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Better Economic Regulation of Infrastructure: Country-based Review

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A list of people from outside the ACCC/AER who have provided information or review is included under 'Caveat'.

An Advisory Committee has been established to assist with the project on *Better Economic Regulation of Infrastructure – International Insights*. It has provided expertise and guidance to the project team. Members of the Advisory Committee are Garth Crawford, Joe Dimasi, Harriet Gray, Michelle Groves, Tim Lear, Mark Pearson and Peter Toy.

Editorial assistance has been provided by Lucy Callaghan and Genevieve Pound.

Caveat

The information in this publication is for general guidance only. It does not constitute legal or other professional advice, and should not be relied on as a statement of the law in any jurisdiction. Because it is intended only as a general guide, it may contain generalisations. You should obtain professional advice if you have any specific concern.

The material has been attained from two main sources. First, it is taken from websites and other primary and secondary sources. Second, information and review has come from regulators, government agencies, academics and others involved in regulation across a wide range of countries.

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In spite of this effort, it is likely that some errors of omission and commission have been made, nuances have been missed and developing events have not been fully assimilated. While those providing information or review are thanked for their generosity, they do not bear any responsibility for any errors.

If you find an error, have a nuance or have an update, please e-mail this address: working.papers@acc.gov.au

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Preamble

Why examine the economic regulation of infrastructure?

In our increasingly globalised and rapidly changing world, insights into the arrangements for the economic regulation of key infrastructure – energy, telecommunications, postal services, water and wastewater, rail, airports and ports – provide important information for regulators, legislators, service providers, consumers and their respective representative bodies.

Having access to these insights and knowing how other jurisdictions manage their regulatory frameworks can, *inter alia*:

- help benchmark local practice;
- inform review and reform processes;
- create opportunities for partnerships and cooperation between jurisdictions; and
- stimulate analysis of the factors influencing competitiveness and capacity to meet local and international demand.

This report summarises research conducted by the Regulatory Development Branch of the Australian Competition and Consumer Commission (ACCC) into the economic regulation of infrastructure in seventeen countries and the European Union. It extends 2009 research undertaken by the Branch, and will be complemented by an interpretative report due for release at the end of 2013. In compiling this information, the ACCC has drawn on online primary and secondary data sources acknowledges the assistance provided by regulatory agencies and others in the countries reviewed.

What is in the report?

This comprehensive, comparative study analyses the economic regulation arrangements for infrastructure in:

1. South Africa
2. Japan
3. Singapore
4. South Korea
5. Australia
6. New Zealand
7. European Union
8. France
9. Germany
10. Ireland
11. Italy
12. Netherlands
13. Spain
14. Sweden
15. United Kingdom
16. Canada
17. Mexico
18. United States of America.

This range of jurisdictions was chosen to allow analysis across different geographic, economic, political and legal contexts, and also to enable a review of both single-state entities and federations. For each country, and for the European Union, the report includes discrete analysis of the seven key infrastructure areas and examines how they are regulated, legislated and governed.

What information is provided about each country?

Each of the seventeen countries and the European Union is reviewed individually and the report provides the following:

- An overview of the agencies responsible for regulating infrastructure (including any national and sub-national division of responsibilities); details of applicable legislation and its administration; and, where applicable, an explanation of specific industry (rail for example) or sector (energy for example) arrangements.
- A descriptive summary of the geography, population, economy, polity and legal systems operating in each country. This section briefly looks at climate and natural assets/resources, GDP, GDP per capita, unemployment rate, level of infrastructure development, and parliamentary and legal systems.
- An outline of the country's competition and regulatory institutional structures. Regulatory agencies and the legislation conferring their responsibilities; the agencies' structure, composition and appointment processes; their objectives and functions; and arrangements for monitoring and review are outlined in this section of the report.
- A detailed description of the regulatory arrangements for the seven infrastructure areas – energy, telecommunications, postal services, waste and wastewater, rail, airports and ports.

For each of these seven infrastructure areas, an overview of the industry/sector market structure, technologies, market share and the extent of competition, incumbency and ownership (government, private or mixed) is provided. The regulatory institutions and legislation covering each infrastructure area are described, and the types of economic regulation carried out by those regulatory bodies – declaration (coverage), retail pricing controls, approval or restriction of capacity deployments, rate of return regulations and structural separation for example – are described.

The ways in which regulatory institutions consult interested parties and their timelines for consultation and review are outlined. Processes for disclosing information, maintaining confidentiality, decision-making and reporting are also covered. Arrangements for reviews (including merits reviews), additional regulatory development and consumer engagement are also summarised for each industry or sector.

Who will find this report useful?

Regulatory reform in response to government policy shifts or market-driven structural adjustments is a feature of industry and sectoral activity in Australia and in other jurisdictions. This report provides infrastructure regulators, legislators, service providers, consumers and their representative bodies in the countries reviewed with a comprehensive overview of the economic regulation arrangements in the seven key infrastructure areas.

When will the interpretative report be available and what will it cover?

It is planned to release an interpretative report based on 'International Insights' from the research conducted for the *Better Economic Regulation of Infrastructure* project in late 2013. It is planned that the interpretative report will include:

- an exploration of trends in industry and sectoral regulation for the seven infrastructure areas;
- information on the integration (or not) of regulatory and competition agencies, and the pros and cons of separate agencies;
- an investigation of the objectives set for these agencies;
- an overview and analysis of the different approaches to engaging customers and other interested parties;
- an analysis of information collection, management, dissemination and confidentiality practices; and
- an overview and analysis of the appeal mechanisms operating in the jurisdictions studied.

South Africa

OVERVIEW

The provision of key economic infrastructure in South Africa was originally established on the basis of government ownership, statutory monopoly and politicisation of pricing and operations. This was true across energy, telecommunications, posts and transport. Water and wastewater institutions were locally based and highly variable in sophistication. This overall approach reflected geographic and socio-economic diversity in the context of the 'apartheid' approach of concentrated political and economic power.

The greater democratisation of South Africa in the 1990s coincided with an international trend towards greater 'liberalisation' of economic infrastructure. However, the transition to more competitive markets; more independent regulation and clearer efficiency-based objectives has been difficult in South Africa. While the emergence of key competition bodies has been relatively successful, the transformation of infrastructure institutions has been more problematic.

The economic regulator for energy, the National Energy Regulator of South Africa (NERSA), regulates the three large state-owned incumbents in electricity, gas and petroleum. The NERSA has a vision, strategic goals and various responsibilities.

There has been substantial regulatory reform in telecommunications, associated with the establishment of the Independent Communications Authority of South Africa (ICASA). Regulation was introduced in the circumstances of wireless communications growing rapidly beside an incumbent fixed-line operator with only a partially complete network; concentrated in the more affluent areas. The ICASA is a sectoral regulator for communications, covering postal services and broadcasting in addition to telecommunications.

For the water and wastewater sector there has been some movement towards a national system, based on the 15 Water Boards responsible for bulk water supply, under Ministerial governance by the Department of Water Affairs. Basic responsibility for direct provision of water and wastewater lies with the myriad of municipalities, where there is a great diversity of achievement across the country with many areas remaining substantially unserved. A policy of 'free basic water' could be inconsistent with a more liberalised institutional structure based on commercial principles.

South Africa's major airports have been organised into a government-owned corporation under the regulation of the 'Regulating Committee' that uses ostensibly sophisticated regulatory tools. *Inter alia*, its objectives are the prevention of the abuse of monopoly power.

A proposal to establish an economic regulator for rail has so far been unsuccessful, and there is no economic regulation of rail. A powerful incumbent, Transnet, owns and operates all major national railways. Transnet is vertically integrated and is a state-owned enterprise. It also operates in other infrastructure areas covering gas pipelines and ports.

South Africa's major seaports are owned and operated by a division of Transnet (Transnet National Ports Authority; TNPA) and are regulated by the National Ports Regulator (established in 2005). The National Ports Regulator has been developing its facilities and procedures, and, *inter alia*, hears complaints; deals with appeals against TNPA's decisions and makes an annual tariff determination. South Africa has supply chains for coal exports from Port Richards and for iron ore from Salhanda Bay, where the main facilities in each case are owned by Transnet.

GEOGRAPHY, POPULATION, ECONOMY, POLITY AND LEGAL SYSTEM¹

South Africa is a large and populous country located on the southern part of the African continent. Its coastline is more than 2500 kilometres in length and it has land borders with Botswana, Lesotho, Mozambique, Namibia, Swasiland and Zimbabwe. Its land mass of over 1.2 million square kilometres is diverse. The western part of the country is mainly desert, and there are few larger settlements. Fertile coastal plains stretch from Cape Town through Port Elizabeth, East London and Durban to the border with Mozambique. The third feature is a long and high mountain range – the 'great escarpment' – that rises up to support an elevated tableland (also called the 'plateau') including the elevated cities of Johannesburg (altitude of 1753 metres), Pretoria and Blomfontein.

¹ CIA World Factbook – South Africa. Available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/sf.html> [accessed on 7 May 2013].

The population is over 49 million, comprised of Blacks (79 per cent); Whites (nine per cent) and others (12 per cent). Among the others there are interesting concentrations of the 'Cape Coloured' and Indian ethnics.

The average population density is around 40 per square kilometre. However, the population is more heavily concentrated along the coastal plain (Cape Town and Durban are the larger cities) and in area of the Highveld including Johannesburg (population over three million) and Pretoria.

South Africa is an 'emerging' economy with considerable diversity of levels of economic development. On a purchasing-power-parity basis the overall GDP is US\$546.3 billion in 2011 which averages to about \$10798 per capita.² While this is well below the average in OECD countries (\$35000), it is only slightly below the lower few of the OECD countries.

South Africa has an abundance of many natural resources. Gold, chromium, antimony, coal, iron ore, manganese, nickel, phosphates, tin, rare earth elements, uranium, gem diamonds, platinum, copper, vanadium, salt and natural gas are listed in the CIA World Factbook. It has well-developed financial and legal institutions; and advanced infrastructure in communications, energy and transport.

However, serious economic problems remain from the apartheid era – especially poverty and a lack of economic empowerment among the disadvantaged. South Africa's economic policy is fiscally conservative focusing on controlling inflation and attaining a budget surplus. However, the government faces growing pressure from special interest groups to use state-owned enterprises to deliver basic services to low-income areas and to increase their job growth.

Economic growth was strong from 2004 to 2007 at a time of macroeconomic stability and a global commodities boom. Growth began to slow in the second half of 2007 (including an electricity crisis) and subsequently from the impact of the global financial crisis on commodity prices and demand. GDP fell nearly two per cent in 2009 but recovered over 2010 and 2011. Unemployment remains high and outdated infrastructure in some areas has constrained growth.

South Africa is a republic, with the full name being the Republic of South Africa (RSA). There are nine administrative provinces – Eastern Cape, Free State, Gauteng, KwaZulu-Natal, Limpopo, Mpumalanga, Northern Cape, North-West, and Western Cape. The administrative capital is in Pretoria. South Africa has a bicameral parliament. The National Council of Provinces (90 seats; ten members elected by each of the nine provincial legislatures for five-year terms) has special powers to protect regional interests, including the safeguarding of cultural and linguistic traditions among ethnic minorities. The National Assembly has 400 seats; with members elected by popular vote under a system of proportional representation to serve five-year terms. Elections for the National Assembly and National Council of Provinces were last held on 22 April 2009, and are scheduled next to be held in April 2014. The dominant political party is the African National Congress (ANC). The current Chief of State and head of government is President Jacob Zuma.

APPROACH TO COMPETITION AND REGULATORY INSTITUTIONAL STRUCTURE

There are several institutions in South Africa that are responsible for either oversight of competition or the economic regulation of particular infrastructure areas. The Competition Commission is a statutory body constituted in terms of the Competition Act. The economic regulator for energy is the National Energy Regulator of South Africa (NERSA). In telecommunications and postal services, the Independent Communications Authority of South Africa (ICASA) serves as the regulatory body. There is no dedicated regulatory body for water and wastewater. In the transport sector: South Africa's major airports have been organised into a government-owned corporation under the regulation of the 'Regulating Committee'; there is no economic regulator for rail; and South Africa's major seaports are regulated by the National Ports Regulator (established in 2005).

The origins of competition policy in South Africa lie with the *Regulation of Monopolistic Conditions Act, 1955* (Act No. 24 of 1955). A review of the Act in the 1970s found that it had been unsuccessful in preventing an increase in oligopolies. As a result, the *Maintenance and Promotion of Competition Act, 1979* (Act No.96 of 1979) was introduced, and the Competition Board was established and tasked with administering the Act.

² Organisation for Economic Cooperation and Development (OECD), *OECD.StatExtracts: National Accounts*. Available at: <http://stats.oecd.org/Index.aspx?QueryId=558> [accessed on 8 May 2013].

The 1979 Act was amended in 1986 to give the Competition Board further powers, including the ability to act not only against new concentrations of economic power but also against existing monopolies and oligopolies. Despite the amendments, it was widely recognised that technical flaws in the Act prevented the effective application of competition law on both substantive and logistical grounds.

The post-apartheid South African government signalled its intention to review the South African competition law regime in the White Paper on Reconstruction and Development in 1994 (Notice 1954 Gazette 16085 of 23 November 1994). The need for a new competition policy in South Africa arose in the context of what was seen as an historical legacy of excessive economic concentration and ownership, collusive practices by enterprises and the abuse of economic power by firms in dominant positions. It was also recognised, however, that the South African economy and society was in a state of transition, in terms of a broader restructuring of the economy, the effects of globalisation and trade liberalisation. A fundamental principle of competition policy and law in South Africa is 'the need to balance economic efficiency with socio-economic equity and development'.

The Department of Trade and Industry embarked on a three-year project, consulting with experts and stakeholders, to arrive at a new competition policy framework for South Africa in 1995. In November 1997, the Department of Trade and Industry released proposed guidelines for competition policy titled *A Framework for Competition, Competitiveness and Development*. These guidelines formed the basis for negotiations with the National Economic Development and Labour Council (NEDLAC). The objective of the NEDLAC process was to reach agreement between business, government and labour on the policy principles, which would shape and inform competition legislation. A NEDLAC agreement on competition policy was concluded on 20 May 1998. After a fourteen-week public consultation process, the *Competition Act, 1998* (Act No. 89 of 1998) was passed by Parliament in September 1998. Certain provisions of the Act were brought into effect in October 1998 to allow for the establishment of a new institutional framework. The remaining provisions of the Act became effective on 1 September 1999.

The stated purpose of the *Competition Act, 1998* (Act No. 89 of 1998) is to promote and maintain competition in South Africa in order to:

- promote the efficiency, adaptability and development of the economy;
- provide consumers with competitive prices and product choices;
- promote employment and advance the social and economic welfare of South Africans;
- expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;
- ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
- promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.

As a result, South Africa has three separate bodies – a competition body (the Competition Commission), a tribunal (the Competition Tribunal) and the Competition Appeal Court.³

*Competition Commission*⁴

The Competition Commission is a statutory body constituted in terms of the *Competition Act*. It is empowered by the Government of South Africa to investigate, control and evaluate restrictive business practices, abuse of dominant positions and mergers in order to achieve equity and efficiency in the South African economy.

The Competition Commission consists of the Commissioner and one or more Deputy Commissioners, appointed by the Minister of Trade and Industry. The Commissioner is the Chief Executive Officer of the Competition Commission and is responsible for its general administration and for carrying out any

³ The story of the establishment and early operation of South Africa's competition authorities has been told by David Lewis in his book, *Thieves at the Dinner Table: Enforcing the Competition Act* (Jacana Media, 2012). Lewis chaired the Competition Tribunal for ten years.

⁴ Competition Commission website. Available at: <http://www.compcom.co.za/> [accessed on 7 May 2013].

function assigned to it in terms of the *Competition Act*. The Commissioner is appointed for a five-year term and is accountable to the Minister of Trade and Industry and Parliament. The Deputy Commissioner assists the Commissioner in carrying out the functions of the Commission.

The Commission is made up of seven divisions, namely Enforcement and Exemptions; Mergers and Acquisitions; Advocacy and Stakeholder Relations; Legal Services; Policy and Research; Cartels; and Corporate Services. It is located in Pretoria.

The Competition Commission has a range of functions in terms of section 21 of the *Competition Act*. These include investigating anti-competitive conduct in contravention of Chapter 2 of the *Competition Act*; assessing the impact of mergers and acquisitions on competition and taking appropriate action; monitoring competition levels and market transparency in the economy; and identifying impediments to competition and playing an advocacy role in addressing these impediments.

In taking these actions, the Commission must balance issues related to competition with the broader social and economic goals outlined in the *Competition Act*, such as employment, international competitiveness, efficiency and technology gains, as well as the ability of small- and medium-sized businesses and firms owned or controlled by historically disadvantaged persons to compete.

In order to ensure the consistent application of the *Competition Act* across sectors, the Competition Commission may negotiate agreements with other regulatory authorities, participate in their proceedings, and advise, or receive advice from, any regulatory authority.

The Competition Commission is independent but its decisions may be appealed to the Competition Tribunal and the Competition Appeal Court.

*The Competition Tribunal*⁵

The Competition Tribunal is the specialist adjudicator of first instance. The Tribunal is required to hold hearings in each matter. Its proceedings are open to the public. The Tribunal has a chairperson; two full-time members and five part-time members. It is served by full-time staff, presently 14 people, who operate through three divisions – registry, corporate services and research. In almost all cases, apart from a few procedural-type cases, three Tribunal members must hear a case and make a decision. Once the Tribunal has arrived at a decision, it publishes its reasons on its website. Tribunal members are appointed to serve a five-year term of office by the President of the Republic. Terms of office can be renewed. Tribunal members typically have experience in law or economics. The Tribunal is located in Pretoria.

*The Competition Appeal Court*⁶

The Competition Appeal Court is a special division of the High Court that has exclusive jurisdiction over appeals from the Competition Tribunal. Eight judges have been appointed to the Competition Appeal Court. These are generalist judges. It has no lay persons as members.

As it concerns the energy sector, appeals relating to NERSA decisions are subject to judicial review by the High Court in accordance with the *Promotion of Administrative Justice Act 2000*.

In telecommunications, the ICASA is formally accountable to the Parliament of South Africa and, through the appeals system, to the courts.

In the postal subsector, the *Postal Services Act 1998* provides that a person 'who is aggrieved by the suspension or cancellation of his or her licence or registration certificate ... may apply to a court to review a decision of the Regulator'.⁷

In the water industry, the Water Tribunal hears appeals against directives and decisions made by responsible authorities, catchment management agencies or water management agencies about matters covered by the *National Water Act 1998*.

Finally in the ports subsector, the National Ports Regulator promotes regulated competition, hears appeals and complaints, and investigates such complaints.

⁵ Competition Tribunal website. Available at: <http://www.comptrib.co.za/> [accessed on 7 May 2013].

⁶ Competition Appeal Court website. Available at: <http://www.comptrib.co.za/home/appeal-court/> [accessed on 7 May 2013].

⁷ *Postal Services Act, 1998*, section 24. Available at: http://www.acts.co.za/post_serv/index.htm [accessed on 8 July 2013].

REGULATORY ARRANGEMENTS BY INDUSTRY OR SECTOR

1. Energy

The energy sector in South Africa⁸ is dominated by state-owned enterprises (SOEs).

The government-owned and vertically integrated Eskom generates about 95 per cent of total electricity output. Coal is the dominant energy source, and the other sources – gas turbines, hydro, wind-power and nuclear – make only small contributions to South Africa's electricity production. In 2007 and 2008, Eskom encountered problems in meeting electricity demand with aging plants, necessitating 'load-shedding' involving cuts to residents and businesses in the major cities.

Eskom has a monopoly over electricity transmission while it shares distribution responsibilities with the municipalities (about 180) and other licensed distributors. At present, Eskom supplies about 40 per cent of the residential market directly, with the rest supplied by municipalities.⁹

Restructuring of electricity distribution occurred under the Electricity Distribution Industry Holdings Company (EDI Holdings),¹⁰ established in March 2003 for the sole purpose of facilitating the restructuring of the South African National Electricity Distribution Industry in accordance with the requirement of the Energy White Paper 1998.¹¹ In July 2005, the first regional electricity distributor (RED) was established, followed by the setting up of another five independent REDs as public entities. However, in December 2010, the Cabinet acted on the advice of the Department of Energy (DoE) to discontinue the restructuring process due to a number of issues relating to network maintenance backlogs and poor performance of REDs. The DoE was asked to take over the responsibility and to review the electricity industry 'with a view to developing a holistic approach to revitalise electricity infrastructure, energy security as well as the financial implications'.¹²

The government published the draft Independent System and Market Operator (ISMO) Bill, serving as the initial step in its intention to establish a state-owned entity which will provide an independent system and market operation outside Eskom.¹³ Independent Power Producers (IPPs), which are targeted to contribute 30 per cent to the overall power generation over the Medium Term Expenditure Framework (MTEF) period, have been licensed.¹⁴

For gas, the DoE website explains that the current development of regional gas-fields will lead to natural gas becoming a more important fuel in South Africa.¹⁵ With the availability of natural gas in

⁸ South Africa Info, *Infrastructure: South Africa's Energy Supply*. Available at: <http://www.southafrica.info/business/economy/infrastructure/energy.htm> [accessed on 8 July 2013].

⁹ ESKOM, *Multi-year Price Determination 2013/14 to 2017-18 (Revenue Application – Part 1)*, p. 9.

¹⁰ Department of Energy, *Basic Electricity*. Available at: http://www.energy.gov.za/files/electricity_frame.html [accessed on 7 May 2013].

¹¹ The White Paper 1998 provides the electricity subsector objectives as follows:

- improved social equity by addressing the requirements of the low income;
- enhanced efficiency and competitiveness to provide low-cost and high-quality inputs to all sectors;
- environmentally sustainable short and long-term usage of our natural resources;
- the right of choice of electricity supplier;
- competition in especially generation;
- open non-discriminatory access to the transmission system; and
- private sector participation in the industry.

¹² EDI Holdings, *EDI Holdings Closure, presented to the AMEU Restructuring Committee*, 10 February 2011. Information is also available at the Association of Municipal Electricity Utilities website at: <http://www.ameu.co.za/ejournal/2011/2/25/termination-of-edi-restructuring-process-and-closure-of-edi.html> [accessed on 8 May 2013].

¹³ National Energy Regulator of South Africa (NERSA), *Annual Report 2011/2012*, p. 28. Available at: <http://www.nersa.org.za/Admin/Document/Editor/file/News%20and%20Publications/Publications/Current%20Issues/NERSA%20Annual%20Report%202011-2012.pdf> [accessed on 7 May 2013].

¹⁴ The regulation of this type of entry is prescribed under the Department of Energy, *Electricity Regulations on New Generation Capacity*, 5 August 2009. Available at: http://www.energy.gov.za/files/policies/22736_reg_721.pdf [accessed on 8 July 2013].

¹⁵ Department of Energy, *Overview*. Available at: http://www.energy.gov.za/files/naturalgas_frame.html [accessed on 8 May 2013].

neighbouring countries, such as Mozambique and Namibia, and the discovery of offshore gas reserves in South Africa, the gas industry is undergoing rapid expansion. The entire gas and condensate output is dedicated to the Petroleum, Oil and Gas Corporation of South Africa (PetroSA)'s liquid-fuel synthesis plant. Its output accounts for about 1.5 per cent of total primary energy supply.¹⁶ With a focus on natural gas exploration and production, PetroSA does not operate in retailing.

Sasol,¹⁷ the biggest local company listed on the South African stock market, produces synthetic fuels from low-grade coal and a small amount from natural gas. It operates the world's only coal-based synthetic fuels facility, and produces 36 per cent of liquid fuels consumed in South Africa. Sasol produces automotive fuels for consumers, premium fuels and lubricants for industry, as well as jet fuel, fuel alcohol and illuminating kerosene. It also converts natural gas into other ('more environmentally friendly') fuels and chemicals. Its subsidiary, Sasol Gas, operates a distribution network and supplies piped gas to consumers. Sasol has interests in many other African countries, including a gas-to-liquids partnership in Nigeria and a cross-border pipeline linking the natural-gas fields in Mozambique to Sasol's gas-conversion plant at Secunda in South Africa's Mpumalanga province (formerly known as Eastern Transvaal).

Transnet Pipelines, formerly known as Petronet, owns and operates a high-pressure petroleum and gas pipeline on behalf of the government.¹⁸ It is a business unit of the government-owned Transnet Limited, which also operates in rail (section 5) and ports (section 7).

Regulatory Institutions and Legislation

The Department of Energy (DoE) was established after the split of the mining and energy portfolios within the then Department of Minerals and Energy in 2009. It is responsible for 'ensuring secure and sustainable provision of energy for socio-economic development'.¹⁹ The DoE is currently implementing a number of programs under the legislative and regulatory framework governing the energy sector, aimed at promoting energy efficiency, demand-side management and renewable energy resources. The Minister of Energy has the power to develop regulations and issue directives in relation to energy matters. For example, the Minister made the following electricity regulations in 2011-12:²⁰ Electricity Regulations on the Integrated Resource Plan 2010-2030 (*Electricity Regulation Act No. 4 of 2006*); Electricity Regulations on New Generation Regulations (Regulation number R 399 Gazette No. 9530 of 4 May 2011); and *Electricity Regulation Act* Section 34(1) Determination by the Minister of Energy – IPP Procurement Programme 2011.

The Minister of Energy also has oversight responsibilities with respect to the National Energy Regulator of South Africa (NERSA) and PetroSA. The Electricity and Nuclear Branch of the Department is responsible for electricity and nuclear-energy affairs, while the Hydrocarbons and Energy Planning Branch is responsible for coal, gas, liquid fuels, energy efficiency, renewable energy and energy planning, including the energy database.

The National Energy Regulator of South Africa (NERSA)

In November 1995, the NERSA replaced the National Electricity Regulator (NER) as the regulatory authority for the electricity supply industry in South Africa. The NERSA, established in terms of the *National Energy Regulator Act of 2004*,²¹ was also mandated to regulate piped gas and petroleum industries in addition to electricity. It was also required to collect levies from people holding title to gas and petroleum. The idea behind a single regulator for the three industries was to improve efficiency and cut costs. It was also expected to boost private-sector participation in the energy

¹⁶ PetroSA website. Available at: <http://www.petrosa.co.za/Pages/Home.aspx> [accessed on 8 May 2013]. PetroSA is a subsidiary of the Central Energy Fund, which is wholly owned by the Government and reports to the Department of Energy.

¹⁷ Sasol, *About Sasol*. Available at: <http://www.sasol.com/about-sasol/company-profile/business-overview> [accessed on 7 May 2013].

¹⁸ Transnet website. Available at: <http://www.transnetpipelines.net/> [accessed on 8 May 2013].

¹⁹ Department of Energy, *Director General*. Available at: http://www.energy.gov.za/files/au_frame.html [accessed on 8 May 2013].

²⁰ NERSA, *Annual Report 2011/2012*, p. 24. Available at: <http://www.nersa.org.za/Admin/Document/Editor/file/News%20and%20Publications/Publications/Current%20Issues/NERSA%20Annual%20Report%202011-2012.pdf> [accessed on 8 July 2013].

²¹ An amendment Bill (as of December 2011) has been drafted by the Department of Energy. A copy of the bill is available at: <http://www.energy.gov.za/files/policies/NationalEnergyRegulatorAmendmentBill.pdf> [accessed on 2 July 2013].

sector. The governing legislation for the sector is the *Electricity Regulation Act 2006*, the *Gas Act 2001* and the *Petroleum Pipelines Act 2003*.²²

The NERSA has a Chairperson; a Deputy Chairperson; three full-time members (one each focusing on electricity, petroleum and piped gas) and two part-time members. According to its website, 'NERSA consists of competent regulators appointed by the Minister of Energy according to their technical expertise and good public standing'.²³ The NERSA is based in Pretoria. Funding includes government budget allocations, funds collected under section 5B of the *Electricity Act*, levies imposed under relevant legislation, charges for dispute resolution and other services under the *National Energy Regulator Act*, and licence fees.

The electricity division of the NERSA consists of the Licensing and Compliance Department (responsible for electricity-supply licensing, registration and compliance monitoring), Pricing and Tariffs Department (responsible for economic regulation), Electricity Infrastructure Planning Department (implementing, for example, the National Integrated Resource Plan), and Regulatory Reform Department (primarily responsible for designing regulatory framework for electricity distribution under restructuring).

The Hydrocarbons Division is responsible for regulating piped gas and administering the Mozambique Gas Pipeline Agreement between the government of South Africa and Sasol Limited. The division consists of the Licensing and Infrastructure Planning Department and the Gas Tariff and Compliance Department.

As reported by the NERSA, 82 per cent of the 177 positions have been filled since its organisational restructuring.²⁴ Among the 146 positions filled, 47 staff members work on electricity regulation, 13 on piped-gas regulation, 13 on petroleum pipelines regulation and 27 work in specialised support units.

The NERSA is responsible for:

- regulating the price of pipeline gas and petroleum;
- reducing monopoly in the energy sector;
- improving competition; and
- boosting economic growth.

As an economic regulator, the NERSA seeks to ensure a 'level playing field' and to prevent abuse by monopolies. The NERSA sets its vision to 'be a world-class leader in energy regulation' and has a mission to 'regulate the energy industry in accordance with government laws and policies, standards and international best practices in support of sustainable development'.²⁵ The NERSA adheres to a set of regulatory principles – transparency, neutrality, consistency and predictability, independence, accountability, integrity, and efficiency. To apply these principles, the NERSA has developed five strategic goals to:

- create regulatory certainty in the energy sector;
- protect the interests of the public and the customers;
- create a dispensation for fair competition for industry players;
- create energy supply certainty; and
- create an effective organisation that delivers on its mandate and purpose.²⁶

²² Amendment bills for the *Electricity Regulation Act* and the *Gas Act* have been drafted by the Department of Energy.

²³ NERSA, *Dispute Resolution*. Available at: <http://www.nersa.org.za/#> [accessed on 8 May 2013].

²⁴ NERSA, *Annual Report 2011/2012*, p. 29. Available at: <http://www.nersa.org.za/Admin/Document/Editor/file/News%20and%20Publications/Publications/Current%20Issues/NERSA%20Annual%20Report%202011-2012.pdf> [accessed on 8 July 2013].

²⁵ NERSA, *Annual Report 2011/2012*, p. 2. Available at: <http://www.nersa.org.za/Admin/Document/Editor/file/News%20and%20Publications/Publications/Current%20Issues/NERSA%20Annual%20Report%202011-2012.pdf> [accessed on 8 July 2013].

²⁶ NERSA, *Annual Report 2011/2012*, p. 9. Available at: <http://www.nersa.org.za/Admin/Document/Editor/file/News%20and%20Publications/Publications/Current%20Issues/NERSA%20Annual%20Report%202011-2012.pdf> [accessed on 8 July 2013].

The NERSA's regulatory functions include issuing licences, setting and approving tariffs and charges, mediating disputes, gathering information pertaining to gas and petroleum pipelines, and promoting the optimal use of gas resources. The NERSA also performs other functions such as administering the *Electricity Grid Code* and the *Gas Transmission Code*, planning electricity infrastructure to meet future demand under the Integrated Resource Plan, and gathering information pertaining to energy for research and/or regulatory purposes.

*Issuing Licences*²⁷

The NERSA is responsible for issuing, amending, renewing or withdrawing the licences of regulated businesses in electricity (covering generation, transmission, distribution), piped gas (activities related to the construction and operation of gas transmission, storage, distribution, liquefaction and re-gasification facilities, and trading in natural gas), and petroleum pipelines and storage (state-owned Transnet and entities engaging in storage-related activities). In 2011-12, the NERSA completed licensing of the 28 recommended independent power producers (IPPs) for the first phase of the competitive-bidding process led by the DoE in line with the Integrated Resources Plan 2010.

In 2011-12, three applications were received for registration of gas production activities in terms of section 28 of the *Gas Act*, namely Highland Exploration in Virginia, Dundee Biogas in KwaZulu-Natal and Petrosa in Mosselbay.

The NERSA also has a role to monitor compliance with licence terms and conditions. In 2011-12, several cases of non-compliance with licence conditions and provisions of the *Gas Act* were identified through regular compliance inspections. Notices of non-compliance were issued. In most cases the licensees took remedial action to address non-compliance.

In the absence of licensing procedures prescribed by the DoE, the NERSA issues licences in accordance with the *Promotion of Administration Justice Act 2000* (Act No. 3 of 2000). The administrative procedure that applies to electricity distribution licences is provided in the 'Internal Electricity Distribution Licensing Procedure' document published by the NERSA in April 2012.²⁸

With respect to licensing of electricity distribution, the application should be made to the NERSA in writing. The application shall include tariff information (that is, tariff and price policies to apply). Within ten working days, a team comprising staff from each of the four areas responsible for electricity regulation (see the section below) and staff from Legal Advisory Services (LAS) will be formed. The team is responsible for evaluating the application, organising a public hearing, preparing draft reasons for decision and other relevant documents for approval, briefing the Electricity Committee, and collaborating with the applicant. In assessing the application, relevant information will be requested for further analysis on legal, financial, technical, economic, and regulatory issues. Information provided in support of the application is generally available to the public, except for confidential information claimed by the applicant and accepted by the NERSA. The approved reasons for decision, together with other documentation approved by the NERSA will be published on the NERSA website.

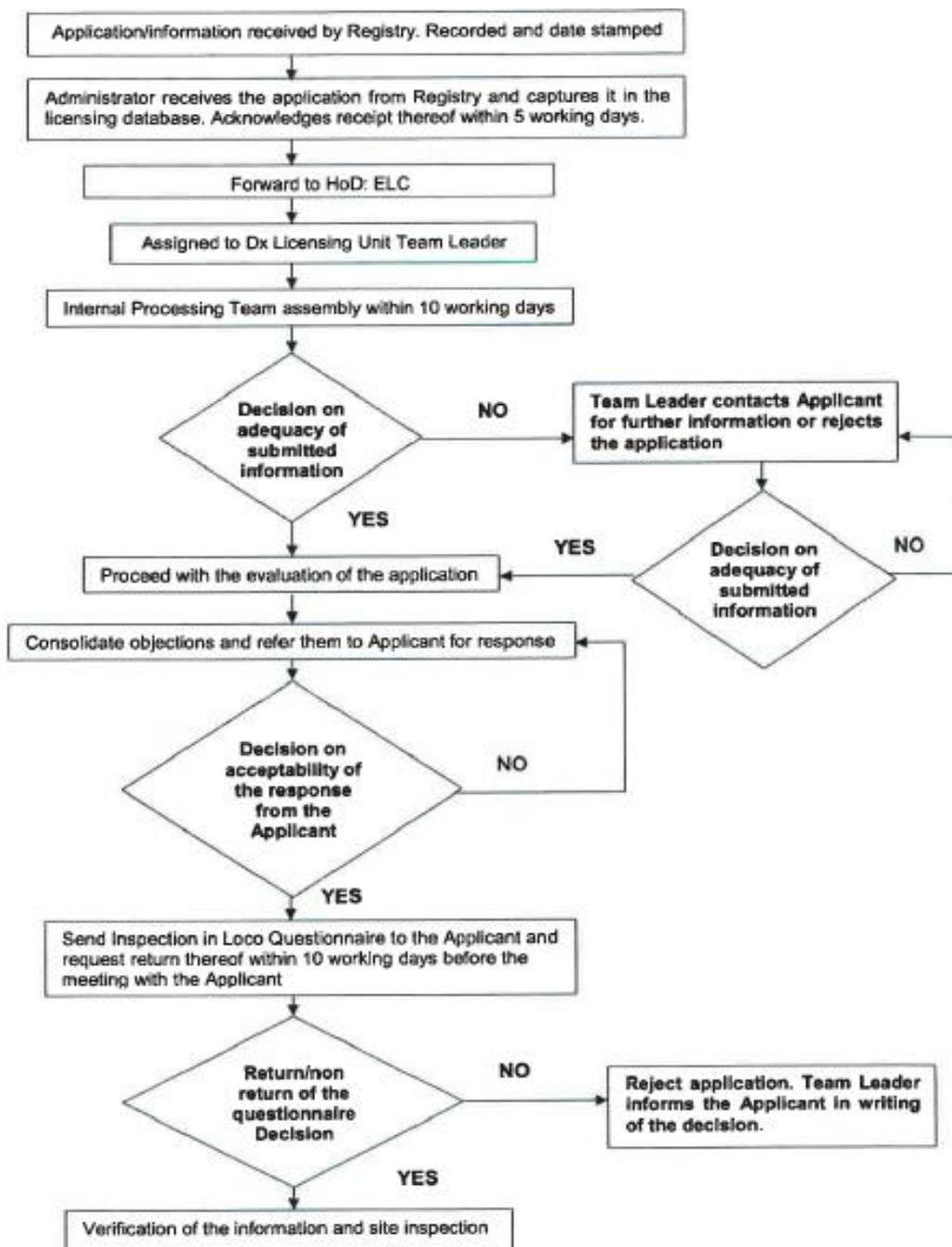
The procedure document also prescribes the workflow process and the timelines for undertaking each step. They are represented below in Figure 1 and Table 1.

²⁷ Regulatory activities performed by the NERSA for the financial year 2011-12 (i.e., 1 April 2011 to 31 March 2012) are sourced from: NERSA, *Annual Report 2011/2012*. Available at: <http://www.nersa.org.za/Admin/Document/Editor/file/News%20and%20Publications/Publications/Current%20Issues/NERSA%20Annual%20Report%202011-2012.pdf> [accessed on 8 July 2013].

²⁸ NERSA, *Internal Electricity Distribution Licensing Procedures*, Version 1, 13 April 2012. Available at: <http://www.nersa.org.za/Admin/Document/Editor/file/Electricity/Licences/Licence%20under%20procedure/Electricity%20Distribution%20Licensing%20procedure.pdf> [accessed on 8 July 2013].

Figure 1: Flow Chart for Processing Electricity Distribution Licence²⁹

A. Information and Evaluation Stage



²⁹ NERSA, *Internal Electricity Distribution Licensing Procedure*, 2012, pp. 16-17. Available at: <http://www.nersa.org.za/Admin/Document/Editor/file/Electricity/Licences/Licence%20under%20procedure/Electricity%20Distribution%20Licensing%20procedure.pdf> [accessed on 8 July 2013].

B. Final Stage

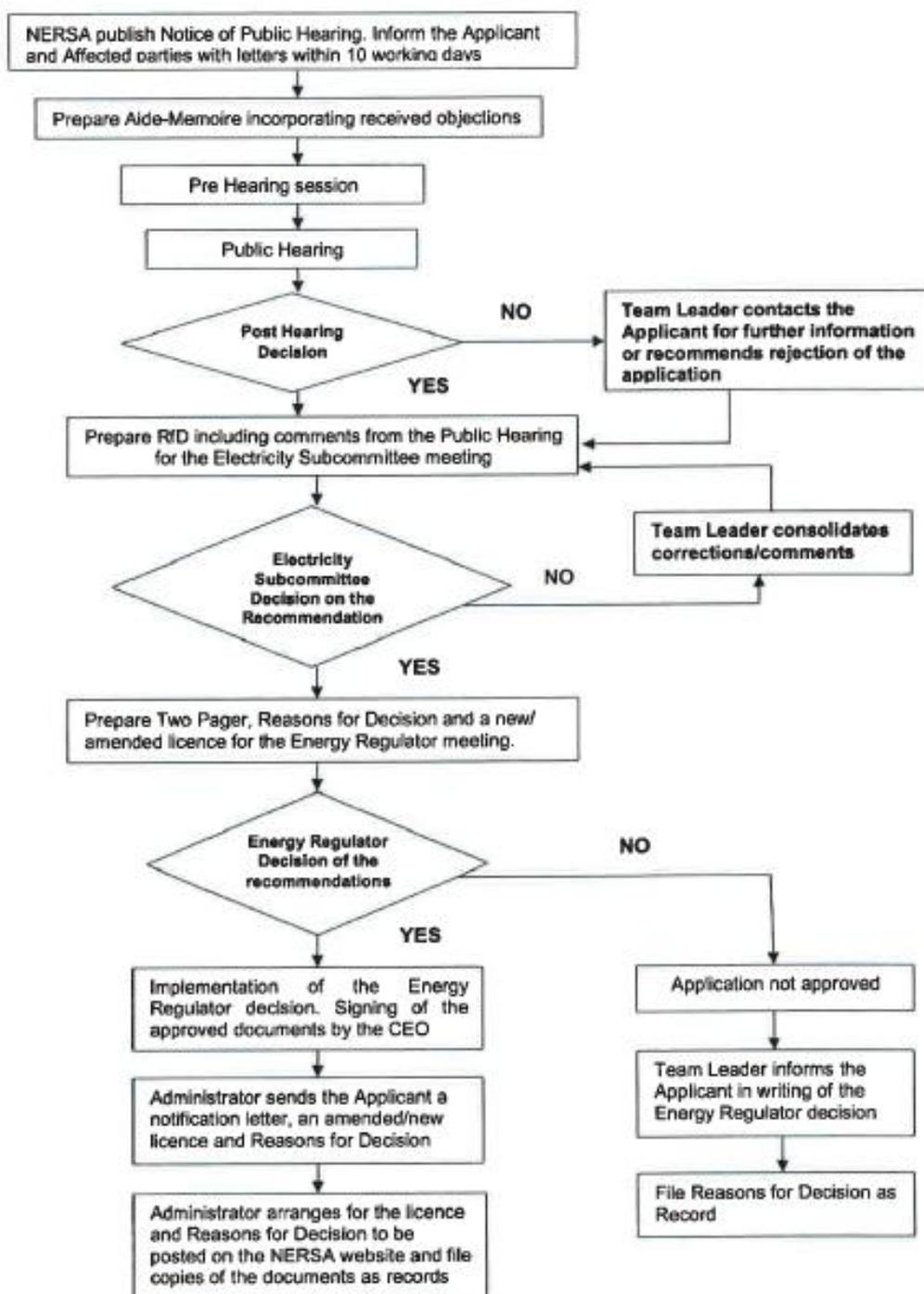


Table 1: Timetable for Processing Electricity Distribution Licence³⁰

Activity	Time Allocated	Responsible Person(s)
Receipt of the application	1 day	Registry
Acknowledgement of receipt	5 days	Administrator
File opening/creation	1 day	Administrator
File allocation	1 day	HoD
Team formation	1 day	Team leader
Evaluation of the information	5 days	Team
Application advertisement by the Applicant	30 days	Applicant
Completion and return of the Inspection <i>in loco</i> Questionnaire by the Applicant	10 days	Applicant
Verification of the information and site visit	2 days	Team
Public hearing advertisement by NERSA	10 days	Team leader
Preparation of the Aide-Memoire	5 days	Team leader
Public hearing	1 day	RSU Dept
Subcommittee submission compilation	5 days	Team leader
Submission review	2 days	HoD
Submission review	2 days	EM
Submission authorisation	2 days	PRRM
Submission consultation	2 days	CEO
Submission pack distribution	5 days	RSU Dept
Subcommittee recommendations for approval	1 day	ER
ER submission compilation	5 days	Team leader
ER submission review	2 days	HoD
ER submission review	2 days	EM
Submission authorisation	2 days	PRRM
Submission consultation	2 days	CEO
ER submission pack distribution	5 days	RSU Dept
ER meeting (Approval)	1 day	ER
Implementation of ER decision	3 days	CEO
Applicant notification of the ER decision	3 day	Administrator
Record keeping	1 day	Administrator
Publishing on NERSA website	3 days	IRM/CSM Departments

Setting Tariffs

The NERSA is responsible for regulating tariffs and prices in relation to electricity, gas and petroleum. The scope of work covers: setting tariff guidelines and structure; developing tariff methodologies (for example, Rate of Return, Multi-year Price Determination); evaluating tariff applications from licensees; and developing pricing frameworks.

In electricity regulation, the NERSA has the role of approving tariff-increase applications by licensed electricity suppliers (including generators, transmitters and distributors). Deviation from approved tariffs must be subject to the NERSA's approval. Tariff principles are set out in the *Electricity Regulation Act 2006*.³¹ The revenue allowed and the setting of tariffs must:

- enable an efficient operator to recover the full cost of its licensed activities, including a reasonable return;

³⁰ Source: NERSA, *Internal Electricity Distribution Licensing Procedure*, 2012, p. 15. Available at: <http://www.nerisa.org.za/Admin/Document/Editor/file/Electricity/Licences/Licence%20under%20procedure/Electricity%20Distribution%20Licensing%20procedure.pdf> [accessed on 8 July 2013].

³¹ *Electricity Regulation Act 4 of 2006*, amended by *Electricity Regulation Amendment Act 28 of 2007*, paragraph 15.

- provide for incentives for continued improvement of the technical and economic efficiency with which services are to be provided;
- give end users proper information regarding the costs that their consumption imposes on the licensee's business; and
- avoid undue discrimination between customer categories, but may permit the cross-subsidy of tariffs to certain classes of customers.

The NERSA has made two multiple-year price determinations (MYPD) setting the revenue requirements for Eskom, each covering three years. The NERSA also approves the service-incentive schemes for Eskom, which set performance targets and ultimately determine rewards and/or penalties applicable at the end of its regulatory-control period. Eskom's application for the third multiple-year price determination covers the period from 1 April 2012 to 31 March 2018. To assess the application, a tentative timeframe (as below) was outlined by the NERSA:

Figure 2: Tentative Timelines for Processing the third MYPD³²

TIMELINES FOR PROCESSING ESKOM'S MYPD 3 APPLICATION	
ACTIVITY/TASK	DATE
Receipt of Eskom's MYPD 3 application.	18 October 2012
Publication of Eskom's MYPD 3 application (request for written comments) on NERSA website.	22 October 2012
Closing date for stakeholder comments on Eskom's MYPD3 application	20 November 2012
Public Hearings in all provinces.	15 – 31 January 2013
Energy Regulator's Decision on Eskom's MYPD3 application.	28 February 2013 ¹

¹ Tentative dates (NERSA 2013 schedule of meeting not yet approved)

The Rate-of-return method, introduced in 2001 by the NER, has been used to derive the overall revenue requirement for Eskom, which is further broken down into generation, transmission and distribution components. These components are used as inputs into the tariff-design process to determine price increases for generation (energy costs), transmission (network costs) and distribution (network and retail costs). Other electricity distributors buy electricity from Eskom at the tariff set by the NERSA.

For electricity distributors other than Eskom, the NERSA annually calculates an appropriate electricity price increase (that is, guideline increase) based on the approved Eskom price, and sets the tariff benchmarks in line with the guideline increase. A distributor is legally required to apply to the NERSA for tariff increases before implementation. Applications that are above the guideline increase and/or are not aligned with the benchmarks need to be supported by evidence and reasons. In 2011-12, the NERSA approved tariff applications from a total of 182 out of 189 licensed distributors. Two distributors were distributing for their own use, one indicated that it would not be increasing its tariffs in the financial year, while four applications were not received. The NERSA is currently consulting on the application of the rate-of-return method to the determination of revenue requirement and pricing for municipal electricity distributors.³³

The NERSA is also responsible for approving the Renewable Energy Feed-in Tariff (REFIT) in renewable electricity (covering wind, small hydro, concentrated solar power and parabolic trough systems, and landfill gas). The REFIT program, run by the NERSA since 2009, focuses on

³² NERSA, *Media Statement*, 22 October 2012, p. 1. Available at: <http://www.nersa.org.za/Admin/Document/Editor/file/News%20and%20Publications/Media%20Releases%20Statements/Media%20statement%20on%20Eskom's%20application%20for%20the%20Third%20Multi-%20Year%20Price%20Determination.pdf> [accessed on 8 July 2013].

³³ NERSA, *Regulatory Framework for the Economic Regulation of Municipal Electricity Distributors of South Africa – Stakeholder Consultation Paper*, September 2010. <http://www.nersa.org.za/Admin/Document/Editor/file/Consultations/Electricity/Documents/Regulatory%20framework%20for%20the%20economic%20regulation%20of%20large%20munic.pdf> [accessed on 8 July 2013].

remunerating independent power producers for renewable power they feed into the national grid. The NERSA reviewed and reduced the rates for REFITs in March 2011.

The NERSA is also responsible for approving the charge-out rates and Free Basic Electricity (FBE) rates, where it aims to ensure that poor residential electricity consumers have access to electricity. In 2010 the NERSA approved the implementation of Inclining Block Tariffs (IBTs) in order to provide cross-subsidies for low-income domestic customers. IBTs have been fully implemented by Eskom and 76 municipal distributors; both to conventional metered customers and prepaid meter customers.

In gas regulation, the NERSA is responsible for approving gas transmission tariffs (for example, Transnet Pipelines, and Republic of Mozambique Pipeline Investment Company – ROMPCO) and storage tariffs. It also approves maximum prices for gas distribution and retailing. Transnet Pipelines publishes its tariff and conditions of transportation, approved by the NERSA. The tariff and standard service levels are uniform for all customers. The rate-of-return method is used to set the tariff. As required by the *Gas Act*, the NERSA developed a methodology to approve maximum prices for piped gas, to ensure sufficient investment and price competition among piped-gas businesses. The methodology is applicable to all licensed piped-gas trading companies, except Sasol, to whom the methodology will apply from the end of the Special Regulatory Dispensation period on 25 March 2014.

In 2011-12, the NERSA also made an annual review of the extent and status of competition in the gas industry, and found that competition is inadequate. This finding paves the way for the NERSA to invoke its powers to monitor and approve maximum prices of gas.³⁴

In performing its role, a guideline on minimum information requirements for considering tariff applications was issued by the NERSA in August 2010.³⁵ The information required covers: checklist, general requirements, financial information in general and specific to the application, and non-financial information. The requirement applies to licensed suppliers that implement the Regulatory Reporting Manual (RRM) such as Eskom, Engen, Chevron and Transnet. In 2011-12, the implementation of Phase 1 of the RRM was completed. These manuals prescribe accounting procedures and requirements necessary to achieve uniformity and consistent reporting of the financial information required by the NERSA for tariff setting and monitoring.³⁶

Others, including non-metropolitan municipal distributors, are subject to lighter information requirements (for example, Distribution forms covering financial information, market information and human resources information) until the RRM is implemented.

Mediation

Under the *Electricity Regulation Act 2006*, the NERSA may mediate disputes between generators, transmitters, distributors, customers or end-users.

The Customer Services Department (CSD) falls within the Corporate Affairs Division of the NERSA. The department handles complaints received from customers whose concerns were not adequately dealt with by their suppliers. Customers can lodge complaints with the NERSA via telephone, letter or e-mail.

The NERSA handles the complaints confidentially and in a timely manner, and is required to settle disputes in an impartial and transparent manner. To resolve the complaint, all relevant information is gathered and the department facilitates the parties to reach an amicable solution. Where a solution cannot be reached, the dispute will be referred to Legal and Advisory Services (LAS) and ultimately

³⁴ NERSA, *Annual Report 2011/2012*, p. 26. Available at: <http://www.nersa.org.za/Admin/Document/Editor/file/News%20and%20Publications/Publications/Current%20Issues/NERSA%20Annual%20Report%202011-2012.pdf> [accessed on 8 July 2013].

³⁵ NERSA, *Guideline on Minimum Information Requirements for Electricity Tariff Applications*, Version 1, 30 August 2010. Available at: http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=3&sqj=2&ved=0CDYQFjAC&url=http%3A%2F%2Fwww.ameu.co.za%2Flibrary%2Findustry-documents%2Fnersa%2FElectricity%2520Tariff%2520Applications%2520MIRTA%2520Guideline.pdf&ei=6QzaUYmeCKeEjALs14HQBQ&usq=AFQjCNHVmQ4WsV2dJkBAAbRcPGZ7Cg64NAw&sig2=V_Sq32XnPcYC1PdtLFXrPGw [accessed on 8 July 2013].

³⁶ NERSA, *Annual Report 2011/12*, pp. 11 and 28. Available at: <http://www.nersa.org.za/Admin/Document/Editor/file/News%20and%20Publications/Publications/Current%20Issues/NERSA%20Annual%20Report%202011-2012.pdf> [accessed on 8 July 2013].

ends up in mediation or arbitration. The LAS deals with the dispute in accordance with the Dispute Resolution Framework. The NERSA's decisions can be challenged in court.

*Advocacy Role*³⁷

Utilities such as Eskom and Sasol cannot increase their regulated rates or alter their conditions of service until the NERSA approves the new tariffs. A regulated utility files an application with the NERSA to 'prove' that an increase is justified. The advocacy role requires that there must be an independent body to represent the side of the consumers during the tariff determination, especially the 'voiceless consumers'.

Consultation of Interested Parties

For relevant regulatory matters, the NERSA encourages all stakeholders and the public actively to participate in the process by submitting written comments and attending or making oral representation at the public hearings held. For example, for Eskom's application for the Third MYPD, the NERSA proposed to conduct the public hearings in all provinces, in line with its commitment to being transparent in its decision-making process.

The South African National Energy Association (SANEA)³⁸ represents a hub for the exchange of energy-related information within South Africa, and between South Africa and bodies internationally, via the World Energy Council networks. The SANEA aims to stimulate original thought and transformation of the energy sector.

The Association of Municipal Electricity Utilities (AMEU),³⁹ formed in 1915, is an organisation with members including municipal electricity distributors, academic researchers, and other commercial entities. Other energy-related associations include the Sustainable Energy Society of Southern Africa⁴⁰ and the South African Wind Energy Association.⁴¹

In 2011-12, the NERSA facilitated dialogues on gas infrastructure investment between gas industry stakeholders via workshops in Durban, Cape Town and Midrand. Three workshops were conducted to educate stakeholders on the methodology to approve maximum prices for gas. Four education sessions were held with customers to educate them on regulated prices and methodology, and field investigations were conducted. The NERSA also convened workshops on the initial phases of the self-assessment exercise, to test levels of compliance to the Electricity Distribution Code with five licensed distributors.⁴²

The NERSA is also contributing to the broader society's understanding of energy regulation through providing learning and development courses that can be attended by external parties. In 2011-12, three regulatory training workshops targeting NERSA staff, licensees and relevant Government departments were run: Foundation of Economic Regulation and Regulatory Accounting; Marginal Cost Pricing in tariff setting; and Regulatory Impact Assessment. NERSA Economic Consulting was also engaged to conduct training on benchmarking.

In accordance with the *Competition Act*, the NERSA and the Competition Commission must negotiate agreements with regard to competition issues that relate to the gas market.⁴³ The draft Memorandum of Understanding with the Competition Commission, approved by the Regulator Executive Committee

³⁷ NERSA, *Home*. Available at: <http://www.nersa.org.za/> [accessed on 3 May 2013].

³⁸ SANEA, *Home*. Available at: <http://www.sanea.org.za/> [accessed on 8 July 2013].

³⁹ AMEU, *Home*. Available at: <http://www.ameu.co.za/> [accessed on 3 May 2013].

⁴⁰ SESSA, *Home*. Available at: <http://www.sessa.org.za/> [accessed on 3 May 2013].

⁴¹ SAWEA, *Home*. Available at: <http://www.sawea.org.za/> [accessed on 3 May 2013].

⁴² NERSA, *Annual Report 2011/2012*, p. 32. Available at: <http://www.nersa.org.za/Admin/Document/Editor/file/News%20and%20Publications/Publications/Current%20Issues/NERSA%20Annual%20Report%202011-2012.pdf> [accessed on 8 July 2013].

⁴³ Department of Energy, *Gas Infrastructure Plan 2005*, 19 April 2005 update, p. viii. Available at: http://www.energy.gov.za/files/media/explained/statistics_gas_infrastructure_2005.pdf [accessed on 8 July 2013].

of the NERSA on 12 September 2011, was sent to the Competition Commission for further negotiations.⁴⁴

The NERSA continued to play an active role regionally and continentally, through participation in the activities of the African Forum of Utility Regulators (AFUR) and the Regional Electricity Regulators Association of Southern Africa (RERA). At the last RERA Annual General Meeting, the NERSA was re-elected as the Chair of RERA.⁴⁵

Timeliness

The National Regulator Act 2004 does not stipulate a timeframe during which a decision must be made. It does, however, delineate the manner in which decisions are to be taken. A review of the last ten decisions made by the NERSA indicates that the majority of decisions are made within three to four months, but can also take up to eight months.⁴⁶

Information Disclosure and Confidentiality

Information submitted to the NERSA in performing its functions is generally available to the public unless refusal is granted because of confidentiality in compliance with the *Promotion of Access to Information Act*. In 2011-12, 60 requests for information access were received by the NERSA and were dealt with within the time period allowed for by the *Promotion of Access to Information Act*. The report on the requests was submitted to the Human Rights Commission (HRC).⁴⁷

Decision-making and Reporting

The NERSA is listed as a public entity in terms of Schedule 3A of the *Public Finance Management Act, 1999* (Act No.1 of 1999) (PFMA).

Within the NERSA, committees are formed to deal with matters in specific areas of work, such as Electricity, Petroleum Pipelines, Piped-gas, and the Regulator Executive Committee. In performing their functions, the committees meet regularly and conduct public hearings. A decision is made according to the majority of the members present at a meeting. In the event of an equality of votes, the person chairing the meeting has a casting vote.

Members are required to declare any conflicts of interest upon appointment to the Minister of Energy, and before the start of each committee meeting. The Code of Conduct that guides members in performing their duties is reviewed on a regular basis, together with the terms of reference and delegations to committees of the NERSA. Annual assessment of the effectiveness of the NERSA and its committees is conducted.⁴⁸ The NERSA is subject to annual reporting to the Minister of Energy in line with the *Public Finance Management Act 1999*.

As statutorily required,⁴⁹ the decision-making process must ensure that decisions are made: in writing; in the public interest; in compliance with legislations, procedurally fair and based on facts and evidence to the regulator; and clearly explained.

Appeals

NERSA decisions are subject to judicial review by the High Court in accordance with the *Promotion of Administrative Justice Act 2000*. Any person affected by a decision of the NERSA sitting as a tribunal may also appeal to the High Court.

⁴⁴ NERSA, *Annual Report 2011/2012*, p. 28. Available at: <http://www.nersa.org.za/Admin/Document/Editor/file/News%20and%20Publications/Publications/Current%20Issues/NERSA%20Annual%20Report%202011-2012.pdf> [accessed on 8 July 2013].

⁴⁵ NERSA, *Annual Report 2011/2012*, p. 11. Available at: <http://www.nersa.org.za/Admin/Document/Editor/file/News%20and%20Publications/Publications/Current%20Issues/NERSA%20Annual%20Report%202011-2012.pdf> [accessed on 8 July 2013].

⁴⁶ NERSA, *All Regulatory Decisions*. Available at: <http://www.nersa.org.za/#> [accessed on 8 July 2013].

⁴⁷ NERSA, *Annual Report 2011/2012*, p. 13. Available at: <http://www.nersa.org.za/Admin/Document/Editor/file/News%20and%20Publications/Publications/Current%20Issues/NERSA%20Annual%20Report%202011-2012.pdf> [accessed on 8 July 2013].

⁴⁸ NERSA, *Annual Report 2011/12*, p. 13. Available at: <http://www.nersa.org.za/Admin/Document/Editor/file/News%20and%20Publications/Publications/Current%20Issues/NERSA%20Annual%20Report%202011-2012.pdf> [accessed on 8 July 2013].

⁴⁹ *National Regulator Act 2004*, paragraph 10.

2. Telecommunications

South Africa's telecommunications system is the best developed and most modern in Africa. However, it is relatively less developed compared with telecommunications systems typically found in OECD countries. Under apartheid (ending in the early 1990s), the fixed-line telecommunications system in South Africa was largely confined to the more affluent parts of the country. The residents of the townships often had only communal arrangements for the use of rudimentary telecommunications services. The move into the post-apartheid era coincided with the advent of improved wireless technologies capable of connecting subscribers at much lower costs. These technologies 'leap-frogged' the geographically limited fixed-line network. Consequently, South African telecommunications moved from a system with only about 25 per cent household penetration under apartheid to a 'tele-density' (combined domestic fixed-line and mobile-cellular) of roughly 110 telephones per 100 persons in 2012.

Telkom SA Ltd is the incumbent telecommunications operator in South Africa. It is fully owned by the Government of South Africa. Mobile telecommunications carriers are Vodacom; MTM; Cell C and Telkom SA.

The telecommunications system consists of carrier-equipped open-wire lines, coaxial cables, microwave radio relay links, fibre-optic cable, radiotelephone communication stations, and wireless local loops. Key centres are Bloemfontein, Cape Town, Durban, Johannesburg, Port Elizabeth, and Pretoria. International connections are via the SAT-3/WASC and SAFE fibre-optic submarine cable systems that connect South Africa to Europe and Asia; and the EASSy fibre-optic cable system that connects with Europe and North America; and satellite earth stations – three Intelsat (one Indian Ocean and two Atlantic Ocean).

Regulatory Institutions and Legislation

The Independent Communications Authority of South Africa (ICASA) is the regulator for the ICT sector, encompassing telecommunications, spectrum, broadcasting and postal services.⁵⁰ The ICASA was established in July 2000, as a merger between the telecommunications regulator (Telecommunications Regulators Association of Southern Africa) and the broadcasting regulator (Independent Broadcasting Authority). It was established by the *Independent Communications Authority of South Africa Act of 2000*.⁵¹

The ICASA's Council is comprised of a Chairperson and eight councillors. The ICASA has four functional branches: Licensing and Compliance; Markets and Competition; Engineering and Technology and Consumer Affairs. The ICASA's head office is located in Sandton, which is an area of Johannesburg.

The *Electronic Communications Act* provides the ICASA's mandate to license and regulate electronic communications and broadcasting services. The *Postal Services Act* provides for the regulation of postal services (see section 3). Legislation empowers the ICASA to: monitor licence-holders' compliance with licence terms and conditions; develop regulations for telecommunications, broadcasting and postal services; to plan and manage the radio-frequency spectrum, and to protect consumers in the sector.

Universal Service and Access provisions require that all people in South Africa have access to basic communication services at affordable prices. The role of the ICASA includes the promotion of this policy. As part of licensing conditions, the ICASA requires operators to deploy services in under-served areas, and to contribute to a 'Universal Service Fund' that is administered by the Universal Service Agency of South Africa.

The ICASA is also responsible for ensuring that 'relevant and appropriate' broadcasting services are provided to all citizens. The ICASA acts as a 'watchdog of the telecommunications, broadcasting and postal industries'. It receives complaints from consumers about services provided by licensees in the sector. The providers of telecommunications services and products must provide consumers with a 'fair hearing and settlement' in relation to complaints about poor services and faulty equipment. The

⁵⁰ ICASA, *2013-2017 Strategic Plan*, 17 April 2012. Available at: http://www.ellipsis.co.za/wp-content/uploads/2012/05/120417icasa_1.pdf [accessed on 3 May 2013].

⁵¹ *Independent Communications Authority of South Africa Act, No. 13 of 2000*. Available at: http://www.doc.gov.za/index.php?option=com_docman&task=doc_view&gid=39 [accessed on 8 July 2013].

ICASA facilitates the resolution of a complaint or refers it to the Complaint and Compliance Committee (CCC) (see below). The divisions of the ICASA include the Consumer Affairs Division. The Consumer Affairs Division provides information to consumers about: the role and functions of the ICASA; the importance for consumers of understanding their rights within the telecommunications industry; and complaints-handling procedures.

*Vision and Mission*⁵²

The ICASA's stated vision is to 'advance the building of a digital society'. The Mission of the ICASA is to ensure that 'all South Africans have access to a wide range of high-quality communication services at affordable prices'.

The ICASA aims to adopt the following principles in relation to its regulatory activity:

Necessity: The ICASA is committed to evidence-based regulation ensuring that regulation is only introduced where there is a demonstrable need. The ICASA intends to ensure that regulatory compliance does not become a barrier to the development of a sustainable ICT sector by simplifying or reducing regulation, wherever possible or appropriate.

Effectiveness: The ICASA is committed to achieving its identified goals and to delivery on its mandate, taking into account the impact of such decisions.

Proportionality: The ICASA aims to impose obligations in an objective, transparent and proportionate manner, where intervention is necessary.

Transparency: The ICASA strives to work within a consistent, fair and defined set of parameters, and to ensure decisions are evidence-based and fully reasoned, and that any decision-making process is open and accessible.

Accountability: The ICASA is formally accountable to the Parliament of South Africa and, through the appeals system, to the courts. The Authority remains conscious that it ultimately serves end-users.

Consistency: The ICASA pursues its legal responsibility to ensure consistency in its actions.

The Consumer Advisory Panel was established by section 71 of the *Electronic Communications Act*. Key functions of the Panel include: to provide advice on consumer affairs matters; provide general guidance on a diverse range of consumer issues that regularly arise in communications; and to promote and endeavour to protect the interest of the consumers.

The Complaints and Compliance Committee (CCC) is an independent committee of the ICASA, established by section 17A of the *Independent Communications of South Africa Act No. 13 of 2000*.⁵³ The CCC is also subject to the Regulations Governing Aspects of the Complaints and Compliance Committee Communications Authority of South Africa published in the *Government Gazette* on 6 October 2010 (as amended).⁵⁴

The CCC is required to investigate, hold hearings and make findings on: all matters referred to it by the ICASA; complaints received by the CCC; and allegations of non-compliance with the *Independent Communications of South Africa Act* or underlying statutes.⁵⁵

The CCC may provide recommendations to ICASA in relation to: the performance of the functions of ICASA in terms of the Act or underlying statutes; or achieving the objects of the *Independent Communications of South Africa Act* and the underlying statutes.

The CCC normally sits in Johannesburg, but may sit elsewhere where there is good reason. It

⁵² ICASA, *Vision & Mission*. Available at: <https://www.icasa.org.za/AboutUs/VisionMission/tabid/57/Default.aspx> [accessed on 8 July 2013].

⁵³ ICASA, *CCC Mandate*. Available at: <https://www.icasa.org.za/CCC/tabid/672/Default.aspx> [accessed on 8 July 2013].

⁵⁴ ICASA, *CCC Procedures*. Available at: <https://www.icasa.org.za/CCC/CCCProcedures/tabid/296/ctl/ItemDetails/mid/1070/ItemID/1262/Default.aspx> [accessed on 8 July 2013].

⁵⁵ ICASA, *CCC Mandate*. Available at: <https://www.icasa.org.za/CCC/tabid/672/Default.aspx> [accessed 8 July 2013].

consists of a Chairperson and six committee members. The Chairperson must be:

- a judge of the High Court of South Africa whether in active service or not;
- an advocate or attorney with at least ten years of experience; or
- a magistrate with at least ten years appropriate experience, whether in active service or not.⁵⁶

Consultation of Interested Parties

Section 4 of the ECS provides the process that the ICASA must follow when it makes regulations. The ICASA must publish proposed regulations in the *Government Gazette* at least 30 days in advance. Interested parties must be invited to make written representations. The ICASA must inform the Minister of the subject matter of intended regulations not less than 30 days before making the regulations. The ICASA may conduct public hearings in relation to the proposed regulations. The process does not apply to a regulation which the public interest requires should be made without delay.

In relation to mergers that require the approval of the ICASA and the Competition Commission, the regulatory agencies may consult each other. However, each regulatory agency must make independent determinations. If the agencies determine the matter differently, a Memorandum of Agreement provides a procedure by which a common position on the proposed merger may be reached.⁵⁷

If the Competition Commission or the ICASA fails to approve the merger, the merger may not proceed. Decisions may be appealed to the courts. The decision of the Competition Commission may be appealed to the Competition Tribunal. The ICASA's decision may be appealed to the ordinary courts.

The ICASA may conduct a public inquiry into any matter with regard to:

- the achievements of the objectives of the *Independent Communications Authority of South Africa Act, 2000*;
- compliance with the *Independent Communications Authority of South Africa Act, 2000* or with any licence; or
- the exercise and performance of any of the ICASA's powers, functions and duties.⁵⁸

The ICASA must invite interested parties to indicate whether they require an opportunity to make oral representations to the ICASA.⁵⁹ For example, in late 2012 the ICASA held public hearings in relation to the Draft Radio Frequency Migration Plan and Regulations published on 17 August 2012. In this case, the stated purpose of the public hearings was to align all frequency migrations identified during the evolution of the frequency plans with the latest version of National Radio Frequency Plan.

Timeliness

The ICASA must invite interested parties to submit written representations within 60 days from the date in which it provides notice of its intention to conduct an inquiry.

Information Disclosure and Confidentiality

An inspector appointed by the ICASA has the power to enter and search premises and seize documents or things that have a bearing on alleged non-compliance with licence terms. Parties may be required to provide information, documents or objects to the ICASA. Failure to do so may constitute an offence.⁶⁰

When a party submits information to the ICASA, the person may request that the information is treated confidentially. The request must be accompanied by a written statement explaining why the

⁵⁶ ICASA, *CCC Mandate*. Available at: <https://www.icasa.org.za/CCC/tabid/672/Default.aspx> [accessed on 8 July 2013].

⁵⁷ Memorandum of Agreement entered into between the Competition Commission and the Independent Communications Authority of South Africa, dated 16 September 2002.

⁵⁸ Section 4B of the *Independent Communications Authority of South Africa Act, 2000* (as amended).

⁵⁹ Section 4B of the *Independent Communications Authority of South Africa Act, 2000* (as amended).

⁶⁰ *Independent Communications Authority of South Africa Act, 2000* (as amended), sections 17G and 17H.

information should be treated confidentially. Within 14 days of receiving the request, the ICASA must make a determination whether the request will be granted and provide written reasons for the determination.

The ICASA must treat the following information confidentially:

- trade secrets;
- financial, commercial, scientific or technical information that is likely to cause harm to the party if disclosed;
- information that could reasonably be expected to put the party at a disadvantage contractually or during negotiations or prejudice the party in commercial competition;
- the names of prospective employees; and
- business plans of a licensee.

Where the ICASA refuses a request for confidential treatment of the information, the party must be given an opportunity to withdraw the information.⁶¹

Decision-making and Reporting

Agreement between a majority of members of the CCC is required for a decision to be made. Complainants may include the ICASA.⁶² Judgements are published on the ICASA website. Fifty judgments have been published between 2007 and 15 November 2012. Four of these decisions were made in 2012.

Appeals

The ICASA is formally accountable to the Parliament of South Africa and, through the appeals system, to the courts.

The provisions of the *Promotion of Administrative Justice Act, 2000* give effect to section 33 of the Constitution of South Africa, which provides that everyone 'has the right to administrative action that is lawful, reasonable and procedurally fair'. In some cases, proceedings for judicial review may be implemented in the High Court up to 180 days after a decision by the regulator has been made: section 7(1) of the *Promotion of Administrative Justice Act, 2000*.

Regulatory Development

On 10 December 2012, the government announced that it had appointed an ICT ministerial policy review panel (the Panel) to review South Africa's ICT policies. The Panel will review 'the functioning of the policy and regulatory framework of telecommunication, broadcasting, postal and e-commerce in South Africa and assess its effectiveness in achieving appropriate policy objectives for the knowledge-based society.' The panel has adopted a three-phase approach to its work. The first phase will assess the policy environment from 1994. The outcome of this phase will be a policy review report. The second phase will focus on the development of a discussion document which will form part of the green paper process which takes into consideration an integrated approach to address convergence of ICT services. The final phase will focus on creating a new ICT policy framework, moving toward the white paper on integrated national ICT policy.⁶³

⁶¹ Section 4D of the *Independent Communications Authority of South Africa Act, 2000* (as amended).

⁶² See case number 60/2011 published on 30 October 2012. Available at: <https://www.icasa.org.za/CCC/CCCJudgments/tabid/286/ctl/ItemDetails/mid/932/ItemID/1374/Default.aspx> [accessed on 8 July 2013].

⁶³ South African Government Information, *Statement on the Inaugural Meeting of the Ministerial ICT Policy Review Panel*, 28 January 2013. Available at: <http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=33914&tid=97285> [accessed on 8 July 2013]. Saminet Law, *Statement Issued on ICT Policy Review Panel*, 29 January 2013. Available at: <http://www.sabinetlaw.co.za/communications/articles/statement-issued-ict-policy-review-panel> [accessed on 8 July 2013].

3. Postal Services⁶⁴

The South African Post Office Ltd (SAPO) provides national postal services in South Africa and is fully owned by the South African Government. It employs over 17 000 people and operates in excess of 2400 postal outlets throughout the country. SAPO is part of the SAPO Group which consists of a number of divisions and subsidiaries providing mail and financial services, logistics, property, electronic commerce and retail services.

Traditional mail services (collection, sorting and delivery of letters and parcels) are the primary business activity of the group. They generated nearly 65 per cent of the group's revenue in 2010-11. In 2010-11, nearly 1.5 billion mail pieces were processed. SAPO operates six large mail centres and more than 40 depots across the country. Traditional mail volumes have decreased between 2009 and 2012. This decline is consistent with similar declines experienced by the majority of postal operators across the world. The second largest activity is financial services which it offers through its savings bank; Postbank. The forerunner of Postbank was established in 1910 and is the largest savings bank in South Africa. It has over six million account holders. Postbank is a deposit-taking institution, offering savings and investment products. It does not offer credit products.

Traditional mail services are defined as 'reserved services' and are provided by the SAPO under statutory monopoly conditions. The SAPO Group is subject to universal service obligations. The provision of courier services in South Africa has been fully liberalised.

Exchange control regulations apply to postal items as they do to other exports in South Africa. Generally, items of a value of more than R1 000 require specific export documents.⁶⁵

Regulatory Institution and Legislation

The SAPO Group is regulated by the ICASA, which is responsible also for telecommunications (see section 2) and broadcasting. The responsibility for postal regulation was assumed by the ICASA in 2005.

The ICASA is responsible for the granting, authorisation, renewal, amendment, transfer and revocation of postal services. This includes authorising licence exemptions and monitoring and ensuring compliance with legislation, regulations and licence terms and conditions by licensees and exempted services. The ICASA is also responsible for promoting competition in the postal market.

The *Postal Services Act 1998* is the principal legislation. Other legislation includes: *South African Post Office Soc Ltd Act, 2011*; *Postal Services Amendment Act, 2006*; and the *ICASA Amendment Act, 2006*.

The objective of the *Postal Services Act 1998* is to provide for the regulation and control of postal services in the public interest and for that purpose, to:⁶⁶

- promote the universal and affordable provision of postal services;
- promote the provision of a wide range of postal services in the interest of the economic growth and development of the Republic;
- make progress towards the universal provision of postal services;
- encourage investment and innovation in the postal industry;
- promote the development of postal services that are responsive to the needs of users and consumers;
- ensure greater access to basic services through the achievement of universal postal service, by providing an acceptable level of effective and regular postal services to all areas including rural areas and small towns where post offices are not sustainable;

⁶⁴ Paul Kruger, 'You've Got Mail: The Postal and Courier Sector in South Africa', Trade Law Centre for South Africa, April 2009. Available at: http://www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/WP032009_Kruger_YouGotMail_MB20100503.pdf [accessed on 3 May 2013].

⁶⁵ *Postal Services Act (124/1998): Fees and Charges for Postal Services 2012*, Rule 1.4.

⁶⁶ ICASA, *Postal Services Act, 1998*, section 2. Available at: <https://www.icasa.org.za/LegislationRegulations/Acts/PostalAct/tabid/88/ctl/ItemDetails/mid/650/ItemID/649/Default.aspx> [accessed on 3 May 2013].

- develop greater equity in respect of the distribution of services, particularly within the areas of the historically disadvantaged communities, including rural areas; ...
- ensure fair competition within the postal industry;
- promote stability in the postal industry;
- protect the interests of postal users and consumers;
- promote the effective maintenance of an efficient system of collecting, sorting, and delivering mail nationwide, in a manner responsive to the needs of all categories of mail users;
- contribute to the community and rural development and education, through actively participating in the development of a citizen's post office, serving as an interface between Government and community and providing a centre for community activities; and
- promote a culture of saving by means of the Postbank.

The *Postal Services Act, 1998* details the scope of the reserved services. It provides broadly-defined policy regarding pricing procedures, regulatory oversight and service obligations for postal obligations. Reserved services include 'all letters, postcards, printed matter, small parcels and other postal articles subject to the mass size limitations (length 458mm, width 324 mm, thickness 100 mm and a mass of up to one kilogram ...) [and the] issuing of postage stamps and the provision of roadside collection and address boxes'.⁶⁷ The functions of the ICASA include to:⁶⁸

- exercise regulatory functions in respect of the reserved and unreserved postal services;
- ensure that the provisions of *Postal Services Act, 1998*, and the terms and conditions contained in licences, are complied with;
- promote the interests of users of postal services;
- ensure that all reasonable requests for postal services are satisfied;
- promote and encourage the expansion of postal services and infrastructure;
- promote universal access to postal and other services to facilitate equal access for all citizens to a service that, in addition to a basic letter service, is reasonably accessible to all people in the country regardless of physical location (with special attention to the needs of persons with disabilities) at a uniform rate of postage, at an affordable price and reliable; and
- regulate the issue of postage stamps.

The *Postal Services Act, 1998* provides that the ICASA, in exercising its powers and performing its duties, must consider policies and policy directions made by the Minister.⁶⁹

The licence issued to the SAPO Group in relation to the provision of universal service obligations allows the ICASA to determine a price cap for the services. The price cap may include allowances for a productivity factor to promote efficiency, as well as for related capital expenditure.⁷⁰

The ICASA requires that the SAPO Group does not cross-subsidise unreserved services using profits from reserved services. It may use profits from unreserved services to finance reserved services. Separate audited financial statements are required to be prepared by the SAPO Group.⁷¹

⁶⁷ ICASA, *Research Report on the Economic Regulatory Framework for Reserved Postal Services*, 2010, p. 36. *Postal Services Act, 1998*, schedule 1. Available at: <https://www.icasa.org.za/LegislationRegulations/FinalRegulations/TelecommunicationsRegulations/EconomicRegulatoryFramework/tabid/415/ctl/ItemDetails/mid/1343/ItemID/364/Default.aspx> [accessed on 8 July 2013].

⁶⁸ *Postal Services Act, 1998*, section 8. Available at: http://www.acts.co.za/post_serv/index.htm [accessed on 8 July 2013].

⁶⁹ *Postal Services Act, 1998*, section 4. Available at: http://www.acts.co.za/post_serv/index.htm [accessed on 8 July 2013].

⁷⁰ ICASA, *Research Report on the Economic Regulatory Framework for Reserved Postal Services*, 2010, p. 37. Available at: <https://www.icasa.org.za/LegislationRegulations/FinalRegulations/TelecommunicationsRegulations/EconomicRegulatoryFramework/tabid/415/ctl/ItemDetails/mid/1343/ItemID/364/Default.aspx> [accessed on 8 July 2013].

⁷¹ *Ibid.*

The Licence provided to the SAPO contains an obligation for the SAPO to meet targets in relation to delivery point and retail outlet deployments, as well as the development of the reserved postal services.⁷²

Consultation of Interested Parties

Licensing to provide postal services in reserved areas may only occur once the Minister has published an invitation to apply. Private individuals or businesses may apply for a licence to operate an unreserved postal service. The *Postal Services Act, 1998* provides that unreserved postal services include: 'all letters, postcards, printed matter, small parcels and other postal articles that fall outside the ambit of the reserved services ... and including thirty kilograms'. Unreserved postal services also include courier services.⁷³ Pricing of unreserved postal services are not regulated by ICASA.

Applicants must complete the application form in triplicate and provide: a registration certificate of business; certified copies of all relevant founding documents; details of shareholders and the percentage shareholding of each; particulars of controlling entity; and a detailed business plan. An applicant is required to submit an application form, together with a non-refundable registration fee of R500. The licence fee is R25 000. The licence may be ready after 30 days.⁷⁴

In relation to the setting of tariffs for reserved postal services, the SAPO must submit to the ICASA, proposed tariffs for the forthcoming financial year. The ICASA may require the SAPO to make oral submissions concerning annual adjustments in the tariffs. For the purposes of determining the annual tariff, the SAPO is required to 'furnish the [ICASA] with the following information on request':

- the cost structures of the Licensee;
- steps taken by the Licensee to reduce costs;
- capital expenditure the Licensee intends to deploy in any one financial period;
- any profit the Licensee may have generated from the reserved postal services;
- the proposed pricing for new products forming part of reserved postal services to be introduced by the Licensee including a detailed analysis of the proper costing for such new products; and
- any other information that the ICASA may require the Licensee to provide.⁷⁵

For 2011-12, SAPO requested a 6.5 per cent general increase in prices for reserved postal services. The ICASA approved a 4.5 per cent general price increase in January 2011.⁷⁶

Clause 7.11 of the Licence granted to the SAPO provides that the SAPO must, 'in addition to the other obligations imposed in terms of this Licence:

- a) Furnish the [ICASA] with such reports as the [ICASA] may require from time to time.
- b) Allow the [ICASA] reasonable access to its books and records during business hours as the [ICASA] may require for the purpose of exercising the functions assigned to it be the [*Postal Services Act, 1998*].⁷⁷

⁷² South Africa Government Services, *Licence to Operate a Reserved Postal Service*, clause 7.5. Available at: http://www.services.gov.za/services/content/Home/OrganisationServices/Communication/operatereservedpostalservice/en_ZA [accessed on 8 July 2013].

⁷³ *Postal Services Act, 1998*, schedule 2. Available at: http://www.acts.co.za/post_serv/schedule_2_unreserved_postal_services.htm [accessed on 27 February 2013].

⁷⁴ South Africa Government Services, *Licence to Operate an Unreserved Postal Service*. Available at: http://www.services.gov.za/services/content/Home/OrganisationServices/Communication/unreservedpostalservice/en_ZA [accessed on 8 July 2013].

⁷⁵ ICASA, *Amended Reserved Postal Services Licence for South African Post Office Limited*, Licence No. 2008/005477/06 granted to the South African Post Office for the Provision of Postal Services, 24 February 2012, Clause 7.6.6. Available at: <http://www.info.gov.za/view/DownloadFileAction?id=160519> [accessed on 8 July 2013].

⁷⁶ ICASA, *Annual Report 2010/2011*, p 21. Available at: <http://www.info.gov.za/view/DownloadFileAction?id=152680> [accessed on 8 July 2013].

⁷⁷ ICASA, *Amended Reserved Postal Services Licence for South African Post Office Limited*, Licence No. 2008/005477/06 granted to the South African Post Office for the Provision of Postal Services, 24 February 2012, clause 7. Available at: <http://www.info.gov.za/view/DownloadFileAction?id=160519> [accessed on 8 July 2013].

Timeliness

Once an applicant has submitted a licence-application form, together with a non-refundable registration fee of R500; the licence may be ready after 30 days.⁷⁸

Information Disclosure and Consultation

In fulfilling its regulatory functions, the ICASA has a broad range of information gathering powers. This is provided in the Licence granted to the SAPO. Section 15(2) of the *Postal Services Act, 1998* requires a licensee to comply with the obligations set out in its licence as follows:

- In relation to a separation of reserved and unreserved postal services, the SAPO Group must: keep proper costing systems for both reserved and unreserved postal services.
- It must prepare management accounts separately.
- It must prepare in respect of each financial year, cost accounts on an historic cost basis for both reserved postal services and unreserved postal services.
- It must send a copy of each of such accounts to the ICASA within six months of the end of the SAPO's financial year.
- It must submit to the ICASA an audited financial statement each financial year.⁷⁹

Decision-making and Reporting

As discussed previously, section 4 of the ECS provides the process that the ICASA must follow when it makes regulations. The ICASA must publish proposed regulations in the *Government Gazette* at least 30 days before making regulations. Interested parties must be invited to make written representations. The ICASA must inform the Minister of the subject matter of intended regulations not less than 30 days before making the regulations. The ICASA may conduct public hearings in relation to the proposed regulations. The process does not apply to a regulation which the public interest requires should be made without delay.

Appeals

The *Postal Services Act, 1998* provides that a person 'who is aggrieved by the suspension or cancellation of his or her licence or registration certificate ... may apply to a court to review a decision of the Regulator'.⁸⁰

Regulatory Development

South Africa is a signatory to the Universal Postal Union (UPU) resolutions, and has agreed to the development of a regulatory framework that provides for Extra Territorial Offices of Exchange (ETOE) within the South African market. The ETOEs are an 'office or exchange operated by or in connection with a designated operator outside its national territory, and is established for commercial purposes to draw business in markets on the territory of another member country'.⁸¹ The ICASA has sought to engage stakeholders on the benefits and threats that ETOEs may introduce, particularly on the sustainability of the SAPO. The ICASA is planning to develop a regulatory framework to govern the ETOEs.⁸²

⁷⁸ South Africa Government Services, *Licence to Operate an Unreserved Postal Service*. Available at: http://www.services.gov.za/services/content/Home/OrganisationServices/Communication/unreservedpostalservice/en_ZA [accessed on 8 July 2013].

⁷⁹ ICASA, *Amended Reserved Postal Services Licence for South African Post Office Limited*, 24 February 2012, clause 7. Available at: <http://www.info.gov.za/view/DownloadFileAction?id=160519> [accessed on 8 July 2013].

⁸⁰ *Postal Services Act, 1998*, section 24. Available at: http://www.acts.co.za/post_serv/index.htm [accessed on 8 July 2013].

⁸¹ ICASA, *Annual Report 2010/2011*, p. 23. Available at: <http://www.info.gov.za/view/DownloadFileAction?id=152680> [accessed on 8 July 2013].

⁸² *Ibid.*

4. Water and Wastewater

Water availability in South Africa varies greatly in both space and time (seasonally).⁸³ While the plateau is arid with rainfall only during the summer and as low as 100mm per annum, the southeast receives rainfall throughout the year with an annual average of up to 1000mm. Total annual surface runoff is estimated at 50 cubic kilometres, of which one-quarter is withdrawn – 31 per cent for domestic use; 6 per cent for industrial use and 63 per cent for agriculture. Nearly 15000 square kilometres of land are irrigated. The absence of important arterial rivers and lakes means that extensive water conservation and control measures are required in providing a reasonable supply. Overall growth in water usage is outpacing supply. Pollution of rivers from agricultural runoff and urban discharge inhibits supply. Soil erosion and desertification are associated issues from inadequate water management.

In 2001, a policy of free basic domestic services was adopted by the South African Government. The South African Department of Water Affairs (DWAF) established a process to implement free basic water supply and sanitation. The DWAF is primarily responsible for the formulation and implementation of policy for water and wastewater. It also has overriding responsibility for water services provided by local government. Municipalities are primarily responsible for implementing the policy.⁸⁴ For example, the City of Cape Town met a target for providing access to basic water supply in 2005-06. Further taps are being installed to reduce the Household-to-Tap ratio.⁸⁵ Access to basic sanitation services increased from about 70 per cent of the population in 2007-08 to 100 per cent by June 2009, based on the minimum standard of at least one toilet per five households.⁸⁶

*Regulatory Institution and Legislation*⁸⁷

The *Water Services Act, 1997* promises the right of access to basic water supply and basic sanitation; providing that everyone has a right of access to basic water supply and basic sanitation, and every Water Services institution must take reasonable measures to realise these rights.⁸⁸ Further,⁸⁹

Every Water Services Authority has a duty to all consumers or potential consumers in its area of jurisdiction progressively to ensure efficient, affordable, economical and sustainable access to Water Services. However, this mandate is subject to the availability of resources, equitability of resources allocated, duty of consumers to pay reasonable charges, duty to conserve water resources, terrain and topography and right of the Department to limit or discontinue the provision if there is failure to complying to set conditions.

Section 9(i) of the *Water Services Act, 1997* provides that every citizen is entitled to the following service-level standards:

- The provision of appropriate health and hygiene education.
- A toilet which is safe, reliable, environmentally sound, easy to keep clean, provides privacy and protection against the weather, well ventilated, keeps smells to a minimum and prevents the entry and exit of flies and other disease carrying pests.

⁸³ CIA, *CIA World Factbook South Africa*. Available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/sf.html> [accessed on 8 July 2013].

⁸⁴ City of Cape Town, *Water and Sanitation Service Standard*, Preliminary Draft 2, March 2008, p. 1. Available at: <http://www.capetown.gov.za/en/Water/Documents/Water%20and%20Sanitation%20Service%20Standards.pdf> [accessed on 8 July 2013].

⁸⁵ City of Cape Town, *Water and Sanitation Service Standard*, Preliminary Draft 2, March 2008, p. 2. Available at: <http://www.capetown.gov.za/en/Water/Documents/Water%20and%20Sanitation%20Service%20Standards.pdf> [accessed on 8 July 2013].

⁸⁶ City of Cape Town, *Water Services Development for the City of Cape Town 2010-11 – 2013-14*, p. 2. Available at: http://www.capetown.gov.za/en/Water/WaterservicesDevPlan/Documents/WSDP_201011_Exec_Sum_11may10_1_print_version.pdf [accessed on 8 July 2013].

⁸⁷ Links to legislation and regulatory framework at http://africanwater.org/south_africa.htm and <http://www.dwaf.gov.za/> [accessed on 3 May 2013].

⁸⁸ *Water Services Act, 1997* clause 3(i).

⁸⁹ City of Cape Town, *Water and Sanitation Department Strategy 2010-11 – 2015-16*, p. 2. Available at: http://www.capetown.gov.za/en/Water/WaterservicesDevPlan/Documents/WSDP_2011_2012/W_S_Strategy_2.pdf [accessed on 8 July 2013]. *Water Services Act, 1997* Chapter III clause II(i)

- The provision of appropriate education in respect of effective water use.
- A minimum quantity of potable water of 25l/per/day or 6kl per household per month at a minimum flow rate of not less than 10l/per minute within 200m of a household and with 98 per cent effectiveness. That is, no consumer should be without a supply of water for more than seven full days in a year.

The *Municipal Structures Act* gives District Municipalities the powers and functions to perform the WSA functions as contained in the *Water Services Act, 1997*. The Minister of Provincial and Local Government (Cooperative Government and Traditional Affairs) may authorise a local municipality after consultation, to be a Water Services Authority.⁹⁰

Water Boards

Government-owned water boards play a key role in the South African water supply and wastewater system.⁹¹ They operate dams, bulk-water supply infrastructure, some retail infrastructure and wastewater systems. Some also provide technical assistance to municipalities. Through their role in the operation of dams, they also play a part in water-resources management.

There are 15 water boards in South Africa, together indirectly serving more than 24 million people in 90 municipalities in 2005, or about half the population. In 2010, eleven of the 13 water boards were financially viable. The Water Boards report to the Department of Water Affairs (DWA). The largest Water Boards are Rand Water in Gauteng Province, Umgeni Water in KwaZulu Natal Province and Overberg Water.

Rand Water,⁹² servicing more than ten million people, has a more than 100-year history in the Gauteng area, which is South Africa's main industrial area. It buys water from the DWA; treats it and sells it to large industries, mines and municipalities. Rand Water's distribution network includes over 3056 kilometres of large diameter pipeline, feeding 58 strategically located service reservoirs. Its customers include metropolitan municipalities, local municipalities, mines and industries; and it supplies, on average, 3653 million litres of water to these customers daily. Rand Water is an 'organ of state', reporting to the Department of Water & Environmental Affairs (Formerly Department of Water and Forestry).

Umgeni Water,⁹³ a state-owned entity, is the largest supplier of bulk potable water in the Province of KwaZulu-Natal, South Africa. The organisation was established in 1974. Umgeni Water currently supplies 426 million cubic metres of potable water to six municipal customers; namely eThekweni Metropolitan Municipality, Ilembe District Municipality, Sisonke District Municipality, Umgungundlovu District Municipality, Ugu District Municipality and Msunduzi Local Municipality.

Overberg Water⁹⁴ is a non-profit organisation and is classified as an entity of state but receives no state subsidy. The income generated by the sale of water is supposed to cover administration, operation, maintenance, capital expenditure and refurbishment. The two main sources of water are the Theewaterskloof Dam on the Sonderend River and the Duivenhoks Dam on the Duivenhoks River. Overberg Water's prime function is to provide purified water to the farms in its area to augment existing sources for watering stock and household use, and to provide bulk water to certain towns. The area currently supplied covers 6000 square kilometres in the Overberg and the pipe network totals 1320 kilometres in length, to approximately 850 clients and also to certain towns.

Information on the governance of the water boards is available from the DWA website.⁹⁵

⁹⁰ City of Cape Town, *Water and Sanitation Department Strategy 2010-11 – 2015-16*, p. 3. Available at: http://www.capetown.gov.za/en/Water/WaterservicesDevPlan/Documents/WSDP_2011_2012/W_S_Strategy_2.pdf [accessed on 8 July 2013].

⁹¹ DWA, *Water Services Institutions*. Available at: <http://www.dwaf.gov.za/IO/wsi.aspx> [accessed on 3 May 2013].

⁹² Rand Water, *Home*. Available at: www.randwater.co.za/ [accessed on 8 July 2013].

⁹³ Umgeni, *Home*. Available at: <http://www.umgeni.co.za/> [accessed on 8 July 2013].

⁹⁴ Overberg, *Home*. Available at: <http://www.overbergwater.co.za/> [accessed on 3 July 2013].

⁹⁵ DWA, *Water Service Institution: Water Boards*. Available at: <http://www.dwaf.gov.za/IO/wsi.aspx> [accessed on 3 July 2013].

Reporting Mechanisms

- The Minister must table in the National Assembly the water board's annual report, financial statements and the audit report on those financial statements.
- In terms of section 39(1) of the Water Services Act, every water board must prepare and adopt a policy statement. A policy statement may be amended from time to time, and must be revised at least every five years.
- In terms of the Water Services Act, a water board must, not later than one month before the commencement of each financial year, submit a business plan relating to the following five financial years.
- In terms of the PFMA, a water board must submit the following to the DG of DWA and to the National Treasury at least one month, or another period agreed with the National Treasury, before the start of its financial year: a projection of revenue, expenditure and borrowings for that financial year in the prescribed format; a corporate plan in the prescribed format covering the affairs of that public entity or business enterprise for the following three financial years; and, if it has subsidiaries, the affairs of the subsidiaries.

Governance and Terms of Office

- A member of a water board is appointed for a period of office determined by the Minister, which may not exceed four years.
- The Minister may require a water board to constitute a selection panel to recommend persons for appointment as members of a water board.

Section 45(2) of the Water Services Act empowers the Minister to appoint a person to investigate the affairs and financial position of a Water Board. Should the outcomes show that the board has failed to carry out its fiduciary duties, the Minister may then terminate the term of office of the Board and replace it with other Board members.

Role of Municipalities

According to the Constitution, the *Municipal Structures Act* and the *Water Services Act of 1997*, responsibility for the provision of water and sanitation services direct to customers lies with the municipalities, which in practice means the country's 52 district municipalities. The national government can also assign responsibility for service provision to local municipalities (231 in number). Overall there are 169 water service authorities in South Africa, including water boards, district municipalities, local municipalities and municipal companies. The responsibility for rural water supply and sanitation has been transferred from the national government to municipalities.

A Water Service Authority⁹⁶ is defined as any municipality responsible for ensuring access to water service in the Act. It may perform the functions of a Water Service Provider, and may also form a joint venture with another water services institution to provide water services. In providing water services, a water services authority must prepare a water service development plan (WSDP) to ensure effective, efficient, affordable and sustainable access to water services. The WSDP should be in line with the catchment management strategy of that water-management area. The plan provides a linkage between water services provision and water-resources management.

The Water Tribunal

The Water Tribunal was established in 1998 to hear appeals against directives and decisions made by responsible authorities, catchment management agencies or water management agencies about matters covered by the *National Water Act, 1998*, such as the issuing of licences to use water. It is an independent body and can hold hearings anywhere in the country.

The Water Research Commission and the Judicial Services Commission recommend people as members of the Tribunal, and the Minister of Water Affairs and Forestry appoints them. The members have to know about water management, engineering, law and other related matters, and they are given administrative support by the Department of Water Affairs and Forestry.

Under the Water Tribunal Rules, an appeal must be commenced within thirty days after:

⁹⁶ DWA, *Water Services Institutions*. Available at: <http://www.dwaf.gov.za/IO/wsi.aspx> [accessed on 3 May 2013].

- publication of the decision in the Gazette;
- notice of the decision is sent to the Appellant; or
- reasons for the decision are given, whichever occurs last.

An application for the determination of compensation must be commenced within six months of the relevant decision of the responsible authority.

The Water Tribunal may:

- subpoena for questioning any person who may be able to give information relevant to any of the issues; or
- subpoena any person who is believed to have possession or control of any book, document or object relevant to any issue, to appear before the Tribunal and to produce that book, document or object.

A subpoena must be signed by a Water Tribunal member and must:

- specifically require the person named in it to appear before the Tribunal;
- state the date, time and place at which the person must appear; and
- sufficiently identify any book, document or object to be produced by that person.

The law relating to privilege, as it applies to a witness subpoenaed to give evidence or to produce any book, document or object before a court of law, applies to the questioning of any person.⁹⁷

The Water Tribunal may conduct an inspection in loco before hearing an appeal. In this case, the parties must have been notified in advance of the inspection. Each party has the right of attendance and representation (Water Tribunal Rules, Rule 13).

Where the matter is heard by more than two members, a decision of a majority of the members constitutes a decision of the Tribunal (Water Tribunal Rules, Rule 15).

5. Rail⁹⁸

South Africa has a relatively well-developed transport network, comprising approximately 362999 kilometres of highways, 21000 kilometres of railways and seven major sea ports.⁹⁹

In 1916, as a consequence of the formation of the Union of South Africa, all railway services were merged into the South African Railways and Harbours, later renamed South African Transport Services (SATS). On 1 April 1990, Transnet was created to take over most of the operations of SATS, with the exception of commuter rail which was transferred to the newly-formed South African Rail Commuter Corporation (SARCC). The SARCC owned commuter rail-related assets, including stations and surrounding land, infrastructure and rolling stock, while the services were operated by Metrorail. Initially Metrorail was an operating unit of Spoornet, Transnet's rail subsidiary. Then, in 1996, it became a separate business unit of Transnet. Long-distance passenger rail services, meanwhile, were operated by Spoornet (now Transnet Freight Rail) under the name 'Shosholozza Meyl'.

The government observed that the separation of ownership between SARCC and Transnet caused problems, in particular with disputes over the responsibility for maintenance and new investment. In 2006, ownership of Metrorail was transferred to SARCC, unifying the responsibility for commuter rail. On 23 December 2008 SARCC was renamed the Passenger Rail Agency of South Africa (PRASA), and, in subsequent months, Shosholozza Meyl and Autopax were transferred from Transnet to the PRASA. This left the PRASA as the owner of all the passenger-carrying operations of the former SATS. The PRASA is under the direct control of the Department of Transport.

⁹⁷ Water Tribunal Rules, Rule 12. Available at: <http://www.dwaf.gov.za/WaterTribunal/documents/TribunalRulesSep05.pdf> [accessed on 8 July 2013].

⁹⁸ Transnet, *History of Transnet*. Available at: <http://www.transnet.net/ABOUTUS/History.aspx> [accessed on 3 May 2013].

⁹⁹ OECD, *Railway and Port Organisation in the Republic of South Africa and Turkey: The Integrator's Paradise?*, February 2009, p. 8. Available at: <http://www.internationaltransportforum.org/jtrc/discussionpapers/dp200905.pdf> [accessed on 8 May 2013].

Transnet Freight Rail is the largest division of Transnet, which is under the jurisdiction of the Department of Public Enterprises (DPE). It is a heavy-haul freight-rail company that specialises in the transportation of freight. It has approximately 25000 employees, spread throughout the country. Transnet maintains an extensive rail network across South Africa that connects with other rail networks in the sub-Saharan region, with its rail infrastructure representing about 80 per cent of Africa's total.

Transnet Freight Rail aims to become a profitable and sustainable freight railway business, 'assisting in driving the competitiveness of the South African economy'. The company is made up of the following six business units: Agriculture and Bulk Liquids; Coal; Container and Automotive; Iron Ore and Manganese; Mineral Mining and Chrome; and Steel and Cement.

Regulatory Institutions and Legislation

The supervision of rail transport in South Africa is the responsibility of the Department of Transport. In relation to rail, the Department¹⁰⁰ facilitates and coordinates the development of sustainable rail transport policies, rail economic and safety regulation, infrastructure development strategies and systems that reduces system costs and improves customer service. It oversees the Railway Safety Regulator (RSR) and the Passenger Rail Agency of South Africa (PRASA). The focus is also on the implementation of integrated passenger rail services planned through the lowest competent sphere of government.

The RSR is a public entity established in terms of section 4 of the *National Railway Safety Regulator Act, 2002* (Act No. 16 of 2002).¹⁰¹ The RSR is governed and controlled by a board of directors, appointed by the Minister of Transport, who hold office for a period of three years. Its list of functions does not include any role in economic regulation.

Regulatory Development

While rail transport in South Africa is not currently subject to economic regulation, the introduction of rail regulation was considered in 2011 by the government. While there is no reference to this on the Department of Transport website, the process was described in Transnet's 2011 Annual Report:¹⁰²

The Department of Transport (DoT) intends to introduce a rail economic regulator to regulate rail prices and to regulate access to the network by other operators. The rail policy framework for such regulation, however, remains unclear. The DoT intends issuing a Green Paper on rail policy in 2011 for public comment. Resolution on rail policy has a material impact on Transnet's ability to invest in the railway and increase operating capacity as planned. Transnet has conducted various studies to contribute to the policy formulation process and will continue to engage the DoT proactively.

The process was further described in Transnet's 2012 Annual Report:¹⁰³

In response to the Department of Transport's (DoT) initial Rail Reform Green Paper, the DPE developed Phase 1 of its position paper on Rail Reform for South Africa in February 2012. The position paper entailed the development of rail reform models and high-level financial verifications of the recommended models. The DPE presented its position paper to Transnet and the Company will continue to monitor developments in this regard.

6. Airports

The main airports in South Africa are those at Johannesburg, Cape Town, Durban and Port Elizabeth. These airports are owned and operated by the Airports Company South Africa (ACSA), a largely state-owned company that has been through a process of corporatisation.

¹⁰⁰ Department of Transport, *Home*. Available at: <http://www.transport.gov.za/Rail.aspx> [accessed on 3 May 2013].

¹⁰¹ Railway Safety Regulator, *Home*. Available at: http://www.rsr.org.za/about_railway_safety_regulator.php?a=About-RSR [accessed on 3 May 2013].

¹⁰² Transnet, *Transnet Annual Report 2011*. Available at: <http://www.transnet.net/InvestorRelations/Transnet%20Reports/Transnet%20%20Annual%20Report%202011.mht> [accessed on 3 May 2013].

¹⁰³ Transnet, *Transnet Annual Report 2012*. Available at: http://overendstudio.co.za/online_reports/transnet_ar2012/pdf/volume1.pdf [accessed on 8 July 2013].

Johannesburg O.R. Tambo International Airport¹⁰⁴ is South Africa's (and Africa's) largest airport, with more than 50 per cent of the country's air passengers passing through it. It handles approximately 17 million passengers per annum. It is situated in Gauteng, 'in the heart of South Africa's commercial and industrial hub'. Road infrastructure links it to Johannesburg, Pretoria and the national road network. The Gautrain rapid rail system links the airport with Sandton, Johannesburg and Pretoria.

Regulatory Institutions and Legislation

The *Airports Company Act* provides for an independent statutory body, the Regulating Committee, to oversee the economic regulation of the ACSA.¹⁰⁵ The principal objectives of the Regulating Committee are to:

- restrain the ACSA from abusing its monopoly position, without placing undue restrictions on its commercial activities;
- promote the reasonable interests and needs of the users of ACSA airports;
- promote the safe, efficient, economical and profitable operation of ACSA airports;
- encourage timely improvement of facilities at ACSA airports so as to satisfy anticipated demand; and
- ensure ACSA is able to finance its obligations and has a reasonable prospect of earning a commercial return.

Under the Act, the Regulating Committee regulates ACSA in two ways. Firstly, it limits aeronautical charges for each year of the Permission Period for any or all of ACSA's airports. Aeronautical charges are determined for a period of five years, with a two-year overlap, meaning that an application is made every three years. Charges at the beginning of the period take into account the anticipated revenues of all activities undertaken by the ACSA, whereby profits from non-aeronautical activities are used to subsidise aeronautical charges. This is referred to as 'single till' regulation. Secondly, it prescribes service standards at any or all of ACSA's airports.

Airport charges are regulated through the use of a price-cap formula, CPI-minus-X, which limits the increase in a basket of revenue-weighted tariffs to the rate of inflation (Consumer Price Index or CPI) minus an X-factor (efficiency factor). The X-factor is determined by applying the 'building-blocks' methodology, whereby each block of the ACSA's activities is identified and costed; namely operating costs, depreciation, return on capital and taxation. From this revenue requirement the non-aeronautical revenues are subtracted to determine the aeronautical revenue requirement. The required aeronautical revenue is divided by anticipated volumes to determine the level of the anticipated unit price increases.

The ACSA charges users for the use of its facilities, in accordance with these regulatory provisions. The categories of airport charges are:

- landing fees
- passenger service charges
- aircraft parking fees

Landing fees vary according to the origin of the aircraft and the aircraft weight across three categories, namely: domestic, regional and international. Similarly, passenger-service charges vary according to the destination of the passenger. For aircraft parking, the weight of the aircraft, the duration parked (to the extent that time exceeds four hours) and the parking stand utilised will be considered in determining the parking charges.

Regulatory Development

A 2005 review of regulation in South Africa reported the following three criticisms of the regulatory arrangements for airports.¹⁰⁶

¹⁰⁴ ACSA, *Home*. Available at: <http://www.acsa.co.za/home.asp?pid=228> [accessed on 8 July 2013].

¹⁰⁵ Information about the Regulating Committee is provided on the ACSA website. Available at: <http://www.acsa.co.za/home.asp?pid=73> [accessed on 3 July 2013].

[1] The Minister of Transport is responsible for appointing the RC [Regulating Committee] and approving its decisions, while at the same time acting as the majority shareholder for the very entities that the RC regulates. [2] The RC is not formally independent, as its decisions require ministerial approval. [3] The co-jurisdiction with the competition authorities requires at least an unambiguous and enforceable cooperation agreement between the two authorities, which does not exist.

7. Ports

The Transnet National Ports Authority (TNPA), an operational division of government-owned Transnet Limited, owns and manages South Africa's ports at Richards Bay, Durban, East London, Port Elizabeth, Mossel Bay, Cape Town, Saldanha and Ngqura. The TNPA provides infrastructure as a conduit for the country's imports and exports. About 98 per cent of South Africa's exports are conveyed by sea. Different ports have different types of business across bulk commodities, containers and passenger vessels.

The Port of Richards Bay, located on the east coast 170 kilometres north of Durban, was established in 1976 to handle coal exports, and now also handles other bulk commodities. It claims to be the largest single coal-export facility in the world with an annual capacity of 91 million tonnes.¹⁰⁷ The coal is sourced at Mpumalanga's 44 coal mines. There is a 580 kilometre rail line descending from the Highveld through KwaZulu-Natal and terminating at Richards Bay. The double line is bi-directionally signalled and fully electrified.

Durban's port¹⁰⁸ is South Africa's largest. It has a grain elevator, facilities for the importation of bulk cargo, container facilities (handling 62 per cent of containers using South African ports) and a passenger terminal.

Port Elizabeth's port services the motor vehicle industry (with a container terminal) and also handles various bulk commodities.

The Port at Saldanha Bay, located on the south-west coast, is a deep-water port, handling, *inter alia*, the bulk of South Africa's iron ore exports. Iron ore is delivered to the port by a dedicated railroad from the mines at Sishen and Kolomela.¹⁰⁹

As port landlord, the TNPA is responsible for:

- developing and managing port properties;
- developing, advising and implementing national port policies;
- providing and maintaining port infrastructure (that is, breakwaters, seawalls, channels, basins, quay walls and jetties), and the sustainability of ports and their environments; and
- coordinating marketing and promotional activities for each port.

The TNPA also has a control function, which includes:

- providing vessel-traffic control and navigational aids;
- licensing and leasing terminals to operators;
- monitoring the performance of port operators; and
- ensuring the orderly, efficient and reliable transfer of cargo and passengers between sea and land.

Transnet Port Terminals, formerly South African Port Operations, is another operational division of Transnet. It operates terminals at the various ports through concessions or licences from the TNPA.

¹⁰⁶ M Mayor and D Onyango, *Review of Regulation in South Africa*, February 2005. Available at: <http://www.hsrc.ac.za/Document-1833.phtml> [accessed on 8 July 2013].

¹⁰⁷ Richards Bay Coal Terminal, *Home*. Available at: http://www.rbct.co.za/jit_default_1.Home.html [accessed on 7 May 2013].

¹⁰⁸ Ports and Ships: Shipping and Harbour News of South Africa, *Home*. Available at: <http://ports.co.za/durban-harbour.php> [accessed on 7 May 2013].

¹⁰⁹ AngloAmerican, *Logistics*. Available at: http://www.angloamericankumba.com/ob_logistics.php [accessed on 7 May 2013].

Regulatory Institutions and Legislation

The National Ports Regulator¹¹⁰ was established in accordance with the *National Ports Act 2005*. It is responsible for the economic regulation of the ports system, in line with strategic objectives to promote equity of access to ports and to monitor the activities of the TNPA. The National Ports Regulator also promotes regulated competition, hears appeals and complaints, and investigates such complaints. It has a Chairman and eight part-time members appointed for five-year terms. It initially relied on contracted staff, but an increased budget allocation has allowed it to appoint permanent staff. It had a staff of fourteen in 2011 and a staff of fifteen in 2012. The National Ports Regulator is located in Durban, close to the port.

The National Ports Regulator's mandate is to be exercised in accordance with Government policy as set out in the National Commercial Ports Policy:

South Africa's commercial ports system should be globally competitive, safe and secure, operating at internationally accepted levels of operational efficiency consistent with the goals and objectives of the Government's macro-economic strategies. The commercial ports system must serve the economy and meet the needs of port users in a manner which is economically and environmentally sustainable.

The National Ports Regulator recognises its obligation to discharge its regulatory responsibilities efficiently, equitably and in the best interests of the people of South Africa as a whole. It acknowledges that regulation can produce gainers and losers; and that it can affect property rights, economic growth and income distribution. It is aware that regulation generates compliance and other costs which must be measured against the benefits associated with regulatory activity. These principles guide the National Ports Regulator and inform the expectations that stakeholders can have of it.

*Processes*¹¹¹

The National Ports Regulator has an annual tariff-setting function; hears appeals against decisions of the TNPA and receives and deals with complaints.

For annual tariff setting, the process requires that, every year in August, an application by the TNPA is submitted to the National Ports Regulator to amend its tariffs for the next tariff year commencing the next 1 April.

Activities under the compliance and monitoring of port participants are still being developed.

The *Regulatory Principles and the Directives* developed by the National Ports Regulator were subjected to a public consultation process. On completion of the consultative process, certain amendments were made and the Principles and Directives were published in the *Government Gazette* and came into effect.

Consultation of Interested Parties

The National Ports Regulator engages stakeholders in the period running up to the tariff application and in the public engagement process. Industry clusters, particularly on the cargo-owner and transport-facilitator side of the industry, are engaged in preparation for the tariff application to ensure that adequate awareness exists about the tariff processes and timelines. These engagements are performed in advance of the application to prepare stakeholders for the process.

The Ports Consultative Committees and the National Ports Consultative Committee have become an 'excellent platform for resolving issues in the ports system before they have an opportunity to escalate into industry conflicts and litigation'.¹¹²

¹¹⁰ National Ports Regulator, *About Us*. Available at: <http://www.portsregulator.org/about> [accessed on 3 July 2013].

¹¹¹ National Ports Regulator, *Ports Regulator of South Africa S30(6) & S44 Report 2011/12 (Incorporating the Annual Report in terms of the PFMA)*. Available at: http://www.portsregulator.org/images/documents/annual_2012.pdf [accessed on 3 July 2013].

¹¹² *Ibid*, p. 20.

Decision-making and Reporting

The National Ports Regulator is an independent regulator, within the context of the prevailing policy and regulatory framework. The National Ports Regulator is funded by fiscal allocation from the national government. The National Ports Regulator has established a Tribunal and a Regulation Committee. The Tribunal made three decisions in 2011-12.

The 2012-13 Annual Tariff Adjustment

In its first important pricing decision, the National Ports Regulator disapproved the TNPA's request to increase tariffs and port dues by 18.06 per cent; instead granting an increase of 2.76 per cent for the 2012-13 tariff year. The National Ports Regulator regarded this increase as 'reasonable and appropriate'. The National Ports Regulator reached the decision after considering various submissions along with the comments of stakeholders.

Transnet said the National Ports Regulator's role in determining port tariffs must be balanced by the need to invest in critical port infrastructure to boost South Africa's competitiveness.¹¹³

The 2012/13 National Ports Authority tariff application was submitted to the Ports Regulator on 29 July 2011, requesting a tariff increase of 18,06%. On 13 March 2012, the Ports Regulator announced its decision to increase the tariffs of National Ports Authority by 2,76%. The increase was determined after taking into account the R1,0 billion rebate to incentivise the export of value added goods from South Africa. Transnet and the Ports Regulator have agreed to have a tariff methodology in place by 30 June 2013.

In its *Sustainable Development Report 2011* (p. 51),¹¹⁴ Transnet had expressed a more general concern about the National Ports Regulator:

Economic regulation of Transnet National Ports Authority began with the establishment of the Ports Regulator in 2008. The rules and methodology of regulating port tariffs however, remain unclear in key respects. Transnet's calculation of revenue required to support port investment differs substantially from the Port Regulator's calculation. Work will continue to bring a closer alignment in order to ensure an appropriate pricing for the sustainability of the ports system.

¹¹³ Transnet, *Annual Report 2012*. Available at: http://overendstudio.co.za/online_reports/transnet_ar2012/pdf/volume1.pdf [accessed on 8 July 2013].

¹¹⁴ Transnet, *Sustainable Development Report 2011*. Available at: <http://www.transnet.net/InvestorRelations/Transnet%20Reports/Sustainability%20Report%202011.pdf> [accessed on 8 July 2013].

Japan

OVERVIEW

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

At the national level, regulation is mainly carried out by agencies within key ministries. The electricity and gas industries are regulated by the Ministry of Economy, Trade and Industry (METI), through the Agency for Natural Resources and Energy, on issues relating to retail and wholesale pricing and capacity variations. The energy regulator has also been supplemented by the Electricity Utility Industry Council (EUIC) representing various stakeholders, and by the formation of the Japan Electricity Power Exchange (JEPX). While significant reforms have been made to energy regulation over the past 20 years, the reform process is ongoing. Current issues under debate include the deregulation of retail electricity markets and the vertical separation of generation and distribution assets.

There is strong government involvement in the regulation and planning of telecommunications infrastructure, with the responsible body being the Ministry of Internal Affairs and Communications (MIC). The MIC continues to subsidise the construction of fixed-line and wireless networks as part of the i-Japan policy.

Since 2005, the national government has been debating the privatisation of the postal industry. This is largely motivated by a desire to unlock the massive financial assets of Japan Post. Although an initial public offering is planned for 2015, the current legislative framework allows the government to maintain control of Japan Post indefinitely. The reform process has also been accompanied by changes in the regulation being applied by the MIC.

There is strong government involvement in the water and wastewater industry at all levels. At the national level there is centralised control of key river basins, through the Japan Water Agency (JWA) under the supervision of five ministries. At the prefectural level there is the river management of class B rivers. At the municipal level, water and wastewater services are provided on a monopoly basis, with prices determined in a limited process involving only the operator and the council. Water rights in Japan are based on the traditional 'first in time, first in rights' system, and are not, strictly speaking, tradeable. There appears to be some interest in moving towards a water trading system to increase the efficiency of water allocation.

In rail, the privatisation and division of Japan National Rail (JNR) has created vertically integrated regional monopoly passenger companies, and led to business diversification. There is limited competition in spite of mandatory rail-track access. There are permission systems for entry and exit, and for fares and rates. Although there is limited access-based competition, the Ministry of Land, Infrastructure, Transport and Tourism's (MLIT) yardstick regulation has been successful in increasing the efficiency of regulated businesses.

The MLIT is in charge of the regulation of airports. Specifically, it is responsible for decisions on capacity expansion and access prices. Airports are generally owned by either national or prefectural governments, but there have been attempts to privatise major international airports. Despite ongoing difficulty in progressing policy in this area, recently the MLIT has revealed plans to streamline and privatise the management of government-administered airports.

The MLIT, through its Ports and Harbours Bureau, determines policy for Japan's ports. Prefectural or municipally operated port-management bodies operate the ports, being responsible for: construction and maintenance; leasing; and setting and collecting of fees.

GEOGRAPHY, POPULATION, ECONOMY, POLITY AND LEGAL SYSTEM¹¹⁵

Japan is an archipelago comprised of over 3000 islands, with the four largest (in order of size, Honshu, Hokkaido, Kyushu, and Shikoku) accounting for 97 per cent of the total land area (377 835 square kilometres). It ranges from subtropical climate in the south to cool temperate climate in the north (northern Honshu and Hokkaido). More than 70 per cent of the country is mountainous, leaving little arable land.

A large population (127.3 million) and a small total land area combine to produce a high density of population. Japan's three largest cities are Tokyo, Osaka, and Nagoya. Population density is intensified by the mountainous nature of much of the country, leading the vast bulk of the population to live in river basins. River basins, representing only 17 per cent of Japan's surface area, account for over half of the population and economic activity. While water is plentiful, drought is not unknown and can affect some areas quite severely.

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

Japan is a highly-developed economy with the fourth-highest GDP in the world (US\$4.52 trillion) after the United States, China, and India. Japan's GDP per capita of US\$36 200 is among the highest in the world, although its ranking has slipped in recent years as other countries have achieved substantially higher growth rates than Japan.

Japan's economic strength is based on its sophisticated manufacturing and services sectors, including highly developed physical and social infrastructure. It has very few natural resources and relies heavily on imports of fuels and raw materials for the production of manufactured goods and energy. It engages in technologically advanced manufacturing of products such as motor vehicles, electronics, machine tools, steel and non-ferrous metals, ships, and chemicals. It has highly productive agriculture (including rice, poultry, pork, and dairy), but the small area of arable land available for agriculture, combined with a large and rich population, means that it is a heavy importer of food stuffs. Fishing is a major industry, with seafood being a very important part of the Japanese diet. Banking, finance, and insurance are all highly developed, with the Japan Post Bank being the largest in the world.¹¹⁶

Japan's infrastructure of roads, rail, ports, airports, energy, and communications, are all highly developed. Its energy production is almost totally reliant on imports of oil, liquefied natural gas (LNG), and coal. The communications network has achieved ubiquitous penetration of both fixed-line and mobile telecommunications, and the utilisation of advanced technologies. Water and wastewater systems are also highly developed, and the country's air, road, and rail networks are extensive and continually undergo further investment. As a major trading nation, and an archipelago surrounded by water, Japan has constructed a capacious and modern sea transportation system.

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

Japan is not strictly a federation, although it does have sub-national governments at prefecture and municipal levels. There are 47 prefectures, often carrying the name of the major city in it, for example, Tokyo, Kyoto, Hiroshima, Osaka, Fukuoka and Niigata.¹¹⁷ Each prefecture has a legislature

¹¹⁵ This information is mainly from Central Intelligence Agency (CIA), *The World Fact Book – Japan*. Available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/ja.html> [accessed on 20 May 2013].

¹¹⁶ A Porges and J Leong, 'The Privatization of Japan Post – Ensuring both a Viable Post and a Level Playing Field', in M Crew and P Kleindorfer (eds) *Progress toward Liberalization of Postal and Delivery Sector*, 2006, p. 385.

¹¹⁷ There is one 'metropolis' (*to*), Tokyo; one 'Circuit' (*do*), Hokkaido; two urban prefectures (*fu*), Osaka and Kyoto; and 43 other prefectures (*ken*). Together the prefectures are known as *todofuken*. Information is available at: http://www.japan-101.com/geography/prefectures_of_japan.htm [accessed on 4 July 2013].

and an elected Governor, supported by an administration. While prefectures average a population a little under three million, some are much larger than the average (Tokyo has a population over 12 million), while others are therefore much smaller than the average (seven have less than one million).

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

The legal system is modelled on the German civil law system but also displays other influences. The Constitution (promulgated on 3 November 1946, and enforced on 3 May 1947) provides for a democratic, fundamental separation of state powers. Legislative power is vested in the Diet. Executive power is vested in the Cabinet with the Prime Minister at its head, designated from among the members of the Diet by a resolution of the Diet (and in the exercise of this power, the Cabinet is collectively responsible to the Diet). All judicial power is vested in the Supreme Court and in such lower courts as high courts, district courts, family courts, and summary courts. The courts are the final adjudicators of all legal disputes, including those between citizens and the State arising out of administrative actions.¹¹⁸ Judicial reviews of legislation are heard in the Supreme Court. There are three tiers of lower courts below the Supreme Court. The main body of statutory law is known collectively as the ‘Six Codes’.

APPROACH TO COMPETITION AND REGULATORY INSTITUTIONAL STRUCTURE

The approach to infrastructure regulation in Japan has traditionally revolved around the powerful economic ministries, specifically the Ministry of Economy, Trade and Industry (METI) (responsible for energy regulation); the Ministry of Internal Affairs and Communication (MIC) (responsible for telecommunications, postal services and water), and the Ministry of Land, Infrastructure, Transport and Tourism (MLIT) (responsible for water, airports, ports, and rail). Within the ministries reside key bureaus that consider matters relating to economic regulation of infrastructure, and make recommendations to the Minister.

In recent years the Japan Fair Trade Commission (JFTC), the entity that administers the *Antimonopoly Act* (1956), has become more active with respect to the regulation of infrastructure. It has done this in four main ways. First, it has convened study groups in key infrastructure industries, to bring public attention to the case for liberalisation.¹¹⁹ Second, it has issued guidelines about appropriate behaviour of infrastructure owners in increasingly liberalised markets – specifically in energy and communications. This has been associated with promulgation of a ‘Grand Design for Competition Policy’; and the JFTC describing itself as a ‘Market Guardian’. Third, it has made specific interventions in markets where there have been breaches of the *Antimonopoly Act*. For example, this has occurred in the water and wastewater industry. Fourth, the JFTC has a Coordination division which consults with other government bodies, to ensure that new legislation and policies will not have anti-competitive effects.¹²⁰

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

Appeals

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

¹¹⁸ Supreme Court of Japan, *Overview of the Judicial System in Japan*, 2006. Available at: http://www.courts.go.jp/english/judicial_sys/overview_of/overview/index.html [accessed on 4 July 2013].

¹¹⁹ A Shibata, ‘The Role of Competition Advocacy by Competition Authority’, Paper presented at ICN Annual Conference, Naples, 28-29 September 2002. Available at: http://www.jftc.go.jp/en/policy_enforcement/speeches/2002.files/shibata.pdf [accessed on 11 July 2013].

¹²⁰ This section has had the benefit of input from officials of the JFTC who have kindly responded to questions.

may commission a designated examination agency to conduct specified examination work. Potential remedies include the invalidation of, or alteration of, the original decision.

REGULATORY ARRANGEMENTS BY INDUSTRY OR SECTOR

1. Energy¹²¹

In Japan, production of both electricity and gas is highly dependent on imported raw materials; particularly liquefied natural gas (LNG), oil, and coal. Electricity is produced using, in order of importance, coal, oil, LNG, nuclear, and hydro-generation. Both the electricity and gas industries have been dominated by vertically integrated producers with regional monopolies, in each case represented by strong industry bodies. However, reforms in recent years have introduced a degree of competition in both industries.

Key legislative acts are the *Electricity Utilities Industry Law*, the *Gas Utilities Industry Law* and the *Gas Business Act*. The *Antimonopoly Act* (administered by the JFTC) has had an increasing influence on both industries in recent years. The key regulatory role in relation to retail and wholesale pricing and capacity variations has been undertaken by the Ministry of Economy, Trade and Industry (METI);¹²² specifically the Agency for Natural Resources and Energy. The Agency is divided into the following departments:

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

The Electricity and Gas Industry Department is further divided into the following divisions: Policy Planning; Electricity Market; Gas Market; Electricity Infrastructure; Nuclear Energy Policy Planning; and Nuclear Fuel Cycle Industry.

Electricity

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

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

There are big differences in size between these, with the largest (Tokyo Electric Power Company) being four times larger (in power generation) than the smallest. The Tokyo supplier is the fourth largest electricity utility in the world.¹²³ Additionally there are two other important market participants, the Electric Power Development Corporation and the Japan Atomic Power Company, which

¹²¹ A key reference for this section is International Energy Agency (IEA), *Energy Policies of IEA Countries – Japan 2008 Review*, OECD/IEA, Paris, 2008. Information has also been obtained from the Ministry of Economy, Trade and Industry (METI) (English language) website. Officials of METI have kindly responded to questions and provided further information.

¹²² METI website (in English). Available at: www.meti.go.jp/english/ [accessed on 4 July 2013].

¹²³ Information from IEA, *Energy Policies of IEA Countries – Japan 2008 Review*, 2008, p. 131. Available at: <http://www.iea.org/publications/freepublications/publication/Japan2008.pdf> [accessed on 11 July 2013]. See also Federation of Electric Power Companies of Japan, *Electricity Review Japan 2008*.

participate in the generation segment. These are all represented by an industry body, known as the Federation of Electric Power Companies of Japan.

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

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

The first movement away from the system of independent regional monopolies came in 1995, when (i) an electricity procurement bidding system was set up among the incumbents, allowing a wholesale supply market to develop; (ii) 'special electric utilities' were allowed to conduct retail power sales (to users with demand greater than 2000 kilowatts) within the designated service areas; and (iii) efforts were made to improve the operational efficiency of incumbent suppliers.

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

With these steps towards greater liberalisation, it was decided to strengthen functional separation of the vertically integrated incumbents (VIUs) and to enhance regulated third-party access through the formation of the ESCJ, which was established in 2004. The ESCJ has a broad membership encompassing the incumbents, new electricity providers and other interests. The ESCJ is establishing a set of evolving rules, involving: construction of new and expanded network infrastructure; technical requirements for installation and connection; operation of transmission systems by VIUs; and disclosure of information about network availability and use.

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

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

The amount of transmission capacity between the original regions supplied by VIUs is limited. According to the IEA, these 'bottlenecks' are allocated on a 'first-come-first-served' and 'use-it-or-lose-it' basis.¹²⁴ Wheeling tariffs must be set in accordance with the METI ordinance and must be reported to the METI. The METI can issue revision orders, but this is a form of *ex post* regulation that, according to the IEA, 'risks undermining transparency and leaves scope for cross-subsidisation' (p. 143). The IEA argues that current charges for imbalances 'are punitive and are not transparently related to real costs' (p. 142).

The METI and Alternative Processes in Electricity

Matters that come before the METI for settlement include applications regarding retail price variations, seeking an order to vary the conditions of a wholesale price contract, and applications regarding capacity adjustments. Such applications are considered by the METI, usually based only on the

¹²⁴ IEA, *Energy Policies of IEA Countries – Japan 2008 Review*, *op. cit.*, p. 128.

evidence put to it by the applicant. The *Administrative Law* and the first article of the *Electricity Utilities Industry Law* are followed, but no other parties are consulted. The *Administrative Procedure Act* (Act No. 88 of 1993) requires that the Minister gives sufficient reasoning when an order is made that is unfavourable to the applicant. Applicants may request administrative review under the *Law of Administrative Tribunals*. Possible remedies include invalidation of, or alteration of, the original decision.

The IEA argued that 'Japan could benefit from making the regulatory functions of the METI fully independent as well as able to issue binding orders' (p. 144). It also argued for a market monitoring role for the JFTC (p. 144).

Gas¹²⁵

Gas accounts for about 22 per cent of energy use in Japan. Japan is the world's largest importer of liquefied natural gas (LNG) and is almost totally reliant on imports – domestic supply accounts for only four per cent of requirements. LNG is used to produce electricity (66 per cent of all LNG is used for this purpose) and supply gas distribution networks (34 per cent). There are 32 LNG facilities in Japan. There has been a rapid growth in importation and consumption of LNG over many years.

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

Gas facilities and gas businesses are regulated under the *Gas Business Act*.¹²⁶ Four types of gas business exist in Japan:

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

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

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

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

¹²⁵ Key references are: US Energy Information Administration: Japan. Available at: <http://www.eia.gov/countries/country-data.cfm?fips=ja> [accessed on 7 May 2013], IEA, *op. cit.*; P Davis and Y Nagata, 'Chapter 16 (Japan)', *International Comparative Legal Guide to: Gas Regulation 2006*; Haruki Takahashi, 'Advancement of the Gas Industry in Japan', *GASEX2004 Member Economy Report*, 1 June 2004.

¹²⁶ Asian Legal Information Institute, *Laws of Japan: Gas Business Act 1954 – Act No. 51 of March 31, 1954* (up to the revisions of Act No. 87 of 2005) (in English). Available at: <http://www.asianlii.org/jp/legis/laws/gba1954an51om311954250/> [accessed on 11 July 2013].

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

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

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

As with electricity, the JFTC and the METI issued joint guidelines,¹²⁷ establishing 'appropriate gas transactions' in relation to major gas supply, wholesale supply, consignment supply, retail, and third-party access to LNG facilities. Private monopolisation, unjust low prices, discrimination, restrictive or exclusive dealing, unjust customer inducement, abuse of dominance, and tie-in sales, are all covered. The JFTC has powers to conduct an investigation of anti-competitive practices, comprising a number of orders, and to enter premises to inspect accounting books, documents, and other conditions of business. By presenting the Guidelines, it may not be necessary to exercise direct administrative intervention against any act infringing the *Gas Utility Industry Law* and the *Antimonopoly Act* but to establish a market environment in which participants can enjoy their businesses with confidence in economic transactions.¹²⁸

Economic Regulation

Economic regulation of the gas and electricity industries in Japan is very similar, with retail rates for smaller users being subject to an approval system.¹²⁹ Rates for larger users, such as medium-scale factories or office buildings are not regulated. The approval system works in such a manner that gas and electricity utilities must apply for approval from the METI when they seek to increase the rates for smaller users. When firms decrease the rates they need only notify the METI. There is also an automatic adjustment scheme to allow rates to be varied to reflect changes in the price of fuel. When the price of fuel changes by more than five per cent tariffs are adjusted automatically.

When approving rate increases, the METI uses a yardstick regulation scheme to determine what the efficient costs of operation are. The scheme introduces indirect competition by comparing the costs of like businesses, and facilitates the approximation of the efficient level of costs for regulated firms. Businesses that report higher costs relative to other businesses in their group are penalised. The penalty takes the form of a reduction of the value of costs allowed in the determination of the business's regulated price. This acts to reduce the incentive for business to report higher costs for the determination of their regulated price. If a business reports higher costs the price they may charge will be lower, and therefore their profits will also be lower.¹³⁰

The yardstick method of regulation was introduced in 1995. There is no fixed review period and review only takes place when a regulated business petitions for a price revision (Mizutani, p.11). Cost data were collected from all businesses during the first assessment in 1995. Only businesses petitioning for a cost revision provide new data. For businesses that do not provide data, the most recent data submitted are used for analysis (Mizutani, p.11).

Businesses are assigned to relative assessment groups on the basis of various factors such as whether they are government or privately owned, their geographical location, and materials they use in production (Mizutani, p.9). There are also further adjustments to ensure there are no groups that are too large or too small to enable further analysis.¹³¹ For example if the number of businesses in a

¹²⁷ JFTC and METI, *Guidelines for Proper Gas Trade*, dated 23 March 2000 and amended 6 April 2004. Available at: http://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines.files/guidelines_gas.pdf [accessed on 11 July 2013].

¹²⁸ *Guidelines for Proper Gas Trade*, *op. cit.*, p. 6.

¹²⁹ F Mizutani, *Regulatory Reform of Public Utilities: The Japanese Experience*, 2012, pp. 54-71. Available at: <http://www.elgaronline.com/view/9781847203304.xml> [accessed on 4 July 2013].

¹³⁰ A Suzuki, *Yardstick Competition to Elicit Private Information: An Empirical Analysis of the Japanese Gas Distribution Industry*, Social Science Research Network, 2008, p. 10. Available at: <http://www.iser.osaka-u.ac.jp/library/dp/2008/DP0709.pdf> [accessed on 4 July 2013].

¹³¹ METI, Agency for Natural Resources and Energy, *General Energy Inquiry Conference City Energy Sectional Meeting*, 11th City Gas Enterprise Tariff System Branch meeting handout, 18 October 1995 (unofficial English translation), pp. 113-114.

geographical region is too few, those businesses may be merged into the group of a larger neighbouring region.

Regression analysis is conducted for each relative assessment group.¹³² The cost categories in the regression are split into two types: costs related to equipment investment, and those related to general overhead costs.¹³³ In order to ensure that like costs are compared to like costs, adjustments are allowed for exceptional costs. These exceptions include: large investments, installation of smart meters, and costs relating to gas reformation.¹³⁴

After cost-driver regression analysis, the results of the regressions are used to make adjustments to a business's actual costs. These adjusted costs are then used for relative assessment of businesses in the same group and to assign scores for each business for each cost category.¹³⁵ Comparisons are made on the basis of the level of costs and the rate of change of costs for each business.¹³⁶

On the basis of this comparison, each firm is placed into one of three efficiency groups. Businesses with overall scores in the top third are placed into efficiency group I; businesses with scores in the middle third are placed into efficiency group II; and businesses with scores in the lowest third are placed into efficiency group III.

After each firm's cost categories have been allocated to their respective efficiency groups, for the purpose of price determination, these cost categories are adjusted according to this allocation. The value of this adjustment is different for gas and electricity. For gas, group I receives no adjustment, group II receives a decrease of 0.5 per cent, and group III receives a decrease of one per cent (Suzuki, p. 9). That is to say, for example, that if a firm's labour costs were in group II, for the purpose of price determination, its labour costs would be reduced by 0.5 per cent leading to a lower regulated price (Suzuki, p. 9). For electricity the penalty for group II is a decrease of one per cent, and group III receives a decrease of two per cent (Mizutani, p. 175).

Regulatory Development

Among other suggestions, the IEA in its 2008 Review recommends that the *Gas Business Act* be reviewed to ensure it 'requires sufficient transparency in the administration of regulations'.¹³⁷

In July 2012 METI's expert committee on electricity system reform released a basic plan for electricity reform. The basic plan recommended the full liberalisation of retail and generation segments and the functional separation of distribution and generation businesses.¹³⁸

2. Telecommunications

Japan has a highly developed telecommunications industry, with ubiquitous penetration of both fixed-line and mobile telecommunications, and the utilisation of advanced technologies. Japan is also a leading producer and exporter of telecommunications equipment. Prior to 1985, Nippon Telegraph and Telephone (NTT) had a statutory monopoly on the provision of telecommunications services in Japan. In 1985, the telecommunications industry was liberalised, with the establishment of Type 1 carriers (those with their own facilities) and Type 2 carriers (those that used the facilities of Type 1 carriers to provide services). This was the first step in removing NTT's legal monopoly, and necessitated the introduction of access arrangements between Type 1 and Type 2 carriers. Type 1 and 2 carriers faced different types of regulation with regard to price, service, entry, and exit regulation. In March 1986, there were seven Type 1 carriers – NTT, KDD (Kokusai Denshin Denwa), Japan-Telecom, and others – mainly providing PSTN (telephone) services.¹³⁹

¹³² *Ibid.*, pp. 121-122.

¹³³ *Ibid.*, p. 123.

¹³⁴ *Ibid.*, pp. 119-120.

¹³⁵ *Ibid.*, pp. 121-122.

¹³⁶ *Ibid.*, pp. 124-125.

¹³⁷ International Energy Agency (IEA), *Energy Policies of IEA Countries – Japan 2008 Review*, *op. cit.*, p. 119.

¹³⁸ METI, *Basic Plan for Reforming the Electric Power System: An Open System for all Citizens* (in Japanese), July 2012. Available at: http://www.meti.go.jp/committee/sougouenergy/sougou/denryoku_system_kaikaku/report_001.html [accessed on 11 July 2013].

¹³⁹ Ministry of Internal Affairs and Communications (MIC), *New Competition Framework: Amendments to the Telecommunications Business Law etc* (PowerPoint presentation), April 2005. Available at: http://www.soumu.go.jp/main_sosiki/joho_tsusin/eng/features/new_competition_framework.pdf [accessed on 11 July 2013].

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

Competition was further promoted by functional separation of NTT into six companies in 1999.¹⁴⁰ The six companies were NTT Corporation, NTT East, NTT West, NTT Communications, NTT Docomo, and NTT Data. NTT East and West operate NTT's fixed-line networks in eastern and western Japan respectively. NTT Docomo operates NTT's mobile network. NTT Communications operates long distance PSTN services. NTT Data provides system integration and network services.

As of March 2012, NTT Corporation still retains majority ownership of all the other NTT companies.¹⁴¹ Resultantly, the NTT companies are indirectly owned by the government, which must hold at least one-third of NTT Corporation shares. NTT Corporation is required by the *NTT Law* always to hold all shares of NTT East and West.

Both NTT East and NTT West are designated essential telecommunications facilities operators, meaning they must provide interconnection on a cost basis. Under the *NTT Law*, NTT East and West are obliged to provide universal fixed-line telephone services throughout Japan, with the costs compensated for by the Universal Service Fund established in July 2002.

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

In 2006 the MIC began to follow an ICT strategy known as u-Japan.¹⁴² One of the key areas of the u-Japan policy was to achieve 100 per cent broadband coverage by the end of 2010.¹⁴³ By the end of March 2012, 99.7 per cent of Japan had access to broadband internet.¹⁴⁴ As part of the u-Japan strategy, the national government provided subsidies for carriers to expand their network footprints. The national government contributed one third of network installation costs in designated communications disadvantaged areas, and towns that had complied with national government policies to streamline municipal bureaucracy.¹⁴⁵ Not-for-profit organisations were able to receive a subsidy equivalent to one-quarter of installation costs.

With respect to fixed-line telecommunications, the broadband market was a major beneficiary of these measures, and Japan now has the second highest number of broadband subscribers in the world (36.3 million as of December 2012).¹⁴⁶ Currently, broadband technology in Japan can enable users to reach data speeds of up to one Gbps.¹⁴⁷ Another result of the Japanese Government's u-Japan policy is that by March 2008 Japan's FTTH coverage was 86.5 per cent.¹⁴⁸ However, Japan's fixed-line broadband penetration rate remains in the median range of OECD nations.

Mobile telecommunications is also highly developed in Japan, with the number of mobile subscribers reaching 129.5 million at the beginning of 2013, with 98 per cent of these services being 3G.¹⁴⁹ Japan has the seventh highest penetration of wireless broadband in the world.¹⁵⁰ As of the end of January

¹⁴⁰ F Mizutani, *op. cit.*, p. 147.

¹⁴¹ NTT Corporation, *About NTT Group*. Available at: http://www.ntt.co.jp/about_e/group.html, [accessed on 11 July 2013].

¹⁴² MIC, *u-Japan policy* (in Japanese). Available at: http://www.soumu.go.jp/menu_seisaku/ict/u-japan/index.html [accessed on 11 July 2013].

¹⁴³ MIC, *ICT Vision Consultative Committee Report on Strategies to Realise a Smart Ubiquitous Network Society: Concrete Policies to Realise Key Strategic Goals* (in Japanese), p. 17. Available at: http://www.soumu.go.jp/main_content/000025477.pdf [accessed on 11 July 2013].

¹⁴⁴ MIC, *The Status of Broadband Infrastructure Development* (in Japanese). Available at: http://www.soumu.go.jp/main_content/000147332.pdf [accessed on 11 July 2013].

¹⁴⁵ M Fujino, *Broadband Policies in Japan*, 2009, p. 20. Available at: http://www.tiaonline.org/gov_affairs/events/Japan's_policies_on_Broadband_deployment.pdf [accessed on 11 July 2013].

¹⁴⁶ OECD, *Broadband Portal* December 2012, updated 18 July 2013. Available at: <http://www.oecd.org/sti/broadbandandtelecom/1c-TotalBBSubs-bars-2012-6.xls> [accessed on 22 July 2013].

¹⁴⁷ OECD, *OECD Communications Outlook 2011*, p. 135.

¹⁴⁸ OECD, *Broadband Portal*, *op. cit.*

¹⁴⁹ Telecommunications Carriers Association, *Number of Subscribers by Carriers (as of 31 January, 2013)*. Available at: <http://www.tca.or.jp/english/database/2013/01/index.html> [accessed on 11 July 2013].

¹⁵⁰ OECD, *Broadband Portal*, *op. cit.*

2013: NTT DoCoMo had 47 per cent of mobile subscribers, according to the Telecommunications Carriers Association;¹⁵¹ KDDI Corporation (originally IDO, DDI, and KDD) had 28.6 per cent of mobile subscribers; followed by Softbank Mobile (formerly Vodafone KK) with 24.5 per cent. This indicates a small loss of market share for KDDI and NTT since 2009, with a considerable increase for Softbank. Softbank was the only carrier to offer Apple's iPhone from 2008 until the end of 2011. Mobile number portability was launched on 24 October 2006.

As for the dedicated wireless broadband market, in December 2007, the Ministry of Internal Affairs and Communications (MIC) granted licences to Wilcom and Wireless Broadband Planning KK for a broadband wireless access service (WiMAX), which utilises the 2.5GHz spectrum band. As of January 2013 there are 4.7 million dedicated wireless broadband subscribers. Wilcom has a market share of 83 per cent and Wireless Broadband Planning KK a share of 17 per cent.¹⁵²

Regulatory Institutions and Legislation

The principal legislation is the *Telecommunications Business Law* (Law No. 86 of 25 December 1984) that was last amended on 24 June 2011 (Law No. 125). The last major revision to the law was made in 2003, at which time prices in the telecommunications industry were largely deregulated.¹⁵³ Other relevant laws include: the *Arbitration Law* (effective 1 March 2004) that governs arbitration; and the *Nippon Telegraph and Telephone Corporation Law* that governs changes to the structure of NTT. The enforcement of the laws is through a series of cabinet orders and ministerial ordinance. Any telecommunications business that violates the *Telecommunications Business Law* (administered by the MIC) and/or the *Antimonopoly Act* (administered by the JFTC) may receive criminal or financial penalties

The MIC is responsible for regulatory supervision of telecommunications, and the Ministry of Finance is also involved as a shareholder in NTT. There are three bureaus within the MIC that are responsible for promoting competition in the telecommunications market: the Global ICT Strategy Bureau; the Information and Communications Policy Bureau; and the Telecommunications Bureau.

Another key institution is the Telecommunications Business Dispute Settlement Commission (TBDSC), established within the MIC in 2001 to realise 'fair and effective competition' and to provide 'quick and smooth dispute settlement between carriers'.¹⁵⁴ The TBDSC conducts mediation or arbitration for telecommunications business disputes upon receipt of an application by a telecommunications carrier, or submission in response to the MIC's inquiries on telecommunications services. The TBDSC also recommends on rule development, such as directives for consultations to the Minister for Internal Affairs and Communications. As shown below, the TBDSC offers an alternative channel to the ministerial ordinances for consultation, or award for dispute settlement. The TBDSC also provides inputs into the formalisation of ministerial ordinances.

By law, the TBDSC is composed of five commissioners appointed on a three-year term by the Minister of the MIC, with consent from both the House of Representatives and the House of Councillors. The Commissioners are assisted by a designated Secretariat and other staff. For each mediation and arbitration case, some commissioners shall be assigned. To improve information provision concerning dispute settlements and provide pre-lodgement consultations, the TBDSC set up the Consultation Window for Telecommunication Business Dispute Settlement in December 2004.¹⁵⁵

Finally, there is the Japan Fair Trade Commission (JFTC) with its role of enforcing the *Antimonopoly Act*. The JFTC works towards eliminating anti-competitive practices in the communications market, mainly with regard to access. In 2001, the JFTC, in cooperation with the MIC, published the guidelines for promoting competition in telecommunications, and these were subsequently revised in

¹⁵¹ Telecommunications Carriers Association, *op. cit.*

¹⁵² *Ibid.*

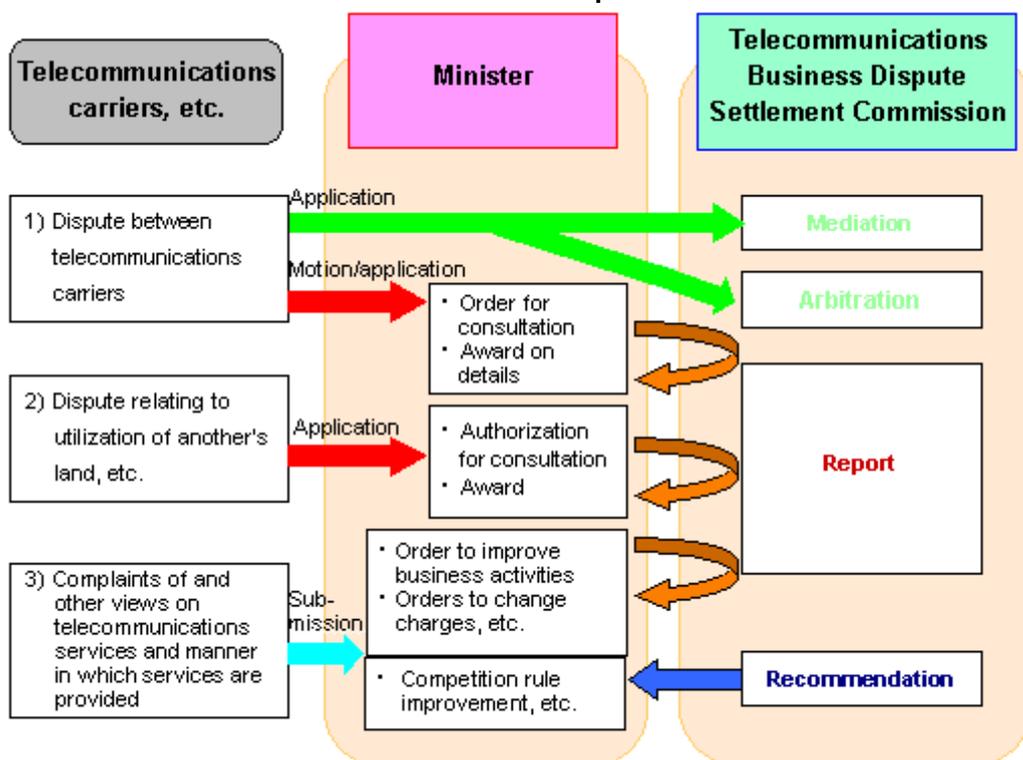
¹⁵³ F Mizutani, *op. cit.*, 2012, pp. 137 and 141.

¹⁵⁴ TBDSC, *The Telecommunications Dispute Settlement Commission*. Available at: http://www.soumu.go.jp/main_sosiki/hunso/english/index.html [accessed on 11 July 2013]; and infoDev and ITU, *Adjudication in Japan*; ICT Regulation Toolkit, *Practice Note: Adjudication in Japan*, 31 October 2008. Available at: <http://icttoolkit.infodev.org/en/PracticeNote.aspx?id=1878> [accessed on 17 May 2013].

¹⁵⁵ MIC, *Information and Communications in Japan – White Paper 2006*, p. 49. Available at: <http://www.soumu.go.jp/johotsusintokei/whitepaper/eng/WP2006/2006-index.html> [accessed on 11 July 2013].

response to new developments.¹⁵⁶ The guidelines list both desirable and undesirable practices in the provision of telecommunications business, or access to telecommunications facilities, that may promote or restrict competition. Those anti-competitive issues that are not specific to telecommunications, such as shareholdings of carriers, mergers and acquisitions, are not specifically covered in the guidelines. However, there is no exemption from the *Antimonopoly Act* for telecommunication business.

Outline of the Telecommunications Business Dispute Settlement Commission¹⁵⁷



Under the guidelines, the JFTC also cooperates with the MIC to set up a system for reporting, consultations, and submission of opinions concerning promotion of competition. In particular, the JFTC provides consultations regarding the applicability of specific provisions of law and regulations to business activities planned by telecommunications businesses. In general, the JFTC will respond in writing within 30 days after receiving an application for the consultation.¹⁵⁸

In line with deregulation in telecommunications, governing regulations have moved from the *ex ante* system to the *ex post* check system since 2003 to better adapt to rapid changes in the market.¹⁵⁹ The *Telecommunications Business Law* was revised in April 2004 as follows:

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

¹⁵⁶ Japan Fair Trade Commission (JFTC), *Guidelines for Promotion of Competition in the Telecommunications Business Field*, issued 30 November 2001 and amended 25 December 2002. Available at: http://www.soumu.go.jp/main_sosiki/joho_tsusin/eng/Releases/Telecommunications/010914_1.html [accessed on 11 July 2013].

¹⁵⁷ TBDS, *The Telecommunications Dispute Settlement Commission*. Available at: http://www.soumu.go.jp/main_sosiki/hunso/english/index.html [accessed on 11 July 2013].

¹⁵⁸ JFTC, *Prior Consultation System*, 1 October 2001.

¹⁵⁹ MIC, *Information and Communications in Japan – White Paper 2007*, *op. cit.*, p. 45.

- Abolishing prior notification of interconnection agreement for non-dominant carriers.

However, asymmetric regulations over dominant carriers were maintained.

Under the current *Telecommunications Business Law*, a registration/notification system is adopted for commencement of telecommunication business. The MIC is authorised to register telecommunication business and related changes upon receiving application relating to installing large-scale circuit facilities (that is, local loop beyond a city/town/village or transit circuits beyond a prefecture). The standard processing period is 15 days. Other businesses that do not require installation of facilities (or only to install small-scale facilities) are subject to a notification requirement to the MIC. Separate approval from the MIC is required for public utility privilege, that is, the rights of way to public water and private land for installing circuit facilities. Such an application for approval may be filed at the same time or after the submission of registration or notification of business, and the processing time is a month.

Under the current *Telecommunications Business Law*, all carriers are required to properly notify users and the MIC for suspension or discontinuation of business. Users may be informed given reasonable advance notice through sure methods, such as visiting, mailing written documents, or email. Notification of the MIC may be conducted on an *ex post* basis.

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

Certain consumer protection provisions are in place, including:

- The obligation for telecommunications carriers to explain important matters about the provision of telecommunications services to potential users through mail, email, brochures, catalogues, or verbal explanation (Article 26).
- The requirement for telecommunications carriers to make notified tariffs available at their business offices and or on the internet.
- The requirement for telecommunications carriers to process complaints and enquiries from users swiftly and properly.

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

*Economic Regulation*¹⁶⁰

Except for basic services, special services, and specified services, there is no price regulation of the telecommunications industry in Japan. Basic services are those considered universally necessary. Special services are charges associated with NTT's fixed-line telephone system that greatly affect users' wellbeing. Specified services relate to any telecommunications bottlenecks for which competition is not possible.

In effect, price regulation only applies to NTT East and NTT West's fixed-line systems. For basic services and specified services, NTT must notify the MIC of any changes in charges. If the MIC considers these charges too high it has the option of ordering the company to alter its prices. For special services the price is regulated using a CPI-minus-X price cap.

Consultation of Interested Parties

The MIC shall consult with the Telecommunications Council in relation to important matters, including establishing standard charges, authorisation of charges, and law and policy formation (Article 169 of the *Telecommunications Business Law*). The Council is composed of representatives from different interest groups, but has often favoured dominant carriers.

¹⁶⁰ F Mizutani, *Regulatory Reform of Public Utilities: The Japanese Experience*, *op. cit.*, 2012, pp. 141-143.

The MIC and the Telecommunications Council often establish study groups composed of experts to report professional knowledge on specific issues, under consideration by the Minister. The MIC has also conducted public consultations with interested parties prior to forming new regulations.

The *Telecommunications Business Law* establishes: a system for public consultation and hearings; and allows for filing complaints and opinions, in accordance with the *Administrative Procedures Law* (APL) (Articles 168–173).

The period allowed for the submission of comments is 30 days or more from the date of public notice.

Complaints on telecommunications matters are submitted to the Minister of the MIC. The Minister is required to handle them in good faith and notify complainants of the results.

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

Timeliness

The standards for processing authorisations and permission are governed by the APL. That is, the MIC must make processing times for applications available at the administrative office that receives the applications (APL, Article 6).

The TBL provides guidance on how much time service providers have to respond to various regulatory requirements. For example after an interconnection service is designated, service providers must apply for authorisation to provide that service within three months of its designation (TBL, Articles 33 and 34).

Response timelines may also be specified in MIC ordinances. For example, when service providers plan to change or add existing functions to designated facilities, the amount of notification they must give the MIC is specified in the applicable designation ordinance (TBL, Article 36).

Information Disclosure and Confidentiality

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

Telecommunications businesses are also required to publish telecommunications charges and financial information at business offices; other workplaces; and on the internet.

Decision-making and Reporting

The authority of the MIC over telecommunication business may be delegated to the Director-Generals of the regional bureaus of telecommunications.

The MIC introduced annual competition reviews in the telecommunications field in 2003 in order to deal with rapid changes caused by the development of Internet Protocol and broadband technologies. The basic principles of market reviews were established in November 2005.

Appeals

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

Regulatory Development

Japan's current overarching IT strategy is the i-Japan strategy.¹⁶¹ There are three main goals of the plan: to use IT to improve the provision of public services; to revitalise business and local communities; and to develop ultra-high-speed broadband infrastructure. The target is for fixed-line services to be able to deliver speeds in excess of one Gbps and mobile services to deliver speeds of greater than 100 Mbps.

3. Postal Services

Historically the postal service operator was a central government ministry, namely the Ministry of Communications from 1885 to 1949; and the Ministry of Posts and Telecommunications in subsequent years until 2001. In 2000-01, Japan ranked third in the world after the United States and China in terms of total mail volume.¹⁶² In that year, the postal service operator was transformed into a government agency – the Postal Services Agency, along with the establishment of the Ministry of Internal Affairs and Communications (MIC) to supervise it.

Japan Post (JP) was established in 2002 as a public corporation responsible for matters concerning the operations of postal service, postal savings, and insurance;¹⁶³ subject to the supervision of the MIC. The MIC was assigned full authority in postal matters: approving all changes in postage rates; setting service standards; and supervising postal operations and standards. It was also responsible for international affairs relating to postal services, such as Universal Postal Union (UPU) matters.

Competition in postal services was introduced through a permission system for entry into the delivery business (see below). The number of operators engaged in the Special Correspondence Delivery business was 253 as of March 2008.¹⁶⁴ Japan Post faces strong competition in this business. In express delivery services Japan Express has a market share of 11.4 per cent compared to the 42.3 per cent share of Yamato Transport, and the 38.6 per cent share of Sagawa Express.¹⁶⁵ Although technically possible, no private operator has entered the general correspondence delivery business.

A package of six Postal Privatisation and related bills was adopted on 14 October 2005, outlining a three-phase privatisation process: a preparation phase through to the end of September 2007; a ten-year transition phase; and the final phase from October 2017.¹⁶⁶ The privatisation process is largely overseen by two government-affiliated committees established under the privatisation legislation: the cabinet-level Headquarters for Promoting Postal Privatisation (HPPP); and the Postal Privatisation Commission (PPC). Both began to operate in 2006 and will cease to exist on 1 October 2017.¹⁶⁷

The HPPP consists of the Prime Minister and relevant cabinet ministers, responsible for advancing measures facilitating the implementation of postal privatisation laws. The PPC is an advisory body of five members, appointed by the Prime Minister for renewable three-year terms, and responsible for making recommendations to the relevant ministers about the progress of postal privatisation in the transition phase. It reviews the privatisation process every three years until 2017 and is consulted by the MIC about decisions in the course of postal privatisation.

¹⁶¹ IT Strategic Headquarters, *i-Japan Strategy 2015* (in Japanese). Available at <http://www.kantei.go.jp/jp/singi/it2/kettei/090706honbun.pdf>, [accessed on 26 February 2013].

¹⁶² Ministry of Public Management, Home Affairs, Posts and Telecommunications, Information and Communications in Japan, *White Paper 2003*, p. 46.

¹⁶³ Japan Post (JP), *Annual Report – Postal Services in Japan 2007*, 2007, p. 64.

¹⁶⁴ The Postal Services Policy Planning Bureau (PSPPB), *Correspondence Delivery Business*. Available at: <http://www.soumu.go.jp/english/psppb/index.html> [accessed on 11 July 2013].

¹⁶⁵ MLIT, 2011 Express Delivery Handling Performance (in Japanese). Available at: http://www.mlit.go.jp/report/press/jidosha04_hh_000042.html [accessed on 12 July 2013].

¹⁶⁶ The laws are primarily based on a Council on Economic and Fiscal Policy report – *Basic Policy on the Privatization of the Japan Post – completed in September 2004*.

¹⁶⁷ *Postal Services Privatization Act* (Act No. 97 of 2005), Chapter 3.

On 1 October 2007, JP was restructured in accordance with the *Postal Services Privatisation Law* and related laws, and split into the following four groups, held under a government-owned holding company, JP Holdings:¹⁶⁸

- JP Service assumed the postal business. As mandated by the *Postal Services Law*, it is obliged to provide universal postal services (see below).
- JP Network inherited the post-office network to conduct postal and financial services, upon receiving commissions from the other three companies.
- JP Bank assumed the banking business.
- JP Insurance assumed the insurance business.

In 2012 JP Service and JP Network merged to become Japan Post Co. (JP Co.).¹⁶⁹

Under the *Postal Services Privatisation Laws*, JP Co. is allowed to diversify its business. The original privatisation bill required Japan Post Holdings to sell all of its shares in JP Bank and JP Insurance by 1 October 2017. Subsequent amendments to the legislation have changed the requirement such that JP Holdings must sell its shares in JP Bank and JP Insurance as soon as possible.¹⁷⁰ Under the legislation the government is required to maintain at least one-third ownership of JP Holdings¹⁷¹ to ensure that Japan Post meets its universal service obligation. This allows the possibility of the government indirectly investing in the two JP financial service companies since cross-holding among all the companies is allowed. In October 2012 a schedule for the privatisation of JP holdings was announced, with an initial public offering planned for 2015.¹⁷²

There were no changes to postage rates for letters and postcards, due to this reorganisation. However, various small parcels were re-classified from mail to freight.¹⁷³

Regulatory Institutions and Legislation

The laws governing the postal business are the *Postal Law 1947* (Act No. 165) and related laws. The *Postal Law* governing the postal services originated in 1947. It has been amended by a series of acts; and was last amended in 2005 (by *Act No. 121*). The *Japan Post Law* was enacted in July 2002 for the establishment of JP and was revised by the package of *Postal Privatisation Laws* introduced in 2005 to facilitate the privatisation of JP.¹⁷⁴ Other relevant laws include the *Law Concerning Correspondence Delivery by Private-Sector Operators* enacted in April 2003.¹⁷⁵

Under the revised *Japan Post Law*, JP Co. will continue to be regulated by the MIC.¹⁷⁶ The MIC has the statutory power to approve major decisions on the postal businesses, after consulting with the PPC. The authority of the MIC includes: approving discounted postal rates for third and fourth-class mail; approving JP Co.'s expansion into non-traditional businesses; approving all subcontracts of JP Co.; enforcing JP Co.'s compliance with the legislation; and having broad powers of audit and inspection of JP Co.

¹⁶⁸ Postal Services Policy Planning Bureau (PSPPB), *Shifting Smoothly to the New Corporations after the Privatization*. Available at: <http://www.soumu.go.jp/english/psppb/index.html> [accessed on 4 July 2013].

¹⁶⁹ Japan Post Bank, *Japan Post Bank Annual Report 2012*, 2012, p. 25.

¹⁷⁰ Japan Post Bank, *Japan Post Bank Annual Report 2012*, 2012, p. 25.

¹⁷¹ *Japan Post Holdings Act* (Act No. 98 of 2005), Article 2.

¹⁷² Postal Privatisation Commission, *Agenda for the 88th meeting of the Postal Privatisation Commission* (in Japanese). Available at: <http://www.yuseimineika.go.jp/iinkai/dai88/88gijisidai.html> [accessed on 11 July 2013].

¹⁷³ MIC, *Postal Administration Public Consultations* (in Japanese). Available at: http://www.soumu.go.jp/yusei/soudan_top.html [accessed on 15 July 2013].

¹⁷⁴ The 2005 package of *Postal Privatisation Laws* include: *Postal Privatisation Law* (Act No. 97), *Japan Post Holdings Corporation Law* (Act No. 98), *Japan Post Service Corporation Law* (Act No. 99), and *Japan Post Network Corporation Law* (Act No. 100).

¹⁷⁵ The concept of 'correspondence' in Japan almost parallels that of 'letter' in most developed countries.

¹⁷⁶ Consumer Postal Council, *Index of Postal Freedom – Japan*. Available at: http://www.postalconsumers.org/postal_freedom_index/Japan_Post.shtml [accessed on 12 July 2013].

Under the *Law Concerning Correspondence Delivery by Private-Sector Operators* enacted in April 2003, correspondence-delivery business further falls into two categories: a general correspondence delivery business; and a special correspondence delivery business (PSPPB *Shifting Smoothly*).

The general correspondence category of delivery is the delivery of correspondence items on a nationwide scale: within the length, width, and thickness of 40 cm, 30 cm and three cm; weighing 250 grams or less; and, in principle, to be delivered within three days of being mailed.

The special correspondence category of delivery is the delivery of items: with combined length, width and thickness of 90 cm or more; weighing over four kilograms; to be delivered within three hours of being mailed; and bearing a delivery charge that exceeds the amount specified by the MIC ordinance, which is not less than ¥1000 (PSPPB *Shifting Smoothly*).

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

The MIC is responsible for ensuring JP's compliance with the relevant postal laws. To this end, it may order inspections of and reports from JP as it deems necessary. It also approves JP's management goals, annual business plans, the transfer of important assets, and plans for restructuring.¹⁷⁷

The MIC's role over the course of postal privatisation includes: establishing JP Holdings; establishing and revising laws related to the new corporations; and instructing JP Holdings to prepare the implementation plan that sets forth the transfer of business, assets, employees, and other resources (PSPPB *Shifting Smoothly*).

The MIC is also responsible for supervising correspondence delivery operators and considering measures to promote competition in the postal market (PSPPB *Shifting Smoothly*).

As in telecommunications, study groups are often used by the MIC prior to forming new regulations.¹⁷⁸ Apart from this, it appears to be unusual for there to be public consultation on routine regulatory decisions. The MIC's postal administration bureau provides information and receives suggestions related to postal administration. The postal administration bureau is not, however, responsible for dispute resolution and mediation relating to postal services.¹⁷⁹

Issue 1: Postal Rate-Making

In accordance with the current *Postal Law*, JP Co. can set and change postal rates for first and second class mail by simply notifying MIC in writing.¹⁸⁰ The notice should provide information with regard to: types and rates of mail, period to apply, and how to apply; date of implementation (which should be no earlier than 13 days after the submission of the notice); and reasons for the change in rates (if applicable). The rates should be set to cover the cost (plus a reasonable profit) of an efficient postal operation, and should not be discriminatory to any specific person.¹⁸¹ MIC approvals are still required for discounted third and fourth-class mail.

Issue 2: Universal Service Obligation (USO)

JP Co. is obliged to provide universal postal services for letters and postcards, involving the provision of mail services (for example, six-day mail delivery) on a nationwide basis at a uniform regulated rate for each service. A new fund will be set up for financing the USO and for maintaining the current

¹⁷⁷ J Campbell and A Porges, 'How Much Postal Reform in Japanese Postal Privatisation?', in M Crew and P Kleindorfer (eds) *Handbook of Worldwide Postal Reform*, 2008, p. 378.

¹⁷⁸ MIC, *Completed Study Groups* (in Japanese). Available at: http://www.soumu.go.jp/menu_sosiki/kenkyu/kenkyu_back.html#ken13 [accessed on 15 July 2013].

¹⁷⁹ MIC, *Postal Administration Public Consultations* (in Japanese). Available at: http://www.soumu.go.jp/yusei/soudan_top.html [accessed on 15 July 2013].

¹⁸⁰ *Postal Law* (Ordinance of the MIC No. 5 of 14 January 2003 amended by Ordinance of the MIC No. 2 of 28 November 2008).

¹⁸¹ *Postal Law 1947* (Act No. 165), Article 76.

post-office network for postal and financial services, particularly in rural areas. The source of the fund will primarily be the sale of shares in the JP companies.¹⁸²

Issue 3: Entry to New Business Areas by JP

The PPC is the first body to receive proposals from JP Holdings companies to enter new business areas. Once the PPC gives its approval, it passes its recommendation on to the MIC, which will make its evaluation and recommendations to the HPPP, including the Prime Minister, for final approval. Each of the three bodies needs to give its approval for the proposal to go ahead. By law, the PPC should consider potential damage to the interests of private-sector competitors in the markets that JP enters.¹⁸³

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

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

So far no private-sector operator has applied for a licence to operate in the general correspondence delivery business, since none is large enough to meet the entry requirements.¹⁸⁴ In light of nil entry into the general correspondence delivery business, the MIC set up the Study Group on Reserved Areas and Competition Policies in Postal Market in January 2006 to consider measures to promote competition in postal services. The group issued a report in June 2006. Subsequently, another Study Group was set up to review postal and mail delivery services, taking into account advances in postal reform domestically and internationally (PSPPB Shifting Smoothly).

Issue 5: Competitive Neutrality

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

JP Co. may still enjoy some discriminatory benefits it received as a government agency, including priority treatment in customs processing for international mail under the Customs Law, and exemptions from traffic regulations under the Road Traffic Law (which enable it to pick up mail and parcels where competitors cannot).¹⁸⁵

JP Co. is regulated by the MIC while private-sector parcels and express delivery operators are regulated by the MLIT.¹⁸⁶ As a result, JP may be treated differently from other private operators in some areas. For example entry to mail delivery is subject to permission from the MIC and entry to parcel delivery is subject to approval from the MLIT. The criteria used by the two regulators can differ.

Also JP Co. may be cross-subsidised by the more profitable financial services business in the absence of independent oversight of all JP accounts and of complete structural separation. All the three JP businesses will continue to be jointly owned by JP Holdings indefinitely.

The Japan Fair Trade Commission (JFTC) administers the Antimonopoly Law in Japan, but historically has had little regulatory authority over the postal market. Under the Postal Privatisation

¹⁸² F Mizutani, *Regulatory Reform of Public Utilities: The Japanese Experience*, 2012, pp. 218-219. Available at: <http://www.elgaronline.com/view/9781847203304.xml> [accessed on 8 July 2013].

¹⁸³ R.B. Cohen, 'Policy Challenges and the Privatization of Japan Post', Economic Strategy Institute Research Report, 2006, p. 5.

¹⁸⁴ F Mizutani, *Regulatory Reform of Public Utilities: The Japanese Experience*, 2012, pp. 132-133. Available at: <http://www.elgaronline.com/view/9781847203304.xml> [accessed on 8 July 2013].

¹⁸⁵ Express Association of America, *RE: Docket No. USTR-2011-0018 Japan's Expression of Interest in the Trans-Pacific Partnership (TPP) Trade Negotiations*, 13 January 2012. Available at: <http://www.regulations.gov/#!documentDetail;D=USTR-2011-0018-0114> [Accessed on 9 July 2013].

¹⁸⁶ JFTC, *Issues Concerning the Postal Services and Competition Policy Coinciding with the Enactment of the Law of Postal Privatization of the Postal Services: Countering Anticompetitive Acts Using the Monopoly Area*, p. 3, July 2006. Available at: http://www.iftc.go.jp/en/policy_enforcement/survey/index.files/060721.pdf [Accessed on 9 July 2013].

Act, the JFTC may play a more active role in anti-trust issues as private postal operators can lodge complaints with the JFTC.¹⁸⁷ Anti-competitive cases can also be taken directly to the courts. In September 2004, Yamato brought a lawsuit to Tokyo District Court against JP. The lawsuit alleged that JP's strategic alliance with Lawson convenience stores for in-store mail collection breached the Anti-monopoly Law by unfairly expanding parcel delivery service and predatory pricing. However, the court rejected Yamato's arguments on the basis of inadequate evidence.¹⁸⁸

The JFTC's power is still not comparable to that in other countries in similar privatisation processes.¹⁸⁹ The United States (and other countries), through its dialogue with Japan, has requested that the JFTC play a central role in overseeing the privatisation process. Concerned with the anti-competitive impact of JP's international expansion strategy, they have also pressed Japan to comply with the pro-competitive undertakings for postal services that Japan proposed to the World Trade Organisation.

Regulatory Development

Historically postal services were under ministerial control, and the MIC has had both the senior management role and the role of regulator, including during the course of privatisation. The MIC remains responsible for approving major decisions on postal business, after consulting with the PPC and the HPPP. Despite plans for a 2015 JP Holdings initial public offer: the poor financial performance of JP Co.; years of political indecision; and the opposition of the banking sector, have raised questions about the achievability of JP Holdings's proposed timeline.^{190 191}

4. Water and Wastewater

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

Difficulties arose from uncoordinated water acquisition and wastewater disposal treatment in the 1950s as Japan was rebuilt, leading to problems including difficulties in attaining adequate supplies, deciding allocation among competing claimants, pollution, and flooding. These were addressed by the 1961 *Water Resources Development Promotion Law* establishing the new principle of 'One river system – one administrator' and centralised control of key river basins. The Water Resources Development Basic Plan arrangements were initially administered through the Water Resource Development Public Corporation (WARDEC) eventually applying in seven key valleys, accounting for one-half of Japan's population and economic activity.

The WARDEC was discontinued in 2003, and its functions transferred to the Japan Water Agency (JWA).¹⁹² The JWA is a semi-governmental body under the supervision of five ministries covering environment, economy, and industries. The five ministries that supervise the JWA are:

¹⁸⁷ J Campbell and A Porges, 'How Much Postal Reform in Japanese Postal Privatisation?', in M Crew and P Kleindorfer (eds) *Handbook of Worldwide Postal Reform*, 2008, p. 383.

¹⁸⁸ R.B. Cohen, 'Policy Challenges and the Privatization of Japan Post', Economic Strategy Institute Research Report, 2006, pp. 41-2

¹⁸⁹ Consumer Postal Council, *op. cit.*, p. 4.

¹⁹⁰ Profit Doubt Dogging Bid to List Japan Post', *The Japan Times*, 31 October 2012.

¹⁹¹ Reuters, *Japan Govt Aims to List Japan Post in Three Years*, 26 October 2012.

¹⁹² All information in this sub-section, except where otherwise noted, is from JWA, *Outline of the JWA*. Available at: <http://www.water.go.jp/honsya/honsya/english/02.html> [accessed on 4 July 2013].

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

These ministries reflect the full diversity of interests involved in water and wastewater. The JWA is responsible for securing and supplying domestic, industrial, and irrigation water. It also constructs, operates and maintains water infrastructure such as dams, estuary barrages, facilities for lake and marsh development, and canals. Projects to increase water supply are limited to those that were underway when the WARDEC was transformed into the JWA. Some of these projects, such as the Koishiwara Dam, are yet to be completed.¹⁹³ Within the JWA, the ministry responsible for project implementation varies according to the objective of the project. The MLIT manages personnel and finances. As of April 2011, the JWA had approximately 1 500 staff.

As a result of the 1961 legislation there are four classes of river in Japan:

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

*Process for Permitted Water Rights and Drought Conciliation*¹⁹⁴

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

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

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

- applicant submits application for river water use to the administrator (MLIT if Class A and Prefectural Governor if Class B);
- the river administrator investigates the application;
- the administrator consults with water-related national organisations (for example, the Japan Water Forum, JWF,¹⁹⁵ is an advisory council with members covering a broad range of interests such as industry bodies, the housewives' association, energy interests (hydroelectricity), trade unions and relevant local governments;
- the administrator coordinates the stakeholders in the river basin; and

¹⁹³ JWA, 'Study Report for the Construction of the Koishiwara Dam', 31 October 2012 (in Japanese).

¹⁹⁴ M Nakai, *The Outline of the River Law*, undated. Available at: http://www.narbo.jp/narbo/event/materials/twwa03/tw03_09_01-2.pdf [accessed on 4 July 2013].

¹⁹⁵ Japan Water Forum website. Available at <http://www.waterforum.jp/en/home/pages/index.php> [accessed on 4 July 2013].

- the administrator either issues or does not issue the permit. Where it is issued, the administrator may order compensation for affected stakeholders.

*Municipal Water and Wastewater Operations*¹⁹⁶

The key national institutions are the JWA and the five ministries that oversee it. Oversight of wastewater utilities are the responsibility of the MLIT's Sewerage bureau. Water supply utilities are overseen by the Water Supply Division of the MHLW's Health Bureau. There are several key pieces of legislation: the *River Act*, the *Local Public Enterprise Law*, the *Sewerage Law*, the *Waterworks Law*, the *Land Improvement Law*, and the *Water Resources Development Promotion Law*.

Water and wastewater bodies at the local level are operated on a monopoly basis. About 95 per cent of water and wastewater utilities are owned by municipalities, with the remaining five per cent being owned by prefectural governments or co-operatives.¹⁹⁷ Water and wastewater services are delegated by municipalities to 'autonomous semi-governmental enterprises' headed by an independent commissioner that reports either to the mayor or to the council.

Under the *Sewerage Law* 95 per cent of capital costs for wastewater utilities are covered by the national and prefectural governments. The remaining five per cent is covered by the utility. The government covers the capital costs of wastewater services because of their public-good nature. Under the *Water Supply Law* the national government provides 33 to 50 per cent of the capital costs of water supply infrastructure, with water supply utilities covering the remainder. Water supply and wastewater utilities cover all of their operation and maintenance costs through the tariffs they levy on end-users.¹⁹⁸

As public corporations, water supply and sewerage utilities are subject to audit by the MIC on a yearly basis. The MIC publishes annual benchmarking reports on quality and financial indicators for water utilities on its website each year.¹⁹⁹

Local operators often rely on terminal sewage treatment plants, jointly owned by two or more municipalities.

The Japan Water Works Association (JWWA), formed in 1932, is an association of 1394 local government bodies operating water and wastewater utilities. It engages in lobbying the central government to obtain budget allocations for water supply. The JWWA also engages in research on technical and managerial issues in water supply. The JWWA holds a General Assembly annually.²⁰⁰

The Japan Sewage Works Agency (JSWA) constructs and operates terminal sewage treatment plants based on contracts with municipal governments.²⁰¹ JSWA is fully owned by local governments. However some large manufacturers provide their own treatment plants rather than utilise and pay for municipal facilities.

The process of price setting involves only the water supply utility or the wastewater utility and the municipal council that owns it. The relevant ministries play no part in price determination; they are 'merely informed' of tariff levels.²⁰² The utility submits a financial plan, of between three and five

¹⁹⁶ S Ueda and M Benouahi, 'Accountable Water and Sanitation Governance: Japan's Experience' in *Water in the Arab World: Management Perspectives and Innovations*, (eds. V Jagannathan, A Mohamed, and A Kremer), The World Bank, Washington DC, 2008, pp. 132-135. Available at: http://siteresources.worldbank.org/INTMENA/Resources/Water_Arab_World_full.pdf [accessed on 4 July 2013].

¹⁹⁷ R Marques, S Berg and S Yane, 'Performance Benchmarking Analysis of Japanese Water Utilities', Proceedings Pi2011 Conference, p. 8. Available at: http://warrington.ufl.edu/centers/purc/purcdocs/papers/1107_Marques_Performance_Benchmarking_Analysis.pdf [accessed on 4 July 2013].

¹⁹⁸ World Bank, 'Water Resources Management in Japan: Policy, Institutional, and Legal Issues', April 2006, p. 13. Available at: http://siteresources.worldbank.org/INTEAPREGTOPENVIRONMENT/Resources/WRM_Japan_experience_EN.pdf [accessed on 4 July 2013].

¹⁹⁹ These reports (in Japanese) are available at: http://www.soumu.go.jp/main_sosiki/c-zaisei/kouei_kessan.html [accessed on 4 July 2013].

²⁰⁰ JWWA, *Japan Water Works Association Profile. 2008*, pp. 1-7. Available at: http://www.jwwa.or.jp/jigyoku/kaigai_file/2008JWWAprofile.pdf [accessed on 4 July 2013].

²⁰¹ JSWA website. Available at: <http://www.jswa.jp/en/jswa-en/introduction.html> [accessed on 4 July 2013].

²⁰² S Ueda and M Benouahi, 'Accountable Water and Sanitation Governance: Japan's Experience' in *Water in the Arab World: Management Perspectives and Innovations*, (eds. V Jagannathan, A Mohamed, and A Kremer), The World Bank, Washington

years, to the mayor or the council. Where it is the mayor that receives the plan, once approved by the mayor, the plan is referred to the council. There is some interplay between the utility and the council over the tariff revisions contained in the plan, with the council usually modifying the plan.²⁰³

The Japan Fair Trade Commission (JFTC) has attempted to apply the *Antimonopoly Law* to open the wastewater market to greater competition. From 1992 it has filed several complaints by residents relating to alleged bid rigging by companies providing services to water utilities.²⁰⁴

5. Rail

Railway transport is an important mode of transport in Japan, particularly in intra- and inter-city passenger services where rail ranked second (28.7 per cent of passenger-kilometres travelled) after automobiles (65.6 per cent) in 2010-11.²⁰⁵ Since the opening of the first Japanese railway between Shimbashi (Tokyo) and Yokohama in 1872, the ownership of railway infrastructure in Japan has been a mix of public and private. At present, Japan's railway infrastructure is managed mainly by three groups based on their legal classification:

- Japan Railways Group (JR) consisting of six independent passenger railway companies (three mainland companies: JR East, JR Central, and JR West; three island companies: JR Hokkaido, JR Shikoku, and JR Kyushu) and one freight railway company (JR Freight).
- Private railway companies offering passenger services on railways that are integrated to various degrees into the JR networks. They are generally concentrated in the more lucrative urban markets, with 16 major private companies carrying more passengers than the JRs in the three biggest cities, Tokyo, Osaka, and Nagoya.
- Public railway companies controlled by the national or municipal governments that run subways.²⁰⁶

The six JR passenger companies together carried about 40 per cent of rail passengers and 62.5 per cent in terms of passenger-kilometres travelled in fiscal year 2011-12.²⁰⁷ JR Freight has access to railway tracks owned by the JR passenger companies for freight transportation. Their forerunner, Japan National Railways (JNR), was broken into the seven JR companies in 1987, marking the beginning of the rail liberalisation process.

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

- the companies were jointly held by the government-owned Japanese National Railways Settlement Corporation (JNRSC);
- the three mainland companies were required to pay off 40 per cent of the former JNR's debts;
- the three island companies' operating deficits were financed by the interest income earned in the Management Stabilisation Fund operated by the JNRSC; and

DC, 2008, pp. 132-135. Available at: http://siteresources.worldbank.org/INTMENA/Resources/Water_Arab_World_full.pdf [accessed on 4 July 2013].

²⁰³ This is based on a description of the process by Mr Ikuo Mitake, President of the Japan Water Works Association, in personal communication of 31 August 2008.

²⁰⁴ S Seryo, *Cartel and Bid Rigging*, 30 August 2005. Available at: <http://www.jftc.go.jp/eacpf/05/jicatext2/0830Car.pdf> [accessed on 4 July 2013].

²⁰⁵ Japan East Railway Company, *Annual Report 2011*, p. 62.

²⁰⁶ Railways (including subways other than Osaka Municipal Subway) are regulated by the *Railway Business Act* (Act No. 92 of 1986).

²⁰⁷ Ministry of Land, Infrastructure and Transport (MLIT), *Monthly Statistical Report on Railway Transport*, Table 2-1 Summary of Table: Passengers Carried by Railways and Tramways. Available at: <http://www.mlit.go.jp/k-toukei/60/railway.html> [accessed on 11 July 2013].

- the freight usage fees paid by JP Freight to the passenger companies were based on short-run incremental costs.

Prior to 1 December 2001, all the JR companies were subject to the special *JR Law*, and their business and management were under the supervision of the Ministry of Land, Infrastructure, Transport and Tourism (MLIT). The three mainland JR companies have since been released from the jurisdiction of the special law, but are still subject to guidelines issued by the MLIT in relation to railway operation management. By 2006 they were fully privatised.²⁰⁸ The other companies are still wholly government-owned through the holding company, the Japan Railway Construction, Transport and Technology Agency (JRTT); an independent public corporation regulated by the *Basic Law on Reforming Government Ministries* of 1998.²⁰⁹ The restructuring of the JR companies has been relatively successful and operating costs have decreased in real terms since privatisation.²¹⁰

Historically private railway companies actively pursued business diversification strategies, often entering into property development along their railway lines. In recent years more investment in other non-rail business, such as hospitality, has been made. The JR group generally has limited exposure to non-rail business because its predecessor, the JNR, was prohibited by law from diversifying its business or forming a group.²¹¹ However the JR companies have increasingly pursued diversification strategies. Over the period 1994 to 2012 the proportion of operating revenues that were from non-transportation services increased from four to 32 per cent.²¹²

The Association of Japanese Private Railways (AJPR) is a non-government association for private railway and subway operators.²¹³ It represents the industry in dialogue with the government, unions, and other parties on important rail transportation issues relating to technology, industrial relations, safety management, and others.

Regulatory Institutions and Legislation

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

The *Railway Business Act* (Act No. 92 of 1986) covers regulations concerning the revenues and management of railway operators. The objective of the act is to promote the public interest focussing on economic and safety considerations.²¹⁴ The *Railway Business Act* came into effect on 4 December 1986 and a series of amendments have been made in subsequent years. The *Railway Business Act* applies to all railways, except for JRTT or Japan Expressway Holding and Debt Repayment Agency, that may build railway tracks for other railway operators.²¹⁵ The Act requires a railway business to fall into one of the following categories:

- Type 1 – provides transportation of passengers and/or freight by using its own railway infrastructure.

²⁰⁸ JNRSH, 'Work of JNR Settlement Headquarters (JNRSH)', *Japan Railway & Transport Review*, 10, January 2007, p. 29. Available at: http://www.jrtr.net/jrtr47/f26_Jap.html [accessed on 11 July 2013].

²⁰⁹ The JRTT assumed the responsibilities of its predecessors, the Japan Railway Construction Public Corporation (JRCC) – a public corporation responsible for the construction of railway lines, and the Corporation for Advanced Transport and Technology – a public corporation responsible for Maritime credit and Railway Development Fund (RDF), in 2003. The JRCC took over the assets and liabilities of the JNRSC in 1998.

²¹⁰ F Mizutani, 'The Japanese Experience with Railway Restructuring', *Governance, Regulation, and Privatisation in the Asia-Pacific Region*, *NBER East Asia Seminar on Economics*, 12 January 2004, p. 321. Available at: <http://www.nber.org/chapters/c10195.pdf> [accessed on 11 July 2013].

²¹¹ T Saito, 'Japanese Private Railway Companies and their Business Diversification', *Japan Railway & Transport Review*, 10, January 1997, p. 3. Available at: http://jrtr.net/jrtr10/pdf/f02_sai.pdf [accessed on 11 July 2013].

²¹² Japan East Railway Company, *Annual Report 2012*, p. 102; T. Saito, 'Japanese Private Railway Companies and their Business Diversification', *op. cit.*, p. 5.

²¹³ Association of Japanese Private Railways (AJPR)'s website (in Japanese). Available at: www.mintetsu.or.jp [accessed on 11 July 2013].

²¹⁴ See *Railway Business Act* (Act No. 19 of 2006), Article 1.

²¹⁵ See *Railway Business Act* (Act No. 19 of 2006), Article 59, Item 1.

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

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

Under a policy introduced by the then MLIT in 2000 to encourage municipal governments' investment, the Type 3 Railway Business can be further divided into two sub-categories that may receive subsidies for-profit operators and break-even operators.²¹⁶

The authority of the MLIT may be delegated to the directors of the District Transport Bureaus.²¹⁷ Typically, a District Transport Bureau manages transport matters at the regional level. Its railway section typically contains:

- a planning division: new line planning; improvement of existing lines; stations; railway crossings; and disability access;
- a technical division: approval; inspection; and security measures;
- a safety directive division: reporting investigation findings; and
- a railroad safety audit office: audits regarding railway safety.

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

Entry and Exit – Permission System

An amendment made in 2000 abolished the demand/supply balance restriction on company entry into the railway market. The MLIT is authorised to grant licences specifying the route and the classification of the railway business upon application, and shall examine the application against the following criteria:²¹⁸

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

Specifically, the MLIT permits entry by checking the propriety of the safety and management of the business plans. The entry applications can be rejected for reasons specified in the *Railway Business Law* (Article 6) that show the applicant is incapable of properly conducting the business on its own.

Prior notification of one year to the MLIT is required when the railway company intends to fully or partially cease service. When the railway company intends to suspend the whole or part of the business for no more than one year, it shall notify the MLIT in advance. Under certain circumstances the MLIT may order an operator to suspend its business and revoke its licence.

Fares and Rates – Approval System

The legislation requires a ceiling price permission system, combined with an advanced notification system for price changes below the ceiling price, when setting and changing fares and surcharges (if applicable). All railway companies are required to obtain approval from the regulator, for the ceiling price it may charge passengers. The ceiling price may not be higher than efficient costs plus the

²¹⁶ K Terada, 'Railways in Japan – Public & Private Sectors', *Japan Railway & Transport Review*, 27 June 2001, p. 51. Available at: http://www.irtr.net/jrtr27/s48_ter.html [accessed on 11 July 2013].

²¹⁷ *Railway Business Act*, Article 64.

²¹⁸ *Railway Business Act* (Act No. 19 of 2006), Article 5.

appropriate profits for railway operations. Subject to advance notice to the MLIT, the railway company can change passenger fares within the approved upper limits. While yardstick regulation is used to determine the efficiency of many cost categories for rail operators, it is not immediately clear from the legislation how efficient costs for the remaining cost items are determined.

'Yardstick regulation' was first introduced to the Japanese rail industry in the 1970s to encourage indirect competition among railway operators.²¹⁹ Under this approach, rail operators compete indirectly with each other to enhance their efficiency. The details of the original system are not publicly available.

In its current incarnation the yardstick regressions are carried out on three separate groups: JR rail companies; private rail companies; and subways.²²⁰ The yardstick system applies to five operating expense categories: tracks; catenary; rolling stock; train operation; and station maintenance. When carrying out the regressions to determine the benchmark costs, different factors are controlled for in each of the above categories:

- track costs are controlled for: snowfall; carriage density; and the ratio of tunnels and bridges;
- catenary costs are controlled for: electric train density; the proportion of electric trains; and the ratio of tunnels;
- rolling stock costs are controlled for: snowfall; distance travelled by each carriage; passenger kilometres per carriage; total number of carriages; and passengers per carriage;
- train operation costs are controlled for: passengers per train kilometre; train density; and the ratio of 'one man train' kilometres; and
- station maintenance costs are controlled for: passengers per station and the average distance travelled by passengers.

The factors controlled for in each category vary slightly between the different yardstick groups.

The relative performance of the regulated firms is assessed by the MLIT at the end of each fiscal year and used as the basis for measuring efficient costs in the consideration of the ceiling price. As fares are capped on the basis of efficient costs, an inefficient operator cannot pass on its higher operating costs to consumers in the form of higher fares. Firms that operate at a cost lower than the benchmark are allowed to recoup half the difference between benchmark and actual costs. The information required for the yardstick analysis is collected from the regulated firms and published along with the results of the yardstick analysis. A 2009 study suggests that yardstick regulation has reduced the variable costs of regulated firms by 12.4 per cent (Mizutani *et al*, p. 319).

Not all railway operators are subject to yardstick regulation. Only the JR companies, (15 of the largest privately-owned rail companies, and 10 public subway systems) are included in yardstick reviews (Mizutani *et al*, p. 311).

The MLIT may order a railway company to change specific fares and set a due date, if it has concerns over unjustifiable discrimination against certain passengers or unjust competition.

The MLIT must consult with the Council for Transportation in relation to both orders to change the passenger fares, and changing ceiling prices.²²¹ The Director of the District Transport Bureau within the MLIT is also authorised to summon interested parties to hear their opinions.

Access Regulation

Setting or changing access arrangements with a Type 2 business (such as JP freight) needs approval from the MLIT (Article 15). The access fees paid by JP freight to other JP passenger companies are

²¹⁹ F Mizutani, H Kozumi and N Matsushima 'Does Yardstick Regulation Really Work?', *Journal of Regulatory Economics*, 36, 2009, pp. 308-323, p. 312. Available at: http://www.wu.ac.at/ic/qv/mitarbeiter/gugler/reg_mkm_ire.pdf [accessed on 11 July 2013].

²²⁰ Information in the next three paragraphs is drawn from MLIT, *2011 Benchmark Unit Costs* (in Japanese), p. 9. Available at: <http://www.mlit.go.jp/common/000219676.pdf> [accessed on 11 July 2013].

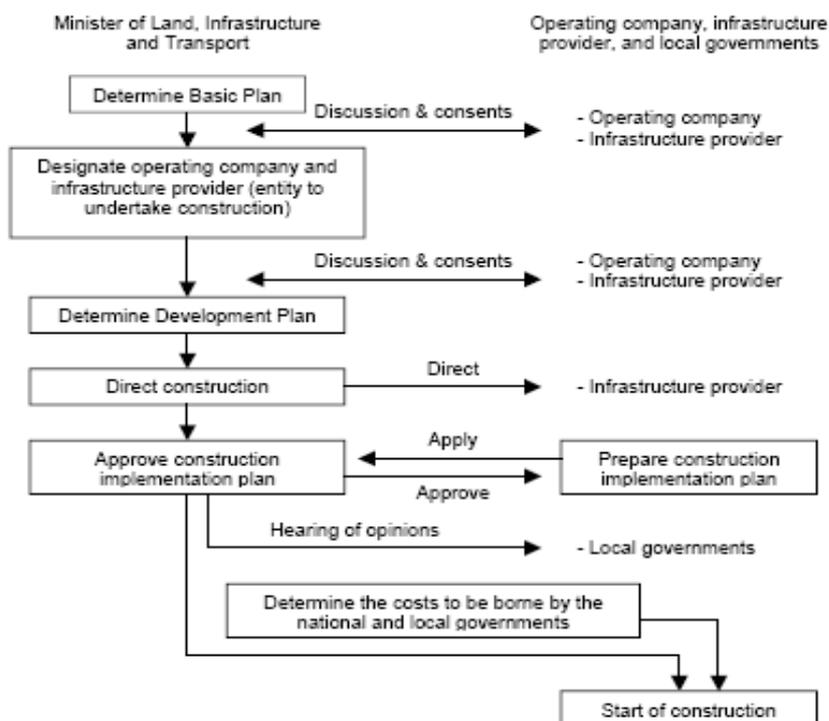
²²¹ *Railway Business Act*, Article 64-2. The MLIT must also consult on an order to suspend business, recession of licence and the formulation of basic policy.

based on the avoidable cost principle. The fees have not changed materially since 1987, and currently cover short-term incremental costs.²²²

Railway Development

Railway development is comprised of two parts: *Shinkansen* (a network of high-speed railway lines) and conventional lines. Under the *Nationwide Shinkansen Railway Development Law* enacted in 1970, the MLIT (on behalf of the national government) is responsible for the *Shinkansen* Basic Plan, Development Plan, and other decisions, and gives permission to start construction of each railway line. The following figure sets out the procedure for authorising new *Shinkansen* lines.

Procedure for Authorising Construction²²³



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

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

The JRJT and the Teito Rapid Transit Authority have used funding from the national government's Fiscal Investment and Loan Program, to promote construction of new rail lines, expansion of existing lines, and subway construction.

Information Disclosure and Confidentiality

The MLIT has the power to obtain business and financial information from the business operator if required for the enforcement of the *Railway Business Act*.²²⁴ It is authorised to conduct on-site

²²² Yoshitaka Fukui, 'Twenty Years After', *Japan Railway & Transport Review*, 49, 2008, p. 10.

²²³ S Gleave, *High-speed Rail: International Comparison*, Final Report prepared for Commission for Integrated Transport, February 2004, Appendix E.

inspections. The MLIT sets the policy on obtaining reports on safety management and on-site inspections.

Regulatory Development

Both national and local governments are involved in the development of the railway network. Economic regulations have been relaxed over time through reduced direct control of the MLIT over rail business operators' entry and pricing decisions. In relation to fare setting, there is limited information about the criteria used for railways that are not subject to yardstick regulation. There is also limited information on aspects of the process used in reaching decisions, including the extent of consultation, for those railways.

6. Airports²²⁵

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

Airports in Japan are classified by the Ministry of Land, Infrastructure, Transport and Tourism (MLIT) into four broad categories according to their main role in air transport: hub airports;²²⁶ regional airports;²²⁷ shared airports;²²⁸ and other airports.²²⁹ Generally hub airports have international connections, regional airports are for domestic flights, shared airports are those built by the Japanese Self Defence Force, and other airports are those that do not fall under the first three categories set out by the *Airport Law*. There are 28 hub airports, 54 regional airports, seven shared airports, and nine other airports.

Hub airports are further split into three categories: company-administered, nationally administered, and special regionally administered. The vast majority of international passenger and cargo traffic traverses through five hub airports: Narita International Airport (60 per cent of international passenger traffic and 70 per cent of freight in Japan); Kansai International Airport; Haneda International Airport (Tokyo's main domestic airport); Chubu Centrair International Airport; and Osaka International Airport. All of these, except Haneda, are classified as company-administered airports.

Hub airports are established under government ownership and are administered either by the central government (through the MLIT) or by private enterprise. Hub airports are usually administered by the MLIT, but some are administered by the Japan Self-Defence Force or prefectural governments.²³⁰ Regional airports are administered by sub-national governments. Airports are designated to the various classes by the Minister (through a Cabinet Order). The MLIT is also responsible for the allocation of rights to: construct, refurbish, and manage hub and regional airports.

Regulatory Institutions and Legislation

The general guiding legislation is the *Airport Law* (AL) (Law No. 80, 20 April 1956, last revised 30 August 2011) with the exception of some airports under special legislation. The AL covers matters concerning the establishment, management, and funding of airports.

Under the AL, development of airports needs approval from the MLIT. The MLIT bears two thirds of construction costs, and prefectural governments bear one third of the costs for the construction of hub airports that fall into the nationally administered category.²³¹ However unlike hub airports, the costs of refurbishment and construction for regional airports are shared equally between the national and

²²⁴ *Railway Business Act*, Articles 55–56-2.

²²⁵ Information on Japan's airports is available from the MLIT English-language website – go to 'Civil Aviation Bureau' at: <http://www.mlit.go.jp/koku/english/index.html> [accessed on 7 May 2013].

²²⁶ *Airport Law*, Article 4, paragraph 1.

²²⁷ *Airport Law*, Article 5, paragraph 1.

²²⁸ *Airport Law*, Article 2, paragraph 1.

²²⁹ MLIT, *List of Airports* (in Japanese). Available at: http://www.mlit.go.jp/koku/15_bf_000310.html. [accessed on 11 July 2013].

²³⁰ ICAO, 'ICAO Case Studies: Japan', 7 July 2011, p. 2.

²³¹ *Airport Law*, Article 6.

prefectural government.²³² The national funds are budgeted, and appropriated, from a Special Airport Development Account set up by the Ministry of Finance. The money from the applicable sub-national government is added to the special account according to the ratio stipulated for each airport in the AL.

The AL does not allow airports to be owned by private companies. Private firms are allowed to operate Hub and regional airports with the permission of the MLIT.²³³ As a result, some exceptional airports were established through special legislation and are currently administered under special laws. The ownership structures of the airports with some private ownership are as follows:

Kansai International Airport was operated by a parastatal corporation (The Kansai International Airport Corporation) and was constructed with private participation. At the time of establishment private corporations owned 12 per cent of the airport corporation's shares. The remaining shares were held by the national government (66 per cent) and the prefectural government (22 per cent).²³⁴ In July 2012, a new parastatal corporation was formed by merging the bodies responsible for the operation of the airfield and terminals at Osaka international airport with the Kansai international airport corporation. The merged entity is called the New Kansai International Airport Corporation.²³⁵ The merger was motivated by a desire to better coordinate air transport in the region and address the Kansai International Airport's debt problems.

- Chubu Centrair International Airport is currently operated by a parastatal corporation in accordance with the *Law Regarding the Establishment and Management of Central Japan International Airport*. Half of the shares in the corporation are held by private investors. The remaining shares are under government ownership: 40 per cent by the national government and ten per cent by the prefectural government.²³⁶ The central government also provides support in capital investment and a loan guarantee.
- New Tokyo International Airport was renamed Narita International Airport on 1 April 2004 in accordance with the *Law for Privatising Narita International Airport Public Corporation*, enacted in 2003 with the intention of a public listing some time from 2009. As of November 2012 no shares in the Narita International Airport Corporation had been sold to private investors. Narita Airport Authority is financed through direct government investment, through the issuance of bonds, and through its own funding.

The MLIT, through its Civil Aviation Bureau and many regional offices, administers hub airports and approves access fees for airports. The Civil Aviation Bureau, headed by its Director-General and Senior Deputy Director-General, is composed of four functional departments: Administration; Aerodrome; Engineering; and Air Traffic Services.²³⁷ Within its Aerodrome Department, there is a designated Narita International Airport Division dealing with matters relating to the establishment, administration, and other affairs of the Narita International Airport Corporation. There is also a designated director supervising Kansai International Airport and Chubu International Airport.

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

Issue 1: Processes in Airport Development

Over the last ten years airport developments were implemented by the MLIT to develop international air transport.²³⁸ Specifically, the MLIT took a number of measures to increase international air transportation capacity, including developing Narita International Airport, internationalising Haneda

²³² *Airport Law*, Article 8.

²³³ *Airport Law*, Articles 22 and 23.

²³⁴ ICAO, 'ICAO Case Studies: Japan', 7 July 2011, p. 2.

²³⁵ Moody's, 'Moody's assigns Aa3 to NKIAC and to land company's debt', 29 June 2012.

²³⁶ ICAO, 'ICAO Case Studies: Japan', 7 July 2011, p. 2.

²³⁷ Civil Aviation Bureau, *Organization and Function*. Available at: http://www.mlit.go.jp/koku/15_hf_000031.html [accessed on 11 July 2013].

²³⁸ MLIT, *Transport White Paper*, 2005.

Airport, and promoting the second phase of construction at Kansai International Airport (a 4000-meters runway). The *Law for Developing Haneda International Airport* enacted in March 2004 specifies the funding scheme for developing the fourth runway in Haneda Airport, including the private finance initiative scheme. The fourth runway began operation in October 2010.²³⁹ Recently the MLIT has been considering constructing dedicated low-cost carrier terminals at the largest hub airports.²⁴⁰

It appears that any capacity expansion requires intensive consultation with local communities, including talks on compensation for land displacement. The Sub-Council for Transport Aviation, within the Transport Policy Council, may be consulted or engaged to study important matters, such as five-year airport development plans.

Issue 2: Access Fees

The level of airport charges (aeronautical revenue per air traffic movement) at Japan's main international airports has been high by international standards, with 2010 charges at Kansai International airport being the third highest of 56 international airports surveyed in a 2011 study, with those at Narita being the sixth highest in the same survey.²⁴¹

Access fees are set by airport administrators and require approval from the MLIT, according to the (*Airport Law* Article 13). Airport administrators are not required to publish the methods used for determining landing fees and the MLIT does not publish information on how it assesses access fee proposals. Passenger handling facility fees are treated in a similar manner except that when examining the fees the MLIT assesses them on the basis that they should not exceed reasonable profits plus appropriate costs (*Airport Law* Article 16). Although in law airport administrators have the ability to set their own landing fees, in practice, with the exception of some of the larger hub airports, landing fees are set at the same level nationally.²⁴²

The International Air Transport Association (IATA) has stated that 'effective and transparent economic regulation is in the interest of everybody', and requested 'prices that reflect efficiency'. Further, the US Government has raised the issue of higher landing fees at major Japanese airports in its bilateral regulatory reform talks with Japan and requested a transparent formula used to calculate landing fees through disclosure and public comment.

Issue 3: Foreign Ownership

An issue arising from the attempted privatisation process is that of foreign ownership. In 2008, the MLIT drew up a bill to cap foreign ownership of airports at 30 per cent after it emerged that Australia's Macquarie Airports Management Ltd. owned nearly 20 per cent of the buildings operator at Tokyo's Haneda Airport. Opponents of the bill, including some Cabinet ministers, feared that ownership restrictions would set back Japan's efforts to attract foreign investment.²⁴³ The Cabinet eventually decided not to adopt the provision limiting foreign ownership.²⁴⁴

Issue 4: Airport Profitability

Despite relatively high landing fees, many airports in Japan are run at a loss by the national and prefectural governments. It is thought that there are two main factors behind this. The first is the Special Airport Development Account. The Second is that airfields and terminals are usually administered separately.²⁴⁵

In Japan, usually the administration of each airport is managed by two separate entities. One body is responsible for the administration of aviation-related services, such as runways and traffic control, and

²³⁹ Flight Global, *Haneda's Fourth Runway Begins Operations*. Available at: <http://www.flightglobal.com/news/articles/hanedas-fourth-runway-begins-operations-348772/> [accessed on 11 July 2013].

²⁴⁰ Yoshiro Taguchi, *Updates on Japan's International Aviation Policy*, 30 June 2011. Available at: http://www.schedule-coordination.jp/archives/arc_icab/pdf/2011/aviation%20policy.pdf [accessed on 11 July 2013].

²⁴¹ Leigh Fisher, *Melbourne Airport Performance and Charges Benchmarking Study*, April 2011: Available at: http://www.pc.gov.au/_data/assets/pdf_file/0017/107801/sub029-attachment1.pdf [accessed on 7 May 2013].

²⁴² ICAO, 'ICAO Case Studies: Japan', 7 July 2011, p. 2.

²⁴³ International Air Transport Association (IATA), *The IATA Chief warns Japan on Airport Privatization*. Available at: <http://afp.google.com/article/ALeqM5iJvuDGMOr0pM7faU2Q6AX5MT7wcv> [accessed on 11 July 2013].

²⁴⁴ 'Airport Bill Drops Foreign Restriction', *The Japan Times*, 8 March 2008.

²⁴⁵ M. Haga, 'The Move Towards Airport Privatisation in Japan', *Infrastructure Journal*, 29 September 2011.

another is responsible for the administration of non-aviation-related services, like parking and shop rental. This has prevented airports from establishing successful business models by cross-subsidising lower landing fees with non-aviation revenue.

The problem is further exacerbated by the Special Airport Development Account being used to fund the maintenance and operation of all airports. This removes the incentives for airport administrators to improve the efficiency of their operations.

At its thirteenth Growth Strategy Council the MLIT outlined a plan to solve this problem through the privatisation of airports. The MLIT intends to sell concessions to the private sector, which would provide the rights to operate airports currently managed by the national and prefectural governments. At this stage the first concessions are planned to be issued from 2014.²⁴⁶

Regulatory Development

The development of airports in Japan has strong central government coordination and funding which presents some obstacles to transparent and consultative processes in decision-making. The airport industry is predominantly government-owned and government-operated, and some require co-ordination between national and subnational governments.

Despite this, over the last two years there has been a growing movement towards the privatisation and rationalisation of airports in Japan.²⁴⁷ The driving force behind this movement has been the poor financial performance of airports under government control. This has led the MLIT to change from its previous strategy of capacity building to industry rationalisation.

7. Ports²⁴⁸

There are over 1000 ports in Japan including the port of Nagoya which is the largest trading port, accounting for about ten per cent of the total trade value of Japan.²⁴⁹ Ports are divided into three categories comprising: 128 'Major Ports' (which have an important bearing on national interest); 23 'Specially Designated Major Ports' (those ports particularly important in promoting foreign trade); and the remainder are 'Local Ports'.²⁵⁰

Regulatory Institutions and Legislation

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

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

²⁴⁶ M Haga, 'The Move Towards Airport Privatisation in Japan', *Infrastructure Journal*, 29 September 2011.

²⁴⁷ *Ibid.*

²⁴⁸ Key references are MLIT, *Ports and Harbours in Japan*. Available at: http://www.mlit.go.jp/english/2006/k_port_and_harbors_bureau/index.html [accessed on 7 May 2013]; and <http://www.mlit.go.jp/kowan/english/index.html> [accessed on 7 May 2013]; and A Olukoju, 'Government and Port Administration in the Aftermath of the Port and Harbour Law of 1950', *Northern Mariner*, 7, 4, October 1997, pp. 65–80.

²⁴⁹ Port of Nagoya, *About the Port*. Available at: http://www.port-of-nagoya.jp/english/about_port.htm [accessed on 21 February 2013].

²⁵⁰ MLIT, *Types and Number of Ports*. Available at: <http://www.mlit.go.jp/english/ports/kowan3.html> [accessed on 21 February 2013].

The accounts of the port management bodies must be kept on a cash-accounting basis, rather than an accrual basis. The accounts must also be kept so as the port management bodies are 'not to turn a profit'.²⁵¹ According to Article 4 of the *Port and Harbour Law*, the 'port authorities are non-profit corporations, as established by public law'.

Fees are charged for services such as the use of wharves; use of mooring; use of warehouses; and the use of cranes. No firm information is available on the process used to set these fees, although it has been stated that fees are 'decided centrally and apply at each port'.²⁵²

The port authorities enter leasing arrangements with private entities, but in Japan there are no private ports *per se*. According to the MLIT:²⁵³

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

Changes to land use must be authorised by the port manager under the supervision of the central government or the prefectural government.

*Regulatory Development*²⁵⁴

The JFTC's Study Group on Government Regulation and Competition Policy has examined competition issues in the areas of coastal shipping, ocean shipping, and harbour transportation.

As in some other areas of infrastructure provision in Japan, there is a strong role for the national government in the funding and operation of ports and harbours.

²⁵¹ MLIT, *Ports and Harbours in Japan*, 2006, p. 29. Available at: http://www.mlit.go.jp/english/2006/k_port_and_harbors_bureau/17_p_and_h/ [accessed on 4 July 2013].

²⁵² Olukoju, *op. cit.*, p. 75.

²⁵³ MLIT, 2006, *op. cit.*, p. 28.

²⁵⁴ This section has had the benefit of input from officials of the JFTC who have kindly responded to questions.

Singapore

OVERVIEW

Singapore has highly-developed infrastructure across all key areas. Economic regulation and enforcement of competition law is the responsibility of individual regulators in energy, telecommunications, posts, water and wastewater, public transport, airports and ports. The competition authority enforces anti-trust law in the remaining areas of the economy. The competition authority may cooperate with regulators when investigating anticompetitive behaviour in regulated areas of the economy.

It is the industry-specific legislation rather than the *Competition Act* that governs the infrastructure areas such as energy, telecommunications, posts and airport services. Objectives of regulators in Singapore often include relying on market forces where possible, and promoting the development of the particular infrastructure area. For example, one of the regulatory principles set out for the telecommunications and postal services regulator is to rely on market forces and to promote facilities-based competition where possible.

The electricity and gas industries are regulated by the Energy Market Authority (EMA), a statutory board under the Ministry of Trade and Industry (MTI). The EMA is responsible for: issuing licences for business to operate in the energy market; setting price and performance standards for energy networks; and promoting the energy industry and industry development.

The Infocomm Development Authority of Singapore (IDA) regulates telecommunications. It is a government statutory board formed in 1999 through the merger of the National Computer Board (NCB) and the Telecommunication Authority of Singapore (TAS). It is responsible for: licensing; issuing code of practices, standards of performance, directions and advisory guidelines relating to telecommunications systems and services; and approving tariffs, as well as price and non-price access conditions.

The IDA also regulates the postal industry pursuant to the *Postal Services Act* (the Postal Act). The mail services market has been liberalised since 2007, and the government-owned postal incumbent is required to provide universal service obligations and to meet quality-of-service standards. As with its role in telecommunications, the IDA is responsible for: licensing of postal services operators; issuing code of practices, performance standards and advisory guidelines. In postal services, the IDA relies on private negotiations and industry self-regulation to ensure the provision of reliable mail services at competitive prices and high quality.

Water and wastewater services are operated and managed by the Public Utilities Board; a government agency. It is responsible for all facets of water supply from water collection, through distribution to wastewater treatment. It has a mission to ensure an efficient, adequate and sustainable supply of water; and it determines water tariffs on the basis of cost recovery.

Singapore's rail networks, Changi airport, and its seaports are operated by government-owned corporations. The Land Transport Authority plans, maintains and regulates rail transport. The Civil Aviation Authority of Singapore regulates airports and civil air traffic. The Maritime and Port Authority regulates and licenses port and marine services and facilities.

Singapore's legal system is derived from English common law. Decisions by economic regulators can often be appealed to the relevant government minister.

GEOGRAPHY, POPULATION, ECONOMY, POLITY AND LEGAL SYSTEM²⁵⁵

Singapore is an island state located in Southeast Asia between Malaysia and Indonesia. It has a land area of 697 square kilometres. The total population in Singapore in 2010 was about five million. At more than 7000 inhabitants per square kilometre, this makes Singapore one of the most densely-populated countries in the world. Singapore's terrain is characterised by lowlands and an undulating central plateau. The climate is tropically hot, humid and rainy. Monsoon seasons are from December to March and between June and September. During other times of the year, Singapore experiences frequent afternoon and early evening thunderstorms.

²⁵⁵ Unless otherwise indicated, information in this section is from Central Intelligence Agency (CIA), *World Factbook: Singapore*. Available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/sn.html> [accessed on 8 July 2013].

Singapore has a highly-developed economy with the fifth-highest level of per capita GDP at purchasing power parity in the world in 2011. In 2011, service-producing industries accounted for 67.6 per cent of Gross Value Added (GVA) and provided employment to about 80 per cent of the labour force. Goods-producing industries accounted for 28.3 per cent of GVA. The economy relies heavily on exports; the major ones being consumer electronics, information technology products, machinery and equipment, refined petroleum products, pharmaceuticals, and financial services. Other major industries include: oil drilling equipment; rubber processing and rubber products; processed food and beverages; ship repairs; offshore platform construction; and *entrepot* trade. Singapore has one of the busiest ports in the world in terms of tonnage handled. It is a focal point for Southeast Asian sea routes. Its natural resources include fish and deepwater harbours.

Singapore imports machinery and equipment, mineral fuels, chemicals, foodstuffs and consumer goods. Major trading partners include Malaysia, Hong Kong, China, Indonesia, the US and Japan.

During the 2009 global financial crisis, Singapore's real GDP contracted by one per cent. The economy grew by 14.8 per cent the following year. GDP growth averaged about six per cent between 2007 and 2011.²⁵⁶ Real GDP grew by 2.1 per cent in 2012. Inflation was 2.8 per cent in 2010, 5.2 per cent in 2011, and 4.4 per cent in 2012. The unemployment rate was about two per cent during this time.

Singapore has well-developed and technologically advanced infrastructure across energy, telecommunications, posts, water and wastewater and transport. This is discussed further in the sections below.

Singapore has a unicameral parliament. Elections were last held in 2011, with the People's Action Party (PAP) obtaining over 60 per cent of votes. The PAP has been Singapore's ruling political party since 1959. Elections are due in May 2016. The basic structure of the political system is provided by the constitution.

The Supreme Court consists of a High Court and a Court of Appeal. Singapore also has Specialist Commercial Courts that consist of the Admiralty Court, the Intellectual Property Court, and the Arbitration Court. The Chief Justice, Judges of Appeal, and judicial commissioners are appointed by the president, with advice from the prime minister. Subordinate courts of Singapore are the Magistrate and District Courts; each with jurisdiction over both civil and criminal matters. Other courts include the Family Court, the Juvenile Court, the Coroner's Court and the Small Claims Tribunal. The legal system is derived from English common law.

APPROACH TO COMPETITION AND REGULATORY INSTITUTIONAL STRUCTURE

The Competition Commission of Singapore (CCS) is Singapore's competition authority. It is responsible for administering and enforcing the *Competition Act 2004*. In addition, each infrastructure area has its own regulator. The electricity and gas industries are regulated by the Energy Market Authority (EMA), a statutory board under the Ministry of Trade and Industry (MTI); the telecommunications and postal industries are regulated by the Infocomm Development Authority of Singapore (IDA); the water and wastewater services are operated and managed by the Public Utilities Board; and Singapore's rail networks, Changi airport, and its seaports are operated by government-owned corporations. The Land Transport Authority plans, maintains and regulates rail transport; the Civil Aviation Authority of Singapore regulates airports and civil air traffic; and the Maritime and Port Authority regulates and licenses port and marine services and facilities.

The CCS is a statutory board under the Ministry of Trade and Industry²⁵⁷ and was established on 1 January 2005. The functions and duties of the CCS are:

- to maintain and enhance efficient market conduct and promote overall productivity, innovation and competitiveness of markets;
- to eliminate or control practices having adverse effect on competition in Singapore;
- to promote and sustain competition in markets in Singapore;

²⁵⁶ Trading Economics, *Singapore: GDP Growth*. Available at: <http://www.tradingeconomics.com/singapore/gdp-growth> [accessed on 3 May 2013].

²⁵⁷ Competition Commission Singapore (CCS), *About CCS*. Available at: <http://www.ccs.gov.sg/content/ccs/en/About-CCS.html> [accessed on 3 May 2013].

- to promote a strong competitive culture and environment throughout the economy in Singapore;
- to act internationally as the national body representative of Singapore in respect of competition matters; and
- to advise the government, or other public authorities, on national needs and policies in respect of competition matters.

The CCS has the power to: investigate anti-competitive activities; adjudicate disputes; impose financial penalties; and require that offenders undertake structural or behavioural remedies.

The CCS only looks after competition matters. It does not cover consumer issues or perform economic regulatory functions. The chairman and other members of the commission are appointed by the Minister for a term between three years and five years, and can be reappointed. Its business is run by the Chief Executive, and is organised into these divisions: Business and Economics; Legal and Enforcement; Strategic Planning; and Corporate Affairs.

The *Competition Act* applies to all undertakings made by natural or legal persons capable of commercial or economic activity, regardless of whether they are foreign-owned, Singapore-owned, or owned by the Government or its statutory boards. However, the Act does not apply to activities, agreements, and conduct of the Government, statutory bodies, or entities acting on their behalf. Further, it does not apply to parts of the economy governed by specific competition legislation. That is, the *Competition Act* does not apply to energy, telecommunications, media, or airport services, as they are regulated areas with their own respective competition legislation and competition codes. Other activities relating to the supply of scheduled bus and rail services, maritime cargo terminal operations, or services of general economic interest, are also excluded under the *Competition Act*.²⁵⁸ These infrastructure areas are administered by other agencies pursuant to separate legislation.

Matters Coming Before the CCS

Businesses may seek guidance from the CCS if they are concerned that an agreement or conduct is likely to infringe the *Competition Act*.²⁵⁹ They may also apply to the CCS for a decision as to whether the agreement or conduct infringes the *Competition Act*.²⁶⁰

With regard to mergers, there is no mandatory requirement for merger parties to notify mergers to the CCS. However, mergers that are anticipated or mergers that have occurred, can be filed with the CCS. Merger parties may apply for a decision by the CCS, in relation to whether the merger has resulted, or may be expected to result, in a substantial lessening of competition.²⁶¹ Merger parties may engage in confidential pre-notification discussions with the CCS in relation to a proposed merger.

With the revision of the Guidelines on Merger Procedures, which came into effect on 1 July 2012, the CCS has introduced a new service: it offers confidential advice to merger parties that wish to keep their merger plans confidential, but wish to get an indication from the CCS as to whether the merger would infringe the *Competition Act*.

Consultation of Interested Parties

The CCS conducts public consultation exercises, where appropriate, to gather feedback from interested parties on new legislation and policies and on amendments to existing legislation and policies. Information on completed and on-going consultation is accessible online.²⁶²

²⁵⁸ Drew Napier LLC, *Your Practical Guide to Merger Control in Singapore*. Available at: http://www.drewnapier.com/DrewASPX/media/assets/Publications/Guide-to-Merger-Control-in-Sg_Drew-Napier.pdf [accessed on 8 July 2013].

²⁵⁹ Competition Commission Singapore (CCS), *About CCS*. Available at: <http://www.ccs.gov.sg/content/ccs/en/About-CCS.html> [accessed on 3 May 2013].

²⁶⁰ Competition Commission Singapore (CCS), *Seeking Guidance and Decision*. Available at: <http://www.ccs.gov.sg/content/ccs/en/Reporting-to-CCS/Seeking-Guidance-and-Decision.html> [accessed on 3 May 2013].

²⁶¹ Drew Napier LLC, *Your Practical Guide to Merger Control in Singapore*. Available at: http://www.drewnapier.com/DrewASPX/media/assets/Publications/Guide-to-Merger-Control-in-Sg_Drew-Napier.pdf [accessed on 3 March 2013].

²⁶² *Ibid.*

Timeliness

There is no indication on the CCS website as to the timeframe for making a decision on complaints or agreements. When applying for guidance or decision, undertakings should ensure that these relate to existing agreements or conduct, as the CCS is unable to accept applications relating to a proposed agreement or conduct that has not been concluded or taken place.²⁶³

Information Disclosure and Confidentiality

The CCS may share non-confidential information with third parties. In general, parties will be asked to identify information that they have provided to CCS which they deem to be confidential to their business, and such requests for confidentiality will be assessed by the CCS. If the CCS rejects the parties' claim for confidentiality, or is of the view that it must share confidential information with third parties, it may require the parties to re-submit a non-confidential version of the application that includes the information.²⁶⁴

Decision-making and Reporting

A decision at a CCS meeting requires a majority of the members to be present and voting. In the case of equality of votes, the chairman or another member presiding at the meeting shall have a casting vote in addition to his original vote. One-half of the total number of members forms a quorum.²⁶⁵

The CCS maintains a public register containing information on decisions, directions and certain notices given by the CCS under the *Competition Act* (Chapter 50B). It also provides a summary of notifications made by undertakings for a decision under section 44 or 51 of the *Competition Act*. The public register is accessible online.²⁶⁶

Appeals

Where the CCS has:

- made a decision as to whether the Act has been infringed;
- provided a direction under the Act;
- made a decision for, or related to, the cancellation of a block exemption; or
- made a decision regarding a commitment;

the parties to the decision may appeal to the Competition Appeal Board (the Board). The Board is an independent specialist tribunal comprised of members with different disciplines and experience appointed by the Minister for Trade and Industry. The Board is able to hear appeals in respect of both points of law and fact. Further appeals may be made to the High Court, and thereafter to the Court of Appeal. Rights of appeal to the High Court and Court of Appeal are limited to points of law and to the quantum of financial penalties.

If a party fails to comply with a direction, for example, to pay a penalty, and it has not brought an appeal within the required time period, the CCS may register the direction with a District Court. The District Court has jurisdiction to enforce any direction and can make any order to secure compliance or require a person to remedy, mitigate or eliminate any effects arising from actions that the person ought or ought not to have done.

Parties suffering loss or damage directly arising from an infringement of any prohibitions under the Act are entitled to commence a civil action against the infringing party seeking relief. Such rights of private action shall only arise after an infringement decision has been found by the CCS, and all appeal mechanisms exhausted.

²⁶³ Competition Commission Singapore (CCS), *Seeking Guidance and Decision*. Available at: <http://www.ccs.gov.sg/content/ccs/en/Reporting-to-CCS/Seeking-Guidance-and-Decision.html> [accessed on 8 July 2013].

²⁶⁴ Drew Napier LLC, *Your Practical Guide to Merger Control in Singapore*. Available at: http://www.drewnapier.com/DrewASPX/media/assets/Publications/Guide-to-Merger-Control-in-Sg_Drew-Napier.pdf [accessed on 3 March 2013].

²⁶⁵ Singapore Statutes Online, *Competition Act 2004, Schedule 1 Constitution and Proceedings of Commission*. Available at: <http://statutes.agc.gov.sg/aol/search/display/view.w3p;ident=2fbd172e-02bc-40f9-958b-c732f3f94ad0;page=0;query=Compld%3Adfea8717-00b2-47f0-8e8f-7a630e163263;rec=0#Sc1-> [accessed on 8 July 2013].

²⁶⁶ Competition Commission Singapore (CCS), *Public Register*. Available at: <http://www.ccs.gov.sg/content/ccs/en/Public-Register-and-Consultation/Public-Register.html> [accessed on 3 May 2013].

In the energy sector, businesses may appeal decisions made by the EMA directly to the Minister for Trade and Industry. For example, this applies to a decision by the EMA to release confidential information provided by the business.²⁶⁷ In other cases, including in relation to a business aggrieved by certain decisions of the EMA, the business may appeal to an Appeal Panel. The composition, procedures and timeframes of the Appeal Panel are determined by the Minister for Trade and Industry.²⁶⁸

In the telecommunications and postal industries, rights to appeal the IDA's decisions are provided in the relevant acts, including the *Telecommunications Act and Postal Act* respectively. An aggrieved licensee can submit its appeal directly to the relevant Minister within 14 days of the issuance of the decision.²⁶⁹

When it concerns airports, rights of appeal are provided by relevant legislation, including the *Airport Competition Code* and the *Civil Aviation Authority of Singapore Act*. Some appeals may be made to the relevant government minister and businesses may have up to 14 days after the decision to appeal to the Minister. In cases that are technically complex, the Minister may establish and consult an Appeals Advisory Panel, comprised of people with specialised knowledge.

REGULATORY ARRANGEMENTS BY INDUSTRY OR SECTOR

1. Energy

Electricity in Singapore is produced mainly from natural gas (about 79 per cent in 2010) imported from Malaysia and Indonesia, and oil and diesel (about 19 per cent). The remainder is produced by renewable sources such as biogas, municipal solid waste and solar.²⁷⁰

Singapore imports all fuel required for energy needs. In 2009, Singapore imported 146.1 million tonnes of oil equivalent (Mtoe) of energy products. Main imports were petroleum products and crude oil and natural gas liquids (NGL).²⁷¹ Singapore is a major oil refining and oil trading hub in the region. In 2009, Singapore exported 84 Mtoe of energy products. Petroleum products accounted for 98.6 per cent, or about 83 Mtoe, of exported energy.²⁷²

In 2009, about 3595 ktoe of electricity was generated within Singapore.²⁷³ Three companies generated the largest share of Singapore's electricity: PowerSeray Ltd (31 per cent); Tuas Power Generation Pte Ltd (27 per cent) and Senoko Energy Pte Ltd (26 per cent). SenbCorp Cogen Pte Ltd generates eight per cent of Singapore's electricity and Keppel Merlimau Cogen Pte Ltd generates five per cent.²⁷⁴

SP PowerAssets Ltd owns and manages Singapore's electricity transmission and distribution systems that combine to transmit electricity from generators to consumers. SP PowerAssets Ltd has

²⁶⁷ Singapore Statutes Online, *The Electricity Act*, s 5. Available at: <http://statutes.agc.gov.sg/aol/search/display/view.w3p;page=0;query=DocId%3A6788a798-cb9f-472e-b6b7-4c0589834e8f%20Depth%3A0%20ValidTime%3A01%2F05%2F2006%20TransactionTime%3A31%2F07%2F2002%20Status%3Ainforce;rec=0;whole=yes#pr5-he-> [accessed on 3 May 2013].

²⁶⁸ Singapore Statutes Online, *The Electricity Act*, s 65. Available at: <http://statutes.agc.gov.sg/aol/search/display/view.w3p;page=0;query=DocId%3A6788a798-cb9f-472e-b6b7-4c0589834e8f%20Depth%3A0%20ValidTime%3A01%2F05%2F2006%20TransactionTime%3A31%2F07%2F2002%20Status%3Ainforce;rec=0;whole=yes#pr5-he-> [accessed on 3 May 2013].

²⁶⁹ The Telecommunications Act, s.69. Available at: <http://statutes.agc.gov.sg/aol/search/display/view.w3p;ident=02a5ed8a-5f24-46f8-b57a-7d9b16bbf3ce;page=0;query=DocId%3Ad8c9baf0-d690-4318-9fbf-6254d27f3b47%20Depth%3A0%20ValidTime%3A01%2F02%2F2012%20TransactionTime%3A21%2F02%2F2012%20Status%3Ainforce;rec=0#pr69-he-> [accessed on 21 May 2013].

²⁷⁰ Energy Market Authority, *Energising Our Nation: Singapore Energy Statistics 2011*, p. 14. Available at: <http://www.ema.gov.sg/media/files/publications/SES2011.pdf>, [accessed on 3 May 2013].

²⁷¹ *Energising our Nation: Singapore Energy Statistics 2011*, op. cit.

²⁷² *Energising our Nation: Singapore Energy Statistics 2011*, op. cit.

²⁷³ *Energising our Nation: Singapore Energy Statistics 2011*, op. cit., p. 5.

²⁷⁴ Energy Market Authority, *Annual Report 2010/2011*, p. 19. Available at: http://www.ema.gov.sg/media/files/annual_reports/EMA_Annual_Report_2011.pdf [accessed on 3 May 2013].

appointed SP PowerGrid Ltd as an agent to manage and operate the transmission and distribution businesses. SP PowerGrid Ltd is licensed by the Energy Market Authority (EMA).²⁷⁵

SP PowerAssets is subject to price regulation.²⁷⁶ The EMA has also set performance standards for SP PowerAssets in relation to: availability of supply; quality of supply; providing supply; customer contact; and metering services.²⁷⁷

Six companies operate in the electricity retail market: SP Services Ltd (with 35.5 per cent of market share in 2010); Seraya Energy Pte Ltd (19.1 per cent); Senoko Energy Supply Pte Ltd (15.6 per cent); Tuas Power Supply Pte Ltd (12.8 per cent); Keppel Electric Pte Ltd (9.5 per cent) and SemCorp Power Pte Ltd (7.5 per cent).

Singapore has two separate gas-pipeline networks – the town gas pipeline network and the natural gas pipeline network. The town gas pipeline network serves about 50 per cent of households and is used to provide gas for cooking and water heating to domestic and commercial customers. Town gas is manufactured and retailed by City Gas Pte Ltd.

Natural gas is imported from Malaysia and Indonesia using offshore pipelines.²⁷⁸ PowerGas Ltd owns the gas pipeline network. It does not participate in the gas import or retail markets.²⁷⁹ That is, gas transport businesses are separate from contestable markets, such as gas importation, shipping and retailing. Gas importers must have a valid licence issued by the EMA to import gas.²⁸⁰

Singapore is developing a liquefied natural gas (LNG) terminal to import LNG. The objective is to diversify Singapore's energy sources.²⁸¹ To encourage the use of LNG, controls on imported natural gas have been announced. The LNG terminal will process up to 3.5 million tonnes of LNG annually. It is expected to be operational in 2013.

The liberalisation of Singapore's electricity retail market is being implemented in three phases. The first two phases of retail competition involved the introduction of retail contestability to large industrial and commercial consumers, whose total consumption accounts for about 75 per cent of total electricity sales. In 2001, the EMA was established to focus on liberalising the electricity and gas markets, and to ensure security of the power system. Singapore Power Ltd's electricity generation business was divested. In 2002, PowerGas Ltd's gas import and retail business assets were divested.

The National Electricity Market of Singapore (NEMS) commenced operation in 2003. Ten thousand large non-residential consumers were able to select their retail electricity supplier. During this time, gas began to be imported from Indonesia. In 2004, vesting contracts were introduced to curb market power of the dominant suppliers. Vesting contracts are bilateral financial contracts imposed (vested) on certain market participants prior to the commencement of the market. The contract price (or strike price) is set at about the economic cost (long-run marginal cost) of a new-entry generator. The same strike price applies to all generators.²⁸² In 2006, large consumers comprising business and industries, which form 75 per cent of Singapore's total electricity demand, became contestable. In 2008, competition was introduced to the gas market.²⁸³

²⁷⁵ Energy Market Authority, *Transmission Company/ Transmission Agent*. Available at: <http://www.ema.gov.sg/page/13/id:37/> [accessed on 3 May 2013].

²⁷⁶ Energy Market Authority, *Introduction to the National Electricity Market of Singapore*, pp. 2-3. Available at: http://www.ema.gov.sg/media/files/books/intro_to_nems/Introduction%20to%20the%20NEMS_Jul%2009.pdf [accessed on 3 May 2013].

²⁷⁷ Energy Market Authority, *Transmission Company/ Transmission Agent*. Available at: <http://www.ema.gov.sg/page/13/id:37/> [accessed on 3 May 2013].

²⁷⁸ Energy Market Authority, *Singapore Gas Authority*. Available at: <http://www.ema.gov.sg/page/114/id:48/> [accessed on 3 May 2013].

²⁷⁹ *Ibid.*

²⁸⁰ Energy Market Authority, *Gas Importers*. Available at: <http://www.ema.gov.sg/page/27/id:56/> [accessed on 3 May 2013].

²⁸¹ Energy Market Authority, *Get Ready for an LNG-fuelled Future*. Available at: <http://www.ema.gov.sg/news/newsletters/2012/04/spotlight-LNG.html> [accessed on 30 May 2013].

²⁸² Energy Market Authority, *Introduction to the National Electricity Market of Singapore*, pp. 2-3. Available at: http://www.ema.gov.sg/media/files/books/intro_to_nems/Introduction%20to%20the%20NEMS_Jul%2009.pdf [accessed on 3 May 2013].

²⁸³ Energy Market Authority, *Milestones*. Available at: <http://www.ema.gov.sg/page/43/id:99/> [accessed on 3 May 2013].

Retail contestability will eventually be introduced to the remaining domestic and small non-domestic consumers (with average consumption less than 10000 kwh per month) under the third phase of retail liberalisation. The number of consumers in the third phase is about one million, but in terms of electricity sales, they represent only about 25 per cent of total sales. The third phase of the retail market liberalisation is currently under study.²⁸⁴

Regulatory Institutions and Legislation

The electricity and gas industries are regulated by the Energy Market Authority (EMA). The EMA is a statutory board under the Ministry of Trade and Industry (MTI). The EMA's Board consists of nine members and a Chairman and meets every two months. The Chief Executive Officer's position is full-time. The board members' positions are part-time and members hold other positions in the government or private sector. For example, the current chairman is from the Ministry of Education. Current members are from companies such as PricewaterhouseCoopers Singapore, Nanyang Technological University and Singapore Exchange Limited. The EMA is made up of the Chief Executive's Office; the Corporate Services Group; Energy Planning and Development Division; the Power System Operation Division; and Regulation Division.

The EMA's powers, in relation to the electricity network, are set out in *The Electricity Act* and the *Energy Market Authority of Singapore Act*. In relation to the gas market, the principal legislation is *The Gas Act* and the *Energy Market Authority of Singapore Act*.²⁸⁵ In addition, the rights and obligations of the participants in the wholesale and retail energy markets are set out in the wholesale market rules and in the licences and codes of practice issued by the EMA.²⁸⁶

The EMA's main goals include:

- Ensuring a reliable and secure energy supply. The EMA operates the power system and promotes the safe use of electricity and gas to ensure that the supply of energy is reliable and secure.
- Promoting effective competition in the energy market. The EMA develops the regulatory framework that encourages investment and is designed to prevent the exercise of market power.
- Developing a dynamic energy sector in Singapore. The EMA promotes the energy industry and industry development, including promoting the development of gas and LNG terminals to ensure Singapore is a gas/LNG trading hub and promotes the efficient use of energy.²⁸⁷

The regulatory framework provides conditions for businesses to operate in the energy market. For example, in relation to electricity, licences are needed for: the operation of any wholesale electricity market; generation of electricity; transmission of electricity; provision of market-support services; retailing electricity; trading in the wholesale electricity market; and importing or exporting electricity.²⁸⁸

The Gas Act provides tradable capacity rights within the transmission network and an open, non-discriminatory access regime to allow use of the gas pipeline network. The Gas Network Code provides the access regime to the onshore gas pipeline network. However, regulations do not compel a pipeline owner to expand capacity to accommodate new customers. Other relevant legislation includes the Metering Code, the Retailer Code of Conduct and the Gas Supply Code.

The market rules have the effect of a contract between each business and the EMA.²⁸⁹

²⁸⁴ Energy Market Authority, *Frequently Asked Questions: Top Ten Most Popular FAQs*. Available at: http://www.ifaq.gov.sg/ema/apps/fcd_faqmain.aspx [accessed on 3 May 2013].

²⁸⁵ Energy Market Authority, *Gas Legislation and Regulations*. Available at: <http://www.ema.gov.sg/page/100/id:137/> [accessed on 3 May 2013].

²⁸⁶ Energy Market Authority, *Introduction to the National Electricity Market of Singapore*, s. 5.1.1. Available at: http://www.ema.gov.sg/media/files/books/intro_to_nems/Introduction%20to%20the%20NEMS_Jul%2009.pdf [accessed on 3 May 2013].

²⁸⁷ Energy Market Authority, *Energising our Nation: Singapore Energy Statistics 2011*. Available at: <http://www.ema.gov.sg/media/files/publications/SES2011.pdf> [accessed on 3 May 2013].

²⁸⁸ Energy Market Authority, *Introduction to the National Electricity Market of Singapore*, s. 5.3.1. Available at: http://www.ema.gov.sg/media/files/books/intro_to_nems/Introduction%20to%20the%20NEMS_Jul%2009.pdf [accessed on 3 May 2013].

²⁸⁹ Singapore Statutes Online, *The Electricity Act*, s 49. Available at: <http://statutes.agc.gov.sg/aol/search/display/view.w3p;page=0;query=DoctId%3A6788a798-cb9f-472e-b6b7->

Consultation of Interested Parties

The process of determining electricity tariffs includes two key components to the cost of electricity in Singapore: the fuel cost and the non-fuel cost. The fuel cost, which includes the cost of imported natural gas, is pegged to the price of fuel oil. The non-fuel cost reflects the cost of generating and delivering electricity to homes. It has remained largely unchanged over the past few years.²⁹⁰ The electricity tariff is regulated by EMA and revised quarterly, mainly to reflect changes in the fuel cost.

The fuel cost in the electricity tariff is pegged to the prices of fuel oil, based on the average forward high sulphur fuel oil (HSFO) price over three months. While Singapore's electricity is mainly generated from natural gas, the prices of natural gas in commercial gas contracts of the generation companies in Singapore are indexed to fuel oil prices, similar to market practice in Asia for natural gas contracts. Hence, the electricity tariff moves closely in line with the HSFO forward price.²⁹¹

In the NEMS, rule changes can be initiated by any interested party and are subject to approval by the EMA. Much of the rule-change process is led by the rule-change panel appointed by the EMA Board. The composition of the rule-change panel, the transparency of the process and the need for final EMA approval are designed to provide assurance that the rule-change process will not prejudice the operation of the market or unduly affect the interests of any particular participant or class of participants.²⁹²

The EMA regulates gas transportation charges under the gas transporter licence. This includes regulation of average revenues from gas distribution and from gas transmission. The charges are determined by formulae that are reviewed each regulatory period. Revenue for gas transportation may include:

- a rate of return on fixed investment, allowing for depreciation;
- projected operation, maintenance and administration expenses;
- tax payments; and
- expenses that promote productivity improvements.

Timeliness

The Energy Market Authority of Singapore Act, which stipulates the manner in which decisions are to be made by the EMA, does not give an indication of the timeframe in which the decision must be made.

Information Disclosure and Confidentiality

The EMA has broad information collection powers when carrying out its functions or duties. For example, under the *Electricity Act*, it is an offence not to provide certain documents or information to the EMA upon request. Further, the *Electricity Act* provides the EMA with powers to enter premises and seize certain documents or information. The EMA may also apply to the court to make an order to acquire information.²⁹³

In relation to information that regulated businesses regard as confidential, the EMA shall not disclose that information unless it is satisfied that:

[4c0589834e8f%20Depth%3A0%20ValidTime%3A01%2F05%2F2006%20TransactionTime%3A31%2F07%2F2002%20Status%3Ainforce;rec=0;whole=yes#pr5-he-](http://www.ema.gov.sg/ema/apps/fcd_faqlist.aspx) [accessed on 3 May 2013].

²⁹⁰ Energy Market Authority, *Frequently Asked Questions: Top Ten Most Popular FAQs*. Available at: http://www.ifaq.gov.sg/ema/apps/fcd_faqlist.aspx [accessed on 3 May 2013].

²⁹¹ Energy Market Authority, *Energising our Nation: Singapore Energy Statistics 2011*. Available at: <http://www.ema.gov.sg/media/files/publications/SES2011.pdf> [accessed on 3 May 2013].

²⁹² Energy Market Authority, *Introduction to the National Electricity Market of Singapore*, s. 7.3. Available at: http://www.ema.gov.sg/media/files/books/intro_to_nems/Introduction%20to%20the%20NEMS_Jul%2009.pdf [accessed on 3 May 2013].

²⁹³ Singapore Statutes Online, *The Electricity Act*, s 4. Available at: <http://statutes.agc.gov.sg/aol/search/display/view.w3p;page=0;query=DocId%3A6788a798-cb9f-472e-b6b7-4c0589834e8f%20Depth%3A0%20ValidTime%3A01%2F05%2F2006%20TransactionTime%3A31%2F07%2F2002%20Status%3Ainforce;rec=0;whole=yes#pr5-he-> [accessed on 3 May 2013]. See also Singapore Statutes Online, *The Gas Act*, s 5. Available at: <http://statutes.agc.gov.sg/aol/search/display/view.w3p;page=0;query=Compld%3Af0cd285d-5597-41f6-ada1-90e338708cb0;rec=0> [accessed on 3 May 2013].

- disclosure would not cause detriment to the supplier of the information;
- in the EMA's opinion, the public benefit outweighs the detriment; and
- the EMA writes to the business, stating that it wishes to disclose the information and the business does not appeal to the Minister.²⁹⁴

Decision-making and Reporting

A quorum is required at every meeting of the EMA. A quorum requires the presence of one-third of the total number of members, or three members, whichever is the higher.

A decision at a meeting of the EMA is adopted by a simple majority of the members present and voting. The Chairman of the meeting has a casting vote.²⁹⁵

Decisions about licences require approval from the Board and the Minister. Pricing decisions require Board approval only.

Appeals

Methods for appeal must be lodged within the times prescribed in the relevant acts. In some cases, business may appeal decisions made by the EMA directly to the Minister for Trade and Industry. For example, this applies to a decision by the EMA to release confidential information provided by the business.²⁹⁶ In other cases, including in relation to a business aggrieved by certain decisions of the EMA, the business may appeal to an Appeal Panel. The composition, procedures and timeframes of the Appeal Panel are determined by the Minister for Trade and Industry.²⁹⁷ In the last ten years, few decisions have been appealed.

Appeal rights to courts are limited by legislation. For example, the *Electricity Law* restricts appeals to a court in relation to issues of fact, but not in relation to matters of law and jurisdiction.²⁹⁸

2. Telecommunications

Singapore has advanced telecommunications networks that include fixed-line and mobile telecommunications. For the past five years, Singapore has been ranked in the top five countries in the world for the 'Networked Readiness' of its information and communications technologies, in the World Economic Forum's Global Information Technology Report.²⁹⁹ In the 2011 Global Information Technology report, Singapore was identified as the country with the most conducive political and regulatory environment for information and communications in the world.³⁰⁰

²⁹⁴ Singapore Statutes Online, *The Electricity Act*, s 5. Available at:

<http://statutes.agc.gov.sg/aol/search/display/view.w3p;page=0;query=DocId%3A6788a798-cb9f-472e-b6b7-4c0589834e8f%20Depth%3A0%20ValidTime%3A01%2F05%2F2006%20TransactionTime%3A31%2F07%2F2002%20Status%3Ainforce;rec=0;whole=yes#pr5-he-> [accessed on 3 May 2013]. See also Singapore Statutes Online, *The Gas Act*, s. 5. Available at: <http://statutes.agc.gov.sg/aol/search/display/view.w3p;page=0;query=Compld%3A0cd285d-5597-41f6-ada1-90e338708cb0;rec=0> [accessed on 3 May 2013].

²⁹⁵ Singapore Statutes Online, *The Energy Market Authority of Singapore Act, First Schedule*. Available at:

<http://statutes.agc.gov.sg/aol/search/display/view.w3p;page=0;query=DocId%3Ae5810b4a-404c-4ea0-ae9b-32829652c051%20Depth%3A0%20ValidTime%3A01%2F03%2F2012%20TransactionTime%3A31%2F07%2F2002%20Status%3Ainforce;rec=0;whole=yes> [accessed on 3 May 2013].

²⁹⁶ Singapore Statutes Online, *The Electricity Act*, s 5. Available at:

<http://statutes.agc.gov.sg/aol/search/display/view.w3p;page=0;query=DocId%3A6788a798-cb9f-472e-b6b7-4c0589834e8f%20Depth%3A0%20ValidTime%3A01%2F05%2F2006%20TransactionTime%3A31%2F07%2F2002%20Status%3Ainforce;rec=0;whole=yes#pr5-he-> [accessed on 3 May 2013].

²⁹⁷ Singapore Statutes Online, *The Electricity Act*, s 65. Available at:

<http://statutes.agc.gov.sg/aol/search/display/view.w3p;page=0;query=DocId%3A6788a798-cb9f-472e-b6b7-4c0589834e8f%20Depth%3A0%20ValidTime%3A01%2F05%2F2006%20TransactionTime%3A31%2F07%2F2002%20Status%3Ainforce;rec=0;whole=yes#pr5-he-> [accessed on 3 May 2013].

²⁹⁸ Singapore Statutes Online, *The Electricity Act*, s 48. Available at:

<http://statutes.agc.gov.sg/aol/search/display/view.w3p;page=0;query=DocId%3A6788a798-cb9f-472e-b6b7-4c0589834e8f%20Depth%3A0%20ValidTime%3A01%2F05%2F2006%20TransactionTime%3A31%2F07%2F2002%20Status%3Ainforce;rec=0;whole=yes#pr5-he-> [accessed on 3 May 2013].

²⁹⁹ INSEAD, *The Global Information Technology Report 2010-2011 Transformation 2.0*, p. 272. Available at: http://www3.weforum.org/docs/WEF_GITR_Report_2011.pdf [accessed on 3 May 2013].

³⁰⁰ INSEAD, *The Global Information Technology Report 2010-2011 Transformation 2.0*, p. 11. Available at: http://www3.weforum.org/docs/WEF_GITR_Report_2011.pdf [accessed on 3 May 2013].

Penetration of fixed-lines and mobile telecommunications is high, measured at 200 handsets per 100 persons in 2009.³⁰¹ By 2012, the mobile telecommunications penetration rate alone was above 151 per 100 people. Wireless broadband penetration was above 160 per cent.³⁰²

Wired broadband has 1.364 million subscribers; with cable providing 47 per cent, DSL providing 32 per cent and fibre providing 20 per cent.

An island-wide deployment of a high-speed fiber-optic broadband network by both government and private-sector providers is nearing completion, having achieved more than 86 per cent nationwide deployment by the end of January 2012.³⁰³ Total broadband subscriptions reached 10 194 800 by the end of December 2012.³⁰⁴

The main suppliers in the fixed-network and broadband markets in Singapore are Singapore Telecommunications Limited (SingTel), Mobile One and StarHub. In relation to the market for post-paid mobile operations, SingTel had 47 per cent market share, StarHub had 28 per cent and Mobile One had about 26 per cent.³⁰⁵

Regulatory Institutions and Legislation

The Infocomm Development Authority of Singapore (IDA) regulates telecommunications. The IDA is a government statutory board formed in 1999 through the merger of the National Computer Board (NCB) and Telecommunication Authority of Singapore (TAS). The IDA consists of: the Competition and Enabling Infrastructure Development Wing (which includes the Policy & Competition Development group, and the Infrastructure & Services Development; the Government Chief Information Office Wing); the Corporate Services Group; and the Industry Development Group.

The IDA consists of a chairman and no less than two and no more than 16 members appointed by the minister for a term not exceeding three years. The IDA members can be reappointed and the business of the IDA is run by the Chief Executive.³⁰⁶

The IDA is responsible for the planning, managing and implementing of information and communications systems for the government. It oversees information technology standards, policies, guidelines and procedures for the government, and manages the security of critical information and communications infrastructure.

The IDA is established pursuant to the *Info-communications Development Authority of Singapore Act* (Cap. 137A) (the Act). The Act sets out the basic framework of the IDA's powers, including the creation of the IDA's constitution, functions and duties, staff, finances and assets.³⁰⁷

Licensing of the telecommunications systems and the grant of spectrum rights is made pursuant to the *Telecommunications Act* (Cap 323). The *Telecommunications Act* also provides for:

- erection, maintenance and repair of telecommunications installations;
- the IDA's powers to issue codes of practice, standards of performance, directions and advisory guidelines relating to telecommunications systems and services;

³⁰¹ Central Intelligence Agency (CIA), *World Factbook: Singapore*. Available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/sn.html>. [accessed on 3 May 2013].

³⁰² Infocomm Development Authority of Singapore (IDA), *Statistics on Telecom Services for 2012 (Jan-Jun)*. Available at: <http://www.ida.gov.sg/Infocomm-Landscape/Facts-and-Figures/Telecommunications/Statistics-on-Telecom-Services/Statistics-on-Telecom-Services-for-2012-Jan-Jun> [accessed on 3 May 2013].

³⁰³ Central Intelligence Agency (CIA), *World Factbook: Singapore*. Available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/sn.html>. [accessed on 3 May 2013].

³⁰⁴ Infocomm Development Authority of Singapore (IDA), *Statistics on Telecom Services for 2012 (Jul-Dec)*. Available at: <http://www.ida.gov.sg/Infocomm-Landscape/Facts-and-Figures/Telecommunications/Statistics-on-Telecom-Services/Statistics-on-Telecom-Services-for-2012-Jul-Dec.aspx> [accessed on 3 May 2013].

³⁰⁵ OCBC Research, *Telecom Overweight*. Available at: http://www.ocbcresearch.com/pdf_reports/company/Telecoms-120302-OIR.pdf. [accessed on 3 May 2013].

³⁰⁶ Singapore Statutes Online, *Info-communications Development Authority of Singapore Act, Part II & Schedule 1*. Available at: <http://statutes.agc.gov.sg/aol/search/display/view.w3p;page=0;query=Compld%3A82c08b53-df89-4d14-8bb8-9c9f10d949f5;rec=0> [accessed on 3 May 2013].

³⁰⁷ *IDA Acts and Regulations*. Available at: <http://www.ida.gov.sg/Policies-and-Regulations/Acts-and-Regulations> [accessed on 21 May 2013].

- telecommunications cable detection work;
- ownership and management controls over designated telecommunications licensees; and
- offences and penalties relating to telecommunications systems and services.

The IDA's regulatory principles include:³⁰⁸

- relying on market forces and promoting facilities-based competition where possible;
- employing proportionate regulation;
- technology-neutrality; and
- providing a transparent and reasoned decision-making process.

The IDA's objectives under its ten-year master plan include:

- establishing an ultra-high speed, pervasive, intelligent and trusted infocomm infrastructure;
- developing a globally competitive infocomm industry;
- developing an infocomm-savvy workforce and globally competitive infocomm manpower; and
- spearheading the transformation of key economic sectors, government and society through more sophisticated and innovative use of infocomm.³⁰⁹

Consultation of Interested Parties

The IDA may conduct public consultations to provide interested parties with an opportunity to comment on a proceeding. In the alternative, the IDA may request comments from interested parties. The IDA is not obligated to consider unsolicited comments (s. 11.8).

The *Telecom Competition Code 2012* (Code) establishes the general duties of all licensees, such as: the duty to disclose prices; terms and conditions; the duty to comply with any applicable minimum quality of service standards issued by IDA; and the duty to prevent unauthorised use of end-user service information (Code s.3). Dominant Licensees are subject to a number of special provisions in the Code. For example, Dominant Licensees must submit proposed retail and wholesale tariffs for *ex ante* approval by the IDA (that is, prior to the intended effective date). Permission is also required before Dominant Licensees withdraw a service (Code s. 4.4). Licensees are classified as dominant if they operate in markets with significant barriers to entry by competitors or have Significant Market Power more broadly (Code s.2.2).

Proposed tariffs must be 'just and reasonable' and non-discriminatory. The IDA will consider factors including: the prices of similar services in other countries; the average incremental cost of providing the service, and; prices for comparable services offered by competitors (Code s.4.4). In relation to wholesale tariffs, the IDA will determine whether the proposed prices and terms and conditions are 'not less favourable' than those offered by the Dominant Licensee directly to retail customers.

In relation to non-price access issues such as requests for new connections to the network, the IDA does not rely solely on market forces. The Code provides that all licensees have a duty to interconnect with other licensees, either directly or indirectly (Code s.5). The Code further provides that a licensee may obtain an Interconnection Agreement with a Dominant Licensee on terms provided by a Reference Interconnection Offer, or on terms that have been offered by Dominant Licensees to competitors. Reference Interconnection Offers have been previously prepared by a Dominant Licensee and approved by the IDA (Code s.6.2). In the alternative, an Interconnection Agreement may be sought through a dispute resolution process provided by the Code.

³⁰⁸ IDA, *Policies and Regulations – Overview*. Available at: <http://www.ida.gov.sg/Policies-and-Regulations/Overview> [accessed on 21 May 2013].

³⁰⁹ IDA, *Realising the iN2015 Vision*. Available at: http://www.ida.gov.sg/images/content/About%20us/About_Us_level1/iN2015/pdf/realisingthevisionin2015.pdf. [accessed on 21 May 2013]. In May 2005, a high-level steering committee developed a ten-year plan aimed at promoting the infocomm sector and to use infocomm technologies to enhance the competitiveness of key economic sectors and build a well-connected society.

Timeliness

The *Info-Communications Development Authority of Singapore Act*, which stipulates the decision-making process to be taken by the IDA, does not designate a time limit during which decisions should be made. A review of the last ten decisions indicates that decisions can be made within one month or take up to eight months.³¹⁰

Information Disclosure and Confidentiality

The IDA has broad information-gathering powers. The IDA can require regulated companies to supply information or documents (11.6). The IDA has the power to interview key staff members and to inspect accounts, documents, records, facilities and operations of regulated businesses.

A party submitting information to the IDA may request that the information is treated confidentially. The IDA will consider requests on a case-by-case basis. The party must demonstrate that the information is commercially sensitive or that the disclosure of the information will have a materially adverse impact on the business (Code s.11.7). That is, information is considered commercially sensitive if there is a reasonable possibility that disclosure may cause harm to the party, or provide a commercial benefit to competitors. For example, the Code provides that commercially sensitive information may include information that describes business procedures, practices, plans or an assessment of market conditions.

Decision-making and Reporting

A decision at the IDA meeting requires a majority of the members present and voting. In the case of equality of votes, the member presiding at the meeting shall have a casting vote in addition to his original vote. At each meeting, one-half of the number of members forms a quorum.³¹¹ The IDA will generally make its decisions available to the public, and will provide an explanation for its actions. Enforcement action taken pursuant by the IDA will generally be made public. Decisions will be published on the IDA's website if feasible and appropriate.

Appeals

Rights of appeal are provided in the relevant acts, including the *Telecommunications Act*, where an aggrieved licensee can submit its appeal directly to the relevant Minister within 14 days of the issuance of the decision.³¹²

3. Postal Services³¹³

Singapore Post Ltd (SingPost) is the incumbent provider of postal services. The liberalisation of Singapore's postal market began in 2007. The Government announced an end to SingPost's monopoly in basic mail services. In 1982, the Postal Services Department merged with the Telecommunication Authority of Singapore. In 1992, the Telecommunication Authority of Singapore was reorganised into three entities: a reconstituted Telecommunication Authority of Singapore (TAS); Singapore Telecommunications Private Limited (now Singapore Telecommunications Limited); and SingPost. The TAS is now part of the Info-communications Development Authority. Singapore Post Limited was listed on the mainboard of the Singapore Exchange on 13 May 2003. The mail services market was liberalised on 1 April 2007. SingPost remains the designated public postal licensee and performs universal service obligations.³¹⁴ Despite a decline in structural mail volume, SingPost steadily increased its revenue from S\$472.6 million (in Singapore dollars) in 2007-08 to S\$578.5

³¹⁰ IDA, *Completed Consultations and Decisions*. Available at: <http://www.ida.gov.sg/Policies-and-Regulations/Consultation-Papers-and-Decisions/Completed> [accessed on 8 July 2013].

³¹¹ Singapore Attorney General's Chamber's, *Info-communications Development Authority of Singapore Act*, schedule 1, paragraph 15(2-3). Available at: <http://statutes.agc.gov.sg/aol/search/display/view.w3p;page=0;query=Compld%3A82c08b53-df89-4d14-8bb8-9c9f10d949f5;rec=0> [accessed on 8 July 2013].

³¹² *The Telecommunications Act*, s. 69. Available at: <http://statutes.agc.gov.sg/aol/search/display/view.w3p;ident=02a5ed8a-5f24-46f8-b57a-7d9b16bbf3ce;page=0;query=DocId%3Ad8c9baf0-d690-4318-9fbf-6254d27f3b47%20Depth%3A0%20ValidTime%3A01%2F02%2F2012%20TransactionTime%3A21%2F02%2F2012%20Status%3Ainforce;rec=0#pr69-he-> [accessed on 21 May 2013].

³¹³ IDA, *Policies and Regulations Postal*. Available at: <http://www.ida.gov.sg/Policies-and-Regulations/Industry-and-Licensees/Postal> [accessed on 30 May 2013].

³¹⁴ IDA, *Statistics on Postal Services for 2012 (Jan – Dec)*. Available at: <http://www.ida.gov.sg/Policies-and-Regulations/Industry-and-Licensees/Standards-and-Quality-of-Service/Quality-of-Service/Postal-Services/Statistics-on-Postal-Services-for-2012-Jan--Dec.aspx> [accessed on 8 July 2013].

million in 2011-12. It made a net profit of S\$135.4 million in 2011-12. Its total mail volume was 959.7 million in 2011-12, an increase of 8.2 million from 2010-11.³¹⁵

Businesses can provide domestic and international basic mail services in Singapore if they obtain a licence from the IDA. Postal services are also provided by DHL Global Mail (Singapore) Pte Ltd, Fuji Xerox Singapore Pte Ltd, Singapore Post Ltd (Public Postal Licensee), Swiss Post International Singapore Pte Ltd and WMG Pte Ltd.

Regulatory Institutions and Legislation

The regulator for telecommunications, the Infocomm Development Authority (IDA) (see section 2 for a general description), also regulates the postal industry pursuant to the *Postal Services Act*. The *Postal Services Act* contains provisions in relation to:

- licensing of postal services;
- the IDA's powers to issue codes of practice, standards of performance, directions and advisory guidelines; and
- offences and penalties.

The IDA may grant, modify and suspend licences, give directions and issue codes of practice and standards of performance for regulated postal firms.

The IDA's objectives in relation to postal services include:³¹⁶

- Maintaining the integrity and security of the postal service.
- Ensuring that postal services will continue to contribute to the overall growth and employment of the Singapore economy.
- Employing market forces where possible to ensure that competitively-priced, high-quality and reliable basic mail services are provided to consumers and businesses to maximise consumer welfare. To this end, the IDA relies on private negotiations and industry self-regulation; minimising regulatory impediments to the entry into or exit from the market; curtailing Significant Market Power within the market that unreasonably restricts competition; deterring and remedying anti-competitive behaviour.

The IDA requires SingPost to perform a set of Universal Service Obligations. These include providing postal services to anyone who requests such services and providing and maintaining posting boxes and post offices throughout Singapore. SingPost also issues national stamps and maintains the national postal-code system.

The IDA has introduced a quality-of-service (QoS) framework on SingPost in order to maintain minimum delivery timeframe standards for end users. A financial penalty may be imposed for each instance of non-compliance of postal QoS requirements.

Further regulations are provided by the *Postal Competition Code 2008*. These include: duties of licensees to customers; duties of dominant licensees to provide basic letter services on just, reasonable and non-discriminatory terms; a list of mandated services; and prohibitions on agreements that unreasonably restrict competition.³¹⁷

Prospective licensees³¹⁸ may choose their own business model. They are not required to provide island-wide or international postal services. In evaluating an application for a licence, the IDA considers:

³¹⁵ Singapore Post Limited, *Annual Report 2011-12*, 2012. Available at: <http://www.singpost.com/download/ar1112.pdf> [accessed on 8 July 2013].

³¹⁶ IDA, *Postal – Policies and Regulation*. Available at: <http://www.ida.gov.sg/Policies-and-Regulations/Industry-and-Licensees/Postal> [accessed on 21 May 2013].

³¹⁷ IDA, *Postal Competition Code*. Available at: <http://www.ida.gov.sg/Policies-and-Regulations/Code-of-Practice-and-Guidelines/Postal-Competition-Code-Postal-Services-Operations-Code-And-Postal-Services-Control-Of-Designated-Postal-Licensees-Regulations-2012> [accessed on 21 May 2013].

³¹⁸ IDA, *Licence Guidelines*. Available at: <http://www.ida.gov.sg/~media/Files/PCDG/Licensees/Licensing/Framework%20and%20Guidelines/GuidelinesLicensingSch/PSOGuide.pdf>. [accessed on 21 May 2013].

- the vision of the applicant;
- the organisational structure and financial capability and strength of the applicant;
- the business and competition strategies of the applicant for the provision of services;
- the soundness of the applicant's business plans and capability to implement the plans;
- the ability of the applicant to maintain security and integrity of postal articles; and
- other information provided by the applicant.

Consultation of Interested Parties

The IDA provides an opportunity for the public to comment about material issues. The exception is issues that rely on information that is: confidential; proprietary; commercially sensitive; or that raises law enforcement or national security concerns.

Timeliness

The IDA decides within ten working days whether to accept a proposed tariff. A statement of reasons is provided if the IDA rejects the proposed tariff.³¹⁹

Information Disclosure and Confidentiality

The IDA has broad information-gathering powers. The IDA can require regulated businesses to supply information or documents, and has the power to search buildings, and seize documents (*The Postal Act*, s.46).

Decision-making and Reporting

As in telecommunications, a decision at an IDA meeting on postal issues requires a majority of the members to be present and voting. In the case of equality of votes, the member presiding at the meeting shall have a casting vote in addition to that member's original vote. At each meeting, one-half of the number of members forms a quorum.³²⁰

The IDA will generally make its decisions available to the public, and will provide an explanation for its actions. Enforcement action taken pursuant by the IDA will generally be made public. Decisions will be published on the IDA's website if feasible and appropriate.

A party that provides comments on applications to the IDA may seek confidential treatment of information that is proprietary or commercially sensitive.³²¹

Appeals

Rights of appeal in relation to decisions of the IDA are provided in relevant acts, including the *Postal Act*. Aggrieved licensees can submit appeals to the relevant government minister within 14 days of a decision.

4. Water and Wastewater³²²

Singapore's water supply comes from four sources; known as the 'Four National Taps'.³²³ For 2010, water from local catchments provided 20 per cent of supply; 40 per cent of water supply was imported, 30 per cent of the supply was highly purified, reclaimed water ('NEWater') and ten per cent

³¹⁹ IDA, *Postal Competition Code*, s. 4.4.2.3. Available at: <http://www.ida.gov.sg/Policies-and-Regulations/Code-of-Practice-and-Guidelines/Postal-Competition-Code-Postal-Services-Operations-Code-And-Postal-Services-Control-Of-Designated-Postal-Licensees-Regulations-2012> [accessed on 21 May 2013].

³²⁰ Singapore Attorney General's Chamber's, *Info-communications Development Authority of Singapore Act*, schedule 1, paragraph 15(2-3). Available at: <http://statutes.agc.gov.sg/aol/search/display/view.w3p?page=0:query=Compld%3A82c08b53-df89-4d14-8bb8-9c9f10d949f5;rec=0> [accessed on 8 July 2013].

³²¹ IDA, *Postal Competition Code*, Section 4.4.2.3, s. 8.10. Available at: <http://www.ida.gov.sg/Policies-and-Regulations/Code-of-Practice-and-Guidelines/Postal-Competition-Code-Postal-Services-Operations-Code-And-Postal-Services-Control-Of-Designated-Postal-Licensees-Regulations-2012> [accessed on 21 May 2013].

³²² PUB, *Singapore Water Story*. Available at: <http://www.pub.gov.sg/water/Pages/singaporewaterstory.aspx>. [accessed on 21 May 2013].

³²³ PUB, *Home*. Available at: www.pub.gov.sg [accessed on 21 May 2013].

was desalinated water. The water supply system includes nine treatment works, 19 raw water reservoirs, and 17 service reservoirs for treated water.

Singapore uses two systems to collect rainwater and used water. First, rainwater is collected through a network of drains, canals, rivers, storm-water collection ponds and reservoirs. This water is then treated for drinking water supply. Singapore is unusual in that it harvests urban storm-water on a large scale for its water supply.

Second, rainwater is collected through water catchments. By 2011, two-thirds of Singapore's land area acted as a water catchment. All available estuaries were dammed to create reservoirs. The responsible body, the Public Utilities Board (profiled below), further aims to harness water from remaining streams near the shoreline using technology that will treat water for salinity. This is expected to increase Singapore's water catchment area to 90 per cent of available land mass by 2060.

Water is imported from Johor, Malaysia. The agreement to import water was made in the early 1960s, prior to independence, expires in 2061. The agreement provided a low price for water. To date, Singapore and Malaysia have failed to reach further agreement to increase the quantity of imported water.

Reclaimed water is produced from treated used-water. The water is purified using membrane technologies and ultra-violet disinfection. In 2011, Singapore's largest reclaimed water plant was completed. By 2060, 50 per cent of future water demand is expected to be met by reclaimed water.

Singapore has one of Asia's largest seawater reverse-osmosis (desalination) plants. The plant produces 136000 cubic metres of water a day; which is equivalent to about ten per cent of total supply. A second desalination plant will be completed in 2013. By 2060, desalination capacity is planned to have increased ten times and to meet at least 30 per cent of water demand.

Singapore employs a 48-kilometre, used-water system that conveys used water from the northern and eastern parts of Singapore to the centralised Changi Water Reclamation Plant. The water is then treated and purified. The reclaimed water is provided to the network.

Regulatory Institutions and Legislation

Singapore's national water agency is the Public Utilities Board (PUB).³²⁴ In 2001, the PUB's responsibilities were broadened from water supply to include sanitation. Sanitation services had previously been provided by the Ministry of Environment. The Board of Directors comprises the Chairman, the Chief Executive Officer and nine members drawn from the private sector, academe and government. The PUB is organised into a Water Systems Group (eight teams) and a Policy Group (six teams including corporate and HR). The PUB's mission is to 'ensure an efficient, adequate and sustainable supply of water'; its vision is 'Water for All: Conserve, Value, Enjoy'; and its values focus on the environment, service, professionalism and integrity.

Water tariffs are calculated to allow for cost recovery, including for capital costs. The price is charged per volume consumed. A Water Conservation Tax, introduced in 1991, is levied on users and is calculated as a percentage of the water tariff. The rate of the tax increases as water usage increases. For example, consumption in excess of 40 cubic meters of water per month attracts a 45 per cent conservation tax. Additional fees include a Sanitary Appliance Fee (SAF) and a Waterborne Fee (WBF). The SAF and WBF offset the cost of treating used water, and for operating and maintaining the used-water network. The SAF is calculated based on the number of sanitary fittings in each premises. The WBF is charged based on the volume of water used.³²⁵

Contracts for the provision of goods, services, maintenance, and for construction and other services, are awarded through tenders.³²⁶

³²⁴ PUB, *Home*. Available at: www.pub.gov.sg [accessed on 21 May 2013].

³²⁵ PUB, *Water Pricing in Singapore*. Available at: <http://www.pub.gov.sg/general/Pages/WaterTariff.aspx> [accessed on 21 May 2013].

³²⁶ PUB, *Goods, Services and Maintenance*. Available at: <http://www.pub.gov.sg/tenders/forthcoming/Pages/GoodsServicesMaintenanceContracts.aspx>. [accessed on 21 May 2013].

Consultation of Interested Parties

The PUB has established a Water Network Panel representing different stakeholders in the water industry, and from the community. The panel provides feedback and alternative perspectives on the PUB's projects and programs.

Regulatory Development

Water conservation programs are promoted by the PUB. For example, the PUB encourages users to save ten per cent of water consumption, and ten litres of water a day. The aim is to lower per capita domestic consumption from 154 litres to 147 litres by 2020.

The Singapore Government invested S\$330 million over five years from 2005 with the objective of developing Singapore into a global hub for water technology and research. Companies were provided with funding to assist in the development of new technologies for the water and wastewater sector. In 2011, a further S\$140 million was provided.

5. Rail

Being a small island-state, Singapore has no need for a national rail network for freight and long-distance passenger movement. There is, however, an international rail service between Singapore and Malaysia, operated by the Malaysia Railway, *Keretapi Tanah Melayu*.

Singapore has a well-developed commuter rail network serving the metropolitan area. It comprises a Mass Rapid Transit (MRT) and Light Rail Transit (LRT) system. The LRT system provides a feeder service that complements the MRT system in three regions – Bukit Panjang, Sengkang and Punggol. The rail network has 142 stations with about 180 kilometres of lines.³²⁷ In 2011, the average daily use of the network was 2.3 million passenger-trips on MRT and 0.1 million passenger-trips on LRT.³²⁸ Operation of the train systems is the responsibility of two main public transport operators in Singapore: SMRT Corporation and SBS Transit. These operators are responsible for the daily operations of trains and their maintenance.

Regulatory Institutions and Legislation

The Land Transport Authority plans, maintains and regulates road and rail transport in Singapore, including the MRT and the LRT. Train fares are regulated by the Public Transport Council; an independent body that regulates bus services, bus fares and rail fares.³²⁹

6. Airports

Singapore's Changi Airport³³⁰ is the seventh busiest airport in the world. In 2012 it provided services to more than 110 international airlines flying to 240 cities in 60 countries. Passenger volume in 2012 was more than 51 million. Changi Airport has over 70000 square metres of commercial space with 130 food and beverage outlets and 360 retail stores. The Changi Airport is owned by Tamasek Holdings (an investment company owned by the Government of Singapore) and is operated by a corporatised entity (the Changi Airport Group (Singapore) Pte Ltd (CAG)).

Regulatory Institutions and Legislation

The Civil Aviation Authority of Singapore (the CAAS) regulates civilian air-service agreements with air-service operators. The CAAS is a statutory board under the Ministry of Transport. There is a chairman and eleven members drawn from the private sector, government and the union movement. The CAAS has a Director-General; a Deputy Director-General; an Assistant Director-General; two

³²⁷ Land Transport Authority, *MRT and LRT Trains*. Available at: <http://www.lta.gov.sg/content/ltaweb/en/public-transport/mrt-and-lrt-trains.html> [accessed on 8 July 2013].

³²⁸ Land Transport Authority, *Public Transport Ridership*, Available at: <http://www.lta.gov.sg/content/dam/ltaweb/corp/PublicationsResearch/files/FactsandFigures/PT-Ridership-2011-cy.pdf> [accessed on 8 July 2013].

³²⁹ Public Transport Council – Regulation. Available at: <http://www.ptc.gov.sg/regulation/fareRegulation.htm> [accessed on 21 May 2013].

³³⁰ Changi Airport, *Who We Are*. Available at: <http://www.changiairportgroup.com/cag/html/the-group/index.html> [accessed on 21 May 2013].

other senior managers and fifteen directors (including one for airport economic and service regulation).³³¹

Responsibilities of the CAAS include regulating civilian air traffic and maintaining the operational efficiency of airports. Its objectives include the development of Singapore as an international centre for air traffic.³³² Previously the CAAS was the operator of Changi Airport.

The CAAS enforces the *Civil Aviation Authority of Singapore Act 2009* that provides for: the reconstitution of the CAAS; and the regulation of airports in Singapore by the CAAS. Additional obligations are imposed on licences by the *Airport Competition Code 2009* (the Code). The Code is intended to:

- promote competition and fair and efficient market conduct in the provision of airport services, and to prevent the exercise of monopoly or market power;
- regulate the development of airports;
- ensure the reliability of airport services;
- ensure airport licensees are able to operate efficiently and in an economically viable manner; and
- foster the development and expansion of Singapore as an international aviation hub.³³³

The regulatory framework sets prices subject to a Revenue Yield Cap (RYC). The RYC is the total aeronautical revenue that the CAG may collect per passenger. The RYC provides the CAG with non-aeronautical profit that may be used to subsidise the cost of providing aeronautical services. Under the regulatory framework, the CAG must set prices within the RYC determined by the CAAS.³³⁴

In addition, the CAAS has also introduced an Aviation Levy payable by passengers to the CAAS. Revenue from the Aviation Levy is used by the CAAS to fund its activities to promote, develop and regulate airports and the air transport industry.

Consultation of Interested Parties

The CAAS lists a number of bodies on its website representing industry interests; including the following three.

The Singapore Air Cargo Agents Association³³⁵ represents the interests of the air cargo agents in Singapore in developing the industry through collective efforts, and raising concerns to relevant agencies in order to protect the interests of its members.

The Singapore National Shippers' Council³³⁶ is a national body that advances the collective interest of the shippers' community to the relevant agencies in order to facilitate the movement of goods and meet the challenges of the new economy.

The Association of Aerospace Industries³³⁷ is an industry association for the aerospace industry in Singapore. It endeavours to provide leadership by facilitating strategies in innovation competitiveness, technical standards and accreditation. It serves as a forum for members to discuss and elevate relevant issues to policy-makers and stakeholders.

³³¹ CAAS, *About CAAS*. Available at: http://www.caas.gov.sg/caas/en/About_CAAS/Our_Organisation/Our_Management.html?_locale=en [accessed on 21 May 2013].

³³² *About Changi Airport*. Available at: <http://www.changiairport.com/our-business/about-changi-airport> [accessed on 21 May 2013].

³³³ CAAS, *The Airport Competition Code 2009* s. 2. Available at: http://www.caas.gov.sg/caasWeb2010/export/sites/caas/en/Regulations/Economics/Airport_Economics/Aiport_Competition_Code_PDFs/CAAS_Airport_Comp.pdf, [accessed on 21 May 2013].

³³⁴ *The Changi Connection*, 2009, issue 2, p. 2. Available at: http://www.changiairportgroup.com/export/sites/caas/assets/changi_connection/Changi_Connection_-_Issue_2.pdf [accessed on 21 May 2013].

³³⁵ SAAA, *Home*. Available at: www.saaa.org.sg [accessed on 3 July 2013].

³³⁶ SNSC, *Home*. Available at: www.sns.org.au [accessed on 3 July 2013].

³³⁷ Association of Aerospace Industries website. Available at: www.aais.org.au [accessed on 3 July 2013].

Timeliness

In relation to investigations into anticompetitive agreements, the Code provides that the CAAS may:

- make a preliminary decision whether to undertake a formal investigation within 30 working days of receiving the complaint; and
- make a final decision within 120 working days.
- Timeframes may be extended where the matter is complex and where further investigation is necessary.³³⁸

Information Disclosure and Confidentiality

The CAAS has broad information-gathering powers. The CAAS can require regulated companies to supply information or documents. The CAAS has the power to search buildings, and seize documents.³³⁹

The CAAS will not release confidential information to the public, unless:

- disclosure would not cause detriment to the supplier of the information; or
- in the opinion of the CAAS, the public benefit of disclosing the information outweighs the detriment.³⁴⁰

Decision-making and Reporting

When granting a licence to operate an airport, the CAAS considers:

- the ability of the applicant to finance the operation of the airport;
- the experience of the applicant; and
- the function and duties of the CAAS.³⁴¹

A decision at a CAAS meeting requires a majority of the members to be present and voting. In the case of equality of votes, the member presiding at the meeting shall have a casting vote in addition to that member's original vote. At each meeting, the greater of three members or one-third of the total number of members, forms a quorum.³⁴² The CAAS may develop its own procedure in relation to the conduct of meetings.³⁴³

Appeals

Rights of appeal are provided by relevant legislation, including the *Airport Competition Code* and the *Civil Aviation Authority of Singapore Act*. For example, some appeals may be made to the relevant government minister, including decisions in relation to: a refusal to grant an airport licence; the imposition of conditions on an airport licence; and the revocation or suspension of an airport licence. In these cases, businesses may have up to 14 days after the decision to appeal to the Minister. In cases that are technically complex, the Minister may establish and consult an Appeals Advisory Panel, comprised of people with specialised knowledge.

³³⁸The Airport Competition Code 2009 s. 17.

http://www.caas.gov.sg/caasWeb2010/export/sites/caas/en/Regulations/Economics/Airport_Economics/Aiport_Competition_Code_PDFs/CAAS_Airport_Comp.pdf, [accessed on 21 May 2013].

³³⁹The Airport Competition Code 2009, ss. 15 and 16 and The CAAS Act, s. 82. Available at:

http://www.caas.gov.sg/caasWeb2010/export/sites/caas/en/Regulations/Economics/Airport_Economics/Aiport_Competition_Code_PDFs/CAAS_Airport_Comp.pdf, [accessed on 21 May 2013].

³⁴⁰ CAAS, *The CAAS Act 2009*, s 83. Available at:

http://www.caas.gov.sg/caasWeb2010/export/sites/caas/en/PDF_Documents/Legislation/2.1.1.pdf. [accessed on 21 May 2013].

³⁴¹ CAAS, *The CAAS Act*, s. 2. Available at:

http://www.caas.gov.sg/caasWeb2010/export/sites/caas/en/PDF_Documents/Legislation/2.1.1.pdf. [accessed on 8 July 2013].

³⁴² CAAS, *The CAAS Act 2009*, No. 17 of 2009, Schedule 1, paragraph 14(2-3). Available at:

http://www.caas.gov.sg/caasWeb2010/export/sites/caas/en/PDF_Documents/Legislation/2.1.1.pdf. [accessed on 8 July 2013].

³⁴³*Ibid*, paragraph 17.

7. Ports

The port of Singapore is one of the busiest ports in the world, shipping one-seventh of the world's total container transshipment throughput, and five per cent of global container throughput. It is one of the world's largest refrigerated container ports.³⁴⁴

Port operations in Singapore are provided by PSA International and Jurong Port. Together, they operate six container terminals and three general-purpose terminals. PSA was formerly the Port of Singapore Authority, a statutory board that regulated, developed and operated the terminals in the port of Singapore. In 1996, the Port of Singapore Authority's regulatory functions were transferred to the Maritime and Port Authority of Singapore (MPA). In 1997, PSA Corporation Limited was incorporated. PSA International became an investment holding company for PSA's businesses worldwide. PSA International now operates in 17 countries and in 29 port projects. PSA International is fully owned by Temasek Holdings.³⁴⁵ Temasek Holdings is an investment company owned by the Government of Singapore.

The second port operator in Singapore, Jurong Port, is a multi-purpose port operator and operates a general-cargo terminal, bulk-cargo terminal and a container terminal. Jurong Port was corporatised in 2001 and is a fully-owned subsidiary of JTC Corporation. JTC Corporation is operated by the Ministry of Trade and Industry Singapore.

Regulatory Institutions and Legislation

The Maritime and Port Authority (MPA) regulates and licenses port and marine services and facilities.³⁴⁶ It also manages vessel traffic in the Singapore port. The MPA was established in 1996 by the *Maritime and Port Authority of Singapore Act 1996*. It was formed through a merger between the Marine Department, National Maritime Board, and the regulatory departments of the former Port of Singapore Authority. The MPA is a statutory board under the Ministry of Transport of the Singapore Government. There is a chairman and eleven members drawn from business, the union movement, academe and the government. Staff is organised into two broad divisions: 'Operations' and 'Development'. There is a 'Maritime Economics Department' within the Development division.

The MPA's responsibilities include: issuing regulations; detailing fees and charges; and developing Singapore as a premier global hub port and international maritime centre.³⁴⁷

³⁴⁴ PSA, *About Us*. Available at: <http://www.singaporepsa.com/aboutus.php>. [accessed on 21 May 2013].

³⁴⁵ PSA website. Available at: <http://www.internationalpsa.com/about/investorrelations.html>. [accessed on 21 May 2013].

³⁴⁶ MPA website. Available at: www.mpa.gov.sg [accessed on 21 May 2013].

³⁴⁷ MPA, *About MPA*. Available at: http://www.mpa.gov.sg/sites/global_navigation/about_mpa/about_mpa.page. [accessed on 21 May 2013].

South Korea

OVERVIEW

The economic regulation of infrastructure in the Republic of Korea (South Korea) is primarily the responsibility of the national government. Regulation is either carried out by key ministries or independent agencies affiliated with responsible ministries. The Ministry of Knowledge Economy (MKE) has the portfolios of energy, communications and posts. The Korea Fair Trade Commission (KFTC) generally regulates anti-competitive behaviour; is the sole authority for consumer issues; and has some role in relation to infrastructure areas.

The government has control over the vertically integrated incumbents in electricity and gas (Korea Electric Power Corporation (KEPCO) and Korea Gas Corporation (KOGAS)) through its majority ownership. The electricity industry is regulated by the Korea Electricity Regulatory Commission (KERC) in relation to licensing, competition, and industry restructuring. There is no regulatory commission for the gas industry. Planned energy reform to liberalise and privatise the electricity and gas industries has not been fully implemented, due to political and economic difficulties experienced.

The Korea Communications Commission (KCC) was established in February 2008 as a unified organisation with the role of overseeing broadcasting and telecommunications policy and regulation. The designated universal service provider, Korea Telecom (KT), is an integrated fixed-line, wireless and Internet service-provider that is predominantly privately-owned, and is subject to monopoly regulations and the Fair Trade Act. The KCC is responsible for licensing, price regulation, and access authorisation in broadcasting and telecommunications.

Korea Post, which is affiliated with the MKE, provides postal services, banking and insurance services. As the designated service-provider, Korea Post has been granted the exclusive right in the provision of reserved postal services. The MKE supervises the operation of Korea Post.

Multiple central government authorities are involved in the development and administration of water policy. The Ministry of Land, Transport and Maritime Affairs (MLTM) is primarily responsible for management of water resources. The municipal governments implement water policies, and coordinate management of local rivers. There is no river-basin management organisation. Government-owned Korea Water Resources Corporation (K-Water) has moved to the provision of integrated management of water systems by operating the environmental infrastructure in the upper reaches of dams; and through the management of water supply and wastewater treatment by way of consignment agreements with municipalities.

The MLTM also has responsibilities over the transport sector; including rail, airports and ports. In rail, the ministry has a role in the formation of policy and the supervision of rail services in terms of price, quality, and safety. The infrastructure service provider, the Korea Rail Network Authority, has, since 2004, been vertically separated from the government-owned monopoly passenger and freight-service provider, Korea Rail.

Two airport corporations have been set up to operate the 15 international and domestic airports that are owned by the government. Similar to its role in rail, the MLTM has the responsibility of policy development; and supervision over airports and civil aviation. Airports are monitored in terms of key performance indicators for cost, productivity, service quality, and safety.

Port reforms aimed at improving productivity, have seen corporatisation and increasing private participation in port construction and operation. Ports remain under government ownership. The MLTM has the overall responsibility for port development and management. Some of its authority has been delegated to its regional offices or to port authorities.

The government moved towards 'mega-ministries' in 2008, aimed at facilitating the implementation of integrated infrastructure policies and regulation. Despite continuing economic reforms, there has been some setback in restructuring or privatising the infrastructure areas. All infrastructure areas (except for telecommunications) are still heavily influenced by governments, particularly the central government.

GEOGRAPHY, POPULATION, ECONOMY, POLITY AND LEGAL SYSTEM³⁴⁸

South Korea is located in the southern part of the Korean Peninsula bordering the Sea of Japan and the Yellow Sea. The total land area is 96 920 square kilometres, most of which is mountainous, and only 16.58 per cent of the land is arable. There are wide coastal plains in the west and south of the country, surrounded by about three thousand islands, mostly small and uninhabited. The east coast is very straight and the tidal range is narrow. The country has natural resources, such as coal, tungsten, graphite, molybdenum, lead and hydropower potential, however, South Korea is heavily dependent upon imports for energy and raw materials.

A large population (48.86 million in 2012) and a small total land area, combine to produce a high density of population; more than ten times the global average. Most people live in urban areas. The nation's capital and largest city is Seoul, with a population of 9.79 million. Other major cities include Busan, Incheon, Daegu and Daejeon. The ethnicity is highly homogenous, with more than 99 per cent of the population being Korean. The official language is Korean, and English is widely taught in high school.

South Korea is a highly developed economy and is one of the four 'Asian Tigers' (including Hong Kong, Singapore and Taiwan) that experienced exceptionally rapid economic growth and industrialisation between the early 1960s and the late 1990s. Its gross domestic product (GDP) at about \$1.611 trillion (in US dollars PPP) in 2012 is the 13th highest in the world, while GDP per capita of \$32 400 is ranked 43rd in the world. The economy is oriented towards services and manufacturing. The manufacturing sector as a whole contributed around 40 per cent of GDP and employed about 24 per cent of the labour force. Manufacturing industries such as electronics, telecommunications, automobiles, and ship-building are major exporters.

After the Second World War, a democratic-based government was set up in South Korea, along with the Communist government (Democratic People's Republic of Korea; short name North Korea) in the north of the Korean Peninsula. South Korea is a unitary presidential constitution republic, whereby the president and other deputies are elected to govern according to existing constitutional law.

The legal system is a combination of European civil law, Anglo-American law and Chinese classical thought. The constitution (originally promulgated in 1948 and last revised in 1987) provides for the sovereignty of the people, and a division of powers among the legislative, executive and judicial branches. The legislative power is vested in the unicameral National Assembly (*Gukhoe*); executive power is vested in the State Council appointed by the President (chief of state) on the recommendation of the Prime Minister (head of the government); and judicial power is vested in the Supreme Court, High Courts and other lower courts, and the Constitutional Court (established in 1988 as part of the judicial review system). The president is elected to a single five-year term by direct popular vote and members of the National Assembly are elected to a four-year term in either single-seat constituencies or by proportional party representation. The Prime Minister is appointed by the President with consent of the National Assembly. The two major parties are the New Frontier Party (NFP) and the United Democratic Party (UDP).

While South Korea is not a federation, it is administratively divided into nine provinces (*do*) and seven metropolitan cities (*gwangyoksi*), and broken down further at the municipal level into city, county and district. The executive and legislative branches operate primarily at the national level, although local functions may also be performed by some ministers in the executive branch. Local governments, elected every four years, are semi-autonomous, and contain executive and legislative bodies of their own. The judicial branch operates at both the national and local levels. Local governments are responsible for 'matters pertaining to the welfare of local residents, manage properties and may, within the limit of laws, enact provisions relating to local autonomy regulation' (*Constitution of the Republic of Korea*, Article 117).

The Presidential Committee on Green Growth was established to implement the national agenda of low-carbon green growth. In 2009, the *Basic Act on Low Carbon Green Growth* was enacted and a five-year action plan was formulated to boost energy efficiency and green technology over the period 2009 to 2013.³⁴⁹ Core technologies have been identified, including: solar and wind energy;

³⁴⁸ CIA World Factbook South Korea. Available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/ks.html> [accessed on 24 May 2013].

³⁴⁹ United Nations Environment Programme, *Overview of the Republic of Korea's National Strategies for Green Growth*, April 2010.

hydropower; lower oil dependent vehicles; and environmentally friendly technologies such as light-emitting diodes (LEDs).

APPROACH TO COMPETITION AND REGULATORY INSTITUTIONAL STRUCTURE

The approach to infrastructure regulation in South Korea has traditionally involved the key ministries holding portfolios over the infrastructure areas. Public sector reform and regulatory reform in recent years led to the integration of ministries in 2008, resulting in a smaller number of powerful 'mega-departments', each having authority over multiple policy areas for efficient co-ordination.³⁵⁰ The Ministry of Knowledge Economy (MKE) is responsible for the energy, communications and post areas. Affiliations include the Electricity Regulatory Commission and Korea Post. The Ministry of Land, Transport and Maritime Affairs (MLTM) has a number of functions in land, construction, water resources, road and public transportation, railways, aviation, shipping, ports and marine affairs. Within the ministries reside key bureaus and offices that develop policies and consider matters relating to economic regulation of infrastructures. The Korea Communications Commission is responsible for policy and regulation in broadcasting and telecommunications, and reports directly to the President.

According to the OECD South Korea has a strong competition law and enforcement agency.³⁵¹ The Korea Fair Trade Commission (KFTC)³⁵² was founded in 1981 and became the sole authority of consumer issues in 2007. The KFTC formulates and administers competition policies, and investigates and hears antitrust cases. It is mandated to promote competition, strengthen consumers' rights, create a competitive environment for small and medium enterprises, and restrain concentration of economic power. The KFTC enforces twelve laws, including the *Monopoly Regulation and Fair Trade Act 1980*, and has a task force for reforming anti-competitive regulations.

A committee of the KFTC, consisting of nine commissioners, makes decisions on competition and consumer protection issues. The chairman and vice-chairman are recommended by the Prime Minister and appointed by the President. Other commissioners are recommended by the Chairman and appointed by the President for fixed three-year periods.

The KFTC is statutorily required to: report directly to the Prime Minister's Office; conduct hearings in public; and publish all of its decisions.

The KFTC's anti-trust case proceeding involves two stages: examination, and deliberation.³⁵³ First, when a potential violation case is reported or alleged, an examination into the issue involving reviewing relevant information, taking statements from related parties, consulting with experts, and conducting legal reviews will be launched. If a violation is found, the case officer makes an examination report and presents it to the committee for deliberation. Second, the committee's decision is in the form of a written resolution, which is sent to the relevant parties. If a violation is duly found, corrective measures (such as a 'cease-and-desist' order, fines, and prosecution) will be imposed.

During the period 1998 to 2007, the KFTC issued corrective measures for 2289 cases, of which 1025 involved surcharge imposition. Since 2008, the KFTC has focused on expanding autonomy of market participants, including enterprises and consumers.³⁵⁴

With respect to telecommunications, the KFTC retains residual jurisdiction over competition matters; while the regulator of the communications sector, the KCC, has primary jurisdiction over regulatory matters.³⁵⁵ Provisions are in place in the relevant legislation to ensure that businesses are not fined twice for the same conduct. For example, a business that has received a sanction imposed by the

³⁵⁰ Republic of Korea, *Gateway to Korea – Executive Branch*. Available at: <http://www.korea.net/Government/Constitution-and-Government/Executive-Branch> [accessed on 8 July 2013].

³⁵¹ OECD, *Regulatory Reform in Korea*, OECD Reviews of Regulatory Reform, 2000, p. 39.

³⁵² Korea Free Trade Commission (KFTC) website. Available at: <http://eng.ftc.go.kr/> [accessed on 8 July 2013].

³⁵³ KFTC, *About KFTC – Overview – How We Handle Cases*. Available at: <http://eng.ftc.go.kr/about/overview3.jsp?pagelid=0102> [accessed on 8 July 2013].

³⁵⁴ KFTC, *2011 Annual Report*, pp. 14-16. Available at: http://eng.ftc.go.kr/bbs.do?command=getList&type_cd=53&pagelid=0301 [accessed on 8 July 2013].

³⁵⁵ Organisation of Economic and Development (OECD), *Report on Experiences with Structural Separation*, January 2012, p. 22.

KCC for a violation of the *Telecommunications Business Act* cannot be subject to further sanction by the KFTC for the same act.³⁵⁶

The Ministry of Environment (MOE) started as the Pollution Section of the Ministry of Health and Society in 1967, and is currently responsible for developing and implementing environmental, climate-change and related policies.

The MOE administers a large number of environmental laws and regulations. The following acts apply to the water and wastewater sector:³⁵⁷

- *Water Quality and Ecosystem Conservation Act*, enacted in 1990 and last revised in 2010.
- *Sewerage Act*, enacted in 1966 and last revised in 2009.
- *Water Supply and Waterworks Installation Act*, enacted in 1961 and last revised in 2010.
- *Management of Drinking Water Act*, enacted in 1995 and last revised in 2010.
- *Soil Environment Conservation Act*, enacted in 1995 and last revised in 2007.

Through its Water Environment Management Bureau, the MOE plays key roles in the areas of water environment management (for example, the Four Major Rivers Restoration Project), and with water supply and wastewater treatment. It has implemented various environmental policies and regulations, including the water environment management master plan, and environmental water quality standards.

The Ministry of Public Administration and Security (MOPAS), founded in 2008, has functions related to national administration, government organisations, personnel management, e-government, and disaster safety. Through its Regional Development Policy Bureau, the MOPAS also supports local government in terms of its administration, finance, and regional development, for the promotion of greater local autonomy. As part of the reform to revive local economy, corporatisation or privatisation of a number of municipal functions, including piped water, will be undertaken.³⁵⁸

The MOPAS facilitates the management of utility fees and prices of basic necessities aimed at improving living conditions, particularly for low-income families.³⁵⁹ These include: water supply; garbage bags; natural gas; subway, bus, and taxi fares; sewage; septic tank cleaning; cultural facility usage; cultural performance admission; and high school tuition. The MOPAS actively collaborates with numerous consumer protection organisations to help stabilise local commodity prices.

*Judiciary System*³⁶⁰

The judiciary of South Korea consists of the Supreme Court, High Courts, District Courts, the Patent Court, the Family Court, the Administrative Court, and Local Courts. The courts exercise jurisdiction over civil, criminal, administrative, electoral, and other judicial matters, while also overseeing affairs related to real estate registrations, family registrations, financial holdings, and court officials.

The Supreme Court is the highest judicial tribunal. It hears appeals on cases rendered by lower courts. The Chief Justice of the Supreme Court is appointed by the President with the consent of the National Assembly for a non-renewable term of six years. Other justices are appointed by the President, upon the recommendation of the Chief Justice, for a term of six years. The retirement ages for the Chief Justice and other justices are 70 and 65 respectively.

The High Courts hear civil, criminal and administrative appeal cases rendered by district, administrative and family courts, and try special cases designated by law.

³⁵⁶ International Comparative Legal Guide (ICLG), *Telecommunication Laws and Regulations 2012: Korea*, 2012, p. 2.

³⁵⁷ Ministry of Environment, *ECOREA: Environmental Review 2011, Korea*, Table 1 – History & Current Status of Environmental Acts.

³⁵⁸ MOPAS, News and Notices, 21 March 2008. Available at: <http://www.mopas.go.kr/gpms/ns/mogaha/user/userlayout/english/bulletin/userBtView.action?userBtBean.bbsSeq=1012394&userBtBean.ctxCd=1030&userBtBean.ctxType=21010009> [accessed on 8 July 2013]

³⁵⁹ MOPAS, *Happy People Safe Society*, 2010, p. 24; MOPAS, *Caring for Our People*, 2012.

³⁶⁰ Republic of Korea, *Government – Constitution and Government – Judiciary*. Available at: <http://www.korea.net/Government/Constitution-and-Government/Judiciary> [accessed on 8 July 2013].

District Courts are located in Seoul and 13 other cities: Incheon, Uijeongbu, Suwon, Chuncheon, Daejeon, Cheongju, Daegu, Busan, Changwon, Ulsan, Gwangju, Jeonju and Jeju. The Administrative Court handles administrative cases only. District Courts outside of Seoul also perform the functions of the Administrative Court in their respective districts.

Appeals

Appeals against the KFTC's decision can be made to the High Court.

On the other hand, decisions of the KCC, the communications regulator, may be appealed to the Seoul Administrative Court, while an administrative action may be brought against the KFTC in the Seoul High Court for the KFTC's decisions. Before pursuing a court action, an appeal of a decision by the KCC or the KFTC may also be made through an in-house administrative appeal process at the decision-making agency.

Regulatory Reform

The Korea Regulatory Reform Committee (KRRC) was established under the *Basic Law on Regulatory Reform* in 1998 to comprehensively enact regulatory reform tasks, including the development of regulatory policies, and the evaluation and reform of regulation.^{361,362} As a regulatory oversight body, the KRRC reports to the President. It has 22 members, including the Prime Minister (co-chairman), a co-chairman from the private sector, six government members and 14 civilian members.

The review procedure typically involves the following steps:

- gathering public opinion;
- internal review (including regulatory-impact analysis) by ministries;
- request for the KRRC review; and
- conducting a preliminary evaluation. For less important regulations, ministerial internal review prevails, for important regulations (that is, any regulation that may have an impact on the economy of \$10 million or more annually, one million people or more, or that apparently undermines competition), the KRRC will make a recommendation.

The review should be completed within 45 days, or ten days for less important regulations.

Regulatory reform has generally resulted in a reduction of existing regulations and an improvement in the effectiveness of regulation. Some regulatory achievements have been made to the infrastructure areas:³⁶³

- In 2005, strategic tasks in relation to transportation regulation (air and ground) were identified for improvement.
- In 2006, monitoring groups for ten sectors including transportation were formed to review regulatory reform outcomes.
- In 2009, reform for promoting new 'growth-engine' industries took place. Eight industries were on the top of the reform agenda, including new and renewable energy, developing a 'green' transportation system, and convergence of broadcasting and communications. For example, due to the reforms, power plants have been allowed to add facilities for new and renewable energy without a separate permit.

REGULATORY ARRANGEMENTS BY INDUSTRY OR SECTOR

1. Energy

South Korea has limited natural resources. It has no oil reserves, only a small amount of natural gas and some low-quality coal reserves. The country relies heavily on imports to meet its energy demands.³⁶⁴

³⁶¹ Korea Regulatory Reform Committee (KRRC) website. Available at: <http://www.rrc.go.kr/> [accessed on 8 July 2013].

³⁶² Article 23 of the *Basic Law on Administrative Regulations*, 18 April 1998.

³⁶³ KRRC, *Regulatory Reform Achievement: 2004 to 2009*. Available at: <http://www.rrc.go.kr/> [accessed on 8 July 2013].

³⁶⁴ International Energy Agency (IEA), *The Republic of Korea: 2006 Review*, Energy Policies of IEA Countries, 2006, p. 42.

*Electricity*³⁶⁵

South Korea was ranked eleventh in the world in 2011, in terms of electricity production (459.5 billion kWh) and consumption (455.1 billion kWh).

Korea Electric Company was established in 1961 as a government-owned vertically integrated monopolist in the electricity supply industry. In 1982, it became a public corporation and was renamed Korea Electric Power Corporation (KEPCO). In 1989, its shares were partially floated (21 per cent) on the Korea Stock Exchange, and in 1994, US\$300 million of American Depository Receipts (ADRs) were issued under the letters KEP on the New York Stock Exchange (NYSE). In 2001 the generation division of KEPCO was split into six subsidiary companies under the government's electricity subsector reform. The subsidiaries are Korea Hydro & Nuclear Power Co.; and five others using thermal energy: Korea South-East Power Co. Ltd (KOSEP); Korea Midland Power Co. Ltd. (KOMIPO); Korea Western Power Co. Ltd. (KOWEPO); Korea Southern Power Co. Ltd. (KOSPO); and Korea East-West Power Co. Ltd. (EWP).

The Basic Plan for Restructuring the Electricity Supply Industry was announced in January 1999 to introduce competition into electricity supply in stages: generation competition during 2001 and 2002; wholesale competition during 2003 and 2008; and retail competition from 2009. The *Act on the Promotion of Restructuring the Electricity Power Industry* was put in place and the *Electricity Business Law* was revised in December 2000. The Korea Electricity Commission (later renamed the Electricity Regulatory Commission) was established within the then Ministry of Commerce, Industry and Energy (MOCIE), being responsible for: licensing electricity companies; facilitating competition and redressing unfair practices; protecting electricity consumers; monitoring monopoly; and implementing the restructuring. The not-for-profit independent public organisation, Korea Power Exchange (KPX), was established to operate the Electricity Market and Power System.³⁶⁶ KPX has three main responsibilities: maintaining the generation output to meet demand; transmission network reliability; and emergency operation procedures. Currently, the six major electricity generation companies sell their production into a power pool, and KEPCO, as the single buyer, purchases power from the pool.

However, in July 2004, the Government announced the suspension of the second-stage restructuring plan, including the indefinite delay of: the privatisation of one of the five non-nuclear generation subsidiaries; the distribution business unbundling and division; and the new wholesale market introduction. As a result, KEPCO retains the transmission and distribution monopoly. In 2008, the Government declared that it would not privatise the electricity industry. This was followed by the August 2010 announcement of the gradual implementation of the Advance Plan for the Electricity Industry, which provided a direction to strengthen a competitive and open-door policy.³⁶⁷ As part of the preparation for the introduction of retail competition, a number of policy changes would be introduced. These included:

- accounting separation of KEPCO businesses into transmission, distribution and sales; and
- take-over by the government of the six electricity generation companies from KEPCO.

Under Article 4 of the *Korea Electric Power Corporation Act* (last amended in December 2002), the government shall hold at least 51 per cent of the ownership of the Corporation. KEPCO remains a dominant electricity supplier through generation, transmission and distribution. It produces electricity through thermal energy (coal, oil, and gas-fired: 62.7 per cent); nuclear (35.7 per cent); hydro-electric (1.3 per cent); and the remainder from wind, solar and other technologies.³⁶⁸ It also develops battery chargers, most notably for automobiles. It has a number of subsidiaries and affiliated companies, such as Korea Gas Corporation (KOGAS).

KEPCO has taken part in the Jeju Smart Grid Demonstration Project (December 2009 to May 2013) to establish its smart-grid foundation for an electric power grid that utilises information technologies to

³⁶⁵ Sources include: Asia-Pacific Economic Cooperation, *The Impacts and Benefits of Structural Reforms in Transport, Energy and Telecommunications Sectors*, January 2011; Korea Electric Power Corporation website at: <http://www.kepco.co.kr/eng/> [accessed on 8 July 2013] Korea Power Exchange website at: <http://www.kpx.or.kr/english/> [accessed on 8 July 2013].

³⁶⁶ Korea Power Exchange (KPX) website. Available at: <http://www.kpx.or.kr/english/main/main.htm> [accessed on 8 July 2013].

³⁶⁷ The summary of the electricity market reform is based on: MKE/Electricity Regulatory Commission, *Korea Power Industry Overview*, 5 November 2010.

³⁶⁸ Korea Power Exchange, *Handbook of Electricity Statistics in Korea*, Table 6.A – Gross Generation by Fuel, 2009, p. 14. The statistics are based on December 2008 estimates.

maximise energy efficiency and to reduce greenhouse gas emissions. With US\$7 billion investment in smart grids by 2030,³⁶⁹ it aims at establishing the broad smart grid by 2020 and building the world's first nation-wide smart grid by 2030.³⁷⁰

Transmission voltages in South Korea are 765kV, and 345kV for trunk routes; and 154kV or 66kV for local networks. The 66kV lines are being replaced. The power network of Jeju Island is now connected to the mainland transmission system by submarine high-voltage direct current (HVDC) cables.

Gas³⁷¹

South Korea is the eighth largest importer of natural gas in the world. In 2010, it imported 42.38 billion cubic meters of natural gas; compared to only 0.54 billion cubic meters of domestic production. Gas accounts for about 14 per cent of energy use in South Korea.

Incorporated in August 1983 under the *Korea Gas Corporation Act*, Korea Gas Corporation (KOGAS) is the public natural gas company and has become the largest Liquefied Natural Gas (LNG) importer in the world. It was subject to the *Special Law on Privatisation of State-owned Companies* in 1997 and has been listed on the Korea Stock Exchange since the initial public offering of 33 per cent of equity in December 1999. As of December 2010, the government controlled a majority of KOGAS shares through its direct or indirect holdings (via KEPCO and local governments). KOGAS currently operates three LNG terminals in Incheon, Pyongtaeck and Tongyoung, and distributes gas via the nationwide pipelines of 3022 kilometres. KOGAS has also been involved in gas exploration in countries such as Russia, Oman and Qatar; and gas infrastructure construction (for example, Mozambique and Ghana).³⁷²

Similar to the electricity market reform, a liberalisation and privatisation plan was proposed for the gas industry in the early 2000s.³⁷³ Announced on 31 August 2001 by the then MOCIE, KOGAS would have been legally separated into two functions: infrastructure (receiving terminals, pipelines and storage); and import and wholesaling. The gas import and wholesale units of KOGAS would have been split into three affiliated companies by the end of 2001. Two of these three import/wholesale units would have been sold to private investors by the end of 2002. Government ownership would have been retained for the other unit as a subsidiary of KOGAS for several years, and this subsidiary was eventually to be privatised.

However, gas reform was not implemented according to the plan.³⁷⁴ Two main barriers were concern about energy security, and opposition from the labour union. The privatisation process of KOGAS and the associated spin-off of importing and wholesaling into three companies stalled. Since 2005, some large gas users (for example, steel makers POSCO and K-Power) have been allowed to import gas directly for their own use under a licensing system. In October 2008, the MKE announced a plan to permit other companies to enter the LNG import and wholesale markets starting in 2010.³⁷⁵ The plan contemplated gradual liberalisation, initially starting with the introduction of competition into the market for power generation, and followed by the market for industrial usage.

KOGAS is in charge of importing, wholesaling and transporting gas to city gas companies or large-scale customers such as industrial users and electricity companies (for example, KEPCO) via its pipelines. There are about 26 private city gas companies with exclusive distribution and retail sales rights within certain geographical regions. They have been privatised since 1997, and some of them

³⁶⁹ Reuters, *Update 1-KEPCO to Invest \$7.2 Bln in Smart Grid by 2030*, 18 February 2011. Available at: <http://af.reuters.com> [accessed on 8 July 2013].

³⁷⁰ See KEPCO, *Annual Report 2011*, p. 44. Available at: <http://www1.kepco.co.jp/english/ir/annual/2011/index.html> [accessed on 8 July 2013].

³⁷¹ Sources include: Korea Gas Corporation website at: <http://www.kogas.or.kr/ENG/main.jsp> [accessed on 8 July 2013]

A Gao, *Regulating Gas Liberalisation: A Comparative Study on Unbundling and Open Access Regimes in the US, Europe, Japan, South Korea and Taiwan*, Wolters Kluwer, 2010, pp. 237-267.

³⁷² Korea Gas Corporation, *Our Profile*. Available at: <http://www.kogas.or.kr/> [accessed on 8 July 2013].

³⁷³ The Government first developed 'The Basic Plan for Restructuring the Gas Industry' in November 1999.

³⁷⁴ IEA, *op cit.*, 2006, p. 42.

³⁷⁵ KOGAS, *KOGAS 2010 Annual Report*, 2010, p. 44. Available at: http://www.kogas.or.kr/kogas_eng/html/main/main.jsp#notice-list [accessed on 8 July 2013].

were acquired by foreign companies.³⁷⁶ However, distribution unbundling did not take place, as originally proposed under the 1999 Gas Restructuring Plan. The city gas companies purchase gas from KOGAS or liquefied petroleum gas (LPG) from oil companies.

Regulatory Institutions and Legislation

The Ministry of Energy and Resources was merged with the Ministry of Trade and Industry to become the Ministry of Trade, Industry, and Energy (MOTIE) in 1993. During the government reforms of 1998, responsibility for international trade issues was moved to the Ministry of Foreign Affairs and Trade, and the Ministry was re-organised as the Ministry of Commerce, Industry, and Energy (MOCIE). In 2008, a 'mega-ministry', the Ministry of Knowledge Economy (MKE), was formed by integrating the MOCIE, the Ministry of Information and Communications, the Ministry of Science and Technology, and the Ministry of Finance and Economy.³⁷⁷ According to the government position, the integration 'provides a vast array of experts to create synergies, spur innovation, and upgrade the nation's economy'.³⁷⁸ The MKE's core responsibilities are to 'strive to assemble traditional industrial know-how, cutting edge R&D, and strong pro-business policies'.³⁷⁹ Its aims are to create a more business-friendly environment that supports Information and Communications Technologies (ICT) and high-end manufacturing, and which promotes foreign trade.

In the energy area, the MKE is primarily responsible for developing energy policy. The Vice Minister for Trade and Energy holds the portfolio. The MKE is responsible for providing for the day-to-day national energy requirements. To this end, it is mandated to engage in energy cooperation projects, expand renewable resources and distribution networks, and craft environmentally-friendly economic policies. A number of energy policies aiming at achieving energy security and environmentally responsible growth have been implemented by the ministry. For example, tasks for electricity security include: securing an efficient energy mix; increasing supply capacity; and effectively managing demand. Tasks for natural gas security include extending infrastructure to supply natural gas to households, and promoting compact and hybrid vehicles to run on LPG.

Under the *National Energy Fundamental Act*, a national basic plan for energy should be established and executed by the National Energy Committee (NEC) every five years. The chairman of the NEC is the President. The NEC's role is basically to establish a long-term energy strategy and to determine the direction of the national energy policy. The first national basic plan for the period 2008 to 2030 has been put in place, after consulting with the relevant government agencies.³⁸⁰ The plan sets out strategies for each energy source in order to have stable supply to meet the increasing demands. For both electricity and gas, further expansion of facilities and networks is prompted. The plan also sets out strategies to make the energy market efficient, and construct a reasonable price system, suggesting:

- for electricity, cost-reflective pricing and more competitive market structures, including entries of private power generators and more retail competition; and
- for gas, import market liberalisation; pricing that takes into account seasonal demand patterns.

Electricity

Under the *Electricity Business Act*, the MKE is required to produce the biannual Basic Plan of Long-term Electricity Supply and Demand that provides the long-term energy policy directions on electricity supply and demand; a construction plan for generation, transmission and distribution facilities; and a demand-side management plan to secure stable electricity supply. The Basic Plan, published as a ministerial ordinance, is a non-binding tool providing market participants with appropriate information and a market-based solution.

³⁷⁶ For example, Belgium's Tractebel and an SK-Enron joint venture. For information up to 2004, see Koji Morita, *Natural Gas Market in East Asia: Present Situations and Challenges*, 20 January 2005, p. 20; Available at: <http://eneken.ieei.or.jp/en/data/pdf/281.pdf> [accessed on 8 July 2013].

³⁷⁷ MKE, *Home*. Available at: <http://www.mke.go.kr/language/eng/about/history.jsp> [accessed on 8 July 2013].

³⁷⁸ MKE, *Responsibilities*. Available at: <http://www.mke.go.kr/language/eng/about/responsibilities.jsp> [accessed on 8 July 2013].

³⁷⁹ *Ibid.*

³⁸⁰ APEC-VC Korea, *Global Environmental Conservation*. Available at: http://www.apec-vc.or.kr/?p_name=database&gotopage=7&query=view&unique_num=ED2008060121 [accessed on 8 July 2013].

The Fifth Basic Plan covering the period 2010 to 2024 was established in 2010.³⁸¹ It was based on the construction intentions of generation companies (six subsidiary companies under KEPCO and other smaller private generation companies) and the demand forecast provided by Korea Power Exchange (KPX). In establishing the plan, the government reviewed and prepared the working drafts of four subcommittees (that is, Generating Capacity Expansion, Demand Forecast, Demand-side Management and Transmission System Expansion), and collected opinions on the tentative plan from various stakeholders through a public hearing. After incorporating the review of the draft plan by the Electricity Policy Review Board, the MKE finalised and announced the Basic Plan.

The main objectives of the Fifth Basic Plan are to: gradually expand base-load generating facilities for establishing the economical electricity supply system; establish an environment-friendly power supply, considering the reduction in national greenhouse gases; and to minimise uncertainties of the supply and demand outlook.

The biannual basic plans are implemented by the MKE through various tools and special measures such as licensing. Generators can apply for the approval of their generation business and power plant construction plans, based on the Basic Plan. The power plants listed in the Plan are exempt from the 19 approvals required for the construction in accordance with the *Power Resources Development Act*.³⁸² Ministerial approval is required for the construction of transmission facilities.

The MKE approves electricity tariffs,³⁸³ consisting of a basic charge and a usage charge (based on electricity demand). Both components differ by customer class (for example, residential, industrial, commercial and agricultural users). Cross-subsidies between alternative users distort prices, with agricultural and industrial users being the main beneficiaries. Since 2002, the MKE has been implementing an electricity tariff reform to reduce the cross-subsidies between residential and industrial users, and to construct a cost-based tariff system. Plans have been under way to introduce a voltage- and cost-based rate system in the medium- and long-term.³⁸⁴ KEPCO was operating at a loss between the period 2008 and 2011, when fuel costs remained high. A fuel cost pass-through system, adopted by KEPCO in July 2011,³⁸⁵ was temporarily suspended.

Within the MKE, the Korean Electricity Regulatory Commission (KOREC) was established to create an environment of fair competition within the electricity businesses. Its other objectives are to: protect consumers' rights and interests; resolve disputes between electricity firms and consumers or among electricity firms; and to monitor for unfair market practices and any abuses of market power. The KOREC is affiliated with the MKE because of its role to restructure the electricity industry and to create markets based on competition.

The electricity regulator is responsible for: licensing electricity companies; facilitating competition; eliminating unfair practices; protecting electricity consumers; monitoring antitrust behaviours; and implementing the industry restructuring. The MKE instead focuses on power procurement, smart-grid, energy consumption, and research and development. To the extent necessary, the MKE is responsible for supervising the operation of KEPCO,³⁸⁶ such as nominating the President of the Corporation.

Key legislation governing the electricity industry includes the following:

- *Korea Electric Power Corporation Act*, enacted in 1989 and last amended in December 2002, that outlines the scope of operation and management.
- Articles of Incorporation of the Korea Electricity Power Corporation, enacted in 1981 and last revised in 2012.
- *Public Agencies Management Act*, enacted in 2007 and last amended in 2011.

³⁸¹ MKE/KPX, *The 5th Basic Plan for Long-term Electricity Supply and Demand (2010 – 2024)*, December 2010.

³⁸² MKE/KPX, *The 4th Basic Plan for Long-term Electricity Supply and Demand (2008 – 2024)*, December 2008, p. 3.

³⁸³ WTO, *Trade Policy Review*, Document number WT/TPR/S/204, p. 106.

³⁸⁴ Sources of information include: H Jung, and K Park, *A Study of Market-Friendly Energy Price Systems*, Korea Energy Economics Institute, Seoul (in Korean), 2010; OECD, *OECD Economic Surveys: Korea, Overview*, April 2012.

³⁸⁵ See KEPCO, *Annual Report 2011*, p. 39. Available at: <http://www1.kepco.co.jp/english/ir/annual/2011/index.html> [accessed on 8 July 2013].

³⁸⁶ Article 18 of the *Korea Electric Power Corporation Act*.

- *Electricity Business Act* (EBA) that provides the basic information for the establishment of electricity businesses and the promotion of sound development. Other relevant laws and regulations governing electricity businesses include: the Enforcement Decree of the EBA (procedures and administrative information for the implementation of the EBA); Enforcement Regulations of the EBA (stipulating detailed authorisation and licensing procedures and application methods and licensing standards); and notices of the MKE (stipulating technical standards and administrative procedures in detail).
- *Power Resources Development Promotion Act* that provides special cases relevant to the development of sources of electricity.

Gas

For the gas subsector, the MKE is the primary regulatory body that determines the wholesale gas tariff under the Return-on-Rate-Base (RoRB) regulation, and long-term industry plans. Management staff of KOGAS is appointed by the government. The MKE and the local governors and mayors co-operate on policies.³⁸⁷

Wholesale gas prices are subject to RoRB regulation, under which allowed profit is set at a predetermined percentage on the rate base.³⁸⁸ That is:

Total cost = raw material costs + supply costs + guaranteed returns

where guaranteed returns = Rate base * RoRB; and rate base = Value of assets and working capital injected in production and supply of goods and services.

Raw material costs are passed on directly to the wholesale tariff. Supply costs, the guaranteed return, and target volume, are decided annually by the MKE after consultation with the Ministry of Strategy and Finance (MOSF) and KOGAS. In principle, the tariff is designed to recover reasonable costs plus a fair investment return. KOGAS records the variance between the allowed cost and the invoice sales price charged to customers as an addition or a reduction in sales amount when it is probable that, through the rate-making process, there will be a corresponding increase or decrease in future invoice sales price charged to customers.³⁸⁹ The price adjustments are made every two months for domestic consumers, and every month for electricity plants.³⁹⁰

Overseas investments receive preferential treatment instead of RoRB regulation.

Key legislation governing the gas industry includes:³⁹¹

- *Korea Gas Corporation Act* (1982) that stipulates the organisation and business scope of Korea Gas Corporation.
- *City Gas Business Act*, enacted in 1983 and amended on 8 February 1999, sets forth the framework for the urban gas industry, such as licensing requirements for the supply of gas, construction of gas supply facilities, terms and conditions of gas supply, and safety management. It abolished part of the KOGAS monopoly on importing LNG and operating LNG infrastructures. Large energy users are allowed to import LNG for their own consumption by constructing their own LNG infrastructure; or completing a negotiation agreement with KOGAS concerning the use of KOGAS pipelines or LNG infrastructures as long as they report to the MKE (that is, negotiated third-party access and voluntary service unbundling).
- *Safety Management of High-Pressure Gas Act*, enacted in 1983, that specifies safety issues in handling and using high-pressure gases and constructing supply facilities.

Under Article 18-2-2 of the *City Gas Business Act 1983*, the MKE is required to formulate a long-term natural gas supply-and-demand plan, which covers more than ten years from the year when the plan

³⁸⁷ KOGAS, *Business System*. Available at: <http://www.kogas.or.kr/> [accessed on 8 July 2013].

³⁸⁸ KOGAS, *IR Information / Presentation*, October 2011.

³⁸⁹ KOGAS, *KOGAS 2010 Annual Report*, 2010, p. 55. Available at: http://www.kogas.or.kr/kogas_eng/html/main/main.jsp#notice-list [accessed on 8 July 2013].

³⁹⁰ WTO, *Trade Policy Review: Republic of Korea*, WT/TPRS/204, p. 105.

³⁹¹ AM Gao, *Regulating Gas Liberalization: A Comparative Study on Unbundling and Open Access Regimes in the US, Europe, Japan, South Korea and Taiwan*, Kluwer Law International, the Netherlands, 2010, p. 408.

is made and is published every two years under a ministry ordinance. Accounting separation between gas and non-gas businesses is specified under Article 40-2-2.

Other relevant laws or government policies that have shaped the industry's development include:

- *Special Act on the Privatisation of Public Companies*, enacted in 1997;
- Second National Energy Plan covering the period 1997 to 2006;
- *Petroleum Business Act*, enacted on 23 September 1998; and
- Gas Industry Restructuring Plan, stipulated in 1999.

Consultation of Interested Parties

Other government bodies involved in the energy sector include:

- Korea Energy Economics Institute (KEEI) which develops energy policies related to: economics and statistics of energy markets; energy conservation and climate change; the petroleum, gas, electricity, and new and renewable energy industries. It is financed directly from government funding.
- Korea Institute of Energy Research (KIER), a government-funded research institution, is a major research institute developing energy technologies. It is divided into five major research departments, namely: energy conservation; energy efficiency; energy environment; new and renewable energy; and technology expansion.
- Korea Energy Management Corporation (KEMCO) plays a key role in achieving Korea's research and development (R&D) policy goals for: energy efficiency; energy conservation; clean energy; and new and renewable energy technologies. It also manages R&D planning, and financial support and management. Within KEMCO, the New and Renewable Energy Centre (NREC) works on R&D in renewable energies.
- Korea Atomic Energy Research Institute (KAERI) conducts studies related to nuclear power.

Decision-making and Reporting

The Board of the electricity regulator, the KOREC, is comprised of: one Chairperson; and a maximum of eight commissioners, one of whom is a permanent member, nominated by the Ministry of Knowledge Economy, and appointed by the President. There are five specialised sub-commissions, which are responsible for matters relating to: legal dispute mediation; restructuring; market creation; electricity rates; electricity tariffs; and power systems.

A Secretariat of the KOREC is in charge of implementing the Board's policies. The Secretariat consists of three divisions:

- Policy Coordination Division, responsible for: overall operation of the KOREC; establishment and implementation of policies to promote the development of the electricity sub-sector; administrative procedures concerning permissions for electricity businesses; transference, division and mergers of corporations; and support for the operation of power companies' climate-change response measures.
- Electricity Market Division, responsible for: overall operation of the electricity market and review/amendment of relevant regulations; revision of policies that affect electricity metering and improvements to the rating system; review of changes to electricity rates suggested by electricity businesses; and finalising the standard electric power supply contract consumer protection.
- Electricity System Division, responsible for: oversight of the overall operation of the electricity system; maintaining the reliability of electricity systems and the quality of service provided to the public; matters pertaining to the stable operation of transmission and distribution facilities; competitiveness of the power plant maintenance industry; and labour relations in the electricity sub-sector.

Some of KOREC's staff is shared with the MKE (IEA, p. 34).

While the KOREC is part of the Ministry, the Minister generally does not over-rule the regulatory decisions made by the KOREC on regulatory activities such as authorisation and licensing of

electricity businesses. Nevertheless, the regulator is not perceived to have full authority and autonomy (IEA, p. 44).

The KOREC and the KFTC have developed memoranda of understanding since 2001, outlining their respective roles, duties and functions in the electricity industry. The KFTC is an anti-trust agency, monitoring monopoly issues and unfair trade practices, whereas the KOREC manages technical and professional competition policy (IEA, p. 34).

2. Telecommunications³⁹²

South Korea is a leader in the area of information and communications technology (ICT), demonstrated by its: vast ICT-related production and exports; rapid adoption of new technologies; and the wide use of Internet and mobile communications devices. ICT-related products, such as computer chips and mobile phones, accounted for 29.5 per cent of total exports in 2010.³⁹³ South Korea is advancing its fourth-generation telecommunications network, which incorporates mobile WiMAX and LTE technologies, enabling data transmission speeds of 100Mbps at high mobility (100km/hour) and 1Gbps at low mobility.

According to the International Telecommunications Union, South Korea is the most broadband-penetrated country in the world with the highest percentage of subscribers, and is the fourth in the world in terms of wired broadband subscriber count (KCC, p. 24). OECD *Broadband Portal* data³⁹⁴ for December 2012 place Korea fourth for subscriptions per one hundred persons for both wireline and wireless broadband.

South Korea is a leader in launching broadcasting and telecommunications convergence technologies, including: Internet Protocol Television (IPTV) technology that allows for live broadcasting using a high-speed Internet network; and smart TV (a computer-like TV with additional VOD, games, video phone and application services) market vitalisation.

As a member of the World Trade Organisation (WTO), South Korea is a signatory to the WTO Basic Telecommunications Agreement and has made a set of market access commitments under the General Agreement on Tariffs and Trade regarding telecommunications/information services.³⁹⁵

Market Structure: Telecommunications Services Market

In December 1981, the Korea Telecommunications Authority (KTA) was set up as a government-owned monopoly corporation. In 1984, Korea Mobile Telecommunications, a subsidiary of the KTA, became the first mobile communications service provider.

Telecommunications market liberalisation started slowly but gradually accelerated in 2000.³⁹⁶ The process commenced with the privatisation of the KTA in three distinct stages:

- In 1987, the government announced its intention to sell 49 per cent of KTA's shares through public tendering. This led to the initial sell-off of about ten per cent of shares through 'the people's share' program in 1989, and another ten per cent divestiture of shares in 1993. KTA was renamed Korea Telecom (KT) in 1991.
- In the second stage, ten per cent in 1994, and 8.8 per cent in 1996, were further sold to mainly private institutional investors. However, the government retained control rights.
- The final stage came with the enactment of the *Special Law on Privatisation of State-owned Companies* in August 1997. This transformed KT from a government-owned enterprise to a smaller funding scale (below 50 per cent), thus subjecting it to a less strenuous set of regulation

³⁹² This section has drawn on information published at the official website of the Republic of Korea, *Leading Industries*. Available at: <http://www.korea.net/AboutKorea/Economy/Leading-Industries> [accessed on 8 July 2013].

³⁹³ Korea Communications Commission (KCC), *Smart Korea Communications for All*, 2011, p. 10.

³⁹⁴ OECD, *OECD Broadband Portal* December 2012, updated on 18 July 2013. Available at: <http://www.oecd.org/internet/broadbandandtelecom/oecdbroadbandportal.htm> [accessed on 22 July 2013].

³⁹⁵ Global Legal Group, *International Comparative Legal Guide to Telecommunication Law and Regulations 2012*, Korea chapter. Available at: <http://www.iclg.co.uk/practice-areas/telecommunications/telecommunications-2012/korea> [accessed on 8 July 2013].

³⁹⁶ C Srinuan, P Srinuan and E Bohlin, 'Entry Relaxation and an Independent Regulator: Performance Impact on the Mobile Telecoms Industry in Asia', in D S Jarvis, M Ramesh, X Wu and E Araral Jr (editors), *Infrastructure Regulation: What Works, Why and How Do We Know? Lessons from Asia and Beyond*, 2011, p. 86.

by relevant ministries. KT was the first public company to draw up a management contract between its CEO and executives, which introduced a system of responsible management.

In December 1998, KT was listed on the Korea Stock Exchange. KT continued to act as a monopoly telecommunications infrastructure provider until May 2002 when foreign entry into the market was permitted. The *Telecommunications Business Act* was revised to introduce competition. In the same year, KT was fully privatised. At present, KT is listed on stock exchanges in South Korea, New York and London, with foreigners holding 47.9 per cent of total shares issued.³⁹⁷ As a licensed network telecommunications service-provider under the *Telecommunications Business Act*, KT is subject to the monopoly regulations and the *Fair Trade Act* that prevent misuse of market power.

In 2009, KT and its subsidiary, Korea Telecom Freetel (KTF) merged,³⁹⁸ after receiving approvals from the KFTC (25 February) and the KCC (18 March). KT is now an integrated fixed-line, wireless and Internet service provider. KT is the designated universal service provider, with an obligation to supply the universal services (that is, fixed-line telephone services, emergency call services and telephone services under a discounted-rate scheme for the disabled and those on low incomes) at uniform rates across the country.

In the market for local telecommunications services, KT (84.3 per cent market share; December 2011) competes with SK Broadband (13.3 per cent) and LG U Plus (2.4 per cent).³⁹⁹ Other companies such as Onse and SK Telink operate in the international long-distance market.

There are two other major mobile service providers – SK Telecom, and LG U Plus. SK Telecom was formed in March 1997 when the former Korea Mobile Telecommunications was privatised. LG Telecom started its mobile services in 1997 and merged with LG Dacom and LG Powercom into LG U Plus in 2010. Fourth-generation mobile services based on LTE technology have recently been deployed by each service provider. In December 2011, KT had 31.5 per cent market share; SK Telecom had 50.6 per cent and LG U+ had 17.9 per cent.

SK Broadband entered the broadband Internet access-services market in 1999, offering both HFC and ADSL services; and KT entered the market with ADSL services in 1999. Dreamline, Onse and LG U+ followed. Cable television providers offering HFC-based broadband access services have also recently entered the broadband Internet access market.

In data-communication services, KT primarily competes with SK Broadband and LG U+. KT retained a monopoly in the domestic data communication service until 1994, when LG U+ was authorised to provide the leased-line service.

*Market Structure: Broadcasting Services Market*⁴⁰⁰

In terrestrial broadcasting,⁴⁰¹ nationwide coverage is provided by the government-owned Korean Broadcasting System (KBS); the Educational Broadcasting System (EBS), and by the Munhwa Broadcasting Corporation (MBC), a commercial broadcaster with a strong public-service character. Seoul Broadcasting System (SBS), one of the country's ten regional commercial broadcasters, also carries out nationwide broadcasting through partnerships with local broadcasters. Terrestrial TV service, in both analog and digital formats, is provided on two KBS channels (KBS1 and KBS2) and on one channel each by EBS, MBC, and SBS. For radio broadcasting, KBS operates on seven channels and MBC, SBS, and EBS on three, two, and one, respectively.

³⁹⁷ Source: Korea Telecom, *Ownership Structure*. Available at: http://www.kt.com/eng/ir/share_01.jsp [accessed on 8 July 2012].

³⁹⁸ In 1996, Korea Telecom Freetel (KTF) began its service. It merged with Internet companies invested by Samsung Group in 2002.

⁴⁰⁰ N Yoshiko and Y Ritsu, *How Public Service Broadcasting Is Talked About?: From a Comparative Web Survey of Japan, the Republic of Korea, and the United Kingdom*, NHK Broadcasting Studies, No. 8, 2010, pp. 126-127.

⁴⁰⁰ N Yoshiko and Y Ritsu, *How Public Service Broadcasting Is Talked About?: From a Comparative Web Survey of Japan, the Republic of Korea, and the United Kingdom*, NHK Broadcasting Studies, No. 8, 2010, pp. 126-127.

⁴⁰¹ Terrestrial broadcasting is a mode of broadcasting which does not involve satellite transmission or cables; typically using radio waves through transmitting and receiving antennas.

Regulatory Institutions and Legislation

Prior to 2008, the telecommunications industry was under the authority of the then Ministry of Information and Communications (MIC), which has since been merged into the Ministry of Knowledge Economy (MKE).

The responsibilities of the MKE include:⁴⁰²

- formulating the basic plan for broadcasting and telecommunications;
- periodically reporting to the National Assembly regarding sectoral developments;
- drafting and implementing plans for developing telecommunications technology; and
- fostering and providing guidance on research and development of the technology.

In response to the rapid development of digital technologies, the Korea Communications Commission (KCC) was established in February 2008 as a single and unified organisation for overseeing broadcasting and telecommunications policy; embracing the core functions of the former Korean Broadcasting Commission and the former MIC.⁴⁰³ It is an independent government agency responsible for policy-making and regulation in the communications sector, in order to contribute effectively to the advancement of broadcasting, communications and related convergence fields, and increase public welfare. The focus of the KCC is: advancement of the broadcasting service market; investment expansion in communications services; support for overseas market development; and the spread of 'green IT'. In addition, the KCC supports international cooperation and new technology development, and possible future industry developments.

The KCC is an independent regulatory body in terms of its operation and composition. It is a collegial administrative body reporting to the President (via direct control of the Prime Minister). The Board consists of a chairperson, a vice-chairperson and three standing commissioners. All the board members are appointed by the President, based on their expertise in communications and broadcasting. Two members, including the chairperson, must be designated by the President, and the other three members must be nominated by the National Assembly. The appointment of the chairperson is subject to approval at a confirmation hearing at the National Assembly. The vice-chairperson is elected by the members through mutual vote. Each member holds the office for a term of three years, and can be reappointed only once.

The KCC consists of two offices (Planning and Coordination Office, and Broadcasting and Communications Convergence Policy Office) and four bureaus providing an oversight of broadcasting policy, telecommunications policy, network policy, and consumer protection, respectively.⁴⁰⁴ The Telecommunications Policy Bureau has four divisions, being responsible for telecommunications policy planning, telecommunications competition policy, telecommunications service policy, and telecommunications infrastructure policy. The Network Policy Bureau has five divisions, operating in areas of network planning, privacy protection and ethics, Internet Policy division, smart network and communications, and network protection respectively. The budget for 2012 is 1161.6 billion won, an increase from the 2011 budget of 856.1 billion won.⁴⁰⁵

Responsibilities related to reviewing broadcasting and telecommunications content have been delegated to the Korea Communications Standards Commission (KCSC),⁴⁰⁶ in order to better promote the objectivity and validity of the process. The KCSC, formed in February 2008, integrated the relevant functions of the Korea Broadcasting Commission and the Korea Internet Safety Commission (KISCOM).

The roles and responsibilities of the KCC in the field of broadcasting and telecommunications include: establishing policies related to broadcasting and telecommunications and their convergence (for example, media supply chain of network, service, device and content); promotion and

⁴⁰² Korea Telecommunications (KT), *KT Corporation Form 20-F 2011*. As filed with the US Securities and Exchange Commission on 27 April 2012, p. 40.

⁴⁰³ KCC, *Home*. Available at: <http://eng.kcc.go.kr/> [accessed on 8 July 2013].

⁴⁰⁴ Source: Korea Communications Commission, *Brochure*, 2011, p. 9.

⁴⁰⁵ KCC, *2012 Budget and Fund Management Plan Overview*, in Korean, p. 5.

⁴⁰⁶ Korea Communications Standards Commission, *Home*. Available at: <http://www.kocsc.or.kr/> [accessed on 8 July 2013].

commercialisation of converged services and development and dissemination of related technologies; managing and allocating spectrum resources; promoting competition in relevant markets and implementing network investment strategies; eliminating or reducing socially undesirable outcomes and designing user protection policies; and investigating unfair business practices, and mediating related disputes. As stated by the KCC, its regulatory goals have shifted from regulation of social, cultural and economic monopoly to fair competition and consumer protection.⁴⁰⁷ The KCC and the MKE have recently reached an agreement that the former will be solely responsible for research and development projects on radio, satellite, broadcasting and other technologies and services that are exclusively within its scope of responsibilities, while it will jointly oversee the latter's projects involving devices.

Law and Rules

There are currently 16 jurisdiction laws governing broadcasting and telecommunications.⁴⁰⁸ For example, key legislation governing telecommunications services includes the *Framework Act on Telecommunications* and the *Telecommunications Business Act*, both enacted in August 1991. The laws governing the broadcasting industry include the *Broadcasting Act* and the *Internet Multimedia Broadcasting Act*.

The *Framework Act on Telecommunications* prescribes technical standards for telecommunications equipment and facilities, and management of accidents and disasters disrupting telecommunications. The *Telecommunications Business Act* prescribes: classification of telecommunications services and service providers; market-entry rules; pro-competition measures; and mechanisms to ensure fair competition and a user-protection system.

The *Broadcasting Act*, enacted in January 2000, provides policy development for upgrading, and ensuring the safety and reliability of, broadcasting and communications networks; and ensuring interoperability between broadcasting and communications networks and their standardisation.

In response to the emerging convergence, the *Internet Multimedia Broadcast Act* was enacted in January 2008, specifying:

- classification of operators (IPTV service-providers and content-providers); and
- entry regulation, business domain, and ownership regulation.

The *Framework Act on Broadcasting and Telecommunications Development* was drafted by the KCC and put in place in March 2010 to ensure the regulatory frameworks in the two areas (that is, telecommunications and broadcasting) are consolidated. It provides basic directions and plans for: broadcasting and communications policy; promotion of broadcasting and communications; establishment of technical standards; disaster management; and establishment of the Broadcasting and Communications Development Fund.

The *Information and Communications Construction Business Act*, governing the registration, technical standards and business scope for construction businesses, was enacted in 1971 and amended in December 1989 to allow privatisation.

The *Act on the Establishment and Operation of the Korea Communications Commission*, enacted in 2010, provides the legal basis for: the establishment of the KCC; its composition; organisation structure and responsibilities; and its method of operation. Pursuant to Article 11 of this Act, the KCC has responsibilities in four major areas: telecommunications regulation; broadcasting regulation; issues related to spectrum research and the management of spectrum resources; and other responsibilities assigned by this Law or other laws relevant to the KCC. Matters subject to the KCC's deliberation are specified in Article 12 of the Act.

Regulatory responsibilities of the KCC are summarised below according to main functions.

⁴⁰⁷ KCC, *Annual Report 2010*, 2010, p. 11. Available at: <http://eng.kcc.go.kr/user.do?mode=view&page=E02020000&dc=E02020000&boardId=1053&cp=1&boardSeq=31275> [accessed on 9 July 2013].

⁴⁰⁸ See the summary table at: KCC, *Annual Report 2010*, 2011, pp. 111-112. Available at: <http://eng.kcc.go.kr/user.do?mode=view&page=E02020000&dc=E02020000&boardId=1053&cp=1&boardSeq=31275> [accessed on 9 July 2013].

Authorisation

The KCC is responsible for granting licences and/or authorisation to telecommunications and broadcasting service providers. The provision of telecommunications networks or services is subject to various reporting, registration and/or licence requirements of the *Telecommunications Business Act*, depending on the types of network owned and services provided. Under the *Telecommunications Business Act*, telecommunications service-providers are classified into three categories:

- **Network carriers:** These typically provide telecommunications services with their own networks and related facilities. Their services may include: transmission services (for example, telephone and internet connection services); services through spectrum allocation (for example, mobile phone services); and leased-line services. A network carrier must be licensed by the KCC. KT and SK Telecom have been designated as market-dominating carriers in the respective markets (that is, a network carrier has the largest market share for a specified type of service and its revenue from that service for the previous year exceeds a revenue threshold set by the KCC). Under the *Telecommunications Business Act*, a market-dominating business may not engage in any act of abuse, such as: unreasonably interfering with business activities of other business entities; hindering unfairly new entry; or substantially restricting competition to the detriment of the interests of consumers. The KCC has also issued guidelines on fair competition, and may take necessary corrective measures against any breaches, after a hearing at which the service provider may defend its action.
- **Service-based carriers:** These are broadly defined as carriers that provide network services using the telecommunications network facilities or services of network carriers (resellers of network-based services). Service-based carriers, such as internet phone service providers and voice resellers, started operations in South Korea in 1998. An application to the KCC for registration as a service-based carrier is required prior to operation.
- **Value-added carriers:** These provide telecommunications services other than those reserved for network carriers; such as data communications using telecommunications facilities leased from network carriers. Value-added carriers may commence operations following filing of a notification with the KCC.

A network carrier must obtain the authorisation of the KCC for matters such as: modification of licences; suspension or discontinuation of business; acquisition or merger; and engaging in certain businesses specified in the Presidential Decree under the *Telecommunications Business Act* (for example, manufacturing telecommunications equipment and constructing telecommunications network). Under the *Telecommunications Business Act*, the KCC can revoke the licences issued, or order the suspension of the businesses that are non-compliant with the regulations

Since early 2000, regulation of the existing network service-providers has been relaxed and simplified. While the licensing requirement for network carriers remains in place, the screening criteria (technical and financial capabilities; user protection) have been significantly eased since 2008.

Price Regulation

Under the *Telecommunications Business Act*, a network carrier that has not been designated may set its own rates, although it must report the price and non-price terms and conditions for each type of network service provided to the KCC.

Each year the KCC specifies in a notice the designated service providers and the types of services on the basis of the market size and share. In 2011, the KCC designated KT for local telephone service and SK Telecom for cellular service. A designated market-dominant network carrier for a specific service category must obtain prior approval from the KCC for the proposed or modified terms and conditions for that service. For cases where the revised rates lower prices, only notification with the KCC is required. The KCC, in consultation with the Ministry of Strategy and Finance, is required to approve the rates proposed by a network service provider if: first, the proposed rates are appropriate, fair and reasonable; and second, the calculation method for the rates is appropriate and transparent. The approval requirement aims to control large incumbents, protect users and ensure fair competition between carriers.

Access and Interconnection

The KCC is responsible for the authorisation of arrangements and agreements between telecommunications service providers on the supply or sharing of telecommunications facilities, interconnection or information sharing.

Under the TBA, a network carrier is required to enter into an agreement and notify the KCC within 90 days upon receiving a request from another telecommunications carrier for a supply, or sharing of, telecommunications facilities, information or interconnection. Notification is also required for modification and termination. However, the market-dominant network carrier must obtain an approval from the KCC, and is required to publish the approved interconnection contracts. Terms and conditions of the access agreement must be in compliance with the relevant regulations set out by the KCC.

The scope of the telecommunications facilities (local loop unbundling, interconnection, and information provision) is first determined by the KCC by issuing a notice detailing the scope, procedure, and method. For example, the scope of the interconnection of telecommunications facilities covers different types of services and different networks (such as between a VoIP and a telephone network, and between Internet networks).

In the case of failure to enter into an agreement, or of a dispute arising from the agreement, either party can apply to the KCC for a ruling. A party can also file a lawsuit at a court.

A telecommunications carrier is subject to accounting separation and must submit a business report to the KCC within three months, after the end of the accounting year. Pricing of interconnection, and/or network access services, needs to be reasonable and is generally determined via negotiation between service providers.

Universal Service Obligation

KT is the designated universal service-provider, with an obligation to supply the universal services (that is, fixed-line telephone services, emergency call services and telephone services under a discounted rate scheme for the disabled and low-income subscribers) at uniform rates across the country. Its loss incurred for the provision of universal service is shared on a *pro rata* basis with other large network carriers (that is, annual sales of 30 billion won or more), based on sales volumes (and possibly also with service-based carriers under the Enforcement Decree).

Ownership

Currently telecommunications is only partially liberalised as there are rules restricting the maximum investment by foreign companies. Under the TBA, the maximum aggregate foreign ownership of a network carrier (for example, BT) is 49 per cent in terms of the number of voting shares issued.⁴⁰⁹ In addition, under both the TBA and the *Foreign Investment Promotion Act*, a foreign shareholder with five per cent or more of ownership is prohibited from becoming the largest shareholder. No voting rights in excess of the foreign shareholding limit can be exercised, and the KCC may also issue a corrective order requiring corrections (for example, by disposal of the excess shares) within a specified period not exceeding six months.

In broadcasting, there are restrictions on market entry, ownership and cross-ownership to protect 'impartiality and public interest nature' of the business (Article 6 of the *Broadcasting Act* as of 31 December 2008). Until recently, large companies (top 30), newspapers, and news agencies could not operate a broadcasting system because of the independence of media. Amendments to the *Broadcasting Act* and the *Internet Multimedia Broadcasting Business Act* allow that newspapers and large companies can hold a stake of up to 10 per cent in a terrestrial broadcaster; 30 per cent in a cable broadcaster; and 40 per cent in an IPTV or news channel.

Numbering and Internet Telephone Number Portability

The KCC allocates telephone numbers and network identification codes after its review of applications by carriers and public entities. The introduction of number portability for internet telephony was approved by the KCC on 1 October 2008, and related rules were effected on 31 October 2008.

⁴⁰⁹ If a company is foreign-owned and a foreign shareholder is the largest shareholder and holds 15 per cent or more of the shares, the company is deemed a 'foreign' company and the company's shares in a network carrier will be deemed foreign-ownership.

Various guidelines on the implementation of number portability in local telephone, mobile, internet telephone and receiving-party-pays (080) services have been produced. Number porting allows new subscribers to keep existing phone numbers, and thus can accelerate the penetration of new services and stimulate competition in the overall voice market.

Other Matters

The responsibilities of the KCC also include:

- imposing penalties and issuing corrective orders for violation of relevant laws;
- making sector-specific regulations;
- formulating the basic plan for the telecommunications industry; and
- preparing periodic reports to the National Assembly of South Korea regarding developments in the telecommunications industry.

Relationship with the KFTC

The Korea Fair Trade Commission (KFTC) is the competition authority which regulates anti-competitive and unfair trading practices in accordance with the *Monopoly Regulation and Fair Trade Act*. The KCC and the KFTC independently exercise their respective regulatory power over telecommunications service providers. The KCC generally enforces the relevant sector-specific legislation and regulations, while the KFTC intervenes to regulate and monitor anti-competitive behaviour or unfair trade practices of telecommunications service providers. Under the *Telecommunications Business Act*, a merger between two or more facility-based businesses requires the KCC's approval, and the KCC is required to consult with the KFTC before it can approve the merger. In such cases, the businesses involved in the merger transaction are not required to obtain a clearance from the KFTC, even if they would otherwise be required to obtain the KFTC's clearance under the *Monopoly Regulation and Fair Trade Act*. Similarly, a network carrier receiving a sanction imposed by the KCC for a violation of the *Telecommunications Business Act* cannot be subject to a sanction by the KFTC for the same violation.

Consultation of Interested Parties

The network carrier licence application consists of a business plan (including the technical development support plan), articles of incorporation, and a shareholder list. Upon receipt, the KCC has two months to make a decision, after deliberation with the Information and Communications Policy Deliberation Committee.⁴¹⁰ In relation to its role in the promotion and commercialisation of converged services, the KCC has coordinated with stakeholders to accelerate the adoption of Internet Protocol Television (IPTV).⁴¹¹

A legislative announcement was made on 9 May 2008 on the draft 'Enforcement Rules to the Internet Multimedia Broadcasting Business Act'. Between 9 May and 29 May 2008, an online opinion survey was conducted at the website of the KCC, inviting industry participants, including firms and associations, to offer feedback on the planned legislation. This was followed by a public hearing on 23 May 2008. After the approval by the Regulatory Reform Committee and deliberation by the Ministry of Government Legislation, the Enforcement Rules were proclaimed on 12 August 2008. On 26 August 2008, an administrative notice was issued, detailing the procedures of licensing, reporting, registration and approval of an internet multimedia broadcasting business; rules related to accounting separation; and rules related to access to essential telecommunications facilities.

On 31 October 2008, a separate administrative notice was issued, describing technical standards applying to telecommunications facilities used by internet multimedia broadcasting businesses. A pilot IPTV service was launched in October 2008 and lasted until December 2008, using mandatory channels. As the quality of service proved satisfactory, KT went ahead with the commercial deployment in November 2008, and SK Broadband and LG Dacom in January 2009. On 12 December 2008, the commercial launch of IPTV services used the promotional slogan, *Power on IPTV, Power up Korea*.

Timeliness

Information on timeframes is included in 'Consultation of Interested Parties', immediately above.

⁴¹⁰ Bae, Kim and Lee, *Telecommunication Laws and Regulations 2010*, 2010, chapter on Korea, p. 2.

⁴¹¹ KCC, *Korea Communications Commission Annual Report 2008*, 2008, pp. 22-25.

Information Collection and Confidentiality

The Korea Internet and Security Agency (KISA),⁴¹² under the *Act on Information and Communications Network Promotion and Information Protection*, Article 52: KISA aims to research and develop systems and technologies to protect information.

Decision-making and Reporting

A meeting of the KCC is convened by the chairperson and the meeting decides on a matter by a majority of votes from the registered members. The meeting should be open to the public in principle. During the first year of its inception, the board met 56 times (48 times in 2008, eight times in 2009) to deliberate 326 total topics. In 2010, the board met 80 times.

Each commissioner chairs one or more sub-committees. These are advisory panels composed of experts from various fields relevant to broadcasting and telecommunications regulation. To ensure the efficiency of the deliberation process, the subcommittees review agenda topics prior to the meeting.

The KCC is required to submit an annual report to the National Assembly within three months of the end of each fiscal year.

*Appeals*⁴¹³

Decisions of the KCC may be appealed to the Seoul Administrative Court, while an administrative action may be brought against the KFTC in the Seoul High Court for the KFTC's decisions. Before pursuing a court action, an appeal of a decision by the KCC or the KFTC may also be made through an in-house administrative appeal process at the decision-making agency.

3. Postal Services

Historically the postal services were provided by the government-owned Korea Post.⁴¹⁴ Founded in 1884 as the Postal Directorate and renamed Korea Post in 2000,⁴¹⁵ it operated as a government department with little autonomy until 2000 when it became an independent government entity under the then Ministry of Information and Communications. It has grown into a large organisation employing 43 000 staff (about 80 per cent working for the postal industry) and has 3700 post offices around the country. It was incorporated into the Ministry of Knowledge Economy (MKE) in February 2008.

Korea Post provides postal, banking and insurance services through its nationwide network of post offices. Its main businesses include:

- providing basic postal services of handling and delivering general mail and parcels;
- providing additional postal services (such as registered mail, acceptance of postal matters at the customers' location, sales of local products by mail order, and postal-errand service);
- handling postal savings, postal money, money order and inter-banking payment transfer; and
- handling postal insurance.

Korea Post consists of one division (General Affairs Division), four bureaus (Planning and Management Bureau, Bureau of Posts, Postal Saving Bureau and Postal Insurance Bureau), and one section (Inspector General). Korea Post is self-funded through its business activities.

⁴¹² KISA, *Home*. Available at: www.kisa.or.kr [accessed on 9 July 2013].

⁴¹³ Global Legal Group, *International Comparative Legal Guide to Telecommunication Law and Regulations 2012*, Korea chapter. Available at: <http://www.iclg.co.uk/practice-areas/telecommunications/telecommunications-2012/korea> [accessed on 9 July 2013].

⁴¹⁴ Korea Post, *Home*. Available at: <http://www.koreapost.go.kr/eng/main/index.jsp> [accessed on 9 July 2013].

⁴¹⁵ In accordance with the *Government Organisation Act*, Korea Post was an integral part of the Ministry of Information and Communications as the Bureau of Posts and the Postal Savings, Insurance & Finance Bureau before it became the Office of Postal Service (reporting directly to the Minister) (Korea Post, *Annual Report*, 1999).

The *Postal Service Act* provides Korea Post with the exclusive right to collect, process, and deliver correspondence, subject to exceptions prescribed by the relevant Presidential Decree (revised in 1997 and 1992).⁴¹⁶ The exceptions include:

- commercial documents, provided that they are required to be delivered within twelve hours after their dispatch, exchanged between headquarters and its branches or among branches in South Korea;
- unsealed accompanying documents or invoice to freight;
- documents relating to export, import, introducing foreign capital and technology, foreign exchange, exchanged with foreign countries; and
- documents exchanged with foreign countries in relation to the introduction of foreign capital and technology.

Postal services other than those reserved services are open to competition. Korea Post competes with private domestic and international couriers, such as Federal Express and DHL, in the express mail and parcel services markets, which are more profitable than traditional mail services.

As the designated postal service provider, Korea Post is required to provide universal postal services, the scope of which covers mail items up to two kilograms and parcels up to 20 kilograms.

Korea Post also provides postal savings services and postal life insurance services provided for in the *Postal Savings and Insurance Act*. It has introduced new postal services, postal financial services, and value-added services after consultation with relevant government ministries or other organisations, if necessary. For example, Internet-based ePost shopping has been provided by Korea Post since 1999.

Financial services of Korea Post (that is, savings, insurance, remittance, e-banking, bill payment, foreign exchange via post office counter, Internet, Telephone, Mobile, CD/ATM, call centre) are all regulated by the Board of Audit and Inspection of Korea.

Korea Post is a member of the Universal Postal Union (UPU).⁴¹⁷

Regulatory Institutions and Legislation

The ministry responsible for postal services is the MKE. The Vice Minister for Industry and Technology has the postal service portfolio. Key legislation governing the operation of Korea Post is summarised as follows:⁴¹⁸

- *Special Act on Postal Business Operation* – Established autonomy in budgetary, personnel and organisational matters relating to the postal services business; establishment of the Postal Services Operation Committee; establishment and execution of the Business Rationalisation plan and adoption of business evaluation mechanisms in government agencies.⁴¹⁹ Enacted on 1 July 1997.
- *Postal Service Act* – Basic matters relating to mail services; mail service operators; monopoly; business-right protection; and standard procedures for mail processing and mail services. Enacted 1 February 1960; revised 28 August 1997.
- *Postal Savings and Insurance Act* – Relating to the execution of postal deposit and insurance businesses. Enacted 31 December 1982; revised 13 December 1997.
- *Act on Entrustment of Affairs at Post Office Counters* – Enacted 31 December 1982.
- *Act of Special Post Offices* – Enacted 31 December 1981.
- *Special Act on Postal Insurance Accounting* – Enacted 31 December 1982.

⁴¹⁶ Information regarding reserved services, universal services obligation and rate determinations, is sourced from: UPU, *Status and Structures of Postal Administrations – Korea (Rep.)*, updated July 2002.

⁴¹⁷ Universal Postal Union, *Home*. Available at: <http://www.upu.int/> [accessed on 9 July 2013].

⁴¹⁸ International Business Publications (USA), *Korea South Business Law Handbook*, Vol. 1 Strategic and Practical Information, 4e, 2011.

⁴¹⁹ A new Relative Performance Evaluation (RPE) incentive plan was introduced in 1998.

- *Act on Mail Money Order* – Enacted 5 August 1993.
- *Act on Mail Transfer* – Enacted 13 January 1975.

Consultation of Interested Parties

In determining postal rates, Korea Post is required to consult the Ministry of the Knowledge Economy. However, with regard to the postal rates for domestic and international parcels, EMS and postal money orders, the consultation process is not required. The Postal Service Management Board of Korea Post deliberates on the adjustment of postal rates. Postal rates for domestic mail (standard-sizes and non-standard sizes) were last raised on 1 October 2011 by 20 won; five years after the previous increase in 2006.

Discounted rates are available for bulk post items (that is, 1000 or more items posted by the same sender at one time) that have been pre-sorted. The discounted rates depend on the quantity of items.

4. Water and Wastewater

The largest rivers in South Korea are the Han River, the Geum River, the Yeongsan River, the Seomjin River, and the Nakdong River. The Han River is the largest in terms of basin area and river discharge, constituting 26 per cent and 28 per cent respectively of the national aggregate. South Korea has an average annual precipitation of about 1283 mm (30 per cent above the world average). However, water management is difficult, due to regional and seasonal variations of precipitation, and relatively small basin areas and steep slopes. About 39 per cent of precipitation is lost as run-off during floods and torrential rains, and 43 per cent is lost in the form of evapo-transpiration. Water can dry up during droughts in winter and spring.⁴²⁰

With increasing water demand, water shortage has become an increasing concern. Domestic and industrial wastewater has been increasing due to urbanisation and industrialisation.

The Korean water management model rests on linking multi-purpose dams with regional water supply systems.⁴²¹ Since the 1970s, a multi-regional water supply system has been built to transfer water from water-rich areas to water-poor areas. Currently there are 29 regional water supply systems and 16 multi-purpose dams in operation, providing 55 per cent of national clean water needs. Five new dams are under construction for the period 2011 to 2015. Five estuary barrages have been constructed in order to protect water-supply sources from salt-water intrusion and to provide a stable water supply; constituting annual water-supply capacities of 1.3 billion cubic metres.

Market Structure

Korea Water Resources Development Corporation was formed in 1967 under the *Korea Water Resources Development Corporation Act*, and was reformed into Korea Water Resources Corporation (K-Water) in July 1988 under the *Korea Water Resources Corporation Act*. K-Water is a government-owned corporation for implementing water-resources management policies regarding multi-purpose dams, water supply dams and regional water supply systems. It also provides domestic and industrial water supply and wastewater treatment services via its multi-regional water networks and facilities. In an effort to move to the integrated management of water systems to improve water quality and preserve the ecosystem, K-Water operates the environmental infrastructure in the upper reaches of dams, and manages water supply and wastewater treatment under consignment agreements with 18 municipalities in 2011.⁴²² Government subsidies and special grant taxes are available to promote the integration of local water services.

K-Water is committed to the development of new and renewable energy resources. In December 2011, it operated 51 plants generating 2856 GWh in electricity using hydro, tidal, wind, solar power and other renewable energies.

By the end of 2011, the central government contributed 90.9 per cent of the capital stock of K-Water, while the rest of capital stock is held by Korea Finance Corporation (8.9 per cent) and municipalities (0.1 per cent).

⁴²⁰ Republic of Korea, *Facts about Korea*. Available at: <http://www.korea.net/AboutKorea/Korea-at-a-Glance/Facts-about-Korea> [accessed on 9 July 2013]. K-Water website available at: <http://english.kwater.or.kr/> [accessed on 9 July 2013].

⁴²¹ IH Ko, *IWRM Practice in Rapidly Developing River Basins*, presentation at the AWRA Summer Specialty Conference, Snowbird Utah USA, 27-29 June 2011.

⁴²² K-Water, *Leaflet* (in English), 2011; K-Water, *Annual Report 2011*, 2011.

K-Water's board is comprised of 15 members, including seven standing executive directors (for example, president, vice presidents) and eight non-standing directors (for example, chairman). It operates a number of regional offices; including Seoul metropolitan, Gangwon, Chungcheong, Jeonbuk, Jeonam, Gyeongbuk, Gyeongnam, and Sihwa regions.

Regulatory Institutions and Legislation

Multiple central government authorities are involved in water-policy development and administration. The municipal governments have a role of implementing water policies.

The Ministry of Land, Transport and Maritime Affairs (MLTM) is primarily responsible for water-resource management. In accordance with the *River Act*, the MLTM administers river-basin management to prevent non-beneficial use of water. The ministry also has a number of other functions in land, construction, road and public transportation, railway, aviation, shipping and ports, and marine affairs. Its mission is to 'develop future-oriented land and maritime management, globalised transport logistics system' to improve people's lives and pursue happiness.⁴²³

Four other central government bodies are identified as the principal authorities with policy design, implementation and regulatory responsibilities in the water subsector.

In relation to industrial water supply, the Ministry of Knowledge and Economy (MKE) has been involved in policy-making and implementation; stakeholders' engagement; information, monitoring and evaluation.

The Ministry of Environment (MOE) is responsible for environmental policy-making and regulation with respect to both water resources, and water and wastewater services. It also administers quality-standard regulation.

The Ministry of Food, Agriculture, Forestry and Fisheries (MOFAFF) is largely responsible for policy-making and regulation in relation to water supply for agricultural purposes.

In relation to domestic water supply, the Ministry of Public Administration and Security (MOPAS) plays a role in economic regulation and information, monitoring and evaluation. As noted above, the MOPAS plans to undertake corporatisation or privatisation of a number of municipal functions, including water supply.⁴²⁴

All five ministries involved in water policy contribute to the budget. A table in the OECD Report summarises the roles and responsibilities of government agencies at the national level.⁴²⁵

While water policy-making is highly centralised, the regional offices of the line ministries are the key participants in implementing relevant water policies at the local level. Municipal governments have also played an important role of implementing the water policies and regulations at the local level. There is no river basin organisation implementing water policies. Municipal governments, regional agencies of the central governments (for example, MLTM Regional Construction Management Administrations, MOE Basic Environmental Office), the Water System Fund (for financial transfer between levels of government), and K-Water contribute to the water policy budget.⁴²⁶

According to the OECD's *Water Governance* report (p. 111), the largest problem in water resource management in South Korea is the lack of matching between administrative zones and hydrological boundaries. This deters effective river management, which requires integrated planning. Other challenges include: allocation of water resources; economic regulation; horizontal co-ordination across ministries; and vertical co-ordination between levels of government.

⁴²³ MLTM, Brochure, p. 5.

⁴²⁴ MOPAS, *News and Notices*, 21 March 2008. Available at: <http://www.mopas.go.kr/gpms/ns/mogaha/user/userlayout/english/bulletin/userBtView.action?userBtBean.bbsSeq=1012394&userBtBean.ctxCd=1030&userBtBean.ctxType=21010009> [accessed on 30 July 2013].

⁴²⁵ OECD, *Water Governance in OECD Countries – A Multi-level Approach*, OECD Studies on Water, OECD Publishing, 2011. Available at: https://www.google.com.au/#output=search&sclient=psy-ab&q=Water+Governance+in+OECD+Countries+%E2%80%93+A+Multi-level+Approach&og=Water+Governance+in+OECD+Countries+%E2%80%93+A+Multi-level+Approach&gs_l=hp.12..0i22i30j0i22i10i30.19344.19344.0.21391.1.1.0.0.0.719.719.6-1.1.0....0...1c..19.psy-ab.BYkm7IEFngw&pbx=1&bav=on.2.or.r_qf.&bvm=bv.48705608.d.cGE&fp=5dd0937842dced97&biw=1536&bih=726 [accessed on 8 July 2013].

⁴²⁶ *Ibid.*

Law and Rules

The *River Act* of 2009 sets out the river-management framework that aims at promoting public welfare. Under the *River Act* and the Enforcement Decree, rivers in South Korea are classified into four categories:

- Class A (Direct jurisdiction) rivers: Rivers that are of vital importance to land conservation and national economy. Such rivers are designated and administered by the MLTM.
- Class B (Local) rivers: Rivers that are of second importance. Such rivers are designated and administered by local government.
- Class C (Semi-application of the law) rivers: Rivers that are of third importance; administered by local government.
- Undesignated rivers are minor to Class C rivers, and are administered by individual villages and towns.

The *River Act* also defines the role and responsibilities of government agencies. The central river management agency, the MLTM, is responsible for formulating plans and developing water policies for the efficient preservation and management of rivers. The municipalities headed by city mayors and provinces headed by (*Do*) governors shall implement national water policies, and formulate and execute plans for local rivers.

Other laws and rules include the *Groundwater Act 2009* sets out the groundwater management provisions with an aim to ‘contribute to the promotion of public welfare and the growth of the national economy’ (Article 1, Purpose). Under the Act, the MLTM is responsible for planning and administering groundwater management, including matters such as research, development and utilisation of groundwater and efficient preservation and management of groundwater.

Water reform has been instigated by the ‘Green Growth’ initiatives under the Government’s broad environmental policy reform since 2008.⁴²⁷ One of the major infrastructure projects under the green growth initiatives is the four-major-river-restoration project addressing the environmental challenges faced by the Han, Nakdong, Geum and Yeongsan rivers. The project involves five ministries and 78 local authorities, coordinated by the Office of National River Restoration, the MLTM. A number of actions are undertaken by the MLTM,⁴²⁸ including: designating waterfront areas; profit reinvestment and partnership with K-Water and local municipalities in the development projects; utilising advanced technologies to monitor water quality and quantity in, and to restore, local rivers; developing guidelines for landscape and models for waterfront cities; and prohibiting unsustainable development from resource conservation.

Agricultural use of water accounted for about 60 per cent of water use in South Korea in 2003.⁴²⁹ Water rights are customary (recognised under the Civil Law) and permits are granted by the water-management agencies. The Korea Rural Community Corporation (KRCC) was established on 1 January 2000 as a result of the merger of the Rural Development Corporation (RDC), Farmland Improvement Associations (FIAs), and the Federation of Farmland Improvement Associations (FFIA). It is affiliated with the Ministry for Food, Agriculture, Forestry and Fisheries. It manages the agricultural water rights under its jurisdiction which are all irrigation facilities with a beneficial area of more than 50ha. The basic-level water-user bodies, called *heungnonggye*, represent farmers. For irrigation facilities of smaller scale, they are managed by local government representative ‘Irrigation Clubs’ or directly by farmers. Disputes over water rights are common between ministries and levels of government.

Since 2000, most farmers (that is, land under the management of the KRCC) have been exempted from agricultural water charges. The move away from the principle of full cost recovery is aimed at lowering the cost of inputs into agricultural production in order to meet food security objectives. Both national government and the KRCC contribute to the subsidies. Farmers whose lands are managed

⁴²⁷ *Water & Green Growth*. Available at: <http://www.waterandgreengrowth.org/> [accessed on 9 July 2013].

⁴²⁸ MLTM, *Main Policy*. Available at: http://english.mltm.go.kr/USR/WPGE0201/m_33147/DTL.jsp#mltm [accessed on 9 July 2013].

⁴²⁹ OECD, *Agricultural Water Pricing: Japan and Korea*, Supporting research for OECD 2010 study on Sustainable Management of Water Resources in Agriculture, 2010. Available at: <http://www.oecd.org/korea/45016191.pdf> [accessed on 9 July 2013].

by local governments are not exempted. The operation of this system is considered to be unsustainable in the long-run and potentially detrimental to smaller schemes.

Demand for agricultural water is being controlled through a long-term water resource management plan.

A third policy area closely related to the water subsector is regional development and spatial planning. The government is building new cities with waterfronts and is restoring riversides and rehabilitating urban rivers; applying 'eco-friendly principles'.

Consultation of Interested Parties

In accordance with the *River Act*, for national river designation, alteration and revocation, the MLTM is required to go through a decision-making process by the Central River Management Committee after consulting the head of the relevant central administrative agencies.

For local river designation, alteration and revocation, the relevant mayor or provincial governor is required to go through a decision-making process of the Local River Management Committee.

For border rivers, consultation with the mayors or provincial governors concerned is required for determining the agency in charge and the method of administration. The designation, alteration or revocation comes into effect on the date that a public notice is issued. As per the Ordinance of the MLTM, the relevant mayor or provincial governor will be informed.

The River Management committees are authorised to deliberate on important matters on river management and mediate disputes on the use of river water. A written application, together with required supporting documents, as prescribed by the Ordinance of Article 54(1) of the *River Act*, should be submitted to the committee.

Other stakeholders operating in the water subsector include:

- Korea Rural Community Corporation (KRCC).
- Environment Management Corporation.
- Korea Regional Construction Management Administration.
- Korea Water Resources Association (KWRA).⁴³⁰ Founded in 1967, KWRA is a non-profit organisation with more than 2000 members ranging from practising hydro engineers to academic researchers interested in Korean water resources.
- Korea Water and Wastewater Works Association.⁴³¹ Founded in January 2002, it is a non-profit organisation working as a bridge between industry, academics and governments through the exchange and development of the knowledge and information on water supply and wastewater services. Its members include: water utilities (for example, K-Water, municipal water and wastewater utilities); enterprises (for example, water and wastewater work equipment suppliers); institutional groups (for example, other associations); and individuals.
- Korea Disaster Prevention Association.⁴³²

There is no water user association in South Korea.

The Rural and Agricultural Water Resource Information System (database) contains data in relation to water scarcity, quantity and quality, economic and financial performance of service providers, and institutional arrangements.

Decision-making and Reporting

The MLTM has a Minister, a Vice-Minister for Land, Water and Construction and a Vice-Minister for Transport, Logistics and Maritime Affairs. The Office of Construction and Water Resources Policy, comprising three Director-Generals for construction policy, technology and safety policy, and water resources policy respectively, report to the Vice-Minister for Land, Water and Construction. The Director-General for Water Resources Policy holds portfolios of five divisions, namely Water

⁴³⁰ KWRA, *Home*. Available at: <http://kwra.or.kr/english.html> [accessed on 9 July 2013].

⁴³¹ KWWA, *Home*. Available at: <http://www.kwwa.or.kr/english/index.php> [accessed on 8 July 2013].

⁴³² Korea Disaster Prevention Association, *Home* (in Korean). Available at: <http://www.kodipa.or.kr/> [accessed on 9 July 2013].

Resources Policy Division, Water Resources Development Division, River Planning Division, River Management Division, and Canal Project Division.

5. Rail

As of December 2010, the total railway network consisted of 3925.8 kilometres, consisting of 3557.3 km of conventional track and 368.5 km high-speed rail.⁴³³ The standard gauge is 1435mm. The high-speed rail system, Korea Train Express (KTX), began operations in April 2004 and provides express service along the Gyeongbu Line and the Honam Line. The total number of passengers travelling on high-speed trains reached 200 million in 2009 (KORAIL, p. 9). Major cities have urban transit systems.

Market Structure

In September 1963, the Rail Construction Bureau of the Ministry of Transportation was reformed as the Construction Department of Korea National Railroad (KNR). Throughout the 1970s and 1980s, the government-owned KNR was in charge of all railways and continued electrifying heavily used tracks and laying additional tracks. During the period 1989 to 1995, the *Korea Railway Corporation Act* was enacted, with the aim of transforming KNR into a public corporation, but its effect was delayed twice and it was finally repealed.⁴³⁴

Following the enactment of the *Railway Industry Department Act* and the *Korea Railway Network Authority Act*, a new railway infrastructure authority, the Korea Rail Network Authority (KRNA), was formed in January 2004.⁴³⁵ It combined the Korea High Speed Rail Construction Authority (established in 1993) with some of the KNR infrastructure operation. As an infrastructure provider, KRNA operates in areas such as: high-speed railway construction; conventional inter-city and urban rail network construction; trans-Korea railway and overseas rail projects; and railway facilities management. KRNA operates as a quasi-government agency. The Minister of Land, Transport and Maritime Affairs (MLTM) is responsible for appointing non-executive board members.

In January 2005 the remainder of KNR was transformed into a railroad operator, Korea Railroad Corporation (short name KORAIL),⁴³⁶ carrying out both passenger and freight transportation businesses including KTX services. KORAIL is a public corporation wholly owned by the government. Since the revision of a law regarding the management of a public corporation, the president of KORAIL has been appointing internal executive directors since December 2009, and the Minister of Strategy and Finance appoints external directors. Government has a role of inspecting the corporation's administration. Since late 2011, the Government has proposed to 'introduce competition' from the private sector to part of the railroad operation that is currently exclusive to KORAIL.⁴³⁷

To maintain cooperative relations, KRNA runs a railway working-level committee with KORAIL to regularly discuss issues in relation to railway safety and facility maintenance. An integrated facilities management system is run in collaboration with KORAIL.

With a goal to recover investment, KRNA sets out standards for assessing fee-for-use of railways by KORAIL. The fee is collected from the operator annually, based on contracts.

Regulatory Institutions and Legislation

The Ministry of Land, Transport and Maritime Affairs has a number of functions in land, construction, water resources, road and public transportation, railway, aviation, shipping and ports, and marine affairs. It was formed in 2008 as a result of the integration of the Ministry of Construction and Transportation, the Ministry of Maritime Affairs and Fisheries and the land registry of the Public Administration Ministry.

⁴³³ KORAIL, *2010 Sustainability Report*, 2011, p. 23.

⁴³⁴ YS Lee, 'The Current State of Railways in Korea and Reform Trends', *Japan Railway & Transport Review*, 37, January 2004, pp. 35-41.

⁴³⁵ KRNA, *About KR*. Available at: <http://www.kr.or.kr/english/> [accessed on 8 July 2013].

⁴³⁶ KORAIL, *Home*. Available at: http://info.korail.com/2007/eng/eng_index.jsp [accessed on 8 July 2013].

⁴³⁷ The Korea Times, *Economics of Privatisation*, 24 June 2012. Available at: http://www.koreatimes.co.kr/www/news/bizfocus/2012/09/330_113655.html [accessed on 8 July 2013].

The ministry has a role in the formation of railroad policy (infrastructure investment, network construction, R&D, safety, industry development) and the supervision of rail services in terms of price, quality, and safety of rail operation in order to promote public welfare. The Director-General for Railroad Policy within the Office of Transport Policy reports to the Vice-Minister for Transport, Logistics and Maritime Affairs. The major railroad policy covers: developing a nationwide high-speed rail network that is of 2362 kilometres by 2020; constructing an underground rail network for connecting high-speed rail between Seoul and surrounding areas; and conducting research and development on leading railway technology.⁴³⁸

The governing legislation includes: the *Railroad Industry Development Act*; the *Railroad Business Act*; the *Railroad Construction Act*; the *Urban Railroad Act*; the *Korea Railroad Corporation Act*; the *Korea Rail Network Authority Act*; and relevant enforcement decrees.

The National Transport Committee (chaired by the Prime Minister) is responsible for establishing a 20-year long-term national inter-modal transportation plan to set out the framework of the surface and air transport network, and the direction of investment. The plan for the years 2000 to 2019 aims at establishing a nationwide integrated public transportation system and promotes highly efficient transportation modes. In particular, the need for an expansion of rail transport, which has relatively high transport efficiency, has been identified. The Committee is also responsible for developing a mid-term transportation infrastructure investment plan on a five-year basis, setting out the priorities of infrastructure investment and fund allocation in accordance with the 20-year plan. In 2007, the then Ministry of Construction and Transportation issued the Guidelines for Transport Facilities Investment Evaluation to promote continuous investment in transportation facilities. In 2009, the *Sustainable Transport and Logistics Development Act* took effect to address issues arising from climate change and energy shortage. It tasked The MLTM with shifting the emphasis from facility expansion to the promotion of green and sustainable transportation

The purpose of the *Railroad Business Act 2009* is to 'promote the sound development of the railroad business and the conveniences for the railroad users, and thereby to contribute to the development of national economy by establishing orders in respect to the railroad business and to create efficient operational conditions'.⁴³⁹ It applies to KORAIL and other licensed railroad service operators. According to the Act, only KORAIL may operate on railway lines constructed on or before 30 June 2005, while juridical persons (including foreign enterprises) that have obtained authorisation from the MLTM, may operate on railway lines constructed on or after 1 July 2005. Such authorisation is subject to an economic needs test. A business plan should be filed as part of the application for a licence. Authorisation from the MLTM is also required when there is a substantial change in: the business plan; a business alliance; a takeover; a suspension; or a discontinuation.

KORAIL is allowed to set or change passenger and freight fares by taking into account factors such as costs of providing the services, and comparison with other transport modes. The passenger fares are subject to the price cap designated and published by the MLTM. It appears that in setting the KTX fare, studies on consumer groups and public opinion received from public hearings have been considered.⁴⁴⁰ KORAIL is statutorily required to report to the MLTM on the new fares and publicly post them one week prior to their implementation. Similarly, reporting to the MLTM is needed for setting or changing the contractual terms and conditions of railroad business.

Quality standards for railroad services are prescribed and evaluated by the MLTM. The results of the performance evaluation will be publicly released. The MLTM may take necessary measures, including an order given for improvement of the service quality.

The MLTM may order KORAIL or other railroad operators to make reports or submit documents pertaining to matters concerning railroad operation. Authorised officers from the MLTM may inspect documents and railroad-operation facilities.

The MLTM has the power to impose financial penalties to a maximum of ten million won for negligence, such as failure to report on passenger and freight fares. Non-compliance of a more

⁴³⁸ MLTM, *Brochure*, p. 15.

⁴³⁹ Article 1 (Purpose) of the *Railroad Business Act*, 1 April 2009.

⁴⁴⁰ NG Cho and JK Chung, *High Speed Rail Construction of Korea and its Impact*, KRIHS Special Report, Korea Research Institute for Human Settlement, 2008, p. 19.

serious nature (for example, unauthorised railroad operation) may be subject to jail time not exceeding two years, or a fine not exceeding 20 million won.

The purpose of the *Railroad Construction Act 2009* is to 'contribute to the efficient expansion of railroad networks and the development of public welfare by prescribing the matters on the establishment of a railroad network building plan, railroad construction and development of station economic zones'.⁴⁴¹ According to the *Railroad Construction Act 2009*, the MLTM is responsible for: establishing the ten-year national railroad network plan in order to build an efficient nationwide railroad network; reviewing the plan every five years; and developing the basic plan for railroad construction (by project).

Only the central or local level of government or KRNA may supply rail construction services, and maintain and repair government-owned rail facilities (including high-speed rail). However, juridical persons that meet the criteria in the *Act on Public-Private Partnerships in Infrastructure* may supply rail construction services.

The railroad infrastructure providers (for example, KRNA) are required to develop an implementation plan for a railroad construction project, which is subject to the approval by the MLTM. In this regard, the ministry shall conduct a public consultation (see below). Whenever applicable, the ministry shall obtain the consent of the local governments or agencies in relation to public asset transfer and concession, and inform the land owners in relation to the expropriation and use of land. Changes to the implementation plan are also subject to the ministerial approval. The MLTM may cancel the approvals after holding a public hearing or make an order for changes after making a public notice.

In principle, the construction costs for a conventional railway are borne by the central government. The construction costs for a high-speed railway are shared between the central government and the rail infrastructure provider(s), conducting the project on the basis of a ratio determined by the Transport Industry Committee. Upon mutual agreement, the rail operator(s) (that is, the beneficiary) may bear the whole or part of the costs by paying railway facility usage fees. The Transport Industry Committee may act as a co-ordinator for settling any disputes over the usage rates after receiving a request from either the infrastructure provider or the rail operator.

The MLTM may order the rail infrastructure provider conducting the project to make reports or submit documents pertaining to matters concerning railroad construction. Authorised officers from the MLTM may make inspection on the construction project.

Financial penalties are applicable for unjustifiable non-compliances or negligence under the *Railroad Construction Act*.

A Railway Accident Investigation Board responsible for investigating major railway accidents was established in 2005. In 2006 it was merged with the Aviation Accident Investigation Board to become the Aviation and Railway Accident Investigation Board, under the *Aviation and Railway Accident Investigation Act*. It operates as an agency of the MLTM.⁴⁴²

Consultation of Interested Parties

After consulting with other relevant central and local government agencies, the MLTM shall finalise the plans for deliberation by the Transport Industry Committee. The plans shall be publicly released. Implementation plans of railroad infrastructure providers are subject to MLTM approval; and the MLTM shall conduct a public consultation, under which relevant information shall be made available to interested parties.

Stakeholders operating in the rail subsector include:

The Korea Railroad Research Institute (KRRI):⁴⁴³ The KRRI was established in 1996 under the *Special Act on National Railroad Operation*, with funding from the KNR. In 1999, it became a member institute of the Korea Research Council of Public Science & Technology (KORP) under the Office of

⁴⁴¹ Article 1 (Purpose) of the *Railroad Construction Act*, 9 June 2009.

⁴⁴² Aviation and Railway Accident Investigation Board, *About ARAIB*. Available at: http://araib.mltm.go.kr/USR/WPGE0201/m_34584/DTL.jsp [accessed on 8 July 2013].

⁴⁴³ KRRI, *Home*. Available at: www.krri.re.kr/ [accessed on 8 July 2013].

the Prime Minister. The KRRI has played an important role in developing railway technology and advising the government on railway policy.⁴⁴⁴

The Korea Transport Institute (KOTI) is a government-funded agency leading research on transport problems and public-transport policies.⁴⁴⁵ Current research projects include strategic planning of transport systems that advance on technologies in relation to ticketing and information systems. Scholars and researchers appear to participate in decision-making of transport-related policies via relevant committees influencing the policy making.

Information Collection and Confidentiality

The MLTM may, when it is deemed necessary, order any railroad business operator and any exclusive railroad operator to make reports or submit documents pertaining to matters concerning rail operation or construction. Authorised officers from the ministry may inspect the documents, rail operations or constructions.

Decision-making and Reporting

There is no information available about the decision-making process used. The MLTM has a Minister, a Vice Minister for Land, Water and Construction and a Vice Minister for Transport, Logistics and Maritime Affairs.⁴⁴⁶ The Director-General for Railroad Policy within the Office of Transport Policy reports to the Vice-Minister for Transport, Logistics and Maritime Affairs. There are six divisions: Railroad Policy Division; Metropolitan Railroad Division; Railroad Planning and Construction Division; Railroad Operation Division; High-speed Rail Division; and Railroad Technology and Safety Division.

When the MLTM finalises its plans, these must be released publicly.

6. Airports

As of 2012, South Korea had 114 airports recognisable from the air.⁴⁴⁷ Among them, 71 airports have paved runways, four of which are over 3047 meters in length. There are also a large number of heliports. The civil aviation market has two major carriers (Korean Air and Asiana Airlines), competing with other airlines operating on domestic or international routes. There are 15 international and domestic airports that are owned by the government but operated by two airport corporations, established under the respective *Airport Corporation Act* for the purpose of constructing and operating airports.

Korea Airports Corporation (KAC) manages and operates seven international airports including Seoul, Busan, and Jeju Island, and seven domestic airports in major cities including Ulsan and Yeosu.⁴⁴⁸ It was established in 1980 as a government agency, the International Airports Authority, and was transformed into a public corporation wholly owned by the government in 2002. The KAC is an autonomous body with its Board deciding on issues such as management objectives and budgets.

Incheon International Airport Corporation (IIAC) operates Korea's largest airport, which opened in March 2001.⁴⁴⁹ In 2010, the airport had 230 000 aircraft movements, 35 million passengers and 2.5 million tons of cargo, ranking it eighth in international passenger traffic and second in international cargo traffic.⁴⁵⁰ The airport has been awarded as the best airport for seven consecutive years (2005 to 2012) in the annual Airport Service Quality (ASQ) surveys conducted by the Airports Council International.⁴⁵¹ Expansion plans for developing the airport into an 'airport city' include constructing a

⁴⁴⁴ IG Oh, 'Korea Railroad Research Institute', *Japan Railway & Transport Review*, 36, September 2003, pp. 22-23.

⁴⁴⁵ Korea Transport Institute, *About KOTI*. Available at: <http://english.koti.re.kr/> [accessed on 8 July 2013].

⁴⁴⁶ MLTM, *About MLTM – Organization Chart*. Available at: http://english.mltm.go.kr/USR/WPGE0201/m_28276/LST.jsp [accessed on 8 July 2013].

⁴⁴⁷ CIA, *CIA World Factbook: South Korea*. Available at: www.cia.gov/library/publications/the-world-factbook/geos/ks.html [accessed on 9 July 2013].

⁴⁴⁸ KAC, *Home*. Available at: www.airport.co.kr [accessed on 9 July 2013].

⁴⁴⁹ Incheon Airport, *Home*. Available at: <http://www.airport.kr/eng/> [accessed on 9 July 2013].

⁴⁵⁰ Incheon International Airport Corporation, *Your Reliable Partner into the Airport Industry*, 2012. Available at: http://www.airport.kr/iacms/pageWork.iaa?_scode=C1303010000 [accessed on 9 July 2013].

⁴⁵¹ Airport Council International, *Airport Service Quality Awards*. Available at: <http://www.airportservicequalityawards.com/> [accessed on 9 July 2013]. The Airports Council International is an international organisation with 577 members operating 1689 airports in the world. For relevant information, see the homepage at:

second passenger terminal, and establishing a Free Trade Zone, and an International Business District.⁴⁵² As with the KAC, the IIAC is a public corporation wholly owned by the government. Its board of directors is the decision-making body for managing its operation.

Regulatory Institutions and Legislation

The Ministry of Land, Transport and Maritime Affairs is responsible for airports. The Director-General for Airport and ANF Policy within the Office of Civil Aviation reports to the Deputy Minister for Transport, Logistics and Maritime Affairs. There are four divisions under the Director General, namely Airport Policy Division, Airport Environment Division, Airport Safety Division, and Air Navigation Facilities Division.

The Airport Policy Division establishes national airport policies and develops airport master plans and new airport plans. The Airport Safety Division has two main functions: forming aerodrome standards and manuals; and airport certification and safety oversight. The Airport Environment Division is responsible for managing airport environment such as wildlife control, noise abatement and pollution control. The Air Navigation Facilities Division sets standards for air navigation facilities and developing the facilities.

The Office of Civil Aviation also consists of two other Directors-General responsible for Aviation Policy and Aviation Safety Policy respectively, and two regional aviation administrations in Seoul and Busan, and other bureaus.⁴⁵³

The legislation governing the airport industry includes the *Aviation Act* (enforcement date 10 September 2009) administered by the MLTM. Section 2 of the Act covers airport-related issues such as the master plan for airport development, project implementation plans, and airport-facilities management. Section 3 of the Act covers airport operation certification to ensure safety of airport operation. This is supplemented by relevant Presidential Decrees and ministerial regulations.

Similar to its role in rail, the ministry has the responsibility for policy development and supervision of airports and civil aviation. The major aviation policy set out by the MLTM aims at providing convenient and safe air transportation services. The MLTM is also responsible for establishing mid- and long-term master plans for airport development every five years, and developing and implementing a basic plan for any airport development project in accordance with the master plan. It supervises the implementation of airport development and investment planning by the airports.

The MLTM also supervises airport performance in terms of cost, productivity, service quality, and airport safety. Airport corporations are required to consult with the MLTM in advance for establishing key performance indicators, and the CEO-management agreement reflecting those indicators. Meetings of committees (for example, the Service Improvement Committee or the Airport Operation Committee; whose members consist of representatives from the MLTM, other government agencies, airport corporations, and airlines) are held regularly.

Airport corporations are required to report to the MLTM regarding setting or changing airport charges. However, there is no requirement for user consultation procedures. Airport corporations generally comply with the International Civil Aviation Organisation (ICAO)'s Policies on Charges for Airports and Air Navigation Services,⁴⁵⁴ to conduct cooperative consultation with the airport users represented by the Airline Operation Committee. For example, in 2007 Incheon International Airport Corporation successfully changed airport charges through consultation with users, which was considered being in part attributable to 'well organised indirect oversight by the government'.⁴⁵⁵

http://www.aci.aero/cda/aci_common/display/main/aci_content07_banners.jsp?zn=aci&cp=1_725_2 [accessed on 9 July 2013].

⁴⁵² Ministry of Land, *Transport and Maritime Affairs*. Available at: www.mltm.go.kr [accessed on 9 July 2013]. See for example, MLTM, *Logistics Policies*, 2005.

⁴⁵³ Relevant websites include: <http://www.sraa.go.kr/index.spf>, <http://brao.mltm.go.kr/intro.do>, <http://acc.mltm.go.kr/intro.do>, [accessed on 9 July 2013].

⁴⁵⁴ The International Civil Aviation Organisation has been notified that South Korea has complied with the transparency and cost-relatedness of airport charge principles set out by the ICAO since 1 August 2001. See, International Civil Aviation Organisation, *ICAO's Policies on Charges for Airports and Air Navigation Services*, Supplement No. 5 to Doc 9082, 7th Edition (2004), 2 February 2009. Available at: http://www.icao.int/publications/Documents/9082_7ed_sup_05.pdf [accessed on 9 July 2013]. The policies are available at: http://www.icao.int/publications/Documents/9082_9ed_en.pdf [accessed on 9 July 2013].

⁴⁵⁵ International Civil Aviation Organisation, *Successful Changes of Charges through Consultation with Users*, Working Paper CEANS-WP/64, September 2008.

In relation to airport operation certification, the MLTM has issued standards (for example, Airport Operations Standards), orders (for example, Procedures for Airport Operating Certification) and guidelines (for example, Safety Management System Manual) to apply to both international and domestic airports. Since 2003, the MLTM has certified eight international airports and Gwangju Airport, in accordance with the *Aviation Act* (Article 111.2 and Presidential Decree 44.2). The certification process involves: dealing with expressions of interest; assessing formal application, Airport Operations Manual; assessing airport facilities; issuing or rejecting certification; and promulgating the certificate.⁴⁵⁶ A recent review of airport certification conducted by the MLTM raised issues with the uniform application of 'Airport Operations Standards' to airports without taking into account each airport's characteristics. It suggested that national airports should be classified into four categories according to aircraft operation (scheduled/non-scheduled), airport operation (international/domestic) and traffic volume, namely major international airports, smaller international airports, domestic airports and other airports. Different or mitigated airport standards are to be applied to each class of airport.

7. Ports⁴⁵⁷

South Korea has 51 ports, which are classified into international trade ports (28) and coastal ports (23) based on their functions. Major ports include Incheon, Pohang, Busan, Ulsan and Yeosu. In recent years, ports such as Busan and Gwangyang have been expanded rapidly with more berths, adjacent complexes, and investment by foreign logistics companies in an attempt to develop into a logistics and shipping hub for the Northeast Asia region.⁴⁵⁸ The largest port, the Port of Busan, is ranked among the top five container ports in the world.⁴⁵⁹ South Korea's shipping industry is ranked fifth in the world, with the capacity to operate a controlled fleet of 51 million tons (DWT).⁴⁶⁰ Cargo-handling capability at Busan Port, Gwangyang Port and Incheon Port has improved as a result of expansion of port facilities and productivity improvements.

Historically ports have been owned and operated directly by the government. The Korean Maritime and Port Administration (KMPA) was established in 1976 and is responsible for port management and development. Part of its responsibility over five container ports was transferred to the Korean Container Terminal Authority (KCTA) in 1989. The KMPA was incorporated into the Ministry of Maritime Affairs and Fisheries (MOMAF) in 1996. The latter had the overall responsibility of developing port policy, which was transferred to its successor, the MLTM, in 2008.

Independent port authorities in three of the major ports (Busan, Incheon, and Ulsan) were established in 2003, 2005 and 2007, respectively, as port operators in accordance with the *Port Authority Act*. Based on the foundation of the KCTA, the Yeosu Gwangyang Port Authority was established to manage and operate both Yeosu Port and Gwangyang Port.⁴⁶¹ The MLTM controls port planning and development through its regional maritime and port offices. According to a UN report, the port reforms in South Korea are aimed 'mainly at improvement of efficiency and productivity through overcoming the limits of the former port authority which was the government'.⁴⁶²

The port authorities have gained financial autonomy; being responsible for budget and investments in port infrastructure. There is more involvement by municipal government on port-related matters, such as the appointment of the CEO through the Port Committee.⁴⁶³

⁴⁵⁶ MLTM, *Airport Certifications: Republic of Korea*, November 2009.

⁴⁵⁷ Key references are: DW Song and SW Lee, 'Port Governance in Korea', in M R Brooks and K Cullinane (eds) *Devolution, Port Governance and Port Performance*, Research in Transportation Economics, 17 (1), 2006, pp. 357-375; H S Bang, *Korea Port Governance System and New Challenge Issues*, presented at the ICHCA Conference, 2009.

⁴⁵⁸ Ministry of Construction and Transportation, *Korea's Logistics Policies: Basic Directions and Tasks*, August 2005.

⁴⁵⁹ Busan Port Authority, *Home*. Available at: <https://www.busanpa.com/Service.do?id=engmain> [accessed on 9 July 2013].

⁴⁶⁰ MLTM, *Brochure*, p. 19.

⁴⁶¹ Yeosu Gwangyang Port Authority (YGPA), *Home*. Available at: <http://www.ygpa.or.kr/views/en/main.jsp> [accessed on 9 July 2013].

⁴⁶² UN Economic and Social Commission for Asia and the Pacific, 'The Port Industry', in *Free Trade Zone and Port Hinterland Development*, 2005, pp. 27-44.

⁴⁶³ K Y A Ng and A A Pallis, 'Port Governance Reforms in Diversified Institutional Frameworks: Generic Solutions, Implementation Asymmetries', *Environment and Planning A*, 42 (9), 2010, pp. 2147-2167.

A number of private container terminal companies operate in South Korea. These include: Korea Express, Dongbu Express, Sebang, Pusan East Container Terminal, U-AM Terminal, Hanjin Logistics and Hutchison Korea Terminals.⁴⁶⁴

*Regulatory Institutions and Legislation*⁴⁶⁵

The MLTM, established in 2008, is responsible for ports. Prior to that, ports were administered by the then Ministry of Maritime Affairs and Fisheries, which had incorporated the port management and development power of the Korea Maritime and Port Administration since 1996. The Korea Container Terminal Authority, established in 1990 under the Korea Container Terminal Authority Act, is responsible for the development and management of container terminals in some ports.

The Director-General for Port Policy within the Office of Logistics and Maritime Affairs reports to the Vice-Minister for Transport, Logistics and Maritime Affairs. The four divisions are those of Port Policy, Port Development, Port Investment Cooperation, and Port Redevelopment. The MLTM is also responsible for maritime safety and development, and improving the competitiveness of the shipping industry.

The key legislation governing the port industry includes: the Port Act; the New Port Construction Promotion Act; the Port Transport Business Act; the Public Order in Open Ports Act; and the Maritime Act. They are administered by the MLTM. The Law of Private Participation in Infrastructure, enacted in 1996 and administered by the Ministry of Finance and Economy, is also relevant given the increasing share of public-private partnerships for port construction and management.⁴⁶⁶ Currently all the ports are government-owned.

The purpose of the Port Act 2008 is to prescribe matters concerning designation, development and management of ports to 'serve to develop the national economy through the promotion of the construction of ports and ensuring the efficiency of management and operation'.⁴⁶⁷ The MLTM is responsible for the planning, construction, maintenance and management of the designated ports, which are further classified into trade ports and coastal ports in accordance with standards prescribed by the Presidential Decree. Local ports are the responsibility of the municipal governments.

The New Port Construction Promotion Act prescribes matters relating to new port construction, such as formulation of the basic plan, and designation and management of the new construction area.

Statutory responsibilities of the MLTM include:

- development of the medium- and long-term port policy;
- establishment of port basic plans governing annual, mid-term and long-term development of ports;
- establishment of technical standards for port planning, design and construction;
- supervision of feasibility studies, surveys and design work for port development; and
- overall planning of port operation, such as integrated planning for developing port-logistics complexes.

Port Policy Committees at the central government level and the local government level are set up to consider matters in relation to basic port plans, designation or abolition of ports, and port logistics.

The MLTM is also responsible for undertaking construction and maintenance work of port facilities. Other parties interested in executing port work are required to apply for permission from the MLTM. Upon receipt of the work completion report, the MLTM will conduct an inspection of the construction

⁴⁶⁴ Busan Port Authority, *Container Terminal Companies*. Available at: https://www.busanpa.com/Service.do?id=engbpa_rs_pr_05 [accessed on 9 July 2013].

⁴⁶⁵ Sources of information include: HS Bang, *Korea Port Governance System and New Challenge Issues*, presented at ICHCA Conference, April 2011; UN Economic and Social Commission for Asia and the Pacific, 'The Port Industry', in *Free Trade Zone and Port Hinterland Development*, 2005, pp. 27-44.

⁴⁶⁶ See relevant discussion in: DW Song and SW Lee, 'Port Governance in Korea', in MR Brooks and K Cullinane (eds) *Devolution, Port Governance and Port Performance*, Research in Transportation Economics, 17 (1), 2006, pp. 357-375; and DW Song, 'Port Reform and Privatisation in Korea', in J Reveley and MT Tull (eds) *Port Privatisation: The Asia-Pacific Experience*, 2008, pp. 138-151; World Trade Organisation, *Korea Trade Policy Review – Part 5*, 2008.

⁴⁶⁷ Article 1 of the *Port Act*, 28 March 2008.

work before issuing a certificate confirming the completion. The construction parties can be granted the management rights of the port facilities and, as such, can collect rental fees for the use of the facilities.

Other managerial functions performed by the MLTM are:

- Imposing and collecting port tariffs – for usage fees collectable by other parties, matters concerning the method of use, the rental rate and the collection shall be reported to the MLTM (Article 33).
- Registering or licensing port operation related companies (for example, stevedoring, tugboat, ship-supply), provided they meet the relevant requirements prescribed by the MLTM.
- Collecting and reporting port-related statistics.

The MLTM may delegate some of its authority to its regional Maritime Affairs and Port offices or Port Authorities in accordance with the provisions of the Presidential Decree (Article 78). For example, the Incheon Regional Maritime Affairs and Port Office (IRMAPO)⁴⁶⁸ has jurisdiction over the Port of Incheon and the surrounding sea area. Its Port Logistics Division performs a number of those functions listed above: establishing the port-management plan; construction work permission; guidance of port management corporations and other port-related businesses; registration of port-related business; and operating and managing a port information management system. Its Port Construction Office, consisting of three Divisions in Port Development, Port Maintenance, and Planning and Investigation respectively, is responsible for matters in relation to the construction, supervision and safety management of new ports and facilities.

In accordance with relevant regulations under the *Public Order in Open Ports Act*, construction work in or near the boundaries of an open port is subject to authorisation by the RMAPO to ensure the safety of vessel traffic, cargos and ports.⁴⁶⁹

Port authorities established under the relevant acts are primarily responsible for the management and development of ports, port facilities and free-trade zones.

The Korean Maritime Safety Tribunal was established as the Central Marine Accidents Inquiry Committee in 1963 and is now under the jurisdiction of the MLTM.⁴⁷⁰ It is responsible for investigating marine accidents to ensure safety at sea.

The Korea Maritime Institute is a leading research institute that conducts research activities in relation to the development of marine affairs and fisheries policy in South Korea.⁴⁷¹ It was established in 1984 as a research centre with a specialisation in shipping economics. It has separate research divisions for port and logistics, maritime industry, marine policy, and fisheries policy, in addition to a dedicated ocean knowledge management division.

The Korean Port Stevedores Association was founded in 1997 and was renamed the Korea Port Logistics Association (KOPLA) in 2004.⁴⁷² It has 294 members who are registered port stevedore businesses.

Since its establishment in 1994, the Korean Shipping Association has provided a supportive role in fostering the shipping industry, by engaging in research and development activities and operating as an industry body for exchanging information.⁴⁷³ In 2012, its members and associate members numbered 1996.

⁴⁶⁸ Port of Incheon, *Home*. Available at: <http://www.portincheon.go.kr/english/> [accessed on 9 July 2013].

⁴⁶⁹ Port of Incheon, *Construction Work Permission*. Available at: <http://www.portincheon.go.kr/english/MarineEnvironment/MarineEnvironment4.asp?qnbFlag=05&depthFlag=31> [accessed on 9 July 2013].

⁴⁷⁰ Korean Maritime Safety Tribunal (KMST), *Home*. Available at: <http://www.kmst.go.kr/main/main.jsp> [accessed on 9 July 2013].

⁴⁷¹ Korean Maritime Institute (KMI), *Home*. Available at: <http://www.kmi.re.kr/kmi/en/> [accessed on 9 July 2013].

⁴⁷² Korean Port Logistics Association (KOPLA), *Home*. Available at: http://www.kopla.or.kr/english/english_main.asp [accessed on 9 July 2013].

⁴⁷³ Korean Maritime Safety Tribunal (KMST), *Home*. Available at: <http://www.kmst.go.kr/main/main.jsp> [accessed on 9 July 2013].

Australia

OVERVIEW

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

The ACCC and AER are multi-member, statutory authorities, established by Commonwealth legislation, the *Competition and Consumer Act 2010*. ACCC staff assists both the ACCC and AER members. The policy functions are separated from the regulator, and are performed by the relevant Commonwealth, State and Territory departments.

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

Second, they are subject to an open-access regime. Airports rely principally upon the economy-wide declare-negotiate-arbitrate model in Part IIIA of the *Competition and Consumer Act*. The other industry-specific or sector-specific regimes are generally based on the negotiate-arbitrate model, but include more interventionist features. In particular, electricity and gas networks are subject to an *ex ante* determination of maximum revenue or price; telecommunications networks are also subject to *ex ante* determination of both price and non-price terms in relation to declared services; postal services are subject to Commonwealth ministerial direction; and services in railways, water and wastewater, and ports are subject to individual State/Territory access regimes.

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

GEOGRAPHY, POPULATION, ECONOMY, POLITY AND LEGAL SYSTEM

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

Australia has only a small population (22.62 million as at June 2012).⁴⁷⁴ Australia's vast and largely arid land mass and small population combine to produce the lowest population density in the OECD. Much of the country is largely uninhabited; the bulk of the population clustering along the south-eastern and south-western coastlines, mainly in large cities. Sydney, Melbourne, Brisbane, Perth and Adelaide are the five largest cities (in order), with populations ranging down from approximately four million to one million. Canberra, the nation's capital, has a population of about 374 000.⁴⁷⁵

The GDP, on a PPP basis, is US\$1.542 trillion. Being equivalent to US\$42 400 per capita (2012 estimates), it is the twentieth highest in the world.⁴⁷⁶ Unemployment has been consistently low by international standards.

The more arable parts of the country produce large agricultural outputs (wheat, sugar, meat, and wool are major exports) well in excess of domestic requirements; and there is large mineral wealth (coal, iron ore, bauxite, gold, natural gas and uranium are important exports). Australia tends to trade primary products for sophisticated manufactured goods. Trade with the major trading partners China, Japan and the United States, exhibits a strong pattern of mineral and agricultural exports to these

⁴⁷⁴ Australian Bureau of Statistics. Available at: <http://www.abs.gov.au> [accessed on 9 July 2013].

⁴⁷⁵ *Ibid.*

⁴⁷⁶ Central Intelligence Agency, *The World Fact Book – Australia*. Available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/as.html> [accessed on 13 March 2013].

countries and manufactured imports from them. Like other developed economies, the service sector produces 70 per cent of GDP and provides most of the employment. Employment in manufacturing is falling, but, at 21 per cent, is still quite substantial.

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

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

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

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

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

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

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

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

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

Australia is administered under a common law system, in that the law (which was originally derived from the English system) is created by judges, with a lower court being bound to follow the precedent

established by higher courts. However, common law is subject to statutory law made by parliament. Economic regulation is principally governed by Federal, State and Territory statutory law.

APPROACH TO COMPETITION AND REGULATORY INSTITUTIONAL STRUCTURE

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

Australian Competition and Consumer Commission (ACCC)

The ACCC is responsible for promoting competition and protecting the rights of consumers. The ACCC does this by enforcing competition, fair trading and consumer protection laws, in particular the *Competition and Consumer Act 2010*. The ACCC also has a role in regulating markets where competition is less effective, such as communications, water, post and transport.

The ACCC consists of a Chairperson, and a discretionary number of other members. All are appointed by the Governor-General on the advice of the Commonwealth Minister, who must be satisfied that the member has the support of the majority of the State and Territories. As at 3 December 2012, there were seven members, known as 'Commissioners'.

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

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

There is no general prohibition of the ACCC using information, obtained under a statutory power for one purpose, for other statutory functions of the ACCC.⁴⁷⁷

The Commissioners are supported by staff and consultants. A staffing level of 802 is provided for in the 2013-2014 budget. Staff is divided into three main divisions:

- Enforcement and Compliance (enforcement of competition law and consumer protection provisions in Parts IV and V of the *Consumer and Competition Act*)
- Regulatory Affairs (economic regulation)
- Mergers and Asset Sales (assesses whether a proposed merger or asset acquisition breaches Part IV of the *Consumer and Competition Act*) and Adjudication (applications for approval of conduct that would otherwise breach Part IV of the *Consumer and Competition Act*)

The Regulatory Affairs Division is divided into five main branches or groups: Australian Energy Regulator (electricity and gas); Communications; Water; Fuel, Transport and Prices Oversight (rail, airports, ports, posts and other areas not covered in this review) and the Regulatory Development Branch.

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

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

The ACCC is supported by in-house lawyers (Legal Group) and economists (Regulatory Development Branch and the Competition and Consumer Economics Unit). There is no requirement to obtain the

⁴⁷⁷ ACCC-AER Information Policy: Collection, Use and Disclosure of Information, October 2008. Available at: <http://www.accc.gov.au/content/index.phtml/itemId/846791> [accessed on 9 July 2013].

pre-approval from the economics groups; although decision documents will be provided to the Legal Group. The Division also engages external solicitors and barristers,⁴⁷⁸ and other economic and technical consultants.

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

Australian Energy Regulator

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

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

Australian Competition Tribunal

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

The Tribunal is a Commonwealth statutory body established by the *Competition and Consumer Act*. It consists of a president and such deputy presidents and other members as are appointed by the Commonwealth Governor-General. The president and deputy presidents are each required also to be a judge of a federal court. Other members (commonly known as ‘lay members’) are required to have knowledge of, or experience in, ‘industry, commerce, economics, law or public administration’. For the purposes of hearing a particular matter, the Tribunal is constituted by a presidential member and two lay members. As at 3 December 2012, there were 13 members.

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

To progress a hearing, the practice is for the ACCC/AER to provide to the other parties a list of the documents that were before the ACCC/AER. The parties then agree upon a ‘Tribunal book’ (an indexed list of documents that are provided to the Tribunal – usually this will be around 30 lever arch folders).⁴⁷⁹ In 2006, the Council of Australian Governments (COAG) agreed that merits review should be limited to the information submitted to the regulator.⁴⁸⁰ Part IIIA of the *Competition and Consumer Act* was amended in 2010 in accordance with this intergovernmental agreement, to limit merits review to information which the decision-maker took into account in making the original decision.

Federal Court of Australia

An affected party may apply to a federal court (in practice, usually the Federal Court of Australia) for review of the legality of an ACCC/AER or Tribunal decision.⁴⁸¹ The time limit for lodging an application for review is 28 days after decision (although this may be extended by the court).⁴⁸²

The parties to the proceeding are: the applicant for judicial review; and the ACCC/AER (or Tribunal) (respondent). The court may order another person to join as a party, or give leave to a person to intervene in the proceeding.⁴⁸³ The basic principle is that, ordinarily, the ACCC/AER/Tribunal should

⁴⁷⁸ Subject to certain exceptions, federal government bodies are free to engage either the Commonwealth’s legal service provider (Australian Government Solicitor) or private law firms.

⁴⁷⁹ The document index identifies documents containing confidential information (the usual practice is for these documents to be printed on yellow paper). In general, the parties (including the ACCC/AER) agree upon a confidentiality regime (including confidentiality undertakings, and the identification of who may have access to the material), which is then reflected in consent orders made by the Tribunal.

⁴⁸⁰ Council of Australian Governments (COAG), *Competition and Infrastructure Reform Agreement*, 10 February 2006, Clause 2.4.

⁴⁸¹ *Administrative Decisions (Judicial Review) Act 1977* (Cth). Judicial review may also be available under s. 75(v) of the Australian Constitution; s. 39B of the *Judiciary Act 1903* (Cth); and s. 163A of the *Competition and Consumer Act*.

⁴⁸² *Administrative Decisions (Judicial Review) Act*, s. 11. See also the other bases upon which judicial review may be sought.

⁴⁸³ *Federal Court Rules*, Order 6.

not contest proceedings for judicial review, and should maintain its impartiality.⁴⁸⁴ However, where there is no other contradictor, the ACCC/AER will be more actively involved in making submissions and adducing evidence.

The court will usually require the ACCC/AER to give discovery of documents.⁴⁸⁵ The ACCC/AER would be required to make available for inspection all relevant documents to the other parties, subject to privilege (in particular, legal professional privilege and public interest privilege). Confidentiality is not a ground for exempting a document from disclosure. However, in practice, where a document contains confidential information, orders are usually made which limit the persons that may inspect the document.

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

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

REGULATORY ARRANGEMENTS BY INDUSTRY OR SECTOR

1. Energy

Prior to the 1990s, the electricity and gas industries in Australia were generally regulated and operated on a State and Territory basis. The electricity industry (and, to a lesser extent, the gas industry) in each State and Territory, was dominated by a single vertically integrated state-owned authority (such as the State Electricity Commission of Victoria) or a combination of state-owned authorities.⁴⁸⁶ The Commonwealth Snowy Mountains Hydro-electric Scheme and Moomba-to-Sydney Pipeline were exceptions.

The National Electricity Market (NEM) provides an interconnected transmission network that spans Queensland, New South Wales, the Australian Capital Territory (ACT), Victoria, South Australia and Tasmania. There are five separate, state-based transmission networks that are linked via six cross-border interconnectors. There are 13 distribution networks, each with a monopoly over its designated area.

In Queensland, New South Wales and Tasmania, the state governments own the distribution and transmission networks. In South Australia and Victoria, the distribution and transmission networks are privately owned. Cheung Kong Infrastructure and Power Assets own 50 per cent of Victoria's two distribution networks, and hold a 200-year lease on South Australia's network. Singapore Power International has a significant interest in companies that own Victorian, South Australian and ACT distribution networks, and in the Victorian transmission network.⁴⁸⁷

In Australia, electricity is mainly generated by the burning of fossil fuels. Fifty-seven per cent of energy production is derived from coal; black coal is predominantly used in New South Wales and Queensland, while brown coal is used in Victoria. Renewable energy accounts for less than ten per cent of total energy generation. The majority of Australia's renewable energy is hydroelectric; with Hydro Tasmania generating the bulk of Tasmania's energy, and Snowy Hydro producing approximately 40 per cent of mainland Australia's renewable energy.

Government-owned energy generators play a large role in Queensland, New South Wales and the Australian Capital Territory. The Queensland Government owns the State's two largest energy producers and has a 50 per cent interest in a number of other large producers. The New South Wales

⁴⁸⁴ The principle derives from *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13.

⁴⁸⁵ *Federal Court Rules*, Order 15.

⁴⁸⁶ AGL was an exception in terms of ownership: it operated as the gas utility in New South Wales and the Australian Capital Territory, fully under private ownership.

⁴⁸⁷ Australian Energy Regulator, *State of the Energy Market 2012*, December 2012, p. 60.

Government owns, or has an interest in, the state's five largest generators. In Tasmania generation remains largely in government hands, through Hydro Tasmania.⁴⁸⁸

Victorian and South Australian energy generators are largely privately owned. In Victoria, AGL Energy, International Power, and Energy Australia, generate approximately 70 per cent of energy. AGL Energy is South Australia's largest producer, generating 36 per cent of energy. A number of other companies also have large generation capabilities: International Power, Alinta Energy, and Origin Energy, each account for more than ten per cent of energy production.

In the eastern states, privately owned retailers AGL Energy, TRUenergy and Origin Energy jointly supply 76 per cent of the market. Although energy retailers are increasingly becoming privatised, there are still a number of government-owned energy retailers. In Tasmania, government-owned Aurora Energy holds a monopoly in the retail energy market. Ergon Energy, owned by the Queensland Government, has significant market share in rural and regional Queensland. The ACT Government has a 50 per cent interest in ActewAGL, the territory's major retailer. ActewAGL supplies over 90 per cent of small customers in the ACT, with the remainder being supplied by TRUenergy.⁴⁸⁹

Although the reforms of the 1990s largely moved towards structural separation in energy markets, there have since been trends of reintegration. The three major retailers, AGL energy, TRUenergy and Origin Energy, have increased their market share in generation from 11 per cent in 2007 to 35 per cent in 2011. Vertical integration allows for the internal management of risk arising from price volatility, rather than through hedge markets.

Australia's electricity and gas markets are significantly intertwined, with gas-powered generation accounting for 24 per cent of domestic gas demand in eastern Australia. Due to its role of providing intermediate and peak power, gas accounts for 20 per cent of capacity but only ten per cent of output. Household demand for gas is largely in Victoria, where residential demand for cooking and heating accounts for around one-third of total gas consumption.⁴⁹⁰

Australia's gas pipelines are privately owned, with the publicly listed APA Group having the most extensive portfolio of gas transmission assets in Australia. Singapore Power International (through its subsidiaries Jemena, SP Ausnet, and Jemema) is a principal owner of both gas transmission and distribution. APA Group also has an interest in gas distribution by way of its 33.4 per cent interest in Envestra, a public company.

Regulatory Institutions and Legislation

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

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

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

The NEL and NGL provide for the regulation of electricity network and gas pipeline services by the Australian Energy Market Commission (rule maker) and the AER (economic regulator).⁴⁹¹ The Ministerial Council on Energy (which provides advice to COAG) is responsible for policy oversight.

⁴⁸⁸ *Ibid.*, p. 30

⁴⁸⁹ *Ibid.*, p. 118

⁴⁹⁰ *Ibid.*, p. 32

⁴⁹¹ The state regulator retains the role of economic regulator for gas in Western Australia.

The Australian Energy Market Operator (AEMO) operates: the NEM; and the retail and wholesale gas markets of south-eastern Australia. AEMO was created by COAG and developed under the guidance of the Ministerial Council on Energy. AEMO's responsibilities include: the day-to-day management of wholesale and retail energy market operations and emergency management protocols; the on-going market development required to incorporate new rules, infrastructure and participants; and long-term market planning through demand forecasting data and scenario analysis. Established in 2009, AEMO amalgamated the roles of the following organisations: Victorian Energy Networks Corporation (VENCorp), Electricity Supply Industry Planning Council (ESIPC), Retail Energy Market Company (REMCO), Gas Market Company (GMC) and Gas Retail Market Operator (GRMO).

In addition, under the NGL, the decision as to whether a pipeline should be regulated (covered), is made by the relevant minister on the advice of the National Competition Council (NCC).

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

Broadly, the regimes provide for two categories of services: those which are subject to the dispute resolution mechanism but not upfront price/revenue control;⁴⁹² and those which are also subject to an upfront decision by the AER setting maximum revenue and/or price for a period of at least five years (under the gas regime, the access arrangement approved by the AER also determines non-price terms and conditions of access).⁴⁹³

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

From 1 July 2012, the AER took on responsibility for regulating retail energy markets, under the National Energy Customer Framework (Customer Framework). The Customer Framework includes the National Energy Retail Law (NERL) and National Energy Retail Rules (NERR). Together, these Laws and Rules set out key protections and obligations for energy customers and the businesses they buy their energy from.

The Customer Framework commenced in the Australian Capital Territory and Tasmania (for electricity customers) on 1 July 2012, for South Australia on 1 February 2013 and for New South Wales on 12 July 2013. Commencement dates for Queensland and Victoria have yet to be confirmed. In states and territories that have not yet adopted the Customer Framework, their governments will remain responsible for regulating retail energy markets. Western Australia and the Northern Territory do not propose to implement the reforms.

In jurisdictions where the Customer Framework has commenced, the AER is responsible for:

- monitoring and enforcing compliance with obligations in the Retail Law, Rules and Regulations;
- reporting on the performance of the market and energy businesses, including information on energy affordability, and trends in disconnection of customers for non-payment of energy bills;
- assessing applications for national retailer authorisations from businesses that want to become energy retailers, and granting exemptions from the requirement to be authorised (for example, for nursing homes and caravan parks that pay for energy and on-sell it to their tenants as part of their normal business);
- approving policies that energy retailers must implement to assist customers who are facing financial hardship and looking for help to manage their bills; and
- administering a national retailer-of-last-resort scheme, which protects customers and the market if a retail business fails.

⁴⁹² The services are known as: (electricity distribution) 'negotiated distribution service'; (electricity transmission) 'negotiated transmission service'; (gas) 'light regulation service'.

⁴⁹³ The services are known as: (electricity distribution) 'direct control service' (which in turn is divided into two subclasses: 'standard control service' and 'alternative control service'); (electricity transmission) 'prescribed transmission service'; (gas) 'full regulation pipeline'.

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

Consultation of Interested Parties

Under both regimes, the access provider is required to submit a proposal to the AER. In the case of electricity, the proposal must be submitted 17 months before the start of the relevant regulatory period. In the case of gas, the proposal must be submitted within three months (extendable) after the pipeline is covered. In preparing a full access arrangement proposal, a service provider may request a pre-submission conference with the AER.

Upon receiving the proposal, the AER must first publish the proposal (and, in the case of electricity, may also publish an issues paper) and invite submissions; the deadline being at least six weeks in the case of electricity, and four weeks in the case of gas.

Second, the AER must make a draft decision and reasons, which are published:

- In the case of electricity, the draft decision must be published as soon as possible after receiving the proposal. If the draft decision requires changes to the proposal, the provider may submit a revised proposal (if any) within 45 business days of the publication of the draft decision. The AER must hold a conference. All parties must then be given at least 45 business days to make submissions;
- In the case of gas, the provider must be given at least three weeks to make revisions (if any). All parties must then be given at least four weeks to make submissions. The AER may hold a hearing.

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

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

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

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

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

The National Electricity Consumers Advocacy Panel was established in 2001 to grant funds to electricity consumer representatives for advocacy on the development of the national electricity market and the *National Electricity Rules*. In 2008, the Panel was reconstituted as the Consumer Advocacy Panel and given additional broader responsibilities for granting funds for consumer advocacy, and research on electricity and natural gas issues.⁴⁹⁴

Timeliness

Timeframes for consideration of matters are stated above, under the heading 'Consultation of Interested Parties'.

Information Disclosure and Confidentiality

Under both regimes, the AER is able to: apply to a magistrate for a search warrant; require a person to provide information or documents; and issue a 'regulatory information order' (which can require a regulated entity to collect and provide specified information on an annual basis). In addition, in order

⁴⁹⁴ *Australian Energy Market Commission (Consumer Advocacy Panel) Amendment Act 2007 (SA)*.

to facilitate the decision-making process, the regimes prescribe detailed information that must be submitted by the regulated entity with its proposal. The AER is able to release confidential information if it is of the opinion that the benefit in disclosing the information would outweigh any detriment that may be caused to the information provider (although the decision is subject to merits review). The Competition and Consumer Act also provides for the sharing of information between the ACCC and the AER.⁴⁹⁵

Decision-making and Reporting

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

Appeals

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

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

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

Regulatory Development

Over recent times, there have been reviews across the full spectrum of energy regulation. These reviews have covered:

- a review of the rules that set out how network prices are determined, which was initiated by the rule changes lodged by the AER (and the EUAA);
- a review of the effectiveness of the Australian Competition Tribunal as the review body;⁴⁹⁶
- how reliability standards are set and the role of jurisdictions;
- how the underlying drivers of cost might be addressed;
- a focus on the efficiency of public and private NSPs; and
- how the long-term interests of consumers can be better integrated with the regulatory process.

In 2011 the AER submitted proposals to the AEMC to address issues with the regulatory framework. The areas identified for attention were:

- how the rate of return was set;
- how the forecasts of capital and operating expenditure were set;
- incentives for network businesses to manage their expenditure and strive for efficiency; and
- improvements to the regulatory process to foster greater consumer involvement.

⁴⁹⁵ *Competition and Consumer Act*, ss. 44AF and 157A(1).

⁴⁹⁶ The process for the review of the limited Merits Review regime has yet to be concluded.

In response, the AEMC went through its rule-change process, and agreement was reached on a wide range of changes. To implement these and other changes, the AER is developing a series of guidelines. Under what is called the 'Better Regulation Project', the AER will publish a series of guidelines by 29 November 2013. These will set out the AER's approach to regulation under the new rules.

An area of major change is with regard to consumer engagement. Changes to the National Electricity Rules (NER) and National Gas Rules (NGR) in late 2012, and decisions of the Council of Australian Governments (COAG) and Standing Council of Energy and Resources (SCER) mean that consumer engagement will be facilitated through new tools and frameworks. While the Consumer Advocacy Panel and the AER's Consultative Group have previously played important roles in assisting consumer engagement, with the rule changes, other measures have also been put in place.

The AER established a purpose-specific Consumer Reference Group to facilitate consumer input to the AER's Better Regulation Program – specifically into the guideline development process.⁴⁹⁷

In addition there will be a Consumer Engagement Guideline developed under the Better Regulation Program. The objective of the guideline is to align the provision of network services by energy network businesses with the long term interests of consumers. The guideline sets out the AER's expectations for consumer engagement by network businesses. It aims to steer network businesses to developing consumer engagement strategies and business processes that incorporate meaningful consumer engagement.⁴⁹⁸

On 1 July 2013 the AER announced its inaugural Consumer Challenge Panel (CCP). This was a key component of the COAG's energy reform agenda. Members of the Panel will provide advice to the AER to help ensure its decisions on energy network costs properly incorporate the interests of consumers.⁴⁹⁹

Finally, as part of COAG's energy market reform package, the SCER was asked to consider the establishment of a national energy consumer advocacy body. One of the primary aims of the panel is to unify national energy consumer advocacy activities into one peak body. An expert report advising on an effective model for a national energy consumer advocacy body was released by the SCER in May 2013, and it has agreed in principle to an initial set up by 1 July 2014.⁵⁰⁰

2. Telecommunications

A key feature of the telecommunications market in the past two years has been the continuing rapid increases in the consumption of broadband data by consumers. As of December 2012, Australia was ranked 18 of the thirty-four OECD countries, in terms of fixed-line broadband penetration; and third in the OECD for wireless broadband penetration.⁵⁰¹

Australian telecommunications is currently undergoing structural reform. Legislation became operational in 2011 to facilitate the structural separation of the vertically integrated incumbent network provider, Telstra, and the building of a new government-owned, wholesale-only national broadband network (NBN).⁵⁰² The NBN will deliver both telephony and high-speed broadband, and will gradually replace Telstra's current copper network which is to be decommissioned.

The legislative reforms leading to Telstra's structural separation and the build of the NBN responded to competition concerns that arose from Telstra's incumbent position in both wholesale and retail

⁴⁹⁷ AER, *Better Regulation-Consumer Reference Group*. Available at: <http://www.aer.gov.au/node/19166> [accessed on 9 July 2013].

⁴⁹⁸ AER, *Consumer Engagement Guidelines for Network Service Providers*. Available at: <http://www.aer.gov.au/node/18894> [accessed on 9 July 2013].

⁴⁹⁹ AER, *AER Establishes Better Consumer Engagement on Energy*. Available at: <http://www.aer.gov.au/node/21000> [accessed on 9 July 2013].

⁵⁰⁰ SCER, *National Energy Consumer Advocacy Body*. Available at: <http://www.scer.gov.au/workstreams/energy-market-reform/national-energy-consumer-advocacy-body/> [accessed on 9 July 2013].

⁵⁰¹ OECD, *OECD Broadband Statistics*, December 2012, updated on 18 July 2013. Available at: http://www.oecd.org/document/54/0,3343,en_2649_34225_38690102_1_1_1_1.00.html [accessed on 22 July 2013].

⁵⁰² *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010; National Broadband Network Companies Act 2011*.

markets. The Government considered that Telstra's high level of integration had hindered the development of effective competition in the sector.⁵⁰³

Under the legislative reforms, Telstra was given the option of either submitting a voluntary structural separation undertaking or being functionally separated. On 27 February 2012 the ACCC accepted Telstra's voluntary structural separation undertaking and migration plan.⁵⁰⁴ These documents outlined how Telstra will cease supplying voice and broadband services to retail customers (within the NBN fibre footprint) over its copper and hybrid fibre coaxial (HFC) network. Telstra will do this by transferring its customers onto NBN Co's network as it is progressively built. The ACCC also authorised an agreement between NBN Co and Optus (Optus is Australia's second largest provider of telecommunication services) for Optus to migrate its HFC network customers to the NBN, and decommission parts of the HFC network.

Given the progressive build to the NBN (expected to be completed in 2021), Telstra's structural separation undertaking specifies a range of measures that are intended to promote equivalence and transparency in Telstra's supply of services to its wholesale customers and its retail business. Of particular significance is the commitment Telstra gave to providing equivalent outcomes for wholesale customers, as are achievable by Telstra's retail business.

The NBN will predominantly be a fibre-to-the-premises network, with wireless and satellite technology being provided in more remote areas of the country where it is considered too expensive to extend the fibre network. The network will be owned and operated by NBN Corporation which, established in April 2009, is wholly owned by the Commonwealth Government. The NBN will operate as a wholesale-only network which will offer access to layer-2 bitstream services in accordance with regulatory principles of non-discrimination (that is, NBN Corporation must not discriminate between customers in providing services). The Government's policy is for there to be uniform national wholesale pricing for access to the NBN.⁵⁰⁵

The *Competition and Consumer Act* requires the ACCC to publish a list of 'points of interconnection' for the NBN.⁵⁰⁶ The ACCC recently published a list of 121 points of interconnection.⁵⁰⁷ These are the points at which NBN Co is obligated to permit interconnection to its facilities, if requested to do so by access-seekers. This allows access-seekers to provide services over the NBN.

Until 1991, the supply of telecommunications transmission infrastructure and the carriage of telecommunications over that infrastructure were a statutory monopoly operated by the Australian Telecommunications Corporation (Telecom) and the Overseas Telecommunications Corporation (OTC). Telstra was formed in 1991 by the amalgamation of Telecom and the OTC. From 1991 to 1997, there was a statutory fixed-line duopoly (Telstra and Optus) and a statutory mobile triopoly (Telstra, Optus and Vodafone). In 1997, restrictions on the number of licences that could be issued were removed. The privatisation of Telstra was completed in 2006. The mobile triopoly is still in place, with 2003-entrant Hutchison Telecom merging with Vodafone during 2009-2010 to form Vodafone Hutchison Australia (VHA). In May 2012, Optus and VHA entered into an agreement to share 3G and 4G sites. This meant Optus gained access to 1000 Vodafone sites, while VHA gained access to 400 Optus sites. From April 2013, VHA customers will also be able to roam on the Optus network in some locations, particularly regional areas. There are also a number of resellers, with agreements formed on a network-by-network basis.⁵⁰⁸

Telstra dominates the fixed-line market, with 76 per cent of Australia's 10.44 million connections. The fixed-line market is shrinking; in June 2012 there were 3.13 million Australians with a mobile phone and no fixed-line access, almost two million more than in 2008. As an ISP, Telstra's grip on the market is not quite as strong, with Optus iiNet and TPG each having between 500 000 and 1 000 000

⁵⁰³ Explanatory Memorandum to the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010*, p. 1.

⁵⁰⁴ ACCC, *Structural Separation*. Available at: <http://www.accc.gov.au/content/index.phtml/itemId/1043715> [accessed on 9 July 2013].

NBN, *Home*. Available at: www.nbnco.com.au [accessed on 9 July 2013].

⁵⁰⁶ *Competition and Consumer Act*, s. 151DB (1).

⁵⁰⁷ ACCC, *NBN Points of Interconnect*. Available at: <http://www.accc.gov.au/content/index.phtml/itemId/952292> [accessed on 9 July 2013].

⁵⁰⁸ Australian Communications and Media Authority, *Communications Report 2011-2012*, 2012, p. 32

subscribers. Bundling home telephone and internet is popular, with 67 per cent of Australia's 473 ISPs offering a voice service to their customers.

Regulatory Institutions and Legislation

The two main regulatory agencies for telecommunications are the ACCC and the Australian Communications and Media Authority (ACMA).

The ACCC is responsible for economic regulation of telecommunications. The ACMA is responsible for technical regulation, consumer issues (including the universal service obligation) and radio-communications.

Legislation – Access Regimes

Access to telecommunications facilities (as opposed to services) is governed by Schedule 1 to the *Telecommunications Act 1997*.

Access to telecommunications services is governed by a telecommunications-specific access regime, set out in Part XIC of the *Competition and Consumer Act*. The overall objective of Part XIC is the promotion of the long-term interests of end-users of carriage services, or of services provided by means of carriage services.⁵⁰⁹

Like the economy-wide access regime in Part IIIA of the *Competition and Consumer Act*, access to services under Part XIC begins with a declaration process. However, unlike Part IIIA, the ACCC, rather than the NCC and relevant minister, decides whether the service should be 'declared'.⁵¹⁰ The ACCC can only declare a service if declaration will satisfy the 'long-term interest of end-users' objective. When the ACCC considers whether something promotes the long-term interests of end-users, it must have regard to (in general terms) the objectives of:

- promoting competition in relevant markets;
- achieving any-to-any connectivity in relation to carriage services that involve communication between end-users; and
- encouraging the economically efficient use of, and investment in, infrastructure.

Once a service is declared, a provider of that service is required to comply with 'standard access obligations' including an obligation to supply the service to an access seeker (subject to certain exceptions). Declarations are to be set for a fixed period of between three and five years, unless the ACCC considers there are circumstances that warrant the expiry date occurring in a shorter or longer period.⁵¹¹

The Part XIC access regime was amended at the beginning of 2011 to change its operation from a negotiate/arbitrate access regime, to a regime which requires the ACCC to set up-front price and non-price terms and conditions for declared services.⁵¹² The regime was amended as it was thought that the 'negotiate-arbitrate' model was not producing effective outcomes for industry or consumers.⁵¹³ This is because it was thought the ability to arbitrate disputes gave Telstra the ability and incentive to pursue a litigation strategy to limit or delay competition.

This contrasts to Part IIIA of the *Competition and Consumer Act*, which is a negotiate/arbitrate model. While Part XIC still encourages negotiation, there are ex ante terms and conditions that parties can 'fall back' on.

⁵⁰⁹ *Competition and Consumer Act*, s. 152AB (1). 'Carriage services' are defined in the *Telecommunications Act 1997* as services for carrying communications by means of guided and/or unguided electromagnetic energy.

⁵¹⁰ An exception to this is that NBN Co is able to declare a service by itself if it publishes a standard form of access agreement on its website that relates to the service. In addition, the ACCC was required to deem certain services to be declared at the commencement of the access regime: see the list of services published in the ACCC's *Deeming of Telecommunications Services Statement*, 30 June 1997.

⁵¹¹ *Competition and Consumer Act*, s. 152ALA(2).

⁵¹² These amendments were made by the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010*.

⁵¹³ Explanatory Memorandum, *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010*, p. 4.

The *ex ante* terms and conditions are set out in an access determination. The ACCC must undertake a public consultation process prior to making an access determination. Terms and conditions in an access determination only apply in the absence of a privately negotiated access agreement between the service-provider and the access-seeker.

The ACCC also has the power to make 'binding rules of conduct' which contain terms and conditions of access to a declared service, but can only operate for a year. They can be made relatively quickly as the ACCC does not need to consult with industry before making them. They are intended to be used in more urgent situations where it is necessary for the ACCC to set terms and conditions of access to a declared service. Once the ACCC makes a binding rule of conduct, it must commence a public consultation process on whether to vary the access determination for that declared service.⁵¹⁴ Terms and conditions agreed between parties in a privately negotiated access agreement have precedence over terms and conditions contained in binding rules of conduct. However, binding rules of conduct have precedence over terms and conditions contained in an access determination.

A service can also be declared if the ACCC accepts a voluntary special access undertaking in relation to the service. This can only be done if a service has not previously been declared by the ACCC. The access provider can seek to vary or withdraw an undertaking while it is in force. If a service is declared by the acceptance of a special access undertaking, the ACCC may, but is not required to, make an access determination in relation to that service. The terms and conditions set out in the special access undertaking will have precedence over the terms and conditions contained in any access determination. Parties can still agree to different terms and conditions of access to those set out in a special access undertaking.

In contrast to other service providers, NBN Corporation is able to declare a service if it publishes a standard form of access agreement on its website that relates to the service. If NBN Corporation publishes a standard form of access agreement, it gives access seekers the right to access the service on the terms and conditions contained in the agreement. The ACCC is still able to (but does not have to) make an access determination in relation to the declared service that sets out terms and conditions of access.

The 2011 amendments to the access regime removed merits review by the Australian Competition Tribunal for decisions made by the ACCC under Part XIC of the *Competition and Consumer Act*. However, the legality of the ACCC's decisions is still able to be reviewed by the Federal Court.

Legislation – Anti-competitive Conduct and Consumer Safeguards

Telecommunications is subject to the economy-wide competition law in Part IV of the *Competition and Consumer Act*, and an additional telecommunications-specific regime in Part XIB (which is based on Part IV, and enforced by the ACCC).

Part XIB specifies that a carrier or carriage service-provider must not engage in anti-competitive conduct.⁵¹⁵ The ACCC may issue a Part A competition notice if it has reason to believe that the carrier or carriage service-provider concerned has engaged, or is engaging, in at least one instance of anti-competitive conduct of the kind specified in Part XIB. A competition notice calls on the carrier to cease the relevant anti-competitive behaviour, and authorises the ACCC to use its enforcement powers in relation to that conduct.

Part XIB also allows the ACCC to issue tariff-filing directions to certain carriers and carriage service-providers,⁵¹⁶ and to make rules requiring carriers and carriage service providers to keep and retain records.⁵¹⁷ The ACCC is also required to report each year on competitive safeguards within the telecommunications industry,⁵¹⁸ and monitor charges for listed carriage-services.⁵¹⁹

⁵¹⁴ *Competition and Consumer Act*, s. 152BCN(9).

⁵¹⁵ *Competition and Consumer Act*, s. 151AK.

⁵¹⁶ *Competition and Consumer Act*, s. 151BK. Telstra is also required to notify the ACCC of proposed changes to charges for basic carriage services: s. 151BTA.

⁵¹⁷ *Competition and Consumer Act* s. 151BU.

⁵¹⁸ *Competition and Consumer Act*, s. 151CL.

⁵¹⁹ *Competition and Consumer Act*, s. 151CM. The ACCC is also required to monitor Telstra's compliance with Part 9 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth) (which deals with price-control arrangements for Telstra).

The regulation of wholesale infrastructure services is affected by the regulation of end-user services. Consumer safeguards include:⁵²⁰

- the universal service obligation (USO);
- access to untimed local calls; and
- retail price controls on Telstra.⁵²¹

The USO has historically required Telstra, as the vertically integrated ubiquitous copper network owner, to provide access to basic telephone and payphone services that are reasonably accessible to all Australians. However, the legislation was amended in 2012 in order for Telstra's regulated USO to be replaced by contractual arrangements,⁵²² in order to adapt to a market in which Telstra's copper fixed-line network is being decommissioned as the NBN is built.⁵²³

A Telecommunications Universal Service Management Agency was formed as the statutory agency responsible for the implementation of service agreements that will deliver universal service.⁵²⁴ On 23 June 2011 the government announced that it had entered into an initial service agreement with Telstra to ensure continuity of universal services during the transition to the NBN. Industry participants contribute to the costs of the Telecommunications Universal Service Management Agency through levies.

Retail price controls on Telstra consist of price caps (CPI-minus-CPI or CPI-minus-0 per cent) applied to certain 'baskets' of services. Regulated services include: local; international; trunk calls and line rental; basic line rental products for residential customers; basic line rental products for business customers; and connection services.

Consultation of Interested Parties

At the time the regime was enacted (1997), the telecommunications industry was intended to be largely self-regulating.⁵²⁵ The industry established two representative bodies: the Australian Communications Industry Forum (ACIF), to develop technical standards and codes of practice; and the Australian Communications Access Forum (ACAF). Under Part XIC of the (then) *Trade Practices Act*, ACAF was the declared Telecommunications Access Forum (TAF) with responsibility to produce telecommunications access codes and make recommendations in relation to declared services. In practice, the ACAF had difficulty reaching consensus, and the TAF provisions in Part XIC were repealed in 2002.

To some extent, the role was taken on by the Service Providers Industry Association (SPAN) which developed an alternative dispute resolution mechanism (which some industry participants consider contributed to a reduction in access disputes from 2001). However, there is currently only limited industry resolution of access issues. In 2006, the ACIF merged with the SPAN to form the Communications Alliance Ltd. The mission of the Communications Alliance is to promote the growth of the Australian Communications Industry and the protection of consumer interests by fostering the highest standards of business ethics and behaviour through industry self-governance.⁵²⁶

In order to represent consumers better, the Federal Government established the Australian Communications Consumer Action Network (ACCAN) as a non-profit company limited by guarantee on 15 October 2008.⁵²⁷ The ACCAN is the peak body representing a diversity of telecommunications consumers in Australia, including: people with disabilities; people from remote areas; low-income earners; seniors; youth, people of different cultural backgrounds; Indigenous; and small businesses. The ACCAN began its full operation in July 2009. ACCAN currently has funding until 2017, and will receive \$2 million annually; fully recoverable from annual carrier licence charges collected by the

⁵²⁰ *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth).

⁵²¹ The current price controls determined by the Minister under Part 9 of that Act and expire on 30 June 2014: *Telstra Carrier Charges – Price Control Arrangements, Notification and Disallowance Determination No. 1 of 2005* (Cth).

⁵²² *Telecommunications Legislation Amendment (Universal Service Reform) Act 2012*.

⁵²³ Explanatory Memorandum to the *Telecommunications Legislation Amendment (Universal Service Reform) Bill 2011*, p. 3.

⁵²⁴ *Telecommunications Universal Service Management Agency Act 2012*.

⁵²⁵ See *Telecommunications Act 1997* (Cth), s. 4.

⁵²⁶ Communications Alliance Ltd, *Home*. Available at: <http://www.commsalliance.com.au/> [accessed on 9 July 2013].

⁵²⁷ ACCAN, *Home*. Available at: <http://accan.org.au/> [accessed on 9 July 2013].

ACMA under the *Telecommunications (Carrier Licence Charges) Act 1997*. The Government expects that the ACCAN will, among other things, take a key role in the communications regulatory process, resulting in better outcomes for consumers and restoring the balance between consumer and provider interests.

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

This section relates to the declaration process, the process for making access determinations, and the process for assessing special access undertakings under Part VIC of the *Competition and Consumer Act*. It also briefly summarises the process for arbitrating facilities' access disputes under the *Telecommunications Act 1997*.

The ACCC may declare services after conducting a public inquiry into whether the declaration of a service would promote the long-term interests of end-users.⁵²⁸

The ACCC may decide to conduct a public inquiry into whether a service is to be declared, either on its own initiative or upon request from a person, most likely service-providers who are seeking access to an eligible service. Subsequent declaration, variation, and revocation of declarations are also subject to public inquiry.

The public inquiry procedures are governed under Part 25 of the *Telecommunication Act*, which require the ACCC to: publish notice of certain matters relating to the inquiry; provide a reasonable opportunity, of at least 28 days, for submissions from the public; and publish a report on the inquiry.

In addition, the ACCC may⁵²⁹ publish a discussion paper; hold one or more hearings; undertake market inquiries; and seek expert advice on particular issues.

The ACCC maintains a register of the services it has declared, including variations and revocations. The register is available online.⁵³⁰

The ACCC must commence to hold a public inquiry into making a final access determination for a declared service within 30 days after it makes a declaration (if no access determination has previously been made in relation to the service).⁵³¹

The ACCC must also commence a public inquiry into remaking a final access determination 18 months before the expiry date for an existing access determination,⁵³² or if it wishes to vary a final access determination (unless the variation is of a minor nature, or the service provider and access seekers whose interests are likely to be affected by the variation consent in writing to the variation).⁵³³

The public inquiry procedures for making a final access determination are also governed by Part 25 of the *Telecommunications Act* (the relevant requirements are set out above).

The ACCC may make an interim access determination if a service is declared, and no access determination has previously been made in relation to the service. The ACCC is not required to consult with industry or observe any requirements of procedural fairness before making an interim access determination.⁵³⁴

There are no strict procedural requirements for public consultation in relation to the ACCC's decision to accept or reject a special access undertaking. However, the ACCC is required to observe rules of

⁵²⁸ There are separate declaration provisions for services provided by NBN Corporation (s. 152AL(8A)), and services not provided by NBN Corporation (s. 152AL(3)). However the provisions are substantially the same.

⁵²⁹ ACCC, *Telecommunications Services – Declaration Provisions: A Guide to the Declaration Provisions of Part VIC of the Trade Practices Act*, July 1999, p. 21.

⁵³⁰ ACCC, *Declared Services Register (s. 152AQ)*. Available at: <http://intranet.accc.gov.au/content/index.phtml/itemId/323824> [accessed on 9 July 2013].

⁵³¹ *Competition and Consumer Act*, s. 152BCI(1).

⁵³² *Competition and Consumer Act*, s. 152BCI(3).

⁵³³ *Competition and Consumer Act*, s. 152BCN.

⁵³⁴ *Competition and Consumer Act*, s. 152BCG.

procedural fairness and will generally be expected to consult with industry before it makes a decision to accept or reject a special access undertaking.

The ACCC also has a role in arbitrating disputes about access to telecommunications facilities. An access seeker or access provider must first notify the ACCC in writing that a dispute exists. The ACCC may be constituted by a single member, or three members, for the purpose of the arbitration. The ACCC has a number of powers in relation to arbitrations, such as directing parties to negotiate in good faith, conducting arbitration hearings, and requiring people to attend those hearings and provide evidence. An arbitrating hearing is generally to be conducted privately.⁵³⁵ There are no strict timing requirements for conducting arbitrations.

Timeliness

There are no time limits in the legislation on how long the ACCC can take to complete an inquiry into declaring a service. When the ACCC commences a public inquiry to declare a service, it will generally indicate timeframes for issuing discussion papers, when public submissions are due, and when it expects to release its draft and final reports.

The ACCC is required to make a final access determination within six months of the commencement of the inquiry. However, the ACCC may further extend that period if it publishes a notice on its website, which must explain why the ACCC has been able to make a final access within the time period.⁵³⁶

The ACCC is required to make a decision on whether to accept or reject a special access undertaking, within six months of receiving the undertaking (however, the clock is effectively stopped for various events, such as the time period allowed for making submissions). The six-month period can also be extended for periods of up to six months if the ACCC provides a notice to the person explaining why the ACCC has been unable to make a decision on the undertaking within the period.⁵³⁷

Information Disclosure and Confidentiality

The ACCC has requirements under the legislation not to disclose certain protected information that is gathered by the ACCC when undertaking its functions under Part XIB and Part XIC (including in some cases information given to the ACCC in confidence).⁵³⁸

Those provisions contain some exceptions which allow the ACCC to disclose information to certain people in some circumstances. For example, the ACCC can in some circumstances disclose information to other regulatory bodies or relevant Ministers, or can disclose information if the information is sufficiently aggregated, or if a person consents to their confidential information being disclosed.

The ACCC has the power under Part XIB of the *Competition and Consumer Act* to obtain information from carriers, and is able to disclose this information if it has considered certain factors (such as whether the disclosure of the information will promote competition in certain markets, and whether the ACCC has had regard to matters such as the legitimate commercial interests of a carrier).

The ACCC has also published guidelines which cover, generally, the collection, use and disclosure of information.⁵³⁹

Decision-making and Reporting

The decision-making process is discussed under 'Consultation of Interested Parties'.

Appeals

Judicial review is available for all ACCC decisions. There is no merits review of ACCC decisions under Part XIC or Part XIB of the *Competition and Consumer Act*.

Regulatory Development

⁵³⁵ See *Telecommunications Act 1997* (Schedules 1 and 3) and *Telecommunications (Arbitration) Regulations 1997*.

⁵³⁶ *Competition and Consumer Act*, s. 152BCK.

⁵³⁷ *Competition and Consumer Act*, s. 152CBC.

⁵³⁸ *Competition and Consumer Act*, s. 155AAA.

⁵³⁹ ACCC, *ACCC-AER Information Policy: The Collection, Use and Disclosure of Information*. Available at: <http://www.accc.gov.au/content/index.phtml/itemId/846791> [accessed on 9 July 2013].

The ACCC is currently assessing a special access undertaking provided by NBN Corporation that sets out terms and conditions of access to certain of its services.

3. Postal Services

Postal services are provided by a government business enterprise known as the Australian Postal Corporation and trading as Australia Post. It was established by the *Australian Postal Corporation Act 1989* (Cth) under which it is required to fulfil its community service obligation, that is, to carry standard letters within Australia at a single uniform basic postage rate (BPR) and to meet prescribed performance standards. In return, Australia Post is granted an exclusive right for collecting and delivering reserved letter services within Australia, and for issuing stamps. In accordance with the *Postal Services Legislation Amendment Act 2004* (Cth), the scope of the reserved letter services has been reduced from letters up to 500 grams and ten times the BPR, to letters up to 250 grams and four times the BPR. This provided greater opportunities for private mail operators to compete with Australia Post in non-reserved services, including upstream operations such as mail houses, printers and mail aggregators, and in downstream areas such as parcel delivery, express delivery and logistics. Large competitors in downstream operation include TNT, DHL, FedEx, Linfox and Toll.⁵⁴⁰

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

Australia Post has consistently returned a profit over the past decade, surviving the global financial crisis largely unscathed. Like many other postal services around the world, Australia Post is facing falling mail volumes. Between 2008 and 2012, volume has fallen approximately 14 per cent. Due to the growing popularity of e-commerce, Australia Post has seen parcel volumes grow by over ten per cent per annum, with similar growth expected for the next five years.⁵⁴¹

Regulatory Institutions and Legislation

The Department of Broadband, Communications and the Digital Economy (DBCDE) provides advice to the Government on postal policy and legislation, and on issues affecting the postal industry, including: setting broad strategic policy framework and goals for Australia Post; and consultations with industry, consumer groups and other government agencies and stakeholders.⁵⁴² In particular, the Minister has the power to disapprove changes to the basic postage rates for the carriage of standard postal articles by ordinary post within Australia.⁵⁴³

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

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

The ACCC's role in assessing proposed price increase for Australia Post's reserved services, falls within the scope of price surveillance regime in Part VIIA of the *Competition and Consumer Act*. Australia Post must notify the ACCC if it proposes to: increase the price of a reserved service; introduce a new reserved service; or change the terms and conditions for providing an existing reserved service.⁵⁴⁴ The ACCC may accept or object to the proposed price increase. However, once the statutory period has expired, Australia Post is legally entitled to increase its price regardless of the ACCC's decision. Australia Post may, however, voluntarily decide not to proceed with the price increase.

While Australia Post is exempt from the national access regime in Part IIIA of the *Competition and Consumer Act*, Part 4 of the *Australian Postal Corporation Act* provides for the ACCC to conduct an inquiry into bulk-mail service disputes (Part 3 of the *Australian Postal Corporation Regulations 1996* (Cth)). A person who requests a 'bulk interconnection service' from Australia Post is able to notify the

⁵⁴⁰ ACCC, *Australia Postal Corporation Price Notification – Decision*, July 2008, Chapter 2.

⁵⁴¹ Australia Post, *Australia Post Annual Report 2012*, 2012

⁵⁴² Department of Broadband, Communications and Digital Economy, *Post*. Available at: <http://www.dbcde.gov.au/post> [accessed on 9 July 2013].

⁵⁴³ *Australian Postal Corporation Act*, s. 33.

⁵⁴⁴ Declaration No. 75 under the *Prices Surveillance Act 1983* (Commonwealth of Australia Gazette, No. GN 6, 12 February 1992, p. 419).

ACCC of a dispute. After conducting an inquiry, the ACCC must provide a report to the Commonwealth Minister who may then direct Australia Post to act in accordance with a recommendation in the report. To date, no bulk-interconnection access disputes have been notified. On 10 August 2012, the ACCC released its *Guidelines to Inquiries into Disputes about Bulk Interconnection Services* and invited submissions from interested parties, with the aim of informing the public and stakeholders about how the ACCC would conduct an inquiry under Part 3 of the *Australian Postal Corporation Regulations* into disputes between Australia Post and users of its bulk-mail services.

To undertake its roles in regulating postal services, the ACCC is authorised under Part 4A of the *Australian Postal Corporation Act* to require Australia Post to keep specific records and provide them to the ACCC. In 2005, the ACCC released a record-keeping rule that established a regulatory accounting framework for Australia Post. To date, the ACCC has released cross-subsidy reports for each financial year from 2004-05 to 2010-11.

The postal services industry is also subject to Part IV of the *Competition and Consumer Act*.

Consultation of Interested Parties

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

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

- Major Mail Users of Australia Ltd: an organisation that is comprised of major mail users or suppliers.
- Post Office Agents Association Limited: a body for licensed post offices.
- Australian Direct Marketing Association (ADMA): a body with over 500 members operating in industries such as the financial services, telecommunications, and energy industries that use or supply direct marketing services.
- Printing Industries Association Australia: an association representing 1400 companies across Australia and the peak advocate for businesses in the print, packaging, and visual communication industries.

Timeliness

The statutory period for the ACCC to make a final decision is 21 days from receiving the formal notice. The ACCC may extend the period but only with the consent of Australia Post. Once the statutory period of 21 days has expired, the declared company may increase its price to the price specified in the notice.⁵⁴⁵ The process of submitting a draft notice was developed by the ACCC to overcome the difficulty of giving proper consideration to a notice within 21 days. However, declared companies have the right to lodge a notification without prior consultation with the ACCC (although this could lead to the ACCC requesting the Minister's approval to hold a public inquiry; during which time prices may be fixed).⁵⁴⁶ In practice, the time taken to complete the entire process has varied from two to six months, depending on the complexity of the issues.

Information Disclosure and Confidentiality

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

- the provider must clearly indicate the parts of the submission it regards as confidential, and the reasons for the claim of confidentiality;
- if the ACCC denies the claim, the provider may withdraw that information; and

⁵⁴⁵ This description is subject to the process set out in the *Competition and Consumer Act* by which the ACCC may serve a response notice, which increases the period by 14 days.

⁵⁴⁶ *Competition and Consumer Act*, ss. 95H and 95N.

- if the ACCC accepts the claim, the ACCC may give less weight to the material in its decision.

In addition, under s.95ZK of the *Competition and Consumer Act*, the ACCC has the power to compel a person to provide information or documents relevant to a price notification (although, in practice, this power is rarely used). The information provider may claim that disclosure would damage the provider's business interests; and the ACCC must not disclose the information if the ACCC is satisfied that the claim is justified and that disclosure is not necessary in the public interest. A decision to refuse to exclude information may be appealed to the Administrative Appeals Tribunal.⁵⁴⁷

Under Part 4A of the *Australia Postal Corporation Act*, the ACCC receives annual financial information from Australia Post. The ACCC may prepare and publish reports analysing the information. The report may include information that Australia Post claims to be commercial-in-confidence if the ACCC considers that the claim of confidentiality is not justified or that it is in the public interest to publish the information. The ACCC has issued principles as to how it will apply this test in determining public disclosure of record-keeping rule information provided by Australia Post.⁵⁴⁸

Decision-making and Reporting

This subsection outlines the process that the ACCC follows to assess Australia Post's proposed price increases for reserved services. In general, the ACCC follows the process set out in its *Statement of Regulatory Approach to Assessing Price Notification*.⁵⁴⁹

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

All submissions and other documents are placed on the ACCC website (subject to issues of confidentiality). The ACCC, in general, publicly releases for comment any consultancy reports obtained by the ACCC. It is common for at least the ACCC and Australia Post to obtain expert reports. The ACCC requires submissions to be provided by the dates specified in the ACCC issues paper and preliminary view. However, in practice, it can be difficult to prevent parties from submitting material at any time up to the final decision.

Appeals

Judicial review is available. Merits review is not available (except for decisions relating to confidentiality of information).

4. Water and Wastewater

While Australia is a dry continent, a particular issue seems to be the distribution of water resources, with water being plentiful in areas where population and economic activity is not concentrated. There

⁵⁴⁷ *Competition and Consumer Act*, s. 95ZC.

⁵⁴⁸ ACCC, *Principles for the Public Disclosure of Record-keeping Rule Information Provided by Australia Post*, November 2006. Available at: <http://www.accc.gov.au/content/index.phtml/itemId/772794> [accessed on 3 December 2012].

⁵⁴⁹ ACCC, *Statement of Regulatory Approach to Assessing Price Notifications*, June 2009. Available at: <http://www.accc.gov.au/content/index.phtml/itemId/700599> [accessed on 12 July 2013].

is also an issue with the temporal reliability of rainfall and river flow, with droughts being frequent throughout the period of European settlement.

Water and wastewater services typically have been provided in Australia by vertically integrated State or local government enterprises that operate within regionally defined monopolies. There are two major national bodies representing interests of the industry. The Water Services Association of Australia (WSAA)⁵⁵⁰ is the peak body of the urban water industry with primary membership for water and wastewater services providers and associate membership for other stakeholders in the industry. According to the WSAA, it has 29 members and 29 associated members providing water and wastewater services to approximately 16 million Australians and to many large industrial and commercial enterprises. The other major body is the Australian Water Association (AWA) that represents water professionals and organisations with a commitment in leadership in sustainable water management.

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

States and Territories

Water services are supplied by various water authorities within each state or territory.

Australian Capital Territory (ACT)

ACTEW Corporation Limited (ACTEW) is an unlisted public company that owns the water and sewerage business and assets in the ACT. The company is owned by the ACT Government and has two voting shareholders; the Chief Minister and Deputy Chief Minister of the ACT. ACTEW also has a 50 per cent interest in ActewAGL, the ACT's major energy provider.⁵⁵¹

The Independent Competition and Regulatory Commission (ICRC) is responsible for price determination, licensing, and investigating complaints regarding competitive-neutrality. Retail water, wastewater services and bulk water are regulated. The relevant legislation in the ACT is the *Independent Competition and Regulatory Commission Act 1997*, and the *Utilities Act 2000*.

New South Wales (NSW)

Sydney Water is Australia's largest water utility, providing drinking water, wastewater services, recycled water and some stormwater services to over 4.6 million people. Sydney Water is a statutory state-owned corporation, operating in Sydney, the Illawarra and the Blue Mountains. In early 2012, Sydney Water put forward the first voluntary access undertaking for a water utility in Australia. The access undertaking, if approved by the Independent Pricing and Regulatory Tribunal of NSW (IPART), would allow access to water network services. The undertaking does not apply to its sewerage network services, water treatment services or bulk water supply.⁵⁵²

In NSW, the Independent Pricing and Regulatory Tribunal (IPART) makes price determinations that set maximum prices for bulk water, urban water and wastewater services. Responsibility for price regulation of bulk water will transfer from the IPART to the ACCC at the time of the next price reset in 2014. The 105 NSW local water utilities serving non-metropolitan urban areas set water charges independently. They are monitored by the New South Wales Office of Water in the Department of Environment, Climate Change and Water. The relevant legislation in NSW is the *Independent Pricing and Regulatory Tribunal Act 1992*, the *Hunter Water Act 1991*, the *Sydney Water Act 1994*, the *Sydney Water Catchment Management Act 1998* and the *Water Industry Competition Act 2006*.

Northern Territory

The development of water allocation plans across the territory is the responsibility of the Water Management Branch within the Department of Natural Resources, Environment, the Arts and Sport (NRETAS). The Utilities Commission is the economic regulator responsible for monitoring and

⁵⁵⁰ WSAA, *Home*. Available at: <https://www.wsaa.asn.au/>. [accessed on 26 May 2013].

⁵⁵¹ ACTEW Corporation, *Annual Report 2012*, 2012, p. IV

⁵⁵² Independent Pricing and Regulatory Tribunal of NSW, *Sydney Water's Third Party Access Undertaking for Water Network Services*, 2012

enforcing compliance with pricing determinations made by the Treasurer in relation to urban water supply and sewerage services. The relevant legislation in the Northern Territory is the *Northern Territory Water Act 2009*.

Queensland

The Queensland Competition Authority (QCA) has price oversight powers, at the direction of the Premier and Treasurer, to conduct investigations into declared water and wastewater services and to determine water supply prices. The QCA has a new formal role of reviewing bulk-water charges in South East Queensland. It is required to investigate and recommend bulk water Grid Service Charges under Chapter 8 of the SEQ Water Market Rules.

The QCA is also currently undertaking interim price monitoring investigations of South East Queensland water and wastewater distribution and retail activities. The monopoly activities of Queensland Urban Utilities, Allconnex Water and Unitywater were referred by the Government to the QCA. The price monitoring investigation covers the period from 1 July 2011 to 30 June 2013.

Local government councils (currently at 73) are responsible for setting prices for urban bulk and retail water services. Rural water boards are generally responsible for rural retail water pricing, except that SunWater and Seqwater set rural bulk and retail prices under the SunWater Water Supply Schemes.

On 1 January 2013 the Queensland Water Commission ceased operations. Its policy functions, largely involving regional water security in South East Queensland, moved to the Department of Energy and Water Supply (DEWS). Water security and restrictions are now the responsibility of the new bulk water supply authority, SEQwater. SEQwater was formed by the amalgamation of the former Seqwater, LinkWater and the SEQ Water Grid Manager on 1 January 2013. The Bulk Water Supply Code regulates the supply of bulk services and is administered by DEWS. The relevant legislation in Queensland is the *Water Act 2000* and the *Water Supply (Safety and Reliability) Act 2008* (recycled and drinking water).

South Australia

The Cabinet of the South Australian Government is currently responsible for setting urban retail water prices. On 1 July 2012, the Essential Services Commission of South Australia (ESCOSA) became the independent economic regulator of the South Australian water industry. Under the *Water Industry Act 2012*, pricing of retail services for SA Water will continue to be set by the Government, with the ESCOSA's initial responsibility being limited to determining annual revenue requirements. The ESCOSA's first revenue determination for SA Water will commence on 1 July 2013. From 1 January 2013, legally binding and enforceable consumer protection standards will be imposed on SA Water for the first time. The ESCOSA's consumer protection regime includes billing, payment and dispute resolution. The relevant legislation in South Australia is the *Essential Services Commission Act 2002* and the *Water Industry Act 2012*.

Tasmania

The Office of the Tasmanian Economic Regulator (OTTER), incorporating the Government Prices Oversight Commission (GPOC), assumed a new role as the economic regulator of water and sewerage from 9 July 2008. Its main responsibilities include: licensing water and sewerage corporations; regulating service prices, and terms and conditions; establishing and administering customer service standards; and monitoring, and reporting on, industry performance on an annual basis. The OTTER took responsibility for licensing on 1 July 2011, and price determination on 1 July 2012. The relevant legislation in Tasmania is the *Tasmanian Water and Sewerage Industry Act 2008*.

Victoria

In Victoria there are three retail suppliers operating the retail water distribution and sewerage systems for the Melbourne metropolitan area: Yarra Valley Water; City West Water; and South East Water. Melbourne Water supplies the three retail companies, controls major sewerage treatment plants, and is responsible for drainage and waterways. In regional Victoria, these services are undertaken by twelve Urban Water Corporations. Four Rural Water Corporations, namely Southern Rural Water, Grampians Wimmera Mallee Water, Goulburn-Murray Water and Lower Murray Water, provide similar services in addition to supplying water for farm, irrigation, stock and domestic purposes.⁵⁵³

⁵⁵³ Department of Sustainability and Environment, *Water Corporations*. Available at: <http://www.water.vic.gov.au/governance/water-corporations> [accessed on 9 July 2013].

The Victorian Essential Services Commission (ESC) regulates the prices and monitors the service standards of 19 businesses supplying water, sewerage and related services to residential, industrial and commercial, and irrigation customers throughout Victoria. The ESC's general regulatory powers are set out in:

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

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

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

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

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

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

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

Western Australia

The Western Australian Economic Regulation Authority (ERA) licenses providers of water, sewerage, drainage or irrigations services, and monitors compliance with licensing conditions. Licences are required in virtually all residential areas across Western Australia and there are currently 31 licence holders. These include the Water Corporation, which is responsible for water services in the Perth metropolitan area, regional shires, and irrigation cooperatives. Charges for water services are set by the State government (assisted by the ERA that conducts inquiries into the urban and rural water and wastewater prices) for the Water Corporation Board; Aqwest (Bunbury Water Board); and the Busselton Water Board. The ERA's powers with respect to water are set out in the *Water Services Licensing Act 1995* and the *Water Services Coordination Regulations 1996*.

Commonwealth Role

In 2004, the COAG agreed to a National Water Initiative (NWI) which set up a consistent inter-state framework covering, among other things: access entitlements; full-cost recovery pricing for water; 'user pays' principle; and independent regulators. A key commitment made by all signatory governments under the NWI is nationally to benchmark water utility performance, in terms of pricing and service quality, on an annual basis. There have been six annual reports (from 2005-06 to 2010-11) on urban water utilities and five annual reports (from 2006-07 to 2010-11) on rural water utilities, published with the assistance of the National Water Commission (and the WSAA for urban water).

The reports on urban water build on the industry's earlier work starting from 1996 that published annual information on benchmarking performance of major utilities. The sixth annual report on urban water contains a comprehensive comparative analysis of 79 urban water utilities over time on the basis of 'comparable size groups' and 28 indicators covering areas such as water resources, asset, customers, pricing, health and finance. Contexts for the indicators are also provided to ensure an appropriate comparison. The data are considered to be accurate as the urban utilities are subject to independent auditing by a qualified third-party auditor for key indicators.⁵⁵⁴

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

The Murray-Darling Basin is vital to Australian agriculture, covering over one million square kilometres and generating 39 per cent of the nation's agricultural income. The Basin spans: most of New South Wales; the Australian Capital Territory and Victoria; and eastern Queensland and south-eastern South Australia. Water availability in the Basin is variable due to intra-annual weather changes, and other short and long-term climatic cycles. This variability is somewhat reduced thanks to the 35 000 gegalitres of water storage in the Basin.⁵⁵⁵

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

- prepare a Basin plan for the adoption of the Commonwealth Minister (Minister for Sustainability, Environment, Water, Population and Communities);
- advise the Minister on the accreditation of State water resource plans; and
- develop a water rights information service which facilitates water trading across the Murray-Darling Basin.

The ACCC has the following roles:

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

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

On 16 July 2010 the Minister for Climate Change and Water made rules relating to charges for water planning and management activities, and on 21 December 2010, made rules relating to fees for access to an irrigation network, and for bulk water charges.

The Basin plan was made by the Minister for Climate Change and Water on 22 November 2012. The plan establishes sustainable limits on water that can be taken from surface and ground-water sources across the Basin; and establishes rules for the trading of water rights in relation to Basin water resources.

Water and wastewater are subject to the economy-wide access regime in Part IIIA of the *Competition and Consumer Act* (see details in the Airport section of this chapter below), and to competition law in Part IV of the *Competition and Consumer Act*, administered by the ACCC. Sewage transmission and

⁵⁵⁴ As noted in the *National Performance Report 2007-08*, approximately 80 per cent of indicators are audited.

⁵⁵⁵ Murray-Darling Basin Authority, *About the Basin*. Available at: <http://www.mdba.gov.au/explore-the-basin/about-the-basin> [accessed on 9 July 2013].

interconnection services provided by Sydney Water Corporation Ltd were declared under Part IIIA in 2005 upon application by Services Sydney. The access dispute between these two parties concerning the access pricing methodology was arbitrated by the ACCC in 2007.⁵⁵⁶

5. Rail

Below-rail infrastructure for intrastate freight and metropolitan rail networks are provided by State/Territory governments and private corporations. Aurizon (previously known as QR National or Queensland Rail)⁵⁵⁷ is a vertically integrated above-and-below-rail operator nationally. Aurizon is subject to 'ring-fencing' arrangements separating its infrastructure and operational functions. In 1997, Commonwealth and State/Territory transport ministers agreed to form a national track authority (Australian Rail Track Corporation (ARTC)) to provide access to the interstate standard gauge rail network.⁵⁵⁸ The ARTC is a company under the *Corporations Act 2001* (Cth), owned by the Commonwealth.

Rail is primarily used for intrastate bulk commodity movement. Rail traffic within Western Australia accounts for 64 per cent of total movement, with the majority being iron ore transported from mines to ports. Intrastate NSW and Queensland movements (principally coal) account for 27 per cent of the total rail freight task. The majority of non-bulk freight transportation is east-west, accounting for 8.4 per cent of total rail freight.⁵⁵⁹

Intrastate Rail Access

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

- New South Wales: NSW Rail Access Undertaking established pursuant to the *Transport Administration Act 1988* (NSW)
- Queensland: Queensland Rail's access undertaking, approved by the Queensland Competition Authority in 2010 under the *Queensland Competition Authority Act 1997* (Qld)⁵⁶⁰
- South Australia: *Railways (Operations and Access) Act 1997* (SA)
- Victoria: Access undertakings for Pacific National and Metro, approved by the Essential Services Commission in 2012 under the *Rail Management Act 1996* (Vic)
- Western Australia: *Railways (Access) Act 1998* (WA) and *Railways (Access) Code 2000*
- Across South Australia and the Northern Territory: *AustralAsia Railway (Third Party Access) Act 1999* (SA & NT)
- The Tasmanian rail network reverted to State-ownership in January 2007. In 2009 Tasrail was established under the Rail Company Act 2009, becoming the sole mainline railway operator in Tasmania.⁵⁶¹

Access is also subject to Part IIIA of the *Competition and Consumer Act*. As at 4 April 2013, one rail service had been declared in respect of the Tasmanian network, which expires in October 2017.

The Pilbara

On 27 October 2008 the Treasurer declared rail services provided by the Goldsworthy (BHP), Hamersley (RIO) and Robe River (RIO), railway lines in the Pilbara region of Western Australia. The declarations were made under s.44H of the (then) *Trade Practices Act*, and were for a period of 20 years, commencing 19 November 2008.

⁵⁵⁶ ACCC, *Access Dispute between Services Sydney Pty Ltd and Sydney Water Corporation: Arbitration Report*, 19 July 2007. Note: this declaration was revoked on 1 October 2009.

⁵⁵⁷ There are other vertically integrated railways operating on a state or local basis. These include: Freight Link (Adelaide-Darwin), Genesee & Wyoming Australia (South Australia), BHP Billiton and Rio Tinto (Pilbara Rail).

⁵⁵⁸ *Australian Rail Track Corporation Agreement* (14 November 1997) between the Commonwealth, New South Wales, Victoria, Queensland, Western Australia and South Australia.

⁵⁵⁹ Bureau of Infrastructure, Transport and Regional Economics, *TrainLine 1*, 2012, p. 4.

⁵⁶⁰ On 25 February 2013, Queensland Rail submitted a voluntary draft access undertaking to the Queensland Competition Authority for approval. If approved, the 2013 undertaking will apply following the expiration of the current access undertaking on 30 June 2013.

⁵⁶¹ Tasrail, *2009-2010 Annual Report*, 2010

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

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

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

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

Following the Treasurer's decision, RIO and BHP applied to the Australian Competition Tribunal to review the decisions to declare the railway lines, while Fortescue Metals Group Ltd (FMG) applied for a review of the Treasurer's decision not to declare a Mount Newman service.

Among other things, the Australian Competition Tribunal held that it would be uneconomical to develop another facility if that facility has natural monopoly characteristics. The Tribunal judged that all lines, except the Mt Newman service, were natural monopolies. On 30 June 2010, the Tribunal:

- affirmed the Treasurer's decision to declare the Goldsworthy line and not to declare the Mount Newman line;
- varied the Treasurer's decision for the Robe River line, reducing the expiry date from 2028 to 2018, and
- set aside the Treasurer's decision to declare the Hamersley line.

The Tribunal's decision was subsequently reviewed by the Full Federal Court of Australia for errors of law (that is, the Court did not consider the merits of the decision). Rio Tinto argued that s.44H(4)(b) of the Act, in requiring 'that it would be uneconomical for anyone to develop another facility to provide the service', erects a test of private economic feasibility. The Court held that:

When s.44H (4)(b) speaks of 'uneconomical for anyone', it is concerned, not with the economic efficiency from the point of view of the community as a whole, but with the ability of someone economically to duplicate the facility.

In our opinion, the intention of the legislature was that, if it is economically feasible for someone in the market place to develop an alternative to the facility in dispute, then criterion (b) will not be satisfied. In such a case, there is no problem in the market place that participants in the market place cannot be expected to solve. This might occasion some wastage of society's resources in some cases, but to say that, is to say no more than that the intention of the Parliament to promote economic efficiency did not trump the competing considerations at play in the compromise embodied in s 44H(4)(b) of the Act.

On 4 May 2011, the Full Federal Court set aside the Tribunal's decision in relation to the declaration of the Robe line.⁵⁶²

FMG then applied to the High Court to review the Full Federal Court's decision. On 14 September 2012, the High Court affirmed the Full Federal Court's interpretation of s.44H(4)(b), that the declaration of infrastructure under Part IIIA is not permitted if a facility can be profitably duplicated. The High Court referred the matter back to the Tribunal to re-decide according to law.

On 8 February 2013, the Tribunal set aside the Minister's Hamersley and Robe declarations.

⁵⁶² *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2011) FCAFC 58

As a result, there is one rail network in the Pilbara region that is the subject of declaration, which is the Goldsworthy (BHP) line.

Interstate Rail Access

There are currently nine major train operators using the ARTC network⁵⁶³, being Aurizon (see above), and the following:

- Asciano – the consolidated holding company of Pacific National and Patrick that was publicly listed in 2007. It provides nation-wide freight services.
- CityRail – the NSW government-owned operator providing passenger services to the greater Sydney region.
- CountryLink – the NSW government-owned operator providing long-distance passenger services.
- El Zorro – providing freight services and infrastructure trains in Victoria and New South Wales.
- Freightliner – the UK rail freight and logistics company largely providing the hauling of export coal from the Hunter Valley to Newcastle for Xstrata.Genesee & Wyoming Australia; providing interstate and intra-state freight services.
- Great Southern Railway – a subsidiary of Serco Asia Pacific that provides long-distance passenger services.
- Specialised Container Transport – providing the general non-container freight services along the East-West route, and recently between Melbourne and Sydney.

Access to the interstate rail network is governed by the national access regime in Part IIIA (summarised in the Airports section below) of the *Competition and Consumer Act*, and the Queensland and Western Australian state rail regimes. In practice, regulation of the interstate rail network relies primarily on access undertakings under Part IIIA. In 2008, the ACCC accepted an undertaking under Part IIIA, given by the ARTC in respect of its interstate rail network (the mainline standard gauge track linking Western Australia, South Australia, Victoria, New South Wales and Queensland). The ARTC's 2011 Hunter Valley Coal Network Access Undertaking was accepted by the ACCC on 29 June 2011, after extensive consultation. The undertaking has a term of five years and covers a number of ports in addition to rail track. The remaining sections focus on the undertaking process in Part IIIA of the *Competition and Consumer Act*.

Consultation of Interested Parties

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

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

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

⁵⁶³ ARTC, *About ARTC*. Available at: <http://www.artc.com.au/Content.aspx?p=14> [accessed on 12 July 2013].

- The ACCC is required to keep a register of undertakings.

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

Timeliness

The ACCC is required to use its best endeavours to make a final decision on an undertaking within six months of receiving it. However, in 2006, COAG agreed to introduce requirements that regulators will be bound to make decisions within six months, subject to the regulator being given sufficient information, and consultation periods.⁵⁶⁴

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

Information Disclosure and Confidentiality

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

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

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

Decision-making and Reporting

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

Appeals

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

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

Regulatory Development

⁵⁶⁴ COAG, *Competition and Infrastructure Reform Agreement*, 10 February 2006, Clause 2.6.

The National Access Regime (Part IIIA) is currently subject to review by the Productivity Commission (PC). The review is to examine the rationale, role and objective of the regime. After a 12-month inquiry, the PC is expected to present the report to government in October 2013.

6. Airports

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

Following the enactment of the *Airports Act 1996* (Cth), the privatisation of Commonwealth-owned airports commenced through long-term (99-year) leases, with the successful lessee determined by competitive tendering. The *Airports Act 1996* places limitations on airline ownership and cross-ownership of certain airports.⁵⁶⁵

Sydney Airport is Australia's largest in terms of both passenger movements, and freight volume. Sydney Airport is particularly dominant in the international sector, handling 43 per cent of passengers. Around a third of Sydney Airport's domestic services are between Melbourne and Sydney; the most travelled Australian route.⁵⁶⁶ Sydney airport is operated by ASX listed Sydney Airport Holdings Ltd, which has an 85 per cent interest in the airport.

Perth Airport is Australia's fastest growing, with passenger movements increasing 67 per cent between 2005 and 2011. This growth is largely attributed to Western Australia's ongoing resources boom, with many employees on fly-in-fly-out (FIFO) contracts. Perth Airport is operated by Perth Airport Pty Ltd (PAPL) under 99-year leasehold from the Commonwealth Government. PAPL is a wholly-owned subsidiary of Perth Airport Development Group Pty Ltd (PADG). Shareholders in PADG are largely superannuation funds.⁵⁶⁷

Regulatory Institutions and Legislation

Airports are subject to the economy-wide competition law in Part IV of the *Competition and Consumer Act*.

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

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

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

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

⁵⁶⁵ This chapter does not cover the regulation of AirServices Australia, which provides air traffic control, air navigation support, and aviation rescue and fire-fighting services at airports in Australia.

⁵⁶⁶ Bureau of Infrastructure, Transport and Regional Economics, *Avline 2010-2011*, 2012

⁵⁶⁷ Perth Airport, *Corporate Information – Ownership*. Available at: <http://www.perthairport.com.au/AboutUs/CorporateInformation/Ownership.aspx> [accessed on 9 July 2013].

Airports may also be, upon the direction of the Minister, subject to price surveillance under Part VIIA of the *Competition and Consumer Act*, which sets out three mechanisms: price notifications; monitoring; and inquiries. (The 'prices surveillance' regime is described in the 'Postal Services' section above.) In the move to privatisation, from 1996 the industry was placed under a transitional (five-year) price cap (CPI-minus-X) regime in respect of 'aeronautical services' and a monitoring regime in respect of 'aeronautical-related services' administered by the ACCC under the former *Prices Surveillance Act 1983* (Cth). The price caps were removed in 2001 and 2002, except in relation to Sydney Airport in respect of regional air services.

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

Under Part 8 of the *Airports Act 1996* (Cth) and the *Airports Regulations 1997* (Cth), the ACCC is required to monitor and evaluate the quality of certain aspects of services and facilities at Sydney (Kingsford-Smith), Brisbane, Melbourne (Tullamarine) and Perth.

In 2007, the Commonwealth Government announced that it reserved the right to re-impose price controls if:

airport operators are found to be misusing their market power by unjustifiably raising prices and/or imposing non-price conditions on access to aeronautical services and facilities in a manner inconsistent with the Government's Aeronautical Pricing Principles'.⁵⁶⁸

The Aeronautical Pricing Principles specify the Government's expectations on pricing behaviour for all airports, which are similar to the pricing principles specified in Part IIIA of the *Competition and Consumer Act* but which also cover: the negotiation process; the sharing of risks and returns; service-level outcomes; aeronautical asset revaluations; and peak period pricing.

The principles are not set out in any legislative instrument. An independent review of the airport regime was finalised in 2012.⁵⁶⁹

The following sections focus on the arbitration process under Part IIIA of the *Competition and Consumer Act*.

Consultation of Interested Parties

The legislation does not specifically recognise any particular representative body. In practice, there are two main airlines (Qantas and Virgin). International airlines operating to and from Australia are represented by the Board of Airline Representatives of Australia Inc.

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

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

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

The ACCC has a broad discretion as to the process it follows in the arbitration. In general, the ACCC follows the process set out below:⁵⁷⁰

⁵⁶⁸ Department of the Treasury, *Productivity Commission Report - Review of Price Regulation of Airport Services*, April 2007. Available at:

<http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2007/032.htm&pageID=003&min=phc&Year=&DocType=0> [accessed on 9 July 2013].

⁵⁶⁹ Productivity Commission, *Economic Regulation and Airport Services*. Available at: <http://www.pc.gov.au/projects/inquiry/airport-regulation/report> [accessed on 9 July 2013].

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

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

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

Timeliness

The ACCC is required to use its best endeavours to make a final arbitration determination within six months of notification (extendable). In 2006, the COAG agreed to introduce requirements that regulators be bound to make decisions within six months (subject to the regulator being given sufficient information, and consultation periods).⁵⁷¹ The regime also seeks to reduce any incentive a party may have to delay, by allowing the ACCC to make an interim arbitration determination and backdate a final determination.⁵⁷²

Information Disclosure and Confidentiality

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

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

Unlike most ACCC processes, arbitration is private unless the parties agree otherwise. Where issues arise that are relevant outside of a particular arbitration, the ACCC is able to: conduct joint arbitration hearings; defer consideration of an undertaking or the arbitration; and establish an informal consultation process outside of the arbitration. The ACCC may also publish its final arbitration

⁵⁷⁰ See guidelines to the ACCC's process. Available at: *Arbitrations: A Guide to the Resolution of Access Disputes under Part IIIA of the Trade Practices Act*, July 2005. Available at: <http://www.accc.gov.au/content/index.phtml/itemId/731775> [accessed on 12 July 2013].

⁵⁷¹ COAG, *Competition and Infrastructure Reform Agreement*, 10 February 2006, Clause 2.6.

⁵⁷² In particular, an interim determination may require the provider to provide access to the service. The ability to backdate a final determination is of little practical relevance unless the access seeker is receiving the service.

determination and reasons, subject to issues of confidentiality. Where the ACCC proposes to publish its determination, it must give each party a notice inviting the party to make a submission within 14 days. In practice, the ACCC publishes its determination on its website.

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

The ACCC collects information under Part VIIA of the *Competition and Consumer Act* and Parts 7 and 8 of the *Airports Act* on an on-going annual basis. The ACCC has issued a single document on information requirements for financial reporting and for quality of service reporting.⁵⁷³ Information obtained in this regard is subject to the disclosure regime in s.95ZN of the *Competition and Consumer Act (Airports Act ss.147 and 158)*. In relation to these monitoring roles, the ACCC issues an annual regulatory report covering both specific financial information and quality of service information. The reports are made available to the public on the ACCC's website (subject to any confidentiality issues). These reports date back to 1997–98.

Decision-making and Reporting

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

Appeals

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

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

The Tribunal may make its own inquiries; has the same power as the ACCC to summon a person to give evidence or produce documents; and may require the ACCC to give information and other assistance and to make reports for the purposes of the review. It is open to the parties to put material before the Tribunal that was not before the ACCC. In 2006, the COAG agreed that merits review should be limited to the information submitted to the ACCC.⁵⁷⁴ It is expected that Part IIIA of the *Trade Practices Act* will be amended in accordance with this inter-governmental agreement.

The legislation provides that the hearing is private unless the parties agree otherwise.⁵⁷⁵ However, in a similar case, the Tribunal's preferred approach has been to conduct public hearings, and to direct that part of the hearing take place in private where there is confidential evidence.

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

7. Ports

International trade is important to the Australian economy. In 2011-12, the values of imports and exports, respectively, were 21.1 per cent and 21.4 per cent of the economic activities measured by the Gross Domestic Product.⁵⁷⁶ The seaports of Melbourne, Sydney and Brisbane are the largest ports, each handling substantial values of internationally traded goods. Port facilities are provided in Australia by State governments and privately-owned enterprises. Australian ports are of two main

⁵⁷³ ACCC, *Airports Prices Monitoring and Financial Reporting Guideline and Template*. Available at: <http://www.accc.gov.au/content/index.phtml/itemId/671389> [accessed on 12 July 2013].

⁵⁷⁴ COAG, *Competition and Infrastructure Reform Agreement*, 10 February 2006, Clause 2.4.

⁵⁷⁵ *Trade Practices Regulations 1974* (Cth), reg. 28K.

⁵⁷⁶ Australian Bureau of Statistics, *Australian System of National Accounts*, 5204.0, 2011-12, released on 2 November 2012.

kinds: those concentrating more on freight ('container ports'); and those devoted to the handling of bulk commodities (minerals and/or agricultural commodities). For example:

- Australia's largest container port is the Port of Melbourne, handling approximately 37 per cent of Australia's container trade. It is managed by the Port of Melbourne Corporation, established by the Victorian Government on 1 July 2003 to be the strategic port manager for the Port of Melbourne.⁵⁷⁷ The Port of Melbourne Corporation has the functions and powers to undertake the integrated management and development of both the land and water sides of the port.
- Sydney Ports Corporation was established in 1995, under the *Ports Corporatisation and Waterways Management Act 1995* (NSW), now known as the *Ports and Maritime Administration Act 1995* (NSW), to give a greater focus to commercial port operations.⁵⁷⁸ Port Botany is Australia's second largest container port and accounts for 70 per cent of Sydney Ports Corporation's total trade throughput. Port Botany also operates bulk-liquid handling facilities, with plans to expand to a second terminal in 2013.⁵⁷⁹
- Dalrymple Bay Coal Terminal (DBCT) is a port facility located in Queensland, which exports coal mined in the Bowen Basin region of Queensland. Already one of the largest coal terminals in the world, DBCT has a 'name-plate' capacity of 85 million tonnes per annum (Mtpa). Terms and conditions for access by customers to the services provided at DBCT (including tariffs that can be charged) are regulated by the Queensland Competition Authority (QCA).⁵⁸⁰
- Fremantle Ports is the largest port in Western Australia. It operates from two locations (Fremantle and Kwinana) and handles bulk commodities, containers, passenger vessels and naval vessels.⁵⁸¹ Two container stevedoring companies operate at the port. It is a trading enterprise of the Western Australian Government.
- Western Australia's Port Hedland has the highest tonnage of any Australian port. Due to its proximity to the mining activity of the Pilbara, 239 million tonnes of iron ore were exported from Port Hedland in 2012. The Port Hedland Port Authority is a statutory authority owned by the Western Australian Government. It has a charter to operate along commercial lines, with its primary purpose being the facilitation of trade through the port.⁵⁸²

Regulatory Institutions and Legislation

Ports are subject to the economy-wide access regime in Part IIIA (see the Airport section above), and competition regime in Part IV of the *Competition & Consumer Act*. Further, the economy-wide prices surveillance regime in Part VIIA of the *Trade Practices Act* has been applied to Australian stevedoring since January 1999, following the Treasurer's direction. The ACCC is required to monitor, and report annually on, prices, costs and profits relating to the supply of services by stevedoring companies at the ports of Adelaide, Brisbane, Burnie, Fremantle, Melbourne and Sydney.⁵⁸³ This monitoring role arose primarily as a result of a reform process during the late 1990s that was intended to increase the productivity of Australian stevedoring. The reform process involved a substantial reduction in the stevedoring labour force. Consequently, funds were provided to ensure that all stevedoring employees made redundant as part of the reform process received full redundancy entitlements. A levy on the loading and unloading of containers and cars for export and import was to be applied to repay these funds. The two major stevedores agreed to absorb the full cost of the levy.

⁵⁷⁷ Port of Melbourne Corporation, *About Port*. Available at: <http://www.portofmelbourne.com/business/aboutport/> [accessed on 9 July 2013].

⁵⁷⁸ Sydney Ports Corporation, *Corporation*. Available at: <http://www.sydneyports.com.au/corporation> [accessed on 9 July 2013].

⁵⁷⁹ Sydney Ports Corporation, *Port Botany*. Available at: http://www.sydneyports.com.au/corporation/port_facilities/port_botany [accessed on 9 July 2013]

⁵⁸⁰ Queensland Competition Authority, *Final Decision: Dalrymple Bay Coal Terminal 2010 Access Undertaking*, September 2010. Available at: <http://www.qca.org.au/files/P-2010dbctdau-QCA-FinalDec-DBCT2010DAU-0910.pdf> [accessed on 9 July 2013].

⁵⁸¹ Fremantle Ports, *How the Port Works*. Available at: <http://www.fremantleports.com.au/AboutWorkingPort/Pages/default.aspx> [accessed on 9 July 2013].

⁵⁸² Port Hedland Port Authority, *Annual Report 2012*. Available at: <http://www.phpa.com.au/About-us/Corporate-Governance/Annual-reports/pdf/PortHedlandPortAuthorityARReport2012FinalWeb.aspx> [accessed on 9 July 2013].

⁵⁸³ The original monitoring regime was implemented under s. 27A of the *Prices Surveillance Act 1983*.

The ACCC's monitoring program was initially designed to provide information to the Commonwealth Government and wider community about the progress of waterfront reform at Australia's major container terminals, and to provide information to the community about the absorption of the stevedoring levy by the major stevedores. The levy ceased in May 2006. However, the ACCC's monitoring role continues focusing in part on the changes in competitiveness in stevedoring.

On 1 July 2008, the *Wheat Export Marketing Act 2008* came into operation regulating wheat exporters that operate grain storage and handling facilities at ports. A purpose of this legislation was to ensure fair and transparent terms and conditions of access to other bulk wheat exporters, in promotion of the development of an efficient and competitive bulk wheat export marketing industry. The Act originally established a system for accrediting exporters of bulk wheat. In order to be accredited, exporters who owned or operated port terminal services, were required to satisfy an 'access test'. The 'access test' required such exporters to have in operation (i) a formal access undertaking accepted by the ACCC under Part IIIA of the *Competition & Consumer Act*, and (ii) comply with the continuous disclosure rules in the *Wheat Export Marketing Act 2008*.⁵⁸⁴ Although recent 2012 amendments to the *Wheat Export Marketing Act 2008* have abolished the accreditation scheme, the Act still requires exporters to satisfy a similar 'access test'.

The State/Territory regimes are:

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

Victorian Ports Monitoring

Under the Victorian ports price-monitoring framework, port operators are required to maintain a published Reference Tariff Schedule, which provides a 'standing offer' of terms and conditions upon which prescribed services will be made available.⁵⁸⁵ Port users may purchase regulated port services on the terms and conditions in the Reference Tariff Schedule, or may seek to negotiate other terms and conditions with the port operator according to their requirements.

*Queensland Competition Authority – DBCT's Access Undertaking*⁵⁸⁶

The *Queensland Competition Authority Act 1997* establishes a two-step 'declaration negotiation/arbitration' regime for the purpose of enabling third-party access to significant infrastructure, similar to that enacted in Part IIIA of the *Competition & Consumer Act*.

In March 2001, the Queensland Government passed a regulation under which the handling of coal at the DBCT was made a 'declared service' for the purposes of the *Queensland Competition Authority Act 1997*. Access providers of declared services have an obligation under the *Queensland Competition Authority Act 1997* to negotiate with, and in certain circumstances provide access to, third parties seeking access to that service.⁵⁸⁷

The *Queensland Competition Authority Act 1997* has provisions that allow the owner of a declared service to voluntarily submit a draft access undertaking to the regulator (in this case, the Queensland

⁵⁸⁴ ACCC, *Wheat Export: Port Terminal Service Access Undertakings*. Available at: <http://www.accc.gov.au/content/index.phtml/itemId/868797> [accessed on 9 July 2013].

⁵⁸⁵ Port of Melbourne Corporation, *Home*. Available at: <http://www.portofmelbourne.com/shipping/tariffsandcharges.aspx> [accessed on 12 July 2013].

⁵⁸⁶ Queensland Competition Authority (QCA), *DBCT 2006 Access Undertaking*. Available at: <http://www.qca.org.au/ports/2006-dbct-dau/> [accessed on 19 July 2013].

⁵⁸⁷ DBCT, *Draft Dalrymple Bay Coal Terminal Access Undertaking submitted by Prime Infrastructure (DBCT) Management P/L on 19 June 2003*. Available at: <http://www.qca.org.au/files/ACF143C.pdf> [accessed on 9 July 2013].

Competition Authority) which sets out the terms and conditions upon which access will be granted to third-party access seekers. If the draft access undertaking meets certain criteria set out under the *Queensland Competition Authority Act 1997* and is approved by the Queensland Competition Authority, it will form the basis for the negotiation of terms and conditions concerning third party access to the service.⁵⁸⁸ These criteria include: 'promoting the economically efficient operation of, use of and investment in infrastructure by which services are provided, with the effect of promoting competition in upstream and downstream markets'; 'the legitimate interests of the owner or operator of the service'; 'the interests of people who may seek the service'; and 'the public interest', and various pricing principles.⁵⁸⁹

Once the access undertaking is approved, should negotiations between infrastructure owner and a third-party access seeker fail to resolve all terms and conditions of access, the Queensland Competition Authority must make its access determination consistent with the approved access undertaking.

An access undertaking for the DBCT was first approved in 2006, being valid for the 2006- 2010 regulatory period. More recently, a new access undertaking was approved in 2010, which will apply from 1 January 2011.⁵⁹⁰

Regulatory Development

In 2011, the Council of Australian Governments (COAG) agreed to a National Ports Strategy.⁵⁹¹ Agreement was reached that this strategy should be implemented as part of a collaborative, nationally coordinated approach to the future planning and development of Australia's port and freight infrastructure (*Ports Strategy*, p. 17). This strategy was developed for COAG by Infrastructure Australia and the National Transport Commission. The National Ports Strategy recognised that reform can remove barriers to trade, reduce transaction costs, increase competition and contestability, and provide important linkages to domestic and global value chains (*Ports Strategy*, p. 5). Each party agreed to review the regulation and effectiveness of competition in significant ports within its jurisdiction (*Ports Strategy*, p. 23).

From October 2014, access to port terminal services for bulk wheat export is expected to be governed by a mandatory code of conduct, to be enforced by the ACCC. The ACCC is currently involved in the development of this code of conduct, with the Department of Agriculture, Fisheries and Forestry and Treasury, using input from the industry representatives from port operators, exporters and producer groups on the Code Development Advisory Committee.

⁵⁸⁸ DBCT, Draft Dalrymple Bay Coal Terminal Access Undertaking submitted by Prime Infrastructure (DBCT) Management P/L on 19 June 2003. Available at: <http://www.qca.org.au/files/ACF143C.pdf> [accessed on 9 July 2013].

⁵⁸⁹ See s. 138 of the *Queensland Competition Authority Act 1997*

⁵⁹⁰ Queensland Competition Authority, 2010 Access Undertaking Amendments and Activities. Available at: <http://www.qca.org.au/ports/2010-AUAA/> [accessed on 9 July 2013].

⁵⁹¹ Infrastructure Australia and National Transport Commission, *National Ports Strategy: Infrastructure for an Economically, Socially and Environmentally Sustainable Future*, 2011. Available at: <http://www.coag.gov.au/sites/default/files/National%20Ports%20Strategy.pdf> [accessed on 9 July 2013].

New Zealand

OVERVIEW

The Commerce Commission New Zealand (CCNZ) has a significant role in the economic regulation of infrastructure in New Zealand. CCNZ enforces the *ex ante* industry-specific legislation such as the *Telecommunications Act 2001*. CCNZ also implements and enforces industry-specific *ex ante* regulatory regimes under Part 4 of the *Commerce Act 1986* in relation to electricity lines services, gas pipelines services and specified airport services. As a result of the amendments made by the *Commerce Amendment Act 2008*, these services are subject to information-disclosure regimes. In addition, gas and some electricity networks are subject to targeted price-quality regulation regimes. All seven industries and sectors reviewed are subject to the *Fair Trading Act 1986* and the provisions in the *ex post Commerce Act* relating to the prohibition of anti-competitive practices, and mergers and acquisitions. These statutes are also enforced by the CCNZ.

The electricity industry is subject to the *Electricity Act 1992* and the *Electricity Industry Act 2010* and relevant regulations that provide a framework for: efficient operation of electricity market; ownership separation between distribution and generation/retailing; and access to transmission networks. These Acts are enforced by the Electricity Authority. Some of the companies that supply electricity line services and gas pipelines services are also subject to information disclosure and default/customised price-quality path regulation, under Part 4 of the *Commerce Act 1986*.

Under the *Telecommunications Act 2001*, an access regime was created in 2001, under which a telecommunications commissioner, appointed by the Governor-General, may decide certain matters in telecommunications. The CCNZ is responsible for economic regulation of telecommunications services. Its role is to make determinations in respect of designated access and specified services, and to undertake costing, monitoring and enforcement activities.

The provision of postal services by the designated Universal Service Obligations provider, government-owned New Zealand Post (NZP), is based on a Deed of Understanding with the Government. Competition was introduced in 1998 by opening the mail market to registered postal operators. NZP is subject to economy-wide competition law. It is obliged to provide competitors with access to its postal network, by way of negotiable access arrangements. There is no regulation of price or access.

Water and wastewater are regulated at the local government level, according to the *Local Government Act*, the *Health Act* and the *Resource Management Act*. In Auckland, water services are provided by a council-controlled organisation called Watercare Services Ltd. In metropolitan Wellington, New Zealand's capital city, a regional council manages bulk-water supply with the territorial authority responsible for local distribution. Elsewhere it is common for a territorial authority to provide water services with occasional arrangements for some collaborative delivery. Since 2009, a Land and Water Forum has been investigating and reporting on water policy issues.

The rail network was privatised in 1993 and then was bought back by the Crown – the Auckland urban rail network was bought back in 2002; and the national rail network in 2004. Rail operations are generally the responsibility of the New Zealand Railways Corporation, under the trading name KiwiRail Group, but private company Veolia Transport Auckland provides metro rail services in Auckland. The Ministers of Finance, and State Owned Enterprises, are the shareholding Ministers responsible for the financial performance of KiwiRail. The Minister of Transport is responsible for rail policy. It has the role of advising on government policy on transport, including rail and the administration of relevant transport legislation. The New Zealand Transport Agency is the rail safety regulator. New Zealand's rail network is not subject to economic regulations involving, for example, price controls or access to rail track, that would necessitate putting in place a regulatory structure with associated processes and procedures for reaching decisions.

The regulatory regime for airports is based on information-disclosure regulation. The three major airports at Auckland, Wellington and Christchurch are required annually to disclose financial and other information. They are also required to disclose price-setting information with respect to specified airport activities, following each price-setting event. The CCNZ has a role of assessing disclosed information, and reporting to the Ministers of Commerce and Transport as to the effectiveness of information disclosure regulation.

The ports of New Zealand, which are largely owned and operated by councils under the *Local Government Act 2002*, are not subject to economic regulation. They have been corporatised and have a duty to operate as successful trading enterprises. A 2002 report suggested they were sufficiently competitive, and the government decided against any regulatory intervention. Three more recent reports have considered aspects of port policy. One of these, from the Productivity Commission of New Zealand, recommends changes in the governance of ports.

GEOGRAPHY, POPULATION, ECONOMY, POLITY AND LEGAL SYSTEM⁵⁹²

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

New Zealand is one of the least populous of the 34 OECD countries. It has a population of 4.365 million (July 2013) living in a total land area of 268 021 square kilometres. While the overall population density is just over 16 per kilometre, large areas of the country are sparsely populated. While having a strong agrarian base in the arable parts, the population is highly urbanised (80 per cent) with the largest cities (in order) being Auckland, Wellington (the capital), Christchurch and Hamilton. Maori, New Zealand's indigenous population, make up just over 15 per cent of the total population; and other Pacific Island people contribute another seven per cent.

New Zealand's GDP in PPP terms is US\$134.2 billion (2012 estimate) and GDP per capita is US\$30 200 (top of the lower third of the OECD). Agriculture, forestry and fishing contribute about seven per cent of GDP; and manufacturing accounts for approximately 19 per cent of GDP. As in other developed economies, services account for about 74 per cent of GDP and employment.

New Zealand is not rich in natural resources, except for natural gas; timber and water. New Zealand's major trading partners are China, Australia, the US and Japan. Main imports are: manufactured goods; machinery and equipment; and petroleum. Main exports are: dairy products; meat; timber; and manufactured goods.

The economy fell into recession before the start of the global financial crisis and contracted for five consecutive quarters in 2008-09. The central bank cut interest rates and the government developed fiscal stimulus measures. The economy posted a two per cent decline in 2009, but grew out of recession late in the year; achieving growth rates of between 1.5 and 2.5 per cent per annum in the years since. The budget has been running at a substantial deficit and government debt has been accumulating. Unemployment, at 6.9 per cent, is relatively low by international standards.

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

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

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

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

⁵⁹² Information is from the Central Intelligence Agency (CIA), *The World Factbook New Zealand*. Available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/nz.html> [accessed on 20 July 2013].

The High Court has both statutory jurisdiction and inherent common law jurisdiction. In general, it hears the more serious jury trials, the more complex civil cases, administrative law cases and appeals from the decisions of courts and tribunals below it, based on judicial review.

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

APPROACH TO COMPETITION AND REGULATORY INSTITUTIONAL STRUCTURE

The Commerce Commission (CCNZ) is New Zealand's primary competition and regulatory agency, established under section 8 of the *Commerce Act 1986*.⁵⁹³ It is an independent Crown entity and is not subject to direction from the government in carrying out its enforcement and regulatory control activities. The CCNZ enforces *ex ante* industry-specific legislation in relation to the dairy industry and telecommunication services, under the *Dairy Industry Restructuring Act 2001* and the *Telecommunications Act 2001*. The CCNZ also *ex ante* enforces industry-specific regulatory regimes under the *Commerce Act 1986* in relation to electricity lines services, gas pipelines services and specified airport services. The CCNZ is located in Wellington.

The *Commerce Act* was amended by the *Commerce Amendment Act 2008*, which introduced new Part 4 provisions that provide for the economic regulation of goods or services where competition is limited. A key feature of the amendments is a new overall purpose statement common to all Part 4 regulatory provisions. The purpose is to: promote incentives for innovation and investment; promote incentives for improved efficiency and the provision of regulated services at a quality that reflects consumer demands; encourage regulated businesses to share the benefits of efficiency gains with consumers, including through lower prices; and limit the ability of regulated businesses to make excessive profits.

Part 4 requires the CCNZ to set up-front 'input methodologies' to apply to each of the regulatory instruments and regulated industries and sectors, and to review each at intervals of no more than seven years. The purpose of these methodologies is to provide certainty for regulated businesses and for consumers in relation to: regulatory methodologies; rules; processes; requirements and evaluation criteria for services that are regulated.⁵⁹⁴ Input methodologies were determined in December 2010 for specified airport services, electricity line and gas pipeline services.

As a result of the amendments to the *Commerce Act*, the regulatory regimes for electricity line services, gas pipeline services and specified airport services have changed.⁵⁹⁵ For example, in 2008 the CCNZ gained responsibility for information disclosure regulation, in respect to the Auckland International Airport, the Christchurch International Airport and the Wellington International Airport.

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

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

The CCNZ has two operational branches, Competition and Regulation. Its regulation branch is structured into five teams. Two teams are responsible for Part 4 Network Regulation: Performance and Incentives; and Compliance. One team is responsible for Telecommunications. The final two

⁵⁹³ Commerce Commission New Zealand (CCNZ), *About Us*. Available at: <http://www.comcom.govt.nz/about-us/> [accessed on 22 July 2013].

⁵⁹⁴ CCNZ, *Input Methodologies*. Available at: <http://www.comcom.govt.nz/input-methodologies-2/> [accessed on 22 July 2013].

⁵⁹⁵ CCNZ, *The Legislation*. Available at: <http://www.comcom.govt.nz/the-legislation/> [accessed on 22 July 2013].

teams are separate legal and economics teams, which are embedded into the two operational branches in order to ensure a more cohesive, integrated and streamlined approach to work.⁵⁹⁶

Under its Cartel Leniency and Co-operation Policies, investigations by the CCNZ are often assisted by the input of individuals and businesses. In exchange for full, continuing and complete co-operation leniency, applicants receive 100 per cent immunity. The CCNZ will exercise its discretion when recommending an appropriate discount to the Court for other parties who admit liability and fully co-operate with CCNZ investigations. The CCNZ considers that such co-operation should be encouraged.⁵⁹⁷

Where the CCNZ's role meets or overlaps with that of another regulatory agency, the agencies may issue a memorandum of understanding, outlining their respective responsibilities and jurisdictions. The CCNZ has reached cooperation agreements with both the Gas Industry Company Limited (co-regulatory body of the gas industry), and the Electricity Authority.⁵⁹⁸

The electricity industry is also subject to regulations under the *Electricity Act 1992* and the *Electricity Industry Act 2010*, which are presently administered by the Ministry of Business, Innovation and Employment. Regulatory arrangements within the electricity and gas subsectors are considered in detail in section 1 below. The CCNZ's regulatory role within the telecommunications industry is detailed in section 2, and the airport industry is detailed in section 6.

In relation to postal services (section 3), a *Deed of Understanding* between the Crown and the dominant ex-monopoly operator, New Zealand Post, effectively regulates service standards and access issues. Water and wastewater (section 4) are regulated by local governments under the *Local Government Act 2002*. Rail operations (section 5) are the responsibility of the New Zealand Railways Corporation under the trading name KiwiRail Group. Ports (section 7) are largely owned and operated by councils.

Appeals

Appeals against determinations of the CCNZ, and applications for judicial review are heard by the High Court.⁵⁹⁹ In addition to appeals on questions of law, s.52Z of the *Commerce Act* provides for a right of appeal to the High Court on the merits of the CCNZ's determinations on input methodologies. The High Court is a court of general jurisdiction, placed above the District Courts and beneath the Court of Appeal and Supreme Court. Regulatory bodies are considered to have equal judicial standing with the District Courts, and hence decisions of the CCNZ are appealed to the High Court.

The CCNZ's determination will stand, pending the outcome of an appeal or application for judicial review. Section 92 of the *Commerce Act 1986* sets out who is entitled to appeal a CCNZ determination. Appeals from Commission decisions, including the documentation required, are governed by Part 20 of the High Court Rules. The CCNZ is entitled to be heard on an appeal.

In its determination of any appeal, the Court may⁶⁰⁰ confirm, modify, or reverse the determination or any part of it; and/or exercise any of the powers that could have been exercised by the CCNZ in relation to the matter to which the appeal relates.

Instead of determining an appeal, the court may also direct the CCNZ to reconsider, either generally or in respect of any specified matters, the whole or any specified part of the matter to which the appeal relates.⁶⁰¹ In addition to the appeals process for decisions made by the CCNZ, in the energy sector decisions made by the Electricity Authority under the *Electricity Industry Act 2010* are not exempt from judicial review. An industry participant that is affected by a decision or order of the Rulings Panel may appeal to the High Court on grounds such as lack of jurisdiction and questions of

⁵⁹⁶ CCNZ, *Briefing for Incoming Minister*, December 2011, p. 36. Available at: <http://www.comcom.govt.nz/assets/The-Commission/Accountability/Briefing-to-Incoming-Minister-2011.pdf> [accessed on 22 July 2013].

⁵⁹⁷ CCNZ, *Commission Policies*. Available at: <http://www.comcom.govt.nz/commission-policies/> [accessed on 22 July 2013].

⁵⁹⁸ CCNZ, *Relationships with Other Agencies*. Available at: <http://www.comcom.govt.nz/relationships-with-other-agencies/> [accessed on 22 July 2013].

⁵⁹⁹ *Commerce Act 1986*, ss. 91-97.

⁶⁰⁰ *Commerce Act 1986*, s. 93.

⁶⁰¹ *Ibid.*, s. 94.

law. Such an appeal must be made by giving notice of appeal within 20 working days of the decision appealed against, or within any further time that the High Court allows.⁶⁰²

In addition, decisions under the *Telecommunications Act* may be appealed to New Zealand's High Court on questions of law, and are subject to judicial review through the normal legal channels. This process is separate from the other processes with regard to access determinations. Other than judicial review or appeals on questions of law, determinations may be subsequently clarified, reconsidered, or reviewed in certain circumstances, by the CCNZ.

REGULATORY ARRANGEMENTS BY INDUSTRY OR SECTOR

1. Energy

New Zealand's electricity and gas markets are controlled by a combination of state and privately owned enterprises. The majority of enterprises in the electricity market are state owned; whereas in the gas market the majority are privately owned. The CCNZ is the economic regulator for electricity and gas transmission and distribution businesses. It sets price-quality paths, and conducts information-disclosure regulation.⁶⁰³ The Electricity Authority is responsible for providing independent governance of the electricity industry; and oversees the efficient operation of the electricity market. The Electricity Authority was established under the *Electricity Industry Act 2010*, following the disestablishment of the Electricity Commission.⁶⁰⁴

Energy Market Profile

Around 60 per cent of New Zealand's electricity is generated from hydro stations, with the remainder generated from coal, gas, geothermal and wind.⁶⁰⁵ Between 1996 and 1998, the government restructured the operation of the state-owned generation assets. This involved creating four separate businesses, three of them as state-owned enterprises and one privately-owned business, Contact Energy.⁶⁰⁶ Presently there are 40 power stations owned by five main generating companies, including: state-owned Median Energy (32 per cent market share); privately-owned Contact Energy (24 per cent); state-owned Genesis Energy (18 per cent); state-owned Mighty River Power (14 per cent); and privately owned TrustPower (five per cent).⁶⁰⁷

For transmission, the state-owned electricity transmission network, Transpower, was set up as a stand-alone Crown entity in 1994. Transpower remains the owner and operator of New Zealand's national high-voltage grid.⁶⁰⁸

For distribution, the *Energy Companies Act 1992* provided for the corporatisation of local electricity distribution networks that were previously owned by electricity supply authorities. The electricity supply authorities were also responsible for retail services. Around the same time the *Electricity Act 1992* removed the electricity supply authorities' statutory monopolies and supply obligations, in relation to distribution and retail supply. Following this the *Electricity Industry Reform Act 1998* required full ownership separation of distribution businesses from retail and generation businesses, however, there have been subsequent amendments⁶⁰⁹ partially to relax these rules.⁶¹⁰

⁶⁰² *Electricity Industry Act 2010*, ss. 63-71.

⁶⁰³ CCNZ, *Gas Information Disclosure*. Available at: <http://www.comcom.govt.nz/gas-information-disclosure/> [accessed on 22 July 2013].

⁶⁰⁴ Ministry of Economic Development, *Chronology of New Zealand Electricity Reform*, November 2010, paragraphs 109 and 115. Available at: <http://www.med.govt.nz/sectors-industries/energy/electricity/industry/chronology-of-new-zealand-electricity-reform> [accessed on 22 July 2013].

⁶⁰⁵ Ministry of Economic Development, *Electricity Generation*. Available at: <http://www.med.govt.nz/sectors-industries/energy/electricity/industry/electricity-generation> [accessed on 22 July 2013].

⁶⁰⁶ Ministry of Economic Development, *Chronology of New Zealand Electricity Reform*, November 2010, s. 19. Available at: <http://www.med.govt.nz/sectors-industries/energy/electricity/industry/chronology-of-new-zealand-electricity-reform> [accessed on 22 July 2013].

⁶⁰⁷ Ministry of Economic Development, *Electricity Generation*. Available at: <http://www.med.govt.nz/sectors-industries/energy/electricity/industry/electricity-generation> [accessed on 22 July 2013].

⁶⁰⁸ Ministry of Economic Development, *Electricity Transmission*. Available at: <http://www.med.govt.nz/sectors-industries/energy/electricity/industry/electricity-transmission> [accessed on 22 July 2013].

⁶⁰⁹ There were a number of subsequent amendments that allowed distributors to have some ownership of generation assets in certain circumstances. First, the rules were relaxed if the generation was from renewable sources; and second, the rule applied only if there was potential for the exercise of market power and anti-competitive practices.

Presently the local distribution networks are owned by 29 lines businesses. While most lines businesses are owned by trusts, others are owned through public listings, shareholder co-operatives, community trusts and local bodies.⁶¹¹ The largest of these, Vector, has a third of the market, by number of connections.⁶¹²

The five main electricity retailers in New Zealand are owned by the five main generation companies listed above.⁶¹³ There are 13 other smaller retail suppliers.⁶¹⁴ Between 1992 and 1994, the retail market was progressively opened to full contestability.⁶¹⁵

The aluminium smelter at Tiwai Point (the Smelter) currently purchases in excess of 5000 GWh per annum, approximately 12 per cent of national electricity demand. The Smelter is owned and operated by New Zealand Aluminium Smelters Limited (NZAS); a company owned 79.36 per cent by Rio Tinto Alcan (New Zealand) Limited and 20.64 per cent by Sumitomo Chemical Company Limited. The Rio Tinto Agreements (previously called the 'Comalco Agreements') are special agreements relating to the purchase of electricity for the operation of the Smelter.⁶¹⁶

The electricity wholesale market was established in 1996. Transpower is the system operator, responsible for maintaining a continuous balance between supply and demand for electricity in real time. This is achieved through half-hourly trading periods where spot prices and quantities are determined at each node. As the system operator, Transpower is also responsible for managing contingency events and forward planning, to ensure supply can meet demand in the future trading periods.⁶¹⁷

The Electricity Authority is responsible for contracting market operators. At present the market is operated by:⁶¹⁸

- Jade Direct, as the Registry Manager;
- the New Zealand Stock Exchange (NZX) as Reconciliation Manager, Pricing Manager, Clearing Manager and Information System Manager; and
- the Electricity Authority as the Market Administrator.

New Zealand's natural gas comes from production sites in the Taranaki Basin on the North Island's west coast. Of the six major gas fields in the area, Maui continues to produce approximately 33 per cent of total gas production, while the relatively new Pohokura offshore field produces almost 43 per cent. Companies involved at this level include Shell, Todd Energy, OMV, and Greymouth Gas.

After processing, natural gas is piped to many urban locations in the North Island on two transmission networks. One is operated by Vector (see below). The other, being the Maui open-access transmission line, is operated by a consortium owned by a number of parties including Shell, Todd and OMV. Natural gas is not reticulated in the South Island.

⁶¹⁰ Ministry of Economic Development, *Chronology of New Zealand Electricity Reform*, November 2010, s. 19. Available at: <http://www.med.govt.nz/sectors-industries/energy/electricity/industry/chronology-of-new-zealand-electricity-reform> [accessed on 22 July 2013].

⁶¹¹ Ministry of Economic Development, *Electricity Distribution*. Available at: <http://www.med.govt.nz/sectors-industries/energy/electricity/industry/electricity-distribution> [accessed on 22 July 2013].

⁶¹² <http://vector.co.nz/electricity> [accessed on 22 July 2013]

⁶¹³ Ministry of Economic Development, *Electricity Retail*. Available at: <http://www.med.govt.nz/sectors-industries/energy/electricity/industry/electricity-retail> [accessed on 22 July 2013].

⁶¹⁴ Consumer Powerswitch, *The Providers*. Available at: <http://www.powerswitch.org.nz/powerswitch/site-info/providers> [accessed on 22 July 2013].

⁶¹⁵ Ministry of Economic Development, *Chronology of New Zealand Electricity Reform*, November 2010, s. 19. Available at: <http://www.med.govt.nz/sectors-industries/energy/electricity/industry/chronology-of-new-zealand-electricity-reform> [accessed on 22 July 2013].

⁶¹⁶ Electricity Authority, *Rio Tinto Agreements Summary*. Available at: <http://www.ea.govt.nz/act-code-regs/code-regs/rio-tinto-agreements-summary/> [accessed on 22 July 2013].

⁶¹⁷ Electricity Authority, *System Operator Market Operation Service Provider*. Available at: <http://www.ea.govt.nz/industry/mo-service-providers/system-operator-market-operation-service-provider/> [accessed on 22 July 2013].

⁶¹⁸ Electricity Authority, *About Market Operation Service Providers*. Available at: <http://www.ea.govt.nz/industry/mo-service-providers/about-market-operation-service-providers/> [accessed on 22 July 2013].

The distribution companies deliver natural gas through pipes from the transmission gate stations to households, and commercial and industrial end-users. The three suppliers of gas delivery services in New Zealand are Vector, Powerco and GasNet. Publicly listed Vector is New Zealand's largest energy infrastructure company,⁶¹⁹ engaging in: electricity distribution; natural gas transmission and distribution (through the distribution network formerly owned by NGC Limited); liquefied petroleum gas (LPG) supply; gas and electricity metering services; and telecommunications (see section 2). Powerco is New Zealand's second-largest electricity and gas distribution company, with gas and electricity networks throughout the North Island. It distributes gas to over 100 000 customers. GasNet Limited is a company dedicated to the ownership and management of natural gas networks and meters, predominantly in the Wanganui-Manawatu region of the North Island of New Zealand.⁶²⁰

There are eight companies engaged in gas retailing: Contact Energy; Genesis Energy; Nova Gas; Mercury Energy; Energy Direct; Direct ENZ; ON Gas; and Wanganui Gas.

The Commerce Commission (CCNZ)

As discussed in the 'Approach to Competition and Regulatory Institutional Structure' section, the CCNZ is New Zealand's primary competition and regulatory agency, established under section 8 of the *Commerce Act 1986*.⁶²¹ It is an independent Crown entity and is not subject to direction from the government in carrying out its enforcement and regulatory control activities. The CCNZ is the economic regulator for electricity and gas transmission, and for distribution businesses.

The *Commerce Amendment Act 2008* introduced new regulatory provisions for electricity lines businesses under Part 4 of the *Commerce Act 1986*. The purpose of Part 4 is:⁶²²

to promote the long-term benefit of consumers in markets referred to in section 52⁶²³ by promoting outcomes that are consistent with outcomes produced in competitive markets such that suppliers of regulated goods or services—

- (a) have incentives to innovate and to invest, including in replacement, upgraded, and new assets; and
- (b) have incentives to improve efficiency and provide services at a quality that reflects consumer demands; and
- (c) share with consumers the benefits of efficiency gains in the supply of the regulated goods or services, including through lower prices; and
- (d) are limited in their ability to extract excessive profits.

As required under Part 4 of the *Commerce Act*, the CCNZ has developed input methodologies (IMs). IMs are the rules, requirements and processes the CCNZ must apply when setting price-quality paths and information disclosure requirements. They are intended to promote certainty to network businesses and consumers. Once the input methodologies have been determined, the CCNZ may not determine any more new input methodologies for existing regulated goods or services.

The CCNZ developed IMs for price-quality paths and information disclosure in December 2010.⁶²⁴ These input methodologies are applicable to both electricity lines businesses and gas pipeline businesses, and to airports. The IMs for Transpower's capital expenditure proposals were determined in January 2012.⁶²⁵ In September 2012 additional IMs applicable to default price-quality paths were determined for the cost of capital, asset valuation, allocation of common costs and taxation treatment.

⁶¹⁹ Vector, *Corporate*. Available at: <http://vector.co.nz/corporate> [accessed on 22 July 2013].

⁶²⁰ GasNet, *Homepage*. Available at: <http://www.gasnet.co.nz/> [accessed on 22 July 2013].

⁶²¹ Commerce Commission New Zealand (CCNZ), *About Us*. Available at: <http://www.comcom.govt.nz/about-us/> [accessed on 22 July 2013].

⁶²² *Commerce Act 1986*, Part 4, s. 52A.

⁶²³ Section 52 of the *Commerce Act 1986* refers to markets 'where there is little or no competition and little or no likelihood of a substantial increase in competition'.

⁶²⁴ CCNZ, *Input Methodologies*. Available at: <http://www.comcom.govt.nz/input-methodologies-2/> [accessed on 22 July 2013].

⁶²⁵ CCNZ, *Transpower Input Methodologies*. Available at: <http://www.comcom.govt.nz/transpower-input-methodologies/> [accessed on 22 July 2013].

Electricity distribution services (except those that are consumer-owned), electricity transmission, and gas pipeline services are subject to price-quality regulation. Price-quality paths are intended to influence the behaviour of businesses by setting the maximum average price or total allowable revenue that the businesses can charge. They also set standards for the quality of services that each business must meet. This ensures that businesses do not have incentives to reduce quality in order to maximise profits under their price-quality path.

For electricity distribution and gas pipeline services, there are two types of price-quality paths. All businesses start off on a 'default' path which has generic components to provide a low-cost form of regulation. If the default path does not suit the particular circumstances of a business, it can apply for a 'customised' price-quality path. Customised price-quality paths use more business-specific information, and rely on more in-depth audit, verification, and evaluation processes.

The electricity transmission business, Transpower, has, since 1 April 2011, been regulated through an individual price-quality path.⁶²⁶ Much like for the default price-quality paths, the CCNZ sets a revenue allowance and minimum quality standards for a four to five-year regulatory period. The next reset of Transpower's individual price-quality path will occur in 2015. Under an individual price-quality path Transpower can submit major capital expenditure proposals at any time (following consultation with stakeholders). Major capital expenditure projects are those that: cost more than \$5 million per project (to be increased to \$20 million per project from 2015); and are needed to meet grid reliability standards or reduce costs in the power system (for example, to reduce losses or dispatch constraints).

Transpower's proposed major capital expenditure must be approved by the CCNZ. In particular the capital expenditure input methodology sets out:

- the process for the submission, assessment and approval of Transpower's capital expenditure proposals; and
- the rules that apply to capital expenditure once the allowance is set.

Once approved, Transpower's capital expenditure allowance is altered accordingly.

There are a number of electricity distribution businesses exempt from default/customised price-quality regulation because they are 'consumer-owned'. Businesses are considered 'consumer-owned' if they: are fully owned by consumer trusts or cooperatives; have less than 150 000 ICPs;⁶²⁷ if trustees or directors are elected; and at least 90 per cent of consumers benefit from income distributions.⁶²⁸ The gas distribution business, Nova Gas, is also exempt from price-quality regulation.

The CCNZ sets the default price-quality paths based on the current and projected profitability of each business. The default price-quality path includes: initial prices; rates of change relative to the Consumer Price Index (CPI); and quality standards. The default price-quality path covers a regulatory period that is between four and five years. Any breaches of price-quality paths are subject to pecuniary and criminal penalties imposed by the Courts.⁶²⁹ The CCNZ re-set the existing default price-quality paths for electricity distribution businesses in November 2012. It set the first default price-quality path for gas pipeline businesses in February 2013. These determinations take effect later in 2013. The determinations reflect the September 2012 re-determined input methodologies.

A customised price-quality path provides an alternative option for suppliers that seek to have all of their information taken into account after testing through audit, verification and evaluation processes.

Consultation of Interested Parties/Timeliness

The process the CCNZ must follow when determining or amending IMs is set out in the *Commerce Act 1986* as follows:⁶³⁰

⁶²⁶ CCNZ, *Electricity Transmission*. Available at: <http://www.comcom.govt.nz/electricity-transmission/> [accessed on 22 July 2013].

⁶²⁷ ICP means a point of connection on a local or an embedded network at which a retailer supplies electricity to a consumer.

⁶²⁸ *Commerce Act 1985*, s. 54D.

⁶²⁹ *Ibid.*

⁶³⁰ *Commerce Act 1986*, Part 4, ss. 52V-Y.

- The CCNZ must outline the process and timelines it intends to follow when it begins the development of IMs.
- The CCNZ must publish a draft, give reasonable opportunity for interested persons to give their views and have regard to views received within the set timeframe. The CCNZ may hold stakeholder conferences.
- Within ten working days of determination of or amendment to the IM, the CCNZ must publish, by *Gazette* notice, and make publicly available the IM.
- The CCNZ must review each IM no later than seven years after publication and no more than seven years thereafter.

The CCNZ's process for determining the initial IMs for electricity and gas distribution and transmission price-quality paths was as follows.⁶³¹

- June – November 2009: Consultation on a Discussion Paper (including a conference and a workshop on the cost of capital).
- December 2009 – March 2010: Consultation on Emerging Views Papers (including a range of workshops).
- May – September 2010: Consultation on Draft IMs and Reasons Papers.
- October – November 2010: Technical consultation on Revised Draft IMs.
- December 2010: Final determination of IMs.
- January 2011: Publication of IMs by *Gazette* notice.

The process for approving a customised price-quality path is prescribed in the *Commerce Act* as follows.⁶³²

- A network business may propose a customised path to the CCNZ any time after the default price-quality path is reset but not within 12 months of the next reset. The business must make the customised path proposal public as soon as practicable after providing it to the CCNZ.
- The CCNZ must assess whether the proposal complies with the relevant IMs within 40 working days. If the proposal does not comply, then the CCNZ may either discontinue any consideration of the proposal or request the business to remedy any deficiencies with the proposal within 40 working days.
- If the proposal complies, then the CCNZ must give notice, set a date for interested persons to give submissions, have regard to submissions and make a determination. The CCNZ may determine any customised path it considers appropriate for a network business that has made a proposal.
- The determination must be made within 150 working days of receiving a complete proposal.
- The timeframes for assessing the proposal and making a determination may be extended by up to 30 working days by agreement between the network business and the CCNZ. If the CCNZ does not meet the timeframe for completing its determination (including any extension), and the business has complied with information requests, then the proposal put forward by the business takes effect.
- The CCNZ may defer consideration of a proposal if it receives more than four proposals in a year. The CCNZ must prioritise proposals based on: quality and completeness; the urgency for investment required to meet consumer quality requirements; the relative materiality of the proposal to the business size; and revenue.

Under the *Commerce Act 1986*, the CCNZ must consult interested parties when resetting the default price-quality path; however, a process for consultation is not prescribed.

⁶³¹ CCNZ, *Consultation Prior to December 2010*. Available at: <http://www.comcom.govt.nz/consultation-prior-to-december-2010/> [accessed on 22 July 2013].

⁶³² *Commerce Act 1986*, ss. 53S-53ZA.

Information Disclosure

All electricity lines businesses and gas pipeline businesses are subject to information disclosure requirements. The purpose of information disclosure is to ensure that sufficient information is readily available to interested persons to assess whether the purpose of Part 4 of the *Commerce Act* is being met.

Updated information disclosure requirements for electricity distribution businesses and gas pipeline businesses were published by the CCNZ in October 2012. The set of information required covers:⁶³³

- how the network is being managed, including forward-looking information on planned investment and information on asset management processes;
- historic and forecast operating and capital expenditure on different activities;
- quality of services outcomes;
- prices and revenues, including how prices are set;
- historic financial performance, including profitability, asset values and the return on investment; and
- supporting information on asset allocation and cost allocation.

The first annual disclosure under the new requirements must be made in 2013.

Transpower is currently subject to the *Electricity Information Disclosure Requirements 2004 (issued in 2004 and consolidated to 2008)*. The CCNZ is reviewing the requirements that will apply to Transpower.⁶³⁴

More generally, section 25 of the *Commerce Act 1986* requires the CCNZ to make available information with respect to carrying out of its functions and exercising its power.

Section 98 of the *Commerce Act 1986* allows the CCNZ to require a person to supply information or documents, or give evidence where the CCNZ considers it necessary or desirable for the purpose of carrying out its functions and exercising its powers. In this regard, the CCNZ may take evidence in writing or on oath. Section 53ZD of the *Commerce Act 1986* provides the CCNZ with further information-gathering powers for businesses regulated under Part 4. This includes requesting suppliers to produce forecasts, and ensure that those forecasts are in line with any methodology specified by the CCNZ.

Parties may request that the CCNZ make an order of confidentiality (s.100 of the *Commerce Act 1986*).⁶³⁵ The CCNZ may prohibit the publication or communication of any document or evidence submitted to it in relation to an application, under penalty of fines, for the duration of the CCNZ's deliberation. Such an order will expire after the delivery of the final decision of the CCNZ. After that time, the provisions of the *Official Information Act 1982* shall apply.

Information is stored electronically. In 2006-07, the CCNZ undertook a security review and risk treatment plan for confidential information. This included developing an information security policy, a new visitor log system, and improved practices for handling electronic information. A secure electronic evidence environment and upgraded document management system were also put in place.⁶³⁶

Decision-making and Reporting

The CCNZ publishes its decisions on a Decision Register. Thirty eight decisions were registered in 2012.

⁶³³ CCNZ, *Information Disclosure for Electricity Distribution Businesses and Gas Pipeline Businesses: Final Reasons Paper*, 1 October 2012, p. 6. Available at: <http://www.comcom.govt.nz/assets/Gas/Information-Disclosure/Information-Disclosure-for-EDBs-and-GPBs-Final-Reasons-Paper.PDF> [accessed on 22 July 2013].

⁶³⁴ CCNZ, *Part 4 Review of Electricity Information Disclosure Requirements*. Available at: <http://www.comcom.govt.nz/part-4-review-of-electricity-information-disclosure-requirements/> [accessed on 22 July 2013].

⁶³⁵ Section 15(i) of the *Telecommunications Act* allows the CCNZ to exercise the s. 100 power.

⁶³⁶ CCNZ, *Annual Report 2006-07*, 2007, p. 30. Available at: <http://www.comcom.govt.nz/assets/Imported-from-old-site/Publications/ContentFiles/Documents/comcom-annualreport2006-2007.pdf> [accessed on 22 July 2013].

Appeals

Along with the ability to judicially review and to appeal on an error of law, all CCNZ determinations, there are specific appeal rights in relation to some determinations made under Part 4 of the *Commerce Act*. General rights of appeal apply to s.52P determinations that set out how customised price-quality or individual price-quality paths apply to suppliers of regulated services.

In the case of input methodologies, there is a specific appeal by way of rehearing on the information that was before the Commission when it made its determination, including amendments. The Court sits with lay members and may only exercise its powers if it is satisfied that an amended or substituted input methodology is (or will be) materially better in meeting the purpose of Part 4, the purpose of input methodologies, or both.

The decision of the High Court may be appealed to the Court of Appeal.⁶³⁷

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

Electricity and gas distribution and transmission businesses, and the major airports, have appealed the following input methodologies:

Cost of capital – appealed by Vector, Powerco, the Major Electricity Users Group, Wellington Electricity, Transpower, Wellington Airport, Christchurch Airport and Auckland Airport.

Asset Valuation – appealed by Vector, Powerco, Wellington Airport, Christchurch Airport and Auckland Airport.

Cost allocation – appealed by Vector.

Tax – appealed by Powerco.

Rules and processes – appealed by Vector and Wellington Electricity.

Hearings were held from early September 2012 to mid-February 2013. The Court's decision is expected later this year (2013). These appeals were an expected part of the implementation of the new Part 4. However, officials at the CCNZ note that they did not expect the appeal hearings to be delayed for so long. These delays were the result of the judicial reviews on a number of matters.⁶³⁸ One of the major judicial reviews was on the CCNZ's consultation process, on which the Court ruled in favour of the CCNZ.

The Electricity Authority

The Electricity Authority is an independent Crown entity established under the *Electricity Industry Act 2010* to oversee the efficient operation of New Zealand's electricity market.⁶³⁹ The Electricity Authority is governed by a Board comprising between five and seven members.⁶⁴⁰ The Board may make amendments to the *Electricity Industry Participation Code 2010* (the Code). The Electricity Authority has four Board committees with delegated responsibilities for specific areas of activity: the Audit and Finance Committee; the Compliance Committee; the System Operations Committee; and the Undesirable Trading Situation (UTS) Committee. Five business groups, each headed by a General Manager, report to the Chief Executive. To deliver its functions the Electricity Authority employs a small team of industry specialists in a range of disciplines, including economics, engineering, law, operations research and technology. External expert advice is contracted on a project-by-project basis as required. The Electricity Authority is located in Wellington and is funded through a levy of electricity industry participants.⁶⁴¹

⁶³⁷ *Commerce Act 1986*, s. 71.

⁶³⁸ CCNZ, *Media Releases: Court of Appeal Conforms Commerce Commission Decision not to Set Input Methodologies*, 1 June 2013. Available at: <http://www.comcom.govt.nz/media-releases/detail/2012/court-of-appeal-confirms-commerce-commission-decision-to-not-set-input-methodology> [accessed on 22 July 2013].

⁶³⁹ Electricity Authority, *Authority Structure*. Available at: <http://www.ea.govt.nz/about-us/structure/> [accessed on 22 July 2013].

⁶⁴⁰ *Electricity Industry Act 2010*, s. 13.

⁶⁴¹ *Electricity Industry Act 2010*, s. 128.

The objective of the Electricity Authority is:⁶⁴²

...to promote competition in, reliable supply by, and the efficient operation of, the electricity industry for the long-term benefit of consumers.

In performing its functions, the Electricity Authority must have regard to any statements of government policy relating to the electricity industry that are issued by the Minister. The Electricity Authority must also review or report on any matter relating to the electricity industry upon request of the relevant Minister.

The key functions of the Electricity Authority are to:⁶⁴³

- make and administer the Code;
- monitor compliance with the Code, the *Electricity Industry Act 2010* and related regulations;⁶⁴⁴
- exempt individual industry participants from the obligation to comply with the Code or specific provisions of the Code;
- investigate and enforce compliance with Part 2 and Part 4 of the Code, the relevant regulations and the Code;
- undertake market facilitation (for example by providing guidelines and model arrangements) and monitor market operation and effectiveness;
- undertake industry and market monitoring, and carry out and make publicly available reviews, studies, and inquiries into any matter relating to the electricity industry;
- contract for market and system operation services; and
- promote to consumers the benefits of comparing and switching retailers.

Among other responsibilities, the Electricity Authority has a role of monitoring compliance with the requirements for separate ownership and arm's-length operations between electricity distributors and certain electricity generation or retailing activities.⁶⁴⁵

The *Electricity Industry Act 2010* also requires the Electricity Authority to appoint a Security and Reliability Council with the responsibility of providing independent advice to the Electricity Authority on the performance of the electricity system and system operator, and reliability of supply issues. The Security and Reliability Council must meet at least once every six months.⁶⁴⁶ Under the Terms of Reference the Council is comprised of a maximum of nine members, and two-thirds of members must be present for business to be transacted.⁶⁴⁷ The Electricity Authority currently has two advisory groups, the Wholesale Advisory Group and the Retail Advisory Group; and a total of seven technical groups.⁶⁴⁸ In accordance with the *Electricity Industry Act 2010*, the Authority also published a Charter on advisory groups, setting out policies regarding: the establishment and interaction with the advisory groups; consultation with advisory groups on material changes to the Code; and the operation of advisory groups.⁶⁴⁹

The Rulings Panel is an independent body corporate funded by the Electricity Authority. It was initially set up in 2003 under the *Electricity Governance Regulations 2003* (revoked in 2010) and was continued under the *Electricity Industry Act 2010*. It is comprised of five members that are appointed

⁶⁴² *Electricity Industry Act 2010*, s. 15.

⁶⁴³ *Electricity Industry Act 2010*, s. 16.

⁶⁴⁴ The related regulations are the *Electricity Industry (Enforcement) Regulations 2010*, the *Electricity (Low Fixed Charge Tariff Options for Domestic Consumers) Regulations 2004*, the *Electricity Industry (Levy of Industry Participants) Regulations 2010* and the *Electricity Industry (Participants and Roles) Regulations 2012*.

⁶⁴⁵ *Electricity Industry Act 2010*, Part 3.

⁶⁴⁶ *Electricity Industry Act 2010*, s. 20.

⁶⁴⁷ Electricity Authority, *Security and Reliability Council, Terms of Reference*, 15 March 2011. Available at: <http://www.ea.govt.nz/our-work/advisory-working-groups/src/> [accessed on 22 July 2013].

⁶⁴⁸ Electricity Authority, *Advisory Groups, Working Groups and Technical Groups*. Available at: <http://www.ea.govt.nz/our-work/advisory-working-groups/> [accessed on 22 July 2013].

⁶⁴⁹ Electricity Authority, *Foundation Documents*. Available at: <http://www.ea.govt.nz/about-us/documents-publications/foundation-documents/> [accessed on 22 July 2013].

by the Governor-General, upon recommendation by the responsible Minister.⁶⁵⁰ The functions of the Rulings Panel are to:⁶⁵¹

- Assist in the enforcement of the Code by:
 - hearing and determining complaints about breaches or possible breaches of the Code, and appeals from certain decisions made under the Code; and
 - considering and resolving certain disputes between industry participants relating to the Code; and
 - making appropriate remedial and other orders.
- Review decisions made by the Electricity Authority to suspend trading.
- Exercise any other function conferred on it under this Act or the regulations.

The *Electricity Industry Participation Code 2010* (the Code) is made and administered by the *Electricity Authority*. The Code may contain any provisions that are consistent with the objectives of the Electricity Authority and are necessary or desirable to promote: competition in the electricity industry; reliable supply of electricity to consumers; efficient industry operation; and the performance by the Authority of its functions.⁶⁵²

The Code governs the operation of the wholesale market, including: the appointment process and functions of the market operation service providers (Part 3); the process for making bids and offers and establishing prices and quantities (Part 13); clearing and settlement processes (Part 14); and reconciliation (Part 15).

The Code comprises the previous *Electricity Governance (Connection of Distributed Generation) Regulations 2007* that were revoked in 2010 (Part 6). This part: provides a framework to enable connection of distributed generation, including pricing principles; processes (including timeframes) under which generators may apply to distributors for approval to connect; and also prescribes maximum fees. The default regulated terms apply unless generators and distributors enter into individual contracts.

The Code also specifies the functions of the system operator (Transpower New Zealand Limited). It specifies how these are to be performed and sets requirements for transparency and performance (Part 7).⁶⁵³ It places requirements on the system operator and asset owners with regard to quality performance and technical standards (Part 8).

The Code also includes provisions in relation to: the transmission agreements; grid reliability and industry information; transmission pricing methodology; financial transmission rights; interconnection asset services and preparation of the Outage Protocol (Part 12); and distribution use-of-system agreements and distributor tariffs (Part 12A).

The Code comprises the previous *Electricity Governance (Security of Supply Regulations) 2008* (Part 9), revoked in 2010. This Part of the Code places requirements on the system operator (Transpower) and industry participants to plan for, manage and co-ordinate outages as an emergency measure during energy shortages. Part 9 also requires the system operator, Transpower, to commence an official conservation campaign in certain circumstances, including when there is a ten per cent risk of shortage in either the South Island or nationally; and for retailers to have in place a default customer compensation scheme which provides financial compensation to customers during an official conservation campaign.

The Code also comprises parts of the previous *Electricity Governance Regulations 2003* (revoked in 2010), in relation to the requirements and exemptions relating to the Rio Tinto Agreements (previously the Camacho Agreements) (Part 16), and the requirements to have a regime in place to deal with undesirable trading situations (described as situations that threaten or may threaten the operation of the wholesale market, and that would, or would be likely to, preclude the maintenance of orderly trading or proper settlement of trades, and that, in the reasonable opinion of the Electricity Authority,

⁶⁵⁰ *Electricity Industry Act 2010*, ss. 23-26.

⁶⁵¹ *Electricity Industry Act 2010*, s. 25.

⁶⁵² *Electricity Industry Act 2010*, s. 32.

⁶⁵³ *Electricity Industry Act 2010*, s. 8.

cannot satisfactorily be resolved by any other mechanisms available under the Code, for example manipulative trading or misleading behaviour) (Part 5).⁶⁵⁴

The Code also provides for metering arrangements (Part 10).

Every industry participant must register and comply with the Code unless granted an exemption. The *Electricity Industry Act 2010* defines industry participants as: generators; Transpower; distributors; retailers; customers connected directly to the grid; any person who owns lines, generates electricity that is fed into a network, or buys electricity from a clearing manager; and any industry service provider identified in section 27(2) of the *Electricity Industry Act 2010* such as metering equipment owners and providers, and market operation service providers (ss.7 and 9).

Consultation of Interested Parties

The Electricity Authority may amend the Code at any time subject to undertaking consultation on the proposed amendments. Consultation is not required under some circumstances, for example: for technical and non-controversial, widely supported or urgently required amendments. Urgent amendments to the Code expire nine months after they come into force. The Electricity Authority is required to publish a consultation charter which sets out guidelines relating to processes for amending the Code and consulting on proposed amendments.⁶⁵⁵ The consultation charter describes the process for amending the Code as follows:⁶⁵⁶

- Any person, whether an industry participant or not, may propose a Code amendment.
- The Electricity Authority makes an initial assessment of whether or not the proposal relates to matters to be included in the Code and then prioritises and categorises the proposal based on the importance for customers and the electricity industry, market impact, size of analysis required, interrelation with other projects, and resources. Proposals are classified as either: Current (to be included in the work plan for the current financial year); Future (for consideration in the next or subsequent financial year); Pending (will be reviewed annually for inclusion in the current or future categories); or Declined (the proposal will not proceed).
- The Electricity Authority may pre-consult one or more Advisory Groups on the proposal, prior to publishing the draft of the proposed Code amendment, the regulatory statement, and consultation paper.
- The Electricity Authority must publish the draft proposed Code amendment, the regulatory statement and the consultation paper (if required under the Act).
- The Electricity Authority provides an opportunity for persons that are representative of the interests likely to be affected by the proposed Code Amendment to make a submission. The Electricity Authority considers submissions and a summary will be published on its website.
- The Electricity Authority then decides whether to make the amendment, and if so, amend the Code.

Under the *Electricity Industry (Enforcement) Regulations 2010*, the process for dealing with reports of alleged breaches of the Code is as follows:⁶⁵⁷

- An industry participant must report to the Electricity Authority if it or another industry participant has breached a provision of Part 7, 8, 9, 13 or 17 of the Code about common quality or security. The industry participant must report the breach as soon as practicable, after it becomes aware of it. An industry participant is also obliged to report, as soon as possible, any other breaches of the Code by another participant. Any other person may also report an alleged breach.
- The Electricity Authority may decline to investigate an alleged breach if it considers that: the matter is better dealt with by another person; the report fails to establish a *prima facie* case; and/or the alleged breach does not warrant further action to be taken.

⁶⁵⁴ *Electricity Industry Act 2010*, s. 34.

⁶⁵⁵ *Electricity Industry Act 2010*, ss. 38-41.

⁶⁵⁶ Electricity Authority, *Foundation Documents, Consultation Charter – December 2012*. Available at: <http://www.ea.govt.nz/about-us/documents-publications/foundation-documents/> [accessed on 22 July 2013].

⁶⁵⁷ *Electricity Industry (Enforcement) Regulations 2010*, Part 1, Regulations 4-31.

- If the alleged breach is to be investigated, the Electricity Authority appoints an Investigator. Within five working days after being appointed, the Investigator notifies (in writing) the alleged participant of the investigation and publicises the information about the matter under investigation. The alleged participant must respond (in writing) within ten working days. Any other participant may notify the Investigator within ten working days if it wishes to become part of the investigation. The Investigator attempts to effect a settlement (informal resolution) within 30 working days after notifying the alleged participant; or any longer period agreed by the Investigator and the party. If a settlement is reached, the Electricity Authority may accept or reject the settlement.
- If no settlement is reached, or the settlement is rejected by the Electricity Authority, the matter may be referred to the Rulings Panel or discontinued, and in the case of a rejected settlement, the Electricity Authority may also direct the Investigator to further attempt to effect a settlement. The Authority must notify the parties and publicise its decision. Alternatively, an industry participant, who is a party to the investigation, may refer the matter to the Rulings Panel within ten working days of receiving a notice from the Electricity Authority saying that no formal complaint will be made to the Rulings Panel.

If the dispute is referred to the Rulings Panel:⁶⁵⁸

- The Investigator must endeavor to provide the complaint and its report to the Rulings Panel within five working days after the Electricity Authority's decision to lay the formal complaint (if a participant wishes to lay a complaint with the Rulings Panel, it can do so within ten business days after receiving a notice from the Electricity Authority that no formal complaint will be made).
- Upon receiving a complaint, the Rulings Panel must set a date for considering the complaint and notify the parties.
- Parties must be given at least 20 working days to make written submissions and may request a hearing.
- The Rulings Panel must hold a hearing if any party requests a hearing within the deadline for submissions, or if the Rulings panel considers that a hearing should be held. A date and location must be determined as soon as practicable.
- Within ten working days before the hearing, the Rulings Panel must provide parties with the date, time, and place of the hearing, and a copy of all relevant material.
- The hearing must be public unless the Rulings Panel determines otherwise and all parties must be given a reasonable opportunity to be heard. Every party to a complaint (that is, industry participant allegedly in breach, the complainant, the Authority, and any other industry participant that was a party to the investigation) is entitled to be present, represented, to call and cross examine witnesses, to make a plea or have another person give evidence.
- If there is no hearing the Rulings Panel must consider and decide on the matter based on written submissions and evidence.
- The Rulings Panel may receive evidence that may be inadmissible in a Court and may request further information and/or seek external expert advice.
- The Electricity Authority must publish the Rulings Panel decisions within ten working days (unless there are special circumstances to justify non-publication).
- Every participant is required to comply with the orders and directions made by the Rulings Panel.

In addition, every dispute, complaint, or appeal must be heard by at least three members of the rulings panel, one of whom must be the Chair.⁶⁵⁹ The Rulings Panel may prescribe additional procedures; for example, it may make a draft decision or determination for comment.⁶⁶⁰

⁶⁵⁸ *Electricity Industry (Enforcement) Regulations 2010*, Part 2, Regulations 32-49 and Part 4, Regulation 116.

⁶⁵⁹ *Electricity Industry Act 2010*, s. 53.

⁶⁶⁰ Electricity Authority, *Rulings Panel Procedures 2011, Summary of the Procedures*. Available at: <http://www.ea.govt.nz/act-code-regs/rulings-panel/> [accessed on 22 July 2013].

Timeliness

As it concerns amendment of the Code, the Electricity Authority takes a maximum of three months to complete the categorisation. If the proposal is classified as Current, the Electricity Authority must prepare a regulatory statement (that is, a statement of the objectives, costs and benefits of the proposal and the alternative options). The length of time taken is not specified, but will depend on the complexity and impact of the proposal and the prioritisation. The Electricity Authority usually allows six weeks for consultation; however, this may vary with the complexity or number of concurrent consultations.

In regard to decisions regarding alleged breaches of the Code, the Rulings Panel must endeavour to make its decision within 40 working days of receiving all submissions.

Information Disclosure and Confidentiality

For the purpose of carrying out its monitoring functions and the function of investigating breaches or possible breaches of, and enforcing compliance with, Parts 1 and 4 of the *Electricity Industry Act 2010*, the regulations, and the Code, the Electricity Authority may:⁶⁶¹

- require an industry participant to provide, within reasonable time, any information, papers, recording or documents that it has;
- require an industry participant to allow interviews with staff, and ensure they are available and truthful;
- require an industry participant to give any other assistance reasonable and necessary for the Electricity Authority to carry out its functions; and
- authorise an employee to search, under warrant, any place named in the warrant for the purpose of investigating whether a breach has occurred.

An industry participant may claim legal professional privilege but is not excused from providing information that may be incriminating. Any self-incriminating material that is provided, however, is not admissible as evidence in criminal or civil proceedings.⁶⁶²

The Electricity Authority, and any appointed Investigator, must keep information disclosed to it under Part 1 of the *Electricity Industry (Enforcement) Regulations 2010* confidential except to the extent necessary to carry out its obligations under the Regulations, the Code or other law (for example, the *Official Information Act 1982*).⁶⁶³

The Rulings Panel may receive more evidence than a Court and may request further information and/or seek external expert advice. The Rulings Panel must keep information confidential except as required to carry out its duties or otherwise compelled by law. The Rulings Panel may prohibit the publication or communication of any information or document.⁶⁶⁴

Decision-making and Reporting

As the industry dispute-resolution and disciplinary body, the Rulings Panel comprises up to five members, including one chairperson and one deputy chairperson, appointed by the Governor-General.⁶⁶⁵ Members hold office for a term of up to five years and may be reappointed. There are currently five members. In accordance with the *Electricity Industry (Enforcement) Regulations 2010* (s.91), the Minister of Energy and Resources may make recommendations on the appointment of members on the basis of having the appropriate knowledge, skills and experience to assist the Rulings Panel to perform its functions.

⁶⁶¹ *Electricity Industry Act 2010*, ss. 45-47.

⁶⁶² *Electricity Industry Act 2010*, s. 48.

⁶⁶³ *Electricity Industry (Enforcement) Regulations 2010*, Regulations 10 and 15.

⁶⁶⁴ Regulations pp. 116-117.

⁶⁶⁵ *Electricity Industry Act 2010*, s. 24.

Every complaint, appeal or dispute before the Rulings Panel must be dealt with by a panel of three members, one of which must be the chairperson or the deputy chairperson acting on behalf of the chairperson.⁶⁶⁶

In general, complaints must be assessed, in accordance with the procedure outlined in the first subsection, by the Investigator and the Electricity Authority before formal complaints are lodged with the Rulings Panel. Whether being considered by the Electricity Authority or by the Rulings Panel, the investigator's report forms the basis of what information is before the panel making the decision. The Electricity Authority or the Rulings Panel may also request more information from the investigator in addition to his/her report.⁶⁶⁷

The Electricity Authority publishes an update following each Compliance Committee meeting with information on key decisions and other activities occurring within the compliance area.⁶⁶⁸

Appeals

Decisions under the *Electricity Industry Act 2010* are not exempt from judicial review. An industry participant that is affected by a decision or order of the Rulings Panel may appeal to the High Court on grounds such as lack of jurisdiction and question of law. Such an appeal must be made by giving notice of appeal within 20 working days of the decision appealed against or within any further time that the High Court allows.⁶⁶⁹

The High Court of New Zealand is a court of general jurisdiction, placed above the District Courts and Beneath the Court of Appeal and the Supreme Court of New Zealand. The *Judicature Act 1908* requires appellants to specify, in their applications to the court, the relief or remedy sought.⁶⁷⁰ The *Judicature Act 1908* also provides for the right of joinder as plaintiffs or defendants. The discovery rights of parties are also provided.⁶⁷¹

In its determination of any appeal against certain determinations made by the Rulings Panel (as specified under section 65 of the *Electricity Industry Act 2010*), the High Court may do any one or more of the following:⁶⁷² confirm, modify, or reverse the decision or any part of it; or exercise any of the powers that could have been exercised by the Electricity Authority or the Rulings Panel in relation to the matter to which the appeal relates.

The High Court may, in any case, instead of determining any appeal, direct the Rulings Panel to reconsider (s.68).

The decision of the High Court may be appealed to the Court of Appeals (s.71).

The appeals process is independent from the regulatory decision-making and hearing process in that the appeal is dealt with through the normal legal channels and considered by a Court. The process is also dissimilar from regulatory processes in that it is more legally focused and judicially structured. Parties seek legal counsel and attend a formal hearing.

2. Telecommunications

In 1987 the telecommunications department of the New Zealand Post Office was separated from its postal and banking arms. Telecom Corporation of New Zealand Ltd ('Telecom') was formed, and the regulatory and policy advice functions of the former Post Office were transferred to the Department of Trade and Industry (subsequently the Ministry of Commerce, and the Ministry of Economic Development and now the Ministry of Business, Industry and Employment). Between 1 October 1987 and 1 April 1989, the supply of customer premises equipment was progressively deregulated. On 1 April 1989, all legal restrictions on telecommunications services market entry were removed. Telecom

⁶⁶⁶ *Electricity Industry Act 2010*, s. 53.

⁶⁶⁷ *Electricity Industry (Enforcement) Regulations 2010*, Regulations 30-31.

⁶⁶⁸ See Electricity Authority, *Compliance Update*. Available at: <http://www.ea.govt.nz/act-code-regs/compliance/update/> [accessed on 22 July 2013].

⁶⁶⁹ *Electricity Industry Act 2010*, ss. 63-71.

⁶⁷⁰ *Judicature Act 1908* (Schedule 2: High Court Rules), s. 5.27.

⁶⁷¹ *Ibid.*, ss. 8.1-8.33.

⁶⁷² *Electricity Industry Act 2010*, s. 67.

was privatised in September 1990, and competition in telecommunications services developed from 1991 with the signing of the first interconnection agreement. However, the 1990s saw a protracted dispute between Telecom and Clear Communications over interconnection.⁶⁷³

The regulatory regime adopted did not involve industry-specific regulation, but relied primarily on the *Commerce Act*. Telecom operated each of its business units as separate subsidiaries, each with its own Board, and with clearly defined performance objectives and responsibilities. In particular, Telecom undertook not to discriminate unfairly between customers by giving preferential treatment to other Telecom companies.⁶⁷⁴ Telecom provided interconnection on a 'fair and reasonable basis'.⁶⁷⁵

The CCNZ undertook an enquiry into telecommunications markets in 1992 and was critical of the likely effectiveness of the undertakings provided by Telecom; and of reliance on the *Commerce Act*, in removing obstacles to the development of competition in telecommunications markets.⁶⁷⁶

A ministerial (Fletcher) inquiry into telecommunications led to *ex ante* industry legislation in the form of the *Telecommunications Act 2001*. There was an expectation that parties would negotiate access agreements for regulated services, but that application could be made to the CCNZ for a determination if they failed to reach agreement. The report of the ministerial inquiry noted that the approach to be taken would still place New Zealand at the 'light-handed' end of the regulatory range; arguably the lightest in the OECD.⁶⁷⁷

Telecommunications was reviewed again in 2005 with a focus on the broadband market. The *Telecommunications Act* was amended in 2006 to enable the CCNZ to set the terms and conditions of regulated services on an industry-wide basis rather than a bilateral basis. The amendments also granted the CCNZ new investigative and inquiry powers and enforcement options. Accounting and operational separation of Telecom was also introduced, resulting in a significant shift from the 'light-handed' regulatory approach.

Operational separation required Telecom's network, wholesale, and retail business units to be operated at arm's length, with the network business operating on a stand-alone basis. Discrimination between service providers and Telecom business units, or service providers, was prohibited.

The CCNZ's new market monitoring powers have enabled it to collect market data and produce annual monitoring reports and a number of other specific reports. The reports indicate an increase in competition over the period since 2006, resulting in increased investment, greater choice, lower prices and better quality telecommunications services in New Zealand. Local loop unbundling developed strongly initially, then at a slower pace as a consequence of the impact of cabinetisation on unbundlers' business plans. A third mobile network operator, 2degrees, entered in 2009.

In 2011 the *Telecommunications Act* was again amended. Operational separation of Telecom was replaced by structural separation, and reliance was placed on enforceable undertakings as the primary regulatory instrument for the fibre network. On 30 November 2011, Telecom voluntarily split into two separate, publicly listed companies: a network services provider (Chorus); and a retail services provider (Telecom).⁶⁷⁸ This enabled Telecom at the outset to participate in the Government's Ultrafast Broadband (UFB) and Rural Broadband (RBI) initiatives (see below).

The fixed-line segment of the telecommunications market is dominated by Telecom New Zealand. However, the second-largest fixed-line carrier, TelstraClear, developed a strong presence in some geographically distinct areas, especially in terms of its cable network. In 2012, Vodafone New Zealand (see below) purchased TelstraClear and is incorporating it into its business.

Mobile telecommunications in New Zealand was initially an infrastructure-based duopoly: the incumbent, Telecom New Zealand; and Vodafone New Zealand (formerly BellSouth NZ). Vodafone

⁶⁷³ Early history from Ministry of Economic Development, *Overview of the New Zealand Telecommunications Market 1987-1997*. Available at: http://www.med.govt.nz/templates/MultipageDocumentPage_4847.aspx [accessed on 13 October 2008 – not able to be accessed on 22 July 2013].

⁶⁷⁴ Telecom, *Telecom Supported Government Telecommunications Deregulation Plans*, Media Release, 16 June 1988.

⁶⁷⁵ Letter from Telecom to the Minister of Commerce, 6 July 1989.

⁶⁷⁶ CCNZ, *Report on Telecommunications*. 1992.

⁶⁷⁷ *Ministerial Inquiry into Telecommunications, Final Report*, 23 September 2000.

⁶⁷⁸ Telecom, *About Telecom*. Available at: <http://www.telecomgroup.co.nz/content/0.8748.200633-1548.00.html> [accessed on 22 July 2013].

captured more than half of the market. 2degrees, entering in 2009, has captured about 20 per cent of the market.⁶⁷⁹

There is now a growing number of competitors accessing Telecom's copper local loop (commonly referred to as Local Loop Unbundling ('LLU')) and providing services using LLU to end-users. Fixed-line broadband, based almost totally on DSL services, is 28.6 subscriptions per 100 inhabitants, which is above the OECD average of 26.3, although substantially below the penetration level achieved in the leading countries of Switzerland, the Netherlands, Denmark and Korea. In wireless broadband, New Zealand is much higher in the ranking, standing at tenth overall.⁶⁸⁰

The Ultra-Fast Broadband Initiative is a government programme to expand and develop New Zealand's broadband services. Ultra-fast broadband will deliver fibre-optic technology that enables downlink speeds of at least 100 Mbps (megabits per second), and uplink speeds of at least 50 Mbps.⁶⁸¹ It is intended that by 2020, 75 per cent of New Zealanders will be connected to ultra-fast broadband. Schools, hospitals, and 90 per cent of businesses, will be connected by 2015. Homes and the remaining ten per cent of businesses will be connected by 2019. This is to be achieved by public/private partnership model; the government is contributing \$1.35 billion to the initiative with significant amounts of private co-investment being contributed by the government's Ultra-fast Broadband partners. Crown Fibre Holdings monitors Ultra-Fast Broadband deployment and the contracts with 'local fibre companies' (that is, the companies that will roll out the new network in partnership with the government).⁶⁸²

The Rural Broadband Initiative targets the remaining 25 per cent of the population, to deliver, via fixed wireless or copper, a minimum of five Mbps to 80 per cent of the population and one Mbps to the remainder of that rural population.

Regulatory Institutions and Legislation

Telecommunications is subject to the *Telecommunications Act 2001* that regulates the supply of certain telecommunication services, for promoting competition in telecommunications markets for the long-term benefit of end-users of telecommunications services in New Zealand.⁶⁸³ Major amendments to the *Telecommunications Act 2001* were introduced by the Government in December 2006 to require the operational separation of Telecom, and subsequently in 2011 to provide for structural separation of Telecom. The CCNZ is responsible for economic regulation of telecommunications services. It is responsible for recommending the regulation of wholesale telecommunications services, and setting the terms and conditions (and, for some services, price) by which regulated wholesale services are provided. The CCNZ is also responsible for monitoring and enforcement of telecommunications.

The CCNZ has a range of regulatory functions under the *Telecommunications Act 2001*. These include: setting designated access and specified services determinations, and enforcing determinations; monitoring and reporting on the telecommunications markets; calculating the cost of providing service related to telecommunications service obligations (TSOs); and approving industry codes. The CCNZ is also responsible for reviewing competitive conditions in telecommunications markets and defining scope of regulation.

There are two types of regulated services provided for in the legislation: designated, and specified services. For designated services the CCNZ can determine the price of supply. In contrast, specified services do not allow for a determination of pricing arrangements and are limited to non-price terms and conditions.

There are a number of ways in which the CCNZ can regulate access to a designated or specified service under the *Telecommunications Act 2001*. An access seeker or an access provider may apply

⁶⁷⁹ Budde report, *New Zealand – Mobile Communications*. Available at: <http://www.budde.com.au/Research/New-Zealand-Mobile-Communications-Statistics-Analysis-and-Major-Operators.html> [accessed on 22 July 2013].

⁶⁸⁰ OECD, *Broadband Statistics*, December 2012, updated 18 July 2013. Available at: <http://www.oecd.org/internet/broadbandandtelecom/oecd broadband portal.htm> [accessed on 22 July 2013].

⁶⁸¹ Downlink is the rate at which you can receive information, and uplink is the rate at which information is sent.

⁶⁸² Ministry of Business, Innovation and Employment, *Ultra-fast Broadband Initiative*. Available at: <http://www.med.govt.nz/sectors-industries/technology-communication/fast-broadband/ultra-fast-broadband-initiative> [accessed on 22 July 2013].

⁶⁸³ *Telecommunications Act 2001*, s. 18.

to the CCNZ for a standard terms determination that sets out the terms and conditions applying to all access providers and access seekers of a service.⁶⁸⁴ The CCNZ may also make bilateral determinations between an access provider and an access seeker to resolve particular disputes involving access to a designated or specified service.

There are standard terms determinations (STDs) in force for the following designated services:

- Unbundled Copper Local Loop Service (UCLL) (access to the copper local loop between the end-user and Telecom's telephone exchange).
- Unbundled Copper Low Frequency Service (UCLFS).
- Unbundled Bitstream Service (UBA) (access to a digital subscriber line-enabled service).
- Three Sub-loop Services: Sub-loop Unbundled Copper Local Loop (access to the copper line between the end-user and Telecom's distribution cabinet), Sub-loop Co-location in the Distribution Cabinet and Sub-loop Backhaul (access to fibre between Telecom's Distribution Cabinet and Telecom's telephone exchange).
- Unbundled Local Loop Co-location Service (UCLL).
- Unbundled Bitstream Backhaul Service (access to transmission capacity to complement the Unbundled Bitstream Service).
- Unbundled Local Loop / Unbundled Bitstream Low Frequency Backhaul Service (access to transmission capacity to complement access to the Unbundled Copper Local Loop Service).

They have been updated under the CCNZ's recent review of standard-terms determinations to incorporate changes required by the 2011 amendments to the *Telecommunications Act 2001*.⁶⁸⁵ As required by the amendments, in November 2011 a new standard determination was made for unbundled copper low frequency services provided by Chorus.⁶⁸⁶

In addition, the CCNZ also made standard terms determinations for the Mobile Co-Location Service (a specified service allowing access to co-location on cellular mobile transmission sites) in December 2008,⁶⁸⁷ and Mobile Termination Access Services (MTAS) in May 2011.⁶⁸⁸

National roaming on cellular mobile telephone networks is also a specified service under the *Telecommunications Act 2001*, but the CCNZ has not yet determined the terms of access for this service.

When the CCNZ makes a determination that includes price, and using the relevant initial pricing principle, any party to that determination may apply for a review to determine a price using the relevant final pricing principle which is generally Total Service Long-run Incremental Cost (TSLRIC).

The CCNZ may also initiate the process for a determination of the functions that must be performed by a system for delivering a designated multi-network service; and the formula for how the cost of delivering the service must be apportioned between the access seeker and all access providers of the service (s.31AA(1)).

Aside from its enforcement and arbitration duties as economic regulator, the CCNZ publishes discussion reports on important issues in the industry. Since the 2006 amendments, the CCNZ is formally empowered to 'continuously monitor the performance and development of the telecommunications industry and its markets'.⁶⁸⁹ In performing its telecommunications monitoring and

⁶⁸⁴ *Telecommunications Act 2001*, s. 20.

⁶⁸⁵ CCNZ, *Consequential Changes Review of STDs*, last updated 1 February 2012. Available at: <http://www.comcom.govt.nz/consequential-changes-review-of-stds/> [accessed on 22 July 2013].

⁶⁸⁶ CCNZ, *Chorus' Unbundled Copper Low Frequency Service STD*. Available at: <http://www.comcom.govt.nz/chorus-unbundled-copper-low-frequency-service-std/> [accessed on 22 July 2013].

⁶⁸⁷ CCNZ, *Mobile Co-location Service*. Available at: <http://www.comcom.govt.nz/IndustryRegulation/Telecommunications/StandardTermsDeterminations/makingandreviewingstds.aspx> [accessed on 22 July 2013].

⁶⁸⁸ CCNZ, *Mobile Termination Access Services (MTAS) STD*. Available at: <http://www.comcom.govt.nz/mobile-termination-access-services-mtas-std/> [accessed on 22 July 2013].

⁶⁸⁹ CCNZ, *Overview of the Standard Terms Determination Process*. Available at: <http://www.comcom.govt.nz/overview-of-the-standard-terms-determination-process/> [accessed on 22 July 2013].

reporting role, the CCNZ has published annual monitoring reports since 2007. These reports assess the status of competition in telecommunications markets.⁶⁹⁰

The CCNZ also facilitates workshops and holds conferences. It conducts inquiries, reviews and studies relating to the telecommunications industry; and publishes reports, summaries and information about these activities.

Consultation of Interested Parties

The CCNZ must follow consultation processes under the *Telecommunications Act* in relation to each of its regulatory decisions. In this subsection, the process in relation to STDs (a standard method of regulation) is explained.

This formal statutory process, as provided under section 30 of the *Telecommunications Act 2001*, is summarised as follows.⁶⁹¹

- The CCNZ initiates standard terms development process.
- The CCNZ holds scoping workshop.
- The CCNZ issues written notice calling for standard terms proposal (STP) from the access provider(s).
- The access provider submits STP by specified date.
- The CCNZ advises of the receipt of STP.
- Interested parties provide submissions on STP.
- The CCNZ issues draft determination
- Interested parties provide submissions and cross-submissions on draft determination.
- The CCNZ may hold a conference.
- The CCNZ issues a standard terms determination.

The purpose of a scoping workshop is to provide the NZCC with information to assist it in specifying the period of time within which an access provider must submit a standard-terms proposal, and any additional requirements for that proposal.⁶⁹²

Conferences are publicised online, and to any party who made a submission on the draft STD. Generally, the following procedures apply.⁶⁹³

Oral statements will be made from a central table. Parties are not required to provide a statement of issues or written submissions prior to the conferences.

Members of the CCNZ and staff will question the parties. The parties may only ask questions of the CCNZ for the purpose of clarifying a question. No party will have the right to cross-examine any other party during the proceedings. If necessary, closed sessions will be arranged where confidential information is discussed.

All parties are required to provide 25 copies for attendees, of any document (such as a PowerPoint presentation) produced during the conference. Following the conference, an electronic version of the document is also required (pdf format preferred) for publishing on the CCNZ's web site.

A computer and data projector (for PowerPoint presentations) will be available for use by parties making statements.

⁶⁹⁰ CCNZ, *Telecommunications Market Annual Monitoring Reports*. Available at: <http://www.comcom.govt.nz/TelecommunicationsMarketAnnualMonitoringReports/> [accessed on 22 July 2013].

⁶⁹¹ NZCC, *Overview of the Standard Terms Determination Process*. Available at: <http://www.comcom.govt.nz/overview-of-the-standard-terms-determination-process/> [accessed on 22 July 2013].

⁶⁹² *Ibid.*

⁶⁹³ CCNZ, *UCLL and UCLL Co-location Conference: Administrative Arrangements*, 2007. Available at: <http://www.comcom.govt.nz/assets/Telecommunications/STD/Co-Location/Draft/Conference-on-Draft-Co-location-Standard-Terms-Determination-Conference-Arrangements-5-September-2007.pdf> [accessed on 22 July 2013].

As is normal procedure, the conferences will be recorded on audiotape. A stenographer will also provide a transcript for conferences. Copies of transcripts will be made available on the CCNZ's website.

After completing consultation on the draft STD, the CCNZ must prepare a final STD that includes all the matters set out in section 30O, and the additional matters set out in section 30P, where appropriate. Most importantly, a standard-terms determination must specify sufficient terms to allow the designated access service or specified service to be made available within the specified timeframe, without the need for the access seeker to enter into an agreement with the access provider.⁶⁹⁴

During any determination process, the CCNZ may call on any expert or consultant it deems relevant to its investigations. Further, the parties may provide evidence prepared by experts and consultants as part of their submissions.⁶⁹⁵

The determination processes in the *Telecommunications Act 2001* involve consultation, discussion and submissions by all interested parties. Although parties may opt to seek legal representation, cases are not considered in formal court-style conditions.

The New Zealand Telecommunications Forum,⁶⁹⁶ formerly the Telecommunications Carriers' Forum (TCF), works collaboratively on the development of key industry standards and codes of practice. The TCF works with a wide variety of industry participants and government agencies to promote competition and investment, accelerate the introduction of new-generation services, and encourage excellence in customer service. The forum facilitates co-operation among telecommunications carriers to encourage the efficient provision of regulated services, not inconsistent with the *Telecommunications Act 2001*; and non-regulated telecommunications services.

The TCF may, of its own accord or if invited to do so by the CCNZ, under Schedule 2 of the *Telecommunications Act 2001*, propose telecommunications access codes to the CCNZ for approval. Under s.4 of Schedule 2 of the *Telecommunications Act 2001*, the TCF must take all practical steps to ensure any stakeholder that is affected or likely to be affected by a draft code, is invited to vote on its acceptance. The TCP may also prepare other telecommunications codes, and provide evidence, studies and opinions to the CCNZ for the purposes of advice on STDs.

The Telecommunications Users Association of New Zealand (TUANZ) is a not-for-profit organisation that promotes the needs of end-users of telecommunications in New Zealand.⁶⁹⁷ It represents both large and small users of telecommunications services.

InternetNZ (Internet New Zealand Inc.), established in 1995, is the non-profit organisation dedicated to protecting and promoting the Internet in New Zealand and fostering a coordinated and cooperative approach to its ongoing development.⁶⁹⁸

The more recently-formed Internet Service Providers Association of New Zealand (ISPANZ) is a non-profit industry group that represents members who provide Internet services in New Zealand.⁶⁹⁹ The ISPANZ aims to promote a fair and fully competitive Internet market where members can deliver the full benefits of the Internet services to the consumers and the economy.

⁶⁹⁴ CCNZ, *Overview of the Standard Terms Determination Process*. Available at: <http://www.comcom.govt.nz/overview-of-the-standard-terms-determination-process/> [accessed on 22 July 2013].

⁶⁹⁵ For example, in support of its submission on draft determination on Vodafone's application for interconnection with Telecom's fixed line, Telecom provided an economic advice report from CRA International. See: Telecom, *Telecom Submission on Draft Determination – Annex B*, 2006. Available at: <http://www.comcom.govt.nz/assets/Imported-from-old-site/industryregulation/Telecommunications/InterconnectionDeterminations/ContentFiles/Documents/Appendix-B---CRA-Report.pdf> [accessed on 22 July 2013].

⁶⁹⁶ New Zealand Telecommunications Forum, *About Us*. Available at: <http://www.tcf.org.nz/content/58c3a401-d124-44e6-be5b-fa9c35f1d456.html> [accessed on 22 July 2013].

⁶⁹⁷ Telecommunications Users Association of New Zealand, *About TUANZ*. Available at: <http://tuanz.org.nz/about/> [accessed on 22 July 2013].

⁶⁹⁸ InternetNZ, *About Us*. Available at: <https://internetnz.net.nz/about-us> [accessed on 26 May 2013].

⁶⁹⁹ Internet Service Providers Association of New Zealand, *Welcome*. Available at: <http://www.ispanz.org.nz/> [accessed on 22 July 2013].

Timeliness

As part of the STD process, an access provider is required to prepare a standard terms proposal. The timeframe for delivery of the proposal is set by the CCNZ, on the basis of discussions at an initial scoping workshop. The time required is likely to vary depending on, for example, whether there is currently a commercial offer for a similar service already in the market place, and the extent to which industry working parties have already agreed on terms and conditions. The timeframe is then set by the CCNZ, and failure to comply can result in enforcement action under Part 4A of the *Telecommunications Act 2001*.

Under section 30K of the *Telecommunications Act 2001*, the CCNZ is required to make reasonable efforts to prepare a draft STD, and issue a public notice seeking submissions on that draft, within 60 working days of receiving the standard terms proposal.

The CCNZ determines and publishes an indicative timetable for the STD development process. This is summarised in the table below:⁷⁰⁰

Step	Timing
Initiation of STD process	
Scoping workshop	Within two to three weeks of initiation
The CCNZ issues notice calling for STP	Within two weeks of holding workshop
Access provider to submit STP	To be discussed at Scoping Workshop
The CCNZ to advise of the receipt of STP	one day
Interested parties to provide submissions on STP	two to four weeks
The CCNZ to prepare and issue draft determination	four to six weeks
Interested parties to provide submissions and cross-submissions on draft STD	four weeks + two weeks
Conference or consultation with persons other than parties to the STD (optional)	two weeks preparation + one to two days' conference
The CCNZ to prepare and issue STD	four to six weeks after close of submissions/conference

Information Disclosure and Confidentiality

As discussed previously in the Energy section when discussing the functions of the CCNZ, Section 25 of the Commerce Act 1986 requires the CCNZ to make available information with respect to carrying out of its functions and exercising its power.

Section 98 of the Commerce Act 1986 allows the CCNZ to require a person to supply information or documents, or give evidence where the CCNZ considers it necessary or desirable for the purpose of carrying out its functions and exercising its powers. In this regard, the CCNZ may take evidence in writing or on oath.

Parties may request that the CCNZ make an order of confidentiality (s.100 of the Commerce Act 1986).⁷⁰¹ The CCNZ may prohibit the publication or communication of any document or evidence submitted to it in relation to an application, under penalty of fines, for the duration of the CCNZ's deliberation. Such an order will expire after the delivery of the final decision of the CCNZ. After that time, the provisions of the Official Information Act 1982 shall apply.

Decision-making and Reporting

The Telecommunications Commissioner, appointed by the Governor-General upon the recommendation of the Minister for Communications and Information Technology, serves as a member of the CCNZ. Under the Telecommunications Act, there must be a quorum of at least three

⁷⁰⁰ CCNZ, *Overview of the Standard Terms Determination Process*. Available at: <http://www.comcom.govt.nz/overview-of-the-standard-terms-determination-process/> [accessed on 22 July 2013].

⁷⁰¹ Section 15(i) of the *Telecommunications Act* allows the CCNZ to exercise the s. 100 power.

members, including the Telecommunications Commissioner, to make a determination in relation to designated access and specified services and TSO cost calculation (s.10). In practice, the Board or the Commission Division (that is, a sub-group of the board) makes decisions in respect of designated access and specified services. The decision is made on the basis of majority voting. Other functions can be performed by the Telecommunications Commissioner alone or with two other members of the board, if requested by the Commissioner and approved by the Chair. In the absence of the Telecommunications Commissioner, the functions may be performed by the Chair.

The Telecommunication Commissioner administers regulatory activities in respect to telecommunication services.⁷⁰² The CCNZ's Regulation Branch has a team working on telecommunications issues.

Appeals

Decisions under the *Telecommunications Act* may be appealed to New Zealand's High Court on questions of law, and are subject to judicial review through the normal legal channels. This process (as discussed previously under the section 'Approach to Competition and Regulatory Institutional Structure') is separate from the other processes with regard to access determinations.

However, no party may appeal against a determination while a clarification, reconsideration, or STD review is pending.⁷⁰³

If appeal against a determination is commenced, the determination continues to have effect and is enforceable until the proceedings are finally disposed of.

Other than judicial review or appeals on questions of law, determinations may be subsequently clarified, reconsidered, or reviewed in certain circumstances, by the CCNZ.

For any determination, section 58 of the *Telecommunications Act* allows the CCNZ to, at any time, on its own initiative, or on the application of any person, amend a determination for the purpose of making a clarification, subject to there being no appeal pending against the determination.

Regarding reconsideration, under section 59 of the *Telecommunications Act 2001*, the CCNZ may, at any time, upon the application of a party to a determination, revoke or amend the determination, or revoke the determination and make a further determination in substitution for it, if the CCNZ considers that: there has been a material change of circumstances since the date on which a determination was made or last reconsidered; or the determination was made on the basis of information that was false or misleading in a material particular.

In reconsidering a determination, the CCNZ must follow the same process that was followed for the initial determination. To avoid doubt, a determination continues to have effect and is enforceable, pending its reconsideration.

For a Standard Terms Determination (STD), the CCNZ can commence a review at any time, of all or any of the terms specified in a STD (section 30R of the *Telecommunications Act 2001*).

Although a review of the STD for a service can only be initiated by the CCNZ, parties are also encouraged to discuss with the CCNZ whether issues of concern could be dealt with by a review under section 30R. If a party wishes to bring a matter to the CCNZ's attention for review, the party should provide sufficient information to enable the CCNZ to make an informed decision regarding whether to initiate a review.⁷⁰⁴

For a Standard Terms Determination review, the CCNZ is required to: consult all parties to the determination; give public notice of the commencement of the review; include in the public notice the closing date for submissions; and give public notice of the result of the review.

Apart from these requirements, the CCNZ may conduct the review in a manner and within a timeframe, that it deems appropriate. This enables the CCNZ to assess the appropriate form and degree of consultation on a case-by-case basis. However, the CCNZ will give notice in the Government Gazette and on its website.

⁷⁰² CCNZ, *Briefing to Incoming Minister, op. cit.*, 2011, p. 5.

⁷⁰³ *Telecommunications Act 2001*, s. 60(2).

⁷⁰⁴ CCNZ, *Review of Standard Terms Determination*, last updated 16 April 2010. Available at: <http://www.comcom.govt.nz/review-of-standard-terms-determinations/> [accessed on 22 July 2013].

In addition, if there is unanimous agreement of the TCF for a particular change, the consultation process may be very short and completed quickly. There is no specific requirement to issue a draft review determination but the CCNZ may or may not opt to do so, depending on the circumstances.⁷⁰⁵

After review, the CCNZ may replace or vary or delete any terms of the STD, if it considers it necessary. The review can also address aspects of a designated access service, or a specified service not covered in an initial STD; and update the terms of an STD to reflect regulatory or technological change.⁷⁰⁶

Regulatory Development

Under the Government's Ultra-Fast Broadband (UFB) initiatives, the local fibre companies (LFCs), including Chorus, are required to submit Deeds of Undertaking to confirm open access on their fibre network. The Deeds have been approved by the Minister of Communications and Information Technology.⁷⁰⁷ The CCNZ monitors and enforces the Deeds.⁷⁰⁸ Following the 2011 amendments to the *Telecommunications Act*, the CCNZ has focused on the implementation of regulatory arrangements, in response to the legislative changes and the UFB initiatives in place. The CCNZ has developed the initial frameworks, particularly with respect to the information disclosure requirements, but will continue the work through continuing review of the existing regulatory regime.⁷⁰⁹ Determinations that set out the new information disclosure requirements were made on 27 June 2012.⁷¹⁰

3. Postal Services

New Zealand Post (NZP) has been a government-owned enterprise since 1987 when postal reform started. The *Postal Services Act*, taking effect on 1 April 1998, removed NZP's statutory monopoly on the carriage of letters and opened the market to any company or individual for conducting a letter delivery business that meets the statutory requirements.

NZP remained the universal service carrier by signing a new *Deed of Understanding* that was established with the Crown in 1998, for an indefinite period. On a *quid pro quo* basis, NZP remains New Zealand's sole representative at the Universal Postal Union. If the government were to designate additional operator(s) in the future, the terms of the *Deed of Understanding* would be reviewed.

NZP delivers more than 800 million mail items a year to approximately 1.9 million postal boxes around the country. Letter volume has declined by 24 per cent from 1.1 billion items in 2002, and is expected to fall to 624 million items by 2016-17. During the period the number of delivery points has increased substantially. As a result, letter service ceased to be the core service contributing to operating profits. Through its extensive network of postal outlets, NZP provides postal and courier services and processes over 21 million financial transactions each year. It also offers bill payment and agency services, ranging from car registration renewal to travel insurance. NZP has operated Kiwibank since 2002, offering banking services nationwide.

NZP maintains a dominant position in the letter market and has expanded into the private sector through a portfolio of joint ventures and acquisitions, such as a joint venture (Express Couriers Limited) with DHL in 2005 on courier and logistics businesses. NZP is also very active in data management and direct-mail processing (Datamail Group); competing against numerous other suppliers. As a group, NZP experienced a loss of \$35.6 million in 2010-11, but managed to obtain a net profit of \$169.7 million in 2011-12.

⁷⁰⁵ *Ibid.*

⁷⁰⁶ *Ibid.*

⁷⁰⁷ Ministry of Business, Innovation and Employment, *Open Access Deeds of Undertaking*. Available at: <http://www.med.govt.nz/sectors-industries/technology-communication/communications/broadband-policy/ultra-fast-broadband-initiative/open-access-deeds> [accessed on 22 July 2013].

⁷⁰⁸ Ministry of Business, Innovation and Employment, *Monitoring and Regulation*, Available at: <http://www.med.govt.nz/sectors-industries/technology-communication/fast-broadband/monitoring-regulation> [accessed on 22 July 2013].

⁷⁰⁹ CCNZ, *Briefing for Incoming Minister, op. cit.*, December 2011, p. 31.

⁷¹⁰ CCNZ, *Information Disclosure*. Available at: <http://www.comcom.govt.nz/information-disclosure-2/> [accessed on 22 July 2013].

Under the *Postal Services Act*, all persons carrying out business as a postal operator must apply to the Chief Executive of the Ministry of Economic Development (merged on 1 July 2012 into the Ministry of Business, Innovation and Employment) to be registered (except where a person is acting as an employee or agent of a postal operator).⁷¹¹ The Ministry cannot decline registration unless the applicant has been convicted of certain offences. A simple form is required to register on the Postal Register with the Ministry. By the end of 1998, there were 17 registered operators in New Zealand, and most were small and localised. Larger competitors emerged, with Fastway Post (a subsidiary of Fastway Couriers) being the first to set up a franchised nationwide network of retail outlets, and with New Zealand Document Exchange Limited (DX Mail) providing regular business-focused deliveries in major cities. As of 1 January 2013, there were 21 registered postal operators in addition to NZP.⁷¹² DX Mail has set up its own delivery network in most urban and large provincial centres. According to NZP, more than 20 per cent of market share for the standard letters was taken by its access seekers.⁷¹³

Regulatory Institutions and Legislation

There is no designated postal regulator in New Zealand. NZP is subject to economy-wide competition law, outlined in the *Commerce Act 1986*. As a government-owned enterprise, NZP is also subject to the *State-owned Enterprises Act 1986*, which sets out the nature of public ownership, the responsibilities of the ministerial shareholders, its objectives, and corporate accountabilities. The shareholder ministers (that is, the Minister of Finance and the Minister for State Enterprise) appoint the Directors of the Board of NZP on the basis of their competencies and experiences, after consulting with the Chairman. Under the *State-owned Enterprises Act*, NZP is required annually to submit to the shareholder ministers the Statement of Corporate Intent, setting out performance targets and accounting rules. Additionally, performance reporting must be presented in half-year and annual reports to the independent Directors, shareholding Ministers and Parliament.

The current Deed of Understanding concluded in 1998 requires NZP to carry basic letter post at prescribed service standards,⁷¹⁴ in terms of the frequency of deliveries and the number of postal outlets that NZP agrees to maintain.⁷¹⁴

The current Deed also requires NZP to provide competitors access to its postal network on terms and conditions that are no less favourable than those offered to other equivalent customers. Accordingly, the postal operators negotiate access arrangements with NZP privately, most of which were updated in 2008. The terms and conditions are governed by clauses on the abuse of a dominant position in s.36 of the *Commerce Act 1986*. There are no regulatory processes in place in relation to these arrangements. The Minister for Economic Development will refer any allegation of NZP's noncompliance with the terms of the Deed to NZP in order to verify the accuracy of the allegation; and any corrective action required. In response to requests for greater independence and transparency in the decision-making process around network access, NZP established the Postal Network Access Committee in November 2010 to oversee access arrangements, including resolving disputes with access operators.⁷¹⁵ The Committee has a majority of independent members with relevant expertise. The Committee issued its first pricing determination in May 2012.

The current Deed also prohibits NZP from re-introducing the rural delivery fees payable by rural delivery mail contractors. No other price regulation has been in place since 2001.

⁷¹¹ Ministry of Business, Innovation and Employment – Economic Development Information, *Postal Services in New Zealand*. Available at: <http://www.med.govt.nz/sectors-industries/technology-communication/postal-policy/postal-services-in-new-zealand> [accessed on 22 July 2013].

⁷¹² Ministry of Business, Innovation and Employment – Economic Development Information, *Postal Register*. Available at: <http://www.med.govt.nz/sectors-industries/technology-communication/postal-policy/postal-register> [accessed on 22 July 2013].

⁷¹³ NZP, *Access Pricing Review Report and Proposal for Industry Consultation*, October 2009, p. 6. Available at: http://www.nzpost.co.nz/sites/default/files/uploads/shared/industryconsultation_19october.pdf [accessed on 22 July 2013].

⁷¹⁴ The frequency of delivery obligations under the *Deed of Understanding*, was amended on 15 December 2010. New Zealand Post is exempt from delivering on certain public holidays and certain days that follow them.

⁷¹⁵ NZP, *Annual Report 2011-12*, p. 7.

The *Postal Services (Information Disclosure) Regulations 1998* were introduced in May 1998 to facilitate postal liberalisation and to ensure compliance with the Deed. Under these regulations, NZP is required to disclose information in relation to the following:⁷¹⁶

- the number of delivery points and postal offices;
- the quality of services;
- separate profit and loss statements for letters carried within the country and other services;
- each set of standard terms of conditions, together with the price usually charged for the carriage of letters on that set of terms and conditions, and discounts of more than 20 per cent; and
- the full details of all access agreements reached with private postal operators within 15 working days.

This information disclosure requirement is administered by the Ministry of Business, Innovation and Employment.⁷¹⁷

Regulatory Development

In 2010, the then Ministry of Economic Development conducted a review of postal regulation. It noted the trend of declining mail volume as a result of the development of new electronic communications technologies.⁷¹⁸

In 2012, NZP commenced discussions with the Government to seek amendments to the Universal Service Obligations under the Deed, primarily relating to delivery frequency and the shape of the postal-outlet network.⁷¹⁹ NZP considers that the obligations no longer reflect customer preferences.

4. Water and Wastewater

New Zealand's geography and small population mean that water is plentiful and reliable, and issues of wastewater treatment and disposal are less than in many other OECD countries. The abundance of water is reflected in the fact that nearly 57 per cent of electricity is hydro-generated; and that only a very small proportion of available water is harvested. According to the Ministry for the Environment:⁷²⁰

By international standards fresh water in New Zealand is both abundant and clean. We generally have plenty of rain which replenishes our streams, rivers, lakes and groundwater. However, protecting the country's freshwater bodies is a growing challenge. For example, water quality in New Zealand varies considerably, and in some areas water shortages can be felt at certain times of the year.

Provision of Water and Wastewater Services

Responsibility for water and wastewater lies with territorial authorities (city and district councils). In Wellington the regional council supplies bulk water to four metropolitan city councils. There are also collaborative arrangements between Wellington territorial authorities for wastewater disposal on a catchment basis. Outside Wellington there are some collaborative arrangements for water services delivery, for example, between the Nelson City Council and Tasman District Councils. However, the most common arrangement is for each territorial authority to manage and deliver its own services. In Auckland, local government reform placed responsibility for water and wastewater services with Watercare Services Ltd from 1 November 2010.

Watercare is a council-owned organisation under the *Local Government Act 2002* and it is a company registered under the *Companies Act 1993*. The owner, the Auckland Council, appoints Watercare's board of directors that determines its overall objectives. Watercare is New Zealand's largest company in the water and wastewater sector. The company supplies bulk water at a rate of 370 million litres

⁷¹⁶ NZP, *Postal Services Information Disclosure*. Available at: <http://www.nzpost.co.nz/about-us/postal-legislation/postal-services-information-disclosure> [accessed on 22 July 2013].

⁷¹⁷ Ministry of Business, Innovation and Employment, *Communications*. Available at: <http://www.med.govt.nz/sectors-industries/technology-communication/communications> [accessed on 22 July 2013].

⁷¹⁸ NZP, *Annual Report 2011-12*, p. 6.

⁷¹⁹ *Ibid.*

⁷²⁰ Ministry for the Environment, *Fresh Water*. Available at: <http://www.mfe.govt.nz/issues/water/> [accessed on 22 July 2013].

per day to the Auckland region, an area of approximately 340 square kilometres, through a regional water network. Watercare also operates a regional wastewater network treating an average of 350 000 cubic metres of wastewater a day at 20 wastewater treatment plants. The two largest plants are located at Mangere and Rosedale.

There are 11 regional councils and 67 territorial authorities (including 12 city councils and 53 district councils) in New Zealand. Regional councils are primarily responsible for environmental-resource management. In this role they regulate resource consents held by territorial authorities to take and discharge water.

Regulatory Institutions and Legislation

The *Local Government Act 2002* (s.130) places an obligation on each local authority to maintain the water services that it has developed. Further, a territorial authority is unable to divest its ownership of these assets except to another local government organisation.⁷²¹

In addition, the *Health Act 1956* (s.25) requires local authorities to provide 'sanitary works', the definition of which includes drainage works and includes all lands, buildings, and pipes used in connection with any such works.⁷²² The *Health Act 1956* also regulates drinking water standards, which in turn determines the quality of water treatment local authorities must undertake when supplying potable water to communities.

Councils are guided in their decisions by Regional Policy Statements and Regional Plans. These lay out environmental objectives, policies, rules and processes, and sometimes set quality standards or specify how much water can be taken from particular water bodies.⁷²³

The *Resource Management Act 1991* (RMA) obliges councils to consult the Maori and wider community on Regional Policy Statements and Regional Plans. As explained by the Ministry for the Environment, the RMA:⁷²⁴

is the key piece of legislation governing the management of freshwater resources. Under the RMA, regional and unitary councils are responsible for making decisions on the allocation and use of water within their boundaries and for managing water quality. The Ministry is working with other agencies to support local government's role, as well as providing national direction to achieve the sustainable use of New Zealand's water resources.

Local authorities determine, with their communities, levels of service and long-term future investment in water services that they are required to develop under the *Local Government Act*.⁷²⁵

Section 30 of the RMA⁷²⁶ allocates various functions to regional councils:

- including surveillance and rule creation for water quality and water extraction;
- in conjunction with the Minister of Conservation: the taking, use, damming, and diversion of water;
- activities in relation to the surface of water;
- setting of maximum or minimum flows of water in any water body; and
- setting of rules in a regional plan, as to the use and discharge of water.

⁷²¹ A copy of the legislation is available at: <http://www.legislation.govt.nz/act/public/2002/0084/latest/DLM170873.html> [accessed on 22 July 2013].

⁷²² A copy of the legislation is available at: <http://www.legislation.govt.nz/act/public/1956/0065/latest/DLM305840.html> [accessed on 22 July 2013].

⁷²³ *Ibid.*

⁷²⁴ Ministry for the Environment, *Fresh Water*. Available at: <http://www.mfe.govt.nz/issues/water/> [accessed on 22 July 2013].

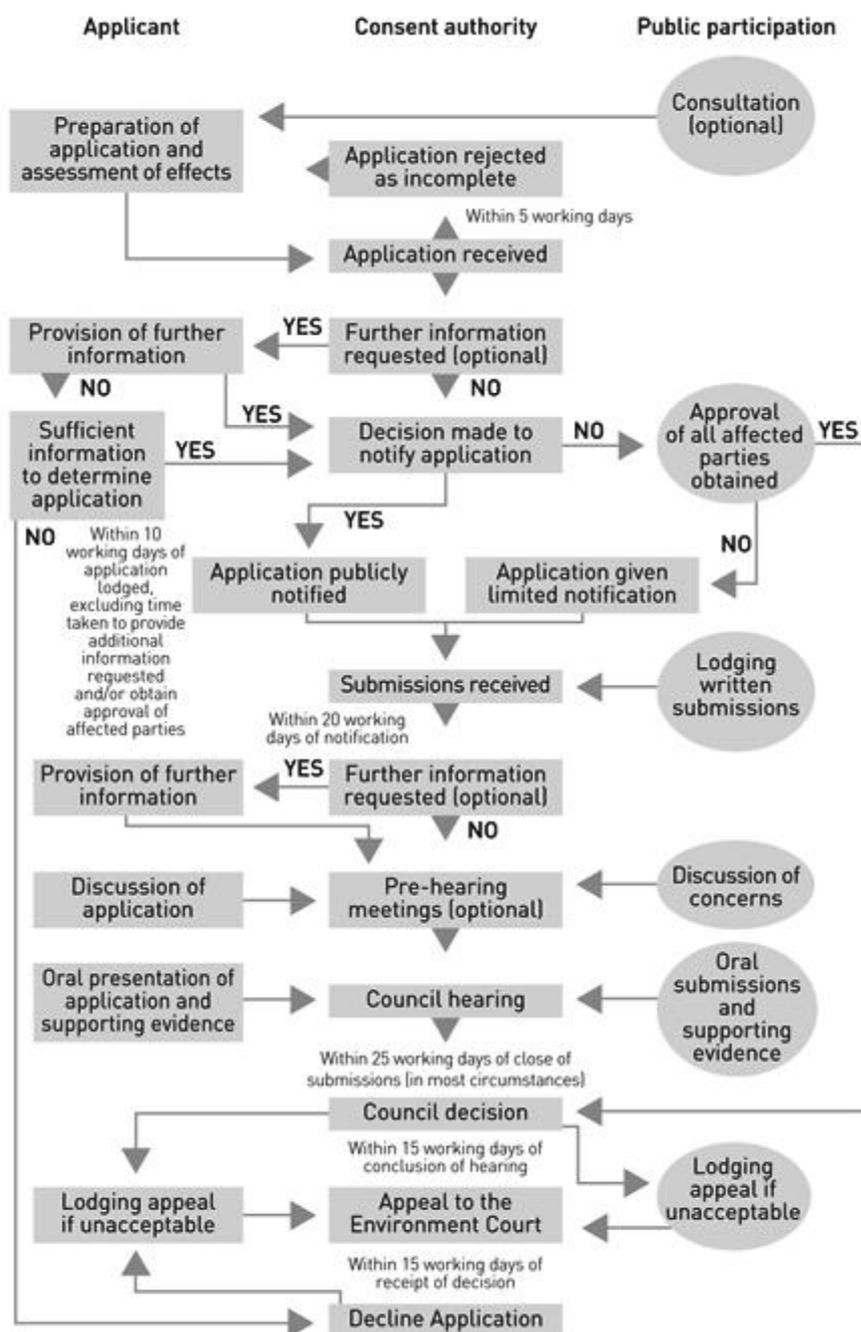
⁷²⁵ Ministry for the Environment, *Water – Freshwater for a Sustainable Future: Issues and Options*. Available at: <http://www.mfe.govt.nz/publications/water/freshwater-issues-options-dec04/html/page6.html> [accessed on 22 July 2013].

⁷²⁶ *Resource Management Act 1991*, s. 30. Available at: <http://www.legislation.govt.nz/act/public/1991/0069/latest/DLM232560.html> [accessed on 22 July 2013].

Resource Consents – Process

There are many types of resource consents, including water permits for the use and diversion of water. Regional councils issue resource consents under the *Resource Management Act 1991*. Water retailers and network operators must obtain resource consents. Guidelines on applying for resource consents are set out in the *Resource Management Act 1991*. The applications are processed in a number of steps, including: receiving the initial application; requesting further information; making a decision on notification, or not; receiving public submissions; holding pre-hearing meetings; holding a public hearing; and releasing a decision. Each step has a specified timeline for completion. A diagram showing the application process is presented below.

Resource Consent Application Process⁷²⁷



⁷²⁷ Environmental Defence Society, *Resource Consents*. Available at: <http://www.rmaguide.org.nz/rma/resourceconsents/processing.cfm?section=diagram> [accessed on 22 July 2013].

The resource-consent application must be in a prescribed form and include an assessment of the environmental effect. Once the application is submitted, it becomes public information and is generally made available to people requesting access. Where the application contains commercially sensitive information, the regional council may agree to keep the sensitive information private.

The regional council may then decide whether or not to notify the application. If the consent of all affected parties is obtained, then the application will not be notified. Otherwise, the application will be publicly notified or given limited notification, depending on the likely impact of the proposal on the environment and on other stakeholders.

The regional council may hold a public hearing in relation to an application for a resource consent and (RMA, s.39) and:

shall establish a procedure that is appropriate and fair in the circumstances. In determining an appropriate procedure the authority shall avoid unnecessary formality, recognise Tikanga Maori where appropriate, not permit any person other than the chairperson or other member of the hearing body to question any party or witness and not permit cross-examination.

Decisions of the council regarding resource consents can be appealed to the Environment Court that can over-ride an original decision made by a regional council. The Environment Court is administered by the Justice Department and is presided over by a judge with expertise in planning and resource management issues. Decisions made by the Environment Court can be appealed to the High Court on questions of law.

In accordance with the *Resource Management Act*, Watercare is required to comply with about 50 different resource consents (currently existing use rights) for discharges from these networks; and for elements of the infrastructure itself. It is seeking the Auckland Council's approval for applying for a single Auckland-wide overflow consent.⁷²⁸

*Regulatory Development*⁷²⁹

In recognition of some of the challenges in freshwater management in New Zealand, the Sustainable Water Programme of Action was implemented during the years 2003 to 2008.⁷³⁰

In 2009 the Land and Water Forum was asked by the Government to conduct a stakeholder-led collaborative process to consider reform of New Zealand's freshwater management system. In September 2010 the Forum reported back to Ministers identifying shared outcomes and goals, and options to achieve them. It then undertook public engagement on its recommendations throughout New Zealand; and in April 2011, provided ministers with its findings, recommendations and thoughts.

In response, the Government launched a package of water-policy initiatives in May 2011 to improve the way water is managed. These included the National Policy Statement for Freshwater Management (which provides central government direction to regional councils);⁷³¹ a \$35 million Irrigation Acceleration Fund, and the \$15 million Fresh Water Clean-up Fund. The Government also asked the Forum to continue its role as a 'consensus builder among water stakeholders and provide further, more detailed, recommendations on the remaining policy issues in 2012'.

In 2012 the Forum delivered the next two of its three reports. The April 2012 report provides advice on setting limits for water quality and quantity, and improvements to decision-making. The October 2012 report provides advice on how to manage to limits, including allocation of fresh water resources; and additional tools to manage the effects upon water of land use.

⁷²⁸Watercare Services Limited, *About Watercare – Projects*. Available at: http://www.watercare.co.nz/about-watercare/projects/Wastewater_Network_Discharge_Consent_App/Pages/Wastewater_network_discharge_consent_application.aspx [accessed on 22 July 2013].

⁷²⁹Ministry for the Environment, *Land and Water Forum*. Available at: <http://www.mfe.govt.nz/issues/water/freshwater/land-and-water-forum/> [accessed on 22 July 2013].

⁷³⁰Ministry for the Environment, *Sustainable Water Programme of Action (2003–2008)*. Available at: <http://www.mfe.govt.nz/issues/water/prog-action/index.html> [accessed on 22 July 2013].

⁷³¹Detailed information about the National Policy Statement is available at: <http://www.mfe.govt.nz/rma/central/nps/freshwater-management.html> [accessed on 22 July 2013].

5. Rail

The rail system in New Zealand has undergone considerable changes in ownership and regulation in the past twenty years. In 1993 the government sold the rail network, but in 2002, the government repurchased the Auckland urban rail network. In the following year, the government entered a Heads of Agreement to purchase the national rail network, which was effected in 2004. In June 2008, the government purchased Toll NZ's rail and ferry operations.⁷³² In August 2008, KiwiRail and ONTRACK merged to become an integrated rail network and service operator called New Zealand Railways Corporation

Background

Since the repurchase of the national rail infrastructure in 2004, arrangements for the rail network (excluding the Auckland urban rail network) were set out under the *National Rail Access Agreement* between ONTRACK (established in 2004 for managing the rail network on behalf of the government) and Toll NZ (a subsidiary of Toll Holding). The *National Rail Access Agreement* granted Toll NZ exclusive access rights until 2070 (with limited exceptions) to the track for freight services, passenger services on the Wellington urban rail network, and long-distance passenger operations. These rights were subject to 'use it or lose it' provisions.⁷³³ In addition to exercising their existing access rights on the network, other rail operators could be granted access rights on a non-exclusive basis to line segments not being taken up by Toll NZ.⁷³⁴ Under the *National Rail Access Agreement*, ONTRACK was responsible for setting Track Access Charges (TAC) for all operators in order to recover the costs of operating the network, beyond the initial funding of \$200 million. The agreements with Toll NZ and Connex New Zealand (now Veolia Transport Auckland – the Auckland passenger operator) provided a process for agreeing the TAC-related portion of ONTRACK's budget. The agreement with Toll NZ also provides for agreeing increases to ONTRACK's capital base. Both agreements affect key determinants of the level of the TAC.⁷³⁵

Toll NZ was to pay ONTRACK a track access charge, agreed for a period of three years at a time.⁷³⁶ ONTRACK and Toll NZ were unable to reach agreement about the track access charge for the period 2005 to 2008. In keeping with the terms of the Agreement, therefore, a track access charge was determined using an independent third party (Bill Wilson QC) in late 2006, and applied from March 2007.

ONTRACK and Toll NZ did not consider that the track access arrangements were providing them with the certainty they would have liked. ONTRACK claimed that negotiations over the track access charge had prevented meaningful discussions with Toll NZ about future plans for the rail network. In its 2007 *Annual Report*, Toll NZ reported that it was:

...ready to make the investment needed to lift rail performance levels and service delivery to customers. We require only the certainty of an access agreement, to allow us to proceed with these plans.

In June 2008, the Government purchased Toll NZ's rail and ferry operations.⁷³⁷ In August 2008, KiwiRail and ONTRACK merged to become an integrated rail network and service operator, New Zealand Railways Corporation; trading under the name KiwiRail Group.⁷³⁸

At present, New Zealand Railways Corporation is a government-owned entity that manages the national rail network. Its core business units include: KiwiRail Freight, providing freight services and locomotives for passenger services; KiwiRail Infrastructure and Engineering, managing and maintaining the rail network; KiwiRail Interislander, operating the ferry passenger and freight services;

⁷³² KiwiRail, *2008-2009 Annual Report*, p. 10.

⁷³³ Controller and Auditor-General of New Zealand, *2008 Reports – Maintaining and Renewing the Rail Network (Part 2)*, 2008. Available at: <http://www.oag.govt.nz/2008/ontrack/part2.htm> [accessed on 22 July 2013].

⁷³⁴ Ministry of Transport, *National Rail Strategy to 2015*, May 2005, p. 6. Available at: <http://www.transport.govt.nz/about/publications/Documents/nationalrailstrategy.pdf> [accessed on 22 July 2013].

⁷³⁵ *Ibid.*

⁷³⁶ Controller and Auditor-General of New Zealand, *op. cit.*

⁷³⁷ KiwiRail, *2008-2009 Annual Report*, p. 10.

⁷³⁸ *Ibid.*

and KiwiRail Passenger, providing urban passenger services in Wellington and long-distance passenger services.

KiwiRail Freight Business Performance⁷³⁹

	2009-10	2010-11	2011-12	Three-year change (per cent)
Freight revenue (million)	367.1	396.7	457.6	25
Freight EBITDA (million)	100.7	117.7	129.1	28
Volumes (ntk) (million)	3,919	4,178	4,580	15

KiwiRail Passenger Business Performance⁷⁴⁰

	2009-10	2010-11	2011-12	Three-year change (per cent)
Passenger revenue (million)	91.3	87.0	66.0	-28
Passenger EBITDA (million)	16.4	10.5	(0.6)	
No. of services (thousand)			111.0	
No. of passengers (million)	11.7	11.7	11.5	-1.7

About 90 licensed rail businesses operate on and/or provide access to rail network in New Zealand.⁷⁴¹ Most of them are both providers and operators, like KiwiRail. They can be broadly classified into three groups: large organisations with extensive network or operating on the network; tourist and heritage operation; and industrial operation serving factories or stores. Each business has its own safety requirements, depending on its size, nature and operational objectives.

The Auckland Regional Transport Authority (ARTA) is New Zealand's only regional transport authority.⁷⁴² It was set up in late 2004 to be the central coordinating agency for managing transport in the Auckland region; a role previously being performed by 18 different bodies. Auckland's rail system extends from Pukekohe in the south and from Waitakere in the west to the Auckland CBD (Britomart Transport Centre). Services are divided into three groups: Western Line, Southern Line and Eastern Line. The ARTA has the key role of integrating the work of national transport agencies, local councils and the ARTA itself, to create a better transport system for Auckland.⁷⁴³ The ARTA is responsible for the planning and development of train services, stations and trains.

Regulatory Institutions and Legislation

⁷³⁹ Source: KiwiRail, *Growing Freight*. Available at: <http://www.kiwirail.co.nz/about-us/kiwirail-the-facts/growing-freight.html> [accessed on 22 July 2013].

⁷⁴⁰ Source: KiwiRail, *2011-12 Annual Report*, p. 23. The segment covers Metro, Tranz Alpine, Northern Explorer, Coastal Pacific and other passenger services.

⁷⁴¹ NZ Transport Agency, *Rail Licensing*, updated on 8 May 2012. Available at: <http://www.nzta.govt.nz/commercial/rail/licensing.html> [accessed on 22 July 2013].

⁷⁴² ARTA, *The ARTA Years 2004 to 2010*. Available at: <http://www.aucklandtransport.govt.nz/about-us/publications/Reports/Documents/ARTA%20Years%20-%20EBook/index.html> [accessed on 22 July 2013].

⁷⁴³ *Ibid.*

The Ministers of Finance and State Owned Enterprises are the shareholding Ministers responsible for the financial performance of KiwiRail, while the Minister of Transport is responsible for rail policy. The Ministry of Transport advises government on transport matters including rail and the administration of relevant transport legislation. Under the *Railways Act 2005*,⁷⁴⁴ the New Zealand Transport Agency, established in July 2008, has the authority to regulate rail activities to ensure safety operation of the rail system. For this purpose, the New Zealand Transport Agency is responsible for issuing rail licences.⁷⁴⁵

A *Rail Network Bill* was introduced on 15 March 2005, however, it was discharged on its second reading.⁷⁴⁶

6. Airports

Mountainous terrain and long distances in New Zealand have facilitated the growth of domestic air travel; most provincial towns have airports, and all major urban centres are linked by air service. The three largest airports in New Zealand by total revenue and volume (aircraft movements, passenger numbers, and freight volumes) are Auckland, Wellington and Christchurch. These airports are the principal international airports.

The largest international airport in New Zealand, Auckland Airport, was corporatised in 1988 and privatised in 1998 when the Government sold its 51 per cent stake in a public float. Later the Auckland City Council sold half its 25.6 per cent of shareholding to private investors. In 2012, the airport handled 14 million passengers, including 7.8 million international passengers. The share of non-aeronautical revenue was about 50 per cent of total revenue generated for the year. Earnings before interest and taxation (EBIT) was NZ\$263 million; a 26 per cent increase from 2011.⁷⁴⁷

Wellington Airport was also partially privatised in 1998. Presently the company is jointly owned by NZ Airport Limited (66 per cent), a subsidiary of Infratil Limited, and the Wellington City Council (34 per cent). In 2012, the airport handled 5.1 million passengers, including 0.78 million international passengers. Total aircraft movements for 2012 was 100 909. EBIT was NZ\$49 million; a 13.5 per cent increase from 2011.⁷⁴⁸

Christchurch Airport became the first international airport operating in New Zealand in 1950 and was corporatised in 1988: jointly owned by the Government (25 per cent) and the Christchurch City Council (75 per cent).⁷⁴⁹ In 2012, the airport handled 5.5 million passengers and 73 184 aircraft movements; a decline of activities at more than three per cent from 2011, due to the impact of earthquake and other events occurring during the period. Operating profits (excluding earthquake costs) for 2012 was NZ\$27 million. Aeronautical services constituted 36 per cent of total revenues generated for the year.

Regulatory Institutions and Legislation

The current regulatory regime for airports in New Zealand is 'light-handed' information disclosure regulation.

Since 1986, airports have been subject to the generic pro-competitive and regulatory provisions in the *Commerce Act*, including the threat of control under Part 4 of the *Commerce Act*. Parts 4 and 5 of the *Commerce Act* provide for the control of the prices, revenues and quality standards of goods and services, where markets fail to deliver competitive outcomes and there is scope for the exercise of substantial market power (s.52G).

In addition, they are also subject to the *Airport Authorities Act 1966* (AAA), which requires airports to operate as commercial undertakings. The AAA and associated regulations include provisions to

⁷⁴⁴ *Railways Act 2005*. Available at: http://www.legislation.govt.nz/act/public/2005/0037/latest/DLM341568.html?search=ts_act_Railways+Act+2005_resel&p=1&sr=1 [accessed on 22 July 2013].

⁷⁴⁵ New Zealand Transport Agency, *Mobile Cranes*. Available at: <http://www.nzta.govt.nz/commercial/forklifts-construction/mobile-cranes.html> [accessed on 22 July 2013].

⁷⁴⁶ New Zealand Parliament, *Legislation – Bills – Rail Network Bill*. Available at: http://www.parliament.nz/en-NZ/PB/Legislation/Bills/a/5/a/00DBHOH_BILL6635_1-Rail-Network-Bill.htm [accessed on 22 July 2013].

⁷⁴⁷ Auckland International Airport Limited, *Auckland Airport Annual Report 2012*.

⁷⁴⁸ Wellington International Airport Limited, *Consolidated Annual Report for the Year Ended 31 March 2012*.

⁷⁴⁹ Christchurch International Airport Limited, *Annual Report 2012*.

address competition concerns and enhance the countervailing market power of airlines.⁷⁵⁰ Under section 4A of the AAA, airport operators are required to consult airline customers when setting charges for identified airport activities, and also when undertaking major capital expenditure. Section 4A allows an airport company – after consulting with substantial customers⁷⁵¹ – to set such charges as it thinks fit for the use of the airport and its services or facilities.

The *Airport Authorities (Airport Companies Information Disclosure) Regulations 1999* were issued pursuant to the AAA, in respect of the three major international airports at Auckland, Wellington and Christchurch. These regulations are administered by the Ministry of Transport. The airport companies are required to disclose: audited segmented financial statements for identified airport activities; passenger charges and charges for identified airport activities (and the methodology used to determine the charges); the basis for allocating assets to identified airport activities; details of asset revaluations; operating costs of identified airport activities; WACC and the methodology and calculations used to determine WACC; numbers of passenger and aircraft movements; interruptions to services; and the number of people employed in identified airport activities.⁷⁵²

Under the 2002 Inquiry into airfield activities, the CCNZ recommended that the Government implement direct regulation of Auckland International Airport charges, under the process set out in the *Commerce Act 1986*.⁷⁵³ In the report, the CCNZ found that the airport had exploited its market power. However, the Government decided not to pursue this course of action.

In April 2007, the then Ministry of Economic Development (now the Economic Development Group of the Ministry of Business, Innovation and Employment) initiated a review of the regulatory provisions under the *Commerce Act*, which found the regulatory regime for the three major international airports (Auckland, Wellington, and Christchurch) inadequate.⁷⁵⁴ This led to the changes in the *Commerce Amendment Act 2008*, which had the objective of replacing the weak information-disclosure system under the AAA with a more meaningful disclosure regime under the *Commerce Act*, coupled with active monitoring of the disclosed information by the CCNZ.⁷⁵⁵

Legislative changes introduced by the *Commerce Amendment Act 2008* transferred responsibilities for information disclosure regulation, in respect to Auckland, Christchurch and Wellington International Airports, to the CCNZ; effective from 14 October 2008. Under Sub-part 11 of Part 4 of the *Commerce Act*, the CCNZ was required to make a determination specifying how information disclosure regulation applies to each of the airport companies no later than 1 July 2010. During the transition the *Airport Authorities (Airport Companies Information Disclosure) Regulations 1999* continued to apply. The *Commerce Act (Specified Airport Services Information Disclosure) Determination 2010*, made by the CCNZ, took effect on 1 January 2011. The three major airports are currently required to disclose: financial statements; asset values and valuating reports; plans and forecasts, and quality performance information in relation to specified airport services on an annual basis; and price-setting information following each price-setting event.⁷⁵⁶ The specified airport services are: aircraft and freight activities;

⁷⁵⁰ Hon. Lianne Dalziel, *Regulatory Control Inquiry into Airfield Activities: Memorandum to Cabinet*, from the Minister of Commerce, May 2003, Paragraph 8. Available at: <http://www.med.govt.nz/business/competition-policy/pdf-docs-library/review-of-regulatory-control-provisions-of-the-commerce-act/airport-regulations/2002-inquiry-into-airfield-activities/Airports-memorandum-to-cabinet-inquiry-into-airfield-activities.pdf/view> [accessed on 22 July 2013].

⁷⁵¹ The AAA defines a *substantial customer* to be a person who pays (or is liable to pay) more than five per cent of an airport's annual revenues in relation to identified airport activities. In addition, a person authorised in writing to represent a number of persons who, in aggregate, pay (or are liable to pay) more than five per cent of an airport's annual revenues in relation to identified airport activities. For example, the Board of Airline Representatives of New Zealand Inc. (BARNZ) is deemed to be a substantial customer.

⁷⁵² *Airport Authorities (Airport Companies Information Disclosure) Regulations 1999*, Regulations 6–7, and Clauses 2-8 of the Schedule.

⁷⁵³ CCNZ, *Final Report, Part IV Inquiry into Airfield Activities at Auckland, Wellington, and Christchurch International Airports*, 1 August 2002.

⁷⁵⁴ Offices of the Ministers of Transport and Commerce, *Cabinet Paper: Commerce Act Review – Airports*, 2007, p. 1. Available at: <http://www.med.govt.nz/business/competition-policy/pdf-docs-library/review-of-regulatory-control-provisions-of-the-commerce-act/airport-regulations/further-work-2007/Cabinet%20paper.pdf> [accessed on 22 July 2013].

⁷⁵⁵ *Ibid.*

⁷⁵⁶ CCNZ, *Airport Information Disclosure Determination*, Decision No. 715 (consolidated version as of 1 March 2012.) Available at: <http://www.comcom.govt.nz/airports-information-disclosure/> [accessed on 22 July 2013].

airfield activities; and specified passenger terminal activities.⁷⁵⁷ Other services such as car-parking and retail are not regulated under Part 4.

Subpart 11 of Part 4 also requires that, as soon as practicable after any new price for a specified airport service is set in or after 2012, the CCNZ reviews the information disclosed and provides a report to the Ministers of Commerce and Transport as to how effective information disclosure regulation is at promoting the purpose of Part 4 in respect of those services.⁷⁵⁸ After Wellington Airport set new prices in March 2012, the CCNZ released a draft report on the airport on 1 November 2012, and a final report on 8 February 2013.⁷⁵⁹ The report concluded that, while the information disclosure provisions have been effective in promoting innovation, quality and pricing efficiency; they have not been effective in limiting excessive profits sought by the airport. After Auckland International Airport set new prices on 7 June 2012, the CCNZ released a draft report in April 2013, which found that the information disclosure regime has influenced the airport's behaviour and limited its ability to make excess profits.⁷⁶⁰ Christchurch airport will be reviewed later in 2013. The CCNZ is required to consult with interested parties in preparing these reports.

The CCNZ made a determination on input methodologies for Auckland, Christchurch and Wellington Airports on 22 December 2010.⁷⁶¹ The determination includes input methodologies for asset valuation, cost allocation, regulatory tax treatment and the cost of capital. Each airport must apply the parts of the input methodology determination relating to cost allocation, asset valuation and treatment of taxation, to the annual information disclosure. Input methodologies do not apply to price-setting, but airports must consult on relevant elements.⁷⁶² Wellington Airport is challenging the CCNZ's input methodologies in the High Court.

The CCNZ is required to apply the relevant input methodologies to set information disclosure requirements. The process for determining input methodologies is set out in section 52V of the *Commerce Act*, with requirements for: publishing a notice of intention at the start to outline the process to follow and set out the proposed timelines; publishing a draft decision during the process; providing interested parties with a reasonable opportunity to give their views; and providing at least one conference (at the discretion of the CCNZ). The CCNZ is also statutorily required to consult with interested parties and to have regard to their views within any timeframes set.⁷⁶³

7. Ports

New Zealand has 14 seaports, the largest of which are Auckland, Lyttelton (Christchurch), Tauranga, Dunedin (Port Chalmers), New Plymouth, Napier and Whangarei.⁷⁶⁴ The Ports of Auckland⁷⁶⁵ handled 3.8 million tonnes of bulk and break bulk cargo and over 808 000 twenty-foot equivalent container units (TEUs) in 2012.⁷⁶⁶ Another leading port, the Port of Tauranga, handled over 18 million tonnes of cargo throughput and over 796 000 TEUs in 2012.⁷⁶⁷ The 14 seaports are responsible for the movement of 99 per cent (by weight) of New Zealand's exports.⁷⁶⁸ Coastal shipping also operates

⁷⁵⁷ *The Commerce Act 1986*, s. 56A(1).

⁷⁵⁸ CCNZ, *Section 56G Report*. Available at: <http://www.comcom.govt.nz/section-56g-reports/> [accessed on 22 July 2013].

⁷⁵⁹ CCNZ, *Media Releases*, 8 February 2013. Available at: <http://www.comcom.govt.nz/airport-services-media-releases/detail/2013/commerce-commission-final-report-on-wellington-international-airport-points-to-excessive-profits> [accessed on 22 July 2013].

⁷⁶⁰ CCNZ, *Media Releases*, 30 April 2013. Available at: <http://www.comcom.govt.nz/media-releases/detail/2013/commission-issues-draft-report-on-auckland-international-airport> [accessed on 22 July 2013].

⁷⁶¹ CCNZ, *Input Methodologies – Airports*. Available at: <http://www.comcom.govt.nz/airports-2/> [accessed on 22 July 2013].

⁷⁶² S Begg, *Effectiveness of Information Disclosure Regulation of Airports*, presentation to the Utility Regulators' Forum, 23 November 2012, slide 5.

⁷⁶³ Detail on the process for input methodologies was set out in the CCNZ's discussion paper on the new legislative provisions: NACC, *Regulatory Provisions of the Commerce Act 1986 – Discussion Paper*, 19 December 2008.

⁷⁶⁴ Other seaports are: Taharoa, Gisborne, Wellington, Nelson, Picton, Timaru, Invercargill (Bluff).

⁷⁶⁵ Ports of Auckland, *About Us*. Available at: <http://www.poal.co.nz/> [accessed on 22 July 2013].

⁷⁶⁶ Ports of Auckland, *Annual Review 2011-12*, p. 8.

⁷⁶⁷ Port of Tauranga, *Annual Report 2012*, p. 1.

⁷⁶⁸ New Zealand Government, *Connecting New Zealand: A Summary of the Government's Policy Direction for Transport*, p. 10. Available at: http://www.transport.govt.nz/ourwork/KeyStrategiesandPlans/Documents/Connecting%20NZ_online_version_9_September.pdf [accessed on 22 July 2013].

as an alternative to road and rail for internal transportation, moving bulk commodities such as oil and cement, in addition to containers. Pacifica Shipping provides a dedicated coastal container service.⁷⁶⁹ Container ships on international voyages carry a significant volume of coastal cargo en route between New Zealand ports.

The port industry underwent corporatisation and some privatisation under the *Port Companies Act 1988* and the *Port Companies Amendment Act 1990*, which provided for the establishment of port companies to take over the ownership and operation of the commercial port-related undertakings of statutory harbour boards. The principal objective of every port company shall be to 'operate as a successful business'.⁷⁷⁰

Port company ownership was initially held by harbour boards but was transferred to the relevant regional council or other local authorities when harbour boards were abolished under local government reorganisation in 1989.⁷⁷¹ All the ports remain majority-owned local government-owned. Seven are wholly owned by a single council, and three are wholly owned by two councils.⁷⁷²

The Port of Tauranga has been listed on the New Zealand Stock Exchange since 1992, but remains under the majority shareholding of the Bay of Plenty Regional Council. It currently holds investments in other New Zealand port stevedoring, marshalling and logistics companies (for example, Northport Limited).⁷⁷³

South Port New Zealand Ltd is the only publicly listed port company that operates a port in the South Island: Port of Bluff.⁷⁷⁴ Its majority shareholder is Environment Southland (the Southland Regional Council).

In July 1996, Lyttelton Port Company was listed on the New Zealand Stock Exchange and now has a 30 per cent public listing.⁷⁷⁵ The Christchurch City Council is the single largest shareholder.

Ports of Auckland Limited was listed on the New Zealand Stock Exchange in 1993 when the Waikato Regional Council floated its 20 per cent shareholding. The other 80 per cent was retained by Auckland regional bodies, which later became Auckland Regional Holdings; the investment arm of the Auckland Regional Council. In July 2005 Auckland Regional Holdings moved to full ownership, buying out private minority shareholders, and was de-listed from the Stock Exchange.⁷⁷⁶

Regulatory Institutions and Legislation

The Act governing port companies (that is, the *Port Companies Act 1988*) is administered by the Ministry of Transport.⁷⁷⁷

The port companies are subject to the economy-wide competition provisions under the *Commerce Act*, administered by the CCNZ. In 2001, the Ministers of Commerce and of Transport commissioned the independent consulting firm, Charles River Associates (CRA), to study the market power of New Zealand's seaports.⁷⁷⁸ The 2002 report indicated that there was evidence of widespread inter-port competition, intra-port competition (particularly in the area of marshalling and stevedoring), and competition between different modes of transport (particularly land, rail and coastal shipping). One of three recommendations for regulatory intervention was a Ministerial directive to the CCNZ to

⁷⁶⁹ Pacifica, *Welcome*. Available at: <http://www.pacship.co.nz/> [accessed on 22 July 2013].

⁷⁷⁰ The *Port Companies Act 1988*, s. 5.

⁷⁷¹ In Canterbury shares went to the Christchurch City Council and other territorial authorities because there were two ports in the region. Gisborne, Marlborough and Nelson were owned by territorial authorities operating as unitary authorities.

⁷⁷² V Billot, *Beyond the Sea: New Zealand's Ports at Risk*, May 2010. Available at: <http://www.converge.org.nz/watchdog/23/13.htm> [accessed on 22 July 2013].

⁷⁷³ Port of Tauranga, *Annual Report 2012*, p. 3.

⁷⁷⁴ South Port NZ, *Welcome*. Available at: <http://www.southport.co.nz/> [accessed on 22 July 2013].

⁷⁷⁵ Lyttelton Port of Christchurch, *A Touch of History*. Available at: <http://www.lpc.co.nz/RP.iasc?Page=N14P3> [accessed on 22 July 2013].

⁷⁷⁶ Ports of Auckland, *Port of Auckland History*. Available at: http://www.poal.co.nz/about_us/history_auckland.htm [accessed on 22 July 2013].

⁷⁷⁷ *Port Companies Act 1988*. Available at: <http://www.legislation.govt.nz/act/public/1988/0091/latest/DLM131683.html> [accessed on 22 July 2012].

⁷⁷⁸ The CRA report titled *Port Companies and Market Power: A Qualitative Analysis* is available at: <http://www.transport.govt.nz/about/publications/Documents/portsreport29april2002final.pdf> [accessed on 22 July 2013].

undertake an inquiry into ports market power issues. However, the Ministers of Commerce and Transport on 20 December 2002 released their conclusion that the area is generally competitive and no government intervention is warranted.

Port company operations are, where relevant, subject to the *Maritime Transport Act 1994*, and maritime and marine protection rules (made by the Minister of Transport) under the Act. Maritime New Zealand is responsible for regulatory oversight and enforcement of the Act and rules, and is the designated authority responsible for oversight of the maritime security regime.⁷⁷⁹

In respect of port operations, a number of health, safety, security and environment requirements are set out in various codes and international conventions.⁷⁸⁰ The *New Zealand Port and Harbour Marine Safety Code 2004* provides best-practice guidelines for port marine operations.

Regulatory Development

In August 2011, the Minister of Transport release a report titled 'Connecting New Zealand' outlining the direction of transport policy over the next decade.⁷⁸¹ In ports, the focus is on port productivity and the improvement of public information on the performance of maritime and freight transport.

In October 2011, the Ministry of Transport released a report on container productivity at New Zealand ports.⁷⁸² Data were provided by six container ports: Ports of Auckland; Port of Tauranga; Port of Napier; CentrePort Wellington; Lyttelton Port of Christchurch; and Port Otago. The report compares productivity of New Zealand ports with Australian and other international ports, and found that container productivity at New Zealand ports compares well with the international comparators.⁷⁸³

In April 2012, the Productivity Commission of New Zealand issued its final report on international freight services.⁷⁸⁴ Its recommendations in relation to ports were the following:

Ports could enhance their abilities to meet the future freight needs of the country if improvements were made to the governance framework for council-controlled port companies by clarifying the purpose of those companies by bringing them into line with the statutory objective for state-owned enterprises; precluding councillors and council staff from being directors of port and airport companies; and establishing a monitoring function to create independent comparative performance information for port owners to consider.

There is scope for a significant lift in workplace productivity at a number of ports. The benefits of high-productivity workplaces include higher real wages, better working conditions, higher levels of job satisfaction, and more competitive and profitable businesses. Most New Zealand port companies, their employees and unions have some work to do to fully achieve these benefits.

⁷⁷⁹ Maritime New Zealand, *Requirements for Ports and Harbours*. Available at: <http://maritimenz.govt.nz/Commercial/Ports-and-harbours/Ports-and-harbours.asp> [accessed on 22 July 2013].

⁷⁸⁰ *Ibid.*

⁷⁸¹ New Zealand Government Official Website, *Media Release: Connecting New Zealand*, Released 31 August 2011. Available at: <http://beehive.govt.nz/release/connecting-new-zealand-released> [accessed on 22 July 2013].

⁷⁸² Ministry of Transport, *Containers Productivity at New Zealand Ports*. Available at: <http://www.transport.govt.nz/ourwork/Sea/Pages/ContainerProductivityNZports.aspx> [accessed on 22 July 2013].

⁷⁸³ Ministry of Transport, *Container Productivity at New Zealand Ports*, October 2011. Available at: http://www.transport.govt.nz/ourwork/Sea/Documents/Container_Port_Productivity_report_final.pdf [accessed on 22 July 2013].

⁷⁸⁴ New Zealand Productivity Commission, *International Freight Transport Services*. Available at: <http://www.productivity.govt.nz/inquiry-content/1508?stage=4> [accessed on 22 July 2013].

European Union

OVERVIEW

The European Union (EU) has 28 Member States. Eight of the Member States are reviewed in detail for this project: France; Germany; Ireland; Italy; the Netherlands; Spain; Sweden; and the United Kingdom. These countries are also members of the Organisation for Economic Cooperation and Development.

Regulatory policy in infrastructure industries within the EU is the responsibility of various Directorates within the EU's executive arm, the European Commission (the Commission). Relevant Directorates include: the Directorate-General for Mobility and Transport (DG Move); the Directorate-General for Energy (DG Ener); the Directorate-General of Competition (DG Comp); the Directorate-General of Communications Networks, Content and Technology (DG CNECT); the Directorate-General of Internal Markets and Services (DG MARKTS); and the Directorate-General of the Environment (DG Env).⁷⁸⁵ The DGs coordinate in the preparation and implementation of Commission decisions.

The Commission develops and enforces Directives. In principle, the Commission must approve all the decisions. In practice some decisions are made by Directorate-Generals.

Background

The EU is an economic and political union of 28 Member States: Austria; Belgium; Bulgaria; Croatia; Cyprus; the Czech Republic; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Ireland; Italy; Latvia; Lithuania; Luxembourg; Malta; the Netherlands; Poland; Portugal; Romania; Slovakia; Slovenia; Spain; Sweden; and the United Kingdom (UK).⁷⁸⁶

The EU is constituted by a series of treaties which set out its legislative competence and institutional arrangements. The main treaties (the Treaties) are: the Treaty of Lisbon signed on 13 December 2007; the treaty of Nice signed on 26 February 2001; the Treaty of Amsterdam signed on 2 October 1997; the Treaty on European Union – Maastricht Treaty signed on 7 February 1992; the Single European Act signed on 17 February 1986 (Luxembourg) and 28 February 1986 (The Hague); the Merger Treaty – Brussels Treaty signed on 8 April 1965; the Treaties of Rome (EEC and EURATOM treaties) signed on 25 March 1957; and the Treaty establishing the European Coal and Steel Community signed on 18 April 1951. The Treaty establishing the European Coal and Steel Community expired in 2002.⁷⁸⁷

Legislative power is shared between the European Union and its Member States in the form of: concurrent or shared powers (most common); exclusive Community powers; and supporting powers. Two principles underlie this distribution of power. The first is the principle of 'subsidiarity'. This principle requires that 'decisions are taken as closely as possible to the citizen'.⁷⁸⁸ That is, in areas which do not fall within its exclusive competence, the European Community will only undertake a proposed action if it 'cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community'.⁷⁸⁹ The second governing principle is 'proportionality'; requiring that an action undertaken by the Community should not go beyond what is necessary to achieve the objectives of the Treaty on European Union.

The main legislative instruments of the EU are: Directives; Regulations; and Decisions. Directives are binding on Member States. However national authorities may decide how the objective can best be incorporated into their country's legal system. Regulations are enforceable in all Member States, and do not require adoption by EU Members into national law. Decisions confer rights or impose obligations on individual Member States or citizens.

⁷⁸⁵ European Commission, *Departments (Directorates-General) and Services*. Available at: http://ec.europa.eu/about/ds_en.htm [accessed on 9 July 2013].

⁷⁸⁶ European Commission, *List of Countries*. Available at: http://europa.eu/about-eu/countries/index_en.htm [accessed on 9 July 2013].

⁷⁸⁷ European Union, *EU Treaties*. Available at: http://europa.eu/about-eu/basic-information/decision-making/treaties/index_en.htm [accessed on 9 July 2013].

⁷⁸⁸ European Commission, *Treaty of Lisbon: Questions and Answers*. Available at: http://europa.eu/lisbon_treaty/faq/index_en.htm [accessed on 9 July 2013].

⁷⁸⁹ European Commission, *Treaty on European Union*. Available at: <http://eur-lex.europa.eu/en/treaties/dat/11992M/hlm/11992M.html> [accessed on 9 July 2013].

The principal institutions of government of the EU are: The European Parliament, The Council of the European Union, The European Commission and the European Court of Justice (ECJ).

The European Parliament, together with the Council of the European Union, is responsible for passing laws.⁷⁹⁰ The Parliament is elected by the citizens of Member States every five years. The present parliament has 752 members from the 27 EU countries. Parliamentary seats are, as a general rule, shared out proportionately to the population of each Member State.⁷⁹¹

Each Member State decides on the form of its election. However, all adopt common principles: equality between the sexes and a secret ballot. In all Member States, the voting age is 18, with the exception of Austria, where it is 16.⁷⁹²

The Council of the European Union (formerly known as the 'Council of Ministers') (the Council) shares legislative responsibility with the Parliament. The Council and the Parliament share equal responsibility for adopting the EU budget. The Council also concludes international agreements that have been negotiated by the Commission. According to the Treaties, the Council has to take its decisions either by a simple majority vote, a 'qualified majority' vote or unanimously, depending on the subject to be decided. The Council has to agree unanimously on important questions such as amending the Treaties, launching a new common policy or allowing a new country to join the Union. In most other cases, qualified majority voting is used. This means that a Council decision is adopted if a specified minimum number of votes are cast in its favour. The number of votes allocated to each EU country roughly reflects the size of its population.⁷⁹³ The European Commission (EC)⁷⁹⁴ acts as the EU's executive arm. Its main roles are to: set objectives and priorities; propose legislation to Parliament and Council; manage and implement EU policies and the budget; enforce European Law jointly with the Court of Justice; and represent the EU outside Europe (for example, this includes negotiating trade agreements between the EU and other countries).

The Commission consists of 27 members, one from each EU country. It is assisted by about 23 000 civil servants. The Commissioners do not represent their national governments. Rather, they act in the interests of the EU. In contrast, the Council consists of leaders from Member States who represent national interests.

Commissioners are appointed every five years. The European Council nominates a candidate to be President of the Commission. The candidate must be approved by a majority of members of the European Parliament. If the candidate is rejected, the Council has one month to propose another. The president-elect chooses the commissioners (and their policy area) from candidates put forward by EU countries.

The Court of Justice of the European Communities (the Court of Justice) is located in Luxembourg. It consists of one judge from each EU country, assisted by eight advocates-general. Judges are appointed by joint agreement of the governments of the member states for a renewable term of six years. The Court of Justice is an independent institution. Its role is to ensure that EU law is complied with, and that the Treaties are correctly interpreted and applied.⁷⁹⁵

APPROACH TO COMPETITION AND REGULATION BY THE EUROPEAN COMMISSION

EU regulatory arrangements for network industries are set through high-level policies (Directives) that outline EU objectives. National Regulatory Authorities (NRAs) determine how to implement the directives at a national level. European Regulations may also be issued by the EC. These must be complied with by Member States in the same way as national laws.

⁷⁹⁰ EU legislation is adopted jointly by the European Parliament and the Council under a co-decision procedure.

⁷⁹¹ European Commission, *European Parliament*. Available at: <http://www.europarl.europa.eu/meps/en/search.html;jsessionid=3C910636D4DB37B53205648C4880827A.node1> [accessed on 9 July 2013].

⁷⁹² *Ibid.*

⁷⁹³ European Commission, *How Does the EU Work*. Available at: http://europa.eu/abc/12lessons/lesson_4/index_en.htm [accessed on 9 July 2013].

⁷⁹⁴ European Commission, *About the European Commission*. Available at: http://ec.europa.eu/about/index_en.htm [accessed on 9 July 2013].

⁷⁹⁵ European Commission, *How Does the EU Work*. Available at: http://europa.eu/abc/12lessons/lesson_4/index_en.htm [accessed on 9 July 2013].

Because directives are often general in nature, they can be implemented in a different manner in each Member Country. For example, both Railways and Communications Directives provide that access charges should either reflect marginal cost or be cost-based. In practice, some Member States include additional 'mark-up' elements within a regulated access charge to recover 'external' costs. The Commission enforces directives by issuing infringement proceedings against Member States who fail to adopt Directives into national law, or who fail to comply with European Regulations. The issue is determined by European Court of Justice. The Commission cannot intervene in decisions made by national courts in relation to disputes under EU laws.

The European Commission has 33 departments (Directorates-General (DGs)).⁷⁹⁶ Regulatory policy in network industries is the responsibility of:

- The Directorate-General of Mobility and Transport (DG MOVE) which covers rail, air, road and maritime transport.
- The Directorate-General of Energy (DG ENER).
- Regulation of telecommunications is the joint responsibility of the Directorate-General of Competition (telecommunications section) and Directorate-General of Communications Networks, Content and Technology (CNECT); postal services are the responsibility of the Directorate-General for Internal Market and Services;⁷⁹⁷ and water policy is dealt with by the Directorate-General for the Environment.

In addition, the Commission, through DG Comp, deals with competition matters, including enforcing European competition law. This includes: European merger regulation; prosecuting anti-competitive behaviour; and monitoring State Aid to regulated sectors. DG Comp can also launch sector-wide enquiries into competition in specific regulated sectors, and recently completed such an investigation in the energy sector.

Regulatory Activities

The European Commission develops policies in order to regulate infrastructure. In relation to specific policy initiatives, the Commission may publish a Green Paper for public consultation. User groups and other associations will have an opportunity to make submissions. After consideration of these submissions, the Commission will finalise the policy proposal.⁷⁹⁸

In relation to the development of a common access framework, the Commission generally undertakes a public consultation with key stakeholders, including representatives of Member States. The purpose of the consultation is to gather additional information and possibly to reach informal consensus among the stakeholders. Following this consultation, an impact assessment of the proposed Directive is undertaken and published. The policy must then be approved by a Committee of experts from Member States.⁷⁹⁹ During March 2013, for example, the European Commission commenced a public consultation to discuss the competition policy issue of EU merger control, which is expected to conclude in June 2013.⁸⁰⁰

Before submitting a document to Commissioners, the department responsible must consult other departments which are associated or concerned with the matter. In the event of a disagreement, the department must attach the differing views expressed by other departments. The Legal Service must be consulted on all proposals.⁸⁰¹

⁷⁹⁶ European Commission, *Departments (Directorates-General) and Services*. Available at: http://ec.europa.eu/about/ds_en.htm [accessed on 9 July 2013].

⁷⁹⁷ European Commission, *Directorate-General for Internal Market and Services: Our Departments*. Available at: http://ec.europa.eu/dgs/internal_market/departments/index_en.htm [accessed on 24 December 2012].

⁷⁹⁸ Europa, *Synthèse de la Législation*. Available at: http://europa.eu/legislation_summaries/glossary/green_paper_en.htm [accessed on 9 July 2013].

⁷⁹⁹ European Union, *European Commission*. Available at: http://europa.eu/about-eu/institutions-bodies/european-commission/index_en.htm [accessed on 9 July 2013].

⁸⁰⁰ European Commission, *Competition: Public Consultations*. Available at: http://ec.europa.eu/competition/consultations/2013_merger_regulation/index_en.html [accessed on 9 July 2013].

⁸⁰¹ European Commission, *Rules of Procedure of the European Commission*. Available at: http://europa.eu/legislation_summaries/institutional_affairs/institutions_bodies_and_agencies/o10004_en.htm [accessed on 9 July 2013].

The Commission has four internal procedures that can be used to adopt proposals, communications and management or administrative decisions. The Commission meeting is the 'ultimate' procedure and is used for major proposals requiring oral discussion within the Commission. Other procedures used to adopt decisions are:⁸⁰²

Written procedures: agreement may be obtained by a written procedure. If none of the Members has made a reservation and maintained it up to the time limit set, the proposal stands adopted by the Commission.

Empowerment: the Commission may empower one or more of its Members to take management or administrative measures on its behalf. It may also task one or more of its Members to adopt the definitive text of an act or a proposal to be presented to the other institutions once its content has been defined following discussion.

Delegation and sub-delegation: the Commission may delegate the adoption of management or administrative measures to the directors-general, acting on its behalf, who may sub-delegate to their heads of department.

The decision is published in the Official Journal of the European Union. The proposed directive is then forwarded to the European Parliament and to the Council.

Enforcement Activities

The Commission monitors individual EU governments to ensure that EU law is applied within each member country.⁸⁰³

The Commission may take action if any EU country: fails to report what measures it has taken to incorporate EU directives into its national law; or is suspected of breaching EU Treaty provisions, regulations or directives.

The first step is to contact the national authorities. If an appropriate solution is not found, the Commission can do one of the following:

- Open formal infringement proceedings, and send a 'letter of formal notice'. The 'letter of formal notice' sets out the Commission's view that the specific transposition of a Directive may not conform to European law. Often, this initial step will be sufficient for the matter to be resolved. If the matter is not resolved, the Commission can send a 'reasoned opinion' to the Member State. The 'reasoned opinion' states an intention to begin infringement procedures. This is intended to 'confront the Member State' with the facts surrounding the alleged infringement.⁸⁰⁴
- Refer the case to the European Court of Justice for a ruling.
- Seek the imposition of financial penalties by the European Court of Justice if the national authorities do not comply with the Court's ruling. Financial penalties may be imposed until the infringement has been remedied.⁸⁰⁵

Investigations can only be directed toward Member States and not the relevant NRA or a specific company, because European law only applies to Member States.

The European Court of Justice does not have power to annul a national provision which is incompatible with Community law, nor to order the Member State to pay damages to an individual adversely affected by an infringement of Community Law. It is up to a Member State against which the Court of Justice gives judgment to take whatever measures are necessary to comply with the European Court of Justice.⁸⁰⁶

⁸⁰² *Ibid.*

⁸⁰³ European Commission, *Applying EU Law*. Available at: http://ec.europa.eu/atwork/applying-eu-law/index_en.htm [accessed on 9 July 2013].

⁸⁰⁴ European Commission (EC), *Application of EU Law: Infringements of EU Law*. Available at: http://ec.europa.eu/eu_law/infringements/infringements_en.htm [accessed on 9 July 2013].

⁸⁰⁵ Under the Treaties, the Commission is responsible for enforcing Community law. A complaint may be made against a Member State about any law, regulation, administrative action or administrative practice which is inconsistent with Community law. The Commission decides whether or not further action should be taken. European Commission, *Exercise Your Rights*. Available at: http://ec.europa.eu/eu_law/your_rights/your_rights_en.htm [accessed 9 July 2013].

⁸⁰⁶ *Ibid.*

EUROPEAN COMMISSION REGULATORY ROLE BY INDUSTRY OR SECTOR

1. Energy

A number of Directives and regulations are the key pieces of legislation establishing the internal markets of electricity and gas in the EU.

The first stage of developing the internal energy markets came with the adoption of two Directives, one on the electricity market (96/92/EC) and the other on the gas market (98/30/EC), in 1996 and 1998 respectively.⁸⁰⁷ The Directives place obligations on national regulators to monitor the development of competition, levels of investment and, where appropriate, the level of prices, in these markets. They also require Member States to legislate to impose public service obligations on energy companies.

The next move to liberalise the energy markets was the adoption of two new Directives (2003/54/EC and 2003/55/EC), repealing the two previous Directives.⁸⁰⁸ Directive 2003/54/EC concerning common rules for the internal market in electricity states that, 'for competition to function, network access must be non-discriminatory, transparent and fairly priced'. Member States are directed to ensure that distribution and transmission systems are operated through legally separate entities. There is no requirement of separate ownership. The Directive aims to ensure that the management structures of distribution or transmission system operators are separate and independent from that of generation and supply companies. Directive 2003/55/EC concerning common rules for the internal market in natural gas introduced similar provisions to the gas industries. Under the Directives, the energy markets for non-household consumers would be open to competition by 1 July 2004; and the markets for all consumers by 1 July 2007.

The Directives were accompanied by regulations governing the energy sector. The *Regulations on Conditions for Access to the Natural Gas Transmission Networks* (1228/2005/EC) set rules for transmission of gas between Member States. These include service conditions for third party network access; criteria and methodologies for setting network access tariffs; capacity allocation mechanisms and balancing rules. The *Regulation on Cross-border Exchanges in Electricity* (1228/2003/EC) sets rules for transmission of electricity between Member States. The regulation establishes a compensation mechanism for cross-border electricity flows; sets harmonised principles on transmission charges; and establishes rules on allocation of available capacities of interconnections between national transmission systems.

In September 2007 a new legislative package was proposed for EU gas and electricity markets (known as the 'third package of energy reforms'). Measures proposed in this package include:

- separation of production and supply for transmission networks (ownership unbundling is preferred, however, an 'independent system operator' is also contemplated);
- establishing an Agency for the cooperation of National Energy Regulators, with binding decision powers, to aid co-ordination;
- strengthening the independence of national regulators in Member States; and
- promoting cross-border collaboration and investment through a new European Network for Transmission System Operators (including developing joint market and technical codes).

At its second reading on 22 April 2009, the European Parliament voted to adopt the energy reform package.⁸⁰⁹ The final agreement reached maintained key elements of the original proposal with some compromises made to strengthen the position of NRAs; and to strengthen consumer protection and

⁸⁰⁷ They refer to: Directive 96/92/EC of the European Parliament and the Council of 19 December 1996 concerning common rules for the internal market in electricity; and Directive 98/30/EC of the European Parliament and the Council of 22 June 1998 concerning common rules for the internal market in natural gas.

⁸⁰⁸ They refer to: Directive 2003/54/EC of the European Parliament and the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing directive 96/92/EC; and Directive 2003/55/EC of the European Parliament and the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC. Refer to European Union, *Energy Directives: Internal Market of Electricity and Natural Gas*. Available at: http://ec.europa.eu/energy/infringements/doc/infringements_energy_directives.pdf [accessed on 9 July 2013].

⁸⁰⁹ European Parliament, *MEPs Give Green Light to Further Liberalisation of EU Electricity and Gas Markets*, Press Release, 22 April 2009. Available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+IM-PRESS+20090421IPR54056+0+DOC+XML+V0//EN> [accessed on 9 July 2013].

consumer rights. Some forms of vertical integration are permitted under strict rules. It entered into force on 3 September 2009.

Since 1 July 2007, energy markets in the European Union (EU) have been fully opened to competition, meaning: all customers, including households, are free to choose their suppliers. However, some Member States continue to regulate retail prices, arguing that regulation is a tool to protect vulnerable consumers.

In 2007, the European Regulators Group for Electricity and Gas (EREG) published a position paper which concluded that retail price regulation should be abolished, as it distorts the functioning of the market and jeopardises both security of supply and efforts to fight climate change.⁸¹⁰ In the EREG's view, the need to protect vulnerable customers should not be confused with the need to regulate tariffs for all customers. Furthermore, the EREG contends that regulated retail energy prices are, in the longer term, incompatible with well-functioning, fully open markets. Thus the EREG called for Member States to publish (by July 2008) a plan for removing retail price regulation, while protecting vulnerable customers.

On 8 September 2010, the EREG published a report showing that more than 80 per cent of retail customers across all market segments remain on regulated prices.⁸¹¹ The EREG was dissolved by the European Commission (Commission Decision of 16 May 2011 repealing Decision 2003/796/EC) with effect from 1 July 2011. Some functions were assigned to a new organisation, the Agency for the Cooperation of Energy Regulators (ACER).⁸¹²

The ACER was founded in March 2011. Its missions and tasks are defined by the Directives and Regulations of the Third Energy Package, especially Regulation (EC) 713/2009. In 2011, the ACER received additional tasks under Regulation (EU) Number 1227/2011 on wholesale energy market integrity and transparency (REMIT).

The overall mission of the ACER is to complement and coordinate the work of national energy regulators at EU level, and to work towards the completion of the single EU energy market for electricity and natural gas. The ACER plays a central role in the development of EU-wide network and market rules with a view to enhance competition. It coordinates regional and cross-regional initiatives which favour market integration. It monitors the work of European networks of transmission system operators (ENTSOs) and their EU-wide network development plans. Finally, it monitors the functioning of gas and electricity markets in general, and of wholesale energy trading in particular.⁸¹³

The ACER works with the not-for-profit Council of European Energy Regulators (CEER). The ACER focuses on cross-border energy-market development and oversight. The CEER pursues a broader variety of energy-market issues.

On 3 March 2010, the European Commission proposed a ten-year strategy titled *Europe 2020*. In relation to climate change and energy, it proposed to reduce greenhouse gas emissions by 20 per cent (or 30 per cent, if 'the conditions are right'), compared to 1990 levels. Other proposals included: 20 per cent of energy generated from renewable sources; and a 20 per cent increase in energy efficiency by 2020.⁸¹⁴

Regulatory Matters within the Scope of the Directorate-General for Energy

The Directorate-General for Energy (DG Ener) is a service unit of the European Commission. It is responsible for the development of energy policies, including the development of common-access

⁸¹⁰ EREG, *Position Paper on End-user Price Regulation*, E07-CPR-10-03, 18 July 2007. Available at: http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/CEER_PAPERS/Customers/2007/E07-CPR-10-03_E-UPriceReg_0.pdf [accessed on 9 July 2013].

⁸¹¹ EREG, *Status Review of End-User Price Regulation as of 1 January 2010*, Ref: E10-CEM-34-03, 8 September 2010, p. 24. Available at: http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/CEER_PAPERS/Customers/Tab1/E10-CEM-34-03_price_per_cent20regulation_8-Sept-2010.pdf [accessed on 9 July 2013].

⁸¹² Agency for the Cooperation of Energy Directors (ACER), *Home*. Available at: <http://www.acer.europa.eu/Pages/ACER.aspx> [accessed on 9 July 2013].

⁸¹³ ACER, *Mission and Objectives*. Available at: http://www.acer.europa.eu/The_agency/Mission_and_Objectives/Pages/default.aspx [accessed on 1 July 2013].

⁸¹⁴ European Commission, *Europe 2020 Targets*. Available at: http://ec.europa.eu/europe2020/targets/eu-targets/index_en.htm [accessed on 1 July 2013].

frameworks. Other key responsibilities include: investigating incorrect transpositions of community law by Member States; and managing financial support programs for the energy sector. The Directorate-General's aims include:

- 'Contributing to setting up an energy market providing citizens and business with affordable energy, competitive prices and technologically advanced energy services;
- Promoting sustainable energy production, transport and consumption in line with the EU 2020 targets and with a view to a 2050 decarbonisation objective; and
- Enhancing the conditions for secure energy supply in a spirit of solidarity between Member States.⁸¹⁵

As noted previously, the Commission must approve decisions that are made by Directorates. In practice, some decisions are taken by the Director-General of Energy, while others need to be approved by the full College of Commissioners.

The general approach to decision-making is 'bottom-up', with agreement at the case-team level being reached in the first instance, then proceeding up to the Director-General, and finally to the Commissioners. The high-level principle adopted by the Commission, in respect of the publication of information and its underlying reasoning, is to be as transparent as possible.

Strategic Cross-border Infrastructure Planning

The EU aims to complete 'strategic energy networks' and storage facilities by 2020. It concerns energy production, transmission and storage. The Commission has identified 12 priority corridors or areas for electricity, gas, oil and CO₂ transport networks, and is promoting projects to implement them. In large part, these projects involve the addition of capacity at the borders between Member States, and therefore fall outside of the competency of any one Member State.⁸¹⁶

*Sustainable Development in the Energy Sector*⁸¹⁷

The EU's dependence on imported energy remained constant at around 45 per cent in the 1990s. Between 2000 and 2011, energy dependence increased to reach 53.84 per cent in 2011.

The demand for energy fell between 2006 and 2009, but started to increase again in 2010. A decrease in the consumption of solid fuels has been offset by greater use of natural gas and renewable energy, though the use of natural gas has also declined since 2010. The share of renewable energy in EU electricity production grew from 13.61 per cent in 2000 to 20.44 per cent in 2011. The share of renewable energy in transport increased between 2006 and 2010 to 4.7 per cent of transport fuel. Cogeneration (combined heat and power (CHP)) has increased to 11.7 per cent of gross electricity generation in 2010.

The implicit tax rate on energy increased in most EU countries between 2000 and 2010, except in Denmark, Spain, France, Italy, Hungary, Austria, and Finland, where it fell. The Eurostat notes that the decrease in those countries is inconsistent with the EU objective to shift taxation from labour to energy consumption in order to promote environmental objectives and to increase employment.

Third-Party Access

The internal market rules for electricity and gas, regulate third-party access for all transmission and distribution infrastructures, and for LNG facilities. Operators of infrastructure must grant third parties non-discriminatory access. A regulated return is received on the assets. Since 3 March 2011, infrastructure operators have been subject to unbundling legislation. However, NRAs may exempt new investment for a limited time where the project is risky and cannot otherwise be realised. This includes projects such as the development of cross-border gas pipelines, LNG terminals, and cross-border electricity interconnectors (Article 17 of the Electricity Regulation (EC) 714/2009 and Article 36

⁸¹⁵ European Commission, *Mission Statement of DG Energy*. Available at: http://ec.europa.eu/dgs/energy/mission_en.htm [accessed on 1 July 2013].

⁸¹⁶ European Commission, *Energy Infrastructure*. Available at: http://ec.europa.eu/energy/infrastructure/index_en.htm [accessed on 1 July 2013].

⁸¹⁷ European Commission Eurostat, *Climate Change and Energy*. Available at <http://epp.eurostat.ec.europa.eu/portal/page/portal/sdi/indicators/theme6> [accessed on 1 July 2013].

of the Gas Directive 2009/73/EC). New investment may also be exempted from EC regulations that provide for tariffication and congestion rents.⁸¹⁸

2. Telecommunications

A number of Directives are relevant to the regulation of telecommunications.

The *Electronic Communications Framework Directive* (2002/21/EC) is the primary regulatory instrument and provides the general framework for the regulation of electronic communications infrastructure and associated services. The directive was amended by Directive 2009/140/EC.

The *Authorisation Directive* (2002/20/EC) harmonises authorisations for market access for providers across the EU. The directive was amended by Directive 2009/140/EC.

The *Universal Services Directive* (2002/22/EC) establishes a minimum level of availability and affordability of basic communication services. The directive was amended by Directive 2009/136/EC.

The *Access Directive* (2002/19/EC) deals with setting conditions of access to, and interconnection of, electronic communications networks and associated facilities. The directive was amended by Directive 2009/140/EC.

The *Privacy Directive* (97/66/EC) sets out rules for the protection of privacy and personal data processed in communications over public networks.

The Authorisation Directive requires Member States to establish a general authorisation for all types of electronic communication services and networks, including: fixed and mobile networks and services; data and voice services; and broadcasting transmission networks and services. The Directive limits the type of conditions which may be included in general authorizations. It does this to ensure service providers are treated in a non-discriminatory, objective, transparent and proportionate fashion by national regulatory authorities.

The regulatory framework also requires Member States to encourage the use of standards as a means of ensuring interoperability of service. In addition; because providers of communication networks need to install infrastructure such as cables, antennas and masts, often on public buildings or land; the framework requires public authorities to consider all rights-of-way requests without delay, and in a transparent and non-discriminatory manner. In 2009, the directives were amended. These changes focused on issues relating to cross-border undertakings. For example, applications were streamlined, and harmonisation relating to radio frequencies was enhanced. The amendments also expanded requirements relating to: information gathering and publishing by NRAs; enhanced penalty powers; and introducing hard deadlines for transitioning to the regulatory framework.

The *Access Directive* requires NRAs to carry out regular market analyses in order to determine whether one or more operators have significant power in a market, and to impose obligations on any operators identified. Obligations imposed can relate to: cost recovery and price controls; transparency; non-discrimination; and good faith in negotiating access. The *Access Directive* applies to all forms of communication networks carrying publicly available communications services. These include: fixed and mobile telecommunications networks; networks used for terrestrial broadcasting; cable TV networks; and satellite and Internet networks used for voice, facsimile data, and image transmission. The *Access Directive* also gives NRAs the power to impose accounting separation in activities relating to interconnection/access.

In 2009 the *Access Directive* was amended to expand the capacity for NRAs to be involved in the separation of vertically integrated entities. The amendments also required NRAs to regulate access to ancillary services such as facilities access. Requirements to consult with BEREC in relation to issues of access were also introduced.

Article 7 of the 2002 *Electronic Communications Framework Directive* (2002/21/EC) is the main EU regulatory instrument governing electronic communications infrastructure and associated services.⁸¹⁹ It sets out Community consultation procedures that contribute to the development of a single market in telecommunications by ensuring a consistent and transparent application of the Directives across

⁸¹⁸ European Commission, *Energy Infrastructure: Exemptions for Infrastructure*. Available at: http://ec.europa.eu/energy/infrastructure/exemptions/exemptions_en.htm [accessed on 1 July 2013].

⁸¹⁹ European Commission, *EU Telecommunications Legislation in Force*. Available at: <http://ec.europa.eu/competition/sectors/telecommunications/legislation.html> [accessed on 1 July 2013].

the Member States. The procedures require the NRAs in Member States to conduct national and Community consultation (via BEREC) on any regulatory measures they intend to take. The NRAs must analyse their relevant electronic communications markets in consultation with the industry, and propose appropriate regulatory measures to address market failures that might be hampering competition (for example, measures to address the existence of a significant market power in a particular market).⁸²⁰ These findings and proposals of NRAs must be notified to the Commission and other national authorities. The Commission then assesses these findings and proposals, which may require the withdrawal of proposed regulatory measures that are incompatible with EU law.

Therefore, the NRAs in Member States are obliged to notify all elements of regulatory measures, as part of their Community Consultation, to BEREC.

In 2009 a number of amendments were made to the *Framework Directive*. The primary change to the framework for EU telecommunication regulation is the creation of BEREC (detailed below). The amendments also expand the responsibilities of NRAs when dealing with entities that have significant market power, by requiring NRAs to undertake analysis and to involve BEREC if an entity operates across multiple EU countries.

The goals of the *Framework Directive* were expanded to incorporate the European Convention for the Protection of Human Rights and Fundamental Freedoms. The amendments enhance the right to equal service quality for groups, including disabled end-users, and immigrants.

Regulatory Institutions and Legislation

On 25 November 2009, the European Parliament created the Body of European Regulators for Electronic Communications (BEREC).⁸²¹ The BEREC replaces the European Regulators' Group and is the main body for NRAs to exchange expertise and best practices. The BEREC also provides NRAs and EU institutions with opinions and analysis in the telecommunications industry.

The BEREC's decisions are made by a board. The board consists of the head of each member state's telecommunications NRA. Board decisions are made by a two-thirds majority, except when otherwise specified by the legislation. Board members must act independently of their respective governments and the European Commission (BEREC, Article 4).

Legislation provides specific tasks for the BEREC, such as commenting on draft measures undertaken by NRAs and the Commission, facilitating cross-border harmonisation and dispute management, and monitoring and analysis duties.

The legislation further requires the BEREC to consult with interested parties in relation to the preparation of reports and recommendations. Consultation materials and decisions are made public, except where material is confidential. NRAs are also required to provide the BEREC with information upon request (the BEREC, Article 19).

Regulatory Matters within the Scope of the European Commission

DG Communications Networks, Content and Technology (DG Connect) shares a joint competency with DG Competition in the application of the *ex ante* framework for regulation of telecommunications. Because of this structure, all decisions need to be approved by both the Director-General of Competition and the Director General of Communication Networks, Content and Technology. When an NRA lodges a proposed regulatory measure, DG Connect and DG Competition have one month to assess the proposal. At the end of the month, the Commission can do one of the following:

- Approve and/or comment on the proposal.
- Open an in-depth investigation which lasts a further two months. This may occur where the Commission considers the proposal would create a barrier to the single market, or has serious doubts as to its compatibility with Community law. The NRA must respond to the Commission's concerns.

⁸²⁰ The starting point for NRAs' market analysis is the European Commission's Recommendation on relevant markets and the Guidelines on market analysis and assessment of significant market power. See EurLex, 52002XC0711 (02). Available at: [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52002XC0711\(02\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52002XC0711(02):EN:NOT) [accessed on 1 July 2013].

⁸²¹ European Commission, *Regulation (EC) No 1211/2009 of the European Parliament and the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office*. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:337:0001:0010:EN:PDF> [accessed on 1 July 2013].

- Veto the proposal (for example, based on the proposed market definition or dominance analysis).⁸²²

The Commission can also launch an *ex officio* investigation against a Member State if there has been an incorrect transposition of European Law. As a consequence of European law only applying to Member States, these investigations can only be directed toward the Member State, and not to the relevant NRA or a specific company.

*Additional Roles of DG Competition's Telecommunications Unit*⁸²³

Anticompetitive Behaviour

The Telecommunications Unit has a role in prosecuting anticompetitive behaviour infringing Articles 81 and 82 (or in combination with Article 86) of the EC Treaty.

Monitoring State Aid

State Aid is any aid granted by a Member State (or through State resources) which distorts competition by favouring certain undertakings, and which affects trade between Member States. Examples of support given to the industry include preferential tax treatment, State guarantees and capital injections. This is particularly important for broadband and digital telecommunications. The Commission has recently adopted new guidelines for state aid to broadband.⁸²⁴

Merger Regulation

The Telecommunications Unit has a role in enforcing the Merger Regulation in telecommunications markets under the European Community Merger Regulation. In dealing with mergers, restrictive agreements and abusive conduct in telecommunications, DG Competition cooperates closely with national competition authorities through the European Competition Network, and with the national regulatory authorities, through the European Regulators Group (ERG).

Once formal notification has occurred, the Commission has bilateral contact with the NRA within the month it has to decide. This contact may involve formal requests for information, in which case the NRA has three working days to respond.

If the Commission expresses 'serious doubts' about a proposed measure, the NRA has a responsibility under the *Framework Directive* to take the 'utmost account' of the Commission's comments. However, if accommodation cannot be reached, the Commission will launch a second-phase investigation, and has a further three months in which it can consider the decision. In the circumstances where the Commission considers a veto, it will prepare a draft veto decision which is submitted to the Communications Committee for approval. The Committee comprises representatives of Member States. A decision to veto an NRA proposal must be approved by the full College of European Commissioners.

The *EU Framework Directive* requires NRAs to consult with relevant parties during their decision-making processes. In reviewing an NRA's proposal, the Commission will seek access to submissions made to the NRA during this consultation. The Commission does not consult directly with those parties affected by the NRA's proposed measure during its initial assessment process.

However, in the second phase of proceedings, after the publishing of a 'serious doubts' letter, the Commission invites interested parties to provide written submissions for its consideration. The Commission may meet with individual companies during this second phase of proceedings. For example, if an NRA wants to remove regulation from a particular relevant market and the Commission raises serious doubts, then it would be typical for the Commission to meet with both the companies concerned and any federations/associations representing alternative network operators during this time.

Despite this consultation, complaints have been raised by companies that the overall process is non-transparent and that certain regulations imposed by the *EU Framework Directive* are disproportionate.

⁸²² European Commission, *EU Telecommunication Legislation in Force*. Available at: <http://ec.europa.eu/competition/sectors/telecommunications/legislation.html> [accessed on 1 July 2013].

⁸²³ *Ibid.*

⁸²⁴ Europa, *State Aid: Commission Adopts New Broadband Guidelines*. Available at: http://europa.eu/rapid/press-release_IP-12-1424_en.htm [accessed on 11 July 2013].

In 2010 for example, Vodafone and four other telecommunications companies, pursued such a complaint through the courts regarding certain provisions of Regulation Number 717/2007 in the United Kingdom on the grounds that its 'legal basis is inadequate, it is disproportionate and that it offends against the principle of subsidiarity'.⁸²⁵

The Commission's interactions with NRAs outside these processes, for example, within the European Regulators' Group, are seen as particularly important in relation to the discussion of current issues, such as broadband-access issues.

*Information Disclosure and Confidentiality*⁸²⁶

According to Article 5 of the *Framework Directives*, Member States are required to give NRAs the power to access all the information from electronic communication networks and service providers, including financial information, which is necessary for NRAs to ensure conformity with the provisions of, or decisions made in accordance with, the *Framework Directive*.

The NRAs are then expected to provide the European Commission, after a reasoned request, with the information necessary for it to carry out its tasks under the EC Treaty. In addition, Member States are to ensure that NRA information is available to an authority in the same, or in another, Member State.

Where information is considered confidential by an NRA, in accordance with European Community and national rules based on business confidentiality, the Commission and the NRA concerned are expected to maintain that confidentiality. Having said this, in relation to the issue of what information is treated as commercial-in-confidence, Article 7 of the *Framework Directive* requires the majority of documents submitted and relied upon in an NRA decision, to be made accessible to the public.

Decision-making and Reporting

According to Article 20 of the *Framework Directive*, in the event of a dispute arising in connection with obligations arising under the *Framework Directive*, the NRA concerned shall, at the request of either party, issue a binding decision to resolve the dispute in the shortest possible timeframe; and in any case within four months, except in exceptional circumstances.⁸²⁷

The Directors-General of Competition and of Information Society approve, in principle, all decisions of the Directorates. In practice, some decisions are taken by the Directors-General, while others need to be approved by the full College of Commissioners. For example, if there is a 'no comments' response to the proposal of an NRA, the decision will be taken by the Directors-General; while a veto decision must always be considered by the full College of Commissioners.

The general approach to decision-making is 'bottom-up', with agreement at the case-team level being reached in the first instance, then proceeding up to the Directors-General, and finally to the Commissioners. The case team typically prepares a case note containing a description of the matter; an assessment of the market; a discussion of possible remedies; and a recommendation. This case note is considered first by the Directors-General, who prepare a second case note which is sent to the Commissioners. All draft decisions involving matters relating to Article 7 also need to be reviewed to the Commission Legal Service.

Once a decision has been made, the parties concerned shall be given a full statement of the reasons on which it is based. In addition, the decision of the NRA shall be made available to the public, though still having regard to the requirements of business confidentiality (*Framework Directive*, Article 20).

⁸²⁵ EurLex, *Judgment of the Court*, 8.6.2010, Case C-58/08, paragraph 29. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008CJ0058:EN:PDF> [accessed on 11 July 2013].

⁸²⁶ *Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a Common Regulatory Framework for Electronic Communications Networks and Services (Framework Directive)*, Official Journal of European Communities. Available at: http://www.ofcom.org.uk/static/archive/oftel/ind_info/eu_directives/framework.pdf [accessed on 1 July 2013].

⁸²⁷ Official Journal of European Communities, *Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a Common Regulatory Framework for Electronic Communications Networks and Services (Framework Directive)*, Article 20. Available at: http://www.ofcom.org.uk/static/archive/oftel/ind_info/eu_directives/framework.pdf [accessed on 1 July 2013].

Appeals

Two appeal processes are relevant in relation to the implementation of the *Framework Directive*. Firstly, Member States can appeal a decision of the Commission under the Directive to the European Court in Luxembourg. Secondly, appeals before national courts in relation to regulatory measures proposed by an NRA under Article 4 of the *Framework Directive*,.

Member States can appeal to the European Court of First Instance against the decision of the Commission, for example, in relation to an infringement proceeding regarding the implementation of the *Framework Directive*. An appeal may be made from the ruling of the European Court of First Instance, to the European Court of Justice on points of law.

The Commission cannot intervene in a dispute before a national court in relation to a regulatory measure proposed by an NRA under the *Framework Directive*. However, where the Commission has a concern about a specific matter it can encourage the national court to refer the matter to the European Court of Justice (or to request an opinion from the European Court of Justice). Where the matter is referred to the European Court of Justice by a Member State, the Commission does not act as Intervener, however, in hearing the matter, the European Court of Justice typically asks the Commission to comment or submit an opinion on the matter through the Legal Service.

3. Postal Services

The regulatory framework for postal services in the EU is provided by a *1997 Postal Directive* (as amended by 2002 Directive 2002/39/EC and 2008/6/EC).⁸²⁸ The Directive provides a Universal Service Obligation defining a minimum range of services of specified quality which must be provided in all Member States at 'affordable prices' for the benefit of all users, irrespective of their geographical location. The Directive also limits the extent that member states can restrict access for postal operators. The regulatory framework provides:

- the minimum characteristics of the universal postal service which must be guaranteed by all Member States;
- the quality standards for universal service provision and the system to ensure compliance with them;
- tariff principles (particularly that tariffs should be related to costs);
- principles governing transparency of accounts for universal service provision;
- the separation of regulatory and operational functions within the postal industry; and
- maximum limits for those services which may be reserved by a Member State to its universal service provider(s) to the extent necessary to ensure the maintenance of the universal service.

These areas of reserved services have been progressively reduced, in 1999, 2003, and 2006. In February 2008, the third Postal Directive came into force. It set the final date for full opening of the internal market for Community postal services as 31 December 2010, with a further two-year transition period for eleven Member States. From that date there were no further reserved areas. The 2008 Directive retains the current obligations on providers in relation to the Universal Service, and outlines measures Member States may take to safeguard and finance, if necessary, the Universal Service. The Directive also upgrades the independent role of national regulatory authorities.

Regulatory Institutions and Legislation

Regulation of postal services is the responsibility of the Directorate-General Internal Market and Services (DG MARKT). It is assisted by approximately 500 staff. The main role of DG MARKT is to coordinate the Commission's policy on the European Single Market, which aims to ensure the free movement of people, goods, services and capital within the European Union.

In this context, the DG MARKT is responsible for proposing to the European Parliament and Council and, once laws are adopted, controlling the implementation of a European Postal Service legal framework in accordance with the *Postal Directive*.

⁸²⁸ European Commission, *EU Postal Legislation*. Available at: http://ec.europa.eu/internal_market/post/legislation_en.htm [accessed on 1 July 2013].

DG MARKT monitors the application of the Postal Directive through Application Reports every two years. It can open infringement proceedings against Member States who fail to apply, or misapply, the Directive. DG MARKT works closely with the Member State concerned to attempt to rectify the situation before commencing formal judicial proceedings. Infringement proceedings are generally settled in this way. However, where both parties do not agree on the meaning of certain provisions in the Directive, formal proceedings are brought in the European Court of Justice.

In parallel with this process of liberalisation and regulation undertaken by DG MARKT, the Commission (through DG Competition) applies competition rules to European postal-services markets, according to the principles set out in the *Notice from the Commission on the Application of the Competition Rules to the Postal Sector* (98/C 39/02) and on the assessment of Member State measures relating to postal services.

Further, DG MARKT consults and negotiates and with the Universal Postal Union,⁸²⁹ the Committee of European Postal Regulators, and the WTO, securing compatibility between the developing EC and international postal regulatory models.

In 2010, the EC established the European Regulators' Group for Postal Services (ERGP) (2010/C 217/07). It comprises the national regulatory authorities (NRAs) of the 27 members of the European Union, countries of the European Economic Area, and of countries applying for membership of the European Union. The ERGP serves as a body for discussion and advice to the European Commission in the postal-services field. It also facilitates consultation, coordination and cooperation between the independent national regulatory authorities in the Member States, and between those authorities and the European Commission, with a view to consolidating the internal market for postal services and ensuring the consistent application of the Postal Services Directive. The first meeting of the group took place in Brussels on 1 December 2010.⁸³⁰

The ERGP has released documents in relation to the problems of regulatory accounting and consumer protection. For example, one addressed the problem of common-costs allocation; and the other addressed the net cost calculation and evaluation of a reference scenario. Two further documents on quality of service and end user satisfaction, and on indicators for postal markets, were also produced.⁸³¹

Consultation of Interested Parties

DG MARKT may launch public consultation with key stakeholders, including representatives of Member States, on postal services. The purpose of public consultation is to gather additional relevant information and to reach informal consensus among the various stakeholders. In developing the third Directive, the Commission accompanied its proposal with a prospective study in the impact of full market opening.⁸³² Following the public consultation, an impact assessment of the proposed Directive was undertaken and published. According to the co-decision-making process of Member State stakeholders, the policy must then be approved by a Committee which represents the experts of Member States.

Decision-making and Reporting

The Commission must approve all decisions of the Directorates. In practice, some decisions are taken by the Director-General while others need to be approved by the full College of the Commissioners.

The general approach to decision-making is 'bottom-up', which involves three stages:

- Initial consultation among the different Commission directorates in order to ensure that all aspects of the matter in question are taken into account (an Inter-service Consultation). Typically, relevant representatives in other Directorates have between two and three weeks to review the proposal. Three types of recommendations typically arise from the Inter-service

⁸²⁹ With 192 member countries, the UPU is the primary forum for cooperation between States concerning postal services. Universal Postal Union. *The UPU*. Available at: <http://www.upu.int/en/the-upu/the-upu.html> [accessed on 9 July 2013].

⁸³⁰ EC, *The European Regulators Group for Postal Services*. Available at: http://ec.europa.eu/internal_market/ergp/ [accessed on 9 July 2013].

⁸³¹ ARCEP, *Postal Sector*. Available at: http://www.arcep.fr/index.php?id=8571&L=1&tx_gsactualite_pi1_per cent5Buid per cent5D=1452&tx_gsactualite_pi1_per cent5BbackID per cent5D=1&cHash=7102094121 [accessed on 9 July 2013].

⁸³² Commission of the European Communities, *Prospective Study on the Impact on Universal Service of the Full Accomplishment of the Postal Internal Market in 2009*, October 2006.

Consultation: the proposal is satisfactory; the proposal is satisfactory but some comments are provided; or the Directorate disagrees with the proposal and suggests that changes are made (and the consultation begins again).

- Once a high degree of consensus is reached across directorates, the proposal will be submitted to the Cabinet of Commissioners for approval. The approval can be made on the basis of either a written procedure (no discussion among Commissioners) or an oral procedure (the proposal is discussed by the College of Commissioners), and the decision is published in the *Official Journal of the European Union*.
- The proposal is then forwarded simultaneously to the European Parliament and to the Council.

4. Water and Wastewater

The Directorate-General for the Environment is responsible for European water policy. In 2000 the Water Framework Directive (WFD) was adopted. The WFD sets the standard for water management in Member States.⁸³³ It established a legal basis from which to protect and restore clean water across Europe and ensure its long-term, sustainable use. The objective of the WFD is to get all water into a healthy state by 2015; including water from lakes, rivers, streams and groundwater aquifers.

Policy is contained within twelve 'water notes':

- Waternote 1: Joining forces for Europe's shared waters – Coordination in international river basin districts
- Waternote 2: Cleaning up Europe's waters – Identifying and assessing surface water bodies at risk
- Waternote 3: Groundwater at risk – Managing the water under us
- Waternote 4: Reservoirs, canals and ports – Managing artificial and heavily modified water bodies
- Waternote 5: Economics in Water Policy – The value of Europe's waters
- Waternote 6: Monitoring programmes – Taking the pulse on Europe's waters
- Waternote 7: Inter-calibration – A common scale for Europe's waters
- Waternote 8: Pollution – Reducing dangerous chemicals in Europe's waters
- Waternote 9: Integrating water policy – Linking all EU water legislation within a single framework
- Waternote 10: Climate change – Addressing floods, droughts and changing aquatic ecosystems
- Waternote 11: From river to the sea – Linking with the *Marine Strategy Framework Directive*
- Waternote 12: A common task – Public participation in river basin management planning.

In relation to the economic regulation of water and wastewater, the WFD provides that water users, including industries, farmers and households pay for the full costs of the water services they receive; including the operational, environmental and resource costs of water resources (Waternote 5).⁸³⁴ Second, the WFD calls on Member States to use economic analysis in the management of water resources and to assess both the cost-effectiveness and overall costs of alternatives when making key decisions.

The WFD further provides that water pricing should create incentives for the efficient use of water resources. These policies are designed to introduce economic efficiencies into the sector and reduce the financial burden on public authorities while improving the environment (Waternote 5).

⁸³³ European Commission, *Water Notes: About Integrated Water Management, EU Water Legislation and the Water Framework Directive*. Available at: http://ec.europa.eu/environment/water/participation/notes_en.htm [accessed on 9 July 2013].

⁸³⁴ European Commission, *Water Note 5: Economics in Water Policy*. Available at: http://ec.europa.eu/environment/water/participation/pdf/waternotes/water_note5_economics.pdf [accessed on 11 July 2013].

Article 9 provides that users should incur water charges that reflect the full costs of the resource, including operational, environmental and resource costs:

The prices users pay for water should cover the operational and maintenance costs of its supply and treatment and the costs invested in infrastructure. The directive goes further and requires that prices paid by users also cover environmental and resource costs...When a water resource is partly or fully depleted and less water is available for other users the cost of that resource goes up.

In 2012, the EC announced the *Blueprint to Safeguard Europe's Water Resources*⁸³⁵ with the aim of improving EU water policy to ensure good-quality water, in adequate quantities, for all authorised uses. While the *Blueprint to Safeguard Europe's Water Resources* is closely related to the EU's 2020 strategy, and its recommendations are expected to be implemented by 2020, it is designed for a longer duration as the analysis underpinning it covers the period up to 2050.

The *Blueprint to Safeguard Europe's Water Resources* was created following:

- Analysis of the WFD's river basin management plans providing information on how Member States have improved their water management.
- Review of the 2007 policy on water scarcity and drought, including water efficiency measures.⁸³⁶
- Analysis of the evolution of water resources including identifying water's vulnerability to climate change and man-made pressures such as urbanisation and land use.
- Undertaking a 'fitness check' of EU freshwater policy and a gap analysis to identify any uncovered areas and assess the adequacy of the current framework.

The *Blueprint to Safeguard Europe's Water Resources* sets out a three-tier approach:

- Improving implementation of current EU water policy by making full use of the opportunities provided by the current laws. For example, increasing the take-up of natural water retention measures such as the restoration of wetlands and floodplains or improving implementation of the 'polluter pays' principle through metering, water-pricing and better economic analysis.
- Increasing the integration of water policy objectives into other policy areas such as agriculture, fisheries, renewable energy, transport and the Cohesion and Structural Funds.
- Filling the gaps of the current framework, particularly in relation to the tools needed to increase water efficiency. In this regard, the *Blueprint to Safeguard Europe's Water Resources* envisages water accounts and water efficiency targets to be set by Member States and the development of EU standards for water re-use.⁸³⁷

5. Rail

A number of directives and regulations provide governance of rail transport across Member States. A 1991 Directive required separation of accounts and charging in the rail industry. Further rail directives were introduced in 2001, 2004 and 2007. In September 2010, the process of merging the directives into a single piece of legislation commenced. The directives were further modified in order to strengthen the regulatory framework.⁸³⁸

The first Directive (91/440 of July 1991) mandated separate accounts for activities relating to the provision of transport services and activities in managing the railway infrastructure. Article 6 (1) provides:

⁸³⁵ European Commission, *2012 Blueprint to Safeguard Europe's Water Resources*. Available at: http://ec.europa.eu/environment/water/pdf/blueprint_leaflet.pdf [accessed on 9 March 2013].

⁸³⁶ European Commission, *Water Scarcity and Drought in the European Union*, p. 5. Available at: http://ec.europa.eu/environment/water/quantity/pdf/special_report.pdf [accessed on 5 April 2013].

⁸³⁷ European Commission, *Environment: Commission Presents Blueprint to Safeguard Europe's Waters*. Available at: http://europa.eu/rapid/press-release_IP-12-1216_en.htm [accessed on 11 July 2013].

⁸³⁸ Railway Gazette, *Proposals for Revision of First Railway Package Published*, 20 September 2010. Available at: <http://www.railwaygazette.com/en/news/single-view/view/proposals-for-revision-of-first-railway-package-published.html> [accessed on 11 July 2013].

Member States shall take the measures necessary to ensure that the accounts for business relating to the provision of transport services and those for business relating to the management of railway infrastructure are kept separate. Aid paid to one of these two areas of activity may not be transferred to the other.

The Directive also provides for the optional functional or operational separation of activities (Article 6 (2)).

In relation to charges, Article 8 provides:

The manager of the infrastructure shall charge a fee for the use of the railway infrastructure for which he is responsible, payable by railway undertakings and international groupings using that infrastructure. After consulting the manager, Member States shall lay down the rules for determining this fee.

The user fee, which shall be calculated in such a way as to avoid any discrimination between railway undertakings, may in particular take into account the mileage, the composition of the train and any specific requirements in terms of such factors as speed, axle load and the degree or period of utilization of the infrastructure.

The first package of directives, known as the Rail Infrastructure Package (Directives 2001/12, 2001/13 and 2001/14), sets rules in relation to the European market for international freight transport by rail. Among these are: the conditions under which railway undertakings can obtain licences and safety certificates; the framework for the allocation and charging of rail infrastructure capacity; the role and responsibility of regulatory bodies in the Member States; and the separation of accounts for subsidised and non-subsidised activities. In addition, the rules vest the Commission with responsibility for monitoring 'technical and economic conditions and market developments of European rail transport', which it proposes to do through a Rail Market Monitoring Scheme.

Directives issued under a Second Railway Package set out: arrangements for the opening of the market for national freight transport by rail; establishment of a European Railway Agency; and a framework for railway safety. According to the two packages of Railway Directives, the rail-freight market should be opened up at least on the Trans European Rail Freight Network (TERFN – accounting for 50 per cent of the EU railway network and 80 per cent of traffic) as of 15 March 2003, with progress to the whole network by 2006.⁸³⁹

In 2007, a Third Railway Package was adopted involving: market opening for international rail passenger services; rail passenger rights and obligations; and the certification of train drivers. The Directives and regulations comprising the third package: introduced a European driver licence; introduced open-access rights for international rail passenger services including cabotage by 2010; and set out rail passengers' minimum quality standards. In January 2012, new regulations on interoperability came into force on both the conventional and the high-speed rail networks.⁸⁴⁰

The Directorate-General for Mobility and Transport (DG Move) is a service unit of the European Commission, with a staff of over 1 000. It was created on 17 February 2012, when energy was separated to form DG Ener. DG Move has responsibility for the development of Community transport policies, including the development of common-access frameworks.

The aim of DG Move is to promote a mobility that is efficient, safe, secure and environmentally friendly; and to create the conditions for a competitive industry generating growth and jobs.⁸⁴¹ Other key responsibilities include: investigating incorrect transpositions of community law by Member States; and managing financial-support programs for the transport sector, in particular, the Trans-

⁸³⁹ Eur-Lex, *Official Journal of the European Union*: L164 Volume 47, 30 April 2004. Available at: <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:L:2004:164:SOM:en:HTML> [accessed on 9 July 2013].

⁸⁴⁰ House of Commons Library, *Railways: EU Policy*. Available at:

<http://www.google.com.au/url?sa=t&rct=i&q=sufficiently%20strong%20rules%20on%20interoperability%20so%20as%20to%20create%20a%20genuine%20european%20rail%20network%204th%20package&source=web&cd=2&cad=rja&ved=0CDgQFIA&url=http%3A%2F%2Fwww.parliament.uk%2Fbriefing-papers%2F%2FSN00184.pdf&ei=t3HrUOavOM-cmQWU94GwAQ&usq=AFQjCNHUOU9I9uevqbr5qwm0yxRQ5deLqg&bvm=bv.1355534169.d.dGY> [accessed on 9 July 2013].

⁸⁴¹ European Commission, *Mobility and Transport*. Available at: http://ec.europa.eu/transport/about-us/index_en.htm [accessed on 9 July 2013].

European Transport Network Project (TEN-T).⁸⁴² The Trans-European Transport Network Executive Agency (TEN-T EA) was created in 2006 to implement and manage the TEN-T program on behalf of the European Commission.

The Commission and Strategic Cross-border Infrastructure Planning

The Commission has identified a number of infrastructure projects where it is keen to foster greater levels of investment. In large part, these projects involve the addition of capacity at the borders between Member States; and therefore fall outside of the competency of any one Member State. In respect of these projects, the Commission is usually allocated a general budget which it then directs toward specific projects. An example of this is TEN-T, which is administered by the Trans-European Transport Network Executive Agency.

An aim for the rail subsector over 2012-2015 is to upgrade a number of important freight routes by deploying ERTMS systems along them. The six routes carry around a fifth of Europe's rail-freight traffic. The EU is also working towards the creation of a rail network giving priority to freight, including the creation of a number of international freight-oriented 'corridors'. The objective was to create at least one corridor in each EU Member State by 2012.⁸⁴³

Issues with Current Arrangements

The European Commission's 2011 *White Paper*⁸⁴⁴ noted that the challenge in the rail subsector is to ensure structural change to enable rail to compete effectively; and to take a significantly greater proportion of medium-distance and long-distance freight. The *White Paper* found that:

considerable investment will be needed to expand or to upgrade the capacity of the rail network. New rolling stock with silent brakes and automatic couplings should gradually be introduced.

The European Commission is developing a Fourth Railway Package with three key goals to: adopt sufficiently strong rules on interoperability so as to create a genuine European rail network; adopt better rules regarding access to markets, for example by mandating tenders for all Public Service Obligations, and by requiring that they be awarded on a purely commercial basis; and take further steps towards institutional separation between transport and infrastructure.

The EU Commissioner for Transport and Vice-president of the Commission, Siim Kallas, has set out the focus of the Package. It goes beyond the basic need to upgrade and expand the infrastructure, by building 'missing links' for improving Europe's connections through the trans-European transport network.⁸⁴⁵ The removal of market-access barriers, such as diverging rules and protected national markets, will work to create more passenger choice; and thereby improve the quality, comfort and reliability of the trans-European transport network. In addition, the package aims: to improve access to rolling stock; improve the relationship between the infrastructure managers running the network and the service operators using it for transporting passengers or goods; and to open domestic passenger markets to more competition across the EU.

6. Airports

The Directorate-General for Mobility and Transport is responsible for matters in relation to European air transport. This includes the regulation of airlines, airports and air-traffic control services.⁸⁴⁶

Historically air transport markets were governed nationally with heavy involvement of the government in ownership, operation and financing. In the 1990s, the air transport industry was liberalised.

⁸⁴² European Commission, *Transport Infrastructures – TEN-T*. Available at: http://ec.europa.eu/transport/themes/infrastructure/index_en.htm [accessed on 9 July 2013].

⁸⁴³ European Commission, *Mobility and Transport: Rail Infrastructure*. Available at: http://ec.europa.eu/transport/modes/rail/infrastructures/index_en.htm [accessed on 9 July 2013].

⁸⁴⁴ European Commission, *White Paper: Roadmap to a Single European Transport Area – Towards a Competitive and Resource Efficient Transport System*, 26. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0144:FIN:EN:PDF> [accessed on 9 July 2013].

⁸⁴⁵ S Kallas, , *European Railways*, 1 October 2012. Available at: http://www.theparliament.com/latest-news/article/newsarticle/european-railways-siim-kallas/#.UOt2BG_NaSo [accessed on 9 July 2013].

⁸⁴⁶ European Commission, *Airports: Boosting Capacity and Promoting Quality at EU Airports*. Available at: http://ec.europa.eu/transport/modes/air/airports/index_en.htm [accessed on 9 July 2013].

Legislation created an Internal Market for Air Transport in the EU Member States.⁸⁴⁷ It removed commercial restrictions for airlines flying within the EU. This included restrictions on routes; the number of flights; and the setting of fares. Since 2004, Air Navigation Services have been subject to regulation under the Single European Sky Initiative. The current regulatory framework was enacted in 2008 (Regulation 1008/2008) which recast three previous Regulations into one (the 'Third Package'). The specific objective of the Third Package was to simplify and update the regulatory framework. The Regulation comprises all the rules on the economic framework of air transport services, including:

- licensing of EU air carriers (granting, financial conditions and revoking);
- the right of these carriers to operate intra-Community air services;
- pricing of intra-Community air services;
- insurance requirements;
- operational flexibility (code-sharing, leasing);
- public-service obligations;
- traffic distribution;
- environmental and emergency measures; and
- information requirements.⁸⁴⁸

A complete list of directives in relation to air transport introduced by the EU is available on the Director-General's website.⁸⁴⁹ In addition, some parts of air transport are subject to competition rules specified under Articles 81 and 82 of the EU Treaty, and air transport is also subject to rules on State Aid under Article 87 of the EU Treaty. While State Aid is considered to distort, or potentially distort, competition by preferential treatment; it can be approved under certain circumstances, for example, regional development.

Pricing of airport infrastructure is regulated at the national level. In 2009, the European Union adopted a Directive (Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on Airport Charges) which had to be implemented in all Member States by March 2011. Directive 2009/12/EC built on previous policies in relation to charges for airports and air navigation services drawn up by the International Civil Aviation Organisation.⁸⁵⁰

Directive 2009/12/EC applies to: all EU airports handling more than five million passengers per year; and to the largest airport in each Member State. The objectives of Directive 2009/12/EC are:

- Greater transparency of costs. Airports must provide a detailed breakdown of costs to airlines in order to justify the calculation of airport charges.
- Non-discrimination. Airlines receiving the same service shall pay the same charge. However, airports may differentiate their services as long as the criteria for doing so are clear and transparent. Airports can also vary charges on environmental grounds. For example, lower fees could be charged for environmentally-friendly aircraft.
- Mandatory consultation. Systems of consultation on charges between airports and airlines, which are already in place at many EU airports, are mandatory at all airports covered by Directive 2009/12/EC.
- Independent supervisory body. Member States will designate or set up an independent supervisory authority that will help settle disputes over charges between airports and airlines.

⁸⁴⁷ This consists of Regulations, EEC No. 2407/92 on Licensing of Air Carriers, 2408/92 on Access to Air Routes and 2409/92 on Fares and Rates for Air Services.

⁸⁴⁸ European Commission, *Roadmap Fitness Check – Internal Aviation Market*. Available at: http://ec.europa.eu/transport/modes/air/internal_market/doc/2011_fitness_check_roadmap_def.pdf [accessed on 9 July 2013].

⁸⁴⁹ Directorate-General for Energy and Transport, *Transposition of Directives*. Available at: http://ec.europa.eu/transport/media/infringements/directives/air_en.htm [accessed on 9 July 2013].

⁸⁵⁰ European Commission, *Airport Charges*. Available at: http://ec.europa.eu/transport/modes/air/airports/airport_charges_en.htm [accessed on 9 July 2013].

Ground-handling Services

Ground-handling services are defined as the services provided to airport users at the airports to ensure the proper flow of passengers and freight (check-in, baggage and freight handling) and ancillary services such as catering, cleaning, maintenance and towing of aircraft, fuelling.⁸⁵¹ Directive 96/67/EC of 15 October 1996, and subsequent regulations on access to the ground-handling market, require European airports to open up access to the ground-handling market.⁸⁵²

Under Directive 96/67/EC, there are two types of ground-handling services. First, there are Restricted Services. That includes baggage handling; ramp handling; fuel and oil handling; and freight and mail between the air terminal and the aircraft. These services can be reserved for a limited number of ground-handling service providers and self-handling users at airports that reach the following thresholds:

- for third-party handling, all airports whose annual traffic is no less than two million passengers or 50 000 tonnes of freight; and
- for self-handling, all airports whose annual traffic is no less than one million passengers or 25 000 tonnes of freight.

Second, there are 'All Other Services', to which free access exists for ground-handling service providers or self-handling users subject to licensing for safety and financial soundness.

Directive 96/67/EC provides that, at the larger EU airports, access to the market by suppliers of ground-handling services is free. However, for certain categories of services (such as: baggage handling; ramp handling; fuel and oil handling; and freight and mail handling), a Member State may limit the number of suppliers to no fewer than two for each category of service. At least one of the suppliers must be independent of the airport or the dominant airline at that airport. Similar provisions exist with regard to self-handling.⁸⁵³

The EC has reported that the Directive 96/67/EC has resulted in both the introduction of competition at many European airports; and in lower prices for ground-handling services. However, the EC has also stated that the current legal framework is not sufficient. For example, ground-handling services are 'not efficient enough due to barriers to entry and expansion'. Moreover, the 'overall quality of ground-handling services has not kept up with evolving needs in terms of reliability, resilience, safety, security and environmental performance'.⁸⁵⁴

Airspace/Air Traffic Management

European airspace is subject to regulation under the 2004 Single Sky legislation.⁸⁵⁵ The 2004 legislation aims to increase capacity and efficiency in European air traffic management. It requires European airspace to be restructured based on traffic flow, rather than on national borders. The legislation comprises four regulations and a number of implementing rules/regulations.

- The Framework Regulation lays down the framework for the establishment of a Single European Sky. The Regulation restructures 28 national air traffic control systems into an airspace divided into functional airspace blocks. Member States are responsible for identifying and establishing the institutions for these blocks.
- The Service Provision Regulation regulates the provision of air navigation services in the Single European Sky. This includes: laying down a common charging scheme for air navigation services; and common requirements for ownership/organisational structure, operating procedures and safety oversight.

⁸⁵¹ See a list of ground-handling services described in the Annex of the Directive 96/97/EC.

⁸⁵² Council Directive (EC) No. [96/67](#), *Official Journal of the European Union L 302*, 26 November 1996, p. 28; Regulation No. [1882/2003](#) of the European Parliament and of the Council, *Official Journal of the European Union L 284*, 31 October 2003, pp. 1-53; and Regulation No. 2111/2005 of the European Parliament and the Council, *Official Journal of the European Union*.

⁸⁵³ European Commission, *Groundhandling*. Available at: http://ec.europa.eu/transport/modes/air/airports/ground_handling_market_en.htm [accessed on 9 July 2013].

⁸⁵⁴ *Ibid.*

⁸⁵⁵ European Commission, *Single European Sky*. Available at: http://ec.europa.eu/transport/modes/air/single_european_sky/index_en.htm [accessed on 9 July 2013].

- The Airspace Regulation regulates the organisation and use of the airspace in the Single European Sky.
- The Interoperability Regulation mandates the interoperability of the European Air Traffic Management Network.

The European Commission adopted new regulations⁸⁵⁶ on 16 December 2010 in relation to air navigation services fees.⁸⁵⁷ The regulation provides that Member States and air navigation service providers set in advance their 'determined costs' in real terms. Fees are then capped for the duration of the performance-reference period. The European Commission has stated that the new Regulations will ensure that operators that have good cost control may generate profit that will be retained by the air navigation service provider. If air traffic is above or under forecast, the difference in revenue will be apportioned between airspace users and air navigation service providers. The objective is to achieve cost-efficiency gains of €340 million to 2014. Under the new performance targets, the European average unit cost is expected to decrease from €59.29 per service unit in 2011 to €53.93 per service unit in 2014.

The European Commission periodically reviews the application of the Single European Sky legislation and reports every three years to the European Parliament and to the Council.

A second legislative package of the Single European Sky was adopted in 2008 and aims to address deficiencies identified in the existing legislation to facilitate the full achievement of the Single Sky.

Regulatory Development

On 1 December 2011, the European Commission adopted measures to address capacity shortage at Europe's airports. Seventy per cent of all delays to flights are caused by problems on the ground, not in the air. Nineteen EU airports will be unable to accommodate additional flights by 2030. The resulting congestion could mean delays for half of all flights across the network. The 2011 package contains three legislative proposals in relation to slots, ground-handling and noise. The package also contains a communication on *Airport Policy in the European Union – Addressing Capacity and Quality to Promote Growth, Connectivity and Sustainable Mobility*.

In relation to ground handling, the proposals are designed to provide better coordination of operations at airports, and to broaden airlines' choice of handlers. The new proposals include the following measures:

- Ensuring that airlines have an increased choice of ground-handling solutions at EU airports. The proposals introduce full opening of the self-handling market for airlines. They will increase the minimum number of service providers in restricted service from two to three at large airports.
- Giving airports more control over the co-ordination of ground-handling services, by establishing a new role for the airport managing body as 'ground co-ordinator' of ground services, including by setting minimum quality standards. This means that airports must co-ordinate groundhandling within an airport. In addition, the proposals are designed to clarify rules for sub-contracting.
- The proposals are designed to clarify the legal framework for training and transfer of staff. Ground handling is a labour-intensive activity, with labour accounting for between 65 per cent and 80 per cent of costs.

In addition, the proposals are designed to introduce greater transparency on how airlines and handlers are charged for centralised airport infrastructure. For example, this includes fees charged by the airport for the use of baggage-processing systems; and the conditions under which airports themselves can provide ground-handling services.⁸⁵⁸

⁸⁵⁶ Amending Commission Regulation (EC) No 1794/2006 establishing a common charging scheme for air navigation services and published on 17 December 2010 (OJEU L333 page 6).

⁸⁵⁷ European Commission, *Press Release: New Regulation on Single European Sky Charging to Make Flying Cheaper and More Performing*. Available at: http://ec.europa.eu/transport/modes/air/single_european_sky/doc/2010_12_17_press_release_charging_regulation.pdf [accessed on 11 July 2013].

⁸⁵⁸ European Commission, *Groundhandling*. Available at: http://ec.europa.eu/transport/modes/air/airports/ground_handling_market_en.htm [accessed on 9 July 2013].

7. Ports

The Directorate-General for Mobility and Transport is responsible for European maritime transport, including matters related to seaports. Currently there is no framework for common European seaport access or charging. Where there is regulation or oversight of European ports, this is conducted at local, regional or national level.

Successive proposals from the Commission for market access to port services (such as cargo handling, towage, pilotage and mooring) failed to establish a common framework regarding the provision of port services in major EU ports. An initial proposal was made in 2001; and later rejected in 2003. A revised proposal was submitted in October 2004, further considering competition in port services.⁸⁵⁹ However, the proposed directive on access to port services was defeated in the European Parliament in 2006. The draft directive would have allowed several providers for pilotage, towage,⁸⁶⁰ mooring, cargo-handling services and passenger services. Any limits on the number of service would need to be justified by limitations in space, available capacity, maritime traffic safety or development policies within the port. The Commission recently undertook a 'port policy review'; including a consultation in relation to regulation of EU Ports.

European Commission Vice-President Siim Kallas in 2012 announced an intention to bring forward in 2013 a package of proposals that are designed to: reduce the administrative burden in ports; and improve the transparency of port financing.⁸⁶¹ Vice-President Kallas stated that:

'[port] service provision today is riddled with inefficiencies – in cost, quality and reliability. While many ports do operate in a competitive environment, technical-nautical and cargo handling services are often restricted to just one, or to a handful of established operators. This makes ports one of the few sectors in the European economy where we still have monopolies and exclusive rights. In many EU countries, port authorities make 'closed-door' agreements for the provision of port services. There are no clear EU-wide rules to cover today's varied patchwork of national regulations, where different types of market barriers prevent services from developing and becoming more productive. This also makes it difficult to monitor or measure performance. Market access in general, the lack of choice between providers, came through clearly in the consultation as problem areas. So we need to review port restrictions on service provision, especially given that many Member States still favour strategies which focus exclusively on national, not European, needs.'⁸⁶²

⁸⁵⁹ European Commission, *Proposal for a Directive of the European Parliament and of the Council on Market Access to Port Services*, COM/2004/654 Final – COD/2004/0240, Brussels, 13 October 2004.

⁸⁶⁰ The Commission distinguishes pilotage from towing and mooring services as follows: pilotage is a mandatory technical-nautical service organised on a monopoly basis in most European ports, towing and mooring services are provided by either the public or private sector on a voluntary or mandatory basis, exclusively or in competition with other operators. European Commission, *Port infrastructure: Green Paper*, (last updated in January 2008). Available at: http://europa.eu/legislation_summaries/transport/waterborne_transport/l24163_en.htm [accessed on 9 July 2013].

⁸⁶¹ European Commission, *Press Release: European Commission to Bring Forward New Package of Measures for Ports in 2013*. Available at: http://europa.eu/rapid/press-release_IP-11-1009_en.htm [accessed on 9 July 2013].

⁸⁶² S Kallas, *A Vital Resource: Europe's Ports Face Winds of Change*, Speech delivered at Conference on European Ports Policy Brussels, 25 September 2012. Available at: http://europa.eu/rapid/press-release_SPEECH-12-640_en.htm [accessed on 10 July 2013].

France

OVERVIEW

France has highly developed economic infrastructure, built predominantly by strong national incumbents. Telecommunications, posts and energy tend to be the most liberalised and have the most transparent and consultative processes of economic liberalisation. On the other hand, the transport areas (rail, airports and ports) display less of these characteristics.

In electricity and gas, the independent regulator, the *Commission de Régulation de l'Énergie* (CRE or Energy Regulation Commission), acts as an advisory body to the Minister who retains the ultimate decision-making power. Particularly, the CRE makes recommendations on energy tariffs for the Minister to consider. In 2010, with the introduction of the 'NOME Law', which established regulated access to nuclear energy, the CRE acquired additional decision-making powers such as being able to set the price of ARENH as of the 7 December 2013 and to fix tariffs for the use of the public networks and related services carried out under the operator monopoly in electricity and gas networks. Unlike before when the Minister was entitled to reject tariff proposals made on behalf of the CRE, the Minister now only has the right, within two months of the CRE's submission of its decision on the tariff, to request a new decision.

In addition and quite significantly, the NOME Law now makes it the duty of the CRE to certify that the three French Transmission Service Operators (TSOs) are acting autonomously and each is independent from its parent company. This is a significant regulatory development as the CRE is, in fact, the first European regulator to implement this new certification procedure. The CRE also acts as a determinative body in relation to the creation of access contracts and access disputes as performed by the *Comité de Règlement des Différends et des Sanctions* (CoRDIS), otherwise known as the Dispute-Settlement and Sanctions Committee.

The respective incumbents in telecommunications and postal services have their universal service obligations monitored by the sector-specific regulator, the *Autorité de Régulation des Communications Électroniques et des Postes* (ARCEP) (Regulation Authority for Electronic Communications and Posts). In telecommunications, the ARCEP acts as an advisory body to the Minister, mainly being consulted for opinions on draft legislation, decrees and regulations concerning electronic communications, while also allocating numbering and frequency resources. Since the recent amendments of the Telecoms Package of 2002, however, the ARCEP's independence has increased, its powers have expanded, users' rights have strengthened and spectrum management has improved.

In postal services, the ARCEP is primarily responsible for overseeing the postal market's liberalisation and proper operation. More specifically, since the complete liberalisation of the postal market took place on 1 January 2011, the ARCEP's responsibilities in the postal market include issuing authorisations to exercise a postal activity, issuing opinions on tariffs and universal service quality, assessing the net cost of *La Poste* to fulfil its regional development mandate and processing complaints received from users of the postal services which were unable to be resolved through the procedures put into place by the authorised postal-service providers. In July 2013, France's Constitutional Council revoked legal provisions governing the ARCEP's powers, thus removing its authority to ensure implementation of its decisions and enforce sanctions. The government is expected to propose new decrees in parliament to reinstate sanctions procedures as soon as possible.

The water management system in France uses a decentralised model composed of institutions at the national level; at the level of each river basin; and at the level of each sub-basin. The Ministry of Ecology, Sustainable Development and Energy is the primary institution responsible for water management at the national level, followed by respective *River Basin Committees* and *Water Agencies* at the river-basin level. Finally, at the level of tributaries or sub-basins, institutions such as the *Local Water Commission* and *Water Police* help prepare, implement and enforce water policy. Local governments have a key role in the provision of water and wastewater infrastructure and services, as they are ultimately responsible for preparing and implementing the Master Plans for Water Management, called the *SDAGE* at the basin level and the *SAGE* at the sub-basin level.

In rail, the *Autorité de Régulation des Activités Ferroviaires* (ARAF or Rail Regulatory Authority) replaced the *Mission for Control of Rail Activity* (MCAF) in 2009, and was made responsible for

ensuring the smooth operation of the public service and the competitive activities involved in providing railway transport for both customers and other users of railway services. The *Ministère de l'Écologie, du Développement Durable et de l'Énergie* (MEDDE or Ministry for Ecology, Sustainable Development and Energy), through the Directorate-General for Civil Aviation (DGAC), also performs various regulatory functions over air transportation. A public airport, including the newly-privatised *Aéroports de Paris*, is statutorily required to draw up a specific economic oversight contract setting out price and quality objectives valid for a period of up to five years. The contract is subject to public consultation and ministerial approval.

The MEDDE is also responsible for regulating sea ports and harbours in France, though public port authorities are responsible for port infrastructure, development and pricing decisions. As a result of a review of the port industry that took place in 2007, which included a government commissioned report that found a loss in competitiveness of public ports, and a report to the senate in 2008 reviewing the lack of coherence and organisation in port regulation, the government converted the seven metropolitan *Autonomous Ports* into *Large Maritime Ports* in 2008 and passed a new law to transfer cargo-handling services from port authorities to private cargo handling companies in 2011.

GEOGRAPHY, POPULATION, ECONOMY, POLITY AND LEGAL SYSTEM⁸⁶³

France is a large Western European country, occupying a land area of 551 500 square kilometres. It has large areas of plains and rolling hills, with mountainous areas to the south and east. A temperate climate is found in the west, while a continental climate prevails in the interior of the country. The south of France, bordering the Mediterranean Sea, is characterised by a climate of mild winters and hot summers.

France has a population of approximately 62.8 million. The major cities are Paris, Marseille, Lyon and Toulouse. The population is largely geographically dispersed, with approximately 85 per cent of the population residing in urban areas (2010 estimate). The country has a moderate population density by OECD standards of 119 people per square kilometre (2010 estimate).⁸⁶⁴ As with most OECD countries, France exhibits small population growth (0.5 per cent per annum, 2012 estimate) and an ageing population.

France is the fifth largest economy in the OECD with a GDP (on purchasing power parity (PPP) basis) of US\$2.58 trillion (2012 estimate). The GDP per capita is US\$35 500 (2012 estimate). Economic growth has been slow on 2012 and 2013, there has been a considerable budget deficit and government debt reached 90 per cent of GDP in 2012. Unemployment is at approximately ten per cent of the estimated workforce.

France has large agricultural production (including wheat, beef, dairy and wine), substantial (but not bountiful) natural resources (for example, little oil and gas) and strong manufacturing (machinery, chemicals, cars, aircraft, electronics and food processing). Services employ 72 per cent of the labour force and account for close to 80 per cent of GDP. Tourism is particularly important.

France has very highly developed infrastructure in telecommunications, energy, transport and water; with a strong engineering tradition. Fixed-line and mobile telecommunications are highly developed and exhibit high rates of penetration. Electricity production includes strong contributions from nuclear and hydro. It has several major seaports like in Bordeaux and Calais; an excellent road system and highly developed railways (including the TGV).

France is a presidential republic. The French Parliament is a bicameral system that is comprised of the National Assembly (elected by popular vote) and the Senate (elected by an electoral college). The President is France's Chief of State and presides over the government. The President is elected by direct popular vote for a five-year term. The Prime Minister is the head of government and the Council of Ministers is the key decision-making body of the government, consisting of the senior ministers. The President appoints the Prime Minister after nomination by a majority of the National Assembly.

The four leading French political parties are: the Socialist Party; the conservative Gathering for the Republic (RPR); the Union for the French Democracy (UDF); and the French Communist Party.

⁸⁶³ The material for this sub-section is from Central Intelligence Agency (CIA), *The World Fact Book, France*. Available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/fr.html> [accessed on 5 July 2013].

⁸⁶⁴ The World Bank, *Data (France)*. Available at: <http://data.worldbank.org/indicator/EN.POP.DNST> [accessed on 9 July 2013].

At the local level, France is organised around 22 administrative regions and 96 metropolitan departments. Each department covers about 5000 square kilometres and is administered by an elected departmental council. Within the departments there are approximately 36 000 communes; these refer to the lowest administrative division, headed by elected mayors.

The legal framework is based on civil law system with indigenous concepts. It allows the review of administrative but not legislative acts; and as a member of the EU, has accepted the authority of European legislation over national law; but has not accepted compulsory International Court of Justice jurisdiction. French law is divided into two principal areas: private law and public law. Private law includes, in particular, civil law and criminal law. Public law includes, in particular, administrative law and constitutional law. The courts are divided into the judicial branch (dealing with civil law and criminal law); and the administrative branch (dealing with appeals against executive decisions). Appeals for all cases are heard by the Court of Appeal, with criminal cases referred by the Court of Appeal to the Assize Court. The court of last resort for the judicial branch is the Supreme Court of Appeal, and the Council of State for the administrative branch.

APPROACH TO COMPETITION AND REGULATORY INSTITUTIONAL STRUCTURE

France does not have a long tradition of independent regulation. Historically, direct intervention by the administration was deemed sufficient to regulate the existing strong monopolies. The major trade union, General Confederation of Work (CGT), a former close ally of the French Communist Party (PCF), is opposed to privatisation in principle. It is very strong in some public companies, such as the electricity producer EDF.⁸⁶⁵

The privatisation process in France has been influenced by ideology, as had been the case for nationalisation itself.⁸⁶⁶ The reluctance to privatise has been attributed to the combination of three political ideologies:⁸⁶⁷

- The Socialist ideology: state ownership is in all cases superior to private ownership.
- The 'Dirigiste' (Colbertiste), 'Bonapartiste', and Gaullist traditions, all highlight the superior knowledge and vision of the state.
- A Christian-inspired Social Doctrine advocates public property in the name of the public good and social solidarity.

This combination resulted in the inclusion of provisions for 'public ownership' in the 1946 Constitution. As stated in the *Preamble to the 1946 Constitution*:⁸⁶⁸

'All property and all enterprises that have or that may acquire the character of a public service or de facto monopoly shall become the property of society.'

This factor constrains the French regulatory regimes, imbuing the relevant minister rather than independent regulator with decision-making power.

The main competition body is *Le Conseil de la Concurrence* (The Competition Council), which was created as an independent administrative authority by the Ordinance of 1 December 1986 and established the general principle of free prices and competition. In addition, each infrastructure area has its own dedicated regulator.

In electricity and gas, the independent regulator, the *Commission de Régulation de l'Énergie* (CRE, in English: Energy Regulation Commission), acts as an advisory body to the Minister who retains the ultimate decision-making power. The respective incumbents in telecommunications and postal

⁸⁶⁵ Michel Berne and Gérard Pogorel, *Privatisation Experiences in France*, CESifo Working Paper No. 1195, Institute for Economic Research, Munich, 2004. Available at: http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CC4QFjAA&url=http%3A%2F%2Fwww.cesifo-group.de%2Fportal%2Fpage%2Fportal%2FDocBase_Content%2FWP%2FWP-CESifo_Working_Papers%2Fwp-cesifo-2004%2Fwp-cesifo-2004-05%2Fcesifo1_wp1195.pdf&ei=P9fkUfaMCu6ziQfJ24HACA&usq=AFQjCNEjfDRXcWu2IEpXdnUvpGsDGgE1Aw&sig2=Etf3dlW6MLmw0oQvflHD1Q&bvm=bv.48705608.d.aGc [accessed on 16 July 2013].

⁸⁶⁶ *Ibid.*

⁸⁶⁷ *Ibid.*

⁸⁶⁸ See *Preamble to the 1946 Constitution*. Available at: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/cst3.pdf [accessed on 9 July 2013].

services have their universal service obligations monitored by the sector-specific regulator, the *Autorité de Régulation des Communications Électroniques et des Postes* (ARCEP) (Regulation Authority for Electronic Communications and Posts). As it concerns the water sector, the Ministry of Ecology, Sustainable Development and Energy is the primary institution responsible for water management at the national level, followed by respective *River Basin Committees* and *Water Agencies* at the river-basin level. In rail, the *Autorité de Régulation des Activités Ferroviaires* (ARAF) (Rail Regulatory Authority) is responsible for ensuring the smooth operation of the public service and the competitive activities involved in providing railway transport for both customers and other users of railway services. The *Ministère de l'Écologie, du Développement Durable et de l'Énergie* (MEDDE) (Minister for Ecology, Sustainable Development and Energy), through the Directorate-General for Civil Aviation (DGAC) performs various regulatory functions over air transportation and sea ports and harbours in France.

Acting in accordance with Part IV of the *Commercial Law*, and Articles 81 and 82 of the EU Treaty, the Competition Council had the competency to penalise anticompetitive practices. As the main competition body in charge of consumer protection and effective maintenance of competition, it specialised in market analysis and the prevention of anticompetitive practices. On 13 January 2009 the Competition Council merged with part of *La Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes* (DGCCRF, In English: Directorate-General for Competition, Consumption and Fraud Prevention) to form the *Autorité de la Concurrence* (Competition Authority). Under the *Law of Economic Modernisation 2008*, the new Competition Authority not only assumed existing functions of the Competition Council, but had enhanced powers and a new role in charge of merger control (Articles 95–97).

French competition law applies to all economic activities. It is the nature of the economic activity concerned, not the status of the operator or the form of intervention, which dictates how competition rules apply. The laws relate to all production, distribution and service activities, including those carried out by public entities.

Proceedings before the Competition Authority are initiated by an act of referral. After examining the admissibility of the referral, the Competition Authority assesses the state of competition in the market or markets concerned.

It may receive requests for opinions regarding any competition-related issue, parliamentary bills, draft legislation regulating prices or restricting competition, and matters relating to corporate mergers. The consultation may be compulsory or optional.

The Competition Authority must be consulted regarding draft decrees regulating prices or restricting competition, and regarding any draft regulations that would introduce a new regime. The Minister of Economy has the option of requesting the Competition Authority's opinion regarding competition matters; however, the Competition Authority must be consulted when the Minister believes the transaction in question will adversely affect competition.

The Competition Authority may be consulted by parliamentary committees regarding parliamentary bills or any other competition-related issue.

The courts may also ask the Competition Authority to issue an opinion on any anti-competitive practices identified in the cases brought before them.

The Competition Authority has litigation powers in the field of anti-competitive practices, in order to repress them or to correct any anti-competitive situation. It also has acquired the power to control mergers since the transformation into the Competition Authority.

Under the *Commercial Law*, abusive behaviours interfering with the free play of competition on a market are prohibited. Agreements and dominant positions are not prohibited *per se*, but may be declared illegal if they distort competition on a given market.⁸⁶⁹

When a third party initiates proceedings before the Competition Authority, it firstly examines the admissibility of the referral. It then analyses the conditions for the exercise of competition in the relevant market or markets. To carry out its mission, the Competition Authority has its instructional services collect evidence of anticompetitive practices however, it can also require the assistance of

⁸⁶⁹ Autorité de la Concurrence, *Missions*. Available at: http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=167&id_article=1078 [accessed on 9 July 2013].

local investigators under the leadership of the Minister of Economy to conduct serious investigations. The general rapporteur may also, at any time, make use of experts in the case of requests made by the rapporteur.⁸⁷⁰

Faced with an emergency situation requiring rapid intervention, the Competition Authority may be required to impose provisional measures, pending a decision on the merits. This occurs usually three to four months after the referral.⁸⁷¹

As it concerns information disclosure and confidentiality, the order of 13 November 2008 changes the rules governing the confidentiality of business to strengthen this protection while ensuring the effectiveness of competition proceedings. It states that "Except in cases where the communication or consultation of these documents is necessary to exercise the rights of the defence of a party implicated, the general rapporteur of the Competition Authority may deny some communication or consulting rooms or elements contained in these documents involving trade secrets of others. In this case, a non-confidential version and a summary of parts or components may be accessible."⁸⁷²

The Competition Authority may order the publication, distribution or display of a decision or an extract. It may also order publication of the decision or extract thereof in the report on the operations of the directors, the board of directors or management of the company. The costs are borne by the person concerned.

Decisions may also be found on the Competition Authority's website, either by using a reference number or by entering a subject title.⁸⁷³

Appeals

The Competition Authority's decision may be open to appeal by the parties in question and the government commissioner before the Paris Court of Appeal at most ten days after its notification. The Court shall rule within one month of the appeal.⁸⁷⁴

Additionally most decisions of the Competition Authority must be reported to the Minister for Economic Affairs, who then has a period of one month in which to make an application for cancellation or reversal to the Paris Court of Appeal.⁸⁷⁵ The presiding judge may order that enforcement of the decision be deferred if it is likely to have manifestly excessive consequences or if exceptionally serious new facts have emerged since its notification.

Any appeal on points of law must be brought within one month of notification of the decision.

Appeals can also be made to the Paris Court of Appeal to cancel or modify decisions made by the *Commission de Régulation de l'Énergie* (CRE) (Energy Regulation Commission) and the *Autorité de Régulation des Communications Électroniques et des Postes* (ARCEP, in English: Regulation Authority for Electronic Communication and Postal Services).

Information confidentiality of administrative documents is determined according to Article 6 of Law no. 78-753 of 17 July 1978.⁸⁷⁶ Administrative documents cannot be published or communicated to another party if their communication or consultation could undermine: the deliberations of the government and/or executive authorities; the secrecy of national defence; foreign relations; State or

⁸⁷⁰ *Autorité de la Concurrence, Missions: Fonctions Décisionnelles*. Available at: http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=169&id_article=436 [accessed on 16 July 2013].

⁸⁷¹ *Ibid.*

⁸⁷² *Ibid.*

⁸⁷³ *Autorité de la Concurrence, Rechercher une Décision*. Available at: <http://www.autoritedelaconcurrence.fr/activites/avis/rechcontroles.php> [accessed on 16 July 2013].

⁸⁷⁴ *Commercial Law*, Chapter IV, Article L464-7. Available at http://www.legifrance.gouv.fr/affichCodeArticle.do?jsessionid=1278B837E04F3624C5F227E66C28E34C.tpdjo17v_3?idArticle=LEGIARTI000019905681&cidTexte=LEGITEXT000005634379&dateTexte=20090301 [accessed on 9 July 2013].

⁸⁷⁵ *Commercial Law*, Chapter IV, Article L464-8. Available at http://www.legifrance.gouv.fr/affichCodeArticle.do?jsessionid=1278B837E04F3624C5F227E66C28E34C.tpdjo17v_3?idArticle=LEGIARTI000019761608&cidTexte=LEGITEXT000005634379&dateTexte=20090301 [accessed on 9 July 2013].

⁸⁷⁶ The *Act no. 78-753 on access to administrative documents of 17 July 1978* was amended by *Act no. 79-587* and *Act no. 2000-321*. 'Administrative documents' refers to 'any files, reports, studies, records, minutes, statistics, orders, instructions, ministerial circulars, memoranda or replies containing an interpretation of positive law or a description of administrative procedures, recommendations, forecasts and decisions originating from the State, territorial authorities, public institutions or from public or private-law organisations managing a public service' (Article 1).

public security; the currency; legal proceedings (except with the permission of the relevant authority); the investigation of financial or immigration fraud; and any secret protected by the law.

Administrative documents may be communicated solely to the party concerned if they could: undermine the secrecy of someone's private life, medical history or commercial/industrial secret; carry a judgement or valuation of a person named or easily identifiable; reveal details of a person's actions, where those actions could be subject to prejudice.

In the energy sector, decisions made by the CRE can be appealed to the Paris Court of Appeal (a civil court) on judicial ground (Article 38).⁸⁷⁷

In telecommunications and postal services, appeals in relation to decisions made by the ARCEP concerning dispute settlements, are made to the Paris Court of Appeal (on judicial grounds) and the process is litigious in nature from that point.

In the rail subsector, notice of the decision reached by the ARAF Board will state the form and period for appeal before the Paris Court of Appeal.⁸⁷⁸

In the airports subsector, disputes surrounding this contract are pursued through the administrative courts. A third party may appeal to the Council of State if it considers the actions of *Aéroports de Paris* in breach of the Economic Oversight Contract.

Finally, in relation to ports, any offence against the *Law for Maritime Ports* and any opposition to the decisions of the administration council are investigated and pursued via the administrative courts.⁸⁷⁹ The nature of these processes is judicial. Parties seek legal representation and it is primarily the legality of the matters that is considered.

REGULATORY ARRANGEMENTS BY INDUSTRY OR SECTOR

1. Energy

Over 75 per cent of electricity in France is generated by nuclear energy.⁸⁸⁰ In 1996 and 1998 the French electricity and gas markets, respectively, were officially opened to competition following the ratification of EU directives. However, the application of these Directives in French law was only achieved during the period 2000-2006. The gradual opening to competition was finalised with all consumers given free right to choose their own electricity and gas suppliers as of 1 July 2007.⁸⁸¹ The most recent EU Directives (2003) aim to create a European energy market with free choice of supplier for consumers, free choice of transport and distribution provider for producers, and objective, transparent, non-discriminatory access for all network users.

The deregulation of the retail French electricity market took place in several stages:

- In June 2000, all business customers with annual electricity consumption over 16 GWh were free to choose a supplier.
- In February 2003, all business customers with annual electricity consumption over seven GWh became free to choose a supplier.
- In July 2004, all companies and local government agencies became eligible.
- In July 2007, all customers became eligible, including residential customers.

Each customer now has the choice of three types of contracts:

- Contracts with regulated tariffs (offered by incumbent suppliers only)

⁸⁷⁷ CRE, *Compétences*. Available at: <http://www.cre.fr/reseaux/reglements-de-differends-et-sanctions/competences> [accessed on 9 July 2013].

⁸⁷⁸ ARAF, *Règlement Intérieur du Collège*. Available at: <http://www.regulation-ferroviaire.fr/index.asp?a=14086> [accessed on 9 July 2013].

⁸⁷⁹ *Ibid.*

⁸⁸⁰ World Nuclear Association, *Nuclear Power in France*, December 2012. Available at: <http://www.world-nuclear.org/info/inf40.html> [accessed on 9 July 2013].

⁸⁸¹ Energie-info, *Généralités sur l'Ouverture des Marchés (General Information on the Opening of the Markets)*. Available at: <http://www.energie-info.fr/questions-reponses/generalites> [accessed on 9 July 2013].

- Contracts with market prices (offered by incumbent suppliers and alternative suppliers)
- Transitory-regulated-tariff-for-market-adjustment (TaRTAM) contracts which are available to consumers who have a contract at market price. The TaRTAM is equal to the regulated retail tariff exclusive of tax, increased by 23 per cent for green tariffs, 20 per cent for yellow tariffs, and ten per cent for blue tariffs.

Similarly, deregulation of the French gas industry also occurred in stages:

- from August 2000, all business customers with an annual gas consumption over 237 GWh and all electricity generators or simultaneous electricity and heat generators were free to choose a supplier;
- from August 2003, all business customers with an annual gas consumption over 83 GWh were free to choose a supplier;
- from July 2004, all companies and local government agencies were free to choose a supplier; and
- from July 2007, all customers were free to choose, including residential customers.

Each customer has the choice between two different types of contract: contracts under regulated tariffs (offered by incumbent suppliers only); or contracts at market prices (offered by incumbent suppliers and alternative suppliers).

A quarterly *Electricity and Gas Market Observatory*, covering the wholesale and retail electricity and gas markets in Metropolitan areas, is published by the CRE to provide the general public with indicators for monitoring market deregulation.⁸⁸²

In spite of liberalisation, the traditional operators are still largely dominant in the gas and electricity markets. *Électricité de France* (EDF) (Electricity of France) and *Gaz de France*, now known as *GDF Suez* since its merger with fellow utility company Suez in 2008, represent the incumbent monopolies in electricity and gas respectively.⁸⁸³ Despite having been forced to divide their distribution and transport arms into separate subsidiaries in line with the new laws, they each remain the dominant suppliers in their respective markets. In 2011, for example, EDF was still Europe's biggest power company, supplying 94 per cent of the household market and 78 per cent of business demand.⁸⁸⁴ The fact that EDF controls 80 per cent of the country's power-generating capacity, including all atomic reactors, two-thirds of thermal capacity, 81 per cent of hydroelectric capacity, and approximately a third of renewable output, has simply meant that new entrants such as *Poweo Direct Energie* have been unable to compete effectively in France's electricity market.⁸⁸⁵ In relation to natural gas, the newly merged GDF Suez now has the biggest natural gas transportation and distribution network in Europe. Since January 2005, however, in accordance with the second European Directive on the Market in Gas, the transport business of *GDF Suez* has been carried on by its subsidiary *GRTgaz*, a limited-liability company which independently operates and markets gas transport services over 31 589 kilometres of pipelines. *GRTgaz* is responsible for the greatest total length of gas pipelines in Europe.⁸⁸⁶

Regulatory Institutions and Legislation

The regulatory body, which was established in 2000, is the Energy Regulation Commission (CRE). For various decisions, the minister(s) retains the final decision-making power while the regulator acts solely as an advisory body. Decisions concerning tariffs for the use of transmission networks,

⁸⁸² CRE, *Electricity and Gas Market Observatory*. Available at: <http://www.cre.fr/en/markets/electricity-and-gas-market-observatory> [accessed on 9 July 2013].

⁸⁸³ GDF Suez, *AMF Approval of Merger Prospectus*, 2008. Available at: <http://www.gdfsuez.com/wp-content/uploads/2012/05/amf-approval-of-the-merger-prospectus.pdf> [accessed on 9 July 2013].

⁸⁸⁴ Bloomberg, *France Fails to Pry Power Market from EDF, Probe Says*, 2012. Available at: <http://www.bloomberg.com/news/2012-04-19/france-fails-to-pry-power-market-from-edf-antitrust-probe-says.html> [accessed on 5 July 2013].

⁸⁸⁵ *Ibid.*

⁸⁸⁶ ENI in France, *Natural Gas: Organisations Involved in the French Gas Markets*. Available at: http://www.eni.com/en_FR/products-services/natural-gas/organizations-involved-french-gas-market/organizations-involved-french-gas-market.shtml [accessed on 9 July 2013].

distribution networks and LNG terminals must be jointly made by the Ministers for the Economy and Energy, upon CRE proposal. In the case of electricity, the Minister can only accept or reject tariffs recommended by the CRE; the Minister cannot amend the proposed tariffs.

In the case of access disputes and the creation of access contracts, however, the CRE is the determining body. The Relevant Legislation is the Law no. 2000-108 of 10 February 2000 and the Law 2003-8 of 3 January 2003.

As of 2012 the CRE organisational structure is was as follows:⁸⁸⁷

- Chairman, Special Adviser to the Chairman and Adviser to the Chairman.
- Managing Director.
- Director of Gas Infrastructures and Networks, who is responsible for the following three departments: Upstream Infrastructure; Downstream Infrastructure; and the European Gas Industry Department.
- Deputy Director of Gas Infrastructures and Networks.
- Director of Markets Development, who is responsible for the following three departments: Tariffs & Competition Departments; Renewable Energy & Consumer Support Schemes Departments; and Stakeholders Forum Department.
- Director of Electric Grid Access, who is responsible for the following four departments: Economics & Tariffs for Use of Public Electricity Grids Department; Cross Border Power Trade Department; Monitoring of Grid Access Conditions Department; and Technical Department.
- Director of Finance and Wholesale Markets Surveillance, who is responsible for the following three departments: Finance Department; Audit Department; and Wholesale Markets Surveillance Department.
- Legal Director, who is responsible for Grids Access & Markets Department; Regulation & Procedure Department; and EU Law & European Affairs Department.
- Director of International Relations.
- Deputy Director to the General Director, who is responsible of the following three departments: Accounting & Procurement Department; IT & Risk Management Department; and Building Management Department.
- Director of Human Resources.
- Director of Public Affairs & Communications.

Though previously composed of nine members, the CRE is now composed of five members known as 'the College'. These members are appointed for their advanced knowledge in the legal, economic and technical fields. The President of the Board and two members are appointed by decree of the President of the Republic following consultation with the Parliamentary committees specialised in the energy sector. The other two members are appointed by the President of the National Assembly and the President of the Senate, respectively.⁸⁸⁸

The President of the Board and two members are appointed for six and two years respectively, by decree of the President of the Republic after consulting Parliament committees that are competent within the energy sector. The other two members are appointed for four years by the President of the National Assembly and the President of the Senate, respectively.⁸⁸⁹

⁸⁸⁷ CRE, *Organisational Chart*. Available at <http://www.cre.fr/en/presentation/organization/services2/organizational-chart> [accessed on 9 July 2013].

⁸⁸⁸ CRE, *The Commission*. Available at: <http://www.cre.fr/en/presentation/organization/the-commission> [accessed on 9 July 2013].

⁸⁸⁹ *Ibid.*

The CRE's principal objective is to ensure the smooth operation of the electricity and natural gas markets for the benefit of the consumer, which it achieved by taking on the following responsibilities:⁸⁹⁰

- Guaranteeing access to the public electricity network, natural gas infrastructures, LNG facilities and natural gas storage facilities. To this end, the CRE produces a model contract called the 'GRD-F' for use by distribution network operators and suppliers as a base access contract.
- Ensuring that the public electricity network, natural gas infrastructures and LNG facilities are properly operated and developed.
- Ensuring that operators of electricity and natural-gas transmission and distribution networks are independent.
- Contributing to building the European Internal Market for electricity and gas.
- Monitoring transactions in the electricity, natural gas, CO2 markets.
- Ensuring the proper functioning of retail electricity and natural gas markets.
- Contributing to the implementation of measures that will support electricity generation and the supply of natural gas.
- Informing consumers about major events and changes taking place in the electricity and natural gas markets.

In order to meet its responsibilities, the CRE is empowered to:⁸⁹¹

- Make regulatory decisions in electricity and gas in a number of areas: the roles of operators of public electricity and gas transmission and distribution networks in operating and developing the networks.
- Determine the roles of operators of both LNG facilities and natural-gas underground storage facilities.
- Define the terms and conditions for connecting to the public electricity and gas transmission and distribution networks.
- Determine the terms and conditions for access to and use of the networks.
- Determine the way planning schedules for energy tender, procurement and consumption are implemented and adjusted; and the financial compensation made for variances.
- Determine the way purchase contracts and protocols are finalised by operators of public transmission and distribution networks.
- Define the scope of each activity that is accounted for separately, the book-keeping entries used to maintain the separate accounts and principles determining the financial relationship between these activities.
- Approve the transmission-network operators' annual investment programme for electricity and for gas.
- Settle disputes between parties concerned through its internal *Comité de Règlement, des Différends et des Sanctions* (CoRDIS) (Committee for Dispute Settlement and Sanctions), created by the French Law of 7 December 2006.
- Impose sanctions for violations of legislative rules as imposed by CoRDIS.
- Propose access tariffs for public electricity and natural gas networks and for LNG facilities.
- Access information held by the industry stakeholders that it regulates and which are necessary to fulfil its responsibilities.

⁸⁹⁰ CRE, *CRE's Missions*. Available at: <http://www.cre.fr/en/presentation/missions> [accessed on 9 July 2013].

⁸⁹¹ CRE, *Powers*. Available at: <http://www.cre.fr/en/presentation/powers> [accessed on 9 July 2013].

- Advise on all proposed regulation relating to access to or use of the public electricity network, natural-gas infrastructures and LNG facilities; on proposed regulated tariffs; and on terms and conditions for purchasing electricity that involve an obligation to purchase.

The introduction of *La Loi portant Nouvelle Organisation du Marché de l'Électricité (NOME)* in 2010, otherwise known as the NOME Law, was intended to further promote competition in France's electricity market.

The establishment of *Le Dispositif d'Accès Régulé de l'Électricité Nucléaire Historique (ARENH)* in order to establish regulated access to nuclear energy, and granted the CRE the following powers:⁸⁹²

- To make proposals to the Energy Minister concerning the conditions for the sale of ARENH to alternative suppliers, in particular the provisions of the relevant framework agreement, and to set the volume of historic nuclear power to be sold to each supplier.
- Set the price of ARENH. However this power will not be exercised until 7 December 2013, when the ARENH price is no longer fixed by the Energy and Finance Ministers in consultation with the CRE.
- Monitor transactions between suppliers, traders and producers and transactions in organised markets, and also to monitor the consistency of offers made by producers, traders and suppliers, especially to end consumers, with their economic and technical constraints.
- Fix tariffs for the use of the public networks and related services carried out under the operator monopoly in electricity and gas networks, instead of suggesting them to the ministers, who could object to the proposals. Ministers now only have the right, within two months of the CRE's submission of its decision on the tariff, to request a new decision.
- Check that the ten-year investment plan of the Transmission System Operators (TSOs) covers all investments necessary for developing the networks; and that it is consistent with the European plan developed by the European Network of Transmission System Operators (ENTSOs).
- Certify that the three French TSOs are all acting autonomously and are independent from its parent company. The CRE is the first European regulator to implement this new certification procedure.

*Consultation of Interested Parties*⁸⁹³

In order to draw up its tariff proposals, the CRE systematically consults market participants and holds public hearings. The categories of costs to be taken into account in requests for settlement of disputes concerning access and use of electricity and natural gas networks are submitted to the CoRDIS in the form of a letter of complaint, or in person. A complaint may be lodged by: an electricity transmission or distribution system operator (DSO); a natural gas transport or distribution system operator; a liquefied natural gas plant operator; or a user of the above grids, systems and plants.

All documents must be submitted in French and in eight copies.

Other matters requiring only the provision of advice by the CRE, may arise through direct ministerial request or as required by the Commission's on-going responsibilities over monitoring the sector.⁸⁹⁴

When a matter arises, the president of the committee appoints a member (or members) of staff as a delegate (*le rapporteur*) responsible for the mediation of communication between the various parties and the coordination of the administration of the dispute resolution process. The *rapporteur* (on behalf of the Committee) then notifies all parties implied in the dispute, giving them notice of the complaint and inviting them to submit arguments and replies successively.

⁸⁹² CRE, *Annual Reports: Activity Report 2011*. Available at: [http://www.cre.fr/en/documents/publications/annual-reports/\(annee\)/2012](http://www.cre.fr/en/documents/publications/annual-reports/(annee)/2012) [accessed on 9 July 2013].

⁸⁹³ All of the information under this subsection is obtained from CRE, *Procédure*. Available at: <http://www.cre.fr/reseaux/reglements-de-differends-et-sanctions/procedure> [accessed on 9 July 2013].

⁸⁹⁴ Legifrance, *Loi n° 2000-108 du 10 février 2000 relative à la Modernisation et au Développement du Service Public de l'Électricité*. Available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000005629085&dateTexte=20110125> [accessed on 9 July 2013].

The parties then communicate their respective arguments in the form of a formal mediated debate. The complainant may respond to the defence of the other party, who may subsequently reply. This process continues with a delay of approximately two weeks between each party's submissions. These submissions constitute a form of negotiation, with each new communication outlining new arguments and also proposing adjustments to the demands of each party. This process may continue up to the date of the committee meeting and is summarised by the *rapporteur* at the meeting.

All consultation is in the form of written submissions and documented investigations, dated and collated by the designated *rapporteur*. Time restrictions for submissions are set by the committee and the parties are notified by the *rapporteur*.

A public committee meeting is held to hear the *rapporteur* the consultation it has undertaken, and the observations of the parties. Any informant/expert deemed relevant and competent by the Minister or the CRE⁸⁹⁵ may appear. However, it seems that the CRE rarely relies on the support of external consultants as about 50 per cent of the CRE staff is previously employed in the industry. Committee members may ask questions to those present before convening privately to make a decision.

The CoRDIS (as part of the CRE) acts as a mediator between the complainants in access disputes. It can only be approached after the failure of independent negotiations between the two organisations. Although the final decision and the powers of the CRE are officially judicial, up until the committee meeting the process is based on submissions and consultation. While the parties are entitled to legal representation, there is no compulsion for them to seek it. Meetings are consultative and give the CRE the opportunity to ask questions and the parties the opportunity to present information.

Appeals are made to the Court of Appeal (on judicial grounds) in Paris and the process is litigious in nature from that point.⁸⁹⁶

The CRE maintains a section on the website called *Market Observatory*. It also produces quarterly industry reports on the state of the electricity and gas markets in France and internationally. These reports are quite detailed and long; for example, the report for the third quarter of 2012 is 66 pages in length.⁸⁹⁷

The model GRD-F contract provides a basis from which parties are encouraged to negotiate fair access terms. It is only in the case of failed private negotiations that parties may approach the CRE for settlement as a last resort. Resolution outside of formal channels is also encouraged. If an amicable compromise can be found before the date of the committee meeting the complainant may withdraw its complaint and (subject to CRE approval) proceedings will be terminated.⁸⁹⁸

The Superior Council for Energy (which replaced the Superior Council for Gas and Electricity in 2006) is an advisory body to the Minister, established by the legislation, and composed of representatives from government, industry, workers' unions, consumer groups, regulators and members of parliament. It was set up specifically to provide an ongoing avenue for communication among the various industry participants.

There is a separate body, the National Ombudsman of Energy, which is focused on consumer issues and handles disputes between providers and consumers.⁸⁹⁹

The CRE instigates, coordinates and facilitates the meetings of various 'work groups' to maintain dialogue with network operators, producers, distributors, suppliers, and consumers. These work groups may be created for a specific consultation or as ongoing forums. For example, the 'consumers', 'gas' and 'electricity' work groups were created in 2005 and given the task of providing

⁸⁹⁵ Légifrance, *Loi n° 2000-108 du 10 février 2000 relative à la Modernisation et au Développement du Service Public de l'Électricité*. Article 33. Available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000005629085&dateTexte=20110125> [accessed on 9 July 2013].

⁸⁹⁶ CRE, *Compétences*. Available at: <http://www.cre.fr/reseaux/reglements-de-differends-et-sanctions/competences> [accessed on 9 July 2013].

⁸⁹⁷ CRE, *Electricity and Gas Market Observatory 2012*. Available at: <http://www.cre.fr/en/markets/electricity-and-gas-market-observatory> [accessed on 9 July 2013].

⁸⁹⁸ CRE, *Contrat GRD-F*. Available at: <http://www.cre.fr/glossaire/contrat-grd-f-gestionnaire-de-reseau-de-distribution-fournisseur> [accessed on 9 July 2013].

⁸⁹⁹ *Énergie-Info, Ouverture des marchés de l'électricité et du gaz: Généralités sur l'ouverture des marchés*. Available at: <http://www.energie-info.fr/questions-reponses/generalites> [accessed on 9 July 2013].

consultation on the functioning of the small-scale electricity and gas markets. The CRE assigns specific issues for it to consider and it provides advice and recommendations to the CRE. This provides an ongoing forum for informal interactions between industry participants and the CRE.⁹⁰⁰

It does not appear that there is any government or CRE-arranged funding of user groups.

The Federal Union of Consumers (UFC) is the main French consumer advocacy group. The UFC regularly presents submissions in relation to access disputes and attends public hearings of the CoRDIS. It is funded through membership fees. Its council members are voluntary contributors.

Timeliness

The CRE is approached after private negotiations have failed and the formal process of mediated debate is initiated immediately. The time limits for submissions are clearly stated and generally observed. The CRE sets the date for its hearing and makes it known to the parties. It will consult any evidence and opinions presented up until that date. The parties are required, by law, to supply any information requested by the CRE in relation to the resolution of a dispute.

The committee is required to give decisions within two months of any matter being brought before it.⁹⁰¹ The two-month time limit can be extended, at the discretion of the CoRDIS (in particular to allow for further investigations necessary to resolve a dispute), to four months, subject to the agreement of the complainant.⁹⁰² In 2012, the CRE deliberated on seven access-dispute resolutions, each of which was dealt with within the two-month time limit.⁹⁰³ The CRE only acts as adviser to the Minister in pricing decisions (these pricing changes would be the most common incentive for parties to cause delay).

Information Disclosure and Confidentiality

Proceedings of the CRE are published on its website.

The CRE, as is necessary for the completion of its mission, has the right to access information from the relevant ministers, the bodies responsible for the management of the public transport and distribution networks; and any operator in the energy market. The employees of the CRE, and those appointed by the CRE according to their expertise, are given the right to access any and all information they deem relevant and important to the investigation of a dispute. The agents of the CRE must be granted permission to enter and investigate any premises, and also be allowed to use any vehicle, of an energy supplier, distributor or producer between 8 a.m. and 8 p.m., and any time outside those hours when operation is taking place.⁹⁰⁴

Subject to the confidentiality restrictions on administrative documents specified in the section 'Approach to Competition and Regulatory Institutional Structure', any information collected as part of an inquiry must be documented, and transcripts must be distributed to all the parties implicated in the dispute within five days of the inquiry being made.

Decision-making and Reporting

Many decrees and draft ministerial orders are submitted to the CRE for recommendation either: by an express measure (rate measures, purchase terms of electricity produced as part of the purchase obligation, specifications of the public transmission system operator, development outline of the public electricity transmission grid, refusal of direct lines, exemptions from rates and commercial terms for the use of natural gas facilities or LNG facilities); or by a general measure (recommendation on all texts relating to the access or use of public electricity grids, natural gas facilities and LNG facilities).

Regarding electricity generation, the CRE conducts calls for tenders intended for the implementation of the long-term program of generation investments. However, the Minister for Energy is responsible for making decisions to carry out these calls for tenders. The CRE is responsible for the application

⁹⁰⁰ CRE, *Référentiel Clientèle*. Available at: <http://www.cre.fr/operateurs/referentiel-clientele> [accessed on 9 July 2013].

⁹⁰¹ CRE, *Procédure*. Available at: <http://www.cre.fr/reseaux/reglements-de-differends-et-sanctions/procedure> [accessed on 9 July 2013].

⁹⁰² *Ibid.*

⁹⁰³ CRE, *Délibérations*. Available at: [http://www.cre.fr/documents/deliberations/\(text\)/acces](http://www.cre.fr/documents/deliberations/(text)/acces) [accessed on 9 July 2013].

⁹⁰⁴ CRE, *Powers*. Available at: <http://www.cre.fr/en/presentation/powers> [accessed on 9 July 2013].

and drafting of specifications; it sorts the results; and issues a reasoned recommendation on the basis of which offers are selected. The Minister for Energy then appoints the selected applicant(s).

When a request for a temporary exemption from third-party access obligations is referred to the Minister for Energy, the Minister consults the CRE. Such requests arise in relation to an LNG or natural gas storage facility or to interconnection facility with a gas transmission network situated within another Member State of the European Community.⁹⁰⁵ The decisions of the CRE relating to advice to the Minister for Energy or recommendations are broadly applicable across the sector.

The Dispute-Settlement and Sanctions Committee (CoRDIS) was created in December 2006. The CoRDIS is distinct from the College of Commissioners and exercises the CRE's authority as regards access dispute settlement and sanctions. It comprises two Government Councillors of State appointed by the Vice-President of the French Council of State, and two Councillors from the Supreme Court of Appeal, appointed by the First President of the French Supreme Court of Appeal. All four Councillors are appointed for six years. The Chairman of the CoRDIS is appointed by Decree from among its members.⁹⁰⁶

The CoRDIS meets and hears the report of the *rapporteur* (containing a summary of the arguments submitted by the parties prior to its meeting, any third-party reports/opinions submitted, and details of any other investigations made by the *rapporteur* and staff); hears the opinions of the representatives of each party implicated in the dispute; and is allowed to ask questions of those present.

The four members of the CoRDIS then meet in private to deliberate and make a decision. Decisions are made according to majority vote of those present. In the case of an equal split of the votes, the President has the casting vote.⁹⁰⁷

Decisions apply to the specific service provider(s) concerned in the dispute. There may be circumstances where one supplier (or a syndicate representative) may act on behalf of a defined group of industry participants (for example, CRE decision of 5 October 2006) or where various applications to the CRE against the same network operator (usually ADF or GDF) may be joined and treated as one single complaint (for example, CRE decision of 7 April 2008). The CRE has the power to impose sanctions for non-compliance with dispute-resolution decisions.

Subject to the approval of the CRE, the parties may reach resolutions departing from the decisions of the CRE. For example, in late 2005, a complaint pertaining to access refusal was made and a decision passed down.⁹⁰⁸ The decision was appealed to the Paris Appeals Court that rejected the decision on judicial grounds, and sent it back to the CRE for re-examination. The parties, however, were able to come to an agreement and design a suitable contract. They had the contract approved by the CRE and the complainant withdrew its complaint before the date of the CRE committee meeting.

Decisions are required to be explained.⁹⁰⁹ To fulfil this requirement, a decision report (usually about 15 pages in length) is prepared, outlining the nature of the complaint, the information presented; the result of the deliberations undertaken; the name of those participating in the process; the legislation considered; and the considerations and conclusions of the committee. These decision reports are submitted to the *Official Gazette* and delivered to the parties concerned, the Minister for Energy and the government representatives. Electronic versions are made available on the CRE website.

While there is no distinction between interim and final reports, there can be protective/interim measures enforced during the period leading up to a committee hearing, usually to protect the continued functioning of the market or to guarantee universal service.

⁹⁰⁵ *Ibid.*

⁹⁰⁶ CRE, *CoRDIS*. Available at: <http://www.cre.fr/en/presentation/organization/cordis> [accessed on 9 July 2013].

⁹⁰⁷ Law no. 2000-108, Law of 10 February 2000.

⁹⁰⁸ CRE, *Délibérations*. Available at: [http://www.cre.fr/documents/deliberations/\(text\)/](http://www.cre.fr/documents/deliberations/(text)/) [accessed on 9 July 2013].

⁹⁰⁹ CRE, *Procédure*. Available at: http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=DD691F27CBAED5ABF1F01736F8A1067D.tpdjo04v_1?cidTexte=LEGI TEXT000005629957 [accessed on 9 July 2013].

Appeals

Decisions made by the CRE can be appealed to the Paris Court of Appeal (a civil court) on judicial ground (Article 38).⁹¹⁰ Decisions can be reformulated or cancelled. They may also be returned to the CRE for reconsideration after cancellation. A decision reconsidered by the CRE may be subject to merits review subsequent to a cancellation of the original decision by the Court of Appeal (*Compétences*).

Any appeal must be submitted within one month of notification of a final decision or within fifteen days of notification of a protective measure (*Compétences*). Appeals do not suspend the CoRDIS decision, but in special circumstances a request to suspend execution of the decision of the CoRDIS can be made to the President of the Paris Court of Appeal (*Compétences*).

The Paris Court of Appeal must deliver its decision within four months of the appeal against a final decision of the CRE being lodged, and within one month of the appeal against an interim measure being lodged.⁹¹¹

The CRE is notified by the Court of Appeal when an appeal is lodged. It may be asked (as are the various parties concerned) to submit its observations/arguments. The CRE and the parties concerned are permitted to access any documents submitted in relation to the appeal via the court clerk. Either party and/or the CRE can choose to have legal representation.

The appeal process is entirely separate from the decision process. For dispute resolution, the decision process involves the CRE (represented by the standing committee) and the parties. For other types of decisions the Minister is involved. For the appeal process, however, the regular civil courts are approached, and the process is treated as any other matter in those courts.

2. Telecommunications

The fixed-line and mobile telecommunications networks are both highly developed, with high penetration. The French mobile market is one of the largest in Europe. Broadband penetration is well above the OECD average in both fixed and wireless.⁹¹² *France Télécom* is the incumbent. While this previous government-owned monopoly has been partially privatised since 1998 and is now subject to competition, it is still the dominant force in French telecommunications.⁹¹³

Fixed broadband penetration is the sixth highest in the OECD. It is based almost totally on DSL technology (92 per cent in late September 2012).⁹¹⁴ *France Télécom* had 9.016 million fixed broadband subscribers in 2010, compared with the second in the market, SFR, with 4.773 million subscribers.⁹¹⁵ More generally, new entrants had a market share of 58 per cent in late 2011.⁹¹⁶

In 2010, the leading carriers in the mobile market included Orange (*France Télécom*'s mobile brand) with 42.69 per cent of the market, SFR with 33.84 per cent, Bouygues with 17.43 per cent and Mobile Virtual Network Operators (MVNOs) with 6.04 per cent.⁹¹⁷ The top three network operators recently signed a framework agreement which will allow them to share 3G network deployments so as to

⁹¹⁰ CRE, *Compétences*. Available at: <http://www.cre.fr/reseaux/reglements-de-differends-et-sanctions/competences> [accessed on 9 July 2013].

⁹¹¹ CRE, *Procédure*. Available at: http://www.legifrance.gouv.fr/affichTexte.do?sessionId=DD691F27CBAED5ABF1F01736F8A1067D.tpdjo04v_1?cidTexte=LEGI-TEXT000005629957 [accessed on 9 July 2013].

⁹¹² OECD, *Broadband Portal* December 2012. Available at: <http://www.oecd.org/internet/broadbandandtelecom/oecdbroadbandportal.htm#Coverage> [accessed on 22 July 2013].

⁹¹³ International Trade Association, *Telecommunications Market Snapshot: France*, p. 1. Available at [http://web.ita.doc.gov/ITI/itiHome.nsf/9b2cb14bda00318585256cc40068ca69/e3397f92e70d4d318525788c004256bf/\\$FILE/telecom%20market%20snapshot-france.pdf](http://web.ita.doc.gov/ITI/itiHome.nsf/9b2cb14bda00318585256cc40068ca69/e3397f92e70d4d318525788c004256bf/$FILE/telecom%20market%20snapshot-france.pdf) [accessed on 9 July 2013].

⁹¹⁴ ARCEP, *Observatoire des Marchés Communications Electroniques en France*. Available at: <http://www.arcep.fr/fileadmin/reprise/observatoire/3-2012/obs-march-t32012.pdf> [accessed on 9 July 2013].

⁹¹⁵ International Trade Association, *Telecommunications Market Snapshot: France*, p. 1. Available at [http://web.ita.doc.gov/ITI/itiHome.nsf/9b2cb14bda00318585256cc40068ca69/e3397f92e70d4d318525788c004256bf/\\$FILE/telecom%20market%20snapshot-france.pdf](http://web.ita.doc.gov/ITI/itiHome.nsf/9b2cb14bda00318585256cc40068ca69/e3397f92e70d4d318525788c004256bf/$FILE/telecom%20market%20snapshot-france.pdf) [accessed on 9 July 2013].

⁹¹⁶ European Commission (EC), *Digital Agenda for Europe: A Europe 2020 Initiative*. Available at: <https://ec.europa.eu/digital-agenda/en/graphs> [accessed on 9 July 2013].

⁹¹⁷ *Ibid.*

facilitate the expansion of the 3G network in France, and thus enable full coverage by the end of 2013.⁹¹⁸ As of June 2012, France was placed slightly below the OECD average in terms of wireless broadband penetration. In early 2012, the market entry of a fourth mobile operator, *Free*, has resulted in the high growth of mobile subscribers (by 6.6 per cent in a year).⁹¹⁹

Regulatory Institutions and Legislation

The Ministry for the Economy, Industry and Employment is in charge of telecommunications regulation. The relevant legislation is the *Postal and Electronic Communications Law*.

The telecommunications industry was legally opened to competition in 1996, but France did not open its telecommunications to full competition until 1998 following the requirements set down in the European Union directives. French governments in the 1990s were not strong supporters of telecommunications liberalisation and were quite protective of the incumbent carrier in which the government is still a major shareholder.⁹²⁰

This is why the creation of an independent sector regulator in 1997 with technical and economic powers, the *Autorité de Régulation des Télécommunications* (ART, in English: Telecommunications Regulation Authority) was a new step in France's administrative procedures.⁹²¹ In May 2005, the ART was renamed the *Autorité de Régulation des Communications Électroniques et des Postes* (ARCEP, in English: Regulation Authority for Electronic Communications and Posts), which is now the sectoral regulatory body for posts and telecommunications.⁹²² The ARCEP is located in Paris.

The ARCEP's Executive Board is composed of seven members. To guarantee the institution's independence, members of the Board cannot be dismissed and their six-year mandate is not renewable. This independence also applies to the way in which members are appointed to the Board: three of the members, including the chairman, are appointed by the President of the Republic; the other two are appointed by the President of the National Assembly and the President of the Senate.⁹²³

At the end of 2011, the total number of staff at the ARCEP was 167 (Annual Report). The ARCEP's personnel is made up of approximately 50 per cent contractors (with particular expertise in telecommunications and posts) rather than permanent employees (Annual Report). The ARCEP's staff is divided into eight service departments; human resources, administration and finances; legal affairs; European and international affairs; economic and forward planning; spectrum and equipment manufacturer relations; broadband/ ultra fast broadband market and local authority relations; fixed and mobile markets and consumer relations; postal activities.

On 1 July 2013, the teams in charge of examining frequency allocation and mobile market analysis matters were combined to form the Mobile Access and Equipment Manufacturer Relations Department. This department is responsible for examining all dossiers relating to: the use of radio spectrum, that is, allocation and monitoring resulting obligations; and to mobile operators and mobile markets, covering relationships between network operators and virtual network operators, mobile roaming and network sharing. It will also act as the interface between the ARCEP and equipment manufacturers.⁹²⁴

⁹¹⁸ *Ibid.*

⁹¹⁹ ARCEP, *Observatoire des Marchés Communications Electroniques (Services Mobiles)*. Available at: <http://www.arcep.fr/fileadmin/reprise/observatoire/obs-mobile/2012/t4-2012/obs-mobiles-t4-2012-fr.pdf> [accessed on 9 July 2013].

⁹²⁰ OECD, *OECD Reviews of Regulatory Reform: Regulatory Reform in France*, p. 5. Available at: <http://www.oecd.org/regreform/32482712.pdf> [accessed on 9 July 2013].

⁹²¹ *Ibid.*

⁹²² ARCEP, *Présentation/l'Institution*. Available at: <http://www.arcep.fr/index.php?id=13> [accessed on 9 July 2013].

⁹²³ ARCEP, *Annual Report 2011*. Available at: http://www.arcep.fr/uploads/tx_gspublication/rapport-2011-anglais.pdf [accessed on 9 July 2013].

⁹²⁴ ARCEP, *ARCEP's Organisation*. Available at: http://www.arcep.fr/index.php?id=8571&L=1&tx_gsactualite_pi1%5Buid%5D=1610&tx_gsactualite_pi1%5Bannee%5D=&tx_gsactualite_pi1%5Btheme%5D=&tx_gsactualite_pi1%5Bmotscle%5D=&tx_gsactualite_pi1%5BbackID%5D=26&cHash=4e5694a1cdac429ed0acbe6d32ac4ef1 [accessed on 9 July 2013].

The ARCEP has traditionally been consulted for opinions on draft legislation, decrees and regulations concerning posts and electronic communications. It has also provided opinions to the Competition Authority when called upon to do so. The ARCEP issued 34 opinions in 2011 (as noted in the Annual Report, p.14):

- 18 opinions on draft legislation, decrees and orders;
- five opinions submitted in response to a request from the Competition Authority;
- nine opinions on La Poste tariff decisions; and
- two opinions on postal complaints.

Another important activity for the ARCEP in the field of electronic communications is the allocation of numbering and frequency resources. This accounted for 1407 decisions adopted by the Board (over 95 per cent of the total number of decisions). The ARCEP establishes and administers the national telephone numbering plan, and assigns numbers and blocks of numbers in an objective, transparent and non-discriminatory fashion to operators requesting these resources. Every number assignment results in an individual decision. The same is true of frequency allocations to operators. Of the 1476 decisions adopted by the ARCEP in 2011 (Annual Report, p.15):

- 1118 were decisions concerning the allocation of spectrum resources;
- 289 were decisions concerning the allocation of numbering resources;
- nine were decisions concerning dispute settlements between operators; and
- 14 were decisions concerning penalties, which included the issuance of notices to comply.

Ten dispute resolution procedures were also opened in 2011.

In addition to the aforementioned duties of the ARCEP, the recent amendments of the Telecoms Package of 2002, which were adopted by the European Parliament and Council in 2009, have been transposed into French national law and have resulted in major changes to the operations of the ARCEP.⁹²⁵ The latest Telecoms Package includes amendments to the Framework, Authorisation, Access, Universal Service & Rights of Users of Electronic Communications Networks, and Personal Data & Protection of Privacy Directives. More specifically, the 'Better Regulation' Directive amended the Framework, Access and Authorisation Directives; and the 'Citizen Directive' amended the Universal Service and Privacy Directives and have resulted in the ARCEP acquiring further independence and greater powers, along with stronger users' rights and improved spectrum management.⁹²⁶

To ensure greater independence, a second clause was inserted in the *Code des Postes et des Communications Électroniques* (CPCE) (*Post and Electronic Communications Law*) Article L. 131 to stipulate that 'members of the Electronic Communications and postal regulatory authority perform their duties in an entirely impartial fashion, without any instruction from the Government or from any other institution, person, enterprise or organisation'.⁹²⁷

The Law of 22 March 2011 also added to Article L. 32-1 of the CPCE 'That no discrimination exists, under analogous circumstances, in the relationship between the operators and providers of public online electronic communication services in traffic routing and access to these services' so that the ARCEP is mandated to ensure that the principle of neutrality is respected (Annual Report 2011).

At the same time, the powers of the ARCEP were expanded by the amendments in the following areas (Annual Report 2011):

- The ARCEP may now settle disputes 'between an operator and an enterprise providing online communication services to the public' so that the ARCEP can now rule on 'reciprocal technical and pricing terms applied to traffic routing between an operator and an enterprise providing online communication services to the public'.

⁹²⁵ ARCEP, *ARCEP Annual Report 2010*. Available at: <http://www.arcep.fr/index.php?id=2105> [accessed on 9 July 2013].

⁹²⁶ *Ibid.*

⁹²⁷ *Ibid.*

- The ARCEP may now set minimum quality of service requirements for Internet access, through a regulatory decision that applies to all operators.
- The ARCEP is empowered to impose penalties without the prior notice to comply being limited to a minimum period of one month so that the imposition of penalties may be more swift.
- The ARCEP may impose functional separation on a vertically integrated firm operator deemed to enjoy significant market power, in accordance with the new CPCE article L. 38-2, though it is only to be used as an exceptional, last recourse measure, when all other measures of regulation have failed to create free and fair competition in the marketplace.

When it concerns consumer interests, Article L. 33-1 now guarantees proper consumer information is available so that they can make informed choices. In fact, the ARCEP will now also work to ensure that the relationship between the vendor and consumer is balanced by implementing a procedure for enabling price comparisons for retail market mobile services, in application of Article 21 of the Universal Service Directive and the principles contained in the laws that govern electronic communications, particularly the obligation of transparency with respect to services.⁹²⁸

Consultation of Interested Parties

Matters arise in the form of complaints made, by letter or in person, by industry participants.⁹²⁹ Upon registration of a complaint, the ARCEP announces the date by which it will meet and provide a decision. A *rapporteur* (staff member in charge) is appointed to the case by the president of the committee. The parties concerned are notified and given the opportunity to present observations/arguments successively; a form of mediated debate which takes place up until five days before the date of the committee meeting. The parties are called to meet before the committee. The *rapporteur* gives a summary of the submissions made up until that date, and the parties are given the opportunity to present their arguments and respond to questions from the committee members. The committee then deliberates privately and delivers its decisions.⁹³⁰

All communication is made through formal, written channels, including the lodgement of the complaint, submissions and notifications.

Any visit to a premises or other investigation, made in addition to formal submissions, must be documented and presented as part of the file summarised by the *rapporteur* at the committee meeting.

Exceptions are, first, that the parties may be called upon, by the *rapporteur*, to meet in person to decide on a provisional schedule for submissions, directly after the official receipt of a complaint; and second, the various parties may present verbal arguments at the actual committee meeting.⁹³¹

The ARCEP is required by law to notify the public of any decision which will have a significant impact on the market, and receive and publish submissions of opinion/comment from the public.⁹³²

The system of successive submissions is based on the principle of a 'right of reply'. Thus, after each submission is received and dated, it is sent to the other party along with a notification of the date by which the ARCEP must receive a reply. Submissions can be made up to five days before the committee meeting.⁹³³

The parties can seek advice from any experts and consultants in preparing their submissions. They may also be assisted by experts and consultants of their choice during the committee meeting. The *rapporteur* is allowed to seek economic, legal or technical consultation at any time. Any consultations or investigations must be documented and forwarded to all the parties.⁹³⁴

⁹²⁸ ARCEP, *ARCEP Annual Report 2011*. Available at: <http://www.arcep.fr/index.php?id=2105> [accessed on 9 July 2013].

⁹²⁹ ARCEP, *Qu'est ce que l'Autorité?* Available at: <http://www.arcep.fr/index.php?id=13#regdiff> [accessed on 9 July 2013].

⁹³⁰ *Ibid.*

⁹³¹ *Ibid.*

⁹³² Legifrance, *Code des Postes et des Communications Électroniques (Postal and Electronic Communications Law)*. Available at: <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070987> [accessed on 9 July 2013].

⁹³³ ARCEP, *Qu'est ce que l'Autorité?* Available at: <http://www.arcep.fr/index.php?id=13#regdiff> [accessed on 9 July 2013].

⁹³⁴ *Ibid.*

The dispute resolution process is consultative and represents a form of mediated debate between the parties. While legal advice may be acquired, there is no compulsion for parties to be represented at hearings. Hearings follow a discussion/information format and are not court-style in their nature. Cases are presented according to their merits and points of view are considered before the ARCEP makes a final decision. Cases are not presented to a judge.

Appeals in relation to decisions concerning dispute settlements are made to the Paris Court of Appeal (on judicial grounds) and the process is litigious in nature from that point.

The ARCEP states analysis of the relevant markets as its primary objective.⁹³⁵ As part of its policy of maintaining an ongoing dialogue with industry participants, the ARCEP facilitates meetings of a consultative committee for telecommunications and one for radio; facilitates meetings of the Interconnection Committee; regularly facilitates forums, meetings and public consultations; and publishes a newsletter with details of its deliberations but also with industry reports and articles.⁹³⁶

The ARCEP also maintains press releases, industry summaries, reference texts and industry monitors (observatories) on its website. It conducts, for example, quarterly industry surveys, the results of which are published on its website.

While it is stated that 'sector-based regulation will eventually be phased out and replaced by common competition law as competition on the various market segments of electronic communications becomes satisfactory',⁹³⁷ there does not appear to be a strict policy with regard to alternative methods of dispute resolution or encouragement to make agreements outside the regulatory process.

The ARCEP maintains relations with various public authorities and actors, along with various economic stakeholders and consumer groups in the communications sector.⁹³⁸

There are several cooperation mechanisms (mainly compulsory but not binding opinions) between the ARCEP and the National Competition Authority (NCA). Thus, the ARCEP may contact the NCA with regard to the abuse of a dominant position in the field of electronic communications. For its part, the NCA has to ask for the opinion of the ARCEP on any practice in its remit. In addition, the ARCEP has to ask for an opinion of the NCA on the relevant electronic communications markets and on the list of operators with significant market power. Similarly to the relationships with the NCA, the ARCEP has to ask some other authorities for non-binding opinions. For instance, the ARCEP must obtain the opinion of the *Conseil Supérieur de L'audiovisuel* (CSA) (Broadcasting Authority) when taking decisions that will have a significant impact on the broadcast of radio and television services. The ARCEP also solicits the opinion of the *Commission Nationale de l'Informatique et des Liberté* (CNIL) (French National Commission on Computing and Freedom) on matters that concern the treatment of personal data.

The ARCEP gives a regular account of its activities to Parliament, in the form of reports or hearings. In 2011, for example, the ARCEP addressed Parliament on 18 occasions. When it concerns hearings, the Authority's work with parliament focuses to a large extent on digital regional development and on fixed and mobile network coverage. The ARCEP is also required to submit its annual report to the Presidents of the National Assembly and the Senate, to the President of the Republic, to the Prime Minister and to concerned members of government.

The ARCEP also works in tandem with the government and all concerned administrations on the various topics that fall under its responsibilities. For example, to ensure consistency in government actions in the regulated sectors, the ARCEP maintains close ties with the Minister responsible for electronic communications. Some decisions issued by the ARCEP need to be approved by the Minister to be given regulatory force. The ARCEP also has an advisory role on draft decrees and orders relating to the issues for which it is responsible. Due to this advisory role, the ARCEP departments will also be in close contact with the *Direction Générale de la Compétitivité, de l'Industrie et des Services* (DGCIS) (General Directorate for Competition, Industry and Services), but also the

⁹³⁵ *Ibid.*

⁹³⁶ ARCEP, *Qu'est ce que l'Autorité?* Available at: <http://www.arcep.fr/index.php?id=13#regdiff> [accessed on 9 July 2013].

⁹³⁷ *Ibid.*

⁹³⁸ ARCEP, *ARCEP Annual Report 2011*, pp. 39-58. Available at: http://www.arcep.fr/uploads/tx_gspublication/rapport-2011-anglais.pdf [accessed on 9 July 2013].

Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes (DGCCRF) (General Directorate for Fair trade, Consumer Affairs and Fraud Control) and the *Direction des Affaires Juridiques* (DAJ) (Legal Affairs Department).

In the performance of its duties, ARCEP also maintains regular relations with other ministries, notably the *Direction Générale des Médias et des Industries Culturelles* (Directorate-General for Media and Cultural Industries), the *Ministère Chargé de l'Outre-mer* (the Ministry for Overseas France) the *Secrétariat d'Etat à la Consommation* (Secretary of State for Consumer Affairs) and the *Ministère de Solidarité et de la Cohésion Sociale* (Secretary of State for Social Welfare and Social Cohesion), with which it co-signed 'charter of voluntary commitments from the telecom sector to facilitate access to electronic communication services for people with disabilities'.

The *Agence Nationale des Fréquences* (ANFR or National Frequency Agency) is in charge of managing radio frequencies and the undertakings licensed to use them. The ARCEP also works very closely with this organisation. The ANFR is also in charge of managing national spectrum assignment records and, given that the ARCEP is responsible for allocating spectrum, the ARCEP must also inform ANFR of the frequency assignments it has authorised while also submitting any plans to create or alter radio stations operating frequency bands for which the ARCEP is responsible.

In order to maintain relationships with local authorities, the ARCEP created a forum in 2004 called the *Groupe d'Échange entre l'ARCEP, les Collectivités Territoriales et les Opérateurs* (GRACO) to host discussions between the ARCEP, private sector operators and local authorities. In 2011, for example, the ARCEP hosted three technical meetings.

Other national public authorities the ARCEP naturally maintains relations with include the Cour d'Appel de Paris (Paris Court of Appeals), the Competition Authority, the *Conseil Supérieur de l'Audiovisuel* (CSA) (French Broadcasting Authority), and the *Commission Nationale d'Informatique et des Libertés* (CNIL) (National Commission of Computing and Freedoms), who is consulted in the performing of the ARCEP's market analyses.

With regard to European and international public authorities, the ARCEP maintains close ties with the European Parliament, the European Council, the *International Telecommunications Union* (ITU), the OECD, and FRATEL (an organisation made up of French-speaking countries that conducts technical seminars and an annual meeting to discuss the regulation of telecommunications).

The ARCEP is also involved in the Body of European Regulators for Electronic Communications (BEREC) which was created in 2009. In 2012, it chaired or co-chaired three expert working groups and participated in eight other groups. The BEREC has been working on key issues of electronic communication regulation (including net neutrality, new generation networks, universal service, international roaming, non-discrimination) and has produced several opinions on the European Commission initiatives.

With respect to the ARCEP's relationships with economic stakeholders, it is heavily involved with: electronic communications operators; equipment manufacturers; and with content-application and service providers.

Finally, consumer groups, such as the consumer group *UFC-Que Choisir* may also be involved with the ARCEP by presenting written submissions to *the rapporteur* in relation to a particular dispute. The *UFC-Que Choisir* is funded through membership fees and donations.

In addition, the Interconnection and Access Committee, appointed by the ARCEP, is made up of representatives of network operators active in: the interconnection market; telecommunications service providers; and consumer associations. The ARCEP's Chairman presides over the committee, and the Authority itself ensures its secretarial duties. The Interconnection and Access Committee is a forum for discussion and exchange between the industry participants on current issues relating to fixed or mobile interconnection.⁹³⁹

In order to share its latest work with stakeholders, the ARCEP is also involved with several committees such as consumer committees, internet service provider committees, and exchange groups with local authorities and operators or other *ad hoc* expert committees on specific subjects.

⁹³⁹ ARCEP, *Annual Report 2011*. Available at: http://www.arcep.fr/uploads/tx_gspublication/rapport-2011-anglais.pdf [accessed on 9 July 2013].

In 2007, the Consumer Affairs Committee was also created to provide consultation and act as a forum for discussion of consumer issues that fall within the portfolio of the ARCEP (*Annual Report 2011*).

Timeliness

There are no provisions made for consultation prior to the lodgement of a complaint, except in the form of general market surveys and reports and the meetings of the consultative committees.

The committee must announce its decision within four months of having received the complaint.⁹⁴⁰ This time period may be extended to six months if deemed necessary by the Authority.⁹⁴¹ There do not appear to be any particular consequences for failure to reach a decision within the time limit. A consultation of the last five decisions (all decisions for the period May 2011 to March 2012) shows that they were all dealt with within the four-month time limit.⁹⁴²

Information Disclosure and Confidentiality

Agents of the Minister or the ARCEP are given complete authority to access all documents and information held by any participant in communications and they are to be provided with access to properties and vehicles. They may conduct visits and interviews. Any information gathered must be documented and copies delivered to all parties concerned.⁹⁴³

Information confidentiality is decided according to Law no. 78 - 753 of 17 July 1978 (Article 6).⁹⁴⁴ The essential features of this Article are summarised in the section on 'Approach to Competition and Regulatory Institutional Structure'.

Any information gathered in preparation for a committee meeting is documented, copies are sent to the parties concerned and copies are kept to be summarised by the *rapporteur* for presentation at the committee meeting.

The ARCEP may not pass on any information gathered from operators in the dispute resolution process to any third party.⁹⁴⁵

The ARCEP is constantly collecting information as part of their on-going market surveillance role. Most often during dispute resolution, the *rapporteur* issues a questionnaire, on behalf of the ARCEP, requesting all the required information. There is rarely an objection to completing these questionnaires.

Decision-making and Reporting

In the case of access and interconnection disputes the ARCEP is the determinative authority. However, ministerial responsibilities and powers are largely preserved in the French system. Several of the ARCEP's other functions require direct approval, by decree, from the relevant minister.

The ARCEP also acts as adviser to the Minister for matters such as the preparation of the French position in international negotiations and acts as the French representative in EU and international organisations.

The Authority is consulted for opinions on draft legislation, decrees and regulations concerning posts and electronic communications. It may also provide opinions to the Competition Authority when called upon to do so.

As summarised earlier, the ARCEP issued 34 opinions on posts and telecommunications in 2011.

In the case of disputes a small team coordinates the transmission of the various submission documents and compiles a summary of the parties' various arguments to the committee – it does not

⁹⁴⁰ *Ibid.*

⁹⁴¹ *Ibid.*

⁹⁴² ARCEP, *ARCEP Annual Report 2011*, p. 16. Available at: http://www.arcep.fr/uploads/tx_gspublication/rapport-2011-anglais.pdf [accessed on 9 July 2013].

⁹⁴³ *Code des Postes et des Communications Électroniques (Postal and Electronic Communications Law)*. Available at: <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070987> [accessed on 9 July 2013].

⁹⁴⁴ Law no. 78-753 (CivL), Law of 17 July 1978, Article 6.

⁹⁴⁵ ARCEP, *Guide Juridique pour les Opérateurs Locaux et Les collectivités* 2007. Available at: http://www.arcep.fr/uploads/tx_gspublication/guide-juridique-crip2007.pdf [accessed on 9 July 2013].

appear to actually present a proposal or suggest a decision. The legal unit is responsible for communications and coordination of the whole process and so, presumably, has to 'approve' the documents that are distributed to the parties and the committee members prior to the meeting.

The committee meets and hears the report of the *rapporteur* (containing a summary of the arguments submitted by the parties prior to the committee meeting, any third party reports/opinions submitted and details of any other investigations made by the ARCEP staff), hears the opinions of the representatives of each party implicated in the dispute, and is allowed to ask questions of those present.

The seven members of the committee then meet in private to deliberate and make a decision. There must be at least five members of the committee present for a decision to be made. Decisions are made according to majority consensus. A vote may be requested by a committee member and is taken in the form of a show of hands unless a secret ballot is requested. Proxy votes are not allowed. In the case of an equal division of the votes, the decision is not adopted.⁹⁴⁶

Decisions apply to the specific service provider(s) concerned in the dispute. There may be circumstances where one complainant may act on behalf of a defined group of industry participants or where various applications to the ARCEP against the same network operator (often France Telecom) may be joined and treated as one single complaint.

Other decisions of the ARCEP, relating to advice to the Minister or recommendations, are broadly applicable across the industry.

Until July 2013, the ARCEP had the power to impose sanctions for the non-respect of decisions made to resolve disputes.⁹⁴⁷ However, France's Constitutional Council has since revoked legal provisions governing the ARCEP's powers, thus removing its authority to ensure implementation of its decisions and enforce sanctions. The government is expected to propose new decrees in parliament to reinstate sanctions procedures as soon as possible. In the meantime, the ARCEP will not have the authority to enforce its statutes in cases currently awaiting a final decision.⁹⁴⁸

Decisions of the ARCEP are required to be justified.⁹⁴⁹ A decision report (approximately 35 pages) is prepared outlining the questions considered, the information presented, the result of the deliberations undertaken, the name of those participating in the process and the decisions adopted.⁹⁵⁰ These documents are kept and stored chronologically.⁹⁵¹ An electronic copy (with exceptions for confidential information) must be published on the ARCEP website and in certain cases submitted to the Official Gazette.

Interim measures can be requested only in relation to a pending the ARCEP decision (a dispute currently being resolved). A request for interim measures to be taken can be lodged at any point in the dispute resolution procedure and must be justified in writing. The head of the ARCEP forwards the request to all the parties concerned. Interim measures are instated to ensure the continued functioning of the network. They are generally reserved for use only in emergencies.⁹⁵² Otherwise, there is no distinction made between draft and final decisions.

Appeals

An appeal can be lodged within one month of an ARCEP decision being published. Appeals are made to the Paris Court of Appeal on judicial grounds.⁹⁵³ A decision may be subject to merits review subsequent to a cancellation of the original decision by the Court of Appeal. This is the same court as the appeal court for Energy (considered above) and the details are substantially identical.

⁹⁴⁶ *Code des Postes*.

⁹⁴⁷ *Code des Postes*. Article L36-11.

⁹⁴⁸ TeleGeography, *France to Amend Law on ARCEP's Power to Sanction*. Available at: <http://www.telegeography.com/products/commsupdate/articles/2013/07/08/france-to-amend-law-on-arceps-power-to-sanction/> [accessed on 10 July 2013].

⁹⁴⁹ ARCEP, *Qu'est ce que l'Autorité?* Available at <http://www.arcep.fr/index.php?id=13#regdiff> [accessed 9 July 2013].

⁹⁵⁰ *Code des Postes*.

⁹⁵¹ ARCEP, *Qu'est ce que l'Autorité?*

⁹⁵² *Code des Postes*.

⁹⁵³ *Code des Postes*.

3. Postal Services

The postal services market was fully opened up to competition on 1 January 2011 when the postal monopoly of items of correspondence weighing less than 50 grams was abolished. However due to weakened economic conditions, the liberalisation of the market did not result in a significant increase in competition. As of 31 December 2011 the market for postal services, which can be subsequently divided into the domestic and the outbound cross-border mail markets, was populated by a total of 29 operators.⁹⁵⁴

In 2011, the market for items of correspondence, that is, letters weighing less than two kilograms, accounted for €7.5 billion in revenue, which was 1.6 per cent less than in 2010. The corresponding volumes were 3.2 per cent down on the same period (*Annual Report 2011*). The addressed-advertising market, which accounts for 20 per cent of the market in terms of value and 30 per cent in terms of volume, contracted by 0.5 per cent in value and 1.7 per cent in volume. The correspondence-item market, however, contracted more sharply, with a 1.9 per cent drop in value and a 3.8 per cent drop in volume (*Annual Report 2011*). Outward international mail volumes also continued to slide, with correspondence flows decreasing by 10.3 per cent in 2011 compared with 2010, and related revenue of €380 million decreased by 3.0 per cent in 2011 (*Annual Report 2011*). Nevertheless, 2011 was a good year for *La Poste* with revenues in excess of €21.3 billion, which was a significant increase from the €20.9 billion reported in 2010 and €20.5 billion in 2009. This performance was said to be a result of strong commercial momentum and a sustained innovation program combined with controlled expenses.⁹⁵⁵

Alongside *La Poste*, the state-owned incumbent postal operator in France, the main domestic operator is Adrexo which has its roots in the delivery of unaddressed advertising and free newspapers, and which covers virtually all of Metropolitan France. The other operators in the domestic mail market are small and medium enterprises established in a town or region that offer various postal services, including the delivery of items of correspondence.⁹⁵⁶

In the outbound cross-border mail market, which was fully opened to competition on 1 January 2003, the main operators aside from *La Poste* are subsidiaries of foreign postal companies (Germany, the Netherlands, Switzerland, the UK and Belgium) or the postal company itself, such as *Austrian Post*. Also present in the market are two private French operators, *IMX-France* and *Optimail-Solutions* (*Annual Report 2011*).

*Regulatory Institutions and Legislation*⁹⁵⁷

The Ministry in charge is the Ministry for the Economy, Industry and Employment. The relevant legislation is the *Postal and Electronic Communications Law*, introduced on 20 May 2005, governing postal matters such as the reorganisation of the postal market, the creation of market specific regulation and the appointment of ARCEP. In accordance with the Postal and Electronic Communication's Law, ARCEP is primarily responsible for overseeing the postal market's liberalisation and proper operation.

As of 1 January 2011, the date on which the French postal market was completely liberalised, the ARCEP was responsible for:

- Issuing authorisations to exercise a postal activity. Since June 2006 the ARCEP has issued 38 authorisations.
- Issuing opinions, which are made public, on tariffs and universal service quality objectives. The ARCEP maintains the ability to supervise tariffs for universal services that are deemed public services, which means that the ARCEP can set a price cap that provides clarity and gives *La*

⁹⁵⁴ ARCEP, *Annual Report 2011*. Available at: http://www.arcep.fr/uploads/tx_gspublication/rapport-2011-anglais.pdf [accessed on 9 July 2013].

⁹⁵⁵ *La Poste, Group Results 2011*. Available at: [http://www.laposte.fr/legroupe/Nos-informations-financieres/Actualites-et-communicues-de-presse/2012/Resultats-2011-du-Groupe-La-Poste/\(curLang\)/eng-GB](http://www.laposte.fr/legroupe/Nos-informations-financieres/Actualites-et-communicues-de-presse/2012/Resultats-2011-du-Groupe-La-Poste/(curLang)/eng-GB) [accessed on 9 July 2013].

⁹⁵⁶ ARCEP, *Annual Report 2011*. Available at: http://www.arcep.fr/uploads/tx_gspublication/rapport-2011-anglais.pdf [accessed on 9 July 2013].

⁹⁵⁷ *Ibid.*

Poste the latitude to alter its rate schedule by increasing the price of some products more than others.

- Assessing the net cost for *La Poste* to fulfil its regional development mandate. The ARCEP carried out this evaluation for the first time in 2011, arriving at a cost of 269 million Euros for 2010.
- Processing complaints received from users of the postal service which were unable to be resolved through the procedures put into place by the authorised postal service providers. The ARCEP makes sure that authorised postal providers put appropriate complaint-handling procedures in place and looks into any complaints that have not been properly dealt with under these procedures or that user finds to be unsatisfactory. Users are essentially entitled to appeal to the ARCEP about these issues once they have exhausted all of the avenues made available by postal operators, including appealing to *La Poste* complaints mediator. In 2011, the ARCEP received 75 letters of complaint, of which only six were admissible. Of these six admissible submissions, two were amicably settled between the users and *La Poste* and two were subject to the Opinions delivered by the ARCEP in 2011.

In addition to the primary responsibilities listed above, the ARCEP may also have an advisory role in issues relating to competition when it is consulted by the designated national competition authority.

Consultation of Interested Parties

The process for access dispute resolution is very similar to that employed by the ARCEP for telecommunications disputes.

Either party in a dispute (usually the party attempting to make a service contract with *La Poste*) can approach the ARCEP for help in resolving the dispute. The complaint is registered and the ARCEP announces the date by which it will meet and provide a decision. A *rapporteur* (staff member in charge) is appointed to the case by the president of the committee.

The parties concerned are notified and given the opportunity to present observations/arguments successively: a form of mediated debate which takes place up until five days before the date of the committee meeting to deliberate.

The parties are called to meet before the committee. The *rapporteur* gives a summary of the submissions made up until that date and the parties are given the opportunity to present their arguments and respond to questions from the committee members. The committee then deliberates privately and delivers its decisions.⁹⁵⁸ The sole decision published on the ARCEP website only involves the ARCEP and the two parties involved in the dispute. The ARCEP can call on any person it deems suitable to give evidence. All communication is documented and presented at the committee hearing.

There seem to be no provisions for informal consultations prior to lodgement of a complaint.

The parties are notified of the date by which their submissions must be made and the date of the committee meeting.

The parties can seek advice from any experts and consultants in preparing their submissions. They may also be assisted by experts and consultants of their choice during the committee meeting.

The *rapporteur* is allowed to seek economic, legal or technical consultation at any time. Any consultations or investigations must be documented and forwarded to all the parties.⁹⁵⁹

The dispute resolution process is consultative and represents a form of mediated debate between the parties. While legal advice may be acquired there is no compulsion for parties to be represented at hearings. Hearings follow a discussion/information format and are not court-style in their nature. Cases are presented according to their merits and points of view are considered before a final decision is made. Cases are not presented to a judge.

Appeals are made to the court of appeal (on judicial grounds) in Paris and the process is litigious in nature from that point.

⁹⁵⁸ *Legifrance, Code des Postes et des Communications Électroniques (Postal and Electronic Communications Law), Article L5-5.* Available at: <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070987> [accessed on 9 July 2013].

⁹⁵⁹ *Code des Postes.*

The ARCEP maintains press releases, industry summaries, reference texts and industry monitors on its website. It also conducts, for example, annual service quality assessments, the results of which are published on its website.⁹⁶⁰

The ARCEP must notify the designated competition authority of matters pertaining to consumer protection or competition.⁹⁶¹

The ARCEP issues a call for public submissions with relation to research being conducted or general investigations being undertaken as part of its function as industry supervisor and information provider.

The ARCEP also maintains regular contact with all postal-service providers. The investigation of authorisation requests involves on-the-spot inspections, and operators' progress is also monitored, in particular through the Statistical Observatory on Postal Activities that the ARCEP publishes annually.⁹⁶²

Whenever applicable, the ARCEP will consult user groups, such as *UFC-Que Choisir?* on postal matters. The ARCEP set up a Postal Consumers Committee in 2008 to promote dialogue and cooperation with such consumer groups on matters coming within the ARCEP's purview. This Committee meets twice a year and, since 2008, eight meetings have been held to debate issues of importance for postal regulation and for consumers. These discussions have enabled the ARCEP to gear its actions to user interests. The ARCEP takes maximum account of the views and concerns expressed by the consumer groups regarding the regulation of the universal service provider, *La Poste* and other postal-service providers.⁹⁶³

When it concerns the ARCEP's relationship with European bodies in postal market matters, the Authority is mainly involved with the European Regulators Group for Postal Services (ERPG), which was established by the European Commission decision of 10 August 2010. The group is composed of all national regulatory authorities for postal services from the 27 Member States and is responsible for examining best-practice regulation. It also acts as an adviser to the European Commission with a view to consolidating the internal market for postal services. The inaugural meeting of the ERPG was held in Brussels on 1 December 2010, during which the ARCEP Executive Board member, Joelle Toledano, was elected chairperson of the ERPG for 2011. At the 2011 meeting, reports on issues surrounding regulatory accounting were submitted to public consultation. Goran Marby, Chairperson of the Swedish regulator, PTS, took over from Joelle Toledano as Chairperson of the ERGP in 2012.⁹⁶⁴

Timeliness

There seem to be no provisions for informal consultations prior to lodgement of a complaint.

Incentives to delay would rest mostly with *La Poste*, as disputes concern the tariffs and conditions it has dictated in contracts with private service providers.

The legislation mandates that parties will grant access to information and make available their premises to the agents of the ARCEP. The ARCEP has the power to impose sanctions (access/activity restraints for private service providers and fines for *La Poste*) in the case of their non-conformity with the requirements of the legislation.⁹⁶⁵

The ARCEP must publish a decision within four months of lodgement.⁹⁶⁶ If, at the end of the four months, the ARCEP has not made a decision, the Court of Appeal can be approached directly.⁹⁶⁷ The only decision published so far was dealt with within the four-month time limit.⁹⁶⁸

⁹⁶⁰ ARCEP, *L'actualité de l'ARCEP*. Available at: <http://www.arcep.fr> [accessed on 9 July 2013].

⁹⁶¹ Legifrance, *Loi n° 2005-516 du 20 mai 2005 relative à la Régulation des Activités Postales*, Article L2. Available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000446769&dateTexte=&categorieLien=id> [accessed on 9 July 2013].

⁹⁶² ARCEP, *Annuel Report 2011*. Available at: http://www.arcep.fr/uploads/tx_gspublication/rapport-2011-anglais.pdf [accessed on 12 July 2013].

⁹⁶³ *Ibid.*

⁹⁶⁴ *Ibid.*

⁹⁶⁵ *Code des Postes et des Communications Électroniques (Postal and Electronic Communications Law)*, Article L 5-3. Available at: <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070987> [accessed on 9 July 2013].

⁹⁶⁶ *Code des Postes et des Communications Électroniques (Postal and Electronic Communications Law)*, Article 5-5.

Information Disclosure and Confidentiality

Agents of the Minister or the ARCEP are given complete authority to access all documents and information held by any participant in the communications industry and they are to be provided with access to properties and vehicles. They may conduct visits and interviews. Any information gathered must be documented and copies delivered to all parties concerned.⁹⁶⁹

Information confidentiality is decided according to Article 6 of *Law no. 78-753 of 17 July 1978*. This Article was summarised in the Energy section of this chapter.

Parties are required to supply any information requested by the ARCEP. The public disclosure of the information is then decided upon according to the above legislation by the ARCEP.

Any information gathered in preparation for a committee meeting is documented, copies are sent to the parties concerned and copies are kept to be summarised by the *rapporteur* for presentation at the committee meeting.

The ARCEP may not pass on any information gathered from operators in the dispute resolution process to any third party.

The ARCEP collects information on a regular basis and, in particular, it is responsible for monitoring the accounts and operations of *La Poste*, including reporting annually on the fulfillment of its service obligations and its pricing levels.

Decision-making and Reporting

The mechanisms for decision-making are identical to those used by the ARCEP in relation to telecommunications matters.

In contrast to the telecommunications cases dealt with by the ARCEP, no provisions are made with regard to interim measures for the treatment of complainants in posts.

As in telecommunications, decisions must be published, along with a justification for the decision.

Appeals

An appeal can be lodged within one month of an ARCEP decision being published. Appeals are made to the Paris Court of Appeal on judicial grounds. Either of the parties involved in the dispute may appeal the decision. A decision may be subject to merits review subsequent to a cancellation of the original decision by the Court of Appeal (that is, after judicial review, a decision may be returned to the ARCEP by the Court). Details are substantially similar to those relating to telecommunications and energy, described earlier.

4. Water and Wastewater

France is a country reasonably rich in water resources, with water and wastewater treatment of good quality. Of total domestic water consumption at about 165 litres per capita per day in 2007, 63 per cent is sourced from groundwater and 37 per cent from surface water.⁹⁷⁰ There are seven major river basin districts in mainland France, namely:⁹⁷¹

- 'Adour, Garonne, Dordogne, Charente, Charente and Aquitaine coastal Rivers' District ;
- 'Sheldt, Somme, the Channel coastal rivers, North Sea' District;
- 'Loire, Vendée and Brittany coastal rivers' District;
- Rhine District;

⁹⁶⁷ *Code des Postes et des Communications Électroniques (Postal and Electronic Communications Law)*, Article 10.

⁹⁶⁸ *Code des Postes et des Communications Électroniques (Postal and Electronic Communications Law)*, Article 10.

⁹⁶⁹ *Code des Postes et des Communications Électroniques (Postal and Electronic Communications Law)*, Article 5-9.

⁹⁷⁰ European Environment Agency (EEA), *The European Environment-State and Outlook 2010: France*. Available at: http://www.eea.europa.eu/soer/countries/fr/soertopic_view?topic=freshwater [accessed on 9 July 2013].

⁹⁷¹ *Office International de l'Eau (OIEAU), Organisation of Water Management in France*. Available at: <http://www.oieau.org/IMG/pdf/IOWater-WaterManagementFrance.pdf> [accessed on 9 July 2013].

- Meuse and Sambre District;
- 'Rhone and Mediterranean coastal rivers' District;
- 'Seine and Normandy coastal rivers' district.

Unlike most other network-operated infrastructure in France, water and wastewater services were never the responsibility of a state-owned monopoly.⁹⁷² Water management in France uses a decentralised model or what is referred to as Integrated Water Resources Management (IWRM) so as to meet the several fundamental challenges faced by the water management authorities, such as ensuring the universal access, preservation and sustainable development of the country's precious water resources.⁹⁷³

Regulatory Institutions and Legislation

The current organisation of water policy relies on three major pieces of legislation.

The first of these is the *Law of 16 December 1964*, which organised water management at the level of river basins and thus divided the country into six large hydrographical basins and created six respective River Basin Committees, namely the Adour-Garonne, Artois-Picardy, Loire-Brittany, Rhine-Meuse, Rhone-Mediterranean and Seine-Normandy.⁹⁷⁴ These committees were established in each large river basin district as an advisory body, along with Water Agencies, which act as an executive organisation that is responsible for levying specific taxes. In addition, the law established the *National Water Committee* which was to be in charge of developing water policy at the national level.

Secondly, the *Law of 3 January 1992* or the *Water Law* laid the principles of true IWRM: patrimonial nature of water, management balanced between the various water uses in all its forms, conservation of aquatic ecosystems and wetlands, use of water as an economic resource, priority given to drinking water supply.⁹⁷⁵ This law also developed the principal planning instrument or master plan for water management in large basins, the *Schéma Directeur d'Aménagement et de Gestion des Eaux* (SDAGE) and the *Schéma d'Aménagement et de Gestion des Eaux* (SAGE), which is the water development and management scheme in sub-basins.⁹⁷⁶

Finally and most significantly, the *European Water Framework Directive (WFD)* of 23 October 2000, which was subsequently transposed into French law in 2004, established a framework for Community action in the field of water policy, gave overall consistency to a well-developed European legislation (about 30 directives and regulations since the 1970s).⁹⁷⁷ This directive sets out common objectives, timetables and working method for the 27 Member states of the European Union.⁹⁷⁸

As a major result of the Water Law in 1992, concerted planning of water policy is institutionalised at three levels: at the national level, at the level of each large river basin and the level of tributaries, sub-basin or aquifers.

At the national level, the *Ministère de l'Écologie, du Développement Durable et de l'Énergie* (MEDDE), that is, the Ministry of Ecology, Sustainable Development and Energy is responsible for laying down and coordinating water policy with the advice of the *Office National de l'Eau et des Milieux Aquatiques* (ONEMA) (National Agency for Water and Aquatic Environments), which is in charge for knowledge and monitoring of the status of water and aquatic environments. More specifically, the Ministry in charge of Ecology operates the secretariat of the *Inter-ministerial Mission for Water* which gathers all the ministers concerned under the authority of the Prime Minister. In addition, the National Water Committee, which is chaired by a Member of Parliament nominated by the Prime Minister, gathers representatives of the users, associations, local authorities, governmental administrations, qualified people and the presidents of Basin Committees. The National Water

⁹⁷² *La Vie Publique, La Politique de l'eau : 40 ans d'une Gestion Décentralisée*. Available at: <http://www.vie-publique.fr/politiques-publiques/politique-eau/index/> [accessed on 9 July 2013].

⁹⁷³ OIEAU, *op. cit.*

⁹⁷⁴ OIEAU, *op. cit.*

⁹⁷⁵ OIEAU, *op. cit.*

⁹⁷⁶ OIEAU, *op. cit.*

⁹⁷⁷ OIEAU, *op. cit.*

⁹⁷⁸ OIEAU, *op. cit.*

Committee gives advice on the draft legal texts on reforms, draft government action plans, water price and the quality of public-water supply and sanitation utilities.

At the level of each large river basin, the River Basin Committee is chaired by a local elected official. It is made up of representatives of local authorities (40 per cent), users and associations (40 per cent) and the State (20 per cent). The Basin Committee is responsible for orientating water policy priorities in the basin and preparing the SDAGE. This document gives the overall orientations of water management in the basin and the objectives to be reached, while also acting as a legal framework for public policies as any administrative decision concerning water management must be compatible with the SDAGE. The Basin Committee also follows up the SDAGE implementation and proposes an amount for the tax levied by the Water Agency, while voting the multilayer action of the Water Agency, which finances the SDAGE implementation. In accordance with the WFD, the SDAGE is now accompanied by a Program of Measures which distributes the means and the actions allowing the achieving of the objectives of good water status in 2015.

At the level of tributaries, sub-basins or aquifers, a Local Water Commission, composed by one half of representatives of local authorities, by one quarter of users' representatives and by one quarter of State representatives, can be set up to prepare a SAGE. The SAGE has administrative and legal status because, once it is approved, the decisions made in the field of water by the administrative authorities must be compatible with the SAGE. The SAGE plans various types of actions adapted to local stakes such as peoples' information and education, river maintenance and development, drinking water supply, control of rain water, defence against floods, pollution control and surface and ground-water protection.

In addition, each local district supports a division called the *Water Police* to ensure developments are in alignment with the relevant SDAGE and SAGE. In accordance with the *Environment Law*, which outlines the various sanctions that the Water Police may enforce, the Water Police is responsible for prosecuting polluters, issuing authorisations for new developments and monitoring water treatment plants to ensure quality standards. They are also entitled to collect information and to investigate reports of activities that are out of line with the relevant SDAGE.

In accordance with the WFD, the State is responsible for approving the various SDAGEs and SAGEs and for regulating the relations between each of the participants in the water market.⁹⁷⁹

The local mayor⁹⁸⁰ also plays a vital role at the local level by approving domestic charges for water supply and wastewater management, while also dealing with disputes by customers. Both functions can be delegated to another person or body. Mayors are required to present an annual report on billing, financing, operations and developments. Where water supply responsibilities have been given to a private operator, that operator must also annually publish a report of its activities to the Mayor. Both reports must then be reviewed by a consultative commission, in accordance with the *Local Democracy Law* of 23 February 2002.

While the mayor appears to have authority to determine charges for water supply and wastewater services, the Water Agency of the river basin levies pollution and abstraction taxes. These are to be proportional to the amount of water used and pollution generated so as to be consistent with the 'polluter pays' and 'water pays for water' principles.⁹⁸¹

Consultation of Interested Parties

Water stakeholders can be divided into three types: national, regional and departmental.⁹⁸² On the national level, the Minister plans operations with other ministries competent in certain specific areas (drinking water and health, hydraulic power, navigable waterways). Coordination is ensured by the *Inter-ministerial Water Mission*. Another organisation that acts on the national level is ONEMA, which is in charge of general studies, research and evaluation.

⁹⁷⁹ OIEAU, *op. cit.*

⁹⁸⁰ Agency for Environment and Energy Management, *The Mayor's Role and Competencies for Water and Solid Waste Management with Inter-communal Cooperation*. Available at: http://www.euromedina.org/bibliotheque_fichiers/alex_Oppeneau.pdf [accessed on 9 July 2013].

⁹⁸¹ OIEAU, *op. cit.*

⁹⁸² *Ministère de l'Écologie, Du Développement Durable, des Transport et du Logement, Water Policy in France: Experience at the Service of the International Community*. Available at: http://www.developpement-durable.gouv.fr/IMG/pdf/Politique_de_l_eau_GB.pdf [accessed on 9 July 2013].

At the regional level (26 regions), the *Direction Régionale, de l'Environnement, de l'Aménagement et du Logement* (DREAL) (Regional Environment, Planning and Housing Department), ensures consistency in implementation of the water policy.

At the departmental level (101 departments), the *Direction Départementales des Territoires* (DDT) (Department Territorial Directorates) implement water policy in its regulatory and technical aspects. Permit applications are also managed by the DDT.

Other stakeholders include companies working in the water and wastewater sector; research bodies; and finally associations concerned with issues such as the protection of the environment, consumers or fisherpersons.

Water stakeholders interested in the developments and issues arising in the field of water management are entitled to access the relevant information as recognised by the *Law of 17 July 1978* and participate in the highly consultative procedures set in place for development projects.⁹⁸³ For very large development projects, the *Commission Nationale du Débat Public* (CNDP) (National Commission of Public Debate) was created to guarantee that public participation is complied with in the development projects of national interest, since they are strong socioeconomic stakes or have significant impacts on the environment or regional planning.

The encouragement of public participation by the French government on matters concerning water management is exemplified by 'Grenelle for the Environment', a great national debate on the environment which took place in 2008. It was after national and regional consultations, which allowed for the collection of comments from the general public and local stakeholders, that the environmental laws, *Grenelle Law I* and *Grenelle Law II* were drafted. These laws contained provisions on water management such as the prohibition of the use of phosphates in all detergent products in 2012 and the obligation for municipalities to make an inventory of their drinking water supply system and to establish a work program for improvement when the leak rate in the network is higher than a fixed rate for each Department.⁹⁸⁴

5. Rail

A new public body called the *Réseau Ferré de France* (RFF) was established in 1997. It resulted from legal reforms aimed primarily at separating the duties of infrastructure manager and the railway operator as carried out by the *Société Nationale des Chemins de Fer Français* (SNFC) (French National Railway Company) at the time,. The RFF was entrusted with the ownership, development, maintenance and management of the national railway infrastructure and today manages over 29 000 kilometres of track.⁹⁸⁵ The RFF is an *Établissement Public à Caractère Industriel et Commercial* (EPIC) – a special classification of French public-service company created specifically for industry and commerce.

The railway subsector has gradually been opened up to competition. In 2006, for example, Freight rail transport in France was entirely opened to competition, followed by the market for International Passenger rail services in 2009.⁹⁸⁶

In 2009, the *Autorité de Régulation des Activités Ferroviaires* (ARAF) (French Rail Regulatory Authority), replaced *La Mission de Contrôle des Activités Ferroviaires* (MCAF) (Mission for the Control of Rail Activity) and was made responsible for ensuring the smooth operation of the public service and competitive activities involved in providing railway transport for both customers and other users of railway services.⁹⁸⁷

Regulatory Institutions and Legislation

The current competition and regulation policy that govern the railway subsector rely on two principal pieces of legislation.

⁹⁸³ OIEAU, *op. cit.*

⁹⁸⁴ OIEAU, *op. cit.*

⁹⁸⁵ ARAF, *Activity Report 2010-2011*. Available at: <http://www.regulation-ferroviaire.fr/pdf/Rapport2010-2011Versionanglaise.pdf> [accessed on 9 July 2013].

⁹⁸⁶ ARAF, *l'ARAF En Bref*. Available at: <http://www.regulation-ferroviaire.fr/index.asp?a=14079&b=S&n=1> [accessed on 9 July 2013].

⁹⁸⁷ ARAF, *Activity Report 2010-2011*, *op. cit.*

First, the *Law of 13 February 1997* reformed the railway subsector by creating the RFF, and thus separating the provision of railway service (SNFC) from the development and maintenance of railway infrastructure (RFF). In addition, it made the *Ministère de l'Écologie, du Développement Durable et de l'Énergie* (MEDDE) (Minster for Ecology, Sustainable Development and Energy) the government body in charge of rail.⁹⁸⁸

Second, the *Law of 8 December 2009* aimed at reforming the organisation and regulation of the railway subsector and led to the creation of France's rail regulatory body, ARAF which replaced MCAF.⁹⁸⁹ In addition, this law created the *Direction de la Circulation Ferroviaires* (DCF), a specialist department within the SNFC, which is responsible for managing traffic on France's national railway network on behalf of, and in accordance with the aims and principles defined by the RFF.⁹⁹⁰

The board is comprised of seven members (including the chairman) chosen for their expertise in the railway industry, economics, legal matters or competition issues. In order to ensure that they remain independent, board members may not be dismissed. They are appointed for a non-renewable period of six years, are prohibited from directly or indirectly holding an interest in companies involved in rail transport, and may not rule on any affair in which they have or have had an interest for a period of three years preceding the ruling. Four board members, including the chairman, are appointed by the government. The remaining three are appointed by the president of the National Assembly, the president of the Senate and the chairman of the Economic, Social and Environmental Council. One-third of board membership changes every two years.

The ARAF's departments are under the responsibility of the secretary-general, who is appointed by the chairman. The departments are divided into three operational divisions:

- The legal affairs division has responsibility for all legal aspects of the ARAF's work. In particular, it oversees the procedures used to resolve disputes and issue sanctions and ensures that the board's decisions are legally sound.
- The network access division is responsible for the economic and technical aspects of the ARAF's work.
- The accounting division is responsible for all tasks involved in maintaining separate accounts for the ARAF's various activities and managing the costs of regulated services, particularly those relating to essential facilities. It also audits those operators that enjoy a monopoly.

Apart from ensuring the smooth operation of the public service and competitive activities involved in the provision of railway transport, the ARAF is particularly responsible for ensuring that the various railway undertakings access the railway network and that the economic, contractual and technical measures implemented by infrastructure managers and railway undertakings are consistent with their own constraints. After seeking appropriate consultations, the ARAF may then make any necessary recommendations regarding the way in which the subsector operates and may submit these recommendations to the government (that is, the MEDDE) or any other relevant body.⁹⁹¹

The ARAF issues opinions relating to the various measures governing the railway subsector's operation. In particular, such opinions involve:⁹⁹²

- Draft regulatory documents covering how the railway network is accessed, and the design, creation and use of infrastructure and railway transport equipment.
- Network statements, which lay out all the economic, technical and administrative regulations that operators must comply with in order to access the various networks.

⁹⁸⁸ MEDDE, *Transports: Le Réseau Ferré National*. Available at: <http://www.developpement-durable.gouv.fr/Le-reseau-ferre-national.html> [accessed on 9 July 2013].

⁹⁸⁹ MEDDE, *Transports: Loi n° 2009-1503 Relative à l'Organisation et à la Régulation des Transports Ferroviaires*. Available at: <http://www.developpement-durable.gouv.fr/Loi-relative-a-l-organisation-et-a.html> [accessed on 9 July 2013].

⁹⁹⁰ ARAF, *Activity Report 2010-11*. Available at: <http://www.regulation-ferroviaire.fr/pdf/Rapport2010-2011Versionanglaise.pdf> [accessed on 9 July 2013].

⁹⁹¹ ARAF, *Activity Report 2010-11*. Available at: <http://www.regulation-ferroviaire.fr/pdf/Rapport2010-2011Versionanglaise.pdf> [accessed on 9 July 2013].

⁹⁹² ARAF, *Activity Report 2010-11, op. cit.*

- The infrastructure fees (tolls) that railway undertakings must pay in order to use the network, which may only come into force once the ARAF has delivered a recommendation regarding pricing principles and rules.
- The appointment or early termination of the director of the traffic management department (DCF), which works within the SNCF on behalf of RFF.

During 2012, the ARAF issued a total of ten opinions on such matters.⁹⁹³

The ARAF also has the following responsibilities.⁹⁹⁴

- Resolving any disputes that may arise when operators exercise their rights to access the network and its associated services, in particular disputes between railway undertaking and infrastructure managers.
- Ensuring that passenger railway transport services established between France and other European countries are mainly international in nature.

In order for the ARAF to carry out its assignments properly, the law grants it a number of far-reaching powers, including:⁹⁹⁵

- extended investigative powers, particularly regarding accessing accounts.
- additional regulatory powers, which it may use to specify the various measures governing the conditions under which operators can be connected to the railway network, technical and administrative conditions for access and use of the network, conditions for accessing and using services that are deemed essential, and the scope of each activity that was separate, in accounting terms, within the incumbent operator, the settlement regulations applicable to them and the guidelines used to determine the nature of the financial relationships between these activities.
- sanction powers for any breach noted, either within the context of a case being submitted to the courts or on its own initiative; it may issue fines of up to five per cent of the offending party's turnover and restrict its access to the infrastructure.

*Consultation of Interested Parties*⁹⁹⁶

Any person authorised to request railway infrastructure capacity (railway undertakings, organising authorities, combined transport operators etc.) or any infrastructure manager may bring matters before the ARAF when it believes it has suffered inequitable treatment, discrimination or any other harm related to railway-network access.

The petitioner brings matters before the ARAF in the form of a *referral*, a document that describes the facts underlying the dispute; the grounds raised and the specific content of its claims; and the capacity of the petitioner and the defendants.

Within a maximum eight-day period, the ARAF's services will verify whether the referral meets the rules set forth in the bylaws. If this is not the case, the secretary general will ask the petitioner to supplement the referral or risk rejection. Once the referral is complete, it is recorded by the ARAF's clerk.

From among the ARAF's agents, the secretary general appoints a *rapporteur* and a *deputy rapporteur* (who will perform the *rapporteur's* duties if the latter is absent or hindered) and informs the parties thereof. The secretary-general sets the deadline by which each party must respond to the comments and exhibits filed by the other parties, especially where the parties do not reach agreement on a provisional timetable; and the date on which the investigation will close.

The ARAF's departments investigate disputes independent of its board. The *rapporteur* carries out all investigative measures deemed useful while respecting adversarial principles, and invites the parties to submit the verbal or written arguments necessary to resolve the dispute. Acting on a proposal by

⁹⁹³ ARAF, *Avis et Décisions du Collège de l'ARAF*. Available at: <http://www.regulation-ferroviaire.fr/index.asp?a=14089&b=S&n=2> [accessed on 9 July 2013].

⁹⁹⁴ ARAF, *Activity Report 2010-2011*, op. cit.

⁹⁹⁵ ARAF, *Activity Report 2010-2011*, op. cit.

⁹⁹⁶ Information for this sub-section was taken from ARAF, *Activity Report 2010-11*, op. cit., p. 52.

the *rapporteur*, the secretary-general may instruct the ARAF'S agents or experts to carry out the necessary fact-finding, particularly by travelling to a given site. Fact finding leads preparation of a report by the *rapporteur* or the authorised agents. This report is signed by the parties, which receive a copy so that they can submit comments. Duly authorised for this purpose by the secretary general, the *rapporteur* carries out technical, economic or legal consultations or obtains expert opinions while respecting confidentiality of the investigation. If the *rapporteur* determines that all of the relevant documents within the meaning of Article L.2134-3 of the *Transport Code* cannot be obtained or reviewed before the close of investigation, the secretary general may, after consulting with the chairman, decide to extend the investigation for a period not to exceed one month. The *rapporteur* submits the investigation file to the secretary general, who will ask the chairman to include it on the agenda of the next board meeting.

The chairman subsequently calls the parties to a hearing before the board, including when it rules on an application for protective measures. The notice of hearing is sent to the parties at least seven clear days before the hearing date. The hearing is public, unless otherwise jointly requested by the parties. If the request is not made by all parties, the ARAF's board will decide on the matter. During the hearing, the *rapporteur* presents the parties' claims and pleadings verbally. The parties, who may be assisted during the hearing, respond to questions from board members and present their verbal comments.

The board deliberates on camera. From among those of the ARAF's agents who did not take part in the dispute's investigation, the chairman will appoint two to serve as secretary of the deliberations. These two agents do not take part in the discussions. The board's decision sets forth the technical and financial terms for resolving the dispute. When necessary to resolve a dispute, it will establish railway-network access procedures and terms of use in an objective, transparent non-discriminatory and proportional manner. Notice of the decision is sent to the parties and published in the *Journal Officiel*, subject to rules on confidential matters protected by law. This notice also states the form and period for appeal before the Paris Court of Appeal.

In case of serious, immediate harm to the rules governing access to the network or its use, the ARAF may, after having heard the parties, order necessary protective measures, under penalty if applicable. These measures may include suspension of practices that harm the rules governing access to or use of the applicable network.

Article L.2135-13 of the *Transport Code* lays out the two principal conditions under which the ARAF works with the Competition Authority.⁹⁹⁷ Firstly, the ARAF chairman refers to the Competition Authority instances of a dominant position being abused, and any practices brought to his knowledge that may impede free competition in railway transport. The chairman may also refer any other issues that fall within his jurisdictions to the Competition Authority for its opinion. Secondly, the Competition Authority passes on details to the ARAF of any cases referred to the courts that fall within its jurisdiction. It can also refer any other issue to do with rail transport to the ARAF for its opinion.

The ARAF also works closely with the *French Railway Safety Authority*, which is responsible for ensuring compliance with rules on safety and the interoperability of railway transport systems. Anyone who feels they have been unfairly treated, discriminated against or made the victim of practices restricting their right to railway-network access by the French Railway Safety Authority may be referred to the ARAF.⁹⁹⁸ On the basis of such a referral, the ARAF formulates an opinion that it then sends to the French Railway Safety Authority's director, who will then take any measures deemed necessary. Thus far, the ARAF has fielded no such requests.

Cooperation with other European rail regulatory authorities requires the ARAF to firstly deal with the *European Commission's Regulators' Group*. The Regulators' Group was established by the European Commission to ensure better coordination among Europe's various regulatory authorities so as to improve the way in which information on their activities and the guidelines that inform their decisions is exchanged. The Regulator's Group meets once every three months. Secondly, ARAF deals with Independent Regulators' Group-Rail Association (IRG-Rail), which was designed to boost

⁹⁹⁷ ARAF, *Activity Report 2010-2011*, op. cit., pp. 13-14.

⁹⁹⁸ *Legifrance, Loi n° 2009-1503 du 8 décembre relative à l'Organisation et à La Régulation des Transports Ferroviaires et portant Diverse Dispositions relatives aux Transports: Article 16*. Available at: http://legifrance.gouv.fr/affichTexte.do?sessionId=D90A30B50AF662591A66FF225C7C08DB.tpdjo17v_1?idSectionTA=JORFSCTA000021451613&cidTexte=JORFTEXT000021451610&dateTexte=20130114#LEGIARTI000021468469 [accessed on 9 July 2013].

exchanges among regulators so as to allow them to share best practices and regulate rail networks reliably and consistently across Europe.

The ARAF has also been very active in setting up bilateral contacts with regulatory authorities of the UK, Belgium and Germany.

*Timeliness*⁹⁹⁹

Once a referral has been submitted by a petitioner, the ARAF's services will verify whether the referral meets the rules set forth in the bylaws, within a maximum eight-day period.

If the referral is accepted, the secretary-general will set the deadline by which each party must respond to the comments and exhibits filed by the other parties; and the date on which the investigation will close.

The ARAF will rule within two months from submission of the defendant's comments to the referral submitted by the petitioner, except if an extension, not to exceed one month, is needed to bring together all of the exhibits required to resolve the dispute.

Information Disclosure and Confidentiality

Article 22 of the *Law of 8 December 2009* regarding the organisation and regulation of the transport market gives the ARAF extensive investigative powers particularly regarding accessing accounts.¹⁰⁰⁰ Sworn officers acting on its behalf can gather information, carry out enquiries, perform checks and seizures, and report any breaches of regulations that fall within its jurisdiction.¹⁰⁰¹

All staff members and agents of the ARAF are legally bound to treat the information acquired during such investigations as confidential, in accordance with Article 20 of the *Law of 8 December 2013*. Having said this, such requirements of confidentiality are not to act as obstacles to communication between ARAF and the government or between ARAF and regulatory authorities from Member States of the European Union.¹⁰⁰²

*Decision-making and Reporting*¹⁰⁰³

The ARAF's board is its decision-making body, responsible for setting major policies. It makes decisions and formulates opinions based on majority vote, subject to the presence of at least four members. In the event of a tied vote, the Chairman has the casting vote.

Notice of the decision is sent to the parties and published in the *Journal Officiel*, along with the ARAF website, subject to rules on confidential matters protected by law.

Article 26 of the *Law of 8 December 2009* also requires ARAF to publish an annual activity reports outlining the number of issues in which the board submitted opinions and made decisions.¹⁰⁰⁴ These reports are approximately 50 to 60 pages in length and there is no distinction made between draft, interim and final reports.

In the case of instances where an operator is abusing a dominant position in the railway market, the ARAF chairman will refer the matter to the Competition Authority, who will deal with it according to its own decision-making mechanisms.

⁹⁹⁹ Information for this sub-section was taken from ARAF, *Activity Report 2010-11*, *op. cit.*, p. 52.

¹⁰⁰⁰ Legifrance, *Loi n° 2009-1503 du 8 décembre relative à l'Organisation et à La Régulation des Transports Ferroviaires et portant Diverse Dispositions relatives aux Transports: Article 22*. Available at: http://legifrance.gouv.fr/affichTexteArticle.do;jsessionid=2B787EF949DB3E94405124AEA0834A5E.tpdjo17v_1?idArticle=LEGIARTI000021468477&cidTexte=LEGITEXT000021468431&dateTexte=20130114 [accessed on 9 July 2013].

¹⁰⁰¹ ARAF, *Activity Report 2010-2011*, *op. cit.*

¹⁰⁰² Legifrance, *Loi n° 2009-1503 du 8 décembre relative à l'Organisation et à La Régulation des Transports Ferroviaires et portant Diverse Dispositions relatives aux Transports : Article 20*. Available at: http://legifrance.gouv.fr/affichTexteArticle.do;jsessionid=2B787EF949DB3E94405124AEA0834A5E.tpdjo17v_1?idArticle=JORFARTI000021451713&cidTexte=JORFTEXT000021451610&dateTexte=20130114&categorieLien=id [accessed on 9 July 2013].

¹⁰⁰³ Information for this sub-section was obtained from the ARAF, *Activity Report 2010-2011*, *op. cit.*

¹⁰⁰⁴ Legifrance, *Loi n° 2009-1503 du 8 décembre relative à l'Organisation et à La Régulation des Transports Ferroviaires et portant Diverse Dispositions relatives aux Transports: Article 26*. Available at: http://legifrance.gouv.fr/affichTexte.do;jsessionid=D90A30B50AF662591A66FF225C7C08DB.tpdjo17v_1?idSectionTA=JORFCTA000021451613&cidTexte=JORFTEXT000021451610&dateTexte=20130114 [accessed on 9 July 2013].

The board of the ARAF published a total of eight decisions during 2012.¹⁰⁰⁵

Appeals

Notice of the decision reached by the board will state the form and period for appeal before the Paris Court of Appeal.¹⁰⁰⁶

Regulatory Development

The ARAF believes, as expressed in various opinions, that the structure of the railway sub-sector's current governance system is 'at a crossroads'.

The way in which the railway sub-sector's system of governance should evolve was the subject of a number of discussions at the government-organised *Assises du Ferroviaire* conference, held in the second half of 2011. At the end of these discussions, the government decided to consider bringing the various infrastructure-management activities back together.

6. Airports

In France, three categories of airports can be distinguished: *Aéroports de Paris* (ADP), major regional airports with an international vocation, and local airports.¹⁰⁰⁷

Aéroports de Paris was created in 1945 as a public corporation subject a speciality principle: building, managing and developing airport infrastructure around Paris. ADP manages and develops France's most important airport platforms: Paris/Roissy-Charles de Gaulle Airport and Paris-Orly Airport. Paris/Roissy-Charles de Gaulle Airport is one of the busiest in Europe, handling over 60 million passengers in 2011.¹⁰⁰⁸ Paris-Orly Airport is the second busiest in France, handling more than 27 million passengers in 2011.¹⁰⁰⁹ As a state-owned enterprise, ADP was able to use two resources for its financing: the French State's budget and debt.

Since the 1930s, major regional airports have been managed by local chambers of commerce and industry (CCI) in a concessionary regime. This is the regime that was criticised by the European Commission in 2000.¹⁰¹⁰ Airports in this category are Lyon, Nice, Marseille, Montpellier, Toulouse, Bordeaux, Nantes and Strasbourg. The largest regional airport in France is the Nice Cote d'Azur airport, handling over ten million passengers annually, followed by Lyon-Saint Exupéry with roughly eight and half million passengers in 2011.¹⁰¹¹ Since 2007 these mid-sized airports have been transferred to specially created companies (in which the state retains control of the capital but will soon reduce its holding to at least 60 per cent).¹⁰¹²

Local airports, attracting mainly domestic traffic, are also managed by local chambers of commerce with the support of local governments. There are approximately 120 local airports, which range from small grassed strips used for light aircraft to larger airports with more than a million passengers passing through each year.¹⁰¹³

The government began liberalisation of airport management in the mid-2000s.¹⁰¹⁴ In 2004, all airports and airfields owned by the French Government were devolved to local authorities (municipal,

¹⁰⁰⁵ ARAF, *Avis et Décisions du Collège de l'ARAF*. Available at <http://www.regulation-ferroviaire.fr/index.asp?a=14089&b=S&n=2> [accessed on 9 July 2013].

¹⁰⁰⁶ ARAF, *Reglement Intérieur du Collège*. Available at: <http://www.regulation-ferroviaire.fr/index.asp?a=14086> [accessed on 9 July 2013].

¹⁰⁰⁷ International Civil Aviation Organisation, *Case Study: France*. Available at: <http://www.icao.int/sustainability/CaseStudies/France.pdf> [accessed on 9 July 2013].

¹⁰⁰⁸ *Union des Aéroports Français, Résultats d'Activités des Aéroports Français 201*. Available at: http://www.aeroport.fr/fichiers/UAF_rapport_d_activite_2011_des_aeroports_francais.pdf [accessed on 9 July 2013].

¹⁰⁰⁹ *Ibid.*

¹⁰¹⁰ *Case Study: France, op. cit.*

¹⁰¹¹ *Union des Aéroports Français, Résultats d'Activités des Aéroports Français 201*. Available at: http://www.aeroport.fr/fichiers/UAF_rapport_d_activite_2011_des_aeroports_francais.pdf [accessed on 9 July 2013].

¹⁰¹² *Case Study: France, op. cit.*

¹⁰¹³ *Union des Aéroports Français, Résultats d'Activités des Aéroports Français 201*. Available at: http://www.aeroport.fr/fichiers/UAF_rapport_d_activite_2011_des_aeroports_francais.pdf [accessed on 9 July 2013].

¹⁰¹⁴ *Case Study: France, op. cit.*

departmental or regional governments) willing to assume this responsibility. Another policy was decided for larger airports in 2005, which incorporated most of the conclusions of both major regional airports and ADP's committee's recommendations involving the creation of airport limited companies, a simpler legal framework and with the state performing regulatory functions.¹⁰¹⁵ Implementation of a price-cap economic oversight model instead of the traditional cost-plus regulation model was also recommended, in order for ADP to adjust its charges and fees to its financing needs.

Air navigation services in France are provided by the *Direction Générale de l'Aviation Civile* (DGAC) (Directorate-General for Civil Aviation).

Regulatory Institutions and Legislation

The current airport policy in France relies on three principal pieces of legislation. The first of these is the *Civil Aviation Code*, which consolidates legislative and regulatory provisions in respect of issues including air transport, aircraft, airports and flight personnel.¹⁰¹⁶

Secondly, the *Law of 20 April 2005* contains several provisions for French airport policy.¹⁰¹⁷ As a result of this law, ADP was transformed into a limited company fully owned by the state, with the possibility of the latter to sell no more than 50 per cent of the shares. In June 2006, the government partially privatised ADP through a €600 million increase of capital: 29.2 per cent of the shares were sold to private investors and 2.4 per cent to ADP employees, while the government retained the remaining 68.4 per cent. In June 2008, ADP and the operator of Amsterdam-Schiphol airport concluded a strategic alliance, leading each company to acquire an eight per cent stake in the other. Finally in 2009, the French Government sold another eight per cent stake to the *Fond Stratégique d'Investissement*, the French investment sovereignty fund. The current ownership structure of ADP is as follows: (a) French Government, 52.1 per cent (b) Schiphol Group, 8 per cent (c) *Fond Stratégique d'Investissement*, 8 per cent (d) private sector, 30.3 per cent and (e) ADP employees, 1.6 per cent. Second, the *Law of 20 April 2005* creates airport limited companies to manage the twelve most important regional airports, yet owned by the State, the local chambers of commerce and industry, and local governments. These airport companies can open their shares to new public and private partners, and it is expected that the French government will sell a certain amount of its shares in these companies. Finally, the *Law of 20 April 2005* modernised the economic oversight of airports with the shift from a cost-plus to a price-cap economic-oversight model, implemented through five-year regulatory contracts signed by the State and airport operators.

The third is the *Law of 10 March 2010*, which resulted in the creation of the *Conseil Supérieur de l'Aviation Civile* (Superior Council of Civil Aviation).¹⁰¹⁸ The Superior Council of Civil Aviation is composed of representatives from parliament and the aviation industry and is responsible for liaising with the MEEDE in all matters concerning air transport.

A single government agency, the *Direction Générale de l'Aviation* (DGAC) (Directorate-General for Civil Aviation), which is under the authority of the MEDDE, is in charge of airports.¹⁰¹⁹ The DGAC plays a dual role, which is a source of conflict of interest: on the one hand, it performs missions of regulation, supervision, co-ordination, training and administration in all aspects of civil aviation, whether in the public or private sectors; and on the other hand, it is also a service provider in air traffic.

The DGAC has twelve thousand staff members distributed across mainland France and its Overseas Departments and Territories.¹⁰²⁰ The DGAC is composed of four departments concerned with the areas of air transport, civil aviation security, air navigation services and the Secretary-General, which deals with research and gathers information on the airport subsector.¹⁰²¹

¹⁰¹⁵ *Case Study: France, op. cit.*

¹⁰¹⁶ OECD, *Regulatory Reform in France: Regulatory Reform in the Civil Aviation Sector*. Available at: <http://www.oecd.org/regreform/32481191.pdf> [accessed on 9 July 2013].

¹⁰¹⁷ *Case Study: France, op. cit.*

¹⁰¹⁸ *Direction Générale de l'Aviation Civile, Observatoire de l'Aviation Civile 2010-2011*. Available at http://www.developpement-durable.gouv.fr/IMG/pdf/OAC_Tome_1_VFF_mai_2012_web-1.pdf [accessed on 9 July 2013].

¹⁰¹⁹ OECD, *Regulatory Reform in France, op.cit.*

¹⁰²⁰ *Direction Générale de l'Aviation Civile, Observatoire de l'Aviation Civile 2010-2011*. Available at http://www.developpement-durable.gouv.fr/IMG/pdf/OAC_Tome_1_VFF_mai_2012_web-1.pdf [accessed on 9 July 2013].

¹⁰²¹ *Ibid.*

When it concerns competition in the air transport market, a great many activities escape supervision by the Competition Authority as relatively few cases are taken before it by the MEDDE.¹⁰²² In the end, the MEDDE is the regulatory body that makes the decisions to authorise concentration in the air transport market, such as the recent equity investments or acquisitions of small regional airlines by *Air France* in a market that is already especially concentrated.

*Consultation of Interested Parties*¹⁰²³

As mentioned previously, the *Law of 20 April 2005* and its subsequent application decrees created a new mechanism for airport economic oversight. Major airport operators are to sign an economic oversight contract with government that contains the parameters of a price-cap regulation formula, with application of the single-till principle, which takes the airport activities into account to determine the level of airport charges.

The process of negotiation begins with the airport operator first proposing a regulation contract after consulting its users. This proposal is then submitted to an independent *Airport Consultative Committee* in charge of evaluating the proposal, conducting public hearings and formulating its own proposal. The Airport Consultative Commission must meet at least once a year and the airport operator is required to supply it with all relevant pricing, financial, service quality and investments information. The Minister of Transport and the Minister of Economy then receive the Airport Consultative Committee report and decide the parameter of the economic oversight formula. The final word thus lies with the government.

The first economic regulation contract was signed between ADP and the French government in 2006, covering the 2006-2010 periods. The contract outlines quality of service obligations, pricing rules and an investment program, while allowing a maximum charges increase of 3.25 per cent per year plus inflation.

A second economic oversight contract was signed between the ADP and the French government for the 2011-2015 periods in July 2010, which allows a maximum charges increase of 1.38 per cent per year plus inflation. This contract also signals a change in the principles of the economic regulation of ADP, with the transition toward and 'adjusted single-till' in which non-aeronautical real estate is not subjected to economic regulation.

In addition, during March 2009 Toulouse-Blagnac Airport became the first major regional airport to sign an economic oversight contract with the French Government. The contract allows a maximum charge increase of 2.50 per cent plus inflation for the first year, 1.00 per cent for the second year and the 1.90 per cent for 2011, 2012 and 2013. Other major regional airports are still completing their transformation into companies and negotiating parameters of their economic regulation contracts with the State. The French Government, which owns 60 per cent of the share of major regional airports, has not engaged any move toward their partial privatisation, but a move is expected in the near future.¹⁰²⁴

In carrying out its duties, the DGAC is closely involved with the *International Civil Aviation Organisation*, which is seen as an instrument for cooperation between the 189 states that have contracted in all domains of civil aviation.¹⁰²⁵ In addition, the DGAC is also part of *Eurocontrol*, an organisation that aims to promote a uniform civil aviation system across its 38 Member States for civil and military users.

Timeliness

Timeframes are inherent in the annual reporting meeting requirements that are discussed above under 'Consultation of Interested Parties'.

¹⁰²² OECD, *Regulatory Reform in France*, *op.cit.*

¹⁰²³ *Case Study: France*, *op. cit.*

¹⁰²⁴ *Case Study: France*, *op. cit.*, p. 3.

¹⁰²⁵ *Direction Générale de l'Aviation Civile, Observatoire de l'Aviation Civile 2010-2011*. Available at: http://www.developpement-durable.gouv.fr/IMG/pdf/OAC_Tome_1_VFF_mai_2012_web-1.pdf [accessed on 9 July 2013].

*Information and Confidentiality*¹⁰²⁶

Each year *Aéroports de Paris* is required to provide a complete activity report – notably outlining pricing, quality of service and pricing information – to the DGAC and to the designated competition authority. Any information supplied by *Aéroports de Paris* is protected by the confidentiality clauses of the *Commercial Law* (protecting commercially sensitive information).

Decision-making and Reporting

A Follow-up Committee is created, with representatives from DGAC, *Aéroports de Paris*, and the Competition Authority, to oversee the adherence to the contract. This committee meets at least twice a year.

*Appeals*¹⁰²⁷

Disputes surrounding this contract are pursued through the administrative courts. A third party may appeal to the Council of State if it considers the actions of *Aéroports de Paris* in breach of the Economic Oversight Contract. For example, in 2007, a group of aviation syndicates approached the Council of State (the highest administrative court in France) to appeal a price change made by *Aéroports de Paris*. The Council of State ruled that the pricing decision was not properly justified (the Economic Regulation Contract requires the submission of particular documents to the economic consultation group) and therefore not allowable.

Note on Ground Services Regulation

Any person or establishment that holds a licence granted in accordance with the provisions of the civil aviation code may supply one or more ground handling services to an air carrier at any airport with an annual traffic of no less than two million passenger movements or 50 tonnes of freight. However, the number of suppliers of ground handling services may be limited by Ministerial decision at the request of the airport manager.¹⁰²⁸ The request to the Minister must be justified on the grounds of: space availability; capacity of the airport's facilities; or safety.¹⁰²⁹ This system has been criticised because of the unavoidable bias for the airport manager to apply for a limitation in the case where it also provides these services.¹⁰³⁰

Under the EU Directive 96/67,¹⁰³¹ in the case of selecting designated service providers, the airport manager is automatically included in the selection. For example, in Paris, *Aéroports de Paris* is included without having to submit a service proposal. For the remaining positions, the Minister makes a decision after consultation of an 'Airport Users' Committee' and the relevant decision-making body. In the case of Paris CDG and Paris-Orly this is DGAC; for most others it is the Prefect.¹⁰³² The committee is made up of carriers using the airport and votes are allocated proportionally to the amount of air traffic handled by the carrier in the last calendar year.¹⁰³³

7. Ports

The major ports and terminals of France are Bordeaux, Calais, Dunkerque, Le Havre, Marseille, Nantes, Paris, Rouen and Strasbourg. The Port of Marseille is the largest port of France and the fifth largest port in Europe with a total traffic of 86 million tonnes of goods and more than two million

¹⁰²⁶ *Case Study: France, op. cit.*

¹⁰²⁷ *Code de l'Aviation Civile*. Available at: <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006074234> [accessed on 9 July 2013].

¹⁰²⁸ OECD, *Regulatory Reform in France, op.cit.*

¹⁰²⁹ *Code de l'Aviation Civile*.

¹⁰³⁰ OECD, *Regulatory Reform in France, op.cit.*

¹⁰³¹ Council Directive (EC) No. [96/67](#), *Official Journal of the European Union L 302*, 26 November 1996, p. 28.

¹⁰³² OECD, *Regulatory Reform in France, op.cit.*

¹⁰³³ OECD, *Regulatory Reform in France, op.cit.*

passengers in 2010.¹⁰³⁴ Le Havre is next on the list with around 70.5 million tonnes handled in 2010.¹⁰³⁵ In each port the public entity (independent port authority) is responsible for port infrastructure, port development and pricing/taxation policies. The private sector is, however, responsible for the unloading and loading functions of the port.

With total goods traffic through metropolitan ports of 347.6 million tonnes in 2010, the activity of French ports exceeded the level of the previous year, obliterating the negative impact of the worldwide economic crisis.¹⁰³⁶ This improvement is mainly due to substantial growth in dry-bulk traffic. The container throughput has also improved showing a noticeable increase of five per cent, which however remains below the European level of ten per cent. Passenger traffic through French ports has also increased by two per cent reaching 28.2 million passengers in 2010. This increase is mainly due to the growing number of cruise passengers, totalling 3.4 million in 2010.

Regulatory Institutions and Legislation

The MEDDE is in charge of seaports and harbours. The relevant legislation is the *Law for Maritimes Ports*.

Section 1 of the *Law for Maritime Ports* states that the administration of the commercial ports of France is entrusted to designated port authorities. These port authorities are public establishments created by decree by the Council of State (the highest administrative jurisdiction in France) which preside over one or a collection of ports. They remain financially autonomous under the supervision of the Minister in charge of maritime ports. With the *Law of 4 July 2008*, the government converted the seven metropolitan *Autonomous Ports* into *Large Maritime Ports*, with the intention of further concentrating the governance of the Large Maritime Ports on their function of landlord port and port authority.¹⁰³⁷ In 2011, another new law was passed to transfer cargo-handling services from port authorities to private cargo-handling companies in order to strengthen the competitiveness of the main French ports to compete more efficiently with European ports.¹⁰³⁸

Headed by an administration council, the port authorities are responsible for expansion, improvement and rebuilding; and the operation, policing and maintenance of the ports in their particular geographical allocations. The administration council of each port authority is made up of 13 representatives of the state or personnel from the port; and 13 representatives of the principal users of the port. This administration council elects a president. The Minister in charge of ports elects a government commissioner for each port authority to oversee the activities of the administration council. A financial controller is nominated by the Minister in charge of finance and economics.

The administration council may call for tenders and allocate public works to private contractors. It must be done as part of a specific work contract for public projects. The port authorities publish all current projects on their websites.

The administration council can only make decisions in the case of a majority vote. The president has the casting vote in the case of an equal separation of the votes. Decisions of the administration council are effective immediately, unless the *Commissaire du Gouvernement* objects within eight days.

Consultation of Interested Parties

In the case of a decision concerning changes to pricing and tariffs, the administration council must display a public notification of the changes in a commonly frequented area of the port during a period of at least 15 days before approving the decision. Members of the public have one month to submit their opinions to be considered. Within eight days after the public consultation has closed, the director of the *port autonome* collates the submissions.

¹⁰³⁴ *Cluster Maritime Français, Ports*. Available at: <http://www.cluster-maritime.fr/article.php?lang=Uk&id=18> [accessed on 9 July 2013].

¹⁰³⁵ *Ibid.*

¹⁰³⁶ *Ibid.*

¹⁰³⁷ *Ibid.*

¹⁰³⁸ *Ibid.*

These stakeholders' interests are reflected in the composition of the administration council – made up of 13 representatives of the state or personnel from the port and 13 representatives of the principal users of the port.

Stakeholders' interest is also reflected through the *Union des Ports de France* (UPF), which is the professional federation for French ports.¹⁰³⁹ Its members comprise the public authorities and semi-public companies in charge of 43 commercial and fishing ports located in France and its Overseas Departments and Territories: Large Maritime Ports, Autonomous Ports, ports run by chambers of commerce and industry and others run by semi-public companies. The UPF's mission is to defend the common interests of the French port authorities and it is the organisation most consulted by government and professional groups concerned with port and maritime issues. The UFP also represents French port Authorities within the European Sea Ports Organisation. On the national level, the UFP also works with *Union Nationale des Industries de la Manutention* (UNIM) (French Cargo Handling Companies Association) in order to oversee the collective agreement and wage agreements for public ports' employees. Finally, as a means of coordinating its actions with many other professional organisations involved in port-related services, the UFP is a member of the *Association for the Development of French Ports*.

Timeliness

The times allowed at each stage of the process are set out above.

Decision-making and Reporting

In the case of objections, the project is returned to the administration council to be reconsidered and the subsequent deliberation is forwarded to the government commissioner for approval. If no objections are submitted, the proposed pricing scheme is forwarded directly to the government commissioner for approval.¹⁰⁴⁰

Appeals

Any offence against the *Law for Maritimes Ports* and any opposition to the decisions of the administration council are investigated and pursued via the administrative courts.¹⁰⁴¹ The nature of these processes is judicial. Parties seek legal representation and it is primarily the legality of the matters that is considered.

¹⁰³⁹ *Cluster Maritime Français, Ports*. Available at: <http://www.cluster-maritime.fr/article.php?lang=Uk&id=18> [accessed on 9 July 2013].

¹⁰⁴⁰ Legifrance, *Le Code des Ports Maritimes*. Available at <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006074233> [accessed on 9 July 2013].

¹⁰⁴¹ *Ibid.*

Germany

OVERVIEW

Under Germany's federal political system, powers relating to regulatory matters are allocated between state and federal authorities as prescribed in the German constitution. As a member of the European Union, Germany's regulatory regime also reflects legislation issued at the European level, which is either directly applicable, or is transposed into German law. Network areas in Germany are at varying points of liberalisation. Energy and telecommunications are the most advanced; while there are currently important changes in rail regulation.

Economic regulation of network industries and sectors is primarily the domain of federal authorities, particularly the *Bundesnetzagentur* (BNetzA) (the Federal Network Agency), which is responsible for infrastructure regulation in respect of gas, electricity, telecommunications, posts and rail, and the *Bundeskartellamt* (the Federal Cartel Agency), which is responsible for the enforcement of the federal competition law and has specific shared responsibilities with BNetzA.

The BNetzA is tasked with ensuring non-discriminatory third-party access to infrastructure and the regulation of efficient access prices. Its determinative bodies (Ruling Chambers) are organised along industry and sectoral lines and make decisions autonomously from the wider organisation. Pre-lodgement mediation of disputes is encouraged, and the process is widely used. Judicial review of administrative decisions is available in most cases.

Energy regulation, which is shared between the national government and the states, is heavily influenced by EU policies promoting competition and integration with neighbouring countries. Regulation now has to take into account various environmental objectives. The phasing out of nuclear generation, the reduction in thermal electricity generation and the growth of wind-generated electricity are all impacting greatly, especially on the transmission network. Germany introduced benchmarking-based incentive regulation in the energy sector in 2009.

The BNetzA is responsible for the regulation of the largest telecommunications market in Europe. Fixed broadband; fixed voice and wireless voice are all highly developed in Germany.

The end of *Deutsche Post's* exclusive licence for the 'letter post market' on 31 December 2007, and the substitution of electronic communications for physical communications, have combined to induce changes in the way the BNetzA regulates the postal industry.

Strict notions of economic regulation are not generally applicable to water supply and wastewater disposal in Germany, which is the province of self-governing municipalities. However, the national government and state governments also have a role; and EU Directives have been influential with respect to water and wastewater management in Germany as in other member states.

In relation to railways, the BNetzA has a shared regulatory responsibility with two federal ministries. Specifically, it is responsible for monitoring compliance with the rules governing access to railway infrastructure and has the right to object to the infrastructure manager's decisions (for example, when it intends to reject an application for allocation of railway embankments or for access to service facilities). A new Law is introducing *ex ante* regulation to German rail governance.

Germany has several major airports; including the Frankfurt Airport which is the third largest in Europe. Airports are usually government owned, with shares held by two or three levels of government – for example, city and state; or city, state and federal. Federal responsibility for airports has been largely devolved to the states that operate regulatory arrangements. Airport charges are often subject to traditional cost-based regulation.

Competence for ports is a state matter, with individual port authorities setting fees and charges. EU directives have had little influence on the governance of ports in the Member States of the European Union.

GEOGRAPHY, POPULATION, ECONOMY, POLITY AND LEGAL SYSTEM¹⁰⁴²

Germany is located in central Europe, bordering the Baltic Sea and the North Sea, between the Netherlands and Poland. Other countries bordering Germany are Denmark, France, Luxembourg,

¹⁰⁴² Central Intelligence Agency (CIA), *World Fact Book – Germany*. Available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/gm.html> [accessed on 20 May 2013].

Belgium, Switzerland; Austria, and the Czech Republic. Germany's central location is important for, *inter alia*, arrangements for energy, telecommunications and transport infrastructure.

Germany's terrain is characterised by lowlands in the north, uplands in the centre and (Bavarian) Alps in the south. It has a temperate climate with significant precipitation in both winter and summer.

Germany is the most populous nation in the European Union with an estimated population in 2011 of 80.4 million.¹⁰⁴³ In area, it is the sixth largest country in Europe, with a land area of 357 021 square kilometres. Population density is the sixth highest in the OECD (225 people per square kilometre). The major cities are Berlin (the capital), Hamburg, Stuttgart, Munich, Cologne and Frankfurt. Even the largest of these cities (Berlin), with a metropolitan population of a little over five million, is not large by European standards.

Germany is the largest economy in Europe and the fifth-largest economy in the world. Its 2012 estimated GDP of US\$3.123 trillion (PPP basis) represents about US\$39100 per capita, which is above the OECD average. The unemployment rate is approximately 6.5 per cent overall, and is broadly higher in the east of the country than in the west.

The temperate climate yields a high proportion of arable land, and Germany produces a wide variety of agricultural products including grains, meats and potatoes. Main natural resources are coal, lignite, natural gas, iron ore, copper, nickel and uranium; but none of these is plentiful. It has large water resources. Major manufacturing products are iron and steel, cement, chemicals, machinery, cars and trucks, ships and food and beverages. In recent years, the structure of German industry has undergone a transformation which has seen a contraction of more traditional activities, such as steel and textiles. Like other OECD countries, the majority of GDP and employment are provided by services (71.1 per cent). In terms of imports, raw materials and semi-manufactured goods constitute a large portion, which are then used to produce final goods. Germany has a strong reputation as an exporter, particularly of technologically advanced goods. Germany's most important trading partners are France, the United States, the Netherlands and the UK for exports; and China, the Netherlands, France and the UK for imports.

Germany has well-developed and technologically advanced infrastructure across energy, telecommunications, posts, water and wastewater and transport. Some further information about Germany's economic infrastructure is included in the discussion of each particular infrastructure area.

Germany is a federal representative democracy consisting of 16 states (or *Bundesländer*). The basic structure of its political system is laid out in a constitution, which is known as the *Basic Law*.¹⁰⁴⁴ Among other things, the constitution divides powers between the federal and state legislatures and between the legislative, executive, and judicial branches.

The federal legislature comprises a directly elected lower house (*Bundestag*) and an upper house (*Bundesrat*) which comprises representatives of the states. The federal Chancellor is appointed by the *Bundestag* and heads the federal cabinet which is the executive branch of the federal government. Germany also has a federal President, elected by the Federal Assembly, a special body which comprises the entire *Bundestag* and an equal number of state delegates. This role is largely ceremonial.

The division of the powers between the federal government and the states is set out in the *Basic Law*. In principle, all legislative power resides with the states except where explicitly stated in the *Basic Law*. However, in practice, the state legislatures are primarily responsible for police, cultural affairs, education policies, and the implementation of most federal policies. Most issues of economic policy fall within the domain of the federal government or EU institutions. The political systems of the individual states are set by state constitutions. The executive head of each state is called 'Minister-President' (with a few exceptions) and presides over a state cabinet.

The legal tradition in Germany is a civil law system where a key characteristic is that the laws are largely codified and there are no binding precedents set by judicial rulings (that is, case law). German law is contained in five codes – civil, civil procedure, commercial, criminal, and criminal procedure. In

¹⁰⁴³ *Statistisches Bundesamt*. Available at: <https://www.destatis.de/EN/Homepage.html;jsessionid=52C0418A2EC3A0FF00D356871EB20255.cae2> [accessed on 5 July 2013].

¹⁰⁴⁴ See the official German version on the German *Bundestag* website at: *Grundgesetz für die Bundesrepublik Deutschland*. An English translation is available at: <https://www.btg-bestellservice.de/pdf/80201000.pdf> [accessed on 22 May 2013].

addition, as a Member State of the European Union, Germany is subject to, or required to transpose, relevant laws set in place at that level.

There are three types of courts in Germany – Ordinary Courts, Specialised Courts, and Constitutional Courts, and within each of these there are separate branches for administrative, tax, labour, and social security issues, each with their own hierarchies. Under German law, almost all decisions of the state are subject to judicial review.

APPROACH TO COMPETITION AND REGULATORY INSTITUTIONAL STRUCTURE

Economic regulation of network areas, such as energy, telecommunications, posts and rail transport, and the enforcement of competition law in these areas, is primarily within the domain of the federal government. For other network areas – such as water, airports and ports – regulation occurs at the state or municipal level. Finally, as a Member State of the European Union, the regulatory arrangements for network activities are, to varying degrees, governed by any relevant regulations, common frameworks or Directives.

The two main federal authorities of relevance to network areas are the *Bundesnetzagentur* (BNetzA) and the *Bundeskartellamt*. The BNetzA is responsible for infrastructure regulation in respect of the gas, electricity, telecommunications and posts, and has some responsibilities in rail regulation. The *Bundeskartellamt* is the antitrust authority which is responsible for the enforcement of the federal competition law, including in network areas.

While both agencies are separate and constituted under different laws, there is legal provision for some information exchange between them. The same threshold for market power is applied by both to ensure a close link between competition policy and sector regulation.¹⁰⁴⁵ In the case of energy regulation, the *Bundeskartellamt* and BNetzA's information sharing is codified in the *Gesetz gegen Wettbewerbsbeschränkungen* (*Act Against Restraints of Competition*). Article 48(3) gives the *Bundeskartellamt* the responsibility to monitor transparency, including wholesale prices and the degree of competition. It also mandates that the *Bundeskartellamt* shares all data compiled from its monitoring activities to the BNetzA, 'without delay'.¹⁰⁴⁶ The *Bundeskartellamt* and the BNetzA are required under the *Energy Act* and the *Competition Act*, to conduct joint monitoring activities in electricity and gas markets.¹⁰⁴⁷ Recently, they jointly published the Monitoring Report 2012 which analyses and evaluates developments in the electricity and gas markets.¹⁰⁴⁸

State authorities are responsible for the regulation of infrastructure in areas such as airports and retail energy (the regulation of end-user retail tariffs in energy and regulation of energy distribution companies with less than 100 000 customers where the entire network is located within the state's borders).¹⁰⁴⁹ Uniform regulation is achieved through a joint committee of representatives from the BNetzA and the regional regulatory authorities, as set out in section 8 of the *Act on the Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway*.¹⁰⁵⁰

¹⁰⁴⁵ Annegret Groebel, *Introduction to the Bundesnetzagentur (BNetzA)*, PowerPoint for Visit of FTS, Bonn 1 March 2010. Available at:

http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&sqj=2&ved=0CC0QFjAA&url=http%3A%2F%2Fwww.fstrf.ru%2Feng%2Finternational_activity%2Fmeropr%2F4%2F1%2FPresentation_of_Annegret_Groebel_ENGL..ppt&ei=rwWcUbOpOMLprAesoYDwAQ&usq=AFQjCNGFzUq4oOnO7Dsi6jhvlugf0j6zcg&sig2=OLIRyu_4E0FishWaND3klw&bvm=bv.46751780.d.bmk [accessed on 22 May 2013].

¹⁰⁴⁶ *Gesetz gegen Wettbewerbsbeschränkungen (Act Against Restraints of Competition)* (English translation). Available at: http://www.gesetze-im-internet.de/englisch_gwb/index.html [accessed on 20 May 2013].

¹⁰⁴⁷ BNetzA, 'Monitoring/Benchmarking Report 2012'. Available at: http://www.bundesnetzagentur.de/EN/Areas/ElectricityGasRegulation/CollectionOfCompanySpecificData/MonitoringBenchmarkReport2012/MonitoringBenchmarkReport2012_node.html [accessed on 10 July 2013].

¹⁰⁴⁸ BNetzA, 'BNetzA Monitoring Report Summary 2012 – Developments of the Electricity and Gas Markets in Germany' (In English). Available at: http://www.bundesnetzagentur.de/SharedDocs/Downloads/EN/BNetzA/PressSection/ReportsPublications/2012/MonitoringReport2012Summary.pdf?__blob=publicationFile [accessed on 20 May 2013].

¹⁰⁴⁹ BNetzA, *Responsibility and Task Delimitation*. Available at: http://www.bundesnetzagentur.de/cln_1931/EN/Areas/Energy/Companies/GeneralInformationOnEnergyRegulation/ResponsibilityAndTaskDelimitation/responsibilityandtaskdelimitation_node.html [accessed 21 May 2013].

¹⁰⁵⁰ BNetzA 2008 Report to the European Commission, p. 5. Available at: http://www.bundesnetzagentur.de/SharedDocs/Downloads/EN/BNetzA/PressSection/ReportsPublications/2008/MonitoringReport2008Id14819pdf.pdf?__blob=publicationFile [accessed on 21 May 2013].

*Role of the Bundeskartellamt*¹⁰⁵¹

The *Bundeskartellamt* is an independent federal authority assigned to the Federal Ministry of Economics and Technology. It exists primarily to enforce the *Act against Restraints on Competition* (also referred to as the 'cartel law'), which came into force on 1 January 1958 and has since been amended numerous times. A major revision of this law has been approved by the German Parliament and the 8th Amendment Bill of the *Act Against Restraints of Competition* is expected to come into force in July 2013.¹⁰⁵² The changes will include new merger controls, enhanced ability to bring private actions for antitrust behaviour, and better alignment of Germany's competition laws with the EU system.

The *Bundeskartellamt* has a staff of about 320, half of whom are legal or economic experts. Apart from German competition law, the *Bundeskartellamt* also applies European competition law in certain circumstances.

The *Bundeskartellamt's* decisions are made in a manner similar to judicial proceedings by twelve decision divisions, which are organised according to sectors of the economy. Within the decision divisions, each case is decided upon by an autonomous collegiate body consisting of the chairman of the respective division and two associate members.¹⁰⁵³ The 'Decision Divisions' are assisted by the General Policy Department which provides advice on special competition law matters and coordinates cooperation with foreign competition authorities and international organisations.

*Role of the BNetzA*¹⁰⁵⁴

The BNetzA is an independent authority within the responsibility of the federal Ministry of Economics and Technology. Its mandate under the *Energy Act*, the *Telecommunications Act*, the *Postal Act*, and the *General Railways Act* is (respectively) to promote liberalisation in energy, telecommunications, postal and rail markets; through non-discriminatory access to infrastructure and efficient use-of-system charges. The BNetzA has evolved from the Regulatory Authority for Telecommunications and Posts, whose authority was expanded to encompass regulation of energy in July 2005 and rail in January 2006.

The BNetzA has a President and two Vice Presidents, who are nominated by the German Government, and appointed by the German President. Their primary functions are to liaise with the public and media and oversee the functions of the seven departments (see below). The BNetzA has approximately 2 600 staff and is funded by the federal government.

There is an Advisory Council to advise the BNetzA on telecommunications and energy matters.¹⁰⁵⁵ The Council consists of 16 members of the German *Bundestag* and 16 representatives of the German *Bundesrat*; the *Bundesrat* representatives must be members or political representatives of the government of a federal state. The members and deputy members of the Advisory Council are appointed by the federal government upon the proposal of the German *Bundestag* and the German *Bundesrat*. There is also a Rail Infrastructure Advisory Council within the BNetzA.

The BNetzA and the regulatory authorities at state level support each other in performing their tasks. In order to ensure a standardised regulatory system across Germany, a national committee of federal state representatives was set up pursuant to section 8 of the *Act on the Federal Network Agency for*

¹⁰⁵¹ *Bundeskartellamt* website. Available at: <http://www.bundeskartellamt.de> [accessed on 20 May 2013].

¹⁰⁵² Arnold and Porter LLP, *Reform of the German Competition Law: Overview of Relevant Changes*, June 2013. Available at: http://www.arnoldporter.com/resources/documents/ADV_GWB-Novelle%20-%20AlerterEnglish1.pdf [accessed on 13 June 2013].

¹⁰⁵³ *Bundeskartellamt*, Organisation page and Organisational Chart. Available at: <http://www.bundeskartellamt.de/wEnglisch/GeneralInformation/Organisation.php> and http://www.bundeskartellamt.de/wEnglisch/download/pdf/Organigramm/EN-2013-04_Organigramm.pdf [accessed on 20 May 2013].

¹⁰⁵⁴ BNetzA website. Available at: http://www.bundesnetzagentur.de/EN/Home/home_node.html [accessed 20 May 2013].

¹⁰⁵⁵ BNetzA, *Advisory Council*. Available at: http://www.bundesnetzagentur.de/cln_1932/EN/General/Bundesnetzagentur/AdvisoryCouncil/AdvisoryCouncil_node.html [accessed on 20 May 2013].

Electricity, Gas, Telecommunications, Post and Railway, consisting of one representative from each federal state's regulatory authority.¹⁰⁵⁶

The BNetzA is divided into seven departments:¹⁰⁵⁷

1. Telecommunications regulatory economics
2. Legal telecommunications regulation issues / frequency regulation
3. International relations/postal regulation (The BNetzA operates in an international environment, having to coordinate and conform to European Union laws. As such the international aspects have been centralised into one department.)
4. Technical telecommunications regulation
5. Regional office; misuse of numbers
6. Energy regulation
7. Rail regulation.

The regulatory departments perform specialised administrative functions, including investigating matters of regulatory interest and advising the nine Ruling Chambers.

In all areas except rail, the Ruling Chambers make all final decisions and determine all sanctions.¹⁰⁵⁸ The Ruling Chambers are organised according to different industries (electricity, gas, telecommunications, postal services) and also according to specific activities within those industry areas – such as system charges, general regulation and access issues, wholesale charges, and unconditioned local loop charges. The nine Ruling Chambers and their responsibilities are as follows:¹⁰⁵⁹

For telecommunications:

- Ruling Chamber 1 – President's Chamber: Universal Service in Telecommunications and Post, Radio Spectrum Resources
- Ruling Chamber 2: Regulation of Telecommunications Retail Markets, Regulation of Wholesale Leased Lines, Subscriber Data, Collection Services, Porting
- Ruling Chamber 3: Regulation of Telecommunications Wholesale Markets, Fixed and Mobile

For energy:

- Ruling Chamber 4: Individual Use of System Charges Electricity, Pipe to Pipe Competition Gas, Investment budgets, Determining Equity Yield Rate
- Ruling Chamber 6: Regulation of Access to Electricity Supply Networks
- Ruling Chamber 7: Regulation of Access to Gas Supply Networks
- Ruling Chamber 8: Regulation of Use of System Charges – Electricity
- Ruling Chamber 9: Regulation of Use of System Charges – Gas.

For postal services:

- Ruling Chamber 5: Rates Regulation, Network Access Regulation and Special Control of Anti-Competitive Practices in Postal Markets.

¹⁰⁵⁶ BNetzA, *Länderausschuss*. Available at: http://www.bundesnetzagentur.de/cln_1932/DE/Allgemeines/DieBundesnetzagentur/BeiraeteAusschuesse/Laenderausschuss/Laenderausschuss-node.html;jsessionid=CE086003A76A1B1FAAF44A9BC15C9586 [accessed on 14 June 2013].

¹⁰⁵⁷ BNetzA's Organisational Chart. Available at: http://www.bundesnetzagentur.de/SharedDocs/Downloads/EN/BNetzA/FederalAgency/OrganisationalChart/20130416OrgChart.pdf?__blob=publicationFile&v=1 [accessed on 20 May 2013].

¹⁰⁵⁸ *Bundesnetzagentur, Annual Report 2011*, p. 211. Available at: http://www.bundesnetzagentur.de/SharedDocs/Downloads/EN/BNetzA/PressSection/ReportsPublications/2012/AnnualReport2011.pdf?__blob=publicationFile&v=2 [accessed on 20 May 2013].

¹⁰⁵⁹ BNetzA, *Ruling Chambers*. Available at: http://www.bundesnetzagentur.de/cln_1932/EN/Service-Funktionen/RulingChambers/RulingChamber_NavNode.html [accessed on 20 May 2013].

The BNetzA provides the following summary of the operation of the Ruling Chambers:¹⁰⁶⁰

- To achieve its regulatory aims, the Bundesnetzagentur has effective procedures and instruments at its disposal, including rights of information and investigation along with the power to impose graded sanctions.
- The Bundesnetzagentur's decisions in the fields of electricity, gas, telecommunications and post are made by its Ruling Chambers.
- The companies directly concerned may participate in the Ruling Chamber proceedings.
- The business circles affected by the proceedings may be invited to attend.
- The Bundesnetzagentur's decisions are based on the Telecommunications Act, the Postal Act and the Energy Act and can be challenged before court.
- In the case of a legal dispute, the supervisory authority, namely the Federal Ministry of Economics and Technology (BMWi), cannot overturn a decision made by the Ruling Chamber. In contrast to the provisions of the Competition Act (GWB) a so-called ministerial decision is not provided for.
- Chamber rulings on telecommunications and postal matters may be challenged directly before the administrative courts, and before the civil courts where energy matters are concerned. There is no appeal procedure. Actions in principal proceedings do not have suspensory effect.

Appeals

Appeals in relation to decisions made by BNetzA in the energy sector are dealt with in the First Instance by the Higher Regional Court of Düsseldorf, where a full substantive ('merits') review is undertaken. The chamber which hears the Appeal is the Cartel Senate, which is also the chamber that deals with appeals under General Competition law.¹⁰⁶¹ Appeals against the decisions of the Düsseldorf Court are heard by the Federal Court in Karlsruhe. These appeals are based only on the legality of the decision of the Court of First Instance, and do not involve a substantive review of the facts (s.86). The remedies under the appeal process are set out in the *Energy Act*.

Appeals of BNetzA decisions in telecommunications are heard in the first instance by the Administrative Court of Cologne. The Administrative Court conducts a substantive ('merits') review of the BNetzA decision. Appeals are heard by five judges, which include three full-time judges of the court, and two lay members (who may not have legal training). Appeals from the Administrative Court of Cologne are heard by the Federal Court in Leipzig, and are based only on the legality of the decision.

In the postal industry, an administrative appeal against a BNetzA regulatory ruling is available. Appeals are dealt with in the First Instance by the Administrative Court of Cologne. Appeals from the Administrative Court of Cologne are heard by the Higher Administrative Court in Münster.

Appeals relating to rail matters are also dealt with in the first instance by the Administrative Court of Cologne, and can be appealed from there to a Higher Administrative Court.

REGULATORY ARRANGEMENTS BY INDUSTRY OR SECTOR

1. Energy

Electricity in Germany is produced from brown coal (24 per cent in 2010); nuclear (23 per cent); black coal (19 per cent); natural gas (14 per cent); renewable (16 per cent) and other (5 per cent).¹⁰⁶² The trend is towards renewable sources of electricity, with a target of 35 per cent by 2020 (*Renewable Energy Act*), and away from nuclear (to be phased out by 2022). Although Germany has some

¹⁰⁶⁰ BNetzA, *Duties*. Available at: http://www.bundesnetzagentur.de/cln_1932/EN/General/Bundesnetzagentur/About/Functions/functions_node.html [accessed on 20 May 2013].

¹⁰⁶¹ WIK Benchmarking Report, *op. cit.*, p. 35.

¹⁰⁶² Ministry of Economics and Technology, *Germany's New Energy Policy*. Available at: <http://www.bmwi.de/English/Redaktion/Pdf/germanys-new-energy-policy> [accessed on 21 May 2013].

natural gas (the third greatest amount in deposits in the EU after the UK and the Netherlands), it is also a large importer of natural gas. Germany is also a large importer of oil.

As a result of consolidation over the past several years, four companies control the largest share of Germany's electricity generation: RWE/VEW, E.ON, *Energie Baden-Wuerttemberg* (EnBW), and Sweden-based Vattenfall. These four companies also operate Germany's national transmission grid as uncoordinated individual entities – there is no unified operator for the entire country. The transmission grid is increasingly becoming integrated with those of neighbouring countries. There are numerous local distribution companies,¹⁰⁶³ many owned by state or municipal governments, which sell electricity to end users, though these companies often also own a small amount of generating capacity.

Private operators control Germany's natural gas production. BEB, jointly owned by Royal Dutch Shell and Esso (a subsidiary of ExxonMobil), controls about half of domestic natural gas production. Other important suppliers include Mobil Erdgas-Erdoel (also a subsidiary of ExxonMobil), RWE, and Wintershall. The largest wholesale distribution company in Germany is E.ON Ruhrgas, controlling about one-half of that market. Germany's wholesale distributors also control most of the national natural gas transport network. In addition, there are thousands of small, independent companies active in retail distribution, many wholly- or partly-owned by municipal governments.¹⁰⁶⁴

The shift from non-renewable to renewable energy, and the phased shutdown of nuclear power generation, is having implications for the transmission grid. While the generation of power and the consumption of electricity have been mainly coincided in the western middle part of Germany, new power sources are in Northern Germany. Hence there is a requirement for substantial capital expenditure on the transmission grid to convey electricity from its new source to areas of greatest demand.¹⁰⁶⁵

*Regulatory Institutions and Legislation*¹⁰⁶⁶

The *Energy Act 2005* (German abbreviation: EnWG) assigns the task of regulating Germany's electricity and gas markets to the BNetzA.¹⁰⁶⁷ Its mandate is to establish fair and effective competition in the supply of electricity and gas. This is achieved by unbundling the electricity and gas supply grids and regulating third-party access to these networks, including price regulation. Article 1 of the *Energy Act* also includes an environmental obligation on energy regulation, which does have a substantive effect on decisions made by the BNetzA.

The BNetzA is responsible for network operators supplying more than 100 000 connected customers and for any network operator whose network crosses federal-state boundaries. In other cases, responsibility lies with the regulatory authority of the state where the company is situated. Federal states may also opt officially to delegate their regulatory powers to the BNetzA.

The BNetzA is also responsible for monitoring the development of the upstream and downstream energy markets (that is, generation, import, and retailing). However, retail price regulation does not fall into the BNetzA's authority. Objections to excessive rates for end-consumers are dealt with by the federal states or by the civil courts.

The BNetzA also monitors abusive pricing behaviour in the energy sector. Where it opens a proceeding and reaches a decision, it must be in agreement with the *Bundeskartellamt* on the market definition and the finding of dominance. The *Bundeskartellamt* also has the right to comment on the remedy. Under section 31 of the *Energy Act*, persons or associations of persons, whose interests

¹⁰⁶³ In 2011, there were 887 network operators. See: BNetzA, *2012 Annual Report Magazine*, p. 13. Available at: http://www.bundesnetzagentur.de/SharedDocs/Downloads/EN/BNetzA/PressSection/ReportsPublications/2013/AnnualReport2012Magazin.pdf?__blob=publicationFile&v=2 [accessed on 13 June 2013].

¹⁰⁶⁴ BNetzA, *Annual Report 2011*, pp. 160ff.

¹⁰⁶⁵ Annegret Groebel, *Financing Infrastructure Investments*, PowerPoint, FSR Conference 7 February 2012. Available at: http://www.fstrf.ru/eng/international_activity/meropr/11/7/09.Groebel_120207_FinancingInfrastrInvestments.pdf [accessed on 20 May 2013].

¹⁰⁶⁶ BNetzA, General Information on Energy Regulation. Available at: http://www.bundesnetzagentur.de/cln_1932/EN/Areas/Energy/Companies/GeneralInformationOnEnergyRegulation/GeneralInformationEnergyReg_node.html [accessed on 20 May 2013].

¹⁰⁶⁷ A copy of the Act (in German) is available at: http://www.gesetze-im-internet.de/enwg_2005/index.html [accessed on 13 June 2013].

have been substantially affected by the conduct of a network operator, can apply to the BNetzA for a review of the conduct in question.

The BNetzA and the *Bundeskartellamt* are required under the *Energy Act* and the *Competition Act* (GWB), respectively, to conduct joint monitoring activities in electricity and gas markets. Thus, in 2012, for the first time, the two agencies carried out a joint data survey for the 2011 reporting year. The *Bundesnetzagentur's* monitoring tasks are set out in section 35 of the *Energy Act*. Under section 63(3), it must publish a report annually on the outcomes of its monitoring activities, conducted in the performance of its regulatory tasks in electricity and gas markets, most notably to create transparency in the markets.¹⁰⁶⁸

In 2011, the German Government placed a moratorium on nuclear generation.¹⁰⁶⁹ By phasing out nuclear power generation and instituting an energy-generation policy with a focus on renewable sources, it was determined that Germany would need an additional 4500 kilometres of high-voltage transmission lines. The majority of the nuclear generators are in the south of Germany, whereas the new off-shore wind generational capacity is in the north of the country.

The *Grid Expansion Acceleration Act 2011* (Acronym in German: NABEG) was created to give the BNetzA new powers in demand evaluation, planning and approval of extra-high-voltage power lines. The purpose of the new powers is to shorten planning and approval procedures. While it is the role of the transmission businesses to draft potential route corridors suitable for interstate and cross-border extra-high voltage power lines; it is ultimately the BNetzA's decision. This decision is supposed to minimise the impact on humans and on the environment, while making the most technological and economic sense.¹⁰⁷⁰

Previously prices for access were determined by the BNetzA on an *ex ante* basis for a set period of time. The process occurred periodically, rather than on the basis of individual application. In 2009, the EnWG was amended to introduce incentive regulation to encourage investment in expansion of the national grid.¹⁰⁷¹ A similar arrangement for gas has also been put in place.

Under the incentive-regulation approach, cost-efficiency benchmarks are used to determine the revenue cap and 'approved investment budgets'. For costs that are not exogenous to the core network activities, network operators must compare their own cost with the cost of other network operators of a similar structure. The identified cost inefficiencies are required to be removed over two regulatory periods of five years each. In addition, network operators are required to achieve cost reductions associated with frontier shift (that is, the productivity change differential net of the input price change differential between the industry and the economy). An individual revenue cap, which also encompasses an enlargement factor accounting for changes of the network requirement to supply customers, is set for each network operator on an *ex ante* basis. An accompanying bonus/penalty scheme for quality of services has also been introduced. The bonus or penalty is capped at two to four per cent of allowed revenue and is to be determined by the BNetzA on an *ex post* basis. The quality regulation is designed to be revenue-neutral; that is, there is a balanced sum of bonuses and penalties across network operators that took part in efficiency benchmarking.¹⁰⁷²

Under the *Ordinance on Incentive Regulation 2007* (most recently amended on 20 December 2012),¹⁰⁷³ small network operators with less than 30 000 customers have the choice between either the full efficiency benchmarking and a simplified procedure which has lower information requirements. As a result, 198 distribution network operators were included in the efficiency benchmarking carried

¹⁰⁶⁸ A summary of the first monitoring report is available (in English) at: http://www.bundesnetzagentur.de/cln_1932/EN/Areas/Energy/Companies/MonitoringEnergyofTheFuture/MonitoringEnergyoftheFuture-node.html [accessed on 20 May 2013].

¹⁰⁶⁹ Federal Ministry of Economics and Technology (BMWi), *Germany's New Energy Policy*, 2012. Available at: <http://www.bmwi.de/English/Redaktion/Pdf/germanys-new-energy-policy> [accessed on 20 May 2013].

¹⁰⁷⁰ BNetzA, *Annual Report 2011*, pp. 153ff.

¹⁰⁷¹ *Germany's New Energy Policy*, 2012, p. 18.

¹⁰⁷² WIK Consult, *Cost Benchmarking in Energy Regulation in European Countries*, Study for the Australian Energy Regulator, 14 December 2011. Available at: <http://transition.accc.gov.au/content/item.phtml?itemId=1054590&nodeId=d13d522931af8eb17dfe2ddf57ab9b1e&fn=WIK-Consult%20Report%20Cost%20Benchmarking.pdf> [accessed on 27 May 2013].

¹⁰⁷³ *Ordinance on Incentive Regulation* (in German). Available at: <http://www.gesetze-im-internet.de/areg/index.html> [accessed on 13 June 2013].

out by the BNetzA. A number of steps were undertaken to inform the efficiency benchmarking analysis; including engineering-based reference network modelling to identify possible cost drivers, and several rounds of stakeholder consultations.¹⁰⁷⁴

For the first regulatory period starting on 1 January 2009, and for the second period, the frontier shift component has been set by the BNetzA to 1.25 per cent per annum and 1.5 per cent per annum, respectively. However, the network operators disputed these values. The High Court decision on 28 June 2011 disallowed the productivity differential component on the basis of the Court's interpretation of the *Energy Act*.¹⁰⁷⁵

Consultation of Interested Parties

In relation to non-price access issues – such as requests for new connections to the network – the BNetzA places a high priority on resolution through informal means.¹⁰⁷⁶ Parties are encouraged to seek a pre-lodgement mediation with the relevant Ruling Chamber. The mediation process is more streamlined than the formal process, with briefer submissions and the Ruling Chamber typically reaching a decision within three weeks. While the decision is non-binding, it sets out the Ruling Chamber's thinking as to how it would address the matter if a formal application is made. Formal applications on non-price terms of access issues must be decided by the relevant Ruling Chamber within two months. During this time period there will typically be an oral hearing. Participation in this process is open to any party that can show its rights have been 'significantly affected' by the regulation and its implementation.

The transposition into national law of the third internal energy market package in August 2011 saw the strengthening of consumer rights as defined in the *Energy Act*.¹⁰⁷⁷ The Act provides the regulation of terms and conditions for energy-supply contracts, such as deadlines for energy billing; the level and due date of prepayments; and the obligation to provide information in the event of contract alterations. Since 1 November 2011 consumers have been able to take their cases directly to an arbitration body (*Schlichtungsstelle Energie E.V.*) if they fail to reach agreement with the service providers. Section 111 of the *Energy Act* sets out dispute-resolution procedures which require the regular completion of arbitration within three months.

The *Energy Act* gives the BNetzA a high-level statutory responsibility to take into account the views of, and impacts on, consumers and other affected parties. For example, the BNetzA has the role of monitoring its performance under the *Energy Act*, including prices for domestic consumers, supply reliability and service quality, consumer complaints, and the effectiveness and enforcement of measures on consumer protection.¹⁰⁷⁸ At the request of a related party, or of its own accord, the BNetzA can hold public proceedings in the Ruling Chambers.¹⁰⁷⁹

The BNetzA has recently held a number of public consultations and information sessions on matters relating to the planned grid expansion, new generation-capacity proposals, and renewable-energy regulations.¹⁰⁸⁰ Its new approach to operating is 'on a platform of maximum information and communication' with 'community groups and interested citizens called upon to get involved' (*Annual Report 2011*, p. 13).

The Federal Ministry of Economics and Technology (BMW) has created a formal working group for grid expansion called the 'Future-oriented grids' platform.¹⁰⁸¹ The group comprises representatives from the energy sector, consumer associations, environmental organisations, regional authorities, the German Energy Agency, the BNetzA, and the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety. The group is supported by an advisory council and has its offices

¹⁰⁷⁴WIK Consult, 2011.

¹⁰⁷⁵*Ibid.*

¹⁰⁷⁶ BNetzA, *Annual Report 2011*, p. 235.

¹⁰⁷⁷ BNetzA, *Annual Report, 2011*, p. 20.

¹⁰⁷⁸ See section 35 of the *Energy Act*.

¹⁰⁷⁹ See section 66 of the *Energy Act*.

¹⁰⁸⁰ BNetzA 'Public Dialogue on Grid Expansion'. Available at: http://www.bundesnetzagentur.de/cln_1931/SharedDocs/Pressemitteilungen/EN/2012/120906PublicDialogueGridExpansion.html?nn=48242 [Accessed on 20 May 2013].

¹⁰⁸¹ *Germany's New Energy Policy 2012*, pp. 8, 20.

within the BMWi. Public submissions have also been a focus of the NABEG in regard to network-expansion plans. The reasoning given by government is that, by giving public a say in the planning process, it will shorten the procedure by avoiding appeals.

Information Disclosure and Confidentiality

In fulfilling its functions, the BNetzA has broad information-gathering powers (section 69). Under section 71 of the *Energy Act*, parties involved in a court proceeding are required to identify confidential material in order to secure their rights provided in accordance with section 30 of the *Administrative Procedure Act*. The BNetzA can publish information in the form of non-personal information.

The efficiency benchmarking carried out by the BNetzA has been subject to a number of legal proceedings by the Regional Courts. In relation to confidential cost data used, the Regional Courts ruled that the data are considered to be confidential business information that merits protection, and therefore should not be published.¹⁰⁸²

Decision-making and Reporting

Decisions regarding specific gas or electricity matters are made by the relevant Ruling Chamber. As outlined in the section on the 'Approach to Competition and Regulatory Institutional Structure' above, five separate Ruling Chambers are responsible for: the use of system charges for gas; the use of system charges for electricity; issues relating to the regulation of access to gas supply networks; issues relating to the regulation of access to electricity supply networks; and issues such as individual electricity network charges, investment measures, and the cost of equity. The Department of Energy Regulation is organised into 13 divisions, each performing specific regulatory tasks. The Department of Grid Expansion is currently under construction.¹⁰⁸³

The BNetzA is statutorily required to publish both the initiation of proceedings according to section 29 (1-2) regarding procedures; and the decisions made on the basis of regulation of the network operators, both on its website and in the official journal of the agency (section 74 of the *Energy Act*). It may also publish other decisions.

Appeals

Appeals must be lodged within the times prescribed in the relevant acts. The *Energy Act* sets out that appeals must be lodged in writing within one month of the BNetzA's decision (s.78). There are limited discovery rights in the appeals process for appellants. The BNetzA typically makes a submission to the relevant Court, and this is the extent of information that the parties are able to access (s.84). However, an appellate court can order disclosure of confidential information (s.84).

Appeals in relation to decisions in the energy sector are dealt with in the First Instance by the Higher Regional Court of Düsseldorf, where a full substantive ('merits') review is undertaken. The chamber which hears the Appeal is the Cartel Senate, which is also the chamber that deals with appeals under General Competition law.¹⁰⁸⁴ Because this is a civil court, the judges have full investigative rights, including that they can hear issues from the parties and call upon expert witnesses (s.75).

Appeals against the decisions of the Düsseldorf Court are heard by the Federal Court in Karlsruhe. These appeals are based only on the legality of the decision of the Court of First Instance, and do not involve a substantive review of the facts (s.86).

The remedies under the appeal process are set out in the *Energy Act*.

2. Telecommunications

Germany's large and affluent population supports Europe's largest telecommunications market with sophisticated fixed-line and mobile telecommunications networks, supported by leading manufacturers of telecommunications equipment.

¹⁰⁸² BNetzA, *Annual Report 2011*, pp. 186-187.

¹⁰⁸³ BNetzA, *Organisation*. Available at: http://www.bundesnetzagentur.de/cln_1931/EN/General/Bundesnetzagentur/About/OrganisationChart/OrganisationChart_node.html [accessed on 14 June 2013].

¹⁰⁸⁴ WIK Benchmarking Report, *op. cit.*, p. 35.

Deutsche Telekom (DT) is the incumbent operator in fixed-network and broadband markets in Germany. DT was partially privatised in 1996, with the Federal Government retaining a 15 per cent share of DT's ownership. Another 17 per cent of DT is owned by the Government-owned bank, KfW. Of the remaining 68 per cent of DT, around 51 per cent is owned by institutional investors and around 17 per cent by retail investors.¹⁰⁸⁵ DT is currently the designated universal services provider.

Other notable market participants in German telecommunications include Vodafone, Telefonica O2, and E-Plus.

Penetration of fixed broadband, with 34.1 broadband subscriptions per 100 inhabitants, is well above the OECD average of 26.3. Fixed-line broadband penetration is based almost totally on DSL (83 per cent), with cable making up most of the remainder at around 15 per cent of subscriptions. Penetration of wireless broadband is below the OECD average.¹⁰⁸⁶

In 2011, penetration of traditional mobile telecommunications, at 132.2 mobile phone subscriptions per 100 inhabitants, was well above the OECD average (102.6).¹⁰⁸⁷

Regulatory Institutions and Legislation

The powers of the BNetzA to act in respect of telecommunications matters are set out in the *Telecommunications Act 2004* (German abbreviation: TKG).¹⁰⁸⁸ This legislation transposed the 2002 EU Directives creating a framework for electronic communications in Germany.¹⁰⁸⁹ The *Telecommunications Act* sets out the basic framework of the BNetzA's powers, including its ability to regulate those undertakings with significant market power in a relevant market. Under the *Telecommunications Act*, the BNetzA controls anti-competitive practices, regulates the prices of carriers with significant market power through unbundling of incumbents' local loops, and regulates third-party access prices to these networks. In addition, the BNetzA promotes telecommunications in public institutions, ensures efficient use of broadcast and communications frequencies, and protects infrastructure and services that maintain public safety. *Deutsche Telekom* provides a fixed-line telephone service to all geographical areas of Germany without any explicit obligation.

The BNetzA's key objectives with regard to telecommunications include:¹⁰⁹⁰

- keeping a check on the dominant provider's market power;
- encouraging efficient investment in infrastructure and promotion of innovation;
- ensuring provision of basic telecommunication services at affordable prices; and
- promotion of development of the internal market of the European Union.

The *Telecommunications Act* has been amended a number of times since 2004, including in early 2012 to reflect the 2009 amendments to the EU Framework for electronic communications. These amendments included enhanced powers relating to infrastructure sharing.

Amendments have also enhanced consumer protection through the new Part 3 of the *Telecommunications Act*. The BNetzA is now able to enforce standards for timely and non-disruptive switching between both mobile and broadband service providers.

Consultation of Interested Parties

Under the *Telecommunications Act*, the access prices for access providers with Significant Market Power (SMP) are required to be submitted for *ex ante* (that is, prior to their intended effective date) approval by the BNetzA (section 30). This approval is for a set period of time which can vary

¹⁰⁸⁵ Deutsche Telekom, *Shareholder Structure*. Available at: <http://www.telekom.com/investor-relations/share/102156> [accessed on 20 May 2013].

¹⁰⁸⁶ OECD, *Broadband Portal*, December 2012, updated on 18 July 2013. Available at: <http://www.oecd.org/sti/broadbandandtelecom/oecdbroadbandportal.htm#Penetration>, [accessed on 22 July 2013].

¹⁰⁸⁷ OECD, *Communications Outlook 2011*, Table 4.9. Available at: <http://dwmw.files.wordpress.com/2011/06/oecd-commoutlook-2011.pdf>, [accessed on 28 May 2013].

¹⁰⁸⁸ A copy of the Act is available at: http://www.bfdi.bund.de/EN/DataProtectionActs/Artikel/TelecommunicationsAct-TKG.pdf?__blob=publicationFile [accessed on 13 June 2013].

¹⁰⁸⁹ The 2002 framework legislation comprised a package of Directives: *Framework Directive*; *Authorisation Directive*; *Interconnection Directive*; *Universal Service Directive*; and *Directive on Privacy & Electronic Communications*.

¹⁰⁹⁰ Compiled from BNetzA website (*About Us*) and Annegret Groebel PowerPoint (*op. cit.*) 1 March 2010.

according to the access service. Therefore, there is no need for individual access prices to be determined by the BNetzA on a case-by-case basis. The BNetzA also has a role in the approval of retail tariffs for those carriers with SMP (section 39).

In relation to some issues, the BNetzA places a high priority on resolution through informal means.¹⁰⁹¹ Section 133 of the *Telecommunications Act* prescribes the dispute-resolution procedure, while section 124 of the *Telecommunications Act* states that, 'where appropriate, the regulatory authority may propose that the parties affected seek to reach mutual agreement before a mediator (mediation process) is initiated to resolve telecommunications disputes'. Parties are encouraged to seek a pre-lodgement mediation with the relevant Ruling Chamber. The mediation process is more streamlined than the formal process, with briefer submissions and the Ruling Chamber typically reaching a decision within three weeks. While the decision is non-binding, it sets out the Ruling Chamber's thinking as to how it would address the matter if a formal application is made. The BNetzA considered that 'mediation has proved a successful tool in the resolution of disputes' (*Annual Report 2011*, p. 220) and the amended *Telecommunications Act* had provided a wider scope for mediation.

Formal applications on non-price terms of access issues must be decided by the relevant Ruling Chamber within ten weeks, which can be extended to a maximum of four months if justified by the BNetzA (section 25). During this time there will typically be an oral hearing. Participation in this process is open to any party that can show their rights have been 'significantly affected' by the regulation and its implementation (section 134).

In telecommunications, where the BNetzA regulates final prices, consumers are more likely to be able to establish a right to participate than in energy matters, where the BNetzA regulates the network and access to the grid, but not end-user tariffs. Outside the scope of individual decisions there are no organised forums in which the BNetzA interacts with telecommunications industry members or user groups. In general terms, interaction tends to occur only in relation to specific matters as and when they arise.

The BNetzA's 'Consumer Advice Service' (*Annual Report 2011*, pp. 18-21) receives enquiries and complaints about telecommunications, energy, postal services and railways. Most matters concern telecommunications, including in switching service providers and in number porting.

Information Disclosure and Confidentiality

In fulfilling its functions, the BNetzA has broad information gathering-powers.¹⁰⁹² As BNetzA proceedings are conducted in the public domain, issues can arise in relation to information that regulated entities regard as confidential. Under section 136 of the *Telecommunications Act*, all parties concerned are to identify materials that contain 'trade or operating secrets'. The BNetzA is required to consult the submitting parties where it rejects the confidentiality claim. If the relevant regulatory decision is appealed, confidential documents relevant to the decision may be submitted at the court's request (section 138).

Decision-making and Reporting

A decision is taken by the relevant Ruling Chamber. As outlined in the section on the 'Approach to Competition and Regulatory Institutional Structure', three separate Ruling Chambers are responsible for: the universal services and radio spectrum resources; regulation of telecommunications retail markets; and regulation of telecommunications wholesale markets, and fixed and mobile services. The decision-making process in general is further discussed in the Background section above.

Four departments work in the regulatory area of telecommunications. They are responsible for issues in relation to: telecommunications regulatory economics; legal telecommunications regulation and frequency regulation; technical telecommunications regulation; and misuse of numbers and regional offices.

The BNetzA is statutorily required to publish notifications (for example, notified undertakings) and regulatory decisions both on its website and in the *Official Gazette* (section 5 of the *Telecommunications Act*).

¹⁰⁹¹ BNetzA, *Annual Report 2011*, p. 220.

¹⁰⁹² See section 127 of the *Telecommunications Act*.

Appeals

Appeals must be lodged within the times prescribed in the relevant acts. There are no specific time limits upon which an appeal must be heard. Appeals of BNetzA decisions in telecommunications are heard in the first instance by the Administrative Court of Cologne. The Administrative Court conducts a substantive ('merits') review of the BNetzA decision. As this is the district court of Cologne, it is not a specialised court, and therefore hears a range of other matters. Appeals are heard by five judges, which include three full-time judges of the court, and two lay members (who may not have legal training).

Appeals from the Administrative Court of Cologne are heard by the Federal Court in Leipzig, and are based only on the legality of the decision.

The overall success rate of the BNetzA on appeal of telecommunications decisions is high. In 2010 the German courts ruled on 136 principal proceedings regarding disputes of BNetzA decisions, with the BNetzA winning 116 (around 85 per cent). Of the 44 summary proceedings ruled on in the same year, the BNetzA won all 44.¹⁰⁹³ In 2011 the success rate was slightly less, with respective figures of 123 and 98 (80 per cent) for principal proceedings; and 23 and 22 for summary proceedings (*Annual Report 2011*, p. 110). The BNetzA's annual report contains detailed notes on several of these appeals covering the Cologne Administrative Court; the Federal Administrative Court and the Federal Constitutional Court.

Regulatory Development

The BNetzA has, in recent times, been active in several key areas of telecommunications; including in relation to broadband. In June 2012, the BNetzA set up a website designed accurately to measure the internet data speeds achieved in different regions of Germany. The website is part of a campaign to increase transparency in telecommunications, specifically with regard to advertised broadband speeds.¹⁰⁹⁴

3. Postal Services

Reform of the German postal market started in 1989 when *Deutsche Post* was sub-divided to operate in three separate areas – postal services, postal banking and telecommunications. Those three operations were corporatised as companies in 1995 under the second stage of postal reform. *Deutsche Post*, that went public in 2000, was one of the first incumbent postal service providers in the EU to be privatised. In 2010, *Deutsche Post* delivered 18 billion mail items, including 13.9 billion addressed items. While the mail volume is falling, the rate of decrease at less than three per cent per annum is below that being experienced in many other developed economies. *Deutsche Post* has an overall market share of about 90 per cent.¹⁰⁹⁵ Since the acquisition of DHL in 2002, *Deutsche Post* has become a major participant in the international parcels, express and logistics markets (while it had expanded presence in the domestic parcels and express market in the 1990s already). *Deutsche Post* also used to operate Postbank, a large retail bank, but has divested this business to Deutsche Bank (a large private bank) during 2006 to 2010.¹⁰⁹⁶

Other postal service operators were allowed to operate under a 'licence' for delivering high-order mail (same-day delivery or pick-up of letters from the customer) from January 1998. On 1 January 2008, the postal market was fully opened to competition. *Deutsche Post* ceased to operate under a statutory exclusive licence. There is no formal obligation for any operators to provide universal services, but the BNetzA can impose such obligations (on dominant operators or using public tendering) if market levels of service should fall short of regulatory standards for universal service. In practice, services levels have always exceeded what is required as universal service by law.

¹⁰⁹³ BNetzA, *2010 BNetzA Annual Report*, p. 129. Available at: http://www.bundesnetzagentur.de/cln_1911/EN/PressSection/Publications/publications_node.html [accessed on 20 May 2013].

¹⁰⁹⁴ BNetzA, *Germany-wide Measuring Campaign Begins*, 14 June 2012. Available at: <http://www.bundesnetzagentur.de/SharedDocs/Pressemitteilungen/EN/2012/120614GermanyWideMeasuringCampaign.html> [accessed on 27 May 2013].

¹⁰⁹⁵ PostNL, *European Postal Markets: 2012 An Overview*. Available at: http://www.postnl.com/Images/postnl-overview-european-postal-markets-2012_tcm216-598141.pdf [accessed on 20 May 2013].

¹⁰⁹⁶ Postbank, *History of Postbank*. Available at: https://www.postbank.com/postbank/en/au_history.html [accessed on 5 July 2013].

Regulatory Institutions and Legislation

The *Postal Act 1997*, which became effective on 1 January 1998, governs primarily the 'letter post market' (mail items up to 1000 grams). The *Postal Act 1997* sets out the basic framework to 'promote competition and to guarantee appropriate and adequate services in Germany'.¹⁰⁹⁷ Regulation of postal services takes the forms of: licensing; price regulation of the prices of the dominant post provider, *Deutsche Post*; access regulation for competitors to the networks of *Deutsche Post*; and the USO provisions. From 1998 to 2005, the regulatory body responsible for postal services was the RegTP when it became part of the BNetzA, that was profiled earlier in this chapter. Ruling Chamber number 5 of the BNetzA is responsible for rates regulation; network access regulation and special control of anti-competitive practices on postal markets. In addition to its responsibilities over telecommunications services, Ruling Chamber number 1 (also known as the President's Chamber), is responsible for universal services in postal services.

The *Postal Act 1997* gives the BNetzA the following powers in the postal market:

- Price regulation of licensed postal services.
- Issuing licences to postal providers.
- Enforcing non-discriminatory third-party access to postal facilities.
- Special oversight of market position abuse.¹⁰⁹⁸

The application of price and access regulation of letter post to *Deutsche Post* is conditional on its status as a dominant provider in the letter-post market. This dominant position of *Deutsche Post* is monitored by BNetzA with its power of 'special oversight of market position abuse'. For example, in its decision dated 14 June 2011, the BNetzA concluded that First Mail Düsseldorf GmbH, a subsidiary of *Deutsche Post AG*, and *Deutsche Post AG*, had contravened the discounting and discrimination prohibitions under the *Postal Act 1997*. The companies were instructed to remedy the breaches that had been identified. Though this decision has since been appealed by *Deutsche Post*, it nevertheless demonstrates the BNetzA's important role in overseeing market position abuse in the postal market.¹⁰⁹⁹ In practice, *Deutsche Post's* prices for single-piece letters have been subject to prior authorisation by the BNetzA. Section 4(3) of the *Postal Rates Regulation Ordinance* provides the BNetzA with the power to set benchmarks and to determine expected rates of productivity increase, taking into account the ratio between the base price level and the cost of efficient service. This *ex ante* regulation of prices has occurred through a RPI-minus-X price-cap system, where RPI is the retail price index and X is the expected productivity growth. The basis of the annual price alignment is made in advance. The determination can be based only on the cost documentation submitted.

The Price-Cap regulation for the period 2008 to 2011, and the Ruling Chamber Price-Cap Rates Regulation, expired in 2011. At the end of 2011, the BNetzA had to re-determine the bundling of services and price-caps for rates charged by the incumbent licensee. This meant setting new benchmarks for the next set of price-cap determinations covering 2012 and 2013, which was determined on 14 November 2011.¹¹⁰⁰

Rates for bulk mail (volume of 50 mail items or above) became a subject of *ex post* price control after 1 January 2008, and are no longer subject to prior authorisation.¹¹⁰¹

Deutsche Post is mandated to provide every competitor access to its postal network, under specific conditions (section 28 of the *Postal Act*). In principle, the access price should be set at the retail price minus the costs avoided by *Deutsche Post* due to worksharing activities performed by the competitor. The BNetzA manages pricing, cross-subsidies, price dumping, and predictive discounts through the price-cap regime. On 1 January 2008, the workshare discounts switched from *ex ante* regulation to *ex post* control, under which the BNetzA intervenes when specific criteria are not met. There is also

¹⁰⁹⁷ The *Postal Act*, Article 1, 22 December 1997.

¹⁰⁹⁸ BNetzA website: *Beschlusskammer 5*. Available at: http://www.bundesnetzagentur.de/cln_1931/EN/FederalAgency/RulingChambers/Chamber5/Chamber%205%20NavNode.html [accessed on 10 July 2013].

¹⁰⁹⁹ *Deutsche Post DHL, Litigation*. Available at: <http://www.dp-dhl.com/reports/2011/annualreport/notes/print-page-51-litigation.html> [accessed on 10 July 2013].

¹¹⁰⁰ The determination of the new price cap is described in BNetzA, *Annual Report 2011*, pp. 139-141.

¹¹⁰¹ Section 19 of the *Postal Act 1997*.

mandatory access to *Deutsche Post's* post-office boxes, information on changes of address of postal customers, and the service of documents. The BNetzA is now also responsible for setting the prices for access to change-of-address information and the service of documents.¹¹⁰²

The BNetzA also has a role in arbitration over access disputes between *Deutsche Post* and a (potential) user, where the two parties fail to reach a contract within a period of three months from the time the user first sought such a contract. The parties concerned may refer the dispute to the BNetzA as the arbitration body. In this case, the BNetzA shall stipulate its decision within a period of two months from the date of the complaint.¹¹⁰³

Customer dispute-resolution services have been used to settle individual disputes between the end customers of postal services and the service provider for the loss, theft or damage of postal items.¹¹⁰⁴ A Conciliation Board has been set up for this purpose. In accordance with section 10 of the *Postal Services Ordinance 2001*,¹¹⁰⁵ the opening of proceedings is conditional on there being no pending legal or other arbitration proceedings, and an attempt having been made beforehand to reach agreement. Participation in the proceedings is voluntary for both parties. In 2011, the BNetzA received 20 applications for the resolution of disputes over postal services, only five of which were successfully concluded. Five were unsuccessful as the parties failed to reach agreement.¹¹⁰⁶ The BNetzA can also declare contracts invalid where there has been an abuse of market position by *Deutsche Post*.¹¹⁰⁷ The BNetzA is also required to conduct market studies on licensed postal service providers (section 312 of the *Act Governing the Federal Network Agency*).¹¹⁰⁸

Consultation of Interested Parties

In relation to access to the letter-post market, an applicant shall lodge with the BNetzA a written request, specifying the intended scope of business that requires a licence for operation. The BNetzA shall grant the licence within a period of six weeks, provided the applicant meets certain licensing requirements such as technical qualification, reliability, public safety, and working conditions. The licence shall be granted in writing.¹¹⁰⁹

The process for price regulation is stipulated in the *Ordinance Concerning Rates Regulation* issued on 22 November 1999. Applications for rates approval shall be submitted in writing. The BNetzA shall make a decision within a period of six weeks upon receipt of the application. It may extend the period by no more than four weeks by notifying the applicant accordingly. The price-cap procedure involves:

- The BNetzA publishes its draft decisions on price-cap procedure, and for the default of the respective measure sizes in its *Official Gazette* to enable competitors, consumer groups and other interested parties to comment on the intended decision.
- After the publication, *Deutsche Post* will be given the opportunity to make its price-cap decision and submit the prices for individual products to the BNetzA for approval.
- The BNetzA publishes its final decision in the *Official Gazette*.

The previous benchmark setting determinations have an opportunity for preliminary comments on key elements published before the draft decision is published. This preliminary process is not

¹¹⁰² BNetzA, *Annual Report 2011*, pp. 140-141.

¹¹⁰³ European Regulator Group for Postal Services (ERGP), *ERGP Report on 'Access' to the Postal Network and Elements of Postal Infrastructure*, August 2012, p. 46.

¹¹⁰⁴ BNetzA, *Dispute Resolution* (in German). Available at: http://www.bundesnetzagentur.de/cln_1931/DE/Sachgebiete/Post/Verbraucher/Streitbeilegung/streitbeilegung-node.html?sessionid=4A85C5F4F0D1137225F54C98022DCD75 [accessed on 16 June 2013].

¹¹⁰⁵ A copy of the Ordinance (in German) is available at: <http://www.gesetze-im-internet.de/bundesrecht/pdlv/gesamt.pdf> [accessed on 17 June 2013].

¹¹⁰⁶ BNetzA, *Annual Report 2011*, pp. 39-40.

¹¹⁰⁷ BNetzA, *Besondere Missbrauchsaufsicht* (in German). Available at: http://www.bundesnetzagentur.de/cln_1911/DE/DieBundesnetzagentur/Beschlusskammern/BK5/Missbrauchsaufsicht/Missbrauchsaufsicht_NavNode.html [accessed on 10 July 2013].

¹¹⁰⁸ BNetzA, *The 9th and 10th Market Studies on Licensed Postal Services*. Available at: http://www.bundesnetzagentur.de/cln_1932/EN/Areas/Post/Companies/MarketObservation/MarketObservation-node.html [accessed on 17 June 2013].

¹¹⁰⁹ Section 5 and 6 of *the Postal Act 1997*.

procedurally required under the *Postal Act*. In the recent processes, interested parties were mostly positive in their comments, and any criticisms have been repetitions of previously used arguments. The BNetzA therefore feels that the opportunity for preliminary commentary will not bring any new insights, and is therefore no longer necessary. The BNetzA will maintain transparency through holding a public hearing and providing an opportunity to comment on the proposed decision.¹¹¹⁰

Information Disclosure and Confidentiality

In fulfilling its regulatory functions, the BNetzA has a broad range of information-gathering powers, including an ability to request data from all postal operators. For example, in approving prices, the BNetzA may order the service provider to supply detailed information on sales and cost, and draw up a cost statement.

Decision-making and Reporting

Major regulatory decisions in postal services in relation to rate regulation, access regulation and special control of anti-competitive behaviors are made by Ruling Chamber number 5. Issues in relation to universal services are under the authority of Ruling Chamber number 1. The Department of International Relations and Postal Regulation is organised into eight divisions, five of which are responsible for specific postal matters. The BNetzA is obliged to publish its regulatory decisions in its *Official Gazette*.

Appeals

An administrative appeal against a BNetzA regulatory ruling is available. Appeals are dealt with in the First Instance by the Administrative Court of Cologne. The Administrative Court conducts a substantive ('merits') review of the BNetzA decision. As this is the district court of Cologne, it is not a specialised court, and therefore hears a range of other matters. Appeals are heard by five judges, which include three full-time judges of the court, and two lay members (who may not have legal training). Appeals from the Administrative Court of Cologne are heard by the Higher Administrative Court in Munster.

4. Water and Wastewater¹¹¹¹

Germany is a water-rich country with only about 20 per cent of the available 180 billion cubic metres of available water being used.¹¹¹² The quality of water supplied and of wastewater treatment in Germany is exceptionally high. There is a very high rate of connection to the water and wastewater networks (98.6 per cent) and a very low leakage level. Mining, manufacturing and thermal power plants are the biggest users of water in Germany. Agriculture is only minor in water use. Water consumption per capita has been declining steadily in recent years

Water supply and wastewater disposal are within the competence of municipalities, usually in separate entities for water and wastewater. There are approximately 6200 water utilities with 60000 employees and more than 10000 wastewater plants in 6900 entities with approximately 40000 employees. Water utilities are 56 per cent municipal and 44 per cent private. Private operation has been increasing and private operations are on average larger than municipal ones; supplying 64 per cent of water. There are some larger water and sanitation service suppliers; the largest being Gelsenwasser AG based in Rhine-Westphalia.

Regulatory Institutions and Legislation

In accordance with the competence rule of the German constitution (*Basic Law*), responsibilities over water and wastewater are shared among the federal government, federal states (*Länder*) and municipalities. At the federal level, the Ministry of Economics and Technology is responsible for

¹¹¹⁰ Bundesnetzagentur website: *Price-Cap-Maßgrößenverfahren* (in German). Available at: http://www.bundesnetzagentur.de/cln_1911/DE/DieBundesnetzagentur/Beschlusskammern/BK5/Massgroessenentscheidung/Price-Cap-Regulierung_ab_2014/Price-Cap-Regulierung_ab_2014_Durchf%C3%BChrung_des_Ma%C3%9Fgr%C3%B6%C3%9Fenverfahrens_2013_NavNode.html [accessed on 10 July 2013].

¹¹¹¹ Information for this section is especially from OECD, *Competition and Regulation in the Water Sector*, OECD Policy Roundtable, 2004, pp. 109-113.

¹¹¹² Federal Ministry for the Environment, Nature Conservation and Nuclear Safety, *Water Management in Germany*, July 2011. Available at: http://www.bmu.de/files/english/pdf/application/pdf/faltblatt_wasserwirtschaft_en_bf.pdf [accessed on 17 June 2013].

national water legislation and policy. The *Federal Water Act (Wasserhaushaltsgesetz, WHG)* was enacted in 1996 to govern water management and has been amended since, including the incorporation of the *EU Water Framework Directive 2000*.¹¹¹³ The Federal/State Working Group Water (LAWA) was established in 1956 in order to harmonise water laws at the federal and state level, consisting of representatives of federal and state authorities. The LAWA is currently a working committee of the Conference of Secretary of the Environment (UMK).

At the state level, the state governments are responsible for the regulation of water supply and wastewater disposal in their respective states though the state water laws.

The provision of water supply and wastewater disposal is under the authorities of the municipalities. Municipalities occupy a distinct position under German law. They are not part of the state in the usual sense (creations of or subordinates of the state), but have their own democratic legitimacy and autonomy in self-government for all local affairs, including the provision of water and wastewater services.¹¹¹⁴ The right of self-government under the *Basic Law* guarantees financial autonomy; that is, the right of municipalities to a source of tax revenues based upon economic ability and the right to establish the corresponding tax rates.¹¹¹⁵ The municipalities also have the right to decide on the institutional (subject to the public-law or the private-law) and contractual (self supply or third-party supply) arrangements for the provision of water services. As a result, there are different organisational forms of water and wastewater operators; viz municipal department, municipal utilities, municipal enterprises, joint ventures, private enterprises, and contracted operators.

Although there is no formal economic regulation conducted by municipalities, federal and state governments set a framework for municipal provision of water services, consistent with the EU Directives. For example, the predominant form of supplier – the public-law utilities – is subject to the laws on municipal water charges (for example, *Hesse Municipal Charges Act*) of the federal states. These laws require certain principles to be adhered to in the calculation of fees and charges. The two most important of these principles are:

- The principle of equivalence – the prices or charges must not be substantially above the value of the service for the citizen, irrespective of the costs of the service.
- The cost-coverage principle – all costs incurred for water supply or wastewater disposal, including water resources protection, abstraction and purifications and so on, must be covered by the price or the charge.

These principles must apply in the case of a public-law contractual relationship.¹¹¹⁶ The water charges are subject to the supervision by the federal states (*Länder*).

In the only apparent instance of a process applicable in water and wastewater regulation, a review of the prices or charges (fees under public law) can be initiated by the customer lodging complaints against notices of water charges from public suppliers through a civil or administrative court.¹¹¹⁷

Supply utilities, either public or private, are subject to the additional supervision of the competition authorities (that is, the *Bundeskartellamt* discussed above) as far as they charge for their services directly to the consumers (charges under private law). In particular, the abuse of a dominant position is prohibited under section 19 of the *Act Against Restraints of Competition* and under Article 82 of the EC Treaty. In addition, public water supply under certain contracts (such as demarcation and exclusive franchise agreements) can be exempted from the German competition law.¹¹¹⁸

Regulatory Development

As with all Member States of the EU, Germany is subject to the *EU Water Framework Directive 2000*. Water legislation at the federal, state and municipal level has been amended accordingly. There is no

¹¹¹³ *Act on Managing Water Resources, Federal Law Gazette I*, p. 1695.

¹¹¹⁴ RA Kraemer, B Pielen and C Roo, 'Regulation of Water Supply in Germany', *CESifo DICE Report 2/2007*, 2007, pp. 21-26.

¹¹¹⁵ *The Basic Law*, Article 28 (2).

¹¹¹⁶ OECD, *op. cit.*, p. 110.

¹¹¹⁷ *Ibid.*

¹¹¹⁸ The *Act Against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen – GWB)*, s. 131 (8) in conjunction with the old *Act Against Restraints of Competition*, s. 103.

evidence of any compliance issues relating to the Water Framework Directive, and the charging principles used appear to be consistent with Water Note 5.

5. Rail

Germany currently has over 37 000 kilometres of railway lines operating within its borders.¹¹¹⁹ Germany has a vertically-integrated incumbent – *Deutsche Bahn AG* (DB) – under a holding-company corporate structure. The DB group consists of four major subsidiaries – Long-Distance Passenger Transport (*DB Fernverkehr*); Short-Distance Passenger Transport (*DB Regio*); Transport and Logistics (*DB Schenker*); and Infrastructure and Services (*DB Netz*). DB generated revenue of €38 billion in 2011, and operates profitably overall. It is fully owned by the German Government.

In the passenger market, DB remains dominant, although the market share of its competitors has increased steadily to reach 15 per cent in 2012. Market share of competitors primarily relates to local/regional transport contracts that procured by public authorities. DB carried 1.98 billion passengers in 2011.

Over time, DB's freight business has acquired all or part of the rail-freight operations in several other European countries. In addition, DB has acquired a major international logistics company. It remains dominant in its home market, although the level of competition has increased with open-access operators carrying 27 per cent of total rail freight traffic in 2012.¹¹²⁰

The development of competition may have been assisted by Germany's position at the centre of Europe. Germany has land borders with nine countries, and national railway networks from Switzerland, Italy and Poland run into Germany. The considerable volume of international transportation business, including transit traffic, is well-suited to being carried by other operators. Some private businesses operating in Germany are based in other EU Member States.

Regulatory Institutions and Legislation

Substantive supervision in railway regulation is the task of the Federal Ministry of Transport, Construction and Town Development (BMVBS) and organisational responsibility lies with the Federal Ministry of Economics and Technology (BMWi).

Under the *General Railways Act 1993* as supplemented by the *Ordinance on Railway Infrastructure Usage Regulations*, there are two regulatory institutions responsible for the railways market. The *Eisenbahn-Bundesamt* (Federal Railway Authority) has responsibility for licensing and safety regulation of railways, rolling stock, and railway undertakings, enforcement of passenger rights, and the supervision and granting of federal subsidies ('service and finance agreement' LuFV).¹¹²¹ The BNetzA has responsibility for monitoring compliance with rules regarding access to railway infrastructure. This includes: the compilation of the train schedule; decisions on the allocation of railway embankments; access to service facilities (for example, maintenance facilities, stations, ports and sidings); usage conditions; rates principles; and rate levels.

Unlike in telecommunications and postal services, railway infrastructure is 'symmetrically' regulated. This means that all track owners and service-facilities operators are subject to regulation regardless of their market position.

Another difference between the regulation of telecommunications and postal services, and rail regulation, is that decisions in rail regulation are made by the rail-regulation section of the BNetzA; not, as in other areas, by a Ruling Chamber. The Rail Regulation Department of the BNetzA comprises five divisions: an economic and legal policy division; an access-to-rail-infrastructure-and-services division; an access-to-service-facilities-and-services division; a charges-for-networks-service-

¹¹¹⁹ *Statistische Bundesamt*, (Federal Statistics Office). Available at: <https://www.destatis.de/EN/FactsFigures/EconomicSectors/TransportTraffic/Transport.html> [accessed on 10 July 2013].

¹¹²⁰ *BNetzA, Annual Report 2012*, p. 126 [accessed on 4 June 2013].

¹¹²¹ *Eisenbahn-Bundesamt* (Federal Railways Agency). Available at: http://www.eba.bund.de/cln_031/nn_201954/sid_11C99549501F8E4F8E51A2BF78AAB885/nsc_true/EN/Home/homepage__node.html?__nnn=true [accessed on 19 June 2013].

facilities-and-services division; and a division covering business aspects of charging, monitoring and statistics.¹¹²²

How Matters Come Before the BNetzA

Infrastructure managers are obliged to draw up and publish a Network Statement for their infrastructure (*Annual Report 2011*, p. 199). These network statements are reviewed by the BNetzA.

In some instances the railway infrastructure operator will be obliged to notify the BNetzA in advance of planned decisions; for example, when it intends to reject an application for allocation of railway embankments or for access to service facilities. Within very short periods (scaled from one day to four weeks), the BNetzA will be able to withhold consent to the planned decision. This objection will include specifications which will need to be taken into account in the new decision, and may result in certain rules and conditions not being allowed to come into force – for example, rate levels. Apart from these preventive regulatory rights, there is also the possibility of subsequent verification of usage conditions for rail tracks and service facilities, and of rules about the level or structure of route rates and other rates.

Consultation of Interested Parties

Under section 35 of the *General Railways Act*, the Rail Infrastructure Advisory Council is tasked with providing guidance for the BNetzA in discharging its duties, drawing up its report, and making proposals on the focus of its activities.¹¹²³ The Rail Infrastructure Advisory Council is made up of an equal number of members of parliament and representatives of the federal states.

The BNetzA reports that the regulation of rail in Germany is increasingly influenced by the advent of full EU market liberalisation in rail, and Germany's involvement in the European Independent Regulators' Group 'IRG-Rail'. According to the BNetzA's Deputy President, Dr Iris Henseler-Unger, making this successful requires strong regulatory authorities in the member states; rather than an EU-wide regulator (DB AG Competition Report 2011, p. 32):

In most cases, our joint European objectives can be achieved more tangibly, quickly and efficiently by strong national regulators and cooperation between these bodies.... The European Independent Regulators' Group 'IRG-Rail', established last year [2010] along the lines of the telecommunications and energy sectors, is a suitable platform for cooperation in international questions, for drawing up joint principles and practices, and therefore ensuring consistent regulation.

Furthermore, there are plans to centralise licensing and safety regulation within the European Railway Agency.

Decision-making and Reporting

There is no ruling chamber for rail, and decisions in rail regulation are made by the Rail Regulation Department of the BNetzA. The *General Railways Act* does not allow for a ruling chamber.

The railway department of the BNetzA has the obligation to observe the railways market with respect to: price discrimination; access to service facilities; network usage; and the terms of use and publishes an annual market survey.

The BNetzA's annual reports contain a summary with detailed accounts of its work in rail regulation in the year covered. For 2011, this can be found at pages 199-205.

Leading decisions of the BNetzA, with links to the decision documents, are available on the BNetzA website.¹¹²⁴

¹¹²² BNetzA, *Organisation*. Available at: http://www.bundesnetzagentur.de/cln_1931/EN/General/Bundesnetzagentur/About/OrganisationChart/OrganisationChart_node.html [accessed on 14 June 2013].

¹¹²³ BNetzA, *Rail Infrastructure Advisory Council*. Available at: http://www.bundesnetzagentur.de/cln_1931/EN/General/Bundesnetzagentur/AdvisoryCouncilRailInfrastructure/RailInfrastructure_e_node.html [accessed on 14 June 2013].

¹¹²⁴ BNetzA, *Leading Decisions in Railway Legislation*. Available at: http://www.bundesnetzagentur.de/cln_1911/EN/Areas/Rail/Companies/LeadingDecisionsRailwayLegislation/LeadingDecisionsRailwayLegislation-node.html [accessed on 18 June 2013].

The BNetzA produces an annual activity report for the Federal Government.¹¹²⁵

Appeals

Appeals are dealt with in the first instance by the Administrative Court of Cologne, and can be appealed from there to a Higher Administrative Court.

The BNetzA's annual report contains details of appeals against its decisions. For example, the *Annual Report 2011* (pp. 206-207) contains a detailed account of the fate of *DB Netz AG's* appeals (first instance; Higher Administrative Court and the Federal Administrative Court) in relation to the BNetzA's objections to 13 clauses of its 2008 Network Statement. The appeal was eventually overruled by the Federal Administrative Court, following the BNetzA's appeal.

Regulatory Development

Based on the European Framework Directive for Railways¹¹²⁶, access regulation has to create incentives to reduce costs and manage their infrastructure efficiently. In 2011, the BNetzA released an assessment report on the introduction of incentive-based regulation in the railway subsector, evaluating that incentive regulation is both possible and essential to effective regulation. Incentives would be added to the current regulatory approach of 'service and finance agreement' (LuFV) to ensure that costs are not overstated.¹¹²⁷ In 2012, the federal Government proposed a draft of the *Eisenbahnregulierungsgesetz* (Railways Regulation Act) to the Parliament, which merges all current railways laws into a single law. This new legislation is pending, and it appears unlikely to be adopted in 2013 due Federal elections in Germany in September 2013, and to a usual standstill on important projects before elections. The draft law introduced an Ex-ante approval procedure and efficiency-oriented incentive regulation for trackage rights and passenger station usage charge with a five years regulatory cycle. The planned price-cap regulation will be based on actual costs and adjusted considering efficiency targets and sectoral productivity growth. The BNetzA is currently conducting a framework study which will form its recommendations for regulatory rule changes.¹¹²⁸ A Charges Working Group has been established under IRG-Rail.¹¹²⁹

With the European Commission's proposal of the Fourth Railway Package¹¹³⁰ in January 2013; and the European Court of Justice's Reprimand for Germany¹¹³¹ for insufficient cost reduction incentives in the current regulatory framework in February 2013, further adjustments of the draft Railways Regulation Act will be necessary with respect to incentive regulation as well as safety and licensing issues.

6. Airports

Germany's position in central Europe makes it a hub for transport, including air transport, and Germany has a number of major international airports – particularly Frankfurt, Munich, Dusseldorf, Berlin, Hamburg, Cologne-Bonn and Stuttgart.¹¹³²

¹¹²⁵ BNetzA, *Rail – About Us*. Available at: http://www.bundesnetzagentur.de/cln_1931/EN/Areas/Rail/AboutUs/aboutus-node.html [accessed on 14 June 2013].

¹¹²⁶ Directive 91/440/EEC, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31991L0440:en:HTML> [accessed on 3 July 2013] and the subsequent directives 2001/12/EC, 2001/13/EC and 2001/14/EC.

¹¹²⁷ BNetzA, *Gutachten zum Thema Anreizregulierung für die Eisenbahninfrastruktur* (in German). Available at: http://www.bundesnetzagentur.de/cln_1932/DE/Sachgebiete/Eisenbahnen/Unternehmen_Institutionen/Veroeffentlichungen/Gutachten/gutachten.html;jsessionid=E6FC2DA1D2C0CF03986A00A6319DF403?nn=266174#doc266152bodyText1 [accessed on 14 June 2013].

¹¹²⁸ BNetzA, *Annual Report 2012*, p. 151,

¹¹²⁹ IRG-Rail, *Charges Working Group*. Available at: <http://www.irg-rail.eu/working-groups/charges/> [accessed on 18 June 2013].

¹¹³⁰ Available at: http://ec.europa.eu/transport/modes/rail/packages/2013_en.htm [accessed on 3 July 2013].

¹¹³¹ Case C-556/10, Judgment of the Court from 28 February 2013. Available at: <http://curia.europa.eu/juris/document/document.jsf?docid=134373&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=485346> [accessed on 3 July 2013].

¹¹³² Information on these airports was taken from their websites accessed on 18 June 2013.

Frankfurt is Germany's busiest airport and the third busiest in Europe; similar in size to London, Paris, Amsterdam and Madrid. It is operated by Fraport, which is owned by the State of Hesse; the City of Frankfurt and private interests. It is the main hub for Lufthansa that holds a very small share of Fraport's shares.

Germany's second busiest airport (and Europe's seventh busiest), Munich, is owned by the State of Bavaria (51 per cent) and by the Federal Republic of Germany and the City of Munich in roughly equal parts.

Dusseldorf is Germany's third-largest airport, and is owned jointly by the City and a private consortium.

In Berlin, all of the air traffic from the three airports is being consolidated into the Berlin-Brandenburg Airport, whose opening has been delayed a number of times and a new date is yet to be decided.¹¹³³ It is jointly owned by the Cities of Berlin and Brandenburg and the Federal Government.

The fifth largest airport, Hamburg Airport, is owned by the City of Hamburg (51 per cent) and a private consortium.

The Cologne-Bonn Airport (seventh largest for passengers; third largest for cargo) is experiencing rapid growth in passenger and cargo traffic. It is owned by national, state and city governments (Cologne and Bonn).

*Regulatory Institutions and Legislation*¹¹³⁴

The economic oversight of airports is carried out by the transport authorities of the federal states under statutory supervision of the Federal Ministry of Transportation. The oversight function of the authorities includes the approval of charges. The approval process for charges is based on the recommendations of the International Civil Aviation Organisation (ICAO) as laid down in the latter's policy document on charges for airports and air navigation services.¹¹³⁵

Stephen Littlechild makes the following general description of airport regulation in Germany:

Airports and airport regulation in Germany present a mosaic of different kinds of ownership (national, state, municipality and private), regulatory frameworks (one in each federal state) and forms of regulatory constraint (rate of return, price cap, sliding-scale, etc). Annual cost-based regulation remains the norm. However, at Hamburg in 2000, and thereafter at three other major airports (Frankfurt, Hannover and Dusseldorf) there emerged multi-year 'framework agreements' between airports and airlines that embodied elements of price cap regulation.

At those airports involving private interests, incentive-based regulation, such as price capping, has been implemented. Price-cap arrangements are set out in public legal contracts between these airports and their state governments and have taken a variety of forms, some of which provide for a sharing of risk between the airport and airlines.

For example, the core of the public contract between Frankfurt Airport (Fraport) and the Ministry of Economic Affairs and Transport of Hesse is a revenue-sharing agreement, under which the average charge per passenger is coupled to the development in passenger volume (actual and budget). If passenger volume grows faster than planned, one-third of the resulting higher revenue is to be returned to the airlines. On the other hand, should passenger figures fail to reach budgeted levels, Fraport can compensate for such shortfalls by higher charges, applying the same ratio. The economic risks and opportunities can thus be shared by both the airport and the airlines. In January

¹¹³³ *Flughafen Berlin Brandenburg, Re Berlin Brandenburg Airport*, Press Release, 7 January 2013. Available at: <http://www.berlin-airport.de/en/press/press-releases/2013/2013-01-07-re-berlin-brandenburg-airport/index.php> [accessed on 17 June 2013].

¹¹³⁴ Stephen Littlechild, 'German Airport Regulation: Framework Agreements, Civil Law and the EU Directive', October 2010. Available at: <http://www.eprg.group.cam.ac.uk/wp-content/uploads/2010/10/Littlechild3Oct20101.pdf> [accessed on 17 June 2013]; Hans-Martin Neimeier, *Regulation of Large Airports: Status Quo and Options for Reform*, OECD International Transport Forum, May 2009. Available at: <http://www.internationaltransportforum.org/itrc/discussionpapers/DP200910.pdf> [accessed on 17 June 2013] and ICAO, *Airport Case Study: Germany*, 16 June 2011. Available at: <http://www.icao.int/sustainability/CaseStudies/Germany.pdf> [accessed on 17 June 2013].

¹¹³⁵ International Civil Aviation Organisation (ICAO), *ICAO's Policies On Charges For Airports And Air Navigation Services*, Document no. 9082/9, 9th Edition, 2012. Available at: http://www.icao.int/publications/Documents/9082_9ed_en.pdf [accessed on 17 June 2013].

2007, a new but similar regulatory regime for airport charges came into force between Fraport and the Ministry of Economics, Transport, Traffic and Development of Hesse.

There is also public legal contract between Hamburg Airport (with some private ownership) and the Ministry of Economic Affairs of Hamburg which covers landing fees, passenger handling fees, noise level charges and aircraft parking fees. The contract incorporates price-cap regulation with the price cap originally characterised by a sliding-scale CPI-minus-X (consumer price index CPI minus a specific value, X), set on a revenue-yield basis. The objective of the sliding scale was to reduce the possibility of the airport achieving 'windfall profits'. However, the sliding scale was suspended because any temporary decrease of demand followed by higher growth would, on average, lead to a relatively high X. In addition to being subject to a price cap, Hamburg airport must attain certain quality-of-service targets, including availability of aircraft, parking positions and availability and punctuality of passenger and baggage transport systems (*Case Study*).

Between 2004 and 2008 Düsseldorf Airport had a four-year pricing path with the Ministry of Transport and the airlines. Where annual passenger volume was within the range of 14.3 and 17 million, a constant Reference Quotient (RQ) was determined per passenger. The RQ was the maximum allowable revenue yield (average charge of all approval-required airport charges) per passenger. Passenger volumes above 17 million would result in a drop in RQ and therefore charges, while volumes below 14.3 million, would lead to an increase in RQ (*Case Study*).

At Munich Airport, which is owned fully by governments at all three levels, the regulatory regime is cost-based and applied to a 'single till'. This is similar to the regulatory approach taken with respect to all airports in Germany without any private ownership.

Regulation of Ground Handling Services at Airports

Ground Handling Services (GHS) at German airports are subject to national legislation transposing an EU Directive which requires airports with more than two million passengers (which includes all of the airports referred to above) to open the market to outside suppliers of GHS and to license at least one independent handler (EC Directive 96/67). GHS principally comprise ramp handling, baggage handling, freight/mail handling, fuel/oil handling, and passenger handling services.

7. Ports

Germany has a number of major seaports, including Hamburg, Bremen and Lubeck.¹¹³⁶ Duisburg, located on the Rhine, is a major inland port.

Hamburg Port is the largest port in Germany and the second-largest in Europe.¹¹³⁷ It is operated by the Hamburg Port Authority and provides terminals for containers (four); bulk cargo, liquid cargo and multipurpose.

Bremen (and Bremerhaven on the mouth of the River Weser) provides container terminals (fourth-largest in Europe with six million TEUs), facilities for bulk commodities, a fresh-fruit terminal, a car terminal (more than two million vehicles) and a liner terminal.¹¹³⁸

Lubeck is the largest German port on the Baltic.¹¹³⁹ It is jointly owned by the City of Lubeck (74.9 per cent) and a private interest.

Duisburg Port is located on the Rhine River proximate to Dusseldorf. It is the largest inland port in the world. The Federal Republic of Germany, the State of North-Rhine Westphalia and the City of Duisburg each holds one-third of the shares.

¹¹³⁶ The three ports of Hamburg, Lubeck and Bremen were once the principal ports of the Hanseatic League, an association of port cities that controlled sea transport and trade in a wide band stretching from the Netherlands, through Scandinavia to Poland. The League formally existed from the twelfth century to 1669.

¹¹³⁷ Hamburg Port Authority, *Home*. Available at: <http://www.hamburg-port-authority.de/en/Seiten/Startseite.aspx> [accessed on 18 June 2013].

¹¹³⁸ Bremenports, *Home*. Available at: <http://www.bremenports.de/> [accessed on 18 June 2013].

¹¹³⁹ Lubeck Port, *Home*. Available at: <http://www.hafen-hamburg.de/en/content/baltic-sea-port-l%C3%BCbeck> [accessed on 18 June 2013].

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Individual port authorities issue regulations detailing fees and charges. There is no common European seaport access or charging framework. In accordance with the competences stipulated by the *Basic Law*, responsibilities for seaports are concurrently shared between the federal and state governments. The authority of the states over the port companies lies primarily in ensuring the safeguard of fair conditions of competition. However, it is the joint task of the Federal Government and the coastal states, in their respective competences, to ensure that the port infrastructure is adapted to the functions of commercial seaports and is integrated with transport links. The duties of the Federal Government mainly result from investment and regulatory requirements and working with the EU. In particular, the Federal Government is responsible, under a Federal Transport Infrastructure Plan, for sea-bound access and hinterland links with German seaports.

The European Commission issued a communication on a European Ports Policy in 2007, providing guidance for policymakers within the European Union. The *Bundeskartellamt*¹¹⁴¹ has dealt with a number of merger cases and some abuse proceedings that concerned competition in ports. Few of these cases required an in-depth investigation. Given the key role of ports as infrastructural nodes, competition issues in ports tend to have significant ramifications for the whole economy. According to the *Bundeskartellamt*, the particular relevance of these cases lies in the strategic importance of the ports concerned for a specific region and for the domestic and international trade of goods. The facts that many ports and related facilities are (co-)owned by states or public entities, high development costs, requirements of administrative authorisations and the need for connecting infrastructures (such as canals, railroads and motorways) can complicate investigations.

¹¹⁴⁰ Joint Platform of the Federal Government and the Coastal States for a German Sea Port Policy, Federal Ministry for Transport, Building and Urban Affairs, *Home*. Available at: <http://www.bmvbs.de/SharedDocs/EN/Artikel/IR/joint-platform-of-the-federal-government-and-the-coastal-states-for-a-german-sea-port-policy.html?nn=39990> [accessed on 16 May 2013].

¹¹⁴¹ OECD, *Competition in Ports and Port Services 2011*, pp. 143-147. Available at: <http://www.oecd.org/daf/competition/48837794.pdf> [accessed on 5 July 2013].

Ireland

OVERVIEW

Traditionally, economic infrastructure in Ireland was dominated by vertically integrated government-owned utility operators with statutory monopoly powers. Entry to the European Union was associated with the restructuring of a number of utility industries to encourage competitive markets. Further liberalisation of infrastructure areas is occurring in line with relevant EU Directives, with the added impetus for reform following the global financial crisis.

Economic regulation of network industries and sectors is currently undertaken by both independent government bodies and government departments. The Irish Competition Authority deals with competition concerns and can therefore have a regulatory presence in infrastructure industries.

The Commission for Energy Regulation (CER) is responsible for the regulation of electricity and gas markets. The wholesale market for electricity has been established as a Single Electricity Market for the island of Ireland. *Bord Gáis Éireann* (BGE) is the government-owned incumbent operator of gas transmission and distribution. Both the electricity retail and gas supply markets are fully open to competition, although the number of independent participants is small.

Regulation of the telecommunications, broadcasting and postal industries is undertaken on a sectoral basis by the Commission for Communications Regulation (ComReg). Regulatory arrangements in both telecommunications and postal services are heavily influenced by the European Union (EU).

Water and wastewater services have traditionally been the concern of local governments; there has not been an independent regulator and domestic water has not been charged for. However, EU Directives are now starting to have a stronger influence on water and wastewater provision in Ireland – a government-owned utility, Irish Water, is being set up and will be regulated by the energy regulator (CER).

In the rail industry, services and fares are monitored and approved by the Minister for Transport, while the provision of infrastructure must be approved by an independent planning body, *An Bord Pleanála* (An Bord). There is no access regime, but third parties can participate in the provision of infrastructure through a joint partnership with the Railway Procurement Agency.

The Commission for Aviation Regulation (CAR) is responsible for regulating charges for runway landing and takeoff, aircraft parking, air-bridge use and passenger processing at Dublin Airport. These charges are subject to price-cap regulation on a single-till basis.

Irish ports are largely government owned, and, to the extent there is any economic regulation, it is conducted by the Minister for Marine. On 15 June 2012, the Competition Authority was instructed to carry out a thorough study of Irish ports, covering competition, efficiency (including international comparisons) and ownership. The Authority will report in 2013.

GEOGRAPHY, POPULATION, ECONOMY, POLITY AND LEGAL SYSTEM

The Republic of Ireland is located in Western Europe and occupies five-sixths of the island of Ireland in the North Atlantic Ocean, west of Great Britain. Ireland's interior terrain is predominantly level to rolling hills. This is surrounded by rugged hills and low mountains. Sea cliffs are a prominent geographic feature of the west coast of the island. The country exhibits a temperate maritime climate with largely mild winters and cool summers.

Ireland is a small country of 70 280 square kilometres, with an estimated population of 4.7 million.¹¹⁴² Ireland exhibits one of the lowest population densities by OECD standards of approximately 69 people per square kilometre. Around 40 per cent of the total population resides in or around the capital city of Dublin. Other major cities are Cork and Galway. All of these cities are very small by European standards. Of the two official languages, English is the most widely used, although Gaelic is still spoken in some parts of the country. Government bodies are also often named in Gaelic.

GDP per capita in 2012, in PPP terms, is estimated at US\$42 600, making it among the richest one third of OECD countries. GDP growth averaged 6 per cent per annum in 1995-2007, driven in large part by investment in high value-added businesses. Economic activity dropped sharply with the onset

¹¹⁴²Central Intelligence Agency (CIA), *World Fact Book – Ireland*. Available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/ei.html> [accessed on 15 June 2013].

of the global financial crisis, with GDP falling by about 10 per cent over 2008 and 2009; Ireland's first recession in more than a decade, with the subsequent collapse of its domestic property and construction markets. The unemployment rate was approximately 14 per cent in 2012.

Ireland's economy is highly dependent on international trade. Its main trading partners are the UK, the US, Belgium, Germany and France. The services sector now accounts for around 70 per cent of GDP and employment. There is little arable land, and Ireland's agriculture produces turnips, barley, potatoes, sugar beet, wheat, beef and dairy products – in total, agriculture makes up two per cent of GDP. There are few natural resources – natural gas, peat, copper, lead and zinc are among those it does possess.

Much of the economic infrastructure in Ireland is government owned and is at various stages of development. Ireland only generates a small amount of energy, mostly from peat and natural gas. Increasing energy needs led to an increase in energy imports. Renewable energy generation is small, but increasing. Despite recent improvements in telecommunications services, broadband penetration is low relative to other EU countries. Water and wastewater infrastructure is also moderately developed, as irrigation requirements are low and a substantial proportion of rural households are not connected to a water supply system. As Ireland is strategically located on major air and sea routes between North America and northern Europe, its transport infrastructure is more developed. Notably, the Republic of Ireland operates some utilities in conjunction with Northern Ireland. The wholesale electricity market, for example, occurs within the Single Electricity Market. Parts of the rail network are also operated in conjunction with Northern Ireland.

Ireland is a republic, having declared independence from the United Kingdom in 1921. It is a parliamentary democracy, where the parliament consists of a Senate (*Seanad Eireann*) and a House of Representatives (*Dail Eireann*). The head of government is the Prime Minister (*Taoiseach*). The President, elected directly by the people, is a largely ceremonial position. The President appoints the Prime Minister on the nomination of House of Representatives.

The legal system in Ireland is based on English common law, with the incorporation of equitable doctrines. As a member of the EU, Ireland has accepted the authority of European legislation over national law. It has not accepted compulsory ICJ jurisdiction.

Ireland's courts structure comprises of courts of first instance which include a High Court with full jurisdiction in all criminal and civil matters and courts of limited jurisdiction, the Circuit Court and the District Court. The central criminal court is the Criminal Division of the High Court. Appeals from the Central Criminal court are heard in the Court of Criminal Appeal. For all cases the Supreme Court is the court of final appeal.

APPROACH TO COMPETITION AND REGULATORY INSTITUTIONAL STRUCTURE

The Irish Competition Authority is an independent statutory authority administering the *Competition Act 2002*. It enforces competition law and regulates mergers and acquisitions. In addition, each infrastructure area has its own dedicated regulator. The Commission for Energy Regulation (CER) is responsible for the regulation of electricity and gas markets. Regulation of the telecommunications, broadcasting and postal industries is undertaken on a sectoral basis by the Commission for Communications Regulation (ComReg). Water and wastewater services have been the concern of local governments and there has not previously been an independent regulator. In the rail industry, services and fares are monitored and approved by the Minister for Transport, while the provision of infrastructure must be approved by an independent planning body, *An Bord Pleanála*. The Commission for Aviation Regulation (CAR) is responsible for regulating airport services at Dublin Airport and Irish ports are largely government owned, and, to the extent there is any economic regulation, it is conducted by the Minister for Marine.

The Competition Authority's Mission Statement is to ensure that competition works well for Irish consumers, business and the economy. It is an independent statutory body that enforces Irish and European competition law. The Competition Authority strives to ensure that competition works for the benefit of all consumers, including businesses, who buy products and services in Ireland. Specifically, where there is evidence of businesses engaging in anti-competitive behaviour, whether through price-fixing or abusing their dominant position, it can intervene through the enforcement of competition law. It can block mergers that would substantially lessen competition. It also has a duty to promote competition in the economy. It does this by identifying restrictions on competition in laws and regulations, advising the Government, and its Ministers, about the implications for competition of

proposed legislation or regulations, and by informing public authorities and the general public about competition issues.

The Authority consists of a Chairperson and three members; who are supported by internal case officers. The Competition Authority is divided into six divisions, namely cartels, monopolies, mergers, advocacy, corporate services and strategy. It is located in central Dublin.

Since the functions of the Competition Authority can sometimes overlap with those of the industry-specific or sector-specific regulators, the CER, the ComReg and the CAR have each implemented co-operation agreements, pursuant to s.34 of the *Competition Act*. These agreements provide for the exchange of information and provide guidance for situations in which both bodies are able to exercise their regulatory functions. They authorise one party to not act on a matter if it deems the other to already be exercising its functions in that area.¹¹⁴³

In the October 2008 Budget, the Minister for Finance announced plans to amalgamate the Competition Authority with the National Consumer Agency (NCA), the body established to enforce consumer law and promote consumer rights. The draft legislation was expected in 2012. According to the NCA:¹¹⁴⁴

Competition law is primarily designed to protect and benefit consumers, who should be able to buy goods and services at a competitive price. Greater competition provides good value for consumers, stimulates business and enhances the economy as a whole. Anti-competitive behaviour by businesses, such as price fixing, results in consumers paying higher prices without any extra benefits, and undermines the Irish economy's competitiveness.

Regulation in Ireland is governed generally by the *Freedom of Information Acts 1997 and 2003* (FOI). The FOI requires public bodies to publish a manual setting out the rules, procedures, guidelines and interpretations by which they operate. The manual is also required to include a list of precedents (s.16). The FOI also gives citizens the right to access information pertaining to them. In general, the Act provides for the disclosure of reasons for a decision, factual and statistical information, scientific or technical advice and reports into the functioning of a public body. A record containing the deliberations of staff, which includes opinions, advice and recommendations, can be withheld if its release is considered to be contrary to public interest. This exclusion does not apply to expert advice, potentially even if given by internal staff (s.18).

The FOI also establishes the Office of the Information Commissioner, under the direction of the Information Commissioner, to review decisions of public bodies regarding FOI requests of information. On application by a requesting party, the Commissioner will seek submissions from the public body concerned as to its decision and will consult with third parties who may be affected. The burden of proof is on the public body to show grounds for denying an FOI request. The Information Commissioner has the power to affirm, vary or replace the decision.¹¹⁴⁵

Appeals

Generally, merits-based appeals are only available for certain regulatory matters, as set out in the legislation governing an industry or sector. Whether such appeals are heard by a specialised appeals panel or the High Court varies across industries and sectors. However, in all areas, judicial review is available by application to the High Court. The appeal process is then governed by the rules of the High Court. The Court has the power to affirm or set aside a decision, in whole or in part and can also remit a matter to be reheard by the relevant regulator. Where an EU Directive applies, a party can also refer any decision to the European Court of Justice on the basis of a misinterpretation of the Directive.

More specifically, in the energy sector and under Part IV of the *Electricity Regulations Act*, parties have the right to appeal a decision of the CER in the modification of, refusal to modify or refusal to

¹¹⁴³ Competition Authority and ComReg, *Cooperation Agreement between Competition Authority and the Commission for Communications Regulation*. Available at: http://www.tca.ie/images/uploaded/documents/CA_COMREG_S.47G_Agreement.pdf [accessed on 15 June 2013].

¹¹⁴⁴ National Consumer Agency, *About Us*. Available at: <http://www.nca.ie/about-us> [accessed on 11 July 2013].

¹¹⁴⁵ Office of the Information Commissioner, *About Us*. Available at: <http://www.oic.gov.ie/en/AboutUs/RoleFunctionsandPowersoftheInformationCommissioner/ThereviewofFOIDecisionsofPublicBodies/> [accessed on 15 June 2013].

grant a licence or authorisation. However, parties are no longer able to appeal network access dispute decisions on substantive grounds.¹¹⁴⁶ Merit-based reviews regarding licences and authorisations are undertaken by an appeal panel which is imbued with all the powers of the High Court to compel the production of documents and the attendance of witnesses. The remedies available for a modification or refusal to modify a licence are simply that the panel may direct the CER to overturn its decision.

REGULATORY ARRANGEMENTS BY INDUSTRY OR SECTOR

1. Energy

Most of Ireland's electricity is generated by burning fossil fuels. There is a small amount of renewable energy – mainly hydroelectricity and some wind generation. Unlike several other European countries, it has no nuclear energy. The Electricity Supply Board (ESB) is the incumbent body in the electricity market. It is a statutory corporation and the government holds 95 per cent of its shares. The other five per cent is held by employees. The ESB is vertically integrated, but is separated into independently operating business units. In the generation market, where entry is subject only to regulatory authorisation (see below), ESB Power Generation owns and operates generation facilities. ESB Networks owns the high- and medium-voltage transmission systems. The high-voltage system is operated by *EirGrid*, which is a separate, government-owned body. The distribution system is owned by the ESB and operated by the ESB networks. In the retail market, that is fully open to competition, ESB Customer Supply provides electricity for retail customers in its capacity as the Public Electricity Supplier.¹¹⁴⁷

The Single Electricity Market (SEM) is the wholesale market for electricity for both the Republic of Ireland and Northern Ireland. It is operated by the Single Electricity Market Operator (SEMO) and operates in dual currencies.

In the gas market the relevant incumbent body is *Bord Gáis Éireann* (BGE), which is wholly owned by the government. BGE owns the distribution and transmission systems. *Bord Gáis Networks* has developed the gas infrastructure in Ireland. 13403 kilometres of gas pipelines and two sub-sea interconnectors have been constructed. On behalf of Gaslink, the independent system operator, *Bord Gáis Networks*, is also responsible for all new gas connections and for work on service pipes and meters at customers' premises, on behalf of all gas suppliers in Ireland. *Bord Gáis Energy* is a dual-fuel, all-island business that serves nearly one million gas and electricity customers. It procures energy on wholesale markets and invests in energy assets. It successfully entered the residential electricity market in early 2009. Since then it has grown its electricity customer base to nearly 407000. The market for gas supply was fully opened to competition in July 2007. However, the number of suppliers remains limited.

Regulatory Institutions and Legislation

The powers of the Commission for Energy Regulation (CER) to regulate electricity and gas are set out in the *Electricity Regulation Act 1999* and the *Gas (Interim Regulations) Act 2002*, respectively. The CER is an independent body and is funded by a levy on regulated industries.

The mission of the CER is described as:¹¹⁴⁸

In a world where energy supply and prices are highly volatile, the mission of the CER, acting in the interests of consumers is to ensure that:

- the lights stay on
- the gas continues to flow
- the prices charged are fair and reasonable
- the environment is protected, and

¹¹⁴⁶ Irish Statute Book, S.I. No. 524/2006 *European Communities (Internal Market in Electricity) Regulations*, *op. cit.*

¹¹⁴⁷ Electricity Supply Board (ESB), *About Us*. Available at: <https://www.esb.ie/main/about-esb/index.jsp> [accessed on 15 June 2013].

¹¹⁴⁸ Commission for Energy Regulation (CER), *About Us – Overview*. Available at: <http://www.cer.ie/en/about-us-overview.aspx> [accessed on 14 June 2013].

- electricity and gas are supplied safely.

The CER is also legally required to promote renewable energy forms.

The CER is headed by up to three Commissioners at any one time. As of June 2013 there are three Commissioners; with Dermot Nolan as Chairperson. The Commissioners have agreed certain lead responsibilities between them. There are four divisional Directors, each heading the CER's functional divisions – safety and consumer affairs; electricity markets and operations; gas, legal and renewable and electricity networks and distribution. The CER is located in Dublin.

Electricity

Since 1 November 2007 there has been a single wholesale electricity market in place across the island of Ireland, known as the Single Electricity Market (SEM). The SEM was put in place by the two regulators – the Utility Regulator in Northern Ireland and the CER in the Republic), working in cooperation with the two governments and the electricity industry. The SEM allows generators to sell their electricity into a 'central pool' and for electricity suppliers to purchase their electricity out of this pool. The SEM is designed to ensure that the most efficient electricity plants are run first (in the absence of any network constraints). The SEM is regulated by the SEM Committee, which is a cross-jurisdictional body made up of the two regulatory authorities (CER and Utility Regulator) and an independent member.

Regulated Revenue and Tariffs:¹¹⁴⁹ The CER first determines the revenues that the transmission business can earn to cover the costs of both the Transmission System Operator (TSO) and the Transmission Asset Owner (TAO). Price reviews are carried out every five years, and are then refined annually. The latest five-year review (Price Review 3) covers the period 2011 to 2015, and sets out the total allowed revenues for the TSO and TAO over the period. Each year the allowed revenue is refined in an annual review that updates a range of assumptions. This determines the allowed revenue in that relevant year which is then used to calculate tariffs and charges to users of the transmission system. The transmission tariffs that are approved by the CER each year include Transmission Use of System (TUoS) charges to Generators and to customers. The full Statement of Charges applicable to the relevant charging period, approved by the CER, can be found on the *EirGrid* website.

Charges to Generators connected to the system are based on the Generator's capacity and are site specific, differing according to the location of the generator. Most customers use the transmission system to some degree although only very large customers are directly connected to the transmission system. The majority of end customers are connected to the distribution system. Customer TUoS charges are based on a mixture of capacity and energy use, with the tariffs depending on whether they are connected to the transmission system or the distribution system. For the majority of customers, the charge is further divided into two tariff categories depending on consumption.

The CER has enforcement powers in the form of licences. Directions can also be issued requiring a holder of a licence or authorisation to cease an activity if such a direction is deemed to be necessary to protect the public, the security of supply or the interest of other holders of licences and authorisations (*Electricity Regulation Act 1999*, s.23).¹¹⁵⁰ Where no direction has been made, the CER can make a determination that a licence holder has breached conditions of that licence (s.24). Court orders can also be applied for to ensure compliance.¹¹⁵¹

In accordance with its legal requirement to promote renewable energy forms, the CER has a special group processing system in place for renewable generators seeking access to the transmission or distribution networks. Since December 2004, renewable generators seeking connection to the transmission or distribution systems have been processed within successive 'Gates'.

¹¹⁴⁹ Commission for Energy Regulation (CER), *Regulated Revenues and Tariffs*. Available at: <http://www.cer.ie/en/electricity-transmission-network-regulated-revenues.aspx> [accessed on 11 July 2013].

¹¹⁵⁰ Irish Statute Book, *Electricity Regulation Act 1999*. Available at: <http://www.irishstatutebook.ie/1999/en/act/pub/0023/> [accessed on 11 July 2013].

¹¹⁵¹ Commission for Energy Regulation (CER), *Regulators' Annual Report to the European Commission*, Ireland, August 2007. Available at: http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CDIQFjAA&url=http%3A%2F%2Fwww.cer.ie%2FGetAttachment.aspx%3Fid%3D4431c7e5-5f2a-4f6b-9bc0-378f0cddf4b1&ei=omFeUaqfPMPZrQevu4C4CA&usq=AFQjCNFQZbmb_lwGMar5QOMcMJ3Bkhj4AQ&bvm=bv.44770516.d.bmk [accessed on 11 July 2013].

The CER previously regulated retail prices charged by ESB Customer Supply while all independent suppliers could freely set tariffs. Business markets were freed from price regulation from 1 October 2010 and the domestic market was deregulated from 1 April 2011.

Gas

The Minister for Communications, Energy and Natural Resources retains responsibility for the licensing and regulation of offshore exploration while the CER's responsibility covers the Irish gas network and the supply of gas to end customers.

Most of the gas consumed in Ireland is imported through the natural gas network, or specifically through interconnection with the UK.

The CER is responsible for the regulation of the Irish gas network and the supply or retail market. *Bord Gáis Éireann* owns the gas network in Ireland, while Gaslink, an independent subsidiary, operates the network. The CER regulates revenues recovered and network tariffs charged by the network operator and owner; aiming to ensure 'that the network in place meets the needs of the Irish gas customer at a reasonable and efficient cost'.

Large customers may connect to the network and purchase gas on the international markets directly. Most large customers – such as electricity generators – do this already. The majority of small customers, including residential customers, are supplied by *Bord Gáis Energy*. Full market liberalisation took place on 1 July 2007, following the implementation of the necessary legislation.

There are a number of licensed suppliers in the market now competing at all levels in the market; although mainly concentrated on the large-customer end of the market. The CER continues to regulate the end-user prices charged by *Bord Gáis Energy* to small and medium sized customers so as to ensure customers receive value for money and efficient services. As BGE has a dominant position in the market, the CER regulates the charges for connecting to and using the network. It ensures that only efficient costs of operating the network are passed on to customers and also that there is fair and non-discriminatory access to the network for competitors. In order to regulate the charges for use of the network, the CER first determines the level of revenue that the transmission business can collect to cover its efficient costs.

In-depth reviews of all of the costs of *Bord Gáis Networks* are carried out every four or five years to ascertain the appropriate revenue levels over that period. Each year, the revenue *Bord Gáis Networks* is allowed to collect from customers is updated and refined. These 'allowed revenues' are used to calculate the transmission use of system (TUoS) tariffs, which are approved by the CER. TUoS tariffs are charged to shippers on the basis of the amount of network capacity and energy used by their customers. There are different TUoS tariffs for the different parts of the transmission system.

Ireland's distribution system is operated by Gaslink and owned by *Bord Gáis Éireann*. It is possible for any undertaking to apply for a licence to enter the market. The CER sets the tariffs for access to and use of Distribution Systems. These tariffs are paid by users of the system such as gas suppliers and will ultimately be included as part of the final tariff charged to end users.

The CER sets the regulated tariffs for the (NDM) Non Daily Metered Residential, Industrial & Commercial and Fuel Variation Tariff customers. On 1 October 2010 the CER deregulated the Regulated Tariff (RTF) segment.

There are three distinct market categories. These are the Large Daily Metered (LDM), Daily Metered (DM) and the Non Daily metered (NDM) segments. Competition in the Irish gas market for industrial and commercial customers (LDM and DM) commenced in July 2004, with several participants active. The domestic segment of the retail market was opened for full competition on the 1st July 2007.

The LDM (>57.5 GWh gas consumption annually) segment is made up of electricity generators and large industrial energy users. In the LDM segment there is no regulated tariff. The largest users generally ship their own gas, purchasing it directly from the wholesale market.

The DM segment is made up of industrial and large commercial users. In the DM segment (<57.5 GWh and .5.55 GWh gas consumption annually) there is no regulated tariff. There are approximately 240 DM customers.

The NDM segment (less than 5.55 GWh of gas annually) is made up of domestic customers and small and medium enterprises (SMEs). The Fuel Variation Tariff (FVT) applies to any BG Energy customer whose supply point capacity is greater than 3750 KWh and annual consumption is greater than 73 000 KWh. There are approximately 1700 FVT customers. The remainder of the NDM segment is split between the industrial and commercial (I&C) and residential customers. There are approximately 22 000 I&C customers and 620 000 residential customers.

Consultation of Interested Parties

The CER is responsible for resolving disputes that arise between consumers and suppliers, and between system operators and third parties.¹¹⁵² The CER also regulates compliance with licences and authorisations, such that issues may arise on a case-by-case basis.

Prior to the beginning of a formal consultation, the CER aims to hold discussion meetings with the relevant parties. In the case of major consultations, an open hearing is to be held before a consultation paper is produced. Such a hearing will require the regulated companies to present their submissions in an open setting and respond to questions by interested parties in attendance. Written proposals by the regulated companies will also be made available for two weeks before the consultation paper is produced, allowing parties to respond in the early stages of the matter.

A consultation paper is then published on the CER website and sent to parties listed on a voluntary distribution list. At this stage, a media release may also be published to stimulate public response. Submissions by interested parties can be received over the telephone, but the CER encourages written submissions to ensure transparency. There is now a minimum period of 28 days in which submissions will be received. However, the CER reserves the right to reduce this time period if a decision is required urgently. In the case of complex issues such as four or five yearly revenue reviews, it has been indicated that the consultation period is likely to exceed 28 days.¹¹⁵³ It is unclear how strict the submission timelines are.

A public hearing may also be called. Under s.21(3)(c) of the *Electricity Regulation Act*, the CER may compel attendance at such a hearing and can require the production of documents. Witnesses are subject to the same immunities and privileges as before the High Court. It is unclear if the CER have the power to compel interviews and discovery outside of this 'public hearing' context.

The use of open hearings suggests the operational culture to be more judicial than administrative in style.

The role of consumers is implicitly recognised in the legislation via consultation requirements. However, no user groups are specifically recognised or established.

The CER does organise a number of regular advisory/stakeholder meetings and industry groups.¹¹⁵⁴ The Retail Electricity Market Industry Governance Group (IGG), for example, was created by the CER to facilitate input from retail participants in retail market governance. It is chaired by the CER, and acts as an advisory and discussion panel. All retail market stakeholders such as suppliers, *Eirgrid* (the transmission system operator) and the assurance body are members. The IGG meets every six weeks. The Retail Market Development Group (RMDG) was established by the CER to deal specifically with policy-related issues which are not dealt with at the IGG. The RMDG is a quarterly meeting chaired by the CER to discuss strategic and policy issues in the retail market. The group is comprised of senior supply and networks company representatives, but may also be extended to other industry stakeholders or interested parties as appropriate. It has a supplier-to-customer focus and assists the CER in its role of policy formulation for the retail market.

¹¹⁵² Irish Statute Book, S.I. No. 60/2005-*European Communities (Internal Market in Electricity) Regulations 2005*, s. 24 and 31. Available at: <http://www.irishstatutebook.ie/2005/en/si/0060.html> [accessed on 11 July 2013].

¹¹⁵³ Commission for Energy Regulation (CER), *Review of CER Public Consultation Process – A Response and Decision Paper*, Dublin, CER/08/089, 2008. Available at: <http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CDIQFJAA&url=http%3A%2F%2Fwww.cer.ie%2FGetAttachment.aspx%3Fid%3D2c2b5689-cacd-4371-8dbb-4d40efabee4c&ei=N2NeUcuBHOaAiQe1t4GIaG&usq=AFQjCNHvfnOs3OHc00XiRbdpHrLtASLvQ&bvm=bv.44770516.d.aGc> [accessed on 11 July 2013].

¹¹⁵⁴ Commission for Energy Regulation (CER), *Industry Working Groups*. Available at: <http://www.cer.ie/en/electricity-retail-market-governance.aspx?article=3f3ff60d-4f4a-43c3-9154-541b9e4e4182> [accessed on 11 July 2013].

Timeliness

Pre-lodgement discussions are held with the relevant parties as outlined above. The content and extent of such discussions is unclear.

The legislation prescribes the time period in which the CER must consider regulatory applications. In electricity, the CER is required to make a decision regarding the modification of a licence or authorisation within a 'reasonable time'.¹¹⁵⁵ An access dispute must be decided upon within two months from receipt of the complaint. However, this time period can be extended by two months if additional information is sought. Further time extensions are possible if a complainant consents to them or, without consent, if the issue relates to major new generation (s.6(c)).

Similarly, determinations with respect to gas must be issued within two months from the date of receipt of a complaint. This may be extended by two months if additional information is sought and further time extensions are possible if the complainant consents to them.

There do not appear to be any consequences for the CER in exceeding the allowable time period.

Information Disclosure and Confidentiality

Under the *Electricity Regulation Act*, the CER can appoint an authorised officer for the purpose of obtaining information.¹¹⁵⁶ An authorised officer has the power to enter the premises of a contravening party to inspect and make copies of documents and records. If a party refuses access, an officer can apply to the District Court for a warrant to search the premises. In order to obtain a warrant, the CER must show reasonable grounds for suspecting the party has contravened some condition of a licence or authorisation. A warrant enables an authorised officer to enter the premises without the consent of the occupier and allows the use of reasonable force to do so. Parties who refuse to comply with a warrant to obtain information may be guilty of an offence leading to a fine or jail time (*Electricity Regulation Act*, ss.11-12).

The CER is subject to confidentiality requirements under the *European Communities (Internal Market in Electricity) Regulations* (SI 60 of 2005) and the FOI. Firstly, it is directed to exclude from publication, any information which could adversely affect a party's interests.¹¹⁵⁷ In addition, information received in confidence may not be able to be released to the public.

Under the FOI, information may be deemed to be obtained in confidence if there is a mutual understanding of confidence, the information is important and if its release would jeopardise future supply of information (s.26). Additionally, information that is commercially sensitive cannot be released otherwise than provided for by the public interest exemption (s.27).

Parties can access commercially sensitive information or that which is obtained in confidence, if the regulator deems it to be in the public interest to release it (s.29). In making such a determination, the CER must notify the relevant party and provide them with an opportunity to respond. Third parties who may be impacted by the decision must also be notified and given a chance to respond. This stays the release of information. Either party also has the ability to appeal the decision to the Information Commissioner (s.26).

Information may also be classified as confidential if it is subject to a common law duty of confidence. This form of confidentiality is not subject to a public interest exemption.

Decision-making and Reporting

The determinative body of the CER is comprised of up to three commissioners (currently there are only two). The chairman and the commissioner split lead responsibilities for the different areas within the CER between them (see earlier).

The majority of CER decisions relate to tariffs and to access terms and conditions. As such, decisions usually affect multiple parties. For example, s.14(3) of the *Gas (Interim Regulation) Act 2002*, allows the CER to make regulations regarding the terms and conditions a pipeline operator can

¹¹⁵⁵ Irish Statute Book, S.I. No. 60/2005, *European Communities (Internal Market in Electricity) Regulations 2005*, op. cit., s. 22(1).

¹¹⁵⁶ Irish Statute Book, *Electricity Regulation Act 1999*, op. cit., s. 11.

¹¹⁵⁷ Irish Statute Book, S.I. No. 60/2005-*European Communities (Internal Market in Electricity) Regulations 2005*, op. cit., s. 5(2).

dictate to an access seeker and the method for determining the access price. The pipeline operator is then bound to comply with the regulations with respect to all access requests. In the event that an access seeker is refused, the parties must bring the matter to the Commission to be resolved; they cannot apply straight to the courts. It is unclear if parties can agree to depart from a decision.

Upon completion of the public consultation process, the CER publishes a final decision paper on its website. All decision papers and consultation papers adhere to standard templates introduced in June 2008 upon the completion of a review of its public consultation process.¹¹⁵⁸ The CER also publishes all responses received during the consultation period. Parties who wish their responses to remain confidential will have to apply to and make their case before the commission. The CER will sometimes publish a 'proposed decision paper' prior to its final determination. Consultation is then held with respect to the paper and a final decision paper will be released once submissions have been considered.¹¹⁵⁹

The CER has committed itself to publishing more information regarding the reasoning behind its decisions.¹¹⁶⁰ This is in addition to the requirement under s.6 of the *Electricity Regulation Act* that such reasoning be included in the final decision paper, unless impractical. In the particular case of rejecting an application for a licence or authorisation without calling a public hearing, the statutory requirement is stronger, stating that the CER must notify the applicant of its reasoning for doing so (*Electricity Regulation Act*, s.20). Under the FOI, parties can also request further information about a decision which applies to them. Appeal to the Information Commissioner is possible if the CER denies access.

Appeals

Under Part IV of the *Electricity Regulations Act*, parties have the right to appeal a decision of the CER in the modification of, refusal to modify or refusal to grant a licence or authorisation. However, parties are no longer able to appeal network access dispute decisions on substantive grounds.¹¹⁶¹

Merit-based reviews regarding licences and authorisations are undertaken by an appeal panel of at least three people, appointed by the Minister in accordance with s.29 of the *Electricity Regulation Act*. A request to the Minister for an appeal must be made within 28 days of the CER's decision and the appeal must be determined within six months. An appeal panel is imbued with all the powers of the High Court to compel the production of documents and the attendance of witnesses. In the case of a refusal to grant a licence, the appeal panel can confirm the refusal, or can direct the CER to grant it subject to any conditions it deems necessary. The remedies available for a modification or refusal to modify a licence are simply that the panel may direct the CER to overturn its decision.

Judicial review is possible under s.32 of the *Electricity Regulation Act* and is undertaken by the High Court. A request for a judicial review must be made within two months of the CER or appeal panel decision. If the High Court finds substantial grounds for ruling in favour of the appellante, the original decision of the CER and/or the appeal panel will be declared invalid.

Regulatory Development

A dispute arose over the nature and treatment of a levy imposed on the market value of electricity generators' emissions of CO₂. The Irish Government had hoped that generators would not pass through the cost of the levy into wholesale (and hence retail) electricity prices. The generators, however, were required to set their offer prices into the wholesale market equal to 'short-run marginal costs' and to value cost items at 'opportunity costs'. The CER decided that the levy did not meet these conditions. The High Court agreed with the CER, but the Irish Supreme Court decided that

¹¹⁵⁸ CER, *Decision on Review of CER Public Consultation Process*, CER08089, 2008. Available at <http://www.cer.ie/en/information-centre-reports-and-publications.aspx?article=535840aa-c822-4d5d-b258-61ee48502dcf> [accessed on 15 June 2013].

¹¹⁵⁹ CER, *Review of CER Public Consultation Process – A Consultation Paper*, CER/07/140, 2007. Available at: <http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CDIQFjAA&url=http%3A%2F%2Fwww.cer.ie%2FGetAttachment.aspx%3Fid%3D15dca1e7-5658-4b28-bcf2-a729f1c3e3c6&ei=fWReUdGEK4b-rAfm4DYCA&usq=AFQjCNFyJSz2KAGaa4SBFoRhPbBtu-06Ow&bvm=bv.44770516,d.bmk> [accessed on 14 June 2013].

¹¹⁶⁰ CER, *Review of CER Public Consultation Process – A Response and Decision Paper*, CER/08/089, 2008. Available at: <http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CDIQFjAA&url=http%3A%2F%2Fwww.cer.ie%2FGetAttachment.aspx%3Fid%3D2c2b5689-cacd-4371-8dbb-4d40efabee4c&ei=EGVeUeldi86tB-SYqMgQ&usq=AFQjCNHvflnOs3OHc00XiRbdpHrLtASLvQ&bvm=bv.44770516,d.bmk> [accessed on 5 April 2013].

¹¹⁶¹ Irish Statute Book, S.I. No. 524/2006 *European Communities (Internal Market in Electricity) Regulations*, op. cit.

paying the levy was a cost by any normal definition, and that giving up cash to pay the levy represented an opportunity cost.¹¹⁶²

2. Telecommunications

Ireland's telecommunication market was liberalised in the 1990s. *Eircom* (previously *Telecom Eireann*) was once the vertically integrated and government-owned incumbent enjoying a statutory monopoly. It was privatised in 1999 via a stock-market float. It owns the core fixed-line infrastructure and has responsibilities as the universal service provider of telephone lines, public payphones, directory services and services to users with a disability. It is also required to ensure affordability, and must allow consumers to control their expenditure by providing itemised billing and call-barring facilities.¹¹⁶³

While the government has not held an ownership stake in *Eircom* since privatisation; an employee fund has, over the years, owned as much as 35 per cent of the company. In 2012, *Eircom* was declared insolvent with €4 billion of debt. Between March and June 2012 the company underwent an 'examinership' process that was finalised when debt-holders agreed to take full ownership of *Eircom* in exchange for a 40 per cent reduction of the company's debt.¹¹⁶⁴

Ireland has 22.6 fixed broadband subscriptions per hundred inhabitants, which is lower than in leading European countries such as Switzerland (43.4), the Netherlands (39.7) and Denmark (38.8).¹¹⁶⁵ Government efforts to improve local-loop unbundling and wholesale access have meant that growth in broadband subscription has been strong in recent years. Annual aggregate traffic has grown by more than 30 per cent per annum. Development of Ireland's telecommunications infrastructure has been affected by *Eircom's* financial performance and subsequent lack of investment. Plans for the deployment of a fibre network have been repeatedly delayed. Competitors have undertaken some infrastructure investment, notably UPC Ireland's cable network¹¹⁶⁶ that currently serves close to one million customers. *Eircom* has lost some fixed-line market share to new entrants. More detail on fixed-line broadband developments is provided in the regulatory development subsection.

The mobile market is supplied by three service providers, all of which provide 3G services, plus two MVNOs (resellers). Mobile broadband, based on HSPA, has become popular. Ireland is ranked twelfth in the OECD with respect to wireless broadband penetration (OECD *Broadband Portal*).

Regulatory Institutions and Legislation

The Commission for Communications Regulation (ComReg) was created by the *Communications Regulation Act 2002*, which was last amended in 2007. It has regulatory responsibilities under the *Communications Regulation Act 2002* and subsequent EU acts either applicable to, or transposed into, Irish law. Under the *Communications Regulation Act 2002*, ComReg has regulatory authority in Ireland telecommunications networks, including over:¹¹⁶⁷

- traditional fixed-line telephone networks;
- mobile networks providing voice or data services;
- television and radio transmission networks;
- cable television distribution networks; and
- radio communications including fixed wireless, MMDS (multipoint microwave distribution) and satellite services.

¹¹⁶² G Shuttleworth and G Anstey, 'Irish Supreme Court Restores Common Sense to the Electricity Market', *The Electricity Journal*, 25, 5, June 2012, pp. 36-42.

¹¹⁶³ Commission for Communications Regulation (ComReg), *Universal Service*. Available at: http://www.comreg.ie/publications/comreg_re-designates_eircom_as_universal_service_provider_from_2012_until_2014.590.104148.p.html [accessed on 15 June 2013].

¹¹⁶⁴ Eircom, *Eircom Restructuring Plan*. Available at: <http://siteassets.eircom.net/assets/static/pdf/IR/Investor%20Announcement.pdf> [accessed on 26 June 2013].

¹¹⁶⁵ OECD, *OECD Broadband Statistics – Penetration*, December 2012, updated on 18 July 2013. Available at: <http://www.oecd.org/sti/broadband/oecdbroadbandportal.htm> [accessed on 11 July 2013].

¹¹⁶⁶ Information available at: <http://www.libertyglobal.com/oo-ireland.html> [accessed on 26 June 2013].

¹¹⁶⁷ ICT Toolkit, *Regulation and Convergence in Ireland*. Available at: <http://www.ictregulationtoolkit.org/en/PracticeNote.aspx?id=1224> [accessed on 15 June 2013].

The *Communications Regulation Act* sets out the ComReg's statutory objectives for electronic communications: to promote competition; to contribute to the development of the internal market; and to promote the interests of users within the European Community. In carrying out its responsibilities, the ComReg seeks to ensure that, through the development of effective competition, Irish consumers receive the highest-quality products and services from the widest choice of operators and at the best prices.

The Commission is comprised of between one and three members. The Minister appoints the members, following a selection process undertaken by the Civil Servants and Local Appointment Commissioners.¹¹⁶⁸ There is currently one commission member. The determinative body is supported by internal staff that are organised into cross-functional teams. A senior legal adviser and a senior economic adviser support these teams.¹¹⁶⁹ There are four divisions within the ComReg. The wholesale division is responsible for interconnection, dispute resolution and unbundling the local loop. It also provides financial advice. The retail division regulates some retail pricing, consumer rights and also provides economic advice to the commission. Both divisions also employ a legal team. The market framework division deals with authorisations, managing the radio spectrum (including licensing) and regulates the postal service. The fourth division manages corporate affairs. The ComReg is located in Dublin.

The ComReg has a responsibility to identify and correct situations of significant market power. In this capacity, the ComReg monitors the retail and wholesale prices set by any operator deemed, through market analysis, to have significant market power. Pricing obligations can be in the form of retail minus control, cost orientation or a price cap.

For licensing and access terms and conditions to the fixed-line infrastructure a price cap is imposed on the rental rate for the local loop, as well as on the price Eircom can charge for retail services. In 2010 ComReg began using a bottom-up long-run average incremental costs (BU-LRAIC) pricing methodology and lowered the regulated LLU maximum tariff.¹¹⁷⁰ The ComReg also monitors compliance with price caps and access conditions. To this end, the ComReg investigates and resolves disputes between undertakings.

The ComReg can investigate and prosecute the existence of anti-competitive behaviours and the abuse of market power in the provision of communications services. A cooperation agreement exists between the ComReg and the Competition Authority to facilitate the sharing of information. This agreement also outlines that each party may forebear to act where the other party is carrying out its functions.¹¹⁷¹

The *Communications Regulation Act 2002* also specifies these functions for the ComReg:

- to ensure compliance by undertakings with obligations in relation to the supply and access to electronic communications services, electronic communications networks and associated facilities and the transmission of services on such networks;
- to manage the use of the radio-frequency spectrum and the national numbering resource;
- to investigate complaints from undertakings and consumers in regard to the supply of and access to electronic communications services and electronic communications networks; and
- to ensure compliance in relation to the placing on the market of communications equipment and radio equipment.

While the independence of ComReg is established under the *Communications Regulation Act*, it does allow the Minister for Communications to 'give such policy direction to ComReg as he or she considers appropriate' and that ComReg shall comply with any such direction (s.13). The Department of Communications, Energy and Natural Resources has stated that any policy direction issued to the

¹¹⁶⁸ Irish Statute Book, *Communications Regulation Act 2002*, s 14 & s 15. Available at: <http://www.irishstatutebook.ie/2002/en/act/pub/0020/index.html> [accessed on 11 July 2013].

¹¹⁶⁹ ComReg, *About Us*. Available at: http://www.comreg.ie/about_us/organisation_who_we_are.472.html [accessed on 15 June 2013].

¹¹⁷⁰ ComReg, *Response to Consultation and Final Decision*, 9 February 2010. Available at: <http://www.comreg.ie/fileupload/publications/ComReg1010.pdf>. [accessed on 14 June 2013].

¹¹⁷¹ ComReg, *Cooperation Agreement with the Competition Authority*, Document No 03/06. Available at: <http://www.comreg.ie/fileupload/publications/comreg0306.pdf> [accessed on 11 July 2013].

ComReg must deal with policy rather than regulation. The last policy direction issued to ComReg was in 2004 and was preceded with a public consultation (as required by the legislation).¹¹⁷² The European Commission had stated that it would continue to monitor the independence of the ComReg.¹¹⁷³

How Issues Arise

In regulating telecommunications, the ComReg can choose to investigate issues by its own initiative or in response to an end user's complaint.¹¹⁷⁴ It also has monitoring responsibilities over retail and wholesale providers who have significant market power and conducts some regular reviews, such as of the maximum call handling fees for an ECAS contract.¹¹⁷⁵

Consultation of Interested Parties

In determining a matter, the ComReg typically publishes a consultation paper and then a final decision paper. The ComReg also publishes its own responses to submissions received during the consultation period. This occurs either at the time of, or before, the publication of the final decision paper. The Competition Authority, EU Member States, and the Body of European Regulators for Electronic Communications (BEREC) have the potential to involve themselves in the decision-making process, in addition to interested companies and the general public.

The ComReg may resolve disputes between undertakings involved in the provision of communications services or networks via formal or alternative mechanisms where it decides that most appropriate approaches on a case-by-case basis. It may make mediation determination that binds the parties to the dispute if the parties agree to the use of mediation. It also encourages the use of other means that can resolve the dispute in a timely manner, such as informal contacts or negotiations, discussion at industry forum or public consultation.

The ComReg follows the following dispute-resolution procedures (where 'Annex C' refers to a 'guidance note' prepared by the applicant that outlines the basis of their dispute, the background to the dispute, what evidence is provided, and other details such as contact information and related legal proceeding):¹¹⁷⁶

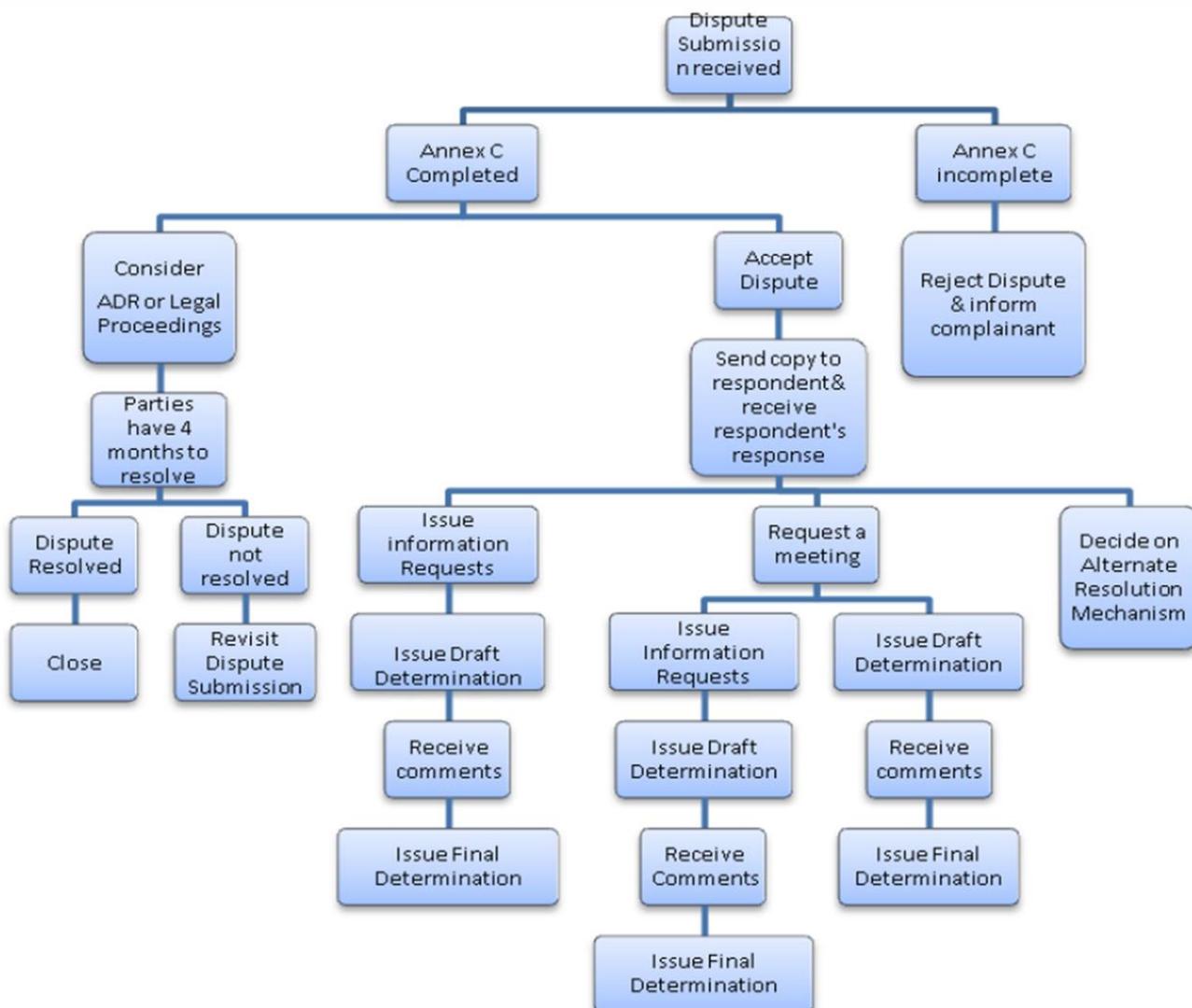
¹¹⁷² Department of Communication, Energy and Natural Resources (DCENR), *Policy Directions to ComReg 2004*. Available at: <http://www.dcenr.gov.ie/Communications/Communications+Policy/Archive/> [accessed on 11 July 2013].

¹¹⁷³ Europa, *Digital Agenda for Europe*, p. 2. Available at: http://ec.europa.eu/information_society/digital-agenda/scoreboard/docs/2012/IE_Country_Chapter_17th_Report.pdf [accessed on 11 July 2013].

¹¹⁷⁴ Irish Statute Book, *Communications Regulation (Amendment) Act 2007*, s. 10(2). Available at: <http://www.irishstatutebook.ie/2007/en/act/pub/0022/print.html> [accessed on 11 July 2013].

¹¹⁷⁵ *Communications Regulation (Amendment) Act 2007*, *op. cit.*, s. 58(D).

¹¹⁷⁶ ComReg, *Response to Consultation and Decision Notice: Dispute Resolutions Procedures – Framework Regulations*, p. 31. Available at: <http://www.comreg.ie/fileupload/publications/ComReg1018R.pdf> [accessed on 11 July 2013].



The ComReg facilitates informal dispute resolution processes via forums or bilateral discussions. This is done with the aim of avoiding formal dispute resolution procedures. The ComReg reports a high level of success in informal dispute resolutions.¹¹⁷⁷

The ComReg employs external consultants in examining a matter if it deems such advice to be required.

The ComReg oversees the operation of some industry and working groups such as the consumer group forum, the numbering advisory panel and the operations and maintenance forum.¹¹⁷⁸

Timeliness

The legislation does not include any requirements regarding maximum mandatory timelines for regulatory processes. The ComReg has a four-month timeline for dispute resolutions. The ComReg may engage in pre-lodgement discussions with parties.

¹¹⁷⁷ ComReg, *Response to Consultation: Response to Consultation – Draft Strategy Statement*, p. 14. Available at: <http://www.comreg.ie/fileupload/publications/ComReg1048.pdf> [accessed on 11 July 2013].

¹¹⁷⁸ ICT Toolkit, *Regulation and Convergence in Ireland*. Available at: <http://www.ictregulationtoolkit.org/en/PracticeNote.aspx?id=1224> [accessed on 15 June 2013].

Information Disclosure and Confidentiality

The ComReg has the statutory power to obtain information.¹¹⁷⁹ The Commission may serve a notice requiring the giving of evidence or the production of documents if it has reasonable grounds for believing this to be necessary. A person required to appear before the Commission under such a notice, may choose to have a lawyer with them and is subject to the same privileges and liabilities as a witness before the High Court. Information gathered in this way is assumed to be private, although the Commission can make the information public if it deems this to be in the public interest.¹¹⁸⁰ The *Communications Regulation Act 2002* makes it an offence to not appear or produce documents if requested to do so by the commission (s.38D). It is also an offence to refuse to swear an oath or to refuse to answer a question (s.38E). Both duties are subject to a reasonable excuse exemption.

The ComReg may also appoint an authorised officer to enter premises and inspect documents as needed by the commission.¹¹⁸¹ An authorised officer is able to obtain a warrant by showing reasonable grounds for suspecting information required by the Commission is on the premises. This will allow an officer to enter without consent by the occupier.

In addition to the above avenues for obtaining information, the ComReg can rely on its cooperation agreement with the Competition Authority to obtain information that may be in the latter authority's possession. The agreement allows either authority to request information from the other. In general, the requesting authority may only use the information for the purposes stated in its request. However it may be used for further purposes, subject to approval by the respondent party.¹¹⁸²

Material submitted voluntarily may also be deemed to be confidential. In order to be satisfied that such material has the 'quality of confidence', the ComReg will consider whether the respondents believe that release of the information would disadvantage them or advantage others. The ComReg will also consider whether the respondent believes the information is confidential and the reasonableness of this belief. Common practice in the telecommunications market with respect to the material in question may also be informative to the assessment of confidentiality.¹¹⁸³ The ComReg generally requests that confidential information be submitted separately to the main submission, which will be published on the website.

As in energy, the *Freedom of Information Acts 1997 and 2003* allow access to information held by certain public bodies (including the ComReg). Information which is claimed to be confidential can be released to other parties if it is deemed to be in the public interest to do so.

Decision-making and Reporting

Decisions are made by the Commission, which is comprised of between one and three members. There are currently two commission members.

The ComReg will sometimes include a draft decision as part of the consultation process. It is not binding and is subject to review based on the responses to the consultation. A final decision is published on the website after consultation has concluded and is the binding decision. The ComReg also publishes all submissions by interested parties on its website, unless they are deemed to be confidential. When publishing its final decision, the Commission also outlines its own responses to specific concerns raised through the consultation process. Further to making reasons for decisions publicly available, s.18 of the *FOI Act* gives a party who is affected by a ComReg decision the right to be provided with reasons for that decision, on request. A party is sufficiently affected by a decision if it confers or withholds a benefit to them, but not to the public, or a sufficiently large class of persons, in general.¹¹⁸⁴

¹¹⁷⁹ *Communications Regulation (Amendment) Act 2007*, *op. cit.*, s. 38(A).

¹¹⁸⁰ *Communications Regulation (Amendment) Act 2007*, *op. cit.*, s. 38(c).

¹¹⁸¹ *Communications Regulation Act 2002*, *op. cit.*, s. 39.

¹¹⁸² ComReg, *Cooperation Agreement with the Competition Authority*, Document No 03/06. Available at: <http://www.comreg.ie/fileupload/publications/comreg0306.pdf> [accessed on 11 July 2013].

¹¹⁸³ ComReg, *Guidelines on the Treatment of Confidential Information*, Document No. 05/24. Available at: <http://www.comreg.ie/fileupload/publications/ComReg0524.pdf> [accessed on 11 July 2013].

¹¹⁸⁴ Freedom of Information (FOI), *Freedom of Information Acts 1997*, s. 18(5). Available at: <http://foi.gov.ie/wp/files/2010/09/freeact.pdf> [accessed on 11 July 2013].

Appeals

Any user affected by an electronic communications-related decision may appeal the decision on its merits. All appeals are heard by the High Court.¹¹⁸⁵ Judicial appeals are possible and are also heard by the High Court. In addition, a party can refer any decision to the European Court of Justice on the basis of a misinterpretation of the EU Directives.

In accordance with the rules of the High Court, a party has 28 days from the publishing of a ComReg decision in which to register intent to appeal. The ComReg then becomes the respondent party and is required to submit all documents that it had before it in making the decision on appeal. These documents are to be returned after the appeal has been determined.

The appeal process is governed by the rules of the High Court. The Court has the power to affirm or set aside a decision, in whole or in part. It can also remit a matter to be reheard by the ComReg, with or without the hearing of further evidence.

A ComReg decision stands pending an appeal and can be implemented during this time. However, the High Court may make an order to stay the operation or implementation of a decision, where it deems this necessary for the effectiveness of the appeal. Such an order will exist until the appeal is determined, or earlier if this is deemed appropriate.¹¹⁸⁶

Regulatory Development

In May 2012, the Government's Next Generation Broadband Taskforce released its report. The taskforce was set up to: assess Ireland's broadband infrastructure and market; to compare it to European regulations and standards; and to discuss the role for government in developing the market. The report proposed that the government may need to intervene in the market for 15 to 30 per cent of the population, for whom next-generation broadband is unlikely to be economic (from the network owner's perspective). Following a consultation period on the report's recommendations, the Government announced a National Broadband Plan for Ireland, titled *Delivering a Connected Society*.¹¹⁸⁷

In 2012, ComReg undertook a public consultation on proposed regulations for mobile termination rates (MTRs) and fixed termination rates (FTRs). ComReg intervened in the MTR market in 2005 and 2008, and introduced cost-based pricing. However, the 2012 proposed regulations are stronger and more specific, and would bring Ireland into line with the European Commission's 2009 Termination Rate Recommendation.

On 21 November 2012, the Commission designated six Mobile Service Providers with Significant Market Power (SMP) and imposed a number of SMP obligations on each, including an obligation of cost orientation. The Mobile Service Providers were: Hutchison 3G Ireland (H3GI), Lycamobile Ireland (Lycamobile), Meteor Mobile Communications (Meteor), Telefonica Ireland (O2), Tesco Mobile Ireland (TMI) and Vodafone Ireland (Vodafone).

ComReg further directed each SMP Mobile Service Provider to ensure that its weighted average wholesale MTR was no more than 2.60 Eurocents per minute, from 1 January 2013 to 30 June 2013. The decision also imposed a maximum permitted wholesale mobile termination rate of 1.04 Eurocents per minute on each SMP Mobile Service Provider from 1 July 2013. The decision has been appealed to the High Court by Vodafone Ireland Limited insofar as the decision imposed a cost-orientation obligation.¹¹⁸⁸

¹¹⁸⁵ Department of Communications, Energy and Natural Resources (DCENR), *European Communities (Electronic Communications Networks and Services) (Framework) (Amendment) Regulations 2007*, SI No 271 of 2007. Available at: <http://www.dcenr.gov.ie/NR/rdoonlyres/0F0B864D-92BA-4EB5-BE88-D8C279D56CE0/0/FrameSINo27107.pdf> [accessed on 11 July 2013].

¹¹⁸⁶ *Ibid.*, s. 7.

¹¹⁸⁷ Department of Communication, Energy and Natural Resources (DCENR), *Delivering a Connected Society*, 30 August 2012. Available at: <http://www.dcenr.gov.ie/Communications/Communications+Development/Next+Generation+Broadband/> [accessed on 15 June 2013].

¹¹⁸⁸ ComReg, *Appeal of ComReg's Decision on Mobile Termination Rates (Press Release)*. Available at: <http://www.comreg.ie/fileupload/publications/ComReg12139.pdf> [accessed on 15 June 2013].

3. Postal Services

An Post is a state-owned postal company established under the *Postal and Telecommunications Services Act 1983* for the purpose of providing a 'national postal Service' to meet the 'industrial, commercial, social and household needs for comprehensive and efficient services' and to provide money remittance and counter services for Government business.

An Post is a limited liability company, incorporated under the *Companies Act*. One ordinary share is held by the Minister for Finance and the remainder of the issued share capital is held by the Minister for Communications, Energy and Natural Resources. The share capital is reported as €68.2 million in the 2011 Annual Report and Accounts.¹¹⁸⁹

The operations of *An Post* encompass postal, distribution and financial services. The operations of *An Post* encompass postal, distribution and financial services. The Company processes and delivers approximately 2.5 million items of mail daily through four major processing hubs and 115 distribution offices. It also provides agency services for Government Departments, the National Treasury Management Agency, *An Post* National Lottery Company and a range of other commercial bodies through its Post Offices.

Approximately 1.7 million customers are served weekly through a retail network of 1170 Post Offices and 180 postal agents (on a per capita basis, Ireland has one of the larger post office networks in Europe). *An Post's* total revenue in 2011 was €806.7 million, including interest income of €9.4 million.¹¹⁹⁰

An Post's monopoly of postal operations in the Irish market has been increasingly circumscribed by EU-driven reform of the legislative framework leading ultimately to full opening of the postal market to competition by 2011. As a result, the area of the market reserved to *An Post* has been progressively reduced since 2006 and is now limited to those services for postal packets weighing less than 50 grams. The final step was the transposition of the Third Postal Directive, which was required by 31st December 2010.

The Third Postal Directive (2008/6/EC) provides for full accomplishment of the internal market for postal services, meaning that *An Post* lost its monopoly of the letter post under 50g in weight. The Directive also contains many provisions relating to universal service pricing and quality of service.

An Post is Ireland's designated universal postal service provider under the regulations that transposed the Second Postal Directive. The Universal Service Obligation (USO), which provides, *inter alia*, for the collection and delivery of mail to every address in the state on every working day, continues as a requirement of the Third Postal Directive. It includes services for postal packets and parcels up to 20 kilograms in weight both domestically and cross border. Where it can be demonstrated that meeting this obligation results in an unfair financial burden for the designated universal provider, the costs will be shared between postal service providers within the scope of the universal service.

The ComReg currently regulates about 64 per cent of *An Post's* activities (by value) on an *ex ante* basis. A further ten per cent (by value) are unregulated postal services and 26 per cent are retail services (available mainly through post offices). For the period 1 January to 30 September 2010, *An Post's* performance in the next-day delivery of single piece priority mail was 85 per cent, an improvement on the 84 per cent recorded for the same period in 2009. The target set by ComReg for next day delivery is 94 per cent.

Regulatory Institutions and Legislation

The main postal law and regulations are the *Postal and Telecommunications Services Act 1983* that established *An Post* as a government-owned postal service provider, and the *Communications Regulation Act 2002*, that established the ComReg (see section 2) as economic regulator for postal services and telecommunications. The *European Communities (Postal Services) Regulations 2002* gave legal effect in the Irish Postal market to the first and second *European Parliament and Council Postal Directives* (97/67/EC of 15 December 1997 and 2002/39/EC of 10 June 2002 respectively) on common rules for the development of EU postal market and the improvement of quality of postal

¹¹⁸⁹ *An Post, Annual Report 2011*. Available at: <https://www.anpost.ie/NR/rdonlyres/1DCD72C8-6821-432F-B1AC-1F7449F618D9/0/AnPostAnnualRepot2011.pdf> [accessed on 26 April 2013].

¹¹⁹⁰ *Ibid.*

service. The ComReg's powers and functions in relation to postal services are provided for by the *Communications Regulation Act 2002* and the *Communications Regulation (Postal Services) Act 2011*. The 2011 Act enacts into Irish law the EC 'Postal Directive' 97/67/EC of the European Parliament and of the Council of 15 December 1997 (as amended by subsequent Directives).

The ComReg has a number of responsibilities with respect to postal services.¹¹⁹¹ The ComReg has a statutory objective of promoting:

the development of the postal sector, and in particular the availability of a universal post service within, to and from the State at an affordable price for the benefit of all users.¹¹⁹²

Section 17 of the *Communications Regulation (Postal Services) Act 2011* designates *An Post* as the universal service provider for a period of 12 years from 2 August 2011, subject to review by ComReg after seven years.

The ComReg has a number of other regulatory responsibilities:

- The ComReg must approve any proposed increase in prices of reserved services by *An Post*.¹¹⁹³
- The ComReg monitors the prices of non-reserved universal services provided by *An Post* to ensure that prices are cost-based, affordable, transparent and non-discriminatory. A revised direction on accounting procedures was issued by the ComReg in December 2006.¹¹⁹⁴
- The ComReg sets the quality of universal postal services and monitors *An Post's* compliance with it.¹¹⁹⁵

Consultation of Interested Parties

Matters can arise before the ComReg in a number of ways. *An Post* must seek approval to increase prices for reserved services. For universal services, the ComReg monitors compliance with tariff principles in price setting and matters may therefore arise by its own instigation. Interested parties can also bring industry issues to the ComReg themselves.¹¹⁹⁶

Under the *Postal Services Regulations 2002*, the ComReg is legally required to consult with interested parties before making a determination on postal issues. The interested parties include 'representatives of postal service providers, users, consumers and manufacturers'.¹¹⁹⁷

The ComReg has a memorandum of understanding with the Competition Authority for formal or informal cooperation between the two agencies on postal matters (see earlier).

As in telecommunications, the ComReg publishes consultation papers and seeks submissions in response. All documents are published on its website. When publishing a decision paper, the ComReg will summarise the submissions received, and state its own position explicitly responding to the views expressed in submissions.

While the ComReg is required to act in the interests of all users, there is no explicit recognition of specific user groups and industry bodies in the relevant legislation. However, representatives of end users and industry operators participate in regulatory decision-making in relation to postal matters through a public consultation process.

¹¹⁹¹ ComReg, *Postal: Overview*. Available at: <https://www.comreg.ie/postal/postal.587.html> [accessed on 11 July 2013].

¹¹⁹² *Communications Regulation Act 2002*, *op. cit.*, Clause 12(c).

¹¹⁹³ ComReg, *Postal: Regulation of Price*. Available at: https://www.comreg.ie/postal/regulation_of_price.521.969.html [accessed on 11 July 2013].

¹¹⁹⁴ ComReg, *Regulation of Universal Postal Services – Accounting Separation and Costing Methodology, Accounting Direction to An Post Document No. 06/63*. Available at: <http://www.comreg.ie/fileupload/publications/ComReg0663.pdf> [accessed on 11 July 2013].

¹¹⁹⁵ ComReg, *Postal: Regulation of Quality*. Available at: https://www.comreg.ie/postal/regulation_of_quality.521.970.html [accessed on 11 July 2013].

¹¹⁹⁶ ComReg, *Postal – Alerting Industry Issues*. Available at: http://www.comreg.ie/postal/alerting_industry_issues.581.html [accessed on 15 June 2013].

¹¹⁹⁷ Irish Statute Book, *S.I. No. 616/2002 — European Communities (Postal Services) Regulations 2002*, s. 16(1). Available at: <http://www.irishstatutebook.ie/2002/en/si/0616.html> [accessed on 11 July 2013].

Information Disclosure and Confidentiality

The ComReg has the power to obtain information in order to carry out its statutory responsibilities. For example, in fulfilling its monitoring role in universal service obligations, the ComReg can request from An Post information on pricing, quality of services and the accounting system used. However, the ComReg has no similar power to request data from other postal service operators.

The ComReg's confidentiality guidelines and information disclosure requirements under the FOI are set out in section 2 of this chapter; immediately preceding.

Decision-making and Reporting

The ComReg, through its Market Framework Division, regulates the postal industry. The commissioners are responsible for the final decision on a postal matter. The average number of staff working on postal matters was five in 2009-10.¹¹⁹⁸ In addition to internal staff, the ComReg may employ external consultants.

Under the *European Communities (Postal Services) Regulations 2002*, the ComReg requires ministerial consent to set uniform tariffs, which apply across the state, and to issue directions to An Post for failing to comply with these uniform tariffs.¹¹⁹⁹ The ComReg is also required to consult with the Minister before issuing directions to An Post for failing to comply with tariff principles in its reserved services.

Appeals

Under the *European Communities (Postal Services) Regulations 2002*, a decision to refuse to grant or withdraw a postal service authorisation may be appealed on its merits. Application must be made to the High Court within 28 days of the decision being published. The decision of the High Court on an appeal is final unless the High Court grants leave to the Supreme Court on a specified question of law.¹²⁰⁰

4. Water and Wastewater

Water is plentiful in Ireland due to the geographic conditions (including high and reliable rainfall) and small population. Irrigation use is minimal, with the majority of water being taken for domestic or industrial use. Thirty four local authorities are responsible for water supply and sanitation. Public water supplies are operated by local authorities or by private operators on behalf of local authorities. There are some private supplies and some group-water schemes (public and private). The main concern of Irish water management is to ensure the quality of water supplies. In some rural areas, homes are not connected to a water supply system operated by a local authority. Rural households may join a Group Water Scheme to organise their own water access.¹²⁰¹ However, the quality of water under such schemes has sometimes failed to meet drinking water standards set by the EU.¹²⁰²

The *EU Water Framework Directive* (WFD), as previously discussed in the chapter on the EU, sets the standard for water management in Ireland. The WFD focuses on ensuring the quality of drinking water and, to a lesser extent, dealing with scarcity issues. Article 9 stipulates that all users should face appropriate water charges and these should reflect the full costs of the resource, including operational, environmental and resource costs. Environmental costs are aimed at addressing pollution concerns while resource costs are intended to reflect the scarcity of water resources.¹²⁰³

¹¹⁹⁸ ComReg, *Annual Report 2010*, p. 58. Available at: http://www.comreg.ie/publications/comreg_annual_report_2010.473.104007.p.html [accessed on 11 July 2013].

¹¹⁹⁹ Irish Statute Book, S.I. No. 616/2002 — *European Communities (Postal Services) Regulations 2002*, op. cit., s. 9.

¹²⁰⁰ Irish Statute Book, S.I. No. 616/2002 — *European Communities (Postal Services) Regulations 2002*, op. cit., s. 7.

¹²⁰¹ Citizens Information, *Water Quality*. Available at: http://www.citizensinformation.ie/categories/environment/water-services/water_supply [accessed on 15 June 2013].

¹²⁰² Department of the Environment, Community and Local Government, *Review of the Rural Water Programme 2003-2006: Value for Money and Policy Review Initiative*. Available at: <http://search.environ.ie/query.html> [accessed on 26 April 2013].

¹²⁰³ European Commission: DG Environment, *Water Note 5: Economics in Water Policy: the Value of Europe's Waters*. Available at: http://ec.europa.eu/environment/water/water-framework/pdf/water_note5_economics.pdf [accessed on 11 July 2013].

River Basin District Plans

The WFD stipulates that member countries must develop river basin district plans for each substantial water body.¹²⁰⁴ In Ireland, some 400 river basins have been grouped into eight RBDs. The Department of Environment, Heritage and Government oversees the establishment of water authorities for each district and the Environmental Protection Agency monitors water quality. Water Authorities are required to report to the EU their detailed progress on putting water management plans in place.¹²⁰⁵

Under the WFD, consultation with interested parties is required in creating RBD plans. In developing the characterisation report for Shannon RBD,¹²⁰⁶ public consultation consisted of public meetings, an information booklet, graphic display panels, setting up a website and participating in seminars and conferences. A six-week consultation period was also announced and submissions received during this time were published on the website. Advisory councils are also to be established for each RBD to involve interested parties.

Domestic Water Charges

According to the Citizens Information website,¹²⁰⁷ water charges are imposed by local authorities but only on 'commercial' uses. Water charges are payable if water is being supplied for use by business, trade or manufacture. This includes hospitals, sanatoriums, homes for people with mental or physical disabilities, maternity homes, convalescent homes, laboratories, clinics, health centres, schools and clubs. There are two types of commercial water charge – either a flat rate or water usage can be monitored using a meter. Domestic water charges were abolished in 1997, but those in a group water scheme may have to pay a certain amount for domestic water.

This appears set to change, bringing Ireland into conformity with EU policy and standard practice in developed countries. Following an extensive inquiry,¹²⁰⁸ a new government-owned water utility, Irish Water, has been formed as a subsidiary within the *Bord Gáis Eireann* (BGE) group.¹²⁰⁹ A system of water metering will be introduced and the Commission for Energy Regulation (CER – see section 1) is devising a scheme of water charges. The Minister said 'Quite simply, we are faced with a substantial investment requirement in future years. The present funding model is not sustainable, and the current scale of operation is not efficient or effective.'

The *Water Services Bill 2013* aims to introduce domestic water charges from October 2014, though these charges are now expected to be delayed until 2015.¹²¹⁰

5. Rail

Responsibilities for providing rail transport services in Ireland are divided between two state agencies of the Department of Transport – the Railway Procurement Agency (RPA) and *Iarnród Eireann* (IE). Under the *Transport (Railway Infrastructure) Act 2001*, RPA is responsible for light railway and metropolitan infrastructure provision and maintenance. It also enters into joint ventures and public-private partnerships (PPPs) to secure the provision of infrastructure. It is also responsible for monitoring safety.

¹²⁰⁴ Department of the Environment, Community and Local Government. *Characterisation & Analysis of Ireland's River Basin Districts*, submitted to the European Commission on 22 March 2005. Available at:

<http://www.wfdireland.ie/Documents/Characterisation%20Report/Background%20Information/Compendium%20of%20Public%20Submissions.pdf> [accessed on 11 July 2013].

¹²⁰⁵ *Ibid.*

¹²⁰⁶ Shannon River Basin District, *Project Summary*. Available at: <http://www.shannonrbd.com/project.htm> [accessed on 11 July 2013].

¹²⁰⁷ Citizens Information, *Water Charges*. Available at: http://www.citizensinformation.ie/en/environment/water_services/water_charges.html [accessed on 11 July 2013].

¹²⁰⁸ Department of the Environment, Community and Local Government, *Irish Water: Phase 1 Report*. Available at: <http://www.environ.ie/en/Publications/Environment/Water/FileDownload.29194.en.pdf> [accessed on 15 June 2013].

¹²⁰⁹ Merrion Street, *Reforming Irish Water*. Available at: <http://www.merrionstreet.ie/index.php/2012/04/reforming-water-services-to-meet-irelands-future-economic-and-environmental-needs-hogan/?cat=12> [accessed on 11 July 2013].

¹²¹⁰ The Independent, *New Water Charges will Now be Pushed Back until 2015*. Available at: <http://www.independent.ie/irish-news/new-water-charges-will-be-pushed-back-to-2015-29220761.html> [accessed on 11 July 2013].

The IE is the monopoly provider of railway services, including operating the Dublin Area Rapid Transit (DART) network, mainline rail services and freight transport. It also jointly operates the Dublin-to-Belfast network with Northern Ireland Railways.¹²¹¹ The IE is a subsidiary company of *Coras Iompair Éireann* (CIE), a state-owned statutory authority with overall responsibility of all land transport in Ireland through its three operating companies in bus and rail business. CIE also reports to the Minister for Transport.

The Department of Transport is responsible for developing public transportation policies. At present, there is no independent regulator in rail. Instead ministerial approval is required for any changes to the standard single fares while rail infrastructure development is subject to the approval of need to an independent planning authority – *An Bord Pleanála (An Bord)*, which assumed the responsibility of authorisation to construct, maintain, improve or operate a railway under the *Planning and Development (Strategic Infrastructure) Act 2006*. Such an authorisation is referred to as a railway order. In granting a railway order, the *An Bord* must follow procedures for consultation and rules for appeal set out in the *Transport (Railway Infrastructure) Act 2001*¹²¹² and amended by the *Planning and Development (Strategic Infrastructure) Act, 2006*.¹²¹³

The *Dublin Transport Authority Act 2008* established an Authority with overall responsibility for coordinating transport in the Greater Dublin Area.¹²¹⁴ Within this area, the Authority has responsibilities of the Railway Procurement Agency in developing infrastructure projects and, as such, applying for railway orders. It is also be responsible for regulating public transport fares.¹²¹⁵ The Act also gave the Minister for Transport the power to appoint the directors of the subsidiary companies instead of the chairman of the CIE.

The following discussion on regulatory processes focuses on *An Bord's* role as an independent planning body that grants railway orders.

An Bord: Consultation of Interested Parties

In accordance with the amended *Transport (Railway Infrastructure) Act*, any party wishing to construct, maintain, improve or operate a railway must apply to *An Bord* for a railway order. Applicants may include the Railway Procurement Agency, another person with the approval of the Railway Procurement Agency, or the CIE acting on behalf of IE.¹²¹⁶ Railway orders may, for example, refer to railway lines, platforms or park-and-ride facilities.

Before applying for a railway order, parties are required to consult with *An Bord* (s.47B). It is usual to hold at least two pre-application consultation meetings. In these consultations the Board may give advice regarding the procedures to be followed in making an application. It may also advise the potential applicant of what considerations will impact its decision to grant (or not) the order.

An applicant for a railway order submits an application to *An Bord* and publishes the application in the newspaper (s.40). The applicant is required to specify the location at which material relevant to the application will be publicly displayed. Material must be displayed for at least six weeks and must include the draft railway order, a book of reference, a plan of the proposed works and an environmental impact statement. The applicant must also serve the proposal and the other relevant information on local authorities and owners/occupiers in the area.¹²¹⁷

¹²¹¹ Competition Authority, *Report on Bus and Rail Passenger Transport Sector*. Available at: <http://www.tca.ie/images/uploaded/documents/Transport%20Study.pdf> [accessed on 11 July 2013].

¹²¹² Irish Statute Book, *Transport (Railway Infrastructure) Act 2001* as amended by the *Planning and Development (Strategic Infrastructure) Act 2006*. Available at <http://www.irishstatutebook.ie/2001/en/act/pub/0055/index.html> [accessed on 11 July 2013].

¹²¹³ Irish Statute Book, *Planning and Development (Strategic Infrastructure) Act 2006*. Available at: <http://www.irishstatutebook.ie/2006/en/act/pub/0027/print.html> [accessed on 11 July 2013].

¹²¹⁴ Irish Statute Book, *Dublin Transport Authority Act 2008*. Available at: <http://www.irishstatutebook.ie/2008/en/act/pub/0015/index.html> [accessed on 11 July 2013].

¹²¹⁵ *Dublin Transport Authority Act 2008*, *op. cit.*, ss. 11 and 46.

¹²¹⁶ *Transport (Railway Infrastructure) Act*, *op. cit.*, s. 37.

¹²¹⁷ Railway Procurement Agency, *Railway Orders*. Available at: <http://www.rpa.ie/en/rpa/railwayorders/Pages/default.aspx> [accessed on 15 June 2013].

Any interested party may make a submission within the six-week inspection period.¹²¹⁸ There appears to be some flexibility about this timeline. For example, in a matter involving the extension of the Dunboyne railway, *An Bord* appears to have accepted late submissions in the two weeks following the deadline. However, two submissions received the following month were returned to their senders.¹²¹⁹

After the period for written submissions has closed, it is at the *An Bord's* discretion whether to then hold a public inquiry.¹²²⁰ If an inquiry is held, the *An Bord* appoints an inspector to hear evidence. The inspector may require witnesses to attend (by summons) and to give evidence. The inspector can also compel the production of documents.¹²²¹

There is no explicit recognition of specific consumer groups or industry bodies in the legislation.

An Bord: Timeliness

Pre-lodgement discussions are legally required to be held. Usually, at least two pre-lodgement meetings occur between the applicant and the *An Bord*. It is unclear if there is a maximum mandatory period in which *An Bord* must hear applications.

An Bord: Information Disclosure and Confidentiality

The *An Bord* can appoint an inspector for the purposes of holding a public inquiry. The inspector is able to compel the production of documents. Information is stored in hard copy and electronically, to facilitate access by interested parties. Planning appeal files are held open to the public for five years after a determination has been made.¹²²² Confidentiality and information access requirements under the FOI Acts apply to *An Bord*.

An Bord: Decision-making and Reporting

The board of the *An Bord* determines matters and consists of a chairperson, a deputy chairperson and nine other board members. Members of the board are appointed by the government. Together, they must be drawn from industries relating to physical planning, engineering or architecture; economic development or construction; local government or farming and trade unions; and charitable or environmental organisations.¹²²³ The board is supported by internal staff, from which an inspector will be appointed to hear a public inquiry. The inspector makes a report to the board, which can include recommendations. The board will then have the inspector's report, recommendation and relevant supporting information before it in coming to a decision.

A board decision applies only to the applicant and any other third parties involved. An order gives the Railway Procurement Agency or the CIE the right to compulsorily acquire land on which a proposed railway or other relevant infrastructure is to be built (s.45). A failure to comply with any part of an order will allow the Board, at its discretion, to revoke it (s.43).

The *An Bord* is required to publish documents relating to a matter (as well as the decision itself) within three days of making the decision. These must be made available for no less than five years, either electronically or at the office of *An Bord*.¹²²⁴

¹²¹⁸ *Transport (Railway Infrastructure) Act, op. cit.*, s. 40(1)(b)(iii).

¹²¹⁹ *An Bord*, Schedule of Correspondence – Dunboyne Railway Order Application, Case Reference: PL17 .NA0001, 2008. Available at: <http://www.pleanala.ie/casenum/NA0001.htm> [accessed on 15 June 2013].

¹²²⁰ Prior to the enactment of the *Planning and Development Act 2006*, the Minister for Public Enterprise was responsible for assessing railway order applications and was mandated to conduct a public inquiry into the application. Changes were made in accordance with s. 49 of the *Planning and Development Act 2006* amending s. 42 of the *Transport (Railway Infrastructure) Act 2001*.

¹²²¹ *Transport (Railway Infrastructure) Act, op. cit.*, s. 42.

¹²²² Irish Statute Book, *Planning and Development Act 2000*, s. 146(4). Available at: <http://www.irishstatutebook.ie/2000/en/act/pub/0030/> [accessed on 11 July 2013].

¹²²³ *An Bord, Board Members*. Available at: <http://www.pleanala.ie/about/members.htm> [accessed on 15 June 2013].

¹²²⁴ *Planning and Development Act 2000, op. cit.*, s. 46(4).

An Bord: Appeals

Under the *Transport (Railway Infrastructure) Act 2001*, a decision to revoke a railway order may be appealed on its merits. Such an appeal is made to the High Court, which can either confirm the decision or declare it invalid and prohibit the order from being remade.

Alternatively, the validity of a railway order or 'any act done by the board in the performance or the purported performance of its functions' can only be challenged by way of judicial review (*Transport (Railway Infrastructure) Act*, s.47(1)). A judicial appeal is heard by the High Court. The *Transport Act* states that leave to appeal will only be given if there are substantial grounds for doing so and the appellant has a substantial interest in the matter. A substantial interest is not limited to a financial interest or an interest in land (*Transport (Railway Infrastructure) Act*, s.47(A)). The court can also require an applicant to give an undertaking as to damages before granting leave to appeal.

Application for a judicial appeal must be made within eight weeks of the order being made. This may be extended by the High Court if there is 'good and sufficient reason' for doing so and if it can be shown that the circumstances causing failure to apply in time were out of the control of the applicant (*Transport (Railway Infrastructure) Act*, s.47(5)). The actual appeal procedure is governed by Order 84 of the Rules of the Superior Court.¹²²⁵

In deciding the case, the High Court may quash the entire order, preventing the same order from being made again. It may also quash part of the order and make consequential amendments to the rest of the order to reflect this.¹²²⁶

6. Airports

The Republic of Ireland has two major international airports – Dublin and Shannon. Both are government-owned. The Dublin Airport is operated by the Dublin Airport Authority (DAA).¹²²⁷ The DAA also operates the Shannon and Cork airports. Dublin Airport handled over 22 million passengers annually before the GFC and now handles around 19 million. There are also several substantial regional airports (e.g. Cork, Knock and Kerry), some of which handle international traffic.

Regulatory Institutions and Legislation

The Commission for Aviation Regulation (CAR) was created by the *Aviation Regulation Act 2001*. The CAR is responsible for the determination of maximum airport charges; for aviation terminal-service charges; and for licensing tour operators and agencies. The CAR has a small staff (capped at 18, but in practice many fewer) and is funded by licence fees and levies. It is located in Dublin.¹²²⁸

When setting the price cap the Commission has three statutory objectives:

1. the efficient and economic development of Dublin Airport
2. the ability of the Dublin Airport Authority to operate in a financially viable manner
3. the protection of the interests of users and potential users of the airport.

The Commission also has to have regard to a number of statutory factors. The *State Airports Act 2004* provides for the regulation of airport charges to apply with respect to airports that had in excess of one million passengers in the previous calendar year. At present, the CAR only regulates the Dublin airport in this manner. Airport charges apply to runway landing and takeoff, aircraft parking, air-bridge use and passenger processing. They are subject to price-cap regulation on a single-till basis, that is, the price cap is set in anticipation of both the regulated revenues from aeronautical services (such as the provision of landing and takeoff) and the unregulated revenues from commercial services (such as retailing and car parking services).

¹²²⁵Irish Statute Book, *SI No. 15/1986-The Rules of the Superior Courts*. Available at: <http://www.irishstatutebook.ie/1986/en/si/0015.html> [accessed on 11 July 2013].

¹²²⁶ Irish Statute Book, *Transport (Railway Infrastructure) Act 2001*, s. 47A(9). Available at: <http://www.irishstatutebook.ie/2001/en/act/pub/0055/> [accessed on 11 July 2013].

¹²²⁷ Dublin Airport Authority (DAA), *Company Profile*. Available at: <http://www.dublinairportauthority.com/company-profile/company-history.html> [accessed on 11 July 2013].

¹²²⁸ CAR, *Annual Report 2012*. Available at: <http://www.aviationreg.ie/fileupload/2012-03-21AnnualReport.pdf> [accessed on 11 July 2013].

To date the CAR has chosen to employ price-cap regulation, applied to a single till. Price-cap regulation is a form of incentive regulation. The Commission announces in advance a cap on the total revenues per passenger that the DAA may collect. This cap lasts for a period of four or more years. If the DAA can successfully reduce its costs below the level of the cap, the airport operator keeps the value of these savings until the cap is reset. At the time of the next price cap, the Commission will consider the level of costs that the airport operator was able to realise when setting the next price cap. Consequently the airport operator and users share the benefits of any cost savings that the DAA is able to realise. The incentives for the airport operator to realise costs savings ultimately should benefit users as well as the airport.

The price cap is derived from a series of inputs known as 'regulatory building blocks' which are calculated by the CAR at the time of a price cap determination. These building blocks are:

- The regulatory asset base ('the RAB') which in any given year is the sum of existing capital stock and a forecast of efficiently incurred new capital stock.
- A return on an efficient capital stock.
- Plus a depreciation charge on that capital stock.
- Plus an estimate of efficiently incurred future operating expenditures.
- Less an estimate of future commercial revenues.

The sum of these building blocks is divided by a forecast of passengers (also a building block) to give the maximum per passenger airport charge.

Aviation terminal charges are levied by the Irish Aviation Authority in its provision of air traffic control services. Regulation of this type occurs at the Cork, Dublin and Shannon airports. Aviation terminal charges are also subject to price-cap regulation.¹²²⁹

Consultation of Interested Parties

Matters arise before the regulator on a regular basis, as it is required by statute to review maximum allowable charges for airports and terminals every five years (*Aviation Regulation Act 2001* ss.32(2) and 35(2)).¹²³⁰ Once two years have elapsed, the CAR can review such charging determinations, on its own initiative or at the request of users or the airport authority (ss.32(14) and 35(12)). Matters may also arise after being remitted from an appeal panel to be reconsidered by the commission. Annual compliance checks are also undertaken to ensure the price cap has been adhered to.

The *Aviation Regulation Act 2001* sets out the basic procedure to be followed in making determinations (ss.32 and 35). Firstly, the CAR must give notice to the concerned party and place a public notice in a daily newspaper. This notice specifies the period in which representations from the public will be received. Under the *Aviation Regulation Act 2001*, the consultation period must be at least one month long. It is unclear how strictly the submission timelines are enforced. The CAR is then directed to take submissions into account in making its final determination. The CAR may also engage consultants in undertaking its regulatory role. A notice stating that a determination has been made must be published in the newspaper. The final decision paper must include the reasons for determination as well as the reasons for accepting or rejecting any representations by the public.

In practice, the CAR undertakes two consultation periods. One follows the initial consultation paper, and the second, which satisfies the statutory requirement, follows the publication of a draft decision.¹²³¹ There is therefore a distinction between draft and final decisions, in that the latter is binding while the former is open to amendment pending the response of interested parties. To

¹²²⁹ CAR, *Freedom of Information Acts 1997 to 2003 – Section 15/16 Manual*, 2004. Available at: http://www.aviationreg.ie/fileupload/Image/ABOUT_FOI_MANUAL.pdf [accessed on 15 June 2013].

¹²³⁰ Irish Statute Book, *Aviation Regulation Act 2001*, ss. 32 (2) and 35 (2). Available at: <http://www.irishstatutebook.ie/1986/en/si/0015.html> [accessed on 11 July 2013].

¹²³¹ Commission for Aviation Regulation (CAR), *Process Paper for Second Determination of ATSCs*, CP7/2006. Available at: <http://www.aviationreg.ie/fileupload/Image/CP7%202006%20Process%20Paper%20ATSC%20Determination.pdf> [accessed on 11 July 2013].

stimulate public response, the CAR may also hold information meetings and may send letters to airport users.¹²³²

The CAR may engage consultants in undertaking its regulatory role. Its website indicates that expert advice has been sought in the past.¹²³³

There is no recognition of specific consumer groups and industry bodies in the legislation, and there is no evidence of special arrangements for consumer groups or industry bodies outside of the normal consultation procedures.

Timeliness

In 2007 the CAR undertook an interim review of airport charges at Dublin Airport (the maximum charges having been set in 2005). Overall the matter took around five and a half months to complete. Each consultation period was one month in duration, and it took the CAR just over a month from the close of the final consultation period to make its final decision.

No information could be found to suggest pre-lodgement discussions occur, and no evidence was found of any 'stop the clock' provisions or mechanisms for expedition.

Information Disclosure and Confidentiality

As in other Irish statutes, s.42 of the *Aviation Regulation Act* allows authorised officers to be appointed in order to enter premises and seize information from parties, either with their consent or a warrant.

The confidentiality and disclosure of information obtained by the CAR is governed by the *Freedom of Information (FOI) Acts*.

Decision-making and Reporting

The Commission, comprised of one to three members, is the determinative body in airport charging matters. Members of the Commission are appointed by the Minister.¹²³⁴

The CAR publishes all consultation and decision papers on its website. It also publishes submissions received by interested parties in so far as they are not confidential. The *Aviation Regulation Act* requires the CAR to provide reasons for its decisions in publishing the final decision paper.¹²³⁵ The *FOI Act* also requires the CAR to make this information available by request.

The settings of maximum charges applies to all users, however it is unclear from available information whether or not this can be departed from by agreement between user and the airport. No information could be found to suggest that disputes over charges have occurred in the past.

Appeals

Under s.40 of the *Aviation Regulation Act 2001*, airport authorities, airport users or the Irish Aviation Authority are able to appeal an airport/terminal charge decision on its merits. A special appeal panel, comprised of three to five members, is formed, by the Minister, to hear such appeals. The panel has three months in which to accept the decision or to reject it, remitting the matter back to the CAR for review. The Commission is then given one month in which to affirm or vary its original decision. The *Aviation Regulation Act* also allows judicial appeals, under the Rules of the Superior Court.¹²³⁶ An application for judicial review must be made within two months of the commission publishing its decision. However, the High Court, that hears judicial appeals, can extend this timeframe as it sees fit.

¹²³² As in the Interim Review of Airport Charges at Dublin Airport. See: Commission for Aviation Regulation (CAR), *Notice Regarding Publication of the Maximum Level of Airport Charges at Dublin Airport 3/2007*. Available at: http://www.aviationreg.ie/fileupload/Image/PR_AC2_NOTICE3_CN3_2007.pdf [accessed on 11 July 2013].

¹²³³ See for example, the publication of the technical procedure that an independent adviser will use in assessing the capacity of Dublin Airport.

¹²³⁴ *Aviation Regulation Act 2001, op. cit.*

¹²³⁵ *Aviation Regulation Act 2001, op. cit.*, ss. 32 and 25.

¹²³⁶ Irish Statute Book, *SI No. 15/1986-The Rules of the Superior Courts, op. Cit.*, Order 84.

7. Ports

Ten of the port companies in Ireland, known collectively as the state port companies, are owned by means of shares held in the name of the Minister for Transport and the Minister for Finance. The Minister for Transport holds all but one share. The other state ports have operated on a commercial basis since 1996, following the introduction of the *Harbours Act, 1996*.

Dublin is the biggest of the state's ports.¹²³⁷ Dublin Port Company is a self-financing, private limited company wholly-owned by the State, whose business is to manage Dublin Port. Established as a corporate entity in 1997, Dublin Port Company is responsible for the management, control, operation and development of the port. It provides facilities, services, accommodation and lands in the harbour for ships, goods and passengers. The company currently employs 144 staff. Located in the heart of Dublin City, at the hub of the national road and rail network, Dublin Port is 'a key strategic access point' for Ireland and in particular the Dublin area. Dublin Port handles almost 50 per cent of the Republic's trade; including two-thirds of all containerised trade.

Cork, Shannon and Foynes are also substantial operations. Galway specialises in fuel importation, while Waterford is an important gateway for the importation of grain and fertilizers for agriculture). Other ports provide overflow capacity as necessary to the larger ports.

The Port of Rosslare, situated in southwest Ireland is the closest spot from Ireland's southern part to Great Britain and the European mainland. The port is Ireland's premier ferry port and a hub of all the principal roll-on/roll-off passenger and cargo ferry services on the southern Irish Sea, and the port operates continental routes. Rosslare is part of the CIE Group.

The majority of ports follow a 'landlord' governance model, under which the port company leases infrastructure to private companies, which then construct and maintain buildings and equipment.¹²³⁸

Regulatory Institutions and Legislation

There is no independent economic regulation of port activities in Ireland. The Minister for Marine effectively regulates port companies. The Minister can make directions with respect to harbour charges, safety, the development of the harbour, acquisition and disposal of land and any other matter affecting the functions of the company. Under the *Harbour Act*, any person can dispute charges set by a port company by applying to the 'person nominated by the Minister'.¹²³⁹

Regulatory Development

On 15 June 2012, the Minister for Jobs, Enterprise and Innovation, Richard Bruton, requested that the Competition Authority carry out a study of ports in Ireland. The request was made in the context of the *Action Plan for Jobs* which includes a commitment to identify any sheltered parts of the economy where competition is restricted. The study was designed to: examine the level of competition between ports in the State and the effect of specialisation; examine the impact of competition from ports in Northern Ireland; examine how competition works within the State's major ports; identify international experience of competition and efficiency in port services; assess the impact on competition of developments in other transport modes in Ireland and development in shipping internationally; examine whether changes in port ownership and structures should enhance competition in port services; and identify any actions the State could take to promote the competitiveness of Ireland's ports including potential benefits to the economy. The Department for Jobs, Enterprises and Innovation published a chosen market study in 2013 titled *Action Plan for Jobs 2013* discussing the

¹²³⁷ Dublin Port Company, *Corporate Information*. Available at: <http://www.dublinport.ie/about-dublin-port/corporate-information/> [accessed on 11 July 2013].

¹²³⁸ Competition Authority, Submission to the DCENR on the Findings and Recommendations of the *High Level Review of the State Commercial Ports*. Available at: <http://www.tca.ie/images/uploaded/documents/S-03-003%20Submission%20to%20DCMNS%20on%20High%20Level%20Review%20of%20Ports.pdf> [accessed on 11 July 2013].

¹²³⁹ Irish Statute Book, *Harbour Act 1996*, s. 13(10). Available at: <http://www.irishstatutebook.ie/1996/en/act/pub/0011/index.html> [accessed on 11 July 2013].

first-year results of the program¹²⁴⁰ and the Competition Authority held a public consultation in early 2013.¹²⁴¹

¹²⁴⁰ Department for Jobs, Enterprises and Innovation, *Action Plan for Jobs 2013*. Available at: <http://www.djei.ie/publications/2013APJ.pdf> [accessed on 11 July 2013].

¹²⁴¹ Competition Authority, *Competition Authority Launches Public Consultation on Competition in the Irish Ports Sector*. Available at: <http://www.tca.ie/EN/News--Publications/Public-Notices/Competition-Authority-launches-public-consultation-on-Competition-in-the-Irish-Ports-Sector.aspx> [accessed on 11 July 2013].

Italy

OVERVIEW

The regulatory regimes surrounding Italian infrastructure have been transitioning towards liberalisation as per European Commission directives. Since 1990, Italy has introduced a dedicated anti-trust authority (*Autorità Garante della Concorrenza e del Mercato*), competition and consumer protection legislation, and a number of dedicated regulatory authorities.

Policy and regulation has generally been aimed at denationalisation of industries, increasing competition via market entry, reducing vertical integration, and increasing efficiency.

Most of the Italian industries covered in this report are still adjusting to the post-State-owned-monopoly environment that existed prior to regulatory reform. Accordingly, the regulatory regime for a number of core infrastructure areas is not mature, with regulatory reform continuing at the national and EU levels across the main areas.

The Italian energy sector is regulated by the *Autorità dell'Energia Elettrica e il Gas* (AEEG) (Electricity and Gas Authority). While the former monopolies ENEL (electricity) and ENI (gas) are still dominant, recent structural reforms have reduced their market power. Retail markets in both electricity and gas are now fully liberalised.

L'*Autorità per le Garanzie nelle Comunicazioni* (AGCOM) regulates telecommunications and broadcasting to 'ensure equitable conditions for fair market competition and to protect fundamental rights of all citizens'.

Postal services were regulated by the *Ministero dello Sviluppo Economico* (MSE) (Ministry for Economic Development) until December 2011, when the AGCOM assumed responsibility. The former State-owned monopoly, *Poste Italiane*, remains the universal service provider. The market is now fully liberalised.

Water and wastewater regulation is currently in a transitional phase. Recent referendums banned water infrastructure from being owned by private companies and also banned the earning of a return on investments in water capital. In the wake of these referendum results, the responsibility for water infrastructure regulation was transferred to the AEEG in late 2011, which established a Directorate of Water Services, along with two offices concerned with water pricing, quality, and infrastructure. On 28 December 2012, after an extensive consultation process with stakeholders, the AEEG finally approved a set of measures of adjustment for integrated water services, aimed at promoting the development of infrastructure and improving the quality of the service.¹²⁴²

Rail services and infrastructure are regulated by the Ministry for Transport, that also owns the rail network and the largest (formerly monopoly) train service provider, *Trenitalia*. The State remains the principal planner, regulator, and owner of the rail companies. The same law that gives water competencies to the AEEG and competencies on postal services to the AGCOM, has created the Transport Authority. The Prime Minister indicated the names of the President and the other executive members in June 2012 but due to political reasons the Parliament has not yet confirmed the nominated persons, nor made any other proposals. Thus, the Transport Authority is yet to come into operation.

Airports are regulated by *Ente Nazionale Aviazione Civile* (ENAC), though final approval for a number of decisions remains with the Ministry for Transport.

Ports are not explicitly regulated in Italy. Ports are generally operated by Port Authorities that lease out port space to private companies. The physical land of the port remains publicly owned.

GEOGRAPHY, POPULATION, ECONOMY, POLITY AND LEGAL SYSTEM

Italy is located in Southern Europe. It is northeast of Tunisia and extends into the central Mediterranean Sea. Italy is mountainous and rugged. It includes plains and coastal lowlands and has a predominantly Mediterranean climate. It is hot and dry in the south and has an Alpine climate in the far north.

¹²⁴² AEEG, *Acqua: Approvati il Metodo Tariffario Transitorio e la Prima Direttiva sulla Trasparenza delle Bollette*. Available at: http://www.Autorità.energia.it/allegati/com_stampa/12/121228idr.pdf [accessed on 17 June 2013].

Italy has a population of over 61 million and a land area of 301340 square kilometres. Population density is the fifth-highest in Europe with an average of about 200 people per square kilometre. Italy's major cities include Rome (the capital), Milan, Naples, Turin and Palermo.

Italy's economy is the third largest in the Euro-zone and the 11th largest in the world. In 2012, GDP was US\$1.863 trillion and GDP per capita was US\$30 600 (both on a purchasing power parity basis). The unemployment rate was 10.9 per cent. Youth unemployment has been significantly higher at around 35 per cent. The labour market in Italy is considered relatively inflexible and there are concerns about widespread tax evasion.

Italy's major manufacturing industries produce machinery, iron and steel, chemicals, textiles, motor vehicles, clothing, footwear, and ceramics. The industrial north manufactures high-quality consumer goods that are often produced by family-owned businesses. Italy's south has a large agricultural sector. Produce includes wheat, rice, grapes, olives, citrus fruits, potatoes, sugar beets, soybeans, beef and dairy products. A sizeable 'underground' economy exists throughout Italy and includes trade in goods and services from the agriculture, construction and services sectors. Recent estimates suggest it is equivalent to 17 per cent of GDP.

Italy's natural resources include: coal, mercury, zinc, potash, marble, barite, asbestos, pumice, fluorspar, feldspar, natural gas, crude oil and fish. Italy exports mechanical products, textiles and apparel, transportation equipment, metal products, chemical products and food. Italian imports include machinery and transport equipment, foodstuffs, ferrous and nonferrous metals, wool, cotton, and energy products. Italy's largest trading partners are Germany, France, US, Spain, UK, China, Netherlands, Russia and Belgium.¹²⁴³ Trade with European Union countries represented 58.1 per cent of total international trade in 2009.

Government debt is high, reaching 126 per cent of GDP in 2012, having increased steadily since 2007. Associated borrowing costs have also increased. Italy's exports and domestic demand more broadly, have been affected by recent austerity measures and by the euro-zone crisis. In 2012, GDP was seven per cent below the 2007 level.

Italy is a representative democracy consisting of 15 regions and five 'autonomous' regions. Italy's constitution came into force in 1948. It established a bicameral parliament with a Chamber of Deputies and a Senate. The executive branch is comprised of a cabinet and headed by the prime minister. The houses of parliament are elected through a system of proportional representation every five years. The President is elected by the parliament for a seven-year term. The President nominates the prime minister who then selects the ministers. The cabinet must retain the confidence of both parliamentary houses to retain power.

The Italian judicial system is a civil law system, based on Roman law modified by the Napoleonic code and subsequent statutes. The constitution provides for an independent judiciary. The three types of courts are: inferior courts of original jurisdiction, intermediate appellate courts; and supreme courts that are courts of last resort. The two types of supreme courts are the Constitutional Court, that hears matters in relation to the constitutionality of law, and the Supreme Court of Cassation, that has jurisdiction over penal, civil, administrative and military cases.

APPROACH TO COMPETITION AND REGULATORY INSTITUTIONAL STRUCTURE

Italy's main competition authority is the *Autorita Garante della Concorrenza e del Mercato* (AGCM). In addition, each of the infrastructure areas has its own regulator. The Italian energy sector is regulated by the *Autorita dell'Energia Elettrica e il Gas* (AEEG) (Electricity and Gas Authority); *L'Autorità per le Garanzie nelle Comunicazioni* (AGCOM) regulates telecommunications and postal services; and the AEEG recently assumed the responsibility for water infrastructure regulation. Rail services and infrastructure are regulated by the Ministry for Transport, that also owns the rail network and the largest (formerly monopoly) train service provider, *Trenitalia*; airports are regulated by *Ente Nazionale Aviazione Civile* (ENAC), though final approval for a number of decisions also remains with the Ministry for Transport. Finally, ports are not explicitly regulated in Italy.

¹²⁴³ CIA, *World Fact Book: Italy*. Available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/it.html#> [accessed on 17 June 2013]. Also see US Department of State, *Background Notes: Italy*. Available at: <http://www.state.gov/r/pa/ei/bgn/4033.htm> [accessed on 17 June 2013].

Regulatory Institutions and Legislation

Antitrust law was first introduced in Italy in 1990. Italy's competition authority is the *Autorita Garante della Concorrenza e del Mercato* (AGCM). It is an independent authority responsible for enforcing *The Competition and Fair Trading Act* (law number 287 of 1990). It is located in Italy's capital city, Rome.

Since 2007, the AGCM has also been responsible for protecting consumers from unfair commercial practices and misleading advertising. The AGCM enforces laws on conflict of interests of holders of Government office, and provides advice to the Government in relation to whether proposed legislation is anti-competitive.

The AGCM and other regulators also have a role in the regulation of local public services. Under certain circumstances, they provide opinions to local authorities in relation to the proposed derogation of local rules in favour of European common principles.

The Presidents of the Italian Parliament's Chamber of Deputies and Senate jointly appoint the AGCM Board. The AGCM Board consists of the Chairman and three Members and is appointed for a seven-year non-renewable term. The Members are generally selected from the magistrates of the State Council, the Court of Auditors and the Court of Appeals, university professors of economics or jurisprudence and from the economic sector. The Board makes decisions by majority vote. The Minister of Economic Development, acting on a proposal by the Chairman of the AGCM, appoints the Secretary-General of the AGCM. The Secretary-General supervises the AGCM's operational and office management.

The objectives of the *The Competition and Fair Trading Act* are: to provide economic operators with equal opportunities for market access and competition; and to protect consumers by promoting price containment and quality improvement for products derived from the free play of competition.¹²⁴⁴

The AGCM is responsible for identifying:

- agreements restricting competition;
- abuses of dominant position;
- merger operations involving the creation or strengthening of dominant positions in ways that eliminate or substantially reduce competition on a lasting basis.¹²⁴⁵

Advanced notification must be provided to the AGCM of mergers where sales revenue exceed predefined thresholds (law number 287/90) (where the merger is not under the jurisdiction of the EU Commission).¹²⁴⁶

The AGCM has powers to:

- Undertake fact-finding inquiries into a market or sector of the economy. This can be done on the AGCM's own initiative, or at the request of a regulatory or other authority or agency, when the operation of the market suggests that competition is being impeded.¹²⁴⁷
- Undertake investigations into agreements between businesses and possible abuses of market power.
- Order interim measures in urgent cases where there is a risk of serious, irreparable damage to competition. The AGCM may levy fines of up to three per cent of turnover if businesses do not abide by the interim measures.¹²⁴⁸

¹²⁴⁴ AGCM, *What it Does*. Available at: <http://www.agcm.it/en/general-information/how-the-authority-takes-decision.html> [accessed on 11 July 2013].

¹²⁴⁵ AGCM, *Scope of Activities*. Available at: <http://www.agcm.it/en/competition/competition-scope-of-activities.html> [accessed on 11 July 2013].

¹²⁴⁶ AGCM, *Mergers and Acquisitions: What They Are and When They Are Prohibited*. Available at: <http://www.agcm.it/en/competitionscope-of-activities/mergers-and-acquisitions.html> [accessed on 11 July 2013].

¹²⁴⁷ AGCM, *Fact-Finding Inquiries*. Available at: <http://www.agcm.it/en/competitionscope-of-activities/fact-finding-inquiries.html> [accessed on 11 July 2013].

¹²⁴⁸ AGCM, *How Investigations into Agreements and Abuses of Dominant Positions Are Conducted*. Available at: <http://www.agcm.it/en/competitionscope-of-activities/investigations.html> [accessed on 11 July 2013].

- Impose fines in some cases, including when there is:¹²⁴⁹ an abuse of a dominant position in the market, or agreements restricting competition (the fine may be up to ten per cent of the business's revenue); repeated offences; where requested information is not provided to the AGCM, or is untruthful; or when the AGCM is not notified in advance of certain mergers and acquisitions.¹²⁵⁰
- Accept undertakings intended to eliminate anti-competitive conduct.
- Cancel or reduce the fines for some cases restricting competition if the businesses cooperate with the AGCM (section 15 of law number 287/90).¹²⁵¹

Consultation of Interested Parties

When the AGCM undertakes investigations:

- the parties are notified;
- the parties are entitled to make representations and to review non-confidential documents held by the AGCM relating to the investigation;
- the parties receive the so-called 'statement of objections' at least 30 days before the end of investigation, in which the alleged violations and evidence are presented;
- the parties may make written submissions throughout the investigation and for a short period of time (five days) before the end of the investigation; and
- at the end of the investigation, the parties attend a final hearing, attended by all the Members of the Authority where the findings of the investigation are discussed.¹²⁵²

During the investigation, the parties can be heard by the person in charge of the proceedings. The parties may make submissions at any stage during the course of the investigation.

As discussed, when the AGCM undertakes investigations, the parties have a number of opportunities to be consulted. For example, the parties are entitled to make representations and to review non-confidential documents held by the AGCM relating to the investigation. The parties may make written submissions throughout the investigation and for a short period of time (five days) before the end of the investigation. At the end of the investigation, the parties attend a final hearing, attended by all the Members of the Authority. The findings of the investigation are discussed.

Timeliness

In relation to investigations involving competition law issues, such as proposed mergers and acquisitions, the AGCM adopts the following processes and timeframes:

First, following the notification of a proposed transaction, the AGCM has a 30-day term to start an in-depth investigation or to adopt a clearance decision. The AGCM will commence an in-depth investigation if it believes that the transaction may create or strengthen a dominant position in the market, which could eliminate or significantly reduce competition on a lasting basis.

Second, the AGCM must make a final decision within 45 days of commencing the in-depth investigation.

Third, the term may be extended for up to 30 days when businesses fail to supply requested information.

Fourth, in relation to cases involving mergers in telecommunications, the non-binding opinion of the Italian regulator for telecommunications, *L'Autorità per le Garanzie Nelle Comunicazioni* (AGCOM), is required. In this case, the timeframe is extended by 30 days.¹²⁵³

¹²⁴⁹ AGCM, *Penalties and Fines*. Available at: <http://www.agcm.it/en/competitionscope-of-activities/penalties-and-fines.html> [accessed on 11 July 2013].

¹²⁵⁰ AGCM, *Penalties and Fines*. Available at: <http://www.agcm.it/en/competitionscope-of-activities/penalties-and-fines.html> [accessed on 11 July 2013].

¹²⁵¹ AGCM, *Immunity or Reduction of Fines: The Leniency Program*. Available at: <http://www.agcm.it/en/competitionscope-of-activities/immunity-or-reduction-of-fines-the-leniency-program.html> [accessed on 11 July 2013].

¹²⁵² AGCM, *How Investigations into Agreements and Abuses of Dominant Positions Are Conducted*. Available at: <http://www.agcm.it/en/competitionscope-of-activities/investigations.html> [accessed on 11 July 2013].

Information Disclosure and Confidentiality

The AGCM has the power to impose fines on those who, without justification, refuse or fail to provide requested information or documents to the AGCM (Article 14.5 of the *The Competition and Fair Trading Act*). Fines may be imposed if untruthful information is provided.

It is not a defence to fail to provide information or documents because of: confidentiality; company regulations or internal instructions, including oral instructions; or the need to protect the party concerned from the risk of fiscal or administrative penalties.¹²⁵⁴

Parties can request that documents collected by the AGCM during inspections be kept confidential (Article 13 of Decree 217/98).¹²⁵⁵

Appeals

Decisions by the AGCM can be appealed before the First-Instance Administrative Court (the *Tribunale Amministrativo Regionale* (TAR)).¹²⁵⁶ Decisions by the TAR can be appealed to the highest Administrative Court, the *Consiglio di Stato*.

In the alternative, parties may appeal directly to the *Consiglio di Stato* by filing an extraordinary appeal to the Head of State.¹²⁵⁷

The TAR and the *Consiglio di Stato* have wide powers when reviewing decisions. They include the power to hear appeals based on: a misapplication of law, including those laws relating to procedure; the obligation to give a full statement of reasons; the jurisdiction and powers of the AGCM; and the accuracy of the findings of fact and economic assessments of the AGCM. This includes the AGCM's analysis of the definition of the relevant market.

However, a judicial review of the AGCM's decisions cannot include a review of the merits of the case. That is, the Administrative Courts cannot substitute their own point of view over the AGCM's. The AGCM must ultimately make the decision.

Administrative Courts may annul a decision, either partially or in full, or uphold a decision. However, there are powers to review the amount of fines, and substitute fines imposed by the AGCM.¹²⁵⁸

There are also appeals processes available for the majority the infrastructure areas with their respective regulatory bodies.

In the energy sector, appeals against the AEEG's decisions can be made to the *Tribunale Amministrativo Regionale* (the TAR) for the Lombardy Region. Appeals against the rulings of the TAR can be made to the *Consiglio di Stato* (Council of State).

In the telecommunications and postal industries, appeals may be made to the TAR Lazio (Administrative Court). An application can also be made for the immediate suspension of the appealed decision as an interim measure, on the basis of *fumus boni iuris* (apparent rights) and *periculum in mora* (danger in delay). In practice, this is applied rather restrictively.¹²⁵⁹

In relation to water, appeals against the AEEG's decisions follow the same process as in the energy sector. *The AGCM's Relationships with Infrastructure Regulatory Bodies*¹²⁶⁰

The AGCM maintains both formal and informal relationships with Italy's infrastructure regulatory bodies. As discussed previously, the AGCM is required by law to request non-binding opinions related

¹²⁵³ M Merola and S Lembo, *Antitrust Encyclopaedia: Italy*. Available at: http://www.concurrences.com/spip.php?page=encyclopedia_reports_search_results&id_rubrique=512&pays%5b%5d=15&lang=fr [accessed on 11 July 2013].

¹²⁵⁴ *Ibid.*

¹²⁵⁵ *Ibid.*

¹²⁵⁶ *Italian Competition Act* (Law 287/90), Article 33.1

¹²⁵⁷ M Merola and S Lembo, *Antitrust Encyclopaedia: Italy*. Available at: http://www.concurrences.com/spip.php?page=encyclopedia_reports_search_results&id_rubrique=512&pays%5b%5d=15&lang=fr [accessed on 11 July 2013].

¹²⁵⁸ *Ibid.*

¹²⁵⁹ AGCOM, *Regolamento, op. cit.*

¹²⁶⁰ *Ibid.*

to the communications market from the Italian regulator for telecommunications, *L'Autorità per le Garanzie nelle Comunicazioni* (AGCOM). They include draft decisions related to agreements between businesses; abuses of dominant position; and mergers and acquisitions.

The AGCOM is required to seek a non-binding opinion from the AGCM when considering matters such as whether operators have significant market power and when considering interconnection offers.

The AGCM must request a non-binding opinion from the AGCOM when investigating radio or television advertisements in relation to misleading or comparative advertising laws.

Finally, the AGCM maintains informal relations with other regulatory bodies, such as the Italian regulator for electricity and gas, *Autorità per l'Energia Elettrica e il Gas* (AEEG).

The Role of the European Union

The European Union's legislation also applies in relation to antitrust laws and regulation of infrastructure in Italy. Article 101 of the *Treaty of Rome* prohibits agreements distorting competition, and Article 102 prohibits the abuse of a dominant market position. The purpose of these provisions is to prevent agreements or abuses on the part of companies enjoying a dominant position from damaging trade between Member States. Article 106 of the *Treaty of Rome* also provides that, in the case of public undertakings and undertakings to which special or exclusive rights are granted, Member States may not adopt measures that restrict competition.¹²⁶¹ Responsibility for enforcement of competition law at the EU level lies with the European Commission. The Directorate-General for Competition reports to a European Commissioner who is responsible for competition policy.¹²⁶²

Further, the European Union has established the European Competition Network designed to facilitate close cooperation between national competition authorities, such as the AGCM and the EU, and with other national competition authorities within the EU.

REGULATORY ARRANGEMENTS BY INDUSTRY OR SECTOR

1. Energy

In 2010, Italy used in excess of 300 TWh of electricity.¹²⁶³ Eighty-six per cent of electricity was produced domestically, while the remainder was imported.

Italy's thermoelectric industry is largely gas-fired, with solid fuel sources such as coal only contributing 18 per cent of thermoelectric output.¹²⁶⁴ A referendum in June 2011 maintained Italy's moratorium on nuclear power.

Renewable Energy Sources produced 75 TWh of Italy's electricity production in 2010. This is a 9 per cent increase from 2009 and was a result of increases in wind production, biomass/waste production and photovoltaic production.

¹²⁶¹ EurLex, *Consolidated Version of the Treaty on the Functioning of the European Union - Part Three: Union Policies and Internal Actions - Title VII: Common Rules on Competition, Taxation, and Approximation of Laws - Chapter 1: Rules on Competition - Section 1: Rules Applying to Undertakings - Article 101*. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E101:EN:HTML> [accessed on 11 July 2013]. Also see EurLex, *Consolidated Version of the Treaty on the Functioning of the European Union - Part Three: Union Policies and Internal Actions - Title VII: Common Rules on Competition, Taxation, and Approximation of Laws - Chapter 1: Rules on Competition - Section 1: Rules Applying to Undertakings - Article 102*. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E102:EN:HTML> [accessed on 11 July 2013]; and EurLex, *Consolidated Version of the Treaty on the Functioning of the European Union - Part Three: Union Policies and Internal Actions - Title VII: Common Rules on Competition, Taxation, and Approximation of Laws - Chapter 1: Rules on Competition - Section 1: Rules Applying to Undertakings - Article 106*. Available at: http://www.iern.net/portal/page/portal/IERN_HOME/ICER_HOME/ABOUT_ICER/Publications/ICER_Reports/D9EC9AF1710885A6E040A8C03C2F7F98 [accessed on 11 July 2013].

¹²⁶² European Commission (EC), *Competition*. Available at: <http://ec.europa.eu/competition/> [accessed on 11 July 2013].

¹²⁶³ International Confederation of Energy Regulators (ICER), *Report on Experiences on the Regulatory Approaches to the Implementation of Smart Meters: Annex 4: Case Study Smart Meters in Italy*. Available at: http://www.iern.net/portal/page/portal/IERN_HOME/ICER_HOME/ABOUT_ICER/Publications/ICER_Reports/D9EC9AF1710885A6E040A8C03C2F7F98 [accessed on 11 July 2013].

¹²⁶⁴ AEEG, *Structure, Prices and Quality in the Electricity Sector*, Table 2.2. p. 41. Available at: http://www.autorita.energia.it/allegati/relaz_ann/10/voll_%20cap2_en.pdf [accessed on 11 July 2013].

As required by EU legislation, the Italian retail electricity market was opened up to competition in July 2007. By 2011, 17 per cent of households (around five million) had actively changed their electricity provider, while 36 per cent of small businesses had switched.

Two thirds of electricity supply is provided under normal retail contract arrangements. The remaining one third (around 27 million customers) are covered under a 'universal supply regime' defined by the regulatory authority.

Italy has some of the highest electricity prices (for both household and industrial end-users) in Europe.¹²⁶⁵

In the distribution subsector, *Enel Distribuzione* provides 86 per cent of services. *A2A Reti Elettriche* provides 4 per cent, *Acea Distribuzione* provides 3.4 per cent and *Aem Torino Distribuzione* provides 1.3 per cent.

The transmission grid was previously operated by an independent system operator but, after a nationwide blackout in 2003, a fully unbundled transmission system operator was introduced. This company, *Terna*, is the owner-operator of the grid.

Italy has the highest penetration of electricity smart meters in the world, with near complete coverage of homes. The smart meters transmit consumption data to the Distribution Service Operators (DSOs), who can remotely manage the supply connectivity.

A price-cap regime was introduced in 2000, but since 2004 prices have been set by applying an efficiency factor to operating costs. Capital expenditure is passed on to consumers with an average lag of eighteen months. A Weighted Average Cost of Capital (WACC) methodology is used to promote investment in electricity transmission and distribution, and in gas infrastructure. Annual investment in electricity production and transmission doubled between 2003 and 2010, reaching around €4.5 billion per year.¹²⁶⁶ Italian governments have been attempting to develop a program for the next generation of electricity production in Italy. However, progress has been slowed by political instability and the recent referendum banning nuclear power.

Overall consumption of gas in Italy was 85.85 G(m³) in 2010. Sales to the retail market totalled 71.96 G(m³). Wholesalers received 43.79 G(m³) and 28.17 G(m³) were supplied to 'pure retailers'. Electricity power stations consumed 13.89 G(m³).

The gas retail market consists of about 21 million customers: 92.2 per cent are domestic, 1.3 per cent are central heating providers, 5.2 per cent are trade and services businesses, 1.2 per cent are in manufacturing and less than 1 per cent are power.

As per EU directives, the retail gas market was liberalised on 1 January 2003, though competition has been much slower to develop than in the electricity market. The dominant (formally State-owned) supplier, ENI, maintains significant market power and vertical integration.

The cumulative switching rate¹²⁶⁷ for small customers was 8.2 per cent (56.3 per cent in terms of total volume) in 2010. Around 4.5 per cent of all end users (33.1 per cent in terms of gas volumes) changed gas supplier in 2010.

As part of the reforms, the ownership and management of the gas network¹²⁶⁸ was transferred from ENI to SNAM Rete Gas, though ENI has remained a majority shareholder. ENI also maintains ownership of important pipelines. In May 2012, Italy's government approved a decree that requires ENI to sell the entirety of its stake (52 per cent) in SNAM, which structurally separated ENI's upstream supply from the gas network.

¹²⁶⁵ Europe's Energy Portal, *Electricity Households*. Available at: <http://www.energy.eu/> [accessed on 11 July 2013]. Also see Europe's Energy Portal, *Electricity Industry*. Available at: <http://www.energy.eu/> [accessed on 11 July 2013].

¹²⁶⁶ ICIS, *Italy's Power Sector Booms While Gas Lags – AEEF Chief*. Available at: <http://www.icis.com/heren/articles/2010/07/15/9376960/italys-power-sector-booms-while-gas-lags-aeeg-chief.html> [accessed on 11 July 2013].

¹²⁶⁷ The aggregate percentage of customers who had changed their gas supplier since the retail market was opened to competition in January 2003. Note that changing contracts with the same supplier is not counted, but a customer that changes supplier more than once has each change counted (so the CSR can be greater than 100 per cent). See International Confederation of Energy Regulators (ICER), *Report on Experience*, *op. cit.*

¹²⁶⁸ Apart from a small portion that is owned by Edison (a competitor to ENI).

The natural gas distribution facilities are owned by over 250 businesses. This has decreased from more than 430 businesses in 2005. ENI controls 22.9 per cent of the market when measured by volume. Only 32 businesses have a customer base greater than 100 000.

The installation, maintenance and readings of meters are carried out by the DSOs. Prior to 2007, retailers could also carry out meter-reading services. In 2008 a law was passed that required a deployment of gas smart-metering systems to almost all Italian gas users by 2016. This has been postponed to 2018.¹²⁶⁹

Businesses propose transmission and distribution tariffs subject to criteria provided by the regulator at the beginning of each four-year regulatory period. The distribution tariff is divided into a fixed fee (payable in the absence of consumption) and a variable fee relating to gas consumption. The regulator defines eight usage brackets and consumption tariffs are applied according to the bracket relevant to the customer's consumption. The regulator monitors and sets tariffs annually.

Regulatory Institutions and Legislation

The *Autorita dell'Energia Elettrica e il Gas* (AEEG) is an independent body established in 1995 (Law 481 of 1995) that regulates the Italian electricity and gas industries. Since November 2011, the AEEG also regulates Italy's water services (see section 4).

The AEEG has a *Collegio* or Board made up of five commissioners: the President and four members.¹²⁷⁰ All commissioners are appointed by the decree of the President of the Republic following nominations by the Council of Ministers on the basis of a proposal by the Minister of Productive Activities. The commissioners are selected from highly qualified, experienced professionals in the sector, who may not have direct or indirect professional relations with any company operating within regulated sectors during their term in office and the subsequent four years. Appointments are for non-renewable term of seven years.

Under the direct supervision of the *Collegio* are the Secretary bodies, which are mainly responsible for the information flows in the decision-making process, and the Department of Communications and Media, charged with managing media relations and assisting the President and the AEEG in its relations with domestic and foreign newspapers.¹²⁷¹ The *Collegio* also manages the Department of International Affairs, Strategy and Planning and the Department of Legislative Affairs and Institutional Relations, along with the following three Directorates (*Organisation Chart*): Information Technology and Communication; Resources and General Affairs; and Legal Affairs and Litigation.

The Secretary bodies are also responsible for supervising the activities of the following organisational bodies (*Organisation Chart*):

- Office of Water Services: Infrastructure
- Office of Water Services: Price and Quality
- Directorate of Electricity and Gas Markets
- Directorate of Electricity and Gas Infrastructure Management
- Directorate of Consumers and Users
- Directorate of Management and Supervisory Controls

In total, the AEEG may employ a maximum of 210 persons on permanent or temporary contracts to carry out its duties. The AEEG has its head office in Milan and an additional office in Rome.

The AEEG regulates electricity transmission and distribution throughout Italy. The AEEG is not government funded; it covers its costs from regulated companies.

¹²⁶⁹ AEEG, *Resolution 22 October 2008, No. ARG/gas 155/08* (Italian). Available at: <http://www.autorita.energia.it/docs/08/155-08arg.htm> [accessed on 16 July 2013].

¹²⁷⁰ AEEG, *The Structure and Role of the Italian Regulatory Authority for Electricity and Gas*. Available at: <http://www.autorita.energia.it/inglese/about/presentazione.htm#%281%29> [accessed on 11 July 2013].

¹²⁷¹ AEEG, *Organisation Chart*. Available at: http://www.autorita.energia.it/allegati/che_cosa/055-11organigramma.pdf [accessed on 11 July 2013].

The purpose of the AEEG is: to protect the interests of users and consumers; and to promote competition and ensure efficient, cost-effective and profitable nationwide services with satisfactory quality levels. This includes:

- defining and maintaining a reliable and transparent tariff system;
- reconciling the economic goals of operators with general social objectives;
- promoting environmental protection and the efficient use of energy;
- providing advice and a reporting service to the government and parliament; and
- providing analysis and recommendations in relation to issues in the electricity and gas industries.

Consultation of Interested Parties

A Presidential Decree, pursuant to the Law of 23 August 1988, no. 400, provides the process that must be followed by the AEEG in relation to its decision-making powers, including in relation to decisions affecting private interests.

The AEEG designates responsibility for all related procedures of a decision to one of the AEEG's officials. A deadline is set for the submission of written observations and further consultations may be arranged with the interested parties. A commissioner is responsible for reporting findings. All determinations are published on the website.

The AEEG also has ongoing reporting and monitoring responsibilities. Currently, AEEG compiles annual reports on the development of distributed electricity generation infrastructure in Italy, the efficiency and electricity generation, transmission, and dispatching, and the impact of, and compliance with, the special tax.¹²⁷² These reports are available on the AEEG website.

An AEEG opinion, or recommendation, can be sought by ministries or other public or private entities and, once completed, are published on the AEEG website.

The AEEG undertakes public audits of regulated entities and publishes communications relating to these audits on its website.

Since 2008, the AEEG has undertaken internal 'regulatory impact analysis' to improve its performance and to assess the effects of its determinations and processes. The framework for this analysis is provided on the AEEG website.¹²⁷³

The AEEG consults with operators and the associations representing interested parties; including consumer groups, environmental groups, trade unions, and business associations. This is done through the circulation of documents and the collection of written observations, discussions and collective and individual hearings, prior to the introduction of new provisions.

The AEEG uses hearings to provide associations with an opportunity to bring concerns to the AEEG's attention.

All consultations are announced by the AEEG and material is published on the website to instruct interested parties in the issues under consideration by the AEEG.

The AEEG also maintains bilateral relations with European Union regulators and has regular contact with regulators of bordering countries in order to regulate cross-border energy trade.¹²⁷⁴ Furthermore, the AEEG collaborates with non-EU regulators to exchange best practices and share experiences.

The AEEG also collaborates with the International Energy Regulation Network (IERN), a web platform that aims at facilitating information exchange on electricity and gas market regulation. The AEEG

¹²⁷² A 6.5 per cent corporate tax increase introduced in 2008 and applied to large firms in certain industries (including electricity generation). In 2011, the tax was extended to cover renewable electricity generation; electricity transmission and distribution; and gas transportation and distribution. The same amendments prohibited companies from passing the tax on to customers via prices. See Eni, *Annual Report 2012: Risks and Uncertainties Associated With the Competitive Environment in European Natural Gas Market*. Available at: http://annualreport2012.eni.com/annual-report/financial-review-and-other-information/risk-factors-and-uncertainties/risks-and-uncertainties-associated-with-the-competitive-environment.aspx?sc_lang=en [accessed on 11 July 2013].

¹²⁷³ AEEG, *Guide to the Regulatory Impact Analysis in the Authority for Electricity and Gas*. Available at: <http://www.autorita.energia.it/allegati/docs/08/GUIDA%20AIR%20ENGLISH.pdf> [accessed on 11 July 2013].

¹²⁷⁴ AEEG, *Le Ultime Novità*. Available at: <http://www.autorita.energia.it> [accessed on 11 July 2013].

also works with the Florence School of Regulation (FSR), including sharing data and expertise; running workshops and training courses; and contributing analysis.

Timeliness

A deadline is set by the *Collegio* for the submission of written observations and consultations with the interested parties.

*Information Disclosure and Confidentiality*¹²⁷⁵

Public administrations and businesses are required, in accordance with Paragraph 22 of Article 2 of the *Law n. 481 of November 14 1995*, to provide the AEEG with any information requested and cooperate with the AEEG so that it may perform its functions.

Such requests for information must incorporate the following: the facts and circumstances on which the AEEG is asking for clarifications; the purpose of the request; the period within which the answer must be sent; the arrangements for the transmission of information and the person to whom the documents can be shown; and the penalties in case of refusal, failure or delay, without justification, to provide the information or produce the documents requested, or if the provision of information or documents produced false.

In terms of information disclosure by the AEEG to third parties, the AEEG must allow access to information in accordance with the *Regulations Governing the Guarantees of Transparency of the AEEG*.¹²⁷⁶

Decision-making and Reporting

Decisions are made by the AEEG *Collegio*, which is made up by the AEEG President and four *Collegio* Constituents. The *Collegio* meets weekly. Decisions are made by a majority vote. Voting is verbal and all decisions are published publicly.

The Authority is required to publish its principal decisions and provisions in a Bulletin. General rules and provisions are also published in the *Gazzetta Ufficiale della Repubblica Italiana* (Official Gazette) and on the Authority's Internet site.¹²⁷⁷

Appeals

Appeals against the AEEG's decisions can be made to the *Tribunale Amministrativo Regionale* (the TAR) for the Lombardy Region. Appeals against the rulings of the TAR can be made to the *Consiglio di Stato* (Council of State).

2. Telecommunications

Italy has well-developed telecommunications infrastructure comprised of 21.6 million fixed-line telephones and 82 million mobile cellular subscriptions. The total number of wired broadband subscriptions, in December 2012, was 13 479 922; that is equivalent to 21.6 per 100 inhabitants. The total number of wireless broadband subscriptions was nearly 32 million, the twenty-first highest in the OECD.¹²⁷⁸ Two per cent of total broadband subscribers had fibre connections. Forty-nine per cent of households and 84 per cent of businesses had broadband access.

The largest telecommunications carrier in Italy is *Telecom Italia*. It was founded in 1994, following the merger of a number of public state owned telecommunications businesses, including *Società Italiana per l'Esercizio Telefonico p.A.*, which was the monopoly telecommunications operator in Italy. *Telecom Italia* was privatised in 1997.

¹²⁷⁵ AEEG, *Regulations on Investigative Procedures of the Authority for Electricity and Gas in Accordance with Article 2, Paragraph 24 Letter a) of the Law of 14 November 1995*. Available at: http://www.autorita.energia.it/it/che_cosa/dpr_244.htm [accessed on 11 July 2013].

¹²⁷⁶ AEEG, *Regolamento recante la Disciplina delle Garanzie di Trasparenza dell'azione amministrativa dell'Autorità per l'Energia Elettrica e il Gas*. Available at: <http://www.autorita.energia.it/allegati/docs/02/115-02all.pdf> [accessed on 11 July 2013].

¹²⁷⁷ AEEG, *Structure and Role of the Italian Regulatory Authority for Electricity and Gas*. Available at: <http://www.autorita.energia.it/inglese/about/presentazione.htm#%281%29> [accessed on 11 July 2013].

¹²⁷⁸ OECD, *Broadband Portal*, December 2012. Available at: <http://www.oecd.org/sti/broadband/oecdbroadbandportal.htm> [accessed on 22 July 2013].

Telecom Italia operates landline telecommunications services, GSM mobile services, DSL internet services under the brand name 'Alice'. It also operates GSM phone services in Brazil and DSL internet services in San Marino. It also owns a stake in Telecom Argentina. *Telecom Italia* also controls, *Telecom Italia Media*, which is one of the main Italian television companies. *Telecom Italia* also owns *Olivetti*, the manufacturer of computer peripherals.¹²⁷⁹ *Telecom Italia's* market share of total mobile subscriptions is around 33 per cent, down compared to 31 December 2009 (34.2 per cent).¹²⁸⁰ Other competitors include: Wind-Infostrada which is a fixed-mobile operator focussed on retail services; Fastweb which offers broadband services and mobile services under the MVNO brand with H3G; Tiscali, offering broadband and mobile services; TeleTu; Vodafone and BT Italia.¹²⁸¹

The media subsector is dominated by two providers: *Radiotelevisione Italiana* (RAI), which is publicly-owned, and the privately-owned Mediaset. Each operates three national television stations. RAI also operated three national radio stations. Over 1300 commercial radio stations and a satellite television network operate in Italy.

Regulatory Institutions and Legislation

Telecommunications is regulated by *L'Autorità per le Garanzie nelle Comunicazioni* (AGCOM). The AGCOM is an independent authority established in 1997 (Law 249 of 1997). The AGCOM's members are elected by the Italian Parliament.

The AGCOM regulates telecommunications and the audiovisual and publishing areas. This is designed to encompass the range of ways that media is consumed. The AGCOM's role is to 'ensure equitable conditions for fair market competition and to protect fundamental rights of all citizens'.¹²⁸²

The AGCOM consists of a President, a Commission for infrastructure and networks, a Commission for services and products, and a Council. The Council is comprised of the President and all Commissioners. The Commission for infrastructure and networks, and the Commission for services and products are both collegiate bodies, comprised of the President of the AGCOM and four Commissioners. The AGCOM's Electronic Communications Networks and Services Directorate regulates communication infrastructure.¹²⁸³ This includes the regulation of: interconnection and access to the networks and spectrum. The AGCOM employs specialist competition economists and competition lawyers.¹²⁸⁴

The Audiovisual and Media Directorate's responsibilities are in relation to media content issues; and include: authorisation and regulation of licence arrangements for access to multimedia content and platforms; and protecting competition in the media.

In relation to consumer protection, the AGCOM is responsible for the following:

- Monitoring the quality and distribution of services and products within communications, including print and media advertising.
- Resolving disputes between operators and consumers.
- Regulating and enforcing universal service provisions. This includes assessing and collecting annual contributions from mobile and fixed telecommunications operators for a fund established by law that subsidises disadvantaged sectors of the community.

¹²⁷⁹ Telecom Italia, *Annual Report 2010*. Available at: http://www.telecomitalia.com/content/dam/telecomitalia/en/archive/documents/investors/Annual_Reports/2010/AnnualReport2010.pdf [accessed on 11 July 2013]. Also see *Telecom Italia, History*. Available at: <http://www.telecomitalia.com/tit/en/about-us/history/2000s.html> [accessed on 11 July 2013].

¹²⁸⁰ Telecom Italia, *Business Areas and Competitors: Overview on the Italian Market*. Available at: <http://www.telecomitalia.com/tit/en/investors/business-areas-competitive-scenario.html> [accessed on 11 July 2013].

¹²⁸¹ *Ibid.*

¹²⁸² AGCOM, *Introduction to the AGCOM*. Available at: http://www2.agcom.it/eng/eng_intro.htm [accessed on 11 July 2013].

¹²⁸³ AGCOM, *l'Autorità*. Available at: <http://www.agcom.it/Default.aspx?message=contenuto&DCId=1> [accessed on 11 July 2013].

¹²⁸⁴ European Competitive Telecommunications Association (ECTA), *Annex IX – Italy*. Available at: http://www.google.com.au/url?sa=t&rct=j&q=agcom%20consultation%20process&source=web&cd=8&ved=0CFcQFjAH&url=http%3A%2F%2Fwww.jonesday.com%2Ffiles%2FPublication%2F0be662b2-d46c-42a6-9ae6-9895b716918f%2FPresentation%2FPublicationAttachment%2F75d31fd0-400d-4884-ba55-a588ddda6c93%2FItaly.DOC&ei=cQ_MT5iuFtOciQeFkKnbG&usq=AFQjCNHyaOCjFYVA8Z-MRvMP2kk7liYsOg [accessed on 11 July 2013].

The AGCOM has the power to impose fines (Communications Code, Article 98) that can range between two and five per cent of revenues generated in the reference market.¹²⁸⁵

The AGCOM's role also includes the promotion of technological innovation in relation to communications.

As part of a process designed to introduce competition into the telecommunications network, the AGCOM rationalised numbering resources, allowed consumers to select their carrier, allowed mobile number portability and implemented local loop unbundling.¹²⁸⁶

The development of regulations relating to telecommunications equipment in Italy has been shaped by the EU harmonisation process (Directive 98/13/EC).

Consultation of Interested Parties

For all major regulatory proceedings, the AGCOM conducts individual or plenary hearings. According to Article 3.1 and 3.2 of Decision 453/03/CONS, participants to public consultation may also request an ad hoc hearing.¹²⁸⁷

The AGCOM may order a public hearing to take place, and may include interested parties to the proceedings including organisations representing common interests related to those proceedings, according to procedural rules.¹²⁸⁸ The proceedings are overseen by a rapporteur appointed by the AGCOM. The AGCOM also appoints a Commissioner that reports to the Council.¹²⁸⁹ Public consultations have been held, for example, on the future development of telecommunications.¹²⁹⁰

The AGCOM provides for the establishment of working groups with incumbents, licensed operators and interested parties, including consumers, for the resolution of a dispute.¹²⁹¹

Timeliness

Formal consultations take 30 to 45 days in market-analysis proceedings. According to the AGCOM (Decision No. 288/99), the minimum term is 60 days for general public consultations. In urgent cases, this may be reduced to 30 days. In relation to disputes about interconnection and access issues, Article 23 of the new Communications Code limits the timeframe for resolution to four months. In practice, however, the average timeframe was over a year. The time taken depends on the degree of complexity of the matter.¹²⁹²

*Information Disclosure and Confidentiality*¹²⁹³

The person in charge of the proceedings, in the course of an investigation, may make requests for information and production of documents, indicating the period within which the answer must be sent.

The AGCOM generally does not seek confidential business documents as part of the registration process. The information that operators must provide mainly concerns ownership structure and the characteristics of their activity. The AGCOM can, however, request confidential corporate documents

¹²⁸⁵ AGCOM, *Regolamento Concernente l'Organizzazione e il Funzionamento dell'Autorità per le Garanzie nelle Comunicazioni*. Available at: <http://www.agcom.it/Default.aspx?message=visualizzadocument&DocID=8975> [accessed on 11 July 2013].

¹²⁸⁶ AGCOM, *l'Autorità*, *op.cit.*

¹²⁸⁷ European Competitive Telecommunications Association (ECTA), *Annex IX – Italy*, *op. cit.*

¹²⁸⁸ AGCOM, *Regulation on the Organisation and Functioning of the Communications*. Available at: http://translate.googleusercontent.com/translate_c?hl=en&prev=/search%3Fq%3Dhttp://www2.agcom.it/regol/reg_organ.htm%26hl%3Den%26biw%3D869%26bih%3D695%26prmd%3Dimvns&rurl=translate.google.com.au&sl=it&u=http://www2.agcom.it/regol/reg_organ.htm&usq=ALkJrhzh_samSTCnbPY7qyqgCF2MdTbvrw#26 [accessed on 11 July 2013].

¹²⁸⁹ AGCOM, *Regulation on the Organisation and Functioning of the Communications*, *op. cit.*

¹²⁹⁰ OECD, *Regulatory Reform in Italy*, p. 275. Available at: http://books.google.com.au/books?id=H5ae7Lv7s8MC&pg=PA275&lpg=PA275&dq=agcom+consultation+process&source=b&ots=z7przUqVE&sig=XGz0t_RKvxGmMqZ0OzWl8kpZ_FY&hl=en&sa=X&ei=cQ_MT5iuFtOciQeFkKnkBg&ved=0CFkQ6AEwCA#v=onepage&q=agcom%20consultation%20process&f=false [accessed on 11 July 2013].

¹²⁹¹ *Ibid.*

¹²⁹² European Competitive Telecommunications Association (ECTA), *Annex IX – Italy*, *op. cit.*

¹²⁹³ AGCOM, *Regolamento in Materia di Procedure Istruttorie e di Criteri di Accertamento per le Attività Demandate all'Autorità per le Garanzie nelle Comunicazioni dal Decreto Legislativo 9 gennaio 2008 n. 9 Recante la 'Disciplina della titolarità e della commercializzazione dei diritti audiovisivi sportivi e relativa ripartizione delle risorse'*. Available at: <http://www.agcom.it/Default.aspx?DocID=2045> [accessed on 11 July 2013].

in the course of an investigation into whether an operator is in compliance with anti-trust laws; in which case AGCOM members must comply with procedural safeguards for handling this information.¹²⁹⁴

Decision-making and Reporting

A meeting of a Commission or the Council can take place with Commissioners absent, so long as the majority of the members are present.

Deliberations are made by the majority vote of the relevant Commission or, for broad matters, by the majority vote of the Council, whereby the President must be present for a deliberation to be ratified. If the vote is tied, the President's vote is the tie-breaker.¹²⁹⁵

All reports, deliberations, monitoring, and communications with Government or industry are published on the AGCOM website.

Appeals

Appeals may be made to the TAR Lazio (Administrative Court). An application can also be made for the immediate suspension of the appealed decision as an interim measure, on the basis of *fumus boni iuris* (apparent rights) and *periculum in mora* (danger in delay). In practice, this is applied rather restrictively.¹²⁹⁶

3. Postal Services

The incumbent provider of postal services is *Poste Italiane*, of which the government is a majority shareholder. *Poste Italiane* operates approximately 14 000 post offices in Italy. Competition has been progressively introduced to Italy's market for postal services since the 1990s when EU legislation started pushing member states towards liberalisation.

Article 2 of Directive 97/67/EC of the European Parliament and Council of 15 December 1997 (the 1997 Directive), initially reduced the services *Poste Italiane* could provide as a statutory monopoly to domestic and incoming cross-border correspondence. In 1998, *Poste Italiane* was converted into a government-owned publicly-limited company.

Directives designed to further liberalise postal services came into force in 2002 and 2006 (Directive 97/67/EC as amended by Directive 2002/39/EC). These directives limited the statutory monopoly enjoyed by *Poste Italiane* to correspondence not more than 100 grams with a price threshold of three times the standard price for basic priority mail items in 2003. In 2006 it was further reduced to correspondence not more than 50 grams and a price threshold of 2.5 times.¹²⁹⁷ Competition was introduced to the market for outgoing cross-border mail in 2003.

The market for postal services was fully liberalised in 2011, meaning any postal operator can enter any EU postal market for any postal service.¹²⁹⁸

Poste Italiane's business areas include postal services for retail customers, small and medium enterprises. It also deals directly with the commercial requirements of major customers. Since 2007, *Poste Italiane* has provided mobile telecommunications services, as a virtual operator with the *PosteMobile* brand. Other subsidiaries include:

- *BancoPosta* which accepts and invests deposits;
- *PostePay* facilitates bill-paying;

¹²⁹⁴ Centre for Media and Communication Studies, *Italy-Expert Assessments: Data Disclosure*. Available at: http://medialaws.ceu.hu/italy5_more.html [accessed on 9 July 2013].

¹²⁹⁵ AGCOM, *Regolamento Concernente l'Organizzazione e il Funzionamento dell'Autorità per le Garanzie nelle Comunicazioni*. Available at: <http://www.agcom.it/Default.aspx?message=visualizzadocument&DocID=8975> [accessed on 11 July 2013].

¹²⁹⁶ AGCOM, *Regolamento*, *op. cit.*

¹²⁹⁷ R Eccles and P Kuipers, *Postal Services Regulation in Europe: A Comparative Study of the UK, the Netherlands, Belgium, France, Germany, Italy and Sweden*, p. 323. Available at: http://www.wu.ac.at/structure/institutes/igv/mitarbeiter/gueller/reg_ek_jre.pdf [accessed on 11 July 2013].

¹²⁹⁸ Some member states (Greece, Luxembourg, and member states that joined in 2004) have delayed full liberalisation until 2013.

- The SDA Group provides express mail and logistics;
- *Mototaxi* runs city bike couriers;
- *Postecom* operates internet services;
- *Poste Vita* sells a range of insurance products;
- *Fondi Bancoposta Sgr* handles investments;
- *Poste* is the European leader for hybrid electronic mail and document processing; and
- *Poste Italiane's Europa Gestioni Immobiliari* unit engages in real-estate financing.¹²⁹⁹

It also provides insurance services through *Poste Vita*.

Poste Italiane has a staff of more than 150 000 and is one of the most profitable postal service providers in Europe.¹³⁰⁰ In 2010, turnover exceeded €19 billion, with €5 billion turnover from postal services and the remainder from financial and other services offered by *Poste Italiane*.

Mail services are considered relatively slow in Italy, with, for example, only half the mail sent between Naples and Bologna, arriving within three days.¹³⁰¹ In 2010, *Poste Italiane* delivered about 5.2 billion pieces of mail. Letter volumes in Italy are less than half of the EU *per capita* average.¹³⁰²

Poste Italiane is governed of a Board of Directors and the Board of Auditors. The accounts are audited externally and are subject to review by the Court of Auditors. The Board of Directors consists of five members. It reviews management performance, results, proposals concerning the organisational model, and operations of strategic importance.

The Board of Auditors is made up of three members appointed by the *Ministero dell'Economia e delle Finanze* (MEF) (The Ministry of the Economy and Finance). The Board of Auditors has a corporate governance role, ensuring *Poste Italiane* meets its legal obligations and that principles of proper administration, including proper organisational, administrative and accounting systems, exist.

In 2011, *Poste Italiane* was fined more than €39 million by Italy's competition authority, *Autorita Garante della Concorrenze e del Mercato* (AGCM), for practices that excluded competitors from the market for 'guaranteed time and date' delivery and messenger notification services.¹³⁰³ The AGCM found that since 2007, *Poste Italiane* had exploited market power and had engaged in predatory pricing strategies by taking advantage of its pre-existing universal services network.

Regulatory Institutions and Legislation

The regulatory regime is provided by both Italian and European legislation (for example, Article 2 of Directive 97/67/EC of the European Parliament and Council of December 15, 1997 (the 1997 Directive), implemented in Italy by Legislation number 261 of 1999).¹³⁰⁴ This was part of a process to introduce competition into the postal industry while maintaining a universal postal service.

The *Ministero delle Comunicazioni* (Ministry of Communication) regulated the postal industry before 2008, in which year responsibility was transferred to the *Ministry of Economic Development*.

In December 2011, responsibility for postal regulation was transferred to AGCOM.

¹²⁹⁹ Consumer Postal Council, *Index of Postal Freedom: Italy – Poste Italiane*. Available at: [http://www.postalconsumers.org/postal_freedom_index/Italy -- Poste Italiane.shtml](http://www.postalconsumers.org/postal_freedom_index/Italy_-_Poste_Italiane.shtml) [accessed on 11 July 2013].

¹³⁰⁰ *Poste Italiane, Poste Italiane: Balancing Innovation and Tradition*. Available at: http://www.poste.it/en/azienda/press_room/company_profile_en.pdf [accessed on 11 July 2013].

¹³⁰¹ Consumer Postal Council, *Index of Postal Freedom: Italy – Poste Italiane*. Available at: [http://www.postalconsumers.org/postal_freedom_index/Italy -- Poste Italiane.shtml](http://www.postalconsumers.org/postal_freedom_index/Italy_-_Poste_Italiane.shtml) [accessed 11 July 2013].

¹³⁰² *Ibid.*

¹³⁰³ AGCOM, *Postal Services: Antitrust Fines Poste over €39 million for Abuse of Dominant Position*. Available at: <http://www.agcm.it/en/newsroom/press-releases/1975-postal-services-antitrust-fines-poste-over-39-million-for-abuse-of-dominant-position.html> [accessed on 11 July 2013].

¹³⁰⁴ AGCOM, *Nella Sua Adunanza del 14 dicembre 2011*. Available at: http://www.agcm.it/trasp-statistiche/doc_download/3034-a413chiusura.html [accessed on 11 July 2013].

The AGCOM Directorate of Postal Services is made responsible for the following tasks:¹³⁰⁵

- the regulation of postal markets;
- the adoption of regulatory measures relating to the quality and characteristics of the universal postal service;
- carrying out of monitoring, control and verification of compliance with quality standards of the universal postal service;
- supervision on progress of the obligations of the universal service provider;
- adoption of regulatory measures relating to access to the postal network and related services, determining the rates of regulated industries and promoting competition in postal markets;
- analysis and monitoring of postal markets, with particular reference to prices of services, including the establishment of an observatory; and
- participation in the work and activities in the relevant international forums and the European Union.

The Directorate of Postal Services is split into three offices: for the analysis and monitoring of the postal market; for network access, universal service, and prices; and for consumer protection.

Consultation of Interested Parties

For all major regulatory proceedings, the AGCOM conducts individual or plenary hearings.¹³⁰⁶

The AGCOM may order a public hearing to take place and may include interested parties to the proceedings, including organisations representing common interests related to those proceedings, according to procedural rules.¹³⁰⁷

The proceedings are overseen by a rapporteur appointed by the AGCOM. The AGCOM also appoints a Commissioner that reports to the Council.¹³⁰⁸

On 5 June 2012 the AGCOM initiated preliminary inquiries into pricing arrangements for universal services. The first inquiry investigates pricing arrangements for universal services (letters up to 2 kilograms, parcels up to 20 kilograms, secured post, and 'mass post' (bank statements, utility bills, etc.)); the inquiry has a timeframe of 180 days.¹³⁰⁹ The second is investigating the valuation and approval methods for the regulated pricing approach used by Poste Italiane; the inquiry has a timeframe of 120 days.¹³¹⁰

As with the AGCOM's telecommunications inquiries, responsibility for each postal inquiry is assigned to an AGCOM staff member who oversees the process. In addition, the AGCOM has prepared a model for the reporting of alleged breaches encountered by postal service users. Known as the Modello P,¹³¹¹ it is essentially a tool available to postal service users who want to report violations of the obligations imposed on all postal service providers, which helps the AGCOM in the performance of its supervisory duties and the exercise of its sanctioning powers.

¹³⁰⁵ AGCOM, *Delibera N.731/11/CONS*. Available at: <http://www.agcom.it/default.aspx?DocID=8243> [accessed on 11 July 2013].

¹³⁰⁶ AGCOM, *Regulation Concerning the Organization and Functioning of the Authority for the Communications*. Available at: http://translate.googleusercontent.com/translate_c?hl=en&prev=search%3Fq%3Dhttp://www2.agcom.it/regol/reg_organ.htm%26h%3Den%26biw%3D869%26bih%3D695%26prmd%3Dimvns&rurl=translate.google.com.au&sl=it&u=http://www2.agcom.it/regol/reg_organ.htm&usq=ALkJrhzh_samSTCnbPY7qgpcF2MdTbvrw#26 [accessed on 11 July 2013].

¹³⁰⁷ *Ibid.*

¹³⁰⁸ *Ibid.*

¹³⁰⁹ AGCOM, *Delibera N. 353/12/CONS Avvio del Procedimento Istruttorio Concernente La Valutazione delle Condizioni Generali per l'Espletamento del Servizio Universale Postale*. Available at: <http://www.agcom.it/default.aspx?DocID=9330> [accessed on 22 July 2013].

¹³¹⁰ AGCOM, *Delibera N. 286/12/CONS Avvio del Procedimento Istruttorio Concernente "Valutazione ed Approvazione della Manovra Tariffaria di Poste Italiane"*. Available at: <http://www.agcom.it/default.aspx?DocID=8998> [accessed on 22 July 2013].

¹³¹¹ AGCOM, *Il Modello P: Tu Segnali, Noi Vigiliamo*. Available at: <http://www.agcom.it/Default.aspx?message=contenuto&DCId=654> [accessed on 11 July 2013].

Once a user has submitted a complaint, the AGCOM assesses it under its general supervision activities in the postal subsector, and if deemed valid, the AGCOM will perform a more in-depth study on the supplier from whom information may be obtained and with whom inspections may also be arranged. In the event that the AGCOM determines that there has in fact been a breach of a legal obligation on behalf of the supplier, it will exercise its power to impose sanctions.

The AGCOM is part of the European Regulators Group for Postal Services, which was established in 2010.¹³¹² The Group is tasked with assisting the Commission on matters relating to postal services, including regulatory development and consultation with industry and end-users.

Timeliness

As exemplified by the inquiries launched by the AGCOM in June 2012 into the activities of Poste Italiane, the first inquiry investigating pricing arrangements for universal services may take up to 180 days.¹³¹³ The second inquiry, investigating the valuation and approval methods for the regulated pricing approach may then take up to 120 days.¹³¹⁴

With regard to inquiries activated by the submission of a Modello P, the AGCOM will determine the appropriate timeframe.

*Information Disclosure and Confidentiality*¹³¹⁵

The person in charge of the proceedings, in the course of an investigation, may make requests for information and production of documents, indicating the period within which the answer must be sent.

Decision-making and Reporting

Deliberations are made by the majority vote of the relevant Commission or, for broad matters, by the majority vote of the Council, whereby the President must be present for a deliberation to be ratified. If the vote is tied, the President's vote is the tie-breaker.¹³¹⁶

All reports, deliberations, monitoring, and communications with Government or industry are published on the AGCOM website.

In the case of a Modello P submitted by a postal-service user, the disciplinary proceedings following the confirmation that a supplier has indeed breached a legal obligation, will be published on the AGCOM website so that it may be accessed by anyone interested in the matter.¹³¹⁷

Appeals

Appeals may be made to the TAR Lazio (Administrative Court). An application can also be made for the immediate suspension of the appealed decision as an interim measure, on the basis of *fumus boni iuris* (apparent rights) and *periculum in mora* (danger in delay). In practice, this is applied rather restrictively.¹³¹⁸

¹³¹² European Commission (EC), *Commission Decision of 10 August 2010 Establishing the European Regulators' Group for Postal Services*. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:217:0007:0009:EN:PDF> [accessed on 11 July 2013].

¹³¹³ AGCOM, *Delibera N. 353/12/CONS Avvio del Procedimento Istruttorio Concernente La Valutazione delle Condizioni Generali per l'Espletamento del Servizio Universale Postale*. Available at: <http://www.agcom.it/default.aspx?DocID=9330> [accessed on 22 July 2013].

¹³¹⁴ AGCOM, *Delibera N. 286/12/CONS Avvio del Procedimento Istruttorio Concernente "Valutazione ed Approvazione della Manovra Tariffaria di Poste Italiane"*. Available at: <http://www.agcom.it/default.aspx?DocID=8998> [accessed on 22 July 2013].

¹³¹⁵ AGCOM, *Regolamento in Materia di Procedure Istruttorie e di Criteri di Accertamento per le Attività Demandate all'Autorità per le Garanzie nelle Comunicazioni dal Decreto Legislativo 9 gennaio 2008 n. 9 Recante la "Disciplina della titolarità e della commercializzazione dei diritti audiovisivi sportivi e relativa ripartizione delle risorse"*. Available at: <http://www.agcom.it/Default.aspx?DocID=2045> [accessed on 11 July 2013].

¹³¹⁶ AGCOM, *Regolamento Concernente l'Organizzazione e il Funzionamento dell'Autorità per le Garanzie nelle Comunicazioni*. Available at: <http://www.agcom.it/Default.aspx?message=visualizzadocument&DocID=8975> [accessed on 11 July 2013].

¹³¹⁷ AGCOM, *Il Modello P*, *op. cit.*

¹³¹⁸ AGCOM, *Regolamento Concernente l'Organizzazione*, *op. cit.*

4. Water and Wastewater

Italy has estimated total renewable water resources of 175 cubic kilometres and freshwater withdrawal of 22 cubic kilometres, with 18 per cent domestic; 37 per cent industrial and 45 per cent agricultural.¹³¹⁹ A large percentage of water is lost through leakages in water infrastructure. This occurs because of structural flaws, obsolescence and inefficient maintenance of the infrastructure. The *Comitato di Vigilanza sulle Risorse Idriche* (COVIRI) (Committee for the Control and Use of Water Resources) estimated that up to 40 per cent of the water in aqueducts is lost. In 2003, 50 per cent of water produced in the Southern regions was lost. The result is that several municipalities were not able to guarantee regular water supply throughout summer. According to the latest National Water Authority Report, €50 billion of investment is needed in Italy's water and wastewater sector over the next 20 years.

Italy uses the greatest amount of water for domestic use per capita in Europe.¹³²⁰ Daily water consumption is about 280 litres per person. Italian law fixes the minimum quantity of water that providers are to make available for domestic consumption. In 1996, this was 150 litres per person per day. In 2005, this figure was raised to between 200 and 280 litres per person per day.

Prior to 1994 there was a mix of central, regional or local government ownership of water supply, sewage and wastewater-treatment operations. The industry structure was highly fragmented, with more than 23 500 businesses operating throughout Italy.¹³²¹ In 1994, reforms were undertaken to allocate water franchises to businesses that were fully or majority-owned by local governments (Act 36/1994). For the purposes of administering water and wastewater services, the country was disaggregated into 92 areas. Water-service businesses that provided services to the area were gradually consolidated. Many merged into single-operating entities. In 67 areas, water franchises were awarded to 102 water firms.¹³²²

Large operators include *Acea* (which services about seven million users in Rome); *Acquedotto Pugliese* with 4.5 million customers in Puglia; *Hera* with about two million users in Bologna; *Smat*, in Turin, with about two million users; *Iride* in Genoa with 1.9 million users; CAP with about 1.7 million customers in Milan and *Abbanoa* with 1.6 million customers in Sardinia.¹³²³

Since 2003, the AGCM has identified concerns and irregularities in relation to tender procedures for the awarding of water services management. In 2007-2008 two antitrust proceedings commenced.

Regulatory Institutions and Legislation

Regulatory responsibility for water now lies with the energy regulator, the AEEG, profiled in section 1. In 2009, the 1994 reforms were amended so that water services in regular ATOs (ones without special social, economic, or geographic conditions) were tendered to private companies. The same reforms guaranteed those companies a safe return on investments via the regulated pricing of their services. In 2011, public opposition to privatised water and guaranteed returns resulted in a referendum on the 2009 amendments. The referendum overwhelmingly abolished the amendments and left Italian water infrastructure in a legislative and regulatory 'vacuum'.¹³²⁴ In response, regulatory responsibility for water in Italy was transferred to the energy regulator, the AEEG.

As discussed briefly under the energy section, the AEEG has established the following two offices to perform its water functions:

¹³¹⁹ CIA, *World Factbook Italy*. Available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/it.html> [accessed on 17 June 2013].

¹³²⁰ International Environmental Law Research Centre, *The Right to Water in Italy*. Available at: <http://www.ielrc.org/content/f0801.pdf> [accessed on 11 July 2013].

¹³²¹ A Asquer, 'The Regulation of Water Infrastructure in Italy: Origins and Effects of an 'Hybrid' Regulatory System', in D Jarvis, M Ramesh, X We and E Araral, *Infrastructure Regulation: What Works, Why and How Do We Know?*, World Scientific, Singapore, 2011, pp. 457-488, 458.

¹³²² A Asquer, *op. cit.*, p. 479.

¹³²³ A Asquer, *op. cit.*, p. 479.

¹³²⁴ M Bonancina, A Creti, and F Pontoni, *Dynamic Efficiency in the Italian Water Distribution Sector: Does Ownership Matter?* Regulatory Conference of the Florence School of Regulation, 2012.

- The Office of Water Infrastructure: charged with studying the structure of the water service sector and developing proposals for the modification of the sector, along with preparing measures for regulatory accounting.¹³²⁵
- The Office of Water Pricing and Quality: charged with determining tariffs for water services in the various sectors of water use and arranging the regulation of the quality of water services.¹³²⁶

The Law of 22 December 2011, n. 214 provides that, with respect to both the regulation and vigilance of water services, the AEEG is to make use of the same powers given by the Law of 14 November 1995, n. 481 for the regulation of the energy sector.¹³²⁷

According to Article 2 of the Law of 6 December 2011, n. 201, the AEEG has the following functions to perform in the regulation of the water market:¹³²⁸

- To ensure the dissemination, usability and quality of water services in a uniform manner across the country.
- Definition of a fair tariff system that is transparent and non-discriminatory.
- Protection of the right and interests of users.
- Management of water services in terms of efficiency and economic and financial balance.
- Implementation of the European Community principles of 'full recovery of costs' and 'polluter pays' in accordance with Article 9 of the Directive 2000/60/EC.

In addition, a decree issued by the Prime Minister on 20 July 2012¹³²⁹ specifies the AEEG regulatory and control functions in water services, and names the *Ministero dell'Ambiente e della Tutela del Territorio e del Mare* as the responsible Minister for water services.

After a detailed consultation process with stakeholders that began in 2012, the AEEG has approved a set of measures related to integrated water services and, in particular, for determining the transient rate for 2012-2013 and transparency of bills.¹³³⁰ Considerations to be made in determining rates include: ensuring that users do not bear undue burdens; employing safeguards to ensure the utilities are not economically disadvantaged; the connection of rates with the quality of service; recognising the cost of efficient service based on values; recognising the cost of only the investments actually made; and promoting the timely entry into service for the infrastructure investment.

When it concerns the transparency of bills, the AEEG has approved the first Directive on the Transparency of Billing Documents, with the aims of: making it simple to understand water bills; fostering a better understanding of the integrated water service; providing more information; and reducing complaints due to lack of information.

Consultation of Interested Parties

A Presidential Decree, pursuant to Law of 23 August 1988, n. 400, provides the process that must be followed by the AEEG in relation to its decision-making powers, including in relation to decisions affecting private interests.

The AEEG designates responsibility for all related procedures of a decision to one of the AEEG's officials.

¹³²⁵ AEEG, *Assetti Servizi Idrici- Ufficio Speciale-ASI*. Available at: http://www.autorita.energia.it/it/che_cosa/ASI.htm [accessed on 11 July 2013].

¹³²⁶ AEEG, *Tariffe e Qualità Servizi Idrici – Ufficio Speciale – TQI*. Available at: http://www.autorita.energia.it/it/che_cosa/TQI.htm [accessed on 11 July 2013].

¹³²⁷ AEEG, *About Us*. Available at: <http://www.autorita.energia.it/it/inglese/index.htm> [accessed on 11 July 2013].

¹³²⁸ AEEG, *Individuazione delle Funzione dell'Autorità per l'Energia Elettrica e il Gas attinenti alla Regolazione e al Controllo dei Servizi Idrici, ai sensi d'articolo 21, comma 19 del decreto-legge del 6 dicembre 2011, n. 201, convertito con modificazioni, dalla legge 22 dicembre 2011, n. 214*. Available at: <http://www.autorita.energia.it/it/docs/riferimenti/120720dpcm.htm> [accessed on 11 July 2013].

¹³²⁹ AEEG, *Individuazione delle Funzione dell'Autorità, op. cit.*

¹³³⁰ AEEG, *Consumer Water Services (English)*. Available at: http://translate.google.com.au/translate?hl=en&sl=it&tl=en&u=http%3A%2F%2Fwww.autorita.energia.it%2F%2Fconsumatori_idr.htm [accessed on 16 July 2013].

A deadline is set for the submission of written observations and further consultations may be arranged with the interested parties. A commissioner is responsible for reporting findings.

The AEEG consults with operators and the associations representing interested parties, including consumer groups, environmental groups, trade unions, and business associations. This is done through the circulation of documents and the collection of written observations, discussions and collective and individual hearings prior to the introduction of new provisions.

The AEEG uses hearings to provide associations with an opportunity to bring concerns to the AEEG's attention.

All consultations are announced by the AEEG and material is published on the website to instruct interested parties in the issues under consideration by AEEG.

Timeliness

A deadline is set by the Collegio for the submission of written observations and consultations with the interested parties.

*Information Disclosure and Confidentiality*¹³³¹

Public administrations and businesses are required, in accordance with Paragraph 22 of Article 2 of the Law n. 481 of November 14 1995, to provide the AEEG with any information requested and cooperate with AEEG so that it may perform its functions.

Such requests for information must incorporate the following: the facts and circumstances on which the AEEG is asking for clarifications; the purpose of the request; and the period within which the answer must be sent.

The arrangements for the transmission of information and the person to whom the documents can be shown; the penalties in case of refusal, failure or delay, without justification, to provide the information or produce the documents requested, or if the provision of information or documents produced false. In terms of information disclosure by the AEEG to third parties, the AEEG must allow access to information in accordance with the Regulations Governing the Guarantees of Transparency of the AEEG.¹³³²

Decision-making and Reporting

Decisions are made by the AEEG Collegio, which is made up by the AEEG President and four Collegio Constituents. The Collegio meets weekly. Decisions are made by a majority vote. Voting is verbal and all decisions are published publicly.

The Authority is required to publish its principal decisions and provisions in a Bulletin. General rules and provisions are also published in the *Gazzetta Ufficiale della Repubblica Italiana* (Official Gazette) and on the Authority's Internet site.¹³³³

Appeals

Appeals against the AEEG's decisions can be made to the *Tribunale Amministrativo Regionale* (the TAR) for the Lombardy Region.

Appeals against the rulings of the TAR can be made to the *Consiglio di Stato* (Council of State).

In addition, an application can also be made for the immediate suspension of an appealed decision as an interim measure, though in practice this is applied rather restrictively.

¹³³¹ AEEG, *Regulations on Investigative Procedures of the Authority for Electricity and Gas in Accordance with Article 2, Paragraph 24 Letter a) of the Law of 14 November 1995*. Available at: http://www.autorita.energia.it/che_cosa/dpr_244.htm [accessed on 11 July 2013].

¹³³² AEEG, *Regolamento recante la Disciplina delle Garanzie di Trasparenza dell'azione amministrativa dell'Autorità per l'Energia Elettrica e il Gas*. Available at: <http://www.autorita.energia.it/allegati/docs/02/115-02all.pdf> [accessed on 11 July 2013].

¹³³³ AEEG, *Structure and Role of the Italian Regulatory Authority for Electricity and Gas*. Available at: <http://www.autorita.energia.it/inglese/about/presentazione.htm#%281%29> [accessed on 11 July 2013].

Regulatory Development

An announcement in the *Annual Report 2012* declared that the AEEG would be focusing upon consumer protection through a regulation that provides incentives for effectiveness and quality of service. The AEEG issued a consultation paper in May 2012 for interested parties to respond to.¹³³⁴

On 28 December 2012, after an extensive consultation process with stakeholders, the AEEG finally approved a set of measures of adjustment for integrated water services, aimed at promoting the development of infrastructure and improving the quality of the service.¹³³⁵

In particular, the AEEG approved a method for determining the rates of integrated water for 2012-13; launched an investigation to verify whether the behaviour of managers has been compliant with current legislation (to be completed by June 2013) and approved the first Directive on the transparency of billing documents. The main novelty of the method for determining water rates involves the removal of a 'return to capital' and the recognition of the 'cost of financial resources' so as to adhere to the principle of full coverage of costs. In addition, operators will be required to provide information to users on the quality of water supplied on the Charter of Services website by June 2013.

5. Rail^{1336 1337}

Italy's railway industry is comprised of national railways and local networks. Italy has over 16 000 kilometres of national railways.

In July 1998, the Italian Parliament approved an EU directive to separate train and infrastructure services.¹³³⁸ In preparation, the incumbent, *Ferrovie dello Stato* (FS), was denationalised 1992 (FS SpA) though the government remained the sole shareholder. FS also reduced its labour force from 209 thousand to 120 thousand between 1989 and 1997, and increased productivity by 55 per cent.

In 2000, two subsidiaries were created from FS: *Trenitalia* and RFI.

Trenitalia is a rail service company that operates regional passenger services, long-distance passenger services and freight services. RFI is responsible for rail infrastructure, including investment projects and network maintenance.

Regulatory Institutions and Legislation

Competition was introduced into Italy's railways on 1 June 2000. RFI's tracks and RFI's passenger and freight facilities became available to be used by any licensed operator.

Twenty-five per cent of the Italian rail freight market was provided by competing operators in 2011.

Despite the separation between the infrastructure operator (RFI) and the service operator (*Trenitalia*), both entities are owned by the State. The Ministry of Transport is responsible for contracts and regulation and the Ministry of Economy is the owner of FS. By 2010, the FS group had over 80 thousand staff. *Trenitalia* employed nearly half of these staff.

That is, the state remains the planner, regulator, and the owner of the rail companies.

The state finances infrastructure investment, network maintenance, and public service obligations. Funding is provided through service contracts and through lump-sum transfers. In 2005, transfers in the form of subsidies to the track operator were €1349 million and €1205 million to the service branch.¹³³⁹ Beria, Quinet, Rus and Schultz¹³⁴⁰ suggest that contractual agreements generally are less

¹³³⁴ AEEG, *Documento per la Consultazione 204/2012/R/IDR*. Available at: <http://www.autorita.energia.it/allegati/docs/12/204-12.pdf> [accessed on 11 July 2013].

¹³³⁵ AEEG, *Acqua: Approvati il Metodo Tariffario Transitorio e la Prima Direttiva sulla Trasparenza delle Bollette*. Available at: http://www.autorita.energia.it/allegati/com_stampa/12/121228idr.pdf [accessed on 11 July 2013].

¹³³⁶ Centre for European Policy Studies, *Regulation of Investment on Transport Infrastructures in Italy*. Available at: <http://crni.epfl.ch/papers/cp1.pdf> [accessed on 11 July 2013].

¹³³⁷ Munich Personal RePEc Archive (MPRA), *A Comparison of Rail Liberalisation Levels Across Four European Countries*. Available at: http://mpr.ub.uni-muenchen.de/29142/1/MPRA_paper_29142.pdf [accessed on 11 July 2013].

¹³³⁸ Jane's, *FS Holding SpA (FS) (Italy), Railway Systems Operators*. Available at: <http://articles.janes.com/articles/Janes-World-Railways/FS-Holding-SpA-FS-Italy.html> [accessed on 11 July 2013].

¹³³⁹ Centre for European Policy Studies, *Regulation of Investment on Transport Infrastructures in Italy*. Available at: <http://crni.epfl.ch/papers/cp1.pdf> [accessed on 11 July 2013].

efficient in Italy because of the lack of an effective enforcement system. That is, because few significant negative consequences occur upon a breach of contract, contracting parties often do not comply with their contractual obligations. The result is that project costs often exceed budget and public sector debt increases.

Fares for regional services are decided at a regional level. The provisions of services on the regional network are usually decided in-house with *Trenitalia*, without a tender process. Long-distance fares are generally unregulated, with some exceptions on 'marginal lines' (Beria, Quinet, Rus and Schultz, p. 22). Fares for freight services are also generally unregulated.

However, subsidies are provided by the State. These are provided for freight services in southern regions, for universal long-distance services and for regional services. In 2007, the State subsidised regional transport by €1488 million (Beria, Quinet, Rus and Schultz, p. 23). Universal long-distance and freight services received €445 million in subsidies annually. The result is that some fares have been kept artificially low and this makes it more difficult for new competitors to enter the market (Beria, Quinet, Rus and Schultz, pp. 24-25).¹³⁴¹

Consultation of Interested Parties

The *Ministero delle Infrastrutture e dei Trasporti* (MIT) (Ministry of Infrastructure and Transport) controls access to the rail network and, following consultation with RFI, sets the level of tolls. The AGCM may intervene to provide access to the rail network for potential entrants.¹³⁴²

The requirements for licensing in Italy are less strict than some other European countries, such as Germany, Spain or France. A declaration must simply be made stating that the required certifications and characteristics exist, not at the time of the request, but at the time that operations commence.

6. Airports

There are 101 airports under the supervision of a regulator, *Ente Nazionale Aviazione Civile* (ENAC). 54 airports operate with a commercial goal, four airports are run only for military purposes, 17 are classified as military airports with the ability to supply commercial flights, two airports are considered as mixed commercial and military, and the remaining 24 airports operate as flying clubs.¹³⁴³

Rome Fiumicino is Italy's busiest airport, and the seventh busiest airport in Europe, with 37.7 million passengers passing through in 2011. Milan Malpensa is the country's second largest airport with 19.3 million passengers in 2011. The third largest airport, Milan Linate Airport, also services Milan and had 9.1 million passengers in 2011.¹³⁴⁴

Regulatory Institutions and Legislation

Airport management in Italy is transitioning away from the central government. Most airports are now operated by either local governments or private companies, who are regulated by the ENAC (that, in turn, is responsible to the Ministry of Transport). The central government retains operating control over a few commercial airports and all military airports. Some smaller airports are managed directly by the ENAC.

Licensing arrangements for operators are diverse. Some airports operate under a 'total' licence (where all airport charges go to the operator, that is responsible for the infrastructure), others under a 'partial' licence (where operators are only responsible for infrastructure concerning passenger and freight terminals, and airside revenues are retained by the government).

¹³⁴⁰ P Beria, E Quinet, G De Rus and C Schulz, *A Comparison of Rail Liberalisation Levels Across Four European Countries*, Personal RePEc Archive (MPRA), p. 8. Available at: http://mpra.ub.uni-muenchen.de/29142/1/MPRA_paper_29142.pdf [accessed on 11 July 2013].

¹³⁴¹ Beria *et al.*, pp. 24-25.

¹³⁴² E-Competitions, *The Italian Competition Authority Closes Two Investigations Against the Manager of Rail Network Group without finding any Competition Infringement*. Available at: http://www.concurrences.com/article.php3?id_article=42080&lang=fr [accessed on 11 July 2013].

¹³⁴³ P Malighetta, G Martini, S Paleari & R Redondi, 'An Empirical Investigation on the Efficiency, Capacity and Ownership of Italian Airports', p. 7. Available at: <http://www.rivistapoliticaeconomica.it/2007/gen-feb/Malighetti.pdf> [accessed on 22 July 2013].

¹³⁴⁴ *Associazione Italiana Gestori Aeroporti* (ASSAEROPORTI), *Passageri : Gennaio-Dicembre/2011*. Available at: <http://www.assaerporti.it/ViewPasseggeriProg.asp?mese=12&anno=2011&lingua=it> [accessed on 22 July 2013].

This scenario reflects Italy's changing approach to airports. Until 2007, airport regulation was limited. Objectives included ensuring that fares reflected costs, financial and governmental transparency and to obtaining productivity increases over time. Airside fares were calculated using a price-cap rule.

Recent reforms have set out a more uniform approach to airport operations. Concessionaires enter into a contract with the ENAC that stipulates the terms and conditions of their airport services. The contracts are relatively uniform. Airport services are split into regulated and unregulated categories and the contract only stipulates conditions for the regulated services. However, at least 50 per cent of revenues from the unregulated services are factored into calculations regarding regulated services.¹³⁴⁵ This arrangement is referred to as a 'mixed single-till',¹³⁴⁶ although it has been questioned whether the cross-subsidisation from unregulated to regulated services actually takes place in practice.¹³⁴⁷

Process and Consultation

Under the new legislation, a contract between the chosen concessionaire and the ENAC stipulates the terms and conditions of airport management (the contract is relatively standardised),¹³⁴⁸ and must be approved by the Ministry of Transport. The contract is valid for a four-year period and is then renewed.

The contract sets out the accounting standards,¹³⁴⁹ reporting requirements,¹³⁵⁰ forecasts and plans for capital investment (for example: infrastructure; construction; and renovation plans and costing).¹³⁵¹ Standards for service quality and environmental impact are also provided in the contract.¹³⁵²

Price setting is mechanical and based on a revenue cap (CPI-minus-X framework). Maximum prices for individual services are calculated via an annually updating formula. Each maximum price is a function of the inflated base-year cost for the service, minus the marginal cost in the current year. The formula for inflating the base-year cost includes a productivity parameter. The formulae and parameters (or parameter schedules) are committed to in the contract and the relevant information is submitted to the ENAC that calculates the regulated prices (which must be approved by the Ministry).¹³⁵³

Timeliness

Contracts run for four years and are then renewed via the same process (contract signed with the ENAC and approved by the Ministry). The relevant documentation for renewing the contract is due within the first 60 days of the final year of the current contract.¹³⁵⁴ These contracts function within the long-term concessions (up to 40 years) granted to the airport's management body. The ENAC is able to re-assess some parameters that enter the pricing equations, so long as they begin the re-assessment before 15 November of any given year.

¹³⁴⁵ Ministero Infrastrutture e dei Trasporti (MIT), *Direttiva in Materia di Regolazione Tariffaria dei Servizi Aeroportuali Offerti in Regime di Esclusiva*. Available at: http://www.mit.gov.it/mit/mop_all.php?p_id=07541 [accessed on 22 July 2013].

¹³⁴⁶ Single-till schemes regulate concessionaires' revenues from airlines and other revenue including from car parking and shops, as a whole, and are designed to prevent the rise of monopoly profits. Dual-till schemes regulate revenues from airlines and other revenues separately. The half dual-till scheme regulates revenue from airlines without regulating other revenues. This provides relatively high profits from the non-airline parts of the businesses.

¹³⁴⁷ Centre for European Policy Studies, *Regulation of Investment on Transport Infrastructures in Italy*. Available at: <http://cmi.epfl.ch/papers/cp1> [accessed on 22 July 2013], p. 8.

¹³⁴⁸ In this paper, references to the 'contract' are for a contract between the ENAC and *La Società Aeroporti di Puglia* (signed on 2 October 2010) for the operation of Bari Airport. See Ente Nazionale per l'Aviazione Civile (ENAC), *ENAC-AdP (Aeroporti di Bari)*. Available at: http://www.enac.gov.it/La_Regolazione_Economica/Aeroporti/Contratti_di_Programma/Stipulati/info-2134230724.html [accessed on 22 July 2013].

¹³⁴⁹ *Ente Nazionale per l'Aviazione Civile* (ENAC), *ENAC-AdP (Aeroporti di Bari)*, Allegato 7. Available at: http://www.enac.gov.it/La_Regolazione_Economica/Aeroporti/Contratti_di_Programma/Stipulati/info-2134230724.html [accessed on 22 July 2013].

¹³⁵⁰ *Ibid.*

¹³⁵¹ *Ibid.*, Allegato 1, 7 e 7bis.

¹³⁵² *Ibid.*, Allegato 5.

¹³⁵³ *Ibid.*, Allegato 9.

¹³⁵⁴ Normativa, *Legge 24 dicembre 1993, n. 537 Interventi Correttivi di Finanza Pubblica, Articolo 10*. Available at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1993-12-24:537> [accessed on 22 July 2013].

Role of Interested Parties

The contract does not specify a role for stakeholders. Concerned parties would have general recourse options to the ENAC, the Ministry, and the Italian Competition Authority.

Information and Confidentiality

All contractual documentation is published online except for data that enter the pricing formulae.¹³⁵⁵

In the assessment of annual reporting, the ENAC is able to request any further information from regulated entities. Confidentiality is not a justifiable reason for withholding requested information, neither is the potential for conflicts of interest to be revealed.¹³⁵⁶

Decision-making and Reporting

An annual reporting regime requires airport operators to have financial accounts certified by an external accounting institution before submitting them to the ENAC.¹³⁵⁷ Airport management is also required to submit to the ENAC any documentation needed to verify the investment plan in the contract.¹³⁵⁸

Airport traffic is also monitored and, if traffic numbers differ from those forecast in the contract, automatic contract reviews are triggered. If the quantity of airport traffic (whether passenger or freight) is +/- 10 per cent or more from the forecasted estimates provided with the contract either party can request a revised contract. If the difference is between 5 and 10 per cent then pricing equation parameters relating to productivity and investment can be adjusted by the ENAC.¹³⁵⁹

Note on Ground Services Regulation

Baggage handling and terminal services such as check-in and boarding are covered under the contract with the ENAC. Other terminal services such as food and retail are not explicitly regulated, though under the mixed single-till arrangement, 50 per cent of revenue from these services should be factored into the pricing of regulated services.

7. Ports

Italy is an important trading nation with a heavy reliance on seaports for its imports and exports. Italy has the seventeenth largest merchant fleet in the world. The major ports of Italy include Gioia Tauro, Genoa, Livorno, Taranto, Trieste, and Venice. Major oil terminals are at Melilli (Santa Panagia) and Sarroch.

The Port of Gioia Tauro is located on the Mediterranean in Calabria, southern Italy. It is Italy's largest seaport and the seventh largest container port in Europe.

The Port of Genoa, on the Mediterranean, is the second largest port in Italy covering a wide range of trades. It is operated by the Genoa Port Authority

The Port of Venice, on the Adriatic, has terminals for various kinds of trade including containers; bulk liquids; RO/RO; and passengers. It is operated by a public body, the Venice Port Authority.

Regulatory Institutions and Legislation

Italian ports are not regulated in the same way as other infrastructure in Italy. Since 1994, Italian law has stipulated that *Autorità Portuali* (Port Authorities) can operate with little regulatory oversight. Port Authorities are entrusted with the administration of port areas (the actual land is publicly owned and

¹³⁵⁵ Ministero delle Infrastrutture e dei Trasporti (MIT), *Decreto Ministeriale Approvazione Contratto di Programma Aeroporto di Bari; ENAC-AdP anno 2010*. Available at: <http://www.mit.gov.it/mit/site.php?p=cm&o=vd&id=1274> [accessed on 22 July 2013], Article 3 and 4.

¹³⁵⁶ Ministero delle Infrastrutture e dei Trasporti (MIT), *Direttiva in Materia di Regolazione Tariffaria dei Servizi Aeroportuali Offerti in Regime di Esclusiva*, p. 6. Available at: http://www.mit.gov.it/mit/mop_all.php?p_id=07541 [accessed on 22 July 2013].

¹³⁵⁷ *Ibid.*

¹³⁵⁸ *Ibid.*

¹³⁵⁹ Ministero delle Infrastrutture e dei Trasporti (MIT), *Decreto Ministeriale Approvazione Contratto di Programma Aeroporto di Bari; ENAC-AdP anno 2010*, Article 3 and 4. <http://translate.google.com.au/translate?sl=auto&tl=en&prev=t&hl=en&ie=UTF-8&u=http://www.mit.gov.it/mit/site.php%3Fp%3Dcm%26o%3Dvd%26id%3D1274> [accessed on 22 July 2013].

Port Authorities hold no property right to the land). However, Port Authorities are not allowed to undertake the commercial operations of the port. Instead, Port Authorities lease land to terminal operators, stevedores, and other port operators via a concession system.

Concessions occupy much of each port's space. For example, in Genoa more than 70 per cent of port land is under concession, with most of the remaining land devoted to shared infrastructure.¹³⁶⁰ Concession contracts are usually long-term, some lasting up to 60 years.¹³⁶¹

Concession fees are regulated to some degree: the land in each port is assigned a maximum payable rent per square metre, calculated using real estate data. These maximum payable rents are then augmented to take into account the quality of infrastructure and type of activity in the specific port area.¹³⁶² There are also minimum rents for each port that Port Authorities must respect.¹³⁶³

Concession revenues vary across Italy's ports, from less than 10 per cent to more than 60 per cent of a port's income.¹³⁶⁴ The average is around 30 per cent.¹³⁶⁵ The variance is reflective of the different markets each port caters to: some ports are small and set low concessions to encourage flow through, others are large and—due to factors such as geography or technology – have relatively inelastic demand for their facilities, thus leading to higher concession prices and Port Authority revenues.

Beyond concession revenues, Port Authorities also take share of fees paid by vessels using the ports, such as passenger embarking/disembarking fees and cargo taxes.

The law intends that Port Authorities use their revenues to undertake investment in their port's facilities. However, it appears that revenues are insufficient and much port investment is undertaken with government funds. The laws regarding port investment financing are complex and it is unclear whether intended demarcations between investment types are adhered to in practice. In general, the State is supposed to finance investment in basic port infrastructure (for example, maritime access, dredging, road and rail links to outside transport networks) and common resources (such as lighthouses, buoys, jetties, and quays). The State also provides Port Authorities with an allowance for maintenance of their port. 'Superstructure' related investment (such as terminal buildings, cranes, sheds, and internal road and rail) are meant to be financed by the Port Authority. In practice, Port Authorities often do not have the required funds for their investment responsibilities and require additional State funding.¹³⁶⁶ Accordingly, investment in port infrastructure is usually undertaken in a public-private partnership.¹³⁶⁷

Because of the legal framework that surrounds Italian ports, this investment arrangement is not as inefficient as it would seem in other contexts. Port land is strictly public property and ownership of infrastructure built on those lands transfers to the State at the end of the concession contract.¹³⁶⁸

Regarding efficiency, studies¹³⁶⁹ suggest that internal inefficiencies and land transport costs limit Italian ports ability to utilise their geographical advantages. On a total cost basis (port, customs, and overland transport), Italian ports are more expensive for shippers compared to Northern European ports.

¹³⁶⁰ F Parola, 'Managing Port Concessions: Evidence from Italy', *Maritime Policy and Management*, 39(1), 2012, pp. 45-61, p. 47.

¹³⁶¹ F Parola, *op. cit.*, p. 56.

¹³⁶² F Parola, *op. cit.*, p. 56.

¹³⁶³ European Commission (EC), *Public Financing and Charging Practices of Seaports in the EU*, p. 12. Available at: http://ec.europa.eu/transport/modes/maritime/studies/doc/2006_06_eu_seaports_study.pdf [accessed on 22 July 2013].

¹³⁶⁴ F Parola, *op. cit.*, p. 49.

¹³⁶⁵ F Parola, *op. cit.*, p. 46.

¹³⁶⁶ European Commission (EC), *Public Financing and Charging Practices of Seaports in the EU*. Available at: http://ec.europa.eu/transport/modes/maritime/studies/doc/2006_06_eu_seaports_study.pdf [accessed on 29 January 2013], p.15.

¹³⁶⁷ F Parola, *op. cit.*, p. 48.

¹³⁶⁸ *Diritto dei Trasporti e della Navigazione, Codice della Navigazione*, Article 49. Available at: <http://www.fog.it/legislaz/cn-0028-0061.htm> [accessed on 22 July 2013].

¹³⁶⁹ For example European Transport, *Italian versus Northern Range Port Competitiveness: A Transportation Cost Analysis in Chinese Trade*. Available at: http://www.openstarts.units.it/dspace/bitstream/10077/5873/1/CazzanigaFrancesetti_ET30.pdf [accessed on 22 July 2013].

Process and Consultation

Any 'process' regarding ports is largely supervisory. Approval from the Ministry of Transport is required for the appointment of a Port Authority's executive management positions, and the Ministries of Transport and Treasury approve the financial system, and final accounts, of each Port Authority.¹³⁷⁰ A customs representative (from the Ministry of Finance) must be on the port's committee.¹³⁷¹

Technically, the port's president and his/her committee are answerable to the Ministry of Transport, who can issue notices of enforcement. However, it is unclear whether such notices extend beyond the purview of the approval processes mentioned above, or whether they are issued regularly.

Role of Interested Parties

The legislation requires each Port Authority to consult with a committee of the firms that have concession arrangements in the port. The committee is made up of five representatives from the firms.

The role of the committee is to assist in the running of the port by keeping the Port Authority informed of the needs of concession holders and other stakeholders. The committee is also able to report to the Ministry of Transport any concerns or considerations that it feels are not adequately addressed by the Port Authority.

Nationally, there is a Central Consultative Committee that includes: members from each port's consultative committee; executives from the Ministries of Transport, Labour and Welfare, and Health; and other maritime officials.¹³⁷²

Regulatory Development

Prior to 1994, ports were considered public land and the exclusive use of any of that land by a port operator was uncommon, or at least not encouraged by the law. The port areas were run by a port body that also carried out port activities, which made it difficult for private entry.

In 1994, the laws applying to ports were changed. As mentioned previously, Port Authorities now manage the port areas but cannot participate in port activities. The concession arrangements allow the Port Authorities to generate income for investment in the ports. This arrangement has been credited with improving the efficiency of Italian ports.¹³⁷³

Further port reforms are currently being debated by the Italian Parliament. The reforms call for: transparency criteria for awarding port areas; mandatory tendering processes; biennial verification that concessionaires have abided by contractual obligations; and a unified methodology at the national level for determining concession fees based on the 'rate of return' principle.

¹³⁷⁰ Legge 26 gennaio 1994, n.84, *Riordino della legislazione in materia portuale*, Article 12. Available at: <http://www.regione.sicilia.it/turismo/trasporti/arcnome/l%2084-1994.pdf> [accessed on 16 July 2013].

¹³⁷¹ *Ibid*, Article 9.

¹³⁷² *Ibid*, Article 15.

¹³⁷³ F Parola, *op. cit.*, p. 48.

Netherlands

OVERVIEW

The Netherlands is a unitary state with regulatory arrangements set at the national level or, where authority is devolved, by administrations at the province level. As a Member State of the European Union, the regulatory regime in the Netherlands also reflects legislation issued at the European level, which is either directly applicable, or that has been transposed into Dutch law.

The regulatory institutional structure in the Netherlands has recently undergone substantial change with the formation of the *Autoriteit Consument & Markt* (ACM or Authority for Consumers and Markets) that commenced operations on 1 April 2013. It was formed by the merger of the two main regulatory authorities for infrastructure; the *Nederlandse Mededingingsautoriteit* (Netherlands Competition Authority, NMa) and the *Onafhankelijke Post en Telecommunicatie Autoriteit* (Office of Post and Telecommunications, OPTA); with *Consumentenautoriteit* (the National Consumer Authority). The ACM enforces the Netherlands and EU competition law, and, through separate chambers, is responsible for the economic regulation of energy, telecommunications, postal services and transport. The ACM has enlarged powers relative to its predecessors.¹³⁷⁴

In energy, the ACM conducts sector-specific regulation to facilitate competition and consumer protection in the area of energy supply, and to improve efficiency and ensuring security of supply in the area of energy networks. The electricity and gas distribution networks are subject to price-cap regulation with a system of national yardstick competition, while a revenue-cap regulation with a yardstick that is partly based on international benchmarks applies to electricity transmission.

Telecommunications and posts are regulated by the ACM that undertakes sector-specific, *ex ante* regulation, to promote competition in the markets for electronic communications and posts in the Netherlands.

Water and wastewater provision is a matter of provincial or municipal concern, although the national government co-ordinates national initiatives involving providers. Efficiency benchmarking of providers is a feature of governance of the water and wastewater sector in the Netherlands. The 2009 *Water Supply Act* was a move to implement integrated water management according to the *EU Water Framework Directive*.

In rail transport, the ACM regulates national railways; and monitors the activities of municipal public transport companies in the three largest Dutch cities: Amsterdam, Rotterdam and The Hague. On 1 April 2013, the ACM took over responsibility for rail regulation from the Office of Energy and Transport Regulation (DREV), a chamber of the NMa. Its authority derives from the *Railway Act 2005* and the *Passenger Transport Act 2000*. The ACM regulates the Netherlands' main airport, Amsterdam Schiphol. The national Ministry of Infrastructure and Environment is responsible for the regulation of four airports which are deemed to be of national importance: Groningen Airport Eelde, Lelystad Airport, Maastricht Aachen Airport and Rotterdam The Hague Airport. Provincial governments have responsibility for airports of regional importance.

Municipalities generally operate ports, with individual port authorities setting fees and charges. The ACM regulates pilotage charges in Dutch ports.

GEOGRAPHY, POPULATION, ECONOMY, POLITY AND LEGAL SYSTEM¹³⁷⁵

The Netherlands is a small western European country bordered by Belgium, Germany and the North Sea. It is very flat, situated at the mouths of three of Europe's main rivers and with the highest point being only 322 meters above sea level. The Netherlands has a maritime climate, with cool summers and mild winters. Precipitation occurs throughout the year.

An estimated population of 16.8 million combined with a small land area of 33 883 square kilometres (about 20 per cent of its area is water) means that the Netherlands has a high population density of 496 per square kilometres of land area. The three largest cities are Amsterdam (the capital with

¹³⁷⁴ ACM, *Our Organisation*. Available at: <https://www.acm.nl/en/about-acm/our-organization/the-netherlands-authority-for-consumers-and-markets/> [accessed on 17 June 2013].

¹³⁷⁵ Central Intelligence Agency (CIA), *World Fact Book – Netherlands*. Available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/nl.html> [accessed on 19 June 2013].

approximately one million population), Rotterdam (approximately one million) and The Hague. While it has no large cities, the Netherlands is heavily urbanised.

The Netherlands has a prosperous and open economy, which depends heavily on foreign trade. The estimated 2012 GDP of US\$773.1 billion (PPP basis) makes the Netherlands the sixth largest economy in the Euro-zone. Per capita GDP is US\$42 900, which is in the upper half of OECD countries. A budget deficit has emerged following the global financial crisis; although accumulated government debt is relatively low by European standards. The economy contracted in 2011. Unemployment is at 6.8 per cent of the estimated workforce.

The natural resources of the Netherlands include natural gas (it has the second largest deposit of natural gas in the EU after the United Kingdom), oil, sand and gravel, limestone, water and arable land.

The considerable arable land produces grains, potatoes, sugar beets, fruits, vegetables and livestock. This highly mechanised agriculture accounts for only about 2 per cent of employment.

The key manufacturing activities in the Netherlands are food processing, chemicals, petroleum refining, transport equipment, microelectronics, and electrical machinery and equipment.

As in other highly developed countries, the services sector accounts for about 80 per cent of employment and GDP.

International trade is important to the economy. An estimated 80 per cent of exports go to EU countries, amounting to a quarter of the Netherlands' national income. The Netherlands' most important European trading partners are Germany, Belgium, the UK, France and Italy. China, Russia and the United States are important, particularly as sources of imports. The Netherlands is one of the leading European nations for attracting foreign direct investment and is one of the five largest investors in the United States of America.

The Netherlands has a highly developed infrastructure in energy, transport, telecommunications, posts and water and wastewater. Most energy production is thermal, but there is one nuclear power plant supplying about 2 per cent of the total and renewable energy now provides 14 per cent of electricity capacity. Telecommunications is highly advanced with high penetration of fixed-line and mobile telecommunications. Broadband penetration is among the very highest in the world. In transport it is a hub for many large European economies, and this is reflected in its large ports of Rotterdam and Amsterdam that are connected to road, rail and inland waterways. Amsterdam's Schiphol airport handles 40 million passenger movements annually.

There are three levels of government in the Netherlands – central government; twelve provincial authorities; and 443 municipalities. Central government is a constitutional monarchy and a parliamentary democracy, with a two-tier parliament, the Staten General. The First Chamber of 75 members is elected by the province councils every four years and has powers only to accept or reject legislation (not initiate or amend it). The Second Chamber of 150 members is directly elected every four years.

The national government comprises a Council of Ministers headed by the Prime Minister, responsible to parliament. The Monarch serves as official head of State.

The twelve province parliaments oversee regional government and have the power to raise regional taxes. Their responsibilities include land-use planning; transport; the economy; agriculture; environmental management; recreation and overseeing the work of the water boards (section 5) and the financial affairs of the municipalities. The governing executive of each state is directly elected, but is presided over by a commissioner appointed by the Crown.

Municipalities form the lowest tier of government in the Netherlands. Each municipality has its own council and executive (mayor and aldermen). They all apply national legislation on matters such as social security benefits. Municipalities generate about 18 per cent of their revenue from their own taxes and levies; with most of the remaining revenue coming from central government.¹³⁷⁶ The main responsibilities of municipalities are to maintain the housing stock, and the local transport network. In

¹³⁷⁶ Statistics Netherland, *Tax Revenues Increasingly Important for Municipalities*, 18 December 2012. Available at: <http://www.cbs.nl/en-GB/menu/themas/overheid-politiek/publicaties/artikelen/archief/2012/2012-3755-wm.htm?RefererType=RSSItem> [accessed on 20 June 2013].

recent years, many central government powers and responsibilities have devolved to the municipalities.

The Constitution contains the rules for the political and legal structure of the Netherlands and establishes the fundamental rights of citizens. Laws made by the central government and by lower legislative bodies such as the province executives and local councils must conform to the Constitution's provisions.

The legal tradition in the Netherlands is a civil law system where a key characteristic is that the laws are largely codified and there are no binding precedents set by judicial rulings (case law). The law is contained in a number of codes such as a *Civil Law Code*, *Code of Civil Procedure*, and *Commercial Code*. In addition, as a member state of the European Union, the Netherlands is subject to, or required to adopt, relevant laws set in place at that level.

The Netherlands court system is divided into 19 districts, each with its own court. The district courts are made up of a maximum of five sectors, including an administrative sector, civil sector, criminal sector and subdistrict sector. The 19 districts are divided into five areas of Court of Appeal jurisdiction. The Court of Appeal can review the decisions of district courts on merits and reach different conclusions. Appeal from the Appeal Courts to the Supreme Court of the Netherlands is possible on points of law only.

As discussed below in more detail, appeals of regulatory decisions are generally considered by a specialised chamber of the Court of Appeal, known as the College of Appeals for Business.

APPROACH TO COMPETITION AND REGULATORY INSTITUTIONAL STRUCTURE

The *Autoriteit Consument & Markt* (ACM; in English: Authority for Consumers and Markets) commenced operations on 1 April 2013. It was formed by the merger of the two main regulatory authorities for infrastructure; the *Nederlandse Mededingingsautoriteit* (Netherlands Competition Authority, NMa) and the *Onafhankelijke Post en Telecommunicatie Autoriteit* (Office of Post and Telecommunications, OPTA) with the *Consumentenautoriteit* (National Consumer Authority).

The ACM enforces Netherlands and EU competition law, and, through separate chambers, is responsible for the economic regulation of energy, telecommunications, postal services and transport areas. It has enlarged powers relative to its predecessors. The rationale for the consolidation of the three existing entities has been described as increasing efficiency and effectiveness of competition oversight and market regulation. Specifically, the consolidated authority is expected to be better able to anticipate market developments in a flexible and integrated manner, and make better use of its consolidated knowledge and expertise. Another anticipated benefit of the consolidation is cost savings.¹³⁷⁷

The ACM has the same legal status as the NMa: being a 'small autonomous administrative authority' (ZBO) under Dutch law. A ZBO is not a legal person. The ACM's staff is officially employed with the Ministry of Economic Affairs, Agriculture and Innovation; which sets the ACM's budget and staffing levels.¹³⁷⁸ Management lies with the ACM Board; consisting of three members, and which governs in a spirit of collegiality. Appointment is made on the basis of expertise required for performing the job, social knowledge and experience. The period of appointment is five years for the chairman and seven years for other members, and they can be reappointed once.¹³⁷⁹ The seven directors and the chief economist of the new entity all come from one of the three authorities that merged into the ACM; three from the NMa, three from the OPTA and two from the Competition Authority.¹³⁸⁰ For example, the Chief Economist of the ACM was previously the Chief Economist of the NMa.

The ACM has two offices (Policy and Communications; and Office of the Chief Economist) and six departments: Consumer Department; Energy Department; Competition Department;

¹³⁷⁷ ACM, *Bill on ACM establishment submitted to the Dutch Parliament*, Press Release. Available at: <https://www.acm.nl/en/publications/publication/7500/Bill-on-ACM-Establishment-Act-submitted-to-the-Dutch-Parliament/> [accessed 20 June 2013].

¹³⁷⁸ The OPTA had a different legal status as an independent administrative body (IAB) with legal personality and its own personnel, and therefore a different form and level of detachment from government.

¹³⁷⁹ *The Bill On Rules Regarding the Establishment of the ACM*, Article 2, in Dutch. Available at: <http://www.eerstekamer.nl/9370000/1/j9vvhwtbnzpbzcc/vj3b6zg5dxzo/f=y.pdf> [accessed on 2 July 2013].

¹³⁸⁰ ACM, *Directors of ACM Departments Announced*, Press Release. Available at: <https://www.acm.nl/en/publications/publication/10807/Directors-of-ACM-departments-announced/> [Accessed 20 June 2013].

Telecommunications, Transport and Postal Services Department; Legal Department; and Corporate Services Department.¹³⁸¹ Together these represent the core of the ACM's oversight and regulatory activities. The ACM has approximately 520 staff members and is located in the Hague.

The ACM describes its mission in the following terms:¹³⁸²

The Netherlands Authority for Consumers and Markets (ACM) creates opportunities and options for businesses and consumers alike: opportunities through innovation, new products, services and businesses, and options because therein lies the key to having well-functioning markets. We want consumers to have a real choice, and to have consumers who are not afraid of making a choice. That is why we want businesses be open about what they offer. And finally, consumers should be informed of what their rights are. Fair trade between businesses and consumers: that is what ACM aims for.

The ACM is the autonomous administrative agency responsible for enforcing the *Competition Act 1997* and applying Articles 101 and 102 of the *Treaty on the Functioning of the European Union* in the Netherlands. It enforces the prohibition against cartels and the abuse of a position of significant market power (SMP) in all markets, and determines whether a violation of the *Competition Act* has taken place. The ACM also approves mergers. (Previously, the NMa worked closely with the OPTA in relation to telecommunications and posts mergers under a Cooperation Protocol.) Since 2012, the ACM is also charged with the oversight of governments (local, provincial and national) under the *Dutch Act on Government and Free Markets*. The Act, which amends the *Competition Act*, sets down rules to prevent unfair competition in situations where the government competes with private undertakings. The ACM is responsible for ensuring government undertakings comply with these rules.¹³⁸³

The ACM undertakes sector-specific regulation of the energy sector under the *Electricity Act 1998*, the *Gas Act 2000*, and the *Independent Grid Administration Act 2006*. The stated objectives of the ACM in relation to the regulation of energy suppliers are competition and consumer protection. The stated objectives of the ACM in relation to the regulation of the energy network operators (where competition does not exist) are improving efficiency plus ensuring security of supply. The ACM is also responsible for enforcing the *Heat Act*.

The ACM supervises compliance with legislation relevant to the electronic communications and postal markets. The Minister of Economic Affairs has no direct control over the decisions of the ACM. The communications work of the ACM is partly funded by electronic communication service providers. Every year they pay a fee for the regulation of their market. The fee is based on the net turnover of these market parties, details of which must be provided to the ACM annually.

In relation to the sector-specific regulation of transport, the following legislation is administered by the ACM: the *Passenger Transport Act 2000*, the *Railway Act 2005*, the *Aviation Act 2006*, and the *Market Oversight Registered Pilots Act 2008*. The ACM's stated objectives are, in relation to the rail network, fair and efficient capacity allocation in the absence of competition. In relation to passenger and freight transport, its objectives relate to the promotion of competition.¹³⁸⁴

The powers of the ACM have been laid down in several laws and regulations. It is a combination of the individual powers of each of the constituent authorities that have merged into the ACM. A bill is currently being drafted that proposes to streamline all of the separate procedures, duties, and powers. ACM officers are authorised to enter premises, ask for information, demand inspection of documents, and take data with them. Furthermore, everyone is required to cooperate with the ACM's officers in investigations. If businesses do not observe the rules, the ACM has several instruments at its disposal

¹³⁸¹ ACM, *Organisational Structure*. Available at: <https://www.acm.nl/en/about-acm/our-organization/organizational-structure/> [accessed on 17 June 2013].

¹³⁸² ACM, *Our Mission*. Available at: <https://www.acm.nl/en/about-acm/mission-vision-strategy/our-mission/> [accessed on 17 June 2013].

¹³⁸³ There are four principal rules: (1) a requirement to include all integral costs in pricing; (2) a prohibition against giving preferential treatment to government undertakings over their competitors; (3) use of data for other purposes; and (4) separation of roles. Available at: <https://www.acm.nl/en/publications/publication/10811/NMa-begins-enforcement-of-Dutch-Act-on-Government-and-Free-Markets/> [accessed on 20 June 2013].

¹³⁸⁴ ACM, *Our Powers*. Available at: <https://www.acm.nl/en/about-acm/mission-vision-strategy/our-powers/> [accessed on 17 June 2013].

to make them observe the rules. For example, it can impose an order on businesses subject to periodic penalty payments. The aim of such orders is to end a violation or to prevent the continuation of one. It can also impose a preventive order. This may be an option when a violation is imminent. Alternatively, businesses can make a commitment containing conditions businesses promise to comply with in order to prevent future enforcement actions. Ultimately, it can punish violators with fines, if necessary. The final level of a fine depends on the type of violation, and on the specific circumstances of the case in question. Repeat offences will be punished more severely.

Appeals

All decisions of the ACM may be appealed, consistent with the *General Administrative Law Act*¹³⁸⁵ and the requirements under the *European Convention of Human Rights*. Under Article 7.1 of the *General Administrative Law Act*, a 'person who has the right to appeal a decision to an administrative court, must first lodge an objection' to the regulatory authority (the ACM) which requires the ACM to reconsider a decision. If a party to a decision is not satisfied with the ACM's finding it may, within six weeks of the decision being released, request this procedure (Article 6.7 of the *General Administrative Law Act*). This 'Objections Procedure' is a unique feature of the appeals process in the Netherlands. (There is provision for the objection procedure to be bypassed under circumstances set out in Article 7.1 of the *General Administrative Law Act*).

The Objections Procedure involves a full substantive review of the ACM's decision. It is undertaken by a team within the ACM that is separate from the ACM. The review must be *ex nunc* (that is, 'from now on'), and take consideration of changed policies, changed legal rules and changed circumstances at the time of the review.

During the Objections Procedure, the ACM must give interested parties the opportunity to be heard before taking a decision. The ACM can conduct the hearing itself or it can appoint an independent external advisory committee (see below) to do so. 'Interested Parties' are parties who are directly affected by the decision or who can otherwise prove an interest in the decision (section 1.2 of the *General Administrative Law Act*). In some cases, competitors and user groups are automatically defined to be Interested Parties.

The ACM has six weeks to undertake an Objections Procedure, although a decision can be delayed by up to four weeks with the consent of the parties, and it is possible to 'stop the clock' in certain circumstances (Article 7.10 of the *General Administrative Law Act*).

Under legislation accompanying the creation of the new ACM, there is a proposal to abolish the Objections Procedure phase for decisions imposing fines.¹³⁸⁶ Currently, a specific advisory committee (the Advisory Committee on Competition Act Objections) advises the ACM on objections against fines. It is comprised of 15 members, lawyers and economists, who have no ties with the ACM.

Should the Objections Procedure not resolve a dispute, parties may apply for review of the ACM's decision at a District Court.¹³⁸⁷

With only a handful of exceptions, administrative disputes are heard by the district court; in many cases the hearing by the administrative law sector is preceded by an objection procedure under the auspices of the administrative authorities. It is usual for these cases to be heard by a single judge, but here too the district court can decide to appoint three judges to a case which is complex or which involves fundamental issues.

For example, the District Court of Rotterdam performs this role in relation to competition (ten appeals completed in 2012); energy (56 appeals) and transport (two appeals).¹³⁸⁸

¹³⁸⁵ A translation of the *General Administrative Law Act* is available at: http://www.juradmin.eu/colloquia/1998/netherlands_annex.pdf [accessed on 28 June 2013].

¹³⁸⁶ JH Jans and A Outhuijse, *Advisory Objection Procedures in the Netherlands: A Case Study on Their Usefulness in Dutch Competition Law*, Working Paper, 16 November 2012. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2176719&download=yes [accessed on 17 June 2013].

¹³⁸⁷ *De Rechtspraak*. Available at: <http://www.rechtspraak.nl/English/Judicial-System/Pages/District-courts.aspx> [accessed on 28 June 2013].

¹³⁸⁸ *NMa 2012 Annual Report*, March 2013, p. 7. Available at: <https://www.acm.nl/en/publications/publication/11263/NMa-Annual-Report-2012-NMa-saved-Dutch-households-an-average-of-EUR-33-in-2012/> [accessed on 28 June 2013].

The Court in the second instance is the specialised chamber of the Court of Appeal known as the *College van Beroep voor het bedrijfsleven* (In English: the Trade and Industry Appeals Tribunal).¹³⁸⁹ It is a special administrative court which rules on disputes in the area of administrative law. The Trade and Industry Appeals Tribunal also rules on appeals for specific laws, such as the *Competition Act* and the *Telecommunications Act*. Although it is not a specialised competition court, it is an independent court with its own pool of judges who have a specialisation in commercial matters. Appeals that are heard through these channels follow strict judicial procedures. The Trade and Industry Appeals Tribunal in 2012 completed 12 judicial appeals in relation to competition; two appeals in relation to energy; three appeals in relation to transport (*NMa 2012 Annual Report*, p. 7); and 14 appeals against market analyses in telecommunications (*OPTA 2012 Annual Report*, p. 71).

*Consumer Focus*¹³⁹⁰

The Chairman of the newly formed Board of the Netherlands Authority for Consumers & Markets (ACM) has stated that consumers are central in the oversight of the Authority, emphasising that consumer focus is concerned with whether consumers benefit from the Authority's actions. The aims of this consumer focus are to promote opportunities and options for businesses and consumers.

Given its widely diverse fields, combined with its limited resources, the ACM plans on prioritising market and consumer problems according to: the harm that the problem inflicts on consumers; the public interest that is at stake; and whether the ACM is able to take action effectively. A major priority for the Authority regarding consumers, for example, will be to increase transparency in order to enable consumers to make a choice (in telecommunication, energy, travel industry, mobile games), and in countering aggressive selling methods.

REGULATORY ARRANGEMENTS BY INDUSTRY OR SECTOR

1. Energy

Gas

The Netherlands is the largest producer of natural gas in the EU, although, on government forecasts, it is expected to shift from a net exporter to a net importer of gas between 2020 and 2025. The Dutch network consists of separate networks to transport two different qualities of gas, H-gas and L-gas. Nearly all residential and commercial consumers use (blended) low-calorific gas (L-gas), while industry and power generators use mostly high-calorific gas (H-gas). The Dutch gas transport network is directly connected to four European countries via 25 interconnections. Gas can be both exported and imported via connections with Belgium and Germany. Gas can be exported only via the connection with the United Kingdom and imported only via the connection with Norway.

NAM (Shell and ExxonMobil each own half) is the largest gas producer and is in charge of the significant Groningen field. Several other oil and gas producers operate small fields onshore and offshore in the North Sea, including GDF SUEZ E&P Nederland BV, Vermillion and Wintershall.¹³⁹¹

There is one national TSO for gas in the Netherlands, *N.V. Nederlandse Gasunie* (Gasunie), a company fully owned by the State, which owns and operates the gas transportation network through its affiliate, Gas Transport Services B.V (GTS). There are currently eight DSOs distributing gas and electricity and two DSOs distributing gas only. These DSOs are fully owned by Dutch municipalities and provinces.

Since 2005, energy companies have been required, under EU Directives, to keep supply and distribution activities legally separated. However Dutch law goes further, requiring structural separation.

¹³⁸⁹ Courts and Cases Netherlands. Available at: <http://www.lexadin.nl/wlg/courts/nofr/eur/xctned.htm> [accessed on 28 June 2013].

¹³⁹⁰ Authority for Consumers and Markets, *The Netherlands Authority for Consumers and Markets: Consumers are Central*. Available at: <https://www.acm.nl/en/publications/publication/11311/The-Netherlands-Authority-for-Consumers-en-Markets-consumers-are-central/> [accessed on 16 July 2013].

¹³⁹¹ International Energy Agency, *Oil and Gas Security, The Netherlands*. Available at: <http://www.iea.org/publications/freepublications/publication/Oil&GasSecurityNL2012.pdf> [accessed on 20 June 2013].

The Dutch *Independent Grid Administration Act 2007* ('the Unbundling Act') required full ownership unbundling of vertically integrated energy companies by 2011. Under the *Independent Grid Administration Act 2007*, companies carrying out gas network activities in the Netherlands are not permitted to be part of the same group as companies carrying out gas production, trading and/or supply activities, or to hold any shares, directly or indirectly, in production, trading and/or supply companies (and *vice versa*). The same 'group-ban' rules apply to those carrying out electricity network activities (see below).

The two largest Dutch utility companies, *Essent NV* and *Nuon NV*, have already unbundled their production and supply arms from their network divisions. However, three vertically integrated Dutch public utility companies (including *Essent NV*) have challenged the *Independent Grid Administration Act 2007* before the Court of Appeal of The Hague, and two DSOs are not yet ownership unbundled, pending completion of this judicial challenge. The Court took the view in 2010 that the Dutch law constituted an obstacle to the free movement of capital, contrary to Article 63 of the *Treaty on the Functioning of the European Union* (TFEU). The Dutch Government has appealed the ruling to the Supreme Court of the Netherlands.¹³⁹² The Supreme Court referred to the European Court of Justice preliminary questions over the compatibility with the TFEU. On 3 June 2013, Advocate-General of the European Court of Justice offered legal opinion on the issue.¹³⁹³

The case is still in progress. An EU Directive, transposed into Dutch law in 2012, sets out unbundling requirements for energy companies and requires separation of the operation of transmission networks from generation and supply activities.¹³⁹⁴ As discussed above, current Dutch law already exceeds requirements of the EU directive in relation to ownership unbundling of gas and electricity companies (because it applies to DSOs as well as TSOs). However, Dutch law will need to be amended in relation to TSOs to extend the group-ban to preclude them being part of a group engaged in either electricity or gas supply or production (not just gas in the case of the Gas TSO, or electricity in the case of the electricity TSO), and to extend the group-ban outside the Netherlands.

A trading and supply company, *GasTerra*, is half owned by the State (ten per cent directly and 40 per cent through EBN, a state-owned company), and half by Shell and Exxon (25 per cent each). *GasTerra* sells domestically produced gas in the Netherlands; and is the major supplier in the wholesale market, with a share of between 70 and 75 per cent. *GasTerra* is also very active on the European gas market, and has import contracts with suppliers from Russia, Norway and Germany.¹³⁹⁵ Trade in gas occurs through a wholesale hub, the Title Transfer Facility (TTF). Liquidity on the TTF is second only to the NBP (UK) in the European Union.

There are around 30 companies operating on the Dutch retail gas market, including NEM, E.ON, DONG, *Electrabel*, *Eneco*, RWE (formerly *Essent*), *Vattenfall* (formerly *Nuon*), and Delta. Suppliers operate under a licence regime, overseen by the ACM. Three large suppliers have a combined market share of nearly 80 per cent.¹³⁹⁶

Since 2004, the energy market has been fully liberalised, with all consumers able to choose their own supplier of gas and electricity. Supply tariffs are not regulated,¹³⁹⁷ although retail market suppliers must submit their prices to the ACM for monitoring purposes, and the ACM has power to impose tariff

¹³⁹² NMa, *National Report of Energykamier to the European Commission*, 2011. Available at: http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/NATIONAL_REPORTS/National%20Reporting%202011/NR_EnC11_NR_Netherlands-EN.pdf [accessed on 20 June 2013].

¹³⁹³ Natural Gas Europe, *Netherlands: Statutory Bans Cleared in Public Energy Network Companies*, 3 June 2013. Available at: <http://www.naturalgaseurope.com/netherlands-statutory-bans-cleared-in-public-energy-network-companies> [accessed on 21 June 2013].

¹³⁹⁴ EU Third Energy Package, Articles 9, 10 and 11 EU Directive 2003/54/EC (Gas) and 2003/55/EC (Electricity). Under the directive, any TSO needs to be certified by the national regulatory authority, and will only be so where it meets certain requirements including unbundling requirements. Under the Directive, unbundling can be achieved under three models (1) full ownership unbundling, (2) the independent system operator model (ISO model); and (3) the independent transmission operator (ITO) model.

¹³⁹⁵ International Energy Agency, *Oil and Gas Security, The Netherlands*. Available at: <http://www.iea.org/publications/freepublications/publication/Oil&GasSecurityNL2012.pdf> [accessed on 20 June 2013].

¹³⁹⁶ NMa, *National Report of Energykamier to the European Commission*, 2011. Available at: http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/NATIONAL_REPORTS/National%20Reporting%202011/NR_EnC11_NR_Netherlands-EN.pdf [accessed on 20 June 2013].

¹³⁹⁷ Since 2004, the energy market for small consumers had been fully liberalised, with all consumers able to choose their own supplier of gas and electricity.

reductions on supply companies if tariffs are determined to be unreasonably high.

Since September 2011, the Netherlands has had the potential to supply gas to the market via an LNG terminal, the GATE terminal, located on the *Maasvlakte* in Rotterdam. It is a joint venture of *Gasunie* and *Vopak*. At the end of 2011 there were four underground natural gas storage facilities in the Netherlands.¹³⁹⁸

The ACM must approve tariffs set by GTS for connection and access to the transmission system. GTS has to submit a tariff proposal annually for each exit and entry point on the basis of cost reflection. The ACM calculates the efficiency factors for the tasks of the TSO concerning transport and transport-related services, balancing services and quality-conversion services.¹³⁹⁹ The new LNG terminal at *Maasvlakte* has a ministerial exemption from having its tariff methodology approved by the regulator. The method used by the former NMa of setting the tariffs for GTS has been the subject of judicial appeal in recent years. However, a 2012 decision of the highest relevant court confirmed the former NMa's methodologies.¹⁴⁰⁰

The ACM also regulates the tariffs set by the operators of the regional gas distribution networks. It does so using a system of national yardstick competition (with a price cap) and the tariffs can differ between DSOs.

In addition to regulating transmission and distribution tariffs, the ACM enforces compliance of energy companies with competition laws, and has powers of dispute-settlement in relation to disputes involving the TSO, DSOs or the LNG facility.

Electricity

Prior to market reform in 2004, electricity supply was dominated by four vertically integrated, non-competing, regional electricity companies which co-operated through an organisation called *Samenwerkende Elektriciteits-Productiebedrijven* (SEP), a joint-stock company owned by its members. SEP owned and operated the high-voltage transmission grid (380 kV and 220 kV levels) and had a statutory monopoly on imports until 1998. SEP ceased coordinating the centralised market after the establishment of the Transmission System Operator, *TenneT*, in October 1998. However, SEP continued to own *TenneT* until November 2001 when *TenneT*, together with its transmission assets, was purchased by the State and SEP was dissolved.¹⁴⁰¹

TenneT TSO, a subsidiary of *TenneT*, is the sole national TSO for electricity in the Netherlands, and is required to keep its public and commercial activities legally separated.¹⁴⁰² As it does not undertake generation or retail activities, the electricity industry also exhibits structural separation. Under the recent EU Directive, participation by *TenneT* in either gas retail or generation activities, or in energy activities outside the Netherlands, are also precluded.

There are currently eight regional electricity distribution companies, each wholly owned by Dutch municipalities and provinces. Under Dutch law, ownership of DSOs must be fully unbundled from companies carrying on any generation or supply activities. Two integrated companies are not yet ownership unbundled pending completion of a judicial challenge to part of the unbundling law (2011 *Energiekamer Report*). As discussed in the gas subsection above, judicial appeals are pending in relation to this requirement.

¹³⁹⁸ International Energy Agency, *op. cit.*

¹³⁹⁹ This method of regulation was introduced in 2011 after the Trade and Industry Appeal Tribunal annulled prior methods of regulation for two early periods.

¹⁴⁰⁰ In November 2012, the Dutch Trade and Industry Appeals Tribunal (CBB) issued a final ruling on the method decisions for Gas Transport Services (GTS). In these method decisions, the NMa had set the tariffs for GTS. These tariffs concerned the regulatory period of 2005 through 2013. Key questions in the ruling were the value of GTS and the level of the tariffs. A copy of the press release by the NMa on 8 November 2012 is available at: <http://www.noodls.com/view/733A6306A46C771BF539A571F664101733DB9412> [accessed on 20 June 2013].

¹⁴⁰¹ OECD, *Experiences with Structural Separation 2011, 2012*. Available at: <http://www.oecd.org/daf/competition/50056685.pdf> [accessed on 20 June 2013].

¹⁴⁰² An electricity interconnector between the UK and the Netherlands started operations in 2011 and is operated by BritNed Development (co-owned by National Grid – a British company) and *TenneT*. It has partial exemption from unbundling regulation. Source: 2011 *Energiekamer Report*.

Ownership of the four regional electricity generators has changed over time, with three now owned by foreign utilities, and one remaining in public hands.¹⁴⁰³ These four – *Electrabel* (part of GDF SUEZ), *E.ON Benelux*, *Essent* (part of RWE) and *Nuon/Vattenfall* are active in both the generation and retail markets. A number of smaller producers also operate in generation and retail.

The electricity retail market is characterised by three very large suppliers (all incumbents); four relatively small suppliers; and a large number of very small suppliers. The three very large suppliers that supply electricity to small consumers have a combined market share of approximately 80 per cent (2011 *Energiekamer Report*).

Since 2004, the energy market has been fully liberalised with all consumers being able to choose their own supplier of electricity. Supply tariffs are not regulated, although the ACM has power to impose tariff reductions on suppliers if tariffs are determined to be unreasonably high.

In the wholesale market, trading of electricity occurs through: bilateral contracts (20 per cent); over-the-counter trade (60 per cent); through the power exchange APX-ENDEX (20 per cent); and the balancing market (2011 *Energiekamer Report*). Competition in the wholesale electricity market is considered by the competition authorities to be increasing; particularly with the integration of the Dutch wholesale electricity market with surrounding markets, specifically the Nordic, Belgian and UK markets.¹⁴⁰⁴

The ACM must approve the transmission tariffs set by *TenneT*. It does so using a revenue-cap system with a yardstick that is partly based on international benchmarks, combined with a frontier shift based on productivity growth of other foreign TSO-companies. An average benchmark based on foreign TSOs is adopted. The yardstick objective is set for the final year of a three-to-five year regulatory period. The current regulatory period ends at the end of 2013. The allowed revenue of the company is adjusted annually at the rate of $(1 + CPI - X)$ in which CPI is the consumer price index and X is the efficiency incentive component. Quality is regulated through setting out quality-of-service standards rather than providing financial incentives. Based on the revenue-cap determination, *TenneT* prepares a tariff proposal (for the given demand forecasts), which will be assessed and approved by the ACM.¹⁴⁰⁵

The ACM also regulates the tariffs set by the operators of the regional electricity distribution networks. It does so using a system of national yardstick competition (with a price cap).¹⁴⁰⁶ The price cap is set at the annual adjustment rate of $(1 + CPI - X + q)$ in which q is measured based on the system-average-interruption-duration index. After legal disputes over the components of the X factor, this productivity yardstick is currently equal for all businesses (except for some regional difference allowances) and is based on sector-average performance which incorporates an estimate of the productivity growth for the sector. The current regulatory period is for three years between 2011 and 2013 inclusive.

Regulatory and Competition Institutions and Legislation

The ACM is charged with administering the *Electricity Act 1998*, the *Gas Act 2000* and the *Heat Act*. This was formerly the task of the Office of Energy and Transport Regulation (DREV), a chamber within the NMa. The stated objectives of the ACM in relation to the sector-specific regulation of energy suppliers are those of facilitating competition and consumer protection. The stated objectives of the ACM in relation to the regulation of the energy network operators (where competition does not exist) are those of improving efficiency and ensuring security of supply.

¹⁴⁰³ *Eneco* is owned by 60 Dutch municipalities; *Essent* was acquired by German company, RWE AG; *Oxxio* by UK company Centrica and *Nuon* by Swedish company *Vattenfall*. Source: OECD, *Experiences with Structural Separation*.

¹⁴⁰⁴ Electricity trading occurs between the Netherlands and each of Belgium, Norway and the UK, utilising cables between the Netherlands and those countries. See NMa, *National Report of Energiekamer to the European Commission*, 2012. Available at: http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/NATIONAL_REPORTS/National%20Reporting%202011/NR_En/C11_NR_Netherlands-EN.pdf [accessed on 17 June 2013].

¹⁴⁰⁵ European Regulators Group for Electricity and Gas (ERGEG), *2011 National Report of Energiekamer to the European Commission*, p. 11; Berenschot, *Tariefregulering in Retrospectief: Inventariserend en Structurerend Feitenonderzoek*, 11 April 2012, p. 3. Available at: <https://www.acm.nl/nl/publicaties/publicatie/10876/Berenschot-en-PwC-bevestigen-effectiviteit-tariefregulering/> [accessed on 21 June 2013].

¹⁴⁰⁶ Detailed information regarding the price-cap regulation can be found at: ACCC/AER, *Regulatory Practices in Other Countries: Benchmarking Opex and Capex in Energy Networks*, May 2012, Available at: <http://transition.accc.gov.au/content/index.phtml/itemId/1054590> [accessed on 21 June 2013].

In energy regulation, the ACM presently resumes the power of its predecessor, the NMa.¹⁴⁰⁷ Therefore, the ACM is responsible for the following matters under the relevant legislation:

- issuing supply permits for the supply of electricity or gas to captive consumers and small-scale users;
- determining the tariff structures and conditions for the transmission of electricity;
- determining guidelines for tariffs and conditions with regard to access to gas transmission pipelines and gas storage installations;
- determining connection, transmission and supply tariffs for electricity, including the discount (price cap) aimed at promoting the efficient operation of the electricity grid operators;
- determining transmission and supply tariffs for gas, including the discount (price cap) aimed at promoting the efficient operation of the gas network operators;
- assessing, every other year, whether operators sufficiently/efficiently meet the total demand for transmission capacity, as calculated on the basis of estimates submitted by the network operators;
- assessing, every other year, whether licence holders sufficiently/efficiently meet demands, as calculated on the basis of estimates of the total supply demand of captive consumers, submitted by the relevant license holders;
- monitoring developments in the markets for gas and electricity closely, with a view to transparency, non-discrimination, competition and effective market operations;
- advising the Minister of Economic Affairs on applications for approval with regard to instructions issued by an electricity/gas network operator;
- advising the Minister of Economic Affairs on applications for exemption from the statutory appointment of an electricity network operator; and
- certifying gas and electricity transmission operators in accordance with various requirements laid out in the transposed EU 'Third Energy Package'.

In summary, the ACM performs three principal functions in relation to the sector-specific regulation of energy. Firstly, it sets tariffs for energy transmission and distribution networks on an *ex ante* basis. These price determinations set the maximum tariffs for a period of three years for the gas and electricity TSOs; and for the gas and electricity distribution companies. Secondly, the ACM adjudicates disputes between users and network operators in non-price access matters. Thirdly, the ACM conducts a major annual monitoring exercise. This involves monitoring the wholesale gas market, the wholesale electricity market and the retail markets, and includes a review of day-to-day movement in prices, and other issues in each of the markets that have been identified either by the ACM or by participants in these markets.

Amendments to the *Gas Act* (effective 2011), gave the NMa (now the ACM) competence to make a one-time adjustment of tariffs at the start of a new regulation period to a level that is in conformity with an efficient-cost level, with due observance of a reasonable yield.

The ACM is responsible, under the *Heat Act*, for regulating the price of heat supplied on 'heat networks'. A heat network is a local network with usually just a single heat source; for example, district heating (through, for example, natural gas or coal, or through waste incineration), or block heating (heat supplied to entire buildings using shared boilers). Most heat networks have just one supplier, and consumers are bound to the supplier that operates the heat network and supplies the heat. Under the *Heat Act*, the ACM is required to set annually a maximum price that heat consumers will pay. Under this price cap, heat consumers will never pay more than gas consumers.

Consultation of Interested Parties

The role of end users and user groups in the regulatory process depends upon the matter under consideration. The main area of activity where end users and user groups get involved is in the development of network codes in energy networks. In undertaking its market monitoring exercise in

¹⁴⁰⁷ ACM, *Our Powers*. Available at: <https://www.acm.nl/en/about-acm/mission-vision-strategy/our-powers/> [accessed on 21 June 2013].

each of the wholesale-gas, wholesale-electricity and retail markets, the ACM meets with relevant suppliers and other key stakeholders, such as user groups and consumer associations, and seeks to identify the key issues and areas of concern of these groups.

End users and user groups are generally consulted, and invited to participate, in those processes. The Association for Energy, Environment and Water (VEMW is the Dutch acronym) represents the industrial users of electricity, gas and water in the Netherlands, and is part of the so-called 'user platform' being consulted by the energy sector and the ACM on defining tariff and non-tariff supply conditions.¹⁴⁰⁸ The Dutch Consumer Association (*Consumentenbond*)¹⁴⁰⁹ represents consumer interests in a wide range of areas in the economy, including the energy, communications and water and wastewater sectors.

The role of external experts and consultants in the regulatory process varies by type of matter under consideration. The former NMa had substantial outsourcing for economics-related work from both the Competition Department and the Chief Economist's Office.¹⁴¹⁰

Timeliness

The NMa published each year information on its 'Lead Times' relating to its various functions, including sanctions and conduct of the Objections Procedure. The *NMa 2012 Annual Report* reports that 'targets with regard to objections (antitrust, energy and transport) have not always been achieved, often due to conflicts with other procedures inside or outside the NMa' (p. 7). For example, with respect to its application of the Objections Procedures in electricity or gas in 2012, it achieved its 'norm' on only 42 per cent of occasions; while for dispute settlement, it achieved the norm on 82 per cent of occasions.

Information Disclosure and Confidentiality

The ACM has wide-ranging powers to obtain information from parties. These include powers to demand information, obtain access to inspect business data and a right to enter places (including residential properties and cars).¹⁴¹¹

These powers are provided under the *General Administrative Law Act 1994*, which places an obligation on companies to cooperate with administrative agencies where there is a reasonable suspicion of an infringement of a legal act. The ACM also has an ability to fine a company for not supplying information, although, in practice, this is generally only used as a threat.

In the interests of transparency, the ACM publishes operational protocols which set out its methods of operation in respect of the 'interaction' between market participants and the ACM. This includes, for instance, protocols in relation to company visits, accessibility and the submission of documents. The ACM also publishes its method of operation when it exercises its power to inspect and copy digital data.¹⁴¹²

In performing its annual market monitoring role, the ACM publishes a major report each year, which presents the key areas of focus in the sector in the following year. The annual market monitoring report requires a range of information gathering activities to be undertaken. Publicly available data are collected – including changes in daily electricity prices as recorded on the Amsterdam Power Exchange. Information requests are made to specific companies. Private information, such as details of generation supply, including bid data to the pool and information on marginal costs, is collected and analysed.

Network operators are subject to specific periodic requirements to provide information on their network's performance (in terms of quality and capacity) along with network and financial data relevant to assessing the efficiency of their operations.

¹⁴⁰⁸ VEMW, *About VEMW*. Available at: <www.vemw.nl/cms/showpage.aspx?id=24> [accessed on 17 June 2013].

¹⁴⁰⁹ Consumentenbond, *Home*. Available at: <http://www.consumentenbond.nl/test/woning-huishouden/woning/energieleveranciers/> [accessed on 17 June 2013].

¹⁴¹⁰ Global Competition Review, *Handbook of Competition Economics 2013*, ISSN 17479401, p. 81.

¹⁴¹¹ ACM, *Our Powers*. Available at: <https://www.acm.nl/en/about-acm/mission-vision-strategy/our-powers/> [accessed on 3 July 2013].

¹⁴¹² This is based on information provided by ACM's predecessor, the NMa. See NMa, *Procedure in Relation to the Inspection and Copying of Digital Data and Documents 2010*, 17 August 2010. Available at: [https://www.acm.nl/download/documenten/nma/digitale%20werkwijze%20\(en\).pdf](https://www.acm.nl/download/documenten/nma/digitale%20werkwijze%20(en).pdf) [accessed on 17 June 2013].

According to the Dutch *Competition Act*,¹⁴¹³ when submitting information to the ACM, parties are required to indicate which information, in their view, is confidential. In order to decide whether the claims of the notifying parties can be accepted, the ACM will apply Section 10 of the *Public Access to Government Information Act*.¹⁴¹⁴ Confidential information submitted by the notifying parties and third parties which is used in the final decision will be deleted in the non-confidential version of the decision which will be made publicly available. If the ACM and the parties disagree about whether or not certain information is confidential, the ACM shall not make this information public until one week has passed after the announcement of a decision to this effect (Sections 35 and 42(3) of the *Dutch Competition Act*). This gives parties the opportunity to commence legal proceedings requesting an injunction against publication to the competent court.¹⁴¹⁵

The provisions of the *Electricity Act* and *Gas Act* in respect of the use of information of parties active on the energy market (such as producers, suppliers and network operators) will be superseded by those in the new legislation empowering the ACM. The proposed new rules have been described as broader than the current ones. Specifically, it has been observed that the information the ACM obtains in relation to the performance of any one of its duties may be used for the performance of other duties attributed to it by different legislation. For example, any information which the ACM receives in the context of its regulatory powers under the *Electricity Act* or *Gas Act*, may also be used for its tasks under the *Passengers Transport Act 2000*, the *Railway Act*, the *Postal Act 2009* and the *Telecommunications Act*. Currently, this 'cross border use' is limited to the European energy legislation, the *Competition Act*, the *Heat Act* and the *Consumer Protection Enforcement Act*. The scope for the ACM to submit information to criminal authorities, and other regulators is also broadened under the new legislation.¹⁴¹⁶

There has been some controversy about these proposed new information powers, with specific concern expressed that information gathered on one legal basis may be made available to another part of the entity for different legal purposes without any restriction.¹⁴¹⁷

Decision-making and Reporting

All significant decisions relating to the regulation of the energy sector are taken by the full Board. The ACM is an independent regulatory body. Its staff is officially employed with the Dutch Ministry of Economic Affairs, whereas the Board is an autonomous administrative authority under Dutch law. The ACM website (*Board*) states that 'the Board of the ACM has final say over all decisions issued by the ACM'.¹⁴¹⁸

The ACM's regulatory tasks in relation to energy are performed by the Energy Department, which is charged with regulation of the energy and drinking water markets.¹⁴¹⁹

Appeals

All decisions of the ACM may be appealed, consistent with administrative law and the requirements under the European Convention of Human Rights. As previously described, the 'Objections

¹⁴¹³ A copy of the Act (in English) is available at: <http://www.dutchcivillaw.com/legislation/competitionact.htm> [accessed on 3 July 2013].

¹⁴¹⁴ A copy of the Act (in English) is available at: <http://www.legislationline.org/documents/action/popup/id/6395> [accessed on 1 July 2013].

¹⁴¹⁵ A copy of the Act (in English) is available at: <http://www.dutchcivillaw.com/legislation/competitionact.htm> [accessed on 1 July 2013].

¹⁴¹⁶ The ACM can now be authorised, by Ministerial decree, to submit information to the criminal authorities or other regulators. Currently, this authorisation is limited to administrative bodies (other than the Dutch Competition Authority) which – on the basis of the *Electricity Act 1998*, the *Gas Act* or any other legislation – are responsible for applying certain rules in the field of electricity and gas. Loyens Loeff newsletter, 10 October 2012. Available at: <http://www.loyensloeff.com/en-US/News/Publications/Newsletters/EnergyNewsletter/Energy_%20Newsletter_October_2012_EN.pdf.> [accessed on 17 June 2013].

¹⁴¹⁷ Jones Day, *Antitrust Alert: The Netherlands Launches New Consumer and Market Authority – The New Dutch Super Regulator*, April 2013. Available at: <http://m.jonesday.com/antitrust-alert-the-netherlands-launches-new-consumer-and-market-authority-the-new-dutch-super-regulator-04-04-2013/> [accessed on 21 June 2013].

¹⁴¹⁸ ACM, *Our Organisation*. Available at: <https://www.acm.nl/en/about-acm/our-organization/board/> [accessed on 3 July 2013].

¹⁴¹⁹ ACM, *Strategy Document (draft): The Netherlands Authority for Consumers and Markets*, April 2013. Available at: <https://www.acm.nl/en/publications/publication/11303/Draft-version-of-Strategy-Document-Netherlands-Authority-for-Consumers-en-Markets/> [accessed on 21 June 2013].

Procedure' must be followed.¹⁴²⁰ Should the Objections Procedure not resolve a dispute, parties may apply for judicial review of the ACM's decision.

Where tariff decisions are appealed, the tariff is still implemented at its scheduled date. If the appeal is allowed, any overpayments or underpayments are settled with future tariffs.¹⁴²¹

In 2012 there were 56 appeals completed by the District Court of Rotterdam against energy decisions and two appeals completed in the Trade and Industry Appeals Tribunal (NMa *2012 Annual Report*, p.6). In November 2012, the Trade and Industry Appeals Tribunal, the nation's highest court in antitrust matters, issued a final ruling on the method decisions for gas transmission operator Gas Transport Services (GTS) for the regulatory period of 2006 through 2013. In these method decisions, the NMa had set the tariffs for GTS. Key questions in the ruling were the value of GTS's network and the level of the tariffs. The Tribunal ruled in the NMa's favour on all counts, and consequently the current tariffs were upheld (NMa *2012 Annual Report*, p. 49).

Regulatory Development

One of the key priorities identified by the ACM for 2013 is to enhance the functioning and integration of the European energy market. The shaping of the integrated market will result in increased competition among energy suppliers, which may benefit consumers. Among other initiatives, the ACM will help draft new European regulations that will make that integration possible.¹⁴²²

2. Telecommunications

Fixed-line and mobile telecommunications in the Netherlands are highly advanced both technologically and with respect to market penetration.¹⁴²³ Fixed-line broadband penetration is the second highest in the OECD, at just under 40 per cent of inhabitants subscribing for fixed broadband. Broadband provision is approximately 49 per cent on DSL, 45 per cent on cable and six per cent on fibre-optic lines. Penetration of wireless broadband is sixteenth highest in the OECD.

Progressive privatisation of the state-owned telecommunications monopoly, KPN, began in 1994. The government sold its last shares in 2006. KPN continues to provide the majority of fixed-line services, although there are a number of other providers. KPN has also entered the mobile communications market, along with other carriers – Vodafone and T-mobile. The market shares of the three major mobile operators are fairly equal.

In the broadcasting market, analogue television has been losing market share to digital, with 72 per cent of Dutch consumers also watching digital TV.

In spectrum management, a major, multiband auction was held in October 2012 to release large amounts of spectrum in certain frequency bands (4G wireless frequencies). The winning purchasers were: KPN; Vodafone; T-Mobile; and new entrant, Tele2.

Regulatory Institutions and Legislation

The ACM supervises compliance with legislation relevant to the electronic communications and postal markets, particularly the *Telecommunications Act 2004*,¹⁴²⁴ the *Postal Act 2000*, and relevant

¹⁴²⁰ Described earlier under the section 'Approach to Competition and Regulatory Institutional Structure'.

¹⁴²¹ NMa media release, 16 November 2012, *Average increase of tariffs of regional network operators 7.1 per cent*. Available at: http://www.nma.nl/en/documents_and_publications/press_releases/news/2012/48_12_nma_average_increase_of_tariffs_of_regional_network_operators_7_1_percent.aspx [accessed on 17 June 2013].

¹⁴²² ACM, *Key Priorities for 2013 of the Netherlands Authority for Consumers and Markets*, April 2013, p. 5. Available at: <https://www.acm.nl/en/publications/publication/11301/Key-Priorities-for-2013-of-the-Netherlands-Authority-for-Consumers-en-Markets/> [accessed on 21 June 2013].

¹⁴²³ Market profile information is from: OPTA *Annual Report 2012*. Available at: <http://optajaarverslag2012.acm.nl/download/OPTA%20Annual%20Report%202012.pdf> [accessed on 21 June 2013]; OECD *Broadband Statistics*, December 2012, updated on 18 July 2013. Available at: <http://www.oecd.org/sti/broadbandandtelecom/broadbandportal-pressrelease-dec2011.htm> [accessed 22 July 2013]; and EC working document, *The Netherlands 2011 Telecommunication Market and Regulatory Developments*, 18 June 2012. Available at: http://ec.europa.eu/digital-agenda/sites/digital-agenda/files/Telecom_Horizontal_Chapter.pdf [accessed 12 July 2013].

¹⁴²⁴ A translation of the Dutch *Telecommunications Act* (June 2012 version) can be downloaded from the Ministry website. Available at: <http://www.government.nl/documents-and-publications/notes/2012/06/07/dutch-telecommunications-act.html> [accessed on 25 June 2013].

European regulations. Previously this supervision was the responsibility of the Office of Posts and Telecommunications (OPTA).

The stated objectives of the ACM's electronic communications function are to promote competition, encourage efficient investment, support innovation, and protect consumers (regarding choice, price and quality) in the markets regulated (*Telecommunications Act*, Article 1.3). Within these broad objectives, the ACM will, at times, express more detailed areas of focus. Immediately prior to the creation of the ACM, these included: stimulating investments in fibre-optic networks; boosting competition in the business market; increasing choice in cable television; and achieving reasonable call tariffs in Europe (OPTA, *2012 Annual Report*, pp. 3 and 21; *passim*).

The ACM is involved in three main regulatory matters – price of access, non-price access issues, and the enforcement of the telecommunications law. The enforcement of the telecommunications law includes a broad range of matters such as Internet security, issuing phone numbers, ensuring minimum-service levels, and other consumer-related issues. (Prior to the creation of the ACM, the OPTA did not have any power to deal with possible anti-competitive practices under general competition law. These were dealt with by the NMa.)

The ACM performs two principal processes in relation to telecommunications. Firstly, in three-year cycles, the ACM analyses markets for: fixed-line services; mobile services; broadcasting; broadband and leased lines; and, issues 'market analysis decisions' imposing *ex ante* regulation or remedies on any parties found to have significant market power (SMP) in a market. Secondly it handles disputes. In terms of access price matters, following the 'market analysis decision', the ACM sets out both its broad approach to pricing and the access prices for a range of regulated services.¹⁴²⁵

Consultation of Interested Parties

The *Communications Framework Directive* ((18)) lays down the following rules on consultation:

It is important that national regulatory authorities consult all interested parties on proposed decisions and take account of their comments before adopting a final decision. In order to ensure that decisions at national level do not have an adverse effect on the single market or other Treaty objectives, national regulatory authorities should also notify certain draft decisions to the Commission and other national regulatory authorities to give them the opportunity to comment.

In the Netherlands, the market analysis process¹⁴²⁶ generally begins with information gathering and research into structural matters, along with the formulation of proposed changes to the relevant market, under periodical market monitoring. Sets of detailed questionnaires are then issued to a range of market participants. The consultation process is intended to be as open and informal as possible – that is, the parties can respond in any form or length that they wish. The responses may result in some additional research or modelling being undertaken, after which a 'concept document' is developed. This is similar to a draft decision.) The draft decision is sent to the European Commission (EC) and to the Body of European Regulators for Electronic Communications (BEREC)). The EC has the power to express 'serious doubts' about planned market analysis decisions and to initiate a second-phase investigation. In such situations, the BEREC gives advice with regard to the serious doubts of the Commission. If a second-phase analysis is launched, the BEREC creates a working group as quickly as possible, which comprises experts from different member states, that formulates advisory notices (OPTA *2012 Annual Report*, p. 86).

In 2012, the OPTA completed six market analyses: fixed telephony (two market analyses); call termination; broadband services for consumers; broadband services for business customers; and unbundled access to fibre-optic networks for businesses (OPTA *2012 Annual Report*, p. 21). With respect to mobile termination and fixed-line termination, the ACM assesses the reasonableness of costs are reasonable, by using a special calculation model; BULRIC. Together with the telecommunication carriers (Industry Group) and consulting firm Analysys Mason, the OPTA in 2012 updated the 'BULRIC' method. In mid-2013, the market analysis decision regarding fixed terminating

¹⁴²⁵ For example, in 2008 the OPTA released its policy rules on price regulation for unbundled fibre access. See ACM, *Policy Rules Tariff Regulation for Unbundled Fibre Access*. Available at: [https://www.acm.nl/en/publications/publication/9713/Policy-rules-tariff-regulation-for-unbundled-fibre-access-/](https://www.acm.nl/en/publications/publication/9713/Policy-rules-tariff-regulation-for-unbundled-fibre-access/) [accessed on 16 July 2013].

¹⁴²⁶ OPTA, *2011 Annual Report*, pp. 7-8.

access and mobile terminating access will be completed. It will contain the maximum tariffs for terminating access (OPTA 2012 Annual Report, p. 28).

Interested parties (including consumer organisations; access users; and access providers) are consulted on the draft decision and are invited to make submissions. The feedback from market participants is published on the website.¹⁴²⁷ Following the receipt of submissions, a formal administrative process begins, which runs over six weeks. During this time an oral hearing is held. The participation in the oral hearing is generally restricted by law to 'Interested Parties' (defined above). Following this consultation, a final decision is taken. A market analysis decision can be challenged on appeal (see below).

Disputes between telecommunications service providers often concern access to a network (belonging to a provider) and the conditions subject to which such access has to be granted, for example, those pertaining to tariffs.¹⁴²⁸ The parties concerned may ask the ACM to hand down a decision in such a dispute.

No consumer groups or industry bodies are specifically recognised in relevant legislation. Unlike some other EU countries, there is no consumer panel for telecommunications in the Netherlands. However, the Dutch Consumer Association (*Consumentenbond*) sometimes was involved in urging the OPTA to enforce telecommunication regulations affecting consumers.¹⁴²⁹

In the market-analysis process, some parties engage external consultants to assist with the preparation of their submissions. The OPTA has also employed external consultants to undertake specific modelling exercises (such as the development of the 'BULRIC' model) that then feed into the market-analysis decision process. The OPTA also conducted an analyst meeting twice a year.¹⁴³⁰ Since 2009, the OPTA (and now the ACM) must send its draft market analysis decisions for an opinion from BEREC (see above). In this respect, the EU (and BEREC) has become an 'interested party' in national telecommunications decisions.

Timeliness

Annual reports of the former OPTA do not contain information on the timeliness of its processes. In relation to the decisions on market analysis and the assessment of significant market power (SMP), the EU guidelines prescribe that 'the period of the consultation should be reasonable'.¹⁴³¹ For example, a period of two months is considered to be reasonable for the public consultation for decisions related to the undertakings with SMP.

*Information Disclosure and Confidentiality*¹⁴³²

The ACM has broad information-gathering powers. This includes an ability to conduct an inspection or site visit (without a notice) to check with compliance with existing regulations.¹⁴³³ Under the *Telecommunications Act*, parties are obliged to cooperate with the ACM. If parties do not supply information requested, the ACM can fine the party to require the production of the information.¹⁴³⁴

The ACM is entitled to share any information internally, regardless of the basis upon which such information was acquired. For example, information obtained in the context of a market inquiry in telecommunications can later be used in conducting a cartel investigation. The ACM also has the

¹⁴²⁷ *Ibid.*

¹⁴²⁸ OPTA, 2012 Annual Report, *op. cit.*, pp. 37-38.

¹⁴²⁹ For example, in 2010, it asked the OPTA to enforce regulations relating to Internet providers notifying rate changes. See OPTA, 2011 Annual Report, p. 29.

¹⁴³⁰ ACM, *Presentation Analyst Meeting Market Analysis 2008*, Presentation dated 17 July 2008. Available at: <https://www.acm.nl/en/publications/publication/9558/Presentation-analyst-meeting-market-analysis-2008/> [accessed on 28 June 2013].

¹⁴³¹ Commission Guidelines on Market Analysis and the Assessment of Significant Market Power under the Community Regulatory Framework for Electronic Communications Networks and Services, 2002/C 165/03, *Official Journal of the European Communities*, C 165/6, 11 July 2002.

¹⁴³² ACM, *Our Powers*. Available at: <https://www.acm.nl/en/about-acm/mission-vision-strategy/our-powers/> [accessed on 17 June 2013].

¹⁴³³ *The Bill Streamlining Market Surveillance ACM*, Article 12C, in Dutch, 31 May 2012. Available at: <http://www.internetconsultatie.nl/materielewetacm> [accessed on 3 July 2013].

¹⁴³⁴ *The Bill Streamlining Market Surveillance ACM*, Article 12I, in Dutch, 31 May 2012.

power to share information with other regulatory bodies, including regulators in other countries (subject to confidentiality requirements).¹⁴³⁵

In accordance with Section 10 of the *Public Access to Government Information Act*, confidential information made available to the ACM will not be made public.¹⁴³⁶ While parties will generally make a submission as to any information they consider as commercial-in-confidence (c-i-c); the final decision rests with the ACM. If the ACM proposes to publish information that a party considers c-i-c, that party can appeal to the court for a temporary order against such publication.¹⁴³⁷

For issues relating to public access to information, the *General Administrative Law Act* (described above) governing freedom of access to information of government agencies (subject to confidentiality requirement) applies in telecommunications.

Decision-making and Reporting

The determinative body in all matters before the ACM is the Board,¹⁴³⁸ and all matters are brought before the full board. There is no formal requirement in the relevant legislation for the Board to vote on decisions taken.

Final decisions made by the predecessor, the OPTA, were often lengthy documents, containing detailed reasoning and evidence.

The key deadlines for decisions are consistent with those prescribed in the *EU Communications Framework Directive*.¹⁴³⁹ In relation to market-analysis decisions, the key deadline is that a new decision must be published before the expiration of the existing one. Currently this is every three years.¹⁴⁴⁰ There is no maximum timeframe placed on the undertaking of a market analysis decision. In regard to other matters, the maximum time for a decision is four months.

The ACM's regulatory tasks in relation to telecommunications are performed by the Telecommunication, Transport and Postal Services Department, which is charged with regulation of those infrastructure areas.¹⁴⁴¹

Appeals

All decisions of the ACM can be appealed, including market analysis decisions and specific applications of decisions. All decisions are subject to substantive review as applied to administrative proceedings. This means that, following the Objections Procedure, a decision is appealed to a first-instance court; and then to a second-instance Court. There is a period of six weeks in which an appeal can be lodged.¹⁴⁴² The court has no strict time restrictions on hearing an appeal. The Trade and Industry Appeals Tribunal (*College van Beroep voor het bedrijfsleven*) aims at making a ruling within six weeks of the hearing, which can be extended by six weeks on notification.¹⁴⁴³

As previously discussed, market-analysis decisions are dealt with by the Trade and Industry Appeals Tribunal. For example, 22 appeals against the OPTA's 2008 fixed-line market analysis decision were lodged with the Tribunal, which ruled in 2011 that the OPTA had to re-evaluate whether the remedies on the business retail market should be continued.¹⁴⁴⁴ It may take around one year for an appeal on a

¹⁴³⁵ *The Bill on the Rules Regarding the Establishment of the ACM*, Articles 7 and 20.

¹⁴³⁶ *The Bill Streamlining Market Surveillance ACM*, Articles 12R and 12S.

¹⁴³⁷ *Ibid.*

¹⁴³⁸ ACM, *Our Organisation*. Available at: <https://www.acm.nl/en/about-acm/our-organization/board/> [accessed on 3 July 2013].

¹⁴³⁹ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a Common Regulatory Framework for Electronic Communications Networks and Services (Framework Directive), *Official Journal of the European Communities*, L 108/33, 24 April 2002. Available at: http://www.ofcom.org.uk/static/archive/oftel/ind_info/eu_directives/framework.pdf [accessed on 1 July 2013].

¹⁴⁴⁰ OPTA, *2011 Annual Report*, p. 4.

¹⁴⁴¹ ACM, *Strategy Document (draft): The Netherlands Authority for Consumers and Markets*, April 2013. Available at: <https://www.acm.nl/en/publications/publication/11303/Draft-version-of-Strategy-Document-Netherlands-Authority-for-Consumers-en-Markets/> [accessed on 21 June 2013].

¹⁴⁴² Trade and Industry Appeals Tribunal, *Appeals to the CBb* (in Dutch). Available at: <http://www.rechtspraak.nl/Naar-de-rechter/Hoger-beroep/Pages/In-beroep-bij-het-CBb.aspx> [accessed on 2 July 2013].

¹⁴⁴³ *Ibid.*

¹⁴⁴⁴ OPTA, *2012 Annual Report*, pp. 21-22.

market analysis decision to be considered by the Tribunal. For example, in 2011, the Tribunal ruled on two of the OPTA's market-analysis decisions made in 2010 concerning the Fixed and Mobile Terminating Access and the Unbundled Access to Broadband.

There is a broad discretion in the courts in terms of available remedies. This can include quashing the decision outright, sending it back to the ACM for further consideration, or substituting its own decision for the regulatory decision. The most common remedy is for a decision to be sent back to the regulator for reconsideration having regard to the findings of the court.

Almost all substantive decisions of the OPTA have been appealed. For example, 76 per cent of market-analysis decisions in 2011 were appealed.¹⁴⁴⁵ In general the court may approve the majority of a decision, but send back certain elements for reconsideration by the regulator. The most recent information about the fate of appeals is contained in the *OPTA 2012 Annual Report* (pp. 31-34). For example, in relation to KPN's behaviour in relation to TCO contracts, after an extensive investigation, the OPTA imposed a fine of more than €10 million on KPN on 8 February 2010. The fact that KPN had already been fined on previous occasions for similar violations, was considered an aggravating factor by the OPTA. KPN filed an objection against this fine. On 8 June 2011, the OPTA turned down these objections. KPN subsequently filed an appeal. The District Court of Rotterdam on 19 June 2012 dismissed KPN's appeal on all counts. KPN then turned to the Trade and Industry Appeals Tribunal¹ which, on 9 January 2013, ruled that the fining decision was unlawful on one count (concerning the aspect of recidivism; repeat offences). The Tribunal lowered the fine to €8.52 million.

Regulatory Development

KPN has been found to have significant market power in a number of markets; including those for unbundled access to its copper network, the wholesale telephony market, and in the fibre-to-the-home market. Accordingly, since 1 January 2012, KPN has been subject to access, transparency, and non-discrimination obligations; and to tariff regulation in relation to these markets (OPTA, *2012 Annual Report*, pp. 21-28). In 2012, the Netherlands made 'net neutrality' a law (OPTA, *2012 Annual Report*, pp. 44-45). The law prevents Internet service providers from blocking or slowing down access to services and applications, except in limited circumstances, and curtails price differentiation between types of data traffic by Internet access providers. The ACM will oversee enforcement of this law.

3. Postal Services

The country's primary mail carrier is *PostNL*.¹⁴⁴⁶ Restructuring of the former state-owned statutory monopoly began in early 1983, when the Postal Giro Service and the National Savings Bank were split off and an independent company, *Postkantoren BV*, was set up to operate counter services in both savings and mail. As of 1 January, 1989, the postal service operator was restructured as PTT Netherlands, a private company whose shares were wholly owned by the state. In 1994 the company was listed under the name of Royal PTT Netherlands (KPN) on the Amsterdam stock exchange and, in 1996, its majority ownership passed from the Dutch government to private hands. In that same year the company acquired TNT, a world-wide delivery service. The company became an important participant in global mail and logistics. In 1998, its postal division was split from the telecommunications arm of the business to become TNT Post Group (TPG), a publicly listed company. In 2005, TPG was renamed as TNT Post (TNT). Its corporate parent, TNT Group, has used strategic partnerships and acquisitions to become a major participant in nearly every European mail market that allows competition.

In 2009, the entire postal market in the Netherlands was deregulated, with no further reserved area for TNT post. TNT Post continued, however, to be responsible for the universal postal services. In 2011, there was a demerger of TNT Post's express division and TNT Post was renamed *PostNL*.

The volume of letters in the Netherlands decreased by approximately six per cent between 2010 and 2011.¹⁴⁴⁷ Large businesses sent over 60 per cent of all letters and other businesses sent about 30 per cent. Major mail categories are letters, direct mail and periodicals. *PostNL* has between 80 and 90 per cent of the market in postal services.

¹⁴⁴⁵ OPTA, *2011 Annual Report*, p. 50.

¹⁴⁴⁶ PostNL, *Home*. Available at: www.postnl.com › About us › History [accessed on 28 June 2013].

¹⁴⁴⁷ OPTA, *2012 Annual Report*, *op. cit.*, pp. 18-20.

*Regulatory Institutions and Legislation*¹⁴⁴⁸

The ACM has assumed the role of the previous Office of Post and Telecommunications (OPTA), and supervises compliance with legislation relevant to the postal markets, particularly the *Postal Act 2009* and related decrees,¹⁴⁴⁹ and relevant European regulations. Some of the secondary legislation has been incorporated into the *Postal Act 2009*.¹⁴⁵⁰ While the ACM is an independent economic regulator, the Minister of Economic Affairs, who holds the postal portfolio, may issue general directives, but will not intervene in individual cases.

The *Postal Act 2009* (and related decrees) requires *PostNL* to perform the Universal Postal Service (UPS). The ACM regulates tariffs relating to the UPS, and must approve the rates for these services every four years. A price-cap system applies such that the rates set cannot lead to a return on sales that exceed ten per cent. After each rate setting, *PostNL* must set rates and conditions which are transparent, non-discriminatory, cost-based and uniform. Tariff development in letter and parcel services is tied to developments in the Consumer Price Index. As the provider of universal postal services, *PostNL* must also meet certain standards of service provision as well as complying with financial accounting and reporting obligations. *PostNL* is obliged to give competitors access to its mail boxes on terms and conditions that are: reasonable; objectively justified; and non-discriminatory. These are set by negotiations between the parties. *PostNL* receives compensation for any deficit incurred in meeting the requirements of the UPS. This compensation is provided by all postal operators in the Netherlands. Specifically, *PostNL* asks the ACM for the amount of the loss incurred in providing the UPS. The ACM reviews the costs, decides which costs are viable, and how the bill will be split over the postal operators in the Netherlands (including *PostNL* in relation to its non-UPS postal services).

In short, the ACM currently performs a supervisory role in relation to *PostNL*'s compliance with its obligations. Specifically, its current statutory duties include:

- auditing *PostNL*'s financial and quality reports to assess whether UPS obligations are met;
- reviewing any rate changes proposed by *PostNL* to assess whether the proposed changes are in accordance with the price-cap system where rate increases are capped by a ceiling based on the general wage index;
- arbitrating access disputes;
- investigating consumer complaints; and
- advising the Ministry of Economic Affairs on postal matters.

Consultation of Interested Parties

The role of end users in the regulatory process tends to be limited to access disputes or consumer complaints. While the ACM does not deal with individual consumer complaints; it will investigate end-user complaints that indicate large-scale anti-competitive behaviours.

Timeliness

Annual reports of the former OPTA do not contain information on the timeliness of its processes.

Information Disclosure and Confidentiality

Under the *Postal Act*, the ACM can request all the necessary information for carrying out its statutory duties. In relation to *Post NL*'s accounting system, it must submit to the ACM each year, a declaration

¹⁴⁴⁸ PostNL, *Annual Report 2012, Postal Regulation in the Netherlands*. Available at: <http://annualreport2012.postnl.com/report-of-the-board-of-management/regulatory-environment/postal-regulation-in-the-netherlands> [accessed on 25 June 2013].

¹⁴⁴⁹ Postal law and regulations include *General Postal Guidelines Decree 1988* concerning obligations for the Universal Service Provider, *Decree on Remittances Postal Act 1997* concerning the remittances of OPTA, *Postal Decree 2000* concerning universal service obligations, and *Decree on Delivery Letterboxes 1989* concerning requirement on letter boxes. See: ECORY, *Country Sheet: the Netherlands*, p. 643. Available at: http://circa.europa.eu/Public/irc/markt/markt_consultations/library?l=/postal_services/studies/netherlands_finalpdf/ EN 1.0 &a=d [accessed on 3 July 2013].

¹⁴⁵⁰ A copy of the Act (in Dutch) is available at: <http://www.internetconsultatie.nl/materielewetacm> [accessed on 3 July 2013].

of an independent auditor (appointed by the OPTA) certifying compliance with relevant financial and accounting obligations; including details of its system of allocating costs and revenues to its different types of services.

The *General Administrative Law Act* (described earlier) governs freedom of access to information of government agencies (subject to confidentiality requirement) and applies to the postal industry.

Decision-making and Reporting

As described in the previous section in relation to telecommunications, regulatory decisions in the postal industry are also made by the full board of the ACM.

Appeals

As described in the telecommunications section, all decisions of the ACM can be appealed, including specific applications of decisions. All decisions are subject to substantive review as applied to administrative proceedings. This means that a decision is appealed to a first-instance Court, and then to a second-instance Court. There is a period of six weeks in which an Appeal can be lodged. In hearing an appeal, the court has no strict time restrictions.

Regulatory Development – Addressing Competition Issues

In the domestic market, only one postal operator – *Sandd* – actively competes with *PostNL*.¹⁴⁵¹ A second former competitor, *Selekt Mail* (a *Deutsche Post* subsidiary), was taken over by *Sandd* in 2011. *Sandd* has developed its own delivery network on a nation-wide scale, however it concentrates on business mail (pre-sort bulk mail), and in the residential market, there is still virtually no competition to *PostNL*. The most competitive segment is the regular-publications segment, where *Sandd* has managed to achieve an almost similar position to *PostNL*. It recommended more effective legislative rules in the area of pricing, cost allocation and transparency as a means of preventing excessively high prices, cross-subsidies and predatory pricing.

In 2009, *Sandd* made a complaint to the NMa, that *PostNL* was abusing its dominant position in the postal market, engaging in predatory pricing practice by giving its subsidiary ‘free’ use of its network. A 2012 decision by the NMa did not uphold the complaint, but the NMa, in issuing the decision, indicated that there was not ‘a level playing field’ in the postal subsector, and improvement could be expected only with the new powers to be bestowed on the proposed new regulator, the ACM.¹⁴⁵²

Under existing legislation, the ACM can only take action against *PostNL* where there have been complaints from rivals about an abuse of *PostNL*’s dominant position in the market. New proposals would allow the regulator to step in to set preventive measures before unfair competition arises. It would also mean the ACM can launch an investigation based on suspicions that *PostNL* is offering postal services below cost in order to take a larger market share. The proposals would give the ACM *ex ante* regulatory powers and increased investigative powers.¹⁴⁵³

4. Water and Wastewater¹⁴⁵⁴

The Netherlands has total renewable water resources of 89.7 cubic kilometres; of which only about one tenth is withdrawn. Being low, flat and wet, the Netherlands has a long history of water management. It has developed a strong reputation for its high-quality supply of household and industrial water, and of its treatment and disposal of wastewater.

Water supply is provided by ten regional water companies, nine of which are public limited companies (PLCs) whose shareholders are municipalities or provinces.¹⁴⁵⁵ The water companies: extract water

¹⁴⁵¹ OPTA, *2011 Annual Report*, pp. 18-19. Available at: http://optajaarverslag2011.acm.nl/download/Jaarverslag%202011%20_ENG.pdf [accessed on 25 June 2013].

¹⁴⁵² ACM, NMa news item from 22 May 2012, ‘NMa Rejects Sandd’s Complaint: No Abuse by PostNL’. Available at: <https://www.acm.nl/en/publications/publication/6748/NMa-rejects-Sandds-complaint-no-abuse-by-PostNL/> [accessed on 25 June 2013].

¹⁴⁵³ Post & Parcel, ‘Dutch Postal Regulator to get Extra Powers’, 12 December 2012. Available at: <http://postandparcel.info/5> [accessed on 25 June 2013].

¹⁴⁵⁴ Key references include OECD, *Competition and Regulation in the Water Sector*, OECD Policy Roundtable, 2004, pp. 135-139. Available at: <http://www.oecd.org/daf/competition/sectors/33691325.pdf> [accessed on 22 February 2013] and *CIA World Factbook, The Netherlands*, *op. cit.*

¹⁴⁵⁵ Vewin, *Dutch Water Sector*. Available at: <http://www.vewin.nl/english/Dutch%20water%20sector/Pages/default.aspx> [accessed on 25 June 2013].

from the ground, rivers, canals and lakes; purify it; and ensure that it flows to the customer. A constant supply is guaranteed. The water companies are responsible for the management and quality of all pipes up to the home water meter. Home owners are responsible for the state of the water supply lines in the home. The distribution network of the Dutch drinking water is of high quality, and leakage losses remain below six per cent. The Association of Dutch Water Companies (*Vewin*) represents the ten water companies.

The Netherlands is the first EU country to apply benchmark techniques to water and wastewater, carrying out consecutive studies in 1997, 2000, 2003, 2006 and 2009, with water companies participating on a voluntary basis.¹⁴⁵⁶ Comparative analysis for the participating water companies is primarily based on four indicators: water quality; customer service; environment; and finance and efficiency.

Treatment of urban wastewater is provided by the 25 Water Boards (*Waterschappen*) that together have approximately 11 000 employees.¹⁴⁵⁷ The water boards (or District Water Control Boards) together with the Department of Public Works and Water Management are responsible for the quality and quantity of regional water in the Netherlands. The water boards monitor physical water levels in their region and discharge water if necessary. They also treat waste water, control the quality of surface water and physically maintain waterways and canals. Water companies and water boards work together in some regions as both benefit from clean ground, clean rivers and canals. The umbrella organisation of the water boards is, in Dutch, the *Unie van Waterschappen*.¹⁴⁵⁸ In the Amsterdam area, the local water supply company and the local Water Board merged in January 2006 to form a public institution, named Waternet. It is the first Dutch company that offers integrated services over the water chain from drinking water supply to wastewater treatment.¹⁴⁵⁹

Regulatory Institutions and Legislation

The *Water Act* of 29 January 2009¹⁴⁶⁰ contains the provisions for the management and use of water systems. It has integrated eight previous sectoral water acts. The *Water Act* highlights integrated water management based on the 'water system approach', addressing all relationships within water systems. For example: the relationship between the quality and quantity of water; between surface water and groundwater; but also the relationship between water, land use and water users. Integrated water management is also characterised by its relationship with other policy areas such as nature, environment and spatial planning. The *Water Act* is framework legislation implemented on the basis of secondary legislation; that is, by governmental decree (the Water Decree) and ministerial regulation (the Water Regulation).

The *Water Act* was also a move to implement the *EU Water Framework Directive*; based on a river-basin district approach to make sure that neighbouring Member States assume joint responsibility for managing the rivers and other bodies of water they share. The goal of the *EU Water Framework Directive* is to ensure that the quality of the surface water and groundwater in Europe reaches a high standard ('good ecological status') by 2015. To meet the 2015 deadline, water authorities in each river basin district in Europe must have agreed on a coherent programme of measures by 2009.

The Ministry of Infrastructure and the Environment is responsible for overall water-resources management.¹⁴⁶¹ The Directorate-General for Public Works and Water Management is in charge of water resources policy and managing surface water, in cooperation with the Water Boards.

At the regional level, the twelve provincial governments are responsible for groundwater management. In principle, the formulation of regional policies should take account of national

¹⁴⁵⁶ Vewin, *Benchmark*. Available at: <http://www.vewin.nl/publicaties/Benchmark/Pages/default.aspx> [accessed on 25 June 2013].

¹⁴⁵⁷ Waterschappen.NL, *Information on Waterschappen*. Available at: <http://www.waterschappen.nl/ontdek-de-waterschappen.html> [accessed on 25 June 2013].

¹⁴⁵⁸ Association of Water Boards (UVW), Home. Available at: http://www.uvw.nl/laatste-nieuws.html?newsdetail=20130219-293_oecd-in-dialog-met-nederlandse-watersector [accessed on 25 June 2013].

¹⁴⁵⁹ Waternet, *About Waternet*. Available at: <https://www.waternet.nl/about-waternet/> [accessed on 20 June 2013].

¹⁴⁶⁰ Ministry of Infrastructure and the Environment, *Organisation Structure*. Available at: <http://www.government.nl/documents-and-publications/leaflets/2012/12/05/organisation-structure-ministry-of-infrastructure-and-the-environment.html> [accessed on 20 June 2013].

¹⁴⁶¹ Ministry of Infrastructure and the Environment, *Overview*. Available at: <http://www.government.nl/ministries/ienm> [accessed on 20 June 2013].

directives. The main regulatory activities of provincial governments are the licensing of groundwater extraction and the supervision of tariffs. Tariffs are set by water companies based on a 'not-for-profit and full cost-recovery basis' and are subject to the supervision of 'the local authorities through shareholders meetings and the Board of Directors'.¹⁴⁶² The tariff contains two parts; a fixed component and a variable component. Tariffs can vary within the service area of a water company, depending on local costs.

5. Rail

The Dutch rail network is among the busiest and densest in the world. The Netherlands has 7000 kilometres of track and rail operators transport more than one million passengers and 85 000 tonnes of freight each day.¹⁴⁶³ There is a high-speed line (300 kmh) between Amsterdam, Rotterdam and the Belgian border (*HSL-Zuid*), and a dedicated freight line connecting the Port of Rotterdam with the German border.

A state-owned private company, *Nederlandse Spoorwegen* (NS), had a statutory monopoly over all rail transport in the Netherlands until 1995, when freight rail transport services were opened to competition. A number of different companies now offer freight-rail transport services on a number of lines. However, NS is still the operator of the core inter-city freight network and retains a statutory monopoly over rail passenger transport on this network until at least 1 January 2015. Passenger transport services on regional rail networks are open to competition, and six companies compete with NS in the regional passenger transport market.¹⁴⁶⁴

Accounting separation of rail transportation services and infrastructure operations was mandated in a 1991 EU Directive, however the Netherlands opted for more rigorous separation – with infrastructure activities split off from the NS and the separated entity, ProRail, becoming responsible for infrastructure management. Both NS and ProRail operate under concessions, and must meet performance, and other statutory, requirements.

ProRail manages all Dutch rail infrastructure with the exception of the dedicated freight line, *Betuweroute*, which is managed by Keyrail, a private company formed by the Port of Rotterdam (35 per cent), the Port of Amsterdam (15 per cent) and ProRail (50 per cent). As the Rail Infrastructure Management Concession holder, ProRail has ultimate responsibility for Keyrail's compliance with its concession holder's obligations.¹⁴⁶⁵

Regulatory Institutions and Legislation

On 1 April 2013, the ACM took over responsibility for rail regulation from the Office of Energy and Transport Regulation (DREV), a chamber of the NMa. The ACM is responsible for regulation of railways, Amsterdam's Schiphol airport (see the next section on 'Airports'), and certain urban passenger transport matters. Its authority derives from the *Railway Act 2005*, the *Aviation Act 2006*, and the *Passenger Transport Act 2000*. In all of these areas it is purely responsible for economic regulation and does not deal with safety issues.

The *Railway Act* transposes, among other things, the EU Directives on railway access and fair pricing into Dutch law.¹⁴⁶⁶ In particular, the *Railway Act* transposes *EU Directive 91/440/EC* which provides for the independent management of railways, the separation of infrastructure management and the separation of operation from provision of transport services (accounting separation is compulsory, operational separation is optional). The *Railway Act* also transposes *EU Directive 2001/14/EC*, which sets out principles and procedures to be applied with regard to: the setting of, and charging for, railway infrastructure; and the allocation of network capacity.

¹⁴⁶² OECD, *Policy Roundtables: Competition and Regulation in the Water Sector*, 18 August 2004, p. 136. Available at: <http://www.oecd.org/daf/competition/sectors/33691325.pdf> [accessed on 16 July 2013].

¹⁴⁶³ UK Trade and Investment, *Rail Sector in the Netherlands: Sector Briefing 2011*. Available at: <https://docs.google.com/viewer?url=https://s3.amazonaws.com/ProductionContentBucket/pdf/20110926131458136.pdf&chrome=true> [accessed on 25 June 2013].

¹⁴⁶⁴ These are: *Arriva*, *Connexxion*, *Syntus*, *HAS*, *DB Regio*, and *Veolia* See C Tinnerman, 'Rail Regulation in the Netherlands', Madrid 21 October 2011. Available at: http://www.vialibre-ffe.com/pdf/Coen_Timmerman_Netherlands.pdf [accessed on 20 June 2013].

¹⁴⁶⁵ ProRail, *Network Statement 2013*. Available at: <http://www.prorail.nl/english/pages/networkstatement.aspx> [accessed on 25 June 2013].

¹⁴⁶⁶ Roald Leuven (NMa), 'The Legal Framework of the Dutch Railway Act', PowerPoint, 7 June 2010. Available at: http://www.seetoint.org/wp-content/uploads/downloads/2012/11/764_taiex-rw-leuvenholland.pdf [accessed on 25 June 2013].

Network Statement

The *Railway Act* envisages the setting of the price and non-price terms of access by way of an access agreement concluded between ProRail (the access provider) and each of the access seekers (including NS, the main transport user, and freight users). In practice, ProRail's annual network statements include, as an annex, a standard access agreement. Each access agreement is set for a period of one year and is concluded in December. The Agreements specify the price and non-price terms of access, including capacity allocation and charges. Agreements are required to be cost-based, but can reflect factors such as a scarcity charge; environmental costs; and reservation/booking charges. In addition, charges are often levied for associated service facilities maintained by the access provider; such as station cleaning and fuelling-station costs.

It is possible under the *Railway Act* for a Framework Agreement to be submitted to the ACM *ex ante* which sets out access terms for a period of five years. These Framework Agreements allow for the allocation of capacity for a period greater than one year and do not relate to a specific path or timetable. In such a case, the ACM would have a role in approving the terms of the Framework Agreement and in the supervision of the implementation of these agreements.

The income from infrastructure charges covers only a small part (15 per cent in 2009) of the costs of constructing and maintaining the infrastructure (*5th Rail Monitor*). The deficit is made up by government.

Consultation of Interested Parties

A main trigger for regulatory activity by the ACM is a complaint from an access seeker about the tariffs and access conditions set out in an annual Network Statement. During this period, the ACM will conduct a public hearing and send out information to each of the parties on which they can respond. It will then issue a ruling. For example, it may direct that additional capacity be allocated to a particular rail undertaking. The ACM can impose a fine or periodic penalty payments if ProRail or KeyRail does not comply with this order.

The ACM can also undertake *ex officio* investigations into specific aspects of the functioning of the market. As practiced by the former NMa, this typically follows a 'tip' (or signal) from the market. The NMa in 2010 opened a 'virtual front desk' on its website, offering interested parties the opportunity to submit tip-offs and indications. Transport undertakings in particular chose this option to notify the NMa of problems in the railway market.¹⁴⁶⁷

Regulatory action can occur through the market-monitoring process. The process in rail is similar to that which occurs in the energy sector, described in section 1 above. It involves interviews with market parties, a survey, and the gathering of information from ProRail and KeyRail. However the exercise occurs far less frequently than in energy, with the last market monitor (the *5th Rail Monitor* referred to above) in rail published in 2009.

In 2012, the previous NMa commissioned a study into whether, under the current light-regulation regime, rail undertakings could exercise buyer power *vis-à-vis* suppliers, both in passenger and freight transport. It found that, although ProRail and KeyRail are statutorily required to consult their users when adjusting their tariffs, in practice, objections raised by users often (or even always) 'fall on deaf ears', with users turning instead to the ministry and law makers to exert pressure.¹⁴⁶⁸

Timeliness

The NMa published each year information on its 'Lead Times' relating to its various functions, including sanctions and conduct of the Objections Procedure. The *NMa 2012 Annual Report* reports that 'targets with regard to objections (antitrust, energy and transport) have not always been achieved, often due to conflicts with other procedures inside or outside the NMa' (p. 7).

¹⁴⁶⁷ NMa 2010 Annual Report, pp. 42-43. Available at: http://www.uu.nl/faculty/leg/EN/organisation/schools/schooloflaw/organisation/departments/europainstitute/marktenoverheid/Documenten/NMa_web_jv_2010_UKf11.pdf [accessed on 26 June 2013].

¹⁴⁶⁸ Oxera, *Buyer Power and its Role in Regulated Transport Sectors*, report for NMa, 17 September 2012. Available at: <http://www.oxera.com/Oxera/media/Oxera/downloads/reports/Buyer-power-and-its-role-in-regulated-transport-sectors.pdf?ext=.pdf> [accessed on 28 June 2013].

Information Disclosure and Confidentiality

The ACM has wide-ranging powers to obtain information from parties. These include: the power to demand information; the right to inspect business data; and a right to enter places (including residential properties and cars). These powers are provided under general administrative law which places an obligation on companies to cooperate with administrative agencies where there is a reasonable suspicion of an infringement of a legal act. The ACM also has an ability to fine a company for not supplying information. In order to promote transparency, the ACM publishes operational protocols which set out its methods of operation in respect of company visits, accessibility, the submission of documents by market participants and its inspection of digital data.

Decision-making and Reporting

The ACM is independent of both the Ministry of Economic Affairs and the Ministry of Transport. All significant decisions relating to the regulation of the transport sector are taken by the full ACM Board.

*Appeals*¹⁴⁶⁹

All decisions of the ACM may be appealed, consistent with the *General Administrative Law Act* and the requirements under the *European Convention of Human Rights*.

6. Airports

The small geographic size of the Netherlands means that domestic air travel is of minor importance. However, the importance of the Netherlands in international trade in goods and services and its strategic location mean that international air travel is important. There are major international airports at Amsterdam (Schiphol), Eindhoven and Rotterdam.

Schiphol Airport¹⁴⁷⁰ is owned and operated by *N.V. Luchthaven Schiphol* (under the trade name Schiphol Group), an unlisted public-liability company jointly owned by the Dutch Government (69.77 per cent), the Municipality of Amsterdam (20.03 per cent), the Municipality of Rotterdam (2.20 per cent) and *Aeroports de Paris S.A.* (Class B shares – 8.00 per cent). The Schiphol group also owns Rotterdam The Hague Airport, Lelystad Airport and Eindhoven Airport (jointly owned with the North Brabant Provincial Authority and the Eindhoven Municipal Authority). In addition, it is a shareholder at both Brisbane Airport in Australia and John F. Kennedy International Airport in the United States, and is indirectly involved in Aruba Airport (Aruba) and *Aeroports de Paris* (France). Schiphol has over 50 million passenger movements per annum and nearly 1.5 million tonnes of cargo.

The Netherlands also has a further twelve airports that are of regional importance. These are public airports that receive virtually no international flights and whose main role concerns the regional economy. These airports fall under the responsibility of the province in which they are situated.

Regulatory Institutions and Legislation

Under the *Aviation Act 2006*, the ACM regulates tariffs and conditions for ‘aviation activities’ provided to airline companies by the operator of Amsterdam’s Schiphol airport – that is, *N.V. Luchthaven Schiphol*. ‘Aviation activities’ include landing, take off, boarding, disembarking, parking planes, baggage transport and security. The *Aviation Act* requires that tariffs and conditions in respect of these activities to be: cost-oriented; non-discriminatory; and reasonable. Schiphol must consult in advance with users about tariffs and conditions of those activities, and explain to users the cost components of the aviation-related activities. The ACM must approve the cost-allocation system used by Schiphol to determine tariffs, but Schiphol is not required to have the ACM approve the actual tariffs and conditions in advance. Instead, the *Aviation Act* provides for a complaints procedure. Complaints may be made that the tariffs breach the requirements of the *Aviation Act* or Dutch *Competition Act*. Tariffs for ‘non-aviation activities’, such as car parking and rents for shops and offices used at airports, are not covered by the *Aviation Act*, but fall within the scope of the *Competition Act*.

A different regulatory framework applies to other airports in the Netherlands.¹⁴⁷¹ The national Ministry of Infrastructure and Environment is responsible for the regulation of four airports which are deemed

¹⁴⁶⁹ Information in this subsection is from JH Jans and A Outhuijse, ‘Advisory Objection Procedures in the Netherlands’, *op. cit.*

¹⁴⁷⁰ Amsterdam Airport Schiphol, *Investor Relations*. Available at: <http://www.schiphol.nl/SchipholGroup/InvestorRelations.htm> [accessed on 28 June 2013].

¹⁴⁷¹ Government of the Netherlands, *Aviation*. Available at: <http://www.government.nl/issues/aviation/airports> [accessed on 28 June 2013].

to be of national importance: Groningen Airport Eelde, Lelystad Airport, Maastricht Aachen Airport and Rotterdam The Hague Airport. These airfields have to meet certain rules and regulations, laid down by the Ministry in a designation order. A designation order sets out matters such as the geographic borders of an airfield, the pattern of the runways, noise zone(s), use specification, preferential runway use, runway allocation, departure and arrival procedures and access policy, depending on the settlements for noise production. A further twelve airports, deemed to be of only regional importance, are regulated by the province in which they are situated.

Airport Coordination Netherlands (SACN) is responsible for the allocation of available slots at the coordinated airports in the Netherlands (Amsterdam Airport Schiphol, Eindhoven Airport and Rotterdam Airport).

Air Traffic Control Netherlands (LVNL) is an independent administrative body, empowered under the *Aviation Act*, with responsibility for the control of civil airspace. It reports to the Ministry of Infrastructure and Environment. Air traffic control services are provided at Schiphol and three regional airports.

The following discussion on regulatory process focuses on the ACM's role in regulating Amsterdam's Schiphol Airport.¹⁴⁷²

Consultation of Interested Parties

The ACM is involved in two principal processes. Firstly, the ACM must approve the cost-allocation system used by Schiphol in setting its tariffs. Approval is based on compliance with the Dutch *Aviation Act* and the AAS Operation Decree, which came into force in July 2006.

While the ACM is not required to approve the actual tariffs and conditions set by Schiphol, it responds to complaints from airlines that tariffs and supply conditions set by Schiphol do not comply with Dutch *Aviation Act* (or competition legislation) and can launch an investigation of its own accord if it suspects Schiphol has violated a relevant statute. In 2011, some adjustments were made to aviation regulations, based on the EU Directive on Airport Charges (2009/12/EC). The Directive requires that, where airlines appeal against a new level of charges, the relevant authority will take an interim decision on the appeal within four weeks, and a final decision within four to six months.

Under competition legislation, the ACM will investigate whether Schiphol has abused its dominant position as sole supplier of the services when setting tariffs and conditions. Stakeholders are consulted in these investigations.

There is a requirement on Schiphol Airport to consult airport users annually on airport charges and service quality levels. A timetable is also established for consultation on changes to the structure and level of charges. Consultation is also required before new infrastructure plans are finalised.

Timeliness

The NMa published each year information on its 'Lead Times' relating to its various functions, including sanctions and conduct of the Objections Procedure. The *NMa 2012 Annual Report* reports that 'targets with regard to objections (antitrust, energy and transport) have not always been achieved, often due to conflicts with other procedures inside or outside the NMa' (p. 7).

Information Disclosure and Confidentiality

As described earlier in this chapter, the ACM has wide-ranging powers to obtain information from parties. These include powers to: demand information; obtain access to inspect business data; and a right to enter places (including residential properties and cars).

Decision-making and Reporting

All significant decisions relating to the economic regulation of the Schiphol Airport are taken by the full ACM Board.

Appeals

¹⁴⁷² Schiphol Airport, *Economic Regulation*, AAS Operation Decree (as amended in 2011 to meet requirements of the *EU Airport Charges Directive 2009*). Available at: <http://www.schiphol.nl/B2B/RouteDevelopment1/ChargesAndSlots/EconomicRegulation.htm> [accessed on 28 June 2013].

See the detailed discussion of appeal provisions applying to ACM decisions in the section on 'Approach to Competition and Institutional Regulatory Structure'.

In a particular case,¹⁴⁷³ the Dutch Trade and Industry Appeals Tribunal, the highest court in antitrust matters in the Netherlands, followed the District Court of Rotterdam in its ruling of 25 November 2010, in which it said that three cost items should not have been included in Schiphol's 2009 airport tariffs. Dutch airline, KLM, in 2008 filed a complaint with the NMa about these cost items relating to the sound barrier Schiphol had built near one of its runways, to a share of the costs of the Schiphol College, and to the costs of an accounting audit Schiphol had carried out.

Regulatory Development

In 2012, the NMa concluded an investigation into whether, under the current light regulation regime, airlines could exercise buyer power *vis à vis* Amsterdam Airport, Schiphol, in both passenger and freight transport. It found that, although Schiphol is statutorily required to consult its users when adjusting their tariffs, in practice, objections raised by users often (or even always) 'fall on deaf ears', with users turning instead to the ministry and law makers to exert pressure.¹⁴⁷⁴

7. Ports

The Netherlands is heavily reliant on international trade and is strategically placed in Europe, with a border around the North Sea. Ports in the Netherlands can be classified by areas as follows: Rotterdam Rhine-Meuse delta – the largest national port area incorporating the ports of Rotterdam, Schiedam, Vlaardingen, Dordrecht, Moerdijk and Scheveningen; North Sea Canal area (also referred to as Amsterdam Ports) – second-largest port area comprising the ports of Amsterdam, Velsen/IJmuiden, Beverwijk and Zaanstad; Scheldt basin; Northern seaports; and other (Scheveningen). Port administration is generally delegated to the corresponding municipalities.

The ports of the Rotterdam Rhine-Meuse Delta, account for about three-quarters of the total cargo in Dutch ports. It handles containers, dry bulk, liquid bulk, break bulk and roll-on / roll-off facilities. Throughput of the port in 2012 totalled 441.5 million tonnes. It is by far the largest seaport in Europe. The ports of Rotterdam, Schiedam, Vlaardingen and Maassluis are jointly managed by the Port of Rotterdam Authority (*Havenbedrijf Rotterdam, HBR*), which is a public limited company whose majority shareholder is the municipality of Rotterdam, and the other shareholder is the Netherlands State.¹⁴⁷⁵

The Port of Amsterdam is directly owned by the municipality of Amsterdam.¹⁴⁷⁶ For smaller ports, port administration is incorporated in the municipal administration as a whole. Port authorities in the Netherlands offer port basins and quays for seaborne and inland waterway shipping, and industrial sites near those port basins.

In principle, port authorities are responsible for investment in the port, with the exception of access infrastructure. The costs of investment and maintenance of ports in the Netherlands have to be covered by the revenues derived from harbour dues and the hiring out or sale of sites. The ports have their own rules and regulations and individually determine port dues (see below). The state is responsible for funding basic infrastructure for accessing ports (that is, the network of highways, railways, inland waterways and the maritime entrances of the ports), which are deemed to one or more of: fall under the 'public scope' of the port; to benefit the country as a whole; or are necessary for 'market-failure' considerations.¹⁴⁷⁷

Regulatory Institutions and Legislation

¹⁴⁷³ NMa, *2012 Annual Report, op. cit.*, p. 53.

¹⁴⁷⁴ Oxera, *Buyer Power and its Role in Regulated Transport Sectors*, report for NMa, 17 September 2012. Available at: <<http://www.oxera.com/Oxera/media/Oxera/downloads/reports/Buyer-power-and-its-role-in-regulated-transport-sectors.pdf?ext=.pdf>> [accessed on 28 June 2013].

¹⁴⁷⁵ Port of Rotterdam, *Home*. Available at: <http://www.portofrotterdam.com/en/Pages/default.aspx> [accessed on 25 June 2013].

¹⁴⁷⁶ Port of Amsterdam, *Home*. Available at: <http://www.portofamsterdam.com/> [accessed on 25 June 2013].

¹⁴⁷⁷ Institute of Shipping Economics and Logistics, *Public Financing and Charging Practices of Seaports in the EU*, Final Report commissioned by DG TREN (Directorate G – Maritime and Inland Waterway Transport; Intermodality, Short Sea Shipping, Inland Waterways, and Port) – of European Commission, June 2006, p. 78. Available at: http://ec.europa.eu/transport/modes/maritime/studies/doc/2006_06_eu_seaports_study.pdf [accessed on 25 June 2013].

Apart from the ACM's role in monitoring pilotage charges (see below), there is no independent economic regulation of ports in the Netherlands. The seaports of the Netherlands are owned, run and 'regulated' at the municipal level. The actual levels of charges, dues and fees are autonomously decided by each port. Some charges are paid to port authorities, while others (pilotage, towage, mooring and unmooring) are paid to private operators.

The *Market Monitoring of Registered Pilotage Services Act 2007* came into force at the beginning of 2008.¹⁴⁷⁸ The reason for introducing the act was that tariffs must be cost-based, reasonable and equal for everybody. Another effect of this legislation is the reduction of cross-subsidies between Dutch seaports, and it offers the opportunity to reduce cross-subsidies at seaports between large and small vessels, and between short and long distances. With regard to the piloting of vessels in the Dutch ports, the ACM (formerly the NMa through the DREV) sets a system that the pilots can use to allocate costs to tariffs. In addition, the ACM annually sets the pilotage tariffs. The pilots send the ACM a tariff proposal. The ACM reviews the proposal, and issues a tariff decision, which may differ from the pilots' proposal. In the most recent decision, the pilotage tariffs in 2013 will increase by 2.67 per cent.¹⁴⁷⁹ The NMa set lower pilotage tariffs than the Dutch Pilots' Corporation had proposed. Each year, the NMa assesses whether the costs have been calculated correctly, and whether the pilots' working methods are efficient. The NMa is authorised to deviate from the tariff proposal should it not meet the requirements set out in the *Dutch Pilotage Act*.

Further, the ACM will annually issue a decision on the maximum profits that pilots are allowed to make, and on the premiums the pilots need to pay in connection with pre-pension reserves.

¹⁴⁷⁸ Archive.nl.com, *Transport Regulation*. Available at: http://archive-nl.com/nl/n/nma.nl/2012-06-03_36279-titles_32/transport_regulation/ [accessed on 16 July 2013].

¹⁴⁷⁹ NMA 2012 *Annual Report*, *op. cit.*, p. 54.

Spain

OVERVIEW

Spain has highly-developed infrastructure across all key areas. Economic regulation is the responsibility of individual regulators in energy, telecommunications, posts, water and wastewater, public transport, airports and ports. The competition authority enforces anti-trust law and may cooperate with regulators when investigating anticompetitive behaviour in regulated areas of the economy.

Objectives of regulators in Spain often include promoting competition and regulatory transparency, and in the case of regulators for specific areas such as the Ministry of Transport that regulates airports, to balance development levels in the different regions of Spain.

Network areas in Spain are at varying points of liberalisation. Energy and telecommunications are well-advanced. Spain's airports and ports are operated by publicly-owned companies operated by the Ministry of Transport. The rail regulator is an internal department within the Ministry of Development.

The Spanish legal system is a civil law system. Decisions by economic regulators can often be appealed to the relevant government minister or, possibly, the relevant appeals court.

The Spanish Government passed the *Law of June 4th 2013* creating the *Comisión Nacional de Mercados y Competencia* (CNMC) (National Commission on Markets and Competition), which had the effect of amalgamating seven industry-based regulators in energy, telecommunications, postal services, audio-visual industries, railway and air transport, and gambling with Spain's *Comisión Nacional de la Competencia* (CNC) (National Competition Commission) to create a sole supervisory body.¹⁴⁸⁰ The objective is to create a regulatory regime within Spain that is more consistent and that avoids duplication. The new body may also review new sectoral legislation on competition grounds before the legislation is adopted. Like its predecessor, the CNMC aims to ensure, preserve and promote the proper functioning, transparency and existence of effective competition in all markets and sectors for the benefit of consumers and users.¹⁴⁸¹

GEOGRAPHY, POPULATION, ECONOMY, POLITY AND LEGAL SYSTEM¹⁴⁸²

Spain is in southwest Europe, bordered by the North Atlantic Ocean, the Mediterranean Sea, Portugal and France. It has an area of 505 370 square kilometres. The population of Spain was about 47.37 million in 2013; implying a population density of about 94 per square kilometre.

Major cities are Madrid (the capital; 5.8 million), Barcelona (five million) and Valencia (0.8 million). Spain has 17 autonomous communities, including the Balearic Islands and the Canary Islands. It controls two autonomous cities in mainland Africa, Ceuta and Melilla. Spanish-ruled territories include the islands of Penon de Alhucemas, Penon de Velez de la Gomera and Islas Chafarinas, off the coast of Morocco.

The Spanish landscape is characterised by a large, flat plateau surrounded by rugged hills, with the Pyrenees Mountains in the north. The interior of Spain has hot summers and cloudy, cold winters. Coastal areas experience moderate, cloudy summers and cool temperatures in the winter. Spain is subject to occasional droughts and flooding.

Spain's economy is the thirteenth largest in the world. Per capita GDP was US\$30 400 at purchasing power parity in 2012, which is substantially lower than in the other large European economies; Germany, the UK, France and Italy. Service-producing industries accounted for 72.6 per cent of GDP in 2012. In contrast, agriculture accounts for 3.3 per cent of GDP.

Natural resources include coal, lignite, iron ore, copper, lead, zinc, uranium, tungsten, mercury and pyrites. Major exports include machinery, motor vehicles, foodstuffs, and pharmaceuticals. Major manufacturing industries include textiles and apparel, food and beverages, metals, chemicals, shipbuilding, machine tools, and refractory products. Spain's agricultural production includes grain,

¹⁴⁸⁰ *Boletín Oficial del Estado, Ley 2/2013 de 4 junio, de creación de la Comisión Nacional de Mercados y Competencia*. Available at: <http://www.boe.es/boe/dias/2013/06/05/pdfs/BOE-A-2013-5940.pdf> [accessed on 15 July 2013].

¹⁴⁸¹ *Ibid.*

¹⁴⁸² Central Intelligence Agency (CIA), *The World Factbook: Spain*. Available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/sp.html> [accessed on 14 July 2013].

vegetables, olives, wine grapes, sugar beets, citrus, beef, pork and poultry. Major imports are machinery and equipment, fuels, chemicals, semifinished goods, foodstuffs and consumer goods. Spain's major trading partners are Germany, France, Italy, the Netherlands, Portugal, China and the United Kingdom.

Spain's economy was severely affected by the global financial crisis in 2007 and 2008. It was in recession from 2008 to 2010; with the economy contracting 3.7 per cent in 2009 alone. The economy came briefly out of recession in 2011, before returning to recession in 2012 (contraction of 1.4 per cent). All economic sectors have suffered a decrease in demand. Unemployment grew from eight per cent in 2007 to about 26 per cent in 2012. The government budget deficit increased from 3.8 per cent of GDP in 2008 to about 11.2 per cent of GDP in 2011. In response, the government reduced public expenditure; strived to increase labour market flexibility and has supported the finance sector.

Spain has well-developed infrastructure across energy, telecommunications, posts, water and wastewater and transport. This is discussed further in the sections below.

Spain has a parliamentary monarchy. King Juan Carlos I is the chief of state. The President is elected by the National Assembly following legislative elections every four years. The National Assembly comprises of the Senate and the Congress of Deputies. Elections were last held in November 2011 with the *Partido Popular* (PP) (People's Party) receiving over 44 per cent of votes. Elections are due in 2015.

The Spanish judicial system includes the *Tribunal Supremo* (Supreme Court), which is the final court of appeal on all issues other than constitutional issues. Constitutional issues are dealt with by the *Tribunal Constitucional de España* (Constitutional Court). Other courts include: the *Audiencia Nacional* (National Court) with criminal and administrative jurisdiction; the *Tribunal Superior de Justicia* (High Courts of Justice) with jurisdiction over each autonomous region; and the *Audiencia Provincial* (Provincial Courts). Courts of first instance include: *Juzgados de Primera Instancia e Instrucción de lo Contencioso-Administrativo* (Administrative Courts); *Juzgados de Primera Instancia e Instrucción de lo Penal* (Criminal Courts) for less serious criminal matters; *Juzgados de Primera Instancia e Instrucción de lo Mercantil* (Mercantile Courts); *Juzgados de Primera Instancia e Instrucción de Vigilancia Penitenciaria* (Prison Surveillance Courts) that oversee conditions in penitentiaries; *Juzgados de Primera Instancia e Instrucción de lo Social* (Labour Courts) and *Juzgados de Primera Instancia e Instrucción de Menores* (Juvenile Courts). The legal system is based on civil law with regional variations.

APPROACH TO COMPETITION AND REGULATORY INSTITUTIONAL STRUCTURE

The major infrastructure regulatory bodies in Spain include: the *Comisión Nacional de la Competencia* (CNC) (National Competition Commission), the *Comisión Nacional de la Energía* (CNE) (National Energy Commission), the *Comisión del Mercado de las Telecomunicaciones* (CMT) (Telecommunications Market Commission), the *Comisión Nacional del Sector Postal* (CNSP) (National Postal Sector Commission), *Comité de Regulación Ferroviaria* (CRF) (Rail Regulatory Committee) and the *Comisión de Regulación Económica Aeroportuaria* (CREA) (Airport Economic Regulatory Commission).

Despite the recent establishment of the CNMC, the CNC is to remain as Spain's acting competition authority until the CNMC become full operation. The CNC is responsible for administering and enforcing the *Ley de Defensa de la Competencia* (Competition Act)¹⁴⁸³ and for applying EU competition law in markets at the national level. With the exception of proposed mergers, regional competition authorities enforce competition law a local level.

The Competition Act applies to all areas of the economy, including regulated infrastructure areas. Agencies that regulate infrastructure areas, such as the *Comisión Nacional de la Energía* (CNE) (National Energy Commission) and the *Comisión del Mercado de las Telecomunicaciones* (CMT) (Telecommunications Market Commission), coordinate with the CNC in matters of restrictive or anti-competitive practices. For example, the CNC may request the CNE to submit reports relating to the abuse of a dominant position in the electricity market.¹⁴⁸⁴ Individual sector and industry regulators submit non-binding opinions to the CNC in relation to: proposed mergers within the sector or industry;

¹⁴⁸³ CNC, CNC. Available at: <http://www.cncompetencia.es/Default.aspx?TabId=85> [accessed on 15 July 2013].

¹⁴⁸⁴ CNC, *Annual Reports*. Available at: <http://www.cncompetencia.es/Inicio/ConocerlaCNC/Memorias/tabid/72/Default.aspx> [accessed on 15 July 2013].

and infringement proceedings initiated by the CNC against businesses within the sector or industry. Regulators may request an opinion from the CNC in relation to regulatory proceedings that significantly impact on competition within the infrastructure area.¹⁴⁸⁵ In some cases, the CNC may investigate cases that go beyond Spanish jurisdiction, pursuant to European Community legislation (Articles 101 and 102 of the Treaty on the Functioning of the European Union, Regulation Number 1/2003).¹⁴⁸⁶

The CNC's objectives are to: preserve, guarantee and promote effective competition in markets at the national level; apply the *Competition Act* consistently; and coordinate with industry regulators, the offices of the Autonomous Regions, and with courts.¹⁴⁸⁷

Core activities of the CNC, as provided by the 'Action Plan 2010-2012' include: increasing effectiveness in competition advocacy and combating the most damaging anti-competitive practices; increasing transparency in decision-making and other activities of the CNC; and increasing coordination of the CNC's activities.¹⁴⁸⁸ Shorter term goals include: working closely with internal economic advisory services to facilitate economic and empirical analysis; developing an ex-post evaluation methodology to measure the long-term impact of the CNC; designing benchmark methodologies for sector studies; establishing criteria for leniency programs, confidentiality in proceedings, and abbreviated merger control procedures; and further encouraging a culture of competition throughout Spain.¹⁴⁸⁹

The CNC is comprised of a Directorate for Investigation (DI) and a Council. The Council is composed of six members and a President, and is appointed for six years by the Government, following a parliamentary hearing.

Anti-competitive practices are investigated by the DI. Decisions are made by the Council after considering recommendations by the DI.¹⁴⁹⁰

Preliminary investigations are carried out by the DI. Formal infringement proceedings may then be launched. Parties are provided with a Statement of Objections with 15 days to respond. The Council is provided with a proposal for resolution, along with the parties' responses. The Council may also request additional evidence or conduct a hearing. The Council then makes a final decision.

The CNC has broad information-gathering powers. The CNC can request information from people or businesses in the application of the Competition Act. Fines may be imposed if information is not provided, or if the information is incomplete or inaccurate.

The CNC has 'search and seize' powers that include powers to enter premises and remove documents. In the course of an inspection, the CNC may ask staff for explanations on facts or documents related to the inspection. The CNC does not have a general power to interview staff.¹⁴⁹¹

Appeals

Some decisions and acts of the DI may be appealed to the Council of the CNC. Parties have ten days to lodge an appeal and fifteen days to provide submissions.

¹⁴⁸⁵ H Brokelmann, M Allendesalazar and B Abogados, 'Spain', in Global Legal Group (ed.), *The International Comparative Legal Guide to Enforcement of Competition Law 2009*, London. Available at: <http://www.iclg.co.uk/practice-areas/enforcement-of-competition-law/enforcement-2009> [accessed on 15 July 2013].

¹⁴⁸⁶ CNC, *CNC*. Available at: <http://www.cncompetencia.es/Default.aspx?TabId=85> [accessed on 15 July 2013].

¹⁴⁸⁷ CNC, *Who We Are?* Available at: <http://www.cncompetencia.es/Inicio/ConocerlaCNC/QueeslaCNC/tabid/77/Default.aspx> [accessed on 15 July 2013].

¹⁴⁸⁸ CNC, *CNC Action Plan 2010-2012: Stepping Forward*. Available at: [http://www.cncompetencia.es/Portals/0/PDFs/Docs/Action per cent20Plan per cent202010-2012.pdf](http://www.cncompetencia.es/Portals/0/PDFs/Docs/Action%20per%20Plan%20per%202010-2012.pdf) [accessed on 15 July 2013].

¹⁴⁸⁹ *Ibid.*

¹⁴⁹⁰ H Brokelmann, M Allendesalazar and B Abogados, *The International Comparative Legal Guide to Enforcement of Competition Law*. Available at: <http://www.iclg.co.uk/practice-areas/enforcement-of-competition-law/enforcement-2009> [accessed on 15 July 2013].

¹⁴⁹¹ H Brokelmann, M Allendesalazar and B Abogados, *The International Comparative Legal Guide to Enforcement of Competition Law*. Available at: <http://www.iclg.co.uk/practice-areas/enforcement-of-competition-law/enforcement-2009> [accessed on 15 July 2013].

Parties may appeal final decisions of the CNC before the *Audiencia Nacional* (National Court) within two months of the publication or notification of the decision. Final decisions of regional competition authorities may be appealed to the regional *Tribunal Superior de Justicia* (High Courts of Justice).

Appeals are heard on their merits. Appeal courts are empowered to reduce fines or set aside decisions in part or in the entirety. Decisions made by the National Court may be appealed to the Supreme Court.

In the energy sector, decisions such as those adopted by the CNC in relation to disputes or system management are appealed at the *Sala de lo Contencioso-Administrativo de la Audiencia Nacional*, that is, in the 'contentious-administrative jurisdiction'. In telecommunications, decisions by the CMT may also be appealed by parties at the 'contentious-administrative jurisdiction', within two months of the decision being made.¹⁴⁹² In relation to postal services, decisions of the CNSP may be challenged in Spain's administrative courts, pursuant to Law 29/1998 of 13 July. In the rail subsector, the decisions of the CRF are binding on the rail businesses, although decisions by the CRF in relation to royalty payments paid by rail businesses may be appealed in the courts for judicial enforcement. Finally decisions made by the CREA in relation to airports may be appealed to the Division of Administrative Litigation of the Court.¹⁴⁹³

*The National Commission of Markets and Competition.*¹⁴⁹⁴

The Law of June 4th 2013 extensively modifies the current regulatory oversight system by creating a new agency, the National Commission on Markets and Competition (CNMC), which integrates the current National Competition Commission with the industry and sector oversight bodies: the National Energy Commission; the Commission of Telecommunications Markets; the Railway Regulatory Committee; the Airport Economic Regulatory Commission and the Postal Sector National Commission.

The Law effectively orders the new institutional framework, leaving the content of the relevant antitrust and regulatory legislation largely intact. In the energy sector, the Act transfers responsibility of inspections, the initiation of disciplinary proceedings and the attendance to industry consumer complaints to the Ministry of Industry, Energy and Tourism. With regard to telecommunications, the Act simply transfers the previous powers of the Telecommunications Market Commission to the CNMC, without attributing a new role for the Ministry of Industry, Energy and Tourism in this area. In relation to postal services, the law accords to the CNMC functions that were previously the responsibility of the Postal Sector National Commission on the terms set out by the legislation. For the transport sector, the CNMC assumes the functions of monitoring the transparency and consultation procedure; firstly for the modification or upgrade of airport charges once conducted by AENA, and the corresponding Railway Regulation Committee under Law 39/2003, of 17 November.

The constitution of the Commission indicates the eventual replacement of these infrastructure regulatory bodies by the CNMC. In the meantime, these separate bodies are to continue to exercise their normal functions until the commissioning of the new CNMC.

REGULATORY ARRANGEMENTS BY INDUSTRY OR SECTOR

1. Energy

Spain produces electricity from nuclear sources (20 per cent), gas (19 per cent), coal (16 per cent), wind (15 per cent) and hydroelectric generators (11 per cent).¹⁴⁹⁵ Spain has large coal reserves and

¹⁴⁹² *Agencia Estatal Boletín Oficial del Estado, Documento BOE-A-2012-10362.* Available at: http://www.boe.es/diario_boe/txt.php?id=BOE-A-2012-10362 [accessed on 15 July 2013].

¹⁴⁹³ *Agencia Estatal Boletín Oficial del Estado, Royal Decree Law 11/2011, of 26 August, establishing the Airport Economic Regulatory Commission, regulating its composition and functions, and amending the legal regime of the workforce of Aena, Second Final Provision.* Available at: <http://www.boe.es/buscar/doc.php?id=BOE-A-2011-14221> [accessed on 15 July 2013].

¹⁴⁹⁴ Garrigues, *Law Creating the National Commission on Markets and Competition.* Available at: <http://www.garrigues.com/es/Publicaciones/Alertas/Paginas/Ley-de-Creacion-de-la-Comision-Nacional-de-los-Mercados-y-la-Competencia.aspx> [accessed on 15 July 2013].

¹⁴⁹⁵ *Red Electrica de España, The Spanish Electricity System – Preliminary Report 2011.* Available at: http://www.ree.es/ingles/sistema_electrico/informeSEE-avance2011.asp [accessed on 15 July 2013].

imports oil from Nigeria, Russia and Mexico.¹⁴⁹⁶ Electricity production was about 275 billion kWh in 2009. 14.8 billion kWh was exported and 8.1 billion kWh was imported.¹⁴⁹⁷

The electricity market is vertically integrated and highly concentrated. The two largest businesses in the market are *Endesa* and *Iberdrola*.¹⁴⁹⁸ The transmission network is operated by *Red Eléctrica de España* (Law 17/2007 of 4 July). In 2010, *Red Eléctrica de España* acquired transmission assets in Balearic and Canary Islands and became the sole transmission agent and electricity-system operator throughout Spain. The transmission grid consists of more than 40 100 kilometres of high-voltage electricity lines and 4800 substation bays, with 74 000 MVA of transformer capacity.

Gas is imported through international pipeline connections with Portugal, Morocco, France, and Algeria. LNG is imported through terminals in Huelva, Barcelona, Categena, Bilbao, Sagunto and Galicia.¹⁴⁹⁹ *Enagás* owns 81.6 per cent of the national transportation gas pipeline network. Other gas transportation companies are *Gas Natural Transporte SA* and *Naturgas Energía Transporte SA*. Gas Natural Group owns 84 per cent of the gas distribution network.¹⁵⁰⁰ The two Spanish underground gas storage facilities are owned by *Enagás*. *Enagás* also operates Spain's LNG terminals. *Enagás* was established by the Spanish Government in 1975 and privatised in 1994. It was listed on the Stock Exchange in 2002.¹⁵⁰¹

Regulatory Institutions and Legislation

The *Comisión Nacional de la Energía* (CNE) (National Energy Commission) regulates the electricity and gas industries in Spain (Law 34/1998 of 7 October and Royal Decree 1339/1999 of 31 July). The CNE is governed by a Board of Directors, comprised of a President, Vice-President, six Directors and a Secretary. The President, Vice President and Directors are appointed by the Government, following a proposal by the Minister of Industry. Appointments are for a term of six years. A maximum of two terms applies.

The objectives of the CNE are to 'monitor efficient responsibility in the energy systems and operational objectivity and transparency, to the benefit of all those individuals who work in these systems as well as consumers.'¹⁵⁰²

The functions of the CNE include:

- Energy planning, including proposing changes to the legal framework for the energy sector;
- Establishing tariffs and charges for energy-related activities, including undertaking payment for the costs of the transport and distribution of electricity where payment is expressly commissioned;
- Monitoring participants in the market to ensure that the principles of free competition are upheld;
- Resolving conflicts in relation to access to transport and distribution networks and connection to the electricity and gas networks, and between other participants in the market; and
- Inspecting technical conditions of facilities, the quality of service, the continuity of energy supply and the market conditions of the energy sector.¹⁵⁰³

¹⁴⁹⁶ European Commission (EC), *Spain: Energy Mix Fact Sheet*. Available at: http://ec.europa.eu/energy/energy_policy/doc/factsheets/mix/mix_es_en.pdf [accessed on 15 July 2013].

¹⁴⁹⁷ Central Intelligence Agency (CIA), *The World Factbook: Spain*. Available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/sp.html> [accessed on 15 July 2013].

¹⁴⁹⁸ P Bennerstedt and J Grelsson, *Spain's Electricity Market Design: A Case Study*. Available at: <http://kth.diva-portal.org/smash/get/diva2:537379/FULLTEXT01> [accessed on 15 July 2013].

¹⁴⁹⁹ H Brokelmann, M Allendesalazar and B Abogados, *The International Comparative Legal Guide to Enforcement of Competition Law*, p.1. Available at: <http://www.iclg.co.uk/practice-areas/enforcement-of-competition-law/enforcement-2009> [accessed on 15 July 2013].

¹⁵⁰⁰ *Ibid.*

¹⁵⁰¹ *Enagás, Presentación*. Available at: http://www.enagas.es/cs/Satellite?cid=1142417697548&language=es&pagename=ENAGAS%2FPPage%2FENAG_pintarContenidoFinal [accessed on 15 July 2013].

¹⁵⁰² CNE, *Presentation*. Available at: http://www.eng.cne.es/cne/contenido.jsp?id_nodo=3&&keyword=&auditoria=F [accessed on 15 July 2013].

¹⁵⁰³ *Ibid.*

Consultation of Interested Parties

The CNE's activities are governed by the *Act in Relation to the Legal Regime of Public Administrations* and the Common Administration Procedure. It is bound by legislation covering Public Administration contracts when contracting goods and services.¹⁵⁰⁴ Royal Decree 1339/1999 of 31 July provides by-laws of the CNE, including its legal framework and organisational structure.¹⁵⁰⁵

The CNE's role as an arbitrator shall be activated by a written request signed by the actor (agents carrying out activities in the electricity industry or consumers regarded as having qualified consumer status) or an actor's representatives giving the name and address of the claimant and the person against whom the claim is being made, the background facts and the legal grounds, the content of the claim and the proposal of any evidence relevant.¹⁵⁰⁶

The Commission Secretariat shall send a copy of the claim to the party against whom the claim is being made so that it may be answered within ten days, setting out the background facts and, as the case may be, the legal grounds believed to be applicable and the proposal of any evidence deemed relevant.

Once the evidence has been examined, the Commission shall ask the parties to put their conclusions in writing. The Commission may decide to hold a hearing or on the request of the parties.

The arbitration award cannot be made without the agreement of at least five of the Board of Commissioners.

The cost of examining the evidence shall be paid for in advance by whoever proposes that evidence.

In its role as arbitrator, the CNE may request the collaboration of the *Central State Administration* institutions to examine the evidence presented by the parties involved in a dispute and these institutions must give collaboration as swiftly as possible.¹⁵⁰⁷

*Timeliness*¹⁵⁰⁸

Disputes must be brought before the CNMC within one month.

The deadline for a decision to be taken on disputes and notifications given thereof shall be three months, after which time the applicant's claims shall be deemed to have been turned down.

Information Disclosure and Confidentiality

The CNE may obtain information it required from businesses operating in the energy markets in order to discharge its functions.¹⁵⁰⁹ This includes information required to assess remuneration for the businesses such as information in relation to: the cost of electricity; investment costs; operation and maintenance of facilities; energy distributed; areas of distribution and physical inventories of facilities.¹⁵¹⁰

Refusal to provide information to the National Energy Commission is a serious offence and punishable under Article 61.a.5 of Law 54/1997 of 27 November.¹⁵¹¹ The National Energy Commission may make inspections needed to confirm the accuracy of information provided by businesses.¹⁵¹² The Energy Legislation provides that information provided to the Commission must

¹⁵⁰⁴ CNE, *CNE : Comisión Nacional de la Energía*. Available at: http://www.cne.es/cne/doc/publicaciones/cuatr_en.pdf [accessed on 15 July 2013].

¹⁵⁰⁵ *Ibid.*

¹⁵⁰⁶ CNE, *National Energy Commission By-Laws*. Available at: http://www.cne.es/cne/doc/publicaciones/NE006_05.pdf [accessed on 15 July 2013].

¹⁵⁰⁷ *Ibid.*

¹⁵⁰⁸ *Ibid.*

¹⁵⁰⁹ CNE, *CNE : Comisión Nacional de la Energía*. Available at: http://www.cne.es/cne/doc/publicaciones/cuatr_en.pdf [accessed on 15 July 2013].

¹⁵¹⁰ *Boletín Oficial del Estado, Resolution of 1 April 2005 and Law 54/1997 of 27 November*. Available at: <http://www.boe.es/boe/dias/2012/08/25/pdfs/BOE-A-2012-11151.pdf> [accessed on 15 July 2013].

¹⁵¹¹ *Ibid.*

¹⁵¹² *Ibid.*

be treated in a confidential manner. The information may be aggregated for statistical purposes and disseminated on a confidential basis.¹⁵¹³

Decision-making and Reporting

Decisions are made by the CNE's Board of Commissioners. An arbitration award cannot be made without the agreement of at least five of the members.¹⁵¹⁴

The number of decisions issued by the CNE is published in its Annual Report. In 2010, the CNE Board reviewed and passed decisions on a total of 774 external proceedings, 4477 inspections and 29 internal proceedings.¹⁵¹⁵

Appeals

Rights of appeal of CNE decisions to the Minister of Industry, Tourism and Trade, have been abolished under the *Sustainable Economy Act* (Law 2/2011).¹⁵¹⁶ The following may be appealed under 'contentious-administrative jurisdiction':¹⁵¹⁷

- decisions adopted by the CNE settling disputes concerning the economic and technical management of the system and transmission in the electricity industry;
- decisions in relation to the system management of the gas industry; and
- decisions in relation to information circulars.

Regulatory Development

In the gas market, regulatory changes have been introduced in an attempt to increase the depth of gas-trading markets. For example, Law 25/2009 and Royal Decree 197/2010 provide for the licensing of new gas suppliers. A gas-trading hub is currently being developed in Bilbao.¹⁵¹⁸

In 2012, the Spanish Government temporarily suspended the support mechanisms for new renewable energy projects (Royal Decree 1/2012). New measures have recently been introduced to:

- correct the imbalance in the electricity system between cost of production and revenues in tariffs (tariff deficit);
- reduce costs in the electricity system so that feed-in tariffs are sufficient to cover the cost of production of regulated activities and achieve a tariff/costs balance in the electricity system by 1 January 2013;
- prevent the current development model of the gas industry from producing similar imbalances between revenues and costs to those in the electricity industry. The heavy investments made in the gas industry in recent years and the decrease in demand have already created an imbalance, although this imbalance is lower than the existing imbalance in the electricity industry; and
- Incorporate the European directives related to energy to the Spanish legal system (Directive 2009/72/CE regarding the electricity industry; Directive 2009/73/CE in relation to the gas industry; Directive 2009/28/CE for the promotion of renewable energies).¹⁵¹⁹

¹⁵¹³ *Ibid.*

¹⁵¹⁴ CNE, *National Energy Commission Bye-Laws*. Available at: http://www.cne.es/cne/doc/publicaciones/NE006_05.pdf [accessed on 15 July 2013].

¹⁵¹⁵ CNE, *Annual Report 2010*. Available at: http://www.cne.es/cne/contenido.jsp?id_nodo=23&&keyword=&auditoria=F [accessed on 15 July 2013].

¹⁵¹⁶ CNE, *Spanish Energy Regulator's National Report to the European Commission 2012*, p. 3. Available at: http://www.cne.es/cne/doc/publicaciones/PA011_12.pdf [accessed on 15 July 2013].

¹⁵¹⁷ CNE, *CNE: Comisión Nacional de la Energía*, p. 2. Available at: http://www.cne.es/cne/doc/publicaciones/cuatr_en.pdf [accessed on 15 July 2013].

¹⁵¹⁸ Iberian Gas Hub, *History*. Available at: <http://www.iberiangashub.com/Company/History.aspx> [accessed on 15 July 2013].

¹⁵¹⁹ CNE, *Spanish Energy Regulator's National Report to the European Commission 2012*, p. 6-7. Available at: http://www.cne.es/cne/doc/publicaciones/PA011_12.pdf [accessed on 15 July 2013].

2. Telecommunications

Spain has a well-developed, modern telecommunication system. Fixed-line density is about 50 per 100 persons; while mobile penetration is such that the number of mobile subscriptions is greater than the population. Combined mobile and fixed-line penetration is about 175 per 100 people.¹⁵²⁰

The recent recession has had a significant impact on the telecommunications market in Spain. Market revenue was about €40 billion in 2009. By 2011, market revenue had fallen to €37.3 billion. Market revenue fell 4.6 per cent in 2011 alone. Investment has also fallen since 2008. While economic activity in the provision of broadband services grew until mid-2010, revenue has since fallen by between 1.5 per cent and 2.9 per cent per quarter.¹⁵²¹

There were 19.40 million fixed telephony lines in service at end-June 2012. This comprised 12.92 million residential lines and 6.48 million business lines. *Telefonica de España* provided fixed telephony services to 7.2 million residential customers. Other market participants were *Ono* with 1.8 million residential customers, *Jazztel* (1.2 million), *Orange* (1 million) and *Vodafone* (916 811).

Four companies compete to provide mobile services in Spain: *Movistar*, *Vodafone*, *Orange* and *Yoigo*. A growing number of resellers have also entered the market. Spain had 54.9 million mobile lines and datacards at the end of the June 2012, down from 55.1 million in June 2011. *Movistar* had 19.5 million mobile voice lines, followed by *Vodafone* with 14.3 million, *Orange* with 10.8 million lines and *Yoigo* had 2.9 million.¹⁵²²

The cost of mobile calls has decreased in recent years because of this competition, together with regulated roaming. The 3G market has changed with the release of 900MHz frequencies for 3G services. This has been accompanied by investment in network upgrades to support LTE and HSPA+ technologies.¹⁵²³

Spain had over 11.14 million fixed broadband lines at 30 June 2012. Fixed broadband subscriptions were at about 25 per 100 of population on 30 June 2012. This was slightly below the OECD average.¹⁵²⁴ Wireless broadband penetration is also slightly below the OECD average.

Telefonica served about 5.5 million fixed broadband customers, while *Ono* had nearly 1.6 million customers. By the end of June 2012, *Orange* had 1.3 million fixed broadband subscribers, *Jazztel* had 1.2 million, *Vodafone* had 808 883, *Euskaltel* with 239 018, *R* with 199 182 and *TeleCable* with 120 148 users.¹⁵²⁵ Eighty-three per cent of the population has 3G coverage.¹⁵²⁶

Regulations have simplified number portability recently. This has led to an increase in the number of ported numbers, to 4.5 million in 2009. A recent entrant into the market, *Yoigo*, has attracted a six per cent share of the mobile market by subscribers. Subscribers to mobile datacards grew 65 per cent in 2009. Datacard penetration is expected to have grown to about 15 per cent of all mobile phone users by 2011. This has placed pressure on the ability of HSPA and future LTE networks to cope with traffic demand.¹⁵²⁷

¹⁵²⁰ Central Intelligence Agency (CIA), *The World Factbook: Spain*. Available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/sp.html> [accessed on 15 July 2013].

¹⁵²¹ Budde Blog, *Spanish Economic Crisis Slashes Telecom Sector Revenue*. Available at: <http://www.buddeblog.com.au/frompaulsdesk/spanish-economic-crisis-slashes-telecom-sector-revenue/> [accessed on 15 July 2013].

¹⁵²² Telecompaper, *Spanish Telecom Sector Revenue Decline 8.6% in Q2*. Available at: <http://www.telecompaper.com/news/spanish-telecom-sector-revenues-decline-86-in-q2> [accessed on 15 July 2013].

¹⁵²³ Budde Comm, *Spain: Mobile Market Insights, Statistics and Forecasts*. Available at: <http://www.budde.com.au/Research/Spain-Mobile-Market-Insights-Statistics-and-Forecasts.html> [accessed on 15 July 2013].

¹⁵²⁴ OECD, *Broadband Portal June 2012*. Available at: <http://www.oecd.org/sti/broadband/oecd-broadband-portal.htm> [accessed on 15 July 2013].

¹⁵²⁵ Telecompaper, *Spanish Telecom Sector Revenue Decline 8.6% in Q2*. Available at: <http://www.telecompaper.com/news/spanish-telecom-sector-revenues-decline-86-in-q2> [accessed on 15 July 2013].

¹⁵²⁶ OECD, *Broadband Portal June 2012*, 17 February 2012. Available at: <http://www.oecd.org/internet/broadbandandtelecom/broadbandportal-pressrelease-dec2011.htm> [accessed on 1 July 2013].

¹⁵²⁷ Budde Blog, *Fibre is Set to Revitalise Spain's Dampened Telecom Sector*. Available at: <http://www.buddeblog.com.au/frompaulsdesk/fibre-is-set-to-revitalise-spains-dampened-telecom-sector/> [accessed on 15 July 2013].

Spain continues to implement the second phase of the national *Avanza Plan*.¹⁵²⁸ The *Avanza Plan* is a telecommunications infrastructure scheme. It is a response to the European Commission's i2010 initiative which calls on Member States to develop national action plans for the advancement of the Information Society. The main objective of the *Avanza Plan* is to increase the volume of economic activity related to Information Technologies. The *Avanza Plan* has been allocated about €6.6 billion in public funds to date.¹⁵²⁹ The continuation of the *Avanza Plan* is expected to stimulate research and development investment and increase economic activity relating to the use of ICTs. The implementation of the *Avanza Plan* is based on cooperation between the national and regional governments, including the 17 Autonomous Communities, which will have a separate Action Plan and budgetary contribution. In Cantabria, for example, €14.78 million has been allocated to support the 'Internet in the Classroom' and 'Health On-Line' programmes.¹⁵³⁰

Regulatory Institutions and Legislation

Law 32/2003, of 3 November, on Telecommunications provides for the regulation of the telecommunication industry. Article 46 of Law 32/2003 provides that the telecommunications industry may be regulated by:¹⁵³¹

- the Government;
- the executive bodies of the Ministry of Science and Technology;
- the higher and executive bodies of the Ministry of Economy in the regulation of prices;
- the *Comisión del Mercado de las Telecomunicaciones* (Commission of Telecommunications Market); and
- the *Agencia Estatal de Radiocomunicaciones* (Radiocommunications Agency).

The *Comisión del Mercado de las Telecomunicaciones* (CMT) is an independent public agency that is responsible for economic regulation of telecommunications and audiovisual services in Spain. It was established by Royal Decree 6/1996.¹⁵³² Initially located in Madrid, the CMT was re-located to Barcelona in 2004.

The CMT promotes competition in telecommunications markets. It establishes and provides oversight of obligations imposed on operators in telecommunications markets (Article 48.2 of Law 32/2003).¹⁵³³ The structure of the CMT includes: a legal department; departments in relation to the regulation of operators; and a department for economic and market analysis.¹⁵³⁴ The CMT is comprised of a Council, which includes the President and Vice President of the CMT and five Councillors.¹⁵³⁵ The President's Office is responsible for managing the agenda of the President of the CMT.¹⁵³⁶ The Directorate General of Education directs the regulatory activity of the CMT, through the coordination and supervision of the: Technical Directorates; Regulatory Operators; the Bureau of Economic Analysis and Markets; and Statistics and Documentation Resources.¹⁵³⁷

¹⁵²⁸ Plan Avanza, *Executive Summary*. Available at: <https://www.planavanza.es/informaciongeneral/executive/Paginas/ExecutiveSummary.aspx> [accessed on 15 July 2013].

¹⁵²⁹ *Ibid.*

¹⁵³⁰ European Commission (EC), *National Initiatives*. Available at: http://ec.europa.eu/enterprise/sectors/ict/files/ebsn/national-initiatives/spain-pyme_en.pdf [accessed on 15 July 2013].

¹⁵³¹ *Agencia Estatal Boltín Oficial del Estado, Ley 32/2003, de 3 noviembre, General de Telecomunicaciones*. Available at: <http://www.boe.es/buscar/doc.php?coleccion=iberlex&id=2003/20253> [accessed on 15 July 2013].

¹⁵³² CMT, *Creacion y Objeto*. Available at: <http://www.cmt.es/creacion-y-objeto> [accessed on 1 July 2013].

¹⁵³³ *Ibid.*

¹⁵³⁴ *Ibid.*

¹⁵³⁵ CMT, *Organisational Structure*. Available at: http://www.cmt.es/c/document_library/get_file?uuid=120b89ca-d1a6-4f3c-baf0-d61b463370b7&groupId=10138 [accessed on 15 July 2013].

¹⁵³⁶ CMT, *Gabinete*. Available at: http://www.cmt.es/detalle-organigrama?p_p_id=101_INSTANCE_85Cg&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&p_p_col_id=column-2&p_p_col_pos=2&p_p_col_count=3&_101_INSTANCE_85Cg_struts_action=%2fasset_publisher%2fview_content&_101_INSTANCE_85Cg_urlTitle=miembros_consejo_025_gabinete&_101_INSTANCE_85Cg_type=content&redirect=%2fcomposicion-y-organigrama [accessed on 15 July 2013].

¹⁵³⁷ CMT, *Instrucción*. Available at: http://www.cmt.es/detalle-organigrama?p_p_id=101_INSTANCE_85Cg&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&p_p_col_id=column-

The CMT's Bureau of Economic Analysis and Markets assesses the competitive position of businesses. It conducts economic and financial analysis of the costs of telecommunications services and the formation of prices of services. It defines relevant markets for networks and electronic communications services, identifies operators that have significant power in each of these markets, and imposes obligations on operators.

The CMT is funded from charges accrued in telecommunications activities for service delivery (Article 48.14 of the Law 32/2003). These services include: from the fees paid by operators of networks or electronic communications services; and telecommunications charges for issuing registration certificates, expert advice and conducting inspection activities or technical checks.¹⁵³⁸

The functions of the CMT include:¹⁵³⁹

- Arbitrating in disputes arising between electronic communications operators.
- Ensuring funding of public service obligations and the provision of the universal service.
- Intervening in conflicts between operators in relation to access and interconnection and sharing of infrastructure.
- Safeguarding plurality in the provision of services, and ensuring access to electronic communications networks by operators, interconnection of networks and pricing and marketing by service providers.
- Enforcing National Competition Commission legislation and ensuring that agreements practices or behaviours are not anticompetitive.
- Advising the Government on the regulation of the telecommunications market, including in relation to matters which may affect the development of a competitive market such as proposed mergers or takeovers within electronic communications. Advice is also provided to Autonomous Communities and Local Government.
- Analysing and defining relevant markets for networks and electronic communications services, including their geographic scope, in order to assess whether effective competition exists.
- Imposing, maintaining or modifying obligations on operators who have significant market power. These may include obligations in relation to transparency, non-discrimination, accounting separation, the provision of access to specific resources, and the imposition of price controls.
- Exercising disciplinary powers following breaches of instructions or decisions issued by the CMT.
- Imposing penalties for breaches of the conditions and requirements imposed on networks and electronic communications businesses, for breaches of the law and regulations imposed on access and interconnection, and breaches of the conditions determining the allocation and assignment of numbering resources included in the numbering plans duly approved.

Spanish telecommunications is also governed by EU regulations and directives including:

- Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office [Decision 2010/299/UE of 21 May, OJ of 26 May, repealing ERG] and Internal Rules of Procedure of BEREC.
- Regulation no. 531/2012, of 13 June 2012 on roaming on public mobile communications networks within the European Union (Regulation of roaming).
- Directive 2009/140/EC on a common regulatory framework for networks and electronic communications services, Directive 2002 / 19/CE on access to electronic communications

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¹⁵³⁸ CMT, *Regimen Juridico y Finciación*. Available at: <http://www.cmt.es/regimen-juridico-y-financiacion> [accessed on 15 July 2013].

¹⁵³⁹ CMT, *Funciones*. Available at: <http://www.cmt.es/funciones> [accessed on 15 July 2013].

networks and associated facilities, and associated facilities, and 2002/20/EC on the authorisation of networks and electronic communications services

- Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and electronic communications services (Universal Service Directive), as amended by Directive 2009/136/EC of 25 November.¹⁵⁴⁰

*Consultation of Interested Parties*¹⁵⁴¹

The CMT's role as an arbitrator is activated by a written request signed by the actor (agents carrying out activities in the telecommunications industry or consumers regarded as having qualified-consumer status) or an actor's representatives giving the name and address of the claimant and the person against whom the claim is being made, the background facts and the legal grounds, the content of the claim and the proposal of any evidence relevant.

The Commission Secretariat shall send a copy of the claim to the party against whom the claim is being made so that it may be answered within ten days, setting out the background facts and, as the case may be, the legal grounds believed to be applicable and the proposal of any evidence deemed relevant. Relevant proof must be submitted within ten days of a written request being submitted.

Once the evidence has been examined, the Commission shall ask the parties to put their conclusions in writing within six days. The Commission may decide to hold a hearing or on the request of the parties.

Once the hearing has been held and written conclusions have been submitted, the decision will be made by the Council within 20 days. The decision shall be expressed in written form and shall outline: the circumstances of the parties; the issue under dispute; a summary of the evidence presented; and the legal basis for the decision.

The arbitration award cannot be made without the agreement of at least four of the Councillors, whereby each member in agreement with the decision must sign off on the decision.

Parties may be notified of the decision by any means of communication that allows for the reception of the decision by each party to be confirmed. Parties may request the CMT to correct any errors or make clarifications regarding the decision within five days from being notified, after which the Board will make the necessary adjustments within six days.

The CMT consults with market participants pursuant to Article 7 of Directive 2002/21/CE of the European Parliament and Council of 7 March 2002.^{1542 1543}

In its role as arbitrator, the CMT may request the collaboration of the *Central State Administration* institutions to examine the evidence presented by the parties involved in a dispute and these institutions must give collaboration as swiftly as possible.¹⁵⁴⁴

*Timeliness*¹⁵⁴⁵

Parties will be notified of the CMT's decision within a period of twenty days once evidence has been presented and the relevant hearings have been held.

¹⁵⁴⁰ CMT, OBA. Available at: <http://www.cmt.es/vigente-oba> [accessed on 21 January 2013]. Also see European Commission (EC), Digital Agenda for Europe. Available at: http://ec.europa.eu/information_society/digitalagenda/scoreboard/countries_2012/information_society/bin12/pdf/Telecom_Horizontal_Chapter.pdf [accessed on 15 July 2013].

¹⁵⁴¹ *Real Decreto 1994/1996 de 6 septiembre, por el que se aprueba el Reglamento de la Comisión del Mercado de la Telecomunicaciones*. Available at: <http://www.onnet.es/ley0039.htm> [accessed on 15 July 2013].

¹⁵⁴² *Real Decreto 1994/1996 de 6 septiembre, por el que se aprueba el Reglamento de la Comisión del Mercado de la Telecomunicaciones*. Available at: <http://www.onnet.es/ley0039.htm> [accessed on 15 July 2013].

¹⁵⁴³ *Agencia Estatal Boletín Oficial del Estado, Ley 32/2003, de 3 de noviembre, General de Telecomunicaciones*. Available at: <http://www.boe.es/buscar/doc.php?id=BOE-A-2003-20253> [accessed on 15 July 2013].

¹⁵⁴⁴ *Real Decreto 1994/1996 de 6 septiembre, por el que se aprueba el Reglamento de la Comisión del Mercado de la Telecomunicaciones*. Available at: <http://www.onnet.es/ley0039.htm> [accessed on 15 July 2013].

¹⁵⁴⁵ *Ibid.*

Information Disclosure and Confidentiality

Telecommunications businesses must provide detailed information about their costs, pursuant to the criteria and conditions set by regulations. The businesses can identify to the CMT information that is confidential. The information must have commercial or industrial importance. Disclosure of the information may harm the business. The CMT will assess the claim for confidentiality.¹⁵⁴⁶

Decision-making and Reporting

Decisions are made by the CMT's Council and an arbitration award cannot be made without the agreement of at four of the members, whereby each member in agreement with the decision must sign off on the decision.¹⁵⁴⁷ The decisions reached by the Council are available on the CMT's website under *Resoluciones* and include details of the dispute between the parties along with the legal basis for which the decision was made. In 2012, the Council ruled on a total of 43 disputes.¹⁵⁴⁸

Appeals

Decisions by the CMT may be appealed by parties at the *Sala de lo Contencioso-Administrativo de la Audencia Nacional*, that is, the 'contentious-administrative jurisdiction', within two months of the decision being made.¹⁵⁴⁹

3. Postal Services

Spain's national postal service is provided by *Sociedad Estatal de Correos y Telégrafos, S.A (Correos)*. *Correos* is owned by the State and has about 59000 employees.¹⁵⁵⁰ It is one of the largest companies in Spain. About four billion pieces of mail were sent in 2011 in Spain. It is based in Madrid, and has over 10 000 postal centres in Spain. Before 1992, *Correos* was a Government Department. In 2001 it was made a Public Limited Company. *Correos* is governed by a Management Board, an Executive Committee and a President. It also has affiliated companies: *Chronoexprés* (a business that specialises in providing express parcel delivery services), *Nexea* and *Correos Telecom* (a business that specialises in providing telecommunications services to the *Correos* group, and uses the surplus capacity of its network to provide services to other customers).¹⁵⁵¹ A comparative analysis of *Correos* with other EU postal operators suggests that *Correos* staffing levels have not been reduced in the same way as other postal operators. Labour costs of *Correos*, as a percentage of revenues, are the highest in the EU. Revenues and earnings per employee are the lowest of those businesses sampled.¹⁵⁵²

Correos's turnover decreased in 2011 by 1.3 per cent compared to 2010. This is a result of: the impact of recent economic conditions on the postal industry; the growth of electronic communication technologies and the maturity of the market. These factors have also resulted in a 7.9 per cent decrease in the volume of mail processed.¹⁵⁵³ Spanish demand for traditional postal services is

¹⁵⁴⁶ *Agencia Estatal Boletín Oficial del Estado, Ley 32/2003, de 3 de noviembre, General de Telecomunicaciones*. Available at: <http://www.boe.es/buscar/doc.php?id=BOE-A-2003-20253> [accessed on 15 July 2013].

¹⁵⁴⁷ *Real Decreto 1994/1996 de 6 septiembre, por el que se aprueba el Reglamento de la Comisión del Mercado de la Telecomunicaciones*. Available at: <http://www.onnet.es/ley0039.htm> [accessed on 15 July 2013].

¹⁵⁴⁸ CMT, *Resoluciones Anteriores*. Available at: http://www.cmt.es/todas-las-categorias?p_p_id=buscador_anoyp_p_lifecycle=0&p_p_state=normal&p_p_mode=view&p_p_col_id=column-2&p_p_col_count=1&_buscador_anoyp_struts_action=%2fbuscador_anoyp2fresultado&_buscador_anoyp_comboAnio=2012&_buscador_anoyp_hcomboMes=00&_buscador_anoyp_sesion=todas&_buscador_anoyp_paginaSelecc=todas-las-categorias [accessed on 15 July 2013].

¹⁵⁴⁹ *Agencia Estatal Boletín Oficial del Estado, Documento BOE-A-2012-10362*. Available at: http://www.boe.es/diario_boe/txt.php?id=BOE-A-2012-10362 [accessed on 15 July 2013].

¹⁵⁵⁰ *Correos, Correos en Cifras*. Available at: <http://www.correos.es/comun/informacionCorporativa/1004-CorreosC.asp> [accessed on 15 July 2013].

¹⁵⁵¹ *Correos, Organización*. Available at: <http://www.correos.es/comun/informacionCorporativa/1001-Organizacion.asp> [accessed on 15 July 2013].

¹⁵⁵² *Comision Nacional de la Competencia, The New Regulatory Framework for the Traditional Postal Sector in Spain*, p. 18. Available at: http://ec.europa.eu/competition/ecn/brief/02_2012/es_bill.pdf [accessed on 15 July 2013].

¹⁵⁵³ *Correos, Correos en Cifras*. Available at: <http://www.correos.es/comun/informacionCorporativa/1004-CorreosC.asp> [accessed on 15 July 2013].

lower than in its neighbouring countries.¹⁵⁵⁴ The price of postal services for an ordinary letter in Spain was the third lowest in the EU in 2009.¹⁵⁵⁵

In contrast, Spain's commercial and industrial parcel segments have been open to competition for some time and supply-side concentration is limited. Many small and medium businesses compete at a local level. Foreign public operators are also present in the market, owning significant shares of businesses that operate in the markets in express delivery and commercial and industrial parcel services: *Deutsche Post* (German semi-public operator) controls *DHL*, *Guipuzcoana* and *Unipost*; *La Poste* (French public operator) controls nearly 20 per cent of *Seur*, and *CTT Correios Portugal* (Portuguese public operator) owns *Tourline*. Marketing and advertising companies generate a large volume of mail and undertake postal activities in the market. Competitive pressures provide a large degree of supply-side diversification and specialisation.¹⁵⁵⁶

Regulatory Institutions and Legislation

European Directives designed to liberalise EU postal markets and allow a single European postal market have been transposed into a new basic law in Spain: Law 43/2010 of 30 December 2010 on the universal postal service, rights of users and the postal market.¹⁵⁵⁷ This replaces the previous basic regulations governing the postal industry since 1998. The aim of the legislation is to: guarantee a universal postal service (UPS) at an affordable price; and to introduce competition in the provision of postal services.

Correos is the universal postal service provider for a 15-year period.¹⁵⁵⁸ The Universal Postal Service includes the provision of letters that weigh up to two kilograms, postal packages that weigh up to 20 kilograms, and services for registered and insured items.¹⁵⁵⁹ The UPS is funded by: contributions of postal services providers; government funds (according to the 'Plan for Provision of Universal Postal Service'); and other sources. The compensation fund is administered by *Comisión Nacional del Sector Postal* (CNSP).¹⁵⁶⁰

The postal industry is regulated and monitored by an independent national regulatory authority, the CNSP. It was created in 2007 by Law 23/2007 of 8 October, but did not commence actual exercise of his functions until October 2010. It is a public body with full legal capacity and reports to the Ministry of Development.

The objectives of the CNSP include to: 'preserve and promote the highest degree of effective competition and transparency in the functioning of the postal industry, without prejudice to the functions conferred on the *Comisión Nacional del Sector Postal*'. The CNSP ensures: the provision of the universal postal service and competition in the industry; the quality, effectiveness, efficiency of the postal market; and the rights of users and postal operators and their workers.¹⁵⁶¹

The CNSP is governed by a Council which is comprised of a Chairman and six Directors.¹⁵⁶² The President and the Directors are appointed by the Government, by Royal Decree, following a proposal by the relevant government Minister. They must be persons of recognised professional competence in the postal industry and in regulation of markets, and have to appear before the competent

¹⁵⁵⁴ *Comisión Nacional de la Competencia, The New Regulatory Framework for the Traditional Postal Sector in Spain*, p. 10. Available at: http://ec.europa.eu/competition/ecn/brief/02_2012/es_bill.pdf [accessed on 15 July 2013].

¹⁵⁵⁵ *Sociedad Estatal de Correos y Telégrafos (Correos), Correos en Cifras*. Available at: http://www.correos.es/comun/informacionCorporativa/1004_h-TarifasUnion.asp [accessed on 15 July 2013].

¹⁵⁵⁶ *Comisión Nacional de la Competencia, The New Regulatory Framework for The Traditional Postal Sector in Spain*, p. 6. Available at: http://ec.europa.eu/competition/ecn/brief/02_2012/es_bill.pdf [accessed on 15 July 2013].

¹⁵⁵⁷ *Ibid.*

¹⁵⁵⁸ *Correos, Legislación*. Available at: <http://www.correos.es/comun/informacionCorporativa/1003-Legislacion.asp> [accessed on 15 July 2013].

¹⁵⁵⁹ *Comisión Nacional del Sector Postal (CNSP), Regulating Postal Liberalisation: The Spanish Case*. Available at: http://www.anacom.pt/streaming/Rosa_Aza.pdf?contentId=1099620&field=ATTACHED_FILE [accessed on 15 July 2013].

¹⁵⁶⁰ *Ibid.*

¹⁵⁶¹ CNSP, *Objeto y Funciones*. Available at: http://www.cnspostal.es/portal/nav_cnsp/nav_objeto_Func/ [accessed on 15 July 2013].

¹⁵⁶² CNSP, *Composición y Organigrama*. Available at: http://www.cnspostal.es/portal/nav_cnsp/nav_compo_organigrama/ [accessed on 15 July 2013].

committee of the Spanish Congress to demonstrate their capacity and technical expertise.¹⁵⁶³ The term of the appointment of the President and the Directors is for six years.

The duties of the CNSP include:¹⁵⁶⁴

- granting licences and receiving declarations and managing a registry of postal service providers (Operators Registry);
- providing binding instructions for businesses operating in the postal industry;
- determining costs involved in the provision of public service obligations of the universal postal service;
- managing postal contribution rates;
- inspecting and enforcing regulations in relation to the postal market. This includes regulating the prices of postal services provided by the designated operator to ensure that they are affordable, transparent, non-discriminatory and that prices are set to take into account the costs of the service;
- informing the National Competition Commission of anticompetitive acts, agreements, practices or behaviours in the industry;
- acting as an arbitrator in disputes between postal operators;
- reporting at least every five years to the Government Commission for Economic Affairs on levels of compliance with the universal postal service and report maximum and minimum prices which may be adopted for services subject to public service obligations;
- reporting annually on the development of the postal market, including the quality, cost and financing of the universal postal service; and
- providing advice to National Competition Commission under the terms established in Law 15/2007 of 3 July, of Protection of Competition.

The CNSP also has a role in ensuring network access to private operators. This includes the following:

- developing criteria to set access tariffs and ensuring that access tariffs are transparent and non-discriminatory and cover incurred costs, taking into account avoided costs;
- ensuring that tariffs do not cause economic losses for the USP nor increase the funding requirements of UPS. This includes: determining the UPS net cost and unfair financial burden; assess the adequacy of Compensation Fund; inform the accounting criteria for the supplier of UPS and verify the correct application of accounting separation rules (between USO and non USO products and services); and¹⁵⁶⁵
- approving the Network Access Standard Contract used by the Universal Service Provider when it negotiates access with other operators.¹⁵⁶⁶

European Legislation that regulates postal services in Spain includes:

- Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 concerning common rules for the development of Community postal services and the improvement of service quality.
- Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002 amending Directive 97/67/EC with regard to the further opening to competition of Community postal services.

¹⁵⁶³ *Comision Nacional de la Competencia, The New Regulatory Framework for The Traditional Postal Sector in Spain*, p. 70. Available at: http://ec.europa.eu/competition/ecn/brief/02_2012/es_bill.pdf [accessed on 15 July 2013].

¹⁵⁶⁴ CNSP, *Objeto y Funciones*. Available at: http://www.cnspostal.es/portal/nav_cnsp/nav_objeto_Func/ [accessed on 15 July 2013].

¹⁵⁶⁵ CNSP, *Regulating Postal Liberalisation: The Spanish Case*. Available at: http://www.anacom.pt/streaming/Rosa_Aza.pdf?contentId=1099620&field=ATTACHED_FILE [accessed on 15 July 2013].

¹⁵⁶⁶ *Ibid.*

- Directive 2008/6/EC of 20 February. Amendment to Directive 97/67/EC of 15 December 1997, in connection with the completion of the internal market of Community postal services.

Spanish legislation includes:

- Law 2/2011 of 4 March, Sustainable Economy.
- Law 23/2007 of 8 October, Building the National Postal Sector.
- Law 43/2010 of 30 December, The Universal Postal Service, The Rights of Users and the Postal Market.

The CNSP is funded through fees imposed on the registration of postal service businesses in the General Register, and fees imposed on economic activity in the postal industry.¹⁵⁶⁷

Both Law 23/2007 and its implementing regulations refer to the relations between the CNSP and competition authorities. Article 51 of the Regulation establishes a general duty of CNSP cooperation with those authorities and provides for the possibility to request a report from the CNC. Article 7 of the Law and article 25 of the Regulation provide that the CNSP must inform the competition authority of acts, agreements, practices and conducts that may present signs of being contrary to the *Ley de Defensa de la Competencia* (Spanish Competition Act). The CNSP must issue opinions that are requested by the CNC. Finally, articles 17 of the Law and 20.2 of the Regulation provide that, when the CNSP issues Circulars that may have significant bearing on the conditions of competition in the postal market, the CNSP must request a report from the competition authority.¹⁵⁶⁸

Consultation of Interested Parties

Businesses must apply to the CNSP in order to provide postal services. For operations that are not within the scope of the UPS, the business must provide a sworn statement of responsibility to the CNSP prior to undertaking the proposed postal services. The statement must include an undertaking to provide information that clearly limits the proposed service and a representation that the business knows and is compliant with, *inter alia*: the requirements for access to and exercise of the postal activity; aspects relating to the inviolability of correspondence and the protection of data; respect for the rights of users; and the relevant employment and tax legislation. The business may operate throughout the country unless the CNSP finds that the mandatory requirements are not met.¹⁵⁶⁹

Businesses seeking to provide postal services within the scope of the UPS activities must obtain a singular administrative authorisation from the CNSP. The business must accept conditions similar to those established for the sworn statement of responsibility, and meet conditions of quality, territorial extension and material scope voluntarily offered to customers. Further, the applicant must assume the public service obligations and publish an annual report in relation to claims filed by users of the services and explain how they were resolved.¹⁵⁷⁰

The CNSP has three months to rule on the application. Lack of reply within that time by the CNSP is equivalent to approval of the application.

The CNSP's sanctioning powers are provided by Law 24/1998 of 13 July, Law 30/1992 of 26 November, and Royal Decree 1398/1993 of 4 August.¹⁵⁷¹ Article 16 of Law 23/2007 of 8 October, *Creating the National Postal Sector* provides a conflict-resolution procedure undertaken by the CNSP that applies when there is a conflict between operators in relation to the right of access to the postal network and to other elements infrastructure and postal services offered by an operator in the field of universal postal service.¹⁵⁷² The legislation provides for the following:

¹⁵⁶⁷ Law 23/2007 of 8 October, *Creating the National Postal Sector*. Article 12. Available at: <http://www.boe.es/buscar/act.php?id=BOE-A-2007-17635> [accessed on 15 July 2013].

¹⁵⁶⁸ *Comision Nacional de la Competencia, The New Regulatory Framework for The Traditional Postal Sector In Spain*, p. 77. Available at: http://ec.europa.eu/competition/ecn/brief/02_2012/es_bill.pdf [accessed on 15 July 2013].

¹⁵⁶⁹ *Comision Nacional de la Competencia, The New Regulatory Framework for The Traditional Postal Sector In Spain*, p. 58. Available at: http://ec.europa.eu/competition/ecn/brief/02_2012/es_bill.pdf [accessed on 15 July 2013].

¹⁵⁷⁰ *Ibid.*

¹⁵⁷¹ *Agencia Estatal Boletín Oficial del Estado, Documento BOE-A-2007-17635*. Available at: <http://www.boe.es/buscar/act.php?id=BOE-A-2007-17635> [accessed on 15 July 2013].

¹⁵⁷² *Ibid.*

- The dispute-resolution processes must include principles of hearing, contradiction and equality.
- The process must commence within two months of the conflict occurring.
- The respondent has 20 days to respond to the submissions by the complainant.
- Evidence must be provided by the parties within 30 days.
- Further submissions must be provided in writing within twenty days. In the alternative, the parties must agree to oral hearings.
- The Commission will notify the parties of the decision within 20 days. This is extendable to forty days by the President of the Commission.
- The decision must be in writing and will provide the factual and legal reasons of the decision. The outcome is binding.

The CNSP is responsible for managing *El Registro de Empresas Prestadoras de Servicios Postales* (the General Registrar for Postal Service Companies), a company responsible for collating data on the administrative issues arising in the postal-services market.¹⁵⁷³

In addition, the CNSP is a member of the European Regulators Group for Postal Services (ERPG), which was established the European Commission in 2010 to serve as a body for reflection, discussion and advice to the Commission in the field of postal services and participates in the annual meetings, the first of which was held in 2010.¹⁵⁷⁴

*Timeliness*¹⁵⁷⁵

The CNSP has three months to rule on an application for administrative authorisation by a business. Lack of reply within that time by the CNSP is equivalent to approval of the application.

With regard to the CNSP's dispute resolution role, the Commission must notify relevant parties of the decision within 20 days. This period is extendable to 40 days by the President of the Commission.

Information Disclosure and Confidentiality

In fulfilling its regulatory functions, the *Comisión Nacional del Sector Postal* has a broad range of information gathering powers, including the ability to request data from postal operators. Businesses must make documents and other information available for inspection. Postal inspection officials are empowered to access any place 'where evidence is found', provided the President of the *Comisión Nacional del Sector Postal* has provided written permission. The President must have a reasonable expectation that evidence is at the premises and the premises are not a constitutionally protected home. In the case of constitutionally protected homes, consent of a court is required.¹⁵⁷⁶

Decision-making and Reporting

The Council is the Commission's decision-making body and must publish decisions on the CNSP website under *Resoluciones*, outlining details of the issue under dispute and the legal basis for the decision made.¹⁵⁷⁷

The CNSP published a total of four decisions in 2012 and has published a total of 80 decisions up until July 15th 2013.¹⁵⁷⁸

¹⁵⁷³ CNSP, *Registro Empresas Postales: Informacion General*. Available at: http://www.cnspostal.es/portal/nav_regEmpresasPostales/nav_infoGeneral/ [accessed on 15 July 2013].

¹⁵⁷⁴ CNSP, *Actividad Externa*. Available at: http://www.cnspostal.es/portal/nav_cnspl/nav_actExterna/ [accessed on 15 July 2013].

¹⁵⁷⁵ *Ibid.*

¹⁵⁷⁶ *Agencia Estatal Boletín Oficial del Estado, Documento Consolidado BOE-A-2010-20139*. Available at: <http://www.boe.es/buscar/act.php?id=BOE-A-2010-20139> [accessed on 15 July 2013].

¹⁵⁷⁷ CNSP, *Composición y Organigrama*. Available at: http://www.cnspostal.es/portal/nav_cnspl/nav_compo_organigrama/ [accessed on 15 July 2013].

¹⁵⁷⁸ CNSP, *Resoluciones*. Available at: http://www.cnspostal.es/portal/nav_acrein/nav_resoluciones/ [accessed on 15 July 2013].

Appeals

Decisions of the CNSP may be challenged in Spain's administrative courts, pursuant to Law 29/1998 of 13 July.

4. Water and Wastewater¹⁵⁷⁹

The majority of Spain is subject to a semi-arid climate with periodic droughts and occasional flooding. There is a strong seasonal variability in rainfall. Natural water resources are unequally distributed across Spain. Spain has over 1300 dams. It has the fourth largest number of dams in the world after the United States, India and China.¹⁵⁸⁰ Spain's dam infrastructure has allowed the agricultural sector in Spain to use water resources intensively.

The cost of desalinated and recycled water is above the prices currently paid by consumers for water. Desalinated water is supplied at subsidised rates¹⁵⁸¹ and is equal to about 2.8 per cent of water abstractions at the national level. Recycled water production is a smaller than the amount of water produced through desalination. It is generally supplied to public gardens, golf courses and selected irrigated agriculture.

The government has pursued demand-management policies to decrease water use. This includes providing subsidies to encourage the introduction of more water efficient irrigation technology. It has resulted in a modest reduction of water use in irrigation in recent years.¹⁵⁸²

Urban and industrial water tariffs are generally progressive; where higher volumes of water consumed attract a higher tariff. Between 2001 and 2009, tariffs for water services to households and industrial users increased in real terms by about 12 per cent. However, charges for household water supply and sewerage service in Spain are lower than in most OECD countries.¹⁵⁸³

Water prices must cover, but not exceed, capital and operating costs. A Spanish Government study suggests that cost recovery is on average about 90 per cent in both urban and agricultural use.¹⁵⁸⁴ However, other studies suggest that cost recovery is 45 per cent, on account of low recovery of capital costs.

A phased introduction of metered water consumption was introduced in 2009. Also, the introduction of a two-part tariff is intended, with a per-unit volume component and a component to reflect fixed infrastructure costs.

Regulatory Institutions and Legislation

Surface and groundwater management is the responsibility of River Basin Authorities (RBAs). RBAs are partly financed through revenues from water service fees and charges. Sub-national governments also contribute to the RBAs funding.¹⁵⁸⁵ The central government oversees and provides funds to RBAs whose jurisdiction extends to two or more regions in Spain. User associations directly participate in some management tasks and elect up to a third of members in RBAs' decision-making boards. Water concessions are often allocated freely.¹⁵⁸⁶

¹⁵⁷⁹ A Fuentes, 'Policies Towards a Sustainable Use of Water in Spain', *OECD Economics Department Working Papers*, No. 840. Available at: <http://www.oecd-ilibrary.org/docserver/download/5kj3l0ggczt.pdf?expires=1358743024&id=id&accname=guest&checksum=2E74974BE84ECB8447412960858EE1AD> [accessed on 15 July 2013].

¹⁵⁸⁰ Martínez-Cortina, 'Physical and Hydrological Characteristics' in A Garrido and M Llamas (eds.), *Water Policy in Spain*, 2010.

¹⁵⁸¹ A Fuentes, 'Policies Towards a Sustainable Use of Water in Spain', *OECD Economics Department Working Papers*, No. 840, 2011, p. 10. Available at: <http://www.oecd-ilibrary.org/docserver/download/5kj3l0ggczt.pdf?expires=1358743024&id=id&accname=guest&checksum=2E74974BE84ECB8447412960858EE1AD> [accessed on 15 July 2013].

¹⁵⁸² *Ibid.*

¹⁵⁸³ *Ibid.*

¹⁵⁸⁴ *Ministerio de Medioambiente, El Agua en la Economía Española : Situación y Perspectivas*, 2007. Available at: <http://hispaqua.cedex.es/formacion/congreso/30026> [accessed on 15 July 2013].

¹⁵⁸⁵ OECD, *Water Governance in OECD Countries: A Multi-level Approach*, p. 96. Available at: <http://www.oecd.org/gov/regional-policy/watergovernanceinoecdcountriesamulti-levelapproach.htm> [accessed on 15 July 2013].

¹⁵⁸⁶ A Fuentes, 'Policies Towards a Sustainable Use of Water in Spain', *OECD Economics Department Working Papers*, No. 840, 2011, p. 10. Available at: <http://www.oecd-ilibrary.org/docserver/download/5kj3l0ggczt.pdf?expires=1358743024&id=id&accname=guest&checksum=2E74974BE84ECB8447412960858EE1AD>

Legislation governing the management of water resources includes:

- European legislation, including the Water Framework Directive (2000/60/CE);
- The *Texto Refundido de la Ley de Aguas* (Revised Water Law Text) (approved July 2001), which includes provisions for the management of infrastructure involved in the urban water cycle. It also provides a role for Central Government in the construction of public local services infrastructure; and
- The *Law of Local Regime* (Act 7/1985) that provides that the supply of water and waste water management are the responsibility of municipalities.¹⁵⁸⁷
- State and Autonomous Community laws.

Legislation provides for two types of management structures in relation to the supply of water and urban waste water:

- direct management, where services are provided by municipalities directly; and
- indirect management, where the provision of services are contracted to private companies.

In 2008, more than 85 per cent of the total market of supplied and treated water was provided under indirect management regimes.¹⁵⁸⁸

5. Rail

Spain has developed advanced urban, regional and inter-city rail systems. In total, it has over 15 000 kilometres of railways. Over two-thirds of the track is broad gauge. The remainder is standard or narrow gauge.¹⁵⁸⁹ Spain has five high-speed passenger lines where trains travel along sections of the lines at up to 300 kmh. The total length of the high-speed rail network is 2665 kilometres. It is the longest high-speed rail network in Europe, and the second longest in the world after the high-speed rail network in China.¹⁵⁹⁰ Spain's high-speed rail network connects the capital, Madrid, with: Seville; Valladolid; Barcelona; and Valencia. A high-speed rail line also connects the city of Córdoba with the city of Málaga. The Spanish government has proposed to link all the provincial capitals with high-speed rail, with a total estimated length of over 9000 kilometres of high-speed railways.

Major rail operators include: *Ferrocarriles Españoles de Vía Estrecha* (FEVE) which is also state-owned and operates most of Spain's 1250 kilometres of narrow gauge rail; *EuskoTren* operates trains on part of the narrow gauge railway network in the Basque Country; *Ferrocarrils de la Generalitat de Catalunya* (FGC) operates rail lines in Catalonia; and *Ferrocarrils de la Generalitat Valenciana* (FGV) operates lines in the Valencian Community. *Ferrocarril de Sóller* (Sóller Railways) and *Serveis Ferroviaris de Mallorca*, who operate on the Spanish island of Majorca.

Legislation was introduced in 2003 to regulate the railways industry: Act 39/2003 of 17 November and Royal Decree 2387/2004 of 30 December. The vertically-integrated, State-owned railway business, *RENFE*, was vertically separated into two companies: *Administrador de Infraestructuras Ferroviarias* (ADIF) and *RENFE-Operadora* (RENFE). Both businesses are state-owned.

The ADIF manages rail infrastructure. It is responsible for managing rail traffic, distributing capacity and collecting access fees from railway transport operators.¹⁵⁹¹ The ADIF is also responsible for the construction of new lines that are either financed from ADIF's budget or by the state directly.¹⁵⁹²

library.org/docserver/download/5kqj3l0ggczt.pdf?expires=1358743024&id=id&accname=guest&checksum=2E74974BE84ECB8447412960858EE1AD [accessed on 15 July 2013].

¹⁵⁸⁷ O Ruiz Canete and D Dizy Menendez, 'The Water Sector in Spain', *Working Paper CIRIEC No 2009/04*, 2009, p. 6. Available at: http://www.ciriec.ulg.ac.be/fr/telechargements/WORKING_PAPERS/WP09-04.pdf [accessed on 15 July 2013].

¹⁵⁸⁸ O Ruiz Canete and D Dizy Menendez, *op. cit.*, p. 11.

¹⁵⁸⁹ Central Intelligence Agency (CIA), *The World Factbook: Spain*. Available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/sp.html> [accessed on 15 July 2013].

¹⁵⁹⁰ Europa Press, *Los Reyes Inaugurarán el AVE a Valencia, y los Príncipes la Connexion a Albacete*. Available at: <http://www.europapress.es/economia/transportes-00343/noticia-economia-ave-reyes-inauguraran-ave-valencia-principes-conexion-albacete-20101210123611.html> [accessed on 15 July 2013].

¹⁵⁹¹ ADIF, *Home*. Available at: www.adif.es [accessed on 15 July 2013].

¹⁵⁹² *Gobierno de España : Ministerio de Fomento, Ferrocarriles*. Available at: http://www.fomento.es/MFOM/LANG_CASTELLANO/DIRECCIONES_GENERALES/FERROCARRILES/Estructura_ferr/ [accessed on 15 July 2013].

Recent construction includes the Madrid-Valladolid line, the Lleida-Barcelona and Barcelona-Figueras line, the Córdoba-Málaga corridor, and the Pajares tunnels.

RENFE is responsible for freight transport and passenger operations.¹⁵⁹³ It was created by Law 39/2003 of 17 November, as a public company. RENFE statutes were provided by Royal Decree 2396/2004 of 30 December 2004. RENFE began operations on 1 January 2005.

RENFE is a part of the Ministry of Development. However, it has management autonomy. RENFE's objective is the provision of rail services for passengers and goods and other services or activities complementary or related to rail transport. RENFE also provides maintenance for rolling stock. RENFE receives state compensation for fulfilling public service obligations for the provision of regional passenger rail services.

Since 1 January 2006, European railway businesses have had access to Spain's rail network for the provision of international or domestic rail freight and for the provision of passenger services. To date, the Ministry of Development has awarded 14 licences to use the rail network.¹⁵⁹⁴

Guidelines for the development of rail policy include the following:

- consolidating industry reform and development of the railway subsector;
- promoting a 'central role' for railroad in major transport corridors throughout the country;
- maintaining high performance in the rail network, especially in relation to mixed traffic;
- reducing the total travel time on intercity rail; and
- increasing the share of rail in freight transport in medium and long distances.

Regulatory Institutions and Legislation

The Ministry of Development is the responsible for the administration of the rail subsector. Its main responsibilities are provided by Law 39/2003 of 17 December, the Railway Industry. They include:¹⁵⁹⁵

- strategic planning of the railway subsector, including in relation to both infrastructure and supply of services;
- organising and regulating the rail system, including managing security and the interoperability of the rail system and the relationships between key players; and
- monitoring ADIF and RENFE.

Legislation provides that rail fees paid by rail businesses must be set in accordance with the general principles of economic viability of the infrastructure, its effective use, the market situation and financial stability in the provision of services. Environmental and safety levies may also be imposed. Other factors considered when setting fees include: the degree of congestion on the rail network; the promotion of new rail services; and the need to encourage the use of underutilised lines, while also ensuring competition between railway undertakings.

The *Comité de Regulación Ferroviaria* (CRF) (Rail Regulatory Committee) is the governing body of the rail subsector. It is attached to the Ministry of Development. It consists of a chairman and four members who are officials from within the Ministry of Development.¹⁵⁹⁶ They are appointed by the Minister. A secretary is appointed by the CRF. Royal Decree 2387/2004 of 30 December provides the term of office, removal, and functions of the committee members.¹⁵⁹⁷ The founding meeting was held on 9 June 2005.

¹⁵⁹³ RENFE, *Home*. Available at: www.renfe.com [accessed on 15 July 2013].

¹⁵⁹⁴ *Gobierno de España: Ministerio de Fomento, Empresas Ferroviarias*. Available at: http://www.fomento.es/MFOM/LANG_CASTELLANO/DIRECCIONES_GENERALES/FERROCARRILES/EMPFERROVIARIAS/ [accessed on 15 July 2013].

¹⁵⁹⁵ *Gobierno de España: Ministerio de Fomento, Principales Agentes del Sector Ferroviario*. Available at: http://www.fomento.es/MFOM/LANG_CASTELLANO/DIRECCIONES_GENERALES/FERROCARRILES/Estructura_ferr/ [accessed on 15 July 2013].

¹⁵⁹⁶ *Via Libre: La Revista del Ferrocarril, Comité de Regulación Ferroviaria*. Available at: http://www.vialibreffe.com/ficha_orga_en.asp?cod=2020&tip=organi [accessed on 15 July 2013].

¹⁵⁹⁷ *Noticias Jurídicas, Real Decreto 2387/ 2004 de diciembre, por el que se aprueba el Reglamento del Sector Ferroviario*. Available at: http://noticias.juridicas.com/base_datos/Admin/rd2387-2004.html [accessed on 15 July 2013].

The objectives, functions and powers of the CRF are as follows:

- To safeguard the plurality of rail supply.
- To ensure equality of all operators in relation to access to the market access.
- To ensure that rail fees are not discriminatory.
- To resolve conflicts between ADIF and railway undertakings in relation to: issuance and use of the security certificate; capacity allocation procedures; and amount, structure and application rates for operators.
- To resolve conflicts between railway companies in relation to alleged discriminatory treatment in access to infrastructure or services.
- To interpret the terms of the licences and authorisations for the provision of services of public interest.
- To inform and advise the Minister and regional authorities on railway matters, especially those that may affect the development of a competitive rail market.¹⁵⁹⁸

*Consultation of Interested Parties*¹⁵⁹⁹

The CRF can act on its own initiative or at the request of an interested party. Businesses who consider themselves wronged by a decision or action have one month to raise the matter with the CRF. Following the commencement of an action before the CRF, the CRF may:

- issue an interim injunction or impose conditions on businesses designed to prevent damages from accruing; and/or
- require a business to provide surety that could be used as compensation in the case that damages arise.

Interim orders may be issued where an action may cause damages that are difficult to repair or where there is a violation of rights protected by law.¹⁶⁰⁰

CRF's meetings are held at the invitation of the Chairman or at the request of at least two members of the CRF and occur as often as necessary for the effective conduct of the CRF's duties.

In order to resolve conflicts between rail infrastructure managers and railway undertakings, the CRF may request the Ministry of Development to undertake technical inspection of services, facilities and activities of companies in the rail subsector. The CRE also deals with the CNC by reporting any activities that adversely affect competition in rail.¹⁶⁰¹

Timeliness

No information on the timeframes of regulatory processes for rail was found in the sources reviewed.

*Information Disclosure and Confidentiality*¹⁶⁰²

The CRF may require entities operating in the rail subsector to provide any information which is necessary for the exercise of its activity.

¹⁵⁹⁸ *Gobierno de España : Ministerio de Fomento, Ferrocarriles*. Available at: http://www.fomento.es/MFOM/LANG_CASTELLANO/DIRECCIONES_GENERALES/FERROCARRILES/Estructura_ferr/ [accessed on 22 January 2013]. Also see: *Comité de Regulación Ferroviaria, Memoria del Comité de Regulación Ferroviaria e Informe Sobre el Mercado y el Sector Ferroviario en España 2011*, p. 6. Available at: http://www.fomento.gob.es/NR/rdonlyres/5A1E0DA0-3176-45A1-BB02-EC0657D31015/112252/memoria_CRF_2011.pdf [accessed on 15 July 2013].

¹⁵⁹⁹ *Agencia Estatal Boletín Oficial del Estado, Real Decreto 2387/2004, de 30 diciembre, por el que se aprueba el Reglamento del Sector Ferroviario*. Available at: http://www.boe.es/diario_boe/txt.php?id=BOE-A-2004-21908 [accessed on 15 July 2013].

¹⁶⁰⁰ *Noticias Jurídicas, Real Decreto 2387/2004, de 30 diciembre, por el que se aprueba el Reglamento del Sector Ferroviario, Article 160*. Available at: http://noticias.juridicas.com/base_datos/Admin/rd2387-2004.t6.html#a148 [accessed on 15 July 2013].

¹⁶⁰¹ *Agencia Estatal Boletín Oficial del Estado, Real Decreto 2387/2004, de 30 diciembre, por el que se aprueba el Reglamento del Sector Ferroviario*. Available at: http://www.boe.es/diario_boe/txt.php?id=BOE-A-2004-21908 [accessed on 15 July 2013].

¹⁶⁰² *Ibid.*

Decision-making and Reporting

The President, the Secretary at least half of the members of the CRF must be present to establish a quorum.¹⁶⁰³ The decisions of the Committee are taken by majority of the members present at the meeting. In case of a tie, the Chairman shall have a casting vote.

Appeals

The decisions of the CRF are binding on the rail businesses. Decisions by the CRF in relation to royalty payments paid by rail businesses may be appealed in the courts for judicial enforcement. Appeals may not be made to the Economic-Administrative Courts.¹⁶⁰⁴ Failure to comply with CRF resolutions is punishable pursuant to Law 39/2003.

Regulatory Development

The Railway Regulatory Committee has recently produced an information package in relation to rail charges. This includes recommendations to remove or correct parts of the *Railway Sector Act* that discriminates against new entrants.

In a study on Railway Terminals and Additional, Supplementary and Auxiliary Services, the Railway Regulatory Committee also advocates greater legal regulation in the supply chain.¹⁶⁰⁵ The Railway Regulatory Committee argues for the removal of barriers that constrain self-supporting and auxiliary services in the rail industry.

6. Airports

Spain's international airports are Madrid-Barajas and Barcelona-El Prat.¹⁶⁰⁶ In total, there are 98 airports with paved runways and ten heliports in Spain.¹⁶⁰⁷ In terms of the volume of passenger traffic in 2011, Madrid-Barajas airport (with 49 542 117 passengers) was the fifteenth largest airport in the world and the fifth largest in Europe. Barcelona-El Prat (34 332 486 passengers) was the ninth largest airport in Europe.

Most air passengers flew from Spain to a destination within the EU (62.6 per cent). Twenty-three per cent flew to a destination within Spain. About fourteen per cent of passengers flew to extra-EU destinations.¹⁶⁰⁸

In 2011 airlines operating in Spain transported 165.9 million passengers, a 7.6 increase compared with 2010. Fifteen airlines accounted for 75 per cent of total traffic. These included Ryanair, Iberia, Easyjet, Vueling, AirEuropa and AirBerlin. Low-cost airlines increased passenger traffic by about 14 per cent in 2011 and carried over 52 per cent of all transported passengers. Spanish airlines carried 33 per cent of total traffic, a 1.8 per cent decrease compared with the previous year.¹⁶⁰⁹

The majority of airports in Spain are owned and operated by *Aeropuertos Españoles y Navegación Aérea* (Aena) (Spanish Airports and Air Navigation). Aena is a public body that is also responsible

¹⁶⁰³ *Noticias Jurídicas*, *Real Decreto 2387/2004, de 30 diciembre, por el que se aprueba el Reglamento del Sector Ferroviario*, Article 149. Available at: http://noticias.juridicas.com/base_datos/Admin/rd2387-2004.t6.html#a148 [accessed on 15 July 2013].

¹⁶⁰⁴ *Vía Libre*, *Real Decreto 2387/2004, de 30 diciembre, por el que se aprueba el Reglamento del Sector Ferroviario*. Available at: <http://www.vialibre-fe.com/noticias.asp?not=8447&cs=infr> [accessed on 15 July 2013].

¹⁶⁰⁵ *Cadena de su Ministro*, *The Railway Regulatory Committee calls for Self-Provision Open to all Terminals*. Available at: <http://www.cadenadesuministro.es/noticias/el-comite-de-regulacion-ferroviario-abogar-por-abrir-la-autoprestacion-a-todas-las-terminales-de-adif/> [accessed on 15 July 2013].

¹⁶⁰⁶ *Gobierno de España : Ministerio de Fomento, Civil Aviation: Major Spanish Airports*. Available at: http://translate.googleusercontent.com/translate_c?depth=1&hl=en&ie=UTF8&prev=t&rurl=translate.google.com&sl=auto&tl=en&u=http://www.fomento.gob.es/MFOM/LANG_CASTELLANO/DIRECCIONES_GENERALES/AVIACION_CIVIL/ESTUDIOS_Y_PUBLICACIONES/ESTADISTICAS_DEL_SECTOR_TRANSPORTE_AEREO_EN_CIFRAS/trafico_cifras_aeropuertos.htm&usg=ALkJrhqB8qTqWjEt-yBbOSN_ssF7z4CftA [accessed on 15 July 2013].

¹⁶⁰⁷ Central Intelligence Agency (CIA), *The World Factbook: Spain*. Available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/sp.html> [accessed on 15 July 2013].

¹⁶⁰⁸ *Gobierno de España : Ministerio de Fomento, Civil Aviation: Major Markets*. Available at: http://www.fomento.gob.es/MFOM/LANG_CASTELLANO/DIRECCIONES_GENERALES/AVIACION_CIVIL/ [accessed on 15 July 2013].

¹⁶⁰⁹ *Gobierno de España : Ministerio de Fomento, Civil Aviation: Major Companies in Air Traffic in Spain*. Available at: http://www.fomento.gob.es/MFOM/LANG_CASTELLANO/DIRECCIONES_GENERALES/AVIACION_CIVIL/ [accessed on 15 July 2013].

for air traffic control throughout Spain. In 2010, 193 million passengers used the Aena airports. Aena is the world's largest airport operator, with 47 airports and two heliports in Spain.¹⁶¹⁰ Aena also operates airports in Mexico, the US, Cuba, Colombia, Bolivia, Sweden and the UK. Aena is the fourth largest provider of air navigation services in Europe.

Regulatory Institutions and Legislation

Economic oversight of airports is carried out by the *Comisión de Regulación Económica Aeroportuaria* (Airport Economic Regulatory Commission) pursuant to *Royal Decree-Law 11/2011, of 26 August, establishing the Airport Economic Regulatory Commission, regulating its composition and functions, and amending the legal regime of the workforce of Aena*.¹⁶¹¹ The Commission commenced operation on 31 December 2011.¹⁶¹²

The functions of the Commission are to: monitor and ensure compliance and transparency of consultation procedures undertaken by Aena and other airport service concessionaires in relation to airport charges; and resolve disputes between airport service concessionaires including Aena, and businesses using airport services, in relation to rates and/or the quality, of airport services.

Law 21/2003 of 7 July, Aviation Safety, as amended by Law 1/2011 of 4 March, incorporates the European Commission Directive 2009/12/EC of 11 March in relation to airport charges and the functions entrusted to the regulator. It provides that the Commission must be independent and objective and ensure non-discrimination and efficiency of airport charges.

Further, the Commission must resolve tariff disputes in a neutral, flexible and transparent manner, and according to internationally recognised principles of economic regulation. That is, the Commission may resolve a dispute by fixing the tariff according to internationally recognised economic methodologies and criteria. When fixing the tariff, considerations may include the sustainability and sufficiency of the airport, cost recovery, including the cost of capital, and incentives for management efficiency.¹⁶¹³ The tariff that is set by the Commission must meet the requirements of Article 91 and 101.1 of Law 21 / 2003, of 7 July. In addition: it must observe national regulations, EU law and international law in relation to fixing rates for regulated activities; and satisfy the criteria of efficiency.¹⁶¹⁴

The Commission must also avoid excessive fluctuations in airport charges, provided this criterion is consistent with other objectives when setting tariffs.¹⁶¹⁵

The Commission consists of three members: a president and two councillors. It was established as a public body under the *Sustainable Economy Act*, with full legal capacity and independence.

The Commission may deal with the CNC by reporting any activities that adversely affect competition in the airport subsector.¹⁶¹⁶

Timeliness

No information on the timeframes of regulatory processes for airports was found in the sources reviewed.

¹⁶¹⁰ Aena, *About Aena*. Available at: <http://www.aena.es/csee/Satellite/Aena/en/Aena.html> [accessed on 15 July 2013].

¹⁶¹¹ *Agencia Estatal Boletín Oficial del Estado, Royal Decree Law 11/2011, of 26 August, establishing the Airport Economic Regulatory Commission, regulating its composition and functions, and amending the legal regime of the workforce of Aena*. Available at: <http://www.boe.es/buscar/doc.php?id=BOE-A-2011-14221> [accessed on 15 July 2013].

¹⁶¹² *Tumbit Spain, European Commission May Investigate Spain Airport Fee Hike*. Available at: <http://www.tumbit.com/news/articles/5311-european-commission-may-investigate-spain-airport-fee-hike.html> [accessed on 15 July 2013].

¹⁶¹³ *Agencia Estatal Boletín Oficial del Estado, Royal Decree Law 11/2011, of 26 August, establishing the Airport Economic Regulatory Commission, regulating its composition and functions, and amending the legal regime of the workforce of Aena*. Available at: <http://www.boe.es/buscar/doc.php?id=BOE-A-2011-14221> [accessed on 15 July 2013].

¹⁶¹⁴ *Agencia Estatal Boletín Oficial del Estado, Royal Decree Law 11/2011, of 26 August, establishing the Airport Economic Regulatory Commission, regulating its composition and functions, and amending the legal regime of the workforce of Aena, Article 12*. Available at: <http://www.boe.es/buscar/doc.php?id=BOE-A-2011-14221> [accessed on 15 July 2013].

¹⁶¹⁵ *Ibid.*

¹⁶¹⁶ *Noticias Jurídicas, Ley 2/2011, de 4 marzo, de Economía Sostenible*. Available at: http://noticias.juridicas.com/base_datos/Admin/l2-2011.t1.html [accessed on 15 July 2013].

Information Disclosure and Confidentiality

Information regarding resolutions, agreements, or new developments in the regulatory activities of the Commission must be made public on the Commission's website, in accordance with the *Law 15/1999, of 13 December, on the Protection of Personal Details*.¹⁶¹⁷

Decision-making and Reporting

Decisions in airport regulation are made by the Commission's Council pursuant to procedures provided by Royal Decree-Law 11/2011, of 26 August, whereby at least five members of the Council must be in agreement for a decision to be made.¹⁶¹⁸ The president and one councillor constitute a quorum.¹⁶¹⁹

For example, where the Commission finds that *Aena* or an airport service concessionaire's tariff proposal is in breach of Articles 98 and 102 of Law 21/2003, of 7 July, the Commission must reject the proposal, identify the problems and require *Aena* or the airport service concessionaire to address the problems. Where the problem has not been rectified, the Commission may set the applicable tariff. Reasons must be provided to support the set tariff.¹⁶²⁰ In the alternative, the Commission may provide *Aena* or the airport concessionaire with the criteria that must be followed when setting tariffs.

Decisions must be published on the Commission's website once the relevant parties have been notified and the personal details of the case removed.¹⁶²¹

Appeals

Decisions of the Commission may be appealed to the Division of Administrative Litigation of the Court.¹⁶²²

7. Ports¹⁶²³

Spain's coastline, at about 8000 kilometres, is the longest length of coastline in the EU. Spain is adjacent to one of the world's busiest shipping lanes, the Strait of Gibraltar; that provides passage between the Atlantic and the Mediterranean ocean. About 60 per cent of exports and 85 per cent of Spain's imports pass through Spanish ports. This is equal to 53 per cent of Spanish foreign trade with the European Union and 96 per cent with other countries. Total TEUs in 2009 was 11 749 298.¹⁶²⁴

Economic activity generated by Spanish ports accounts for about 20 per cent of economic activity in the transport sector. This represents about 1.1 per cent of Spanish GDP.¹⁶²⁵ About 35 000 people are employed in the industry, with an estimated 110 000 jobs created indirectly. Major ports are

¹⁶¹⁷ *Ibid.*

¹⁶¹⁸ *Noticias Jurídicas, Ley 2/2011, de 4 marzo, de Economía Sostenible*. Available at: http://noticias.juridicas.com/base_datos/Admin/l2-2011.t1.html [accessed on 15 July 2013].

¹⁶¹⁹ *Agencia Estatal Boletín Oficial del Estado, Royal Decree Law 11/2011, of 26 August, establishing the Airport Economic Regulatory Commission, regulating its composition and functions, and amending the legal regime of the workforce of Aena*. Available at: <http://www.boe.es/buscar/doc.php?id=BOE-A-2011-14221> [accessed on 15 July 2013].

¹⁶²⁰ *Agencia Estatal Boletín Oficial del Estado, Royal Decree Law 11/2011, of 26 August, establishing the Airport Economic Regulatory Commission, regulating its composition and functions, and amending the legal regime of the workforce of Aena, Article 11*. Available at: <http://www.boe.es/buscar/doc.php?id=BOE-A-2011-14221> [accessed on 15 July 2013].

¹⁶²¹ *Ibid.*

¹⁶²² *Agencia Estatal Boletín Oficial del Estado, Royal Decree Law 11/2011, of 26 August, establishing the Airport Economic Regulatory Commission, regulating its composition and functions, and amending the legal regime of the workforce of Aena, Second Final Provision*. Available at: <http://www.boe.es/buscar/doc.php?id=BOE-A-2011-14221> [accessed on 15 July 2013].

¹⁶²³ *Gobierno de España : Ministerio de Fomento, Puertos del Esatado*. Available at: <http://www.puertos.es/en> [accessed on 22 January 2013]. Castillo-Manzano *et al.*, 'Economic Analysis of the Spanish Port Sector Reform during the 1990s'. *Transportation Research Part A: Policy and Practice*, 42(8), 2008, pp. 1056-1063; González and Trujillo, 'Reforms and Infrastructure Efficiency in Spain's Container Ports', *Transportation Research Part A*, 42, 2010, pp. 243-257 and Castillo-Manzano, 'El sistema portuario español: buscando un nuevo rumbo'. *Economistas*, 123, 2010, pp. 290-295.

¹⁶²⁴ *Gobierno de España : Ministerio de Fomento, Puertos del Esatado: Statistics Since 1962*. Available at: http://www.puertos.es/en/estadisticas/estadistica_historica/index.html [accessed on 15 July 2013].

¹⁶²⁵ *Gobierno de España : Ministerio de Fomento, Puertos del Esatado: Presentación*. Available at: <http://www.puertos.es/en/node/93> [accessed on 15 July 2013].

Algeciras, Barcelona, Bilbao, Cartagena, Huelva, Tarragona, Valencia, Las Palmas and Santa Cruz de Tenerife in the Canary Islands.¹⁶²⁶

Some ports facilitate trade with global markets. These are 'general interest' ports (article 149.1.20 of the Spanish Constitution). Some terminals are managed by private businesses, including national or multinational firms. Others are managed directly by public authorities.

Regulatory Institutions and Legislation

The Spanish port system includes 46 ports managed by 28 Port Authorities. They are overseen by the State Ports Agency which is an agency of the Ministry of Development. The Port Authorities are: A Coruña; Algeciras Bay; Bilbao Ferrol-S.Cibrao; Malaga; Pasaia; Tarragona; Alicante; Bay of Cadiz; Cartagena; Gijón; Marin and R. Pont; SC Tenerife; Valencia; Almería; Islands; Castellón; Huelva; Melilla; Santander; Vigo; Aviles; Barcelona; Ceuta; Las Palmas; Motril; Seville; and Arousa.¹⁶²⁷

Legislation provides that ports are to be managed in a way that promotes 'efficiency, the economy, productivity and safety.' A minimum level of services must be offered at each Port (article 66, law 27/1992). Port services could be provided directly by a port authority or indirectly by means of a concession or contract with a private firm.

Some ports are managed by *Ente Público Puertos del Estado* (EPPE). The EPPE is a public company overseen by the Ministry of Transport. Its objectives include the coordination of operations in the ports. It also sets prices that are paid by shipping companies to the businesses that manage the terminals. The EPPE is financed by a proportion of the total revenues collected by each port authority.¹⁶²⁸ The fees collected also form a compensation fund for investment within the industry. This is designed to ensure that the industry is financially self-sufficient and that fees are correlated with the total costs of the industry.

The second types of ports are fishing, sport-oriented and non-commercial ports. These are operated by a *Comunidades Autónomas* (Autonomous Port Authorities) (article 148.1.6 of the Spanish Constitution). However, all are subject to a common regulation.¹⁶²⁹

The *Comunidades Autónomas* are public institutions with their own legal personality. The regional Government appoints the autonomous Port Authority's President. Investment plans are proposed by the President of the autonomous Port Authority. The President also establishes concession contracts with businesses that operate at the terminal. Autonomous Port Authorities rely on property income, port charges and contributions from an inter-port solidarity fund.

Port charges for all types of ports are based on Law 48/2003 of 26 November. In 2010, Act 33/2010 of 5th August was introduced and designed to provide greater incentives to manage ports in an environmentally sustainable manner and to also attract new sources of private investment.

Terminal operators pay two charges to Port Authorities. The first is a fee for the occupation of a public area. This is determined by the size of the area occupied. This fee is updated annually to reflect changes in the consumer price index. The second fee paid by terminal operators is for the use of a public domain. This depends on the type and volume of activity and the degree of benefit received from the service obtained. Both are also affected by the land value of the port area. Fees are paid to the Port Authority by the concessionaires.¹⁶³⁰

Shipping companies pay a fee for the use of port facilities. This is determined by the type of product being transported, the size of the vessel and the number of passengers being transported. The fee classification is the same for all the port authorities and is theoretically determined by port infrastructure costs. However, the fee payable for the type of products being transported is not determined by the value of the products transported because goods with a higher value are not

¹⁶²⁶ Central Intelligence Agency (CIA), *The World Factbook: Spain*. Available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/sp.html> [accessed on 15 July 2013].

¹⁶²⁷ *Gobierno de España : Ministerio de Fomento, Puertos del Estado: Presentación*. Available at: http://www.puertos.es/en/estructura/distancia_puertos.html [accessed on 15 July 2013].

¹⁶²⁸ X Fageda and M Gonzalez-Aregall, *Regulation of Port Charges in Spain: Global versus Local Competition*, Research Institute of Applied Economics Working Paper 2012, p. 5. Available at: http://www.ub.edu/irea/working_papers/2012/201217.pdf [accessed on 15 July 2013].

¹⁶²⁹ *Ibid.*

¹⁶³⁰ *Ibid.*

necessarily charged a higher fee. These fees are paid directly to the Port Authority by the shipping companies.¹⁶³¹ Port Authorities may discount fees for some ships.

¹⁶³¹ Fageda and Gonzalez-Aregall, *op. cit.*

Sweden

OVERVIEW

Economic regulation in Sweden is the responsibility of national regulatory institutions in most sectors of the economy, with the exception of water and wastewater which is governed by five district water authorities. As a member of the European Union (EU), the regulatory regime in Sweden also reflects Directives issued at the European level, either directly applicable, or that have been transposed into Swedish legislation. Sweden also has close relations with the other 'Nordic' countries (Finland, Denmark, Norway), which have similar objectives in their legislation, and often have a similar regulatory approach. In addition, the regulatory bodies of these four countries often engage in information transfers and disclosure. In addition to sector-specific regulators (see below), a major regulatory institution in Sweden is the *Konkurrensverket* (Swedish Competition Authority) which enforces Swedish and EU competition law.

Economic regulation is structured into three sector-specific regulators; the *Energimarknadsinspektionen* (Energy Markets Inspectorate) for energy; the *Post och Telestyrelsen* (Swedish Post and Telecom Agency, PTS) for telecommunications and postal services and the *Transport Styrelsen* (Swedish Transport Agency) for rail, airports and ports.

The Energy Markets Inspectorate evolved from the Swedish Energy Agency to become an independent authority responsible for regulating the electricity, natural gas and district-heating markets. Energy regulation is heavily influenced by the EU (for example, the recent adoption of *ex ante* regulation) and Sweden's Nordic single-market partners. A Swedish Consumer Energy Markets Bureau provides advice and guidance to energy consumers.

The PTS monitors the electronic communications (telecommunications and radio) and postal services. Sweden has among the most advanced telecommunications system in the world, particularly in wireless (second-highest wireless broadband penetration in the OECD). The incumbent, *TeliaSonera*, has retained a strong position in all main markets. The EU has a great influence on telecommunications in all Member States, including Sweden.

The postal system is jointly operated by the Swedish and Danish postal operators, trading as *Posten AB*. Postal services have been substantially liberalised in all EU countries in recent years. Sweden is one of the first countries to open up the postal market; however, *Posten AB* has retained dominant market share in mail delivery.

The water and wastewater sector is regulated both at the national level (environment and purity) and in a three-tier decentralised system. Since 2004, Sweden has been divided into five water districts, with one water authority (the *Vattenmyndigheterna*) in each appointed as the water authority for the district. There are concurrently County Administrative Boards and 91 Municipal Boards. These organisations operate within a three-tier system in which the water authority has primacy. The Swedish Water and Sewage Tribunal adjudicates disputes.

The Swedish Transport Agency has an overall supervisory and regulatory responsibility for rail, airports, roads and ports. It began operations on 1 January 2009, replacing the former industry-specific regulators. While differing across sub-sectors, it has roles in promoting safety, security and environmental standards; and in economic regulation (primarily in rail and airports). The Swedish Competition Authority also has a role across all parts of the economy, including in rail, airports and ports.

GEOGRAPHY, POPULATION, ECONOMY, POLITY AND LEGAL SYSTEM¹⁶³²

Sweden is a large country with a comparatively small population (approximately 9.1 million) and a sometimes severe winter climate. Geographically, Sweden is the third largest country in Western Europe with an area of 450 000 square kilometres, and the small population and large area combine to produce a population density of about 20 per square kilometre, that is low in comparison to most European countries. It is characterised by its long coastlines, large forests and numerous lakes.

¹⁶³² CIA. *World Factbook – Sweden*. Available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/sw.html> [accessed on 3 July 2013].

The most densely populated areas of the country lie in the triangle formed by the three largest cities – Stockholm, Göteborg and Malmö – and along the Baltic coastline north of the capital. The capital and the largest city is Stockholm, with a population of about 1.3 million. The Norrland interior is very sparsely populated, which creates problems in supplying adequate services and transportation facilities to its inhabitants.

The GDP on a Purchasing-Power-Parity (PPP) basis is US\$395.8 billion in 2012. This is equivalent to approximately US\$41 700 per capita.¹⁶³³

The Swedish economy slipped into recession in 2008 and 2009, but recovered strongly in 2010 and 2011. Economic growth was lower in 2012. Unemployment is 7.5 per cent of the estimated workforce. The budget deficit and the level of government debt are both low in comparison with many European economies.

The service sector employs 71 per cent of the workforce; manufacturing employs 28 per cent; and agriculture one per cent.

In recent years the Swedish economy has undergone rapid restructuring and adjustment to more intensive international competition and freer markets. It has been heavily oriented toward foreign trade with more than half of all manufactured goods now being exported. Major trading partners are Germany, the Nordic countries, and the Netherlands. Both exports and imports comprise sophisticated manufactured goods, such as machinery, motor vehicles and chemicals.

Sweden is characterised by sophisticated economic infrastructure with a high degree of development in energy, communications, water and wastewater, and transportation systems. Energy, communications and transportation infrastructure are strongly integrated with other Scandinavian countries, and increasingly more broadly with other member states of the EU.

Sweden is a constitutional monarchy, although these duties are limited to official and ceremonial functions. The Swedish public sector operates at the national, regional and local levels. National parliament (*Riksdag*) is a unicameral system, with 349 members. The Prime Minister is the head of government and is elected by the parliament.

Sweden is divided into 21 regional elected county councils and county administrative boards. The county councils are responsible for overseeing tasks that cannot be handled at the local level by municipalities but require coordination across a larger region, such as health care and public transportation. The county administrative boards are the central government's representatives at the regional level. The head of the county administrative board, the county governor, is appointed by the Government for a six-year term. The county administrative boards decide on such issues as land use and traffic regulation.

At the local level, Sweden is divided into 290 municipalities, each with an elected assembly or council. Municipalities are responsible for a broad range of facilities and services including housing, roads, water supply and wastewater processing, schools and public assistance. The municipalities are entitled to levy income taxes on individuals and charge for various services.

The Swedish legal system does not appear to fit neatly into either the civil or common law traditions, but rather sits somewhere in between the two, being adversarial with no binding precedence by judicial ruling (although the Supreme court creates legal precedents) and possessing substantial room for interpretative court judgments on codified law. In addition, as a member state of the EU, Sweden is subject to, or required to adopt, relevant laws set in place at that level.

Sweden has two parallel types of courts – general courts, which deal with criminal and civil cases, and administrative courts, which deal with cases relating to public administration. The general courts are organised in a three-tier system of district courts, courts of appeal and the Supreme Court. Judges are appointed to the Supreme Court by the Prime Minister and the Cabinet. The administrative courts also have three tiers – county administrative courts, administrative courts of appeal and the Supreme Administrative Court. In addition, a number of special courts and tribunals have been established to hear specific kinds of cases and matters. For example, the

¹⁶³³ Organisation for Economic Cooperation and Development (OECD), *OECD Stat Extracts: National Accounts*. Available at: <http://stats.oecd.org/Index.aspx?QueryId=558> [accessed on 8 May 2013].

Marknadsdomstolen (Swedish Market Court) is a specialised court that handles cases related to the *Competition Act*, the *Marketing Act*, and other consumer and marketing legislation.¹⁶³⁴

In general, a party is free to lodge an appeal against a decision with the court that presides above it in the hierarchical structure, outlined above. In certain cases, a case can only be given a full review by a court of appeal after the court has granted leave to appeal. The Supreme Courts are the court of last resort.

The arrangements for the appeal of regulatory decisions display differences across infrastructure areas, and are described in each section of this chapter. Where information on appeal avenues for regulatory decisions is available – in telecommunications, posts and rail – appeals can be made to the County Administrative Court. Appeals against the rulings of the County Administrative Court can be made to the Administrative Court of Appeal.

APPROACH TO COMPETITION AND REGULATORY INSTITUTIONAL STRUCTURE

There are several bodies of relevance to Sweden's pursuit of competition policy and economic regulation of infrastructure. The *Konkurrensverket* (Swedish Competition Authority) is a major regulatory institution, whose mandate is to enforce Swedish and EU competition law. The main authorities of relevance to network areas are the sector-specific regulators for energy (gas and electricity), communications (telecommunications and post), and transport (rail, road, airports and ports). The water and wastewater industry is regulated by five water district authorities, regional county councils and local municipalities. In addition, there are three consumer bodies.

Konkurrensverket (Swedish Competition Authority)

The Swedish Competition Authority is a state authority that operates to safeguard and increase competition and supervise public procurement in Sweden. The goal of Swedish competition policy is well-functioning markets. In addition to applying the *Competition Act*, the Authority provides proposals for changes to rules and other measures to eliminate obstacles to effective competition. It also plays a role in informing the public and promoting awareness about competition issues.¹⁶³⁵ It is divided into eight departments – four competition departments; a department for the enforcement of procurement laws; a legal department; the office of the chief economist and an administrative department. It is located in the capital city of Sweden, Stockholm.

The Authority's main tasks are: controlling notified mergers (taking action against infringements of the prohibitions in the *Competition Act*); supervising compliance with the *Public Procurement Act*; submitting proposals for changes in the rules concerning competition policy and their application; and initiating and supporting relevant research within the field of competition and public procurement.

Once a case has been registered at the Swedish Competition Authority, the process is as follows for a final decision to be made:

- Registration of a case.
- Assigning the case to a department and group of case officers.
- Preparing the case.
- Circulating the department's proposed decision internally within the Authority.
- The proposed decision being presented by the case officers to the Director-General and discussed in the presence of a Competition Counsellor and the Head of Department.
- Issuing the final decision and closing the case file.

In 2008 the Competition Authority was mandated to undertake a broad review of the competitive situation in Sweden, dealing comprehensively with both new and existing proposals for competition-enhancing reforms and presenting them in a concrete form. The competitive advantages that the EU internal market presents for Sweden were also addressed. On 31 March 2009, the Authority

¹⁶³⁴ *Marknadsdomstolen*, Swedish Market Court. Available at: <http://www.marknadsdomstolen.se/default.aspx?id=1225> [accessed on 10 July 2013].

¹⁶³⁵ Swedish Competition Authority, *About Us*. Available at: http://www.konkurrensverket.se/t/SectionStartPage_219.aspx [accessed on 10 July 2013].

delivered its report, titled *Action for Better Competition*,¹⁶³⁶ containing an analysis of competition in Sweden and a wide range of proposals on how to improve competition. The analysis was conducted by the Competition Authority and commissioned researchers and consultants, using data and documentation provided by regulatory authorities and data collected directly by the Competition Authority. The proposals included the establishment of an integrated consumer portal site and the introduction of measures that improve consumer choice and public procurement.

Energimarknadsinspektionen (Energy Markets Inspectorate)

The regulatory authority for the economic regulation of Swedish energy is the *Energimarknadsinspektionen* (Energy Markets Inspectorate).¹⁶³⁷ It is profiled in more detail in section 1 of this chapter.

Post och Telestyrelsen (Swedish Post and Telecom Agency)

The *Post och Telestyrelsen* (PTS) (in English, Swedish Post and Telecom Agency) monitors the electronic communications (telecommunications, the Internet and radio) and postal services in Sweden. The PTS is profiled in more detail in sections 2 and 3 of this chapter.

Transport Styrelsen (Swedish Transport Agency)

On 1 January 2009, the transport-sector regulator, *Transport Styrelsen* (Swedish Transport Agency)¹⁶³⁸ assumed regulatory responsibilities of the former industry-specific regulators in rail (Swedish Rail Agency), airports (Swedish Civil Aviation Authority), ports (Swedish Maritime Inspectorate), and roads (Swedish Road Traffic Inspectorate and parts of the Swedish Road Administration that is in charge of vehicles; vehicle imports; traffic regulations; and taxes and charges). Its headquarters is in Norrköping, located 163 kilometres by road from Stockholm in a south-westerly direction.

As a government agency that has an overall responsibility for the four modes of transport, the Swedish Transport Agency is authorised to prescribe and apply regulations in the transport sector. All the regulations developed by the agency (including amendments to earlier regulations) are required to be published in the *författningssamling* (Transport Board). The agency works, under the direction of its Director General, with these principal departments – Road and Rail Department; Civil Aviation and Maritime Department; Traffic Registry Department; Driving Licence Department; and Tax and Fee Department. It also has four administrative departments in finance and administration, communications; IT; human resources and legal. The Director General is also directly supported by its Office, Registry of the DG and Legal Division. The Swedish Parliament and the Government decided that the activities of the agency with regard to permits, inspections and record keeping shall mainly be financed through the levying of charges, as from 1 January 2011.

The role of the Swedish Transport Agency in the areas of rail, airports and ports is considered in sections 5, 6 and 7, respectively.

Appeals

In the energy sector, for both electricity and gas, certain decisions may be appealed against at a general administrative court. Leave to appeal is required in connection with appeals to the Administrative Court of Appeal.

In telecommunications, appeals against PTS decisions can be made to the County Administrative Court. Appeals against the rulings of the County Administrative Court can be made to the Administrative Court of Appeal.

In postal services, the PTS's licensing decisions on alterations of postcodes system may not be contested by appeal. Appeals against other rulings handed down by the PTS can be made to the Administrative Court of Appeal (*Postal Services Act 2010*, Chapter 4, s.22). Leave to appeal is required.

¹⁶³⁶ Swedish Competition Authority, *Action for Better Competition: Executive Summary*, Report 2009:4, May 2009. Available at: http://www.kkv.se/upload/Filer/ENG/Publications/rap_2009-4_summary.pdf [accessed on 10 July 2013].

¹⁶³⁷ Energy Markets Inspectorate, *Home*. Available at: <http://ei.se/en/About-us/> [accessed on 10 July 2013].

¹⁶³⁸ Swedish Transport Agency, *About Us*. Available at: <http://www.transportstyrelsen.se/en/About-us/> [accessed on 10 July 2013].

In the water and wastewater sector, appeals against the Tribunal's decisions can be lodged with the Land and Environment Court of Appeal and, in the last instance, to the Supreme Court.

In the rail industry, the *Railway Act* (Chapter 11, s.2) provides for an appeal of the decision of the General Administrative Court. Leave to appeal is required upon appeal to the Administrative Court. The *Railway Act* (Chapter 11, s.1) also requires the Swedish Transport Agency to reconsider a decision not to approve a subsystem, upon the request from the applicant. In addition, the *Rail Ordinance* (s.13) states that *Trafikverket's* decisions may be appealed to the Government.

Consumer Authorities

There are three key consumer authorities in Sweden. First, the *Konsumentverket* (Swedish Consumer Agency) is a government agency in charge of the interests of consumers.¹⁶³⁹ Second, the *Sveriges Konsumenter* (Swedish Consumers' Association) is a politically independent association, which promotes the interests of consumers.¹⁶⁴⁰ Third, the 'National Board of Consumer Disputes' (ARN) is a government agency that operates like a court; with the primary role of impartial dispute resolution between consumers and businesses.¹⁶⁴¹ However, the ARN's recommendations are advisory in nature and, as such, are not binding on the parties. While the majority of companies at disputes follow them, this is not always the case. For example, ARN's involvement has not necessarily resulted in action from the airlines such as Ryanair.¹⁶⁴²

REGULATORY ARRANGEMENTS BY INDUSTRY OR SECTOR

1. Energy

The generation of electricity in Sweden is mainly from hydro, nuclear and other renewable sources (just under 90 per cent). Production is mainly located in the north where there is a generation surplus and demand is concentrated in the south where there is a generation deficit. Transmission links the supply with the demand.

As described by the *Energimarknadsinspektionen* (Energy Markets Inspectorate) in its 2011 energy market report:

The Swedish electricity market was deregulated in 1996, since when electricity trading and generation have been open to competition, while network operations are a regulated monopoly. The aim of deregulation was to increase consumer choice and provide conditions for an efficient utilisation of the generation resources. For efficiency reasons, the electricity networks were retained in a regulated monopoly.¹⁶⁴³

Generation is dominated by a small number of companies – three of these (*Vattenfall*, *Fortum* and *E.ON Sverige*) accounted for 80 per cent of total generated electricity in 2011 (2011 Report, p. 36).

The electricity network consists of 538 000 kilometres of conductors, of which 320 000 kilometres are underground cables and 218 000 kilometres are overhead lines. It can be divided into three levels; that is, the national grid, regional networks and local networks. The national grid transmits power over long distances at high voltage levels, while the regional networks take power from the grid to local networks and, in some cases, directly to major users. The local networks connect to the regional networks and carry power to households and other end-users. *Svenska Kraftnät*, which is a public authority, is responsible for managing the transmission network and maintaining the power

¹⁶³⁹ Swedish Consumer Agency, *English Website*. Available at: <http://www.konsumentverket.se/otherlanguages/English/> [accessed on 5 July 2013].

¹⁶⁴⁰ Swedish Consumers' Association, *About the Swedish Consumers' Association*. Available at: <http://www.sverigeskonsumenter.se/Eng/> [accessed on 10 July 2013].

¹⁶⁴¹ National Board for Consumer Disputes, *The National Board for Consumer Disputes*. Available at: <http://www.am.se/English/> [accessed on 5 July 2013].

¹⁶⁴² The Local, *Ryanair Tops Swedes' Airline 'Complaint List'*. Available at: <http://www.thelocal.se/41144/20120530/> [accessed on 8 May 2013].

¹⁶⁴³ Energy Markets Inspectorate, *The Swedish Electricity and Natural Gas Markets 2011, 2012*, p. 39. Available at: [http://ei.se/Documents/Publikationer/rapporter_och_pm/Rapporter%202012/Swedish Electricity and Gas Markets 2011 EIR 2012 11.pdf](http://ei.se/Documents/Publikationer/rapporter_och_pm/Rapporter%202012/Swedish%20Electricity%20and%20Gas%20Markets%202011%20EIR%202012%2011.pdf) [accessed on 10 July 2013].

balance and the operational reliability of the Swedish power network system. The local and regional network companies are responsible for ensuring an adequate network maintenance level in order to maintain the security of supply within their own networks. In 2010, five companies undertook regional network operations and 173 companies, local network operations in Sweden. The largest electricity suppliers, *Vattenfall*, *E.ON Sverige* and *Fortum*, had a market share of about 50 per cent, which is the equivalent of about 2.5 million customers.

With deregulation in 1996, Sweden together with Norway formed the wholesale market Nord Pool, which later included Denmark and Finland. Nord Pool sets the price of electricity in every hour, based on supply and demand bids. Nord Pool is jointly owned by *Svenska Kraftnät* (30 per cent), *Statnett* (the Norwegian TSO; 30 per cent), *Fingrid Oyj* (the Finnish TSO, 20 per cent) and *Energinet dk* (the Danish TSO, 20 per cent) (2011 Report, p. 34).

In the wholesale power market, the three largest Swedish generators held an aggregate 42.3 per cent of the Nordic market in 2011.¹⁶⁴⁴

Since liberalisation, the number of electricity suppliers has declined from around 220 in 1996 to 120 in December 2011, of which about 100 sell electricity to customers throughout Sweden. In 2011, a total of over 1.6 million domestic customers (about 37 per cent of all domestic customers) switched energy suppliers or renegotiated their contracts. At the end of 2011, the total number of customers in the market amounted to approximately 4.4 million.¹⁶⁴⁵

The Swedish gas market is relatively small. The natural gas grid consists of 620 kilometres of transmission pipeline and around 27 200 kilometres of distribution pipeline located on the west coast, with just over thirty municipalities having access to gas (2011 Report, p. 56). All the natural gas consumed in Sweden is imported by the two companies selling natural gas on the wholesale market, half by *E.ON Sverige* and half by *Dong Sverige*. *E.ON Sverige*, *Dong Sverige*, and *Göteborg Energi* are the three major natural gas retailers, accounting for around 85 per cent of the total supply by the five suppliers in the retail market in 2011 (2011 Report, p. 61).

The gas transmission system is owned by *Swedegas* that has the responsibility for operating, maintaining and developing the pipelines. *Svenska Kraftnät* (also the electricity transmission system operator, TSO) is the system operator, being responsible for short-term maintenance of the balance between injection and withdrawal of natural gas in the national system. During 2013 the balancing responsibility of *Svenska Kraftnät* will transfer to *Swedegas* that will become the sole certified transmission system operator in natural gas.¹⁶⁴⁶

Legal separation and ownership unbundling between transmission, distribution and other operations in natural gas is required under the *Natural Gas Act*.

Since July 2005, all non-household customers (accounting for about 95 per cent of Sweden's total natural gas consumption) have been free to choose their supplier. The remaining market was opened in July 2007 (2011 Report, p. 13).

Regulatory Institutions and Legislation

The regulatory authority for the economic regulation of Swedish energy is the *Energimarknadsinspektionen* (Energy Markets Inspectorate).¹⁶⁴⁷ The Inspectorate evolved from the Swedish Energy Agency,¹⁶⁴⁸ which was formed in 1998 to work 'towards transforming the Swedish energy system into an ecological and economically sustainable system through guiding state capital towards the area of energy'. The Inspectorate commenced in 2005 as an autonomous department within the Agency, established to encourage a more vigorous supervision of electricity and natural gas

¹⁶⁴⁴ Nordic Energy Regulators, *Nordic Market Report 2012*, July 2012, p. 7; Available at: <https://www.nordicenergyregulators.org/upload/Reports/NMR%202012%20-%20publication.pdf> [accessed on 10 July 2013].

¹⁶⁴⁵ Energy Market Inspectorate, *The Swedish Electricity and Gas Market 2011*. Available at: http://www.ei.se/Documents/Publikationer/rapporter_och_pm/Rapporter%202012/Swedish_Electricity_and_Gas_Markets_2011_EIR_2012_11.pdf [accessed on 10 July 2013].

¹⁶⁴⁶ Energy Markets Inspectorate, *An Overview of the Swedish Natural Gas Market*, 2012, p. 9. Available at: http://ei.se/Documents/Publikationer/rapporter_och_pm/Rapporter%202012/An_overview_of_the_Swedish_natural_gas_market_EiPM2012_06.pdf [accessed on 10 July 2013].

¹⁶⁴⁷ Energy Markets Inspectorate, *About Us*. Available at: <http://ei.se/en/About-us/> [accessed on 5 July 2013].

¹⁶⁴⁸ Swedish Energy Agency, *About Us*. Available at: <http://www.energimyndigheten.se/en/> [accessed on 10 July 2013].

markets. Then, commencing on 1 January 2008, the Inspectorate became more autonomous. The Swedish Energy Agency remains responsible for the security of electricity and natural gas supply.

The Inspectorate is led by a Director-General appointed by the government. There are about 100 employees at the agency, most of whom are economists, lawyers or engineers. It administers legislation such as the *Electricity Act 1997*; the *Natural Gas Act 2005*, the *District Heating Act*, and the *Act on Certain Pipelines*.¹⁶⁴⁹ It is located in Eskilstuna, 112 kilometres east of the capital, Stockholm.

The mission for the Inspectorate is to work for an improvement of the functioning and efficiency of the Swedish electricity, natural gas and district heating markets. This includes the drawing up of regulations and deciding on matters that concern the duties of the Inspectorate under the relevant legislation.

The Inspectorate makes regulatory decisions, acts as market surveyor, issues licences, coordinates information to the public and participates in international cooperation. In more detail its functions are:

- Supervision of network providers in electricity and natural gas for compliance with the legislation. The Inspectorate supervises network tariffs and grants permits (known as 'network concessions') for the construction and connection of power lines and gas pipelines (except exemptions). Tariff regulation in electricity is presently conducted on an *ex ante* basis, where the regulator decides the revenue cap for each network for the years 2012 to 2015. In regard to connections, the Energy Markets Inspectorate will only review connection fees and other conditions upon receiving a request from network users for such an examination.¹⁶⁵⁰ The Network Regulation Department has three units – the Network Company Unit, the Network Tariffs Unit, and the Network Quality and Licences Unit.
- In addition to access issues, the Energy Markets Inspectorate must approve the standardised-balance agreement for electricity. This agreement is drawn up each year by *Svenska Kraftnät*, which is the public authority responsible for operating the electricity transmission system. The Inspectorate examines the agreement for compliance with the objectivity and non-discrimination requirements of the *Electricity Act 1997*. In gas, the regulator must approve the methods used for drafting the agreements.
- Monitoring of markets for efficient operation and an operational role in electricity trading. When needed, the Inspectorate can suggest changes in the regulatory framework. It also provides information to consumers. The Market Monitoring Department has two units; one for market surveillance and the other for market analysis.
- The Inspectorate cooperates with the Swedish Consumer Agency and the Swedish Energy Agency, together with relevant industry associations (Swedenergy, Swedish Gas Association and Swedish District Heating Association) in operating the Swedish Consumer Energy Markets Bureau.¹⁶⁵¹ The Bureau provides advice and guidance to consumers on issues in relation to the energy markets, and conveys common problems in the energy markets to the authorities or actors involved. In December 2011, the Bureau became a contact point for energy consumers making enquiries and complaints.¹⁶⁵²
- The Inspectorate also runs a designated website, *Elpriskollen*,¹⁶⁵³ to help electricity customers to choose electricity retailers.
- The inspectorate is responsible for international collaboration, including the EU's creation of a single market for electricity and gas, and the integration of energy markets between the Nordic countries. It has an International Department.

¹⁶⁴⁹ The first three of these acts are available in English at: <http://ei.se/en/Publications/> [accessed on 12 July 2013].

¹⁶⁵⁰ Energy Markets Inspectorate, *Connect to the Electricity Grid*, Available at: <http://ei.se/sv/el/bygga-och-ansluta-elledning/Ansluta-till-elnat/> [accessed on 10 July 2013].

¹⁶⁵¹ Swedish Consumer Energy Markets Bureau, *Summary in English*, Available at: <http://www.energimarknadsbyran.se/Webbinnehall1/Om-oss/Summary-in-English/> [accessed on 10 July 2013].

¹⁶⁵² Energy Markets Inspectorate, *The Swedish Electricity and Natural Gas Markets 2011, 2012*, p. 47.

¹⁶⁵³ *Elpriskollen.se, Home*. Available at: <http://www.ei.se/elpriskollen/> [accessed on 10 July 2013].

Network Tariffs – Electricity

The Inspectorate previously made an annual assessment of the reasonableness of network tariffs using a simulation model called the Network Performance Assessment Model (NPAM) to perform this evaluation. Each year the network companies sent in data concerning their business to the Inspectorate. The data were input into the model, creating a reference network. The model then calculated a financial value of what the network company had done, known as the network performance. Performance was related to operation and management of electricity distribution and quality of distribution, for example, in terms of the number of power cuts during the year and their length. The network performance was then compared with what the company had invoiced its customers and a debiting rate was created. If the debiting rate exceeded 1.0 this indicated that the network tariff might have been too high and the company would be subject to an extended evaluation. The NPAM was formally abandoned in January 2009.

Under the third package to liberalise the energy market, the EU Directive 2003/54/EC,¹⁶⁵⁴ required all Member States to regulate electricity tariffs *ex ante*. To implement this European legislation, Sweden introduced *ex ante* revenue-cap regulation, commencing in 2012.¹⁶⁵⁵ The regulator shall decide the revenue cap for each network after a proposal from the network operator providing data and methodologies used in determining the level of revenue requested. The duration of a regulatory period is set to be four years.¹⁶⁵⁶ The revenue cap shall cover reasonable operational costs and a reasonable return on the necessary network assets to conduct network activities, taking into account the quality of services. For the regulatory period 2012 to 2015, an efficiency target of one per cent per annum in real terms is applied to the controllable component of the operational costs. A quality-of-service reward/penalty regime is integrated into the revenue cap so if actual supply reliability exceeds or falls below the standard level during the regulatory period, rewards or penalties (up to three per cent of annual allowed revenues) apply to the revenue cap in the following regulatory period.¹⁶⁵⁷

In early 2011, electricity network operators submitted their applications for revenue caps for the years 2012 to 2015. However, it appears that more than half of the revenue-cap decisions made by the Energy Markets Inspectorate have subsequently been appealed (that is, 96 out of approximately 170 decisions).¹⁶⁵⁸ The revenue-cap decisions take effect immediately after being announced by the Energy Markets Inspectorate. For those decisions being the subject to an appeal, the regulatory decisions remain effective until the Court decides the case.

Network Tariffs – Gas

According to the *Natural Gas Act*, the transmission system operator, *Svenska Kraftnät*, cannot conclude balance agreements with individual gas suppliers until the methods used for drafting the agreements have been approved by the Energy Markets Inspectorate.¹⁶⁵⁹

In gas, the Energy Markets Inspectorate must approve the method of calculation of transmission and distribution network tariffs *ex ante*. The regulator also monitors the methods on which the design of the fees is based to ensure that they are objective and non-discriminatory in accordance with the requirements in the *Natural Gas Act*. Auditing the fairness of the network fees is currently carried out on *ex post* basis (2011 Report, p. 57). The reasonableness of the tariff level and revenue is assessed, after the grid operator has decided the tariffs it shall charge its customers and it has

¹⁶⁵⁴ That is, Directive 2003/54/EC of the European Parliament and the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing directive 96/92/EC.

¹⁶⁵⁵ WIK Consult, *Cost Benchmarking in Energy Regulation in European Countries*, 14 December 2011. Available at: <http://www.accc.gov.au/content/item.phtml?itemId=1054590&nodeld=d13d522931af8eb17dfe2ddf57ab9b1e&fn=WIK-Consult%20Report%20Cost%20Benchmarking.pdf> [accessed on 10 July 2013].

¹⁶⁵⁶ The regulatory period is one year in regard to revenue determination for transmission network operated by *Svenska Kraftnät*.

¹⁶⁵⁷ Sources include: WIK Consult, *op. cit.* and Nordic Energy Regulator, *Economic Regulation of Electricity Grids in Nordic Countries*, December 2011, p. 103. Available at: https://www.nordicenergyregulators.org/upload/Reports/Economic_regulation_of_electricity_grids_in_Nordic_countries.pdf [accessed on 10 July 2013].

¹⁶⁵⁸ Energy Markets Inspectorate, *Revenue Caps – Electricity Networks 2012-2015*, in Swedish, Available at: <http://ei.se/sv/el/Elnat-och-natprisreglering/forhandsreglering-av-elnattariffer/intaktsramar-elnatsforetag-2012-2015/> [accessed on 10 July 2013].

¹⁶⁵⁹ Energy Markets Inspectorate, *The Swedish Electricity and Natural Gas Markets 2011, 2012*, p. 56.

received payment. In performing this function, the Energy Markets Inspectorate examines all annual reports for the grid operator.¹⁶⁶⁰

Consultation of Interested Parties

One core activity of the Energy Markets Inspectorate is to provide information to consumers to ensure their position in energy markets. To this end, the Energy Markets Inspectorate addresses relevant information to interested parties and their representatives. It also cooperates with the Swedish Consumer Agency and industry associations in running the Swedish Consumer Energy Markets Bureau, an independent bureau in providing advice and guidance to electricity consumers.

Svensk Energi (Swedenergy) is an industry body representing state-owned, municipal and private companies producing, distributing or trading electricity in Sweden.¹⁶⁶¹ It acts as an advocate for its member companies in dealing with regulators and government on a local, national and international level.

Energigas Sverige (Swedish Gas Association) is the industry association dedicated to promoting a greater use of gases for energy.¹⁶⁶² It also promotes research and development within the industry. Working areas include the development of guidelines, industry standards and authorisation in the gas field.

Information Disclosure and Confidentiality

Under the relevant legislation,¹⁶⁶³ the Energy Markets Inspectorate shall, upon request, be given access to all information and documents necessary for conducting supervision of network companies in electricity and natural gas markets. In making its information request, the Energy Markets Inspectorate can specify fines for non-compliance.

The Energy Markets Inspectorate, as a government agency, is bound under the *Freedom of the Press Act* to give public access to official information held by the agency, to any party requesting them. However, in accordance with the *Public Access to Information and Secrecy Act 2009*, information that is deemed to be commercial-in-confidence may not be provided to third parties.

Decision-making and Reporting

In general, the Energy Markets Inspectorate may settle disputes and issue decisions involving distribution network providers on its own initiative, on the basis of a notification or on the basis of complaints. Complaints over connection fees, tariffs and other terms and conditions can be brought forward to the regulator for decision.¹⁶⁶⁴

In relation to decision processes, the decision is made by the Director-General following a presentation of the case by one case officer, who may be supported by other officers. During the process of preparing the decision, other staff – such as the general counsel – are also been involved. In relation to determining the revenue requirement, the Director-General makes decision on a weekly basis according to the agency work plan. How the matters should be processed by the Energy Markets Inspectorate is set down by the law. All decisions are archived and available on the website.¹⁶⁶⁵ Decisions are usually short (around 10 to 20 pages) plus some brief attachments, and this brevity is irrespective of the size of the business reviewed.

¹⁶⁶⁰ Energy Markets Inspectorate, *Natural Gas – Network Price Regulation*. Available at: <http://ei.se/en/Natural-gas/Network-price-regulation1/> [accessed on 10 July 2013].

¹⁶⁶¹ Swedenergy, *Swedenergy*. Available at: <http://www.svenskenergi.se/sv/In-English/> [accessed on 10 July 2013].

¹⁶⁶² Swedish Gas Association, *About the Swedish Gas Association*. Available at: <http://www.energigas.se/In-English> [accessed on 10 July 2013].

¹⁶⁶³ The information-gathering power is in the *Electricity Act 1997*, Chapter 12, s. 2, SFS 1997:857, amended up to 1 January 2012; and the *Natural Gas Act*, Chapter 10, s. 2, SFS 2005:403, amended up to 1 January 2012. Available at: <http://ei.se/en/Publications/> [accessed on 12 July 2013].

¹⁶⁶⁴ WIK Consult, *Cost Benchmarking in Energy Regulation in European Countries*, 14 December 2011, p. 54.

¹⁶⁶⁵ Energy Markets Inspectorate, *Intäktsramar elnätsföretag 2012-2015 (Revenue – Electricity Grid Companies Framework 2012-2015)*. Available at: <http://www.ei.se/sv/el/Elnat-och-natprisreglering/forhandsreglering-av-elnatstariffer/intaktsramar-elnatsforetag-2012-2015/> [accessed on 10 July 2013].

Appeals

For electricity, certain decisions may be appealed against at a general administrative court. These include: decisions made by the Energy Markets Inspectorate under Chapter 2, Sections 18 to 20, Chapter 3, Sections 3, 6 to 8, 9b, 11, 14 and 15, Chapter 4, Sections 6, 7 and 10, Chapter 5, Sections 3, 11 to 13, 15 to 17, 26 and 27, Chapter 8, Section 4a and Chapter 12, Sections 8 and 11; decisions made by a supervisory authority under Chapter 12, Sections 2 to 4; and decisions by the authority having system responsibility concerning compensation to a party that has been ordered to increase or reduce the generation of electrical power under Chapter 8, Section 2.¹⁶⁶⁶ Leave to appeal is required in connection with appeals to the Administrative Court of Appeal.

For gas, certain decisions may be appealed at a general administrative court. These include: decisions made by the supervisory authority under Chapter 2, Sections 15 and 16, Chapter 6, Section 5, first paragraph, Chapter 7, Section 5, second paragraph and Chapter 10, Sections 3, 4, 7 and 10; and decisions by the authority having system responsibility concerning compensation under Chapter 7, Section 2 and also concerning measures and compensation under Chapter 8a, Sections 5 and 6.¹⁶⁶⁷ Leave to appeal is required in connection with appeals to the Administrative Court of Appeal.

2. Telecommunications

The Swedish telecommunications industry was liberalised beginning in the early 1990s and, has achieved very high penetration of fixed-line, mobile and broadband (fixed and wireless). The incumbent, *TeliaSonera*, which is still partially owned by the Swedish Government, has a strong market share in all main market segments. Telenor, a subsidiary of the Norwegian incumbent, has established a strong market presence. Other providers include Tele2 and *Comhem*.

The *Post och Telestyrelsen* (Swedish Post and Telecom Agency, PTS) publishes a market report biannually, most recently for 2012.¹⁶⁶⁸

For fixed-line services, the major market providers are *TeliaSonera* (61.2 per cent); Tele2 (10.5 per cent); Comhem (8.3 per cent) and Telenor (7.6 per cent). *TeliaSonera's* market share fell from 76.7 per cent in 2006. For mobile services, the market shares are more equal, but *TeliaSonera* (39.2 per cent) has the greatest share, followed by Tele2 (30.6 per cent) and Telenor (16.7 per cent). In the voice market, in the first six months of 2012, the PTS reported that 59 per cent of all call traffic came from mobile networks, while 41 per cent originated from fixed networks.

Of the fixed broadband subscriptions, direct fibre (FTTx/LAN) connections rose to 977 000 at the end of June 2012, a 15 per cent increase year-on-year. ADSL subscriptions continued to decline to 1.47 million at mid-2012, down five per cent year-on-year, while cable broadband lines remained static at 592 000. Just over one-fifth of fixed broadband customers had a download speed of at least 100Mbps, although only 3 per cent had an upload speed of at least 100Mbps. In the pay-TV market, IPTV via fibre represented the largest proportion of subscription growth, with 312 000 IPTV-via-fibre customers at end-June 2012, an increase of 47 per cent in one year. For December 2012, Sweden ranked twelfth in the OECD on fixed-broadband penetration.¹⁶⁶⁹

The number of mobile broadband subscriptions increased to 6.2 million at the end of June 2012, a year-on-year increase of 51 per cent. The mobile figure was more than twice the fixed broadband total, which at the same date amounted to 3.05 million, up by two per cent year-on-year. Around two-thirds of the mobile broadband subscriptions were smart-phone-based, and the amount of mobile data traffic increased by 73 per cent on a year-on-year basis. For December 2012, Sweden ranked second in the OECD countries on wireless-broadband penetration.¹⁶⁷⁰

¹⁶⁶⁶ *Electricity Act* (unofficial translation). Available at: http://ei.se/Documents/Publikationer/lagar_pa_engelska/Electricity_Act_.pdf [accessed on 10 May 2013].

¹⁶⁶⁷ *Natural Gas Act* (unofficial translation). Available at: http://ei.se/Documents/Publikationer/lagar_pa_engelska/Natural%20Gas%20Act.pdf [accessed on 10 May 2013].

¹⁶⁶⁸ Swedish Post and Telecom Agency, *The Swedish Telecommunications Market – First Half Year 2012*, PTS-ER-2012:24. Available at: <http://www.pts.se/en-GB/Documents/Reports/Telephony/2012/The-Swedish-Telecommunications-Market---First-half-year-2012---PTS-ER-201224/> [accessed on 10 May 2013].

¹⁶⁶⁹ OECD, *OECD Broadband Portal*, December 2012, updated on 18 July 2013. Available at: <http://www.oecd.org/internet/broadbandandtelecom/oecdbroadbandportal.htm> [accessed on 22 July 2013].

¹⁶⁷⁰ *OECD Broadband Portal*, *op. cit.*

In the 4G Long Term Evolution (LTE) mobile segment, the figures reported by the PTS appeared to clash with recent reports from operators.¹⁶⁷¹ The PTS claimed there were around 80 000 subscribers using LTE networks in the second quarter of 2012, noting that the slow arrival of LTE handsets in the market may have inhibited development of the user base. However, TeleGeography pointed out that Swedish operators had themselves reported higher LTE subscriber figures, with *TeliaSonera* saying in late-May 2012 that it had 140 000 Swedish LTE users, and Tele2 reporting at end-June 2012 that there were 70 000 LTE subscribers on its network alone. TeleGeography reported that both these operators had seen increased uptake following their launch of 4G handsets in February 2012. Telenor and 3 Sweden also offer LTE services.

*Regulatory Institutions and Legislation*¹⁶⁷²

The *Post och Telestyrelsen* (PTS, In English, Swedish Post and Telecom Agency) monitors the electronic communications (telecommunications, the Internet and radio) and postal services in Sweden. The PTS is a public authority that reports to the Ministry of Enterprise, Energy and Communications. It is an independent agency according to the Swedish public-authority model and the government cannot intervene in how the PTS applies, acts or decides in particular matters relating to the exercise of official power.

The PTS is headed by a board appointed by the Swedish Government, currently consisting of ten members including a chairman.¹⁶⁷³ The Director-General is the executive manager. The Board of the PTS determines matters.

The PTS has a staff of around 250, most of whom are economists, lawyers or engineers. The departments are organised into areas of responsibility such as spectrum, competition, consumer affairs, network security and postal affairs (see section 3), and then further into economic, legal and administrative groups. It is located in Stockholm.

The PTS's ongoing activities are funded through charges imposed on operators and undertakings and people who hold licences subject to the PTS's supervision, for example licences for various kinds of radio use. The PTS's annual budget is just over 200 million kronor. In addition to this, there are contributions and appropriations for the procurement of services for robust communications and for people with disability.¹⁶⁷⁴ This amount is approximately 300 million kronor per year.

The PTS is governed by the *Electronic Communications Act 2003*,¹⁶⁷⁵ and EU Directives relevant to the communications (telecommunications and postal services) sector. In particular, the PTS must draw up decisions *ex ante* concerning the obligations (including access obligations) that operators with significant market power (SMP) must comply with. The PTS is also the determinative body for disputes between those who provide electronic communications networks or associated services and third parties seeking access to these networks or associated services (Chapter 7, s.2). Matters, such as licensing applications and treatment of behaviour that is deemed to be anti-competitive, come before the regulator as a result of its own research and supervision of the market. Specifically, section 4 of the *Electronic Communications Act* states that if the PTS has reason to suspect that a party is acting contrary to the conditions and regulations set out in the Act, then the PTS will notify the party and give it one month to rectify the situation and state its views.

Accounting separation has been imposed by the PTS in all markets exhibiting SMP in accordance with the EU Directives. The new telecommunications package of the European Commission (that is, Directive 2009/140/EC),¹⁶⁷⁶ introduced in 2009, has entered into force whereby functional separation has been included as a last resort of the national regulatory authority to impose on

¹⁶⁷¹ TeleGeography, *Communications Update*. Available at:

<http://www.telegeography.com/products/commsupdate/articles/2012/11/16/pts-reports-fibre-32-of-fixed-broadband-operators-lte-figures-disagree-with-regulator/> [accessed on 10 July 2013].

¹⁶⁷² Swedish Post and Telecommunications Agency, *Operations*. Available at: <http://www.pts.se/en-GB/About-PTS/Operations/> [accessed on 10 July 2013].

¹⁶⁷³ PTS, *Management and Board*. Available at: <http://www.pts.se/en-GB/About-PTS/Organisation/Management/> [accessed on 10 July 2013].

¹⁶⁷⁴ *Ibid.*

¹⁶⁷⁵ *Electronic Communication Act 2003*. Available at:

http://www.pts.se/upload/Documents/EN/The_Electronic_Communications_Act_2003_389.pdf [accessed on 10 July 2013].

¹⁶⁷⁶ Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:337:0037:0069:EN:PDF> [accessed on 10 July 2013].

telecommunications providers. On 14 June 2007, the PTS published a report, proposing statutorily required functional separation in order to achieve non-discrimination and openness in access to the local loop.¹⁶⁷⁷ In response, the Swedish incumbent, *TeliaSonera*, voluntarily separated its operation by creating new infrastructure company, *Skanova Access AB*, wholly owned by *TeliaSonera* on 1 January 2008.¹⁶⁷⁸ Furthermore, the government amended the legislation in 2008 to include mandatory functional separation as one of the powers of the PTS.¹⁶⁷⁹

Consultation of Interested Parties

The PTS publishes its process in relation to SMP decisions.¹⁶⁸⁰ The steps, as described, are:

- The PTS draws up a draft decision concerning the relevant sub-markets, having examined whether there are any stakeholders that have significant power in the respective market and which obligations it would be appropriate to impose on these undertakings.
- The PTS consults with the operators, the Swedish Competition Authority and the European Commission in relation to the draft decision. The consultation period can vary depending on whether new issues arising and whether there is a need for meetings with the European Commission. The operators have one month to express their views on the draft decision concerning market definition, SMP assessment and the obligations that the PTS intends to make a decision on.
- The views of the operators will be published on the PTS's website and the PTS will incorporate these views into the draft decision. The draft decision will be sent to the Swedish Competition Authority. The Authority has one month to issue a statement of views.
- The views of the Swedish Competition Authority will be published on the PTS's website and the PTS will incorporate the views in the draft decision.
- The operators have another month to express an opinion about the draft decision in a second round of consultations.
- The views of the operators will be published on the PTS's website and the PTS will incorporate these views into the draft decision.
- The proposed decision will be submitted to the European Commission and other European regulatory authorities. The European Commission has one month to submit a statement of views concerning the proposed decision.
- The PTS will publish the decision on its website and any revisions to the draft decision based on the European Commission's statement of views will be made.
- The PTS will send the final decision to the recipients, and the obligation decision will be published on the PTS's website.

In the case of a request for resolution of a dispute, the PTS has four months from the date of the request to resolve the dispute unless there are special circumstances or the scope of the dispute demands further time (*Electronic Communications Act*, Chapter 7, sections 10-11). The PTS can refer the dispute for mediation where it deems this suitable; however, if mediation has proceeded for four months without agreement, a party can request that the PTS resolve the dispute through the formal process (Chapter 7, sections 10-11). This alternative dispute resolution mechanism suggests that some emphasis is placed on resolution outside of the regulatory process. A decision issued by the PTS to resolve a dispute will only regulate the terms between the parties in the specific dispute.

¹⁶⁷⁷ PTS, *Improved Broadband Competition Through Functional Separation*, PTS-ER-2007:18. Available at: <http://www.pts.se/en-GB/Documents/Reports/Telephony/2007/Improved-broadband-competition-through-functional-separation--PTS-ER-200718/> [accessed on 10 July 2013].

¹⁶⁷⁸ *TeliaSonera, About Us – Sweden*. Available at: <http://www.teliasonera.com/en/about-us/markets-and-brands/sweden/> [accessed on 10 July 2013].

¹⁶⁷⁹ O Teppayayon and E Bohlin, 'Functional Separation in Swedish Broadband Market: Next Step of Improving Competition', *Telecommunications Policy*, 34 (7), 2010, pp. 375-383.

¹⁶⁸⁰ See the website of the Swedish Post and Telecom Agency (PTS). Available at: <http://www.pts.se/en-gb/Industry/Telephony/SMP---Market-reviews/Method/> [accessed on 10 July 2013].

The PTS's supervisory activities can result in decisions that are generally applicable. In these decisions the PTS is required to publish a proposal and give those affected and other interested parties 'reasonable time (typically not more than four weeks) to express their views' (Chapter 8, sections 8-10). These consultations are made publicly available except where information is legally protected (Chapter 8, section 14). In addition, the regulator, as industry supervisor, publishes a half-year and a full-year Market Review.¹⁶⁸¹

External experts and consultants may be involved in the regulatory process. Parties may use consultants' studies and/or expert opinions as evidence to support their claims in disputes.¹⁶⁸² In some cases the regulator may invite external experts/consultants to conduct investigations into the systems and processes of parties being investigated.¹⁶⁸³

Timeliness

As above, consultation periods typically run for four weeks. The PTS has a four-month time limit for the consideration of disputes unless there are special circumstances.¹⁶⁸⁴ Decisions on telecommunications are published on the regulator's website.¹⁶⁸⁵

Information Disclosure and Confidentiality

The PTS is given information-gathering powers in order to police compliance with the *Electronic Communications Act 2003* (Chapter 7, s.4.). The legislation obliges any party that conducts operations subject to the *Electronic Communications Act 2003* to supply information and documents as requested by the PTS. The PTS is also granted permission to gain access to the premises of operations subject to the *Electronic Communications Act 2003* for the purpose of supervision (Chapter 7, s.2). The PTS also constantly collects information in order to fulfil its role as industry supervisor.

The PTS can issue fines and further orders to parties who fail to fulfil its requests for information or other orders (*Electronic Communications Act 2003*, Chapter 7, s.3). However, if the regulator deems there to be 'special circumstances' (*Electronic Communications Act 2003*, Chapter 7, s.1 0), having regard to the scope of the dispute, the time limit may be extended.

As a government agency, the PTS is bound under the *Freedom of the Press Act* to give the right of public access to official information. All documents, including personal data submitted to the PTS, may be provided to any party requesting them.

Information disclosure in the *Electronic Communications Act* is subject to the standard Swedish laws of information confidentiality and secrecy (*Public Access to Information and Secrecy Act 2009*). The PTS may supply the information it collects to the Commission of the European Communities or other competent authorities within the European Economic Area upon justified request by these authorities (Chapter 8, s.2).

Decision-making and Reporting

The decision-making process is not litigious, but could be considered 'closed' or non-participatory. The PTS considers and decides on a dispute without the participation of the parties, past the point of their initial submissions outlining the dispute. That is, in the case of a request for resolution of a dispute, parties' views are gauged entirely from their initial submission and no further consultation takes place.

PTS dispute determinations apply specifically to the parties in the dispute.¹⁶⁸⁶ A decision made under Chapter 7, s.4 of the *Electronic Communications Act* which entrusts the PTS with supervisory and enforcement responsibilities is, on the other hand, broadly applicable.¹⁶⁸⁷

¹⁶⁸¹ PTS, *Reports*. Available at: <http://www.pts.se/en-gb/Documents/Reports/> [accessed on 10 July 2013].

¹⁶⁸² PTS, *Beslut 03-15622 (Decision 03-15622)*, Stockholm, 2004 pp. 7–8 and 12. Available at: http://www.pts.se/upload/Documents/SE/Kaskadbeslut040930_med_bilaga.pdf [accessed on 10 July 2013].

¹⁶⁸³ PTS, *Föreläggande till Telia Sonera om information kring tillträde till kopplingsskåp - 08-1844 (Injunction under Chapter 7, Section 5 of the Act, No. 08-1844)*, Stockholm, 2008. Available at: <http://www.pts.se/upload/Beslut/Telefoni/2008/Forelaggande-information-kopplingsskap-08-1844.pdf> [accessed on 10 July 2013].

¹⁶⁸⁴ PTS, *Dispute Resolution* (in Swedish). Available at: <http://www.pts.se/sv/Regler/Tvistlosning/> [accessed on 10 July 2013].

¹⁶⁸⁵ PTS, *Telefoni & Internet*. Available at: <http://www.pts.se/sv/Dokument/Beslut/Tele/?p=0> [accessed on 10 July 2013].

¹⁶⁸⁶ PTS, *PTS Decisions*. Available at: <http://www.pts.se/en-gb/Regulations/PTS-decisions/> [accessed on 10 July 2013].

¹⁶⁸⁷ PTS, *Tvistlösning* (in Swedish). Available at: <http://www.pts.se/sv/Regler/Tvistlosning/> [accessed on 10 July 2013].

Reasons for regulatory decisions, including dispute-resolution decisions, are published on the agency's website.¹⁶⁸⁸

*Appeals*¹⁶⁸⁹

Appeals against PTS decisions can be made to the County Administrative Court. Appeals against the rulings of the County Administrative Court can be made to the Administrative Court of Appeal. On 1 January 2008, the Administrative Court of Appeal became the court of last instance for the determination of cases involving the *Electronic Communications Act*. Prior to this, decisions could be appealed further to the Supreme Administrative Court.

3. Postal Services

The Swedish postal system operates in one of Europe's first and most liberalised mail markets. The incumbent, *Posten AB*, is 100 per cent state owned, although it has been 'privatised' in terms of its corporate structure.¹⁶⁹⁰ *Posten AB* is a part of *PostNord AB* that was founded through the merger of *Post Danmark A/S* and *Posten AB* in 2009. The group offers communication and logistics solutions to, from and within the Nordic region. In 2011, the group had net sales of over 39 billion kronor. The group has over 40000 employees. The parent company *PostNord AB* is a Swedish public company owned 40 per cent by the Danish state and 60 per cent by the Swedish state. Voting rights are shared equally between the owners. Operations are managed by business area, namely *Breve Danmark* (mail), *Meddelande Sverige* (mail), Logistics and *Strålfors*. The group's headquarter is located in Solna, Sweden.

Posten AB lost its monopoly privileges on letter mail in 1993, well before most other European counterparts. Before then, the government already allowed competition in parcels and bulk mail. However, in spite of this exposure to competition, as of 2009, *Posten AB* had retained roughly 89 per cent of the addressed letter market (about 2.915 billion items).¹⁶⁹¹ It is also dominant in the unaddressed mail market and has engaged in a variety of other postal and related services, such as logistics.

As of April 2012, there were 31 other licensed postal operators in Sweden.¹⁶⁹² The majority operate actively in the local market of mail conveyance. Some are involved in the delivery of international mails. Bring CityMail, owned by Norwegian Post, is one major competitor to *Posten AB* in the delivery of addressed mail.¹⁶⁹³ In 2009, Bring CityMail's market share in terms of volume was about 11 per cent of all addressed mail.¹⁶⁹⁴ There has been stagnation in the mail volume since the late 1990s and early 2000s.

Regulatory Institutions and Legislation

The PTS (see previous section for details) is the independent government agency responsible for the enforcement and administration of the *Postal Services Act* and related legislation.¹⁶⁹⁵ Its regulatory duties on postal services include:

- licensing and supervising all postal operations;
- supervising the quality of service in the provision of universal services by *Posten AB*;
- supervising the prices for universal services provided by *Posten AB*;

¹⁶⁸⁸ PTS, *Decisions*. Available at: <http://www.pts.se/sv/Dokument/Beslut/> [accessed on 10 July 2013].

¹⁶⁸⁹ PTS, *Decisions*, *loc. cit.*

¹⁶⁹⁰ *Posten AB*, Home (English). Available at: <http://www.posten.se/en/Pages/About-Posten.aspx> [accessed on 10 July 2013].

¹⁶⁹¹ PTS, *Number of Letters 1993–2009*. Available at: <http://www.pts.se/upload/Ovrigt/Post/antal-brevforsandelser-i-miljoner-1993-.pdf> [accessed on 10 July 2013].

¹⁶⁹² PTS, *Listed Postal Operators*. Available at: <http://www.pts.se/en-GB/Industry/Post/List-postal-operators/> [accessed on 10 July 2013].

¹⁶⁹³ Bring, *Bring in Sweden*. Available at: <http://www.bring.se/hela-bring/om-bring/sverige> [accessed on 8 May 2013].

¹⁶⁹⁴ PTS, *Number of Letters 1993–2009*, *loc. cit.*

¹⁶⁹⁵ PTS, *Post*. Available at: <http://www.pts.se/en-GB/Industry/Post/> [accessed on 10 July 2013].

- settling access disputes between postal service providers;
- issuing regulations necessary for the application and implementation of the *Postal Services Act*, and
- taking charge of undeliverable letters.

Competition issues are dealt with by the Swedish Competition Authority.

The items of legislation governing the postal services are the *Postal Services Act 2010*; related acts such as the *Postal Services Ordinance 2010*; and relevant EU Directives.¹⁶⁹⁶ The *Postal Services Act* stipulates the rules on universal service obligations and postal operations. A universal service provider is obliged to provide a daily and national delivery of letters and other addressed mail items weighing up to and including 20 kilograms at the prescribed minimum service standards. Pricing needs to be: transparent; non-discriminatory; cost-based; and to promote efficient provision of the services. A price cap is imposed on mail items weighing up to 500 grams, whose annual price increases are capped by the change in the Consumer Price Index, but it is possible to use any unused price increase in a year during one of the three following years (*Postal Services Ordinance 2010*, s.9). Provision of postal services is subject to a licence, which can be granted if the applicant satisfies certain criteria such as the capability of the applicant to ensure reliability and integrity.

Posten AB, as the universal service provider obliged by its licence, is required to deliver at least 85 per cent of mail items the next working day and 97 per cent of the mail items within three working days.¹⁶⁹⁷ It receives no compensation for this service provision, commonly in other countries taking the form of reserved services or government subsidy. Through past investigation, the Swedish Government formed the view that competitive advantage of providing full postal service was embedded with a universal service provider.

The Swedish Competition Authority heard more than a hundred cases concerning *Posten AB* before 2007.¹⁶⁹⁸ Some of these cases related to whether *Posten AB*'s 'customer loyalty programs' (discounts offered to big and well-established companies to keep their business with *Posten AB*) are anti-competitive or not. Other cases include investigations of allegations of below-cost pricing,

As the PTS has a collective role in regulating telecommunications and posts, the regulatory process may have common elements in consultation, information disclosure and decision-making mechanism. Therefore, the following section focuses on components of the process that are unique to the postal services industry. It may be considered concurrently with the previous section on telecommunications.

Consultation of Interested Parties

The PTS is required to act in the best interests of consumers. To this end, it continually collects information about the market to make consumers better informed. The PTS regularly publishes reports on the development of the market.¹⁶⁹⁹

In performing its regulatory role in the postal subsector, the PTS is required to study the postal market in terms of: accessibility of the services; the degree of competition; and market development. The PTS annually reports on: the compliance of postal operations with the licence conditions; *Posten AB*'s compliance with the price regulation; and complaints made by the general public.¹⁷⁰⁰ As part of the licence-compliance review, *Posten AB*'s cost estimates and quality of services achieved to meet the universal service obligations are examined.

¹⁶⁹⁶ The Acts (translated into English) are available at: <http://www.pts.se/en-GB/Regulations/Legislation/> [accessed on 15 February 2013]. The new set of legislation came into effect on 1 September 2010, replacing the 1993 Acts.

¹⁶⁹⁷ This is also the minimum requirement stated in the European Community Directive on Postal Services.

¹⁶⁹⁸ PTS, *The Liberalised Swedish Postal Market: the Situation 14 Years After the Abolition of the Monopoly*, March 2007, pp. 10-11. Available at: [http://postinsight.com/files/PTS - The Liberalised Swedish Postal Market.pdf](http://postinsight.com/files/PTS_-_The_Liberalised_Swedish_Postal_Market.pdf) [accessed on 10 July 2013].

¹⁶⁹⁹ Examples include PTS, *Service and Competition 2011: The Postal Services Market in Sweden*, PTS-ER 2011:11.

¹⁷⁰⁰ Relevant publications include: PTS, *Service and Competition 2011: The Postal Services Market in Sweden*, PTS-ER 2011:11, available at: <http://www.pts.se/upload/Rapporter/Post/Service%20and%20competition%202011.pdf> [accessed on 10 July 2013]; PTS, *Analysis of Whether Posten AB Pricing Is Transparent and Non-discriminatory*, PTS-ER-2012:12, in Swedish, available at: <http://www.pts.se/sv/Dokument/Rapporter/Post/2012/Analys-av-om-Posten-ABs-prissattning-ar-oppen-for-insyn-och-icke-diskriminerande---PTS-ER-201222/> [accessed on 10 July 2013].

In assessing requests for changes in the postcode system, the PTS is required under the *Postal Services Act 2010* (Chapter 4, s.3) to consult other licence holders, authorities responsible for national registration, the real estate directory and local authorities concerned.

In assessing licence applications, the PTS is required to issue a decision within three months after receiving the complete application. One extension, of at most one month, is permitted; subject to the complicity of the matter being investigated and the applicant being informed of the reasons for extension in time (*Postal Services Ordinance 2010*, s.4). When a matter pertaining to the application of the *Postal Services Act* needs to be regulated generally, the PTS has the option of issuing regulations. For example, as the licensing authority, the PTS issued new licence conditions to specifically apply to *Posten AB* and new licence condition for postal operations in general in October 2011.¹⁷⁰¹

The PTS may issue regulations about planning and other measures for the needs for postal communications of Sweden's defence and emergency services. In this regard, the PTS must consult the Armed Forces and the Swedish Agency for Civil Emergency Planning.

Timeliness

Timeframes for PTS decisions are included in the subsection immediately above.

Information Disclosure and Confidentiality

The PTS shall, upon request, be given access to all information and documents necessary for conducting supervision (*Postal Services Act 2010*, Chapter 4, s.14). Furthermore, the PTS is entitled to gain access to premises – though not dwellings – where operations subject to supervision are being conducted. Such decisions by the PTS are enforced through the Swedish Enforcement Authority.

In performing its supervisory role, the PTS collects information about strategic plans and the operation from *Posten AB*. *Posten AB* is required to report to the PTS on matters relating to: changes to the organisation, amended terms and conditions of services, operational disruptions (without any delay); service points (upon request and usually annually); the number of residential customers that do not have five day deliveries (on an annual basis).¹⁷⁰² For other licensed postal operators, they shall promptly notify the PTS of matters relating to changes to the organisation, and operational disruptions.¹⁷⁰³

As a government agency, the PTS is bound under the *Freedom of the Press Act* to give the right of public access to official information. All documents, including personal data submitted to the PTS, may be provided to any party requesting them. However, in accordance with the *Public Access to Information and Secrecy Act 2009*, information that is deemed to be commercial-in-confidence may not be provided to the third parties.

Decision-making and Reporting

The Postal Affairs Department of the PTS is responsible for supervising the postal industry and licensing for postal operations. The PTS also has the powers to issue orders necessary for compliance with the Act and related regulations, which may be imposed under penalty of a fine, and to revoke licences. The Postal Affairs Department is organised into two areas of responsibilities: Postal Supervision; and Missing Letters.

Appeals

The PTS may issue orders and prohibitions necessary for statutory compliance or licence conditions set out. A default fine may apply, but a fine cannot be imposed for the same action that is subject to fine under the *Competition Act 2008* (*Postal Services Act 2010*, Chapter 4, ss.18-19).

¹⁷⁰¹ PTS, *Licence Conditions for Posten AB, Decision 11-9665*, 14 October 2011; and PTS, *Licence Conditions for Postal Operation*, 3 October 2011. Available at: <http://www.pts.se/en-GB/Documents/Decisions/Post/2011/Licence-conditions-for-Posten-AB---11-9665/> [accessed on 10 July 2013].

¹⁷⁰² PTS, *Licence Conditions for Posten AB, Decision 11-9665*, 14 October 2011.

¹⁷⁰³ PTS, *Licence Conditions for Postal Operation*, 3 October 2011.

The PTS's licensing decisions on alterations of postcodes system may not be contested by appeal. Appeals against other rulings handed down by the PTS can be made to the Administrative Court of Appeal (*Postal Services Act 2010*, Chapter 4, s.22). Leave to appeal is required.

In 2011, *Posten AB* lodged the first appeal against PTS decisions since the letter monopoly was abolished.¹⁷⁰⁴ One element of the decisions appealed concerns the universal postal service obligations.

4. Water and Wastewater

Water resources are generally abundant in Sweden, except the south-eastern part and some islands. However, the quality of water is not uniform and in some cases water treatment is needed to provide high-quality drinking water. There are over 2000 municipal water supply works and 67 thousand kilometres of municipal water pipes. The average household water consumption is about 200 litres per person and day. There are more than 2000 wastewater plants and 92 thousand kilometres of sewers of which 32 thousand kilometres are drainage pipes.¹⁷⁰⁵

Public water and sanitation utilities (the VA service) have traditionally been managed by municipalities in Sweden. A co-ordinating and research body, *Svenskt Vatten* (Swedish Water; formerly the Swedish Water & Wastewater Association), was set up by the municipalities in 1962 to assist with technical, economic and administrative issues and to represent the interests of the municipalities in negotiations with authorities and other organisations on regulations.¹⁷⁰⁶

Swedish Water has several *ad hoc* working groups with experts from member municipalities covering the fields of municipal water and wastewater activities. Swedish Water publishes a journal, newsletters and reports. The association is a member of the European Union of National Association of Water Supplies (EUREAU) and administers the national secretariat for the International Water Association (IWA). At present, Swedish Water has 289 municipalities as its members.

In addition, in 1996 the water and wastewater industry founded the Swedish Water Development (SWD). The SWD is jointly owned by Swedish Water, Stockholm Water Company and Water and Sewage Works in Goteburg and Malmö. The SWD's board is composed of municipal politicians and civil servants. The SWD is mandated to co-operate with counties to develop Sweden's water and wastewater industry. The SWD's projects are funded by the Swedish Water members, and research and development charge in 2012 is 1.74 kronor per municipality inhabitants.¹⁷⁰⁷

There was a trend in the 1990s for some municipalities to establish limited companies, multi-utility or sole water companies. Beginning in 1998, Sweden experienced a trend toward some privatisation of facilities through one of: private ownership; public-private partnerships; or a multinational-management contract. However, only two private water companies operate in Sweden – *Norrköping* and *Karlskoga*. Concurrently Sweden has a well-developed market where subcontractors support the municipal owners. In addition, six purely private management contracts exist. However, *Vivendi Environment* is the only multinational operating in Sweden with a ten-year management contract with *Norrtälje*, the fortieth largest municipality. According to one source, given the continued public and political resistance to private ownership, the transition to greater private-sector involvement in urban water management is unlikely.¹⁷⁰⁸

¹⁷⁰⁴ PTS, *Service and Competition 2011*, 15 April 2011. Available at: <http://www.pts.se/en-GB/Documents/Reports/Post/2011/Service-and-competition-2011---PTS-ER-201111/> [accessed on 10 July 2013].

¹⁷⁰⁵ Swedish Water and Wastewater Association, *Facts on Water Supply and Sanitation in Sweden* (in English). Available at: [http://www.svenskvatten.se/Documents/Kategorier/Om%20Svenskt%20Vatten/Facts%20on%20Water%20Supply%20and%20Sanitation%20in%20Sweden%20\(English\).pdf](http://www.svenskvatten.se/Documents/Kategorier/Om%20Svenskt%20Vatten/Facts%20on%20Water%20Supply%20and%20Sanitation%20in%20Sweden%20(English).pdf) [accessed on 10 July 2013].

¹⁷⁰⁶ *Svenskt Vatten*, *About SWWA*. Available at: <http://www.svenskvatten.se/Om-Svenskt-Vatten/Om-oss/In-English/> [accessed on 10 July 2013].

¹⁷⁰⁷ *Svenskt Vatten*, *Swedish Water Development* (in Swedish). Available at: <http://www.svenskvatten.se/FoU/SVU/> [accessed on 10 July 2013].

¹⁷⁰⁸ M Lannerstad, *Water Supply and Sanitation in Sweden: A Public Trust*, AQUALIBRIUM – European Water Markets between Regulation and Competition, Berlin, 2002. Available at: http://www.siwi.org/documents/Resources/Water_Front_Articles/2002/WF4-02_Water_Supply_and_Sanitation_in_Sweden.pdf [accessed on 10 July 2013].

Regulatory Institutions and Legislation

Overall water policy in Sweden is administered by the Ministry of the Environment and the *Naturvårdsverket* (Swedish Environmental Protection Agency).¹⁷⁰⁹ The *Food Act* states that drinking water is to be considered a foodstuff and must be handled with equal standards as other food products. The *Environmental Code* regulates environmental standards and stipulates measures to prevent and minimise environmental impacts caused by water abstraction and sewage effluent. However, in accordance with the *EU 2000 Water Directive*, the Environmental Protection Agency, in co-ordination with various user groups and industry participants, drew up more detailed environmental regulations in the *Ordinance on Management of the Quality of the Aquatic Environment 2004*.¹⁷¹⁰

The *Public Water Supply and Wastewater System Act*, administered by the Ministry of Health and Social Affairs, came into effect on 1 January 2007.¹⁷¹¹ The main purpose of the Act is to ensure that water supply and sewerage services are provided for dwellings and households.¹⁷¹² It applies to detached houses and apartment buildings or similar properties that are situated in the service area of a public water system. The Act may also be applicable to industrial, office and commercial properties that are situated in a service area. The Act states that it is a municipal responsibility to arrange sufficient water supply and sewage treatment services to assure the municipal population's good health (s.1). It also mandates that water charges are not to exceed necessary costs to provide the services, and that charges only can be used within the water and wastewater industry (ss.29 to 34). Consequently, municipalities cannot generate funds from water charges to be used in other areas, and potential private owners cannot pay profit-based dividends to their shareholders.

Vattenmyndigheterna (District Water Boards)

Since 2004, under the EU Directive requiring bodies of water to be managed according to river basins, Sweden has been divided into five water-basin districts, with a dedicated water authority (the *Vattenmyndigheterna* – Water Boards) appointed in each district. Each Water Board is also the regulatory authority in its district. Under the EC Directive, water authorities are granted the power to establish district water programs which will include: water quality objectives which will take the form of statutes that bind sectoral, regional and municipal authorities and individual stakeholders; water quantity objectives; and the establishment of programs for monitoring and measurement.

Regional Level

At the regional level, the 21 County Administrative Boards and the five Environmental Courts are the corresponding government bodies acting in the national interest with respect to the environment. These have the right to issue non-tradable pollution permits. An Environmental Court operates to deal with applications for permits for water operations (such as permits for discharges of treated wastewater) with the exception of land drainage, which is dealt with by the County Administrative Board. Consultation with the supervisory authority for water operations, the County Administrative Board, is compulsory before applying for a permit. The County Administrative Board also ensures that permit holders comply with water regulations and other orders. The County Administrative Board may change or stop operations that are non-compliant with the regulations governing actors with an issued permit.

Municipal Level

At the local level, municipalities retain responsibility for provision of water and sanitation services. The municipalities own the infrastructure (including supply, sanitation and wastewater facilities) and are responsible for its operation, and for determining fees and tariffs. The municipalities may jointly form inter-municipal companies or contract operations to non-governmental companies. If water supply and sewerage treatment facilities are inadequate to meet the health needs of the municipality, the County Administrative Board, under penalty of fine, can order the Municipality to fulfil its obligations.¹⁷¹³ The

¹⁷⁰⁹ Swedish Environmental Protection Agency, *Home*. Available at: <http://www.swedishepa.se/> [accessed on 10 July 2013].

¹⁷¹⁰ Geological Survey of Sweden, *SGU and the EC's Water Framework Directive*, Uppsala. Available at: http://www.sgu.se/squ/eng/samhalle/grundvatten/squ_ramdirektiv_e.html [accessed on 10 July 2013].

¹⁷¹¹ The *Public Water and Wastewater Plant Act* (1970: 244) was repealed.

¹⁷¹² *Public Water Supply and Wastewater System Act*, Swedish Code of Statutes 2006: 412 (in Swedish). Available at: http://www.riksdagen.se/sv/Dokument-Lagar/Lagar/Svenskforfattningssamling/Lag-2006412-om-allman-na-vat_sfs-2006-412/ [accessed on 10 July 2013].

¹⁷¹³ *Public Water Supply and Wastewater System Act*, s. 51.

County Administrative Board's decisions may be appeal by the municipalities to the Swedish Water Supply and Sewage Tribunal.¹⁷¹⁴

Several stakeholders have a voice at the municipal level, such as the Swedish Farmer's Federation, landowners and the Swedish Local Authorities Association.

The Swedish Water Supply and Sewage Tribunal¹⁷¹⁵

The Swedish Water Supply and Sewage Tribunal adjudicates disputes relating to water supply and sewerage under the *Public Water Supply and Wastewater System Act* and the *Swedish Water Supply and Sewage Tribunal Act*. The Tribunal is the court of first instance for the country as a whole. The Tribunal consists of a legally qualified judge, who is President of the Tribunal, and five other members who are experts on technical and practical matters relating to water supply and sewerage. Legal and administrative staff is employed in the Tribunal's offices in Stockholm. The parties to disputes relating to water supply and sewerage are the operator of the system ('the operator') and, normally, the owner, or leasehold owner, of the property in question.

Disputes that are referred to the Tribunal may, for example, relate to the obligation to pay a charge or the amount of the charge, the right to use the system or conditions for use, the imposition by the operator of rates or conditions for use, the interpretation of agreements concluded by the parties, the right to cut off the water supply, liability for damages, etc. Proceedings are undertaken by the Tribunal in accordance with the Regulation governing the Swedish Water Supply and Sewage Tribunal.¹⁷¹⁶

Appeals against the Tribunal's decisions can be lodged with the Land and Environment Court of Appeal and, in the last instance, the Supreme Court.

5. Rail

Rail is an important mode of transportation for long-distance travel in Sweden. Rail transport has a market share of 14 per cent for all journeys of 100 to 300 kilometres and 23 per cent for journeys of more than 300 kilometres.¹⁷¹⁷

Starting from 1988, Sweden was one of the first countries to establish a separately owned railway infrastructure authority (owned by the state). Prior to 1 April 2010, *Banverket* had been the National Rail Administrator and main infrastructure manager. It was then taken over by *Trafikverket* (Swedish Transport Administration), which also incorporated all operations of *Vagverket* (former Swedish Road Administration); parts of *Sjöfartsverket* (Swedish Maritime Administration), LfV (responsible for air traffic control) and the Swedish Institute for Communications Analysis. In rail, *Trafikverket* is responsible for the construction, operation and maintenance of all government-owned rail infrastructure.¹⁷¹⁸ As directed by *Riksdagen* (the Swedish Parliament) and the Government who make infrastructure investment and financing decisions, *Trafikverket* works on long-term planning of rail services and allocation of train paths. In March 2011, *Trafikverket* was tasked by the Government with analysing the need for capacity increases in the Swedish railway system for the period 2012 to 2021, and putting forward proposals for future action.¹⁷¹⁹ Licensed railway operators can apply to *Trafikverket* for train-path allocation.

¹⁷¹⁴ *Public Water Supply and Wastewater System Act*, ss. 52-57.

¹⁷¹⁵ National Board, *Summary in English*. Available at: <http://www.va-namnden.se/summary/default.asp> [accessed on 10 July 2013].

¹⁷¹⁶ *Regulation (2007: 1058)* (Swedish). Available at: [http://62.95.69.15/cgi-bin/thw?\\$\(HTML\)=sfst_lst&\\$\(OOHTML\)=sfst_dok&\\$\(SNHTML\)=sfst_err&\\$\(MAXPAGE\)=26&\\$\(TRIPSHOW\)=format=THW&\\$\(BASE\)=SFST&\\$\(ANDOR\)=NOT&\\$\(FREETEXT\)=2007%3A1058&tidb=<2008-1-28&UPPH=<2008-1-28&\\$\(SORT\)=ÅR.LPNR+](http://62.95.69.15/cgi-bin/thw?$(HTML)=sfst_lst&$(OOHTML)=sfst_dok&$(SNHTML)=sfst_err&$(MAXPAGE)=26&$(TRIPSHOW)=format=THW&$(BASE)=SFST&$(ANDOR)=NOT&$(FREETEXT)=2007%3A1058&tidb=<2008-1-28&UPPH=<2008-1-28&$(SORT)=ÅR.LPNR+) [accessed on 10 July 2013].

¹⁷¹⁷ Swedish State Railways, *Annual Report 2011*, p. 37.

¹⁷¹⁸ *Trafikverket, About the Swedish Transport Administration*. Available at: <http://www.trafikverket.se/Om-Trafikverket/Andra-sprak/English-Engelska/About-Trafikverket/> [accessed on 10 July 2013].

¹⁷¹⁹ Upgrading Our Current System is the Fastest Way to Improve Capacity, *European Railway Review*, Issue 5, 2012. Available at: <http://www.europeanrailwayreview.com/tag/sweden/> [accessed on 10 July 2013].

Trafikverket owns 13 642 kilometres of government-owned rail track, of which 11 152 kilometres are electrified.¹⁷²⁰ *Trafikverket* is a member of RailNet Europe.¹⁷²¹ *Trafikverket's* railway network can be broadly divided into three categories, namely Trans-European Network (TEN) high-speed rail, TEN conventional rail, and national rail. The track gauge generally is of the Europe standard of 1435 millimetres. Parts of the Swedish rail network are also managed by *Inlandsbanan AB*, *Öresundsbro Konsortiet* and A-train AB (Arlandabanan – Arlanda Express). There are also a number of connecting railway tracks administered by municipal authorities or ports, or that are privately owned.¹⁷²²

In 1988, *Statens järnvägar* (SJ – Swedish State Railways) was established to run railway services operation. In 2001, the State-owned incumbent was split into several limited-liability companies. SJ AB and Green Cargo were formed to operate in passenger services and freight services respectively. They remain wholly owned by the government. Also, *Jernhusen* was formed to manage the properties such as train stations, and *EuroMaint* and *SweMaint* were formed as train maintenance companies. They have subsequently been privatised.

Rail services have been deregulated gradually. Entry to operate passenger train services on all rail routes in Sweden is now permitted. Despite the entry of several other operators offering passenger and/or freight services, both incumbents dominate the passenger and freight markets respectively. SJ AB is an important service provider in long-distance rail, and regional rail services in the Mälardalen area. In 2011, SJ AB competed with around 24 other train operators and secured 55 per cent of all train services in Sweden.^{1723 1724} Green Cargo and subsidiaries have a market share of 72 per cent in terms of tonne-kilometres.¹⁷²⁵

Regulatory Institutions and Legislation

The regulatory agency for rail in Sweden is the *Transport Styrelsen* (Swedish Transport Agency) that took over the supervisory and regulatory responsibilities of the *Järnvägsstyrelsen* (Swedish Rail Agency; JVS), commencing on 1 January 2009. The Agency is an independent authority under the Ministry of Enterprise, Energy and Communications. The Board of Directors shall consist of no less than five and no more than nine members – it currently consists of seven members including the Chairman. The Swedish Transport Agency has five core areas – Road and Rail Department, Civil Aviation and Maritime Department, Driving Licence Department, Traffic Registry Department, and Tax and Free Department, plus supporting departments such as Management, Human Resources, Information Technology and Communications.¹⁷²⁶ In 2011, it had a budget of 2493 million kronor.¹⁷²⁷ The Agency is staffed with approximately 1650 people. About 300 employees work at the Road and Rail Division.¹⁷²⁸ The Agency is mainly financed through the levying of charges as from 1 January 2011. The charges are determined by the agency based on the time needed for processing relevant cases.¹⁷²⁹

¹⁷²⁰ *Trafikeverket, Network Statement 2014*, Chapter 3 – Infrastructure, pp. 1-4. Available at: <http://www.trafikverket.se/Om-Trafikverket/Andra-sprak/English-Engelska/Railway-and-Road/Network-Statement1/Network-Statement-2014/> [accessed on 10 July 2013].

¹⁷²¹ See RailNet Europe (RNE), *Sweden – Trafikverket*. Available at: <http://www.rne.eu/country-information-detail/items/34.html> [accessed on 10 July 2013]. RailNetEurope is an association for European rail infrastructure managers and allocation bodies to enable fast and easy access to rail, and to increase quality and efficiency of rail traffic. It currently has 37 members.

¹⁷²² *Trafikeverket, Network Statement 2014*, Chapter 3 – Infrastructure, pp. 1-4.

¹⁷²³ Swedish State Railways, *Annual Report 2011*, pp. iii and 37.

¹⁷²⁴ G Alexandersson, S Hulten, JE Nilsson and R Pyddoke, *The Liberalization of Railway Passenger Transport in Sweden – Outstanding Regulatory Challenges*, CTS Working Paper 2012:5. Available at: <http://www.transguide.org/SWoPEc/CTS2012-5.pdf> [accessed on 10 July 2013].

¹⁷²⁵ Van de Velde, DC Nash, A Smith, F Mizutani, S Uranishi, M Lijesen and F Zschoche, *Eves-Rail – Economic Effects of Vertical Separation in the Railway Sector*, Summary Report for CER – Community Of European Railways and Infrastructure Companies, 2012. Available at: http://www.europolitics.info/pdf/gratuit_en/323894-en.pdf [accessed on 10 July 2013].

¹⁷²⁶ Swedish Transport Agency, *About Us*. Available at: <http://www.transportstyrelsen.se/en/About-us/> [accessed on 10 July 2013].

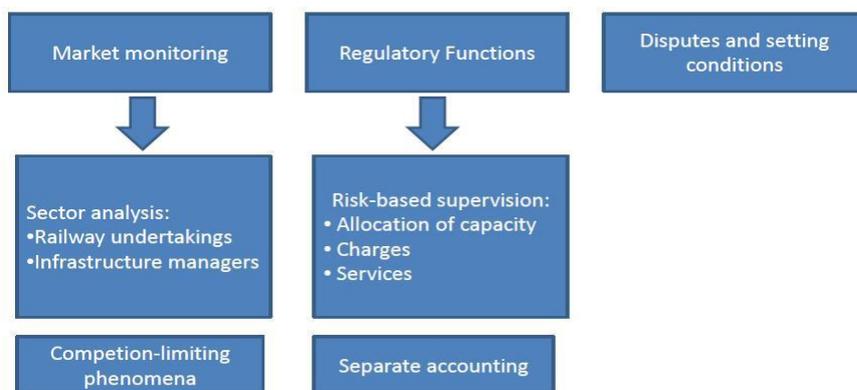
¹⁷²⁷ Swedish Transport Agency, *Licensing*, 2 November 2011. Available at: http://www.seetoint.org/wp-content/uploads/downloads/2012/11/1059_presentation-swedish-transport-agency-licensing-ru.pdf [accessed on 10 July 2013].

¹⁷²⁸ Swedish Transport Agency, *Organisation*, in Swedish. Available at: <http://www.transportstyrelsen.se/sv/Om-oss/Organisation/> [accessed on 10 July 2013].

¹⁷²⁹ Swedish Transport Agency, *Charges*. Available at: <http://www.transportstyrelsen.se/en/About-us/Financing/Charges/> [accessed on 10 July 2013].

The *Railway Act 2004* and associated regulations,¹⁷³⁰ which implemented the 2001 EU Directives on rail transport,¹⁷³¹ are the key items of legislation governing Sweden's rail industry. The *Competition Act 2008* also governs the railway industry. *The market goal of the Agency is to 'work to achieve an effective railway market with healthy competition and equal conditions'*.¹⁷³²

With respect to rail, the Swedish Transport Agency performs a number of functions, ranging from formulating regulations, making approvals and granting permits, to performing supervision, monitoring markets and overseeing safety. These main functions are summarised in the following figure:¹⁷³³



Some of the main functions can be summarised as follows:

Approvals:¹⁷³⁴ The approval of the Swedish Transport Agency is required before rail infrastructure, vehicles or technical systems can be put into service. This also applies to upgrading or renewal of an already approved subsystem, where safety is affected. The purpose of approval is both to ensure that different subsystems can be used together in practice without the risk of damage or accidents occurring, and that the relevant safety requirements in the *Railway Act* (ss.1-5) have been met. A decision to grant approval means that the subsystem in question may be used for railway operations in Sweden. An approval decision remains in force until a railway infrastructure, a technical system or a vehicle is upgraded or renewed.

Permits:¹⁷³⁵ The Swedish Transport Agency may grant permits to companies that wish to provide railway services: licence and safety certificate part A and part B; or special permits for insignificant rail traffic. It may grant certificates to those with an interest in procuring infrastructure capacity (or example, major purchasers of freight transport and county councils). It is also responsible for issuing safety permits for managing railway infrastructure. The *Railway Act* provides scope to allow someone else to conduct traffic management.

Supervision:¹⁷³⁶ The Swedish Transport Agency checks that the areas being supervised (organisations or individuals) meet the requirements set by laws and regulations. If it finds any deficiencies, it can order those responsible to take corrective actions. It may also impose a fine. The Agency has a risk-based approach to supervision; focusing its resources where they can be most effective. The areas of supervision are: allocation of capacity; charges; services; network statement;

¹⁷³⁰ These include: the *Railway Ordinance 2004* and the Swedish Rail Agency's Regulations on the Access to Railway Infrastructure 2005.

¹⁷³¹ That is, Directives 2001/12/EC on the development of the Community's railways, 2001/13/EC on the licensing of railway undertakings, 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification and 2001/16/EC on the interoperability of the trans-European conventional rail system.

¹⁷³² Swedish Transport Agency, *Railway – Regulatory Function and Market Monitoring*. Available at: <http://www.transportstyrelsen.se/en/Railway/Market-monitoring/> [accessed on 10 July 2013].

¹⁷³³ *Ibid.*

¹⁷³⁴ Swedish Transport Agency, *Approval*. Available at: <http://www.transportstyrelsen.se/en/Railway/Approval/> [accessed on 10 July 2013].

¹⁷³⁵ Swedish Transport Agency, *Permits*. Available at: <http://www.transportstyrelsen.se/en/Railway/Permits/> [accessed on 10 July 2013].

¹⁷³⁶ Swedish Transport Agency, *Regulatory Function*. Available at: <http://www.transportstyrelsen.se/en/Railway/Market-monitoring/Track-access/> [accessed on 10 July 2013].

and accounting separation. Risk-based market supervision means that the Agency will prioritise resources for measures taken against unsatisfactory conditions that are deemed to greatly affect the operation of the market.¹⁷³⁷ An illustration of this is how the Agency's procedure for capacity allocation has a higher priority than the same procedure put in place by the municipality. Another example is that the access to capacity and services in harbours, terminals or maintenance facilities central to the railway system, is of greater interest than individual occurrences at more peripheral and marginal facilities. A third example is that it is more important to inspect how funds are transferred and reported between different activities (that is, accounting separation) by market participants that have received public funding that could be used for cross-subsidisation, than it is to inspect those that cannot gain any competitive advantages in this way.

One area of supervision is the examination that the infrastructure managers' network statements are consistent with applicable provisions under the *Railway Act* and associated regulations. This in turn leads to a more efficient use of the network infrastructure and an increase in rail transportation. The Swedish Transport Agency estimated that the total number of infrastructure managers establishing a network statement increased from 105 in 2009 to 112 in 2010.¹⁷³⁸

The Swedish Transport Agency publishes a guideline for developing a network statement.¹⁷³⁹ Each infrastructure manager is statutorily required to draw up an annual network statement for the rail network it manages. The network statement must contain details of available infrastructure; information about the conditions for access to it and information about procedures and criteria for the allocation of infrastructure capacity. The statement must be drawn up after consultation with all stakeholders, including those who previously applied for capacity and potential future service providers. The statement must be published, regularly updated and amended as necessary. For example, the national infrastructure manager, *Trafikverket*, annually publishes its Network Statement about the railway network administered.¹⁷⁴⁰ The statements are published for the purpose of ensuring transparency, predictability and non-discriminatory access to railway services.

The network statements are incorporated into the track access agreement, and regulate the contractual terms and conditions between the parties in concluded agreements.

According to *Trafikverket*, any dispute between parties regarding the track access agreements must first be determined by the consultation committee established by the parties. Unless the parties agree otherwise, the Swedish Transport Agency, or alternatively a Swedish common court, may be used as an exclusive forum in the event that a dispute cannot be resolved through consultation.¹⁷⁴¹

The Swedish Transport Agency published a number of decisions regarding track access, made by the regulator and its predecessor, JVS.¹⁷⁴²

The *Railway Act 2004* (Chapter 8, s.9) stipulates that, if the parties cannot agree on the terms of a track access agreement, the Swedish Transport Agency may, at the request of a party, determine the administrative, technical and financial conditions to apply.

Market Monitoring:¹⁷⁴³ The Swedish Transport Agency publishes a yearly report on market monitoring, covering both railway services and railway infrastructure. The Agency also examines

¹⁷³⁷ Swedish Transport Agency, *Risk-based Supervision*. Available at: <http://www.transportstyrelsen.se/en/Railway/Market-monitoring/Track-access/Risk-based-supervision/> [accessed on 10 July 2013].

¹⁷³⁸ Swedish Transport Agency, *Swedish Infrastructure Manager 2010*, in Swedish, 1 February 2011, p. 2. Available at: http://www.transportstyrelsen.se/Global/Jarnvag/Marknadsovervakning/Svenska_infrastrukturforvaltare_2010.pdf [accessed on 10 July 2013].

¹⁷³⁹ Swedish Transport Agency, *Guideline for Developing a Network Statement*, 9 November 2009. Available at: <http://www.transportstyrelsen.se/Global/Jarnvag/Vagledning/Marknadsovervakning/V%c3%a4gledning%20TS%20JV%202009%20%202020%20j%c3%a4rnv%c3%a4gsn%c3%a4tsbeskrivning%2009-11-09.pdf> [accessed on 10 July 2013].

¹⁷⁴⁰ *Trafikverket*, *Network Statement*. Available at: <http://www.trafikverket.se/Om-Trafikverket/Andra-sprak/English-Engelska/Railway-and-Road/Network-Statement1/> [accessed on 10 July 2013].

¹⁷⁴¹ *Trafikverket*, *Track Access Agreement – Timetable 2012*, p. 6. Available at: <http://www.trafikverket.se/PageFiles/71898/Access%20agreement%202012.pdf> [accessed on 10 July 2013].

¹⁷⁴² Swedish Transport Agency, *Decisions Regarding Track Access*. Available at: <http://www.transportstyrelsen.se/en/Railway/Market-monitoring/Track-access/Decisions-regarding-track-access/> [accessed on 10 July 2013].

¹⁷⁴³ Swedish Transport Agency, *Market Monitoring*. Available at: <http://www.transportstyrelsen.se/en/Railway/Market-monitoring/Market-Monitoring/> [accessed on 10 July 2013].

competition-limiting phenomena being reported by the railway service providers or on its own initiative. It consults with the Swedish Competition Authority on matters regarding competition and reports any unsatisfactory conditions to the Authority.

Dispute Resolution:¹⁷⁴⁴ The infrastructure managers or railway companies may refer disputes to the Swedish Transport Agency for mediation. This might, for instance, involve assessing whether the infrastructure manager's decisions regarding allocation of capacity, levying of charges or the provision of services comply with the *Railway Act*. It may also concern setting the conditions of track access agreements.

The Swedish Transport Agency published 12 decisions made by the Agency and its predecessor (that is, JVS) since 2004.

In 2012, the Agency completed three litigations relating to concerns by parties of being discriminated against the track capacity allocation or the charges.¹⁷⁴⁵

Consultation of Interested Parties

In accordance with the *Railway Ordinance 2004*, Chapter 3 on Licensing, the Swedish Transport Agency assesses an application with a checklist to review the applicant's economic and administrative competence, and its competence in logistics or timetable planning. If necessary, additional documents may be requested, and the Road and Rail Department may verify the application by audits. A decision is required to be taken as soon as possible and within three months from receiving a full application. Licensing information will then be registered in the European Railway Agency Database of Interoperability and Safety (ERADIS),¹⁷⁴⁶ which is a database to ensure the information relevant to the safety and interoperability of the railways in Member States is accessible and transparent to all stakeholders.¹⁷⁴⁷ All permits were issued free of charge prior to 1 January 2012. As of 1 January 2012, a fee of 20200 kronor applies.

The *Railway Act 2004*, Chapter 6 ss.10–13, requires the infrastructure manager to settle disputes concerning capacity allocation through coordination and consultation. The infrastructure manager is mandated to try to resolve possible conflicts of interest that arise in connection with the allocation of capacity through the provision of a procedure for the resolution of the disputes. Most often, disputes arise between the infrastructure manager and those operators wishing to contest its conditions and prices for access to the network. If coordination fails (that is, no compromise can be made), the infrastructure manager must declare the section of rail congested and resume discussions with the complainant.

Under the *Railway Act 2004*, Chapter 8 on Supervision, any railway services operator, infrastructure manager or party that is authorised to organise rail transport may refer a dispute concerning whether an infrastructure manager's decision is in accordance with the Act to the regulator. However, only if the operator contests the validity of the infrastructure manager's decision under the *Railway Act 2004* or relevant regulations can it approach the regulator to resolve its dispute. Matters may arise from the review of the network statement submitted to the regulator for approval by the infrastructure manager.

In 2010, the Railway Department of the Swedish Transport Agency started the process of three disputes between *Trafikverket* and railway operators. One of the disputes concerns the management of traffic restrictions set out in the Network Statement, and the other two concern shutdown and diversion of traffic and the handling of capacity allocation.¹⁷⁴⁸

¹⁷⁴⁴ Swedish Transport Agency, *Settling Disputes and Setting Conditions*. Available at: <http://www.transportstyrelsen.se/en/Railway/Market-monitoring/Disputes-and-setting-conditions/> [accessed on 10 July 2013].

¹⁷⁴⁵ Swedish Transport Agency, *Annual Report 2012* (in Swedish), p. 49. Available at: http://www.transportstyrelsen.se/Global/Om_oss/Finansiering/arsredovisning-2012.pdf [accessed on 10 July 2013].

¹⁷⁴⁶ European Railway Agency, *Welcome to ERADIS*. Available at: <https://pdb.era.europa.eu/> [accessed on 10 July 2013].

¹⁷⁴⁷ Swedish Transport Agency, *Licensing*, 2 November 2011. Available at: http://www.seetoint.org/wp-content/uploads/downloads/2012/11/1059_presentation-swedish-transport-agency-licensing-ru.pdf [accessed on 10 July 2013].

¹⁷⁴⁸ Swedish Transport Agency, *Swedish Infrastructure Manager 2010*, in Swedish, 1 February 2011, p. 2. Available at: http://www.transportstyrelsen.se/Global/Jarnvag/Marknadsovervakning/Svenska_infrastrukturforvaltare_2010.pdf [accessed on 10 July 2013].

The *Branschrådet för järnväg* (Industry Council for Railways) is a public forum for railway transport issues, set up by the Swedish Transport Agency.¹⁷⁴⁹ It is also a channel for disseminating information regarding the work being conducted in the European railway area.

The Swedish Public Transport Association is the trade organisation for local and regional public transport in Sweden.¹⁷⁵⁰ The association currently has 27 full members who are public transport authorities and several associate members who are suppliers and consultants to the Public Transport industry.

The *Tågoperatörerna* (Train Operators Association) was founded in 2001 as a trade association representing active operators of railways, light-rail and underground transport services in Sweden.¹⁷⁵¹ It currently has 28 full members and eight associate members.

In the case of competition matters, the Swedish Transport Agency is required to consult with the Swedish Competition Authority and report abuses to the Authority.¹⁷⁵²

There does not appear to be a process of consultation and a formal hearing; rather, parties concerned in the dispute are given time to submit their respective points of view and most consultation with consumer groups is undertaken by the operators themselves. In addition, the infrastructure manager, as part of drawing up its network statement, must consult any interested parties and receive their submissions of opinion. This process involves written submissions within a time limit (not less than one month) defined by the infrastructure manager (*Railway Act 2004*, Chapter 6, s.9). As a result, the process is fairly 'closed' in that the regulator receives the claims of each party, reviews them and then hands down a decision.

Timeliness

The *Railway Act 2004* (Chapter 8, s.9) mandates that regulatory decision on an access dispute is made no later than two months from when all relevant information regarding the dispute has been submitted to the regulator.

Information Disclosure and Confidentiality

The *Railway Act 2004* (Chapter 8, s.3) requires the infrastructure manager and any party undertaking negotiations with respect to price or capacity allocations to notify the regulator of the negotiations underway, to make it aware and informed about any negotiations that may potentially require mediation.

The *Railway Act* also entitles the regulator to obtain any information, documents, and access to premises that are associated with operations subject to the Act. It may call upon the police and customs authorities: first, to aid in the execution of a decision that relates to gathering information for fulfilling the statutory supervision activities, and second, to ensure the cooperation of the parties (Chapter 8, s.3).

In addition, the Swedish Transport Agency publishes annual industry analysis reports, records the details of ownership for railway undertakings, monitors competition-limiting phenomena, and works collaboratively with the Swedish Competition Authority.¹⁷⁵³ Its regulations are published in the Agency's Code of Statutes (*JvSFS*).¹⁷⁵⁴

As a government agency, the Swedish Transport Agency is bound under the *Freedom of the Press Act* to give the right of public access to official information. All documents submitted to the Agency may be provided to any party requesting them. As with other regulatory institutions in Sweden, the public disclosure of information gathered by the regulator is subject to the conditions of the *Public*

¹⁷⁴⁹ *Transport Styrelsen, Industry Council for Railway*. Available at: <http://www.transportstyrelsen.se/sv/Jarnvag/branschradet/> [accessed on 10 July 2013].

¹⁷⁵⁰ Swedish Public Transport Association, *Home* (In English). Available at: <http://svenskkollektivtrafik.se/English/> [accessed on 10 July 2013].

¹⁷⁵¹ Train Operators Association, *About Us*. Available at: www.tagoperatörerna.se [accessed on 10 July 2013].

¹⁷⁵² *Regulation Governing the Swedish Transport Agency* (2008: 1300), s. 12.

¹⁷⁵³ Swedish Transport Agency, *Market Monitoring*. Available at: <http://www.transportstyrelsen.se/en/Railway/Market-monitoring/Market-Monitoring/> [accessed on 10 July 2013].

¹⁷⁵⁴ Swedish Transport Agency, *Code of Statutes* (in Swedish). Available at: <http://www.transportstyrelsen.se/sv/Regler/Regler-for-jarnvag/Jarnvagsstyrelsens-forfattningssamling/> [accessed on 10 July 2013].

Access to Information and Secrecy Act 2009. The *Railway Act 2004*, Chapter 6 s.1, also states that information supplied to the infrastructure manager as part of capacity-allocation applications may not be utilised for other purposes or forwarded to a third party, and is subject to the confidentiality conditions set out in the *Public Access to Information and Secrecy Act 2009*.

Decision-making and Reporting

The Board of Directors acts as the decision-making body. The Board may delegate to the Director-General, who is the agency head and also a board member, to decide on regulation.¹⁷⁵⁵

The *Public Access to Information and Secrecy Act 2009* requires a public authority (covering the Swedish Transport Agency) to publish official documents drawn up by the authority. Preliminary outlines, drafts (of a decision) and memoranda are not classified as official documents. Decision reports are published on the regulator's website.

Appeals

The *Railway Act* (Chapter 11, s.2) provides for an appeal of the decision of the General Administrative Court. Leave to appeal is required upon appeal to the Administrative Court.

The *Railway Act* (Chapter 11, s.1) also requires the Swedish Transport Agency to reconsider a decision not to approve a subsystem, upon the request from the applicant. Request for reconsideration shall be notified to the Agency within one month from the date on which the applicant was part of the decision. The Agency shall make a decision in the review of the matter within two months of receiving the request for reconsideration.

The *Rail Ordinance* (s.13) states that *Trafikverket's* decisions may be appealed to the Government.

6. Airports

Commercial airports in Sweden are allocated as either main or regional. There are three main international airports, all owned by the government. Because of its large geographical size, domestic air transport is important in Sweden. There are 37 regional airports, which can be divided into two sub-categories – major regional airports with between one and five million passengers per year; and small regional airports with fewer than one million passengers per year.¹⁷⁵⁶ These are owned by a county or by a municipality. There are also a large number of small privately-owned airports.

The Government-owned company, *Swedavia*, is the managing body that is mandated to administer airport infrastructure.¹⁷⁵⁷ It currently owns and operates 11 state-owned airports. These are the three largest ones (Stockholm-Arlanda; Göteborg Landvetter; and Malmö) plus Åre Östersund; Kiruna; Luleå; Umeå; Sundsvall Härnösand; Bromma Stockholm; Visby; and Ronneby.¹⁷⁵⁸ It also owns Göteborg City Airport. *Swedavia* was formed on 1 April 2010, taking over the airport management function from the LfV group, where the latter has resumed the other main business of air navigation control services across Sweden.

The *Swedavia* airports, as a group, employed 2500 employees to generate around 4.7 billion kronor in 2011.¹⁷⁵⁹ Stockholm-Arlanda International Airport is the third largest in Scandinavia, with approximately 20 million passenger movements per year (three-quarters are international).¹⁷⁶⁰ In 2012, 146000 tonnes of goods moved through the airport. The second largest airport in Sweden,

¹⁷⁵⁵ *Regulation Governing the Swedish Transport Agency* (2008: 1300), ss. 15-16(a).

¹⁷⁵⁶ These correspond to groups C and D as per EC's classification of types of airports in Communications from the Commission of 9 December 2005, *Community Guidelines on Financing of Airports and Start-up Aid to Airlines Departing from Regional Airports*, *Official Journal of the European Union* 2005 / C312/01.

¹⁷⁵⁷ *Swedavia, About Swedavia*. Available at: <http://www.swedavia.com/about-swedavia/this-is-swedavia/> [accessed on 10 July 2013].

¹⁷⁵⁸ LfV Group, *About Us*. Available at: <http://www.lfv.se/en/About-us/> [accessed on 10 July 2013].

¹⁷⁵⁹ *Swedavia, Sustainable Development Review 2011*. Available at: http://www.swedavia.com/Global/Swedavia/detta_ar_swedavia/Hallbarhetsfolder_eng_120515.pdf [accessed on 10 July 2013].

¹⁷⁶⁰ *Swedavia, About Stockholm-Arlanda Airport – Facts about the Airport*. Available at: <http://www.swedavia.com/arlanda/about-stockholm-arlanda-airport-/about-stockholm-arlanda-airport/facts-about-the-airport/> [accessed on 10 July 2013].

Göteborg Lanvetter International Airport on the southwest coast,¹⁷⁶¹ handles about five million passengers per year (three-quarters international). Malmö Airport handles about 2 million passengers per year.¹⁷⁶²

Since 2000, some of the previously Swedish government-owned airports have been transferred to local authorities. They include: Kalmar, Norrköping, Halmstad, Jönköping, Örnsköldsvik, Skellefteå, and Karlstad.¹⁷⁶³ At present, 24 airports are owned by local or regional authorities, and five airports have other ownership structures such as limited-liability companies.¹⁷⁶⁴ Sundsvall Härnösand Airport will eventually be transferred to local authorities.¹⁷⁶⁵

As for airlines, Scandinavian Airlines System (SAS) is the dominant carrier in both domestic and international services, operating in Denmark, Norway and Sweden.¹⁷⁶⁶ Since the deregulation of domestic aviation in 1992, there have been a large number of smaller airlines operating in the domestic market, often providing flights on a specific route. Low-cost carriers have entered the domestic and international market. For example, Ireland-based Ryanair entered into the Swedish market in 1997, first offering flights to Stockholm-Skavasta Airport.¹⁷⁶⁷

Regulatory Institutions and Legislation

Sweden has historically had a largely unique system of regulating its airports. Prior to 2005, the *Luffartsverket* (Swedish Civil Aviation Administration) existed as a government agency that acted as both the operator and economic regulator of all aspects of aviation in Sweden. On 1 January 2005, *Luffartsverket* was split up into two agencies:

- the *Luffartsstyrelsen* (Swedish Civil Aviation Authority – SCAA) that regulated the aviation market and oversaw safety; and
- the LFV Group (that retained the name *Luffartsverket*) managed state-owned airports and air traffic control. The LFV Group was sub-divided on 1 April 2010. At present, the LFV Group operates as a public limited company civil and military air navigation services across Sweden. *Swedavia* owns and operates a group of airports previously managed by the LFV Group (see above).

On 1 January 2009, the SCAA was transferred to the Swedish Transport Agency (see the 'Rail' section for a general profile) as the Civil Aviation Department of the Agency, now the Civil Aviation and Maritime Department. In the field of civil aviation, the Department prescribes regulations, grants permits, examines civil aviation with a special focus on safety and security, and monitors the developments in the aviation market.¹⁷⁶⁸ In 2011, the Civil Aviation Department had about 228 staff, of which 37 were classified as 'legal/experts'.¹⁷⁶⁹ As with the road and rail area, the Agency adopts a risk-based approach to prioritise activities for oversight of civil aviation.¹⁷⁷⁰

¹⁷⁶¹ Swedavia, *About Göteborg-Lanvetter Airport – Facts about the Airport*. Available at: <http://www.swedavia.com/landvetter/about-goteborg-landvetter-airport-/about-goteborg-landvetter-airport/> [accessed on 10 July 2013].

¹⁷⁶² Swedavia, *About Malmö Airport – Facts about the Airport*. Available at: <http://www.swedavia.com/malmo/about-malmo-airport-/about-malmo-airport/facts-about-the-airport/> [accessed on 10 July 2013].

¹⁷⁶³ Swedish Transport Agency, *Aviation Trends 2012*, 2012, p. 11. Available at: <http://www.transportstyrelsen.se/Global/Publikationer/Luftfart/Flygtendenser/AviationTrends-2012.pdf> [accessed on 10 July 2013].

¹⁷⁶⁴ International Civil Aviation Organisation, *Action Plan of Sweden: With Reference to Resolution A37-19 – Climate Change*, June 2012, p. 3. Available at: http://www.icao.int/environmental-protection/Documents/ActionPlan/SwedenRepublic_ActionPlan.pdf [accessed on 10 July 2013].

¹⁷⁶⁵ Swedish Transport Agency, *Aviation Trends 2010*, p. 39. Available at: http://www.transportstyrelsen.se/Global/Publikationer/Luftfart/Flygtendenser/Flygtendenser_aviationtrends_2010_100907.pdf [accessed on 10 July 2013].

¹⁷⁶⁶ SAS Group, *Home*. Available at: <http://www.sasgroup.net/SASGroup/default.asp> [accessed on 10 July 2013].

¹⁷⁶⁷ Ryanair, *History of Ryanair*. Available at: <http://www.ryanair.com/en/about> [accessed on 10 July 2013].

¹⁷⁶⁸ Swedish Transport Agency, *About Us*. Available at: <http://www.transportstyrelsen.se/en/About-us/> [accessed on 10 July 2013].

¹⁷⁶⁹ Swedish Transport Agency, *Aviation Trends 2012*, 2012, p. 30. Available at: <http://www.transportstyrelsen.se/Global/Publikationer/Luftfart/Flygtendenser/AviationTrends-2012.pdf> [accessed on 10 July 2013].

¹⁷⁷⁰ *Aviation Trends*, p. 5.

Airports – Safety and Charges

The Swedish Transport Agency supervises all Swedish airports to ensure that air safety is maintained. The supervision is also used as the basis for its review of the airport operation, carried out at regular intervals or in response to changes at the airport.

The Agency is responsible for issuing licences (instrumental or non-instrumental depending on the landing system) to public airports.

In 2009, the European Union adopted a Directive on airport charges which had to be implemented in all Member States by March 2011.¹⁷⁷¹ The Directive built on previous policies in relation to charges for airports and air navigation services drawn up by the International Civil Aviation Organisation.¹⁷⁷² The objectives of the Directive are:

- Greater transparency of costs – Airports must provide a detailed breakdown of costs with airlines in order to justify the calculation of airport charges.
- Non-discrimination – airlines receiving the same service shall pay the same charge. However, airports may differentiate their services as long as the criteria for doing so are clear and transparent. Airports can also vary charges on environmental grounds. For example, lower fees could be charged for environmentally-friendly aircrafts.
- Systems of consultation on charges between airports and airlines, which are already in place at many EU airports, are mandatory at all airports covered by the Directive.
- Member States will designate or set up an independent supervisory authority that will help settle disputes over charges between airports and airlines.

The Directive applies to all EU airports handling more than five million passengers per year and to the largest airport in each Member State. For Sweden this currently applies to Stockholm-Arlanda Airport only.¹⁷⁷³ *Swedavia* referred to regulation of charges in its 2011 Annual Report: 'The Swedish Transport Agency is currently considering the level of *Swedavia*'s airport charges for 2012'.¹⁷⁷⁴

The Directives have been transposed into the *Act on Airport Charges 2011*. According to the Act and the *Ordinance on Airport Charges 2011*, the Swedish Transport Agency is required to:¹⁷⁷⁵

- publish annually the airports covered under the Act;
- examine an application for setting up an airport network;
- be first instance to refer disputes to;
- prepare an annual report on the regulatory activities carried out on airport charges; and
- assist the European Commission in the preparation of the report provided for in article 12(1) of the underlying EU directive on airport charges (2009/12/EC).

The Swedish Transport Agency may issue regulations on airport charges, and is the first instance of disputes resolution for airport charges. Interested parties may refer a dispute to the Agency within three weeks of an airport publishing the decision on airport charges. The Agency will take a decision within four months. An extension of the decision by two months is permitted under exceptional circumstances. The decision shall take into account, in particular, if the complainant has relied on any of the following circumstances in its appeal:

¹⁷⁷¹ That is, Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges.

¹⁷⁷² European Commission, *Airport Charges*. Available at: http://ec.europa.eu/transport/modes/air/airports/airport_charges_en.htm [accessed on 10 July 2013].

¹⁷⁷³ Swedish Transport Agency, *Oversight of Airport Charges* (in Swedish). Available at: <http://www.transportstyrelsen.se/sv/Luftfart/Flygplatser-och-flygtrafikjanst/Tillsyn-av-flygplatsavgifter/> [accessed on 10 July 2013].

¹⁷⁷⁴ *Swedavia, Annual Report 2011*, p. 54. Available at: http://www.swedavia.com/Global/Swedavia/detta_ar_swedavia/Finansiell_information/Swedavia_annualReport.pdf [accessed on 10 July 2013].

¹⁷⁷⁵ Swedish Transport Agency, *Oversight of Airport Charges* (in Swedish). Available at: <http://www.transportstyrelsen.se/sv/Luftfart/Flygplatser-och-flygtrafikjanst/Tillsyn-av-flygplatsavgifter/> [accessed on 10 July 2013].

- legal compliance of the consultations with the airport users;
- the development of the consumer price index; and
- how the decision on the amended fees published.

The International Civil Aviation Organisation (ICAO)'s policies on airport charges should be indicative.¹⁷⁷⁶

The Agency's final decision under the *Act on Airport Charges* may be appealed to the Administrative Court.¹⁷⁷⁷ Leave to appeal is required.

Aviation

The key legislation governing aviation includes the *Aviation Act 2010*,¹⁷⁷⁸ which contains provisions on access to the air transport services, as either airlines or air-navigation service providers. Relevant regulations are stipulated in the *Aviation Ordinance 2010*.¹⁷⁷⁹

In relation to air carrier services, the Swedish Transport Agency is responsible for issuing three types of licences that an air carrier operating in Sweden must hold each of an air operator certificate, an operating licence for carrying air transport business, and a traffic licence for operating particular routes.

Ground Handling

The *Act on the Ground Services at Airports*,¹⁷⁸⁰ which transposed the EU Directive 96/67/EC, contains provisions on market access to ground-handling services at commercial airports. The *Act on the Ground Services at Airports* states that decisions in relation to limiting ground-services provision must be objective, transparent and non-discriminatory, according to limitations of capacity, space, restricted services (namely baggage handling services, ramp services, fuel and oil services and freight/mail services) or for security reasons. For restricted services, the managing body may apply to the Swedish Transport Agency to have the number of service providers limited to no fewer than two for each service. At least one of the suppliers must be independent of the managing authority.

If the Swedish Transport Agency limits the number of service providers, the managing body will call for competitive tenders and engage in consultation with the User Committee to select the providers. If the managing body provides similar services, or is otherwise related to the companies tendering applications, the selection will be left to the Agency. Selections are made for a maximum period of seven years. The managing body is responsible for informing the User Committee of the selection made. In specifying conditions and contract terms with suppliers the managing body is required to consult with the User Committee. Independent of contract negotiations, the managing body must consult at least once a year with the User Committee and the companies providing ground-handling services. Section 11 of the *Act on the Ground Services at Airports* concerns the right of the managing body to provide ground-handling services without being subject to the procedure described above.

The designated ground service providers must be given access to the infrastructure necessary for them to provide the particular service. This access may be subject to charges as compensation for use. A ground services provider may have its licence to operate revoked by the Swedish Transport Agency if it is found to be acting outside of the provisions of the law. The managing body may apply to the Swedish Transport Agency to have an operator's licence revoked.

There is a statutory requirement on the managing body of the airports to set up a User Committee consisting of representatives of all users of the airport concerned (the *Act on the Ground Services at Airports*, s.5). The Committee shall be consulted by the managing body or the regulator, either on a regular basis or when matters such as selection of ground-handling service providers arise.

¹⁷⁷⁶ International Civil Aviation Organisation (ICAO), *ICAO's Policies on Charges for Airports and Air Navigation Services*, Document 9082, 9th Edition, 2012. Available at: http://www.icao.int/publications/Documents/9082_cons_en.pdf [accessed on 10 July 2013].

¹⁷⁷⁷ *Act on Airport Charges 2011*, s. 23.

¹⁷⁷⁸ See the *Aviation Act* under the reference code of SFS 2010: 500 (enacted on 1 September 2010).

¹⁷⁷⁹ See the *Aviation Ordinance* under the reference code of SFS 2010: 770 (enacted on 1 September 2010).

¹⁷⁸⁰ See laws prescribed under the references of SFS 2000: 150 (enacted on 6 April 2000), SFS 2004: 1095 (effective on 1 January 2005) and SFS 2008:1374 (effective on 1 January 2009).

Decisions of the Swedish Transport Agency or the managing body may be appealed in the county administrative courts (the *Act on the Ground Services at Airports*, s.24). Leave for appeal is required.

*Air Navigation Services*¹⁷⁸¹

The Swedish Transport Agency is the national supervisory authority for air navigation services covering: Air Traffic Services; Aeronautical Information Services; Meteorological Services for Air Navigation Communication, Navigation and Surveillance; Airspace Management; Air Traffic Flow Management; and Search and Rescue Services. The objectives of the Air Navigation Services are to secure and facilitate safe, regular and efficient air traffic operations. The Air Navigation Services (ANS) unit within the Agency issues approvals and certificates, and performs supervision and safety oversight of ANS providers.

The Swedish Transport Agency issues national aviation regulations, which are largely based on standards that have been adopted within international aviation organisations such as the ICAO.

The Swedish Transport Agency is responsible for the information that is published in the Integrated Aeronautical Information Package (IAIP).¹⁷⁸² The production of the IAIP is performed by the LfV Group – Airports and Air Navigation Services.

As a government agency, the regulator is required to act in accordance with the 1986 *Administrative Procedure Act* that governs procedures of public authorities and the *Public Access to Information and Secrecy Act* 2009 that grants public access to information concerning matters within the scope of the authorities' functions (subject to the confidentiality requirements).

7. Ports

Sweden has a coast line that is 3218 kilometres long.¹⁷⁸³ There are approximately 50 public ports and a number of industry-owned loading quays along the coastline, handling essentially all Swedish foreign trade. The Port of Göteborg is Sweden's and Scandinavia's largest public port.¹⁷⁸⁴ Among other cargos, it handles: crude oil; containers; Roll-on/Roll-off; and passenger ferries and cruise liners. It is owned by the municipality. Other ports in Sweden include: Port of Falkenberg, Port of Helsingborg (second largest container port), Port of Kalmar, Ports of Stockholm, Port of Uddevalla, Port of Halland (merged between the ports of Halmstad and Varberg in 2012).

The public ports¹⁷⁸⁵ in Sweden must be open (subject to capacity and other constraints),¹⁷⁸⁶ and may charge fees for services provided. They are mainly municipally owned and are increasingly run by joint port and stevedoring companies on market conditions and in competition with each other and with ports in other jurisdictions. A small number of public ports retain a traditional structure with the municipality responsible for port administration and infrastructure management and with legally separate entities operating cargo handling services – either wholly owned by the municipality or co-owned with private interests. The majority of ports, however, are organised as limited liability companies (owned by the municipality or a combination of municipal and private interests) with integrated operations. The Port of Göteborg is organised on this basis. The port companies are responsible for the management and development of the infrastructure of the port (land, docks, terminals and water area) and provide cargo handling services. Some of them own the infrastructure, while others lease the land from the owner, which is usually the municipality.

¹⁷⁸¹ Swedish Transport Agency, *Air Navigation Service* (in Swedish). Available at: <http://www.transportstyrelsen.se/en/Aviation/Airports--Air-Navigation-Services/Air-Navigation-Services/> [accessed on 10 July 2013].

¹⁷⁸² Swedish Transport Agency, *IAIP*. Available at: <http://www.transportstyrelsen.se/en/Aviation/Airports--Air-Navigation-Services/Air-Navigation-Services/IAIP/> [accessed on 10 July 2013].

¹⁷⁸³ Central Intelligence Agency (CIA), *The World Factbook*. Available at: <https://www.cia.gov/library/publications/the-world-factbook/fields/2060.html> [accessed on 10 July 2013].

¹⁷⁸⁴ Göteborgs Hamn, *Home*. Available at: <http://translate.google.com.au/translate?hl=en&sl=sv&u=http://www.goteborgshamn.se/&prev=/search%3Fq%3Dport%2Bof%2Bg%25C3%25B6teborg%26hl%3Den%26biw%3D1274%26bih%3D585&sa=X&ei=UUgsUeGVDcSQiQeb2oDwCA&ved=0CDQ7qEwAA> [accessed on 10 July 2013].

¹⁷⁸⁵ OECD, *Competition in Ports and Port Services 2011*, 19 December 2011. Available at: <http://www.oecd.org/daf/competition/48837794.pdf> [accessed on 10 July 2013].

¹⁷⁸⁶ The *Swedish Act 1983* on the establishment, expansion and suspension of the fairway and the general port (SFS 1983:293), s. 1.

*The Konkurrensverket (Swedish Competition Authority)*¹⁷⁸⁷

As of 1 January 2010, complementary rules on anti-competitive sales activities by public entities were included in the *Competition Act*. These rules are intended as a supplement to the two general antitrust prohibitions: on anticompetitive agreements; and on abuse of a dominant position. Recently, the Authority has focused on municipal ports broadening their market scope. Municipal ports now offer services traditionally provided by the private sector. Municipal ports allegedly take advantage of their respectively market power and the stevedoring monopoly in the markets (for example, forwarding shipping agents and shipbrokers). The Authority has received several complaints over the years regarding the competitive situation in ports.

Since the most common owner of a port's infrastructure in Sweden is a municipality, the new rule regarding anti-competitive sales activities by public entities is of special interest. Since this new rule came into force, the Authority has received complaints regarding ports, where the operations have all been fully or partially owned by a municipality.

The Sjöfartsverket (Swedish Maritime Administration)

The *Sjöfartsverket* (SMA, In English: Swedish Maritime Administration)¹⁷⁸⁸ is a governmental agency and enterprise within the transport sector and is responsible for maritime safety and availability. It offers modern and safe shipping routes with 24 hour service and takes responsibility for the future of shipping. The SMA's services include: pilotage; fairway service; maritime traffic information; icebreaking; hydrography; and maritime and aeronautical search and rescue. Its activities focus primarily on merchant shipping. The Administration issues regulations on the marine transport of bulk cargoes on the basis of the *Ship Safety Act* (2003:364); the *Ship Safety Ordinance* (2003:438) and SMA's regulations (SJÖFS 2006:34, SJÖFS 2006:35, SJÖFS 2007:15).

Responsibility for the supervision of maritime safety rests with the Maritime Safety Inspectorate, which was transferred from the Sweden Maritime Administration to the Swedish Transport Agency on 1 January 2009.

*Swedish Transport Agency*¹⁷⁸⁹

The Swedish Transport Agency has a regulatory role in the use of the waterways. The Maritime Department: formulates regulations; examines and grants permits; and exercises supervision principally of Swedish and foreign ships sailing in Swedish waters. It also works to improve maritime safety and environmental influence for recreational boating. It analyses accidents and near-misses. For example, the Agency issues regulations and guidelines on pilotage, which provide that pilotage in Swedish internal waterways is generally mandatory.¹⁷⁹⁰ There are designated pilotage waterways in larger ports in Sweden. Whether or not a ship shall use a pilot depends on the vessel size and the type of cargo it is carrying.

Ports of Sweden

'Ports of Sweden' is an industry and employers' organisation comprising 60 port companies and over 4000 employees. Practically all port companies in Sweden are members. As an industry organisation, the association represents also around 15 port administrations through co-operation agreements. Collective agreements are signed with the Swedish Transport Workers' Union, *Ledarna*, the Swedish Association of Graduate Engineers and the Salaried Employees' Union. One such agreement, with the Swedish Transport Workers' Union, is the 'stevedoring monopoly' arrangement, under which a single stevedoring service provider is responsible for the complete handling of goods in a port. Only workers employed by a stevedoring company that is listed in the agreement, and that is a member of Ports of Sweden, are included in the collective agreement.¹⁷⁹¹

The aim of the association is to defend the interests of ports, to establish cooperation between ports and to support maritime transport and shipping interests in general. The association describes itself

¹⁷⁸⁷ OECD, *Competition in Ports and Port Services 2011*, op. cit.

¹⁷⁸⁸ SMA, *Home* (in English). Available at <http://www.sjofartsverket.se/en/About-us/About-SMA/> [accessed on 10 July 2013].

¹⁷⁸⁹ Swedish Transport Agency, *Shipping*. Available at: <http://www.transportstyrelsen.se/en/Shipping/> [accessed on 10 July 2013].

¹⁷⁹⁰ Swedish Transport Agency, *Pilotage*. Available at: <http://www.transportstyrelsen.se/en/Shipping/Ship-traffic/Pilotage/> [accessed on 10 July 2013].

¹⁷⁹¹ OECD, *Competition in Ports and Port Services 2011*, op. cit., p. 192.

as 'a mouthpiece for the ports when it comes to transport policy, the interests of ports, their customers and the community which they serve'. It also cooperates with port organisations in the other Nordic countries and is a member of the European Seaports Organisation (ESPO) and of the Federation of European Private Port Terminals (FEPORT).¹⁷⁹²

¹⁷⁹² *TransportGruppen, Association Ports of Sweden*. Available at: <http://www.transportgruppen.se/In-English/Association-ports-of-Sweden/> [accessed on 10 July 2013].

United Kingdom

OVERVIEW

The United Kingdom (UK) has highly developed economic infrastructure across the areas of energy, communications, water and wastewater and transport. The introduction of competition in key areas commenced in the 1980s, and the range of economic regulation expanded to include the regulation of access to incumbents' monopoly infrastructure networks. Independent economic regulators were established initially on a narrow industry or sub-sector basis, with the title usually being 'The Office of xxx Regulation' and with the responsibility resting with a single Director-General. Over time, these have been reorganised on a broader sectoral basis in energy and communications; while the others remain on an industry basis. Board structures have also replaced the Director-General structure.

In energy, former electricity and gas regulators were combined to form the Office of Gas and Electricity Markets (Ofgem) in 1999. The Ofgem is currently undertaking a number of reviews, as it deals with its expanding regulatory remit encompassing economic, social and environmental objectives. Directives from the European Union (EU) are increasingly important in relation to energy regulation and integration in line with the Single Market Objective.

In communications, the Office of Communications (Ofcom) inherited its duties from the previous telecommunications regulator (Ofcom). The Ofcom's duties have broadened to include the regulation of businesses providing telecommunications, television, radio and spectrum services and postal services. Various EU framework directives and regulations have been influential in the design and conduct of telecommunications regulation in the UK.

The transfer of responsibility for postal services to the Ofcom from the Postal Services Commission (Postcomm) involved some important changes, especially to prices regulation and consumer consultation. These changes are currently being worked through.

The Water Services Regulation Authority (Ofwat) regulates water and wastewater, and is therefore strictly a sectoral regulator. A series of important EU Water Directives have affected water regulation in the UK, particularly the Water Framework Directive.

The Office of Rail Regulation (ORR) continues to operate on an industry basis. Again, big changes emanating from the European Union (EU) are having an impact on rail regulation in the UK.

The Civil Aviation Authority (CAA) regulates the charges of the three biggest airports in the UK. Its primary role is to prevent the exploitation of monopoly power by these airports.

There is no economic regulator for ports, although there is a 'reasonableness test' for certain charges under the *Harbours Act 1964*. The provision of ports services remains substantially unaffected by EU directives.

The regulators generally have UK-wide jurisdiction, although there are exceptions. For instance; gas, electricity and water are regulated separately in Northern Ireland by the Northern Ireland Authority for Utility Regulation (NIAUR). Similarly, in Scotland, water and wastewater is regulated by the Water Industry Commission for Scotland (WICS) rather than by the Ofwat.

Some of the regulators also enforce competition laws concurrently with the Office of Fair Trading (OFT). In addition, the Competition Commission (CC) has a role in promoting competition in network industries, and considers referrals from the sectoral regulators where they are concerned that there may be competition problems. The OFT and the CC are in the process of being amalgamated to form the Competition and Markets Authority, to be established in October 2013 and fully functional in April 2014.

GEOGRAPHY, POPULATION, ECONOMY, POLITY AND LEGAL SYSTEM

The United Kingdom (UK) is in Western Europe just off the coast of France. It consists of Great Britain (England, Scotland and Wales) and Northern Ireland. Much of the country has terrain of rolling hills; however, there are mountainous regions in Scotland and Wales and low-lying terrain in many coastal areas. The UK has a temperate maritime climate consisting of mild temperatures and few extremes. Rain is fairly well distributed throughout the year.

As at July 2012, the population of the UK was estimated to be 63.0 million. Given this large population inhabiting a small land area of 241 590 square kilometres, the population density of 261

per square kilometre is one of the highest in Europe. London is the capital and by far the largest city. Other large cities are Birmingham, Leeds, Glasgow and Sheffield.

The UK is the world's fifth largest economy. In 2012, its GDP was around US\$ 2.29 trillion, equating to approximately US\$ 36600 per capita (around the OECD average).¹⁷⁹³ The available arable land is highly productive (major products are cereals, oilseeds, potatoes and vegetables). Fishing is important and the UK has large reserves of coal, natural gas, and oil. Primary energy production accounts for 10 per cent of GDP. The largest share of GDP is represented by services (around 80 per cent of GDP and employment), particularly banking, insurance, and business services. As with many OECD countries, manufacturing is declining in importance. The UK's key exports are machinery and transport equipment, fuels, chemicals; food, beverages and tobacco. Its main trading partners are, for exports, Germany, the US, the Netherlands, France, Ireland, and Belgium; and for imports, Germany, China, the Netherlands, the US and France.

The UK has extensive road and rail networks and a large number of airports. Fixed-line and mobile communication is highly developed. Broadband penetration is well above the OECD average. Because it is a very large economy that is heavily dependent on international trade, the UK has a number of very large seaports. The UK water and sewerage supply industry is also sophisticated and extensive.

After emerging from recession in 1992, Britain's economy enjoyed the longest period of expansion on record during which time growth outpaced most of Western Europe. In 2008, however, the global financial crisis adversely affected the economy, particularly due to the importance of its financial sector. Sharply declining home prices, high consumer debt, and the global economic slowdown resulted in recession in the latter half of 2008 and prompted the then government to implement a number of measures aimed at stimulating the economy and stabilising the financial markets. Facing increasing public deficits and debt levels, in 2010 the coalition government initiated a five-year program aimed to lower the budget deficit from over ten per cent of GDP in 2010 to one per cent by 2015. In November 2011, the Chancellor of the Exchequer announced additional measures through to 2017 because of slower-than-expected economic growth, and the impact of the Euro-zone debt crisis. The value added tax was raised from 17.5 per cent to 20 per cent in 2011.

The UK is a constitutional monarchy and parliamentary democracy. It has been a member of the European Union since 1973. Under this 'Westminster system', the Monarch (currently Queen Elizabeth II) is the head of State, and the Prime Minister is the head of government. Executive power is exercised by the Monarch, the Prime Minister and Cabinet Members who are appointed by the Prime Minister. The Prime Minister is usually the leader of the majority party or the leader of the majority coalition following an election. The UK has a multi-party system with the two largest parties being the Conservative Party and the Labour Party. Legislative power is vested in both the government and the two chambers of Parliament – the (elected) House of Commons (646 seats) and the (unelected) House of Lords (760 members).¹⁷⁹⁴

The UK Parliament has power to legislate for the UK as a whole, and has responsibility for defence, foreign affairs, economic and monetary policy, social security, employment and equal opportunity. The parliament may legislate in relation to any geographic region of the UK separately, but will not usually legislate on devolved matters in Scotland and Northern Ireland without the agreement of the Scottish Parliament and the Northern Ireland Assembly. In Wales, powers are vested in the National Assembly for Wales and the Welsh Government.¹⁷⁹⁵ However, the UK Parliament and Government still have significant powers in relation to Wales.

UK devolution created a national Parliament in Scotland, a national Assembly in Wales and a national Assembly in Northern Ireland. This process transferred varying levels of power from the UK Parliament to Scotland, Northern Ireland and Wales, including powers related to education, health and prisons. For example, the Assembly in Wales inherited the powers and budget of the Secretary of State for Wales and most of the functions of the Welsh Office. Following a referendum on 4 March

¹⁷⁹³ Central Intelligence Agency (CIA), *The World Fact Book: United Kingdom*. Available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/uk.html> [accessed on 14 July 2013].

¹⁷⁹⁴ UK Parliament, *Parliamentary Business*. Available at: <http://www.parliament.uk/business/> [accessed on 12 July 2013].

¹⁷⁹⁵ Wales Online, 'AMs Applaud as Assembly Passes First Bill... on Byelaws'. Available at: <http://www.walesonline.co.uk/news/welsh-politics/welsh-politics-news/2012/07/03/ams-applaud-as-assembly-passes-first-bill-on-byelaws-91466-31318217/> [accessed on 17 January 2013].

2011, the Welsh Assembly received direct law making powers that may be exercised without the need to consult Westminster. On 3 July 2012, the Welsh Assembly passed its first Act.¹⁷⁹⁶

At a local level government bodies include county councils, metropolitan district councils, English unitary authorities, London boroughs, shire district councils and Welsh unitary authorities.

The UK does not have a written constitution. The unwritten constitution consists of statutes, common law and practice. The UK Parliament also has a legal duty to comply with the EU law. UK Courts must apply the EU law where there is a conflict with the UK law.

The UK does not have a single judicial system. England and Wales have one system, consisting of the Supreme Court of England and the Supreme Court of Wales. In Scotland, the Superior Courts consist of the Court of Session and the High Court of Justiciary. The Court of Session is the supreme civil court in Scotland. The High Court of Justiciary deals with criminal appeals and serious criminal cases.¹⁷⁹⁷ The Northern Irish system comprises the Courts of Appeal, the High Courts of Justice and the Crown Courts. The Court of Appeal hears appeals in civil matters from the High Court and in criminal matters from the Crown Court which handles ordinary criminal matters. The Court of Appeal also hears appeals on points of law from the county courts, magistrates' courts and certain tribunals.¹⁷⁹⁸

APPROACH TO COMPETITION AND REGULATORY INSTITUTIONAL STRUCTURE

Regulatory bodies in the UK are specific to an industry or a sector. The Ofcom, the CAA, and the ORR are the sole regulators in communications, aviation, and rail infrastructure services, respectively. In the gas and electricity sector, the Ofgem is the primary regulator in all jurisdictions except for Northern Ireland. In the water and wastewater industry, the Ofwat regulates all jurisdictions other than Northern Ireland and Scotland. The NIAUR is the regulator responsible for gas, electricity and water in Northern Ireland and the WICS regulates water in Scotland.

These regulatory bodies were set up at different times as different types of organisation (for example, public-corporation *versus* non-ministerial government department) with different funding models. They are independent from the government. The regulators have formed the Joint Regulators' Group (JRG) that meets four times a year at CEO level to discuss issues of mutual concern and to report on recent developments in their own particular industry or sector.

Some of the regulators also act as the competition authority in their respective industries or sectors, concurrently with the Office of Fair Trading (OFT), applying and enforcing UK and EC competition laws. These include the regulators for communications, gas, electricity, water and sewerage, railway and air traffic services.

The Civil Aviation Authority (CAA) has entered into a Memorandum of Understanding with the OFT with respect to its power under s.41 of the *Airports Act 1986* to handle certain conduct of airports.¹⁷⁹⁹ This sets out the matters to be considered in deciding whether the OFT or the CAA will deal with a particular case affecting airports.

The OFT is the UK's consumer and competition authority. It is a non-ministerial government department established by statute in 1973. The OFT aims to improve the welfare of consumers by working to bring about competitive and efficient markets, by deterring deceptive and coercive trading practices, and by empowering consumers with the knowledge and skills they need to make rational and informed buying decisions.¹⁸⁰⁰ The OFT achieves its goals by using both the competition law regime and the consumer law regime. The OFT is led by a Board consisting of a chairman, an executive director and five non-executive members.

¹⁷⁹⁶ Wales Online, 'AMs Applaud as Assembly Passes First Bill... on Byelaws'. Available at: <http://www.walesonline.co.uk/news/welsh-politics/welsh-politics-news/2012/07/03/ams-applaud-as-assembly-passes-first-bill-on-byelaws-91466-31318217/> [accessed on 17 January 2013].

¹⁷⁹⁷ Scottish Courts. Available at: <http://www.scotcourts.gov.uk/index.asp> [accessed on 29 October 2012].

¹⁷⁹⁸ Northern Ireland Courts and Tribunals Service. Available at: <http://www.courtsni.gov.uk/en-GB/pages/default.aspx> [accessed on 29 October 2012].

¹⁷⁹⁹ Civil Aviation Authority, *The CAA's Use of Section 41 of the Airports Act 1986: The CAA's Policy and Processes. Appendix 5*, 2006. Available at: <https://www.caa.co.uk/docs/5/ergdocs/section41policy.pdf> [accessed on 11 June 2013].

¹⁸⁰⁰ Office of Fair Trading, *Benefits of Our Work*. Available at: <http://www.oft.gov.uk/about-the-oft/what/#named1> [accessed on 11 June 2013].

The OFT has the power to apply and enforce the *Competition Act 1998*. Since 1 May 2004 the OFT, along with the competition directorate of the European Commission (EC), also has the power to apply and enforce EU Competition Law in the UK. The *Competition Act 1998* (CA98) prohibits anti-competitive agreements (for example, cartels) between businesses (Chapter I) and abuse of a dominant position in a market (Chapter II of the CA98). Anti-competitive agreements are also prohibited under Article 101 of the EC Treaty while abuse of a dominant position is prohibited under Article 102 of the Treaty on the Functioning of the European Union (TFEU). The relationship between Articles 101 and 102 TFEU and national competition law is discussed by the CC:

Where national competition authorities apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 101(1) which may affect trade between member states or to any abuse prohibited by Article 102 they shall also apply Article 101 or 102 respectively. Under paragraph 2 the application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between member states but which are not prohibited under Article 101(1) or which fulfil the conditions of Article 101(3) or are covered by an EC block exemption, although they may prohibit or sanction unilateral conduct engaged in by undertakings which is not prohibited by Article 102.¹⁸⁰¹

The *Competition Act 1998 (Concurrency) Regulations 2004* set out the collaborative framework under which the concurrent powers are exercised.¹⁸⁰² The regulations require the competition and regulatory agencies to advise each other when they are considering an issue which falls within the jurisdiction of more than one institution. The regulations also mandate that it must be determined which institution will deal with the matter before any action is undertaken. Once this determination has been made, no other regulator is able to exercise formal powers in respect of that matter unless the matter has been transferred formally to it.¹⁸⁰³

The Concurrency Guidelines issued by the OFT govern the concurrency procedures in practice.¹⁸⁰⁴ These guidelines specify that matters will generally be investigated by the authority which is best placed to undertake the investigation. It is generally considered that the competent industry-specific or sector-specific regulator is better placed than the OFT to investigate agreements or conduct relating to its industry or sector, while the OFT may be better placed to undertake an investigation relating to matters relating to more than one industry or sector. Other relevant factors include prior experience of dealing with similar issues.

The OFT and each concurrent regulator is represented on the Concurrency Working Party (CWP).¹⁸⁰⁵ The CWP was formed in 1997 to coordinate among the OFT and the concurrent regulators in developing a consistent approach to performing their functions and powers under the competition laws. The CWP meets about six times a year, chaired by the OFT. Without concurrent powers in its industry, the previous Postcomm attended the meetings as an observer.

The OFT also reports to the Joint Regulators Group on an annual basis, providing an overall view about whether competition law is being applied consistently and proactively across all regulated industries.¹⁸⁰⁶

¹⁸⁰¹ Competition Commission, *Guidelines for Market Investigations: Draft for Public Consultation*, June 2012, p. 8. Available at: http://www.competition-commission.org.uk/assets/competitioncommission/docs/2012/consultations/market_guidelines_main_text.pdf [accessed on 29 January 2013].

¹⁸⁰² The *Competition Act 1998 (Concurrency) Regulations 2004*, SI 2004 No. 1077. Available at: <http://www.opsi.gov.uk/SI/si2004/20041077.htm> [accessed on 29 October 2012].

¹⁸⁰³ OFT, *DTI/HMT Report on Concurrent Competition Powers in Sectoral Regulation – Response of the Concurrency Working Party*, 2007. Available at: http://www.of.gov.uk/shared_of/reports/oft_response_to_consultations/oft900b.pdf [accessed on 29 October 2012].

¹⁸⁰⁴ The key guideline 'Concurrent Application to Regulated Industries' and other concurrency-related publications are available at: http://www.of.gov.uk/advice_and_resources/resource_base/legal/competition-act-1998/Concurrency/Publications [accessed on 29 October 2012].

¹⁸⁰⁵ OFT, *Concurrency*. <http://www.of.gov.uk/about-the-of/legal-powers/legal/competition-act-1998/Concurrency/#named3> [accessed on 29 October 2012].

¹⁸⁰⁶ OFT, *Advice and Resources, Concurrency*. Available at: http://www.of.gov.uk/advice_and_resources/resource_base/legal/competition-act-1998/Concurrency/ [accessed on 29 October 2012].

The OFT's decisions under competition law, including those made under the *Competition Act 1998* and decisions on the CC references of mergers or markets, are subject to appeal to the specialist Competition Appeal Tribunal (CAT), an independent body established under the *Enterprise Act 2002*. A further appeal above the CAT may also be possible on judicial review grounds and will be held in the Court of Appeal, Court of Session or Court of Appeal in Northern Ireland, depending on whether the CAT sat as a tribunal in England and Wales, Scotland or Northern Ireland respectively.

Where there is concern about competition in a market, the *Enterprise Act 2002* provides that the OFT and the sector regulators may request the CC to undertake an in-depth 'market investigation'.

The CC must determine whether a feature or combination of features in a market prevents, restricts or distorts competition. Market investigations enable it to undertake a broad, in-depth assessment of the complexities of a market and focus on the functioning of a market as a whole rather than on a single aspect of it or on the conduct of an individual firm within it. A market investigation may also examine indirect indicators of a lack of effective competition. These include persistently high profitability or restrictions that impede or delay new entry into the market.¹⁸⁰⁷

If the CC finds that features of a market are harming competition, it must seek to remedy the harm; either by introducing remedies itself or recommending action by others (see below).

*Competition Commission*¹⁸⁰⁸

The Competition Commission (CC) was established by the *Competition Act 1998* and replaced the Monopolies and Mergers Commission in 1999. It is an independent public body whose functions are to decide substantial economic questions in three areas – merger inquiries, market investigations, and regulatory references and appeals in relation to price controls or modification to licence terms. Members are appointed by the Department for Business, Innovation and Skills to the CC for eight years, following open competition. They are selected and appointed for their experience, ability and diversity of skills in competition economics, law, finance and industry. Decisions are made by a panel of at least three independent members (out of a total of over 40 members), assisted by professional staff. It is located in Victoria House in London.

The CC can only act on matters that are referred to it by either the OFT, the Minister,¹⁸⁰⁹ the CAT or a regulator specific to an industry or a sector. When making a reference, the referee must have reasonable grounds for suspecting that one or more features of a market prevents, restricts or distorts competition in relation to the supply or acquisition of goods or services in the UK (or a part of the UK).

The CC also deals with specific matters in the regulated industries. Stated broadly, it rules on licence modifications and price control reviews where there is disagreement between the regulator and a licensee. The involvement of the CC depends on the specific regulatory regime. For example, in postal services and energy, the CC hears appeals against price-control decisions. It deals with price-control reviews in the water and communication sectors, and can review access charges in the rail subsector. It reviews licence modifications in relation to water, rail and airports, and hears appeals against changes to licence conditions in gas and electricity. The CC does not deal with decisions regarding the General Conditions which apply to operators in telecommunications and postal services.¹⁸¹⁰

¹⁸⁰⁷ Competition Commission, *Guidelines for Market Investigations: Draft for Public Consultation*, June 2012, pp. 8-9. Available at: http://www.competition-commission.org.uk/assets/competitioncommission/docs/2012/consultations/market_guidlines_main_text.pdf [accessed on 29 January 2013].

¹⁸⁰⁸ Competition Commission, *About Us*. Available at: <http://www.competition-commission.org.uk/about-us> [accessed on 11 June 2013].

¹⁸⁰⁹ Competition Commission, *Guidelines for Market Investigations: Draft for Public Consultation*, June 2012, pp. 8-9. Available at: http://www.competition-commission.org.uk/assets/competitioncommission/docs/2012/consultations/market_guidlines_main_text.pdf [accessed on 29 January 2013]. 'Ministers have the ability to make market references as a reserve power; in addition to applying the same criteria set out in the Act for the making of a reference by the OFT or other referring body, a minister must either be 'not satisfied' with an OFT decision not to make a reference or, having brought information to the attention of the OFT, will decide whether to make a reference in the period that the minister considers is reasonable. As at June 2012, this power had never been used.'

¹⁸¹⁰ The Competition Commission, *About Us*. Available at: <http://www.competition-commission.org.uk/about-us> [accessed on 11 June 2013].

The CC previously had a unique relationship with the airport regulator, the Civil Aviation Authority (CAA), in relation to regulatory price determination. The CAA had been required to make a reference to the CC every five years in relation to designated airports. The CC made recommendations to the CAA on future price caps, and reported on whether any airports had, over the previous five years, engaged in conduct that is against the public interest.¹⁸¹¹ However, in May 2012 the CAA received an order to make no further reference to the CC on mandatory airport charges.¹⁸¹² The *Civil Aviation Act 2012*, which came into effect on 19 December 2012, removed this reference power permanently. Instead, the *Civil Aviation Act 2012* sets out a regime for: market-power determination; licensing; and appeals. This relationship is further considered in section 6 of this chapter.

*Regulatory Development*¹⁸¹³

In May 2012, the UK Government announced plans to create the Competition and Markets Authority (CMA). The CMA will combine the competition and consumer enforcement functions of the OFT and the functions of the CC. The creation of a single competition authority is expected to 'increase transparency, and deliver a strengthened and streamlined regime as well as eliminating inefficiency and duplication'.¹⁸¹⁴ The CMA will also take over some of the OFT's consumer responsibilities, which will include the powers to deal with anti-competitive business activities that may do harm to consumers.¹⁸¹⁵

The CMA will come into being in October 2013 and become fully operational in April 2014. The Secretary for Business, Innovation and Skills, Vince Cable, announced the appointment of Lord Currie as Chair Designate to the CMA on 17 July 2012. In a speech to the Law Society, Lord Currie set out his vision for the CMA to address competition and consumer issues, including:¹⁸¹⁶

- deploying resources more effectively and flexibly to the different parts of its work, such as merger and markets investigations and decisions, adhering to tighter timetables;
- using new powers to make antitrust investigations more efficient and fair; and
- tackling hardcore cartels more effectively to ensure that markets can be as dynamic and innovative as possible to help achieve the economic growth that the country needs, through the proposed removal of the dishonesty test.

Alex Chisholm was appointed as the Chief Executive Designate on 8 January 2013 for a five-year term.¹⁸¹⁷ In his first speech since taking the post, he summarised the benefits from having a single competition and consumer protection authority:¹⁸¹⁸

...the decision to create a single authority was driven by the opportunity to create efficiencies, remove duplication and to ensure that the competition regime has the

¹⁸¹¹ CAA, *Information on the Economic Regulation of Stansted Airport*. Available at: Available at: <http://www.caa.co.uk/docs/78/20120917StanstedInformation.pdf> [accessed on 6 June 2013].

¹⁸¹² Department of Transport, *Removing Mandatory References to the Competition Commission*, 16 May 2012. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/3615/letter-respondants.pdf [accessed on 12 July 2013].

¹⁸¹³ Competition Commission, *Policy – Institutional Reform*. Available at: <http://www.competition-commission.org.uk/policy> [accessed on 7 June 2013].

¹⁸¹⁴ Department for Business, Innovation and Skills, *Enterprise and Regulatory Reform Bill: Competition and Markets Authority*. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/86517/bis-12-1252-enterprise-and-regulatory-reform-bill-competition-markets-authority-factsheet.pdf [accessed on 7 June 2013].

¹⁸¹⁵ Inside Government, *Providing Better Information and Protection for Consumers*, Policy, updated on 8 April 2013. Available at: <https://www.gov.uk/government/policies/providing-better-information-and-protection-for-consumers/supporting-pages/consumer-and-competition-landscape-reform> [accessed on 7 June 2013].

¹⁸¹⁶ Department for Business, Innovation and Skills, *Lord Currie Sets Out Vision for New Competition and Markets Authority*, Press Release, 28 November 2012. Available at: <http://news.bis.gov.uk/Press-Releases/Lord-Currie-sets-out-vision-for-new-Competition-and-Markets-Authority-68428.aspx> [accessed on 7 June 2013].

¹⁸¹⁷ Vince Cable (Secretary of State for Business, Innovation and Skills), *Written Ministerial Statements – Competition and Markets Authority*, 8 January 2013. Available at: <http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm130108/wmstext/130108m0001.htm#13010823000041> [accessed on 7 June 2013].

¹⁸¹⁸ Inside Government, *The New Competition and Markets Authority: Aspirations and Challenges*, Speech by Alex Chisholm on 24 April 2013. Available at: <https://www.gov.uk/government/speeches/the-new-competition-and-markets-authority-aspirations-and-challenges> [accessed on 7 June 2013].

functions and powers needed to tackle competition problems and encourage compliance. A single authority will be able to deploy resources more effectively and flexibly across its work. It will have useful new powers, for example in relation to information gathering and the use of interim measures in merger situations. It will face important safeguards, for separation between phases in the markets and mergers regimes, and between investigation and decision-taking in Competition Act cases. The Authority will be able to deliver decisions in a more timely way without reduction in quality – for example, statutory time limits for markets work have the potential to reduce the end-to-end length by up to a year. And the Government intends the CMA to provide a powerful single voice on competition issues both at home and internationally, as well as having an important interface with the sector regulators, putting in place new mechanisms for enhanced cooperation.

*Competition Appeals Tribunal*¹⁸¹⁹

The Competition Appeals Tribunal (CAT) was created by the *Enterprise Act 2002*. It is a specialist independent Tribunal with the following functions:

- It can hear appeals on the merits in respect of decisions made under the *Competition Act 1998* by the OFT and by regulators in the telecommunications (non-price control decisions), electricity, gas, water, railways and air traffic services.
- It can review decisions made by the Secretary of State, the OFT and the CC in respect of merger and market references or possible references under the *Enterprise Act 2002*.
- It can hear appeals against certain decisions made by the Ofcom and the Secretary of State relating to the exercise by the Ofcom of its functions under Part 2 (networks, services and the radio spectrum) and ss.290 to 294 and Schedule 11 (networking arrangements for Channel 3) of the *Communications Act 2003*. Where an appeal raises a price-control matter, the CAT must refer the matter to the CC for determination in accordance with the CAT's Rules and any direction of the CAT (s.193). In most cases, the CAT must follow the CC's determination concerning the price control matter (s.193(7)).¹⁸²⁰
- It can hear appeals in respect of decisions made by the OFT under the EC Competition Law (Articles 84 and 85) Enforcement Regulations 2001.

An appeal to the CAT may be made by any party to an agreement in respect of which the OFT, or sectoral or industry regulator has made a decision. Similarly, any person in respect of whose conduct the OFT or sectoral or industry regulator has made a decision may also appeal to the CAT. The CAT may allow an appeal from any third party whom the CAT considers has a sufficient interest in a decision made by the OFT or a sectoral or an industry regulator. A person who considers he has sufficient interest in the outcome may make a request to the CAT for permission to intervene in the proceedings.

Parties have a time limit of two months from notification or publication of a decision to make an appeal to the CAT. The Tribunal may not extend the time limit unless it is satisfied that the circumstances are exceptional.¹⁸²¹ The CAT is headed by the President. The President is a lawyer qualified in any part of the United Kingdom with at least ten years' experience. The President is appointed by the Lord Chancellor (upon the recommendation of the Judicial Appointments Commission) and must appear to the Lord Chancellor to have appropriate experience and knowledge of competition law and practice.¹⁸²²

The membership consists of two panels: a panel of chairmen and a panel of ordinary members. Cases are heard before a panel consisting of three members: either the President or a member of the panel of chairmen and two ordinary members. The members of the panel of chairmen are judges of the Chancery Division of the High Court and other senior lawyers. The ordinary members have

¹⁸¹⁹ CAT, *Home*. Available at: <http://www.catribunal.org.uk/> [accessed on 11 June 2013].

¹⁸²⁰ CAT, *About the Tribunal*. Available at: <http://www.catribunal.org.uk/242/About-the-Tribunal.html> [accessed on 6 June 2013].

¹⁸²¹ CAT, *Rules and Guidance*, rule 8(1). Available at: <http://www.catribunal.org.uk/240/Rules-and-Guidance.html> [accessed on 6 June 2013].

¹⁸²² CAT, *Personnel*. Available at: <http://www.catribunal.org.uk/246/Personnel.html> [accessed on 6 June 2013].

expertise in law, business, accountancy, economics and other related fields. Appointments to the panel of chairmen are made by the Lord Chancellor for a period of five years, renewable for a further three years.¹⁸²³ The ordinary members are appointed for four years automatically renewable for a further four years. Remuneration for ordinary members is paid according to the amount of time spent working for the Tribunal, based on a daily rate of £350.¹⁸²⁴ The appointments carry no right of pension, gratuity or allowance on termination. Currently there are 16 ordinary members.¹⁸²⁵

In making its decisions, the CAT may: confirm or set aside all or part of the decision; remit the matter to the OFT (or the regulator); impose, revoke or vary the amount of any penalty; give such directions, or take such other steps as the OFT or sectoral or industry regulator could have given or taken; or make any other decision which the OFT or sectoral or industry regulator could have made.

The CAT's decisions may be appealed on either a point of law or, in penalty cases, as to the amount of any penalty. The appeal lies from the CAT to the Court of Appeal in relation to proceedings in England and Wales. In relation to CAT proceedings in Scotland, the Inner House of the Court of Session is the body to which appeals against the CAT's decisions are made. In Northern Ireland, appeals are made to the Court of Appeal of Northern Ireland. Such a further appeal may only be made with the permission of the CAT or the relevant appellate court.¹⁸²⁶

The Department of Business, Skills and Innovation (BIS) is currently consulting on the Appeals mechanisms.¹⁸²⁷ In its consultation document, BIS notes that, while in many ways the appeals regime works well, there are concerns about the current arrangements. These include: a significant number of appeals in some areas; too few appeals in other areas; that when brought, appeals are often lengthy and costly; and that there is significant diversity of how appeals are handled across the different areas, particularly in terms of which appeal bodies hear which types of appeal, and the standards by which those appeals are decided.

The specific proposals being consulted on include:

- Where appeals are currently heard 'on the merits', should these appeals shift either to a judicial review standard, or to defined grounds of appeal setting out more clearly the basis on which a regulator's decision can be challenged.
- Changing the standard of review for appeals under the *Communications Act 2003* from appeal on the merits to a flexible judicial review, or specifying more focused grounds for these appeals.
- Making similar changes to the standard of review for appeals under the *Competition Act 1998*, excepting decisions relating to the level of penalty.
- Aligning the grounds of appeal for energy (in Great Britain), aviation and postal services decisions.
- Considering what the costs and benefits would be of moving to a similar appeal model for rail decisions.

The government is also proposing reforms to the appeals bodies including the governance of the CAT. According to the consultation, the government intends to retain the specialist appeals body, but is considering changes which could re-route appeals between different appeals bodies to increase the overall effectiveness of the system, and make it easier to understand for firms and investors.

¹⁸²³ Schedule 2 sub paragraph 2(2) of the *Enterprise Act 2002*. Also see [http://jac.judiciary.gov.uk/static/documents/TandCs\(1\).pdf](http://jac.judiciary.gov.uk/static/documents/TandCs(1).pdf) [accessed on 8 November 2012].

¹⁸²⁴ CAT, *Appointment of New Members*. Available at: <http://www.catribunal.org.uk/247-6909/Appointment-of-New-Members.html> [accessed on 6 June 2013].

¹⁸²⁵ CAT, *Personnel*, *op. cit.*

¹⁸²⁶ CAT, *Frequently Asked Questions*. Available at: <http://www.catribunal.org.uk/245/Frequently-asked-questions.html> [accessed on 6 June 2013].

¹⁸²⁷ HM Government, *Streamlining Regulator and Competition Appeals: Consultation on Options for Reform*, 19 June 2013. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/207701/bis-13-876-regulatory-and-competition-appeals.pdf [accessed on 12 July 2013].

REGULATORY ARRANGEMENTS BY INDUSTRY OR SECTOR

1. Energy

The gas and electricity transmission and distribution subsectors in Britain primarily consists of regional monopoly companies, including four companies that own and operate the energy transmission networks, four companies that own the local gas distribution networks (GDNs) and fourteen licensed regional electricity distribution network operators (DNOs). The four energy transmission providers are:

- National Grid Electricity Transmission (NGET), which owns the network in England and Wales
- Scottish Hydro-Electric Transmission Limited (SHETL), which owns the northern Scotland networks
- Scottish Power Transmission Limited (SPTL), which owns the southern Scotland network
- National Grid Gas (NGG), which owns and operates the national gas transmission network.

The fourteen electricity DNOs, each responsible for a regional area, are owned by seven different groups.¹⁸²⁸ In addition, four independent network operators run smaller networks embedded in the DNO networks. The transmission and distribution systems remain fully separated through independent ownership. The *Utilities Act 2000* prohibits one legal person from holding both a supply and a distribution licence for electricity.¹⁸²⁹

The gas distribution subsector was restructured on 1 June 2005, following the sales of four of the eight GDNs by NGG. At present, there are four GDNs – NGG, Scotia Gas Network, Northern Gas Networks, and Wales & West Utilities – each operates in a separate geographical region. A number of smaller independent networks are also in operation. NGG also owns and operates the gas transmission network.

Six vertically integrated companies (the 'Big Six') have 99 per cent of the retail market in energy. These companies are also active in electricity generation. They are: Centrica (with three retail brands – British Gas, Scottish Gas and *Nwy Prydain* – in England, Scotland and Wales, respectively), E.ON UK, Scottish and Southern Energy (SSE), RWE Npower, EDF Energy and ScottishPower.

Regulatory Institutions and Legislation

The energy regulator in Great Britain is the Office of Gas and Electricity Markets (Ofgem). The Ofgem's regulatory powers are primarily derived from legislation governing the gas and electricity industries, such as the *Gas Act 1986*, the *Electricity Act 1989* and the *Utilities Act 2000*. Other legislation includes the *Competition Act 1986*, the *Enterprise Act 2002* and the relevant EC laws. The Ofgem describes its objectives as follows:¹⁸³⁰

Our priority is protecting and making a positive difference for all energy consumers through promotion of value for money, security of supply and sustainability, for present and future generations. We do this through the supervision and development of markets, regulation and the delivery of government schemes. We work effectively with, but independent of, government, the energy industry and other stakeholders within a legal framework determined by the UK government and the European Union.

Under s.4AB of the *Gas Act* and s.3B of the *Electricity Act*, the Secretary of State is required to give the Ofgem guidance as to the contribution that the Ofgem should make towards the attainment of those policies. The Ofgem is required to have regard to that guidance when discharging its statutory functions.¹⁸³¹

¹⁸²⁸ Energy Linx, *Electricity Distribution Network Operators*, 2007. Available at: http://energylinx.co.uk/distribution_network_operators.htm [accessed on 18 October 2012].

¹⁸²⁹ Section 6(2) of the *Electricity Act 1989* as amended by s. 30 of the *Utilities Act 2000*.

¹⁸³⁰ Ofgem, *About Us*. Available at: <http://www.ofgem.gov.uk/About%20us/Pages/AboutUsPage.aspx> [accessed on 17 July 2013].

¹⁸³¹ *Social and Environmental Guidance to the Gas and Electricity Market Authority*, 23 February 2004. Available at: <http://www.ofgem.gov.uk/About%20us/Documents1/file37517.pdf> [accessed on 18 October 2012].

The Ofgem is governed by the Gas and Electricity Markets Authority (GEMA).¹⁸³² The GEMA consists of non-executive and executive members and a non-executive chair. Non-executive members bring experience and expertise from a range of areas including industry, social policy, environmental work, finance and Europe. The Authority determines strategy, sets policy priorities and takes decisions on a range of matters, including price controls and enforcement. There are also two advisers to the GEMA; a legal adviser and secretary. The Chairperson is appointed by the Secretary of State for a term of five years. Reappointment is possible. The GEMA is supported by a senior management team and various sub-committees and advisory bodies, including the audit committee, the remuneration committee and the enforcement committee. It operates under the prescribed Rules of Procedure that set out, among other things, the conduct of the GEMA's meetings, delegations and committees, and conflicts of interest.

Staff is organised into the following groupings: Smarter Grids and Governance: Distribution; Smarter Grids and Governance: Transmission; Markets; Sustainable Development, Ofgem E-Serve (Commercial and Environmental Programmes); and Corporate. There are approximately 550 full-time equivalent employees.

The Ofgem recovers its costs from the licensed companies it regulates.¹⁸³³ Licensees are obliged to pay an annual licence fee which is set to cover costs. The Ofgem is independent of the companies it regulates. It operates under a five-year cost control regime that runs 2010-2015. It pegs expenditure growth at three percentage points below the retail price index.

The Ofgem is primarily responsible for introducing competition in energy wholesale and retail markets, and for regulating the gas and electricity networks. Its functions include:

- Administering a price-control regime that takes the form of RPI-minus-X (retail price index minus an X factor), under which the maximum amount of revenue that network operators can earn is capped at an annual growth rate of RPI-minus-X for a specified period. Historically, this period has been five years, but for future price control periods, this will increase to eight years. This change is part of a new regulatory framework for energy introduced under the RIIO (Revenue = Incentives+ Innovation + Output) model (see below).
- Monitoring quality of services by setting a set of guaranteed standards of performance, covering a range of measures. Incentives for the regulated companies to improve service quality are put in place through financial rewards and penalties.
- An important piece of work that the networks team has undertaken with the Department of Energy and Climate Change (DECC) has been to set up the regulatory framework for the operation and licensing of cables that will carry electricity from offshore wind farms to the onshore grids. These links will be subject to the same price-control approach used for onshore networks.
- Deciding upon certain proposed industry code changes (some changes are determined by industry or governance panels), although the Ofgem cannot raise a proposal itself.

The Ofgem has important duties relating to the environment and sustainable development, and the Secretary of State for Trade and Industry has provided statutory guidance on environmental matters to which it must have regard.¹⁸³⁴ The Ofgem has expressed a commitment to its new sustainable development duty: to playing its part in 'facilitating the transition to a low carbon energy sector ... taking full account of the impact on the environment across the range of ... decision-making'. The Ofgem contributes to the debate on how to reduce carbon emissions from the energy sector in the most cost-effective manner, and aims to administer government environmental programmes (such as the Renewables Obligation, Climate Change Levy exemptions and the Carbon Emission Reduction Target) efficiently and effectively.

Consultation of Interested Parties

The Ofgem has statutory duties under the *Gas Act* and the *Electricity Act* to consult when exercising its statutory powers. The Ofgem endeavours to keep its operations transparent through full and

¹⁸³² Ofgem, *The Gas and Electricity Markets Authority*. Available at: <http://www.ofgem.gov.uk/About%20us/Authority/Pages/TheAuthority.aspx> [accessed on 6 June 2013].

¹⁸³³ Ofgem, *About Us*, *op. cit.*

¹⁸³⁴ Ofgem, *Environmental Programmes*. Available at: <http://www.ofgem.gov.uk/Sustainability/Environment/Pages/Environment.aspx> [accessed on 6 June 2013].

thorough consultation in developing decisions.¹⁸³⁵ The Ofgem may also consult on behalf of other bodies, such as the Office of Fair Trading (OFT), in merger cases.

As part of its 'Ways of Working' review in 2011, the Ofgem published a guidance document, setting out its approach to consultation.¹⁸³⁶ For formal consultation, the Ofgem typically publishes a document or letter online, setting out relevant issues, possible options for consideration and an invitation for views. Additional documents may also be published as a policy develops. The Ofgem may also undertake informal pre-consultation in the form of seminars and meetings before publishing any formal consultation document.

The Ofgem is generally required to carry out a Regulatory Impact Assessment (RIA) or publish reasons when it does not.¹⁸³⁷ This requirement applies to its functions under Part 1 of the *Electricity Act* or *Gas Act*, or for any other proposal it considers to be important. Environmental Impact Assessments (EIAs) are also undertaken to satisfy statutory environmental objectives. While the Ofgem expects that EIAs will usually form a part of its RIA, it has noted that a separate environmental statement may be prepared for large matters such as price-control reviews.¹⁸³⁸

In recent years, the Ofgem has also increased its focus on engaging with consumers.¹⁸³⁹

The Gas and Electricity Consumer Council ('EnergyWatch') was established under the *Utilities Act 2000* to represent consumers and act as a consumer advocate to protect and promote the interests of existing and future gas and electricity consumers in the UK. On 1 October 2008, EnergyWatch was merged with Postwatch and with the Welsh, Scottish and National Consumer Councils to form a new statutory National Consumer Council known as 'Consumer Focus'. Consumer Focus has three core functions: to represent the views of consumers to Ministers, the European Commission and regulatory bodies; to research consumer matters and views; and to facilitate the dissemination of advice and information to consumers. Consumer Focus has legislative powers to: investigate a consumer complaint that is of wider interest, conduct research, and make an official 'super-complaint' to the Ofgem about failing services.¹⁸⁴⁰ Consumer Focus has changed its name to Consumer Futures.¹⁸⁴¹ Within the legal framework of the National Consumer Council, it will fulfill the responsibilities of the statutory consumer body in energy and postal services in Great Britain, water services in Scotland and postal services in Northern Ireland. It will also have a wider role in applying learning and insight across other regulated markets.

Under the Government's 'consumer-landscape reform', Consumer Futures' Regulated Industries Unit (RIU) will become part of the Citizens Advice Service in April 2014, while responsibility for representing postal service consumers in Northern Ireland is to be transferred to the Consumer Council for Northern Ireland. The reorganisation of the network of organisations that provide advice and assistance to consumers and that enforce consumer law is designed to make the network simpler and more efficient.¹⁸⁴² Under the reform, the Citizens Advice Services has taken on responsibilities for general consumer advocacy. In addition, it has taken on the national co-ordination role of consumer advice, information and education about consumer rights previously performed by the OFT.

In relation to consumer involvement in price control decisions, a number of changes have been introduced in recent years which give consumers a more prominent role in regulatory decision-making. Following the introduction of the RIIO regulatory framework, transmission and distribution companies are now required to engage (and are rewarded for engaging) with consumers of their

¹⁸³⁵ Ofgem, *About Us*, *op. cit.*

¹⁸³⁶ Ofgem, *Guidance on Ofgem's Approach to Consultation*, 20 December 2011. Available at: [http://www.ofgem.gov.uk/Pages/MoreInformation.aspx?docid=5&refer=About us/BetterReg](http://www.ofgem.gov.uk/Pages/MoreInformation.aspx?docid=5&refer=About%20us/BetterReg) [accessed on 12 July 2013].

¹⁸³⁷ Under s. 5A of the *Utilities Act 2000* as amended by the *Sustainable Energy Act*.

¹⁸³⁸ Ofgem, *Environmental Policy*. Available at: <http://www.ofgem.gov.uk/Sustainability/Environment/Policy/Pages/Policy.aspx> [accessed on 6 June 2013].

¹⁸³⁹ Ofgem, 'Ways of Working' – *Ofgem's Response to Issues Raised in the Ofgem Review*, 12 July 2011. Available at: [http://www.ofgem.gov.uk/Pages/MoreInformation.aspx?docid=2&refer=About us/BetterReg](http://www.ofgem.gov.uk/Pages/MoreInformation.aspx?docid=2&refer=About%20us/BetterReg) [accessed on 12 July 2013].

¹⁸⁴⁰ Consumer Focus website. Available at: www.consumerfocus.org.uk [accessed on 7 June 2013].

¹⁸⁴¹ Consumer Futures website. Available at: <http://www.consumerfutures.org.uk/> [accessed on 7 June 2013].

¹⁸⁴² Inside Government, *Providing Better Information and Protection for Consumers*, Policy, updated on 8 April 2013. Available at: <https://www.gov.uk/government/policies/providing-better-information-and-protection-for-consumers/supporting-pages/consumer-and-competition-landscape-reform> [accessed on 7 June 2013].

services on various aspects of their proposed business plans which they submit as part of the price control process.

The Ofgem and the regulated companies have established various processes to facilitate this engagement with users. The engagement process typically begins with the Ofgem setting up a number of workshops, open to all, which are focussed on defining the 'outputs' that stakeholders, including consumers, wish to see addressed in a company's business plan. These workshops can include a number of working groups on specific issues.¹⁸⁴³ Once the outputs have been defined (at a general level) the process shifts to the company, and the role of the regulator generally becomes one of ensuring that stakeholders and consumers are getting the information they need.

The Ofgem has also established a 'consumer challenge panel', which is intended to act as a 'critical friend' to the Ofgem, and to ensure that price-control settlements are in the best interest of consumers.¹⁸⁴⁴ The consumer challenge panel for the current transmission price control review comprises six members who are 'consumer experts' and include: a representative from the sustainable energy sector; an academic interested in consumer matters; a representative of the consumer representative body (Consumer Futures) and other representatives. The consumer challenge panel meets with the regulated company directly to discuss their business plan. Interaction between the Ofgem and the consumer challenge panel in the context of a price review takes the form of meetings between the panel and senior staff of the regulator involved with the price review, as well as opportunities for the panel to present to the Board of the regulator on key points.

Timeliness

The time permitted for the Ofgem to respond to an initial consultation, with either a further consultation document or a decision document, depends on: the breadth; complexity; degree of urgency; and the impact of the issues raised through the consultation. Three distinct consultation periods are used:

- A maximum period of twelve weeks for consultations on issues that are expected to be of wide significance and interest.
- A standard period of eight weeks for consultations on issues that are less likely to have a very wide impact and be the subject of substantial interest.
- Four weeks for consultations on issues that are urgent, or which represent minor changes to existing policies, or where external constraints on timetables apply.

The Ofgem may accept late submissions, and the contact person nominated on the consultation document is able to advise if a late submission is acceptable.¹⁸⁴⁵

Extension of time for the Ofgem is possible on the basis of prioritisation of resources. In the case of any significant delay in the decision-making process, the Ofgem will notify relevant stakeholders and provide the reasons.¹⁸⁴⁶

Information Collection, Disclosure and Confidentiality

The Ofgem's statutory powers with respect to information are under the *Electricity Act 1989* (section 28),¹⁸⁴⁷ and the *Gas Act 1986* (section 12 (6)-(7)).¹⁸⁴⁸ It has the power to acquire information, including documents, from those who the Ofgem considers may have contravened relevant legislation. However, this does not apply if the person cannot be compelled to produce such a document in civil proceedings in the UK High Court.

¹⁸⁴³ Ofgem, *Working Groups*. Available at: <http://www.ofgem.gov.uk/Networks/PriceControls/WorkingGroups/Pages/WG.aspx> [accessed on 12 July 2013].

¹⁸⁴⁴ Ofgem, *Consumer First*. Available at: <http://www.ofgem.gov.uk/Sustainability/Cp/CF/Pages/CF.aspx> [accessed on 12 July 2013].

¹⁸⁴⁵ *Ibid.*, p. 9.

¹⁸⁴⁶ Ofgem, *Guidance on Ofgem's Approach to Consultation*, 20 December 2011, p. 10. Available at: <http://www.ofgem.gov.uk/Pages/MoreInformation.aspx?docid=5&refer=About us/BetterReg> [accessed on 12 July 2013].

¹⁸⁴⁷ *Electricity Act 1989*. Available at: <http://www.legislation.gov.uk/ukpga/1989/29/contents> [accessed on 7 June 2013].

¹⁸⁴⁸ *Gas Act 1986*. Available at: <http://www.legislation.gov.uk/ukpga/1986/44> [accessed on 7 June 2013].

The Ofgem generally publishes the information that it collects on its website, and may publish confidential information if such publication is in the public interest and facilitates the carrying out of its regulatory role. The Ofgem will, as far as practical, exclude the publication of commercially-sensitive information that relates to an individual or body. This is in accordance of section 105 of the *Utilities Act 2000* which provides general restrictions on disclosure of information.¹⁸⁴⁹ As a result, the Ofgem does not routinely publish reports and papers provided for consideration at the Gas and Electricity Markets Authority (GEMA) meetings (see below for details).¹⁸⁵⁰

In line with other UK regulators, information collected by the Ofgem is generally subject to the *Freedom of Information Act 2000* and the *Data Protection Act 1998* that regulate the use of personal data relating to individuals. The Ofgem has published its data protection and records management policy.¹⁸⁵¹

Decision-making and Reporting

The Ofgem is governed by the GEMA. It operates under the prescribed *Rules of Procedure*¹⁸⁵² that set out, among other things, the conduct of the GEMA's meetings, delegations and committees, and conflicts of interest. The GEMA's decisions are made by majority voting of board members present at a board meeting. If the vote is tied, the Chairperson has a second or casting vote.

Under s.5A of the *Utilities Act 2000*, the GEMA is required to undertake impact assessments of important policy proposals. Otherwise, it needs to publish a statement setting out its justifications for not carrying out an impact assessment.¹⁸⁵³ An impact assessment must set out an assessment of the costs and benefits, and the social and environmental impacts of, implementing the policy proposal.

The Ofgem must justify its regulatory decisions. On the basis of information collected through consultation and from its own research, it will ultimately issue a decision document that will contain its response to issues raised by interested parties during the consultation period. The Ofgem publishes all consultation and decision documents on its website. On request, the Ofgem will endeavour to provide documents in alternative formats to aid accessibility. It maintains a free email news service which notifies subscribers on a daily basis when new documents are published.¹⁸⁵⁴

Appeals

Appeals are heard by the CAT as outlined in the section on 'Approach to Competition and Regulatory Institutional Structure'. It can hear appeals on the merits in respect of decisions made by the Ofgem under the *Competition Act 1998*.

As also discussed previously, market investigation referrals under the *Enterprise Act 2002* are undertaken by the CC. The CC also hears appeals against price-control decisions and licence-modification decisions made by the Ofgem. The appeal arrangements were changed as part of the RIIO changes in 2010 to introduce a consumer right of appeal. This can be undertaken, through specialist consumer bodies (such as Consumer Futures) that have the third-party rights of appeal from the Ofgem's final decision.¹⁸⁵⁵

Regulatory Development

The following four projects are being, or have recently been, conducted:

¹⁸⁴⁹ *Utilities Act 2000*. Available at: http://www.legislation.gov.uk/ukpga/2000/27/pdfs/ukpga_20000027_en.pdf [accessed on 7 June 2013].

¹⁸⁵⁰ Ofgem, *How We Make Decisions*. Available at: <http://www.ofgem.gov.uk/About%20us/transparency/ps/hwmd/Pages/hwmd.aspx> [accessed on 7 June 2013].

¹⁸⁵¹ Ofgem, *Managing Data*. Available at: <http://www.ofgem.gov.uk/About%20us/transparency/md/Pages/md.aspx> [accessed on 7 June 2013].

¹⁸⁵² Ofgem, *Rules of Procedure of the Gas and Electricity Markets Authority*, 2012. Available at: <http://www.ofgem.gov.uk/About%20us/Documents1/Ofgem%20Rules%20of%20Procedure.pdf> [accessed on 6 June 2013].

¹⁸⁵³ Ofgem, *Impact Assessment Guidance*. Available at: <http://www.bis.gov.uk/files/file44544.pdf> [accessed on 6 June 2013].

¹⁸⁵⁴ Ofgem, *Guidance on Ofgem's Approach to Consultation*, 20 December 2011, p. 11. Available at: [http://www.ofgem.gov.uk/Pages/MoreInformation.aspx?docid=5&refer=About us/BetterReg](http://www.ofgem.gov.uk/Pages/MoreInformation.aspx?docid=5&refer=About%20us/BetterReg) [accessed on 12 July 2013].

¹⁸⁵⁵ Ofgem, *A Guide to Price Control Modification References to the Competition Commission – Licensee and Third Party Triggered References*, 4 October 2010. Available at: <http://www.ofgem.gov.uk/Networks/rpix20/Pages/RPIX20.aspx> [accessed on 12 July 2013].

RIIO: revenue = Incentives + Innovation + Outputs:¹⁸⁵⁶ In March 2008, the Ofgem launched a comprehensive review of the 20-year-old framework used to regulate gas and electricity networks, known as the RPI-X@20 review. The new framework is designed to promote smarter gas and electricity networks for a low-carbon future. The RIIO model is now being implemented as part of the price-controls for electricity and gas transmission (RIIO-T1) and gas distribution (RIIO-GD1).

Discovery:¹⁸⁵⁷ Project Discovery was an investigation into whether future security of supply of energy could be provided by existing market arrangements. The Ofgem found that ‘far-reaching reforms’ were needed to meet security challenges that may arise in the next ten years. These include requiring suppliers to demonstrate they have sufficient plans in place to cope better with threats to security of supply and placing obligations on the system operator (National Grid) to take additional measures to help further improve security of supply.

TransmiT:¹⁸⁵⁸ Project TransmiT is the Ofgem’s independent review of the charging arrangements for gas and electricity transmission networks, and the connection arrangements that the Department of Energy and Climate Change (DECC) has explicitly left for the Ofgem and the industry to resolve. Project TransmiT is being delivered in a number of phases – the first, looking at whether all or part of the transmission charging regime should be modified, has now been completed, with the conclusion that incremental changes should be made to current charging arrangements to improve the accuracy of cost targeting for generation charges. The project also aims to identify what changes can be made to facilitate the timely connection of new generation. In addition to seeking views on these issues from stakeholders, Project TransmiT is drawing on the expertise of an independent advisory panel and a number of reports prepared by experienced academic commentators.

Retail Market Review:¹⁸⁵⁹ The review found that structural features of the retail energy market served to weaken competition, to the detriment of consumers. It also found that pricing information was complex, and there were a high number of ‘sticky’ consumers. In relation to these concerns, it made a number of proposals including the simplification of tariff structures.¹⁸⁶⁰

2. Telecommunications

Major telecommunications service providers operate in all or some of the segmented markets, broadly classified into traditional fixed-line telephone services, mobile services and internet services. Penetration of telecommunications technologies is high, with mobile penetration exceeding 100 per cent. Broadband (fixed connection) penetration is 34.3 per 100 inhabitants, substantially above the OECD average of 26.3.¹⁸⁶¹ Wireless internet penetration is 71.8 subscriptions per 100 inhabitants (OECD average is 62.8), all of which is mobile internet.

In the fixed-line market, British Telecom (BT), successor of the former state monopoly Postal Office Telecommunications, was privatised in 1984 and remains a major fixed-line provider. Since 2005, when BT underwent functional separation of its wholesale and retail services, one part has provided fixed-line connectivity and the other provides content and other value-added services. Openreach is the independently operating business owned by BT and created to manage the network infrastructure. Before separation, there were only 105 000 unbundled (LLU) lines, by 2011, 92 per cent of UK households had access to an LLU-enabled BT local exchange.¹⁸⁶²

¹⁸⁵⁶ Ofgem, *RIIO – A New Way to Regulate Energy Networks*. Available at: <http://www.ofgem.gov.uk/Media/FactSheets/Documents1/re-wiringbritainfs.pdf> [accessed on 6 June 2013].

¹⁸⁵⁷ Ofgem, *Project Discovery*. Available at: <http://www.ofgem.gov.uk/Markets/WhlMkts/monitoring-energy-security/Discovery/Pages/ProjectDiscovery.aspx> [accessed on 6 June 2013].

¹⁸⁵⁸ Ofgem, *Project TransmiT*. Available at: <http://www.ofgem.gov.uk/Networks/Trans/PT/Pages/ProjectTransmiT.aspx> [accessed on 6 June 2013].

¹⁸⁵⁹ Ofgem, *Retail Market Review*. Available at: <http://www.ofgem.gov.uk/Markets/RetMkts/rmr/Pages/rmr.aspx> [accessed on 6 June 2013].

¹⁸⁶⁰ For detailed discussion, see: Ofgem, *The Retail Market Review – Statutory Consultation on the RMR Domestic Proposals*, 20 June 2013. Available at: <http://www.ofgem.gov.uk/Pages/MoreInformation.aspx?docid=521&refer=Markets/RetMkts/rmr> [accessed on 12 July 2013].

¹⁸⁶¹ OECD Broadband Portal, Fixed and Wireless Broadband per 100 Inhabitants’, December 2012, updated 18 July 2013. Available at: <http://www.oecd.org/sti/broadbandandtelecom/oecdbroadbandportal.htm> [accessed on 22 July 2013].

¹⁸⁶² Ofcom, *Communications Market Report 2012*, p. 24. Available at: http://stakeholders.ofcom.org.uk/binaries/research/cm/cmr12/CMR_UK_2012.pdf [accessed on 7 June 2013].

In 2012 BT had 42.5 per cent of residential fixed-line connections and 39.6 per cent of the total residential fixed-line call minutes.¹⁸⁶³ For business, BT had 47.3 per cent of connections and 36.0 per cent of minutes.¹⁸⁶⁴ Virgin Media is the second largest provider in these markets.

In mobile communications there are four major network operators – Everything Everywhere (a merger of Orange and T-Mobile in the UK), Vodafone, O2, and Hutchinson 3G – and a large number of mobile virtual network operators (MVNOs) and other service providers. Everything Everywhere is now the largest mobile service provider with 34.8 per cent of total mobile retail revenue. BT does not own or operate a mobile telecommunications service.

BT's retail share of broadband connections was 29.6 per cent in 2012.¹⁸⁶⁵ Virgin (20.2 per cent), TalkTalk (18.5 per cent), and Sky (17.9 per cent) are the largest competing entrants.

Regulatory Institutions and Legislation

The Office of Communications (Ofcom) is the economic regulator for the UK communications market, spanning television, radio, telecommunications, wireless communications services, and (since 2011) postal services.¹⁸⁶⁶ It is responsible for both content and infrastructure regulation. It was established under the *Office of Communications Act 2002* to assume the duties and responsibility of the four existing regulators, namely the Broadcasting Standards Commission, the Director General of Telecommunications (OfTel), the Independent Television Commission and the Radio Authority. The Ofcom is governed by a Board which consists of a Chairman and both executive and non-executive members. There may be up to nine members of the Board in addition to the Chairman. The Chairman and non-executive members are appointed by the Secretary of State for the Department of Culture, Media and Sports. Appointments are for a fixed period – current Chairman Collete Bowe began a five-year term in 2009, most other board members have three-year terms. Membership can be renewed at the discretion of the Department. The Ofcom is located in London.

The enactment of the *Communications Act* in July 2003 moved the UK away from a licence-based authorisation system to one where operators are under a 'general conditions of entitlement' regime; constituting an obligation that operators comply with a set of rules. There are general conditions which apply to all businesses and others that apply to specific entities. For example, certain conditions apply only to businesses with significant market power (SMP).

In addition, some businesses are required to provide undertakings pursuant to section 154 of the *Enterprise Act 2002*. Undertakings are legal commitments. If any of the Undertakings are breached, the Ofcom can apply to the Court for an injunction to compel compliance. In the case of BT's undertakings, an alternative procedure is provided under which the Ofcom can issue BT with a direction. While BT is entitled, through a decision of the Board, to reject such a direction, this could lead to legal action by the Ofcom. A breach could also lead to the Ofcom making a reference to the CC. Third-parties who suffer loss as a result of a breach may take action against BT for damages.¹⁸⁶⁷

The Ofcom's powers derive from the *Communications Act 2003*, the *Wireless Telegraphy Act 2006*, the *Broadcasting Acts 1990 and 1996*, the *Digital Economy Act 2010* and the *Postal Services Act 2011*.¹⁸⁶⁸ According to the *Communications Act 2003*, its principal duty is to further the interests of citizens in relation to communications matters and to further the interests of consumers in relevant markets, where appropriate by promoting competition. The performance of its regulatory functions is subject to regulatory principles set out in the *Communications Act 2003*,¹⁸⁶⁹ requiring it to:

- regulate with a clearly articulated and publicly reviewed annual plan;

¹⁸⁶³ Ofcom, *Telecommunications Market Data Update Q4 2012*, Tables 7 and 8. Available at: <http://stakeholders.ofcom.org.uk/binaries/research/cmr/telecoms/Q42012.pdf> [accessed on 7 June 2013].

¹⁸⁶⁴ *Ibid.*, Tables 12 and 13.

¹⁸⁶⁵ Ofcom, *Telecommunications Market Data Update Q4 2012*, Table 16. Available at: <http://stakeholders.ofcom.org.uk/binaries/research/cmr/telecoms/Q42012.pdf> [accessed on 7 June 2013].

¹⁸⁶⁶ Ofcom, *Home*. Available at: <http://www.ofcom.org.uk/> [accessed on 19 July 2013].

¹⁸⁶⁷ BT Group, *Regulation in the UK*. Available at: <http://www.btplc.com/Thegroup/RegulatoryandPublicAffairs/RegulationsintheUK/index.htm> [accessed on 12 June 2013].

¹⁸⁶⁸ Ofcom, *Annual Report and Accounts 2012/13*, 2013, p. 2.

¹⁸⁶⁹ Ofcom, *Statutory Duties and Regulatory Principles*. Available at: <http://www.ofcom.org.uk/about/what-is-ofcom/statutory-duties-and-regulatory-principles/> [accessed on 6 June 2013].

- intervene only when markets alone cannot achieve a particular public policy goal;
- be willing to intervene firmly, promptly and effectively where required;
- strive to ensure its interventions are evidence-based, proportionate, consistent, accountable and transparent in both process and outcome;
- use minimum regulation to achieve the particular policy objective; and
- conduct wide consultation and assess the impact of its proposed regulatory actions before imposing the regulations.

It is also required to research markets constantly, and to aim to remain at the forefront of technological understanding. The Ofcom is also under a statutory duty to consider the needs of vulnerable consumers. Vulnerable consumers are taken to include rural, elderly, low-income consumers, and people with a disability.

Under the *Communications Act*, the Ofcom has the power to impose rules on communications providers who have SMP in particular markets, and rules on all providers as general conditions. Access conditions may be imposed on providers of communications networks if the provider is found to have SMP in certain markets. SMP is assessed through a market review carried out under the EU Directives (transposed by the *Communications Act*).

The Ofcom is continually reviewing UK telecommunications markets. A review completed in 2005 focused on assessing the prospects for maintaining and developing effective competition in the UK telecommunications markets, having regard to investment and innovation. Following the review, the Ofcom accepted a legally enforceable undertaking from BT in lieu of making a reference to the CC under the *Enterprise Act 2002*.¹⁸⁷⁰ Previously, BT, as the monopoly provider of the UK fixed-line network, had been subject to RPI-minus-X retail price regulation since the early 1980s.

The undertaking committed BT to substantial changes in its operation and behaviour, including the offering of a wholesale line rental product (equivalent between itself and its customers) and the operational separation of its wholesale and retail functions. As a consequence, retail-price regulation was replaced with access regulation to achieve equality of access to BT's natural monopoly wholesale services. A 2009 review and consultation on BT's market power maintained the conclusion that BT has SMP in the markets for wholesale fixed-call origination and geographic call termination. The network charge controls (NCCs) applied to BT in these markets were updated and will expire in September 2013. Another round of assessment has already taken place and is to be completed before the current controls expire.¹⁸⁷¹ In its consultation paper published in February 2013, the Ofcom came to a similar conclusion that BT had SMP in the United Kingdom excluding the Hull Area in the markets for wholesale fixed-call origination, and each service provider (including BT) has SMP for the supply of wholesale call termination to its respective customers. The Ofcom proposed the application of the NCCs to BT in these markets.

Charge controls for local loop unbundling (LLU) and wholesale line rental (WLR) services have also been set following the Ofcom's 2010 reviews of the Wholesale Local Access (WLA) and Wholesale Fixed Analogue Exchange Line (WFAEL) markets. In both markets, the Ofcom identified that BT (Openreach) has SMP and that charge controls are necessary as a remedy to address Openreach's ability to fix or maintain prices at an excessively high level for LLU and WLR services. These charge controls will cover two years; 2012-13 and 2013-14. An extension of the controls will be subject to further market reviews.¹⁸⁷²

In relation to mobile communications, the Ofcom determines disputes between providers of electronic communications networks and services. It is accountable to the EU for its responsibilities in relation to competition at the European level. These accountabilities include the regulation of mobile numbering and portability, international roaming and mobile termination rates (MTRs). In March 2011 the Ofcom's review of the UK mobile termination market concluded that all four national mobile

¹⁸⁷⁰ Ofcom, *Final Statement on the Strategic Review of Telecommunications and Undertakings in lieu of a Reference under the Enterprise Act 2002*, 22 September 2005.

¹⁸⁷¹ Ofcom, *Review of the Fixed Narrowband Services Markets*. Available at: <http://stakeholders.ofcom.org.uk/consultations/nmr-13/> [accessed on 17 July 2013].

¹⁸⁷² Ofcom, *Charge Control Review for LLU and WLR Services*. Available at: <http://stakeholders.ofcom.org.uk/consultations/wlr-cc-2011/statement-march2012/> [accessed on 17 July 2013].

communications providers (MCPs) (Everything Everywhere, O2, Vodafone, and Hutchison 3G) display SMP. They are further subject to network charge control for the period 1 April 2011 to 31 March 2015.¹⁸⁷³

As part of this review, the Ofcom decided to switch from a Long Run Incremental Costs Plus (LRIC+) formula for regulating mobile termination rates (MTRs) to a pure LRIC format (Bottom-Up Long Run Incremental Costs (BU-LRIC)). The LRIC cost standard is a method for calculating the average incremental cost per minute of traffic terminated by an average-efficient operator, compared with not providing that service. The LRIC+ cost standard, which the Ofcom used in previous price controls, includes a mark-up for joint and common network costs on top of the LRIC.¹⁸⁷⁴

A bottom-up model of network costs means that cost components are identified at a granular level and cost causation relationships are defined to link the quantity of each of these cost components with outputs and other cost drivers. Once the bottom-up model is built, the Ofcom calibrates parts of the model against financial and network parameter data. This ensures that the Ofcom's model of a hypothetical efficient operator reasonably matches the infrastructure deployment of the national mobile communications providers on average.¹⁸⁷⁵

Mobile communications providers have until 1 April 2014 to transition to a pure BU-LRIC pricing structure. These decisions were appealed to the CAT by a number of mobile providers. On 9 February 2012, the CAT determined that the pure BU-LRIC was appropriate and brought the transition deadline forward one year to 1 April 2013. In response, a revised final decision on MTRs was published in May 2012.¹⁸⁷⁶

Consultation of Interested Parties

As previously discussed, the Ofcom is continually conducting inquiries of various kinds; including reviews of telecommunications markets and investigations of SMP in mobile, fixed narrowband and fixed broadband. Further, the Ofcom has powers to investigate complaints about breaches of conditions imposed on providers; and a duty to resolve disputes relating to conditions imposed under the EU Directives. All of these processes involve extensive consultation with interested parties; as detailed in the documents referenced above and as described on its website:¹⁸⁷⁷

Ofcom seeks people's views on a very broad range of policies; at any one time we will have a number of consultations open for comment. This area of our website explains how to find a particular consultation – and how to respond to our consultation teams.

The decisions that Ofcom takes must be based on evidence and need to take into account the views of people and organisations with an interest in the outcome. This Plain English guide explains Ofcom's consultation process.

The Ofcom is advised by four Advisory Committees for the Nations (England, Northern Ireland, Scotland and Wales) established under the *Communications Act*.¹⁸⁷⁸ The Committees' members report directly to the Ofcom Board and are appointed by an open public process. The Committees are tasked with identifying communications issues that are of particular importance to their nation and to

¹⁸⁷³ Ofcom, *Wholesale Mobile Voice Call Termination: Statement*, 15 March 2011. Available at: http://stakeholders.ofcom.org.uk/binaries/consultations/mtr/statement/MCT_statement.pdf [accessed on 17 July 2013].

¹⁸⁷⁴ Competition Appeal Tribunal, *British Telecommunications plc v Office of Communications*, Case 1180/3/3/11 Available at: http://www.google.com.au/url?sa=t&rct=j&q=9%20february%202012%2C%20the%20cat%20determined%20that%20the%20pure%20bu%20lic%20&source=web&cd=2&cad=rja&ved=0CDQQFjAB&url=http%3A%2F%2Fwww.catribunal.org.uk%2Ffiles%2F1.1180-83_MCT_Determination_Excised_090212.pdf&ei=22YIUdrqEOIhAf0kYCACQ&usq=AFQjCNFc2uhLuo3YKjHgfOf8BBiYAVnZGQ&bvm=bv.41642243.d.dGY [accessed on 17 July 2013].

¹⁸⁷⁵ *Ibid.*

¹⁸⁷⁶ European Commission, *United Kingdom 2011 Telecommunication Market and Regulatory Developments*, pp. 10-11. Available at: http://ec.europa.eu/information_society/digital-agenda/scoreboard/docs/2012/UK_Country_Chapter_17th_Report.pdf [accessed on 7 June 2013].

¹⁸⁷⁷ Ofcom, *Consultations*. Available at: <http://www.ofcom.org.uk/ofcoms-publication-scheme/> [accessed on 17 July 2013]

¹⁸⁷⁸ Ofcom, *Committees*. Available at: <http://www.ofcom.org.uk/about/how-ofcom-is-run/committees/> [accessed on 19 July 2013].

offer advice to the Ofcom accordingly. The Committees may also be asked to provide advice on non-metropolitan issues even if there is not a relevant national issue.

As per amendments to the European Framework for Electronic Communications, the Ofcom is required to seek an opinion from the Body of European Regulators for Electronic Communications (BEREC) for any matter involving regulation of cross-border electronic communications.

The Ofcom has statutory duties under the *Communications Act* to further the interests of citizens and consumers in relation to communications matters (s.3(1)). The Communications Consumer Panel (previously the Ofcom Consumer Panel) was established in 2004, as required by s.16(2) of the *Communications Act*, replacing its two predecessors – the Advisory Committee on Telecommunications and Telecommunications Advisory Panel.¹⁸⁷⁹ A non-executive member of Consumer Focus (the new National Consumer Council) may be appointed as a member of the Consumer Panel. Panel members are appointed by the regulator but operate at full arm's length and with their own budget.

The Panel advises the Ofcom on the consumer interest in the markets that the Ofcom regulates, with particular attention paid to vulnerable consumers (for example, rural consumers, older people, people with disabilities and those on low incomes or otherwise disadvantaged). The Panel states that it works closely with the Ofcom on policies early in their development – before public consultation – to build consumer interests into the Ofcom's decision-making. The Ofcom has entered into a Memorandum of Understanding with the Consumer Panel.

The Ofcom has also established, as required, an Advisory Committee for Older (over 60) and Disabled People to provide advice and comment on consultations affecting older and disabled people.¹⁸⁸⁰ This Advisory Committee is appointed by the Ofcom and reports directly to the Ofcom Board. The Chairman of this Advisory Committee meets formally with the Ofcom's Chairman and Chief Executive Officer each year, and also meets periodically with Chairs of other Ofcom advisory committees.

The Ofcom's dispute-resolution powers (s.190 of the *Communications Act*) are limited to resolving disputes about electronic communication networks and services and spectrum.¹⁸⁸¹ A dispute is defined as the failure of commercial negotiation about a matter that falls within the scope of s.185 of the *Communications Act*. This may include the provision of network access and/or other regulatory conditions imposed by the Ofcom.

Issues that do not fall within the Ofcom's dispute-resolution powers may still be referred to the Ofcom as a complaint. A complaint is an allegation that the *Competition Act* (and/or Articles 101 and 102 of the EC Treaty), or a specific *ex ante* condition, has been breached. As *ex ante* conditions are imposed following a market review and the finding of SMP in a market, the Ofcom will not usually impose rights or obligations in the context of a dispute about the provision of new forms of access that have not been subject to a market review. However, if the dispute raises significant regulatory issues, the Ofcom may undertake a market review into whether or not an access obligation should be imposed before resolution.

The Ofcom will only invoke its dispute-resolution powers where there is evidence to back up the allegation and to demonstrate that 'best endeavours' have resulted in failed commercial negotiation.

The Ofcom only consults on the outcome of a dispute when the issue is of interest to a large number of stakeholders. Otherwise, consultation is limited to the parties involved in the dispute. Before commencing a formal consultation process, the Ofcom engages in pre-consultation with stakeholders to ensure it has a clear understanding of the issues. During the formal process, interested parties are able to make written submissions in response to a consultation document.¹⁸⁸²

¹⁸⁷⁹ Communications Consumer Panel, *Informing the Debate*, July 2012. Available at: <http://www.communicationsconsumerpanel.org.uk/CCP%20AR%202011-12.pdf>, [accessed on 6 June 2013].

¹⁸⁸⁰ Ofcom, *Advisory Committee for Older and Disabled People*. Available at: <http://www.ofcom.org.uk/about/how-ofcom-is-run/committees/older-and-disabled-people/> [accessed on 12 June 2013].

¹⁸⁸¹ Ofcom, *Dispute Resolution Statement*, 7 June 2011. Available at: <http://stakeholders.ofcom.org.uk/consultations/dispute-resolution-guidelines/statement/> [accessed on 6 June 2013].

¹⁸⁸² Ofcom, *Annual Report 2007-08*, 2008.

In June 2011, the Ofcom concluded a review of its dispute-resolution powers and process. The Ofcom had observed an increase in the number of disputes being referred to it, and a subsequent increase in costs and decrease in timeliness. The review, which coincided with both a government review of public spending on regulatory institutions and the implementation of amendments to the European Framework for Electronic Communication, resulted in a reduction of the Ofcom's mandatory dispute-resolution requirements and an expansion of the category of persons who can refer disputes to the Ofcom for resolution. The new resolution processes focus on involving relevant parties early on at senior management level and replaces the procedure of issuing a detailed draft decision for consultation with a smaller document outlining the Ofcom's provisional views and assessment.

The Ofcom must also seek a recommendation from the BEREC for any cross-border disputes.

The Ofcom has formal information-gathering powers for conducting investigations and will take enforcement action against businesses that fail to respond to formal requests for information. Where time permits, or if the information request is complex, the Ofcom will issue a draft information request and allow three days for identification by stakeholders of the practicality of providing the information within the specified deadline.

The dispute will be considered by an internal sub-committee which summarises the information gained through consultation and market research. The summary is to be completed two weeks after the completion of the consultation process. The summary is provided to the Board, which has ultimate decision-making authority.

In contrast to disputes, the Ofcom's decisions on complaints result in a decision that the *Competition Act*, or a specific *ex ante* condition, has, or has not, been breached, rather than a direction as to the arrangements that should apply between two parties to a dispute. Where the Ofcom reaches a decision that there has been a breach of a condition or the *Competition Act*, it must follow procedures set out in either the *Competition Act* or the *Communications Act*.

*Timeliness*¹⁸⁸³

To decide the period of consultation, the Ofcom classifies its consultation into three categories:¹⁸⁸⁴

- Ten weeks for consultations on issues that contain major policy initiatives and/or are expected to be of wide interest;
- Six weeks for consultations on issues that contain important policy proposals and/or are of limited interest; and
- One month for consultations on issues that are urgent or technical or of less significance, which represent minor changes to existing policies, or where minimum statutory consultation period applies.

In 2012-13, seven of the nineteen telecommunications matters were consulted for ten weeks or longer. The majority of the Ofcom's regulatory decisions in communications and postal services were made within ten weeks following the consultation.¹⁸⁸⁵

Once the Ofcom has accepted a dispute or complaint, it will publish details of the dispute (unless confidential) in its Competition Review, and seek to resolve the issue as quickly as possible. It seeks to resolve disputes, and complaints about compliance with an *ex ante* condition, within four months. The Ofcom seeks to deal with other types of complaints within six months, own-initiative investigations within six months, and to make an infringement decision within twelve months. If the deadlines are not met, it will publish the reason for the delay. Recognising that incumbents may have incentives to delay determinations of access disputes, it will not usually agree to extend a consultation deadline and enforces parties' obligations to respond to information requests in a timely manner. Final decisions are usually published within ten weeks from the close of the consultation period. There is no set period for an enforcement action under competition law.

¹⁸⁸³ *Dispute Resolution Statement, op. cit.*

¹⁸⁸⁴ Ofcom, *Annual Report and Accounts 2012/13, op. cit.*, p. 39.

¹⁸⁸⁵ *Ibid.*

*Information Disclosure and Confidentiality*¹⁸⁸⁶

The Ofcom has information-gathering powers under the *Communications Act*. A party that fails to provide requested documents or information in their custody to aid an investigation, or that intentionally alters or destroys information, will be subject to a fine on conviction. However, a body or individual is not required to produce any documents that they would not be compelled to produce in civil proceedings in the High Court. Contravention of a notice requiring information can be subject to penalty of £2 million plus £500 per day that the contravention continues and, in certain circumstances, a suspension or restriction of a provider's entitlement to provide networks, services or facilities.¹⁸⁸⁷ The Ofcom's Information Gathering Policy outlines how it will exercise its information gathering powers and possible uses of the information. This includes:

- information concerning future network and service developments that could have an impact on wholesale services; and
- accounting data relating to retail markets that are associated with wholesale markets, where a market power determination has been made in the wholesale markets.

Examples of specific purposes of information include:

- assessing the security of a public electronic communications network or a public electronic communications service, when investigating a complaint or compliance;
- assessing the availability of a public electronic communications network, when investigating a complaint or compliance; and
- identifying electronic communications apparatus that is suitable for shared use.¹⁸⁸⁸

The Ofcom publishes public documents on its website. It has the power to publish any information it considers to be in the public interest by facilitating the performance of the Ofcom's regulatory role. Submitters of confidential material are asked if it may publicly refer to confidential information in non-specific terms and publish general summaries of confidential information, without revealing specifics, if necessary.¹⁸⁸⁹

Disclosure of information obtained by the Ofcom may also be subject to the *Freedom of Information Act*, the *Code of Practice on Access to Government Information* and the *Data Protection Act 1998*, subject to exemptions to disclosure. The Ofcom generally does not release third-party information that has been obtained under a statutory power.

Decision-making and Reporting

The Ofcom is governed by a Board which consists of a Chairman and both executive and non-executive members. The Board provides strategic direction and has oversight of the Ofcom's overall funding and expenditure. It meets at least once a month (except for August). Its agendas and notices of meetings are published on the Ofcom's website. There are a number of committees and advisory bodies which may exercise delegated powers or offer advice to the Board. These committees and advisory bodies include the Consumer Panel, the Content Board, the Nations and Regions Advisory Committees and the Older Persons and Disabled Persons Advisory Committee.

The Ofcom publishes all reports on its website and informs the public via media statements. The Ofcom sets no limits on the length of its reports and decisions are generally published with all related information available in appendices and annexes. The structure of the Ofcom's website allows the history of a decision (for example, the consultation documents, submissions received, and draft decisions) to be easily traced and accessed. If a round of consultation and a draft statement is

¹⁸⁸⁶ *Dispute Resolution Statement, op. cit.*

¹⁸⁸⁷ Ofcom, *Enforcement Guidelines*, 25 July 2012, p. 26. Available at: http://stakeholders.ofcom.org.uk/binaries/consultations/draft-enforcement-guidelines/annexes/Enforcement_guidelines.pdf [accessed on 17 July 2013].

¹⁸⁸⁸ Ofcom, *Update on Policy Concerning Information Gathering for the Purposes of section 145 of the Communications Act 2003 and section 32 of the Wireless Telegraphy Act 2006*. Available at: http://stakeholders.ofcom.org.uk/binaries/consultations/info_gathering/statement/update.pdf [accessed on 30 January 2013].

¹⁸⁸⁹ Further information on the Ofcom publication scheme can be found at: <http://www.ofcom.org.uk/ofcoms-publication-scheme/> [accessed on 30 January 2013].

insufficient to inform and conclude the Ofcom's decision then it is able to undertake a further round of consultation.

Amendments to the European Commission's Telecommunications Framework Directive were transposed into UK legislation in May 2011. This changed the Ofcom's reporting process. The Ofcom now undertakes a consultation process with domestic stakeholders before releasing a draft statement that doubles as the consultation document for the Ofcom's European consultation requirements. The European Commission, BEREC, and other Member States have one month to comment on the draft decision.

Appeals

As noted previously, appeals against the merits of the Ofcom's decisions are heard at the CAT. These include market power determinations, dispute resolution, and other non-price control decisions. The composition and processes of the CAT are contained in the section on 'Approach to Competition and Regulatory Institutional Structure'.

In addition, appeals from telecommunications businesses in relation to price-control decisions are referred by the CAT to the CC in accordance with the CAT's Rules and any direction of the CAT. Where the cases are decided by the CAT as appeals on the merit, the CAT must follow the CC's determination. The composition and processes of the CC are described in the section on 'Approach to Competition and Regulatory Institutional Structure'.

Regulatory Development

The EU framework for electronic communications, amended in 2009, includes four measures – the Framework, Authorisation, Access and Universal Service Directives. The UK notified the European Commission of full transposition of the amended Framework Directive within the deadline of 25 May 2011. These amendments included incorporating consultation processes with BEREC into Ofcom determinations, and enhancing the Ofcom's investigatory obligations regarding regulated entities with Significant Market Power (SMP).

The Ofcom's budget is being reduced by 28.2 per cent over four years finishing in 2014. The reduction in budget has seen Ofcom rely on 'calls for input' before launching formal consultations. Further, the Ofcom is now required to undertake national-level consultation before undertaking European-level consultation. This has been supported by the European Commission – previous practice was to undertake national and European consultation simultaneously, which often led to repeated and prolonged European consultation as the terms of reference changed as a result of national consultation.

3. Postal Services

Royal Mail,¹⁸⁹⁰ with its 350 year history, had been a statutory monopoly until the phased opening-up of the UK mail market for competition commenced in 2003. Its current licence was revised on 3 April 2006, setting out obligations on universal postal service and service standards. It remains fully government-owned. It has approximately 159000 employees, and generates revenue of nearly £10 billion per annum. Royal Mail group revenues declined in 2009-10 and 2010-11, before increasing again in 2011-12. The parcels business is the largest contributor to revenue (about 27 per cent) and volumes are increasing driven by on-line purchasing. Traditional letter volume has decreased by six per cent and five per cent in the last two financial years. Marketing mail provides around 12 per cent of overall revenue. It is undertaking a modernisation program.

Legislation and Regulatory Institutions

Between 2001 and 2011, postal services in the UK were regulated by the Postal Services Commission (Postcomm) under the *Postal Services Act 2000*. This Act gave effect to the *1997 EU Postal Services Directive* (as amended) setting out common rules governing the provision of postal services across Europe. The Act was amended by the *Enterprise Act 2002* and a series of orders and regulations that oversee the mail market, such as the *Postal Services (EC Directive) Regulations 2002*. The *Postal Services Act 2000* also: established the consumer organisation, Postwatch (s.2); required the provision of a 'universal service' of postal services (ss.3-4); and established a licensing

¹⁸⁹⁰ Royal Mail, *Annual Report 2011-12*. Available at: <http://www.royalmailgroup.com/financial-highlights-2012> [accessed on 30 October 2012].

regime for postal-services operators (ss.6-41). It converted the Post Office from a statutory corporation to a public limited company.

The *Postal Services Act 2011* transferred regulatory responsibility for postal services from the Postcomm to the Ofcom, effective from 1 October 2011. The Ofcom's primary duty in relation to postal regulation is to secure the provision of the universal postal service and to determine the needs of postal users.¹⁸⁹¹ The scope of postal regulation covers price and quality of services in relation to universal service, and access to postal network. The Ofcom has concurrent powers under the *Competition Act 1998* to deal with anti-competitive behavior in postal services.

The *Postal Services Act 2011* also made provision for the restructuring of the Royal Mail (i.e., removing the ownership restrictions) and about the Royal Mail Pension Plan. These changes were based on the 2008 reviews (chaired by R Hooper).¹⁸⁹²

Specifically, the Hooper reviews examined three issues: first, the impact of liberalisation on the UK postal market; second, the trends in future market development and the likely impact on postal service providers and consumers; and third, the continued provision of universal services. The initial report from the independent review panel considered that there was a compelling case for action given the presence of substantial threats to the Royal Mail's financial stability, and therefore, the universal service. The final report, delivered in December 2008, concluded that 'sustaining the universal service depends fundamentally on modernising Royal Mail' and recommended a package of changes. These were encapsulated in the *Postal Services Act 2011*.

The primary objectives of postal regulation under this legislation are to ensure the continued provision of a universal postal service by Royal Mail; and to further the interests of postal users wherever appropriate through the promotion of effective competition.

Royal Mail is required to negotiate access agreements with competing postal operators on the use of its network for final delivery on a transparent and non-discriminatory basis. Access agreements are commercial agreements negotiated between access seekers and Royal Mail. If competing postal operators are unable to agree fair terms and conditions for access with Royal Mail, the Ofcom can intervene to ensure that access is made available on appropriate terms. The *Postal Services Act 2011* replaced the licensing regime with a general authorisation regime. It provides that the Ofcom: may provisionally designate a universal service provider; may approve a consumer-redress scheme and require postal operators to be a member of that scheme; and may prepare a statement of the principles that it is proposing to apply in fixing administrative charges.

Formerly, price controls on Royal Mail operations took the form of RPI-minus-X on two baskets of products – captive and non-captive. These arrangements were reviewed by the Ofcom in 2011 because of concerns about Royal Mail's financial position, and the likelihood of continuing uncertainty in the postal market. The Ofcom anticipated continued decline in mail volumes and a consequent upward pressure on unit prices:

In a highly uncertain market, price controls have removed the flexibility that would allow Royal Mail to adjust to changes in demand, while at the same time Royal Mail has been unable to improve.

Under new regulatory arrangements, to apply for seven years, Royal Mail has greater freedom in relation to setting retail prices. These are subject to a number of safeguards, including caps on the price of second-class stamps for standard letters, and on the price of second-class small parcels and large letters, to protect the universal postal service. The Ofcom will monitor Royal Mail's performance, and may intervene if the new arrangements do not deliver the universal service or affordability of mail services. Royal Mail must continue to provide network access to its competitors and, while it will have freedom to set the wholesale price for such access, it is subject to rules regarding the margin between its wholesale and retail prices.

¹⁸⁹¹ Ofcom, *Annual Report and Accounts 2012/13*, *op. cit.*, p. 22.

¹⁸⁹² An Independent Review of the UK Postal Service Sector, (chaired by R. Hooper), *The Challenges and Opportunities Facing UK Postal Services: An Initial Response to Evidence*, May 2008; and *Modernise or Decline: Policies to Maintain the Universal Postal Service in the United Kingdom*, 16 December 2008.

Consultation of Interested Parties

As in relation to telecommunications, the Ofcom uses highly consultative processes in carrying out its functions with respect to postal services.

The role of consumers of postal services in postal regulation has changed substantially over the years, in the direction of greater advocacy and greater centralisation.¹⁸⁹³ The most recent step has been the formation of the Regulated Industries Unit. The role of the RIU, in the words of the Ofcom, is to:¹⁸⁹⁴

provide the primary advocacy input to our work on post, a function it will inherit from Consumer Focus. We hope that RIU work will also be relevant to some of our work in electronic communications markets, and believe there is potential for this where RIU analysis provides insights on issues which cut across regulated industries. For advocacy to work well ... it will be vital for the RIU to work collaboratively with the Communications Consumer Panel which provides ... advocacy and advice to Ofcom, government and other stakeholders.

Other stakeholders, commercial consumers and their trade associations include: the Mail User Association representing major mail users; the Direct Marketing Association (trade organisation in the marketing communications businesses); the Envelope Makers' and Manufacturing Stationers Association; and the Periodical Publisher Association (representing publishers and associated members).

The Ofcom Board and Executive are informed by the contribution of a number of committees and advisory bodies, which are required by the *Communications Act*. These include the Communications Consumer Panel; the England, Northern Ireland, Scotland and Wales Advisory Committees; and the Older Persons and Disabled Persons Advisory Committee.

The Ofcom has powers to resolve access disputes in postal services, where an access condition has been imposed. A party to an access dispute can refer the dispute to the Ofcom for determination. The Ofcom must decide whether it is appropriate to handle the dispute, and then it must inform each of the parties of its decision and the reasons for it. If a dispute is accepted, the procedure for consideration and determination of an access dispute is the procedure that the Ofcom considers appropriate. The procedure it considers appropriate for determining access disputes is set out in its Dispute Resolution Guidelines (originally formulated for telecommunication disputes and the latest version being June 2011) supplemented by its Guidelines for Dispute Resolution for Postal Disputes (issued in April 2012 to account for differences in legal requirements between the postal services and telecommunications).¹⁸⁹⁵ In particular, in exercising its discretion as to whether to handle, and how to determine, postal disputes, it must have regard not only to the factors in the Guidelines, but also to its primary duty of securing the provision of the universal postal service. Under the Guidelines, there is an enquiry phase (where the Ofcom determines whether the dispute has been properly referred and whether to handle it) and the formal proceedings.

Consultation is part of the determination process. The Consultation will be published unless a party to the dispute can show this would seriously prejudice its interests.

The Ofcom has a discretionary power to recover its costs associated with resolving disputes from disputing parties. It has proposed to issue guidance on the types of disputes in which it would seek to recover costs, and the mechanism it would use for calculating them.

¹⁸⁹³ Under the *Postal Services Act 2000*, the Consumer Council for Postal Services (Postwatch), an independent consumer body that replaced the Post Office Users' National Council, was established in 2001. The Postwatch had nine committees across the UK with offices in Scotland, Wales, Northern Ireland and six regions across England. It represented all mail customers (business or individual) in all postal matters to ensure that consumers get the best possible service from postal service operators. The Act also required the regulator to consider the interests of specified vulnerable consumer groups, whose interests were particularly represented by the Postwatch, in making its determinations. On 1 October 2008, the Postwatch was merged with EnergyWatch and the Welsh, Scottish and National consumer councils to form a new National Consumer Council known as 'Consumer Focus', a statutory consumer body established by the *Consumers, Estate Agents and Redress Act 2007*. Among other things, Consumer Focus had the legislative ability to make an official 'super-complaint' to the Ofcom.

¹⁸⁹⁴ Ofcom, *Ofcom's Response to Proposals for Design Principles for the Regulated Industries Unit*. Available at: <http://www.consumerfocus.org.uk/files/2012/07/31-Ofcom-response.pdf> [accessed on 7 June 2013].

¹⁸⁹⁵ Available at: http://stakeholders.ofcom.org.uk/binaries/enforcement/complaints-disputes/Dispute_resolution_april2012.pdf [accessed on 7 June 2013].

Timeliness

As with telecommunications, the Ofcom consults on postal-service matters for a normal period of ten weeks, six weeks or one month; according to the three classified categories of consultation. In 2012-13, only one of the eleven postal service matters was consulted for a period of ten weeks or longer.¹⁸⁹⁶

Where the Ofcom decides it is appropriate for it to handle an access dispute, it must consider the dispute and make a determination as soon as reasonably practicable (Schedule 3, section 15 of the *Postal Services Act 2011*). The Guidelines for Dispute Resolution for Postal Disputes provide that the Ofcom will complete the enquiry phase in 15 working days, and resolve the dispute within four months. During the formal phase, information requests are made and responses received. There is consultation with stakeholders on the Ofcom's provisional reasoning and assessment. The Ofcom no longer publishes a full draft determination for consultation. Instead, it publishes a shorter document at around eight weeks; outlining the reasoning and assessment. Discussion with stakeholders and further analysis is undertaken before final determination. Final determination occurs by the end of four months.

*Information Disclosure and Confidentiality*¹⁸⁹⁷

The *Postal Services Act 2011*¹⁸⁹⁸ provides the Ofcom with the power to access information from relevant stakeholders for the purposes of determining an access dispute, or whether to handle an access dispute. Information must be provided in the specified manner and within the specified period (which period must be reasonable).

The Ofcom has further information-gathering powers in relation to carrying out its other investigative functions in relation to competition complaints and the enforcement of regulatory rules, and may require information from certain persons for certain purposes. The Ofcom must provide reasons why the information is required.

The failure of a party to comply with its obligation to provide information, or to meet any other regulatory obligation under notice from the Ofcom, is an offence, and can result in penalties up to £50 000 and a suspension or restriction of a provider's entitlement to provide postal services.

The Ofcom must publish a statement of its general policy in relation to the exercise of its information powers and the uses towards which it intends to put the information obtained.

Parties are not required to provide documents which they would not be compelled to produce in civil proceeding before the court.

Decision-making and Reporting

The Ofcom's main decision-making body is the Board, which provides strategic direction for the organisation. It has a Non-Executive Chairman, Executive Directors (including the Chief Executive), and Non-Executive Directors. The Executive runs the organisation and answers to the Board. The Ofcom Board meets at least once a month, with the exception of August. Agendas, summary, notes and minutes of meetings are published on the Ofcom's website.¹⁸⁹⁹

The Ofcom must send a copy of its determination, together with a full statement of its reasons, to every party to the dispute. Under current guidelines, the Ofcom accompanies its final determination with non-confidential versions of the dispute submission and any other party's comments on it, together with any other non-confidential submissions to the Dispute Consultation.

Appeals

Regulatory decisions relating to postal services are subject to appeals. As outlined in the section on 'Approach to Competition and Regulatory Institutional Structure', appeals in relation to changes to conditions under the authorisation regime are heard by the CAT, as are appeals on the merits of

¹⁸⁹⁶ Ofcom, *Annual Report and Accounts 2012/13*, *op. cit.*, p. 39.

¹⁸⁹⁷ *Explanatory Memorandum to the Postal Services Act 2011*. Available at: http://www.legislation.gov.uk/ukxi/2012/1128/pdfs/ukxiem_20121128_en.pdf [accessed on 6 June 2013].

¹⁸⁹⁸ *Postal Services Act*. Available at: <http://www.legislation.gov.uk/ukpga/2011/5/schedule/8/part/1/crossheading/information-required-for-purposes-of-ofcoms-functions-in-relation-to-postal-services> [accessed on 6 June 2013].

¹⁸⁹⁹ Ofcom, *How Ofcom is Run*. Available at: <http://www.ofcom.org.uk/about/how-ofcom-is-run/> [accessed on 7 June 2013].

regulatory decisions other than price control decisions. The CAT can either dismiss the appeal or reject the whole or part of the original Ofcom decision. It may refer the matter back to the Ofcom with a direction to reconsider (section 57 of the *Postal Services Act 2011*).

As for appeal against a price-control decision, a notice of appeal should be submitted to the Ofcom within two months of the decision being published. The Ofcom must refer the appeal to the CC who will decide on the appeal within four months (or six months for exceptional cases). The CC can dismiss the appeal, make a substituting decision, or reject the whole or part of the original Ofcom decision. It may refer the matter back to the Ofcom with a direction to reconsider (section 59 of the *Postal Services Act 2011*).

4. Water and Wastewater

The quality of water supply and wastewater treatment and disposal in the UK is generally high. Approximately 96 per cent of households are connected to the sewer system.

There are currently 34 companies operating in the water and sewerage sector in England and Wales that are regulated by the Ofwat.¹⁹⁰⁰ Ten regional companies have appointments to provide both water and sewerage services. Each is a regional monopoly for the services provided, based on boundaries that were fixed at the time of privatisation in 1989. The businesses can apply to vary their appointment to cover a new area. Each water and sewerage company has between 1.2 million and 8.5 million customers. Some customers receive both water and sewerage services from the one businesses. Others receive sewerage and water services from different businesses.

Eleven regional companies have appointments to provide only water services. Each has a regional monopoly for water supply based on boundaries that were fixed at privatisation. Each water-only company has between 2000 and 3.1 million customers. All of their customers receive sewerage services from another water and sewerage company.

Six local companies have appointments to provide either water or sewerage services or both. Each one has a local monopoly for its services based on boundaries that were set when it was appointed. They can also apply to vary their appointments to cover new areas. Each locally appointed company has up to around 1700 customers. Some of their customers will receive both water and sewerage services, but others will receive water or sewerage services from another company. The Ofwat ensures that customers are no worse off under a locally appointed company than they would be under the regional monopoly supplier. They have the same powers and responsibilities as the regional water and sewerage and water-only companies.

Seven licensed water suppliers offer water services to large users. In England and Wales, market competition is very limited. Suppliers without appointments can only offer water services to non-household customers who require at least 50 megalitres of water per year. This element of competition was introduced in 2005 through a water supply licensing (WSL) regime. The regime enables water supply licensees to access the water distribution network operated by a monopoly water and sewerage company in order to compete to provide water to eligible large users of water. Non-eligible customers are not allowed to switch suppliers.

Other companies can apply for new appointments to serve defined areas or licenses for supplying large users. The Ofwat publishes a register of all the new appointments and variations to existing appointments that have been made.¹⁹⁰¹

In Scotland, competition in water supply to all non-household customers was introduced in April 2008 in accordance with the *Water Services etc (Scotland) Act 2005*. There are currently eleven licensed suppliers in Scotland, providing water and sewerage services in the retail market for non-household customers.¹⁹⁰² They all buy wholesale services from Scottish Water.

¹⁹⁰⁰ Ofwat, *Supplying Water and Sewerage*. Available at: <http://www.ofwat.gov.uk/competition/supplying/> [accessed on 18 July 2013].

¹⁹⁰¹ Ofwat, *New Appointments and Variations*. Available at: http://www.ofwat.gov.uk/competition/inset/prs_web_insetapptstable.xls [accessed on 18 July 2013].

¹⁹⁰² Water Industry Commission for Scotland, *List of Current Licensees*. Available at: http://www.watercommission.co.uk/view_List_of_current_licensees%20.aspx [accessed on 18 July 2013].

Regulatory Institutions and Legislation

The Water Services Regulation Authority (Ofwat), established in 1989 under the name of the Director General of Water Services, is the economic regulator of the water and sewerage industry in England and Wales. In Northern Ireland, water is regulated by the Northern Ireland Utility Regulator and in Scotland by the Water Industry Commission for Scotland. The Ofwat is an independent non-ministerial government department accountable to the UK Parliament (and, by delegation, to the Secretary of State for the Environment, Food and Rural Affairs) and the National Assembly for Wales. It is responsible for the development of policy for the water and sewerage industries in England and Wales. The Ofwat's statutory responsibility and powers are set out in the *Water Industry Act 1991* and the *Water Act 2003*. Its main duties include the following:¹⁹⁰³

- Protecting the interests of consumers by promoting effective competition wherever appropriate. The Ofwat is specifically required to take into account the interests of vulnerable consumers in making decisions.
- Regulating appointed water and sewerage companies to ensure they properly carry out and finance their functions, in particular by securing a reasonable rate of return on capital.
- Regulating licensed water supply companies to ensure that they properly carry out their functions.
- Setting and enforcing leakage and water efficiency targets as part of its Water Supply and Demand Policy.

The Ofwat has a general duty when exercising its powers to consider sustainable development and environmental effects. The Ofwat considers that the principles of best regulatory practice require its activities to be transparent, accountable, proportionate, consistent and targeted only at cases where action is needed.¹⁹⁰⁴ The Ofwat is funded by water and sewerage customers through an annual licence fee. It is subject to scrutiny by the National Audit Office and appears before the Public Accounts Committee following publication of its audit reports.

The main functions of the Ofwat are implementing and enforcing price regulation and access regulation of the regional supply companies. The Ofwat sets retail price caps every five years for regulated water companies, under which price limits are set according to future efficient costs derived from benchmarking monopoly companies. Price reviews were undertaken every five years from 1989. The next price review is scheduled for 2014. This will cover the delivery of water and sewerage services between 2015 and 2020.¹⁹⁰⁵

The Ofwat has issued guidance to water and sewerage companies on offering access to the water-supply system. In accordance with this guidance, all water and sewerage companies have published access codes which set out how they will offer access to their water supply systems. The Ofwat can take enforcement action to ensure that a water company's access code complies with the Ofwat's guidance, or that the company complies with its own access code.

The Ofwat became a corporate body governed by its Board from 1 April 2006. It is independent of government and the water companies, although it is directly accountable to Parliament and the Welsh Government.¹⁹⁰⁶ Based in Birmingham in central England, it employs around 200 people. It has a Board structure. The Board comprises a Chair, Chief Executive, executive Board members and non-executive directors. Board members are appointed by the Secretary of State in consultation with the Welsh Government. The Board meets regularly during the year. It publishes the minutes of its meetings on its website. The Board operates according to published rules of procedure, which cover all aspects of its work ranging from how often it should meet to how decisions are made.

Consultation of Interested Parties

Various methods of user involvement in price reviews have been tried in the water industry in England and Wales in the period since privatisation.¹⁹⁰⁷ For the forthcoming price review from 2015, the Ofwat

¹⁹⁰³ *About Ofwat*. Available at: <http://www.ofwat.gov.uk/aboutofwat/structure/> [accessed on 6 June 2013].

¹⁹⁰⁴ Ofwat, *Board Leadership, Transparency and Governance*. Available at: *Fact Sheet – Regulating the Companies Ofwat's Role*. [accessed on 17 July 2013].

¹⁹⁰⁵ Ofwat, *Price Review 2014*. Available at: <http://www.ofwat.gov.uk/pricereview/pr14/> [accessed on 17 July 2013].

¹⁹⁰⁶ Ofwat, *Who We Are*. Available at: <http://www.ofwat.gov.uk/aboutofwat/structure/> [accessed on 17 July 2013].

¹⁹⁰⁷ Ofwat, *Future Price Limits*. Available at: <http://www.ofwat.gov.uk/future/monopolies/fpl> [accessed on 17 July 2013].

has introduced additional measures for consumer involvement in regulatory decision-making. These include: (i) requirements that each company undertake 'local engagement' to understand its customers views and to inform the development, and test the acceptability, of its business plan; (ii) the establishment of customer challenge panels charged with ensuring that the overall package is acceptable to consumers; and (iii) the creation of a sector-wide customer advisory panel to influence the Ofwat's thinking.

The requirement of 'local engagement' obliges companies to test consumers' views on the acceptability of their overall business plan through the collection of quantitative evidence. Such evidence needs to include consumer views in relation to: billing; complaints handling; tariffs; metering; and local-service level issues (such as reliability of supply and sewer flooding).

The second new requirement is that the companies assemble a customer challenge panel. The panel is charged with considering the evidence on the extent of direct customer engagement, and how the company has responded in its business plan to any issues raised. The membership of the customer challenge group is intended to be diverse and include: consumer representatives (such as the Consumer Council for Water); customer and community stakeholders (including local authorities and businesses); and representatives of particular segments of society (such as the elderly, through Age UK). The water companies are responsible for establishing their own panel, and the Ofwat will not be a full-time member of the customer challenge group, but may attend meetings occasionally, and will 'take account' of the panel's advice when considering the companies' business plans. The Ofwat expects that the customer challenge panels will be able to tell it how effective a company's engagement with consumers has been, and how the priorities identified by customers have been taken into account in its final business plan. However, the Ofwat has not set out how it intends to take account of customers' views when it sets price controls.

In competition issues, the Ofwat seeks advice from standing advisory groups comprised of customer representatives, market entrants and water companies.

The Ofwat may also engage consultants and other outside parties to help it consider technical or financial issues.

The licensed water-supply companies must negotiate the terms and conditions of access with the monopoly water company. If the two parties are unable to reach agreement, a dispute may be referred to the Ofwat, which can then determine the terms and conditions of access to the water-supply system.¹⁹⁰⁸

The Ofwat has enforcement powers under s.18 of the *Water Industry Act 1991* in relation to regulating water and sewerage companies and licensees. In relation to its determination on water-supply arrangement disputes, the Ofwat can, among other things, take enforcement action if it considers that a water company or licensee is not complying with the terms of a determination.

The Ofwat has power to determine some disputes that arise as a consequence of the Water Supply Licensing Scheme. For example, the Ofwat can determine a customer's eligibility to be supplied by a licensee if the dispute is referred by the potential customer or the licensee. Water companies are not able to refer an eligibility dispute to the Ofwat.

The Ofwat is also able to determine disputes about terms and conditions of access. Once determined, the licensee can decide whether to proceed with the access agreement. If accepted, the terms and conditions determined by the Ofwat become binding on both the licensee and water company and the company must make access available to the licensee on those terms and conditions.

The Ofwat has noted that it does not expect regulated companies to use disputes as a means of preventing or delaying access to water supply systems and will be concerned if either party has not made a serious attempt to reach agreement. Generally, the Ofwat will not consider making a determination unless it is satisfied that the parties have tried unsuccessfully to reach an agreement.¹⁹⁰⁹

A typical determination process consists of the following stages:

¹⁹⁰⁸ Ofwat, *Water Supply Licences*. Available at: <http://www.ofwat.gov.uk/competition/wsl/wsllicensees/> [accessed on 6 June 2013].

¹⁹⁰⁹ Ofwat, *Water Act 2003, Water Supply Licensing, Proposed Procedure for Handling Water Supply Licensing Determinations*. Available at: http://www.ofwat.gov.uk/competition/wsl/wslpublications/gud_pro_wslideterpro.pdf [accessed on 6 June 2013].

- Pre-investigation: The Ofwat decides whether to accept the dispute. The Ofwat seeks to complete this stage within five working days of receiving an initial submission but may continue pre-investigations if additional information is required.
- Information gathering: Information may be requested from potential customers, licensees and water and sewerage companies depending on the nature of the dispute. The Ofwat aims to request information within ten working days of accepting a dispute and to give parties ten working days to respond. Further information requests may be made with similar response times until the Ofwat has all of the facts that it needs to make a determination.
- Draft determination: A draft report will be prepared at the conclusion of the information-gathering stage. This draft determination will set out the facts of the case, the views of interested parties and the Ofwat's draft conclusions. The Ofwat aims to issue a draft determination within 15 working days of completing the information-gathering stage.
- Further submission: Interested parties will be given ten working days to respond to the Ofwat's draft determination before a final determination is issued. The Ofwat will take account of comments received before issuing the final determination within another ten working days. The Ofwat has noted that, while written consultation is important, it may not be the best or only way of undertaking consultation. Meetings, workshops or seminars are sometimes held to explain the issues and to improve understanding of the various points of view. The Ofwat will also consider publishing leaflets and contributing articles to journals.
- Final determination: A final report will be published in the Ofwat's library within 15 days of issuing the determination.

In relation to disputes, if the dispute relates to the quality of drinking water, the Ofwat may seek external advice from the Drinking Water Inspectorate (DWI). The Ofwat has entered into a Memorandum of Understanding with the DWI. Similarly, the Ofwat will consult with the Environment Agency if the dispute involves issues such as pollution control.

If the dispute involves consumer-protection issues, the Ofwat will consult with the relevant Consumer Council for Water (CCWater) committee. The CCWater was established in 2005 under the *Water Act* to: represent customers' interest; deal with complaints about water companies; and to monitor the services companies provide. Unlike its predecessors – Watervoice and Ofwat Customer Service Committees – CCWater is an independent consumer council external to Ofwat.¹⁹¹⁰ However, the Ofwat provides support to CCWater under Service Level Agreements.

Timeliness

The determination process involves a number of stages, including consultation with relevant parties and the publication of those parties' non-confidential submissions. In order to resolve disputes as quickly as possible, the Ofwat has set targets for dealing with each of the stages of a dispute (described above). However, the targets are not binding on the Ofwat and may not be met if: parties to the dispute do not respond to requests within the Ofwat's deadlines; the facts of the dispute are not clearly established; or the matter is complex. In order to deter regulatory 'gaming', the Ofwat has stated that, if parties do not provide information within its timescale, it may decide to proceed on the basis of available facts. In public consultations for major issues in policy development, the Ofwat will, in accordance with the Government's code of practice, usually allow 12 weeks for submissions.¹⁹¹¹

Information Disclosure and Confidentiality

The Ofwat monitors and reports on regulated companies on an annual basis. As part of its monitoring, it obtains information including about: levels of customer service; security of supply; financial performance; and unit costs.¹⁹¹² Further, the Ofwat has powers under the *Water Industry Act* to gather documents and information from companies where the Ofwat considers that a company may have contravened the statutory requirements of the Act. However, an individual or organisation

¹⁹¹⁰ Consumer Council for Water website. Available at: <http://www.ccwater.org.uk/> [accessed on 6 June 2013].

¹⁹¹¹ Ofwat, *Having Your Say: Ofwat's Code of Practice on Consultations*. Available at: http://www.ofwat.gov.uk/consumerissues/pointofview/gud_pro_havvoursay20040722.pdf [accessed on 17 July 2013].

¹⁹¹² Ofwat, *Regulatory Compliance – A Proportionate and Targeted Approach A Consultation, 2011*. Available at: http://www.ofwat.gov.uk/consultations/pap_con111006regcompliance.pdf?download=Download [accessed on 19 July 2013].

cannot be required to produce any documents which it could not be compelled to produce in civil proceedings in the High Court.¹⁹¹³

In February 2013 the Ofwat published its *Revised Regulatory Accounting Guideline*.¹⁹¹⁴

The regulatory accounts are yearly financial statements the water companies make about their regulated business. To comply with its licence, each company must prepare a set of regulatory accounts, which are examined by independent auditors. In this information notice, we set out the way in which we expect the companies to prepare their regulatory accounts for 2012-13 and onwards using the revised regulatory accounting guidelines...

The Ofwat also requires the companies to publish an 'accounting separation methodology statement'.

An international comparison with water companies from Canada, Portugal, the Netherlands, Australia and the US was carried out in 2008.¹⁹¹⁵

All information gathered by the Ofwat is stored in its library. In 2005 the Ofwat launched a long-term project, Project Reservoir, to restructure the office-wide software suite used to collect, process and store regulatory information. Reservoir uses open-source software to make the Ofwat's systems transparent and freely available to stakeholders.¹⁹¹⁶

In addition, the Ofwat publishes its determination and consultation documents on its website. The Ofwat will generally not publish information that relates to an individual or body where it may seriously and prejudicially affect the interests of that individual or body. However, it may publish such information if it considers publication is in the public interest in that it facilitates the carrying out of the Ofwat's regulatory role.

As with other regulators, third parties may also be able to access information as required by the *Freedom of Information Act 2000* and the *Data Protection Act 1998* unless that information is covered by exemptions under those Acts. The *Freedom of Information Act 2000* is retrospective and therefore applies to both old and recent records. It requires the Ofwat to provide information in response to a written request, within 20 working days.

The Ofwat has duties to provide information under the Environmental Information Regulations, similar to those under the *Freedom of Information Act 2000*. These regulations provide a right of access to environmental information and requests need not be in writing.¹⁹¹⁷

Decision-making and Reporting

The Board of the Ofwat is responsible for deciding how the Ofwat carries out its functions and effectively meets its statutory duties. The heads of each of the Ofwat's operating divisions, along with the Chief Executive, make up the Management Team. Some decisions may be made by this team without input from the Board. However, the division heads are not able to vote on Board decisions.

Decisions by the Board are generally made by consensus rather than by formal vote. However, a vote will be taken if a clear consensus has not emerged or a board member requests that a vote be taken. When a vote is taken, a decision will be determined by majority vote. If a vote is tied, the Chairperson has a casting vote, in addition to his/her original vote. All decisions, including minority views, are recorded in Board minutes.

The Board's operations are set out in its Rules of Procedure.¹⁹¹⁸ An agenda and papers for Board meetings are normally circulated, via email, five working days before a meeting is to be held.

¹⁹¹³ *Water Industry Act 1991*, Chapter 56, s. 201. Available at: <http://www.legislation.gov.uk/ukpga/1991/56/contents> [accessed on 17 July 2013].

¹⁹¹⁴ Ofwat, *Revised Regulatory Accounting Guidelines and Regulatory Accounts Reporting Requirements for 2012-13 and Onwards*, February 2013. Available at: https://www.ofwat.gov.uk/publications/rags/prs_in1301rag.pdf [accessed on 19 July 2013].

¹⁹¹⁵ Ofwat, *International Comparisons 2008*. Available at: http://www.ofwat.gov.uk/regulating/reporting/rpt_int_08intro [accessed on 18 July 2013].

¹⁹¹⁶ Ofwat, *Data Collection*. Available at: <http://www.ofwat.gov.uk/regulating/reservoir/> [accessed on 6 June 2013].

¹⁹¹⁷ Available at: <http://www.ofwat.gov.uk/aboutofwat/foi/> [accessed on 11 June 2013].

¹⁹¹⁸ Ofwat, *Rules of Procedure for the Water Services Regulation Authority (Ofwat)*. Available at: <http://www.ofwat.gov.uk/aboutofwat/structure/rop/> [accessed on 11 June 2013].

In the case of determination of an access dispute, a final determination is published in the Ofwat's library within 15 days of issuing the determination.

The Ofwat may also make an interim determination when a regulated company requests changes to its price limits during the five-year review period. Interim changes will only be allowed in the case of a material and relevant change of circumstances since the last review.¹⁹¹⁹

In aiming to communicate effectively and to operate transparently, the Ofwat provides explanations for all decisions. Responses to consultations are also published to the extent that they are non-confidential.

Appeals

The Ofwat's regulatory decisions are subject to judicial review before the High Court (Administrative Court). The Ofwat's decisions on price controls and changes to licence conditions can be appealed to the CC, on a reference by the Ofwat.¹⁹²⁰ Its decisions under the *Competition Act 1998* can be appealed on the merits to the CAT. The composition and processes of the CC and the CAT are described in the section on 'Approach to Competition and Regulatory Institutional Structure'.

5. Rail

The structural separation of the national rail network and rail services occurred, at the time of privatisation, under the *Railways Act 1993*. Consequently, the rail industry now primarily consists of a single network operator and a number of rail service providers ('train operating companies'). The network operator, Network Rail, operates the national rail network (including track, signalling, bridges, tunnels, stations and depots). It operates under a network licence issued by the Secretary of State but enforced and amended by the Office of Rail Regulation (ORR). Network Rail is a not-for-dividend company with members, whose profits are required to be re-invested into the railway. It is financed by debt fully guaranteed by government.

A number of train operating companies (TOCs) run passenger and/or freight trains on the national rail network. TOCs are franchisees, their franchises granted by the Department of Transport. Their operating licences are issued by the ORR. In order to operate trains, a TOC must negotiate access terms and conditions with Network Rail. Parties to an access negotiation are required to consult with potentially affected stakeholders, prior to reaching an access agreement that will be submitted to the ORR for approval.

The remainder of the industry consists of those operating other networks: the underground rail (London Underground), light rail (including tramways) and other rail (including the Channel Tunnel).

Regulatory Institutions and Legislation

The Secretary of State for Transport and the Scottish Ministers are responsible for the development of public policies in the rail industry in England and Wales, and in Scotland.

The ORR is the independent statutory body responsible for safety and economic regulation of rail in Britain.¹⁹²¹ It was established in July 2004, replacing the predecessor in economic regulation of rail – the Rail Regulator. In accordance with the *Railways Act 2005*, the ORR assumed the responsibility of the Health and Safety Executive in governing the health and safety issues in rail. It is also a competition authority in this industry, sharing this power concurrently with the Office of Fair Trading. The Secretary of State for Transport appoints Board members for a fixed term of up to five years. The Secretary of State can only dismiss a member of the Board on the grounds set out in paragraph 2 of Schedule 1 to the *Railways and Transport Safety Act 2003*. The ORR Board is responsible for setting strategy and oversees efficient, effective and economic delivery of that strategy. The ORR has a range of statutory duties set out in the *Railways Act 1993* (as amended under the *Railways Act 2005*), *Railways and Transport Safety Act 2003*, *Competition Act* and others. The duties are not prioritised under the laws, but are balanced by the ORR in order to promote the public interest (that is,

¹⁹¹⁹ Ofwat, *Interim Determinations*. Available at: <http://www.ofwat.gov.uk/pricereview/setting/interim/> [accessed on 6 June 2013].

¹⁹²⁰ Competition Commission, *What We Do*. Available at: <http://www.competition-commission.org.uk/about-us/what-we-do> [accessed on 11 June 2013].

¹⁹²¹ ORR website. Available at: <http://www.rail-reg.gov.uk/> [accessed on 11 June 2013].

the interest of society as a whole). The ORR is funded from licence fees and a railway safety levy, is located in London and had approximately 270 employees in 2011-12.¹⁹²²

As both a regulatory and competition authority, the ORR has relied heavily on regulatory tools to perform its duties. These include:¹⁹²³

- Licensing network providers and train services operators.
- Approving access agreements.¹⁹²⁴
- Conducting periodical reviews of access charges – a review of access charges is normally undertaken every five years, but an interim review can be carried out more frequently if certain conditions are met. The ORR completed a periodic review in 2008 and set Network Rail's outputs, revenue requirement and access charges for the five years from 1 April 2009 to 31 March 2014. A periodic review is currently underway to assess what Network Rail must achieve from 2014, the money it needs to do so, and the incentives needed to encourage delivery and outperformance. It also considers how Network Rail could work more closely with train operators, suppliers and others to reduce costs and deliver more for customers. As part of each periodic review, the ORR determines Network Rail's outputs and expenditure separately for England and Wales, and for Scotland.¹⁹²⁵
- Monitoring and enforcement.

Consultation of Interested Parties

The ORR has set out a framework for access negotiations between Network Rail and the TOCs. Network Rail and TOCs are encouraged to hold informal discussions with stakeholders prior to entering into draft access arrangements. Formal consultation must take place once a draft arrangement has been made. Consultation may include hearings, oral representation, written submissions and informal meetings. Network Rail and the TOC must aim to resolve concerns raised during consultation where possible. A consultee must advise Network Rail and/or the TOC whether it is satisfied with the response within two working days.

The ORR mandates that parties' consultation periods shall be 14 days for changes to a freight track-access contract and 28 days for all other proposed changes to track-access arrangements, unless an application is urgent or particularly complex.

When Network Rail and the TOC have agreed on the terms of an access arrangement, and consultation with stakeholders has been exhausted, the arrangement may be submitted to the ORR. If all stakeholders' concerns have been resolved, the arrangement may be accepted by the ORR.

However, if, at any stage of the negotiation process, an access seeker believes it is being unfairly treated, discriminated against, or is, in any other way, aggrieved in connection with its entitlements under an access arrangement, it can appeal to the ORR, which will then undertake its own consultation to determine the outcome of the dispute.¹⁹²⁶

Similarly, where there are unresolved objections to the access arrangements made by third parties, these will be considered by the ORR in making its final determination. The ORR may request further information from third parties or arrange a meeting to obtain further information.

The ORR publishes on its website an application to determine a dispute and a list of parties that have already been consulted. If a party has not already been consulted, or is unhappy with the proposal but has not been listed as a consultee with outstanding objections, it is able to notify the ORR of its interest at this stage (*Code*).

¹⁹²² ORR, *Annual Report and Resource Accounts 2011-12*. Available at: <http://www.rail-reg.gov.uk/upload/pdf/annual-report-2011-12.pdf> [accessed on 11 June 2013].

¹⁹²³ ORR, *Network Rail Regulation*. Available at: <http://www.rail-reg.gov.uk/server/show/nav.130> [accessed on 11 June 2013].

¹⁹²⁴ ORR, *Track Access and the Network Code*. Available at: <http://www.rail-reg.gov.uk/server/show/nav.201> [accessed on 11 June 2013].

¹⁹²⁵ ORR, *About the Periodic Review*. Available at: <http://www.rail-reg.gov.uk/pr13/about/index.php> [accessed on 11 June 2013].

¹⁹²⁶ ORR, *The Railways Infrastructure (Access and Management) Regulations 2005*. Available at: <http://www.rail-reg.gov.uk/server/show/nav.2010> [accessed on 11 June 2013].

In relation to the process associated with price reviews, the ORR undertakes three broad phases of work:¹⁹²⁷

- A development phase that considers development of the regulatory framework. Public consultation is undertaken and advice is provided to the governments in England & Wales and Scotland on the development of 'high-level output specifications' (HLOSs) and 'statements on the public financial resources available' (SoFAs). HLOSs set out outputs that that governments want to see delivered in the price review. SoFAs set out available funding.
- A formal review phase where Network Rail produces a strategic business plan in response to the HLOSs. The ORR determines if the government's HLOSs are affordable. The ORR also makes a determination on Network Rail's outputs, access charges and the regulatory framework that applies during the price-control period. This includes decisions on improving Network Rail's efficiency.
- An implementation phase where changes to access contracts are made. These changes are the key means of implementing many of the decisions taken in the review. Network Rail will also develop its price control delivery plan.

During this time, the ORR undertakes consultations on a range of issues relating to the approach the ORR will take to determining Network Rail's outputs and access charges.¹⁹²⁸ The ORR also hosts consultation events and workshops.

The Rail Passengers Council (Passenger Focus) is an independent consumer body in the railway industry, which is external to the ORR. Passenger Focus was created by the *Railways Act 2005* and is a non-departmental public body sponsored by the Department for Transport. It describes itself on its website as 'The Passenger Watchdog'.¹⁹²⁹

Timeliness

The ORR publishes key dates for its periodic reviews (currently PR13) with a useful timeline for the process (described previously).

There are no mandatory timeframes for access agreement negotiation and determinations to be completed. However, the ORR has set a target of 12 to 18 weeks for determination, depending on the complexity of the agreements. For example, it considers that a determination of a straightforward agreement should be finalised within 12 weeks, including five weeks for the ORR to review the agreement. A contentious agreement may be finalised within 18 weeks, including eleven weeks for consideration by the ORR.¹⁹³⁰

The ORR aims to make decisions on licence applications and licence exemption applications within twelve weeks of receiving the application.¹⁹³¹

Information Disclosure and Confidentiality

The ORR has powers under the *Railways Act 1993* to obtain information and documents from any person or organisation who may have information relevant to a contravention of the Act (section 58).¹⁹³² However, no person shall be required to produce any documents which they could not be compelled to produce in civil proceedings in the High Court (section 58). In addition, on request, licensed rail operators, including holders of European licences, are required to provide relevant information to the ORR (section 80).

As with other regulators, access by third parties to information supplied to the ORR may be subject to the *Freedom of Information Act 2000* and the *Data Protection Act 1998*. However, the ORR may not

¹⁹²⁷ ORR, *Periodic Review 2013: Key Stages of the Review Process*. Available at: <http://www.rail-reg.gov.uk/pr13/about/key-stages.php> [accessed on 11 June 2013].

¹⁹²⁸ ORR, *Key Dates*. Available at: <http://www.rail-reg.gov.uk/pr13/about/key-dates.php> [accessed on 11 June 2013].

¹⁹²⁹ Passenger Focus. Available at: <http://www.passengerfocus.org.uk/> [accessed on 19 July 2013].

¹⁹³⁰ ORR, *Criteria and Procedures for the Approval of Track Access Contracts*, 3.62-3.75. Available at: http://www.rail-reg.gov.uk/upload/pdf/ta_criteria_and_procedures.pdf [accessed on 12 June 2013].

¹⁹³¹ ORR, *How to Apply for a Licence*. Available at: <http://www.rail-reg.gov.uk/server/show/ConWebDoc.5605> [accessed on 12 June 2013].

¹⁹³² *Railways Act 1993*. Available at: <http://www.legislation.gov.uk/ukpga/1993/43/contents> [accessed on 18 July 2013].

release information covered by exemptions under those acts, including information that may be considered commercial-in-confidence (section 145 of the *Railways Act 1993*).

*Decision-making and Reporting*¹⁹³³

The ORR is led by a Board which is responsible for setting the ORR's strategy. The Board meets monthly and consists of a mix of executive and non-executive directors. The Board's members are appointed for a fixed term of up to five years. The Board has four committees covering Audit, Remuneration, Periodic Review ('oversees and provides guidance on the delivery of the programme of work associated with ORR's periodic review of Network Rail's revenue requirement for the next five-year Control Period') and Safety Regulation. Other committees may be appointed to deal with specific areas of work, such as investigating access arrangements.

The Board is independent of the UK Government. The Board is also required under the *Railways Act 2005* to comply with a reasonable requirement of the Secretary of State to provide him/her with information or advice about a matter connected with a function or other activity of the Secretary that relates to railways or railways services.¹⁹³⁴

The *Railways Act* mandates that the ORR maintain a register of all decisions – including full written reasons for such decisions, consultation documents, annual reports, hearing and seminar transcripts – that must be published on the ORR's website.¹⁹³⁵ Information should not be published if it seriously and prejudicially affects the interest of the party.

Appeals

Ex ante regulatory decisions made by the ORR are subject to judicial review by the High Court (Administrative Court). Appeals on the merits in respect of decisions made by the ORR under the *Competition Act 1998* are heard by the CAT. In addition, the CC may review licence modifications and access charges in the rail industry where there is disagreement between licensees and the ORR. It deals only with regulatory matters which are referred to it by the ORR. The composition and processes of the CC and the CAT are described in the section on 'Approach to Competition and Regulatory Institutional Structure'.

6. Airports

Three UK airports – Heathrow, Gatwick and Stansted – are currently designated by the Secretary of State for Transport as being in a monopoly position, and subject to regulation ('designated airports'). Heathrow Airport and Gatwick Airport, both located in London, are among the top ten busiest airports in the world for international passenger traffic. Manchester Airport was 'de-designated' in 2007 on the ground that it experienced sufficient competition from other airports. Non-designated regional airports are smaller, but have experienced fast growth in recent years due to the successful entry of 'no-frills' airlines.

The British Airport Authority (BAA) was established in 1965 as a public body that operated some major airports. It was privatised in 1987 in accordance with the *Airports Act 1986* and was acquired by the Ferrovial Group in 2006. At present, the BAA owns and operates two of the three designated airports (Gatwick Airport was sold in 2009 to Global Infrastructure Partners) and some smaller regional airports in South-Eastern England and Scotland.

Regulatory Institutions and Legislation

The aviation industry in the UK is regulated by the Civil Aviation Authority (CAA).¹⁹³⁶ The legislative framework for the economic regulation of airports had been contained in the *Airports Act 1986* and the *Civil Aviation Authority (Economic Regulation of Airports) Regulations 1986*. The *Civil Aviation Act 2012*, which came into effect on 19 December 2012, provides the CAA the current power for airport regulation.¹⁹³⁷ The law governing airports in Northern Ireland, the *Airports (Northern Ireland) Order 1994*, sets up a similar regime.

¹⁹³³ ORR, *ORR Board*. Available at: <http://www.rail-reg.gov.uk/server/show/nav.80> [accessed on 11 June 2013].

¹⁹³⁴ ORR, *Corporate Governance*. Available at: <http://www.rail-reg.gov.uk/server/show/nav.76> [accessed on 11 June 2013].

¹⁹³⁵ ORR, *Publication Scheme Guide*, May 2011. Available at: http://www.rail-reg.gov.uk/upload/pdf/pub-scheme_guide.pdf [accessed on 11 June 2013].

¹⁹³⁶ CAA website. Available at: <http://www.caa.co.uk/> [accessed on 11 June 2013].

¹⁹³⁷ A copy of the Act is available at: <http://www.legislation.gov.uk/ukpga/2012/19/contents/enacted> [accessed on 18 July 2013].

The CAA is a public corporation, established by Parliament in 1972 as an independent specialist aviation regulator and provider of air-traffic services. The UK Government requires that the CAA's costs are met entirely from its charges on those whom it regulates – there is no direct Government funding of the CAA's work. The CAA employs around 1000 staff. Of this number, 800 work within the Safety Regulation Group at Gatwick. The remainder works mainly at CAA House in Holborn, central London (within small groups such as the Regulatory Policy Group, the Consumer Protection Group and the Directorate of Airspace Policy). Some staff members are based at regional offices within the UK and in overseas offices. The CAA also has a Corporate Centre based at CAA House which includes the Chairman's Office and the CAA Board and corporate functions.

The CAA has a range of statutory duties in relation to regulating airlines, airports, air-traffic control and ensuring civil-aviation standards are met. The prime focus of the CAA's economic regulation work is to ensure that the airports at Heathrow, Gatwick and Stansted do not exploit their position as monopoly service providers. All three had been designated by the UK Government as being in a monopoly position, meaning that they do not have enough competition to protect the users of the airport. The CAA uses its role as a specialist regulator to control the charges that these airports levy on airlines using the airport. Its work also covers ensuring that these airports meet the levels of service and standards expected by consumers – such as the setting of a maximum time for passengers to pass through airport security.

Under the *Civil Aviation Act 2012*, an airport that passes the market power test is required to hold a licence issued by the CAA. The test involves the following assessment:¹⁹³⁸

- Whether the relevant airport operator has, or is likely to acquire, substantial market power in a market, either alone or jointly with other parties;
- Whether competition law fails to prevent the relevant operator from engaging in conduct that amounts to an abuse of that substantial market power.
- Whether there are net benefits of regulating the relevant operator by means of a licence for users of air transport services.

Until 1 April 2004, the three major airports at Heathrow, Gatwick and Stansted will continue to be regulated under the Airports Act 1986 and are exempted from the licensing requirement. The CAA is currently in the process of assessing whether these three airports pass the test, and if so, the conditions of their licenses.¹⁹³⁹

Key functions of the CAA in airport regulation include:

- Applying five-year price cap controls to all designated airports. Each airport is subject to a different price cap, with price controls closely linked to the airport's specific circumstances and the needs of airlines and customers at that airport. Prices charged by non-designated airports are more loosely regulated, with the government holding reserve powers to determine prices if direct negotiations between airports and airlines fail.¹⁹⁴⁰
- Referring public-interest matters in respect of designated airports, in the context of setting price controls, to the Competition Commission (CC), and implementing remedies for public interest issues identified by the CC.¹⁹⁴¹ The CAA was required to make a reference to the CC every five years in relation to the designated airports. However, in May 2012 the CAA received an order to make no further reference to the CC on mandatory airport charges.¹⁹⁴² The *Civil Aviation Act 2012*, which came into effect on 19 December 2012, removed this reference power permanently.

¹⁹³⁸ CAA, *Airport Regulation*. Available at: <http://www.caa.co.uk/default.aspx?catid=78&pagetype=90> [accessed on 18 July 2013].

¹⁹³⁹ *Ibid.*

¹⁹⁴⁰ CAA, *Quinquennial Reviews of Designated Airports*. Available at: <http://www.caa.co.uk/default.aspx?catid=78&pagetype=90&pageid=67> [accessed on 11 June 2013].

¹⁹⁴¹ *The Airports Act 1986*. Available at: <http://www.caa.co.uk/default.aspx?catid=78&pagetype=90&pageid=68> [accessed on 11 June 2013].

¹⁹⁴² Department of Transport, *Removing Mandatory References to the Competition Commission*, 16 May 2012. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/3615/letter-respondants.pdf [accessed on 12 July 2013].

Instead, the *Civil Aviation Act 2012* sets out a regime for: market-power determination; licensing; and appeals.

- Investigating and remedying anti-competitive behaviours by airports. Under s.41 of the *Airports Act*, the CAA is entitled to impose conditions on regulated airports that are found by the CAA to be engaging in anti-competitive conduct. If an airport operator objects to a condition that the CAA intends to impose upon it, the CAA must make a reference to the CC who will determine whether the airport is pursuing a course of conduct contrary to the public interest and if so, how this might be remedied by the CAA (*Airports Act 1986*).
- Exercising powers under the *Airports Act 1986* and the *Airports (Northern Ireland) Order 1994* for the economic regulation of airports in the UK. An airport with an annual turnover of at least £1 million requires a 'permission to levy airport charges' from the CAA. The exceptions are airports managed by the Secretary of State or owned or managed by the CAA. The CAA can investigate the conduct of such airports and if it finds that the airport operator is unreasonably discriminating between users, unfairly exploiting its bargaining position, or engaging in predatory pricing it can impose conditions to remedy the situation.
- The CAA is able to set the maximum revenue yield per passenger to be levied by an airport operator in connection with aircraft landing, parking or taking off and passengers' arrival or departure. The CAA also sets prices for NATS (En Route) plc. NATS (En Route) plc is licensed to provide *en route* air traffic services in the UK: the *Transport Act 2000* (UK).¹⁹⁴³

Consultation of Interested Parties

Price controls for designated airports are set every five years following a process that involves consultation, research and analysis by the CAA, and negotiation between airports and airlines. For instance, the parties, rather than the CAA, determine volume and capacity requirements, service quality, capital investment and operating expenditure efficiency. These determinations result from meetings and consultation between the airlines and airports. This process has come to be termed 'constructive engagement'. These negotiated outputs will form inputs to financial modelling provided to the CAA. The CAA will then determine the operating and capital expenditure allowance, the cost of capital allowance and total regulated revenues.¹⁹⁴⁴

Although the CAA's powers under s.41 of the Act are not limited to an investigation in response to an access dispute, the CAA will normally only investigate access issues when a party has complained to the CAA.

The CAA engages in a three-stage process when analysing a dispute. On receipt of a complaint, it carries out a number of tests to determine whether it should launch an investigation, reject the complaint or refer it to another regulatory body. These tests would normally be finalised within three weeks of receiving a complaint. However, if the complaint is particularly complex or there is insufficient information, the process may take longer.¹⁹⁴⁵

If the CAA accepts a complaint, it will then request information from the airport operator and carry out internal analysis to determine whether there is substantial evidence that the operator is abusing its market power. This process normally takes around three months from the receipt of a complaint unless the issue is particularly complex. If substantial evidence is found, the CAA will proceed to a formal investigation.

In pursuing a formal investigation, the CAA usually consults with interested parties and invites written submissions within a set timeframe which is published on its website. The CAA concurrently gathers further evidence from, and holds meetings with, interested parties. The CAA may hold an oral hearing if either the complainant or the airport requests such a hearing. At a hearing, each party gives evidence and may cross-examine other parties. The CAA may also seek input from experts and consultants.

¹⁹⁴³ CAA, *NATS Licence*. Available at: <http://www.caa.co.uk/default.aspx??catid=5&pagetype=90&pageid=585> [accessed on 31 January 2013].

¹⁹⁴⁴ CAA, *Airport Regulation: The Process for Constructive Engagement May 2005*. Available at: http://www.caa.co.uk/docs/5/ergdocs/erg_ercp_airportregulation_may05.pdf [accessed on 11 June 2013].

¹⁹⁴⁵ CAA, *The CAA's Use of Section 41 of the Airports Act 1986: The CAA's Policy and Processes*, 2006. Available at: <http://www.caa.co.uk/docs/5/ergdocs/section41policy.pdf> [accessed on 11 June 2013].

An investigation will be concluded by the publication of a written report that sets out the CAA's final decision and its analysis and reasons for reaching that decision. If the CAA intends to impose a condition on an airport operator, it must give the operator one month's notice of the proposed condition and invite a response. The operator may offer an undertaking instead of the remedy proposed by the CAA. If so, the CAA must inform the complainant of the proposed undertaking and whether the CAA considers it to be an effective remedy. The complainant then has two weeks to provide comment to the CAA.

If the airport objects to the proposed condition and does not offer an undertaking in its place, the CAA must refer the matter to the CC.

End users, user groups and industry bodies are not specifically recognised in the legislation governing the regulation of airports and airport services. As previously described, airports and airlines have been involved in a 'constructive engagement' process in negotiating key inputs into financial modelling provided to the CAA for the purpose of determining five-year price-cap controls. The CAA has described constructive engagement as a 'process for structured discussion and negotiation between airport operators and airlines' which produces information relevant for the CAA's economic regulation of airports. The CAA effectively structures the discussions between the regulated firms and consumers, and identifies the types of issues and topics which should be addressed, including: volume and capacity requirements; the nature and level of service outputs; potential operating cost efficiencies; efficient levels of future capital expenditure; expected revenues from non-regulated activities; and the elements of service quality and investment to which specific financial incentives should be attached. However, the outcome of the constructive engagement process is advice to the regulator, which is not binding.

The constructive engagement approach was first introduced in the 2004-05 British Airports Authority (BAA) airports review, and has subsequently been used in price control reviews for the air traffic control operator (NATS) and in subsequent price control reviews for the airports. In all cases, the number of 'consumers' involved (principally airlines) in the constructive engagement processes has been relatively small, and in neither case have end-consumers been involved in the process.

The CAA has a statutory duty to 'further the reasonable interests of users of air transport services'.¹⁹⁴⁶ To fulfil this duty, the CAA first established the Air Transport Users Council (ATUC) as an independent consumer group for the airline industry. The two organisations entered into a Memorandum of Understanding in 2004, which was to be reviewed every three years.¹⁹⁴⁷ The council members (between 12 and 20, including a chairman) were volunteer consumer representatives and the ATUC was funded by, and reported to, the CAA. As an integrated part of the CAA, the ATUC promoted the wider interests of airline passengers with the regulatory authorities and service providers. On 9 March 2011, the ATUC ceased to exist and was replaced by the Aviation Consumer Advocacy Panel.

The CAA Consumer Panel was established in October 2012.¹⁹⁴⁸ The Panel has internal independence from the CAA and acts as a 'critical friend', scrutinising and challenging all of the CAA's work. Its main aim is to be a 'champion for the interests of consumers' and its members have a very broad range of skills and experience in this area. The CAA claims that the panel has a 'deep understanding of the regulatory environment both through the development of policy in the consumer interest, and through practical experience of how business best operates within a regulatory framework'.

Timeliness

The legislation does not mandate a timeframe for resolving disputes. Some airlines, however, have told the CAA that they are reluctant to use s.41 to address complaints because the anticipated length of time taken to resolve a dispute imposes significant costs and increases the risk of worsening relationships with the BAA, the airport's owner. Consequently, the CAA has undertaken to set an indicative timetable for each individual case based on its complexity. To improve the timeliness of its

¹⁹⁴⁶ *Civil Aviation Act 1982*, s. 4(1)(b).

¹⁹⁴⁷ The Air Transport Users Council & the Civil Aviation Authority, *Memorandum of Understanding*, December 2004. Available at: <http://www.auc.org.uk/docs/306/TermsOf.pdf> [accessed on 11 June 2013].

¹⁹⁴⁸ CAA, *The CAA Consumer Panel*. Available at: <http://www.caa.co.uk/default.aspx?catid=2488&pagetype=90> [accessed on 11 June 2013].

decision-making, the CAA also enters into pre-lodgement discussions with relevant parties to determine whether it should launch a formal investigation.

There is no direct discussion in available documents of the mechanisms that the CAA uses to mitigate incentives that airports have to delay regulatory determinations. Further, there is little information on the CAA's past performance in relation to the time taken to reach a final decision.

Information Disclosure and Confidentiality

The CAA has information-gathering powers under the *Airport Act 1986*. These powers require parties to produce any information to the CAA that it may reasonably require for the purposes of performing its functions. Parties cannot be compelled to produce any documents that they would not be required to produce in civil proceedings before the High Court.

As with the other regulators in the UK, access by third parties to information from the CAA supplied by another stakeholder, may be allowed under the *Freedom of Information Act 2000* and the *Data Protection Act 1998*. However, the CAA may not release information covered by exemptions under the act, including information that may be regarded as commercial-in-confidence. In addition, as a 'Public Corporation', the CAA maintains and provides Records to the National Archive. The CAA publishes on its website all information that is not commercial-in-confidence.

The frequency with which the CAA uses its information-gathering powers is not detailed in any documents published on the CAA website. General trends in use of these powers may be obtained by examination of specific case documents or via information requests directly to the regulator.

Decision-making and Reporting

The CAA is directed by a Chairperson and Board. The four sub-committees are the Safety Regulation Group, the Regulatory Policy Group, the Directorate of Airspace Policy and the Consumer Protection Group. Each sub-committee has a director who oversees the committee's functioning. The Chairperson has ultimate oversight of the CAA's committees and the Board.¹⁹⁴⁹

If a formal investigation is to be conducted, a panel of (normally three) CAA members will be set up to decide the issue. The panel would normally be chaired by the Group Director of the Regulatory Policy Group (RPG) whose remit is to provide policy advice to colleagues across the CAA. A core function is the economic regulation of the three designated airports (Heathrow, Gatwick and Stansted). The RPG ensures that the CAA considers all potential regulatory options when deciding on a course of action.¹⁹⁵⁰ The CAA publishes decisions, including in relation to price control reviews, on its website.

Appeals

Appeals on the merits in respect of regulatory decisions made by the CAA can be heard by the CAT.

In addition, the CC also has review functions under legislation relating to a number of regulated industries. In relation to airports, the CC can review licence modifications or conditions of new licence for air traffic services under the *Civil Aviation Act*, and decisions to 'designate' and 'non-designate' airports. The CC only considers regulatory matters that are referred to it by the CAA, or on appeal by the licence holder or a person affected by a regulator's decision.¹⁹⁵¹

The composition and processes of the CC and the CAT are described in the section on 'Approach to Competition and Regulatory Institutional Structure'.

7. Ports¹⁹⁵²

The UK has a number of large ports that account for 95 per cent of the country's freight trade (75 per cent by value) and employ over 70 000 people. The UK port industry is the largest in Europe, handling over 500 million tonnes of freight in 2012. Much of the cargo entering and leaving Britain is in the form of raw materials – oil, chemicals, petroleum, ores, grains and feedstuffs. Finished goods

¹⁹⁴⁹ CAA, *Structure*. Available at <http://www.caa.co.uk/default.aspx?catid=2348&pagetype=90&pageid=798> [accessed on 11 June 2013].

¹⁹⁵⁰ CAA, *Regulatory Policy Group*. Available at: <http://www.caa.co.uk/default.aspx?catid=5> [accessed on 11 June 2013].

¹⁹⁵¹ Competition Commission, *About Us*. Available at: <http://www.competition-commission.org.uk/about-us> [accessed on 11 June 2013].

¹⁹⁵² See British Ports Association, *UK Ports Industry*. Available at: <http://www.britishports.org.uk/uk-ports-industry> [accessed on 11 June 2013].

include vehicles, fresh foods, steel, timber, building materials, machinery and manufactured goods. In addition to its traditional cargo and passenger handling roles, the port industry offers a range of other services, such as ferry links, fishing and cruise liners.

British ports are either under private ownership, municipal control, or are operated by a trust. Whether private, trust or municipal, all ports in the UK operate as commercial entities and receive no systematic funding assistance from the national government. In comparison, the majority of continental European ports operate on the landlord/tenant model with publicly owned and maintained infrastructure.

The three biggest ports in the UK are Felixstowe, Tilbury (London) and Southampton. The Port of Felixstowe is Britain's busiest container port and one of the largest in Europe, handling over 3.4 million twenty-foot equivalent units (TEUs) of freight a year – over 40 per cent of Britain's containerised trade passes through the port. It is privately owned by Hutchison Ports.

The Port of Tilbury (London),¹⁹⁵³ located on the River Thames, provides an interface for transport into and out of London and the South-East. The Port is a significant distribution centre, covering over 850 acres and is well positioned to access the M25 motorway and the rest of Britain's national motorway network. In addition, there are direct rail connections within the Port, with access to the whole of the Britain. It handles a diversity of facilities, including for containers and various bulk-handling, all of which are handled at a number of berths both in dock and on river facilities. It is owned by Forth Ports Limited.

The Port of Southampton has the busiest cruise terminal and is the second largest container port in the UK.¹⁹⁵⁴ It has good links to Britain's rail network and to the motorway network. A unique double-tide contributes to 17 hours of high water each day. This results in a longer operational window for ships to arrive and leave the port. The Port of Southampton is owned and operated by Associated British Ports.

Regulatory Institutions and Legislation

Each port has local legislation regulating the port's environmental and safety requirements. However, ports are not currently subject to economic regulation at either the national or local level. Seaports constitute the only major infrastructure area in the UK that is not supervised by an industry-specific or sector-specific regulator. While there is no statutory framework for setting price controls on port access charges, there are a number of regulations which apply to port activities.¹⁹⁵⁵

The Harbours Act 1964 (the Act) is the main governing legislation in the ports sector and includes certain provisions relating to the charges at certain ports and port activities within these. The Act provides a 'reasonableness' test as to the level and application of certain port charges. The Act provides for interested parties to lodge a written objection in relation to ship, passenger and goods dues imposed by a harbour authority to the Secretary of State (SoS).

In practice, appeals against port charges under section 31 of the Harbours Act have been few in number. In the past six years the SoS has decided on five section 31 appeals, all of which have been unsuccessful (Portland, Bridlington, Langstone, Bembridge and Brightlingsea). The Department for Transport is currently considering several further section 31 appeals.

¹⁹⁵³ Information available at: <http://ww7.investorrelations.co.uk/ports/ports/tilbury/> [accessed on 11 June 2013].

¹⁹⁵⁴ Southampton VTS, *Port Information*. Available at: http://www.southamptonvts.co.uk/Port_Information/ [accessed on 11 June 2013].

¹⁹⁵⁵ OFT contribution to OECD, *Competition in Ports and Port Services 2011*. Available at: <http://www.oecd.org/regreform/liberalisationandcompetitioninterventioninregulatedsectors/48837794.pdf> [accessed on 12 July 2013].

Canada

OVERVIEW

Economic regulation of infrastructure industries is currently undertaken by both independent government bodies and a government department. A major regulatory institution is the Competition Bureau which enforces Canadian competition law.

The independent federal regulators in Canada are the National Energy Board (NEB), the Canadian Radio-television and Telecommunications Commission (CRTC), and the Canadian Transportation Agency (CTA).

The NEB's authority is limited to inter-provincial and international energy trade and commerce; and the management of non-renewable resources on federal lands. Sub-nationally, governments of provinces regulate intra-provincial energy producers and providers. Energy regulation at the provincial level is profiled for two provinces – Alberta in the west, and Ontario in the east. Alternative Dispute Resolution (ADR) is a feature of energy regulation in Canada.

The CRTC is the economic regulator of telecommunication, radio and television services. The CRTC 'allows competition, not regulations, to drive the market [and] regulates only where the market doesn't meet the objectives of the *Telecommunications Act*'.

There is no specific regulator for the postal industry. Canada Post is substantially 'self-regulated' and overseen in a largely inactive capacity by the Minister for Transport, Infrastructure and Communities.

Water and wastewater services are operated by municipalities. Provincial governments, through their water department, administer the allocation and pricing of water. The federal government primarily focuses on environmental issues.

The CTA regulates both the rail industry and large privately operated ports.

The airport industry has undergone significant changes since the government instituted its divestiture policy in 1994. The largest airports are owned by the government but operated by independent airport authorities, and the smaller regional airports retained both government ownership and control.

Other than the major ports, the public ports are regulated by Transport Canada in accordance with the *User Fees Act 2004*.

GEOGRAPHY, POPULATION, ECONOMY, POLITY AND LEGAL SYSTEM

Located in northern North America, Canada is a country of significant land mass. Spanning over almost ten million square kilometres, it is the world's second largest country. It has the world's longest coastline and the border between the US and Canada is also the longest undefended border in the world.¹⁹⁵⁶ Canada's terrain consists mostly of plains with mountains in the west and lowlands in the southeast. There is a large area of forest in the central east. Its climate varies from temperate in the south to subarctic in the north; with a large area of continuous permafrost.¹⁹⁵⁷

Its population is small relative to geographical size, totalling 34.9 million people, and making Canada one of the least densely populated countries in the world. Approximately 90 per cent of the population is concentrated within 160 kilometres of the US border, with nearly one-third living in the three largest cities of Toronto, Montréal and Vancouver.

Canada is rich in natural resources, particularly; oil, zinc, uranium, gold, nickel, aluminium, and lead. Its key industries are agriculture, transportation equipment (aeronautics, automobiles), chemicals, processed and unprocessed minerals, petroleum and natural gas, food products, wood and paper products and fish products. It is a rich country with an estimated GDP of US\$1.414 trillion or US\$41 400 (PPP) per capita, placing it in the upper quarter of OECD countries. Since World War II, the country has experienced significant growth in the manufacturing, mining, and service sectors which has transformed the economy from largely rural to primarily industrial and urbanised.

¹⁹⁵⁶ About.com, *Geography – Canadian Superlatives*. Available at: <http://geography.about.com/library/weekly/aa052500a.htm> [accessed on 16 July 2013].

¹⁹⁵⁷ Information on geography and economy mainly from Central Intelligence Agency (CIA), *World Factbook: Canada*. Available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/ca.html> [accessed on 16 July 2013].

The various trade agreements between Canada and the United States, specifically the 1994 North American Free Trade Agreement (NAFTA) have resulted in increased trade and economic integration with the US. Exports account for roughly a third of Canada's GDP, 80 per cent of which are absorbed by the US. Canada is the US's largest foreign supplier of energy, including oil, gas, uranium, and electric power. Canada's proven oil reserves, are the third highest in the world behind Saudi Arabia and Venezuela.

Canada has strong air transport and rail systems. It also has extensive and sophisticated fixed-line and mobile telecommunications and high-quality water and wastewater infrastructure.

Canada remains a member of the Commonwealth, and as such is a constitutional monarchy. Its governmental system is very similar to the Australian system, being both a parliamentary democracy and federation. Its Federal Parliament consists of two houses; an elected House of Commons and an appointed Senate. The Queen of England, represented by the appointed Governor General is its official head of state. The Prime Minister, the leader of the political party with the majority of seats in the lower house, holds the position of head of government. While constitutionally empowered with executive authority the Governor General performs a mostly ceremonial role, deferring the exercise of the power to the Cabinet comprised of Ministers appointed by the Prime Minister.

Sub-nationally, there are ten provinces. Additionally there are three territories – Northwest Territories; Nunavut and Yukon Territory. Responsibilities are divided between the federal parliament and the provinces' parliaments, which consist (unlike Australia) of unicameral legislatures. The Territories' legislatures are also bestowed with certain responsibilities, of a less significant nature.

The Constitution of Canada is the supreme law in Canada. It is a combination of both codified acts and unwritten conventions. It determines which areas the federal government is empowered to legislate upon, and which areas remain under provincial jurisdiction.

Both the federal and provincial legal systems are based upon the English Common Law, apart from Quebec where a hybrid system prevails whereby common law is used for public law matters and private law matters follow a civil law tradition.

The nation's highest court and final arbiter is the Supreme Court of Canada, to which nine Judges are appointed by the Prime Minister through the Governor General. Three of these positions must be held by Judges from Quebec so as to ensure that the judicial body has sufficient experience with the civil law system to adjudicate cases involving Quebec laws.¹⁹⁵⁸ Other than the Supreme Court, the Canadian court system is divided into two classes of courts: superior courts of general jurisdiction, and courts of limited jurisdiction.

The superior courts, created and maintained by the provinces and territories, consist of courts of original jurisdiction and courts of appeal. These courts have jurisdiction over matters under both federal and provincial law, unless the matter has been assigned by statute to some other court or administrative agency.

There are additional federal courts established by Parliament, which have a specialised jurisdiction in certain areas of federal law. These courts include the Federal Court, the Federal Court of Appeal and the Tax Court.

The provinces also can establish courts of limited jurisdiction.

APPROACH TO COMPETITION AND REGULATORY INSTITUTIONAL STRUCTURE

The federal regulators in Canada are the National Energy Board (NEB), the Canadian Radio-television and Telecommunications Commission (CRTC), and the Canadian Transportation Agency (CTA). Canada's federal competition regulator is the Competition Bureau and the Competition Tribunal was created in 1986. At the provincial level, the main concern of utility regulators is in relation to energy. Canada's Energy and Utility Regulators (CAMPUT) operate to improve the quality of utility regulation.

¹⁹⁵⁸ Supreme Court of Canada, *The Canadian Judicial System*. Available at: <http://www.scc-csc.gc.ca/court-cour/sys/index-eng.asp> [accessed on 16 July 2013].

The Competition Bureau and the Competition Tribunal

The *Competition Act* governs most business conducts in Canada.¹⁹⁵⁹ It contains both criminal and civil provisions aimed at preventing anti-competitive practices in the marketplace.¹⁹⁶⁰ Its purpose is set out in s.1.1 of the legislation:

The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

Part VI (ss.45 to 62) of the *Competition Act* deals with offences in relation to competition including conspiracies or arrangements between competitors. Part VII.1 (ss.74.01 to 74.19) of the *Competition Act* deals with deceptive marketing practices. Part VIII (ss.75 to 107) deals with restrictive trade practices (such as refusal to deal, price maintenance, exclusive dealing, tied selling, market restriction, abuse of dominant position, and delivered pricing), specialisation agreements, and mergers.

Canada's federal competition regulator is the Competition Bureau. It is an independent agency empowered to administer and enforce the *Competition Act*, *Consumer Packaging and Labelling*, the *Textile Labelling Act* and the *Precious Metals Marking Act*. In doing so, it aims to protect and promote both competitive markets, and consumers.

The Competition Bureau is comprised of a commissioner, appointed by the Governor-in-council, and supporting staff (*Competition Act* s.7). The organisation is divided into nine branches: Civil Matters; Compliance and Operations; Criminal Matters; Economic Policy and Enforcement; Fair Business Practices; Legal Support; Legislative and International Affairs; Mergers; and Public Affairs.

Following receipt of a complaint, the Competition Bureau may launch inquiries into price fixing, bid-rigging, abuse of dominant position, potential mergers and deceptive marketing practices. Having investigated a complaint, the Competition Bureau decides whether to file an application under Parts VII.1 and VIII of the *Competition Act* to the Competition Tribunal. If the Competition Bureau determines that the complaint is a criminal matter, it may refer the case to the Attorney-General who then has the prerogative to prosecute.

The Competition Tribunal was created in 1986 under the *Competition Tribunal Act* when the Canadian Parliament enacted major reforms of Canada's competition laws and replaced the *Combines Investigation Act* with the *Competition Act*.¹⁹⁶¹ It is an independent quasi-judicial adjudicative body, without investigatory or advisory functions.¹⁹⁶² The Tribunal is composed of up to six judicial members appointed from among the judges of the Federal Court and not more than eight lay members. It is a specialised tribunal that combines expertise in economics and business with expertise in law and its members are appointed by the Governor-in-council to hear applications and make orders.¹⁹⁶³

The Tribunal hears and decides all applications made by the Competition Commissioner under Parts VII.1 (Deceptive Marketing Practices) and VIII (Reviewable Matters by the Tribunal) of the Canadian *Competition Act*. The Tribunal also hears references filed pursuant to s.124.2 of the *Competition Act* regarding questions of law, mixed law and fact, jurisdiction, practice or procedure in relation to the application or interpretation of Part VII.1 or Part VIII. Private individuals may seek leave to file an application directly with the Tribunal with regard to refusal to deal (s.75 of the *Competition Act*), price

¹⁹⁵⁹ Justice Law Website, *The Competition Act R.S.C. 1985*. Available at: <http://laws-lois.justice.gc.ca/eng/acts/c-34/> [accessed on 16 July 2013].

¹⁹⁶⁰ *Ibid.*

¹⁹⁶¹ Competition Tribunal, *History*. Available at: <http://www.ct-tc.gc.ca/Tribunal/History-eng.asp> [accessed on 31 May 2013].

¹⁹⁶² Competition Tribunal, *Procedures*. Available at: <http://www.ct-tc.gc.ca/Procedures/FAQs-eng.asp> [accessed on 31 May 2013].

¹⁹⁶³ Competition Tribunal, *Member Appointments*. Available at: <http://www.appointments.gc.ca/prflOrg.asp?OrgID=RCT&lang=eng> [accessed on 16 July 2013].

maintenance (s.76 of the *Competition Act*) and exclusive dealing, tied selling, and market restrictions (s.77 of the *Competition Act*).¹⁹⁶⁴

Section 16 of the *Competition Tribunal Act* provides that the Competition Tribunal may make general rules for regulating its practice and procedure with the approval of the Governor in Council. On 14 May 2008, new *Competition Tribunal Rules*, SOR/2008-141, came into effect. They set out the framework for informal and expeditious proceedings.¹⁹⁶⁵

Appeals

The process for appealing decisions concerning energy matters is determined by which energy board the decision was made. A party dissatisfied with a decision of the National Energy Board (NEB) may apply for leave to appeal to the Federal Court of Appeal on matters of law or jurisdiction. Alternatively, the applicant can apply for a review of the original decision, or a rehearing by the Board, if it believes there are sufficient grounds including: an error of law or jurisdiction; changed circumstances or new facts which have arisen since the close of the original proceeding; or facts that were not placed in evidence in the original proceeding and that were not discoverable by reasonable diligence.¹⁹⁶⁶

If the decision is taken in the Alberta province by the Energy Resources Conservation Board (ERCB), the original decision made by the ERCB is final and not subject to merits review (*Energy Resources Conservation Act*, s.25). However, if a decision has been made by the ERCB without hearing, the disenchanted party may apply within 30 days for hearing and associated re-determination (*Energy Resources Conservation Act*, s.40). Any questions of jurisdiction or law from ERCB determinations, and the Alberta Utilities Commission (AUC), provide grounds of appeal to the Alberta Court of Appeal (*Energy Resources Conservation Act*, s.41). This appeal process is entirely independent of the original decision. It is held in the Court of Appeal and the regulator is an ordinary party without special powers or rights.

If the decision has been made by the Ontario Energy Board (OEB), a person directly affected may, within 15 days after receiving notice of the order, appeal the order to the Board or request a review, or ultimately appeal the decision at the Divisional Court of Ontario.¹⁹⁶⁷

In telecommunications, there are three types of appeal in relation to the Canadian Radio-television and Telecommunications Commission (CRTC) decisions:

- Appeal to the CRTC. The CRTC has the power to review, rescind or vary its prior decision, on application or on its own motion (s.62).
- Appeal to the Federal Court of Appeal.¹⁹⁶⁸ This is a form of judicial review, and only relates to questions of law or jurisdiction. Leave to appeal is required, and when obtained, the court can only alter findings or policy decisions as they relate to law and not to fact (*Telecommunications Act*, s.64 and *Federal Courts Act*, s.28 (1) (c)).
- Appeal to Government. This is form of merits review. The government may rescind or alter the CRTC decision and is required to publish reasons for its decision. This right of appeal has only been used sparingly.¹⁹⁶⁹

Decisions made by the Canadian Transportation Agency (CTA) on rail and private ports can be appealed to the Federal Court on matters of law or jurisdiction. Alternatively, parties may appeal at any time to the Governor in Council. Following an application of one of the parties, another interested person or of its own motion, the Governor in Council may 'vary or rescind any decision, order, rule or

¹⁹⁶⁴ Competition Tribunal, *Rules of Procedure*. Available at: <http://www.ct-tc.gc.ca/Procedures/RulesProcedure-eng.asp> [accessed on 2 June 2013].

¹⁹⁶⁵ *Ibid.*

¹⁹⁶⁶ NEB, *National Energy Board Rules of Practice and Procedure*, 1995, s 44(1). Available at: <http://laws-lois.justice.gc.ca/eng/regulations/SOR-95-208/FullText.html> [accessed on 15 July 2013].

¹⁹⁶⁷ Ontario eLaws, *Ontario Energy Board Act*. Available at: http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_98o15_e.htm#BK25 [accessed on 16 July 2013].

¹⁹⁶⁸ CanLi, *Federal Courts Act*. Available at: <http://canlii.org/en/ca/laws/stat/rsc-1985-c-f-7/latest/rsc-1985-c-f-7.html> [accessed on 15 July 2013].

¹⁹⁶⁹ OECD, *OECD Review – Regulatory Reform in Canada*, 2002, p. 13. Available at: <http://www.oecd.org/regreform/1960562.pdf> [accessed on 2 June 2013].

regulation of the Agency' (*Canada Transport Act*, s.40). Decisions of non-jurisdictional facts are final and conclusive (*Canada Transport Act*, s.31). However, an applicant may seek internal review of decisions if there has been a change in the facts or circumstances related to the decision or order (*Canada Transport Act*, s.32). The Agency may then review, rescind or vary any decision or order made by it, or it may re-hear any application before deciding it.

*CAMPUT*¹⁹⁷⁰

The former Association of Utility Commissioners was reorganised in the 1970s, and CAMPUT was formally established as the 'Canadian Association of Members of Public Utility Tribunals'. The objective was to promote the 'quality of public utility regulation in Canada by providing the forum for the exchange of information and views among the members of the Association'. Founding members agreed to hold annual general meetings in host jurisdictions. In 1986, CAMPUT developed a training and educational program for members and other invited officials which would be delivered through an annual conference.

In 2003, associate membership in CAMPUT became available to public utility tribunals or commissions from countries other than Canada, and in 2007 associate membership became available to other Canadian regulatory tribunals or commissions.

In 2011, the CAMPUT Constitution was amended to discontinue the name 'Canadian Association of Members of Public Utility Tribunals', but to continue using the acronym. CAMPUT became '*Canada's Energy and Utility Regulators*', and full membership is available to any Canadian tribunal, board, commission or agency that is responsible for the economic regulation of one or more utilities in its province, territory or jurisdiction, as well as to any Canadian energy tribunal, board, commission or agency that makes binding decisions through adjudicative or quasi-judicial processes.

REGULATORY ARRANGEMENTS BY INDUSTRY OR SECTOR

1. Energy

Canada is the fifth largest energy producer in the world. It is also one of the highest per capita consumers of energy, reflecting its geography and climate, its industrial structure and income level.¹⁹⁷¹ The regulation of energy is divided between federal and provincial regulators. The Federal regulator is the NEB that regulates international and interprovincial aspects of the oil, gas and electric utility industries. Regulatory institutions exist at the province level and have jurisdiction over intra-province matters. The regulatory institutions of Alberta and of Ontario are profiled for illustrative purposes – Alberta is an energy-rich western province with 11 per cent of Canada's population; while Ontario is a more energy-consuming province located in the country's east with more than 38 per cent of Canada's population.

Energy Market Profile

In 2010, the energy sector accounted for 6.9 per cent of Canada's gross domestic product (GDP) and 25.4 per cent (\$113.7 billion) of the total value of Canadian exports. The large majority of investments in Canada's energy sector come from the private sector – the exception being in the electricity industry where provinces rich in hydro-electric power own their publicly funded and publicly managed utilities.¹⁹⁷²

Canada's energy policy is guided by a series of principles, agreements and accords. The main principles are a commitment to markets as the most efficient means of determining, supply, demand, prices and trade; respect for the jurisdictional authority and role of the provinces; targeted intervention in market processes where necessary to achieve specific policy objectives including issues of health and safety (for example, pipeline regulation) and environmental sustainability. Agreements and accords include the Western Accord between the Governments of Canada, Alberta, Saskatchewan and British Columbia on oil and gas pricing and taxation; the Agreement on Natural Gas Markets and

¹⁹⁷⁰ CAMPUT, *About CAMPUT*. Available at: http://www.camput.org/pub_about.html [accessed on 6 June 2013].

¹⁹⁷¹ Natural Resources Canada, *Energy Policy*. Available at: <http://www.nrcan.gc.ca/energy/policy/1635> [accessed on 16 July 2013].

¹⁹⁷² NEB, *Energy Regulation in Canada: Lessons Learned from the Past – the Way Forward*, Speech by Gaetan Caron to 12th Annual Meeting of the *Asociación Iberoamericana de Entidades Reguladoras de la Energía* (ARIAE) San Luis Potosi, México, 13-16 April 2008. Available at: <http://www.neb-one.gc.ca/clf-nsi/archives/rpblctn/spchsndprsntrn/2008/nrgrgltnrndpstfrwrdr/nrgrgltnrndpstfrwrdr-eng.html> [accessed on 31 May 2013].

Prices between the same western provinces; Atlantic Accords with Newfoundland and Labrador and with Nova Scotia, including the establishment of jointly managed Offshore Boards; the North American Free Trade Agreement (NAFTA) which is the cornerstone of Canadian energy policy with regard to trade.¹⁹⁷³

Natural Gas

Canada is the third largest producer of natural gas in the world.¹⁹⁷⁴ The Canadian and US natural gas markets operate as one large integrated market. Canadian gas production is connected to the North American gas market through a network of thousands of kilometres of pipelines.¹⁹⁷⁵ Canada produced about one quarter of the combined natural gas production of Canada and the US in 2010. About 53 per cent of Canadian production is consumed within Canada with the remainder exported to the US.¹⁹⁷⁶ Canadian natural gas production is expected to continue a slow decline or remain stagnant until 2013 or 2014, after which production is expected to rise slowly, due to unconventional gas development.

In 2011, estimated Canadian natural gas consumption was about 235 million m³/day, eight per cent higher than in 2010. Over one-third of domestic natural gas consumption was for residential and commercial use, primarily for space and water heating. Approximately 10 per cent of total Canadian natural gas production was used by oil sands operations in Alberta to generate electricity and steam.¹⁹⁷⁷ Canadian natural gas exports were 248 million m³/day in 2011, slightly lower than in 2010. Net exports decreased by about 14 per cent per annum to 59.8 billion m³/day in 2011.¹⁹⁷⁸

Natural gas exploration and production is dominated by North American energy conglomerates. Those with the largest proven and probable reserves are publicly listed; Canadian Natural, Husky Energy, Cenovus Energy, Encana Corp, Nexen Inc and Talisman Energy. Eight of the thirty largest natural gas producers in North America are Canadian.¹⁹⁷⁹ The price of natural gas is determined in the competitive North American natural gas market. However, pipeline transmission and distribution rates are regulated, with rates based on the cost of providing services.

Interprovincial and international pipeline transportation tolls and tariffs are regulated by the National Energy Board (NEB). The tolls and tariffs are decided through a public hearing process or through negotiations between pipeline companies and shippers. These negotiated settlements must be approved by the NEB.

The local distribution rates are regulated by provincial regulatory boards or commissions, or directly by a provincial government.¹⁹⁸⁰

Electricity

Coal, nuclear, natural gas and hydro generation are the main sources of electricity generation in Canada.

In 2011, total Canadian electricity generation increased by 3.2 per cent from 2010. Thermal generation fell in 2011 because of Ontario's coal generation declining by two-thirds of its 2010 output. This was due to coal unit retirements and reduced need for output from the remaining coal units.

¹⁹⁷³ Natural Resources Canada, *Overview of Canada's Energy Policy*. Available at: <http://www.nrcan.gc.ca/energy/policy/1352> [accessed on 16 July 2013].

¹⁹⁷⁴ Natural Resources Canada, *Natural Gas*. Available at: <http://www.nrcan.gc.ca/energy/sources/natural-gas/1557> [accessed on 16 July 2013].

¹⁹⁷⁵ National Energy Board, *Natural Gas – How Canadian Markets Work*. Available at: <http://www.neb-one.gc.ca/clf-nsi/rnrgynfmltn/prcng/ntrlqs/cndnmrk-eng.html> [accessed on 16 July 2013].

¹⁹⁷⁶ National Energy Board, *Natural Gas – The Canadian Industry*. Available at: <http://www.neb-one.gc.ca/clf-nsi/rnrgynfmltn/prcng/ntrlqs/cndnndstr-eng.html> [accessed on 16 July 2013].

¹⁹⁷⁷ National Energy Board, *Canadian Energy Overview 2011 – Energy Briefing Notes*. Available at: <http://www.neb-one.gc.ca/clf-nsi/rnrgynfmltn/nrgyrprt/nrgyvrw/cndnrgyvrw2011/cndnrgyvrw2011-eng.html#s5> [accessed on 16 July 2013].

¹⁹⁷⁸ *Ibid.*

¹⁹⁷⁹ The Globe and Mail, *Catch-22 Ensnare Canadian Gas Producers*, Sep 2011, Available at: <http://www.theglobeandmail.com/report-on-business/international-business/catch-22-ensnares-canadian-gas-producers/article619127/> [accessed on 16 July 2013].

¹⁹⁸⁰ National Energy Board, *Natural Gas – Frequently Asked Questions (FAQs)*. Available at: <http://www.neb-one.gc.ca/clf-nsi/rnrgynfmltn/prcng/ntrlqs/frqntlyskdqtstn-eng.html> [accessed on 16 July 2013].

In 2011, total electricity generation was 608 terawatt hours, with net exports of 36.8 terawatt hours, or \$1.7 billion in net export revenue.¹⁹⁸¹ Canada is a net exporter of electricity to the US, mainly due to the availability of low-cost hydro-electric resources. Some regions, however, rely on imports to meet domestic load requirements during high demand periods or when water levels are low in hydropower-based provinces.¹⁹⁸²

The Canadian electricity system is part of an integrated North American electricity grid, but Canada's electricity markets have primarily developed along provincial or regional boundaries.

The provinces and territories have jurisdiction over generation, transmission and distribution of electricity within their boundaries, including restructuring initiatives and electricity prices. The federal government has jurisdiction over electricity exports, international and designated inter-provincial power lines, and nuclear safety.

Electricity pricing varies by province or territory according to the volume and type of available generation and whether prices are market-based or regulated.¹⁹⁸³ Alberta has restructured its electricity market since the late 1990s and has competitive wholesale and retail markets. Ontario has chosen to partially restructure its electricity market. Prices in other provinces and territories are set by the electricity regulator to cover costs and allow for a reasonable rate of return to investors.¹⁹⁸⁴

National Regulation – The National Energy Board (NEB)

The NEB was established in 1959 and is the independent federal agency that regulates international and interprovincial aspects of the oil, gas and electric utility industries.¹⁹⁸⁵ It is empowered under the *National Energy Board Act*¹⁹⁸⁶ to enforce and administer the *Canada Oil and Gas Operations Act* and certain provisions of the *Canada Petroleum Resources Act*, which include crude oil and natural gas exploration and production on frontier lands and certain areas offshore Canada's east, west and arctic coasts. The NEB is located in Calgary in Alberta.

The NEB is composed of up to nine board members, appointed by the Governor in Council.¹⁹⁸⁷ The Governor in Council also designates which board members will be Chairperson and vice-Chairperson. The Chairperson has supervision of, and directs the work of, and the staff of the NEB. Each member is appointed initially for a seven-year term, and may be reappointed for periods of seven years thereafter. Temporary board members may also be appointed.¹⁹⁸⁸

The board members are supported by approximately 400 employees who possess the diverse skills required to support the work of the Board. Employees may be financial analysts, computer specialists, economists, engineers, environmentalists, geologists, geophysicists, communications specialists, lawyers, human resource and library specialists or administrative staff.¹⁹⁸⁹ The Board may also appoint experts to assist it in an advisory capacity. The NEB has a number of roles including the promotion of safety and security, environmental protection and efficient energy infrastructure and

¹⁹⁸¹ National Energy Board, *Canadian Energy Overview 2011 – Energy Briefing Note*. Available at: <http://www.neb-one.gc.ca/clf-nsi/rnrgynfmrtn/nrgyrprt/nrgyvrw/cndnnrgyvrw2011/cndnnrgyvrw2011-eng.html#s5> [accessed on 16 July 2013].

¹⁹⁸² National Energy Board, *Electricity – How Canadian Markets Work*. Available at: <http://www.neb-one.gc.ca/clf-nsi/rnrgynfmrtn/prcng/lctrct/cndnmrkt-eng.html> [accessed on 16 July 2013].

¹⁹⁸³ Centre for Energy, *What Is the Status of Regulation in Canada?* Available at: <http://www.centreforenergy.com/AboutEnergy/Electricity/Generation/Overview.asp?page=25> [accessed on 16 July 2013].

¹⁹⁸⁴ *Ibid.*

¹⁹⁸⁵ National Energy Board, *Who We Are & Our Governance*. Available at: <http://www.neb-one.gc.ca/clf-nsi/rthnb/whwrndrgvrnnc/whwrndrgvrnnc-eng.html> [accessed on 16 July 2013].

¹⁹⁸⁶ *National Energy Board Act*, Available at: <http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-n-7/latest/> [accessed on 3 June 2013].

¹⁹⁸⁷ *National Energy Board Act*, s. 3(1).

¹⁹⁸⁸ *National Energy Board Act*, s. 4(1).

¹⁹⁸⁹ National Energy Board, *Canada's National Energy Regulator*. Available at: <http://www.neb-one.gc.ca/clf-nsi/rthnb/whwrndrgvrnnc/cndntlnrgrqltr-eng.html> [accessed on 16 July 2013].

markets in the Canadian public interest.¹⁹⁹⁰ It is accountable to Parliament through the Minister of Natural Resources Canada.¹⁹⁹¹

The NEB's main responsibilities include:

- regulating the construction and operation of interprovincial and international oil and gas pipelines, and international and designated interprovincial power lines;
- regulating tolls and tariffs for pipelines under its jurisdiction;
- regulating exports and imports of natural gas and exports of oil, natural gas liquids (NGLs) and electricity; and
- regulating oil and gas exploration, development and production in frontier lands and offshore areas not covered by provincial or federal management agreements.¹⁹⁹²

In addition to its role as a regulator, the NEB reports on specific energy issues, holds public inquiries when appropriate, and monitors current and future supplies of Canada's major energy commodities.¹⁹⁹³ When required, the Board conducts studies or research into energy matters to meet its regulatory responsibilities. With this knowledge and expertise, the Board reports to and advises the Minister of Natural Resources on energy issues.¹⁹⁹⁴

The *National Energy Board Act* is the key piece of legislation that sets out the NEB's role in the economic regulation of energy. Under this Act all tolls must be 'just and reasonable' and be non-discriminatory (*National Energy Board Act*, sections 62 and 67).

In addition to the requirements of the legislation, the NEB has enunciated a number of regulatory principles and case-specific rulings. For example, it requires that tolls should be, to the greatest extent possible, cost-based and that users should pay the costs caused by transportation of their product through the pipeline. It also requires that tolls should promote economic efficiency by having price signals that maximise the utilisation of the pipeline system and promote efficient costs.¹⁹⁹⁵

Consultation of Interested Parties

Applications are made to the Board for any of the activities that the NEB regulates. Decisions on these applications are made in a similar way to civil court decisions. For major applications, the NEB holds oral public hearings. Normally a panel of three Board Members make a decision on the application. Oral hearings are usually held in locations where there is specific interest in the application. Public hearings may also be conducted in writing.

A written hearing means the hearing is conducted entirely in writing. The majority of these documents are available for the public to view on the NEB website.¹⁹⁹⁶ When the NEB announces a hearing, it will also include information on how the hearing will be conducted and how people can participate.¹⁹⁹⁷ An oral hearing is more commonly used and usually begins with a written process. Participants file their written evidence and then have the opportunity to ask questions in writing of each other. Information

¹⁹⁹⁰ National Energy Board, *Energy Information Program*. Available at: <http://www.neb-one.gc.ca/clf-nsi/rnrgynfmrn/nrgyrprt/nrgnfrmtnprgrm/nrgnfrmtnprgrm-eng.html> [accessed on 16 July 2013].

¹⁹⁹¹ National Energy Board, *Who We Are & Our Governance*. Available at: <http://www.neb-one.gc.ca/clf-nsi/rthnb/whwrndrgvrnnc/whwrndrgvrnnc-eng.html> [accessed on 16 July 2013].

¹⁹⁹² National Energy Board, *Our Responsibilities*. Available at: <http://www.neb-one.gc.ca/clf-nsi/rthnb/whwrndrgvrnnc/rrspnsblt-eng.html> [accessed on 16 July 2013].

¹⁹⁹³ National Energy Board, *Regulating in the Public Interest*, Speech by Gaetan Caron on 16 October 2012 for the University of Calgary Public Policy Master of Public Policy Speakers Series. Available at: <http://www.neb-one.gc.ca/clf-nsi/rpblctn/spchsndprsntrn/2012/rqltngnthpblctrst/rqltngnthpblctrst-eng.html> [accessed on 16 July 2013].

¹⁹⁹⁴ National Energy Board, *Our Responsibilities*. Available at: <http://www.neb-one.gc.ca/clf-nsi/rthnb/whwrndrgvrnnc/rrspnsblt-eng.html> [accessed on 16 July 2013].

¹⁹⁹⁵ NEB, *Energy Regulation in Canada: Lessons Learned from the Past – the Way Forward*, Speech by Gaetan Caron to 12th Annual Meeting of the Asociación Iberoamericana de Entidades Reguladoras de la Energía (ARIAE) San Luis Potosi, México, 13-16 April 2008. Available at: <http://www.neb-one.gc.ca/clf-nsi/archives/rpblctn/spchsndprsntrn/2008/nrgqltncndpsstfwrdr/nrgqltncndpsstfwrdr-eng.html> [accessed on 16 July 2013].

¹⁹⁹⁶ See the website at: www.neb-one.gc.ca [accessed on 16 July 2013].

¹⁹⁹⁷ See for example, National Energy Board, *Application for the Edmonton to Hardisty Pipeline Project*. Available at: <https://www.neb-one.gc.ca/ll-eng/Livelink.exe?func=ll&objId=895427&objAction=browse&sort=-name> [accessed on 16 July 2013].

is usually available on the NEB website. This is followed by the oral portion of the hearing in which participants may ask oral questions of witnesses and present their final argument or the summary of their position based on the evidence.¹⁹⁹⁸

Matters arise before the regulator when parties make an application or complaint. The NEB is a court of record and its decisions and reasons for decision are public documents. Applications and complaints concerning traffic, tolls and tariffs may be filed with the NEB at any time. When examining tolls, the NEB has the discretion to determine whether an oral or written public hearing is warranted. The NEB's practice is to seek input from interested parties before making a decision on an application or complaint.¹⁹⁹⁹

Under the legislation, the NEB may make rules relating to procedures for making applications, representations and complaints, and the conduct of hearings. However, the NEB is able to dispense with or vary these Rules during a proceeding where public interest considerations or procedural fairness require such a course of action.²⁰⁰⁰ The NEB's current rules are set out in *National Energy Board Rules of Practice and Procedure 1995*.²⁰⁰¹

Gas pipeline companies are classified into two groups:

- Group one companies that operate extensive pipeline systems; and
- Group two companies that operate the remaining smaller pipelines.

There are currently 12 Group one companies and approximately 100 Group two companies, including six commodity pipelines.²⁰⁰² Since 1985, the NEB has decided to apply lighter economic regulation to smaller pipelines.

The NEB uses a complaint approach for the economic regulation of Group two companies. This method of regulation is described in each company's tariff. The pipeline company is responsible for providing shippers and other interested persons with sufficient information to enable them to determine whether the tolls are reasonable. Once filed with the NEB, the tariffs containing new tolls automatically become effective. If a complaint is filed, the NEB may establish a procedure to examine tolls. In the absence of a complaint, the NEB may presume that the filed tolls are just and reasonable. Overall, this approach has resulted in few complaints.

The NEB now also adopts this approach for tariff filings by certain smaller Group one companies that have few shippers, when there is general support for this from their stakeholders.

Under the complaint approach, the parties are encouraged to work out any problems with the pipeline company. If this is unsuccessful, a complaint may be filed with the NEB. This approach is considered to have resulted in few complaints.²⁰⁰³

Major toll applications (that is, establishing tolls for the Group one companies) normally warrant a public hearing, which may be written or oral. The parties usually involved in the formal hearing process include the energy provider and affected third parties who are often landowners, particularly in cases related to pipelines. The hearing process is placed on the public record and the NEB is bound by the rules of natural justice.

However, in order to reduce the length and cost of such hearings, the NEB has introduced negotiated multi-year settlements. In 1994, the NEB published its *Guidelines for Negotiated Settlements of Traffic, Tolls and Tariffs*, which were revised in 2002. The guidelines are intended to facilitate a negotiated settlement process which will allow pipeline companies, producers, shippers, consumers, governments and other interested parties to resolve toll and tariff matters through consensus building and negotiation rather than the hearing process. Any negotiated settlements must still be approved by

¹⁹⁹⁸ National Energy Board, *The Public Hearing Process – Your Guide to Understanding NEB Hearings*. Available at: <http://www.neb-one.gc.ca/clf-nsi/rthnb/pblcprtctpn/pblchrng/pblchrngmpmplt-eng.html> [accessed on 16 July 2013].

¹⁹⁹⁹ National Energy Board, *The Regulation of Traffic, Tolls and Tariffs*. Available at: <http://www.neb.gc.ca/clf-nsi/rthnb/whwmdrgvrnnc/rqlnttrfctllstrffs2007-eng.html#s8> [accessed on 16 July 2013].

²⁰⁰⁰ NEB, *National Energy Board Rules of Practice and Procedure 1995*, 1995, s. 4. Available at: <http://laws-lois.justice.gc.ca/eng/regulations/SOR-95-208/FullText.html> [accessed on 15 July 2013].

²⁰⁰¹ NEB, *National Energy Board Rules of Practice and Procedure 1995*, *op. cit.*

²⁰⁰² National Energy Board, *The Regulation of Traffic, Tolls and Tariffs*, *op. cit.*

²⁰⁰³ NEB, *The Regulation of Traffic, Tolls and Tariffs*, *op. cit.*

the NEB. However, if these guidelines are followed, in most cases the NEB would be able to determine that the resultant tolls were just and reasonable without a public hearing.²⁰⁰⁴

The need for a public hearing has also been reduced by the NEB's generic multi-pipeline cost of capital proceeding in 1994-95. As a result, the capital structure and rate of return on equity for some Group one companies are set based upon an adjustment mechanism established in this proceeding.²⁰⁰⁵

The NEB conducts compliance audits as part of its monitoring responsibility.

NEB procedures are further streamlined by pre-application meetings. These meetings give prospective applications the opportunity to fully understand the regulatory processes and regulatory requirements. According to the NEB, these meetings can lead to more complete applications, which facilitate the review process and improve response times. To assist prospective applicants in determining whether a pre-application meeting would be beneficial, the NEB has prepared *Pre-Application Meeting Guidance Notes*.²⁰⁰⁶

The NEB provides and encourages Alternative Dispute Resolution (ADR) for parties as an alternative to regulatory or litigated decision-making. It published *Appropriate Dispute Resolution Guidelines* in July 2003.²⁰⁰⁷ These indicate that ADR processes may be appropriate in toll and tariff issues such as complaints about access or annual toll applications.

After an application is made with respect to certificates (issuance, revocation or suspension), licence (exportation of gas or electricity or importation of gas) and permission (leave to abandon the operation of a pipeline), the NEB holds a public hearing in which any member of the public may make a submission, following which, the board makes a determination (*National Energy Board Act*, s.24(1)). Prior to the hearing, the NEB may hold information sessions in potentially affected communities and pre-hearing planning conferences so as to obtain public input into the hearing process.²⁰⁰⁸ For other applications no public hearing is necessary (*National Energy Board Act*, s.24 (2)).

In considering to make, amend or revoke a declaration of significant or commercial discovery, the NEB must give at least 30 days' notice of its intention to make a decision to whomever is affected, after which any person to whom notice was given may request a hearing. If such a request is made, the NEB will conduct a hearing, and when it has made a decision, it must give notice of that decision to anyone who had requested hearing, and must provide reasons if they are requested (*National Energy Board Act*, s.28.2).

The parties usually involved in the formal hearing process include the energy provider and affected third parties who are often landowners, particularly in cases related to pipelines. Outside of the formal hearing process, the applicant is expected to undertake adequate consultation with all relevant stakeholders at all stages of the application and construction process. It is intended that this consultation process will influence the design and construction of facilities.

The procedures conducted by the NEB appear judicially styled in that it acts as a Court of Record, only deciding issues on the basis of submissions and evidence gathered, through a process of hearing and notice (*National Energy Board Act*, s.11). Before a hearing, individuals, interest groups, companies and other organisations have an opportunity to register as intervenors or interested parties and thus may actively participate in the proceedings. The hearing process is placed on the public record and the NEB is bound by the rules of natural justice.

Outside of specific cases, the NEB conducts research and gathers information about how to best protect the interests of Aboriginal communities. Additionally, the NEB tries to educate Aboriginal

²⁰⁰⁴ NEB, *Guidelines for Negotiated Settlements of Traffic, Tolls and Tariffs*, 2002. Available at: <https://www.neb-one.gc.ca/ll-eng/livelink.exe/fetch/2000/90463/157025/208496/A0E4C1 - Letter Decision.pdf?nodeid=208497&vernum=0&redirect=3> [accessed on 3 June 2013].

²⁰⁰⁵ NEB, *Our Responsibilities (Efficient Processing of Applications)*. Available at: <http://www.neb.gc.ca/clf-nsi/rthnb/whwrndrgvrnnc/rrspnsblt-eng.html> [accessed on 3 June 2013].

²⁰⁰⁶ NEB, *Pre-Application Meetings Guidance Notes*, Notice, 13 November 2007. Available at: <http://www.neb.gc.ca/clf-nsi/rpblctn/ctsndrgltn/rrggnmgpnb/prpplctnmtnq/prpplctnmtnq-eng.pdf> [accessed on 3 June 2013].

²⁰⁰⁷ NEB, *Appropriate Dispute Resolution Guidelines*, 2003. Available at: http://www.neb.gc.ca/clf-nsi/rpblctn/ctsndrgltn/rrggnmgpnb/pprprtsptrsltn/ADRGuidelines2003_e.pdf [accessed on 3 June 2013].

²⁰⁰⁸ For example, in the 2011 TransCanada application. Available at: <http://www.neb-one.gc.ca/clf-nsi/archives/rthnb/nws/nwsrls/2011/nwsrls29-eng.html> [accessed on 3 June 2013].

communities on ways to promote and defend their interests in the course of application procedures through the 'Aboriginal Engagement Program'.

The NEB's involvement in a project does not end with an approval. The NEB can attach environmental conditions to project approvals which it can then monitor and enforce throughout the lifecycle of the pipeline, from project approval to abandonment.²⁰⁰⁹

There is a clear role for interested parties in Canadian energy regulatory processes. In particular, in the conduct of public hearings, individuals, companies and other federal and provincial government agencies with an interest in the outcome have an opportunity to participate directly in proceedings.²⁰¹⁰ The interests of Indian communities are also specifically recognised in the *National Energy Board Act* (s.78).

As noted previously, the NEB conducts a public hearing for certain applications, including:

- applications for the construction and operation of pipelines that are either international or inter-province, and international power lines;
- applications to set the tolls and tariffs of pipeline companies under the Board's jurisdiction;
- applications to abandon a pipeline;
- export applications for natural gas, oil or electricity or import applications for natural gas; and
- landowner oppositions to the detailed route of an approved pipeline.²⁰¹¹

Hearings at the NEB can be conducted solely in writing or through a combination of written and oral submissions. Depending on the process chosen, there are typically three ways that individuals or groups may participate in a hearing: write a letter of comment; make an oral statement; or become an intervenor.

The available options and deadlines for participation are set out by the Board in the Hearing Order which is issued when the NEB decides that an application requires a hearing. Notices for hearings are well-publicised. The NEB sends out a news release when a Hearing Order is issued and posts the Hearing Order on its website. Applicants must also publish notice of the hearing in newspapers that serve the area around the proposed project (*NEB Hearings*).

NEB hearings usually take place in the community impacted by the proposed project, to make it easier for people to participate in the hearing process and may take place in more than one community if necessary (*NEB Hearings*).

Sometimes NEB staff members will go out to communities that may be impacted by the proposed project to conduct a public-information session. These informal meetings are held before the start of an oral hearing and they provide people with information on how to participate during the hearing and information on the hearing process (*NEB Hearings*).

The NEB distributes a preliminary list of issues for a particular application. These issues structure how the NEB will hear the application. Participants in the hearing may suggest changes to the list of issues which may be made if the NEB panel believes the matter is necessary to their decision (*NEB Hearings*).

Participants in an NEB hearing or any other NEB process may also make requests to the Board for somebody to be designated to speak on their behalf. The designated person does not have to be a lawyer (*NEB Hearings*).

Those who are registered as intervenors can request additional information about the application from the company or from others who have filed written evidence (*NEB Hearings*). Intervenors have the right to receive all of the documents concerning the project in the written and oral portions of the hearing process. During the hearing process, they also have the opportunity to present written evidence, question others on their written evidence, cross-examine other witnesses at the oral portion

²⁰⁰⁹ National Energy Board, *Canada's National Energy Regulator*. Available at: <http://www.neb-one.gc.ca/clf-nsi/rthnb/whwrndrgvrnnc/cndntnlngqltr-eng.html> [accessed on 15 July 2013].

²⁰¹⁰ NEB, *The Public Hearing Process – Your Guide to Understanding NEB Hearings*. Available at: <http://www.neb-one.gc.ca/clf-nsi/rthnb/pblcprtctn/pblchrng/pblchrngmpmplt-eng.htmlpdf> [accessed on 16 July 2013].

²⁰¹¹ *Ibid.*

of the hearing, and give final argument. They may also be questioned on any evidence that they present (*NEB Hearings*).

Persons who cannot attend the oral hearing in person can listen to the live hearing broadcast on the NEB website (*NEB Hearings*).

Intervenors and others also have the opportunity to provide feedback to the NEB after the hearing and to contact the NEB at any time after approval of a project if they have a concern (*NEB Hearings*).

Landowners who have a pipeline or power line project crossing their land may also contact the NEB to use one of its programs to help work out any issues with the company. The Landowner Complaint Resolution Program and the Appropriate Dispute Resolution (ADR) process are options for resolving outstanding issues that are not related to compensation. ADR could take the form of a meeting between the landowner and the company, which may be facilitated by trained NEB staff or by another neutral third party (*NEB Hearings*).

The NEB also has a Participant Funding Program which provides financial assistance to support the timely and meaningful participation of interested parties in the NEB's oral hearing process for facility applications (*NEB Hearings*). Under the program, funding is available to individuals, landowners, incorporated non-industry not-for-profit organisations, and Aboriginal Groups to cover eligible expenses, such as travel costs and fees for experts. As program funding is limited, it is not meant to cover all expenses incurred by the participant throughout the process and not all applications will be successful.²⁰¹² When the Canadian Environmental Assessment Agency is involved in NEB hearings, it may also provide participant funding.

Costs related to detailed route hearings are not covered by the participant funding program. The cost-recovery provisions for detailed route hearings are found in the *National Energy Board Act*, which provides that persons who make representations at these types of hearings may have their reasonable costs reimbursed by the company whose pipeline route is affected (s.39).

Timeliness

The *National Energy Board Act* was amended on 6 July 2012 to include time limits for the processing of applications made under sections 52, 58 and 58.16. The NEB is required to complete its assessment and make its recommendation or decision within these time limits, which are set by the Chair and which must be no longer than 15 months after the day on which an applicant has, in the Board's opinion, provided a complete application.²⁰¹³

On 6 July 2012, the Chair determined the following standard time limits for the processing of facility applications filed under sections 52, 58, and 58.16 of the *National Energy Board Act*:

Section 58 Non-hearing²⁰¹⁴

Category	Complexity of Issues	Service Standard Target	Maximum Time Limit
A	Minor	80 per cent of decisions released within 40 calendar days*	130 days
B	Moderate	80 per cent of decisions released within 90 calendar days*	210 days
C	Major	80 per cent of decisions released within 120 calendar days*	300 days

²⁰¹² NEB, *FAQ Participant Funding Program*. Available at: <http://www.neb-one.gc.ca/clf-nsi/rthnb/pblcptcptn/prcptntfndngprgm/fq-eng.html#s7> [accessed on 3 June 2013].

²⁰¹³ NEB, *Efficient Processing of Applications*. Available at: <http://www.neb-one.gc.ca/clf-nsi/rthnb/whwmdrgvrnnc/rrspnsblt-eng.html> [accessed on 3 June 2013].

²⁰¹⁴ NEB, *Non-hearing Applications (section 58)*. Available at: <http://www.neb-one.gc.ca/clf-nsi/rthnb/whwmdrgvrnnc/nbsrvctndrd/nbsrvctndrd-eng.html> [accessed on 3 June 2013].

* The NEB remains committed to processing applications in accordance with its Service Standards (see further information about the Service Standards below). These standards do not include timeouts (previously, any period of time during which the NEB had limited or no control over the processing of an application was considered a timeout). Note that any modification to the time limit which is permitted by statute will apply to both the service standards and time limits. Any such modifications will be shared publically.

Non-hearing section 58 applications are classified into one of three categories based on:

- their level of complexity;
- the estimated number and type of information requests which may be generated; and
- the probability of third-party interest.

Section 58, 58.16, or 52 Hearings²⁰¹⁵

Process	Time Limit
Written	15 months
Oral	15 months

The Chair has retained the discretion to vary the time limit for a specific project application based on factors related to that project application. However, in all cases, the time limit will be no later than 15 months from the Board’s determination that a section 52, 58 or 58.16 application is complete.

The Chair may also may take any measure that he/she considers appropriate to ensure that these time limits are met, including designating a sole member who is authorised to deal with the application (*National Energy Board Act*, s.6 (2.2)).

Although other types of applications may not be subject to these time limits, the NEB is committed to work efficiently in the processing of all applications in accordance with its Service Standards.²⁰¹⁶ In addition to the standards outlined above, the NEB Service Standards also identify specific delivery targets or timelines for other key services such as export/import applications; applications for the drilling of wells and geological and geophysical work in frontier areas; significant Discovery and Commercial Discovery Applications on frontier lands; landowner complaints; and Onshore Pipeline/Processing Plant and financial audits. In addition, to ensure that any application before the Board is dealt with in a timely manner, the Chair has the power to issue directives to the members regarding the manner in which they are to deal with an application (*National Energy Board Act*, s.6 (2.1)).

The NEB also has a number of other procedures put in place that are intended to reduce the time taken for regulatory decision-making.

The NEB has developed a *Filing Manual* to provide applicants with a clear definition of its expectations for complete application or information filings. Complete filings should allow the Board to carry out more consistent assessments with fewer information requests and, therefore, shorten timelines required to make a decision.²⁰¹⁷

²⁰¹⁵ Letter – Jobs, Growth and Long-term Prosperity Act – Establishment of time limits for section 52, 58, and 58.16 applications. Available at: <https://www.neb-one.gc.ca/ll-eng/livelink.exe?func=ll&objId=831396&objAction=browse> [accessed on 3 June 2013].

²⁰¹⁶ NEB, *NEB Service Standards*. Available at: <http://www.neb-one.gc.ca/clf-nsi/rthnb/whwrndrgvrnnc/rrspnsbtl-eng.html> [accessed on 3 June 2013].

²⁰¹⁷ NEB, *Filing Manual*. Available at: http://www.neb-one.gc.ca/clf-nsi/rpblctn/ctsndrgltn/flngmnl/fmchptr1-eng.html#s1_1html [accessed on 16 July 2013].

Prospective applicants may also request a pre-application meeting with the NEB in which the process of application is elucidated.²⁰¹⁸ Pre-application meetings give both the regulator and the prospective applicant the opportunity to share process information and establish contacts, discuss filing requirements and identify resources. Board staff members present in the meeting cannot, however, give any specific guidance on the proposed project or any substantive issues. The meeting's proceedings are documented, and the agreed notes are available, on request, to the public; together with any other documents provided at the meeting. The experience of the NEB shows that these meetings improve the completeness of applications, which in turn facilitates the review process and hastens response times.

Information Disclosure and Confidentiality

The *Access to Information Act* is a federal law that provides access to information under the control of the Canadian Government. The majority of the written information, including a complete copy of the application, any letters of comment, or correspondence between the NEB, the applicant, and other parties can be found on the NEB's website. Copies of any information that cannot be posted on the NEB's website may be requested from the NEB library (*NEB Hearings*). All documents relating to a NEB public hearing must be made available for public inspection in its library. In addition, the NEB maintains an electronic and accessible record on its website of all applicant and intervenor submissions, letters of comment and hearing transcripts. All interim reports and compiled procedure and the final detailed reasons for decisions are publicly available.²⁰¹⁹

The *Access to Information Act* also sets out limited and specific exceptions to the right of access, and provides for independent review of decisions on the disclosure of government information. Among other reasons, information may be excepted from disclosure if that information was obtained in confidence from a foreign government or institution, an international organisation or institution of states, a provincial government or institution, a municipal or regional government, or an aboriginal government, unless the party who provided the confidential information agrees to its disclosure (s.13).

Information may also be exempted from disclosure if its publication would be likely to harm law enforcement and investigations, or security, or if it relates to an individual or third party who has not consented to its disclosure.

A decision on disclosure may be referred to the Information Commissioner.

Notwithstanding information disclosure laws, an applicant may request that the NEB treat a filing as confidential in accordance with ss.16.1 and 16.2 of the *National Energy Board Act*. The NEB may take any measures and make any order that it considers necessary to ensure information confidentiality if it is satisfied that:

- disclosure of the information could reasonably be expected to materially affect a person or prejudice the person's competitive position; or
- the information is financial, commercial, scientific or technical information that is supplied to the NEB on a confidential basis, and
 - the information has been consistently treated as confidential information; and
 - the NEB considers that the person's interest in confidentiality outweighs the public interest in disclosure;
- there is a real and substantial risk that disclosure of the information will impair the security of pipelines, international power lines, buildings, structures or systems, including computer or communication systems, or methods employed to protect them; and
- the need to prevent disclosure of the information outweighs the public interest in disclosure.

²⁰¹⁸ NEB, *Pre-Application Meetings Guidance Notes (Revised)*, 14 February 2013. Available at: <http://www.neb-one.gc.ca/clf-nsi/rpblctn/ctsndrgltn/rrggnmgpnb/prpplctnmtng/prpplctnmtng-eng.html#s3> [accessed on 15 July 2013].

²⁰¹⁹ Enterprises Workspace, *Gas*. Available at: <https://www.neb-one.gc.ca/ll-eng/livelink.exe?func=ll&objId=90550&objAction=browse&sort=-name> [accessed on 3 June 2013].

Decision-making and Reporting

At least three board members must be present at a Board meeting to constitute a quorum (*National Energy Board Act*, s.7(2)) and that is normally the number on the panel that makes a decision on an application.²⁰²⁰ The Chair may authorise one or more members to report to the Board on any question or matter for which it has jurisdiction. That member(s) has all the power of the Board for the purposes of taking evidence or acquiring information (*National Energy Board Act*, s.15(1)). When required, the Board conducts studies or research into energy matters to meet its regulatory responsibilities. The Board may also hold inquiries on its own initiative, when appropriate. With this knowledge and expertise, the Board reports to, and advises, the Minister of Natural Resources on energy issues.²⁰²¹

In the course of making a determination, the board members hear all the relevant information provided by the applicant and any intervenors at the hearing, and then decide accordingly. The NEB does not necessarily create a draft decision, but an interim decision may be made pending a final decision (*National Energy Board Act*, s.19(2)).

The NEB has the power to make decisions applying to specific providers and more generally (s.18). The decision made by the Board creates enforceable rights as if it was an order of the Federal Court and is final except as to the appeal rights provided in the *National Energy Board Act* (ss.17 and 23).

Under the Act, the NEB must provide reasons for decisions upon request in the case of Declarations of Significant Discovery and Commercial Discovery (*National Energy Board Act*, s.28.2 (7)). In practice however, the NEB provides publicly accessible reasons of decisions for each and every determination. Significant detail is published in support of decisions.

Appeals

A party dissatisfied with a decision of the NEB may apply for leave to appeal to the Federal Court of Appeal on matters of law or jurisdiction. Leave applications must be made no more than 30 days after the NEB has made its decision, unless a judge of the Federal Court of Appeal allows further time, and if leave is granted, an appeal must be entered within 60 days (*National Energy Board Act*, s.22).

The Federal Court of Appeal has the power to dismiss the appeal; or to declare the original proceedings to be invalid or unlawful; or to quash, set aside or set aside and refer the matter back for determination in accordance with such directions as it considers appropriate (*Federal Courts Act*, s.28(2)).²⁰²²

Alternatively, the applicant can apply for a review of the original decision or a rehearing by the Board if it believes there are sufficient grounds including: an error of law or jurisdiction; changed circumstances or new facts which have arisen since the close of the original proceeding; or facts that were not placed in evidence in the original proceeding and that were not discoverable by reasonable diligence.²⁰²³

Energy Regulation in the Province of Alberta

The regulatory arrangements in the Province of Alberta are reviewed with the aim of indicating the processes and scope of province-level regulation more generally. Alberta's electricity market is unique in Canada. Its wholesale and retail markets are open to competition, while its transmission and distribution wires businesses are regulated.²⁰²⁴ In 2008 the regulatory function was divided between two bodies – the Energy Resources Conservation Board (ERCB), and the Alberta Utilities Commission (AUC).

²⁰²⁰ NEB, Canada's National Energy Regulator. Available at: <http://www.neb-one.gc.ca/clf-nsi/rthnb/whwrndrgvrmnc/cndntnlnrgrqltr-eng.html> [accessed on 3 June 2013].

²⁰²¹ NEB, *Our Responsibilities*. Available at: <http://www.neb-one.gc.ca/clf-nsi/rthnb/whwrndrgvrmnc/rspnsblt-eng.html> [accessed on 3 June 2013].

²⁰²² Available at: <http://laws-lois.justice.gc.ca/eng/acts/F-7/> [accessed on 3 June 2013].

²⁰²³ NEB, *National Energy Board Rules of Practice and Procedure*, 1995, s 44(1). Available at: <http://laws-lois.justice.gc.ca/eng/regulations/SOR-95-208/FullText.html> [accessed on 15 July 2013].

²⁰²⁴ Transalta, *Alberta Electricity Market*. Available at: <http://www.transalta.com/customers/alberta-electricity-market> [accessed on 3 June 2013].

*Energy Resources Conservation Board*²⁰²⁵

The ERCB is a quasi-judicial branch of the government of Alberta. The ERCB answers directly to the Executive Council (Cabinet) of Alberta through the Minister of Energy. However, its formal decisions are made independently of government. The ERCB regulates the safe, responsible, and efficient development of Alberta's energy resources of oil, natural gas, oil sands, coal, and pipelines; and has a mission to ensure that the discovery, development, and delivery of Alberta's energy resources take place in a manner that is fair, responsible, and in the public interest. Its legislation is the *Energy Resources Conservation Act*.²⁰²⁶

The ERCB is led by a Board that consists of a Chairman and up to eight Board Members. Supporting the Chairman and Board Members are the Executive Committee, and approximately 900 staff. The majority of the ERCB annual budget is funded through an administrative levy applied to each producing gas or oil well in the Alberta. The remainder is financed by the provincial government; revenues from application and licensing fees; and revenues from information sales.

In 2011, the ERCB was responsible, *inter alia*, for the regulation of 181 200 operating natural gas and oil wells; 39 800 oil and gas batteries, plants and other facilities; 399 000 kilometres of pipelines; and 11 producing coal mines.

*Alberta Utilities Commission*²⁰²⁷

The AUC is a quasi-judicial independent agency established by the Government of Alberta. It is responsible to ensure that the delivery of Alberta's utility service takes place in a manner that is fair, responsible and in the public interest. The AUC regulates investor-owned (private) natural gas, electric, and water utilities and certain municipally owned electric utilities to ensure that customers receive safe and reliable service at just and reasonable rates. It also deals with inquiries and complaints respecting utility matters. In addition, the AUC ensures that electric facilities are built, operated, and decommissioned in an efficient and environmentally responsible way. The AUC also provides regulatory oversight of issues related to the development and operation of the wholesale electricity market and the retail gas and electricity markets in the province.

*Market Surveillance Administrator*²⁰²⁸

In addition to the AUC, a Market Surveillance Administrator (MSA) has been established under the *Alberta Utilities Commission Act*.²⁰²⁹ Its role is to monitor Alberta's electricity and natural gas markets for fairness and balance in the public interest. The MSA aims to keep a close watch on the overall performance of Alberta's electricity and natural gas markets; checking that they operate in a fair, efficient, and openly competitive manner.

Inter-agency Cooperation

There is some interaction and cooperation between federal and provincial regulators. In particular, the *Alberta Utilities Commission Act* empowers the AUC to conduct proceedings in cooperation with other Alberta regulators and federal regulatory bodies, provided they have obtained the approval of the Lieutenant Governor in Council (s.16(1)). The NEB cooperates with other federal and provincial agencies to reduce regulatory overlap and improve the efficiency of regulation. Its members also sit on the executive committee of the Canada's Energy and Utility Regulators (Acronym reflecting previous name: CAMPUT). The NEB also provides staff support to CAMPUT.²⁰³⁰

The NEB also has relationships with other North American regulatory bodies. For example, Board members participate in meetings of the US National Association of Regulatory Utilities Commissioners (NARUC) under which the agencies meet to share perspectives on regulatory approaches and to

²⁰²⁵ ERCB, *What we do*. Available at: <http://www.ercb.ca/> [accessed on 15 July 2013].

²⁰²⁶ Available at: http://www.ercb.ca/actregs/erc_act.pdf [accessed on 3 June 2013].

²⁰²⁷ AUC, *Who we Are*. Available at: <http://www.auc.ab.ca/about-the-auc/who-we-are/Pages/default.aspx> [accessed on 3 June 2013].

²⁰²⁸ Market Surveillance Administrator, *Who We Are*. Available at: <http://albertamsa.ca/index.php?page=who-we-are> [accessed on 3 June 2013].

²⁰²⁹ CanLi, *Alberta Utilities Commission Act, SA 2007, c A-37.2*. Available at: <http://www.canlii.org/en/ab/laws/stat/sa-2007-c-a-37.2/latest/sa-2007-c-a-37.2.html> [accessed on 3 June 2013].

²⁰³⁰ NEB, *Cooperation with other Agencies*. Available at: <http://www.neb-one.gc.ca/clf-nsi/rthnb/whwmdrgvrnnc/rhstry-eng.html> [accessed on 3 June 2013].

work to eliminate inconsistencies in regulation. Furthermore, the NEB has entered into a Memorandum of Understanding (MOU) with the FERC to enhance inter-agency coordination and there is a trilateral agreement between the NEB, the FERC and the *Comisión Reguladora de Energía* (Mexico) under which the agencies meet to share perspectives on regulatory approaches and to work to eliminate inconsistencies in regulation.

Where North American jurisdictions overlap, the NEB is working with province and territory regulatory agencies to ensure that the regulatory issues are dealt with in a co-ordinated manner.²⁰³¹

Consultation of Interested Parties

In Alberta, parties make a submission to the ERCB, and then may apply for a hearing. For some applications, the ERCB conducts a hearing after a period of thirty 30 days' notice and then makes a final determination (*Oil and Gas Conservation Act*, s.99 (2)).²⁰³² A pre-hearing meeting may be conducted with the applicant, public interest groups (discretionary participants) and intervenors (interested parties with standing) to establish the relevant issues to be considered at the hearing.²⁰³³ Additionally, the ERCB often organises an information session for interested parties to inform them of the hearing process so as to convey to the public how to engage effectively in that hearing process.²⁰³⁴ Alternatively, if a hearing is not requested, a decision may be made by the ERCB without hearing.

The procedure of the AUC is essentially the same where regulated companies submit an application to increase tariffs or build infrastructure. The regulatory process in Alberta can be considered judicial as the procedure and the powers vested in the AUC mimic those of the judiciary (Alberta Utilities Commission Act, s.11):

In addition to any other powers conferred or imposed by this Act or any other enactment, the Commission has, in regard to the attendance and examination of witnesses, the production and inspection of records or other documents, the enforcement of its orders, the payment of costs and all other matters necessary or proper for the due exercise of its jurisdiction or otherwise for carrying any of its powers into effect, all the powers, rights, privileges and immunities that are vested in a judge of the Court of Queen's Bench

The AUC is required to monitor the electricity and gas market and report findings to the Minister. The AUC establishes mandatory requirements and standards of practice for the retail electric and natural gas markets through the use of a rule-making procedure involving a consultative process with stakeholders and interested parties. Additionally, the AUC holds regular consultation with stakeholders such as utilities, municipalities and intervenor groups in order to refine the regulatory process.

The AUC's regulatory functions are carried out through both written and oral proceedings. Representative groups are encouraged to participate in the process. Participation helps to ensure that the AUC is informed of the issues and decisions are made in the public interest.

The AUC provides and encourages Alternative Dispute Resolution for parties as an alternative to regulatory or litigated decision-making. This may include a pre-hearing meeting, the design and goals of which are created to suit the particular dispute. The AUC facilitates such meetings because, even when they do not result in a final resolution, they further define and narrow the disputed issues and raise awareness of the hearing process. However, sometimes a dispute may be completely resolved in mediation, concluding with a signed agreement, without the need for hearing.²⁰³⁵

²⁰³¹ NEB, *Chair Accountability profile*. Available at: <https://www.neb-one.gc.ca/clf-nsi/rthnb/whwrndrgvrnnc/rqgztnndstrctr/brdmbr/chrmncntblyprfl-eng.html> [accessed on 3 June 2013].

²⁰³² Available at: <http://www.qp.alberta.ca/documents/Acts/O06.pdf> [accessed on 3 June 2013].

²⁰³³ ERCB, *Memorandum of Decision*. Available at: <http://www.ercb.ca/applications-and-hearings/decisions/MemorandumofDecision> [accessed on 3 June 2013].

²⁰³⁴ ERCB, *Enhanced Production Audit Program – Industry Information Session, 20 January 2010*. Available at: http://www.ercb.ca/enforcement/IndustryInformationSession_201001.pdf [accessed on 3 June 2013].

²⁰³⁵ AUC, *Public Involvement in Needs or Facilities Applications*. Available at: http://www.auc.ab.ca/news-room/brochures/Documents/Public_Involvement_in_Needs_or_Facilities_Applications_to_the_AUC.pdf [accessed on 3 June 2013].

Outside of specific regulatory decisions, the AUC appoints a Market Surveillance Administrator (MSA) that engages in a range of activities. For instance, under the *Code of Conduct Regulation AR160/2003* market participants may request exemption from any or all provisions of that regulation. To do so they must make an exemption application to the MSA, who will then conduct a form of hearing to deal with the request. In addition, the MSA has the mandate to carry out surveillance and investigation of services and activities under its jurisdiction. Its published investigations procedures set out the broad processes that it will follow during its surveillance and investigation activities.²⁰³⁶

The Office of the Utilities Consumer Advocate (UCA)²⁰³⁷ was established in 2003 by the Albertan government to represent the interests of consumers (residential, small business and agriculture) during regulatory proceedings. This collaboration helps to reduce duplication of intervener efforts and regulatory hearing costs. The UCA also has roles in providing information to consumers to help them make informed choices about energy suppliers, and in mediating disputes between consumers and utilities. The UCA reports directly to the Minister responsible for consumer affairs. The UCA is assisted by an advisory committee which consists of members of the public who are appointed for a one year term.

The interests of people who would be affected by a determination of the ERCB are explicitly recognised in the legislation (*Energy Resources Conservation Act*, s.28 (1)). All parties that are found to have a legally recognised right that may be affected by the application have the right to 'intervene' and provide evidence in the hearing process. A party that has 'standing' as determined by the ERCB may claim costs, which will be compensated when the ERCB deems it appropriate (*Energy Resources Conservation Act*, s.28).

Aside from intervenors, other interested parties without standing may still be involved in a public hearing, and are able to provide relevant information to the Board. As described in relation to a particular application:²⁰³⁸

A person who fails to qualify for standing under the Board's two-part test is not entitled to the rights described above. However, it is the Board's longstanding practice to allow persons without standing to have some degree of participation at a public hearing triggered by a party with standing, provided that they offer information that is relevant and material to the applications. The Board refers to such parties as discretionary participants. The Board determines whether to allow a party to appear as a discretionary participant and the scope of such participation on a case-by-case basis.

Additionally, the ERCB conducts pre-hearing meetings in which interested user-groups and public interest groups can be involved in what matters are to be considered in the hearing. In particular, environmental and indigenous interest organisations are consulted and contribute to the application process in this way.

The AUC specifically encourages the public to get involved in the application process to assist the Commission in arriving at decisions that are in the best interest of Alberta. For instance, members of the public are able to apply to become an intervenor in rates hearings.

Additionally, the AUC holds regular consultation with utility stakeholders such as utilities, municipalities and intervener groups in order to refine the regulatory process, and make parties more aware of the regulatory scheme.²⁰³⁹

The MSA has a mandate to engage with stakeholders about 'public projects'. To fulfil this mandate, the MSA published *Principles for Stakeholder Engagement on Public MSA Projects*.²⁰⁴⁰

²⁰³⁶ Market Surveillance Administrator (MSA), *MSA Investigation Procedures*, 9 July 2008. Available at: http://www.albertamsa.ca/files/MSA_Investigation_Procedures_07-09-08.pdf [accessed on 3 June 2013].

²⁰³⁷ Alberta Government, Utilities Consumer Advocate (UCA). Available at: <http://www.ucahelps.gov.ab.ca/4.html> [accessed on 3 June 2013].

²⁰³⁸ Petro-Canada Application for Wells and Associated Pipelines Prehearing Meeting, *Decision 2008-029*, p. 5. Available at: <http://www.ercb.ca/decisions/2008/2008-029.pdf> [accessed on 3 June 2013].

²⁰³⁹ AUC, *Stakeholder Consultation Discussion Paper*, 29 July 2009. Available at: <http://www.auc.ab.ca/market-oversight/market-consultations/Documents/2009-07-29-StakeholderDiscussionPaper-ISORule.pdf> [accessed on 3 June 2013].

Timeliness

The ECRB also conducts pre-hearing meetings between applicants, interested third parties and Board members when deemed helpful to determine the issues and scope of matters to be considered at hearing.²⁰⁴¹

For applications presented by the MSA, the AUC must make a decision within 90 days of the date of the hearing (*Alberta Utilities Commission Act 2007*, s.56 (1)).

Past performance indicates that the AUC takes approximately one year to make a final decision regarding regulated rate tariff applications. For example, the EPCOR Energy Alberta application took the AUC eleven months to decide.²⁰⁴²

Information Disclosure and Confidentiality

The AUC and the MSA have broad rights of information gathering which includes the inspection of property and documents. When information is purported to be lawyer-client privileged, the material may be seized by the MSA, but the court must then determine whether the material is in fact privileged (*Alberta Utilities Commission Act*, s.50).

Decision-making and Reporting

Up to nine members of the ERCB are appointed by the Lieutenant Governor in Council for terms of five years (*Energy Resources Conservation Act*, s.5).

The AUC is comprised of not more than nine members, each appointed by the Lieutenant Governor in Council for terms of five years. Additional acting members may be appointed.

The ERCB has the responsibility to prepare reports and conduct general investigations and make any recommendations to the Lieutenant Governor in Council that it thinks relevant (*Energy Resources Conservation Act*, s.21).

Similarly the AUC may be required by the Lieutenant Governor in Council to inquire into, hear or determine any matter or thing for which it has jurisdiction (*Alberta Utilities Commission Act*, s.8(4)).

Appeals

In general, the original decisions made by the ERCB are all final and not subject to merits review (*Energy Resources Conservation Act*, s.25). However, if a decision has been made by the ERCB without hearing, the disenchanted party may apply within 30 days for hearing and associated re-determination (*Energy Resources Conservation Act*, s.40).

Any questions of jurisdiction or law from ERCB determinations provide grounds of appeal to the Alberta Court of Appeal (*Energy Resources Conservation Act*, s.41). The appellant has the right to be provided with materials that they have requested from the Board for the purposes of applying for leave to appeal, within 14 days. The Board is not required to provide a transcript of the hearing, unless directed by the Court of Appeal.

The appeal must be lodged within 30 days of the Board's determination, or within a further time at the Judge's discretion. This appeal process is entirely independent of the original decision. It is held in the Court of Appeal and the regulator is an ordinary party without special powers or rights. If the appellant is successful, the issue is returned to the ERCB for re-determination. No costs are awardable.

With regard to AUC determinations, rights to appeal are specifically excluded in the Act, apart from appeal on matters of jurisdictional error, or error of law (*Alberta Utilities Commission Act*, s.30). An applicant may appeal to the court on these bases within 30 days of the determination (*Alberta Utilities Commission Act*, ss.29 (1)-(2)).

²⁰⁴⁰ MSA, *Principles for Stakeholder Engagement, and a Common Framework, for MSA Public Projects*, January 2008. Available at: http://albertamsa.ca/uploads/pdf/About%20Us/Principles_and_Framework_for_MSA_Public_Projects_-_Revised_01-15-08.pdf [accessed on 3 June 2013].

²⁰⁴¹ ECRB, *Board Rules of Practice, Number 32*. Available at: http://www.ercb.ca/actregs/AR_98_2011_erc_rules_of_practice.pdf [accessed on 3 June 2013].

²⁰⁴² AUC, *EPCOR Energy Alberta Inc.: 2007-2009 Regulated Rate Tariff Non-Energy Charge, Decision 2008-031, 30 April 2008*. Available at: <http://www.auc.ab.ca/applications/decisions/Decisions/2008/2008-031.pdf> [accessed on 3 June 2013].

The Ontario Energy Board

Ontario is an eastern province with more than 38 per cent of Canada's population. As of July 2013, approximately 56.9 per cent of its electricity was from a nuclear source, followed by 22.2 per cent coming from a hydro source and 14.7 per cent being sourced from gas.²⁰⁴³ The major energy market participants are the Independent Electricity System Operator (IESO), the Ontario Power Authority (OPA) and the Ontario Energy Board (OEB). The IESO is responsible for balancing the supply of, and demand for, electricity in Ontario, and the OPA is the agency that plans the power system and ensures that Ontario has enough electricity over the long term. It also coordinates conservation efforts across the province. Finally the OEB is responsible for overseeing the energy sector in general. It ensures companies in the natural gas and electricity subsectors in Ontario follow the rules, promotes a viable and efficient energy sector that provides consumers with reliable energy services at a reasonable cost.²⁰⁴⁴

Regulatory Institutions and Legislation

The Ontario Energy Board (OEB)²⁰⁴⁵ is the energy regulator for Ontario. The guiding legislation is the *Ontario Energy Board Act, 1998*.²⁰⁴⁶ The Board has full-time and part-time members who are appointed by the Lieutenant Governor in Council for a term of two years initially, and renewable up to five years. Together they bring significant experience in a range of disciplines including engineering, economics, accounting and law. Staffing is divided into the following business units: applications and regulatory audit; regulatory policy; legal services and board secretary; communications and stakeholder relations; planning and business services; human resources; and compliance and consumer protection. The OEB is located in Toronto.

The *Ontario Energy Board Act, 1998*, sets out guiding objectives for the Board:

- To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.
- To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.
- To promote electricity conservation and demand management in a manner consistent with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.
- To facilitate the implementation of a smart grid in Ontario.
- To promote the use and generation of electricity from renewable energy sources in a manner consistent with the policies of the Government of Ontario, including the timely expansion or reinforcement of transmission systems and distribution systems to accommodate the connection of renewable energy generation facilities.

In the electricity subsector, the Board sets transmission and distribution rates, and approves the Independent Electricity System Operator's (IESO) budget and fees. The Board also sets the rate for the Standard Supply Service for distribution utilities that supply electricity directly to consumers.

The OEB licenses all market participants including the IESO, generators, transmitters, distributors, wholesalers and retailers. Board approval is required for the construction of electricity transmission lines longer than two kilometres. In addition, the Board is responsible for approving specific business arrangements involving the regulated parts of Ontario's electricity industry.

The Board monitors markets in the electricity subsector and reports to the Minister of Energy on the efficiency, fairness and transparency and competitiveness of the markets. In addition, the OEB

²⁰⁴³ Ontario Energy Board, *Ontario's Energy Sector*. Available at: <http://www.ontarioenergyboard.ca/OEB/Consumers/OEB+and+You/Ontario+Energy+Sector> [accessed on 16 July 2013].

²⁰⁴⁴ *Ibid.*

²⁰⁴⁵ Ontario Energy Board, *Home*. Available at: <http://www.ontarioenergyboard.ca/OEB> [accessed on 15 July 2013].

²⁰⁴⁶ Ontario, *Ontario Energy Board Act 1998*. Available at: http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_98o15_e.htm [accessed on 15 July 2013].

reports on any abuse or potential abuse of market power. The Board may also be asked to review the IESO market rules and consider appeals of IESO orders.

The Board does not regulate 'competitive services' being all business activities other than distribution, transmission and providing Standard Supply Service.

The *Ontario Energy Board Act* sets out guiding objectives for the Board in relation to gas:

- To facilitate competition in the sale of gas to users.
- To protect the interests of consumers with respect to prices and the reliability and quality of gas service.
- To facilitate rational expansion of transmission and distribution systems.
- To facilitate rational development and safe operation of gas storage.
- To promote energy conservation and energy efficiency in accordance with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.
- To facilitate the maintenance of a financially viable gas industry for the transmission, distribution and storage of gas.
- To promote communication within the gas industry and the education of consumers.

Ontario's natural gas utilities are required to submit the rates they propose to charge their customers to the Board for review and approval.

The OEB licenses all marketers who sell natural gas to residential and small commercial consumers.

The Board is required to determine if the construction of a natural gas pipeline is in the public interest by considering: need; safety; economic feasibility; community benefits; security of supply; and environmental impacts. Each municipality may grant a gas utility the right to deliver gas service and use road allowances or utility easements within its borders. The specific terms and conditions of these franchise agreements between the municipality and the utility are subject to Board approval.

In addition, the Board approves geological formations that are suitable to store natural gas and, where the parties cannot come to an agreement among themselves, it determines the compensation payable to landowners when storage pools are situated on their property.

Board approval is also required before a natural gas utility can sell its distribution system or amalgamate with another distributor.

*Consultation of Interested Parties*²⁰⁴⁷

The Board operates as an adjudicative tribunal and carries out its regulatory functions in proceedings through oral or written public hearings. These provide a forum for individuals or groups of individuals who may be affected by the Board's rulings to express their views to the Board, and to participate meaningfully in the Board's decision-making process. Public participation helps ensure that the Board makes informed decisions. The Board operates Alternative Dispute Resolution procedures, and ADR may be mandatory.

*Timeliness*²⁰⁴⁸

The duration of this process – from the time an application is filed to the time a decision is rendered and communicated by the OEB – varies depending on the type and complexity of application being made. For example, a licence application with a written hearing may take up to 90 days. A rate application with an oral hearing, on the other hand, can take up to 235 days and a leave to construct application, with an oral hearing, can take 210 days.

²⁰⁴⁷ OEB, *Rules of Practice and Procedure* (last amended, 17 January 2013). Available at: http://www.ontarioenergyboard.ca/OEB/Documents/Regulatory/OEB_Rules_of_Practice_and_Procedure.pdf [accessed on 15 July 2013].

²⁰⁴⁸ OEB, *Understanding the Adjudication Process*. Available at: <http://www.ontarioenergyboard.ca/OEB/Industry/Media%20Room/Publications/OEB%20Resource%20Guide/Understanding%20the%20Adjudication%20Process> [accessed on 16 July 2013].

*Information Disclosure and Confidentiality*²⁰⁴⁹

A party may request that all or any part of a document, including a response to an interrogatory, be held in confidence by the Board. The opposing party may object to a request for confidentiality by filing and serving an objection in accordance with the Practice Directions, and within the time specified by the Board. After giving the party claiming confidentiality an opportunity to reply to any objection made, the Board may order: the document be placed on the public record; be kept confidential; be disclosed under suitable arrangements as to confidentiality; or make any other order the Board finds to be in the public interest.

Radio and television recording of an oral or electronic hearing which is open to the public may be permitted on conditions the Board considers appropriate, and as directed by the Board.

Decision-making and Reporting

Under the *OEB Act*, the Board has the power to make orders, rules, codes and policy directions.²⁰⁵⁰ On the whole, orders may only be issued after a hearing. Hearings may be oral or in writing. The difference between the two largely turns on the minimum legal rights provided to the participants in a hearing. In oral hearings, parties have: the right to file evidence; challenge the evidence of other parties; and make oral submissions. In written hearings, parties are entitled to file written materials and have access to all written materials considered by the Board in making its decision. Orders are made by panels on the basis of an evidentiary record. The Board publishes its decisions on its website, providing detailed reasons for its decisions.²⁰⁵¹

Appeals

A person directly affected by an order made by an employee of the Board may, within 15 days after receiving notice of the order, appeal the order to the Board or request a review, or ultimately appeal the decision at the Divisional Court of Ontario.²⁰⁵²

2. Telecommunications

Telecommunications plays an important role in Canada, with over 99.3 per cent of households having fixed-line telephone access, and relatively high penetration of both fixed and wireless broadband.²⁰⁵³ The industry has migrated from a monopolistic service-delivery model (with regional monopoly providers) to a more competitive sector with multiple suppliers. Since the early 1980s, Industry Canada (IC) has licensed many suppliers of mobile and fixed telecommunications services, and the Canadian Radio-television and Telecommunications Commission (CRTC) has opened most telecommunications markets to competition. There are now six incumbent telecommunications service providers (TSPs) in Canada. Non-incumbent providers, referred to as Alternative TSPs, are largely made up of incumbent providers conducting out-of-territory operations, along with cable broadcast distribution undertakings (cable BDUs) that now provide telecommunications services.

The mobile market is dominated by Rogers, Bell and Telus, with a combined market share of 91.8 per cent and 85 per cent of frequency licences.²⁰⁵⁴ In the provinces of Alberta and Saskatchewan, MTS Allstream and SaskTel hold the largest market share respectively (CRTC *Monitoring Report*, Table 5.5.5). Rogers, Bell, Telus and MTS Allstream are publicly traded companies, while SaskTel is a Saskatchewan crown corporation. Bell and Telus began a tower-sharing agreement in 2001, combining Bell's historically east coast infrastructure with the west coast based Telus.²⁰⁵⁵ This

²⁰⁴⁹ *Ibid.*

²⁰⁵⁰ Ontario Energy Board, *A Report with Respect to Decision-making Processes at the OEB*, September 2006. Available at: http://www.ontarioenergyboard.ca/documents/abouttheoeb/corpinfo_reports/decision_making_processes_report_270906.pdf [accessed on 16 July 2013].

²⁰⁵¹ OEB, *Rules of Practice and Procedure* (last amended, 17 January 2013).

²⁰⁵² Ontario eLaws, *Ontario Energy Board Act*. Available at: http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_98o15_e.htm#BK25 [accessed on 16 July 2013].

²⁰⁵³ CRTC, *CRTC Communications Monitoring Report, 2012, Appendix 2*. Available at: http://www.crtc.gc.ca/eng/publications/reports/PolicyMonitoring/2012/cmr_a.htm [accessed on 15 July 2013].

²⁰⁵⁴ *OECD Communications Outlook 2011*, p. 59.

²⁰⁵⁵ Bell Canada Enterprises, *Bell signs wireless agreement with TELUS which will significantly expand access to digital voice and data services across Canada*, 2001. Available at: <http://www.bce.ca/news-and-media/releases/show/bell-signs-wireless-agreement-with-telus-which-will-significantly-expand-access-to-digital-voice-and-data-services-across-canada> [accessed on 15 July 2013].

relationship continued in 2009, jointly introducing 3GS and ending Rogers's monopoly on the iPhone.²⁰⁵⁶

Broadband penetration is high relative to most other OECD countries. Canada has fixed line broadband penetration of 32.4 per 100 of population, which is eleventh highest in the OECD.²⁰⁵⁷ Cable BDUs Videotron (Quebec), Cogeco (Montreal & Quebec) and Shaw (Western Canada) compete strongly with Rogers, Bell and Telus as ISPs. Bell and Telus are the major providers of DSL in their respective markets. The market share of cable internet has grown from 50 per cent in 2007 to 55 per cent in 2011, reflecting a shift away from dial-up (CRTC *Monitoring Report*). Incumbent TSPs have seen their market share fall from 76 per cent in 2008 to 66 per cent in 2011. This is partially due to the growth of cable BDUs providing network-based services in the residential market. The market share of Cable BDUs in the residential market has grown from 18.6 per cent in 2008 to 28 per cent in 2011 (CRTC *Monitoring Report*, Table 5.2.4). Penetration of wireless broadband is twenty-fifth highest in the OECD.

Regulatory Institutions and Legislation

The regulatory body of the Canadian telecommunications industry is the Canadian Radio-Television and Telecommunications Commission (CRTC),²⁰⁵⁸ which is an independent body governed by both the *Telecommunications Act 1993* and the *Broadcasting Act 1991*. The CRTC follows the objectives of these Acts and defines its telecommunications role in these terms:

In telecommunications, the CRTC ensures that Canadians receive reliable telephone and other telecommunications services, at affordable prices. But the CRTC's role in telecommunications is evolving. In many telecom markets, several consumer choices are available. This natural competition results in better prices and packages for consumers. In these cases, CRTC allows competition, not regulations, to drive the market. The CRTC regulates only where the market doesn't meet the objectives of the *Telecommunications Act*.

The CRTC is comprised of up to 13 full-time and six part-time commissioners for renewable terms of up to five years, all appointed by the Governor in Council. Only full-time commissioners are involved in actual decision-making. The Determinative body is supported by 400 employees specialising in broadcasting and telecommunications who respond to immediate and long-term responsibilities concerning legislation, the public, government and industry. Staff is divided into divisions specifically engaging in: Broadcasting; Telecommunications; Strategic Communications and Parliamentary Affairs; Office of the Chief Consumer Officer and Compliance and Enforcement. The CRTC is located in the Gatineau area of Ottawa.

As service providers often rely upon having access to components of a competitor's network to enable them to provide an end-to-end service to their customers, the CRTC has a regulatory framework under which certain facilities, functions and services are made available by incumbents to competitors at regulated rates. At the same time, suppliers are often fully-integrated service providers able to offer the same range of service and competing for the same customers. As technical innovations are introduced, suppliers are finding niches to provide selective services, while others are integrating packages or bundles of services together to attract customers. The CRTC Interconnection Steering Committee (CISC) is an organisation established by the CRTC to assist in developing information, procedures and guidelines as may be required in various aspects of the CRTC's regulatory activities. It has a number of associated working groups.

²⁰⁵⁶ Bell Canada Enterprises, *Bell clients to access the fastest, largest national wireless network deployment ever starting next month*, 2009. Available at: <http://www.bce.ca/news-and-media/releases/show/bell-clients-to-access-the-fastest-largest-national-wireless-network-deployment-ever-starting-next-month> [accessed on 4 June 2013].

²⁰⁵⁷ OECD, *OECD Broadband Portal*, December 2013, updated 18 July 2013. Available at: <http://www.oecd.org/sti/broadband/oecdbroadbandportal.htm> [accessed on 22 July 2013].

²⁰⁵⁸ CRTC, *CRTC Interconnection Steering Committee*. Available at: <http://www.crtc.gc.ca/eng/cisc-cdci.htm> [accessed on 3 June 2013].

The Competition Bureau published a Bulletin²⁰⁵⁹ in 2008 describing its approach under the abuse of dominance provisions (ss.78 and 79) of the *Competition Act* with respect to conduct in the telecommunications industry.

The *Telecommunications Act 1993*²⁰⁶⁰ places specific emphasis on universal service and affordability (s.7.(a)).

*Consultation of Interested Parties*²⁰⁶¹

A matter may be brought before the Commission by an application or complaint or on the Commission's own initiative. If a matter is brought before the Commission on the Commission's own initiative, the Commission must post a notice of consultation on its website.

Section 9(1) of the *Telecommunications Act* specifically recognises the role of the public in the regulatory process. When the CRTC is deciding upon exemption of any class of Canadian carriers from the application of the Act, it must hold a public hearing. Additionally, the *Rules of Practice and Procedure* stipulate that, in applications for general rate increases, 'any interested person or association may intervene' (25. (1)).

There are two processes that the CRTC uses which allow interested parties to participate in proceedings – public hearings and public notices. When the CRTC is considering a policy issue, or amending regulations it holds a public hearing, whereby members of the public can submit written comments by an announced deadline. They also have an opportunity to express their views in an oral process, which may occur by teleconference. The public-notice process only allows for written submission and is used when the CRTC wishes to obtain submissions on telecommunications issues that do not require in-person discussions.

Timeliness

A maximum mandatory period within which the CRTC must make a decision exists with regard to tariff applications. Under the *Telecommunications Act* (s.26), within forty-five business days after a tariff is filed, the Commission shall:

- either approve the tariff (subject to certain amendments or substitution); or
- disallow the tariff; or
- make public written reasons why the Commission has not acted in accordance with the above two options and specify the period of time within which the Commission intends to do so.

However, under the *Telecommunications Act* the Commission may extend the time of delivering its decisions under certain circumstances (s.50).

Information Disclosure and Confidentiality

The CRTC has some powers with respect to information gathering that may require any Canadian carrier to submit information the Commission deems necessary, in the form it specifies (37. (1)). Where the CRTC deems that information held by any person other than a Canadian carrier is necessary for the operation of the Act, it may require that person to provide the information, unless the information is 'a confidence of the executive council of a province' (37. (2)).

Information is treated as commercial-in-confidence (c-i-c) if the information discloser designates it as such because it is (39. (1)):

- trade secret information;
- financial, commercial, scientific or technical information that is confidential, and treated as such by the person submitting the information;

²⁰⁵⁹ Competition Bureau, *Information Bulletin on the Abuse of Dominance Provisions as Applied to the Telecommunications Industry*, Bulletin, 6 June 2008. Available at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02690.html> [accessed on 6 June 2013].

²⁰⁶⁰ CanLi, *Telecommunications Act 1993*. Available at: <http://www.canlii.org/en/ca/laws/stat/sc-1993-c-38/latest/sc-1993-c-38.html> [accessed on 15 July 2013].

²⁰⁶¹ CanLi, *Canadian Radio-Television and Telecommunications Commission Rules of Practice and Procedure* (SOR/2010-277). Available at: <http://www.canlii.org/en/ca/laws/regu/sor-2010-277/latest/sor-2010-277.html> [accessed on 15 July 2013].

- information, the disclosure of which would reasonably be expected to result in material loss or gain to any person; or prejudice the competitive position of any person; or affect contractual or other negotiations of any person.

Parties holding confidential information must still supply the required information, and if they designate it as confidential, and the CRTC agrees, the information will not be disclosed unless it determines that disclosure is in the public interest (39. (2), (4) and (5)).

Generally where it is determined that information is confidential, the CRTC is permitted to take the following actions (*Commission Rules Of Practice and Procedure*, ss.30-34):

- order that the document not be placed on the public record;
- order disclosure of an abridged version of the document; or
- order that the document be disclosed to parties at a hearing to be conducted in camera.

In practice, the CRTC has permitted parties to enter into an agreement to share confidential information on terms such as:²⁰⁶²

- using the confidential information solely for purposes related to the course of performance of the Agreement;
- promptly returning to the disclosing party, upon its request, or certify as destroyed, any material concerning confidential information, including all copies and notes;
- taking all reasonable precautions to maintain the secrecy of all confidential information disclosed; and
- disclosing the confidential information only to those personnel with a need to have access to it, provided that they are bound to observe the set confidentiality requirements.

Decision-making and Reporting

The CRTC²⁰⁶³ is comprised of up to 13 full-time and six part-time commissioners for renewable terms of up to five years, all appointed by the Governor in Council. Only full-time commissioners are involved in actual decision-making. A quorum is a majority of members in office. The Commission must meet at least six times per year. All of the decisions of the CRTC since 1995 inclusive are available on the CRTC website.²⁰⁶⁴

Appeals

There are three types of appeal in relation to CRTC decisions:

- Appeal to the CRTC. The CRTC has the power to review, rescind or vary its prior decision, on application or on its own motion (s.62).
- Appeal to the Federal Court of Appeal.²⁰⁶⁵ This is a form of judicial review, and only relates to questions of law or jurisdiction. Leave to appeal is required, and when obtained, the court can only alter findings or policy decisions as they relate to law and not to fact (*Telecommunications Act*, s.64 and *Federal Courts Act*, s.28 (1) (c)).
- Appeal to Government. This is form of merits review. The government may rescind or alter the CRTC decision and is required to publish reasons for its decision. This right of appeal has only been used sparingly.²⁰⁶⁶

²⁰⁶² CRTC, *Telecom Order*, CRTC 97-288, 4 March 1997. Available at: <http://www.crtc.gc.ca/eng/archive/1997/O97-288.HTM> [accessed on 15 July 2013].

²⁰⁶³ Justice Laws Website, *Canadian Radio-television and Telecommunications Commission Act*, s. 3. Available at: <http://laws-lois.justice.gc.ca/eng/acts/C-22/> [accessed 2 July 2013].

²⁰⁶⁴ CRTC, *Telecommunications Decisions*. Available at: <http://crtc.gc.ca/eng/dno7.htm> [accessed on 3 June 2013].

²⁰⁶⁵ CanLi, *Federal Courts Act*. Available at: <http://canlii.org/en/ca/laws/stat/rsc-1985-c-f-7/latest/rsc-1985-c-f-7.html> [accessed on 15 July 2013].

²⁰⁶⁶ OECD, *OECD Review – Regulatory Reform in Canada*, 2002, p. 13. Available at: <http://www.oecd.org/regreform/1960562.pdf> [accessed on 2 June 2013].

The time limits which apply in appeals to the Federal Court are the following (*Telecommunications Act* s.64 (2)-(4)):

- An application for leave to appeal must be lodged within 30 days of the Commission's decision or within such further time as the Judge permits.
- Notice must then be served on the Commission and each of the parties to the original proceeding.
- An appeal must be brought within 60 days after leave is granted.

In appeals to the Federal Court, relief may be granted, provided the court is satisfied that the CRTC (s.18.1 (4)):

- acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
- failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
- erred in law in making a decision or an order, whether or not the error appears on the face of the record;
- based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;
- acted, or failed to act, by reason of fraud or perjured evidence; or
- acted in any other way that was contrary to law.

The remedies available to the Federal Court are writs of *certiorari*, prohibition, *mandamus*, *quo warranto*, declaratory relief or other relief of that nature as contemplated by the statute (18 (1) (a) and (b)). For example, it may order the CRTC to correct or re-consider its decisions or set aside the CRTC's decisions (18 (3)).

3. Postal Services

Canada Post is experiencing new challenges as the postal industry adapts in response to the increasingly popular technologies of email and the Internet. Over the past decade, the number of addresses to which Canada Post must deliver has increased steadily, while volume has fallen 14.4 per cent from its peak in 2007. This has led to a 20 per cent decline in deliveries per point of call between 2007 and 2011. Canada Post has over 69000 employees who process and deliver approximately 10 billion pieces of mail to 15 million addresses, annually.²⁰⁶⁷

Transaction mail volume fell 14.3 per cent between 2007 and 2011, driven by decreases in both domestic and international mail. Direct marketing has experienced the greatest reduction in volume, experiencing a volume loss of 14.4 per cent between 2007 and 2011. Although Canada Post is currently experiencing significant declines in letter volume, the rapidly growing Canadian e-commerce sector has led to renewed growth in parcel delivery, with revenues up 7 per cent in the first three quarters of 2012. These changes in the consumer environment, along with Canada Post's first financial loss in 16 years, have led to Canada Post announcing plans for significant structural change.²⁰⁶⁸

Canada Post's 2011 loss of CA\$181 million was partially due to labour disruptions in the third quarter, leading to a quarterly loss of CA\$157 million. Seventy one per cent of Canada Post's costs are for labour, and with a CA\$4.7 billion solvency deficit in its pension plans, future labour negotiations are integral to future profitability.

Competing with Canada Post in the parcel and courier segments are Purolator, a subsidiary of Canada Post, FedEx, UPS and DHL. Although Purolator competes with Canada Post, it operates primarily in the business-to-business market segment, with the majority of its revenue earned through the provision of courier services. .

²⁰⁶⁷ Canada Post, *Annual Report 2011*. Available at: http://www.canadapost.ca/cpo/mc/assets/pdf/aboutus/annualreport/2011_AR_front_end_en.pdf [accessed on 15 July 2013].

²⁰⁶⁸ *Ibid.*

Regulatory Institutions and Legislation

The Minister responsible for Transport, Infrastructure and Communities is also responsible for the Canada Post Corporation. Additionally, the Minister of State (Transport) has been appointed to assist the Minister in the carrying out his responsibilities relating to Crown corporations including Canada Post Corporation. The key legislation governing the postal industry are the *Canada Post Corporation Act*,²⁰⁶⁹ and related regulations, including Letter Mail Regulations and Letter Definition Regulations. In accordance with the Act, Canada Post may make regulations in relation to postal matters, subject to the approval of the Governor in Council. The Canada Post Corporation has a Board of Directors consisting of the Chairperson, the President and nine other directors appointed by the Minister.²⁰⁷⁰

The Corporation has been granted some autonomy in proposing regulations in postal matters. With the approval of the Governor in Council, Canada Post may prescribe rates of postage (19. (1)(d)), subject to being:

fair and reasonable and consistent so far as possible with providing revenue from other sources sufficient to defray the costs incurred by the corporation. (19. (2))

Canada Post is a Crown Corporation that is required to financially self-sustain for the provision of universal service (5. (2) (b)):

conduct its operations on a self-sustaining financial basis while providing a standard of service that will meet the needs of the people of Canada and that is similar with respect to communities of the same size.

Canada Post is given the sole and exclusive privilege in Canada of collecting, transmitting and delivering letters to the addressee. This exclusive privilege extends to letters weighing up to 500 grams mailed in Canada for delivery within Canada or outside Canada, or mailed outside Canada for delivery within Canada (s.14).

The Minister responsible for Canada Post is the Minister for Transport, Infrastructure and Communities, who has ultimate regulatory control over Canada Post; which must comply with ministerial directives (22. (1)). The role of the Minister in postal matters includes issuing directives governing the operation of Canada Post, such as the continuous provision of rural mail delivery; and the appointment of the Board of Directors of Canada Post, subject to the approval of the Governor-in-Council (6. (2)).

Consultation of Interested Parties

The regulatory process involves a gazetting system, whereby proposed changes to regulations or postal rates are published in the *Canada Gazette*. Any proposed increase to the basic letter rate, if warranted, shall come into effect in January, subject to a notice in the *Canada Gazette* six months in advance.

The publication of proposed changes to regulation, including increases in rates of postage for mail items other than the basic letter rate, initiates a public consultation period of 60 days. During the period, members of the public have an opportunity to object to the Minister. These public submissions will then be considered by the Board of Canada Post before finalising the proposals. The final proposals are submitted to the Minister for ultimate approval or disapproval by the Governor in Council. The proposals are deemed approved 60 days after submission, unless the Governor-in-Council previously makes the decision.²⁰⁷¹

4. Water and Wastewater

Canada has an abundant water supply relative to population, with approximately seven per cent of the world's renewable water supply in its territory, but with only about half of one per cent of the world's population. Nevertheless, there are challenges facing water supply, wastewater treatment and disposal and regulation. Almost 85 per cent of the nation's population lives in the south, while 60 per

²⁰⁶⁹ Justice Laws Website, *Canada Post Corporation Act*. Available at: <http://laws-lois.justice.gc.ca/eng/acts/C-10/index.html> [accessed on 2 June 2013].

²⁰⁷⁰ *Ibid*, s. 6.

²⁰⁷¹ Canada Gazette, *Regulations Amending the Letter Mail Regulations 6 December 2012*. Available at: <http://www.gazette.gc.ca/rp-pr/p2/2012/2012-12-19/html/sor-dors275-eng.html> [accessed on 15 July 2013].

cent of the water supply flows north towards the Arctic Circle.²⁰⁷² Canadians are high per-capita consumers of water, with water usage well above the OECD average.²⁰⁷³ This is partly because users face prices that do not reflect the economic cost of the water consumed.

Regulatory Institutions and Legislation

Urban Water and Wastewater Services

Water and wastewater services are organised, owned and operated at the municipal and province level. These bodies are organised into associations such as the Canadian Water and Wastewater Association (CWWA).²⁰⁷⁴ The CWWA is a non-profit national body representing the common interests of Canada's public-sector municipal water and wastewater services and their private sector suppliers and partners. According to its website, the CWWA is recognised by the federal government and national bodies as the national voice of this public service sector.

Water and wastewater services are generally funded by a combination of charges on users and taxes. For example, the crown corporation Ontario Clean Water Agency (OCWA) manages the water and wastewater services of 140 of Ontario's 444 municipalities on a cost-recovery basis. The OCWA also provides project management for infrastructure construction and maintenance.²⁰⁷⁵ The City of Ottawa manages the water and wastewater of over 750 000 customers. Unlike many provinces, Ottawa has a user-pays system with a sewer surcharge to cover the costs of wastewater treatment and release.²⁰⁷⁶ In 2011 The City of Ottawa began introducing its Advanced Metering Infrastructure (AMI). AMI sends daily meter readings wirelessly, reducing the need for City employees to access meters and eliminating the need for estimated water bills.²⁰⁷⁷

In the western province of Alberta, the City of Edmonton is the sole shareholder of the municipally-owned utility, EPCOR, which provides water and wastewater services to Edmonton, with water prices tiered to encourage customers to use water wisely. EPCOR also offers water services to other municipalities in Alberta and British Columbia, paying dividends of over CA\$1.2 billion to the City of Edmonton between 2001 and 2011.²⁰⁷⁸

Water wastage is increasingly being targeted by municipalities through tiered pricing and forced residential meter usage. For example, the City of Calgary currently offers a flat rate on water, but has plans to install water meters in all homes by 2014 and is no longer offering a flat rate to new customers.²⁰⁷⁹ Metering is becoming more widespread in Canada, with municipalities that do not meter having per capita usage 65 per cent higher than those that do. Although caution must be taken with these statistics, the difference persists for municipalities of all sizes. Additionally, approximately ten per cent of the Canadian population relies on private wells, with Nova Scotia and New Brunswick having the highest rates, at 39.5 and 22.1 per cent, respectively.²⁰⁸⁰

Federal Jurisdiction

The Federal government has jurisdiction to regulate:

²⁰⁷² Environment Canada, *Frequently Asked Questions*. Available at: <http://www.ec.gc.ca/eau-water/default.asp?lang=En&n=1C100657-1> [accessed on 15 July 2013].

²⁰⁷³ OECD, *OECD Factbook 2011-2012: Economic, Environmental and Social Statistics*, 2011

²⁰⁷⁴ Canadian Water and Wastewater Association (CWWA), *About the Canadian Water and Wastewater Association*. Available at: http://www.cwwa.ca/about_e.asp [accessed on 15 July 2013].

²⁰⁷⁵ Office of the Auditor General of Ontario, *2008 Annual Report*, December 2008, p. 319. Available at: http://www.auditor.on.ca/en/reports_en/en08/ar_en08.pdf [accessed on 2 July 2013].

²⁰⁷⁶ City of Ottawa, *Understanding your water and sewer bill*. Available at: <http://ottawa.ca/en/residents/water-and-environment/water-and-sewer-bills/understanding-your-water-and-sewer-bill> [accessed on 15 July 2013].

²⁰⁷⁷ City of Ottawa, *AMI FAQ*. Available at: <http://ottawa.ca/en/residents/water-and-environment/water-and-sewer-bills/water-meters> [accessed on 15 July 2013].

²⁰⁷⁸ EPCOR, *Financial Information*. Available at: <http://corp.epcor.com/about/Pages/financial-information.aspx> [accessed on 16 July 2013].

²⁰⁷⁹ The City of Calgary, *Switch to a water meter*. Available at: <http://www.calgary.ca/UEP/Water/Pages/Customer-service/Water-meters/Switch-from-a-flat-rate-to-a-water-meter-/Switch-From-a-Flat-Rate-to-a-Water-Meter.aspx#> [accessed on 15 July 2013].

²⁰⁸⁰ Environment Canada, *2011 Municipal Water Use Report*. Available at: http://www.ec.gc.ca/Publications/B77CE4D0-80D4-4FEB-AFFA-0201BE6FB37B/2011-Municipal-Water-Use-Report-2009-Stats_Eng.pdf [accessed on 2 July 2013].

fisheries, navigation, federal lands, and international relations, including responsibilities related to the management of boundary waters...It also has significant responsibilities for agriculture, health and the environment, and plays a significant role supporting aquatic research and technology, and ensuring national policies and standards are in place on environmental and health-related issues.²⁰⁸¹

To understand fully the federal government's role in water management in Canada, it is important first to understand the interests and mandates of the departments involved in program delivery. Within the federal government, over 20 departments and agencies have unique responsibilities for fresh water. As all levels of government hold key policy and regulatory instruments which apply to water management, it is a challenge to ensure that these are developed and used collaboratively. Environment Canada works closely with other federal departments to develop a more strategic approach to addressing nationally significant freshwater issues.

Legislation administered by Environment Canada in its water-related activities includes:

- the *Canada Water Act*,²⁰⁸² which contains provisions for formal consultation and agreements with the provinces;
- the *International River Improvements Act*,²⁰⁸³ which provides for licensing of activities that may alter the flow of rivers flowing into the United States; and,
- the Department of the Environment Act,²⁰⁸⁴ which assigns the national leadership for water management to the Minister of the Environment.

Provincial Governments

For the most part, waters that lie solely within a province's boundaries fall within the constitutional authority of that province. Provincial legislative powers include, but are not restricted to, areas of flow regulation; authorisation of water-use development; water supply; pollution control; and thermal and hydroelectric power development.

In most provinces, power is ultimately vested in the Minister, and decisions tend to be made by either the Minister or a delegate appointed by the Minister. In British Columbia, power is vested in a comptroller, designated by the Environment Minister. Provision has been made to ensure the accountability of this official, through extensive hearing and notice requirements and detailed appeal possibilities. Where the ultimate power for decisions lies with the minister, the processes of responsible government ultimately ensure accountability of exercised power.

5. Rail

The freight rail industry in Canada mainly consists of privately owned companies, while intercity and commuter rail services are primarily government owned. Canadian National (CN) and Canadian Pacific (CP) are the largest two railways, accounting for approximately 85 per cent of industry revenues. CN and CP's rail networks serve as important links in Canada's key trade corridors. Additionally there are over eighty railway companies including those which own track, and rail operators and carriers. These smaller operators include tourist trains, a growing segment of passenger rail, largely operating in the spring, summer and autumn.

The freight traffic operators primarily transport petroleum, metals, forest products, coal, grain, fertilisers and automotive products. Intermodal freight transport makes up approximately 23 per cent of revenues, with rail continuing to gain market share from trucking. Contributing to the strength of CN and CP is the high level of integration of North American rail. With US railway companies

²⁰⁸¹ Environment Canada, *Water*. Available at: http://www.ec.gc.ca/water/en/policy/federal/e_intro.htm [accessed on 15 July 2013].

²⁰⁸² Justice Laws Website, *Canada Water Act*. Available at: <http://laws-lois.justice.gc.ca/eng/acts/C-11/index.html> [accessed on 2 June 2013].

²⁰⁸³ Justice Laws Website, *International River Improvements Act*. Available at: <http://laws.justice.gc.ca/eng/acts/I-20/index.html> [accessed on 2 June 2013].

²⁰⁸⁴ Justice Laws Website, *Department of the Environment Act*. Available at: <http://laws-lois.justice.gc.ca/eng/acts/E-10/index.html> [accessed on 2 June 2013].

operating on tracks that are the same gauge and maintained to similar standards, cars and locomotives can be interchanged in order to complete a journey.²⁰⁸⁵

The Canadian Government established VIA rail in 1977 in order to provide intercity rail, largely inheriting passenger cars and locomotives from the then nationalised CN. VIA is highly reliant on government funding; in 2011 VIA rail received government funding of CA\$260.9 million and made CA\$282.6 in revenue. It mostly operates along tracks that are owned and operated by CN, however infrastructure developments of almost CA\$1 billion have taken place since 2007.^{2086 2087}

Canadian National is Canada's only transcontinental railway, with over 1800 diesel locomotives operating on 33000 kilometres of track. Originally a crown corporation, CN went public in 1995 and is now the most profitable railway company in North America. This increase in profitability was in part due to CN's expansion into the United States, acquiring Illinois Central, Wisconsin Central and Great Lakes Transportation. In 2010 US domestic and trans-border freight accounted for 41 per cent of total revenues. CN's revenue is derived from seven commodities, with no commodity accounting for more than 19 per cent of revenue.²⁰⁸⁸

Canadian Pacific Railways operates on over 23000 kilometres of track, servicing the major business centres of Canada and the Northeast and Midwest regions of the United States. CP transports bulk commodities, merchandise freight and intermodal traffic. Grain, coal, sulphur and fertilisers are the major commodities transported by CP, making up 44 per cent of total revenues.²⁰⁸⁹

Regulatory Institutions and Legislation

The Canadian Transportation Agency (CTA) is an independent, quasi-judicial tribunal empowered by the *Canada Transportation Act 1996* to regulate the rail, air and marine transport industries.²⁰⁹⁰ The CTA is comprised of five full-time members including a Chairman and Vice Chairman (s.7(2)). In the case of a dispute, a panel of at least two members is assigned to make a decision (s.16(1)). The members of the CTA are supported by approximately 250 employees. It includes divisions supporting the main areas of responsibility for accessible air, rail and marine transportation; a Legal Services and Secretariat Branch; the Corporate Management Branch; and the Chairman's Office, which includes Internal Audit and the Communications Directorate.²⁰⁹¹

With regard to rail, the CTA:

- deals with rate and service complaints, and with disputes between railway companies and other parties over railway infrastructure matters;
- processes applications for certificates of fitness for the operation of railways, and approves construction of railway lines;
- determines regulated railway inter-switching rates;
- administers the railway revenue caps for the movement of western grain and determines amounts to be returned to shippers where a cap is exceeded;
- regulates rail track access (running rights);
- develops costing standards and regulations; and
- audits railway companies' accounting and statistics-generating systems, as required.

²⁰⁸⁵ Transport Canada, *Transportation in Canada 2011*, p. 77. Available at: <http://www.tc.gc.ca/eng/policy/report-aca-anre2011-index-3010.htm> [accessed on 2 July 2013].

²⁰⁸⁷ VIA Rail, *Annual Report 2011*, p. 50. Available at: http://www.viarail.ca/sites/all/files/media/pdfs/About_VIA-our-company/annual-reports/2011/VIA-Rail-Annual-Report-2011.pdf [accessed on 2 July 2013].

²⁰⁸⁸ Canadian National Railway Company, *2011 Investor Factbook*. www.cn.ca/-/media/Files/Investors/Investor-Factbook.../2011-IFB-en.pdf [accessed on 15 July 2013].

²⁰⁸⁹ Canada Pacific Railways, *Annual Report 2011*. Available at: <http://www.cpr.ca/en/invest-in-cp/financial-reports/FinancialReports/Attachments/200/cp-ar-2011.pdf> [accessed on 2 July 2013].

²⁰⁹⁰ Justice Laws Website, *Canada Transportation Act*. Available at: <http://laws-lois.justice.gc.ca/eng/acts/c-10.4/> [accessed on 4 June 2013].

²⁰⁹¹ Canadian Transportation Agency, *Annual Report 2011-12*. Available at: https://www.otc-cta.gc.ca/sites/all/files/altformats/books/CTA-Annual-Report-2011-12-EN_0.pdf [accessed on 3 June 2013].

Rail transportation of western grains carried by a prescribed railway company (currently, CN and CP), is subject to a revenue cap and a penalty mechanism for exceeding the cap. The CTA is responsible for the annual determination of the revenue cap for each of CN and CP, and for ensuring compliance. After each crop year, the CTA determines the revenue cap on each company, using a complex formula that adjusts the company's base year revenue for actual tonnage moved and the average length of haul in the year; and allows for cost increases based on forecast rail inflation. It also determines whether each company's actual revenue is above its entitlement or not. A railway company found to exceed its revenue cap shall pay out the excess amount and any applicable penalty.²⁰⁹²

The CTA has power to make determinations in relation to disputes and is required by statute to report annually on its operations to the Minister for Transportation (s.42). As part of the report the CTA must assess how well the agency has operated. This, together with the provisions for the appeal and review of decisions, promotes the accountability of the agency.

Consultation of Interested Parties

Matters arise when a complaint is made by users and others regarding poor service or abuse of market power. After a complaint is made, the CTA ensures that each interested party has an opportunity to submit a written response to the complaint. They must do so within 30 days, after which the complainant has ten days to reply. In more complex cases, submissions may be made by way of public hearing. The Agency then reviews all evidence and relevant legislation and regulations in arriving at a decision.²⁰⁹³

Part IV of the *Canada Transportation Act* provides for a system of Final Offer Arbitration (FOA) as an alternative method of resolving rate and service disputes between carriers and shippers or between carriers and railway companies engaged in passenger rail services. FOA uses either a single arbitrator or a panel of three arbitrators. Under these confidential processes, parties may choose their arbitrators and can benefit from procedural flexibility. The arbitrator's decision is enforceable as a decision of the Agency.

Alternatively, the parties to a dispute may elect to undergo mediation supported by the CTA (s.36.1). Mediation must be completed within thirty days (s.36.1(5)). In 2011-12 the CTA resolved 16 rail disputes; two through facilitation, five through mediation and nine through adjudication. Seven cases were withdrawn and 22 were in progress at the end of the financial year (*Annual Report 2011-12*, p. 38).

Timeliness

The CTA must complete its decision-making process within 120 days of receiving the initial complaint.²⁰⁹⁴ However, the agency may postpone the delivery date of a final decision if the parties agree to an extension. The regulator may also extend the time limit if parties undergo mediation (*Canada Transportation Act*, s.36.1(6)). If parties require a hastier resolution of the dispute they may choose Final Offer Arbitration. The FOA process must be completed within 60 days, or 30 days for disputes involving freight charges of less than CA\$750 000, unless the parties agree to a different time frame (*Canada Transportation Act*, ss.161-165) .

Information Disclosure and Confidentiality

The regulator is empowered (*Canada Transportation Act*, s.39) to:

enter and inspect any place, other than a dwelling-house, or any structure, work, rolling stock or ship that is the property or under the control of any person the entry or inspection of which appears to the inquirer to be necessary.

... [E]xercise the same powers as are vested in a superior court to summon witnesses, enforce their attendance and compel them to give evidence and produce

²⁰⁹² CTA, *Western Grain: Railway Revenue Cap*. Available at: <https://www.otc-cta.gc.ca/eng/revcap> [accessed 15 July 2013].

²⁰⁹³ CTA, *Decision-Making Process*. Available at: <http://www.cta-otc.gc.ca/eng/decision-making-process> [accessed on 3 June 2013].

²⁰⁹⁴ CTA, *Decision-Making Process*. Available at: <http://www.cta-otc.gc.ca/eng/decision-making-process> [accessed on 4 June 2013].

any materials, books, papers, plans, specifications, drawings and other documents that the inquirer thinks necessary.

Decision-making and Reporting

The CTA is comprised of five full-time members including a Chairman and Vice Chairman. In the case of a dispute, a panel of at least two members is assigned to make a decision.

Apart from the determinative role of the CTA, there are circumstances in which it operates in an advisory capacity. The Minister of Transportation has the power to make policy determinations in relation to the operation of the *Canada Transportation Act*. Before tabling the policy before the two houses of parliament, the Minister must consult with the Agency with respect to the subject matter (s.46).

The decisions made by the Agency are binding on parties, can be made an order of the Federal Court and are enforceable in the same manner as such an order (*Canada Transportation Act*, s.33).

Decisions are recorded in reports, which contains detailed discussion of the process and deliberations that occurred prior to the final determination. Considerable detail is published in support of decisions including the background, relevant issues, facts, legislation, position of parties, and analysis of all information.²⁰⁹⁵

Draft decisions are not recognised by statute, however interim decisions may be made (*Canada Transport Act*, s.28(2)):

The Agency may, instead of making an order final in the first instance, make an interim order and reserve further directions either for an adjourned hearing of the matter or for further application.

Appeals

Parties involved in a complaint who are dissatisfied with the agency's decision may appeal to the Federal Court on a matter of law or jurisdiction within one month of the decision (*Canada Transport Act*, s.41). Once leave has been granted by the court, the party must enter the appeal within sixty days (*Canada Transport Act*, s.41(2)).

Alternatively, parties may appeal at any time to the Governor in Council. Following an application of one of the parties, another interested person or of its own motion, the Governor in Council may 'vary or rescind any decision, order, rule or regulation of the Agency' (*Canada Transport Act*, s.40).

Decisions of non-jurisdictional facts are final and conclusive (*Canada Transport Act*, s.31). However, an applicant may seek internal review of decisions if there has been a change in the facts or circumstances related to the decision or order (*Canada Transport Act*, s.32). The Agency may then review, rescind or vary any decision or order made by it, or it may re-hear any application before deciding it.

6. Airports

The 26 airports constituting the National Airport System (NAS) handle 90 per cent of Canada's passenger and cargo volumes. There is a further 570 airports, heliports and waterdromes. There are 1297 registered aerodromes that largely service areas where aviation is the only year-round transportation option.²⁰⁹⁶

With the exception of four airports, NAS members are owned by Transport Canada and are operated by non-profit airport authorities. Three of these airports are located in Canada's territories and are owned and operated by their respective territorial governments. The Kelowna International Airport is owned by Transport Canada, but is operated by the City of Kelowna.

Four of Canada's airports enplane and deplane over ten million passengers annually; Toronto Pearson International Airport, Vancouver International Airport, Montréal-Pierre Elliott Trudeau International Airport and Calgary International Airport. These four airports handle approximately 65

²⁰⁹⁵ See, for example, CTA, Decision No. 161-R-2013 on 2013-2014 volume-related composite price index required for Western Grain Revenue Caps. Available at: <http://laws-lois.justice.gc.ca/eng/acts/c-10.4/page-13.html#h-28> [accessed on 4 June 2013].

²⁰⁹⁶ Transport Canada, Transportation in Canada 2011, p. 31. Available at: <http://www.tc.gc.ca/eng/policy/report-aca-anre2011-index-3010.htm> [accessed on 15 July 2013].

per cent of all scheduled passengers, and over 90 per cent of non-US international scheduled passengers. Together, Toronto Pearson International and Vancouver International handle approximately 50 per cent of Canada's air cargo. A further five airports handle 35 per cent of Canada's air cargo: Calgary International Airport; Hamilton Airport; Montréal-Pierre Elliott Trudeau International Airport; Montréal-Mirabel International Airport; and Winnipeg James Armstrong Richardson International Airport.²⁰⁹⁷

The Toronto Pearson International Airport is Canada's largest for both international and domestic passengers. Toronto Pearson enplaned and deplaned over 30 million passengers every year from 2006 to 2012, with domestic travellers accounting for approximately 40 per cent of traffic. International traffic at Toronto Pearson is almost evenly split between US (trans-border) and non-US services, with trans-border travellers accounting for approximately 45 per cent in 2012.²⁰⁹⁸ Toronto Pearson handles approximately one-third of air freight in Canada, and approximately half of Canada's international freight. The Greater Toronto Airport Authority (GTAA) controls and operates the airport. It was incorporated in 1993 as a non-share capital corporation. The GTAA is governed by a 15-member board, whose members are drawn from regional municipalities, and the business and professional community.²⁰⁹⁹

The Vancouver Airport Authority (VAA) operates the second-largest airport in Canada. Vancouver International Airport served approximately 17.6 million passengers in 2012, with an even split between domestic and international. Vancouver International Airport is the second largest air freighter in Canada, loading and unloading 228 000 tonnes of cargo in 2012. It is operated by a community-based not-for-profit organisation known as YVR. The VAA is controlled by a board of directors who are appointed by nominating government entities and professional associations. Its primary method of ensuring accountability is through its annual report and online sustainability report.²¹⁰⁰

The Montreal Pierre Trudeau International Airport is Canada's second-largest airport for international passengers. Non-US international flights account for approximately 40 per cent of Montreal-Trudeau's passenger traffic of 13 million. Non-US international flights also accounted for approximately 85 per cent of Montreal-Trudeau's 76000 tonnes of cargo in 2011. This is in part due to the large domestic and trans-border freighting role played by Montreal's other major airport, Montreal-Mirabel International. *Aéroports de Montréal* (ADM) operates both Montréal-Mirabel and Montréal-Trudeau, overseeing Montréal-Mirabel's transition to a freight-only airport. ADM is controlled by a 15 member board of directors; including two members nominated by the Government of Canada; one by the Government of Québec; three by *Communauté Métropolitaine de Montréal*; three by the Board of Trade of Metropolitan Montréal; and two by the main carriers operating at Montréal-Trudeau airport. Terms are for three years and are renewable up to a total of nine years. ADM holds itself accountable to the community by voluntarily complying with the governance rules required of public companies, and by publishing annual and quarterly reports.²¹⁰¹

The Calgary International Airport²¹⁰² primarily operates domestic and trans-border flights, with almost 90 per cent of its 12 million passengers either arriving from, or departing for, a US or Canadian airport in 2011. Calgary International Airport is strong in both the domestic and international freighting sectors, handling 83 000 tonnes in 2011. The Calgary Airport Authority is a not-for-profit, non-share capital corporation, incorporated under the Province of Alberta's *Regional Airports Authorities Act*. Since 1992, it has been responsible for the operation, management and development of Calgary International Airport, and subsequently Springbank Airport, under long-term lease from the Government of Canada.

²⁰⁹⁷ Statistics Canada, *Air Carrier Traffic at Canadian Airports 2011, 2012*.

²⁰⁹⁸ Toronto Pearson, *Toronto Pearson Traffic Summary as of November 2012*. Available at: http://www.torontopearson.com/uploadedFiles/GTAA/Content/About_GTAA/Statistics/11-Nov.pdf [accessed on 15 July 2013].

²⁰⁹⁹ Toronto Pearson, *Home*. Available at: <http://www.torontopearson.com/gtaa.aspx#> [accessed on 15 July 2013].

²¹⁰⁰ YVR, *About Us*. Available at: <http://www.yvr.ca/en/about.aspx> [accessed on 4 June 2013].

²¹⁰¹ *Aéroports de Montréal*, 2011 Annual Report, 2012, pp. 41. Available at: <http://www.admtl.com/AboutUs/MediaRoom/Publications.aspx> [accessed on 2 July 2013].

²¹⁰² YYC, *Home*. Available at: <http://www.yyc.com/> [accessed on 6 June 2013].

Until 1994, the airports in Canada were all owned and operated by the federal government. In that year, the government instituted its National Airports Plan (NAP), whereby all the airports were divided into four distinct groups.²¹⁰³

- National Airports System (NAS). This included 26 of the main airports located in a national, provincial or territorial capital and/or who has annual traffic of no less than 200000 passengers. Operation of these airports was devolved to Canadian airport authorities (CAAs), with the national government retaining ownership.
- Regional and local airports with fewer than the 200 000 passenger threshold – ownership transferred to province governments, airport commissioners or other interest.
- Smaller airports (mainly used for recreational flying) were transferred to local interests or closed.
- Remote or arctic airports continued to be operated and or supported by the federal government.

With regard to the NAS airports, the benefit of transferring larger airports on long-term leases to local CAAs was perceived to be increased cost-effectiveness, responsiveness to local needs, and matching service to demand. However, ownership was retained by the Government for these airports to ensure 'the integrity and long term viability of the NAS'. The airport divestiture process is not uniform across the NAS airports. Five airports – Vancouver, Calgary, Edmonton, Montreal Dorval and Montreal Mirabel – had been transferred to Local Airport Authorities (LAAs) in 1992, prior to the NAP implementation. The majority of the airports were transferred to CAAs between 1995 and 2003.

Both LAAs and CAAs are private-self-financing, not-for-profit, non-share-capital corporate entities that do not pay income tax. Their leases on the federal land are for 60 years with an option to renew for an additional 20 years.

Regulatory Institutions and Legislation

The legislation governing various aspects of the air transport services includes the *Aeronautics Act 1985*, the *Airport Transfer (Miscellaneous Matters) Act 1992*, and the aviation provisions under the *Canada Transport Act 1996*. However, the legislation does not provide a framework for the economic regulation of the NAS airports. Notwithstanding that the main description of airport regulation and governance on the Transport Canada website was written in 1994, the following features can be established:

As a general rule, airports within the NAS were required to become financially self-sufficient (operating and capital costs) within five years beginning 1 April, 1995.

Each of the 26 airports is able to determine its own fees and tariffs, and there is no formalised and enforced legislative system for dispute resolution or regulation.

As the landlord of airports, the government, through Transport Canada may audit the managing bodies of the airports' records and procedures at any time, and requires them to attain a performance review every five years. Public disclosure provisions in the ground lease require that certain documents be made available to the public and that public meetings be held at fiscal year-end.

A Community Consultative Committee must be established. For Toronto's Pearson Airport, the committee is described as follows.²¹⁰⁴

The GTAA [Greater Toronto Airport Authority] shall, within six months of the transfer date, establish a community consultative committee to provide for effective dialogue and dissemination of information on matters relating to the Airport, including airport planning and plans, operational aspects of the Airport, and municipal concerns.

The Consultative Committee shall meet not less than twice each year, and shall be comprised of members who are generally representative of the community, including persons representing the interests of consumers, the travelling public and organized

²¹⁰³ Transport Canada, *National Airport Policy – The National Airports System (NAS)*. Available at: <http://www.tc.gc.ca/eng/programs/airports-policy-nas-1129.htm> [accessed on 15 July 2013].

²¹⁰⁴ GTAA website, *Consultative Committee*. Available at: <http://www.torontopearson.com/en/consultativecommittee/#> [accessed on 4 June 2013].

labour, aviation industry representatives and appropriate provincial and municipal government representatives.

7. Ports

Canada is a major trading nation with substantial exports and imports of bulk items; containers and other types of merchandise. Canada's major ports have a legal designation under the *Canada Marine Act* as Canada Port Authorities (CPA) and consist of 17 Port Authorities known as the National Ports System. These Port Authorities were designated as being 'critical to domestic and international trade'. These 17 ports handle about 60 per cent of all Canadian marine cargo. The balance of Canadian marine cargo is handled by the regional ports system consisting of several hundred ports from the Atlantic to the Pacific to the Arctic. The marine industry functions are multi-faceted, and each coast has a unique component of both domestic and international marine transportation supporting key transportation corridors. Canada's port system provides critical infrastructure linking the movement of goods by water to important landside services including critical connections to road and rail. The Great Lakes/St. Lawrence inland waterway system from the Atlantic Ocean to the heartland of the United States is an important trade corridor with approximately 50 regional ports on both sides of the Canada/US border. The Great Lakes and St. Lawrence regions specialise in bulk carriers, self-unloaders and tug/barge units related to domestic dry cargo movements and a fleet of small tankers transports petroleum products.²¹⁰⁵

Ports that are of strategic importance to trade are category one ports operated by CPAs. There are currently 17 CPAs: Belledune Port, Halifax Port Authority, Hamilton Port Authority, Montreal Port Authority, Nanaimo Port Authority, Port Alberni Port Authority, Prince Rupert Port Authority, Quebec Port Authority, Saguenay Port Authority, Saint John Port Authority, Sept-Îles Port Authority, St. John's Port Authority, Thunder Bay Port Authority, Toronto Port Authority, Trois-Rivières Port Authority, Vancouver Fraser Port Authority, and Windsor Port Authority.

Vancouver is Canada's largest and busiest port. The Vancouver Fraser Port Authority (VFPA) was formed in January 2008, combining three existing CPAs – namely Fraser River Port Authority, North Fraser Port Authority and Vancouver Port Authority. The integrated authority is 'governed by a diverse board of directors representing government and industry, able to make independent and timely decisions on business plans and capital spending'. As the most diversified port in North America, Port Metro Vancouver operates across five business sectors: automobiles, break bulk, bulk, container and cruise. The port facilitates trade with more than 160 world economies, and handles nearly 130 million tonnes of cargo each year.²¹⁰⁶

Canada Port Authority Ports

The CPAs are independent federal agencies empowered by the *Canada Marine Act 1998*. In general, these authorities are non-share-capital not-for-profit corporations accountable to the federal Minister of Transport. Each of these port authorities is granted certain powers with corresponding responsibilities in accordance with the *Canada Marine Act 1998* and letters patent (the official grant of authority). In accordance with Part I of the *Canada Marine Act 1998*, the Canadian Transportation Agency (CTA) (profiled in section 5 of this chapter) is empowered to regulate the port authorities.²¹⁰⁷

The Canadian Transportation Agency acts as an economic regulator for certain marine activities. Through its powers and often in response to a complaint, the Agency determines whether tariffs, tolls and fees are unjust, unreasonable, discriminatory or prejudicial to the public interest. Other operational decisions are determined independently by the relevant CPA.

Consultation of Interested Parties

When a CPA proposes to increase its fees, it must provide notice. The CPA may change its fees sixty days after notice has been publicised if nobody challenges the proposed fee changes. The CPAs are required by the *Canada Marine Act* to hold an annual meeting where they present the annual report and the Chief Executive Officer is available to answer questions about the operation of

²¹⁰⁵ Association of Canadian Port Authorities, *Home*. Available at: <http://www.acpa-ports.net/industry/industry.html> [accessed on 4 June 2013].

²¹⁰⁶ Port Metro Vancouver, *Port Overview*. Available at: <http://www.portmetrovancover.com/en/about/portoverview.aspx> [accessed on 4 June 2013].

²¹⁰⁷ CTA, *Role in Marine Transportation*. Available at: <https://www.otc-cta.gc.ca/eng/agencys-role-marine-transportation-system> [accessed on 4 June 2013].

the port, and respond to queries (s.35). This is the most significant way in which the port authorities interact with the public, and are made accountable for their operations.

The Toronto Ports Authority (TPA) states in its policy that, when contemplating initiatives that will have a significant impact upon port users or surrounding communities, it will provide sufficiently detailed notice to them of the proposed changes, and give them an opportunity to submit their thoughts. The TPA at its discretion will also allow those with relevant interests to present their thoughts to the Board of Directors. Generally speaking, the Board will give an opportunity to be heard to any presenter having legitimate interest to appear before the Board, or before the designated Board Committee in the Board's discretion.²¹⁰⁸ Other CPAs all allow for public submissions in relation to proposed changes in tariffs.

Timeliness

Any interested person may, at any time, file a complaint with the Canada Transportation Agency that there is unjust discrimination in a fee fixed under s.49(1) of the *Canada Marine Act*, and the Agency shall consider the complaint without delay and report its findings to the port authority, who must govern itself accordingly (s.52(1)).

Decision-making and Reporting

The composition of the CTA has been previously described in relation to its regulation of the rail industry (section 5). According to the *Canada Marine Act*, between seven and twelve directors are to be appointed to the CPAs. One is nominated by the Minister for Transportation and appointed by the Governor-in-Council, one individual is appointed by the municipalities mentioned in the letters patent, one individual is appointed by the province in which the port is situated, and, in the case of the Port of Vancouver, another individual is appointed by the Provinces of Alberta, Saskatchewan and Manitoba acting together, and the remaining individuals nominated by the Minister and appointed by the Governor-in-Council in consultation with the users selected by the Minister or the classes of users mentioned in the letters patent (s.8(2)(f)).

Appeals

Under the *Canada Marine Act* there is provision for review of fees, any interested person may at any time file a complaint with the CTA that there is unjust discrimination in a fee fixed under s.49 (1) of the *Canada Marine Act*, and the CTA shall consider the complaint without delay and report its findings to the port authority, and the port authority shall govern itself accordingly (s.52 (1)).

Public Ports

Canada's public ports are regulated under Part II of the *Canada Marine Act 1998*. The designated public ports are owned and operated and regulated by Transport Canada (Department of Transportation). The Minister of Transportation is empowered to determine fees and tariffs for ships, vehicles, aircraft and persons coming into or using a public port or public port facility; goods loaded on ships, unloaded from ships or transhipped by water within the limits of a public port or stored in, or moved across, a public port facility; and any service provided by the Minister, or any right or privilege conferred by the Minister, in respect of the operation of a public port or public port facility; with regard to all public ports (*Canada Marine Act 1998*, s.67).

The *User Fees Act 2004* applies to all user fees fixed by a regulatory authority.²¹⁰⁹ As a result, a public port is required, in considering a change in tariff pricing fixed by the Minister, to give all service users a reasonable opportunity to provide ideas or proposals for ways to improve the services to which the fees relate. In addition, an impact assessment must be conducted to identify relevant factors which must be taken into account in a decision to fix or change the user fee (ss.4 (1) (b) and (c)).

Anyone may bring a complaint in relation to a proposed change in fees or tariffs to the regulatory authority. When the complaint is received, the regulatory authority must make an attempt to resolve it and give the complainant notice in writing of proposed resolution. If it is not resolved in 30 days, the complainant may request that the issue be referred to an independent advisory panel set up by the

²¹⁰⁸Treasury Board of Canada Secretariat, *User Fees*. Available at: <http://www.tbs-sct.gc.ca/fm-gf/ktopics-dossiersc/fms-sqf/uf-fu/menu-eng.asp> [accessed on 6 June 2013].

²¹⁰⁹Treasury Board of Canada Secretariat, *User Fees*. Available at: <http://www.tbs-sct.gc.ca/fm-gf/ktopics-dossiersc/fms-sqf/uf-fu/menu-eng.asp> [accessed on 6 June 2013].

regulatory authority (s.4.1). The Panel is mandated to send a report in writing of its findings and proposed resolution to the authority and the complainant within 30 days.

Mexico

OVERVIEW

Mexico is a federation of 31 states, with the federal district located in the capital, Mexico City. The Mexican constitution has a substantial impact on the arrangements for the production and regulation of infrastructure services; and the institutions responsible for regulating energy, telecommunications, postal services, and rail are all federal. Municipal authorities have some powers to regulate water and wastewater services. The Mexican constitution mandates that water, energy, and postal services must be provided by a government-owned entity, while telecommunications, rail and airports may be privately operated. Most ports are managed by the state. These arrangements are also being increasingly influenced by Mexico's membership of the North American Free Trade Association (NAFTA); together with Canada (chapter 16) and the United States of America (chapter 18).

The institution responsible for competition regulation is the *Comisión Federal de Competencia* (Competition Federal Commission). It has jurisdiction over all areas of economic activity, except those public services that must be provided by the state (including mail, telegraphs, and radiotelegraphy) according to article 28 of the Mexican constitution.²¹¹⁰

The regulatory agency for energy is the *Comision Reguladora de Energía* (CRE) (Energy Regulatory Commission). With only limited exceptions, energy is one of those areas restricted to exclusive supply by the state under article 28 of the constitution.

The *Comisión Federal de Telecomunicaciones* (COFETEL) (Telecommunications Federal Commission) is the regulator for telecommunications. The incumbent operator, TELMEX, has been privatised. It has retained a high market share in both fixed-line and mobile services. A recent OECD Study has identified (p. 11) a number of 'shortcomings and challenges' in Mexican telecommunications.²¹¹¹

The lack of telecommunications competition in Mexico has led to inefficient telecommunications markets that impose significant costs on the Mexican economy and burden the welfare of its population...[It] is characterised by high prices, among the highest within OECD countries...poor market penetration...and low infrastructure development.

A Federal Government Ministry, *Secretaría de Comunicaciones y Transportes* (SCT) (Ministry of Communication and Transport) has jurisdiction in the case of postal services. The government-owned *Correos de México* exclusively supplies letter services (an article 28 service), while parcels and courier services are also supplied by competing carriers.

The *Comisión Nacional del Agua* (CONAGUA) (Water National Commission) has a governance role in relation to water. Water is another area subject to exclusive provision by the government (article 27). Mexico has a substantial amount of irrigation for agricultural purposes. Municipalities own and operate utilities for water and wastewater.

Railways and airports also come under the SCT – the *Dirección General de Transporte Ferroviario y Multimodal* (General Directorate of Railway and Multimodal Transportation) has jurisdiction in the case of rail; and the *Dirección General de Aeronáutica Civil* (General Direction of Civil Aviation) in the case of airports.

There is no economic regulation of seaports in Mexico. There has been some privatisation of port activities in recent years.

Another important body is the *Comisión Federal de Mejora Regulatoria* (COFEMER) (Federal Commission for Regulatory Improvement), a part of the Ministry of the Economy. All regulatory agencies must submit regulatory proposals for review by the COFEMER, which it is charged with determining the impacts of regulations in terms of costs and benefits on society. The opinion of the COFEMER is not binding on agencies, but such agencies must explain their reasons for

²¹¹⁰ Constitution of Mexico. Available at: http://www.oas.org/juridico/mla/en/mex/en_mex-int-text-const.pdf [accessed on 15 July 2013].

²¹¹¹ OECD, *OECD Review of Telecommunications Policy and Regulation in Mexico*. Available at: <http://www.oecd.org/sti/internet/economy/oecdreviewoftelecommunicationpolicyandregulationinmexico.htm> [accessed on 15 July 2013].

disagreement with its assessment. The COFEMER also administers a register of procedures used by federal agencies. No agency can use procedures other than those registered with the COFEMER.

GEOGRAPHY, POPULATION, ECONOMY, POLITY AND LEGAL SYSTEM

The population of Mexico is estimated at approximately 115 million at July 2012.²¹¹² With a continental surface of 1 943 945 square kilometres, the population density is approximately 59 persons per square kilometre. Mexico has a southern border of 1149 kilometres with Guatemala and Belize, and a Northern border of 3169 kilometres with the United States of America. It limits with the Pacific Ocean at the west, and with the Gulf of Mexico and the Caribbean Sea at the east. The country has 11 122 kilometres of continental littorals.²¹¹³ Mexico's climate diversity is great, ranging from deserts and semi-deserts in the North-West, to forests, and tropical forests in the South-East. There are some mountainous areas, with the highest point being 5700 metres above sea level.

Larger cities are Mexico City (capital) 19.319 million; Guadalajara 4.338 million; Monterrey 3.838 million; Puebla 2.278 million; and Tijuana 1.629 million (2009).

Mexico has substantial natural resources including silver, copper, gold, lead, zinc, oil, natural gas, forests and water. Only about 13 per cent of Mexico's land is arable.

GDP at PPP is US\$1.667 trillion in 2011 and the GDP per capita is US\$14700 in 2011. Agriculture and mining contribute approximately 8 per cent of GDP; manufacturing 17.5 per cent and services 75 per cent.²¹¹⁴ Tourism produced 8.6 per cent of the GDP in 2011.²¹¹⁵

Since the implementation of the North American Free Trade Agreement (NAFTA) in 1994, Mexico's economy has become more integrated with those of the other members – its share of US imports has increased from 7 per cent to 12 per cent, and its share of Canadian imports has doubled to 5 per cent.²¹¹⁶ Mexico has free trade agreements with over 50 countries. Major exports are manufactured goods, oil and oil products, silver, fruits, vegetables, coffee, cotton. Imports include a range of machinery for manufacturing and agriculture; and vehicle and aircraft components.

Mexico's GDP declined by 6.2 per cent in 2009 as world demand for exports dropped, asset prices tumbled, and remittances and investment declined. GDP posted positive growth of 5.4 per cent in 2010 and 3.8 per cent in 2011. Unemployment stands at 5.2 per cent of the estimated workforce. While the budget is in deficit, the size of the deficit and the level of government debt (both as a percentage of GDP) are both low by OECD standards.²¹¹⁷

The country is a representative republic headed by a democratically elected president whose mandate lasts for six years with no possibility of re-election. The country has a house of representatives and a senate (500 and 128 members respectively). The judiciary is presided over by the Supreme Court of Justice (ten justices divided into two chambers and one chief justice, 11 justices in total) which has the dual role of court of appeals (as the last domestic resource) and constitutional court.²¹¹⁸

Mexico is a federation with 31 states and a 'federal district' (Mexico City). The Federal District functions in practice as another political sub-unit with similar powers as the other states. Each one of the political sub-units replicates the political organisation of the country – each one has a governor

²¹¹²Central Intelligence Agency (CIA), *The World Factbook: Mexico*. Available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/mx.html> [accessed on 15 July 2013].

²¹¹³ *Instituto Nacional de Estadística, Geografía e Informática (INEGI), Superficie Continental et Insular del Territorio Nacional*. Available at: <http://mapserver.inegi.gob.mx/geografia/espanol/datosgeogra/extterri/frontera.cfm?c=154> [accessed on 15 July 2013].

²¹¹⁴ *Instituto Nacional de Estadística, Geografía e Informática (INEGI), Producto Interno Bruto: Estructura Porcentual del Producto Interno Bruto por Sector de Actividad Económica*. Available at: <http://www.inegi.org.mx/sistemas/bie/cuadrosestadisticos/GeneraCuadro.aspx?s=est&nc=785&c=24407> [accessed on 15 July 2013].

²¹¹⁵ *Instituto Nacional de Estadística, Geografía e Informática (INEGI), Producto Interno Bruto: Participación del Turismo en el PIB*. Available at: <http://www.inegi.org.mx/sistemas/bie/cuadrosestadisticos/GeneraCuadro.aspx?s=est&nc=739&c=24560> [accessed on 15 July 2013].

²¹¹⁶ Central Intelligence Agency (CIA), *The World Factbook: Mexico*. Available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/mx.html> [accessed on 15 July 2013].

²¹¹⁷ *The World Factbook: Mexico*.

²¹¹⁸ *The World Factbook: Mexico*.

(elected for six years without the possibility of re-election) a house of representatives and a *Tribunal Supremo* (which has similar faculties as the national Supreme Court, but its powers are limited to interpreting the state constitution).²¹¹⁹

In theory, according to the constitutional framework, the original faculties and powers reside in each one of the constituent states, and are delegated to the federation. However, article 73 of the Mexican constitution has nearly 50 sections that vest the Federation with a wide set of powers, including regulating all areas considered in this chapter.

The legal system is civil law.²¹²⁰ The Judicial Power is presided by the Supreme Court of Justice which is both the highest court of appeals and the constitutional court of the country. The Supreme Court is divided into two *salas* or chambers (one exercises jurisdiction in criminal or private law cases, and the other in administrative or labour law ones). It is headed by a chief justice who is nominated among the 11 justices of the Court. Below the Supreme Court stand a range of *Tribunales Colegiados de Circuito*. The *Tribunales* are composed of three judges each, and specialise in different areas of the law (private, administrative, criminal, and labour). The *Tribunales* are ordinary courts for *amparo directo*. Below these *Tribunales Colegiados* stand the *Jueces de Distrito* (District judges).

The *Juicio de amparo* is a procedure for constitutional judicial review. In Mexico, only federal courts have jurisdiction to review the constitutionality of any legislative, judicial, or administrative decision. It has two types: *amparo indirecto*, and *amparo directo*. By *amparo directo* the court can review the decision of any lower court or judge (regarding the subject: administrative, criminal, private or commercial law, labour law, etc.). Only the *Tribunales Colegiados de Circuito* have jurisdiction over *amparo directo*. *Amparo indirecto* happens when any other act or decision which is not issued by a court is being reviewed, or, even when it is issued by a court, it does not put an end of the process. Any person has also the right to file an *amparo* against the issuing or enforcement of a law or regulation (through *amparo indirecto* before a district judge). *Jueces de distrito* are the ones who have jurisdiction over *amparo indirecto*. Both decisions of *amparo directo* or *indirecto* can be reviewed by the *Tribunales Colegiados* (in the case of the former) or one of the two chambers of the Supreme Court (in the case of the latter).²¹²¹ However, if the procedure needs the direct interpretation of an article of the constitution, the Supreme Court of Justice has authority to attract and review the case.

Typically, regulatory decisions in areas described in this chapter will be reviewed by a district court through a procedure of *amparo indirecto*. However, if they put an end to the administrative process, the parties have three mechanisms for revision (appeal).²¹²² The first is a *recurso de revisión* before the same agency (COFETEL, CRE, CONAGUA, the Ministry of transport, etc.). After that, to appeal the decision, there is a two-instance procedure, the (*juicio de nulidad* before the *Tribunal Federal de Justicia Fiscal y Administrativa* (TFJFA)).²¹²³ This court has jurisdiction to review any decision emanated from a federal administrative authority on the grounds of administrative procedure.²¹²⁴ If a party wants to further appeal the decision, there is the option of *amparo directo* before a *Tribunal Colegiado de Circuito*.

The TFJFA, district judges, and *Tribunales Colegiados* have the power to suspend the effects of administrative decisions.

APPROACH TO COMPETITION AND REGULATORY INSTITUTIONAL STRUCTURE

The main competition authority is the *Comisión Federal de Competencia* (CFC) (Federal Competition Commission). In addition, each infrastructure area has its own dedicated regulator. The regulatory agency for energy is the *Comisión Reguladora de Energía* (CRE) (Energy Regulatory Commission);

²¹¹⁹ *The World Factbook: Mexico*.

²¹²⁰ MexOnline, *The Mexican Legal System*. Available at: <http://www.mexonline.com/lawreview.htm> [accessed on 15 July 2013].

²¹²¹ See R Baker, *Judicial Review in Mexico: A Study of the Amparo Suit*, Austin: University of Texas Press, 1971.

²¹²² In this order, the parties cannot go to *amparo directo* if they have not appealed to the TSJFA. Further, they cannot file a procedure before the TSJFA if they have not filed a revision before the agency.

²¹²³ The TFJFA used to have limited jurisdiction over tax cases (or where fines or economic punishments were present). However, since the mid-1990s, it has jurisdiction also to revise any administrative act issued by a federal agency.

²¹²⁴ There is a *Ley Federal de Procedimiento Administrativo* (Federal Law of Administrative Procedure) which mandates the requirements (formal and substantive) of any administrative act.

the *Comisión Federal de Telecomunicaciones* (COFETEL) (Telecommunications Federal Commission) is the regulator for telecommunications; the *Secretaría de Comunicaciones y Transportes* (SCT) (Ministry of Communication and Transport) has jurisdiction in the case of postal, rail and airport services and the *Comisión Nacional del Agua* (CONAGUA) (Water National Commission) has a governance role in relation to water. The *Dirección General de Aeronáutica Civil* (General Direction of Civil Aviation) also has jurisdiction in the case of airport services and there is no economic regulation of seaports in Mexico.

Another important body is the *Comisión Federal de Mejora Regulatoria* (COFEMER) (Federal Commission for Regulatory Improvement), a part of the Ministry of the Economy. All regulatory agencies must submit regulatory proposals for review by the COFEMER, which it is charged with determining the impacts of regulations in terms of costs and benefits on society.

The CFC has authority to review and sanction both 'absolute' antitrust practices (for example, collusion) and 'relative' antitrust practices (for example, exclusivity agreements).²¹²⁵ The CFC has existed since 1992 and, in 2006, received new powers from a constitutional reform. It has jurisdiction over most economic activities in Mexico.

The commission is a semi-autonomous organisation within the *Secretaría de Economía* (Ministry of Commerce) (CFC) with the following powers.²¹²⁶

- Investigate the existence of monopolies and antitrust practices.
- Carry on research over buildings, data, archives, computer files, etc.
- Apply administrative sanctions (fines) and report criminal offences to the *Ministerio Público* (District Attorney, which in Mexico, is the only one entitled to begin a criminal trial).
- Order the suspension of antitrust practices or prohibited mergers.
- Decide over competition conditions and substantive power in the relevant market.
- Issue, when it considers it relevant or when some public or private party asks for it, a binding opinion over adjustments to programmes and policies of other organisations of the federal government; especially whenever these can have undesirable consequences on competition.
- Give its opinion over law projects and regulation drafts regarding competition.

Its board of commissioners is nominated by the President but needs the approval of the Senate in any case.²¹²⁷ The President cannot remove any of the Commissioners without cause.

The main regulatory bodies are: the *Comisión Reguladora de Energía* (CRE) (Energy Regulatory Commission) in the case of energy; the *Comisión Federal de Telecomunicaciones* (COFETEL) (Telecommunications Federal Commission) in the case of telecommunications; *Comisión Nacional del Agua* (CONAGUA) (Water National Commission) in the case of water; the *Secretaría de Comunicaciones y Transportes* (SCT) (Ministry of Communication and Transport) in the case of postal services; the *Dirección General de Transporte Ferroviario y Multimodal* (General Directorate of Railway and Multimodal Transportation) in the case of rail; and the *Dirección General de Aeronáutica Civil* (General Direction of Civil Aviation) in the case of airports.

The CRE, the COFETEL, and the CONAGUA have powers as entities with a degree of independence from their respective ministry. The other organisations are sub-units of the Ministry of Communications and Transport). In this case, the minister has the power of nominating and removing each one of the civil servants in those areas.

All regulatory agencies must submit regulatory proposals for review by the Federal Commission for Regulatory Improvement (COFEMER), a part of the Ministry of the Economy. The COFEMER is charged with determining the impacts of regulations in terms of costs and benefits on society.²¹²⁸ The

²¹²⁵ CFC, *Misión y Visión*. Available at: <http://www.cfc.gob.mx/index.php/cfc-quienes-somos/pleno> [accessed on 15 July 2013].

²¹²⁶ *Comisión Nacional de Competencia* (CFC), *Que Hacemos ?* Available at: <http://www.cfc.gob.mx/index.php/cfc-quienes-somos/pleno> [accessed on 15 July 2013].

²¹²⁷ There are five commissioners (one of them acting as President), see *Comisión Nacional de Competencia* (CFC), *Pleno*. Available at: <http://www.cfc.gob.mx/index.php/cfc-quienes-somos/pleno> [accessed on 15 July 2013].

²¹²⁸ COFEMER, *Quiénes Somos y Que Hacemos ?* Available at: <http://www.cofemer.gob.mx/contenido.aspx?contenido=29> [accessed on 15 July 2013].

opinion of the COFEMER is not binding on agencies, but – where they do not follow the COFEMER's advice – such agencies must explain their reasons for disagreement with its assessment.

The COFEMER also administers a register of procedures used by federal agencies.²¹²⁹ No agency can use procedures other than those registered with the COFEMER. The register contains a detailed description of the information, data and other documents required to carry out any procedure, and this inventory is systematically reviewed by COFEMER and the private sector (OECD 2003 Administrative Simplification in Mexico). The timeframes for the processes are also set out in the register. The maximum time in which a federal agency or authority has to answer or finish an administrative procedure is three months.²¹³⁰ If, by the end of the three months, the authority has not decided, the decision must be understood as negating the claims of the party. However, the authority can set a shorter time.

The COFEMER typically sets a timeframe for consultation to the public of the proposals received; unless it is a matter related to national security or it is otherwise justified. The draft is normally published in the relevant ministry webpage or on the COFEMER's website.

The COFEMER should receive a regulatory impact assessment from the ministry or agency that intends to issue the regulation. However, it can do the assessment by itself. The COFEMER can only suggest that a given regulation should not be issued or should be changed. It lacks binding powers. Nevertheless, before issuing a draft to the Congress, or a regulation, the authority²¹³¹ must take into account the advice from the COFEMER.

Appeals

Generally there are three processes of appeal from administrative decisions.

The first is a revision process that is carried out by the same authority that took the decision. It has to be presented within 15 days after the decision was notified.²¹³²

Once the procedure of revision has been concluded, and the decision puts an end to the administrative process, the interested party can then choose to appeal to the *Tribunal Federal de Justicia Fiscal y Administrativa* (TFJFA), through a *jucio de nulidad*. The TFJFA has two instances. The party can appeal the first decision of the TFJFA to the *Sala Superior* (Superior Chamber) of the same court.

Finally, the party has the choice of filing an *amparo directo* before a *Tribunal Colegiado de Circuito*. If the decision does not put an end to an administrative process, the interested party can file an *amparo indirecto* before a *Juez de Distrito* (Federal judge). The procedure typically assesses the constitutionality of administrative decisions, but it can also review its legality.

Only interested parties can appeal the decision. An interested party is defined as any person or organisation affected by the decision.²¹³³ Since 2010, it has been possible to file class actions in Mexico. However, these actions are only possible for the defence of consumers of public or private services, or cases involving environmental protection.²¹³⁴

²¹²⁹ *Ibid.*

²¹³⁰ *Cámara de Diputados del H. Congreso de la Unión, Ley Federal de Procedimiento Administrativo*. Available at: <http://www.diputados.gob.mx/LeyesBiblio/pdf/112.pdf> [accessed on 15 July 2013].

²¹³¹ The legal counsel of the President.

²¹³² CRE, *Ley de la Comisión Reguladora de Energía*, Article 11. Available at: <http://www.cre.gob.mx/documento/33.pdf> [accessed on 15 July 2013]. Note that the procedure follows the rules established in Article 83 of the *Ley de Procedimiento Administrativo*. See *Justia Mexico, Ley Federal del Procedimiento Administrativo*. Available at: <http://mexico.justia.com/federales/leyes/ley-federal-del-procedimiento-administrativo/> [accessed on 15 July 2013].

²¹³³ *Cámara de Diputados del H. Congreso de la Unión, Ley de Amparo, Reglamentaria de los Artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos*, Article 4. Available at: <http://www.diputados.gob.mx/LeyesBiblio/pdf/20.pdf> [accessed on 15 July 2013]. Also see: *Justia Mexico, Ley Federal del Procedimiento Administrativo, Article 83*. Available at: <http://mexico.justia.com/federales/leyes/ley-federal-del-procedimiento-administrativo/> [accessed on 15 July 2013].

²¹³⁴ *Instituto de Investigaciones Jurídicas, Código Federal de Procedimientos Civiles*, Article 578. Available at: <http://info4.juridicas.unam.mx/ijure/tcfed/5.htm?s> [accessed on 15 July 2013].

Appeals can consider all aspects of the decision, but typically courts would leave aside the substance of the regulatory decision and would focus on judicial review.²¹³⁵

REGULATORY ARRANGEMENTS BY INDUSTRY OR SECTOR

1. Energy

The Mexican Constitution mandates that all activities regarding electricity (generation, distribution, and supply) are to be provided by the state.²¹³⁶ In this context, reforms to the electricity subsector have been modest relative to some other jurisdictions. Vertical integration has been largely maintained, although, since 1992,²¹³⁷ private electricity generators have been allowed to set up new additional capacity and use it for their own consumption or, in certain circumstances, sell it to the national electricity provider, the *Comisión Federal de Electricidad* (CFE).

According to Article 72 of the *Reglamento de la Ley del Servicio Público de Energía Eléctrica* (Regulations of the Law of Electricity Generation)²¹³⁸, private providers can generate electricity, with prior authorisation from the *Secretaría de Energía* (Ministry of Energy), through the *Comisión Reguladora de Energía*, (CRE) – see next section), in order to:

- sell it to the CFE (Independent Power Producer) with long-term contracts;
- use it for their own consumption (total or partial);
- use it in case of emergencies caused by interruptions in the provision of the service; or
- export it.

Further, they can also import electricity for their own consumption.

Regulations specify three modes of generation by particular firms: co-generation, independent generation, and small-scale generation ('pequeña producción').

Co-generation happens when a given company is specialised in processes that produce energy (steam, geothermic energy, gas extraction, etc.) and uses part of this energy to generate electricity for its own processes. In this case, the generating company can sell the surplus of electricity to the CFE (articles 103 and 104 of the Regulations of the Law).

Independent generation happens when the CFE needs private companies (individuals are not authorised) to generate electricity according to the CFE's own plans and programs (authorised by the CRE), or when the electricity will be exported (articles 108-110 of the Regulations of the Law). There is no cap on the size of this type of private generation.

Small-scale generation can be authorised for companies or individuals whose capacity is less than 30 MW, or 1MW when the generation is intended for small rural communities (article 111 of the Regulations of the Law).

The CRE can set the generation charges when the electricity is produced or co-produced by private parties, and retail charges. Transmission charges and tariffs are dealt with by the CFE as a public monopoly. When it concerns the gas market, the Mexican Constitution mandates that all the production of oil and its derivatives (gas, petrol, diesel, etc.) have to be carried out by *Petróleos Mexicanos* (PEMEX) a monopoly owned by the state. The *Ley Reglamentaria del Artículo 27 Constitucional en el Ramo del Petróleo* (Implementing legislation of Article 27 of the Constitution regarding Oil,), establishes that both the extraction and the distribution of gas is exclusively done by

²¹³⁵ AL Magaloni and L Negrete, *El poder judicial y su política de decidir sin resolver*. *Division de Estudios Jurídicos*, 2001. México: CIDE.

²¹³⁶ This is the case in Mexico since the 1960s, when all three private companies were nationalised. See E De la Garza, 'La Integración de la Industria Eléctrica en México' in *Industria y Estado en la Vida de México* (Patricia Arias, ed.), Morelia: El Colegio de Michoacán, 1990.

²¹³⁷ Although the reforms were introduced in 1992, participation of private generators started in 2000. See JB Ruiz-Mendoza & C Sheinbaum-Pardo, 'Electricity Sector Reforms in Four Latin American Countries and their Impact on Carbon-Dioxide Emissions and Renewable Energy', *Energy Policy*, volume 38 (11), November 2011, pp. 6755-6766.

²¹³⁸ There is a hierarchy of types of legislation in the Mexican legal system. At the top stands the Constitution and international treaties signed and ratified by Mexico. Next there is the legislation that implements articles of the constitution, followed by federal legislation unrelated with the constitution. The next category is constituted by 'reglamentos' or 'regulations' that are enacted by the President without the Congress's approval. These regulations typically detail a statute or a set of statutes (Article 89, I, and 133 of the Constitution).

PEMEX. In this case, it is carried out by *PEMEX Gas y Petroquímica Básica*, a subsidiary of the company. Gas retailers selling to the final consumer, (supplying either liquefied or natural gas) can be private.

The CRE has jurisdiction to regulate natural gas retail permit holders.²¹³⁹

Regulatory Institutions and Legislation

The regulatory agency in the case of energy is the *Comisión Reguladora de Energía* (CRE) (Energy Regulating Commission). The CRE administers three laws: the *Ley del Servicio Público de Energía Eléctrica* (Law of the Public Service of Electricity) and – partially – the *Ley Reglamentaria del Artículo 27 Constitucional en el Ramo del Petróleo* (Implementing legislation of Article 27 of the Constitution regarding Oil). The CRE was created in 1994.²¹⁴⁰ It is structured by the *Ley de la Comisión Reguladora de Energía*, and has powers to regulate:²¹⁴¹

- the supply and retailing of electricity;
- the generation, exportation and importation done by private parties;
- the acquisition of electricity to supply public services;
- the distribution, transformation and delivery of electricity among the bodies that carry out the service of electricity provision;²¹⁴²
- the ‘first hand sales’²¹⁴³ of gas, petrol and basic petrochemicals;
- the transport and distribution of gas, of the products obtained from oil refining, and of basic petrochemicals done by pipes;
- the storage systems linked to the activities above, or those that are integral parts of importation or distribution terminals for the same products; and
- the transport and distribution of bio-fuels done through pipes, their storage linked with systems of transport and distribution, and the importation or distribution terminals for the same products.

In order to regulate these activities, the CRE has the following powers under Article 3 of the Law of the Energy Regulating Commission:²¹⁴⁴

- Participate in the decision-making process of retail tariffs of electricity.
- Approve the criteria for determining the amount of money that a state of the federation, city council, or beneficiary should pay for the provision of the public service of electricity when specific works, refurbishments, additions or changes are requested by the above mentioned parties.
- Verify that the electricity used to provide the service is the lesser costly and offers best stability, quality, safety to the whole system.
- Approve the methodology for setting the price of electricity destined to public services.
- Make suggestions – when requested by the Ministry of Energy – over energy planning, the needs of growth or substitution of the national capacity for electric generation; whether the CFE or, on

²¹³⁹ CRE, *Reglamento de Gas Natural*. Available at: <http://www.cre.gob.mx/documento/39.pdf> [accessed on 15 July 2013]. It is still common to distribute liquefied gas among consumers. This is done by lorries which fill each consumer’s tanks. However, the CRE does not have jurisdiction to regulate this market. The regulation is done directly by a directorate in the Ministry of Energy.

²¹⁴⁰ CRE, *Evolución Histórica*. Available at: <http://www.cre.gob.mx/articulo.aspx?id=10> [accessed on 15 July 2013].

²¹⁴¹ *Camara de Diputados del H. Congreso de la Unión, Ley de la Comisión Reguladora de Energía* (Law of the Energy Regulating Commission), Article 2. Available at: <http://www.diputados.gob.mx/LeyesBiblio/pdf/48.pdf> [accessed on 8 July 2013].

²¹⁴² The only body that distributes electricity in Mexico is the CFE.

²¹⁴³ ‘First hand sales’ are those that PEMEX does within the Mexican territory to private parties, or those which are done by the former to other consumers. See: CRE, *Ley de la Comisión Reguladora de Energía*, Article 2. Available at: <http://www.cre.gob.mx/documento/33.pdf> [accessed on 15 July 2013].

²¹⁴⁴ CRE, *Ley de la Comisión Reguladora de Energía*. Available at: <http://www.cre.gob.mx/documento/33.pdf> [accessed on 15 July 2013].

the contrary, a private party, should execute a project, and – if the latter – the terms and conditions of the application process.

- Approve and issue the terms and conditions of ‘first hand sales’ of petrol, gas, or basic petrochemicals. To approve the methodology to set the prices, except when there exist effective competition according to the CFC’s judgment, or the prices are set by the executive branch through an *Acuerdo* (enactment).²¹⁴⁵
- Approve and issue the terms and conditions of the service of transport, storage, and distribution of gas, petrol, basic petrochemicals, and bio-fuels.
- Determine the geographical zones for distribution, storage, importation, etc. In these cases, the CRE has to listen to other incumbent authorities (that is, urban planning ones).
- Issue the methodology to set the price for services of gas, petrol, basic petrochemicals, and bio-fuels’ storage, distribution, etc. With the exception that the CFC judges that there exist fair competition in the market.
- Regulate the minimal conditions and standards of the services regarding the issuing of the methodology to set the price for services of gas, petrol, basic petrochemicals, and bio-fuels’ storage, distribution.
- Request to the Ministry of Energy the necessary measures for the continuation of the services regarding the issuing of the methodology to set the price for services of gas, petrol, basic petrochemicals, and bio-fuels’ storage, distribution.
- Issue and revoke permits and authorisations required to carry out the activities regulated under CRE’s legal attributions.
- Approve and issue contract and agreement models for ‘contratos de adhesión’ (standard term contracts) where the parties cannot negotiate the terms, but only agree or disagree.
- Issue general administrative rules for regulatees and oversee their compliance.
- Suggest to the Ministry of Energy improvements in legislation related with the area of its expertise; and to suggest the terms to collaborate with other areas of the government in the formulation of projects statutes, laws, and regulations.
- Carry out a public register of the areas subject to its regulation.
- Act as arbitrator or mediator in dispute resolutions within regulated areas.
- Request safeguards to the competent authorities, when it gets to know a fact that may put in danger public health and safety.
- Mandate verification inspections, to request information, and to summon the people that carry out regulated activities, to verify rules’ compliance.
- Impose administrative sanctions (that is, fines) in case of breach.
- Issue health and safety measures and to fine the breach of the law in the case of gas, petrol, petrochemicals and bio-fuels.

The CRE is not independent of government. It has technical and budgetary autonomy (that is, it can decide its organisational life without interference from the Ministry), but it is a body that stands under the umbrella of the Ministry of Energy.²¹⁴⁶

Consultation of Interested Parties

There is not a formal process of consultation within either the CFE or the CRE, nor for gas or electricity prices. The tariffs, charges and prices are decided by the Ministry of Finance with the input of the CFE and the CRE. However, the COFEMER, the Federal Commission for Regulatory

²¹⁴⁵ If the CFC decides that the context of competition no longer exist, the CRE can decide the terms and conditions for those sales. See: CRE, *Ley de la Comisión Reguladora de Energía*, Article 3. Available at: <http://www.cre.gob.mx/documento/33.pdf> [accessed on 15 July 2013].

²¹⁴⁶ CRE, *Ley de la Comisión Reguladora de Energía*, Article 1. Available at: <http://www.cre.gob.mx/documento/33.pdf> [accessed on 15 July 2013].

Improvement, must always take part and give an expert opinion on any regulatory change (general rules, principles, setting the charges or tariffs).

The entity that is issuing the regulatory outcome must send a draft of it with a *manifestación de impacto regulatorio* (MIR) (Regulatory Impact Assessment). The MIR is based on a cost-benefit analysis. The COFEMER should immediately publish it and invite comments from interested parties. The COFEMER has 30 days to issue its expert assessment of the MIR and send it to the issuing body.²¹⁴⁷ As noted above, the COFEMER's view is not binding on the agency, but an agency must clearly explain the basis of any disagreement with COFEMER's assessment.

Consumer and user groups have an input into the process of pricing. They can go to the Consumer Protection Attorney ('*Procuraduría Federal del Consumidor*': '*Profeco*'). This eases the participation of consumers in the COFEMER's consultation processes described in the last section.

Timeliness

The general rule is that a decision must be made within three months, or otherwise it must be understood that the petition or claim is denied. However, the COFEMER has a register with all the applications for the federal government. In it the agency establishes what the time within which the authority must answer is, and whether – if not answered – the applicant must understand that his/her petition is approved or disapproved.²¹⁴⁸

Information Disclosure and Confidentiality

All regulators must comply with the *Ley Federal de Transparencia y Acceso a la Información* (Federal Law of Transparency and Information Access). This Law is administered by a regulatory agency known as the *Instituto Nacional de Acceso a la Información* or IFAI. Each agency or ministry of government must have a unit of transparency. It also manages regulation pertaining to data protection. Any citizen can ask for any public information unless it is deemed confidential, privileged, commercially confidential or reserved for a period of time.

Decision-making and Reporting

The CRE is governed by five commissioners, one acting as its chairman. Decisions are taken by majority of votes and the chairman of the CRE has a casting vote.²¹⁴⁹ Every one of the commissioners is designated by the President of Mexico. The board of commissioners has to approve all the CRE's decisions, which – like any other administrative decision in Mexico – needs to be justified by a legal norm (that is, the case and the CRE's behaviour must be foreseen by the law), and based on sufficient evidence.²¹⁵⁰ If any of these two conditions are not present, the decision can be invalidated by the courts of appeal.

Appeals

The decisions made by the CRE may be appealed through any of the three processes described under 'Appeals' in the section on 'Approach to Competition and Regulatory Institutional Structure'.

Regulatory Development

The *Ley para el Aprovechamiento de Energías Renovables y el Financiamiento de la Transición Energética* (Law for the Use of Renewable Energy and Financing Energy Transition) was published on 12 January 2012. This law intends to privilege 'clean' sources of energy. Although the law's main purpose seems to be to structure the action of the state to migrate to renewable energies, it creates a public fund for that purpose. The fund can subsidise public or private projects of generation by

²¹⁴⁷ According to a former official of the CFE, the regulatory impact assessments and drafts of regulation are very technical. This feature is a disincentive for general participation in the process. See *Justia Mexico, Ley Federal del Procedimiento Administrativo*. Available at: <http://mexico.justia.com/federales/leyes/ley-federal-del-procedimiento-administrativo/> [accessed on 15 July 2013].

²¹⁴⁸ However, different applications have different terms. See COFEMER, *Tramites*. Available at: <http://207.248.177.30/BuscadorTramites/BuscadorGeneralHomoclave.asp?SIGLASDEPENDENCIA=&accion=> [accessed on 15 July 2013].

²¹⁴⁹ CRE, *Ley de la Comisión Reguladora de Energía, Article 4*. Available at: <http://www.cre.gob.mx/documento/33.pdf> [accessed on 15 July 2013].

²¹⁵⁰ Constitution of Mexico, Article 14 & 16. Available at: http://www.oas.org/juridico/mla/en/mex/en_mex-int-text-const.pdf [accessed on 15 July 2013].

renewable sources (wind, sun, tides, etc.). It excludes nuclear energy and hydroelectricity dams bigger than 50 000 cubic metres of water.²¹⁵¹

2. Telecommunications

Teléfonos de México, S.A. (TELMEX) was a state-owned utility until 1991 when it was privatised.²¹⁵² At the time of privatisation, TELMEX owned all the land lines and networks in the country, and service was generally considered inefficient – for example, getting a land line took years in many cases; and network coverage was partial (while most urban areas were covered by the service, many rural or poor areas were not).

The privatised TELMEX entity was granted a concession to provide services until 2026 (with the possibility of extension). The concession title set out the regulatory framework for TELMEX and set goals of expansion, quality, and interconnection. According to the concession title, if those goals were not met from 1995, the concession could be withdrawn by the government.

While there have been criticisms of the way privatisation was carried out,²¹⁵³ TELMEX is seen to have complied with the objectives set by its title of concession,²¹⁵⁴ and to have much improved service quality and coverage.

As of 2011, Mexico had a total of 19 731 369 landlines.²¹⁵⁵ TELMEX is the largest supplier in the market of land lines with 84.8 per cent of lines. However, since the mid-1990s other suppliers have started providing services and have 15.2 per cent of lines.²¹⁵⁶

The total number of mobile connections in 2009 was 94 565 305.²¹⁵⁷ The structure of the market also has TELMEX as the main supplier (through *Telcel*, its subsidiary), as follows with 72.5 per cent; while *Movistar* has 19.5 per cent; *Iusacell-Unefon* has 4.5 per cent and *Nextel* has 3.5 per cent.²¹⁵⁸

In December 2012, Mexico had 11.8 wireline broadband subscribers per 100 inhabitants and 10.9 wireless broadband subscribers per 100 inhabitants.²¹⁵⁹ These penetration levels are among the lowest in the OECD.

Mexico is one of the few OECD countries that imposes limitations on foreign ownership in fixed-line services. This has been criticised as being detrimental to the development of new entry, and therefore competition in the market, resulting in higher prices and a slower diffusion of technologies.²¹⁶⁰

Regulatory Institutions and Legislation

The telecommunications regulator is the *Comisión Federal de Telecomunicaciones* (COFETEL) (Federal Telecommunication Commission). The COFETEL was created in 1995 to regulate

²¹⁵¹ *Cámara de Diputados del H. Congreso de la Unión, Ley para el Aprovechamiento de Energías Renovables y el Financiamiento de la Transición Energética*, Article 2. Available at: <http://www.diputados.gob.mx/LeyesBiblio/pdf/LAERFTE.pdf> [accessed on 15 July 2013].

²¹⁵² F De Jong, *Telecommunications Reform in Mexico: An In-depth Analysis on the Socio-economic Consequences of Liberalization of Mexico's Telecom Services Industry*. Available at: <http://eb.wewi.eldoc.uib.uio.no/FILES/rapporten/2003/EC135/EC135download.pdf> [accessed on 15 July 2013].

²¹⁵³ The main criticism was that, instead of privatising the utility to several providers so as to create competition, the government chose to create a very profitable monopoly. See J Mariscal, *Unfinished Business: Telecommunications Reform in Mexico*, Praeger: Westport, 2001.

²¹⁵⁴ World Bank: Independent Evaluation Group, *Privatisation and Deregulation in Mexico*. Available at: <http://lnweb90.worldbank.org/oeo/oeooclib.nsf/b57456d58aba40e585256ad400736404/02ba59e41714b982852567f5005d8a07?OpenDocument> [accessed on 15 July 2013].

²¹⁵⁵ COFETEL, *Líneas Telefónicas Fijas Totales: Serie Anual a Parir de 1971*. Available at: <http://siemt.cft.gob.mx/SIEM/> [accessed on 15 July 2013].

²¹⁵⁶ The Competitive Intelligence Unit, *Competencia en México: Que, 20 Años no es nada?* Available at: http://www.the-ciu.net/ciu_0k/pdf/ciu18agosto.pdf [accessed on 15 July 2013].

²¹⁵⁷ COFETEL, *Suscripciones a Teléfonos Celulares Móviles: Serie Anual a Parir de 1990*. Available at: <http://siemt.cft.gob.mx/SIEM/> [accessed on 15 July 2013].

²¹⁵⁸ The Competitive Intelligence Unit, *Competencia en México: Que, 20 Años no es nada?* Available at: http://www.the-ciu.net/ciu_0k/pdf/ciu18agosto.pdf [accessed on 15 July 2013].

²¹⁵⁹ OECD, *Broadband Portal* December 2012, updated 18 July 2013. Available at: <http://www.oecd.org/sti/broadband/oecebroadbandportal.htm> [accessed on 22 July 2013].

²¹⁶⁰ OECD, *OECD Review of Telecommunications Policy and Regulation in Mexico 2012*. Available at: <http://www.oecd.org/sti/broadbandandtelecom/50550219.pdf> [accessed on 15 July 2013].

telecommunications and broadcasting. It is not an independent agency, being under the umbrella of the *Secretaría de Comunicaciones y Transportes* (SCT) (Ministry of Communication and Transport). Its powers and functions are delegated from the SCT. However, it has organisational, technical and financial independence.²¹⁶¹

The COFETEL administers the *Ley Federal de Telecomunicaciones* (Federal Telecommunication Law) and the *Ley Federal de Radio y Televisión* (Federal Law of Radio and Television). It is also regulated by the *Reglamento Interno de la Comisión Federal de Telecomunicaciones* (Internal Regulations of the COFETEL).

The COFETEL is governed by a board of commissioners.²¹⁶² The chairman of the board has a casting vote in the event of a tie. All the decisions have to be taken by the board, but they can be delegated to other areas or individuals inside COFETEL. The commissioners are nominated by the President of Mexico and, until 2007, the Senate could object the nominations by a majority vote within 30 days from when it received the proposal by the President. However, the Supreme Court of Justice invalidated that part of the law on 20 August 2007, considering it to be unconstitutional.²¹⁶³

The powers of the COFETEL are as follows:

- Issue general and technical rules and standards regarding telecommunications ('Normas Oficiales Mexicanas').
- Carry out research linked with telecommunications and to make projects aimed at improving legislation.
- Promote training and research in telecommunications.
- Give its opinion regarding applications for the granting, modification, extension, delegation, and termination of permits and concessions.
- Make and submit to the SCT, for its authorisation, the plan for the usage of different frequency bands of the *bandas de frecuencia del espectro radioeléctrico* (radio-electric spectrum).
- Coordinate tendering procedures for geostationary orbital positions and satellite orbits assigned to Mexico.
- Establish the procedures to standardise equipment.
- Certify equipment or to authorise third parties to do so.
- Administer and promote the efficient use of the radio-electric spectrum. To actualise the *Cuadro Nacional de Atribución de Frecuencias* (National Framework for Frequencies Attribution).
- Administer and keep up to date a register for telecommunication providers.
- Promote and oversee the quality and efficiency of the equipment and public networks' interconnection inside the country and with other countries. To determine the conditions of interconnection between operators of public networks, when those conditions have not been agreed.
- Register the tariffs of telecommunication services and to establish specific duties regarding tariffs and standards for quality of the service to the operators that have substantial power in the market.
- Receive payment of taxes, benefits or duties regarding telecommunication services.
- Intervene in international affairs regarding telecommunications.
- Suggest to the SCT penalties to the agents in the market for breaching regulations.

²¹⁶¹ *Cámara de Diputados del H. Congreso de la Unión, Ley Federal de Telecomunicaciones, Article 9A.* Available at: <http://www.diputados.gob.mx/LeyesBiblio/pdf/118.pdf> [accessed on 15 July 2013].

²¹⁶² Four commissioners, a technical secretary and a *pro-secretario técnico* or auxiliary secretary. See COFETEL, *Reglamento Interno de la Comisión Federal de Telecomunicaciones, Article 8 & 11.* Available at: http://www.cofetel.gob.mx/work/models/Cofetel_2008/Resource/2971/1/reglamentointernodelaCFT.pdf [accessed on 15 July 2013].

²¹⁶³ *Cámara de Diputados del H. Congreso de la Unión, Ley Federal de Telecomunicaciones, Article 9C.* Available at: <http://www.diputados.gob.mx/LeyesBiblio/pdf/118.pdf> [accessed on 15 July 2013].

- Set the methodology for calculating transmission tariffs in mobile phones' subscriptions.

All the other powers are given to the SCT by the *Ley Federal de Radio y Televisión* (Federal Law of Radio and Television).²¹⁶⁴

As discussed, however, the COFETEL is not independent of the SCT and its role is, in some areas, consultative, and subordinate to the SCT. This has been argued to lead to the practice whereby the SCT receives the opinion of the COFETEL and then often undertakes its own analysis.²¹⁶⁵ This blurring of responsibility and duplication of work has been argued to waste resources and open the door to lawsuits filed on procedural issues.²¹⁶⁶

Price Regulation

Telmex's concession provides for the regulation of Telmex's end-user prices through the use of a price-cap regime. The concession sets out an 'RPI-X' price-cap regulation on a 'basket' of basic services. The power to authorise tariffs was transferred from the COFETEL to the SCT in 2009 with the COFETEL's role reduced to giving a 'plenary opinion of the tariffs that should be authorised'. This change has been criticised as bringing price regulation decisions closer to influence by political considerations.²¹⁶⁷

Dispute Resolution

Network operators can ask the COFETEL to intervene to set an interconnection rate when it cannot reach an agreement with a user. This should be done in 60 days, but this has not been adhered to.²¹⁶⁸ However, any party can then appeal to the courts against the ruling, and seek *amparo* to prevent application of the ruling until the legal process is exhausted. This process – whereby regulatory decisions are stayed pending the outcome of a judicial process – has permitted operators to delay or prevent implementation of the COFETEL's decisions. However, in 2011, the Supreme Court ruled that the COFETEL's decisions on interconnection prices cannot be suspended, and will stand pending *amparos* (regulatory decisions on other matters such as the provision of physical interconnection remain open to strategic gaming through abuse of *amparos*). The COFEMER has approved the COFETEL's cost model criteria for interconnection. The model has been used to determine current rates, and the COFETEL intends to use this model to settle disputes between operators in 2012 and beyond.

Access Obligations

Where the Competition Authority (CFC) declares a network operator dominant in a particular market, the COFETEL can impose interconnection obligations on that operator. However, most dominance declarations of the CFC have been successfully appealed, and, on the one declaration that has been re-instated, the COFETEL has yet to impose obligations. A set of technical interconnection rules was proposed by the COFETEL in 2009, including specific access terms and conditions, but three large operators excluded application of the rules to themselves through legal challenge. Despite the OECD having proposed that COFETEL be empowered to impose ex-ante regulation, particularly asymmetric regulation on players with significant market power, there is no *ex ante* access price regulation and no asymmetric regulation for operators with substantial market power (OECD Review, p. 12). In late 2012, however, COFETEL announced that it expected to make a decision early the following year on whether or not to apply asymmetric regulation to curb the market power of *Telcel*.²¹⁶⁹ Mony de Swaan, president of the COFETEL, said the Commission is currently considering proposals for asymmetric regulation of mobile retail service, and is studying the case of mobile termination rates.

²¹⁶⁴ The powers are mainly to give permits and concessions to radio and TV providers, and manage and regulate the transmission, advertisement, etc. See *Cámara de Diputados del H. Congreso de la Unión, Ley Federal de Radio y Televisión*. Available at: <http://www.diputados.gob.mx/LeyesBiblio/pdf/114.pdf> [accessed on 15 July 2013].

²¹⁶⁵ OECD, *OECD Review of Telecommunications Policy and Regulation in Mexico 2012*. Available at: <http://www.oecd.org/sti/broadbandandtelecom/50550219.pdf> [accessed on 15 July 2013].

²¹⁶⁶ *Ibid.*

²¹⁶⁷ *Ibid.*, p. 47.

²¹⁶⁸ *Ibid.*

²¹⁶⁹ *The Wall Street Journal*, Mexican Telecoms Watchdogs to Analyse Asymmetric Regulation. Available at: <http://online.wsj.com/article/BT-CO-20121101-723778.html> [accessed on 15 July 2013].

Consultation of Interested Parties

As in the case of energy regulation, whenever a decision affecting regulation (even about charges or tariffs) is planned, the COFETEL must send the draft to the *Comisión Federal de Mejora Regulatoria* (COFEMER) (Federal Commission for Regulatory Improvement). This commission publishes the draft and opens a consultation period, after which it issues a *Manifestación de Impacto Regulatorio* (MIR) (Regulatory Impact Assessment), based, as in many other jurisdictions, on a cost-benefit analysis. The COFEMER must take all submissions into consideration. The COFEMER cannot veto regulations, but regulatory agencies must clearly justify disagreement with its judgements.

The COFETEL directs the claims made by consumers to *Profeco* (Consumer Protection Agency). Consumer protection in Mexico is not as developed as in other industrialised countries.²¹⁷⁰ However, recent failures in the service by *Telcel* (the incumbent in the market) caused the CFC to issue a penalty to that company.²¹⁷¹

The market for telecommunications (one main national provider) and broadcasting (television has only two main national providers) are deeply concentrated. The COFETEL, in the opinion of some, has 'no teeth'.²¹⁷² All its decisions about fines and penalties have to be proposed to the SCT in order to be implemented.

Timeliness

As stated above, the general rule is that a decision must be made within three months, or otherwise it must be understood that the petition or claim is denied. The same comments apply here regarding the role of the COFEMER and the national register of applications.

Information Disclosure and Confidentiality

Like all entities of federal public administration, the COFETEL has a unit dedicated to transparency and data protection.²¹⁷³ The same considerations as in the previous section apply to the COFETEL.²¹⁷⁴

At present the COFETEL is not required to provide the information, economic and legal argument for its decisions or the opinions provided by stakeholders during any consultative process.²¹⁷⁵ Some progress in transparency has been made recently with the publication of, and consultation on, its interconnection cost model, and the re-establishment of an Advisory Council. The Council includes academics, consumer bodies, and industry experts; and advises the COFETEL Board. It has presented 16 regulatory proposals to the COFEMER.

While there are no formal consultation requirements on the COFETEL, consultation can be carried out with stakeholders informally. For example, informal consultation was undertaken in relation to its interconnection cost model.

In relation to end-user price regulation, the composition of the basket of services is not disclosed publicly. In addition, the IFAI (the transparency agency) ruled in September 2012 that the COFETEL

²¹⁷⁰ There are some consumer organisations such as the *Red de Asociaciones de Consumidores en México*. See *Red de Asociaciones de Consumidores en México* (REDAC), *Inicio*. Available at: <http://www.redac.org.mx> [accessed on 24 January 2013]. For information about Profeco, see *Portal del Consumidor* (Profeco), *Inicio*. Available at: <http://www.consumidor.gob.mx> [accessed on 15 July 2013].

²¹⁷¹ The penalty was revised by the CFC and withdrawn. However, Telcel agreed to lower its prices and connection charges to other companies' users.

²¹⁷² Statement was made by Carlos Guzmán, an analyst with Strategis Group in Washington D.C. See IT World, *Unchained Links*. Available at: <http://www.itworld.com/CIO010101passportmexico> [accessed on 15 July 2013].

²¹⁷³ COFETEL, *Transperencia*. Available at: http://www.cofetel.gob.mx/es_mx/Cofetel_2008/Cofe_transperencia [accessed on 15 July 2013].

²¹⁷⁴ Any user has the right to opt-out of the directory in case he/she does not want his/her personal information open to anyone. In a joint press release, the COFETEL, IFAI, and Profeco communicated that the procedure for opting-out must be free (it was not). See Profeco, *Profeco, COFETEL e IFAI Logran Avances en la Protección de Datos Personales a favor de los Usuarios de Servicios de Telecomunicaciones*. Available at: <http://www.profeco.gob.mx/prensa/prensa12/octubre12/bol93.asp> [accessed on 15 July 2013].

²¹⁷⁵ OECD, *OECD Review of Telecommunications Policy and Regulation in Mexico 2012*. Available at: <http://www.oecd.org/sti/broadbandandtelecom/50550219.pdf> [accessed on 15 July 2013].

must publish all the interconnection agreements between TELMEX and other companies, including the interconnection points.²¹⁷⁶

Decision-making and Reporting

Decisions must be taken by the board of commissioners in full (at least three commissioners of the total four), where the Chairman has the casting vote in the case of tied vote²¹⁷⁷. However, Article 21 of the Internal Regulations of COFETEL delegates some decisions to other areas of the agency (for example, to request information, to revise the regulatees' original bylaws or their modifications, to authorise the standard-form contracts between consumers and providers, or to authorise penalties or safeguards, among others). Thus, in these cases, the COFETEL's sub-units can act without the authorisation of the board of commissioners.

As in the case of the CRE, the COFETEL must reason its decisions, and justify them according to the legislation and regulations. Its decisions need to be justified by a legal norm (that is, the case and the Cofetel's behaviour must be foreseen by the law), and based on sufficient evidence. If any of these two conditions are not present, the decision can be invalidated by the courts of appeal.

Appeals

Decisions made by the COFETEL may be appealed through any of the three processes described under 'Appeals' in the section on 'Approaches to Competition and Regulatory Institutional Structure'.

It is also worth noting that in the case of the COFETEL, when a decision does not need the authorisation of the SCT (for example, decisions about tariffs and interconnection charges), the revision process is addressed to the board of commissioners of the COFETEL. However, in decisions in which the COFETEL only suggests and the SCT authorises (for example, penalties) the revision must be filed before the ministry.

Once this administrative procedure is over, any interested party can file an *amparo* suit or writ to the federal courts, as described above.

As appeals typically lead to a suspension of a regulatory decision or a freeze or delay in it, they could be used strategically to prevent or delay regulatory decisions. Following a 2011 Supreme Court Decision, they can now no longer be used in this way in relation to interconnection decisions related to pricing, but the possibility remains in relation to other elements of interconnection and other regulatory decisions.

The COFETEL's report (2006-2012) lists, nevertheless, some Supreme Court decision that, according to COFETEL, reinforced the agency's authority. The report mentions the political context of the last 15 years that has hindered legal reforms in a variety of areas (including telecommunications). Among those Supreme Court decisions, the COFETEL mentions:²¹⁷⁸

- 2011: Resolutions made by the COFETEL regarding interconnection (in those aspects not agreed by the parties) must have full legal force and cannot be 'suspended' by courts.
- 2011: The 'plenum' of the COFETEL (the board of commissioners) and not the ministry of communications has jurisdiction to solve the revision procedure over the decisions issued by the same COFETEL.
- 2010: The COFETEL is autonomous and should not be under the authority of the ministry in those faculties that are exclusive of the agency.
- 2007: The COFETEL has faculties to establish tariffs, standards of quality of service and information to regulate.
- 2007: The COFETEL can define the relevant market and substantial power of its regulatees. By doing so its functions do not overlap with those of the CFC.

²¹⁷⁶ Instituto Federal de Acceso a la Información y Protección de Datos (IFAI), Resoluciones de Recursos de Revisión por Tema. Available at: <http://ifai.gob.mx/SesionesTema?tema=1&subtema=5> [accessed on 15 July 2013].

²¹⁷⁷ COFETEL, *Reglamento Interno de la Comisión Federal de Telecomunicaciones*, Article 11. Available at: http://www.cofetel.gob.mx/work/models/Cofetel_2008/Resource/2971/1/reglamentointernodelaCFT.pdf [accessed on 15 July 2013].

²¹⁷⁸ COFETEL, *Informe 2006-2012*, pp. 30-34. Available at: <http://www.cft.gob.mx:8080/portal/2012/11/informe-de-resultados-2006-2012/> [accessed on 15 July 2013].

- 2007: The COFETEL's duty to impose certain obligations to its regulatees which have substantial power in the relevant market is constitutional.

Regulatory Development

The *Norma Oficial* or the official standard NOM-184-SCFI-2012 mandates new minimal conditions for the *contratos de adhesión* or standard-term contracts among them, the obligation of providing a service for consumers' claims that is open 24 hours a day. Most of the NOM's content is intended for consumer protection.²¹⁷⁹

There are also developments in relation to broadband and the internet. The goal of the Digital Media E-Mexico Programme is to achieve a broadband penetration rate of 20 per cent and internet usage of 60 per cent by 2012.²¹⁸⁰

A number of wider regulatory issues have been identified by the OECD in its 2012 report. For example, the inability of the COFETEL to impose asymmetric regulations on dominant operators is seen to make small operators rely to an unreasonable extent on competition law.

3. Postal Services

Article 28 of the Mexican constitution lists postal services as an exclusive area to be carried out by the state. The entity in charge of exclusively providing the service is *Correos de México*.²¹⁸¹ Legislation provides that parcel services can be managed by private parties. For that purpose the *Ley del Servicio Postal Mexicano* (Law of the Postal Service) distinguishes *correspondencia* or 'postal services' from 'other services'.

'Postal services' are always carried out by *Correos de México*.²¹⁸² Envelopes between 114 and 458 mm long and 81 and 324 mm wide, weighing no more than 1000 grams; or postcards between 105 and 148 mm long and between 90 and 140 mm wide are considered *correspondencia*. Private parties, however, can manage postal services whenever there is not a service provided by *Correos de México*, when a person or a corporation manages its own mail using their own vehicles and do not transport other people's mail.²¹⁸³

The *Ley Federal de Caminos, Puentes y Auto-Transporte* (Law of Motorways, Bridges and Auto-Transportation) establishes that a concession is needed to provide parcel services.²¹⁸⁴ It also mandates the creation of implementing legislation for courier and parcel services. There are 21 companies providing parcel services which are members of the *Asociación Mexicana de Paquetería y Mensajería*.²¹⁸⁵ There are other international firms that manage parcel services in Mexico (UPS, DHL, and FedEx).

Regulatory Institutions and Legislation

According to the Law of Postal Service, the Ministry of Communications and Transport (SCT) has jurisdiction over *Correos de México*, and grants the concessions/permits and regulates courier and parcel service providers and the Internal Regulations of the SCT, article 22).²¹⁸⁶ The SCT does so through the *Dirección General de Autotransporte Federal* (General Directorate of Federal Transportation). The General Directorate has powers to grant permits for providing parcel service,

²¹⁷⁹ *Diario Oficial de la Federación, Norma Oficial Mexicana NOM-184-SCFI-2012*. Available at: http://dof.gob.mx/nota_detalle.php?codigo=5265386&fecha=24/08/2012 [accessed on 15 July 2013].

²¹⁸⁰ OECD, *OECD Review of Telecommunications Policy and Regulation in Mexico 2012*. Available at: <http://www.oecd.org/sti/broadbandandtelecom/50550219.pdf> [accessed on 15 July 2013].

²¹⁸¹ *Correos de México, Home*. Available at: www.sepomex.gob.mx [accessed on 19 July 2013].

²¹⁸² *Camará de Diputados del H. Congreso de la Unión, Ley del Servicio Postal Mexicano*, Article 11. Available at: <http://www.diputados.gob.mx/LeyesBiblio/pdf/98.pdf> [accessed on 15 July 2013].

²¹⁸³ *Ley del Servicio Postal Mexicano, op. cit.*, Article 12.

²¹⁸⁴ *Cámara de Diputados del H. Congreso de la Unión, Ley de Caminos, Puentes y Autotransporte Federal, Article 58*. Available at: <http://www.diputados.gob.mx/LeyesBiblio/pdf/27.pdf> [accessed on 15 July 2013].

²¹⁸⁵ *Asociación Mexicana de Paquetería y Mensajería (AMMPAC), Home*. Available at: www.ammpac.org.mx [accessed on 15 July 2013].

²¹⁸⁶ *Cámara de Diputados del H. Congreso de la Unión, Ley de Caminos, Puentes y Autotransporte Federal*. Available at: <http://www.diputados.gob.mx/LeyesBiblio/pdf/27.pdf> [accessed on 15 July 2013], Article 58. Also see *Secretaría de Comunicaciones y Transportes, Reglamento Interior de la Secretaría de Comunicaciones y Transportes*. Available at: <http://www.sct.gob.mx/obrapublica/MarcoNormativo/2/2-3/2-3-1.pdf> [accessed on 15 July 2013].

terminate those permits, inspect and oversee the fulfilment of the law and regulations, impose penalties for breaching the law and regulations.²¹⁸⁷

Consultation of Interested Parties

A consultation process is available in the procedure for regulatory improvement (carried out by COFEMER), as explained above.

The *Asociación Mexicana de Mensajería y Paquetería, A.C.*; *Cámara Nacional del Autotransporte de Pasaje y Turismo*; and the *Cámara Nacional del Transporte de Carga*, pressed the SCT so that a Regulation for the Parcel Service provision was finally issued.²¹⁸⁸

Profeco can intervene in the case of parcel service, against the providers of the service and in defense of consumers. Nevertheless, against *Correos de México*, *Profeco*, does not have this ability as the post office is a public entity.

Timeliness

As stated above, the general rule is that a decision must be made within three months, or otherwise it must be understood that the petition or claim is denied. The same comments apply here regarding the role of COFEMER and the national register of applications.

Information Disclosure and Confidentiality

As with railroads and ports, the SCT has a unit specialising in transparency and data protection that works similarly to those in other agencies (CRE, COFETEL, etc.) or ministries.

Decision-making and Reporting

The general principle of Mexican administrative law mandates that all decisions must be justified both by the law and relevant regulations, and the evidence of each case.²¹⁸⁹

Appeals

Decisions made by the COFEMER may be appealed through any of the three processes described under 'Appeals' in the section on 'Approach to Competition and Regulatory Institutional Structure'.

4. Water and Wastewater

Article 27 of the Constitution mandates that all water resources are the property of the state. The federation holds the power to regulate the sources of water (lakes, rivers, springs, etc.) but the municipalities have the power and responsibility, according to Article 115 of the Mexican Constitution, of overseeing and organising water supply (drinkable water supply, drainage, water treatment, etc.). Water is one of those areas – along with energy production, transportation, and supply – in which the Constitution mandates that the service must be provided by a government-owned provider. Each urban municipality and Mexico City typically has a public utility which manages water supply and wastewater disposal. The utilities coordinate with the *Comisión Nacional del Agua* (CONAGUA) (National Water Commission) to receive and administer a water source (river, aquifer, well, etc.).

CONAGUA grants permits and concessions for the public or private exploitation of water sources.

Regulatory Institutions and Legislation

The federal body that carries out the regulation in the sector is CONAGUA. The agency is under the umbrella of the *Secretaría del Medio Ambiente y Recursos Naturales* (SEMARNAT) (Ministry of

²¹⁸⁷ *Diario Oficial de la Federación, Reglamento de Mensajería y Paquetería, Article 29*. Available at: http://dof.gob.mx/nota_detalle.php?codigo=5183495&fecha=29/03/2011 [accessed on 15 July 2013].

²¹⁸⁸ Portal Automotriz.com, *Urgen Asociaciones a Emitir el Reglamento de Paquetería y Mensajería*. Available at: http://www.portalautomotriz.com/content/site/module/news/op/displaystory/story_id/30447/format/html/ [accessed on 15 July 2013].

²¹⁸⁹ Constitution of Mexico, Article 14 & 16. Available at: http://www.oas.org/juridico/mla/en/mex/en_mex-int-text-const.pdf [accessed on 15 July 2013].

Environment and Natural Resources) with budgetary and organisational autonomy.²¹⁹⁰ CONAGUA administers the *Ley de Aguas Nacionales* (Law of National Waters).²¹⁹¹

CONAGUA is organised both nationally and regionally (by councils on each hydrological basin). The powers of CONAGUA, nationally, are to:

- regulate the quantity and quality of waters;
- issue principles and rules regarding water;
- to issue technical standards to prioritise investment in infrastructure;
- build those works needed for the better quality of the sustainability of the service;
- foster and help the development of the drinkable water supply and waste water disposal;
- regulate irrigation;
- issue concession titles and permits to disposal of water;
- mediate in disputes regarding water and its management;
- sign memoranda of understanding with other bodies of the federal government, the states or municipalities;
- study with the 'basin councils' ('consejos de Cuenca') the level of charges and tariffs for water, to propose them to the ministry, state, or municipal authority;
- receive payment for taxes, benefits and duties from water sources; and
- decide over the extension of concessions or permits.

The basin councils are headed by a director and report to the general director of CONAGUA. They have representatives from the federation, the states, and the municipalities. The councils have, among others, the power to:

- regulate irrigation services;
- maintain and control water quality;
- issue the concession titles or permits to waste water disposal; and
- grant extensions or terminate concessions or permits.

Consultation of Interested Parties

The Law of National Waters establishes the creation of a general assembly of users.²¹⁹² The assembly can discuss strategies and priorities for the planning in each hydrological basin, and nominate representatives in the basin council. Each one of the Basin councils must have 50 per cent of their representatives nominated from users and NGOs.²¹⁹³

A consultation process is also available in the procedure for regulatory improvement (carried out by COFEMER), as explained above (only for regulations with general effects).²¹⁹⁴

²¹⁹⁰ SEMARNAT, *Que Hacemos?* Available at: <http://www.semarnat.gob.mx/conocenos/Paginas/quehacemos.aspx> [accessed on 15 July 2013].

²¹⁹¹ The *Procuraduría Federal del Medio Ambiente* (Federal Environment Protection Agency) is another regulator specialising in environment protection and pollution control.

²¹⁹² *Cámara de Diputados del H. Congreso de la Unión, Ley de Aguas Nacionales, Article 13 BIS 1A.* Available at: <http://www.diputados.gob.mx/LeyesBiblio/pdf/16.pdf> [accessed on 15 July 2013].

²¹⁹³ *Cámara de Diputados del H. Congreso de la Unión, Ley de Aguas Nacionales, Article 13 BIS 1A.* Available at: <http://www.diputados.gob.mx/LeyesBiblio/pdf/16.pdf> [accessed on 15 July 2013].

²¹⁹⁴ COFEMER, *Proceso de Mejora Regulatoria.* Available at: <http://www.cofemer.gob.mx/contenido.aspx?contenido=91> [accessed on 15 July 2013].

Timeliness

The general rule, applying here as elsewhere, is that a decision must be made within three months, or otherwise it must be understood that the petition or claim is denied. The same comments apply here regarding the role of the COFEMER and the national register of applications.

Information Disclosure and Confidentiality

CONAGAU has a unit specialised on transparency and data protection that works similarly to those in other agencies (CRE, COFETEL, etc.) and ministries.²¹⁹⁵ Any disputes are solved by IFAI, as with other agencies or ministries.

Decision-making and Reporting

As explained above and according to Articles 14 and 16 of the Constitution, the general principle of Mexican administrative law mandates that all decisions must be justified both by the law and relevant regulations, and the evidence of each case.

Appeals

Decisions may be appealed through any of the three processes described under 'Appeals' in the section on 'Approach to Competition and Regulatory Institutional Structure'.

5. Rail

Rail services used to be provided by *Ferrocarriles Nacionales de México* or *Ferromex* a company owned by the state. In 1995 the industry was privatised.²¹⁹⁶ To avoid creating another situation similar to the privatisation of TELMEX, the government decided to divide the railway network into six parts and privatise each one of them.²¹⁹⁷ Since 1995, there have been mergers between some of these companies. For example, in 2011, a Mexican Tribunal ruled in favour of *Grupo Mexico*, operator of Mexico's largest railroad company *Ferromex*, that wished to merge this railroad unit to *Ferrosur*, which it acquired in 2005.²¹⁹⁸ *Ferromex* has experienced rapid growth in its carload volume and revenues. Mexico's second-largest rail carrier, *Kansas City Southern de México* (KCSM), is also experiencing rapid growth.²¹⁹⁹ This growth reflects, in part, the greater integration of the Mexican and US economies as a consequence of NAFTA. *Ferromex* and KCSM offer cross-border service in partnership with KCS, UP, and BNSF Railway. The US and Mexican railroads pass freight from one jurisdiction to the other at six major border crossings.

Regulatory Institutions and Legislation

The SCT is the regulator of the subsector, through the *Dirección General de Transporte Ferroviario y Multi-Modal* (General Directorate of Railway and Multi-modal Transportation). The Directorate administers the implementing of the *Ley Reglamentaria del Transporte Ferroviario* (Legislation of Railway Transport) and has powers to:

- grant concessions and permits and oversee their compliance;
- determine the technical features of the railroads, through standards ('*Normas Oficiales Mexicanas*');
- verify that the railways and services comply with the law and regulations;
- establish principles for setting the tariffs;
- apply sanctions for breaching the law and regulations; and

²¹⁹⁵ *Comisión Nacional del Agua* (CONAGUA), *Transparencia Focalizada*. Available at: <http://conagua.gob.mx/Contenido.aspx?n1=8&n2=109&n3=109> [accessed on 15 July 2013].

²¹⁹⁶ Emilio Sacristán Roy, *Las Privatizaciones en México*, e-journal, UNAM: Mexico, 2002. Available at: <http://www.ejournal.unam.mx/ecu/ecunam9/ecunam0904.pdf> [accessed on 15 July 2013].

²¹⁹⁷ *Centro de Estudios Económicos, Privatisation and Regulation in Mexico: A Brief Recount and Agenda for the Future*, p. 7. Available at: <http://kellogg.nd.edu/faculty/research/pdfs/castaned.pdf> [accessed on 15 July 2013].

²¹⁹⁸ Reuters, *Mexican Tribunal OKs Group Mexico Railroad Merger*. Available at: <http://www.reuters.com/article/2011/03/28/grupomexico-railroad-idAFN2821457620110328> [accessed on 24 January 2013].

²¹⁹⁹ Inbound Logistics, *In Mexico, Rail Is On A Roll*. Available at: <http://www.inboundlogistics.com/cms/article/in-mexico-rail-is-on-a-roll/> [accessed on 15 July 2013].

- manage a register of concessions and permits.

Consultation of Interested Parties

A consultation process is available in the procedure for regulatory improvement (carried out by the COFEMER), as explained above.

The railway service providers are organised in the *Asociación Mexicana del Ferrocarril, A.C.* This includes the companies that were privatised and other service providers for the railway industry.²²⁰⁰ TFM and *Ferromex-FXE* are members of the American Association of Railroads.²²⁰¹

Timeliness

There is not a general timeframe for decision-making in General Directorates of the SCT. However, the same comments apply here regarding the role of COFEMER and the national register of applications.

Information Disclosure and Confidentiality

The SCT has a unit specialised on transparency and data protection that works similarly to those in other agencies (CRE, COFETEL, etc.) and ministries.

Decision-making and Reporting

As explained above, the general principle of Mexican administrative law mandates that all decisions must be justified both by the law and relevant regulations, and the evidence of each case.²²⁰²

Appeals

Decisions made by the SCT may be appealed through any of the three processes described under 'Appeals' in the section on 'Approach to Competition and Regulatory Institutional Structure'.

²²⁰⁰ *Asociación Mexicana de Ferrocarriles A.C. (AMF), Carta Editoria.* Available at: www.industriaferroviariaonline.com [accessed on 15 July 2013].

²²⁰¹ Asian Development Bank & The World Bank, *Contract No. 7133241: Best Practices for Private Sector Investment in Railways.* Available at: https://www.ppiaf.org/sites/ppiaf.org/files/documents/EAP_BP_Rail_Final_Report.pdf [accessed on 15 July 2013].

²²⁰² Constitution of Mexico, Article 14 & 16. Available at: http://www.oas.org/juridico/mla/en/mex/en_mex-int-text-const.pdf [accessed on 15 July 2013].

6. Airports

By the second half of the 1990s, Mexico had 57 airports owned by the state. Between 1997 and 1999, 35 of them (those that were profitable) were privatised.²²⁰³ Three groups were formed:

- The southeast group (nine airports), bought by *Aeropuertos del Sur* (www.asur.com.mx).
- The Pacific group (12 airports), bought by *Grupo Aeroportuario del Pacífico* (www.aeropuertosgap.com.mx).
- The north-central group (13 airports), bought by *Grupo Aeroportuario Centro Norte* (www.oma.aero).

Aeropuertos y Servicios Auxiliares (ASA) – a government-owned company – still holds the ownership of the other 19 airports, including Mexico City International Airport and also works for all the airports supplying jet fuel and other services.²²⁰⁴ As happened with the privatisation of railroads and telecommunication services, the new buyers had to agree on certain goals for new investments, maintenance and quality of service in each one's concession title. Up to 49 per cent of the shares of companies which administer an airport can be held by foreigners (Article 19 of the Law of Airports).

Mexico City International Airport is one of the busiest airports in Latin America, and in the world's top 30 airports for passenger numbers and cargo volume. Mexico City Airport handles over 21 million passengers annually.²²⁰⁵

Regulatory Institutions and Legislation

The main regulatory institution is the *Secretaría de Comunicaciones y Transportes* (SCT) (Ministry of Communications and Transport). It administers the Law of Airports. The SCT has powers to:²²⁰⁶

- plan the policy for the development of airport infrastructure;
- build, administer civil airports;
- grant concessions and permits;
- revise the fulfilment of the law and regulations;
- establish rules for air traffic, and to set the general principles for take-off and landing timetables;
- set the principles for the efficient management of the airports and to establish the minimal conditions for their operations;
- establish the basic health and safety rules for civil airports;
- decide the partial or permanent closure of an airport when they lack the minimal health and safety conditions;
- oversee, inspect, and verify airports;
- manage the Mexican Aeronautical Register;
- impose penalties and sanctions for the breach of the law or regulations; and
- set the charges and tariffs for the services given by the airports.

The Internal Regulations of the SCT delegate the powers of the ministry to the *Dirección General de Aeronáutica Civil* (General Directorate of Civil Aviation).²²⁰⁷

²²⁰³E Sacristán Roy, *Las Privatizaciones en México*, UNAM: Mexico, 2006. Available at: <http://www.ejournal.unam.mx/ecu/ecunam9/ecunam0904.pdf> [accessed on 15 July 2013].

²²⁰⁴ *Aeropuertos y Servicios Auxiliares, Administración Aeroportaria*. Available at: http://www.asa.gob.mx/es/ASA/Administracion_Aeroportaria [accessed on 15 July 2013].

²²⁰⁵ World Airport Guides, *Mexico City Benito Juarez*. Available at: <http://www.worldairportguides.com/mexico-city-mex/> [accessed on 15 July 2013].

²²⁰⁶ *Cámara de Diputados del H. Congreso de la Unión, Ley de Aeropuertos, Article 6*. Available at: <http://www.diputados.gob.mx/LeyesBiblio/pdf/15.pdf> [accessed on 15 July 2013]. Also see *Secretaría de Comunicaciones y Transportes, Reglamento Interior de la Secretaría de Comunicaciones y Transportes, Article 21*. Available at: <http://www.sct.gob.mx/obrapublica/MarcoNormativo/2/2-3/2-3-1.pdf> [accessed on 15 July 2013].

Consultation of Interested Parties

A consultation process is available in the procedure for regulatory improvement (carried out by COFEMER), as explained above.

The *Cámara Nacional de Aerotransportes* (CANAERO) (National Chamber of Aerotransportation) is an organisation that actively liaises with both public and private institutions in the aviation sub-sector so as to participate in the development of Legislation and ensure that the country's aviation industry meets international standards for security, competition and airport operation.²²⁰⁸

It is in fact CANAERO's primary objective to maintain open and continuous communication with industry participants to ensure that the aviation sub-sector works as efficiently as possible.²²⁰⁹

Timeliness

There is not a general timeframe for decision-making in General Directorates of the SCT. However, the same comments apply here as regarding the role of the COFEMER and the national register of applications.

Information Disclosure and Confidentiality

As with railroads and ports, the SCT has a unit specialised on transparency and data protection that works similarly to those in other agencies (CRE, COFETEL, etc.) and ministries.

Decision-making and Reporting

The general principle of Mexican administrative law mandates that all decisions must be justified both by the law and relevant regulations, and the evidence of each case.²²¹⁰

Appeals

Decisions made by the SCT may be appealed through any of the three processes described under 'Appeals' in the section on 'Approach to Competition and Regulatory Institutional Structure'.

7. Ports

The main ports in Mexico are at Altamira, Coatzacoalcos, Lazaro Cardenas, Manzanillo, Salina Cruz, Veracruz; and significant oil terminals are at Cayo Arcas and Dos Bocas. All ports are under federal jurisdiction in Mexico.²²¹¹ All of them are owned by the Mexican federal government²²¹² and most of them are run through *Administraciones Portuarias Integrales* (APIs) (Integral Port Administrations) or federal administrators (in smaller ports). APIs are autonomous in their operational and financial administration, despite having to adhere to the Port Master Development Program developed by the SCT and Port Administrator.²²¹³ Some of the ports are administered by APIs controlled by states and even municipalities.²²¹⁴

As can be seen in the following map, there are other ports that are not APIs. If controlled by the federation, they must have a federal administrator.

²²⁰⁷ Within the General Directorate of Civil Aviation there are three directorates specialised on airports' regulation: the Directorate of Airport Verification, the Directorate of Airports, and the Directorate of Tariffs.

²²⁰⁸ *Cámara Nacional de Aerotransportes, Quienes Somos ?* Available at: <http://www.canaero.org.mx/canaero/quienes.php> [accessed on 15 July 2013].

²²⁰⁹ *Cámara Nacional de Aerotransportes, Misión.* Available at : http://www.canaero.org.mx/canaero/quienes_dinamico.php?ldPagina=13 [accessed on 15 July 2013].

²²¹⁰ Constitution of Mexico, Article 14 & 16. Available at: http://www.oas.org/juridico/mla/en/mex/en_mex-int-text-const.pdf [accessed on 15 July 2013].

²²¹¹ *Cámara de Diputados del H. Congreso de la Unión, Ley de Puertos*, Article 5. Available at: <http://www.diputados.gob.mx/LeyesBiblio/pdf/65.pdf> [accessed on 15 July 2013].

²²¹² *Ley de Puertos, op. cit.*, Article 11. Available at: <http://www.diputados.gob.mx/LeyesBiblio/pdf/65.pdf> [accessed on 15 July 2013].

²²¹³ Integral Port Administration Huatulco, *Huatulco API*. Available at: <http://www.fonatuoperadoraportuaria.gob.mx/micrositios/API/in/Huatulco/LaApiH.asp> [accessed on 15 July 2013].

²²¹⁴ *Ley de Puertos, op. cit.*, Article 38.

The law foresees four types of services in any port:

- commercial, when devoted to the movement of merchandise or passengers;
- industrial, when devoted to the management of goods for industries based in that port or terminal;
- fishing, when devoted to fisheries and fishing boats;
- touristic, when devoted to passenger cruises or marinas.



Source: http://www.sct.gob.mx/fileadmin/CGPMM/puertosdemexico/mapa_o.jpg

Regulatory Institutions and Legislation

The powers to regulate the ports subsector are vested in the Ministry of Communications and Transport (SCT).²²¹⁵ The main legislation for ports is the Law of Ports, a federal law, and the *Reglamento de la Ley de Puertos* (Implementing Regulation of the Law of Ports).

The Internal Regulations of the Ministry of Communications and Transport, however, delegate the powers of the SCT to a sub-unit within the ministry: the General Coordination of Ports and Merchant Navy. This sub-unit has two main General Directorates: the General Directorate of Merchant Navy, and the General Directorate of Ports.

According to the Internal Regulations of the SCT, the General Directorate of Ports has, among others, powers:²²¹⁶

- to suggest the construction or enablement of ports and maritime terminals;
- to authorise ports and marinas for private use;
- to carry out the processes of tender for APIs and other services within the ports;

²²¹⁵ *Cámara de Diputados del H. Congreso de la Unión, Ley de Puertos, Article 16.* Available at: <http://www.diputados.gob.mx/LeyesBiblio/pdf/65.pdf> [accessed on 15 July 2013].

²²¹⁶ *Secretaría de Comunicaciones y Transportes, Reglamento Interior de la Secretaría de Comunicaciones y Transportes, Article 27.* Available at: <http://www.sct.gob.mx/obrapublica/MarcoNormativo/2/2-3/2-3-1.pdf> [accessed on 15 July 2013].

- to carry out processes of extension, modification, renewal, widening, termination and delegation of concessions to public or private entities;
- to build those constructions in ports or maritime terminals that have not been part of a concession and are relevant for the public interest;
- to fix the standards for construction works in ports' areas;
- to authorise master programmes for a port's development, in those ports administered by an API. To set the amounts that they should pay to the government for the concessions or permits;
- to decide the controversies over tenders;
- to revise that the ports and APIs are safe for navigation and they comply with the substantive rules and regulations;
- to authorise the construction and operation of harbours, ports, piers, etc. in in-land waterways;
- to set penalties for breaches of the law.

The General Directorate for Merchant Navy has control over each *Capitanía de Puerto* or port's captain and over those vessels that are registered under its authority.²²¹⁷

Consultation of Interested Parties

A consultation process is available in the procedure for regulatory improvement (carried out by COFEMER), as explained above. Most of the users of ports are public companies. However, an important role is played by the labour unions in each port, which have considerable influence on the day-to-day functioning of ports.

Timeliness

There is not a general timeframe for decision-making in General Directorates of the SCT. However, the same comments apply here regarding the role of the COFEMER and the national register of applications.

Information Disclosure and Confidentiality

The SCT has a unit specialised on transparency and data protection that works similarly to those in other agencies (CRE, COFETEL, etc.) and ministries.

Decision-making and Reporting

As explained above, the general principle of Mexican administrative law mandates that all decisions must be justified both by the law and relevant regulations, and the evidence of each case.²²¹⁸

Appeals

Decisions made by the SCT may be appealed through any of the three processes described under 'Appeals' in the section on 'Approach to Competition and Regulatory Institutional Structure'.

²²¹⁷ ²²¹⁷ *Secretaría de Comunicaciones y Transportes, Reglamento Interior de la Secretaría de Comunicaciones y Transportes*, Article 28. Available at: <http://www.sct.gob.mx/obrapublica/MarcoNormativo/2/2-3/2-3-1.pdf> [accessed on 15 July 2013].

²²¹⁸ Constitution of Mexico, *Article 14 & 16*. Available at: http://www.oas.org/juridico/mla/en/mex/en_mex-int-text-const.pdf [accessed on 15 July 2013].

United States

OVERVIEW

The regulatory institutional structure in the United States (US) is complex; drawing upon a long history of experiment and pro-competitive reforms dating back to the late nineteenth century. In the broadest sense, the United States has mature and well developed regulatory institutions at the federal and state levels that are responsible for the economic regulation of its key infrastructure. Regulation is conducted on either a sectoral basis (energy; communications) or at an industry level (posts; rail), with separate agencies for competition (the Federal Trade Commission) and antitrust (the Department of Justice (Antitrust Division)). However, within this broad structure, the regulators themselves are involved with merger issues, and there is a certain level of overlap between the functions of a sectoral or industry regulator, the FTC and the DoJ. While this intersection of functions may seem confusing, it is necessary to recognise that each agency has exclusive authority over certain conduct. For example merger reviews are allocated according to the respective expertise of each agency. The DoJ typically investigates mergers in the Financial Services, Telecommunications, and Agricultural Industries; the FTC typically investigates mergers in the Defence, Pharmaceutical, and Retail Industries. In addition, each agency has exclusive authority over non-merger matters.²²¹⁹

The regulatory agencies have some interesting design features. For example, most regulators have an office dedicated to the advancement of consumer and user interests that acts as an advocate in regulatory processes. Further, there is also a strong emphasis on 'alternative' dispute resolution (ADR) where parties are assisted and encouraged to reach a private settlement by negotiation. However, once matters are to be decided by the commission, processes are legalistic, with some agencies having Administrative Law Judges operating within them. Appointments to boards (ranging from three to seven members) are governed by rules aimed at achieving a degree of political balance.

In energy, regulation at the national level is conducted by the Federal Energy Regulatory Commission (FERC), covering electricity (especially wholesale power markets); gas pipelines and LNG. State public utility commissions also play a role in intrastate matters (retail pricing) and where transmission facilities transit the state. There is also some degree of integration of the Canadian, Mexican and US energy sectors, leading to the necessity for some coordination of regulation in the two countries.

The responsibility for telecommunications regulation is shared by the Federal Communications Commission (FCC), the National Telecommunications and Information Administration (NTIA) and the state public utility commissions. The FCC is a large and complex organisation, established in 1934. It regulates interstate and international communications by radio, television, wire, satellite and cable. The NTIA is the Executive Branch agency that is principally responsible for advising the President on telecommunications and information policy issues. The NTIA's programs and policymaking focus largely on expanding broadband Internet access and adoption.

The US Postal Regulatory Commission (PRC) is the dedicated regulatory body for the postal industry. The PRC, *inter alia*, determines which services have market dominance; establishes pricing rules for these market-dominant services; and administers both access ('workshare' discounts) and the universal service obligation. While ADR is a feature of the PRC's operation, rate-making procedures are formal and legalistic.

The economic regulation of water and wastewater industry is generally in the form of rate regulation, market monitoring and service-quality monitoring, and is usually the responsibility of state public utility commissions.

The federal rail regulator is the Surface Transportation Board (STB) created by the *Interstate Commerce Commission Termination Act 1995*. The STB serves as both an adjudicatory and a regulatory body, with the primary function being the economic regulation of the rail industry. Its work is advised by councils of rail providers and users in specific areas (for example, grain). State-level PUCs often have a role in the regulation of intrastate rail.

For eligible airports under the National Plan of Integrated Airport Systems (NPIAS), the Department of Transport is authorised to review the reasonableness of airport fees charged to airlines if it receives a

²²¹⁹ American Bar Association, *Understanding Differences between the DOJ and the FTC*. Available at: http://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/understanding_differences.html [accessed on 1 July 2013].

complaint or request for determination and a finding of a significant dispute. The NPIAS identifies airports that are significant to national air transportation and, thus, are eligible to receive Federal grants under the Airport Improvement Program (AIP).

The regulation of ports is the responsibility of the Federal Maritime Commission (FMC) that has detailed processes and extensive functions in relation to ports. Its role is more one of a competition body than a traditional utility regulator. In particular, the FMC does not set port authority fees; provide for access to terminals or promote competition between terminals.

GEOGRAPHY, POPULATION, ECONOMY, POLITY AND LEGAL SYSTEM²²²⁰

The United States is situated in North America, bordering both the North Atlantic Ocean and the North Pacific Ocean, between Canada and Mexico. It is the fourth largest country in the world in area and consists of a highly varied geography including the vast interior lowland, two extensive mountain systems and deserts in the south west. The Mississippi-Missouri River, the world's fourth-longest river system, runs through the centre of the country

The climate in the US also varies considerably, ranging from tropical in a small part of southern Florida to arid climatic conditions in the Great Basin in the west. Extreme weather conditions are not uncommon in several parts of the country.

As at July 2012, the population of the United States was estimated to be 313.8 million. This population occupies a total area of 9 826 630 square kilometres, yielding a population density of about 321 per square kilometre. However, this population is unevenly spread with large concentrations in areas such as the northeast corner; eastern Texas and southern California, with vast mountainous and desert areas being very sparsely populated. Major cities (including associated areas) in order of population are New York (19 million), Los Angeles, Chicago; Dallas-Fort Worth; Philadelphia; Houston, Washington DC (the nation's capital); Atlanta; Boston; Detroit; San Francisco and Phoenix all having populations in excess of four million.

The US has the largest economy in the world with a GDP of US\$15.29 trillion in 2011. This is equivalent to US\$49 000 per capita in 2011, approximately the third-highest in the OECD. It is the leading industrial power in the world, with technologically advanced petroleum, steel, motor vehicles, aerospace, telecommunications, chemicals, electronics, food processing, consumer goods, lumber, and mining. It is rich in agricultural land (producing including wheat, corn, fruit, vegetables, cotton, dairy and meat) and has many natural resources (including coal, copper, lead, bauxite, and natural gas), but is heavily reliant on imported oil which accounts for about two-thirds of its consumption. Like other highly developed countries, the US has a very high proportion of its labour force and GDP in services (around 80 per cent) and a very small proportion in agriculture. Its main exports are agricultural products (soybeans, fruit, corn), industrial supplies (organic chemicals), capital goods (transistors, aircraft, motor vehicle parts, computers, telecommunications equipment), and consumer goods (automobiles, medicines). Its main trading partners are Canada, Mexico, China, Japan and Germany.

The US has very highly developed infrastructure in all main areas – energy, telecommunications, posts, water and wastewater, and all forms of transport infrastructure. Some notes on infrastructure provision across the seven key areas are provided in each of the seven sections. These cover market structure, major providers, technologies used and extent of competition.

The economy has grown little since the downturn and recession associated with the global financial crisis (GFC) in 2008 and 2009. The unemployment rate is approximately nine per cent of the estimated workforce. The Federal budget is in deficit, with central government debt now having reached around 75 per cent of GDP.

The US is a constitution-based federal republic with a strong democratic tradition. It consists of 50 states and one district.

The political structure consists of an executive and legislative branch. The executive branch includes the chief of state known as the President. The President is also the head of government. The branch also includes a cabinet which is appointed by the president with approval from the Senate. The

²²²⁰ Central Intelligence Agency (CIA), *The World Fact Book*. Available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html#Govt> [accessed on 1 July 2013].

President and Vice President are elected on the same ticket by a college of representatives who are elected directly by each state. The President and Vice President serve four-year terms.

The executive branch also consists of 15 Cabinet-level Departments which oversee a number of Bureaus, Agencies, and other entities. All of these bodies exercise executive power delegated by the President. These powers can include the authority to promulgate rules that define with precision more general statutory terms. The courts will invalidate a statute that grants an agency too much power. The *Administrative Procedure Act* explains the procedures agencies must follow when promulgating rules, judging violations, and imposing penalties.²²²¹ It also lays out how a party can seek judicial review of an agency's decision.

The legislative branch is known as Congress. It consists of the 100 seat Senate – which includes two members elected from each state by popular vote for six-year terms, with one third elected every two years – and the 435-seat House of Representatives whose members are directly elected by popular vote to serve two-year terms.²²²² Congress's ability to pass legislation is limited by the Constitution. If a majority of each house of Congress – two-thirds should the President veto it – votes to adopt a bill, it becomes law.

As a federal system, the US is regionally divided into 50 states and one district. State governments enjoy extensive authority. The Constitution outlines the specific powers granted to the national government and reserves the remainder to the states. Powers left to the states include public health, social security, education, transport and intrastate economic regulation. Both the state and federal governments both have the power to tax. There are some 85 000 local government units in the United States established by state governments to assist in carrying out their constitutional powers.

The American legal system has several layers reflecting, in part, the division between federal and state law and the US's legal history. It rests upon the legal principles of English Common Law and the courts continue to apply unwritten common law principles to fill in the gaps where the Constitution is silent and Congress has not legislated.

The US Constitution fixes the boundaries between federal and state law and divides federal power among legislative, executive, and judicial branches of government. Where the federal Constitution speaks, no state may contradict it although the role of the individual state legal systems in areas that are not addressed by the Constitution remains unclear. The Constitution also delineates the kinds of laws that may be passed by Congress and forbids the states from adopting certain kinds of laws. In addition, in some areas, Congress authorises administrative agencies to adopt rules that add detail to statutory requirements.

The powers of the US judiciary are also delegated by the Constitution which extends federal jurisdiction only to certain kinds of disputes, including questions of federal law and disputes between citizens of two different states. The judiciary also has the power to determine whether a statute violates the Constitution, and if so, to declare the statute invalid.

Federal Courts

The federal court system consists of the trial courts (Federal District Courts), the appellate tribunals (US Courts of Appeal), and the US Supreme Court.

The federal district courts have original jurisdiction in federal criminal and civil cases, and in diversity of citizenship disputes (disputes between parties from different states or between an American citizen and foreign citizen or country).

The US Courts of Appeals, also known as circuit courts, do not have original jurisdiction, but have appellate jurisdiction over: ordinary civil and criminal appeals from the federal district courts; and appeals from certain federal administrative agencies and departments and from independent regulatory commissions.

The US Supreme Court has original jurisdiction in relation to disputes between two or more states. It also shares original jurisdiction (with the US district courts) in certain cases brought by or against foreign ambassadors or consuls, in cases between the United States and a state, and in cases commenced by a state against citizens of another state or another country.

²²²¹ *United States Code*, Title 5, s. 551, et. seq.

²²²² Central Intelligence Agency (CIA), *The World Fact Book*. Available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html#Govt> [accessed on 1 July 2013].

The majority of its work, however, is in relation to its appellate jurisdiction. Appeals may be made from all lower federal constitutional and territorial courts and from most federal legislative courts. The Supreme Court may also hear appeals from the highest court in a state if there is a substantial federal question.

Jurisdictions and Policy-making of State Courts

The jurisdictions of the 50 separate state court systems in the United States are established in virtually the same manner as those within the national court system. Each state has a constitution that sets forth the authority and decision-making powers of its trial and appellate judges. Likewise, each state legislature passes laws that further detail the specific powers and prerogatives of judges and the rights and obligations of those who bring suits in the state courts. Because no two state constitutions or legislative bodies are alike, the jurisdictions of individual state courts vary from one state to another.

APPROACH TO COMPETITION AND REGULATORY INSTITUTIONAL STRUCTURE

The complex regulatory institutional structure in the US has evolved over more than one hundred years with key events being the passing of antitrust legislation in the late nineteenth century and the early twentieth century; the establishment of the Federal Trade Commission (FTC) in 1914; the formation of the state regulatory bodies in the early twentieth century; the establishment of the Federal Communications Commission (FCC) in 1934 and the establishment of the Federal Energy Regulatory Commission (FERC) in 1973.

The United States has mature and well-developed regulatory institutions at the federal and state levels that conduct the economic regulation of its key infrastructure. Regulation is organised on either a sectoral or an industry-specific basis, with separate agencies for competition and antitrust. However, within this broad structure, the sectoral or industry regulators are involved with merger issues, and there is some overlap between the functions of a sectoral or industry regulator, the FTC and the DoJ.

Antitrust Legislation and the Formation of the Federal Trade Commission

The key US antitrust laws are:

- Section 5 of the *Federal Trade Commission Act*, which prohibits 'unfair methods of competition'.
- Section 1 of the *Sherman Act*, which outlaws 'every contract, combination ... or conspiracy, in restraint of trade'.
- Section 2 of the *Sherman Act*, which makes it unlawful for a company to 'monopolize, or attempt to monopolize', trade or commerce.
- Section 3 of the *Clayton Act*, which proscribes certain types of tying and exclusive dealing arrangements.
- Section 7 of the *Clayton Act*, which prohibits mergers and acquisitions the effect of which 'may be substantially to lessen competition, or to tend to create a monopoly'.
- Section 7A of the *Clayton Act*, which requires companies to notify antitrust agencies before certain planned mergers.
- Section 8 of the *Clayton Act*, which proscribes interlocking directorates and officers.
- Other provisions of the *Clayton Act*, including prohibitions against certain forms of anti-competitive price discrimination.
- The *Robinson-Patman Act* (1936) which prohibits price discrimination in the sale of goods when it harms competition.

These antitrust laws are enforced by both the FTC's Bureau of Competition and the Antitrust Division of the Department of Justice. The industry-specific or sector-specific regulators also have some concurrent powers to enforce the antitrust laws.

In addition, almost all US states have enacted versions of *Sherman Act* and merger laws.

The Federal Trade Commission

The FTC was created in 1914 with the mandate to engage in a range of antitrust activities. Since then, the FTC has been given additional powers to enforce the broad prohibition against 'unfair and deceptive acts or practices' and has been directed to administer a number of consumer-protection laws. The FTC also has the authority to adopt trade regulation rules. Its strategic goals are to protect consumers; maintain competition and to advance (the FTC's) performance.

The FTC is an independent agency that reports to Congress. It is headed by five Commissioners, nominated by the President and confirmed by the Senate. The rules for appointing commissioners mean that there is unlikely to be a political bias on the Commission. Each Commissioner is appointed for a seven-year term and appointments and reappointments are staggered. No more than three Commissioners may belong to the same political party. The President appoints one of the five Commissioners as Chairman. The FTC is the only federal agency that has both consumer protection and competition jurisdiction in broad sectors of the economy. The FTC is located in Washington DC.

The FTC's anti-trust work is performed by the Bureau of Consumer Protection and the Bureau of Competition. The Bureau of Competition seeks to prevent anti-competitive mergers and other anti-competitive business practices by reviewing proposed mergers and other business practices for possible anti-competitive effects, and, when appropriate, recommending that the Commission take formal law enforcement action to protect consumers. The Bureau also serves as a research and policy resource on competition topics and provides guidance to business on complying with the antitrust laws.

The Bureau of Consumer Protection is responsible for protecting consumers from unfair, deceptive or fraudulent business practices. The work of both Bureaus is supported by the Bureau of Economics which provides economic analysis and support to the FTC's antitrust and consumer protection investigations and rulemakings. It also analyses the impact of government regulation on competition and consumers and provides Congress, the Executive Branch and the public with economic analysis of market processes as they relate to antitrust, consumer protection, and regulation.

The Bureau's work is also supported by thirteen offices, including the Office of Administrative Law Judges. That office adjudicates litigation brought by the Bureaus. Its administrative law judges issue orders, resolve pre-trial litigation, conduct administrative hearings and issue Initial Decisions (see below). In addition to its head office in Washington DC, the FTC has seven regional offices. Among other things, the regional offices work with the Bureaus of Competition and Consumer Protection to conduct investigations and litigation, recommend cases for litigation and provide advice to state and local authorities on the competitive implications of their proposed actions.

*FTC Actions*²²²³

FTC actions may be initiated by complaints from consumers or businesses, pre-merger notification filings, Congressional inquiries or articles on consumer or economic subjects. FTC investigations are not generally publicised in order to protect both the investigation and the companies involved.

If the FTC believes that a person or company has violated the law or that a proposed merger may violate the law, it may seek to enter into a consent agreement with the relevant parties in order to gain voluntary compliance. A consent agreement does not require an admission that the law has been broken but does require an agreement to stop the conduct outlined in an accompanying complaint, or to undertake certain actions to resolve the anti-competitive aspects of a merger. The respondent may sign a consent agreement (without admitting liability), consent to entry of a final order, and waive all right to judicial review. If the FTC accepts such a proposed consent agreement, it places the order on the record for thirty days of public comment (or for such other period as the FTC may specify) before determining whether to make the order final.

If voluntary compliance cannot be achieved, the FTC may issue an administrative complaint or seek injunctive relief in the federal courts. The FTC's administrative complaints initiate a formal proceeding before an administrative law judge. The judge will make an initial decision based on evidence and testimony, including examination and cross-examination of witnesses. Initial decisions by administrative law judges may be appealed to the FTC which has the ultimate power to make a final

²²²³ Federal Trade Commission, *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*. Available at: <http://www.ftc.gov/ogc/brfovrw.shtm> [accessed on 2 July 2013].

decision. Final decisions may be appealed to the US Court of Appeals and ultimately to the US Supreme Court.

The FTC can issue *Trade Regulation Rules* if there is evidence of industry-wide unfair or deceptive practices. *Trade Regulation Rules* may result from a rule-making proceeding during which the public has the opportunity to attend hearings and file written comments. An FTC rule may be challenged in any of the US Courts of Appeal, but has the force of law once issued.

Finally, the FTC's authority enables it to conduct wide-ranging economic studies that do not have a specific law enforcement purpose.

Department of Justice (DoJ) Antitrust Division

The Department of Justice (DoJ) is a national regulatory authority located in Washington DC. The DoJ was established under the *Department of Justice Act 1870* as an executive department with the Attorney General as its head. The Act gave the department control over all criminal prosecutions and civil suits in which the US had an interest. It also gave the Attorney General and the department control over federal law enforcement.

The Antitrust division is the agency of most direct relevance to economic regulation. Its mission is to promote and protect the competitive process through the enforcement of the antitrust laws. It is supervised by an Assistant Attorney General (AAG), who is nominated by the President and confirmed by the Senate. The AAG is assisted by five Deputy Assistant Attorneys General and several special counsels.

- The Antitrust Division consists of five key sub-divisions: Economic Analysis; International Enforcement; Criminal Enforcement; Regulatory Matters and Civil Enforcement. There are 18 sections within these sub-divisions. The sections of particular relevance to economic regulation are the following: The Economic Regulatory Section works with the Transportation, Energy, and Agriculture, Networks and Technology, and Telecommunications and Media Sections, on all enforcement matters through to final resolution. The section also participates in regulatory, competition advocacy, and legislative matters by providing economic analysis of the economic issues and positions advocated.
- The Telecommunications and Media Enforcement Section is responsible for enforcing antitrust laws in the communications and media industries, investigating and litigating violations of the antitrust laws, providing competition advocacy and participating in proceedings before the Federal Communications Commission.
- The Transportation, Energy, and Agriculture Section enforces antitrust laws and investigates and litigates violations of antitrust laws within the transportation, energy, and agriculture industries. It participates in proceedings before the Federal Energy Regulatory Commission, the Environmental Protection Agency, and the Department of Agriculture.

The Antitrust Division may institute criminal proceedings against 'serious and wilful' violations of the antitrust laws, potentially leading to fines and imprisonment. Alternatively, it may undertake civil proceedings seeking a court order that forbids future violations of the law and requires steps to remedy the anti-competitive effects of past violations. It may also issue guidance to the business community in conjunction with the FTC. Such guidance is intended to lower the costs to business of complying with the law by reducing uncertainty about the types of conduct that may breach the law.

Coordination with Regulatory Bodies

The DoJ and the FTC have overlapping powers and jurisdiction. The allocation of merger cases occurs through a 'clearance' process that identifies each department's comparative expertise.²²²⁴ For example, the FTC lacks jurisdiction over common telecommunications carriers. In these cases, the DOJ would receive clearance to examine the proposed transaction in detail. In other cases, the departments may divide their regulatory role by industry or sector. For example, the FTC has traditionally regulated disputes concerning the oil industry. Nevertheless, significant discussion and negotiation may be involved in determining which body investigates a particular case. The DoJ and the FTC may effectively compete for cases and employ agents whose specific role is to negotiate and gain authority over certain cases.

²²²⁴ Department of Justice, *Annex 3-B: The Relationship Between Antitrust Agencies and Sectoral Regulators*, p. iii. Available at: <http://www.justice.gov/atr/icpac/3b.pdf> [accessed on 2 July 2013].

In addition to the antitrust laws enforced by the FTC and the DoJ, most US economic regulators have competition-law powers under their enabling legislation. In addition, the economic regulators often have powers to approve mergers within their jurisdiction. Therefore, the regulatory and antitrust agencies may concurrently engage in their own independent investigation and in some instances, a matter may require approval from all relevant authorities before being allowed to proceed. Furthermore, in some instances, the regulatory agency is required to consult with the antitrust agencies in the course of its work. For example, s.271 of the *Telecommunications Act 1996* requires the FCC to consult with the DoJ before handing down its final determination. The antitrust agencies may also play an advisory role to the industry-specific or sector-specific regulators with respect to non-merger issues that impact on competition.

This collaborative work may lead to the transfer of information from the FTC and the DoJ to the regulatory institution. However, information can only be exchanged with the approval of the party under investigation.²²²⁵

Shared authority between antitrust agencies and sectoral regulators differ between industries and sectors.

The Department of Transportation (DOT) grants antitrust immunity for agreements between US airlines and foreign carriers. The DOJ has an advisory role.

In relation to the electricity industry, transactions involving energy companies are subject to competition policy review or possible challenge by the following:

- Federal antitrust agencies (both the DOJ and the FTC have reviewed transactions involving electric power producers).
- The Federal Energy Regulatory Commission (FERC).
- For some transactions, the Securities and Exchange Commission (exercising powers granted by the *Public Utility Holding Company Act*).
- The public service commission (PSC) in each state where the businesses operate.
- The attorney general of each state, who may develop a policy position independent from and inconsistent with the position adopted by the public service commission.
- Private entities, including competitors in the market.

Review by each of these potential challengers is nonexclusive. Separate challenge may be made by any or all other entities. Approval by one entity subject to one set of concessions, does not guarantee approval by other entities.

The Surface Transportation Board (STB) has jurisdiction over mergers involving railroads. The DOJ provides nonbinding advice to the STB. The STB must consider, but need not necessarily heed, the DOJ's recommendations.

Mergers involving telecommunications service providers may be subject to competition policy review or challenge by any of the following:

- At least one federal antitrust agency. For example, the DOJ has exclusive jurisdiction to review mergers between telephone companies. In contrast, both the DOJ and the FTC have reviewed mergers between cable television firms.
- The Federal Communications Commission (FCC).
- The PSC of each state where the telecommunications businesses operate. However, in many cases, state PSCs lack jurisdiction over cable television mergers.
- In the case of cable television, county and municipal authorities with responsibility for granting and overseeing cable franchise agreements.
- The attorney-general of each state in which the merging parties do business.

²²²⁵ International Competition Network, *Antitrust Enforcement in Regulated Working Groups: Subgroup 2: Interrelations between Antitrust and Regulatory Authorities* June 2004. Available at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc381.pdf>

[accessed on 1 July 2013].

- Private entities such as competitors to the merging parties.

As with mergers involving electric power firms, review by any of these entities is nonexclusive. Approval of a transaction by one entity does not preclude a separate challenge by any of the other entities, nor does it bar another entity from seeking adjustments that exceed concessions that resolved the concerns of other bodies.²²²⁶

State Regulatory Functions and Processes

State regulatory bodies date back to the early twentieth century in most states, when they were set up following the emergence of concerns about the existing system of direct political control of public utilities by municipal or state legislatures.²²²⁷ Often named the 'public utilities commission' (PUC), these independent bodies are mandated to regulate aspects of telecommunications, energy, and rail; with many having major responsibilities in one or more of water and wastewater, ports and airports industries. They are also involved with the enforcement of antitrust law. There is one for each of the fifty states and the District of Columbia.

A brief profile on a representative sample of five of these regulatory bodies follows – in each case an edited version of the description taken from the body's website is presented.

The California Public Utilities Commission (CPUC) was established in 1911 (as the Railway Commission) and was given broader jurisdiction over other utilities in 1912, expanding the Commission's regulatory authority to include: natural gas; electric, telephone and water companies; and railroads and marine transportation companies. In 1946, the Commission was given its present name. It is located in San Francisco. The Governor appoints the five Commissioners, who must be confirmed by the Senate, for six-year staggered terms. The Governor appoints one of the five to serve as Commission President. The CPUC employs economists, engineers, administrative law judges, accountants, lawyers, and safety and transportation specialists. The Commission is currently organised into several advisory units, an enforcement division, and a strategic planning group. The Division of Ratepayer Advocates is an independent arm of the CPUC that represents consumers in Commission proceedings, pursuant to statute. The Commission also has a Public Advisor who assists the public in participating in Commission proceedings, and a unit that is charged with informally resolving consumer complaints.

The Maryland Public Service Commission (PSC) was established in 1910 by the Maryland General Assembly to regulate public utilities and certain passenger transportation services. The jurisdiction and powers of the Commission are found in the Public Utility Companies Article, Annotated Code of Maryland. The Maryland PSC is located in Baltimore. It regulates gas, electric, telephone, water, and sewage disposal. Also subject to its jurisdiction are electricity suppliers, fees for pilotage services to vessels, construction of generating stations and certain common carriers engaged in the transportation for hire of persons. It is empowered to hear and decide matters relating to: (1) rate adjustments; (2) applications to exercise or abandon franchises; (3) applications to modify the type or scope of service; (4) approval of issuance of securities; (5) promulgation of new rules and regulations; and (6) quality of utility and common carrier service. The Commission has the authority to issue a Certificate of Public Convenience and Necessity in connection with an electric utility's application to construct or modify a new generating station or high-voltage transmission lines. In addition, the Commission collects and maintains records and reports of public service companies, reviews plans for service, inspects equipment, audits financial records, handles consumer complaints, promulgates and enforces rules and regulations, defends its decisions on appeal to State courts, and intervenes in relevant cases before federal regulatory commissions and federal courts.

In Hawaii, the Public Utilities Commission (PUC): regulates all franchised or certificated public service companies operating in the State; prescribes rates, tariffs, charges and fees; determines the allowable rate of earnings in establishing rates; issues guidelines concerning the general management of franchised or certificated utility businesses; and acts on requests for the acquisition, sale, disposition or other exchange of utility properties, including mergers and consolidations. Infrastructure areas covered include energy; telecommunications; and water and wastewater. The Hawaii PUC is located in Honolulu.

²²²⁶ Department of Justice, *Annex 3-B: The Relationship Between Antitrust Agencies and Sectoral Regulators*, p. iii. Available at: <http://www.justice.gov/atr/icpac/3b.pdf> [accessed on 2 July 2013].

²²²⁷ Mark Jamison, 'The Regulator's Challenge: Providing Stability While Leading Change', *Network*, 30, December 2008, pp. 1-7.

The Montana Public Service Commission, located in Helena, has limited responsibilities in energy, telecommunications, water and sewerage and transportation. For example, the rates and service of only publicly owned water and sewerage providers are regulated. The Commissioners are elected to a four-year term from five districts throughout the state. The Chair and Vice Chairman are elected by the Commissioners.

The Public Utility Commission of Texas, located in Austin, protects customers, fosters competition, and promotes high-quality infrastructure. It regulates the state's electric and telecommunication utilities, implements respective legislation, and offers customer assistance in resolving consumer complaints. It was formed in 1975 when the Texas Legislature enacted the *Public Utility Regulatory Act* (PURA) and created the Commission to provide state-wide regulation of the rates and services of electric and telecommunications utilities. In the mid-1990s, the combined effects of Texas legislation and the Federal *Telecommunications Act* of 1996 resulted in competition in telecommunications wholesale and retail services and the creation of a competitive electric wholesale market. Further changes in the 1999 Texas Legislature called for a restructuring of the electric utility industry and also created new legislation that ensured the protection of customers' rights in the new competitive environment. Over the years, these various changes have re-shaped the Texas PUC's mission and focus, shifting from up-front regulation of rates and services to oversight of competitive markets and compliance enforcement of statutes and rules. It also plays a role in overseeing the transition to competition and ensuring that customers receive the intended benefits of competition. Additionally, it regulates the rates and services of transmission and distribution utilities that operate where there is competition, investor-owned electric utilities where competition has not been chosen, and incumbent local exchange companies that have not elected incentive regulation.

The National Association of Regulatory Utility Commissioners (NARUC) is the national association representing the State Public Service Commissioners who regulate essential utility services in each of the fifty states and the District of Columbia. According to its website, NARUC members are responsible for assuring reliable utility service at rates that are fair, just, and reasonable. Founded in 1889, the Association describes itself as a resource for its members and the regulatory community, providing a venue to set and influence public policy, share best practices, and foster innovative solutions to improve regulation. It is based in Washington DC.

In addition to the typical state regulatory activities, the state PUC may monitor the federal agencies where those activities may in some way impact upon state stakeholders. PUCs can also participate in federal regulatory proceedings – for example, they can participate in the FCC and the FERC proceedings through intervention and the filing of comments.

In some States, notwithstanding federal approval processes, merger proposals must be approved by the independent state regulators, and state Attorneys General. For example, in Texas, there is a requirement for merger proposals to be approved by the PUC.²²²⁸ Furthermore, the Consumer Protection Division of the Office of the Attorney General of Texas may investigate proposed mergers to evaluate their potential effect on market competition. This office may investigate matters in conjunction with the Department of Justice.

Freedom of Information

Under the *Freedom of Information Act* (FOIA) any person has the right to request public access to federal agency records or information. An agency must release the records upon receiving a written request unless the records fall within the nine exemptions and three exclusions outlined in the Act. These nine exemptions cover: (1) classified national defence and foreign relations information; (2) internal agency rules and practices; (3) information that is prohibited from disclosure by another Federal law; (4) trade secrets and other confidential business information; (5) inter-agency or intra-agency communications that are protected by legal privileges; (6) information involving matters of personal privacy; (7) records or information compiled for law enforcement purposes, to the extent that the production of those records could reasonably be expected to interfere with certain legal proceedings; (8) information relating to the supervision of financial institutions; and (9) geological information on wells. Specifically, records held by federal agencies that can be exempted from disclosure include: information that must be kept secret in the interest of national defence or foreign

²²²⁸ American Electric Power, *Newsroom Public Utility Commission of Texas Approves Merger Between American Electric Power and Central and South West*. Available at: <http://www.aep.com/newsroom/newsreleases/?id=638> [accessed on 2 July 2013].

policy; and information that is privileged, confidential, or would constitute an unwarranted invasion of personal privacy.

REGULATORY ARRANGEMENTS BY INDUSTRY OR SECTOR

1. Energy

The Federal Energy Regulatory Commission (FERC) was created in 1973 by the *Energy Organisation Act*. Located in Washington DC, it is an independent agency that regulates the interstate transmission of electricity, natural gas and oil, and regulates natural gas and hydroelectricity projects. Its mission is to ensure reliable, efficient and sustainable energy for customers at a reasonable cost through appropriate regulatory and market means. Its guiding principles are organisational excellence; due process and transparency (open and fair to all); regulatory certainty (consistent approaches and actions); stakeholder involvement (regular outreach; appropriate opportunity to participate) and timeliness (expeditious)

The FERC's main responsibilities are:

- Regulating the interstate transmission of natural gas (including LNG import terminals), oil, and electricity
- Regulating the wholesale sale of electricity
- Licensing and inspecting hydroelectric projects
- Approving the construction of interstate natural gas pipelines, storage facilities, and Liquefied Natural Gas (LNG) terminals
- Monitoring and investigating energy markets
- Reviewing mergers and certain corporate transactions involving public utilities and public utility holding companies.

Included in the things the FERC does not have a role in are:

- Regulation of retail electricity and natural gas sales to consumers. This role is undertaken by state regulatory authorities.
- Approval for the physical construction of electric generation, transmission, or distribution facilities. This role may be undertaken by PUCs.
- Regulation of activities of the municipal power systems, federal power marketing agencies and most rural electric cooperatives.
- Regulation of nuclear power plants (the responsibility of the Nuclear Regulatory Commission).
- Mergers and acquisitions between oil companies.
- Responsibility for pipeline safety or for pipeline transportation on or across the Outer Continental Shelf.
- Regulation of local distribution pipelines of natural gas.

The FERC is composed of up to five commissioners. Commissioners are appointed by the President with the advice and consent of the Senate. Commissioners serve five-year staggered terms, and have an equal vote on regulatory matters. One member of the Commission is designated by the President to serve as Chairperson and the FERC's administrative head. To avoid any undue political influence or pressure, no more than three commissioners may belong to the same political party. As the FERC is an independent regulatory agency, its decisions are not reviewable by either the President or Congress.

The FERC budget requires a recommendation by the President and authorisation by Congress. The FERC currently operates under a so-called 'continuing resolution'. Funds equal to the budget are reimbursed through: filing fees for individual filings assessed to the filing entity; and annual charges assessed generally to the regulated industries. That is, the agency has a revenue-neutral effect on

the Government's overall budget. In the 2013-14 fiscal year, the FERC requested a budget of US\$304.6 million.²²²⁹

The FERC has eleven functional offices made up of multi-disciplinary teams of (as required) economists, engineers, attorneys, auditors, data management specialists, financial analysts, regulatory policy analysts and energy analysts. These are the Office of Administrative Law Judges; the Office of Administrative Litigation; the Office of Electric Liability; the Office of Energy Market Regulation; the Office of Energy Policy and Innovation; the Office of Energy Projects; the Office of Enforcement; the Office of External Affairs; the Office of the Executive Director; the Office of the General Counsel and the Office of the Secretary.

The Office of Administrative Law Judges will be undergoing some structural changes during 2013. Traditionally it resolved contested cases as directed by the Commission either through impartial hearing and decision or through negotiated settlement; conduct of investigations as directed by the Commission; performance of various ADR procedures as directed by the Commission, including mediation, arbitration, facilitation, and acting as settlement judge, and presiding over ADR procedures at the request of the parties in cases assigned for hearing. It was recently announced, however, that the FERC Dispute Resolution Service will be moving to the Commission's Office of Administrative Law Judges. The new office will be renamed the Office of Administrative Law Judges and Dispute Resolution (OALJDR). The transfer will provide a process for the referral and early identification of issues and proceedings that lend themselves to consensual resolution. This new structure will allow for a continuum of progressive Alternative Dispute Resolution options when considering complex, multi-disciplinary energy issues.²²³⁰

The Office of Administrative Litigation undertakes litigation and conducts or participates in settlement processes.

The Office of Energy Market Regulation analyses filings to ensure they are just and reasonable; and provides support on matters involving market design.

The Office of Energy Projects fosters economic and environmental benefits through the approval and oversight of hydroelectric and natural gas pipeline projects that are in the public interest.

The Office of Enforcement guides the evolution and operation of energy markets and their regulation; identifying market problems and remedying them, assuring compliance with rules and regulations.

The Office of the General Counsel provides legal services to the Commission; and represents the Commission before the courts and Congress.

In performing any of these roles, the functions of the presiding judge include managing and presiding over hearings and investigations on-the-record; issuing orders; issuing initial decisions; issuing reports to the Commission; overseeing discovery; acting on motions filed in a case; making findings of fact; certifying questions to the Commission; reviewing and certifying settlements to the Commission; and summarily disposing of cases.

Electricity

Total electricity net generation increased from 0.3 trillion kilowatt hours (kWh) in 1949 to 4.1 trillion kWh in 2011. Of this, 69 per cent was from fossil fuels, 19 per cent was nuclear and eight per cent was from renewable energy sources (mainly hydroelectric power).²²³¹

The northern United States transmission network systems are closely integrated with parts of the Canadian network. Transmission networks are owned by private or public utilities, and operated either by vertically integrated utilities, or by independent system operators (ISOs), which may combine several networks to form a regional transmission operator (RTO). There are currently ten ISO/RTOs operating in North America, eight of which are in the US.

²²²⁹ FERC, *FY 2014 Congressional Performance Budget Request*. Available at: <https://www.ferc.gov/about/strat-docs/fy14-budg.pdf> [accessed on 1 July 2013].

²²³⁰ FERC, *FERC's Dispute Resolution Service to Join Office of Administrative Law Judges*, 14 June 2013. Available at: <https://www.ferc.gov/media/news-releases/2013/2013-2/06-14-13.asp> [accessed on 21 July 2013].

²²³¹ Energy Information Administration, *Annual Energy Review*. Available at: <http://www.eia.gov/totalenergy/data/annual/pdf/aer.pdf> [accessed on 2 July 2013].

PJM Interconnection is an RTO that coordinates wholesale electricity in all or parts of Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia and the District of Columbia. PJM Interconnection is currently the world's largest competitive wholesale electricity market, serving 60 million customers.²²³²

All US RTOs currently use locational marginal pricing (LMP) that reflects the value of energy at the specific location and time it is delivered. Prices are set using a uniform price auction approach, although pay-as-bid schemes have been tried in the past. RTOs typically operate both a day-ahead spot market and a real-time spot market. As generators often use spot markets to adjust for differences between announced and actual production, the RTO real-time spot markets are sometimes called 'balancing markets'.²²³³

Participants in the electricity industry in the United States include investor-owned (private) utilities and electric cooperatives; federal, state, and municipal utilities, public utility districts and irrigation districts; co-generators and onsite generators; and nonutility independent power producers (IPPs), affiliated power producers, power marketers, and independent transmission companies that generate, distribute, transmit, or sell electricity at wholesale or retail.

Investor-owned utilities provide electricity to 68 per cent of customers, while public utilities serve 14.5 per cent. Major areas served by public utilities include Puerto Rico, Los Angeles, Long Island and Phoenix. Most public utilities are small; 85 per cent serve less than 10 000 customers.²²³⁴ There are 214 investor-owned utilities serving a total of 91.5 million customers, with 51 serving more than 500 000 customers. Power marketers only operate in Texas, providing electricity to over 50 per cent of the state's 11 million customers.

The US electricity industry is regulated at the local, state and federal levels, with some exemptions. Intra-state activities are regulated by the PUCs, which approve plant and transmission-line construction and retail prices for electric utilities within their jurisdiction. For example, the Californian Public Utilities Commission (CPUC) sets the rates that electricity utilities may charge Californian consumers. The CPUC also investigates customer complaints and has rule-making powers relating to intra-state matters, as set out in Californian law.

Inter-state activities, including wholesale prices are regulated by the FERC that has effective responsibility for all transactions on the transmission grid, including prices. The major federal legislation dealing with the electricity industry is the *Federal Power Act*²²³⁵ and the *Energy Policy Act 2005*.

Among other things, the *Federal Power Act* provides for the regulation of electric utility companies engaged in interstate commerce. It requires that all rates and charges for the transmission or sale of electric energy shall be just and reasonable, and non-discriminatory. Advance notice (60 days) of rate changes must be given to the FERC. The *Federal Power Act* sets out the FERC's powers to deal with such notices of rate changes, including the power to determine rates that are 'just and reasonable'. In relation to the *Energy Policy Act*, three of its principal policy goals relate to the FERC: a reaffirmation of a commitment to competition in wholesale power markets as national policy; strengthening the FERC's regulatory tools; and providing for development of a stronger energy infrastructure. The *Energy Policy Act* granted the FERC new responsibilities and authority to discharge these responsibilities by modifying the *Federal Power Act*, the *Natural Gas Act* and the *Public Utility Regulatory Policies Act* of 1978 (PURPA).

Given the jurisdictional division of regulatory responsibilities between state and federal regulators, participants in the electricity industry may be regulated at a number of levels.²²³⁶

²²³² PJM Interconnection, *2012 Annual Report*, p. 27. Available at: <http://www.pjm.com/~media/about-pjm/newsroom/annual-reports/2012-annual-report.ashx> [accessed on 2 July 2013].

²²³³ PJM Interconnection, *How RTOs Establish Spot Market Prices*, 2007

²²³⁴ American Public Power Association, *Distribution of Public Power Utilities by Customer Class*. Available at: <http://www.publicpower.org/files/PDFs/DistributionofPublicPowerUtilities1.pdf> [accessed on 2 July 2013]

²²³⁵ *United States Code*, Title 16, Chapter 12. s. 824(e) of the *Federal Power Act* defines 'public utility' as 'any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter (other than facilities subject to such jurisdiction solely by reason of ss. 824e(e), 824e(f), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title'.

²²³⁶ The Electric Energy Market Competition Task Force, *Report to Congress on Competition in Wholesale and Retail Markets for Electric Energy, Pursuant to Section 1815 of the Energy Policy Act of 2005*, 2007.

Investor-owned utility operating companies (IOUs) are private, shareholder-owned companies ranging from small local operations serving a retail customer base of a few thousand to multi-state holding companies serving millions of customers. Most IOUs are vertically integrated into generation, transmission, and distribution although many IOUs do not own generation assets and thus must procure electricity from wholesale markets. The services provided by IOUs to retail customers are regulated by state regulators. The FERC regulates wholesale electricity transactions and unbundled transmission activities of IOUs as 'public utilities' engaged in interstate commerce, except where the IOU does not operate across state borders.

The regulation of publicly owned power systems, including local, municipal, state, and regional public power systems varies among states. In some, the public utility commission exercises jurisdiction in whole or in part over operations and rates. However, in most states, public-power systems are regulated by local governments or are self-regulated.

Electric cooperatives are privately-owned, non-profit electric systems that are owned and controlled by the members they serve. Regulatory jurisdiction over cooperatives varies among states. Some states exercise authority over rates and operations, while others exempt cooperatives from regulation. In addition, cooperatives that have repaid loans under the *Rural Electrification Act* (and thus were previously regulated by the Rural Utilities Service of the Department of Agriculture), are regulated by the FERC.

There are also a number of federally-owned or chartered power systems. Wholesale power from federal facilities (primarily hydroelectric dams) is marketed through four federal power marketing agencies (PMAs). The PMAs own and control transmission to deliver power to wholesale and direct service customers. They also may purchase power from others to meet contractual needs and may sell surplus power as available to wholesale markets.

Non-utilities are entities that generate, transmit, or sell electricity but do not operate regulated retail distribution franchises. They include: wholesale nonutility affiliates of regulated utilities; merchant generators; qualifying facilities (QFs); and power marketers that buy and sell power at wholesale or retail but do not own generation, transmission, or distribution facilities. Independent transmission companies that own and operate transmission facilities but do not own generation or retail distribution facilities or sell electricity to retail customers are also included in this category.

Non-QF wholesale generators engaged in wholesale power sales in interstate commerce are subject to FERC regulation under the *Federal Power Act*. Power marketers selling at wholesale are also subject to FERC oversight. Power marketers selling only at retail are subject to state jurisdiction and oversight in states where they operate. The FERC regulates interstate transmission services of independent transmission companies under the *Federal Power Act*. Such companies also may be organised and regulated as utilities where they are located for planning, siting, permitting, and other purposes.

Competition was introduced into wholesale electricity markets in 1992, when deregulation was initiated at the federal level with the passage of the *Energy Policy Act 1992*. This Act gives the FERC powers to require electricity utilities to provide access to their transmission grids for wholesale electricity transmission. The regulatory arrangements for third-party access to electricity transmission networks are detailed in the FERC's 'landmark' Orders 888, 889 (of April 1996) and 890 (of July 2008). (The FERC uses the term 'landmark' to describe orders that set precedent in establishing the manner in which it will regulate a certain area within its jurisdiction.)

Order 888 (the *Open Access Rule*) establishes the right of third-party access to transmission networks and the pricing arrangements for those networks. It has two central components – the first requires all public utilities that own, operate or control interstate transmission facilities to offer network and point-to-point transmission services (and ancillary services) to all eligible buyers and sellers in wholesale bulk-power markets, and to take transmission service for their own uses under the same rates, terms and conditions offered to others. In other words, it requires non-discriminatory (comparable) treatment for all eligible users of the transmission facilities.

The open-access requirement is reflected in:

- A *pro forma* open-access tariff contained in the Rule. The *pro forma* tariff sets out the details of the minimum non-price transmission terms and conditions required to provide non-discriminatory access. Utilities are able to propose their own pricing terms.

- A requirement for the functional separation of the utilities' transmission and power marketing functions (also referred to as functional unbundling). There is no requirement for corporate unbundling or divestiture of assets.
- The adoption of an electricity transmission system information network.

The second central component of Order No. 888 addresses whether and how utilities will be able to recover costs that could become stranded when wholesale customers use the open-access tariffs to switch suppliers. Order No. 888 also clarifies whether and when the FERC may address stranded costs caused by 'retail wheeling' (the sale of electricity from a generator (or a power marketer) to a home or business over transmission and distribution lines) and clarifies that the FERC has exclusive jurisdiction over the terms, rates and conditions of unbundled retail transmission in interstate commerce up to the point of local distribution. Nevertheless, the orders do not usurp the authority of the state regulators who maintain their jurisdictions in regulating most of generation asset costs, the siting of generation and transmission facilities and decisions regarding retail-service territories.²²³⁷

Order 889 recommended the creation of Independent System Operators (ISOs) to manage transmission activities. Under these arrangements, a utility would retain ownership of transmission assets but relinquish control of transmission services. Order 889 also requires utilities to implement Open Access Same-time Information Systems (OASIS) which is an Internet-based system that allows utilities to search for transmission services to view each provider's availability and cost information in real time. Reservations for access can be made nearly instantaneously.

Order No. 890 ensured that transmission service is provided on a non-discriminatory basis by requiring that public utilities develop consistent methodologies for calculating available transfer capability and publish those methodologies to increase transparency. Order 890 reforms Orders 888 and 889 to ensure that transmission services are provided on a non-discriminatory, just and reasonable basis; and provide for more effective regulation and transparency in the operation of the transmission grid.

In 1999, the FERC issued Order 2000 which required utilities to submit plans for participation in a Regional Transmission Organisation (RTO). The objective was to encourage vertically integrated electricity utilities to cede operational control of their transmission lines to a limited number of unaffiliated RTOs. The FERC considered that regional institutions could address the operational and security issues confronting the industry. In addition, with access to the grid controlled by independent RTOs, there would no longer be an economic incentive to discriminate between competing suppliers.

Since the issue of Order 2000, the FERC has approved RTOs or ISOs in several regions including the Northeast (PJM, New York ISO, ISO-New England), California, the Midwest (MISO) and the Southwest (SPP).

However, in other states, wholesale trades may still occur as a result of bilateral sales negotiated directly between suppliers and scheduled through individual, non-regionalised transmission owners. This approach predominates in the Northwest and Southeast regions.

Despite support at the federal level, the progress of retail electricity reforms varies from state to state.

Natural Gas

The US natural gas market is dynamic with an active spot and futures market, having been long deregulated. The US market is integrated with those of Canada and Mexico in the North American gas market. It has a high degree of private ownership with little vertical integration. The only public ownership in the US gas industry is found in gas distribution with publicly owned gas distributors accounting for about seven per cent of all domestic gas sales. The majority of local gas distribution companies are government owned. These often provide services to small to medium-sized communities.²²³⁸ Currently only the services provided by interstate gas pipelines and local gas distribution companies (LDCs) are directly regulated. Producers and marketers are not subject to regulation of rates or services.

²²³⁷ FERC, *Summary of FERC Order 888*. Available at: <http://www.ferc.gov/legal/maj-ord-reg/land-docs/order888.asp> [accessed on 2 July 2013].

²²³⁸ J Tobin, *Distribution of Natural Gas: The Final Step in the Transmission Process*. Available at: http://www.eia.gov/pub/oil_gas/natural_gas/feature_articles/2008/lcd2008/lcd2008.pdf [accessed on 2 July 2013].

For residential customers, natural gas is primarily used for heating. Therefore usage patterns are highly cyclical – for example, residential consumption was 107 billion cubic feet in July 2010 and 969 billion cubic feet in January 2011. Outside of the winter months, natural gas is largely used in electricity generation and for industrial purposes.²²³⁹

LDCs' rates are regulated at the state level by PUCs such as the CPUC and the Maryland PSC. Although the general aims of state-based regulation are similar, there are inter-state differences in processes and regulation. Regulation of distribution is also undergoing change with several states introducing retail competition.

The FERC's powers in relation to the interstate gas pipelines are contained in the *Natural Gas Act*.²²⁴⁰ The regulatory environment for natural gas relies more heavily on competitive forces than in the past. The introduction of mandated access to the gas industry occurred gradually by means of Orders developed by the Federal Power Commission (predecessor to the FERC) and the FERC. The transition to open access was completed in 1992 with the FERC Order 636. This mandated separation of pipeline-transportation services from the sale of natural gas and required pipeline owners to offer open access to their pipelines to enable sellers to compete on an equal and unbiased basis.

Oil Pipelines

The FERC's jurisdiction over the rates, terms and conditions of transportation services provided by interstate oil pipelines derives from the *Interstate Commerce Act*.

Consultation of Interested Parties

In exercising its delegated executive powers, the FERC can introduce new regulations, developed through its rule-making process. A petition for a rule-making can arise from the energy sector, specific companies, stakeholders and the public.²²⁴¹

There are two ways a rulemaking process can begin. First, a petition for rulemaking may be filed with the FERC by the energy sector, specific companies, stakeholders or a member of the public. The FERC's Office of General Counsel reviews the petition and recommends an action to the FERC which may be a Notice of Inquiry (NOI), an Advanced Notice of Proposed Rulemaking (ANOPR), or a Notice of Proposed Rulemaking (NOPR). The FERC then issues an order that dismisses the petition or takes further action.

Alternatively, the FERC can initiate its own investigations in one of three ways:

- Where there is preliminary evidence that parties are not complying with licences and permits issued by the FERC.²²⁴²
- The FERC's Audit Division may open an audit of a utility to determine whether its transmission practices are in compliance with the FERC's rules, regulations and tariff requirements. If the audit finds any evidence of non-compliance, the FERC will open a formal investigation into the perceived violation (the initial course of action may be a preliminary, non-public investigation).
- The instituting of formal hearing procedures under the *Federal Power Act* to investigate, among other things, the justness and reasonableness of rates.

Prior to opening an investigation, FERC staff will review the information received and conduct a preliminary examination of the issue. Staff may consult publicly, seek commercially available sources of data, obtain input from other staff with relevant expertise, or contact the entity involved for an explanation of its actions.

To determine whether there is a substantial basis for opening an investigation, staff consider the following factors:

²²³⁹ US Energy Information Administration, *Natural Gas Consumption by End Use*. Available at: http://www.eia.gov/dnav/ng/ng_cons_sum_dcu_nus_m.htm [accessed on 2 July 2013]

²²⁴⁰ *United States Code*, Title 15, Chapter 15B.

²²⁴¹ FERC, *Rulemaking*. Available at: <http://www.ferc.gov/help/processes/pro-rule.asp> [accessed on 2 July 2013].

²²⁴² FERC, *Enforcement*. Available at: <http://www.ferc.gov/enforcement/enforcement.asp> [accessed on 2 July 2013].

- nature and seriousness of the alleged violation and harm (if applicable);
- efforts made to remedy the violation;
- whether the alleged violations were widespread or isolated;
- whether the alleged violations were wilful or inadvertent;
- importance of documenting and remedying the potential violations to advance Commission policy objectives;
- likelihood of the conduct reoccurring;
- amount of detail in the allegation or suspicion of wrongdoing;
- likelihood that staff could assemble a legally and factually sufficient case;
- compliance history of the alleged wrongdoer; and
- staff resources.

In some situations, this preliminary examination may establish an adequate justification for the conduct or otherwise indicates that no further inquiry is needed. The cases would be closed by staff without any further action being taken.

Where staff determines that a fuller inquiry into the conduct is required, an investigation will be opened. Staff will advise the outcome to the company against whom allegations have been made.

Once opened, an investigation involves fact-gathering by enforcement staff through discovery methods such as data and document requests, interrogatories, interviews, and depositions. The time to complete an investigation depends on many factors, including the complexity of the conduct involved and the nature of the alleged violations. During this process, staff maintains frequent contact with the company under investigation.²²⁴³

If staff reaches the conclusion that a violation occurred that warrants sanctions, the relevant company will be advised and given the opportunity to respond and to provide additional information. If, after considering the response and further information, staff continues to believe that sanctions of some sort are warranted, the company and enforcement staff will either agree on a settlement, or the company may contest the conclusion.

Staff will attempt to reach a settlement with the company in the first instance before recommending an enforcement proceeding. Once a settlement is agreed between staff and the party, the settlement agreement is submitted to the Commission for its consideration. Upon approval, the settlement is released publicly. The FERC considers settlement to be a much better mechanism than litigation to serve the public interest because compliance problems are remedied faster and fewer enforcement resources are required.

If a settlement cannot be reached, an administrative hearing before an administrative law judge (ALJ) at the FERC will take place. The ALJ will issue an Initial Decision and determine whether a violation or violations occurred. If a violation is found, the Initial Decision will recommend any appropriate penalty. The initial decision is based on the evidence provided at the hearing and the briefs filed by the parties. The FERC will then consider the initial decision and any exceptions filed. If the FERC determines that there is a violation, it will issue an order and may assess any appropriate penalty. The ALJ's initial decision becomes the final FERC decision ten days after briefs on exceptions to the initial decision are due, unless exceptions are filed or the FERC issues an order staying the effectiveness of the initial decision pending review.²²⁴⁴

A Request for Rehearing may be filed with the FERC. The Office of General Counsel reviews the petition and recommends action to the FERC, which then issues an order to deny or grant the rehearing. A party who has requested a rehearing may file a petition for review (within 60 days) of issuance of the rehearing order.

Within this context, the FERC's regulatory work may focus on company-specific or industry-wide issues.

²²⁴³ FERC, *Processes*. Available at: <http://www.ferc.gov/help/processes.asp> [accessed on 1 July 2013].

²²⁴⁴ FERC, *Administrative Litigation*. Available at: <http://www.ferc.gov/legal/admin-lit/functions.asp> [accessed on 2 July 2013].

The process followed for company-specific issues (classified into three types – applications for rate changes; applications for changes in access arrangements; and complaints) is broadly similar. The process is initiated when an application or complaint is given to, or ‘filed’ with, the FERC. The application or complaint is then posted on the FERC’s website with interested parties invited to comment. The FERC staff then analyses the information obtained and makes a recommendation to the FERC, although minor matters may be delegated to a FERC staff member. The FERC may make a decision without any further procedures or it may hold a trial-type hearing before an ALJ. Alternatively, the FERC may hold a technical conference, or ‘paper’ hearing. Alternative dispute resolutions processes, such as mediation and arbitration, may also be used.

The process for industry-wide issues is more complex, reflecting the greater number of interested parties and the likely divergence of views among those parties. The process is typically started when the FERC issues a Notice of Inquiry (NOI) or a Notice of Proposed Rulemaking (NOPR). A NOI usually means that the FERC is collecting information, ideas and opinions; whereas a NOPR generally indicates that the FERC is proposing a new regulation or policy change. Then the FERC will seek comment, which it then reviews and considers before making a formal decision. The final outcome could be the issue of a NOPR, to propose new regulation or policy changes or issue new regulations or policy changes in the form of a FERC Order, policy statement or rule making. The FERC can also abandon the initiative altogether.

Matters may also arise before the FERC when a complaint is filed, which may be dealt with through the following channels:

- The FERC may assign a case to be resolved through alternative dispute resolution (ADR) procedures, in cases where the affected parties consent.
- The FERC may issue an order (a final decision) on the merits based upon the pleadings.
- The FERC may establish a hearing before an ALJ where the parties do not consent. Parties are able to elect to enter into ADR procedures even after a case has been set for hearing.²²⁴⁵

In addition, a party may directly contact the FERC’s Dispute Resolution Service (DRS) about a potential alternative dispute resolution (ADR) process, without filing a formal complaint to the FERC.²²⁴⁶ Parties who elect an ADR process do not relinquish the right to pursue their matter through a more formal and traditional approach. If an agreement is reached as a result of ADR processes, the parties will file a copy of the agreement with the FERC, if required.

The DRS has been active in a wide variety of issues such as environmental matters, contractual disagreements, landowner disputes, and billing discrepancies in all areas of the FERC’s regulatory responsibilities. The DRS may address a dispute at any time – prior to or after a matter is filed with the Commission. The DRS staff is not subject to rules prohibiting off-the-record communications between and among parties. However, it is subject to separation-of-functions rules; that is, the DRS staff may not communicate substantive matters in any of its proceedings with non-DRS staff.

The dispute-resolution process involves both formal and informal consultation, dependent on the proposed dispute resolution process being pursued. Consultation may also include technical conferences and workshops.

Parties involved in the ADR processes may include those directly involved in the dispute, third parties that hold relevant information, a FERC administrative law or chief judge, a neutral third party (conciliator, mediator or facilitator) from the private sector, and a mediator from the DRS. Experts on technical, scientific or legal questions may also be consulted in the dispute-resolution process. Staff members from the Office of Enforcement serve as trial staff at administrative hearings. Trial staff includes attorneys and technical staff that serve as expert witnesses.²²⁴⁷

As discussed in more detail in the following sub-section, ‘Fast-track’ processing is available as a complement to the standard complaint resolution paths in limited circumstances. There are also

²²⁴⁵FERC, *Complaint Resolution Paths and Target Timeframes*, 2010. Available at: <http://www.ferc.gov/legal/complaints/form-comp/comp-resolution.asp> [accessed on 2 July 2013].

²²⁴⁶FERC, *Dispute Resolution Service*, 2010. Available at: <http://www.ferc.gov/legal/adr/drs.asp> [accessed on 2 July 2013].

²²⁴⁷FERC, *Legal Resources: Administrative Litigation*. Available at: <http://www.ferc.gov/legal/admin-lit.asp> [accessed on 2 July 2013].

simplified procedures for complaints involving ‘small controversies’ – in other words, if the amount in controversy is less than US\$100 000 and the impact on other entities is minimal.

In performing its regulatory role, the FERC regularly consults and conducts investigations to ensure that interested parties have an appropriate opportunity to contribute to the performance of its duties. Such consultations may include technical conferences and workshops designed to explain and explore issues related to the development and implementation of its policies.

Persons who think that they might be affected by a proposed natural gas or hydroelectric project that is regulated by the FERC have certain rights to participate in the decision-making process. These rights are:²²⁴⁸

- accessing and inspecting via eLibrary all public documents associated with the proposed project;
- making concerns known to the FCC via eFiling;
- participating in public meetings;
- participating in site visits;
- eFiling comments on draft Environmental Assessments and Environmental Impact Statements;
- intervening on specific proposed projects;²²⁴⁹
- having FERC decision reviewed in federal court; and
- filing a Critical Energy Infrastructure Information Report.

In addition, the FERC regularly meets with state and other federal regulators, industry officials and the public to discuss electricity market and reliability issues and holds regional conferences to identify local concerns, conditions and needs.²²⁵⁰

The FERC’s relationships with a number of external bodies have been formalised by Memorandums of Understanding between the FERC and the external body. These include: the Department of Energy, the Department of Agriculture, the Department of Defence, the Department of Commerce, the Department of Transportation, the Environmental Protection Agency, and the Council on Environmental Quality.²²⁵¹

Timeliness

Unless otherwise ordered by the FERC, answers, interventions, and comments to a complaint must be filed within 20 days after the complaint is filed. In cases where the complainant requests privileged treatment for information in its complaint, answers, interventions, and comments are due within 30 days after the complaint is filed. In the event there is an objection to the protective agreement (the agreement enabling certain information to be treated as confidential) the FERC will establish when answers will be due. The FERC would usually expect to make a decision on the merits, based on the pleadings within 60 to 90 days after an answer is filed. When a complaint is set for hearing before an ALJ, the aim will be for the ALJ to render an initial decision no later than 60 days after the case is set for hearing. Briefs on exceptions to an initial decision would be due, under the FERC’s rules, 30 days after the initial decision, and briefs opposing exceptions, 20 days thereafter.²²⁵² The FERC would expect to issue an order on the exceptions no later than 90 days after their filing.²²⁵²

The FERC also establishes clear time standards for discovery although the ALJ has the discretion to adjust these time frames as required to meet the needs of the case.²²⁵³

²²⁴⁸ FERC, *For Citizens Get involved*. Available at: <http://www.ferc.gov/for-citizens/get-involved.asp> [accessed on 2 July 2013].

²²⁴⁹ Intervenor has the right to participate in hearings before the FERC’s Administrative Law Judges; file briefs; file for rehearing of FERC decisions; have legal standing in Court of Appeals if they challenge FERC’s final decision; and placed on service list to receive copies of case-related FERC documents and filings by other intervenors.

²²⁵⁰ FERC, *The Strategic Plan FY 2009 – 2014*, Revised February 2012, p. 39. Available at: <http://www.ferc.gov/about/strat-docs/FY-09-14-strat-plan-print.pdf> [accessed on 2 July 2013].

²²⁵¹ FERC, *Memoranda of Understanding*, 2012. Available at: <http://www.ferc.gov/legal/maj-ord-reg/mou.asp> [accessed on 2 July 2013].

²²⁵² FERC, *Time Period for Answers, Interventions, and Comment*. Available at: <http://www.ferc.gov/legal/complaints/form-comp/time-period.asp> [accessed on 2 July 2013].

²²⁵³ FERC, *Time Standards*. Available at: <http://www.ferc.gov/legal/admin-lit/time.asp> [accessed on 2 July 2013].

'Fast-track' processing is available as a complement to the standard complaint resolution paths in limited circumstances. It is used to address disputes that require quick relief and is available upon request by a complainant who can present a highly credible claim that standard procedures are not appropriate. Fast-track procedures may include expedited action on the pleadings by the FERC, expedited hearing before an ALJ, or expedited action on requests for stay, extension of time, or other relief by the FERC or an ALJ.

Hearing procedures may be compressed into only a few days if the circumstances warrant. For cases resolved based on the pleadings, it is expected that the FERC could issue an order on the merits within 20 days after the answer is filed.²²⁵⁴

There are also simplified procedures for complaints involving small controversies. These are available to complainants if the amount in controversy is less than US\$100 000 and the impact on other entities is minimal. A complainant filing under simplified procedures is required to simultaneously serve the complaint on the respondent and any other entity referenced in the complaint. The FERC will issue a public notice of the complaint promptly, usually within two days. An answer to a complaint filed under the simplified procedure must be filed within ten days after the complaint is filed, or within 20 days if the complainant requests privileged treatment for information in its complaint. Because of the less complex nature of complaints filed under the simplified procedure, the FERC is usually able to issue an order within 30 days of the filing of an answer.

The time period in which a complaint is resolved via alternative dispute resolution is largely in the control of the affected parties, as the process is voluntary. The FERC, however, treats ADR resolution like uncontested settlements, and therefore expects to issue any subsequent orders no later than 45 days after the ADR resolution is rendered.²²⁵⁵

Information Disclosure and Confidentiality

Unless exempt from disclosure, information collected, and decisions made by, the FERC are available from a number of sources:²²⁵⁶

- Documents created by or received by the FERC on or after November 1981 are available on the FERC's Website through its document-management system.
- Descriptions of the FERC's organisation, methods of operation, statements of policy and interpretations, procedural and substantive rules, and amendments are published in the *Federal Register*.
- Media releases that explain major applications, decisions, opinions, orders, rulemakings, new publications, major personnel changes, and other matters of general public interest. News releases may be obtained by the public through the Public Reference Room.
- Copies of FERC opinions, orders in the nature of opinions, rulemakings and selected procedural orders, and intermediate decisions which have become final are published in the *Federal Energy Guidelines* and may be obtained from the Commerce Clearing House.²²⁵⁷
- Furthermore, media (including television, radio and photographic) coverage of FERC proceedings is permitted.

The treatment of information varies according to whether the matter is being handled by ADR facilitated by the Dispute Resolution Service, or Settlement facilitated by Administrative Law Judges. In ADR proceedings parties agree on the level of confidentiality during dispute resolution discussions. In addition, all inquiries and discussions with the DRS are privileged and confidential, unless

²²⁵⁴ FERC, *Fast Track Procedures*. Available at: <http://www.ferc.gov/legal/complaints/form-comp/fast-track.asp> [accessed on 2 July 2013].

²²⁵⁵ FERC, *Complaint Resolution Paths and Target Time Frames*. Available at: <http://www.ferc.gov/legal/complaints/form-comp/comp-resolution.asp> [accessed 2 July 2013].

²²⁵⁶ Records that are exempt from disclosure include information that must be kept secret in the interest of national defence or foreign policy, and information that is privileged, confidential, or would constitute an unwarranted invasion of personal privacy.

²²⁵⁷ *Electric Code of Federal Regulations, Title 18: Conservation of Power and Water Resources: Part 388 – Information and Requests*. Available at: <http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr;sid=14ab972dd97e8309c0a1d7ccbc64d719;rgn=div5;view=text;node=18%3A1.0.1.21.86;idno=18;cc=ecfr> [accessed on 2 July 2013].

otherwise agreed.²²⁵⁸ In the course of Settlement proceedings, parties may seek privileged treatment for any documents that are submitted, via a protective order issued by the presiding judge, as required under s.388.112 of the *Code of Federal Regulations* (CFR). A Protective Order applies to materials, which customarily are treated by that participant as sensitive, which are not available to the public, or which, if disclosed freely, would subject that participant or its customers to risk of competitive disadvantage or other business injury. A protective agreement preserves the privileged status of the information, but at the same time, makes it available to other parties to assist them in preparing their case. Any person may file an objection to the proposed form of protective agreement.²²⁵⁹

Public access to information known as Critical Energy Infrastructure Information (CEII) is restricted through specific arrangements. CEII is defined as specific engineering, vulnerability, or detailed design information about proposed or existing critical infrastructure (physical or virtual) that:²²⁶⁰

- relates details about the production, generation, transmission, or distribution of energy;
- could be useful to a person planning an attack on critical infrastructure;
- is exempt from mandatory disclosure under the *Freedom of Information Act*; and
- gives strategic information beyond the location of the critical infrastructure.

The FERC has established procedures for gaining access to CEII that would otherwise not be available under the *Freedom of Information Act*.²²⁶¹

Under the *Freedom of Information Act* any person has the right to request public access to federal agency records or information unless the records are subject to the nine exemptions and three exclusions set out in the Act (see the previous sub-section on 'Freedom of Information') including CEII. Parties may make a written request for information under the Act to the FERC's Public Reference Room (*Electric Code of Federal Regulations*).

Decision-making and Reporting

The decision-making processes of the FERC are many and varied.²²⁶² For example, the Administrative Law Judges:

resolve contested cases as directed by the Commission...either through impartial hearing and decision or through negotiated settlement...Rate cases are set for hearing if proposed rates, terms and conditions have not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory, or otherwise unlawful.

The Office of Administrative Litigation 'litigates or otherwise resolves cases set for hearing'. The Office of Energy Market Regulation, *inter alia*, 'provides support to the Commission on matters involving market design'. The Office of Energy Policy and Innovation 'issues, coordinates and develops proposed policy reforms to address emerging issues'. The Office of the Secretary 'promulgates and publishes all orders, rules and regulations of the Commission'. Hydroelectricity licensing processes 'include consulting with stakeholders, identifying environmental issues through scoping, and preparing environmental documents such as Environmental Assessments or Environmental Impact Statements. Licenses are issued by Commission order'.

²²⁵⁸ FERC, *Legal Resources: Dispute Resolution*. Available at: <http://www.ferc.gov/legal/adr/drs.asp> [accessed on 2 July 2013].

²²⁵⁹ *Electric Code of Federal Regulations, Title 18 – Conservation of Power and Water Resources*, 2008. Available at: <http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=4fa6ecccdca43c295c2b87249e546645&rgn=div8&view=text&node=18:1.0.1.21.85.2.46.6&idno=18> [accessed on 2 July 2013].

²²⁶⁰ FERC, *Legal Resources, Critical Energy Infrastructure Information*. Available at: <http://www.ferc.gov/legal/ceii-foia/ceii.asp> [accessed on 2 July 2013].

²²⁶¹ FERC, *CEII Filing Guideline*. Available at: <http://www.ferc.gov/help/filing-guide/file-ceii/ceii-guidelines.asp> [accessed on 2 July 2013].

²²⁶² The role of FERC offices can be found at <http://www.ferc.gov/about/offices.asp#orgchart> and information on processes (including decision-making processes) is available at: <http://www.ferc.gov/help/processes.asp> [accessed on 2 July 2013].

Appeals

Appeals against FERC decisions can be applied internally by requesting rehearing of the dispute (see above) or externally by requesting rehearing in the US Court of Appeals, and ultimately the US Supreme Court.

The *Federal Rules of Appellate Procedure* apply to petitions for review of FERC orders in the Courts of Appeals. Each Court of Appeals also has local rules that must be followed.²²⁶³

In addition, the judicial review provisions of the *Natural Gas Policy Act*, the *Natural Gas Act* and the *Federal Power Act* govern review of FERC orders. All three Acts require that an application for rehearing be made to the FERC before a petition for review of a FERC order may be brought. However, the *Interstate Commerce Act*, applicable to the transportation of oil by pipeline, contains no such express statutory rehearing requirement.

Regulatory Development

To help support the modernisation of the nation's electric system consistent with Title XIII of the *Energy Independence and Security Act of 2007*, the FERC is focusing on issues associated with a smarter grid. Smart Grid advancements apply digital technologies to the grid, and enable real-time coordination of information from generation supply resources, demand resources, and distributed energy resources (DER). The FERC's interest and responsibilities in this area derive from its authority over the rates, terms and conditions of transmission and wholesale sales in interstate commerce, its responsibility for approving and enforcing mandatory reliability standards for the bulk-power system, and a law requiring the Commission to adopt interoperability standards and protocols necessary to ensure smart-grid functionality and interoperability in the interstate transmission of electric power and in regional and wholesale electricity markets. A FERC-NARUC Collaborative on Smart Response provides a forum for Federal and State Regulators to discuss Smart Grid and Demand Response policies, share best practices and technologies, and address issues that benefit from State and Federal collaboration.

2. Telecommunications

Historically the US telecommunications industry was operated under a private monopoly 'Bell System', comprising a number of Bell local operating companies, controlled by American Telephone and Telegraph Company (AT&T). On 8 January 1982, AT&T reached a settlement with the United States Department of Justice of an antitrust case, under which AT&T would divest its local operating companies. AT&T's local operations were eventually split into seven independent Regional Bell Operating Companies known colloquially as 'Baby Bells'. Since the breakup, these companies have merged over time to form the present three major regional companies in the US. In order of size these are:

- AT&T Inc. – a major provider of Internet, wireless and telecommunications services. It is the largest telecommunications company in the US and in the world, consisting of four of the former 'Baby Bells'.
- Verizon Communications – a major provider of broadband and telecommunications services. Verizon was founded as Bell Atlantic, the Regional Bell Operating Company operating in the US states of New Jersey, Pennsylvania, Delaware, Maryland, West Virginia, and Virginia. In 1996 Bell Atlantic merged with another 'Baby Bell', NYNEX, which primarily operated in New York and New England. Therefore Verizon is currently operating mainly in the eastern United States.
- CenturyLink – Louisiana-based acquired Qwest in 2010 and is a fiber optics long-distance company, providing Internet, wireless and local telephone services particularly in western states.

There are four major wireless service operators in the US; Sprint Nextel, T Mobile, AT&T and Verizon. In 2011 AT&T offered US\$39 billion to purchase T Mobile, however the deal faced significant resistance from the US Government. If it had proceeded, the merger would have created the largest wireless carrier in the US with 130 million customers. There are a number of regional providers that operate both on home network and through roaming agreements. Regional operators primarily provide pre-paid services in low income urban areas. T Mobile and MetroPCS successfully

²²⁶³ Both sets of rules are in Title 28 of the *United States Code*.

concluded a merger in May 2013. The newly formed T Mobile US now serves approximately 43 million customers.²²⁶⁴

In fixed broadband, the US is characterised by having multi-platform competition, where most households have access to both DSL and cable networks. According to the most recent OECD report on Broadband Statistics (for December 2012), the US at 28.8 subscriptions per 100 inhabitants is ranked substantially above the average (26.3) among the 34 OECD member countries.²²⁶⁵

Four ISPs account for almost 70 per cent of connections; DSL providers AT&T and Verizon along with cable companies Comcast and Time Warner. CenturyLink, Cox, Charter and Cablevision each have between 3.5 and 7.5 per cent market share. Verizon is the only major provider of fibre to the premises in the US, serving 3.8 million customers.

The provision of broadband by wireless is highly advanced in the United States, with penetration being the sixth highest in the OECD, only slightly less ubiquitous as in countries such as Finland, Sweden and Korea.

Regulatory Institutions and Legislation

The US telecommunications industry is regulated federally by the Federal Communications Commission (FCC) and by the state public utility commissions at the state level. The National Telecommunications and Information Administration (NTIA) is the Executive Branch agency that is principally responsible for advising the President on telecommunications and information policy issues, and expanding broadband Internet access and adoption.

The FCC is an independent government agency located in Washington DC. The FCC regulates interstate and international communications by radio, television, wire, satellite and cable. It also develops (and administers the implementation of) policies concerning interstate and international communications.²²⁶⁶ The FCC was established by the *Communications Act 1934*. The federal sources of authority for economic regulation are the *Telecommunications Act 1996* and FCC rules, which are codified in Title 47 of the *Code of Federal Regulations*. The *Telecommunications Act 1996* deals with restructuring of the industry and with access provisions. Access is also dealt with in Title 47 Parts 59 and 69 of the *Code of Federal Regulations*. The FCC's rules on tariffs (the initial establishment of and subsequent revisions to) are set out in Title 47 Part 61 of the *Code of Federal Regulations*.

The objectives of the FCC include to:

- foster sustainable competition across the entire telecommunications sector;
- facilitate a more effective wholesale market through interconnection policy and other competition-related rules;
- promote and advance universal service;
- ensure that consumers have choices among communication services and are protected from anti-competitive behaviour in the increasingly competitive telecommunications landscape; and
- continually evaluate and report on the competitive environment for communications services.²²⁶⁷

The FCC's strategic plan for 2012 to 2016 provides eight goals for the organisation. Namely to:

- 'connect America'. This includes maximising American's access to and adoption of affordable fixed and mobile broadband;
- maximise benefits of spectrum;
- protect and empower consumers by ensuring that consumers have the tools and they needed to make informed choices and to protect consumers from harm in the communications market;

²²⁶⁴ The Verge, *T-Mobile and MetroPCS Merger Finalised: Company to begin Trading as 'T-Mobil US', May 2004*. Available at: <http://www.theverge.com/2013/5/1/4286622/t-mobile-us-metropcs-merger-complete-tmus> [accessed on 1 July 2013].

²²⁶⁵ OECD, *OECD Broadband Statistics to December 2012*, updated 18 July 2013. Available at: <http://www.oecd.org/internet/broadband/oecdbroadbandportal.htm> [accessed on 21 July 2013].

²²⁶⁶ FCC, *What We Do*. Available at: <http://www.fcc.gov/what-we-do> [accessed on 1 July 2013].

²²⁶⁷ FCC, *FCC Encyclopedia*. Available at: <http://www.fcc.gov/encyclopedia/strategic-plan-fcc> [accessed on 1 July 2013].

- promote innovation, investment, and America's global competitiveness;
- promote competition for communications and media services to foster innovation, investment, and job creation and to ensure consumers have meaningful choice in affordable services;
- promote public safety and homeland security, including promoting reliable, interoperable, redundant, rapidly restorable critical communications infrastructures that are supportive of all required services ;
- advance key national purposes; and
- achieve operational excellence.²²⁶⁸

The FCC is directed by five commissioners appointed by the President and confirmed by the Senate for five-year terms, except when replacing another commissioner whose term had not expired. The President designates one of the Commissioners to serve as Chairperson. Normally, one Commissioner is appointed or reappointed each year.²²⁶⁹ Only three Commissioners may be members of the same political party. None of them can have a financial interest in any Commission-related business.

The FCC's staff is organised by function into seven operating Bureaus and eleven Staff Offices. Of most relevance to economic regulation of telecommunications services are the following:

- The Consumer & Governmental Affairs Bureau (CGB) that develops and implements the Commission's consumer policies.
- The Enforcement Bureau is responsible for enforcing the relevant legislation, rules and orders. Within the branch, the Market Disputes Resolution Division (MDRD) handles formal complaints against common carriers and common carrier mediation efforts, and pole catchment complaints.
- The Office of General Counsel is the chief legal adviser and represents the Commission in litigation in federal courts, makes recommendations in adjudicatory matters before the FCC and assists the FCC in its decision-making.²²⁷⁰
- The Wireless Telecommunications Bureau (WTB) handles all matters, including licensing, enforcement, and regulatory functions, pertaining to domestic wireless telecommunications.
- The Wireline Competition Bureau (WCB) handles all matters pertaining to communications common carriers and ancillary operations.
- The Office of Administrative Law Judges (OALJ) is responsible for conducting the hearings ordered by the Commission.
- The Office of Media Relations (OMR) is responsible for the dissemination of information on Commission issues.

The tariff-setting framework requires that all tariffs filed with the FCC must conform to the rules set out. This includes a prohibition on the provision of any interstate or foreign communication service until all tariffs for each communication service have been filed with the FCC and are in effect.

Tariffs should be filed annually. Filed tariffs are required to comply with rate-of-return price caps applied to baskets of services and be just, reasonable and non-discriminatory. Specifically, s.61.40 of the *Code of Federal Regulations* framework provides guidance on the structure of tariffs that is likely to be just, reasonable and non-discriminatory and thus reduces a regulated company's burden of cost-justification.²²⁷¹ The guidance provides rate structures for the same or comparable services should be integrated and consistent with each other; rate elements should be selected to reflect market demand, pricing convenience for the carrier and customers, and cost characteristics; a rate

²²⁶⁸ FCC, *Strategic Plan 2012-2016*. Available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-312420A1.pdf [accessed on 1 July 2014].

²²⁶⁹ FCC, *Code of Federal Regulations: Title 47 – Telecommunications Part 0 – Commission Organisation*, 2008. Available at: http://www.access.gpo.gov/nara/cfr/waisidx_07/47cfr0_07.html [accessed on 2 July 2013].

²²⁷⁰ FCC, *Code of Federal Regulations: Procedural Rules – 47 C.F.R 1.721-1.736*. Available at: <http://www.fcc.gov/eb/mdrd/rules/cmpl.html> [accessed on 2 July 2013].

²²⁷¹ *Code of Federal Regulations*, Title 47, Part 61.40 – *Private Line Rate Structure Guidelines*. Available at: http://edocket.access.gpo.gov/cfr_2007/octqtr/47cfr61.40.htm [accessed on 2 July 2013].

element which appears separately in one rate structure should appear separately in all other rate structures; rate elements should be consistently defined with respect to underlying service functions and should be consistently employed through all rate structures; and rate structures should be simple and easy to understand.

The *Telecommunications Act* introduced new regulatory and institutional arrangements for the telecommunications industry, mandating interconnection through the unbundling of networks and the resale of services provided by local exchange operators. The arrangements provide for negotiated agreements between parties on interconnection and resale, with provision for State regulators to arbitrate if parties cannot agree on price and conditions. To facilitate a consistent approach to pricing by state regulatory commissions, the FCC established national pricing principles.

State-level Regulation

Whereas the FCC regulates interstate and international telecommunications, each state has a body to regulate intra-state telecommunications. In general, telecommunications will be one of multiple industries regulated by an independent state agency, often named the Public Utilities Commission, or PUC. Each PUC is empowered by state legislation to perform certain activities, and to hold certain responsibilities, and these may vary somewhat across the states. However, typically, the PUC will have jurisdiction to:

- regulate rates and services for incumbent local exchange carriers that have not elected incentive regulation.
- certify competitive local exchange carriers.
- register inter-exchange carriers, automatic-dial-announcing devices, payphone providers and other non-dominant carriers.
- monitor quality of service of local telecommunications providers.
- oversee wholesale and telecommunications markets.
- adopt and enforce rules relating to telecommunications competition.
- monitor access-line reporting for certificated telecommunications providers.
- administer a discount low-income telephone service program.
- oversee the 911 service program.

The National Telecommunications and Information Administration (NTIA)

The NTIA is the Executive Branch agency that is principally responsible for advising the President on telecommunications and information policy issues. The NTIA's programs and policy-making focus largely on expanding broadband Internet access and adoption, expanding the use of spectrum, and 'ensuring that the Internet remains an engine for continued innovation and economic growth'.

The NTIA is based in Washington DC within the Department of Commerce. It has nine offices – Assistant Secretary, Spectrum Management (OSM), Telecommunications and Information Applications (OTIA), International Affairs, Policy Analysis and Development (OPAD), Institute for Telecommunications Sciences, Public Affairs, Congressional Affairs and Chief Counsel.

One of the OSM's primary activities is implementing the Obama administration's commitment to nearly double the amount of commercial spectrum. In 2010, a Presidential Memorandum directed the Secretary of Commerce, working through the NTIA, to collaborate with the FCC to make available a total of 500 megahertz of Federal and non-federal spectrum over the next ten years for mobile and fixed wireless broadband use.

The NTIA's OTIA administers grant programs that further the deployment and use of technology, 'laying the groundwork for sustainable economic growth; improved education, public safety, and health care; and the advancement of other national priorities'.

The NTIA's OPAD supports the agency's role as the principal adviser to the President on telecommunications and information policy. The OPAD performs research; releases reports, letters and formal comments to the FCC or other regulatory bodies; and reviews federal legislation. The OPAD also plans and conducts public discussions to facilitate dialogue on telecommunications and information matters.

The NTIA and FCC's Memorandum of Understanding on Spectrum Coordination

The NTIA and the FCC executed a Memorandum of Understanding (MOU) on spectrum coordination in 2003.²²⁷² The MOU establishes procedures relating to: frequency coordination; and spectrum planning provisions that are contained in the *Communications Act*.²²⁷³ The MOU provides that the Chairman of the FCC and the Assistant Secretary for Communications and Information shall meet biannually to conduct joint spectrum planning.

Spectrum management is assigned jointly by the Communications Act to the FCC and the NTIA. The FCC is responsible for non-federal users, including commercial broadcasters, state and local government public safety agencies. The NTIA is responsible for Federal Government users.²²⁷⁴

The National Broadband Plan

In early 2009, the United States' Congress directed the FCC to develop a National Broadband Plan to ensure every American has 'access to broadband capability'.²²⁷⁵ The National Broadband Plan produced by the FCC in 2010 recommends:

- 'establishing policies to ensure robust competition and, as a result maximise consumer welfare, innovation and investment;
- ensure efficient allocation and management of assets government controls or influences, such as spectrum, poles, and rights-of-way, to encourage network upgrades and competitive entry;
- reform current universal service mechanisms to support deployment of broadband and voice in high-cost areas, and ensure that low-income Americans can afford broadband, and support efforts to boost adoption and utilization; and
- reform laws, policies, standards and incentives to maximise the benefits of broadband in sectors government influences significantly, such as public education, health care and government operations.²²⁷⁶

The National Broadband Plan also recommended an additional 500 MHz of spectrum be made available for commercial use.²²⁷⁷ As discussed previously, President Obama also called for a near doubling of the spectrum available for wireless broadband.²²⁷⁸ In March 2012, the FCC announced that it will conduct incentive auctions to allocate spectrum.²²⁷⁹ Incentive auctions are designed to provide broadcasters with a financial incentive to return unused spectrum licences to the FCC. The spectrum is then auctioned to companies offering mobile data services. Participation is voluntary and broadcasters receive a share of the revenue raised from selling their spectrum.

In 2011, the FCC announced the creation of the *Connect America Fund*.²²⁸⁰ The objective is to use the fund to connect seven million rural Americans, who do not have internet service, to broadband in the next six years. A broader objective is to connect 19 million people without internet service to broadband by 2020. The *Connect America Fund* was established following reforms to the Universal

²²⁷² 'Memorandum of Understanding Between the Federal Communications Commission and the National Telecommunications and Information Administration'. Available at: http://www.ntia.doc.gov/files/ntia/publications/fccntiamou_01312003.pdf [accessed on 2 July 2013].

²²⁷³ NTIA, *FCC and NTIA Memorandum of Understanding on Spectrum Coordination*. Available at: <http://www.ntia.doc.gov/other-publication/2003/fcc-and-ntia-memorandum-understanding-spectrum-coordination> [accessed on 2 July 2013].

²²⁷⁴ *Ibid.*

²²⁷⁵ FCC, *National Broadband Plan*. Available at: <http://www.broadband.gov/plan/executive-summary/> [accessed on 2 July 2013]

²²⁷⁶ *Ibid.*

²²⁷⁷ *Ibid.*

²²⁷⁸ Executive Office of the President Council of Economic Advisers, 'The Economic Benefits of New Spectrum for Wireless Broadband', 2012. Available at: http://www.whitehouse.gov/sites/default/files/cea_spectrum_report_2-21-2012.pdf [accessed on 2 July 2013].

²²⁷⁹ FCC, 'Incentive Auctions: The Concept Ratified, and the Work Begins', 27 March, 2012. Available at: <http://www.fcc.gov/blog/incentive-auctions-concept-ratified-and-work-begins> [accessed on 2 July 2013].

²²⁸⁰ FCC, 'FCC Kicks-Off 'Connect America Fund' With Major Announcement: Nearly 400,000 Unserved Americans in Rural Communities in 37 States Will Gain Access to High-speed Internet Within Three Years', 2012. Available at: http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0801/DOC-315413A1.pdf [accessed on 2 July 2013].

Service Fund, which was used to connect rural America to the telephone network in the twentieth century.

Consultation of Interested Parties

Regulatory issues arise before the FCC via two main avenues – complaints lodged by external parties and self-initiated investigations. The FCC adjudicates formal complaints and determines whether the conduct is unlawful. If so, the FCC makes a ruling and an order which may award compensation or damages.²²⁸¹ Any person may file a complaint to the FCC alleging that a common carrier (wireline, wireless or international) has violated its obligations under the *Communications Act* or the FCC's rules.²²⁸² A dispute between two parties may also be referred to the FCC by a court pursuant to the doctrine of primary jurisdiction. These referrals are known as Primary Jurisdiction Referrals.²²⁸³

Courts invoke the primary jurisdiction doctrine where the court has jurisdiction over the case, but the case requires the resolution of issues which, under a regulatory scheme, have been placed in the hands of a regulatory agency. The procedures by which the FCC handles a common carrier matter referred by a court pursuant to the primary jurisdiction doctrine may vary according to the nature of the matter referred. Generally, primary jurisdiction referrals involving common carriers are appropriately filed as formal complaints with the Enforcement Bureau pursuant to s.208 of the *Communications Act*.²²⁸⁴

Alternatively, the FCC has authority under the *Communications Act* to initiate its own investigation into whether a regulated company has violated the Act or the FCC's rules.²²⁸⁵ The FCC has discretion to determine whether and what it will investigate, and the manner and time period of the investigation.²²⁸⁶

There are three mechanisms that the FCC may use to resolve a dispute depending on the nature of the complaint. The FCC may: adjudicate and make a final decision; refer the dispute to informal dispute resolution leading to mediation and settlement if the parties agree; or initiate investigations and forfeitures.²²⁸⁷

Formal complaints are adjudicated by the FCC via an administrative hearing presided over by a designated administrative law judge (ALJ), subject to the 'granting' by the Enforcement Bureau. That means the Enforcement Bureau recommends to the Commission that it accept the formal complaint and pursue its formal dispute resolution process. This process involves examination of the preliminary facts and detailed legal analysis.²²⁸⁸

Formal complaint proceedings involve a written record consisting of a complaint, answer, and joint statement of stipulated facts, disputed facts and key legal issues, along with all associated affidavits, exhibits and other attachments. Commission proceedings may also require or permit other written submissions such as briefs, written interrogatories, and other supplementary documents or pleadings.

When filing a formal complaint, parties must provide as much factual support for their case as possible. This can be in forms such as sworn affidavits and documentary evidence. If a complainant wishes to recover damages, the complaint must contain a clear request for damages. Any party who

FCC, *Local Telephone Competition Enforcement*. Available at: <http://www.fcc.gov/encyclopedia/local-telephone-competition-enforcement> [accessed on 21 July 2013].

²²⁸³ FCC, *Market Disputes Resolution Division*. Available at: <http://www.fcc.gov/eb/mdrd/> [accessed on 2 July 2013].

²²⁸⁴ FCC, *Primary Jurisdiction Referrals Involving Common Carriers*, 2000. Available at: http://www.fcc.gov/eb/Public_Notices/da002606.html [accessed on 2 July 2013].

²²⁸⁵ FCC, *FCC's Local Telephone Competition Enforcement*. Available at: <http://www.fcc.gov/encyclopedia/local-telephone-competition-enforcement> [accessed on 2 July 2013].

²²⁸⁶ *Ibid.*

²²⁸⁷ *Ibid.*

²²⁸⁸ FCC, *Before the Federal Communications Commission: In the Matter of Bright House Networks, LLC, et al., (Complainants) v. Verizon California, Inc., et al., (Defendants): Memorandum Opinion and Order*, 2008. Available at: <http://www.fcc.gov/eb/Orders/2008/FCC-08-159A1.html> [accessed on 2 July 2013].

is served a formal complaint must answer the complaint outlining the facts, disputed facts and legal issues of the matter within twenty days of service of the formal complaint by the complainant.²²⁸⁹

At the initial stages of any complaint proceeding, the FCC may direct the attorneys and/or the parties to appear before it for a status conference. A status conference may include discussion of the issue to narrow the dispute, settlement of all or some of the disputed matters by an agreement, determination of the necessity and the scope of discovery.²²⁹⁰

The pre-trial discovery (fact-finding) process permits the complainant to file with the FCC and serve on a defendant, concurrently with its complaint, a request for up to ten written interrogatories (questions to be answered under oath by the defendant). These may be used as evidence in the administrative hearing. A defendant may also file with the Commission and serve on a complainant, a request for up to ten written interrogatories. Within three days of receiving the defendant's answers, a complainant may serve on a defendant a further five written interrogatories.

Requests for interrogatories may be used to seek discovery of any non-privileged matter that is relevant to the material facts in dispute in the pending proceeding. Requests for additional interrogatories by a complainant after the defendant has submitted its response to the initial interrogatories must be limited in scope to specific factual allegations made by the defendant in its response. This procedure may not be employed for the purpose of delay, harassment or obtaining information that is beyond the permissible scope (*Rules*).

The FCC may allow additional discovery, including, but not limited to, document production, depositions and/or additional interrogatories. In its discretion, the FCC may modify the scope, means and scheduling of discovery in light of the needs of a particular case and the requirements of applicable statutory deadlines (*Rules*).

At the conclusion of the evidentiary phase of a proceeding, the Presiding ALJ writes and issues an initial decision, which may be appealed to the FCC.²²⁹¹ This initial decision becomes the final decision 50 days after its release if exceptions are not filed within 30 days thereafter, unless the FCC elects to review the case on its own motion.²²⁹²

Throughout the formal complaint process, the parties to a complaint action may file motions requesting FCC orders addressing a wide variety of procedural and substantive issues. Generally, the parties may file oppositions to such motions within ten days after the motion is served.²²⁹³

In certain circumstances, disputes may be resolved under an accelerated schedule called the 'Accelerated Docket' which leads to a written staff-level decision within 60 days from the filing of the complaint. The Accelerated Docket rules set out the procedures that must be followed if a fast-track process is to be used. Among other things, staff must engage in pre-filing settlement discussions with the parties. As a result many disputes are settled without the need to file a formal complaint. Accelerated Docket decisions are subject to FCC Approval. If parties to the proceeding file comments in relation to the recommended decision,²²⁹⁴ the FCC will issue its decision adopting or modifying the recommended decision within 30 days of the filing of the final comments.²²⁹⁵

²²⁸⁹ FCC, *Rules*. Available at: <http://www.fcc.gov/eb/mdrd/rules/cmpl.html> [accessed on 2 July 2013].

²²⁹⁰ *Ibid*.

²²⁹¹ FCC, *Office of Administrative Law Judges*. Available at: <http://www.fcc.gov/office-administrative-law-judges> [accessed on 2 July 2013].

²²⁹² FCC, *Before the Federal Communications Commission: In the Matter of Florida Cable Telecommunications Association, Inc.; Comcast Cablevision of Panama City, Inc.; Mediacom Southeast, L.L.C.; and Cox Communications Gulf, L.L.C., (Complainants) v. Gulf Power Company, (Respondent)*, 2007. Available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07D-01A1.doc [accessed on 2 July 2013].

²²⁹³ FCC, *In the Matter of Implementation of the Telecommunications Act of 1996: Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers: Notice of Proposed Rulemaking*, 1996. Available at: http://www.fcc.gov/Bureaus/Common_Carrier/Notices/1996/fcc96460.txt [accessed on 2 July 2013].

²²⁹⁴ Comments Challenging Recommended Decision, File No. EB-08-MD-002 (filed Apr. 28, 2008); Comments of Verizon in Support of Recommended Decision, File No. EB-08-MD-002 (filed May 13, 2008); Complainants' Reply Comments Challenging the Recommended Decision ('Reply Comments'), File No. EB-08-MD-008 (filed May 23, 2008).

²²⁹⁵ FCC, FCC No. 08-159A, 23 June 2008. Available at: <http://www.fcc.gov/eb/Orders/2008/FCC-08-159A1.html> [accessed on 2 July 2013].

Alternative dispute resolution (ADR) is authorised under the *Administrative Dispute Resolution Act* and *Negotiated Rulemaking Act*.²²⁹⁶ Where appropriate, the FCC uses ADR as an alternative to litigation to resolve complaints and has been placing increased emphasis on this mechanism as a way to resolve formal complaints. The use of ADR may include the use of consent decrees (a judicial decree expressing a voluntary agreement between parties in a dispute) that avoid the delay and expense of litigation. If a party is interested in a consent decree, it can approach the FCC at any stage in the process. However, there is no right to a consent decree and the FCC will only enter into one if it considers that it is in the public interest to do so.²²⁹⁷

The FCC encourages parties to contact its Markets Dispute Resolution Division (MDRD) staff before filing a formal complaint to describe the issues raised in the dispute and to discuss the appropriateness of pre-complaint mediation. The MDRD has a mediation program specifically set up to encourage settlement of disputes without a formal complaint. According to the FCC, this program has been successful in resolving many cases that would otherwise have become formal complaints.²²⁹⁸ The MDRD's mediation process is a prerequisite before a complaint can be resolved using the Accelerated Docket procedures.²²⁹⁹

An investigation initiated by the FCC is commenced with a letter of inquiry to the company under investigation seeking information regarding compliance and may include questions that must be answered under oath and a request for documents.

FCC staff will then evaluate the response and may issue follow-up questions before deciding whether to recommend or take enforcement action. The investigations are confidential unless and until enforcement action is taken. If the facts indicate a potential violation of law, the agency may initiate enforcement action or seek a consent decree. In the circumstance in which a party fails to comply with the FCC Order, an interim injunctive relief will automatically take effect, suspending the party's contentious action until a final decision is set down. The matter will then be set for hearing.²³⁰⁰ In extreme cases, the Enforcement Bureau may recommend to the Commission that it initiate hearing proceedings to revoke a licence or authorisation.

The FCC may begin a rule-making with a Notice of Inquiry (NOI) or a notice of proposed rule-making (NPRM) for the purpose of gathering information on a broad subject or as a means of generating ideas on a specific issue. NOIs are initiated either by the FCC or an outside request. After reviewing comments from the public, the FCC may issue a Notice of Proposed Rulemaking (NPRM). An NPRM contains proposed changes to the FCC's rules and seeks public comment on these proposals. After reviewing comments on the NPRM, the FCC may also choose to issue a Further Notice of Proposed Rulemaking (FNPRM) regarding specific issues raised in comments. The FNPRM provides opportunity for further comment on a related or specific proposal. After considering comments on a NPRM or an FNPRM, the FCC will issue a Report and Order (R&O). The R&O may develop new rules, amend existing rules or make a decision not to do either. Parties can appeal decisions by filing a Petition for Reconsideration within 30 days from the date the R&O appears in the *Federal Register*. In response to the Petition for Reconsideration, the FCC may issue a Memorandum Opinion and Order or an Order on Reconsideration amending the new rules or stating that the rules will not be changed. The FCC's specific procedures are delineated in Title 47 of the *Code of Federal Regulations Subpart C*.²³⁰¹

The Consumer Advisory Committee (CAC) was chartered by the FCC in November 2000 under the *Federal Advisory Committee Act*. The *Federal Advisory Committee Act* is the legal foundation defining how federal advisory committees operate. It has a special emphasis on open meetings,

²²⁹⁶ FCC, *Code of Federal Regulations: Title 47 – Telecommunications Part 1- Practice and Procedure*. Available at: http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&tpl=/ecfrbrowse/Title47/47cfr1_main_02.tpl [accessed on 2 July 2013].

²²⁹⁷ FCC, *Enforcement Primer*. Available at: <http://www.fcc.gov/encyclopedia/enforcement-primer> [accessed on 1 July 2013].

²²⁹⁸ FCC, *Market Disputes Resolution Division*. Available at: <http://www.fcc.gov/eb/mdrd/> [accessed on 2 July 2013].

²²⁹⁹ FCC, *Local Telephone Competition and Other Common Carrier Market Violations*. Available at: <http://www.fcc.gov/eb/LoTelComp/lccocmv.html#FS208> [accessed on 2 July 2013].

²³⁰⁰ FCC, *Commission Orders Comcast to End Discriminatory Network Management Practices*, 2008. Available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-284286A1.doc [accessed on 2 July 2013].

²³⁰¹ *Electronic Code of Federal Regulations*, Title 47: Telecommunications. Available at: http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&SID=3c457154a0e486e53c3395504b2cd836&tpl=/ecfrbrowse/Title47/47cfr1_main_02.tpl [accessed on 1 July 2013].

chartering, public involvement and reporting. The CAC is a federal advisory committee whose mission is make recommendations to the FCC regarding consumer issues within the FCC's jurisdiction and to facilitate the participation of consumers (including people with disabilities, and under-served populations such as Native Americans and people in rural areas) in proceedings before the FCC, including rulemaking processes.

Under the Federal legislation, the CAC's charter must have a termination date, although the CAC can be and routinely is re-chartered prior to that date. The CAC currently has 31 members representing consumers, state, local and Native American tribal governments, and the telecommunications and media industries.²³⁰² The CAC reports to the Chairman of the FCC. It is located within the FCC's Consumer and Governmental Affairs Bureau and the FCC provides facilities and support staff (estimated at 2.25 full-time equivalents) necessary to conduct the CAC's meetings. The CAC must meet at least twice a year. Meetings are open to the public and must be advertised in advance in the *Federal Register* and on the Internet.

Timeliness

Any carrier upon which a copy of a formal complaint is served must answer the complaint within 20 days of receiving the complaint, unless otherwise directed by the Commission.²³⁰³ Failure to do so may result in financial penalties.

Answers or objections to interrogatories are due within 30 days after service of the interrogatories, or the defendant may respond within 15 days after its answer to the complaint is filed, whichever date is later.²³⁰⁴

Information Disclosure and Confidentiality

Information gathering largely occurs during the pre-trial discovery (fact-finding) process. This process permits the complainant and the defendant to file with the FCC and serve on a defendant ten interrogatories (questions to be answered under oath by the defendant).

Requests for interrogatories may be used to seek discovery of any non-privileged matter that is relevant to the material facts in dispute in the pending proceeding. Requests for additional interrogatories by a complainant after the defendant has submitted its response to the initial interrogatories answer must be limited in scope to specific factual allegations made by the defendant in its response. This procedure may not be employed for the purpose of delay, harassment or obtaining information that is beyond the scope of permissible inquiry related to the material facts in dispute in the pending proceeding.²³⁰⁵

Any materials generated in the course of a formal complaint proceeding may be designated as confidential if the party believes in good faith that the materials fall within an exemption to disclosure contained in the *Freedom of Information Act (FOIA)* (see the nine exemptions identified previously). If this is challenged, the party claiming confidentiality must demonstrate that the material falls under the standards for nondisclosure as stated in the FOIA.

Materials commercially in confidence (c-i-c) may, however, be disclosed to counsel, officers of the opposing party, consultants or expert witnesses, court reports and the FCC for use in prosecuting or defending a party to the complaint action, and only to the extent necessary to assist in the prosecution or defence of the case. These individuals shall not disclose confidential information to any person who is not authorised to receive this information, and shall not use the information in any activity or function other than the prosecution or defence in the case before the FCC.

²³⁰² Consumer Advisory Committee, *Charter*. Available at: [Consumer Advisory Committee](#), [accessed on 2 July 2013].

²³⁰³ *Electronic Code of Federal Regulations*, Title 47: Telecommunications, ss 1.221 Notice of Hearing; Appearances. Available at: <http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&SID=539844342368520e5c419c8769c3cc45&rgn=div8&view=text&node=47:1.0.1.1.2.2.154.9&idno=47> [accessed on 1 July 2013].

²³⁰⁴ FCC, *In the Matter of Implementation of the Telecommunications Act of 1996: Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed against Common Carriers: NOTICE OF PROPOSED RULEMAKING*, 1996. Available at: http://www.fcc.gov/Bureaus/Common_Carrier/Notices/1996/fcc96460.txt [accessed on 2 July 2013].

²³⁰⁵ FCC, *Rules and Regulations for Title 47*. Available at: <http://www.fcc.gov/encyclopedia/rules-regulations-title-47> [accessed on 2 July 2013].

The *Freedom of Information Act 1966* governs public access to Federal records, excluding information pursuant to the exemptions and exclusions outlined previously.²³⁰⁶ When one of these FOIA exemptions applies, the FCC may, in some circumstances, release the records, depending upon the exemption at issue and the circumstances of the FOIA request.

Publicly available FCC records, including records from docketed cases, broadcast applications and related files, petitions for rulemakings, various legal and technical publications, and legislative history compilations, are usually available on the FCC's website. Documents may also be viewed in the FCC's Reference Information Centre at the FCC's Headquarters.²³⁰⁷ In addition, the *Daily Digest*, which is released via email and on the FCC website, provides a brief summary of the FCC's opinions, orders, policy statements, news releases, speeches and public notices.

Decision-making and Reporting

Pursuant to s.5(c) of the *Communications Act*, the Commission may delegate authority to its staff to act on matters which are minor, routine or settled in nature and those in which immediate action may be necessary. Actions taken under delegated authority are subject to review by the Commission. Except for the possibility of review, actions taken under delegated authority have the same force and effect as actions taken by the Commission.²³⁰⁸

Matters that require or warrant Commission action are dealt with by the Commission at regular monthly meetings, or at special meetings called to consider a particular matter. Notices of meetings are placed on the Federal Register and made available to the press.²³⁰⁹ Commission meetings are open to the public except in circumstances set out in the legislation.²³¹⁰ In some instances, Commission action may be taken between meetings 'by circulation'. This involves the submission of a document to each of the Commissioners for his/her approval.²³¹¹

A complete transcript or electronic recording is made available unless the meeting has been closed to the public. If the meeting is closed, the FCC may maintain minutes in lieu of a transcript or recording. The minutes should include a full and accurate summary of actions taken and the reasons for such actions, including the different views expressed and a record of any roll call vote. The Office of the Secretary maintains a public record of transcripts or minutes. Copies of transcripts may be obtained without charge.²³¹²

Formal complaints are adjudicated by an administrative hearing presided over by a FCC-appointed ALJ. Judges are assigned to cases in rotation so far as practicable, and may not perform duties inconsistent with their duties and responsibilities as ALJs (the *Federal Administrative Procedure Act*, s.3105).

The information in front of the ALJ in making his/her decision includes the complaint, answer, and joint statement of stipulated facts, disputed facts and key legal issues, along with all associated affidavits, exhibits and other attachments. Commission proceedings may also require or permit other written submissions such as briefs, written interrogatories, and other supplementary documents or pleadings.

The Presiding ALJ issues an Initial Decision which may be appealed to the FCC.²³¹³ This Initial Decision becomes the final decision 50 days after its release if exceptions are not filed within 30 days thereafter or the FCC elects to review the case on its own initiative.²³¹⁴

²³⁰⁶ United States Department of Justice, *Freedom of Information Act*. Available at: <http://www.usdoj.gov/oip/> [accessed on 2 July 2013]

²³⁰⁷ FCC, 'Freedom of Information Act'. <http://www.fcc.gov/encyclopedia/freedom-information-act/> [accessed on 21 July 2013].

²³⁰⁸ *Code of Federal Regulations*, Title 47.05. Available at: http://edocket.access.gpo.gov/cfr_2007/octqtr/47cfr0.5.htm [accessed on 2 July 2013].

²³⁰⁹ *Code of Federal Regulations*, Title 47.0605. Available at: http://edocket.access.gpo.gov/cfr_2007/octqtr/47cfr0.605.htm [accessed on 2 July 2013].

²³¹⁰ *Code of Federal Regulations*, Title 47.0602. Available at: http://edocket.access.gpo.gov/cfr_2007/octqtr/47cfr0.602.htm [accessed on 2 July 2013].

²³¹¹ *Code of Federal Regulations*, Title 47.05, op. cit.

²³¹² *Code of Federal Regulations*, Title 47.0607. Available at: http://edocket.access.gpo.gov/cfr_2007/octqtr/47cfr0.607.htm [accessed on 2 July 2013].

²³¹³ FCC, *Office of Administrative Law Judges*. Available at: <http://www.fcc.gov/oalj/html> [accessed on 2 July 2013].

The FCC only makes decisions with respect to dispute resolution when the case has been initiated by the FCC (some of these decisions may still be determined in an administrative hearing); an initial decision by an ALJ is appealed to the Commission²³¹⁵ or a fast-track decision is made by the Market Disputes Resolution Division.²³¹⁶

All US government decisions and announcements are published daily in the *Federal Register*. In addition, FCC's rulemakings, timelines for proceedings, licensing decisions, and announcements are available on its website. The FCC's decisions are also available in hard copy in the FCC Record. A summary document may be published as a public notice if the original decision document contains confidential material. In addition, the official record of all actions taken by an ALJ, including initial and recommended decisions, public information used in making the decisions, and actions taken, is contained in the original docket folder, which is maintained in the Reference Information Centre of the Consumer and Governmental Affairs Bureau.²³¹⁷

The FCC publishes reasons for its decisions and each commissioner publishes a statement of dissent from, or support for, a commission decision, outlining their individual position on the issue.

Appeals

The *Administrative Procedures Act* sets out a review and appeal process for all government agencies, and requires that all decisions be justified. The Act sets out an entitlement for judicial review for a person who suffers legal wrong because of agency action, or is adversely affected or aggrieved by an agency's action within the meaning of a relevant statute.

A petition for reconsideration, which relies on facts that have not previously been presented to the FCC, will be granted only where:

- the facts relied on relate to events which have occurred or circumstances which have changed since the last opportunity to present them to the FCC;
- the facts relied on were unknown to the petitioner until after the last opportunity to present them to the FCC, and could not have been learned prior to such opportunity through the exercise of ordinary diligence, or
- the FCC determines that consideration of the facts relied on is required in the public interest.

The FCC may grant a petition for reconsideration in whole or in part or may deny the petition. Its order will contain a concise statement of the reasons for the action taken. Any order disposing of a petition for reconsideration which modifies rules adopted by the original order is, to the extent of such modification, subject to reconsideration in the same manner as the original order.

3. Postal Services

The United States Postal Service (USPS) is an independent establishment of the executive branch of the United States Government, responsible for providing postal services in the US. It is governed by the eleven-member Board of Governors, nine of whom are presidentially appointed. Governors serve up to two terms of seven years.²³¹⁸

The USPS has an exclusive legal right to deliver non-urgent first-class, outbound US international letters and to put mail into private mailboxes. Deliveries are made on six days of the week. Competition in 'extremely urgent letters' is allowed under certain conditions. The USPS is restricted from operating in some markets; including the provision of office supplies.

²³¹⁴ FCC, Before the Federal Communications Commission: In the Matter of Florida Cable Telecommunications Association, Inc.; Comcast Cablevision of Panama City, Inc.; Mediacom Southeast, L.L.C.; and Cox Communications Gulf, L.L.C., (Complainants) v. Gulf Power Company, (Respondent), 2007. Available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07D-01A1.doc [accessed on 2 July 2013].

²³¹⁵ FCC, *Office of Administrative Law Judges*. Available at: <http://www.fcc.gov/oalj.html> [accessed on 2 July 2013].

²³¹⁶ FCC, *FCC-08-159A1*. Available at: <http://www.fcc.gov/eb/Orders/2008/FCC-08-159A1.html> [accessed on 2 July 2013].

²³¹⁷ FCC, *Code of Federal Regulations: Title 47 – Telecommunications Part 1 - Practice and Procedure*, 2008. Available at: http://www.access.gpo.gov/nara/cfr/waisidx_07/47cfr1_07.html [accessed on 2 July 2013].

²³¹⁸ United States Postal Service, *About the Board of Governors*. Available at: <http://about.usps.com/who-we-are/leadership/board-governors.htm> [accessed on 2 July 2013]

The financial performance of the USPS has been weak in recent years, with net operating losses in each year since 2006-07. Currently, the USPS is experiencing losses that are accelerating through 2012-13. Mail volumes have fallen 21 per cent between 2008 and 2012. As reported in the 2010-11 *Annual Report* of the Postal Rates Commission:

The Postal Service has continued to report significant losses through FY 2011.4. Since the passage of PAEA in FY 2007, total losses have been \$25.3 billion. However, \$20.9 billion has been spent to pre-fund retiree health benefits as required by PAEA and \$6.1 billion has been for non-cash adjustments to the workers compensation liability. Without those charges to the income statements, the Postal Service would have recorded a net income of approximately \$1.6 billion since FY 2006.

Of greatest impact to USPS revenue are electronic alternatives to correspondence and transactions, particularly for first-class mail items such as business correspondence, bills, statements, and customer payments. On the other hand, the Internet and electronic commerce also have some positive effect on mail volume, by stimulating new uses of postal services, such as package delivery and targeted advertising mail. The USPS's business-to-consumer parcel service, Parcel Select Mail, has seen volumes grow by 26 per cent between 2008 and 2012.²³¹⁹ There is now emerging competition in priority mail, express mail, bulk parcel post and bulk international mail. FedEx and UPS have the substantial market share in express, priority mail and package delivery. FedEx and UPS use the USPS for 'last-mile' delivery in many areas where it would cost them too much to deliver. Foreign postal operators such as DHL and TNT have established operations in the United States, offering express delivery, logistics, financial, and electronic services.

Regulatory Institutions and Legislation

The Postal Regulatory Commission (PRC) is an independent federal regulator that was established in 1970. Initially, it only had the power to make recommendations on rates and mail classifications to the Board of Governors in the USPS and to hear complaints.²³²⁰ It was reorganised with new legislation and powers in 2006, from then with the power actually to set postal rates charged by the USPS. This change is in accordance with the enactment of The *Postal Accountability and Enhancement Act* (PAEA), an amendment to the *Postal Law* (Title 39 of the *United States Code*), on 20 December 2006. The *Postal Accountability and Enhancement Act* introduced some significant regulatory development in the postal industry, giving the PRC considerably enhanced regulatory power and change the way the USPS can operate. The PRC is located in Washington DC.

The PRC consists of five Commissioners who are appointed by the President with the advice and consent of the Senate for six-year terms.²³²¹ A Commissioner may continue to serve after the expiration of his/her term for up to one year or until a successor is confirmed. The Chairman is designated by the President and usually is a member of the President's political party. Only three Commissioners may be members of the same political party. The Vice Chairman of the PRC is elected by majority vote of the Commissioners and acts as Chairman in the Chairman's absence.

The Commissioners are chosen solely on the basis of their qualifications and expertise in economics, accounting, law, or public administration, which are necessary for carrying out their responsibilities prescribed under the *Postal Accountability and Enhancement Act*. They may be removed by the President only for cause.

The PRC is assisted by a staff that has expertise in law, economics, finance, statistics, and cost accounting. It is organised into four operating offices: Accountability and Compliance; General Counsel; Public Affairs and Government Relations; and Secretary. In addition, the PRC maintains an independent office for its Inspector General.

The Office of Accountability and Compliance is responsible for technical analysis and formulation of policy recommendations for the PRC in both domestic and international matters. It provides the

²³¹⁹ United States Postal Service, *2012 Annual Report to Congress*, 2012, p. 21. Available at: <http://about.usps.com/publications/annual-report-comprehensive-statement-2012/annual-report-comprehensive-statement-2012.pdf> [accessed on 1 July 2013].

²³²⁰ Postal Regulatory Commission (PRC), *About the Postal Regulatory Commission*. Available at: <http://www.prc.gov/prc-pages/about/default.aspx> [accessed on 2 July 2013].

²³²¹ US Congress, *Postal Accountability and Enhancement Act, Public Law 109-435*, 20 December 2006, s. 3238.

analytic support for PRC review of rate changes, negotiated service agreements, classifications of new products, post office closings, and other issues. The Office evaluates USPS accounting records, financial reports, and other financial data to assess accuracy, completeness, and conformance to reporting and procedural standards established by the PRC. The Office assists the PRC in its annual determinations of compliance with service performance standards and the preparation of the annual report to the President and Congress.

The PRC pursues a complex mission, vision and set of strategic goals, under eight guiding principles. The objectives are perhaps best encapsulated in the headline to the Mission statement – ‘The Commission will ensure transparency and accountability of the United States Postal Service and foster a vital and efficient postal system that includes universal service.’

The postal legislation classifies postal products into two categories based on a market power criterion: market dominant or competitive product.²³²² It grants the USPS greater price flexibility because of the move from rate-of-return regulation to price-cap regulation. That is, the annual rate of increase for each class of market-dominant products is capped at the CPI-U which is ‘the seasonally unadjusted Consumer Price Index for All Urban Consumers over the most recent annual period preceding the date the USPS files notice of its intention to increase rates’.²³²³ Each product must cover its attributable costs plus a reasonable contribution to cover institutional costs. Following these changes, the USPS was required to adopt a profit-loss model instead of the previous break-even model.

The PRC is required to establish a modern system of rate and mail class regulation for market dominant products that provides transparency and accountability of the postal service.²³²⁴ The PRC also has an enhanced oversighting responsibility over USPS-specific issues, including annual compliance determinations, development of accounting practices and procedures for the review of the Universal Service requirement, and assurance of transparency through periodic reports. New enforcement tools include subpoena powers, authority to direct the USPS to adjust rates and to take other remedial actions, and power to levy fines in cases of deliberate non-compliance with applicable postal laws.

Following its re-establishment, the PRC started the process of fulfilling its obligation of rule-making. It has finalised a number of rules, including:

- Final rules on regulating rates and mail classifications, issued in October 2007 and came effective on 10 December 2007.²³²⁵
- Final rules on complaints and rate of service inquires, issued on 24 March 2009.²³²⁶
- Final rules on periodic report with respect to financial and operating cost information, issued on 16 April 2009.²³²⁷
- Periodic Reporting Rules on Service Performance Measurement and Customer Satisfaction on 25 May 2010.

It is yet to finalise its rules for periodic reporting of service performance and the cost of the Universal Service Obligation. Concerning the method of calculating the cost of the Universal Service Obligation, presently the Postal Service expresses a belief that the ‘profitability’ method is the sole realistic method to place a cost on the Universal Service Obligation.²³²⁸

As required, the PRC submitted a report to the President and Congress on universal service and the postal monopoly in December 2008, after consulting with the public and soliciting written comments

²³²² US Congress, *Postal Accountability and Enhancement Act*, Public Law 109–435, 20 December 2006, s. 3642 (b) (1).

²³²³ *United States Code*, Title 39, s. 3622, d (1)(A).

²³²⁴ US Congress, *Postal Accountability and Enhancement Act*, Public Law 109–435, 20 December 2006.

²³²⁵ PRC, *Order Establishing Rate-Making Regulations for Market Dominant and Competitive Products*, Docket No. RM2007–1, 29 October 2007 and Postal Regulatory Commission, *Rules of Practice and Procedure – 39 CFR (Code of Federal Regulations) 2001, 3010, 3015, 3020*, 10 December 2007.

²³²⁶ PRC, *PRC Issues Final Rules for Complaints and Rate of Service Inquires*, Press Release, 24 March 2009.

²³²⁷ PRC, *PRC Issues Final Rules on the Form and Content of Periodic Reports*, Press Release, 16 April 2009.

²³²⁸ PRC, *Report on Universal Postal Service and the Postal Monopoly*. Available at: <http://www.prc.gov/Docs/61/61628/USO%20Report.pdf> [accessed on 1 July 2013].

from the USPS.²³²⁹ In the report, the PRC reviewed the current scope and the historical development of universal service and the postal monopoly in the US, in addition to some other countries. While there is no recommendation on changes to either the universal service or the monopoly, the PRC suggests some policy considerations if the changing economic situation merits changes.

Other advisory roles of the PRC include the following:

- A report to Congress as part of the latter's five-year review to determine if the institutional cost contribution requirements specified in the rule applicable to competitive products should be retained in its current form, modified, or eliminated.²³³⁰
- A report to Congress as part of the latter's ten-year review on the modern system for regulating rates and classes for market-dominant products to determine whether the system is achieving the *Postal Accountability and Enhancement Act's* objectives.²³³¹

The US has broadly adopted the regulatory approach which views the postal network as an essential public infrastructure that is uneconomic to duplicate. To this end, downstream access regulation, which governs 'worksharing activities', has been established by law as part of rate and mail class regulations. Postal worksharing activities generally involve mailers preparing, bar-coding, presorting, or transporting minimum volumes of mail to qualify for reduced postage rates. These bulk-mailing activities allow mailers to bypass some USPS mail processing and transportation operations.

Historically workshare discounts have been considered in successive postal rate and reclassification cases, dating back to 1976, when the first workshare discount of one cent was determined in a mail reclassification case. The structure of workshare discounts has evolved over subsequent years and the PRC developed a guideline for recommending workshare discounts under the efficient component pricing rule (ECPR).²³³²

Title 39 of the *United States Code* provides the primary legal basis for workshare discounts. It specifies that one of the statutory factors considered by the PRC in recommending or determining rates is 'the degree of preparation of mail for delivery into the postal system performed by the mailer and its effect upon reducing costs to the USPS'.²³³³ It is a statutory requirement that workshare discounts do not exceed the cost that the USPS avoids as a result of worksharing activity unless justified by at least one of four exceptions.²³³⁴

Two subsections of the *Postal Accountability and Enhancement Act* make specific references to workshare discounts:

- s.3622 (e) refers to workshare discounts relating to modern rate regulation. It defines workshare discounts as 'rate discounts provided to mailers for the pre-sorting, pre-bar-coding, handling, or transportation of mail (and further defined by the PRC)'.
- s.3652 (b) refers to information relating to a workshare discount for each market-dominant product that the USPS is required to report in its annual compliance report, including the per-item avoided costs by the USPS in absolute and percentage value and the per-item contribution made to institutional costs.

Consultation of Interested Parties

As discussed before, the PRC has a role in a number of postal service matters, such as changing rates and mail classifications, hearing complaints, changing the workshare discount, and annual compliance assessment. The PRC also has an advisory role in regard to industry-wide issues such as the development of postal services.

²³²⁹ PRC, *Report on Universal Postal Service and the Postal Monopoly*, 19 December 2008. Available at: <http://www.prc.gov/Docs/61/61628/USO%20Report.pdf> [accessed on 2 July 2013].

²³³⁰ *United States Code*, Title 39, s. 3633 (a) (3).

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²³³² United States General Accounting Office, *US Postal Service – Key Elements of Comprehensive Postal Reform*, Testimony before the Special Panel on Postal Reform and Oversight, Committee on Government Reform, House of Representatives, 28 January 2004, p. 18.

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²³³⁴ US Congress, *The Postal Accountability and Enhancement Act*, Public Law 109–435, 20 December 2006, s. 3622 (e) (2).

Rate change and mail reclassification (covering worksharing activities) matters may arise through the following channels:

- formal request made by the USPS that the PRC submits a recommended decision on whether the proposed rates comply with the CPI-U regulation;
- complaints lodged by other parties;
- the PRC's annual determination of compliance; or
- mail re-classification proposed by the USPS or initiated by the PRC.

By law, the USPS is required to give public notice of any rate adjustment for a market dominant product no later than 45 days before the implementation of the adjustment (subject to exceptions).²³³⁵ The process for assessing the proposed rate adjustments from the USPS involves:

Notice of intention to adjust: the USPS must file with the PRC a formal request for a recommended decision on its proposed rate changes. The request must be accompanied by a schedule of the applicable workshare discounts, a companion schedule listing the corresponding avoided costs and a separate justification for all proposed workshare discounts that are set substantially below avoided costs.

Dockets: The PRC will establish a docket for each rate-adjustment filing and publish notice of the filing in the *Federal Register*. The filing will be posted on its website.²³³⁶ The PRC also designates an officer of the PRC to represent the interests of the general public.

Public comment: The public comment process continues for 20 days from the date of the filing.²³³⁷

Determination: The PRC makes its determination on the compliance of the proposed rates with the price cap by issuing an order within 14 days of the conclusion of the public-comment period.

Amendments if applicable: If the PRC determines that all or part of the proposal is not in compliance with the price cap, the USPS must respond to the PRC's notice of non-compliance and describe the action to be taken to comply with the price-cap requirement. In this case, there will be another ten-day period for public comment and a 14-day review period. If the amended rate adjustments are still found by the PRC to be non-compliant, the PRC shall explain the basis of its determination and suggest a remedy.

Rate adjustment. Rates cannot be implemented until at least 45 days after the USPS files a notice of rate adjustment that is consistent with the price-cap regulation.

The process followed for settling a rate and service complaint, lodged by any interested person (including an officer of the PRC representing the interests of the general public) seeking an order granting remedial relief, is similar. The statutory period for determination is 90 days after receiving the complaint. The determination must be in writing and will depend on whether the PRC finds that such a complaint raises material issues of fact or law.²³³⁸ If the complaint is found to be justified, the PRC shall order the USPS to take appropriate corrective action. In cases of deliberate non-compliance by the USPS, the PRC may order a fine (the amount is determined on the basis of the extent of non-compliance) for each incidence of non-compliance. District courts have jurisdiction specifically to enforce any order issued by the PRC.

The PRC encourages the resolution and settlement of complaints by informal *ex parte* communications procedures, including correspondence, conferences between parties, and the conduct of proceedings off the record with the consent of the parties. A summary of *ex parte* communications is placed in a public file shortly after its occurrence. The PRC is expected to issue

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²³³⁶ Within five days after the filing, the Secretary (of the PRC) shall lodge a notice with the Director of the *Federal Register* for publication in the *Federal Register*.

²³³⁷ PRC, *Order Establishing Ratemaking Regulations for Market Dominant and Competitive Products*, Docket No. RM2007-1, p. 38. Available at: <http://www.prc.gov/prc-docs/home/PAEA/FinalRulesWeb.pdf> [accessed on 1 July 2013].

²³³⁸ *United States Code*, Title 39, s. 3662.

proposed rules regarding *ex parte* procedures to ensure mandated transparency under the *Postal Accountability and Enhancement Act*.²³³⁹

In its final ruling on complaints, the PRC adopts a two-tier system that separates formal complaints from informal complaints for rate or service (referred as ‘rate or service inquires’).²³⁴⁰ The new system is considered by the PRC as ‘enabling the Commission to process complaints in a more streamlined and efficient manner’.²³⁴¹ For a complaint not resolved or settled under informal procedures, the PRC considers whether or not, in its discretion, to conduct a proceeding on the record with an opportunity for hearing. The PRC shall issue a notice of proceeding in accordance with its Rules of Practice (s.3001.17).

Similar to price regulation, downstream access regulation can either be specified *ex ante* by advance determination of workshare discounts based on pricing principle and cost calculation methodology or is performed *ex post* by acting upon *complaints* if the parties fail to come to an agreement. If the USPS establishes a workshare discount rate it must submit to the PRC a detailed report that:²³⁴²

- explains the reasons for establishing the rate;
- presents the data, economic analyses, and other information that justify the rate; and
- certifies that the discount will not adversely affect rates or services provided to mail users who do not take advantage of the discount rate.

The PRC has indicated that it will elicit remedies if the present ratemaking regulations governing workshare discounts prove to be inadequate.²³⁴³ For example, the PRC has adjusted the way it applied the workshare provision (39 USC § 3622(e)) to the relationship between single-piece First-Class Mail and commercial First Class Mail. This, combined with the cap, ‘reduces much of the Postal Service’s pricing in First-Class Mail, to be more an exercise in arithmetic rather than one of strategic marketing’.²³⁴⁴

The statutory period for the PRC’s annual compliance assessment is within 90 days after receiving the USPS’s annual compliance report on costs, revenues, rates, quality of service and workshare discounts.²³⁴⁵ The first stage in the annual determination is a public comments process whereby the PRC seeks interested parties’ comments on compliance of the USPS. The PRC may hold public hearings during this process and give notice of such a hearing in its original notice of the proceeding or in a subsequent notice issued. However, in practice it is difficult to conduct a full evidentiary hearing because of the statutory timeframe.

The process for mail re-classification due to a change in the nature of postal services offered by the USPS that has a nationwide effect generally requires that:

- the USPS submits a proposal to the PRC, within a reasonable time prior to the effective date of such proposal, requesting an advisory opinion on the change;²³⁴⁶ and that
- the PRC provides an opportunity for hearing on the record to the USPS, mail users, and an officer of the PRC who represents the general public prior to issuing a written opinion that is certified by each Commissioner.

²³³⁹ PRC, *Order Establishing Ratemaking Regulations for Market Dominant and Competitive Products*, Docket No. RM2007-1, p. 19. Available at: <http://www.prc.gov/prc-docs/home/PAEA/FinalRulesWeb.pdf> [accessed on 1 July 2013].

²³⁴⁰ PRC, *Order Establishing Rules for Complaints and Rate or Service Inquiries*, Docket No. RM 2008-3, 24 March 2009. Available at: <http://www.prc.gov/Docs/62/62762/Order195.pdf> [accessed on 2 July 2013].

²³⁴¹ PRC, *PRC Issues Final Rules for Complaints and Rate or Service Inquiries*, Press Release, 24 March 2009. Available at: [http://www.prc.gov/prc-docs/Newsroom/PressReleases/PRC%20Issues%20Final%20Rules%20for%20Complaints%20and%20Rate%20or%20Service%20Inquiries%20\(AK%20AF%20SS\).pdf](http://www.prc.gov/prc-docs/Newsroom/PressReleases/PRC%20Issues%20Final%20Rules%20for%20Complaints%20and%20Rate%20or%20Service%20Inquiries%20(AK%20AF%20SS).pdf) [accessed on 1 July 2013].

²³⁴² *United States Code*, Title 39, s. 3622, e (4).

²³⁴³ PRC, *Order Establishing Ratemaking Regulations for Market Dominant and Competitive Products*, Docket No. RM2007–1, p. 38.

²³⁴⁴ http://www.prc.gov/PRC-DOCS/UploadedDocuments/701_Report-092211_2705.pdf p. 17 [accessed on 2 July 2013].

²³⁴⁵ *United States Code*, Title 39, s. 3653.

²³⁴⁶ *United States Code*, Title 39, s. 3661.

The PRC may, on its own initiative, change mail classifications between the market-dominant and competitive categories in accordance with criteria specified under s.3642 (b) of the *Postal Accountability and Enhancement Act*. A new list of products shall be prescribed and published in the *Federal Register*.

The role of interested parties is stipulated in the legislation as follows:

- The PRC is required to designate an officer in all public proceedings (such as developing rules, regulations and procedures) to represent the interests of the general public (s.505 of the *Postal Accountability and Enhancement Act*).
- The PRC may not issue any order unless the USPS, mail users, other affected parties and a designated officer representing the general public have been given an opportunity for a hearing on the record in accordance with the *Administrative Procedure Act*.²³⁴⁷
- In relation to its annual review of the USPS's compliance, the PRC is required to provide an opportunity for comments from all the interested parties, on the Annual Compliance Report submitted by the USPS (s.3653 (a) of the *Postal Accountability and Enhancement Act*).

Timeliness

The statutory period for implementing rate changes is a minimum of 45 days while the statutory period for other regulatory work is generally 90 days.

Under the *Postal Accountability and Enhancement Act*, if the PRC fails to act in a timely manner in handling a complaint, it shall be treated in the same way as if it had been dismissed by an order issued on the last day allowable; that is, failing to identify non-compliance.

Information Disclosure and Confidentiality

The PRC has the power to disclose relevant information in fulfilling its duties, provided that it has established a procedure for accord appropriate confidentiality to information identified by the USPS as commercial-in-confidence (c-i-c).²³⁴⁸ In determining what information is treated as c-i-c, the PRC balances the nature and extent of the likely commercial injury to the USPS against the public interest in maintaining the financial transparency of a government establishment competing in commercial markets.

Where the PRC has accepted information is c-i-c, it is not able to (subject to exceptions):²³⁴⁹ use the information for purposes other than the purposes for which it is supplied; or permit anyone who is not an officer or employee of the PRC to have access to the information.

Non-confidential information is published on the web and filed with the *Federal Register*. All information other than those being determined to be confidential may be accessed remotely via the PRC's website or viewed at the PRC's dockets section during regular business hours.

The PRC's intermediate and recommended decisions, advisory opinions, public reports and orders are released to the press and promptly made available to the public by posting on the PRC's website. The public records include:²³⁵⁰

- All submissions and filings
- All other part of the formal record in any matter or proceeding set for hearing and any related PRC correspondence
- Any proposed testimony or exhibit filed with the PRC but not yet offered or received in evidence.

Decision-making and Reporting

Decisions about matters such as changes to postal rates, reclassifications and the level of the workshare discount are made by the PRC. The process followed in each case has been set out in previous sub-sections.

²³⁴⁷ *Ibid.*

²³⁴⁸ *United States Code*, Title 39, s. 504, g (3).

²³⁴⁹ *United States Code*, Title 39, s. 504.

²³⁵⁰ PRC, *Rules of Practice and Procedure*, s. 3001.42.

The PRC obtains the following information prior to making a decision:

- reports relating to the USPS's statistical cost, revenue and outputs;
- witness material such as transcript of testimony;
- reference material consisting of previously published material;
- material provided in response to discovery;
- material filed at the request of another; and
- other, including documents and detailed data and information. Data analyses in electronic form are also offered in evidence.

Decisions may be made through proceedings, which are a formal and public process conducted by the PRC Commissioners to examine an issue and produce a decision. For example, when the Postal Service decides to raise postage prices, it submits a proposal to the PRC, which conducts a proceeding to ensure that the proposal meets the requirements set by law. Other proceedings might examine service complaints, proposals for nationwide changes to service, proposals for new products and services, or suggestions for new rules and procedures. In any case, PRC proceedings are judicial in nature, with strict rules of procedure and practice. Proceedings are conducted to define the issues, clarify the facts and ensure due process for all parties so that fair and timely decisions are reached.²³⁵¹

Appeals

Judicial review on PRC's decisions is available. Any party adversely affected or aggrieved by a final order or decision of the PRC may, within 30 days after the order or decision becomes final, file a petition in the United States Court of Appeal for the District of Columbia (the US District Court of Appeal in Columbia).²³⁵² The Court shall review the order or decision on the basis of the record before the PRC in making the order or decision.

Findings of whether a planned rate adjustment is in compliance with the CPI-U price cap rule are subject to subsequent merit review.²³⁵³ Findings of whether a planned rate adjustment does not contravene other policies specified in Title 39 of the *United States Code*, Chapter 36, Subchapter 1, is provisional and subject to subsequent review.

Regulatory Development

The PRC Annual Report 2011 (p.54) notes that:

In June 2011, the Commission participated in the third Postal Regulatory Dialogue, hosted by the European Commission in Brussels. Regulators from Australia, Brazil, France and China also attended. The Postal Regulatory Dialogue was an initiative launched by the Postal Regulatory Commission in 2008 to bring together postal regulators to share best practices and exchange views on regulatory models and challenges in their respective countries. This initiative has now become an annual event with solid international support.

4. Water and Wastewater

The US has highly developed infrastructure in water and wastewater, and is internationally prominent in expertise in water and wastewater technology. Water and wastewater infrastructure systems include surface and ground water used for residential and other purposes; facilities that contain and transport raw water; treatment facilities for drinking water; reservoirs; water distribution systems; and wastewater collection and treatment facilities. Across the US, these systems comprise approximately 77 000 dams and reservoirs; tens of thousands of miles of pipes, aqueducts, water distribution, and sewer lines; 168 000 public drinking water facilities (some serving as few as 25 customers); and about 16 000 publicly owned wastewater treatment facilities. Ownership and management are both public

²³⁵¹ PRC, *Commission Proceedings and Dockets*. Available at: <http://www.prc.gov/prc-pages/ConsumerInfo/Default.aspx?section=Prctfaq> [accessed on 2 July 2013].

²³⁵² *Postal Accountability and Enhancement Act*, s. 3663.

²³⁵³ PRC, *Rules of Practice and Procedure*, s. 3010.13 (j).

and private. The federal government has ownership responsibility for hundreds of dams and diversion structures, but the vast majority of the nation's water infrastructure is either privately owned or owned by non-federal units of government (mainly public ownership).²³⁵⁴

Around 86 per cent of the United States gets its water from a public supply system, with the majority of the remainder being self-supplied groundwater. Self-supplied withdrawals account for only one per cent of total withdrawals. Surface water in the US is untreated in areas with protected watersheds such as Boston, New York, San Francisco and Denver, while cities that obtain water from the lower reaches of rivers rely on expensive water purification plants. Some western cities rely on pipelines, with water being diverted from its basin of origin to more arid regions.

The Water Infrastructure Network (WIN) is an organisation comprised of members that are local government officials, drinking water and wastewater service providers, state environmental and health administrators, engineers and environmentalists.²³⁵⁵ It engages in activities that encourage support for adequate infrastructure funding at federal, state and local government levels.

Regulatory Institutions and Legislation

Regulation of water and wastewater in the US is split between the Federal and state governments, with the main responsibility for economic regulation being at the state level.

Federal regulation occurs through the United States Environmental Protection Agency's Office of Wastewater Management (OWM) that oversees a range of programs contributing to the well-being of the nation's waters and watersheds. The Office of Water consists of five main offices:

- American Indian Environmental Office
- Office of Wetlands, Oceans and Watersheds
- Office of Science and Technology
- Office of Wastewater Management (OWM)
- Office of Ground Water and Drinking Water.

Through its programs and initiatives, the OWM promotes compliance with the requirements of the *Federal Water Pollution Control Act*. The OWM states that cleaning and protecting the nation's water is an 'enormous task'. Under the *Clean Water Act*, the OWM works in partnership with Environmental Protection Agency (EPA) regions, states and tribes to regulate discharges into surface waters such as wetlands, lakes, rivers, estuaries, bays and oceans. Specifically, the OWM focuses on control of water that is collected in discrete conveyances (also called point sources), including pipes, ditches, and sanitary or storm sewers.

State Regulation

At the state level, the economic regulation of the water and wastewater industry is generally in the form of rate regulation, market monitoring and service quality monitoring. Consider, for example, the regulatory institutions in California and the approach in Washington State.

The California Department of Water Resources (CDWR) has the mission to:²³⁵⁶

manage the water resources of California in cooperation with other agencies, to benefit the State's people, and to protect, restore, and enhance the natural and human environments.

It is responsible for flood protection, water management, water planning management, public safety and security, and water projects.

²³⁵⁴ OECD, *Managing Water for All: An OECD Perspective on Pricing and Financing*, 2009, p. 39. Available at: <http://www.oecd.org/env/42350563.pdf> [accessed on 1 July 2013]; Congressional Research Service, *Terrorism and Security Issues Facing the Water Infrastructure Sector*, 2007. Available at: <http://ftp.fas.org/sgp/crs/terror/RL32189.pdf> [accessed on 1 July 2013].

²³⁵⁵ Water Infrastructure Network, *Water Infrastructure Now*, 2001. Available at: <http://www.win-water.org/reports/winow.pdf> [accessed on 21 July 2013].

²³⁵⁶ California Department of Water Resources, *Mission and Goals*. Available at: <http://www.water.ca.gov/about/mission.cfm> [accessed on 2 July 2013].

The California EPA was established in 1991 as a single State Cabinet level environmental authority unifying the Air Resources Board (ARB), State Water Resources Control Board (SWRCB), Regional Water Quality Control Boards (RWQCBs) and the Integrated Waste Management Board (IWMB). It assists the federal EPA (see above) in environmental protection.

The California PUC (CPUC) has the following responsibilities over water and wastewater under the state's *Public Utilities Act*.²³⁵⁷

- Investigating water and sewer system service quality issues
- Analysing and processing utility rate change requests
- Performing auditing, accounting and financial services and running water public program to track and certify water companies' compliance with CPUC requirements.

It appears that regulatory processes and practices followed by the CPUC are not specific to an industry or a sector. The rest of this section summarises the six elements of the CPUC's regulatory process and practice relating to water and wastewater.

Matters arise before the CPUC through: complaints lodged by any parties; applications of rate increases by a regulated company; or the CPUC's own initiatives to investigate or make rules.

Timelines applicable to the completion of various stages of the regulatory process are clearly specified, but can be extended except for statutory deadlines. There is no statutory requirement for pre-lodgement discussion, but informal resolution channels may be used.

The Division of Ratepayer Advocates (DRA) within the CPUC is the designated body representing the interests of public utilities consumers, that is, to 'obtain the lowest possible rate for services consistent with reliable and safe service levels'.²³⁵⁸

Third parties can have access to information that is not of commercial-in-confidence (c-i-c) in nature.

Regulatory decisions over water by the CPUC and ALJs are assisted primarily by the Water Division.

The court's review on the CPUC's decisions relating to water companies shall not be extended further than to determine whether the CPUC has regularly pursued its authority, including a determination whether the decision under review violates any right of the petitioner under the federal or state constitution.

In Washington State, regulation of privately owned water utilities which serve more than 100 customers or have charges that exceed an average of \$471 per customer per year in is the responsibility of the Utilities and Transportation Commission.²³⁵⁹ The commission does not regulate the rates or services of city, town or county water systems, Public Utility Districts, cooperative or homeowners' associations. In reviewing rate increase requests, the commission functions much like a court and must decide the case based on the evidence brought before it. Regulated water companies can propose rate increases at any time, for any amount. Before a proposed rate increase takes effect, it must be filed with the commission and customers must be notified. Commission staff then reviews the request. The staff review is then presented to the commissioners for decision at an open public meeting.

Many factors can lead to rate increase proposals: old pipes, storage tanks and treatment equipment may need to be upgraded or replaced or operating costs, such as the cost of electrical services or gas for repair trucks, can increase. Companies are not allowed to spend unreasonable amounts on their facilities or operations. State law requires rates to be fair and reasonable for customers but high enough to allow the company the opportunity to earn a return on capital. The commission can set service standards and penalise companies for poor service, but it cannot deny rates that are needed to cover legitimate costs. Rates are based on each company's specific cost structure and are not based on what customers of other water companies pay. Therefore, rates vary widely between companies.

²³⁵⁷ California Public Utilities Commission (CPUC), *Water and Sewer*. Available at: <http://www.cpuc.ca.gov/PUC/water/> [accessed on 2 July 2013].

²³⁵⁸ CPUC, *Division of Ratepayer Advocates*. Available at: <http://www.dra.ca.gov/dra/> [accessed on 2 July 2013].

²³⁵⁹ Washington Utilities and Transportation Commission, *Frequently Asked Questions: Water Rates*. Available at: <http://www.utc.wa.gov/regulatedIndustries/utilities/Documents/WaterRates-FAQs.pdf> [accessed on 1 July 2013]

5. Rail

Regional vertically-integrated railways have been in operation in the US. The major rail operator was the Consolidated Rail Corporation (Conrail). It began operations in 1976 as a government-funded company, taking over all major railroad companies (rail infrastructure and rolling stock) in North-eastern United States. Conrail became privately owned in 1987. In 1998 it was acquired (with Surface Transportation Board approval) by Norfolk Southern Corporation and CSX Corporation. These companies split Conrail's rail infrastructure and rolling stock while Conrail Shared Assets Operations continued to operate on behalf of its new owners in Northern New Jersey, Southern New Jersey/Philadelphia, and Detroit.²³⁶⁰ In the 1970s, the Federal government created Amtrak to take over intercity passenger service from the nation's freight railroads. According to its website:²³⁶¹

As the nation's intercity passenger rail operator, Amtrak connects America in safer, greener and healthier ways. With 21,000 route miles in 46 states, the District of Columbia and three Canadian provinces, Amtrak operates more than 300 trains each day — at speeds up to 150 mph — to more than 500 destinations. Amtrak also is the operator of choice for state-supported corridor services in 15 states and for four commuter rail agencies.

The largest commuter rail services operate in the areas surrounding New York City. The Metro-North Railroad runs services between New York City and its northern suburbs in New York and Connecticut. The Long Island Rail Road runs the breadth of Long Island, and is largely used to commute to and from New York City. Metro-North Railroad and Long Island Rail Road are owned by the Metropolitan Transport Authority (MTA), a New York state public-benefit corporation. New Jersey Transit Rail Operations is the rail division of New Jersey Transit; with services are centred around New York City, Hoboken and Newark. Together these three commuter rail operators serve almost one million passengers each weekday.

There are currently 11 Class I railroads in North America, eight of which operate in the US. Class I railroads have revenues of at least US\$398.7 million and account for 93 per cent of freight revenues. The four major freighters are geographically split, with CSX Corporation and Norfolk Southern Railways operating in the east, while BNSF Railway and Union Pacific operate in the west. The Kansas City Southern Railway (KCS) company is the smallest Class I railroad, operating in the central states of the US. KCS is the only Class I Railroad to own track in both the US and Mexico.²³⁶²

The Powder River Basin (PRB) in southwest Montana and northeast Wyoming is the largest coal source in the US. Mines in the PRB currently supply 40 per cent of US coal, with miners such as Arch Coal, Peabody Energy and Rio Tinto having a large presence in the region. The PRB is served by a 103-mile rail line in Wyoming, owned by the BNSF Railway and the Union Pacific Railroad. The line runs the length of the southern section of the PRB and most Powder River Basin coal travels through it to reach the rest of the United States. With more than 60 mile-long trains traversing its tracks each day, the line is the busiest stretch of railroad in the world.

Regulatory Institutions, Functions and Legislation (Federal)

The regulation of rail in the US is administered by the Surface Transportation Board (STB) and by state regulators (see below). The STB was created by the *Interstate Commerce Commission Termination Act 1995* and is the successor to the Interstate Commerce Commission (ICC). The STB is affiliated with, but is independent of, the Department of Transportation. Rules governing the STB and its powers are set out in the *United States Code (USC)*.²³⁶³ The STB has the authority to formulate regulations and these are codified in Title 49, Chapter X of the *Code of Federal Regulations*. The STB is located in Washington DC.

The STB serves as both an adjudicatory and a regulatory body. Its primary function is the economic regulation of the rail industry, including resolving railroad rate and service disputes, regulating third

²³⁶⁰ Conrail, *A Brief History of Conrail*, 2008. Available at: <http://www.conrail.com/history.htm> [accessed on 2 July 2013].

²³⁶¹ <http://www.amtrak.com/servlet/ContentServer?c=Page&pagename=am%2FLayout&cid=1241256467960> [accessed on 2 July 2013].

²³⁶² Association of American Railroads, *Class I Railroad Statistics*, May 2012. Available at: <https://www.aar.org/StatisticsAndPublications/Documents/AAR-Stats-2012-05-10.pdf> [accessed on 2 July 2013].

²³⁶³ Rules governing the STB are Title 49, Subtitle I, Chapter 7, Subchapters I and II, and Title 49, Subtitle IV, Part A of the *United States Code*.

party access to infrastructure, reviewing proposed railroad mergers and the construction, acquisition and abandonment of rail lines.²³⁶⁴ The STB regulates competition law in the rail industry. The STB also has responsibilities regarding road transport, ocean transport and some pipelines that are not regulated by the FERC. Competitors can gain access to rail infrastructure in particular ways, but access regulation is subject to a 'market dominance' test. Regulatory processes are transparent and consultative, advised by bodies such as the Railroad-Shipper Transportation Advisory Council (RSTAC) and the Rail Energy Transportation Advisory Committee (RETAC). Alternative Dispute Resolution procedures operate, but where the STB makes arbitration decisions they can be appealed to the STB under limited circumstances or to the Court.

The STB Board is comprised of three members, who are appointed by the President and confirmed by the Senate for five-year staggered terms. The STB's Chairman is designated by the President from the members. The Chairman coordinates and organises the agency's policies, resolution of regulatory matters and acts as its representative in relations with other government bodies. The Vice Chairman is elected by the Board for a one-year term.

The STB has six offices – Public Assistance, Government Affairs and Compliance; Economics; General Counsel; Proceedings; Environmental Analysis and the Managing Director. The head of each office reports to the Chairman.

Railroads have a common-carrier obligation to provide transportation or rail service upon reasonable request as required under Title 49 of the USC, s.11101 (a). The track owner must accept traffic from an origin carrier willing to pay a rate that covers the cost of access.²³⁶⁵ They can provide that service under rates and service terms agreed to in a confidential transportation contract with the shipper²³⁶⁶ or under openly available common carriage rates and service terms.²³⁶⁷ Rates and services terms established by contract are not subject to STB regulation, except for limited protections against discrimination involving agricultural producers. Businesses may gain access to a prescribed new rail route under the 'competitive access' provisions of Title 49 of the USC s.10705 in certain circumstances where the network carrier is found to have abused its market power.

The STB can adjudicate complaints challenging the reasonableness of a common carriage rate only if the railroad has market dominance over the traffic (goods transported) involved.²³⁶⁸ Market dominance refers to 'an absence of effective competition from other rail carriers or modes of transportation to which a rate applies'.²³⁶⁹ As a result, in considering a complaint, the STB first considers whether the railroad has market dominance, or whether there is significant competition in the market or if the shipper has an alternative to paying the rate under dispute.

The STB also has authority to investigate and resolve disputes with respect to the adequacy of the service provided by a railroad to its shippers and connecting carriers. In doing so, the STB can require a railroad to meet its service obligations; compel a railroad to provide an alternative through route with another railroad for specific traffic; provide switching for another railroad; or provide another railroad with access to terminal facilities.

The STB has limited regulatory authority over the National Railroad Passenger Corporation (Amtrak) under Title 49 of the USC s.24308(c). Amtrak-owned railroad include 363 miles of the 456-mile Northeast Corridor railroad from Washington to Boston. Amtrak concurrently owns commuter trains. However, 70 per cent of the train-miles travelled by Amtrak trains are on tracks owned by external freight and commuter railroads. Amtrak receives federal investment to support its operating and capital needs.²³⁷⁰ This authority mandates the STB to ensure that Amtrak may operate over the track of the nation's freight railroads, and to adjudicate disputes between Amtrak and individual freight

²³⁶⁴ *United States Code*, Title 49, ss. 10101–11908.

²³⁶⁵ *United States Code*, Title 49, s. 10742.

²³⁶⁶ *United States Code*, Title 49, s. 10709.

²³⁶⁷ *United States Code*, Title 49, s. 11101.

²³⁶⁸ *United States Code*, Title 49, s. 10701.

²³⁶⁹ *United States Code*, Title 49, s. 10701(a).

²³⁷⁰ See Amtrak, *Annual Report 2011*. Available at: <http://www.amtrak.com/ccurl/677/158/2011-Amtrak-Annual-Report-Final.pdf> [accessed on 1 July 2013].

railroads concerning shared use of tracks and other facilities, and to set the terms and conditions of such use if Amtrak and the freight railroad fail to reach a voluntary agreement.²³⁷¹

The STB has statutory authority in regulating competition law in the rail industry. Rail carriers must gain STB's approval before seeking to merge as required under Title 49 of the USC ss.11323–25. The STB's authorisation exempts the transaction from all other laws (including anti-trust laws).²³⁷²

Regulatory Institutions and Legislation (State)

State rail regulation is either conducted by the State departments of transportation, or independent agencies. In New York, for example, the Department of Transport is responsible for coordinating state transportation policy, facility development, public safety, and for directing state regulation of such carriers in matters of rates and service.²³⁷³ In Texas and California, rail is regulated by independent agencies, namely the Rail Road Commission of Texas and the California Public Utilities Commission (CPUC), respectively. The CPUC has regulatory responsibilities relating to Californian law or under its own rules, but does not appear to be responsible for approving the sale of carriers in the manner of energy, water and telecommunications.

The remainder of this section surveys the regulatory processes and procedures used by the federal rail regulator – the STB.

Consultation of Interested Parties

Regulatory investigations may arise for STB determination via a complaint submitted by an aggrieved party. Alternatively, the STB may conduct investigations on its own initiative.

For complaints, detailed information must be submitted with a complaint, including history of the traffic, transport alternatives and the parties' relevant financial records. The complainant must also provide to the defendant all documents relied upon in formulating its assessment of the dispute. Complaints cannot be brought before the STB without a prior consideration of using the voluntary arbitration process. In all complaint proceedings, the parties must discuss discovery and procedural matters. Facts disclosed in the course of the pre-hearing conference are privileged and, except by agreement, will not be used against participating parties either before the STB or elsewhere, unless fully corroborated by other evidence. It is possible for parties to issue a cross complaint, where relevant.

The STB will convene a technical conference for its staff and the parties prior to the filing of any evidence in a stand-alone cost rate case,²³⁷⁴ for the purpose of reaching agreement on variable cost calculation methodology and resolving certain factual disputes between the parties. In addition, parties may be directed to appear before an officer for a conference, prior to or during the course of a hearing, to discuss issues of the dispute including the simplification of issues; the necessity or desirability of amending the pleadings; and the procedure at the hearing. Informal conferences among STB staff and the parties also enable the narrowing of issues in dispute and discovery disputes/conflicts. These initial conferences and submissions involve a collaborative determination of the schedule of proceedings by the parties and the regulator. However, the final determination of this schedule must be approved by the STB.²³⁷⁵

A decision by the STB to institute an investigation will be served upon respondents. If a respondent fails to comply with any requirement specified in the decision within the stated time period, the respondent will be deemed in default and to have waived any further proceedings and the investigation may be decided immediately. Examination of decision documents indicates that further proceedings usually involve a public hearing in which aggrieved and interested parties may make

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²³⁷² The *Antitrust Enforcement Bill 2009* removes antitrust exemptions protecting freight railroads from competition. The bill has been approved by the US Senate Judiciary committee and is on a legislative calendar. See information on: <http://maplight.org/us-congress/bill/111-s-146/355701/contributions-by-vote> [accessed on 2 July 2013].

²³⁷³ New York State Department of Transportation, *Responsibilities and Functions*. Available at: <https://www.nysdot.gov/portal/page/portal/about-nysdot/responsibilities-and-functions> [accessed on 2 July 2013].

²³⁷⁴ Large rail rate cases are those that are reviewed under what is known as the 'stand-alone cost' (SAC) methodology.

²³⁷⁵ Surface Transportation Board (STB), *Surface Transportation Board Requests Comment on Proposed Procedures to Expedite Resolution of Large Rail Rate Challenges*, 2002. Available at: <http://www.stb.dot.gov/newsrels.nsf/cee25ffbd056e9d1852565330043f0d6/936af2d2b302774285256c2a0051ecb5?OpenDocument> [accessed on 2 July 2013].

statements. The STB then makes a tentative agreement before seeking further written comments from relevant parties. Based on this additional information the STB makes a final decision.²³⁷⁶

Alternative Dispute Resolution – Arbitration

The STB encourages private-sector agreements rather than dispute resolution in a formal litigation process.²³⁷⁷ It has adopted a voluntary alternative dispute resolution (ADR) process and provides assistance to parties in a dispute informally. The STB's Rail Customer and Public Assistance Program assists with everything from straightforward inquiries to informal dispute resolution. STB-led mediation enables disputing parties to seek common ground, and arbitration allows an impartial third-party to settle parties' disputes in lieu of a formal adjudication by the Board.²³⁷⁸

Complainants bringing cases before the STB must first consider using the agency's voluntary arbitration process. The complainant must consequently include a statement that arbitration was considered, but rejected, as a means of dispute resolution.²³⁷⁹ Further, for all rates disputes, participation in a nonbinding mediation process is mandatory.²³⁸⁰

Evidence of the success of private-sector resolutions of disputes is seen in the number of requests for voluntary dismissal or discontinuance of a variety of proceedings in each fiscal year since the establishment of the STB.

Submissions to the STB that a dispute is to be arbitrated must be accompanied by a written complaint that details the nature of the dispute; the statutory basis of STB jurisdiction, a statement of each issue as to which arbitration is sought and the specific relief sought.²³⁸¹

Any defendant willing to enter into arbitration must, within 20 days of the date of a complaint, answer the complaint in writing, addressing each factual allegation, and making affirmative defences, and any counterclaims.²³⁸²

Discovery will be available only if the parties agree. Evidence will be submitted under oath either in writing or orally, at the direction of the Arbitrator who may also require additional evidence. Hearings for the purpose of cross-examining witnesses may be permitted by the Arbitrator.

The dispute-resolution process may involve parties directly involved in the dispute; industry bodies and consumer groups such as shipper associations, railroad associations, freight railroads and agricultural shippers; government departments, and; other interested parties.

The evidentiary process should be completed within 90 days from the start date established by the arbitrator. The arbitrator's decision will be issued within 30 days from the close of the record and shall contain findings of fact and conclusions. The Arbitrator is not bound by formal rules of evidence, but avoids basing a decision entirely or largely on unreliable proof.²³⁸³

²³⁷⁶ STB, *Surface Transportation Board Proposes Removing Product and Geographic Competition as Factors in Market Dominance Determinations*, 1998. Available at: <http://www.stb.dot.gov/newsrels.nsf/71c35e25bd34f1f68525653300425877/20c0e2cfa4cf8a6d852565f500627404?OpenDocument> [accessed on 2 July 2013].

²³⁷⁷ STB, *Surface Transportation Board Summarizes Private-Sector Dispute Resolution of Pending Proceedings*, 2001. Available at: <http://www.stb.dot.gov/newsrels.nsf/219d1aee5889780b85256e59005edefe/762c72576f120efd85256a020056c692?OpenDocument> [accessed on 2 July 2013].

²³⁷⁸ STB, *Litigation Alternatives*. Available at: <http://www.stb.dot.gov/stb/LitigationAlternatives/CurrentLitigationAlternatives.html> [accessed on 1 July 2013].

²³⁷⁹ STB, *Surface Transportation Board Issues Decision on Use of Arbitration to Resolve Disputes in Railroad Matters*, 2002. Available at: <http://www.stb.dot.gov/newsrels.nsf/219d1aee5889780b85256e59005edefe/0d95aae6a00950f385256bc1005696d9?OpenDocument> [accessed on 2 July 2013].

²³⁸⁰ STB, *Surface Transportation Board Simplifies Issues Decision on Use of Arbitration to Resolve Disputes in Railroad Matters*, 2001. Available at: <http://www.stb.dot.gov/newsrels.nsf/219d1aee5889780b85256e59005edefe/8382be432599e2c28525734d005bb616?OpenDocument> [accessed on 2 July 2013].

²³⁸¹ STB, Part 1108 – Arbitration of Certain Disputes Subject to the Statutory Jurisdiction of the Surface Transportation Board. Available at: <http://www.stb.dot.gov/stb/docs/Resources/PART%201108.pdf> [accessed on 1 July 2013].

²³⁸² *Ibid.*

²³⁸³ *Ibid.*

An Arbitrator may grant monetary damages, to the extent available under the *Interstate Commerce Act* and require specific performance of statutory obligations (including the prescription of reasonable rates) for a period not to exceed three years from the effective date of the Arbitrator's award.

The decision and award of the Arbitrator is binding and enforceable, subject to a limited right of appeal to the STB. A party may petition an Arbitrator to modify or vacate an arbitral award, based on materially changed circumstances or the criteria for vacation of an award contained in Title 9 of the USC Chapter 10.

Industry participants are represented by the Railroad-Shipper Transportation Advisory Council (RSTAC). The RSTAC was established after the termination of the Interstate Commerce Commission in 1995. The RSTAC consists of 15 private sector senior officials representing large and small shippers, and large and small railroads, the Secretary of the US Department of Transportation and the three STB members. Its functions are to advise the STB on regulatory, policy and legislative matters relevant to small shippers and small railroads.²³⁸⁴

In addition, in November 2000, the STB's Rail Consumer Assistance Program was established to provide the public with access to informal assistance with any type of transportation problem related to rail service. Now known as the Rail Customer and Public Assistance Program, it is administered by the STB's Office of Public Assistance, Governmental Affairs and Compliance, is nationwide in scope, and allows anyone with a problem involving a railroad subject to the STB's jurisdiction to contact the STB informally.

The National Grain Car Council (NGCC) assists the STB in addressing problems concerning rail transportation of grain. The NGCC is established under the *Federal Advisory Committee Act* and is comprised of representatives from Class I, II and III railroads, grains shippers and receivers and rail car owners and manufactures, and STB members. The purpose of the Council is to convene meetings at least once a year that allow the members to discuss openly the issues affecting the grain transportation industry.

The Rail Energy Transportation Advisory Committee (RETAC) was established by the STB in July 2007 for advice and guidance, and for serving as a forum for discussion of emerging issues, regarding the transportation by rail of energy resources (including, but not necessarily limited to, coal, ethanol, and other biofuels). The RETAC is comprised of 23 voting members, representing a balance of stakeholders with an interest in energy transportation by rail, including large and small railroads, coal producers, electric utilities, the biofuels industry, and the private railcar industry. The three members of the STB serve as *ex officio* members of the RETAC, along with representatives of the Departments of Agriculture, Energy, Transportation, and the Federal Energy Regulatory Commission.

Expert panels may be constructed in the alternative dispute resolution process to resolve issues.²³⁸⁵ In investigations on its own initiative, the STB may seek comments from relevant expert consultants.²³⁸⁶

Timeliness

In 1995, Congress directed the STB to establish a simplified and expedited method for resolving smaller rail rate disputes.²³⁸⁷ The STB's dispute resolution procedures include an expedited procedural schedule that calls for a decision within approximately eight or 17 months of filing a complaint (dependent on the nature of the dispute). More specifically, the simplified *Three Benchmark* process (established in 2007), enables freight-rail customers to obtain an award of up to US\$1 million in relief within eight months of filing a complaint. This process involves technical

²³⁸⁴ STB, *Rail Consumers-Railroad-Shipper Transportation Advisory Council*. Available at: http://www.stb.dot.gov/stb/rail/railshipper_council.html [accessed on 2 July 2013].

²³⁸⁵ STB, *Surface Transportation Board Responds to Shipper Requests to Modify Procedures for Discussing Revenue Adequacy, Competitive Access Issues with Railroads*. Available at: <http://www.stb.dot.gov/newsrels.nsf/71c35e25bd34f1f68525653300425877/d697dbb0931ac0c7852565fa004f3efb?OpenDocument> [accessed on 2 July 2013].

²³⁸⁶ STB, *Methodology to be Employed in Determining the Railroad Industry's Cost of Capital*. Available at: <http://www.stb.dot.gov/decisions/readingroom.nsf/WebDecisionID/37949?OpenDocument> [accessed on 2 July 2013].

²³⁸⁷ STB, *Surface Transportation Board Simplifies Issues Decision on Use of Arbitration to Resolve Disputes in Railroad Matters*, 2001. Available at: <http://www.stb.dot.gov/newsrels.nsf/219d1aee5889780b85256e59005edefe/8382be432599e2c28525734d005bb616?OpenDocument> [accessed on 2 July 2013].

procedures that must be followed such as use of the Revenue Shortfall Allocation Method benchmark formula.

Mid-sized rail shipments are eligible to utilise the 'Simplified Stand Alone Cost' process, in which freight-rail customers can obtain an award of up to US\$5 million in relief within 17 months of filing a complaint.²³⁸⁸ Freight rail customers can choose which rate dispute resolution process they would like to use.

Any proceeding may be held in abeyance for 90 days while ADR procedures (such as arbitration and mediation) are pursued and an additional 90 day periods can be requested. The period while any proceeding is held in abeyance to facilitate ADR will not be counted towards the statutory deadlines (Title 49, Subtitle B, chapter X).

With respect to alternative dispute resolution, the arbitrator will establish the rules and timetables for each arbitration proceeding. The parties may agree to vary these timetables subject to the Arbitrator's approval. Matters handled through arbitration under these rules are exempted from any applicable statutory time limits (Title 49, Subtitle B, chapter X).

An answer to a complaint by the defendant must be filed within 20 days after the service of the complaint or within a longer time if the STB agrees. The answer should fully advise the STB and the parties of the nature of the defence.²³⁸⁹ An answer to a complaint may be accompanied by a motion by the defendant to dismiss the complaint or a motion to make the complaint more definite. A motion to dismiss can be filed at any time during a proceeding, but is rarely granted. Under Title 49 of the *United States Code* s.11701(b), the STB may dismiss a complaint if it 'does not state reasonable grounds for investigation and action'.

A complainant may, within ten days after an answer is filed, file a motion to make the answer more definite. Any motion to make more definite must specify the defects in the particular pleading and must describe fully the additional information or details thought to be necessary.

Delays in resolving large rate cases have traditionally been a consequence of discovery disputes (in terms of attempts to access particular documents and information), which are ultimately brought to the STB for resolution (*Surface Transportation Board Requests Comment on Proposed Procedures to Expedite Resolution of Large Rail Rate Challenges*). Incumbents will also have incentives to cause delay to the proceedings by failing to provide information in a timely fashion. These incentives are mitigated by the STB mandating that failure to respond to complaints in time results in the claims made in a complaint being admitted. In addition, in the interest of facilitating discovery and the prompt and efficient resolution of a proceeding, the STB may issue an order allowing the limited disclosure to parties to the case of certain confidential, proprietary, or commercially sensitive information.

Information Disclosure and Confidentiality

The parties, rather than the STB, have the responsibility for gathering sufficient information to prove unlawful conduct by the defendant.²³⁹⁰ The incumbent has incentives to cause delay to the proceedings by extending discovery procedures. To ensure this procedure is not employed for the purpose of delay, the STB has established clear standards for obtaining discovery.²³⁹¹ The standards are more restrictive in large rate cases, so that parties would know in advance that they should not attempt to obtain certain types of information.²³⁹²

Discovery is to be complete 75 days after the complaint is served. Parties then both file opening evidence to the STB – that is, a formal statement based on internal information and the information collected in the discovery process. This is followed by rebuttal evidence from both parties. Simplified procedures may be used if the STB deems that the case is less complex.

²³⁸⁸ *Ibid.*

²³⁸⁹ STB, *Legal Questions*. Available at: <http://www.stb.dot.gov/stb/faqs.html> [accessed on 2 July 2013].

²³⁹⁰ STB, *Dairyland Power Cooperative v. Union Pacific Railroad Company*, *op. cit.*

²³⁹¹ STB, *February 23 Voting Conference*, *op. cit.*

²³⁹² At the board's discretion, information may also be obtained through an oral argument, in which parties present their positions in a public forum.

The Arbitrator shall take necessary measures to ensure that any matters are treated confidentially where a party to an arbitration proceeding wishes this to be the case. If the Arbitrator regards any confidential submission as being essential to the written decision, such information may be considered in the decision,²³⁹³ but the Arbitrator will make every effort to omit confidential information from the written decision.

In all ADR matters involving the STB, whether under the *Administrative Dispute Resolution Act* or not, the confidentiality provisions of that Act (Title 5 of the USC s.574) shall bind the STB and all parties and neutrals in those ADR matters.²³⁹⁴

With respect to formal complaints in answering interrogatories, a party may request a protective order.²³⁹⁵ If granted by the STB, the Arbitrator must maintain the confidentiality of certain proprietary or commercially sensitive information.

In addition, facts disclosed in the course of the pre-hearing conference are privileged and, except by agreement, will not be used against participating parties either before the STB or elsewhere, unless fully corroborated by other evidence.

The frequency of the STB's use of its information-gathering powers is not detailed in any documents published on the STB's website.

Parties may access information held by the STB under the *Freedom of Information Act* subject to the nine exemptions outlined previously. The STB's website publishes documents including Agency decision and notices; reports and major decisions; all filings (other than confidential documents) on all proceedings; and audio archives of STB meetings, transcripts of hearings and statements by members and staff at voting conferences. Hard copy access to these documents is available from the *Federal Register*. STB decision and relevant filings are also available from the agency's reading room.

Decision-making and Reporting

The STB Board considers all rulemaking, investigations, matters submitted for decision (except where assigned to an individual employee or commissioner), administrative appeals in a matter previously considered by the STB, determines whether to reconsider a decision being challenged in court and all appeals of initial decisions issued by the Director of Office of Proceedings.

Information before the Board mainly involves that brought by the parties in the dispute in making and answering their complaint and via the pre-trial discovery (fact-finding) process (*Voting Conference*). The Office of Proceedings provides legal research and prepares (internal) draft decisions for cases before the STB and prepares the decision made by the Board.

The Board, having considered all the evidence, issues a final decision to resolve the dispute. This is determined by a majority vote by Board members (*Voting Conference*). The *Code of Federal Regulations* mandates that the STB must provide and publish reasons for its final decision.

The Chairman may reassign related proceedings to a board of employees and may remove a matter from an individual Board Member or employee or employee board for consideration and disposition by the Board. In addition, the Chairman may authorise any officer, employee, or administrative unit of the Board to perform a function vested in or delegated to the Chairman.²³⁹⁶

The STB is a determinative body. However it concurrently liaises and provides advice to Congress. In particular the Office of Governmental and Public Affairs works with Members of Congress, state, local and municipal governments and provides them with information about the STB's procedures and actions and about transportation regulation more generally.²³⁹⁷

²³⁹³ *Code of Federal Regulations, Title 49 – Transportation; Subtitle B – Other Regulation Relating to Transport (continued) Chapter X – Surface Transportation Board, 2007.*

²³⁹⁴ *Ibid.*

²³⁹⁵ *Code of Federal Regulations, Title 49, s.1104.14.*

²³⁹⁶ STB, *About STB – Overview*. Available at: <http://www.stb.dot.gov/stb/about/overview.html> [accessed on 2 July 2013].

²³⁹⁷ STB, *About STB – Office: OGPA*. Available at: http://www.stb.dot.gov/stb/about/office_ogpa.html [accessed on 2 July 2013].

The arbitration process is voluntary. An arbitrator (or panel of arbitrators) is selected from a roster of persons (other than active government officials) experienced in rail transportation or economic issues similar to those capable of arising before the STB. Alternatively, the parties to a dispute may select an arbitrator. Any person designated by a party who is not already on the roster, if found to be qualified, will be added to the roster and may be used as the arbitrator for that dispute.

If the parties cannot agree upon an arbitrator (or panel of arbitrators), then each party shall, using the roster of arbitrators, strike through the names of any arbitrators to whom they object, number the remaining arbitrators on the list in order of preference, and submit its marked roster to the Chairman of the STB. The Chairman will then designate the arbitrator (or panel of arbitrators, if mutually preferred by the parties) in order of the highest combined ranking of all of the parties to the arbitration.²³⁹⁸

Arbitrators are not bound by any procedural rules or regulations adopted by the STB for the resolution of similar disputes. However, arbitrators are guided by the *Interstate Commerce Act* and by STB and ICC precedents (*Code*).

The decision and award of the Arbitrator is binding and judicially enforceable in law and equity in any court of appropriate jurisdiction, subject to a limited right of appeal to the STB (*Code*). Decisions made by arbitrators have no precedential value.

Appeals

An arbitration decision may be appealed to the STB within 20 days of service of such decision. Any such appeal shall be served by hand delivery or overnight mail on the parties and on the STB, together with a copy of the arbitration decision. Replies to such appeals may be filed within 20 days of the filing of the appeal with the STB. The filing of an appeal automatically will stay an arbitration decision pending disposition of the appeal. The STB will decide any such appeal within 50 days after the appeal is filed. Appeals from arbitration decisions are limited to clear errors of general transportation importance, and not issues of causation or fact. Arbitration awards can be challenged on the basis that they do not take their essence from the *Interstate Commerce Act*, or are not limited to the matters the parties have referred for arbitration (*Code*).

Arbitration decisions will become effective in 30 days unless a party seeks a stay of the decision within ten days of its issuance, and the stay is granted. Appeals and stay petitions should be limited to extraordinary circumstances (*Code*).

Alternatively, parties may apply or 'petition' for discretionary review; that is a reconsideration of the STB's decision if there was evidence of the STB committing a material error in its prior decision (*Voting Conference*). Parties may also request the STB to issue a declaratory order clarifying a particular decision (*Voting Conference*).

Judicial review of most STB decision is available in the US District Court of Appeal in Columbia.²³⁹⁹ Review is available from Federal district courts for STB orders that are solely for the payment of money and for certain matters referred to the STB by district courts.²⁴⁰⁰ Under Title 49 of the USC s.703 (d), the STB defends its own decisions against challenges in court and may appear in any civil court action matters within its jurisdiction.

Regulatory Development

In 2007, the STB commissioned an independent research team to conduct a rigorous study of the competitive state of the US freight railroad industry, in response to a call by the US Government Accountability Office.²⁴⁰¹ With assistance from the STB and various stakeholders through intensive consultation over the course of this year-long study (and a subsequent update), the team found that increases in railroad rates are not a result of an abuse of market power. Nevertheless, it made several rail-specific policy recommendations on increasing competitiveness in the industry. It also suggested that regulatory oversight is necessary in areas where competition is not viable.

²³⁹⁸ *Code of Federal Regulations, Title 49 -- Transportation; Subtitle B -- Other Regulation Relating to Transport (continued) Chapter X -- Surface Transportation Board, 2007.*

²³⁹⁹ *United States Code, Title 28, ss.2321 and 2342(5).*

²⁴⁰⁰ *United States Code, Title 28, ss.1336 and 2321.*

²⁴⁰¹ Studies from Christensen Associates Inc. Available at: <http://www.stb.dot.gov/stb/elibrary/CompetitionStudy.html> [accessed on 2 July 2013].

6. Airports

As the originator of commercial aviation and as a country with a large and affluent population spread over a very large land mass (with two disconnected states), the United States has a highly developed commercial aviation industry. There are a large number of airports, including several that are among the world's busiest in terms of both passengers and cargo. The largest and busiest airports in the United States include Atlanta Airport (possibly the busiest passenger airport in the world), Dallas-Fort Worth, Chicago O'Hare Airport, John F Kennedy Airport in New York, and Los Angeles Airport, but there are many others that are large by world standards.

Some airports in the US are much larger than the city they serve would suggest because they also act as a hub in the hub-and-spoke structure that followed air transport deregulation in the late 1970s. For example, Charlotte Airport in North Carolina is strategically located in the southeast as a domestic and international hub for US Airways and has a large amount of traffic (it claims to be the sixth largest in the world). However, the Charlotte metropolitan area has a population of less than two million. Commercial airports in the US are virtually all owned by local or state governments. For example, Atlanta Airport is owned by the City of Atlanta, and Charlotte Airport by the City of Charlotte. Airports are generally operated by local government aviation departments or airport authorities. A notable exception is the Port Authority of New York and New Jersey which operates LaGuardia Airport, John F Kennedy international Airport and Newark Liberty International Airport. Public-use general aviation airports are both publicly and privately owned.

There are a number of freight hubs in the US, the most notable being:

- Louisville International Airport – home to 'Worldport', the worldwide hub of UPS;
- Memphis International Airport – the world's second busiest airport by freight traffic and home to the FedEx Express global 'SuperHub',²⁴⁰²
- Miami International Airport – base for the Latin American operations of UPS and FedEx; and
- Ted Stevens Anchorage International Airport – base for the Far East operations of UPS and FedEx.

Regulatory Institutions and Legislation

The economic regulation of airports in the United States is the responsibility of the Federal Aviation Administration (FAA) which is part of the Department of Transportation. The FAA was created by the *Federal Aviation Act 1958*, initially as the Federal Aviation Agency. Its major roles include regulating civil aviation to promote safety; encouraging and developing civil aeronautics, including new aviation technology; developing and operating a system of air traffic control and navigation for both civil and military aircraft; researching and developing the National Airspace System and civil aeronautics; developing and carrying out programs to control aircraft noise and other environmental effects of civil aviation; and regulating US commercial space transportation.

Title 14 of the *Code of Federal Regulations*, titled Aeronautics and Space, contains regulations governing the airport industry. In particular, Part 16 relates to the compliance of federally funded airports (any airport included in the National Plan of Integrated Airport Systems (NPIAS)) with the obligations in their funding contracts (called grant assurances), such as non-discriminatory access to infrastructure built with federal funding or a prohibition against granting exclusive operational rights for infrastructure.

The Department of Transportation is authorised to review the reasonableness of airport fees charged to airlines if it receives a complaint or request for determination and a finding of a significant dispute.

The NPIAS identifies more than 3400 airports that are significant to national air transportation and thus are eligible to receive Federal grants under the Airport Improvement Program (AIP). When airports receive Federal grant funds or the transfer of Federal property for airport purposes, their owners or sponsors must accept certain obligations and conditions. These obligations may be incurred by contract (Grant Assurances) or by restrictive covenants in property deeds. Anyone

²⁴⁰² Airports Council International, *2011 ACI World Airport Traffic Report*, 2012.

concerned about an airport's compliance with these obligations may file informal or formal complaints with the FAA.²⁴⁰³

Consultation of Interested Parties

Matters arise before the FAA in two ways. The FAA may accept formal complaints in writing under Title 14 of the *Code of Federal Regulations* Part 16 (Part 16), *Rules of Practice for Federally-Assisted Airport Enforcement Proceedings*. Parties filing under Part 16 must be substantially affected by the alleged non-compliance. The FAA may also consider informal complaints about 'small matters'. Alternatively, the FAA may initiate its own investigation of any matter.²⁴⁰⁴

The FAA accepts informal complaints either verbally or in writing under Title 14 of the *Code of Federal Regulations* Part 13.1, *Investigative and Enforcement Procedures*. FAA regional staff usually looks into these complaints and determine what course of action to take. Part 13 imposes no time deadlines for issuing decisions regarding informal complaints.

The FAA accepts formal complaints in writing under Part 16 from the parties substantially affected by the alleged non-compliance. Part 16 imposes strict deadlines for filing, adjudication, and appeal. It also lists specific requirements for filing a Part 16 complaint.

The process for handling formal complaints can be divided into four broad stages: pre-filing; director's consideration; hearing and appeal. The first two stages are consultative and discussion-centred. As matters progress to the hearing stage, the process becomes more litigious. Cases are presented in a court-room style setting and the regulator becomes a party in the hearing, with a burden of proof of non-compliance.

Prior to filing a formal complaint (the pre-filing stage), the complainant must try to resolve the disputed matter informally with the relevant party or parties. Efforts at informal resolution may include mediation, arbitration, or the use of a dispute-resolution board, or other form of third-party assistance. The Airports District Office, Airports Field Office, or Regional Airports Division within the FAA are available upon request to assist the parties with informal resolution.²⁴⁰⁵ At any time in the informal dispute resolution process, the parties and the FAA may agree to resolve the complaint by consent order.²⁴⁰⁶

Unless the complaint is resolved informally or dismissed, the complaint will be considered by a director and an initial decision will be made on the basis of the respective points of view of the parties.

A person subject to a proposed compliance order as a result of a Director's determination may within 20 days:

- request a hearing;
- waive a hearing and appeal the Director's determination in writing to the Associate Administrator;
- file, jointly with a complainant, a motion to withdraw the complaint and to dismiss the proposed compliance action; and
- submit, jointly with the agency attorney, a proposed consent order.²⁴⁰⁷

If the respondent fails to request a hearing or to file an appeal in writing within the time periods, the Director's determination becomes final and is not judicially reviewable.²⁴⁰⁸

If the complaint progresses to the hearing stage it will be preceded by a pre-hearing conference. A pre-hearing conference will be held to address matters raised in the pre-hearing conference notice and other matters that will assist in a prompt, full and fair hearing of the issues.²⁴⁰⁹

²⁴⁰³ Federal Aviation Administration (FAA), *National Plan of Integrated Airport Systems*, Available at: http://www.faa.gov/airports/planning_capacity/npis/ [accessed on 2 July 2013].

²⁴⁰⁴ *Code of Federal Regulations (CFR)*, Title 14, s. 16.101.

²⁴⁰⁵ *CFR*, Title 14, s. 16.21(a).

²⁴⁰⁶ *CFR*, Title 14, s. 16.243(a).

²⁴⁰⁷ *CFR*, Title 14, s. 16.109(c).

²⁴⁰⁸ *CFR*, Title 14, ss. 16.33(e) and 16.109(d).

²⁴⁰⁹ *CFR*, Title 14, s. 16.211(b).

At the close of the pre-hearing conference, the hearing officer rules on any requests for evidence and the production of documents in the possession of other parties, responses to interrogatories, and admissions. The pre-hearing officer also rules on any requests for depositions, on any proposed stipulations, and on any pending applications for subpoenas as permitted by s.16.219 of Title 14 of the *Code of Federal Regulations*. In addition, the hearing officer establishes the schedule which will provide for an initial decision to be issued not later than 110 days after the Director's determination.²⁴¹⁰ Parties may incorporate witness accounts and expert opinions in their written submissions to the agency.

The parties to the hearing are the respondent(s) named in the hearing order, the complainant(s), and the FAA. In accordance with the provisions on intervention and other participation,²⁴¹¹ a person may submit a motion for leave to intervene as a party no later than ten days after the notice of hearing and hearing order. The motion may be granted if the hearing officer finds that intervention will not unduly broaden the issues or delay the proceedings and, if the person has a property or financial interest that may not be addressed adequately by the parties. Other persons may also petition the hearing officer for leave to participate in the hearing. However, such participation is limited to the filing of post-hearing briefs and reply to the hearing officer and the Associate Administrator.

During a hearing, parties may call on experts and consultants as witnesses, subject to the approval of the hearing officer. However, an employee of the FAA (or the Department of Transportation) may not be called as an expert or opinion witness for any party other than the FAA.²⁴¹²

Each party adversely affected by the hearing officer's initial decision may file an appeal with the Associate Administrator no later than 15 days after the initial decision is issued. Each party may file a reply to an appeal within ten days after it is served on the party. If an appeal is filed, the Associate Administrator will review the entire record and issue a final agency decision no later than 30 days after the due date of the reply. The Associate Administrator may take review of the case on own motion. In this case, the parties may file one brief on review to the Associate Administrator. If the Associate Administrator finds that the respondent is not in compliance with the Act, the final order of the FCC will include a statement of corrective action (if appropriate) and identify sanctions for continued non-compliance.

If no appeal is filed, and no review is initiated on the Associate Administrator's own motion, then the initial decision will become the final decision of the FAA on the sixteenth day after the initial decision was issued.

The failure to file an appeal is deemed a waiver of any rights to seek judicial review of an initial decision that becomes a final decision. A person may seek judicial review of a final agency decision and an order of an Associate Administrator in a United States Court of Appeals.

In addition to handling complaints, the FAA may initiate its own investigation of any matter where it considers an airport may not be in compliance with its regulatory obligations. The investigation may include a review of written submissions or pleadings from relevant parties, and of additional information requested by the FAA. However, the FAA may make an initial decision solely on the basis of a complaint and responses in reply to that complaint. Alternatively, an FAA-initiated investigation may involve the audit of airport financial records and transactions by either the FAA or a party appointed by the FAA.

Once an investigation is initiated, the FAA notifies the persons subject to investigation of the details of the investigation, the date of service and the opportunities that are available to resolve the matter, including through informal processes.²⁴¹³

If the matters addressed in the FAA notices are not resolved informally, the FAA may issue a Director's determination,²⁴¹⁴ from which point the same processes as for formal complaints (discussed above) will be applicable.

²⁴¹⁰ *CFR*, Title 14, s. 16.211(c).

²⁴¹¹ *CFR*, Title 14, s. 16.207.

²⁴¹² *CFR*, Title 14, s. 16.223(g).

²⁴¹³ *CFR*, Title 14, s. 16.103.

²⁴¹⁴ *CFR*, Title 14, s. 16.105.

The FAA is not required to consult any particular consumer group, user group or industry association in relation to Part 16 disputes regarding access and regulatory compliance. Disputes are handled between the parties involved without, necessarily, outside consultation.

Nevertheless, the FAA hosts various conferences and forums related to Airports and the various other functions of the FAA (such as safety, aviation, and aircraft). In particular, the FAA hosts annual airport conferences for each region joining industry participants, users and the regulator. The major industry body is the American Association of Airport Executives (AAAE). The AAAE is a not-for-profit organisation funded through membership fees and donations. The FAA website contains an extensive news and information section including research derived from consultation with industry and other interested groups.

Timeliness

The formal decision-making and consultation process is structured around explicit and detailed timeframes. However, the informal dispute resolution process does not exhibit a timeframe within which processes must be completed. Indeed, such resolution continues to be available at any time throughout the formal complaint-resolution process.

With respect to the formal complaint process the key timeframes are as follows:

- Persons subject to an investigation initiated by the FAA are given 30 days to respond to the FAA's concerns.
- Where a formal complaint is lodged, the respondent and complainant must be notified within 20 days of the complaints filing.
- The respondent must file an answer within 20 days of service of the notification.
- The complainant may file a reply within ten days of the date of service of the answer.
- The respondent may file a rebuttal within ten days of the date of service of the complainant's reply.
- The Director will make an initial determination within 120 days of the date the last pleading was due.²⁴¹⁵
- If a hearing is not required or provided for, an appeal of the Director's determination must be made within 30 days of the determination.
- A reply to an appeal must be filed within 20 days of the date of service of the appeal.
- The Associate Administrator must issue a final decision within 30 days of the due date of reply.²⁴¹⁶
- If a hearing is provided for in the Director's determination, a person subject to a proposed compliance order has 20 days to respond, otherwise the Director's determination becomes final.²⁴¹⁷
- If a hearing is held, an initial decision must be issued by the hearing officer no later than 110 days after the Director's determination unless otherwise provided for in the hearing order.
- Each party may file an appeal with the Associate Administrator no later than 15 days after the initial decision is issued. Each party may file a reply to an appeal within ten days after it is served on the party.²⁴¹⁸
- If an appeal is filed, the Associate Administrator will review the entire record and issue a final agency decision no later than 30 days after the due date of the reply.²⁴¹⁹

If the parties agree, the timelines may be extended by the hearing officer for a reasonable time to allow a document to be filed for a hearing.²⁴²⁰ However, only one extension of time will be granted to

²⁴¹⁵ *CFR*, Title 14, s. 16.31(a).

²⁴¹⁶ *CFR*, Title 14, 16.241(c).

²⁴¹⁷ *CFR*, Title 14, 16.109(d).

²⁴¹⁸ *CFR*, Title 14, s. 16.241(b).

²⁴¹⁹ *CFR*, Title 14, s. 16.103.

each party. A written request for an extension of time should be made no later than seven days before the document is due unless good cause for the late filing is shown.

Information Disclosure and Confidentiality

The FAA has the power to compel production of oral and documentary evidence. Its statutory authority to do so has been delegated to the Chief Counsel, the Deputy Chief Counsel, the Assistant Chief Counsel for *Airports and Environmental Law*, and each Assistant Chief Counsel for a region or centre.

In relation to investigating complaints,²⁴²¹ the FAA has the authority to compel production of additional oral and documentary evidence under s.313 *Aviation Act*,²⁴²² and s.519 of the *Airport and Airway Improvement Act*.²⁴²³

During a hearing, the parties have an obligation to supply information requested by the hearing officer and may be the subject to discovery orders. Discovery is limited to requests for admissions, requests for production of documents, interrogatories, and depositions. The hearing officer shall limit the frequency and extent of discovery permitted by this section if a party shows that:²⁴²⁴

- The information requested is cumulative or repetitious;
- The information requested may be obtained from another less burdensome and more convenient source;
- The party requesting the information has had ample opportunity to obtain the information through other discovery methods permitted; or
- The method or scope of discovery requested by the party is unduly burdensome or expensive.

The parties or their witnesses may also be the subject of a subpoena sought by the other party.

The hearing officer may order that any information contained in the record be treated as confidential and not disclosed to the public if the hearing officer determines that disclosure would be in violation of the *Privacy Act*, would reveal trade secrets or privileged or confidential commercial or financial information, or is otherwise prohibited by law.²⁴²⁵ Any person may request such treatment in writing, giving specific reasons for non-disclosure.

The FAA maintains a 'statistics and data' section on the airports section of its website which contains statistics about all aspects of the industry. There is also a 'publications' section of the website containing up-to-date information on the latest legislative changes, industry updates, research studies and other relevant publications.

Third parties may have access to information gathered by the FAA, subject to exemptions under the *Freedom of Information Act* (discussed previously).²⁴²⁶ Documents are lodged and stored in an electronic database called the Federal Docket Management System (FDMS).²⁴²⁷ The FAA also maintains an electronic reading room with all FAA records accessible to the public. Proprietary information is not placed in the Docket but held in a separate file to which the public does not have access. A note, however, is placed in the docket that the information has been received.

Decision-making and Reporting

The FAA is an administration under the US Department of Transportation. The FAA Administrator is appointed by the president. The Administrator is assisted by a number of advisory committees whose charters are approved by the Secretary for Transportation. It is also assisted by a number of rule-

²⁴²⁰ *CFR*, Title 14, s. 16.209.

²⁴²¹ *CFR*, Title 14, s. 16.29 (b) (2).

²⁴²² *United States Code*, Title 49, ss. 40113 and 46104.

²⁴²³ *United States Code*, Title 49, s. 47122.

²⁴²⁴ *CFR*, Title 14, s. 16.213(b).

²⁴²⁵ *CFR*, Title 14, s. 16.225.

²⁴²⁶ *CFR*, Title 14, s. 11.35(b).

²⁴²⁷ Department of Transportation, *Frequently Asked Questions*. Available at: <http://docketsinfo.dot.gov/FAQ.cfm> [accessed on 2 July 2013].

making committees whose charters are approved by the Administrator. The FAA is divided into nine geographical regions and two major centres.

For access-related disputes and regulatory enforcement, the FAA is the determinative body and does not require approval of its decisions by another authority. However, the FAA also has an advising role to policy makers and conducts industry research. Decisions may be taken by a number of administrative officials including a Director, Associate Administrator and hearing officer.

A Director's determination is made after the submissions of complaint, answer, reply and rebuttal by the parties and any further investigations undertaken by the agency. Each party adversely affected by the Director's determination may appeal this determination to the Associate Administrator. The Director's determination will include a concise explanation of the factual and legal basis for the determination on each claim made by the complainant and will include notice of opportunity for a hearing in the case of an appeal being lodged. Notwithstanding any appeal the Director's determination becomes the final agency decision.²⁴²⁸

A decision without hearing is given in cases where the Director's determination does not provide the opportunity for a hearing or the respondent has waived the opportunity for a hearing and the determination is appealed by the adversely affected party. The Associate Administrator will consider the appeal and the reply to that appeal and give a final decision within 60 days of receiving them.

A hearing officer's decision and any order must be based solely on the transcript of hearing testimony, all exhibits received into evidence, all motions, applications requests and rulings, and all documents included in the hearing record.²⁴²⁹ Notwithstanding appeals within 15 days of this decision, it will become the final decision.

A final decision refers to the final decision of the FAA arrived at by default through no appeal from the Director's determination and/or the hearing officer's initial decision or by decision of the Associate Administrator after consideration of appeals from the hearing officer's initial decision. Final decisions arrived at through the latter avenue only may be appealed on judicial grounds to the Court of Appeals.

Decision reports are generally 30 to 40 pages in length for a Director's determination and 20 to 30 pages in length for a final decision. The reports appear to follow a standard format: Introduction, Description of the Parties, Background and Procedural History, Issues, Applicable Laws, Analysis and Discussion, Findings and Conclusions, Order and Right of Appeal.

Appeals

Any party adversely affected by a Director's determination may lodge an appeal to the Associate Administrator (see the 'Process and Consultation' sub-section).

Appeals against final hearing decisions are made to the Court of Appeals and are considered on judicial grounds only.

The following do not constitute final decisions subject to judicial review:

- An FAA decision to dismiss a complaint without prejudice.
- A Director's determination.
- An initial decision issued by a hearing officer at the conclusion of a hearing.
- A Director's determination or an initial decision of a hearing officer that becomes the final decision of the Associate Administrator because it was not appealed within the applicable time periods.

The opportunity to seek merits review of a decision is given at two points in the decision-making process. First, a merits review may be requested by appealing the Director's determination to the Associate Administrator and in the absence of such an appeal becomes a final decision of the Associate Administrator. Second, a merits review may be requested by appealing the hearing officer's initial determination (after a hearing) to the Associate Administrator and in the absence of

²⁴²⁸ CFR, Title 14, s. 16.31(b).

²⁴²⁹ CFR, Title 14, s. 16.233(a).

such an appeal becomes a final decision of the Associate Administrator. An appeal to the Court of Appeals must be made within 60 days of the decision order being made.²⁴³⁰

7. Ports

There are more than 300 ports (sea, river and lake) in the US with South Louisiana, Houston and New York the largest by tonnage. Twenty eight of these ports have annual tonnage in excess of 25 million tons. Some (such as Huntington-Tristate, Memphis and Baton Rouge) are predominantly based on domestic cargo; while others (such as Houston, Long Beach and Los Angeles) are based largely on foreign trade.²⁴³¹

Ports may be operated by a state, a county, a municipality, a private corporation, or a combination. Many ports are complex entities, involving facilities for transportation by several modes of transportation: water, rail, road, or even air. Ports are an important part of the nationwide Marine Transportation System, which includes not only ports, but also inland and coastal waterways, and the inter-modal connectors. Currently, there are more than 150 deep-draft seaports under the jurisdiction of 126 public seaport agencies located along the Atlantic, Pacific, Gulf and Great Lakes coasts, and in Alaska, Hawaii, Puerto Rico, Guam, and the US Virgin Islands.²⁴³²

Public port agencies are established under state laws to develop, manage and promote the flow of waterborne commerce and act as catalysts for economic growth. These agencies include port authorities, special-purpose navigation districts, bi-state authorities and departments of state, county and municipal government. Many of these seaport agencies are governed by an elected and/or appointed body, such as a port commission. Seaport authorities develop and maintain the terminal facilities for intermodal transfer of cargo between ships, barges, trucks and railroads. Port authorities also lease land, and in some cases build and maintain facilities, for the cruise, excursion and ferry passenger industry.

Public port authorities only own approximately 30 per cent of the deep-water marine terminal facilities in the United States. Most of the privately owned marine terminals are associated with commodities such as oil, gas, and chemicals. The Port of Houston Authority only owns 12 marine terminals at the Port of Houston while there are over 150 private terminals that are owned by either US, foreign or multi-national corporations. These private terminals handle approximately 85 per cent of the cargo that moves through the Port of Houston.²⁴³³

Regulatory Institutions and Legislation

Under the *Shipping Act* of 1984,²⁴³⁴ the Federal Maritime Commission (FMC) is responsible for the regulation of ocean-borne transportation in the foreign commerce of the US and regulates certain practices of the entities that operate marine terminals. The FMC was established as an independent regulatory agency by Reorganization Plan No. 7, effective 12 August 1961, and is located in Washington DC with six area representatives.²⁴³⁵ The FMC is composed of five commissioners (including the Chairman), each appointed by the President and officially appointed after the approval of the Senate. There are a number of functional offices, including the following:

- The Office of Consumer Affairs and Dispute Resolution Services, responsible for developing and implementing the Alternative Dispute Resolution program.
- The Office of the Managing Director that comprises the Bureau of Certification and Licensing, the Bureau of Trade Analysis, and the Bureau of Enforcement. The Bureau of Trade Analysis is primarily responsible for monitoring certain regulated activities within the jurisdiction of the FMC.
- The Office of the General Counsel that provides legal counsel to the Commission and represents the Commission before courts and Congress.

²⁴³⁰ CFR, Title 14, Part 16.

²⁴³¹ US Army Corps of Engineers: Navigation Data Centre, *Tonnage for Selected U.S. Ports in 2010*. Available at: <http://www.navigationdatacenter.us/wcsc/porttons10.html> [accessed on 2 July 2013].

²⁴³² American Association of Port Authorities, *US Public Port Facts*. Available at: <http://www.aapa-ports.org/files/PDFs/facts.pdf> [accessed on 2 July 2013].

²⁴³³ Congressional Research Service, *Terminal Operators and Their Role in U.S. Port and Maritime Security*, April 2006

²⁴³⁴ *The United States Code*, Title 46, ss. 40101–41309 (previously codified as Title 46, Appendix, ss. 1701–1719).

²⁴³⁵ FMC, *About the FMC*. Available at: http://www.fmc.gov/about/about_fmc.aspx [accessed on 2 July 2013].

- The Office of Administrative Law Judges that is authorised to administer formal proceedings.

The administrative law judges office is delegated the authority to make and serve initial or recommended decisions.

Designated 'marine terminal operators' (MTOs) are defined as parties that offer terminal services to ocean common carriers in foreign commerce. In practice, this definition covers three types of MTOs:

- Public port authorities.
- Private terminal operators – companies that, typically, lease terminals from a public port authority (which acts as landlord) and operate those terminals as a private business that serves ocean common carriers calling at the port.
- MTO Conferences – regulated organisations of multiple MTOs (port authorities, private MTOs, or both).

The FMC's regulations apply to two particular MTO activities:

- the publication of MTO rates, regulations, and other practices in MTO Schedules; and
- agreements among MTOs, or between MTOs and ocean carriers, to discuss, fix, or regulate rates or other conditions of service in foreign commerce.

The FMC is responsible for the approval of *ocean common carrier agreements* relating to fixing transportation rates; pooling or apportioning traffic; restricting sailings; engaging in exclusive, preferential, or cooperative working arrangements among themselves or with one or more MTOs; preventing competition in international ocean transportation; or discussing and agreeing on any matter related to service contracts.

The FMC is also responsible for the approval of *MTO agreements*. This part applies to agreements among MTOs and among one or more MTOs and one or more ocean carriers to discuss, fix, or regulate rates or other conditions of service; or engage in exclusive, preferential, or cooperative working arrangements, to the extent that such agreements involve ocean transportation in the US foreign commerce.

The *Shipping Act* also enhances the role of the FMC as a monitoring agency.

Neither the FMC's role – nor that of any other federal body – involves any of these items of economic regulation – setting port authority fees; providing for access to terminals or of promoting competition between terminals.

Consultation of Interested Parties

The FMC carries out its regulatory duties by reviewing agreements and conducting investigations (on a formal or informal basis) into certain practices of marine transportation in foreign trade.

The process for the approval of an agreement (ocean carrier or MTO) involves several of the following steps.²⁴³⁶

- Notice: The FMC is required to publish the filing at the *Federal Register*; covering required information including notice will include the final date for filing comments.
- Preliminary review: The FMC shall make a preliminary review of each filed agreement to determine compliance with the requirements of the Act. It shall reject any agreement that otherwise fails to comply substantially with the Filing and Information Form requirements. The FMC shall notify the filing party in writing of the reason for rejection of the agreement. The original filing, along with any supplementary information or documents submitted, shall be returned to the filing party.
- Comment: Persons may file with the Secretary, with the specified time limits in the Notice, written comments regarding a filed agreement. Late-filed comments will be received only by leave of the FMC and only upon a showing of good cause.

²⁴³⁶ CFR, ss. 535.601–606, Subpart F – Action on Agreements. Available at: <http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&SID=8a53a220b634bebd21901c88098214b&h=L&n=46y9.0.1.2.16.6&r=SUBPART&ty=HTML> [accessed on 2 July 2013].

- Request for additional information: the FMC may request from the filing party any additional information necessary for making a decision. Where the FMC has made a request for additional information, the agreement's effective date will be 45 days after receipt of a satisfactory response. The FMC may, upon notice to the Attorney General, request the US District Court for the District of Columbia to further extend the effective date until there has been substantial compliance.
- Waiting period: The agreement becomes effective, either 45 days after the agreement is filed with the FMC, or on the thirtieth day of the publication of notice of the filing in the *Federal Register*, whichever is the later.

Investigations may be instituted by the FMC, under s.11(c) of the *Shipping Act* 1984, upon complaints or upon its own motion. A Formal Docket Complaint ('formal complaint') may be filed with the FMC under s.11 of the Act. When a complaint is lodged, the Respondent shall file with the FMC an answer to the complaint within 20 days after the date of service of the complaint by the FMC or within 30 days if such respondent resides in Alaska or beyond the Continental US. The respondent may additionally file a counter-complaint. Replies to answers are not permitted.

Prior to any hearing, the FMC (or presiding officer) may direct all interested parties, by written notice, to attend one or more pre-hearing conferences for the purpose of considering any informal settlement, formulating the issues in the proceeding and determining other matters to aid in its disposition.²⁴³⁷

The FMC encourages the use of alternative means of dispute resolution (ADR) in lieu of or prior to initiating a proceeding, through its Office of Consumer Affairs and Dispute Resolution Services (CADRS). In accordance with the provisions governing informal settlement,²⁴³⁸ all parties to dispute matters are required to consider use of a wide range of alternative means to resolve disputes at an early stage. That is, all parties are directed, as soon as practical after the commencement of a proceeding, to consider and consult with the FMC's ADR Specialist the use of any or a combination of procedures (including but not limited to mediation), as an alternative mean to formal litigation towards reaching settlements. In the process, upon request of any party, a mediator (or other neutral third party) acceptable to all parties will be appointed by the presiding officer to conduct mediation or other ADR within the prescribed time. Similarly, a settlement judge may be appointed to oversee settlement negotiations. Both of them shall report to the presiding officer on the outcomes and make recommendations as to future proceedings. The presiding officer shall issue an appropriate decision.

With the concurrence of the FMC's ADR Specialist, binding arbitration may be used as an alternative means of dispute resolution whenever all parties consent (subject to exceptions).²⁴³⁹ Such concurrence may be withheld if the FMC's General Counsel objects to use of binding arbitration.²⁴⁴⁰ The ADR Specialist will appoint an arbitrator, who shall be a neutral third party meeting the criteria of Title 5 of the *United State Code*, s.573. The arbitration agreement that specifies a maximum award and other conditions limiting the range of possible outcomes that can be issued by the arbitrator shall be submitted to the arbitrator in writing. The arbitrator has authority to settle a dispute through binding arbitration pursuant to the arbitration agreement, provided that the decisions shall not have precedential value with respect to decisions by Administrative Law Judges or the FMC.

²⁴³⁷ CFR, 502.94 – Pre-hearing Conferences. Available at: <http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&SID=8a53a220b634bebdba21901c88098214b&h=L&n=46y9.0.1.1.3&r=PART&ty=HTML> [accessed on 2 July 2013].

²⁴³⁸ CFR, s. 502.91 – Opportunity for Informal Settlement. Available at: <http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&SID=8a53a220b634bebdba21901c88098214b&h=L&n=46y9.0.1.1.3&r=PART&ty=HTML> [accessed on 2 July 2013].

²⁴³⁹ CFR, s. 502.406 – Arbitration. Available at: <http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&SID=8a53a220b634bebdba21901c88098214b&h=L&n=46y9.0.1.1.3&r=PART&ty=HTML> [accessed on 2 July 2013].

²⁴⁴⁰ CFR, s. 502.403 – Provisions Governing General Authority. Available at: <http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&SID=8a53a220b634bebdba21901c88098214b&h=L&n=46y9.0.1.1.3&r=PART&ty=HTML> [accessed on 2 July 2013].

Except with respect to arbitration, the provisions regarding *ex parte* communications do not apply to dispute resolution proceedings, and mediators are expressly authorised to conduct private sessions with parties.²⁴⁴¹

General regulatory processes at the FMC are consultative and place emphasis on resolution of disputes outside of the formal process. However, having filed a formal complaint, the parties to a matter are treated as parties in a legal dispute and a court-style hearing before an administrative judge is called. This section of the process is litigious in nature and parties seek legal counsel before the judge.

All designated parties (for example, 'proponents', 'protestants', 'intervenor')²⁴⁴² and the FMC are parties in the hearing process. Written arguments are submitted by the parties and a hearing is held before an Administrative Law Judge. Parties can be joined as respondents under certain circumstances, such as through-transportation cases. A party may appear in person or by a representative (an officer, partner, or regular employee of the party, or by or with counsel or others duly qualified) in any proceeding. Experts and consultants may be introduced as witnesses or asked to provide evidence to the judge in a proceeding. Any party or the representative may testify, produce and examine witnesses, and give oral argument, if granted.²⁴⁴³ Anyone appearing before the FMC shall be accorded the right to be accompanied, represented, and advised by counsel.

The FMC may call informal public hearings, not required by statute, to be conducted for the purpose of rulemaking or to obtain information necessary or helpful in the determination of its policies or the carrying out of its duties, and may require the attendance of witnesses and the production of evidence to the extent permitted by law.²⁴⁴⁴

There is no evidence of specific user groups or industry bodies that has been recognised in the legislation governing the FMC.

However, interested parties do have a right in participating in the FMC regulatory process. Persons who have a substantial interest in the matters covered in a FMC proceeding can apply for intervention and request for affirmative relief.²⁴⁴⁵ If permitted, they become the designated 'intervenor', who have the rights of discovery and presenting evidence or arguments, subject to limitations imposed by the presiding officer in his discretion.

Timeliness

The party that files for the approval of an agreement may request for expedited approval. In support of a request, the filing party should provide a full explanation, with reference to specific facts and circumstances, of the necessity for a shortened waiting period. Requests for expedited review will be granted only on a showing of good cause, which include, but is not limited to, the impending expiration of the agreement; an operational urgency; Federal or State imposed time limitations. A request for expedited review will be also considered for an agreement whose 45-day waiting period has restarted after being stopped by a request for additional information.²⁴⁴⁶ In reviewing requests, the FMC will consider the parties' needs and its ability to complete its review of the agreement. The

²⁴⁴¹ CFR, s. 502.11 – *Ex Parte* Communications. Available at: <http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&SID=8a53a220b634bebdba21901c88098214b&h=L&n=46y9.0.1.1.3&r=PART&ty=HTML> [accessed on 2 July 2013].

²⁴⁴² 'Proponents' are the parties to the agreement; 'Protestants' are the parties protesting the agreement; An 'Intervenor' is the person who has been permitted to intervene.

²⁴⁴³ CFR, s. 502.21 – Appearance. Available at: <http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&SID=8a53a220b634bebdba21901c88098214b&h=L&n=46y9.0.1.1.3&r=PART&ty=HTML> [accessed on 2 July 2013].

²⁴⁴⁴ CFR, s. 502.141 – Hearings not Required by Statute. Available at: <http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&SID=8a53a220b634bebdba21901c88098214b&h=L&n=46y9.0.1.1.3&r=PART&ty=HTML> [accessed on 2 July 2013].

²⁴⁴⁵ CFR, s. 502.72 – Petition for Leave to Intervene. Available at: <http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&SID=8a53a220b634bebdba21901c88098214b&h=L&n=46y9.0.1.1.3&r=PART&ty=HTML> [accessed on 2 July 2013].

²⁴⁴⁶ CFR, s. 535.605 – Requests for Expedited Approval. Available at: <http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&SID=8a53a220b634bebdba21901c88098214b&h=L&n=46y9.0.1.2.16&r=PART&ty=HTML> [accessed on 2 July 2013].

FMC may shorten the waiting period to no less than 14 days after the publication of the notice in the *Federal Register*, or deny the request, to which the normal 45-day waiting period will apply.

In the order instituting a proceeding or in the notice of filing of complaint and assignment, the FMC is required to establish dates by which the initial decision and the final FMC decision will be issued. These dates may be extended by order of the FMC for good cause shown.²⁴⁴⁷ For undue delays caused by a party to the proceedings, the FMC may impose sanctions, including entering a decision adverse to the delaying party. Time extension for the filing of documents can also be extended for good cause shown.²⁴⁴⁸

By consent of the parties and with approval of the FMC or presiding officer, a complaint proceeding may be conducted under shortened procedure without oral hearing.²⁴⁴⁹

In proceedings referred to the Office of Administrative Law Judges, the FMC shall specify a date, no more than six months from the date of publication in the *Federal Register* of its order instituting the proceedings or notice of complaint, on or before which hearing shall commence. Hearing dates may be deferred by the presiding officer only in the public interest or to prevent undue prejudice to a party.²⁴⁵⁰ Such motions must be received, whether orally or in writing, at least five days before the scheduled date for hearing.²⁴⁵¹

At any time after the conclusion of a hearing in a proceeding, but before issuance by the presiding officer of a decision, any party to the proceeding may request for reopening the proceeding for the purpose of receiving additional evidence.²⁴⁵²

Information Disclosure and Confidentiality

The FMC collects industry information through various avenues including FMC-initiated investigations, reporting obligations imposed on industry participants, annual reports and research for congressional reports.

The *Shipping Act of 1984* requires MTO agreements or ocean common carriers agreements to be lodged with the FMC for processing and review.²⁴⁵³ At any time after the filing of an agreement and prior to the conclusion of judicial injunctive proceedings, the filing party may submit additional evidence for an agreement or may propose modifications of an agreement. Other third parties cannot engage in such negotiations between FMC personnel and filing parties.²⁴⁵⁴ The FMC may also make requests from the filing party for additional information and documents necessary to complete its review.²⁴⁵⁵ The request can be made orally with a follow-up confirmation letter within seven days or in

²⁴⁴⁷ CFR, s. 502.61(c) – Proceedings. Available at: <http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&SID=8a53a220b634bebda21901c88098214b&h=L&n=46y9.0.1.1.3&r=PART&ty=HTML> [accessed on 2 July 2013].

²⁴⁴⁸ CFR, s. 502.102(a) – Enlargement of Time to File Documents. Available at: <http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&SID=8a53a220b634bebda21901c88098214b&h=L&n=46y9.0.1.1.3&r=PART&ty=HTML> [accessed on 2 July 2013].

²⁴⁴⁹ CFR, s. 502.181 – Selection of Cases for Shortened Procedure: Consent Required. Available at: <http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&SID=8a53a220b634bebda21901c88098214b&h=L&n=46y9.0.1.1.3&r=PART&ty=HTML> [accessed on 2 July 2013].

²⁴⁵⁰ CFR, s. 502.61(b) – Proceedings. Available at: <http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&SID=8a53a220b634bebda21901c88098214b&h=L&n=46y9.0.1.1.3&r=PART&ty=HTML> [accessed on 2 July 2013].

²⁴⁵¹ CFR, s. 502.104 – Postponement of Hearing. Available at: <http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&SID=8a53a220b634bebda21901c88098214b&h=L&n=46y9.0.1.1.3&r=PART&ty=HTML> [accessed on 2 July 2013].

²⁴⁵² CFR, s. 502.230(a) – Case Re-opening by Presiding Officer or Commission. Available at: <http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&SID=8a53a220b634bebda21901c88098214b&h=L&n=46y9.0.1.1.3&r=PART&ty=HTML> [accessed on 2 July 2013].

²⁴⁵³ CFR, s. 535.901 – Fail to File. Available at: <http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&SID=8a53a220b634bebda21901c88098214b&h=L&n=46y9.0.1.2.16&r=PART&ty=HTML> [accessed on 2 July 2013].

²⁴⁵⁴ CFR, s. 535.609 – Negotiations. Available at: <http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&SID=8a53a220b634bebda21901c88098214b&h=L&n=46y9.0.1.2.16&r=PART&ty=HTML> [accessed on 2 July 2013].

²⁴⁵⁵ CFR, s. 535.606 – Requests for Additional Information. Available at: <http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&SID=8a53a220b634bebda21901c88098214b&h=L&n=46y9.0.1.2.16&r=PART&ty=HTML> [accessed on 2 July 2013].

writing. A notice will also be published in the *Federal Register*, serving as a notice on any commenting parties. The notice will indicate only that a request was made and will not specify what information is being sought. Interested parties will have 15 days after publication of the notice to file further comments on the agreement.

A failure to comply with a request for additional information results when a filing party fails to respond or substantially respond to the request or does not file a satisfactory statement of reasons for non-compliance, within a specified time. In such an event, the FMC may, pursuant to s.6 (i) of the *Shipping Act*, request reliefs from the US District Court of Appeal in Columbia:

- to order compliance with the request; and
- extend the review period until there has been substantial compliance; or
- grant other equitable relief that under the circumstances seems necessary or appropriate.

In conducting inquiries and non-adjudicatory investigations, the FMC determines which information is required for the purposes of rulemaking or is necessary or helpful in the determination of its policies or the carrying out of its duties, including whether to institute formal proceedings directed toward determining whether any of the laws which the FMC administers have been violated.²⁴⁵⁶ The *Shipping Act* has enhanced the FMC's role as a monitoring agency by giving it the power to impose certain reporting and information requirements on participants in order to ensure the fulfilment of its monitoring obligations.

With respect to information confidentiality,²⁴⁵⁷ all information submitted to the FMC by the filing party (except for an agreement filed under s.5 of the *Shipping Act*) will be exempt from disclosure under Title 5 of the *United States Code*, s.552. This applies to information provided in the Information Form, voluntary submission of additional information, reasons for non-compliance, and replies to requests for additional information. However, the confidential information may be disclosed to the extent that it is relevant to an administrative or judicial action or proceeding; or it is disclosed to Congress. Parties may voluntarily disclose or make information publicly available. They shall promptly inform the FMC.

As for comments and any accompanying material in relation to the approval of an agreement, they shall be accorded confidential to the fullest extent permitted by law. Where a determination is made to disclose all or a portion of a comment, notwithstanding a request for confidentiality, the party requesting confidentiality will be notified prior to disclosure.

Transcripts of testimony will generally be available in any proceeding, and will be supplied to the parties and to the public, except when required for good cause to be held confidential.²⁴⁵⁸

Decision-making and Reporting

All initial and recommended decisions will include a statement of findings, conclusions and reasons, upon all the material issues presented on the record, and the appropriate rule, order, sanction, relief, or denial. Initial decisions should address only those issues necessary to a resolution of the material issues presented on the record. A copy of each decision when issued shall be served on the parties to the proceeding.²⁴⁵⁹

²⁴⁵⁶ *CFR*, s. 502.282 – Initiation of Investigations. Available at: <http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&SID=8a53a220b634bebdba21901c88098214b&h=L&n=46y9.0.1.1.3&r=PART&ty=HTML> [accessed on 2 July 2013].

²⁴⁵⁷ *CFR*, s. 535.608 – Confidentiality of Submitted Material. Available at: <http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&SID=8a53a220b634bebdba21901c88098214b&h=L&n=46y9.0.1.2.16&r=PART&ty=HTML> [accessed on 2 July 2013].

²⁴⁵⁸ *CFR*, s. 502.165 – Official Transcript. Available at: <http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&SID=8a53a220b634bebdba21901c88098214b&h=L&n=46y9.0.1.1.3&r=PART&ty=HTML> [accessed on 2 July 2013].

²⁴⁵⁹ *CFR*, s. 502.223 – Decision – Administrative Law Judges. Available at: <http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&SID=8a53a220b634bebdba21901c88098214b&h=L&n=46y9.0.1.1.3&r=PART&ty=HTML> [accessed on 2 July 2013].

Within 30 days, the initial decision shall become the decision of the FMC, unless within such a period, or a period extended by the FMC for good cause shown, request for review are made or a determination to review is made by the FMC on its own initiative.²⁴⁶⁰

The FMC will issue a final decision including a statement of findings, conclusions and reasons, upon all the material issues presented on the record, and the appropriate rule, order, sanction, relief, or denial. A copy of each decision when issued shall be served on the parties to the proceeding. The decisions of the FMC are not subject to ministerial approval. The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision.²⁴⁶¹

The FMC is required to produce a written report of every statutory investigation made in which a hearing was held stating its conclusions, decisions, findings of fact, and order. A copy of this report shall be furnished to all parties and made publicly available.

In the case of dispute resolution, the decisions of the FMC are applicable only to the parties involved in the dispute. This is also the case for approval of terminal agreements and investigations initiated by the FMC. The process provides numerous opportunities for parties to apply to the FMC for a consent order to proceed on terms separately negotiated with the other party – thus departing from the decision-making processes of the FMC.

Appeals

Within 30 days after issuance of a final decision or order by the FMC, any party may file a petition for reconsideration to the FMC.²⁴⁶² Such petition shall be limited to 25 pages in length and shall be served in conformity with some specified requirements. Any party may file a reply in opposition to a petition for reconsideration or stay within 15 days after the date of service of the petition.²⁴⁶³ The reply shall be limited to 25 pages in length and shall be served in conformity with some specified requirements. The FMC may order a rehearing; otherwise the final decision stays.

Although it is not stated anywhere in the sources consulted, it appears that decisions of the FMC may be appealed to the district administrative courts and, subsequently, the US court of appeals. Information about these courts is similar to that for the other regulatory authorities.

²⁴⁶⁰ *CFR*, s. 502.227 – Exceptions to Decisions or Orders of Dismissal of Administrative Law Judge; Replies thereto; Review of Decision or Orders of Dismissal by Commission; and Judicial Review. Available at: <http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&SID=8a53a220b634bebda21901c88098214b&h=L&n=46y9.0.1.1.3&r=PART&ty=HTML> [accessed on 2 July 2013].

²⁴⁶¹ *CFR*, s. 502.169 – Record of Decision. Available at: <http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&SID=8a53a220b634bebda21901c88098214b&h=L&n=46y9.0.1.1.3&r=PART&ty=HTML> [accessed on 2 July 2013].

²⁴⁶² *CFR*, s. 502.261 – Petitions for Reconsideration and Stay. Available at: <http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&SID=8a53a220b634bebda21901c88098214b&h=L&n=46y9.0.1.1.3&r=PART&ty=HTML> [accessed on 2 July 2013].

²⁴⁶³ *CFR*, s. 502.262 – Reply to Petition for Reconsideration or Stay. Available at: <http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&SID=8a53a220b634bebda21901c88098214b&h=L&n=46y9.0.1.1.3&r=PART&ty=HTML> [accessed on 2 July 2013].