Decision of the Office of Rail Regulation
Association of Train Operating Companies

Relating to a finding of 17 November 2009 by the Office of Rail Regulation (ORR) that the Association of Train Operating Companies (ATOC) has not infringed the prohibition imposed by section 18 of the Competition Act 1998 ('the Act') or Article 82 of the EC Treaty.

Introduction

1. This decision relates to the conduct of ATOC in the supply of Real Time Train Information (RTTI) in Great Britain (GB).

2. National Rail Enquiries (NRE) is the body with whom third parties generally engage in order to procure a licence for access to RTTI. NRE is wholly controlled by ATOC (see paragraphs 11-16 below) and this decision is, therefore, addressed to ATOC and tends to refer to ATOC and NRE collectively as 'ATOC'. This document refers to NRE directly only where to do otherwise would cause obvious confusion, for example, when referring to the notes of NRE board meetings.

3. ORR's investigation[1] into ATOC's conduct was commenced as a result of ORR being made aware of difficulties that the company Kizoom Software Ltd[2] (Kizoom) had experienced in accessing and maintaining access to RTTI. These difficulties were set out to ORR by way of arguments made in a letter from Kizoom, dated 10 February 2009, to the Department for Transport (DfT) and copied to ORR. Kizoom had previously met with ORR in 2007 to raise concerns of a similar nature. This meeting did not result in action by ORR at that time. In its letter Kizoom alleged that ATOC aimed to hold a monopoly over UK train movement data and, to this effect, had cancelled Kizoom's licence to access RTTI. The fact that Kizoom's expiring licence was not renewed or extended is not in doubt, although the reasons behind this are a matter of factual dispute between the parties. This decision in some places refers to this non-renewal as a 'loss of access' on Kizoom's part, since without this licence it was no longer able to offer certain services using ATOC's data[3] (see below). It should be noted, however, that Kizoom's parent company Cityspace retains some rights to use ATOC's RTTI data in its network of information kiosks.

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[1] On 4 June 2009 and in accordance with SI 2000 No. 260 The Competition Act 1998 (Concurrency) Regulations 2000, ORR informed the Office of Fair Trading (OFT) that it wished to exercise its concurrent jurisdiction to investigate the complaint. Agreement by the OFT was given on 10 June 2009.

[2] Since August 2009, following the acquisition of Kizoom Software Ltd by Cityspace in 2008, the two legacy firms Cityspace and Kizoom Software Ltd have operated jointly under the company name Kizoom Ltd.

[3] This investigation considered the feasibility of the use of alternatives to NRE's RTTI data, as explained in the market definition and assessment of dominance sections of this decision.

4. The immediate effect of the loss of Kizoom's access to RTTI was that its iPhone[4] application (known as an 'app') *MyRailLite* had to be withdrawn from Apple's App Store[5] in December 2008. This app had enjoyed popularity amongst iPhone users and was highly ranked in Apple's table of most downloaded free apps. This resulted in ORR receiving nine complaints from members of the public and two from Members of Parliament on behalf of their constituents. All of these complainants made allegations to the effect that ATOC was acting in an anticompetitive manner with the objective of advantaging its own rival app. Similar concerns were expressed in a number of user reviews provided on Apple's App Store. As set out above, ORR was also copied into an open letter which was circulated by Kizoom in February 2009 to parties including the DfT[6]. Attached to this letter was a briefing note in which Kizoom alleged that ATOC was seeking to impose a data monopoly on RTTI.

5. The ATOC app that effectively replaced *MyRailLite* is sold by an independent third party Agant Ltd (Agant) and is called *National Rail Enquiries for iPhone*[7] (henceforth referred to as 'the Agant iPhone app'). Agant entered into an agreement with ATOC for a supply of RTTI data in February 2009. This app, which bears NRE branding, is sold by Agant via Apple's App Store and has a retail price of £4.99 including VAT.

6. Kizoom's loss of access to RTTI also meant that it was no longer able to continue to supply live real time train information services to the UK mobile network operators (MNOs)[8]. Kizoom had previously supplied these firms with services that enabled MNOs to offer live train information to their passengers via their web portals[9]. This created an opportunity for other firms to bid to supply these services, including the company mxData, which successfully bid to replace Kizoom in supplying services to the MNO Orange from April 2009.

7. ORR exercises its powers under the Act concurrently with the Office of Fair Trading[10] (OFT) in respect of the agreements or conduct relating to the supply of services relating to railways[11]. ORR is also a National Competition

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4 The iPhone is an internet and multimedia enabled smartphone, i.e. a mobile phone with advanced capabilities, sold by Apple Inc. Over one million iPhones were sold in the UK between its launch in 2007 and early 2009.

5 Apple's App Store is an online service for the iPhone that allows users to browse and download applications from the iTunes Store.

6 ORR 10/41/1/8 Internal ORR email attaching a letter from Kizoom to DfT

7 www.agant.com

8 In the UK the MNOs are 3, O2, Orange, T-Mobile, and Vodafone.

9 A web portal is, effectively, a web page that provides a list of links intended to be of interest to the user.

10 Defined in section 67(3ZA) of the Railways Act 1993

11 The Office of Fair Trading, *Application to services relating to railways*, a Competition Act 1998 guideline published with the ORR, OFT 430, October 2005

Authority (NCA)[12] for the purpose of applying Articles 81 and 82 of the EC Treaty. Article 82 provides that any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

8. The ability and willingness of the railways to keep pace with fast-moving mobile technology has the potential to bring about important benefits for passengers in terms of the types of products and services they can enjoy and the ease with which they can access good, reliable RTTI whilst on the move.

9. It is important that the industry conducts itself in such a way so as not to discourage or dampen the emergence of new products and the introduction of new technology. ORR, therefore, considered this an important area to investigate using its powers under the Act particularly given the level of public interest shown in the withdrawal of *MyRailLite*.

Conduct of the investigation

10. ORR sent out its first information requests under section 26 of the Act (section 26 notices) on 12 June 2009 to ATOC and Kizoom. Further section 26 notices were sent on 5 August 2009 (to ATOC) and on 28 August 2009 (to Agant). A follow up letter asking for clarification and missing documents was also sent to ATOC on 28 August 2009. Transport for London was also issued with a section 26 notice on 2 September 2009.

The undertakings under investigation

ATOC

11. The Association of Train Operating Companies (ATOC) is an unincorporated association owned by its members. It was set up by the train operators following privatisation of the railways under the Railways Act 1993. ATOC describes itself as, *"the official voice of the rail passenger industry"*[13], with the purpose of supplying such services to its members as they require in order to comply with the conditions of their franchise agreements and operating licences.

12. ATOC's work is administered through four companies. The majority of its services are provided under ATOC Limited, with three smaller companies undertaking discrete responsibilities: Rail Settlement Plan Ltd, which manages revenues; Rail Staff Travel Ltd, which manages staff travel; and National Rail Enquiries, which provides rail information to the public.

13. ATOC is funded via the contributions of its member Train Operating Companies (TOCs).

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[12] Council Regulation EC 1/2003 and Regulation 3 of the Competition Act 1998 and Other Enactments (Amendment) Regulation 2004 SI 2004 No 1261

[13] http://www.atoc.org/about.asp

NRE

14. NRE was established in June 1996 as a part of the privatisation of the railways. It was the means by which the TOCs fulfilled the obligation in their passenger train licence to be a party to and comply with arrangements (approved by the Secretary of State) relating to a telephone inquiry bureau relating to railway passenger services. The arrangement was the National Rail Enquiry Scheme (NRES), a multi party contract in which all participants instruct the ATOC executives how they wish the telephone enquiry bureau to be run. Membership of ATOC is a prerequisite for participation in NRES.

15. Schemes such as NRES have their own scheme council with representatives from all participating TOCs. The NRES Council has delegated most management functions to the directors of NRES Limited (NRESL), a company established as part of the structure of NRES. The shareholders of NRESL are the TOCs who are part of the NRES scheme.

16. ATOC therefore controls NRESL and is the party whose conduct is at issue in this investigation. ATOC is, self-evidently, an association of undertakings who are, at least in some instances, competitors. It is possible to view actions taken by ATOC as the decisions of an association of undertakings, raising the question of whether this case potentially involves a breach of Chapter I of the Act. However, the core concern to date is the control that ATOC has over the supply of RTTI and ORR considers that this concern is more properly approached by reference to the relevant legal tests for a potential abuse of dominance. It also seems likely that such dominance (if established) is an exercise of collective dominance on the part of the TOCs through the medium of ATOC/NRESL. ORR takes the view that the TOCS are presenting themselves, in this context, as a collective entity.

Third party licencees of RTTI

17. In addition to providing information directly to passengers via various media (see below), ATOC supplies RTTI to a number of third party customers. The three parties that are most relevant to this investigation are briefly described below.

Kizoom

18. Kizoom is an IT firm specialising in converting transport data into consumer accessible formats. Kizoom's website states that it: "*Works on behalf of transport authorities and operators to transform multi-modal transport data into relevant and easy to digest information. It then delivers this information across a wide range of channels - the web, mobile phones, kiosks*[14] *and screens - to enable the travelling public and transport professionals to make informed decisions*"[15].

19. Kizoom has had a commercial relationship with ATOC since 2003 and worked with it to develop the output ports of RTTI. In 2005 Kizoom was

[14] Previously delivered by Cityspace. Since August 2009, following the acquisition of Kizoom Software Ltd by Cityspace in 2008, the two legacy firms Cityspace and Kizoom Software Ltd have operated jointly under the company name Kizoom Ltd.

[15] http://www.kizoom.com/index.html / ORR/10/41/3/323

granted its first RTTI licence, which was primarily for the purpose of providing services to ATOC. Kizoom has also undertaken work for MNOs in the provision of real time train information services for mobile portals.

Agant

20. Agant Ltd was formed in 2002, initially to develop non-transport related software for Apple Macintosh personal computers. It continues to work in this area and also provides consultancy services for internet and intranet development. More recently, Agant has developed software for the iPhone, most notably the Agant iPhone app[16].

mxData

21. mxData Ltd (mxData) uses mobile, internet, and database technology to provide live information services to consumers via mobile phones, the internet, and satellite navigation devices. Its website provides examples of products that mxData has developed on behalf of local authorities (such as live bus movement data), and MNOs. A feature of mxData's information solutions is the integration of live data with mapping software[17].

22. mxData first sought access to RTTI in 2008 in order to bid for a contract by Orange. Although this request was initially turned down, mxData was later successful in gaining access following Kizoom's loss of access (see assessment of conduct below). The result was that mxData was able to replace Kizoom as a supplier of services to Orange in April 2009.

The product and services concerned

Real time train information

23. The provision of timetable information to consumers is developed from the core industry purpose of running the railways. Various planned and unplanned events (see below) mean that train timetables are continually evolving as more detailed information becomes available. This document uses the term 'RTTI' to refer only to timetable information that has been subject to all of the following iterations:

- The core timetable is altered twice a year in December and May to take account of seasonal variations.
- Under the terms of its licence, Network Rail is required to give 12 weeks' notice of planned track works (repairs and improvements) which will result in line closures (or possessions). This is known as ('T – 12'). The timetable will therefore change each week based on the 12 weeks advance notice of possessions. This obligation is to enable passengers to be informed in sufficient time for them to plan their future journeys and to buy tickets. Such pre-notification is essential for cheaper priced advance ticket purchases which are train specific and not available on the day of travel.

[16] ORR 10/41/2/225

[17] http://www.mxdata.co.uk/about_us/what_we_do.aspx

- Short notice possessions will also affect the working timetable. These arise due to non-planned work on the network that requires Network Rail to make possessions with very little notice to train operators.
- A final iteration to the timetable arrived at via the stages set out above is the inclusion of those changes that are brought about by the day-to-day imperfect operation of the timetable. This includes the effect of delays and cancellations to services (arising from a number of factors including, for example, train failure, passenger incident and line-side fires). This information is gathered from the individual stations, area control rooms, and from monitoring points on the tracks, and is often a manual input by individual staff. Only when this fourth stage of information is included can a timetable be described as providing RTTI.

24. For the purposes of its analysis, ORR has assumed that the passenger is agnostic as to the 'origin' of the time of the train in terms of the source of the live data. The type of passenger that is relevant for the purposes of the present investigation is accessing the times of the trains not for advance ticket purchases but for the purpose of travelling on the day. As such he/she has a specific requirement for actual running time information.

Retail products

25. Train time information can be presented to passengers in a variety of forms. As noted above, its closeness to real time train running will be dependent upon the stage at which it is able to be produced, with, for example, printed timetables only providing 'real time' information where trains are running to their scheduled times.

- The bi-annual timetable is available from the internet, in a full printed manual, and also in the form of a 'route timetable'. The latter is most commonly used by passengers in the form of a small leaflet which can be picked up at stations and which is provided and printed by each train operating company for use of its own customers.
- Alterations resulting from planned possessions are publicised in several ways. Where a possession will cause a variation to the core timetable lasting several days or weeks, an individual operator will publicise this through advertising in local media, notices on its website, and posters/information boards at relevant stations. In some cases a revised route timetable will be made available at stations.

26. NRE through its website and its telephone enquiry bureau displays the revised timetable for the purpose of providing up-dated travel information for journey planning purposes. The non-regular traveller may indeed be unaware that the train is running outside of the core timetable. S/he will access the timetable purely in order to purchase a ticket and to plan his/her individual journey. Websites which sell tickets (for example thetrainline.com) will take these variations into account and only offer tickets on running services/ the actual timetable. As noted above access to a revised timetable is critical for advance purchase tickets which are train specific.

27. By their nature there is little time for train operators to provide printed material in response to short-notice possessions (i.e. within 12 weeks).

Generally these alterations to the timetable will only be communicated to the public via:

- announcements at stations (for example hand-written boards or LCD displays);
- the NRE telephone enquiry service (in response to a passenger request); and
- notices on NRE/ticket websites (note, this is limited to a notice, the timetable information for each individual train will not alter).

28. In summary, the principal[18] ways in which passengers can obtain live train information, i.e. information that has been subject to all of the iterations set out above, are:

- enquiry services, such as information provided by telephone (the NRE telephone enquiry bureau);
- public departure boards displayed at stations (on platforms or concourses) or sometimes at other public buildings;
- various alerting services, typically[19] sent to passengers via SMS[20] or email;
- live arrival and/or departure boards (LDBs) that are provided on standard web pages, which can be accessed via a standard web browser on a computer or handheld device including a mobile phone;
- departure and/or arrival boards that are provided via mobile portals. These provide the same basic functionality as LDBs accessed via standard web pages and standard mobile browsers, but with added speed and convenience of access. Mobile portals may provide additional functionality such as journey planning; and
- departure and/or arrival boards that are provided via smartphone applications (e.g. the iPhone apps referred to above). Like the services provided via mobile portals, these have the same basic functionality as LDBs accessed via standard web pages and standard mobile browsers, but with added speed/convenience of access and features. The greater processing power, memory, and other features (such as global positioning services/GPS) of high-end smartphones are important in this regard.

29. Other, non-live, means by which passengers can obtain train time information. Important examples of these are provided below.

- Printed timetables (see above).
- Electronic journey planners. These enable passengers to find out information about timetabled train departure times, including any required connections/changes, between pairs of stations. They may be accessed

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[18] NRE has told ORR about other products including its Windows Vista gadget, which broadly replicates the live departure boards that are available on its website.

[19] NRE also sends out live information via the social networking service Twitter.

[20] Short Message Service, i.e. a mobile phone text message.

either via telephone (e.g. NRE's telephone enquiry bureau) or directly by passengers (e.g. on 21 October 2009 Kizoom and the trainline.com launched a new iPhone journey planner app[21]). Such services are not dependent on truly live train information as described above or, therefore, on an RTTI feed such as the one that has been a source of contention between Kizoom and ATOC.

Wholesale inputs

30. NRE compiles all train timetabling and running information into a single RTTI database which it has named 'Darwin'. The iterations involved in arriving at RTTI are briefly summarised at paragraph 23, above, but it is useful to list the key specific individual inputs relied on by NRE to aggregate and disseminate this information.

31. In broad conceptual terms the inputs required to provide a database comparable to ATOC's RTTI database can be subdivided as follows:

(a) Timetable data, which effectively provides a list of the predicted location of all of the trains on the network at different points in time. Network Rail's Train Service Database (TSDB) database is the source of such data in GB.

(b) Movement data, i.e. automatically generated information on the location of trains at different points in time (which ultimately comes from track-side detectors operated by Network Rail). A comparison between the timetabled and actual location of trains enables the identification of trains that are not on time and, together with disruption data (see below) can be used to make predictions about future train times. Network Rail's Train Operating System TOPS[22] is GB's central train operating system.

(c) Movement data, i.e. comparisons between actual and predicted train locations are not sufficient on their own to enable reliable predictions, which require additional information, for example on train cancellations or changes to train stopping patterns, covering:

  (i) planned disruptions (e.g. resulting from pre-scheduled works);and

  (ii) unplanned disruptions, inputted manually by TOC staff in control rooms (input into Darwin via Nexus Alpha[23]'s Tyrell service), and at stations (input into Darwin via CIS APIs[24]).

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[21] http://www.kizoom.com/newsroom/archive/press-releases/2009/20091021-thetrainlinecom-unveils-free-iphone-app-from-kizoom.html

[22] Train Operating Processing System

[23] www.nexusalpha.com/

[24] 'CIS' is an acronym standing for Customer Information System, a term sometimes used within the industry to refer to both passenger-facing station displays and the large systems that underpin them, which may draw on timetable and movement data and include predictive capabilities. API stands for Application Programme Interface. This is the interface that a computer system, library or application provides in order to allow requests for services to be made of it by other computer programs, and/or to allow data to be exchanged between them.

(d) Various systems and software for aggregating, manipulating, and distributing the above.

(e) Prediction algorithms. These are used to make predictions about the arrival time at stations of trains that are currently behind schedule.

ATOC's policy on access to RTTI

32. ORR is aware of several key types of third party (i.e. service provider) access to ATOC's Darwin RTTI database:

- A **push feed** (also sometimes referred to as 'raw data feed' or 'push port', but for convenience referred to throughout this document, other than where using direct quotations, as a push feed) - ORR understands this to be the highest level of access[25] to Darwin as it involves the full output of the database (i.e. including minute by minute updates) being provided to a third party via a constant stream of data. The full and live data stream then resides on a server hosted by a third party. ORR understands that this type of access offers benefits to a third party by placing it (subject to the terms of its licence) in full control of the data and how it is used. The speed and reliability of services offered by the third party will be dependent on the processing and bandwidth capabilities of its own server rather than that of ATOC. ORR understands this to be a significant factor in the use that the data allows a third party. For example, a real time alerting service provided via a pull feed (see below) would require ongoing queries to be put to the data set by the third party, which could potentially result in excessive demand on the available resources of ATOC, thus constraining the ability of all parties to supply RTTI-based information to passengers. More generally, it has been suggested to ORR that a push feed may offer significant benefits in terms of the ability of third parties to exercise control over the development of new services. This issue is discussed in greater detail in the analysis of ATOC's conduct below.
- A **pull feed** (various forms of this type of access may also be referred to as an 'enquiry feed', 'enquiry port' or 'web services') - the key difference between this and a push feed is that, in the case of a pull feed, the data set is not transferred to the third party's server. Instead, the third party is given direct access to Darwin (through a 'port') and can interrogate it on the ATOC server, which will return responses to individual queries. This method of access allows third parties to build their own applications (including those offered as websites or on a smartphone application).
- **White label services** in this context refers to instances where ATOC controls the functionality and development is controlled by the data owner. The involvement of a third party receiving white label services is limited to the application of branding. On this basis, third parties can only innovate to the extent that NRE programmers can facilitate any given innovation, and third parties would not own any IP rights over the developed product.

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[25] Serco (see below) told ORR that the information provided by the main alternative to a push feed, namely a pull feed, is, *"...distinctly less rich than that provided by the Push Ports and does not provide an automatic update facility".*

33. The evidence obtained by ORR indicates that around May 2008 there was a change of policy on the part of ATOC, this change being to "[...] *provide interested third parties with 'Services', built to third party specification, rather than raw data feeds which have been proposed in the past.*" The paragraphs below set out the facts, as gathered from contemporaneous documents, as to what access was available from 2006 to date.

Pre- May 2008

34. A NRE Board paper of 21 September 2006 entitled, "*Fees for NRE data feeds*[26]" refers to a previous NRE Board decision to recover costs for the provision of data and the development and maintenance of the data system. It refers to three distinct levels of access: a *"full RTTI feed"* (ORR interprets this term as equating to push feed), a *"knowledgebase feed"*; and an *"LDB feed"*. It mentions in particular its intention to charge TTL (Trainline.com) a licence fee relevant to a full RTTI feed. It would, therefore, appear that all types of access referred to at paragraph 32 above were available to third parties during that period, including access to a full push feed (although this option was not taken up by any third party).

Post – May 2008 policy

35. A NRE Board paper of May 2008 states a policy change, in that ATOC decided to cease offering "*raw data feeds*" to third parties, a change henceforth referred to as the 'May 2008 policy'. The Board paper states that new access will only be granted for "*Services*", which ATOC told ORR to have the same meaning as 'Enquiry Port', i.e. a pull feed.

36. There remains, however, significant doubt as to precisely what was universally available to third parties between May 2008 and July 2009. This issue is considered in detail in the section of this decision which examines ATOC's conduct below.

37. In the period from February 2008 to July 2009 access to pull feeds was agreed with two commercial parties. ATOC entered into licences with Agant[27] on 18 February 2009 and with mxData on 22 April 2009[28], enabling these two firms respectively to launch the Agant iPhone app and to sign a contract with the MNO Orange.

ATOC's processes and criteria for assessing applications for access to RTTI

38. ATOC, in response to ORR's section 26 notice of 12 June 2009, set out the internal processes ATOC adopts for handling requests for access to Darwin and the criteria it applies in assessing the acceptability or otherwise of the application. It sets out a procedure whereby:

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[26] As ORR understands it, this term is used to apply to all forms of access to the Darwin database.

[27] Document *AGANT.pdf* provided in response to question 29A of the section 26 notice of 12 June 2009

[28] Document Q30 *Mxdata contract.pdf* provided in response to question 30 of the section 26 notice of 5 August 2009

- Third party enquiries will in the first instance be sent to either its Head of Commercial or its Head of Online Services.
- The recipient of the request will respond, setting out that there is a charge for accessing Darwin and requesting further information in order to allow the request to be considered.
- Once the further information/detailed proposition is received from the third party, NRE will assess it against its access criteria. If these are met a meeting will be arranged to discuss the opportunity.
- If, following the meeting, it is clear that the acceptance criteria are met, NRE's Head of Commercial will seek the approval of its Chief Executive before entering into a licensing agreement with the third party.

39. ATOC told ORR that the acceptance criteria are that[29]:

- the proposed service is a worthwhile and viable service for passengers;
- the enquirer is reputable; and
- the project has no negative impact on TOCs[30].

40. ORR has not sought evidence to confirm that these processes and criteria have been applied consistently and universally in the past. ORR is, however, satisfied that as a stated policy going forward they will play an important role in enabling future innovations based on RTTI source data to reach market (see the analysis of ATOC's conduct and ORR's conclusions below).

Market definition and assessment of dominance

Market definition

Case law and Commission guidelines

41. Section 60(1) of the Act sets out the principle that, so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising in European Community law in relation to competition within the Community. In particular, under section 60 of the Act, the OFT [31]must act (so far as is compatible with the provisions of the Act) with a view to ensuring that there is no inconsistency with either the principles laid down by the EC Treaty and the European Court or any relevant decision of the European Court[32].

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[29] ATOC response to Question 14 C of section 26 notice of 12 June 2009.

[30] ATOC has indicated that it has on occasion had concerns about the potential of some applicants' proposed services to be used for fraudulent purposes – ATOC's response to Question 17 of the section 26 notice of 5 August 2009

[31] And the sectoral regulators given concurrent powers under the Act

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

42. The European Court of Justice, in *United Brands v Commission*[33], set down that dominance refers to:

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

43. In order to assess whether an undertaking holds a dominant position, it is first necessary to define the relevant market on which that position might be held. The need to define a relevant market before assessing dominance has been established in European case law[34].

44. For the purposes of Community competition law the relevant market usually comprises a relevant product market and a relevant geographic market. As stated in the *Commission Notice on the definition of the relevant market for the purposes of Community competition law* [35] (the 'Commission Notice'):

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

45. This definition reflects the case law of the European Court.

46. The standard approach to market definition, as outlined in the OFT's market definition guidelines[36] is that of the 'hypothetical monopolist test', the principles of which are also described in the Commission Notice on market definition. The approach involves identifying a focal product, which would constitute a relatively narrow market definition, and considering the ability of a hypothetical monopolist of that focal product profitably to implement a non-transitory price rise of say 5-10% above the competitive level.

47. If substitution would be enough to make the price increase unprofitable because of the resulting loss of sales, additional substitutes and areas are included in the relevant market.

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

[34] For example, in Continental Can Co Inc, JO [1972] CMLR 199, see paragraph 32.

[35] OJ C372, 9/12/1997, page 5, paragraphs 7 and 8

[36] OFT 403 *Market Definition*

48. The market can also be widened on the supply-side to include goods and services from which other firms can swiftly switch in response to the price rise thereby constraining the hypothetical monopolist's price to the competitive level. Having defined the product market, the process can then be repeated to define the geographical market both on the demand-side and on the supply-side.

Background

49. The focus of ORR's investigation has been on ATOC's conduct with regard to the provision of access to its RTTI database, Darwin, to third parties, i.e. 'the supply of RTTI'. Such access can take various forms, with, from the perspective of users of the database, potentially significant distinctions between the different forms of access listed at paragraph 32 above.

50. ORR's market definition does not differentiate between these forms of access. This is because the competitive conditions for the supply of each type of product are identical. ATOC has a single RTTI database which could potentially provide access to third parties using any of the means listed at paragraph 32. The raw data sources that a firm would need, in order to construct an RTTI database offering comparable functionality using all of the means listed at paragraph 32 are the same as the ones that it would require to provide only one of them. ORR's market definition therefore does not differentiate further between different forms of access.

51. ATOC supplied ORR with detailed documentation regarding the many different systems and vendors that feed into Darwin. The most important sources of input data are summarised in broad terms at paragraph 31 above.

52. In order to define the relevant market(s) ORR applied the hypothetical monopolist test to the terms on which access to an RTTI database might be supplied to a third party.

53. During the period spanned by this investigation ATOC has provided access to Darwin on varying terms to a number of different parties, including:

- itself, in order to enable it to supply various NRE-branded information services to passengers[37], with no internal transfer charging within NRE that ORR is aware of;
- the franchised TOCs who are ATOC's members;
- various organisations including universities and local councils, who want to be able to display live train information (charging models vary); and
- various other third parties, including:
    - companies such as Nexus Alpha which provides services to TOCs and pays ATOC a fixed fee for access; and
    - other third parties who use access to earn revenue from supplying services based on the data to other firms outside the industry or directly to passengers. Kizoom represents an example of this. Such access

[37] See, for example, http://www.nationalrail.co.uk/passenger_services/info_on_the_move/

has in the past been provided on both a fixed fee and revenue share basis.

54. ORR's market definition focuses on the last of these types of access since it represents both the area where concerns have been raised and also seems to ORR to be the area where technological developments are most likely to drive the emergence of new products and services.

55. The relevant geographic market for this investigation is no wider than GB. This is because:

- NRE does not collate or disseminate train information for Northern Ireland;
- Information on train services outside GB is not, from the perspective of a passenger looking to travel within GB, a viable substitute for information on train services within GB; and
- Any non-GB firms looking to supply live GB rail information to third parties or directly to passengers would remain ultimately reliant on information that originated with Network Rail and the GB TOCs, and would therefore be in no stronger a position than any potential GB entrants.

56. It was also necessary for ORR to consider whether the relevant market might be narrower than the whole of GB. Whilst the access to RTTI data that has been supplied by ATOC to third parties such as Kizoom and Agant has hitherto taken place on a national (GB-wide) basis, certain downstream products that are available on a regional basis could have implications for market definition.

57. Such 'regional' products are discussed below, but this decision characterises the potential for them to impose constraints as a product rather than geographic market issue. Whether or not non-substitutable train information in one area and train information in another area are classified as being in the same product market but different geographic markets, or as being in distinct product markets, is not vital from a competition authority perspective. What matters is that a market definition properly takes into account all of the relevant constraints.

Possible constraints

58. The hypothetical monopolist test assesses the constraints that a supplier faces in setting prices. In the case of a product, such as the provision of access to an RTTI database, that is sold to intermediate third parties rather than directly to end consumers, such constraints could come from one or both of the two mechanisms listed below.

- One type of constraint would be **indirect** substitution whereby a third party, facing a price increase or reduction in quality, could pass this on to its customers. For example, if a third party developer was offered a less favourable revenue share by ATOC it might choose to respond - to the extent that its contract with ATOC permits this – by increasing the retail price of its consumer product. This would have the effect of incentivising potential new buyers of the third parties' product to switch

to a competitor's product, thus reducing ATOC's revenues if the alternative product did not depend on access to Darwin.

- Another type of constraint would be the **direct** substitution of the wholesale input by third parties. In the case of the access provided by ATOC, a third party, facing a price increase above the competitive level (e.g. a third party software developer being offered a less favourable revenue share or being asked to pay a higher fixed fee) might respond by attempting to obtain a similar product from another supplier, thereby reducing ATOC's revenues.

Indirect constraints

59. A brief examination of the various means by which passengers can obtain live train information reveals that indirect constraints are of very limited relevance for these products.

60. Almost all of the live train information that is available in GB is currently supplied using access to ATOC's Darwin database. The only two material exceptions that ORR is currently aware of are:

- JourneyCheck alerts, provided to passengers by TOCs based on systems provided by the firm Nexus Alpha, using control room disruption data. These alerts provide a different functionality to live departure boards. In particular, they do not enable a user to find out about all departures from a particular station. Rather, they provide information around possible delays to routes and trains in which a passenger has previously registered an interest.
- Many of the arrival and departure boards that are located within stations operate using CIS data and without access to Darwin. These departure boards, however, offer a very limited substitute to the vast majority of users seeking to obtain passenger information online, since a passenger has to be standing physically in front of such a departures board, rather than being able to access it remotely such as via the internet or telephone.

61. Due to the particular functionality of these two products, ORR does not consider that they are close substitutes for the majority of consumer information products that can be achieved based on access to ATOC's RTTI database.

62. ORR has also considered whether passengers could switch to non-live information products and services. If this was a possibility, it would have the potential to act as a constraint on the terms to which access to RTTI was provided.

63. ORR does not consider that non-live train information can be considered as potential substitutes to the live passenger train information services that are provided based on access to RTTI. The latter have a number of important advantages. The most fundamental of these is that they provide train information that is live, i.e. that is regularly updated following disruptions. The importance of live information from a passenger perspective is highlighted

by the fact that an MNO told Kizoom[38] that, without access to real time information, they would retender for new suppliers.

64. ORR's market definition therefore only considers, in the terms introduced above, direct constraints, i.e. the scope for third parties buying access to switch to alternative upstream products. Such constraint as may exist in the downstream market is marginal at best.

Direct constraints

65. In this investigation ORR has looked at a particular range of issues around the supply of access to RTTI to third parties (and any other firms in a similar position) by ATOC and the scope for a rival supplier to enter the market. The key question for ORR's market definition is whether a hypothetical monopolist of an RTTI database such as Darwin could profitably impose a non-transitory price rise of 5-10% above the competitive level to third parties.

66. No company other than ATOC currently supplies a single data feed in a way that combines timetable, movement, and manually inputted disruption data in the way that a Darwin RTTI feed does. Since no alternatives are currently available, ORR has considered whether market entry could occur at the upstream level with the creation of an alternative with comparable functionality to ATOC's Darwin database.

67. Any alternative to Darwin would need to be constructed using individual inputs supplied by a number of distinct firms within the industry (see below). Such a process, whereby a firm, possibly the access-seeker itself, collated a number of inputs in order to provide an equivalent to Darwin could reasonably be termed either 'demand side substitution' or 'supply side substitution'. Such a process would be time-consuming. For example, Darwin, in its current form represents the cumulative developments over six years, from the original 2003 database. Supply-side constraints could reasonably be assessed either as part of a market definition exercise or in an assessment of market power. As set out in the OFT's guidelines on market definition:

> "Supply side substitution can be thought of as a special case of entry – entry that occurs quickly (e.g. less than one year), effectively (e.g. on a scale large enough to affect prices), and without the need for substantial sunk investments. Supply side substitution addresses the questions of whether, to what extent, and how quickly, undertakings would start supplying a market in response to a hypothetical monopolist attempting to sustain supra competitive prices."

68. There are a number of difficulties inherent in obtaining a robust estimate of the timeframe in which an alternative to Darwin might be developed, and over what should be assumed about the potential entrant. For example, an established industry player with some prior involvement in providing Darwin inputs at the wholesale level might be far better placed to develop an alternative more quickly than a third party buying access to Darwin

[38] ORR/10/41/3/319

as a wholesale product. ORR has assessed such alternatives within its market definition.

69. Paragraph 31 lists the individual types of input that make up ATOC's Darwin database. Of these inputs, timetable and movement data are undoubtedly essential. Not even rudimentary live departure boards could be provided without access to both of these sources of data. It might be possible for an entrant to obtain access to these inputs, via the TRUST and TSDB data feeds[39]. These feeds are not controlled by ATOC, or its member TOCs. However, given the difficulties that would be inherent in obtaining disruption data (see below), ORR does not consider that it is necessary for it to conclude on whether obtaining access to both timetable and movement data would be feasible or not. ORR instead focused on the feasibility of obtaining disruption data, collating these feeds, and using these inputs to provide information services.

70. ORR was provided[40] with the following estimates of the additional capital expenditure that would be required, assuming that disruption data could be procured, of building a database with comparable functionality to ATOC's Darwin RTTI database.

- prediction engine - £500k-£1m;
- distribution/connections - £50k-£250k; and
- functional feed services - £50k-£250k.
- **Total - £600k-£1.5m.**

71. For example, Agant told ORR that its initial revenues from the sale of its iPhone app were around [✂] up to the end of June 2009, equating to a potential annual income of around [✂], meaning that the capex estimates set out above represent around [✂] years' worth of revenue, assuming constant revenues and that the data in question was only used to supply an iPhone app which had comparable revenue-generating capability to the one currently supplied by Agant.

72. In ORR's view, though, it is access to disruption data rather than capital costs such as these that represent the key barrier to a company building up a database with a functionality as ATOC's Darwin database.

73. Kizoom told ORR that[41]:

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[39] From condition 2.6 of the Network Licence: "*The licence holder shall grant access to information it holds on the planned movement of trains on its network to persons providing or seeking to provide credible enquiry services relating to the operation of railway passenger services on the licence holder's network. The licence holder shall grant access to such information as these persons may reasonably require for the proper carrying out of their operations. The licence holder shall grant access to the information on reasonable terms (including the prices charged, means of access and confidentiality)*".

[40] ORR/10/41/3/110

[41] ORR/10/41/3/110

"[...] a major factor [...] is likely to be the management costs of dealing with the many stakeholders and permissions, and in organising access to secure rail-industry operational networks (rather than just technical development per se). This is also likely to take a considerable time to progress - one might put a cost to the feed developer of several hundred thousand pounds, and a similar or higher cost to the rail industry in time in spent in processes and approving the use"

74. ORR considers that the concern expressed in the previous paragraph is valid.

75. The need to obtain the co-operation of a large number of industry stakeholders represents, in ORR's view, the key barrier to entry faced by would-be competitors to ATOC in constructing and operating an RTTI database. A database offering a comparable richness of information as Darwin would require disruption information from the control rooms of all 20 franchised TOCs. Obtaining such information would require an entrant to reach agreements with all of these firms. A database offering an equal richness of information as Darwin would additionally require data from the many CISs on the network.

76. It is, in ORR's view, very unlikely that an entrant would be able to reach agreements with all of the necessary TOCs. Whilst there are cost and logistical issues to consider, the key issue in ORR's view concerns the incentives of TOCs and their relationship with ATOC. Kizoom told ORR that:

"The TOCs and rail infrastructure providers are themselves under intense competitive pressures (especially in the current business climate) and have no commercial incentive even to spend business development time in negotiations or attending meetings to progress an alternative system agreement, yet alone providing resource to implement a connection."[42]

77. It is also clear that ATOC's view is that the interests of the industry would be best served by Darwin being the primary source of live passenger information. ATOC is an association whose members are the TOCs themselves. In this context, ORR has taken account of a number of the internal documents supplied by ATOC to ORR which[43] refer to an objective of providing: *"one version of the truth"* in the provision of information to passengers. It subsequently told ORR that this objective was derived from the July 2007 White Paper, *Delivering a Sustainable Railway*, which stated that, as part of a short discussion entitled "*Fast, accurate, helpful information*", that (emphasis added):

"The Government's role here is to ensure consistent minimum network standards of information. The Government intends to focus the standards around the National Rail Enquiry Service (NRES) website and related services to mobile phones. **NRES will provide a single**

[42] Kizoom Response_ORR Investigation_Final_140709.pdf, sent in response to the section 26 notice of 12 June 2009

[43] For example the NRE Board paper dated 29 November 2007 provided as part of its response to Question 29 F of the section 26 notice of 12 June 2009.

source of comprehensive information about timetables, service disruption, real-time train running, fares, and facilities. Operators will be required to participate in it and to provide the necessary information. In particular, passengers will be able to find information about any fare available on the network (including internet only fares or operator-specific offers) via NRES."

78. ATOC told ORR[44] that its interpretation of the above was that: "*Train Operators would provide the necessary information to NRE and that NRE would process this information and make it available for the consumption of Train Operators' staff, their customers and 3rd parties, in a consistent way [...]*".

79. In its Board paper of 19 November 2007 NRE characterised the provision of access to Darwin to third parties (as opposed to third parties attempting to source live train information from elsewhere) as being advantageous because, in addition to generating revenue, it was supportive of its *"aim of 'one version of the truth'"*.

80. The NRE policy paper of 15 May 2008, referring to the National Task Force and ATOC's board, said that "*[p]art of the deliverables within Workstream 3 of the PIDD Programme is to provide 'One version of the truth'. The Control Communications Project Group view Darwin (formally National Real Time Database) as the best candidate to achieve this*".

81. ORR also reviewed documentation from the Passenger Information Strategy Group[45], which makes it clear that TOCs are expected to base the information that they provide to passengers and staff on ATOC's Darwin database.

82. Based on the above, ORR considers it very unlikely that ATOC would be positively disposed towards the development of a rival database to Darwin. Any such rival would, if used to support the provision of new information services to passengers, have the potential to cause a loss of revenue and market share for ATOC but, more significantly, disturb ATOC's status as the supplier of 'one version of the truth' within the industry. ATOC, through NRE, plays a key role in the provision of information to passengers. It is not at all clear that individual TOCs would have strong incentives to supply disruption data to a new entrant that was seeking to exploit the information for commercial reasons (as opposed to using it to supply services to TOCs in the way that Nexus Alpha does) given their trade association's likely opposition to it and ATOC's interpretation of its responsibility to forward the government's agenda.

83. On this basis ORR considers that the need to obtain disruption data represents the key barrier to entry in this market, to the extent that, in ORR's view, the relevant market is no wider than access to ATOC's Darwin database.

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[44] Response to Question 19 of the section 26 notice of 5 August 2009

[45] *Delivering the Industry's Vision for Passenger Information*, Version 2.0

84. ATOC's submissions to us said that, *"it is technically possible to provide a nationwide information service without access to Darwin".* This view[46] appeared to be predicated on an assumption that the *"nationwide information service"* in question would be provided without access to TOC control room and CIS disruption data, i.e. that it would be inferior to Darwin. ATOC also said that *"we cannot comment on the technical and financial resources required in such a venture as these depend on the solution architecture and different 3rd parties would architect a solution differently".*

Market definition - conclusion

85. For the reasons set out above, ORR's view is that the relevant upstream market is the supply of data in the form and to the standard represented by Darwin and, given the barriers to entry explored above, that the wholesale market, i.e. the market for RTTI, is in effect confined to the supply of Darwin itself, as the only national RTTI database of its type.

Dominance assessment

The concept of dominance

86. As noted previously (in the introduction to the *Legal and economic assessment*), the legal concept of dominance has been defined by the ECJ (in *United Brands*) as the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.

87. Dominance is related to the economic concept of market power, which as stated in the OFT Guideline Assessment of Market Power[47], "[...] *can be thought of as the ability profitably to sustain prices above competitive levels or restrict output or quality below competitive levels*". The guideline goes on to explain that *"[a]n undertaking with market power might also have the ability and incentive to harm the process of competition in other ways; for example, by weakening existing competition, raising entry barriers or slowing innovation.*" The guideline also states at paragraph 2.9: "*The OFT considers that an undertaking will not be dominant unless it has substantial market power.*"

88. While holding a dominant position is not contrary to the Act, it is unlawful to abuse that position. As the ECJ has stated, for example in *Michelin v Commission*[48], a firm in a dominant position *"has a special responsibility not to allow its conduct to impair undistorted competition on the common market."*

89. The case law also indicates that the degree of dominance is an important factor in assessing an undertaking's conduct.

90. In *CMB*, [49]Advocate General Fennelly stated:

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[46] Provided in response to Question 24 of the section 26 notice of 5 August 2009

[47] OFT Guidelines *Assessment of Market Power* (OFT 415), paragraph 1.4

[48] Case 322/81 [1983] ECR 3461, [1985] 1 CMLR 282, paragraph 57

"[...] Article [82] cannot be interpreted as permitting monopolists or quasi-monopolists to exploit the very significant market power which their superdominance confers so as to preclude the emergence either of a new or additional competitor. Where an undertaking [...] enjoys a position of such overwhelming dominance verging on monopoly [...] it would not be consonant with the particularly onerous special obligation affecting such a dominant undertaking not to impair further the structure of the feeble existing competition for them to react, even to aggressive price competition from a new entrant, with a policy of targeted, selective price cuts designed to eliminate that competitor".

91. This approach has also been adopted in the UK. The Tribunal in *Napp*[50] stated:

"We for our part accept and follow the opinion of Advocate General Fennelly in Compagnie Maritime Belge [...] that the special responsibility of a dominant undertaking is particularly onerous where it is the case of a quasi-monopolist enjoying 'dominance approaching monopoly', 'superdominance' or 'overwhelming dominance approaching monopoly'[...]."

92. The OFT's "*Guideline on Assessment of Conduct*[51]", also refers to the concept that conduct must be assessed by reference to the degree of dominance, stating:

"Where an undertaking is in a position of 'super-dominance' (that is, it has a very high degree of market power, which may be inferred, typically, from a market share in the order of 90 percent), and it selectively cuts prices with the intent of eliminating a competitor, it may be abusing its dominant position even if the discounted prices charged are not loss making. (see cases C-395 and 396/96P Compagnie Maritime Belge v Commission [2000] ECR I-1365, including the opinion of Advocate General Fennelly; Case T-228/97 Irish Sugar v Commission [1999] ECR II-2969; and Napp at paragraphs 337 to 339.)"

93. Further, ORR considers that the above authorities represent the application of the well established principle, articulated by the ECJ, that: [52]*"the actual scope of the special responsibility imposed on a dominant undertaking must be considered in the light of the specific circumstances of each case which show a weakened competitive situation"*.

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[49] C-395/96P *Compagnie Maritime Belge v Commission* [2000] I 1365, Opinion of Advocate General Fennelly, paragraph 137

[50] Judgment of 15 January 2002 [2002] CAT 1, [2002] CompAR 13, [2002] ECC 177

[51] OFT414 – Previously entitled *Assessment of individual agreements and conduct*

[52] *C-333/94P Tetra Pak II* [1996] I 5951, paragraph 24; C-395P *CMB* [2000] I 1365, paragraph 114

94. As noted by Whish[53]:

> *"It follows that behaviour may be considered not to be abusive when carried out by some dominant firms but to be abusive when carried out by others [...] The idea that the obligations on dominant firms become more onerous depending on the special circumstances of the case (to use the language of the ECJ in Tetra Pak), finds expression in decisions and judgments that seem to have turned on the degree of market power that the dominant undertaking enjoys [citing Tetra Pak; CMB; IMS Health [2002] 4 CMLR 111 and Deutsche Post AG [2004] 4 CMLR 598]."*

95. ORR has therefore approached its assessment of dominance by reference to the guiding principle that the greater the market power of a dominant undertaking, the greater its special responsibility not further to impair competition.

ORR's assessment

96. As explained at paragraph 85, above, ORR's view is that access to RTTI, i.e. ATOC's Darwin database, represents a distinct economic market in itself. ATOC's share of the relevant market is therefore 100%. A market share of 100% is suggestive of a position of market power unless entry barriers are low or certain unusual circumstances, such as a very concentrated buyer market, exist.

97. Paragraphs 72 to 82 explain why, in ORR's view, entry into the relevant upstream market in competition with ATOC is very unlikely. It seems implausible that any third party seeking access to Darwin would enjoy a position of countervailing buyer power given ATOC's monopoly position in respect of the supply of the essential input for participation on the downstream market. In addition, the main direct purchasers of the data on the downstream market are, at least to date, relatively small companies. On this basis ORR has concluded that ATOC enjoys a dominant position in the relevant market.

98. As set out in the OFT guidelines *Assessment of market power*, market power is essentially *"the ability profitably to sustain prices above competitive levels or restrict output or quality below competitive levels".*

99. ORR has not attempted to assess whether or not ATOC's charges for access to its Darwin are currently above the competitive level. The data supplied to ORR by ATOC shows that the access charges ATOC receives from third parties do not cover the historic and ongoing costs of developing and operating the Darwin database. This is not surprising given that the primary uses of Darwin are to provide information to power NRE information services and to supply data to ATOC's members without direct charging. As explained above, the costs of running ATOC, including NRE, are met by its TOC members, who are in turn funded by a mixture of fare income and taxpayer subsidy. Any estimate of a 'competitive' (for example cost-based) price for access to Darwin would need to include at least a notional transfer

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[53] *Competition Law,* 5th edition, pages 189 to 190

charge within NRE/ ATOC and to TOCs. ORR has not considered it necessary to examine that issue for the purpose of this investigation.

100. ORR has concluded that ATOC's absolute share of the relevant market and absence of current and potential rivals means that it is dominant in any practical sense.

101. This view is supported by the evidence from ATOC's dealings with would-be users of information. ATOC provided ORR with details of a number of other third parties that have approached it seeking access to its Darwin database. None, as far as ORR is aware, of these companies has sought to obtain access to, or has begun the process of constructing, an alternative data source. Similarly, Kizoom did not begin to attempt to construct its own solution following the termination of its licence by ATOC and despite its reliance on a source of RTTI data to support the services that it wished to offer in this field.

102. In summary, ORR considers that it is clear from the above discussion that ATOC, acting through its control of NRE, is dominant in the relevant market for the supply of RTTI in GB. The remainder of this document considers whether ATOC abused its dominant position, contrary to Chapter II of the Act and Article 82 of the EC Treaty.

Assessment of conduct

Applicable legal principles

The relevant test for abusive conduct

103. According to the case law of the European Court of Justice (ECJ), an 'abuse' is an objective concept referring to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is already weakened and which, through recourse to methods different from those governing normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition[54].

104. A dominant undertaking has a special responsibility, irrespective of the causes of that position, not to allow its conduct to impair genuine undistorted competition on the common market[55]. Whilst the fact that an undertaking is in a dominant position cannot deprive it of its entitlement to protect its own commercial interests when they are attacked, and whilst such an undertaking must be allowed the right to take such reasonable steps as it deems appropriate to protect those interests, such behaviour cannot be allowed if its purpose is to strengthen that dominant position and thereby abuse it[56].

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[54] See, for example, Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461 ("HLR"), paragraph 91; Case 322/81 *Michelin v Commission* [1983] ECR 3461 ("Michelin I"), paragraph 70; Case C-62/86 *AKZO v Commission* [1991] ECR I-3359, paragraph 69; and Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969, paragraph 111.

[55] *Michelin I,* paragraph 57, and *Irish Sugar*, paragraph 112.

[56] Case 27/76 *United Brands v Commissio*n [1978] ECR 207, paragraph 189.

105. In *Claymore*[57] the Competition Appeal Tribunal ('the Tribunal') stated that the relevant considerations for the application of the Chapter II prohibition include, amongst other matters:

- whether the actions of the dominant firm go beyond what may be considered 'normal' competition in a market where competition is already weak as a result of the presence of the dominant firm[58];
- whether the firm's conduct was reasonable and proportionate;
- whether the conduct was intended or likely to affect the structure of the market, by preserving or strengthening its dominant position.

106. The core concern in this case has been specifically whether ATOC has constrained the supply of RTTI in such a way that an infringement of the Act has taken place. In investigating the concerns raised, ORR identified early on that the resource represented by the Darwin RTTI database is the result of investment and development by ATOC. Such material as is available to the public via the NRE website is subject to copyright and there are elements of RTTI that appear to ORR to have the characteristics of a database right. For these reasons, ORR considers that RTTI is or should reasonably be treated as equivalent to intellectual property (IP). In this respect, ORR is following the approach of the European Commission in Microsoft[59]. Its behaviour in relation to granting access must therefore be assessed by reference to the case law of the European Court where the conduct of the owner of intellectual property has been considered under Article 82.

107. In a number of cases, most notably Magill[60], Bronner[61] and IMS Health[62], the European Court has established that only where the following elements are present will it be possible to establish that there has been an abuse of a dominant position:

- there must be an actual or constructive refusal to supply;
- the input that is withheld must be indispensable (as opposed to highly desirable) for the delivery of the product or service in respect of which access to the relevant IP is sought;

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[57] Case 1008/2/1/02 *Claymore Dairies Limited and Arla Foods UK PLC v Office of Fair Trading* [2005] CAT 30, §188.

[58] See also the Opinion of AG Kokott of 23 February 2006 in Case C-95/04P *BA v Commission* (not yet published; "the BA Opinion"), at paragraph 26.

[59] *Microsoft Corp v Commission* Case T-201/04 [2007] E.C.R II-000 5 CMLR 846

[60] *RTE and ITP v Commission* ("Magill") (Cases C-241/91 P and Ors) [1995] E.C.R. I-743

[61] Oscar *Bronner Gmbh & Co KG v Mediaprint Zeitungs und Zeitschriftenverlag GmbH & Co KG* (Case C-7/97)[1998]E.C.R. I-7791;[19999] 4 C.M.L.R. 112

[62] *IMS Health GmbH & Co v NDC Health GmbH & Co* Case C-418/01 [2004]ECR I-5039, [2004] 4 CMLR 1543

- the party seeking access to the IP must be intending to offer a new product not offered by the IP owner and for which there is a potential consumer demand;
- the refusal eliminates all competition on the downstream market; and
- the refusal is not justified by objective justifications.

108. The European Court has also considered the application of these principles in the field of emerging technologies in the Microsoft[63] case. The Court re-affirmed the key principle that undertakings are free as a rule to choose their business partners[64]. It also confirmed[65] that as a first step conduct should be assessed against the tests evolved in Magill and IMS Health and only if elements were missing would it be necessary to assess whether the circumstances of the case nonetheless supported a finding of abuse.

109. The Court in Microsoft also offered further guidance on some elements of the test, as set out below.

110. The Court[66] observed that it was not necessary to establish that all competition was eliminated on the downstream market. There might be some competing products at the margins but this did not invalidate a finding that all effective competition was at risk of being eliminated on that market.

111. Further in relation to the prevention of the appearance of a new product, the Court found[67] that this element of the test is rooted in the wording of Article 82(b) which prohibits abusive practices which consist in "*limiting production, markets or technical developments to the [...] prejudice of consumers*".

112. The Court took the view that prejudice to consumers was the key concept and that therefore the prevention of the appearance of a new product (as envisaged in IMS and Magill) cannot be the only parameter which defines whether a refusal to licence an IP right is capable of causing prejudice to consumers within the meaning of Article 82(b). The Court placed emphasis[68] on the fact that Article 82(b) states that prejudice to consumers may arise where there is a limitation not only of product or markets but also of technical development.

Burden and standard of proof

113. The burden of proving that conduct amounts to an abuse of a dominant position falls on the authority alleging the infringement[69]. It is therefore for

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[63] Op Cit

[64] *Microsoft*, Para 319

[65] Microsoft, Para 336

[66] Microsoft, Para 593

[67] Microsoft, Para 643

[68] Microsoft, Para 647

[69] Council Regulation 1/2003/E, Article 2

ORR to establish that ATOC has acted in such a way as to breach section 18 of the Act or Article 82 of the Treaty.

114. The relevant standard of proof is the civil standard: that is, ORR must be satisfied that, on the balance of probabilities, the Act has been infringed. Further, in applying that civil standard, the more serious the allegation, the more cogent the evidence must be before it can safely be concluded that an allegation is established on the balance of probability. In *Napp*[70], the CAT indicated that cases under the Act involving penalties are serious matters and strong and convincing evidence will be required before infringements of the Chapter I and Chapter II prohibitions can be found to be proved. The test is expressed as follows:

> "It is for the Director to satisfy us in each case, on the basis of strong and compelling evidence, taking into account the seriousness of what is alleged, that the infringement is duly proved, the undertaking being entitled to the presumption of innocence, and to any reasonable doubt there may be."

115. This case involves an allegation of abuse of dominance in the form of refusal to supply. A finding of infringement would normally involve both the imposition of a fine and also potentially directions to remedy the infringing refusal (in effect, a mandatory injunction). Infringements of the Act are serious matters as are the consequences that flow from such infringements and the relevant standard of proof to be applied in this case will therefore require stronger evidence than less serious matters as indicated in *Napp.*

116. Accordingly, ORR's concern in carrying out its investigation has been to establish whether there is strong and compelling evidence that all elements of the relevant legal test for an abuse of dominance have been met. The conclusions are set out below.

ATOC's conduct - Introduction

117. In response to section 26 notices, ATOC supplied ORR with evidence regarding the dialogue it has had with a number of companies and individuals who have approached it with it with a view to obtaining access to RTTI and to whom access has not been granted.

118. This decision, however, only considers ATOC's conduct vis-à-vis Kizoom in detail. This is because:

- the enquiries of many of the other firms that unsuccessfully approached ATOC with a view to obtaining access to RTTI were of a much more preliminary nature than those of Kizoom (with whom ATOC had an established relationship) and the available evidence falls short of indicating that ATOC's dealings with these other firms could be characterised as an actual or constructive refusal to supply; and

[70] Napp v Director General of Fair Trading [2002] CAT 1, Paragraphs 108-9

- none of the evidence obtained by ORR in the course of this investigation suggested that the companies other than Kizoom which have unsuccessfully sought access to RTTI would be more likely than Kizoom to be important competitors in downstream markets or to bring about benefits to consumers by offering innovative new products.

119. As such, it is ATOC's conduct as regards Kizoom which in ORR's view merits examination in the context of the applicable legal test.

120. ORR has examined ATOC's conduct in relation to both the supply of RTTI on a pull feed and a push feed basis. The issues raised by these distinct forms of access seemed to merit separate consideration and ORR's conclusions below therefore deal with them on that basis.

121. ORR's analysis, particularly in relation to the technical properties of push and pull feeds, has been supported by a series of exchanges with, and a short report[71] written by, Serco Consulting. Serco based its advice and findings on written documentation supplied to it by ORR (originally provided by ATOC in response to section 26 requests) and on the assumption that service providers will follow industry standard techniques for accessing and aggregating timetable data and will not necessarily have access to outside data sources other than Darwin.

ATOC's conduct with regard to pull feeds

122. As set out at paragraphs 38 and 39, ATOC's stated position is that, when considering requests for the supply of a pull feed, it will observe the following procedures and criteria:

- Third party enquiries will in the first instance be sent to either its Head of Commercial or Head of Online Services.
- The NRE recipient of the request will respond, setting out that there is a charge for accessing RTTI and requesting further information in order to allow the request to be considered.
- Once the further information/detailed proposition is received from the third party, NRE will assess it against its access criteria. If these are met a meeting will be arranged to discuss the opportunity.
- If, following the meeting, it is clear that the acceptance criteria are met, NRE's Head of Commercial will seek the approval of its Chief Executive before entering into a licensing agreement with the third party.

123. According to ATOC applications will be assessed against the following criteria[72]:

- the proposed service is a worthwhile and viable service for passengers;

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[71] *ORR RTTI Report*, 10 November 2009, Serco Consulting ('the Serco report') - ORR 10/41/3/323

[72] Response to Question 14 C of the section 26 notice of 12 June 2009.

- the enquirer is reputable; and
- the project has no negative impact on TOCs.

124. ORR's views on ATOC's conduct towards Kizoom are set out below.

125. It is not in dispute that, from March 2009, Kizoom has not had access to RTTI[73]. Kizoom's RTTI Licence was not renewed at the end of December 2008. ATOC at this time required that Kizoom withdraw *MyRailLite* (which it contended was not a permitted data use under the terms of the licence) in order to retain its entitlement to the three month notice period specified in the licence.

126. Kizoom met with NRE on 9 January 2009 in order to seek a way forward from this position and continue to provide RTTI products to its contracted customers. ORR has not been able to establish with certainty what occurred at the meeting. Responses to section 26 information requests provided by Kizoom and ATOC give conflicting recollections of what was offered at this meeting:

- Kizoom stated that NRE was very clear that it would no longer be providing RTTI data to commercial parties and that it would in future only offer white label products to parties such as Kizoom, hence that Kizoom would not be able to develop any RTTI based applications for any retail market.
- ATOC stated that (through NRE) it offered *"Services"* to Kizoom. In response to a clarificatory question from ORR, ATOC stated that this would mean access to RTTI via an enquiry port, i.e. a pull feed. Access of this type would have enabled Kizoom to continue to supply RTTI products as previously.

127. In ORR's view the following pieces of evidence are relevant in explaining why Kizoom has arrived at its current view, irrespective of whether this view in itself originated from a misunderstanding as to what precisely was on offer. At a minimum, it is clear from these exchanges that it was the intention of ATOC to cease the supply of all forms of data feed to Kizoom at the end of the notice period and that relationships between the two companies would cease from that point.

- Kizoom's notes of a meeting held between Damian Brown and Chris Scoggins in June 2008 record the understanding that: *"[t]he intention [of NRE] is also that data from this (and RTTI) will not be made available to third parties (familiar claims of quality concerns) except when delivered through a white label NRE applications"* [sic][74].
  This appears consistent with the May 2008 policy to[75]:

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[73] In the period covered by this investigation Kizoom Software Ltd's parent company Kizoom Ltd retained access to RTTI via a white label product, in the form of an LDB webpage, but this access would not have permitted Kizoom Software Ltd to continue to offer services to passengers.

[74] Document 20080617A.msg, provided by Kizoom in response to the section 26 notice of 12 June 2009.

[75] NRE Board Paper of 5 May 2008, provided in response to Question 29E of the section 26 notice of 12 June 2009

"[...] provide interested third parties with 'Services', built to third party specification, rather than raw data feeds which have been proposed in the past."

- In an email from Derek Parlour, NRE's head of Commercial, to Guy Wolfenden of Kizoom, dated 19 December 2008, he stated: "*[f]rom the end of the notice period [31 March 2009] all use of our data by yourselves will cease*"[76].
- In preparation for the meeting of 9 January 2009, Nick O'Connor, of Kizoom, sent an email to Derek Parlour on 7 January 2009, which suggested an agenda of: contract review debrief; contingency planning; and, the way forward. In response to this email, Derek Parlour replied: "*[e]ven with your agenda I am not clear as to the purpose of the meeting other than to ensure a smooth transition from your current clients who you will not be able to service from 31st March. Is that the sole purpose?*"[77].
- Kizoom subsequently met with NRE on 29 January 2009, again with the purpose, from Kizoom's point of view, of maintaining an RTTI feed in order to continue to service its contracts. Kizoom's notes of this meeting indicate its understanding that ATOC was only prepared to allow Kizoom to access white label services[78].

128. NRE's record[79] of the 29 January 2009 meeting suggests an unwillingness on the part of Kizoom to enter into a discussion on *"services"* on the basis that this would not allow Kizoom to "*add value*". ATOC's response to a notice issued under section 26 of the Act stated that this note was not made until several days after the meeting took place[80]. ATOC has since stated that, after checking their computer records, the note was created on 29 January 2009[81].

129. From March 2009 (following the three month notice period specified in the licence) Kizoom no longer had access to RTTI. This resulted in Kizoom being unable to offer *MyRailLite* or supply its MNO customers, providing commercial opportunities for Agant and mxData. Agant had entered into a licensing contract with ATOC in February 2009 and started selling its app in mid-March 2009. MxData successfully bid to provide RTTI content for Orange.

130. The actions of ATOC leading up to and including the meeting of 29 January 2009 meant that Kizoom no longer had access to RTTI, and that it

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[76] Document 20081219A_Re Kizoom RTTI License renewal.msg, provide by Kizoom in response to the section 26 notice of 12 June 2009

[77] 20090106A_FW Meeting Friday_Agenda_NRE.msg, provided by Kizoom in response to the section 26 notice of 12 June 2009.

[78] Document 20090109C_NRE meeting 9 Jan- GW meeting notes.doc, provided by Kizoom in response to the section 26 notice of 12 June 2009.

[79] Document 'NRE notes of meeting Kizoom - dated 29.01.09.pdf' provided in response to Question 29 B of the section 26 notice of 12 June 2009

[80] Confirmed by NRE in response to Question 13 of the section 26 notice of 5 August 2009

[81] Letter from Chris Scoggins to Bill Emery, 26 November 2009

was, as a result, unable to continue supplying certain products that it had previously supplied based on access to RTTI. This conduct is assessed below against the key elements of the established legal test as set out above.

131. In the period since the January meetings, Kizoom has been actively seeking to re-gain access to RTTI. Kizoom and NRE met on 3 September 2009, and agreed that future requests for access to RTTI would be considered on a case-by-case basis. Kizoom, on 14 September 2009, submitted a technical specification for a mobile service. ORR's understanding is that, as of 20 November 2009[82], an agreement has not yet been reached between the parties and Kizoom has not been provided with the access it is seeking. ATOC has, however, consistently stated that it is willing to supply Kizoom with pull feed access on the same basis as Agant and mxData. Given these stated positions, it is not clear to ORR why Kizoom has not been able to gain access to Darwin.

Actual or constructive refusal to supply

132. As explained above, ATOC's conduct resulted in the loss of Kizoom's access to RTTI. ATOC has, however, continued to enter into licences for the supply of pull feed data with other commercial parties, i.e. there has not been a universal policy of actual or constructive refusal to supply. In particular, in early 2009 ATOC entered into agreements to supply pull feeds to both Agant and mxData.

133. Both of these agreements were entered into on a non-exclusive basis, suggesting that ATOC must have, at the very least, considered the possibility of expanding the market beyond the current two licencees. ATOC also provided ORR with details of procedures and criteria for handling and assessing applications for access to RTTI pull feeds (see paragraph 38, above) that do not appear to be consistent with a general refusal to provide access to RTTI.

134. The evidence obtained to date is strongly suggestive of a pronounced reluctance on the part of ATOC to continue dealing with Kizoom. It has not, therefore, been possible for ORR to conclusively rule out the possibility that ATOC's conduct vis-à-vis Kizoom might amount to an actual or constructive refusal to supply. On this basis the other elements of the relevant legal test are considered below.

Withheld input must be indispensable

135. As set out in the market definition and dominance analysis above, there are currently no substitutes to ATOC's 'Darwin' RTTI database available to a third party interested in supplying real-time train information to passengers. ATOC has itself acknowledged the difficulties that would be inherent in replicating its Darwin database[83]. On this basis ORR has concluded that RTTI is an indispensible input, and therefore that the other aspects of the relevant legal test must be considered.

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[82] ORR 10/41/323

[83] Note of meeting between ORR and NRE on 15 May 2009

Party seeking access must be intending to offer a new product not offered by the IP owner and for which there is potential consumer demand

136. In order to constitute an abuse of a dominant position, a refusal to supply must cause a product to be denied to the market which is not offered by the IP owner and for which there is consumer demand.

137. In ORR's view the available evidence does not support a suggestion that this element of the *Magill/IMS Health* test has been met. ATOC's conduct did not have the effect of reducing the number of competing products available to passengers, or materially alter the range of functionalities available. This is because:

- in the case of iPhone applications, an alternative to Kizoom's *MyRailLite* in the form of the Agant iPhone app[84]was on the market by the time *MyRail Lite* was withdrawn; and
- in the case of services supplied to MNOs, ATOC showed a willingness to deal with alternatives to Kizoom, such as mxData.

138. The new products launched by Agant and mxData were functionally comparable to the ones previously provided by Kizoom. Neither, from a consumer perspective, amounted to a significant diminution in what was available. Much of the customer dissatisfaction resulting from the withdrawal of *MyRailLite* stemmed from the fact that the remaining option on the market, the Agant iPhone application was a paid-for service in contrast with *MyRailLite*. However, ORR has not given weight to this factor. For the purposes of the *Magill/IMS Health* test, the relevant question appears to ORR to be whether the effect of the refusal to supply is to prevent the emergence of a new product for which there is consumer demand, not that it has prevented or led to the withdrawal of such a product on a 'free' basis. In addition, it seems unlikely to ORR (based, for example, on comparisons with the price of comparable products including the Agant iPhone app) that Kizoom would have continued to offer a free 'Lite' introductory product indefinitely. For this reason, ORR does not consider that this factor has a bearing on the competitive impact of ATOC's conduct.

139. ORR also considered whether ATOC's conduct might have held back any potential new products in addition to the products provided by Kizoom prior to its loss of access to RTTI. In response to a section 26 notice Kizoom provided ORR with commercially confidential plans regarding possible further uses of RTTI. ORR did not, however, consider that these plans amounted to strong and compelling evidence of a clearly distinct product for which there was evidence of consumer demand.

140. ORR does not consider that the available evidence establishes to the required standard of proof that ATOC's conduct to date towards Kizoom has prevented new products or readily identifiable new technologies coming to market such that prejudice to consumers can be found to have occurred.

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[84] Agant's iPhone app was launched in mid-March 2009. Kizoom's access to RTTI came to an end in March 2009 resulting in it being unable to offer *MyRailLite*.

Refusal eliminates all competition on the downstream market

141. The behaviour of ATOC in effectively replacing Kizoom by AGANT has, in effect limited the number of potential suppliers of RTTI-based iPhone applications and, therefore, limited the choice available to iPhone customers. ORR does not feel it necessary, however, to conclude on whether or not ATOC's action has eliminated all competition on the downstream market, however, for the following reasons:

- The licence with AGANT is not exclusive and, therefore, there appears to be no intent to limit the size of the downstream market in the future;
- To conclude on this point would require a more detailed review of the market from a demand side perspective than has been considered necessary in the market definition analysis; and
- The case is not dependent on this element of the test.

142. It is also worth noting that iPhone users looking to access live train information without buying the AGANT iPhone app have the opportunity to access NRE's website without being charged via a standard web browser on an iPhone (even though in a less convenient and functional fashion as described at paragraph 28 above).

143. In the case of mobile portal services it is also relevant to note that the MNOs each contract with only one supplier at a time. An MNO chooses its supplier by way of competitive tender meaning that in effect competition has been eliminated not by ATOC's conduct in the granting of licences but by the competitive tender process held downstream. The refusal to supply by ATOC does not, therefore, have a direct effect on the *number* of suppliers in the market though its behaviour can be materially influential in terms of the identity of the winner. This is because would-be bidders are likely to require co-operations and information from ATOC in preparing their bids and RTTI is an essential input for any bidder wishing to offer live data services to MNOs. This influence on the bidding process does not affect ORR's overall assessment of the conduct of ATOC against the four elements of the test.

144. There remains a responsibility on ATOC, as a dominant supplier, to avoid discrimination in its approach to those seeking to bid for MNO contracts such that its own interests are being put before those of passengers. Such discrimination can occur both where different conditions are applied to equivalent parties and where the same conditions are applied to parties who are not equivalent. The key concern is that viable and potentially innovative bidders are not excluded from tendering either directly or indirectly by ATOC's behaviour upstream. ORR's views as to what this means in terms of future conduct are set out below.

Refusal is not justified by objective justification

145. Given the conclusions reached on other elements of the relevant legal test, ORR did not consider it necessary to come to a firm conclusion on whether there was strong and compelling evidence of an absence of objective

justification. In particular, ORR does not consider it necessary to reach a firm conclusion on the merits of the commercial disagreement between ATOC and Kizoom in relation to the termination of Kizoom's licence.

146. There is a conflict of evidence from the parties concerned about elements of the history of their commercial relationship for the supply RTTI. ATOC told ORR[85] that it opted not to renew Kizoom's licence because of a series of issues in its dealings with Kizoom, including its view that the latter had breached the licence by using its RTTI feed to power an iPhone app. ATOC's view is that such usage was not permitted under the terms of licence agreed between ATOC and Kizoom. Kizoom's view is that its licence did permit it to use the RTTI supplied by ATOC to power an iPhone app.

147. The disagreement between ATOC and Kizoom in this regard appears to ORR to turn on the proper interpretation of the list of permitted uses in Schedule 1 to the Kizoom/ ATOC data licence. The licence appears to entitle Kizoom to offer a service titled "*Kizoom Train Times*", described as, "*An anonymous train information service for PDA and high end mobile users.*". Whilst an iPhone would fall under many definitions of a *"high end mobile"* product, Kizoom's iPhone app was launched under the name *MyRail Lite* rather than *Kizoom Train Times*. For the reasons set out above, ORR did not consider it necessary to reach a conclusion on what the proper interpretation of these contractual terms was, or whether Kizoom's conduct could be regarded as offering an objective justification for ATOC's apparent refusal to supply RTTI to Kizoom since March 2009.

Conclusions on the supply of pull feeds

148. In relation to products that are dependent on access to a pull feed, ORR has reached the conclusion that ATOC's conduct does not constitute an infringement of Chapter II of the Act or Article 82 of the EC Treaty.

149. The key factor underlying this conclusion is that, where access to RTTI has not been supplied, it was not possible for ORR to readily identify specific examples of innovative new products or readily identifiable new technology, that have been denied to the market and for which there is currently a consumer demand. ATOC's continuing application of its criteria for the provision of access to Darwin should enable RTTI-based innovations to be introduced into the market to satisfy consumer demand in the future.

ATOC's conduct with regard to push feeds

150. As set out at paragraph 35, a paper presented to the NRE Board on 15 May 2008 ('the May 2008 policy') documents a conscious shift away from offering push feeds. Kizoom has told ORR[86] that it has repeatedly sought a push feed. There appears, therefore, to have been a clear refusal by ATOC to supply a push feed not only to Kizoom but to the market more generally. ORR

[85] Meeting note ORR and NRE/ATOC 15 May 2009

[86] ORR 10/41/1/110

has therefore assessed this course of conduct on the part of ATOC against the other elements of the legal test governing IP rights.

Withheld Input must be indispensable

151. As set out in the assessment of market power above, access to ATOC's RTTI information is indispensible from the perspective of a firm wishing to offer live information to passengers on a national basis. But the extent to which a push feed specifically is indispensible needs to be considered on a standalone basis.

152. Kizoom told ORR[87] that a push feed is necessary to support an alerting service, and also that, *"another benefit of NRE licensing a push feed is that it could be used by Kizoom and others to provide a separately scalable delivery system that is not dependent on NRE's query capacity"*[88].

153. ATOC has argued that a pull feed is capable of enabling a variety of services including alerting services. It has, for example, cited that one of the regional train operators[89] has offered an alerting service (albeit for a limited customer base/geographic region) based on a pull feed. ATOC also told ORR that *"We are currently in discussions with both* [✂] *and* [✂] *about providing alerting for their applications"* using a pull feed.

154. The evidence that ORR has available to it is not conclusive regarding whether a push feed is an indispensible input to any individual service (in terms of the legal test set out at paragraph 107). ORR's technical investigations of this aspect have indicated that a push feed may not be strictly necessary in order to provide an alerting service, although it may be more efficient and support some additional functionality. On this issue the Serco report said: *"It is not essential to have the push service in order to provide a real-time journey planner or alerting service capability. It is possible, though hardly efficient, to extract the same information from DARWIN by using the pull/enquiry ports"*. However, the demand for additional functionality is as yet untested and ORR has not quantified the value of potential efficiency gains. Given the conclusions below on the other key elements of the legal test for finding an infringement, ORR did not consider it necessary to reach a definitive view on this point for the purposes of this decision.

Party seeking access must be offering a new product not offered by the IP owner and for which there is potential consumer demand

155. As discussed above in relation to pull feed data, a key part of the relevant legal test is that the party seeking access to the IP must be intending to offer a new product, not offered by the IP owner, and for which there is a potential consumer demand. Kizoom has specifically contended that a push feed is necessary to provide an alerting service. However, even if this is true, ATOC, through NRE, currently offers an alerting service of its own (via SMS), and is also looking to develop alerting services with [✂] and also with [✂]. It

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[87] ORR 10/41/1/110

[88] ORR 10/41/1/110

[89] Response to question 20 of the section 26 notice of 5 August 2009

does not, therefore, appear that in relation to alerting, there is a new product being blocked which is not being offered by ATOC itself.

156. ATOC seems to ORR to be in an analogous position to the dominant party in the IMS Health case where the court's conclusion was that it could not be a requirement of competition law that a dominant party should have to grant access to its data base structure to enable a third party to replicate what it was already supplying.

157. ORR referred earlier in this decision to the findings of the European Court in Microsoft in relation to how the issue of new products should be approached when applying the Magill/IMS Health test. ORR has considered how its findings might apply to ATOC's conduct in this case. In Microsoft the development of the market in work group servers and client PC operating systems was at a more advanced stage than the market for RTTI where the scope for its development may depend to some extent on the development of the electronic media through which RTTI may be delivered. Microsoft's actions were constraining competition at upstream and downstream level. There is no suggestion that ATOC is acting to constrain the upstream market for RTTI. It is simply an objective fact that the cost and practical difficulties in creating an alternative to Darwin act as a deterrent of new entry at that level. Microsoft by contrast was actively preventing entry at the work group server level in order to also prevent entry at the client PC operator system level.

158. Most importantly, ORR has considered the weight accorded by the court in Microsoft to the fact that the Commission had satisfied itself that there was ample scope for differentiation and innovation beyond the base element that Microsoft would be required to share with competitors. ORR is not satisfied that there is evidence sufficient to establish that there are new and distinctive products that will not come to market to the detriment of consumers. Kizoom has identified some elements of enhanced functionality in relation to alerting services but it is not clear whether these would represent a sufficiently distinctive service in addition to the alerting service already offered by or in development by ATOC.

159. The nature of consumer demand itself in this area is uncertain. For some consumers, the ability to browse the NRE website for RTTI based information will always be sufficient. Some consumers will wish to have the facility of journey planning and alerting and some may not. The appetite of innovation is as yet unknown, again in contrast with the situation in Microsoft where the finding was that consumers had an active preference for non-Microsoft products based on their superior reliability and security.

160. No party has provided detail of a specific, demonstrable and readily identifiable technology or product for which there is consumer demand, which is being denied access to market for want of a push feed facility. As noted at paragraph 139 above, Kizoom provided ORR with commercially confidential plans regarding possible further uses of RTTI, but these did not, in ORR's view, amount to strong and compelling evidence of a clearly distinct product and of consumer demand for that product such that prejudice to consumers can be found to have occurred.

161. ORR's conclusion is therefore that the current case can be distinguished from Microsoft and that this key element of the Magill test, namely prevention of a new product for which there is a consumer demand, cannot be shown to be present with a sufficient degree of certainty to meet the relevant standard of proof.

Refusal eliminates all competition on the downstream market

162. ORR recognises a legitimate concern that ATOC's decision not to supply a push feed has the clear potential to limit the development of competition on the downstream market from products that cannot be efficiently provided without access to a push feed. However, the extent to which such a decision eliminates such competition is dependent in practice on, *inter alia*, whether there is any overlap from a consumer's perspective between products based on a push feed and those based on a pull feed.

163. For the same reasons that it found the position in relation to consumer demand to be unproven, ORR considers that it is currently unproven to the relevant legal standard that the effect of ATOC's decision is to eliminate competition on the downstream market. Unless the value of a push feed to innovation and development is more clearly demonstrated, ORR considers that the existence of competitive alternatives provided on the basis of a pull feed tend to suggest that this condition is not satisfied.

Refusal is not justified by objective justification

164. ATOC justified its decision not to supply a push feed based on concerns about maintaining data integrity and consistency[90], flowing in part from its interpretation of the Government White Paper[91] objectives (as set out above - the 'one version of the truth' objective) and also from concerns about the protection of TOC and third party reputations.

165. ATOC stated that it moved to a position of not providing access to push feeds ("*raw data feeds*") because of concerns that such feeds required third parties to build applications to interpret raw data for passengers. These could, according to ATOC, result in inconsistencies, with passengers receiving different responses depending on what application they were interrogating.

166. However, ATOC has not provided strong and compelling evidence of past system failure arising from such access. Indeed, given that such access has been rare, even before the adoption of the May policy, there is limited experience on which to draw and from which to form a view that such access would lead to the problems envisaged.

167. ORR's research into the risks of data misinterpretation associated with push as compared with pull feeds suggests that the risk of information providers misinterpreting the RTTI is not necessarily confined to push feeds[92].

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[90] ATOC Response to Question 19(ii) of section.26 notice of 5 August 2009

[91] July 2007 White Paper, *Delivering a Sustainable Railway*

[92] The Serco report

168. ATOC said that an alternative would be to impose a more rigorous accreditation on third parties of their interpretation systems. However, it considered that this would put a high burden both on ATOC and on the third parties which would, in its view, be more likely to limit the market. ATOC has in effect asserted that the cost to third parties of ensuring data integrity so that consistency of train information is maintained would be prohibitive. It has not said what its position would be if a third party was prepared to absorb this cost and has not provided any details of where those costs would arise and what order of magnitude they would represent in terms of future business.

169. ORR does not find either arguments based on integrity or cost grounds to be persuasive. ATOC does not, for example, appear to take account of the possibility of market pressures serving as an additional incentive to avoid inaccurate information reaching end consumers. Neither is ORR satisfied on the evidence provided to date that replications of ATOC's RTTI database sitting on a third party server would necessarily lead to an erosion in the integrity of the system particularly if access and use is controlled by tightly defined contractual obligations and responsibilities. ATOC's views on costs are untested and there is no compelling evidence either way as to whether such costs could or would be borne by a third party.

170. For these reasons, ORR does not consider that ATOC has an objective justification for a refusal to grant access to a push feed on any terms.

Conclusions on Push feeds

171. ORR concludes that the legal test in *Magill/IMS Health* cannot be satisfied in relation to ATOC's decision not to supply push feed-based access to RTTI. In particular, there is no strong and compelling evidence of a new product or a specific and readily identifiable technology for which there is consumer demand, which is being denied access to market for want of a push feed facility. The standard of proof required to substantiate a finding of an infringement of the Chapter II of the Act or Article 82 of the EC Treaty has not in ORR's view been met.

Conclusion

172. ORR's view is, on the basis of the evidence available, that ATOC's conduct to date does not amount to an infringement of Chapter II of the Act or of Article 82 of the EC Treaty.

Further observations and recommendations

173. The resource represented by ATOC's RTTI database is the result of considerable investment and development, and ORR has assessed ATOC's conduct in relation to granting access to it by reference to the case law of the European Court dealing with the conduct of the owner of IP. For the reasons set out above ORR has not found an infringement of the Act or Article 82 of the EC Treaty. Critically, for the assessment against the four elements of the test set out in Magill/IMS Health, ORR could find no strong and compelling evidence that ATOC's conduct in relation to granting access to Darwin has as yet either prevented a new product coming to market or hampered the emergence of new technology.

174. Real time information, particularly where provided by way of mobile technology, is by its very nature, however, a fast moving, technology led market, where it is difficult to predict future market outcomes. Consumer demand is itself uncertain and the appetite for innovation is as yet unknown.

175. Notwithstanding ORR's findings in relation to the Act, it is nonetheless the case that ATOC has total control over the supply of RTTI and as a result, to a very great extent, over what the future market will look like in terms of what products and services consumers will ultimately enjoy. ATOC has itself been influenced in its approach by the government's desire for there to be a single reliable source of train information for the benefit of passengers (see paragraph 82, above). ORR is concerned that ATOC does not go beyond what is needed to fulfil that aim. This is of particular concern given that ATOC's view on what is and is not desirable or feasible will be highly determinative not just of what products become available but also of the speed of new product introduction and of the shape of the market both in terms of the number of competitors and their identity.

176. ATOC is, in competition law terms, highly dominant in the supply of real time train information by its ownership and control of the data base 'Darwin' and there is no practicable alternative for third parties wishing to provide national real time train information services and products other than to deal with ATOC. ATOC has a unique ability to shape future market outcomes in this area.

177. ORR is strongly of the opinion, based on a long established and central principle of competition law, that ATOC has a special responsibility to ensure that its conduct does not in any way distort market outcomes including by way of dampening the prospect for future technological developments. It is in the industry's best interests that ATOC positively encourages new ideas and actively sets out to foster a positive view of the railways as a place in which to explore the introduction of forward looking and innovative new products and services.

178. ORR recognises that ATOC, through NRE, has made significant strides forward in the provision of real time train information and many of its products and services have already brought benefits to passengers[93]. ORR's concern is to ensure that this progress is maintained and that the industry continues to demonstrate that it remains receptive to future new possibilities that could benefit rail passengers.

179. ORR recognises also that there seems no obvious incentive for ATOC to limit the development of that downstream market as it stands to gain from its growth. There are, however, certain aspects of ATOC's processes and conduct which may unwittingly have a deterrent or dampening effect on third parties' willingness to deal. Material to this is:

- the lack of published processes leading to uncertainty as to, for example, what information is required in order to submit an application; who to engage or deal with and on what level; what time scales to expect in terms of response times and the lead times for grant of access;

[93] http://www.nationalrail.co.uk/contact/about_national_rail_enquiries.html

- the resulting total lack of transparency in how applications for access to Darwin will be assessed, and what criteria are used, leading to a potential perception that ATOC discriminates unfairly between third parties; and

- the lack of transparency around what is and is not permissible by way of type of access and the reasons for this which may lead to a perception of a restrictive and controlling approach.

180. In the light of these concerns there would be considerable merit in ATOC publishing a Code of Practice which sets out, for the avoidance of all doubt, the criteria against which it will assess applications for licences and some commitments as to future conduct.

181. This approach has considerable appeal in that it:

- introduces transparency into an area where there is significant market power in the hands of one party and, therefore, a responsibility on that party to demonstrate that it has processes in place not to abuse that position; and
- sets out a behavioural framework against which all future conduct can be assessed.

182. ORR would expect the Code to include matters such as:

- a commitment not unreasonably to refuse access to data;
- details on the process for making an application including the information required within the initial approach;
- the criteria against which applications will be assessed;
- commitments on time scales and information ATOC is able to provide; and
- what the applicant should expect by way of assistance from ATOC.

183. ORR also considers that, given that this market is fast moving and technology led, and that it is difficult to predict future market outcomes, that there should, in particular, be some commitment not to unreasonably refuse access to data via a push feed. ORR has set out above its findings on ATOC's lack of objective justification for its refusal to supply a push feed. It considers that ATOC's views on the negative implications of providing push feed access are not persuasive. For this reason, ORR considers that a commitment of this sort is necessary to support the future development of technologies beneficial to passengers.

184. ORR looks forward to discussing the introduction of such a Code and its publication with ATOC.

185. ORR does not rule out the possibility of using its powers to modify licences, or of opening another investigation under the Act, if ATOC does not publish such a Code, or fails to follow the terms of such a Code following its adoption.