COMPETITION ACT : APPLICATION TO THE RAILWAY SECTOR

Railway Specific Guidelines

- Published for consultation by my office on 10 February. A formal OFT version will be published this week with an invitation to respond to my office

- Not an easy read – difficult and complicated issues

- But your company can't afford not to read and digest them, and I look forward to receiving comments by 31 March 2000

- ORR may elect to organise further seminars to develop the guidance – depending on the issues raised

- The purpose of today is to give you an opportunity to test your understanding and to raise issues and concerns at an early stage in the consultation process. While I hope you will want to raise a wide-range of issues, a word of warning, we are not here today to provide free guidance on individual cases

Setting the Guidelines against a wider Competition background

- Approach to competition powers no different: tougher and more effective regulation

- Proactive rather than reactive, using the powers in a timely and proportionate manner

- Competition Act functions relate to the enforcement of the two prohibitions and not to the promotion of competition

- When exercising Competition Act functions, Section 4 Railways Act duties do not apply but I can have regard to any matter to which the DGFT would also have regard

- In some situations, choice between enforcement functions under the Competition Act or enforcement powers under the Railways Act

- Competition Act jurisdiction determined according to the subject matter of the agreement or conduct (that is, whether it relates to the supply of railway services) …

- and not according to the identity of the parties or undertakings. In particular, it does not depend on whether the undertaking is licensed under the Railways Act

- Importance of section 60 and the need to follow European Jurisprudence.

Relationship between OFT and Rail Regulator

- Enforcement of the Competition Act in respect of agreements and conduct relating to the supply of railway services carried out by the Rail Regulator concurrently with the DGFT.

- In general, an agreement or conduct which falls within my jurisdiction will be dealt with by my office

- Competition Act jurisdiction wider than Railways Act – eg ROSCOs

- DGFT and I are committed to transparency and clarity – we will make it clear in each case whether it is the Rail Regulator or the Director General who will consider a case, and will always work closely together

- DGFT's functions under the Act apply to business generally so that even if an agreement or conduct is not within the jurisdiction of the Rail Regulator, it will be within the jurisdiction of the Director General.

- Subject to two exceptions, I have all the powers of the DGFT to apply and enforce the Competition Act

- I am pleased to welcome Gover James from the OFT who will expand upon the Concurrency arrangements later

Some key regulatory relationships

- Relationship with Regulation and Franchising

- Status of access agreements

- Status of franchising agreements

  It is expected that the latter two will be excluded from the scope of the Competition Act in most circumstances.

The importance of market definition

- I will use the same framework as DGFT on the approach to market definition and assessment of market power. Each individual case will need to be examined on its own merits, on the basis of the facts and analysis relevant to that case.

- Assessment of market power involves several elements, which may include:
  - considering the size of market shares, and their movement over time;
  - barriers to entry;
  - buyer power; and
  - the effect of regulation.

- Defining the market will always be a crucial first step in any competition analysis

Anti-competitive agreements (Chapter 1 infringements)

- Examples might include:
  - agreements between train operators to restrict increases in service frequency or to miss out individual station stops (such activity is likely to constitute a form of market sharing);
  - agreements between train operators on fares, for example which restrict the introduction of cheaper fares or inhibit the development or introduction of quality initiatives;
  - agreements between train operators not to introduce new services into each other's franchise areas;
  - agreements not to bid for particular contracts or franchises; and
  - agreements to restrict the access of third parties to facilities.

Industry-wide arrangements and agreements

- Many of the industry-wide agreements which currently provide network benefits have been notified to the OFT under section 24 of the Restrictive Trade Practices Act 1976 and are the subject of a direction issued by the Director General under section 21(2) of that Act.

- Therefore benefit from exclusion from Chapter I prohibition unless the agreement is materially altered.

- Industry-wide agreements may also benefit from exclusion to the extent that they are made in order to comply with a legal requirement.

- Act also admits possibility of exemption, because of the benefits of some agreements. Before contemplating exemption, would want to see eg

  - real material benefits for passengers;
  - that there are no restrictions which are not indispensable to achieving those benefits; and
  - that there is no unnecessary elimination of competition or the potential for competition through the creation of new barriers to entry

- Land and vertical agreements are excluded (subject to clawback) – but the conduct associated with negotiation is not

Abuse of a dominant position in a market

- ECJ view is that dominance can be presumed in the absence of evidence to the contrary if an undertaking has a market share persistently above 50 per cent.

- Unlikely that an undertaking will be individually dominant if market share is below 40 per cent although dominance could be established below that figure if other relevant factors such as the weak position of competitors in that market provided strong evidence of dominance.

- Potential abuses of a dominant position include:

- Charging excessive prices**.** Could apply to all activities across the railways sector, including passenger fares, freight charges, access charges and rolling stock lease charges.

- Charging discriminatory prices or applying discriminatory terms or conditions. For example, the owner of a maintenance facility offering different terms to its own operations to those of a competitor might be abusive if the company in question were dominant.

- Engaging in predatory behaviour: eg targeted fares reductions (as opposed to a general reduction across most fares)

- Enforcing vertical restraints. Examples of abuse might include the enforced bundling together of the supply of scarce spares and the provision of maintenance, or the bundling together of a railway ticket and on-board refreshments, or of railway haulage with warehousing and distribution.

- Refusing to supply existing or potential customers: particularly where there is an intention to distort competition in an upstream or dominant market

The rolling stock leasing market

- ROSCOs have considerable market power, particularly at times such as franchise replacement

- Government accepted my predecessor's conclusion that the potential detriments could be remedied by three pronged approach:

    - voluntary code of practice
    - 3 year call option
    - enforcement using Competition Act powers

- Codes of practice were published by the ROSCOs on 10 February 2000

- Cautious welcome but must meet spirit as well as letter of codes – I will not hesitate to act using Competition Act powers if they do not do so.

Compliance

- DGFT and I share a common view of the importance of corporate compliance programmes.

- Competition law can have implications for the activities of a wide range of individuals at a variety of levels in an organisation and the risk of infringement is therefore potentially greater than with other legislation

- Expect companies to implement corporate compliance programmes to minimise the risk of infringing the prohibitions by systematically ensuring that all relevant employees are sufficiently knowledgeable about the provisions of the law, and that they will put that knowledge to good effect.

- Developing a compliance programme is not about producing a nicely bound document that gathers dust on the shelf.

- The degree to which companies can demonstrate commitment will be one of the determinants of the severity of any penalties applied.

- No single recipe for what makes a good compliance programme and I do not intend to endorse individual compliance procedures. Minimum programme can be expected to comprise at least four elements:

    - Support and personal commitment from senior management

    - A clear policy commitment to comply with the legislation

    - Training on both the law and the company policy and procedures, on a continuing basis

    - Evaluation and audit

- I would like to see the rail industry follow the example of the Telecoms industry and create a Compliance forum. I am pleased to welcome Jane Whittles from OFTEL who is going to share her experience of creating the Telecoms Compliance Forum.

Conclusion

- I understand that some of the major players in the industry consider that because access agreements, franchise agreements and many of the industry wide arrangements are likely to benefit from an exclusion or exemption, that the Competition Act will have a limited impact upon the railway industry. Let me assure you that the combination of an industry well endowed with dominant undertakings and the nature of European Jurisprudence could make for seriously interesting times – after today I hope you will understand why.