] of the market despite having entered only two years before. Furthermore, over the period since the introduction of electric trackside lubricators, QHi accounted for around [] of all sales;
- delay in customer switching is unlikely to be an issue given that QHi is already approved for use on Network Rail's track infrastructure; and
- with Network Rail vertically integrating into maintenance its direct share of purchasing will rise which is likely to provide it with countervailing buyer power.

For these reasons, ORR does not consider there to be strong and compelling evidence that Portec is dominant in the supply of electric trackside lubricators in Great Britain, although it would seem to have at least some market power.

120. Whether Portec might be found dominant in the provision of testing services is addressed after the analysis of the market for the supply of grease.

Market definition for the supply of grease

Product market definition - demand side substitution

121. A wide range of greases and lubricants are used in the rail industry, some of which can be used for a range of applications and are therefore substitutable between products. However, evidence supplied by both consumers and producers confirm that grease used in trackside lubricators needs to be designed specifically for this purpose. Therefore, abstracting from geographic issues, grease for use in electric trackside lubricators provides the narrowest feasible a starting point for considering the relevant product market definition.

122. Clare stated that each grease product is designed specifically to, as far as is possible, be compatible with as many lubricator types as are currently in operation (although in reality it is unlikely that any individual grease products would be compatible with the entire range of lubricators). Further, each grease product contains certain constituents that are common to greases used elsewhere in the rail industry and also outside the rail industry.

123. With the advent of electric lubricators an essential safety requirement is that the grease is electrically resistive to ensure that there is no risk that any electrical charge from the lubricator is conducted through the grease and onto the rails. The risk being that any electrical leakage onto the rails could affect the track circuitry used for train detection and operation of signals, which, if it were to do so, would clearly compromise safety.

124. Another key additional operational specification arises from the ability of electric lubricators to spread grease over much greater distances than is the case for hydraulic/mechanical lubricators. Therefore, the grease's properties must ensure that it is able to achieve this greater 'spread-ability'.

125. Although specific additional characteristics are required of grease for use in electric lubricators, i.e. electrical resistivity and increased 'spread-ability', these characteristics may also be found in greases already approved for use in hydraulic and mechanical lubricators. For example, Clare's B1099 grease product, previously approved for use in hydraulic and mechanical lubricators, has also been approved, following field trials carried out by Interfleet Technology on behalf of Network Rail, for use in the PIV and L10 electric lubricators without modification. As stated by Clare,

'Clare B1099 and High Load-1 curve rail greases are the Clare greases approved for use in electric lubricators in the UK. They were not specifically developed for use in the Portec Protector IV'⁶⁰

126. Similarly, Shell UK Bio-Rail grease is also approved for use in all lubricator types currently used by Network Rail.

127. This indicates that lubricator greases are interchangeable between all three lubricator types. However, in practice demand-side switching in this case is unlikely to take place in the timescales conventionally applied for the

⁶⁰ Responses to questions 15(a)(i) of section 26 Notice dated 10 February 2005.

purposes of market definition – i.e. one-year. This is because of the timescales resulting from the following:

- (a) the need for confirmation that the supplier's grease has received a 'letter of no objection' from the trackside lubricator manufacturer – a process which is beyond the customer's (whether Network Rail or a contractor on Network Rail's behalf) control; and
- (b) in the case of grease for use in electric lubricators, an extended field trial, to test the grease in hot and cold weather conditions which Network Rail states should last at least one year.

128. The potential for demand-side switching to other greases or lubricants not currently approved for use in any lubricator types exists in principle but is unlikely as prior to, and in addition to the two approval stages listed above (which are concerned with how the grease performs in a particular lubricator), any new product would have to meet Network Rail's separate acceptance process for approving the efficacy of the grease in treating rail curve wear⁶¹.

Product market definition: supply-side

129. The production of grease for use in trackside lubricators is generally more complicated than that for other lubricants used on trackside infrastructure. This is because it not only has to meet the specific technical standards required to ensure it is effective in treating rail curve wear but also due to the automated nature of application. Therefore, each grease product must be compatible with the operation of each particular type and model of trackside lubricator. This test is carried out by the lubricator manufacturer who issues a letter of 'no objection' if the grease meets the performance criteria for the relevant lubricator.

Substitution from greases approved for hydraulic/mechanical trackside lubricators

130. Clare's grease products that have been approved for use in electric lubricators – i.e. Clare B1099 and Claretech High Load -1 were not designed specifically for use in electric trackside lubricators. Gaining the original acceptance from Network Rail for High Load -1 and B1099 took approximately eighteen months to two years, including field trials and obtaining 'letters of no objection'.

131. Clare estimates, that once a new grease product is developed for use in trackside lubricators (of any type), it would take a further period of between 6-12 months for the manufacturer of the trackside lubricator to then test and develop its new grease product in trackside lubricators and would cost around £[].

132. Network Rail requires that each new grease product undergoes an extended field trial of at least one year, which taken together with the requirement for a pumpability test and the lead times involved with setting up a field trail means the acceptance process is outside the one year timescale by which supply-side switching is typically required to take place in order for

⁶¹ NB LUL has a similar acceptance process and timescales.

the suppliers in question to be included in the relevant market. Therefore, even greases currently approved for use in mechanical/hydraulic lubricators cannot be regarded as being in the same market as grease for use in electric lubricators.

Switching from greases not currently used in trackside lubricators

133. Both Clare and NTM suggest that general greases currently used for applications other than trackside lubrication can be modified to be made suitable for use in any model of trackside lubricator. However, in light of the preceding discussion (in particular the timescale required to switch production and gain product approval) in which even grease products already approved for use in other trackside lubricators were not considered supply-side substitutes, it follows that grease products not currently approved for use in trackside lubricators should also be excluded as relevant supply-side substitutes.

Geographic market definition

134. There appear to be no geographical boundaries to the demand for grease for use in electric trackside lubricators or any significant barriers to supplying grease for use in electric trackside lubricators throughout Great Britain. Prices charged for greases used in electric trackside lubricators are uniform throughout Great Britain. Any overseas grease product for trackside lubricators from a non-GB supplier would need to go through the same acceptance procedures noted above – in particular an extended field trial.

135. These factors therefore suggest that the geographic market for the supply of grease for use in electric trackside lubricators is Great Britain-wide.

Market definition for the supply of grease: conclusion

136. The available evidence suggests that the relevant market is that for the supply of grease for use in electric trackside lubricators in Great Britain.

Assessment of market power

Market shares

137. Calculating accurate market shares for the supply of grease for use in electric trackside lubricators is not possible since grease sales are not disaggregated by lubricator type. Clare estimates (based on its estimate of the GB supply of grease for use in trackside lubricators of approximately [] tonnes), that it currently accounts for around []% of lubricator grease supplies (by value) to companies other than Network Rail e.g. to the logistics companies. It also supplies a small amount directly to Network Rail (Network Rail purchases most of its grease directly from third party logistics companies).⁶²

⁶² It should, however, be noted that grease for use in rail applications accounts for a small proportion of Clare's total grease sales, currently around []% (by value) of all RS Clare's total grease sales.

138. NTM, estimates its share of the UK lubricator grease market at between [] and []% (by value). The remaining suppliers of grease for use in trackside lubricators are Shell UK, Texaco Ltd, Henkel Loctite and Whitmores.

139. With regard to the specific market of grease for use in electric trackside lubricators, currently only Network Rail operates electric trackside lubricators and Clare supplies two out of the three grease brands currently approved for use by Network Rail in the PIV and Shell UK supplies the other. Clare also supplies two out of the three brands approved for use by Network Rail in the QHi L10, again Shell UK supplies the other remaining brand. Under the crude assumption that each grease supplier's share of brands approved for each electric trackside lubricator (i.e. the PIV and the L10) corresponds to its volume of grease share for that lubricator and assuming that each lubricator uses on average comparable volumes of grease, then based on the relative number of electric trackside lubricator units installed, Clare's market share would be of the order of []%⁶³. Clearly this estimate is very approximate and is highly sensitive to the assumption that brand approval accurately maps onto the volume of each brand actually purchased. Nevertheless, if Clare's market share in the supply of grease for use in electric trackside lubricators is as suggested by the above calculation, it would be sufficiently high to suggest market power in the absence of evidence to the contrary.

Barriers to entry and expansion

140. Although the grease used in trackside lubricators needs to be designed specifically for that purpose, it is essentially a modification of an existing grease product – often with similar properties. The design, development and testing costs for a grease used in electric trackside lubricators appear relatively low for a grease manufacturer already producing specialist greases for other trackside lubricators and switching could take place in a little over one-year.

141. The possibility also exists for other rail or industrial grease manufacturers to enter this market but over a longer time horizon – given the need to develop, test and market greases suitable for use in the specialised products in question – i.e. electric trackside lubricators.

142. With regard to expansion by existing competitors, it should be noted that Shell UK supplies brands for use on both Portec's and QHi's products. In light of this and in the absence of evidence to the contrary it would seem that Shell UK is in a good position to expand its sales if Clare sought to increase its prices persistently and significantly above the competitive level.

Countervailing buyer power

143. Manufacturers of grease for use in electric trackside lubricators may face countervailing buyer power from Network Rail given that electric

⁶³ From Table 3 it can be seen that between 2001-2004, Portec accounted for []% of units sold and QHi []%. With Clare supplying 2 out of 3 brands approved by Network Rail for use in the Portec PIV and 2 out of 3 brands approved by Network Rail for use in the QHi L10, Clare's weighted average share of brands would be $([]\% \times 2/3) + ([]\% \times 2/3) = []\%$.

trackside lubricators are currently only used on Network Rail's infrastructure. However, given that it appears that the majority of purchases are made by logistics companies, rather than Network Rail directly, this countervailing buyer power is unlikely to be as strong as in the market for electric trackside lubricators themselves.

Conclusion on market power

144. Based on the evidence gathered, it seems likely that Clare would have market power. However, because ORR does not consider the agency agreement (see assessment of conduct below) between Portec and Clare to be anti-competitive, it has not been necessary to investigate more fully the extent of Clare's market power further and conclude definitively on this point.

Market definition for the supply of testing services

145. Given that the previous section has identified the supply of grease for use in electric trackside lubricators as the relevant market, a natural candidate for the relevant market for the supply of testing services (in respect of testing grease for use in trackside lubricators) is the provision of testing services for grease for use in electric trackside lubricators.

146. Clearly on the demand side those requiring testing services are suppliers of grease and a hypothetical monopolist of electric trackside lubricators would seem able to impose a SSNIP for testing services since this is the only route to market for those wishing to supply grease for use in electric trackside lubricators. Essentially, in the absence of centrally coordinated testing (e.g. by Network Rail) each trackside lubricator manufacturer has a monopoly in the provision of testing for grease for use in its electric trackside lubricators.

147. Supply side switching would only be relevant if manufacturers of other trackside lubricators (hydraulic or mechanical) could switch into the provision of electric trackside lubricators and hence the provision of testing. As established above, the relevant lubricator supply market was not expanded to comprise hydraulic or mechanical lubricators. Therefore the market definition is not wider than the supply of testing services for grease for use in electric trackside lubricators.

148. ORR acknowledges that it could theoretically be possible to define the market for the provision for testing services as narrowly as that of testing grease for use in Portec electric lubricators. This would in effect mean that Portec was a monopolist supplier in the provision of testing services on its electrical lubricators. The degree to which demand and/or supply side switching can take place or not will determine whether or not this is the case. In addition, the extent any potential reaction by Network Rail a SSNIP by Portec for testing services in its electric trackside lubricator will also determine the extent of any market power Portec may possess. Both these points are discussed further below in the next section on the assessment of dominance. Nevertheless, for the same reasons explained in the assessment of dominance below, it is not necessary to conclude definitively on whether such a narrower market definition might be justified.

Market definition for the supply of testing services

149. The available evidence suggests that the relevant market for the provision of testing services is therefore the provision of testing services for grease used in electric trackside lubricators.

Assessment of dominance in the provision of testing of greases for use in electric trackside lubricators

150. Portec's market power in the provision of testing for grease used in electric trackside lubricators depends on the number of its electric trackside lubricators installed and the relative usage of these lubricators. Assuming that the quantity of grease used per lubricator is the same for both Portec and QHi, then market shares in testing services will be equivalent to the installed base of the two manufacturer's electric trackside lubricators.

151. As can be seen from Table 3, from the time of introduction of electric trackside lubricators (2001) to 2004, Portec's volume market was []% which on its own – i.e. absent countervailing factors – would be indicative of dominance.

152. Entry into the supply of testing depends on the ability to enter the market for the supply of electric trackside lubricators and this was previously considered unlikely. However, because of the presence of a significant competitor in the form of QHi and because of Network Rail's increasing involvement in direct purchasing it was previously considered that Portec was unlikely to be dominant in the supply of electric trackside lubricators. While it remains the case that QHi is still an alternative route to market for those wishing to supply grease for use in electric trackside lubricators, grease suppliers are likely to have less influence over Portec and QHi than Network Rail (as evidenced by NTM's complaint).

153. Nevertheless, it is Network Rail that has created the requirement for testing and hence conferred apparent market power on trackside lubricator manufacturers in the provision of testing. In assessing the extent of market power in testing it is therefore critical to consider Network Rail's potential reaction to the attempted exercise of market power in testing – not least since this will ultimately affect the number of grease suppliers from which it can itself (or others on its behalf) purchase grease for use in electric trackside lubricators. To this end it is relevant to note that Network Rail's predecessor, Railtrack, stated explicitly to the suppliers of trackside lubricators that it did not expect them to use the process of testing for pumpability to hinder the introduction and testing of grease products seeking approval for use on their lubricators:

“The ‘no objection’ letter issued by the machine manufacturers will be on the basis of technical considerations – NOT [*Railtrack's emphasis*] commercial. No such letters from machine manufactures should be withheld on commercial grounds. Should a machine manufacturer not feel it appropriate to issue a letter of ‘no objection’ then the technical reasons must be provided to the grease supplier. Any grease suppliers may appeal to Railtrack if they do not consider the technical explanation reasonable.⁶⁴”

⁶⁴ Letter from Peter Anderson, Product Acceptance Manager, Railtrack to Rail Lubricator grease suppliers dated 21 February 2002, supplied by NTM in response to section 26 notice dated 21 November 2004.

Conclusion on assessment of dominance

154. On balance it would seem that Portec has greater market power in the provision of testing for grease for use in electric trackside lubricators than in the market for electric trackside lubricators since it is not dealing directly with Network Rail. Nevertheless, an alternative route to market exists for grease suppliers in the form of testing on QHi's electric trackside lubricators and Network Rail's predecessor appears to have recognised the potential for abuse of market power explicitly. Therefore, if Network Rail were to act similarly – and given that it has scope to play the trackside lubricator manufacturers off against each other if they do not comply (e.g. in terms of future purchases) – Portec's potential dominance might be diminished. Moreover, if Network Rail were to become concerned over the price for the supply of grease for use in electric trackside lubricators (i.e. whether purchased directly or on its behalf), it would likely be in a position to facilitate entry into that market itself – e.g. by changing the testing procedures and/or conducting them itself using its pre-installed lubricators. However, given the untested nature of this potential countervailing factor, ORR is not prepared to conclude that a finding of dominance for Portec can be ruled out.

155. Nevertheless, given the finding of no abuse (for the reasons explained below), it is not necessary to conclude definitively on whether Portec is dominant in the provision of testing services for grease for use in electric trackside lubricators.

ASSESSMENT OF POTENTIAL BREACH OF THE CHAPTER I PROHIBITION/ARTICLE 81

156. A contract exists between Portec and Clare, whereby Clare acts as a sales agent for Portec. It is an arrangement between non-competing undertakings.

157. As an agency agreement, a great deal of the contract falls outside the scope of the Chapter I prohibition of the Act /Article 81 of the Treaty. This is because agency agreements, assuming that they meet certain criteria, are treated under EC competition law as not falling within Article 81(1) because the agent and principal are not viewed as separate undertakings but rather as a single economic entity. However, certain elements of an agency agreement that is otherwise outside the scope of Article 81(1) can still be scrutinised under that article⁶⁵. The agreement between Portec and Clare contains some such restrictions that could in principle be subject to competition law.

158. However, it is the ORR's view that these restrictions would not have anti-competitive effects in the context of the relevant markets such as to represent a breach of Chapter I/Article 81. The agreement has no effect on Network Rail's or other customers' ability to source grease from whomever they choose. The only other effects to consider therefore are those on intra-brand competition in trackside lubricator sales (i.e. competition between intermediaries in sales/promotion of Portec's trackside lubricators to end-customers) and interbrand competition in trackside lubricators (i.e. competition between manufacturers of trackside lubricators).

159. Intra-brand competition is unlikely to be materially affected as Portec also makes sales directly – i.e. Clare is not the only means by which Portec distributes its trackside lubricators – and in any case, Clare does not act as a reseller which charges a mark-up over the manufacturer's price, merely as a promoter of Portec's product.

160. With regard to those restrictions that curtail Clare's ability to act as an agent for other trackside lubricator manufacturers there appears to be no material impact on distribution/sales channels to end-purchasers of trackside lubricators, because there is no evidence to suggest that manufacturers would be constrained from selling directly to end purchasers, by the existence of the Clare-Portec agency agreement. Furthermore notwithstanding the period of the agreement since 1 November 2002, there is evidence of a reasonable level of competition between QHi and Portec in the trackside lubricator market and no evidence to suggest that this level of competition will not continue into the future.

⁶⁵ Paras 12-20 of Commission Notice 2000/C291/01 Guidelines on Vertical Restraints.

ASSESSMENT OF POTENTIAL BREACH OF THE CHAPTER II PROHIBITION/ARTICLE 82

161. In order to consider whether an undertaking has breached the Chapter II prohibition/Article 82, it is first necessary to establish that that undertaking is dominant on the relevant market. ORR does not consider Portec to be dominant in the supply of electric trackside lubricators, although it is possible that it might be dominant in the provision of testing services, given that Network Rail is not a direct purchaser in that market. Given the inconclusive finding regarding dominance it is therefore necessary to consider whether the alleged conduct would amount to an abuse if Portec were found dominant.

162. It is alleged that Portec deliberately refused to test NTM's grease in its new electric trackside lubricator. The alleged aim being to foreclose the market for the supply of grease for electric trackside lubricators to NTM in favour of its sales agent Clare. The rationale for this might be that as Clare acts as an agent for Portec, the higher its share of the market for grease the more likely it will be able to promote Portec's own sales of lubricators. NTM was concerned that Network Rail would tend to favour grease products approved for use on all trackside lubricators and hence foreclosure of one grease market would make it more likely that NTM would be foreclosed from all markets for the supply of grease used in trackside lubricators.

163. ORR does not consider that Portec's conduct would amount to an abuse for the following reasons:

- (a) there is not strong and compelling evidence of a refusal to test to the appropriate standard of proof required by case law;
- (b) an extended field trial in itself appears objectively justifiable;
- (c) even if refusal to test were established it is unlikely that access to Portec's PIV could be considered indispensable such that refusal would exclude all competition in the market for grease for use in electric trackside lubricators (i.e. that access to testing by Portec was an essential facility). Moreover, Network Rail does not appear to purchase (or require logistics companies to purchase on its behalf) only those grease products approved for use in all trackside lubricators and there is no indication that it will do so in future.

164. A final consideration is also relevant, namely, that on the facts of the case, it would appear that there is limited incentive on Portec's part to foreclose the market for grease to be used on its lubricators.

Indeterminate evidence of refusal to test

165. ORR has been unable to find conclusive evidence that Portec refused to test NTM's grease and Portec had previously tested NTM's grease for use in all its other lubricator types, including an early model of electric lubricator. Further, Portec has cleared the use of Shell UK's Bio Rail Grease in the PIV, despite the fact that Shell has a similar sales agency arrangement with Portec's principal competitor QHi.

166. It remains unproven as to whether Portec initially refused to test NTM's grease in the PIV. Furthermore Portec has informed ORR that it is prepared to carry out a pumpability test on NTM's grease. However, in addition to the

pumpability test, Portec also required that NTM's grease should undergo an extended field trial of its performance in the PIV as had been the case for other grease products approved for use in the PIV. This, Portec stated, was because of the need to ensure the grease remained effective under different weather conditions.

167. NTM disputed the necessity for an extended field trial as this had not been required previously with regard to hydraulic and mechanical lubricators and particularly as NTM alleged that Clare's (and other suppliers') grease products were not subjected to such a field trial in order to secure approval for use in the PIV. It cited this as further evidence of Portec's and Clare's attempts to foreclose NTM's entry into the market for the supply of grease for use in electric trackside lubricators.

Objective justification for extended field trials

168. It was therefore necessary for ORR to consider whether there was objective justification for an extended field trial as stated by Portec and also endorsed by Network Rail and QHi.

169. The requirement for an extended field trial (in addition to the standard pumpability test) before a grease product is given approval for use in an electric lubricator arose out of the performance of greases during the trials on the PIV and subsequently the L10 electric lubricators. The trials were carried out by Interfleet Technology ("Interfleet"), in conjunction with Network Rail, Dean & Dyball, Portec, QHi and Clare. The trial's findings were published in a report compiled by Interfleet, '*Monitoring of Trial Lubricators – Portec Protector IV – final Report.*' (August 22 2002, Report No. ITLR/t10332/0022).

170. The trials were part of Railtrack's (now Network Rail's) IIP following the Hatfield crash, where increased track lubrication at curves by trackside lubricators was identified as an important way to manage 'gauge corner cracking' and 'rolling contact fatigue'.

171. For this reason the majority of the costs involved with the trials were financed by Railtrack. Railtrack purchased 20 lubricators from Portec, with initially only six and then a further two electric lubricators being used in the trials. The remainder were subsequently put into service at various locations on Railtrack's infrastructure. Portec took no part in the funding of the trials but supplied labour for monitoring purposes at zero charge.

172. It is important to emphasise that the trials were conducted specifically to test the new PIV and L10 electric lubricators but it is of course not possible to test a lubricator without grease. The greases chosen were 'traditional'⁶⁶ greases already approved for use in mechanical and hydraulic lubricators as they were low cost, '..., with little or no scientific appreciation of their performance.'

⁶⁷

⁶⁶ *ibid.*

⁶⁷ P. 9, Para 5.1 of '*Monitoring of Trial Lubricators – Portec Protector IV – final Report.*' (August 22 2002, Report No. ITLR/t10332/0022).

173. Initially Clare's XP788 was selected, followed later by Clare's B1099 and Hi-Load-1, the latter two demonstrating the best performance for reasons discussed below. A further grease product was supplied for testing by QHi, known as High Power, but its use was discontinued since it performed badly.

174. It was only during the conduct of these trials that the performance of the grease itself within the electric lubricators became an issue as a result of the specific operational characteristic of the PIV,

'It became apparent that the properties required for successful delivery through an electric lubricator system are different to those normally successful in a mechanical or hydraulic system. Traditional lubricators [mechanical/hydraulic] induce high impulse loads into the grease lines which do not occur with the electric pumps. The result has been that many of the composite greases were inclined to segregate and congeal, the hydraulic shock loads induced by the non-electric lubricators seem more able to overcome these tendencies.'⁶⁸

175. The key findings of the report relevant to the performance of the greases tested concerned the potential for temperature changes to affect a grease's performance.

176. During hot weather greases exhibit less viscosity and hence the tendency to run down the face of the GDU [grease dispensing unit] is greater. Conversely in cold weather grease can become excessively viscous requiring extra power to pump the required distance which in turn increases the tendency for grease to breakdown and separate (i.e. the oils and solids separate).

177. Both these features result in ineffective grease spread meaning that both a train's wheels and the rails would not receive effective protection from wear and whereby the lubricator will be deemed to have failed.

178. This risk of ineffective protection involving electric trackside lubricators is exacerbated by the fact that one electric lubricator can typically replace a number of hydraulic or mechanical lubricators: therefore if it fails the impact can extend over several curves and large distances. The Interfleet report found that these phenomena might not be noticed immediately, as was the case with the tests involving Clare XP788.

179. Failure of the grease also raises potential safety hazards as excessive grease being pumped onto the head of the rail will result in poor adhesion for traction and/or a build up at the foot of the rail (the latter presenting a slip hazard to track workers).

180. Clare's XP788 was chosen initially for the trial but its performance was unsatisfactory resulting in excess grease being,

'...spread all over the rail head and widely over the ballast on both sides of the high rail.'⁶⁹

⁶⁸ P.7, Para. 4.1 'Monitoring of Trial Lubricators - Comparative Summary Report', Interfleet (ITLR/T10332/005), 28 March 2003.

⁶⁹ P. 9, Para 5.1 of 'Monitoring of Trial Lubricators – Portec Protector IV – final Report.' (August 22 2002, Report No. ITLR/t10332/0022).

181. Interfleet, following discussions with Railtrack’s Great Western Zone and Portec, concluded that Clare XP788

‘...is not best suited in this type of lubricator.’⁷⁰

Subsequent tests by Interfleet demonstrated Clare’s B1099 and Hi-Load grease products performed much better. With respect to the B1099, Interfleet stated,

“After the change from Clare XP-788 to the bio-degradable Clare B-1099, the spread of grease around successive curves at all sites was visibly improved by a significant amount...”⁷¹,

and that Clare’s Hi-Load grease had,

‘...performed almost as well as the B-1099.’⁷²

182. The lubricator trials and therefore the trial of greases in the electric lubricators lasted for a period of between six to nine months as set out in table 4 below. However, Interfleet recommended that only a full year trial would provide enough information on a grease’s performance in an electric lubricator,

‘As we have said before, we believe that only a full twelve month period would generate sufficient information to understand the performance of the biodegradable Clare B-1099 grease and to demonstrate the full potential of the devices.’⁷³

Table 4. Grease product trial dates and duration

Manufacturer	Product	Dates	Duration (Months)
Clare	XP 788	Sept 2001 to Mar 2002	6
Clare	High Load 1	Feb 2002 to Jun 2002	6
Clare	B1099	Feb 2002 to Oct 2002	9
Shell UK	Bio Rail Grease	Dec 2002 to Mar 2003	4
Shell UK	Lubricator Grease	Dec 2002 to Mar 2003	4

Source: Network Rail

183. As a result of Interfleet’s findings Portec stipulated the need for an extended field trial (in addition to a pumpability test) before it would provide full approval for the use of a grease in its PIV. Network Rail also made it a requirement following the Interfleet report,

‘Network Rail has stipulated that a field trial is required due to operational and safety risks with poor performing grease products. This requirement was instigated by Network Rail following the Interfleet report which recommended a 12 month trial as the grease needs to be consistent across bathes and should not separate within the GDU’.⁷⁴

⁷⁰ *ibid.*, at p.10, section 5.2.

⁷¹ *ibid.*, at p.10, section 5.1.

⁷² *ibid.*, at p.10, section 5.1.

⁷³ *ibid.*, at p. 20, section 7.

⁷⁴ Response to section 26 Notice dated 17 May 2005.

Since August 2002, Network Rail has required extended field trials for new grease products to cover all lubricator types i.e. hydraulic, mechanical and electrical.

184. On the basis of the above ORR therefore believes that the need for extended field trials is objectively justified.

185. A key issue relevant to NTM's complaint is the timing of the trials in relation to NTM's entry into the supply of grease for use in lubricators. The trials commenced in September 2001 and ran until March 2003. NTM did not enter the supply of lubricator grease until February 2003 (when it gained Network Rail product acceptance). Therefore, NTM was not in the market at the time the trials were started and there have been no other field trials since. In short this means NTM had missed the opportunity to be part of the original lubricator trials where much of the cost was borne by Railtrack.

Alleged discriminatory treatment of NTM

186. NTM has complained that Clare's greases did not undergo an extended field trial. Furthermore, now that both Portec and QHi have agreed to test NTM's grease, they have notified NTM that it will have to pay c £[] for a pumpability test and meet the costs of an extended field trial including the purchase of an electric lubricator. NTM claims this is yet another attempt to exclude it from the relevant market as it was not aware that any other grease manufacturers faced these charges, NTM claimed that it is being discriminated against as a result.

187. ORR, therefore considered the charges proposed by Portec and QHi. Prima facie, it is reasonable that both companies would seek to charge for the use of their equipment and any associated labour costs.

Portec's charges

188. Portec does not charge (and has not charged) for carrying out pumpability tests on its hydraulic and mechanical lubricators because the work and subsequent cleaning involved is minimal. The following greases were tested on its hydraulic/mechanical lubricators, with no charge:

- Henkel-Loctite 'Super Lube'
- NTM Sales and Marketing 'XL Rail Curve Sidewear Inhibitor'
- QHi Rail 'QH ECO Grease 200 Biodegradable'
- RS Clare B1099
- Square Two Lubrication Railmaster LF 1.5
- BIO-Rail EP1.5

189. Portec has, however, introduced a charge for a pumpability test on its PIV from April 2005 at £[] plus VAT. This followed a request by NTM for a pumpability test on its XL Rail Curve grease on the 8 April 2005, Portec states that this is the only request it has received to date from any grease manufacturer for such a test. Portec states that a charge is necessary because of the more substantial costs associated with carrying out the test in the PIV – i.e. covering the set up work required prior to test; subsequent cleaning and dismantling of the equipment and scrapping of certain components. Portec supplied the following breakdown of its costs for conducting the test.

Table 5 Portec's costs for pumpability testing

PIV Pumpability Test Cost				
Procedure	Hours	Quantity	Cost	Total
Set up and initial test (inc. photographs)	6		£[]	£[]
Dismantle test set up	4		£[]	£[]
Strip down, clean and reassemble GDU's	8		£[]	£[]
Strip down, clean and reassemble cabinet and pump	10		£[]	£[]
Disposal of waste covered grease materials	1		£[]	£[]
Repaint GDU's	3		£[]	£[]
Main feed hose (scrapped)		1	£[]	£[]
Secondary hoses (scrapped)		4	£[]	£[]
H Assembly (scrapped)		1	£[]	£[]
GDU gaskets (scrapped)		4	£[]	£[]
Degreasing material and paint		1	£[]	£[]
Prepare report	6		£[]	£[]
Total Cost				£[]

Source: Portec

QHi's charges

190. QHi initially agreed to conduct pumpability tests on its mechanical lubricators free of charge. These initial tests involved Clare products as it was 'the market leader'⁷⁵. As the number of grease suppliers requesting pumpability tests/letters of no objection increased, QHi stated that it could no longer bear the cost and introduced a charge of £[]. Grease producers charged for carrying out this test were Shell UK, NTM and Henkel-Loctite.

191. QHi charges a higher rate for a pumpability test in its L10, NTM was given a quote of £[] plus VAT, to cover the cost of providing the following⁷⁶.

- Mock up application
- Trial XL Gel in 8 Blade and 4 blade configurations
- Trial XL gel in long (30 metre) and standard hose configurations
- Prepare and issue report
- Clean and rebuild used 'grease contaminated' items where possible
- Scrap various items after the tests that are impractical to clean and re-use (i.e. hose fittings).

Network Rail's current policy on grease testing

192. With respect to the costs of an extended field trial, Network Rail has supplied the following response to ORR as to how future trials are to be carried out and funded,

'In the interim, grease will need to be supplied free of charge by suppliers and a letter of no objection obtained from the relevant lubricator manufacturer. Trials will be accommodated at local level into previously (new) lubricator units and monitored against set criteria by Network Rail. If the grease performs irretrievably poorly and the electric unit requires removal,

⁷⁵ Response by QHi to question 9 section 26 notice dated 17 May 2005.

⁷⁶ Response by QHi to section 26 Notice date 17 May 2005.

dismantling, cleaning and reassembly including any access and labour cost to undertake this task, these costs will be borne by the grease suppliers. For “normal” trials, labour and access costs associated with pre-planned installation will be borne by Network Rail. If there is not a planned new unit available to trial a new grease product then the grease supplier will be responsible for producing a (new) unused unit and absorbing all installation, access and labour costs to commission and decommission the trial unit. A letter of no objection will not be required for this type of trial as this can be undertaken in-situ by Network Rail. Monitoring will be undertaken by Network Rail.⁷⁷

193. It therefore appears that Network Rail has in place a system for carrying out future tests of new grease products in electric lubricators, whereby Network Rail is prepared to share a considerable portion of the costs at least where a) the grease performs well or b) where the test can be conducted as part of a pre-planned installation process. (Indeed the latter is akin to the situation that arose when Clare’s greases were tested during the trialing of the electric lubricators).

194. There remains a risk that if the grease product fails, or if there is no pre-planned installation programme, that a prospective supplier may face the full cost of trialing its product, however ORR considers that this is not dissimilar to the normal commercial considerations facing any undertaking seeking to enter a market.

195. The fact that Clare did not have to bear the cost of the trials and supply of lubricators is not, as NTM has alleged, evidence that it is being treated on an unequal basis to Clare, or indeed any other grease manufacturer, rather it was simply that Clare and Shell UK were the main suppliers at the time of the initial electric lubricator trials. There is no reason to presume that if NTM had been supplying grease at this time, it too could not have participated in the trials on the same basis.

Not all grease underwent extended field trials

196. NTM has also alleged that certain greases, namely Clare’s XP788 and Shell’s Malleus RSB 1, did not undergo extended field trials. ORR has found however that both Clare’s XP788 and Shell’s Malleus RSB 1 were included in the extended field trials.

Application of refusal to supply/essential facilities doctrine

197. NTM has argued that access to Portec’s testing to secure a “letter of no objection” is essential. Where a complaint is made that a refusal to supply goods or services amounts to barring access to an essential facility, it is necessary to evaluate this claim in light of the relevant case law in this area.

198. Under the current market structure it seems unlikely that the provision of testing or an extended field trial on Portec’s Protector PIV, or indeed its electric trackside lubricators more generally, represents an essential facility such that refusal to test would amount to an abuse. In *IMS*⁷⁸ the ECJ held

⁷⁷ Response to QHi section 26 Notice date 17 May 2005.

⁷⁸ *IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG* [Case C-418/01].

that, in respect of a dominant firm with an Intellectual Property (IP) right, refusal to licence that IP right would be abusive if the following conditions were satisfied:

- (a) access to the IP right was indispensable;
- (b) refusal of access prevented the emergence of a new product for which there would be consumer demand;
- (c) refusal was unjustifiable;
- (d) refusal excluded all competition on a secondary market.

199. While the present case is not concerned with IP rights, it is analogous in the sense that Portec is the sole supplier of testing services for greases to be used in its trackside lubricators. The essential facilities principles that were set down in *IMS* had previously been applied to a variety of situations not all of which involved IP⁷⁹ rights. The principles set out in *IMS* are capable of being applied more broadly to any situation where access is being sought to the assets of another company.

200. Applying the *IMS* test in the present context, the relevant secondary market is that of grease for use in electric trackside lubricators. Therefore, it is clear that another supplier's product is available – namely, QHi – and so refusal to test by Portec could not be considered indispensable and would not exclude all competition on the relevant secondary market. NTM's grease could be used on QHi's products, subject to suitable testing.

No potential foreclosure through Network Rail's grease purchasing and usage requirements

201. The potential foreclosure envisaged by NTM does not seem likely to materialise in practice. This is because Network Rail does not appear to purchase (or require logistics companies to purchase on its behalf) only those grease products approved for use in all trackside lubricators and there is no indication that it will do so in future. For example, Texaco, Henkel Loctite, Whitmores and NTM do not currently supply grease for use in electric trackside lubricators but all are purchased for use in other trackside lubricator types. Network Rail has also stated⁸⁰,

“Network Rail would be prepared to purchase a grease product that had not been accepted for use in a Portec Protector IV, for other trackside lubricators for which it is suitable.”

and

“One grease product does not always have universal application, i.e. it may not suit each lubrication delivery system.”

202. Moreover, as noted previously, Network Rail's predecessor appears to have recognised the potential for abuse of market power explicitly:

⁷⁹ Bronner (Oscar) GmbH & Co KG v Mediaprint Zeitungs-und Zeitschriftenverlag GmbH & Co KG: C-7/97 (1998), ECJ.

⁸⁰ Response by Network Rail to question 21 of section 26 notice dated 25 November 2004.

“The ‘no objection’ letter issued by the machine manufacturers will be on the basis of technical considerations – NOT [*Railtrack’s emphasis*] commercial. No such letters from machine manufactures should be withheld on commercial grounds. Should a machine manufacturer not feel it appropriate to issue a letter of ‘no objection’ then the technical reasons must be provided to the grease supplier. Any grease suppliers may appeal to Railtrack if they do not consider the technical explanation reasonable.⁸¹”

203. Therefore, even if Network Rail were to move towards requiring grease transferability across all trackside lubricator types, such a procurement policy would be unlikely to unduly restrict Network Rail’s choice of grease suppliers since it seems that each would be given the opportunity to be tested on the necessary trackside lubricator products. This conclusion is reinforced by Network Rail’s response to ORR noted above under the heading ‘*Network Rail’s current policy on grease testing*’.

Limited incentive to foreclose the supply of grease for Portec products

204. Finally, ORR has also considered what potential benefit Portec might obtain from foreclosing the supply of grease for use on its electric trackside lubricators. Two observations are pertinent in this regard which suggest that this is not a concern in the present case:

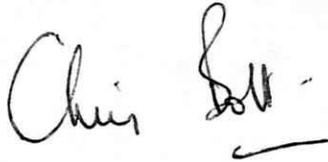
- (a) Portec has allowed testing of other, non-Clare supplied, grease products on its electric trackside lubricators (i.e. Shell’s). That Portec has allowed such testing of another grease supplier’s products would not be consistent with attempting to foreclose the market for the supply of grease for electric trackside lubricators;
- (b) As a general proposition, where a supplier supplies only one of two complementary products (in this case trackside lubricators or grease) and has no share in the revenues/profits of the second product, it is in that supplier’s interest to have more rather than fewer brands of the second, complementary, product compatible with its own product. It can be seen that this network effect reasoning is relevant in the present case (i.e. Portec’s trackside lubricators are more valuable to customers the more grease products are compatible with it) because ORR has found that Portec does not share in Clare’s performance in the grease market(s).⁸²

⁸¹ Letter from Peter Anderson, Product Acceptance Manager, Railtrack dated 21 February 2002, supplied by NTM in response to section 26 notice dated 21 November 2004.

⁸² If Clare’s market share grows, Portec does not share in its revenues or profits. Therefore, any benefit from Clare growing at the expense of other suppliers – even if this were the case – would be indirect at best and conditional on Clare being able to better promote Portec’s product as a result.

DECISION

206. ORR does not therefore consider that there is strong or compelling evidence that either Portec or Clare has infringed either (a) the Chapter I prohibition of the Act/Article 81 of the Treaty or (b) the Chapter II prohibition of the Act/Article 82 of the Treaty.

A handwritten signature in black ink that reads "Chris Bolt". The signature is written in a cursive style with a horizontal line underneath the name.

**CHRIS BOLT
CHAIRMAN
OFFICE OF RAIL REGULATION**

12 August 2005