

The Juridification of Regulatory Relations in the UK Utilities Sectors

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1. Introduction

Privatization of the United Kingdom utilities sectors over the last fifteen years has been accompanied by a marked change in the way in which these sectors are viewed by lawyers, and in the relationship of these sectors with the legal system more generally. During the period of public ownership of the utilities sectors organisational and supply relationships were governed almost exclusively by bureaucratic methods, with very little involvement of lawyers or recourse to the legal framework within which the services were managed and provided.² The descriptive argument of this chapter is that the UK utilities sectors are witnessing processes of juridification. Juridification describes a process by which relations hitherto governed by other values and expectations come to be subjected to legal values and rules - "the tendency to formalize all social relations in juridical terms".³

² See B. Schwartz and H.W.R. Wade *The Legal Control of Government: Administrative Law in Britain and the United States* (Oxford, Oxford University Press, 1972) at 37-41, cited in C.Harlow and R.Rawlings *Law and Administration* (London, Butterworths, 1997, 2nd ed) at 312-313. The decision of the House of Lords in *Bromley London BC v Greater London Council* [1983] 1 AC 768 provides a rare example of a judicial intervention in the decisions affecting a public corporation, the London Transport Executive, and interpreting the obligations of the statute under which it was established and operated. See the discussion in A.Ogus, *Regulation: Legal Form and Economic Theory* (Oxford University Press, Oxford, 1994) at 274-276.

³ M. Loughlin, *Legality and Locality - The Role of Law in Central-Local Government Relations* (Oxford, Oxford University Press, 1996), at 369. Loughlin suggests that the British state tradition generally is characterised by "largely non-juridified structure of administrative law", at 379.

Such a process creates the risk that law will overstep the mark beyond which its contribution to structuring the way in which relations are managed ceases to be useful. In that even law risks being ignored or being destructive either of activities which it seeks to control, or of the legitimacy of law itself - the so-called "regulatory trilemma".⁴ Though the most visible indicators of juridification are instances of litigation, whether judicial review or other forms of action, they are just the tip of the iceberg. The seepage of law into the management of relationships in the utilities sectors is also indicated by the more hidden but growing presence of lawyers at each stage of negotiating commercial and regulatory relationships, the increasing use of more formal processes of information gathering and enforcement, and the hidden growth of technical regulatory rules expressed in a variety of legal and sub-legal instruments.⁵

The descriptive claim that the utilities sectors are becoming juridified calls for a number of distinct forms of critical analysis. First, the main body of the chapter is devoted to an examination of the most visible indicator of juridification - the marked increase in incidences of litigation. Though much of the analysis is concerned with judicial review of decisions of public authorities, the inclusion of contractual disputes recognises that contracts have been deployed in the utilities sectors to meet the regulatory purposes of government policy-makers, regulators and/or dominant firms seeking to exercise some

⁴ G. Teubner, "Juridification - Concepts, Aspects, Limits, Solutions." In G. Teubner (Ed.), *Juridification of Social Spheres* (pp. 3-48). (Berlin, Walter de Gruyter, 1987), at 3-5.

⁵ J. McEldowney, "Law and Regulation: Current Issues and Future Directions." In M. Bishop, J. Kay, & C. Mayer (Eds.), *The Regulatory Challenge* (pp. 408-422). (Oxford, Oxford University Press, 1995) at 418-9.

form of regulatory power over the market.

Second, we need to understand why law is taking on greater importance in the utilities sectors following privatization. The main factor in increasing the importance of law in the utilities sectors has been the processes of liberalization which have developed some years after privatization in most of the utilities sectors. Liberalization has had the effect of multiplying the number of players participating in each sector (both regulatory and commercial) and tended to threaten the consensual, bureaucratic models of provision and regulation which carried over from the era of public ownership. Increasingly these more numerous players are seeking to test their rights and obligations against the legal frameworks of each sector.

The final issue for analysis is to understand the potential impact of juridification. While the impact might be understood in the instrumental terms of interfering with the efficiency of expert regulation, or improving the accountability of non-elected regulatory authorities, we question whether such straightforward instrumental effects for law are credible. The limits of legal understanding of the utilities sectors are amply demonstrated by the analysis of the case law, within which the needs of the legal system to categorise aspects of provision and regulation in terms which the law recognises leads to outcomes which are difficult to understand and process from the perspective of the utilities sectors. Understood at a theoretical level it is possible for law to support organic processes within the utilities sectors which might enhance regulatory efficiency or accountability, or to damage them through the over-ambitious claims of the legal system to be able to control processes which fall outside its particular organising rationales and objectives.

2. Administrative Law

Administrative law governing regulatory relations in the utilities sectors has a number of distinct sources. Most visible are the somewhat limited provisions of the various statutes governing the powers and duties of ministers and regulatory offices.⁶ For example, the Telecommunications Act 1984 sets out the basic responsibilities of the Director General of Telecommunications to monitor and collect information about telecommunications activities,⁷ enforce licence conditions,⁸ and to investigate complaints.⁹ In carrying out these duties the Director General shares a responsibility with the Secretary of State to secure the provision of telecommunications services sufficient “to satisfy all reasonable demands” and “to secure that any person by whom such services fail to be provided is able to finance the provision of those services.”¹⁰ Further duties to promote the interests of “consumers, purchasers and other users”, “to maintain and promote effective competition”, “to promote efficiency and economy” among the service providers and to promote research¹¹ are expressed in such terms as to be secondary responsibilities.

⁶ The Office of Telecommunications (Of tel) established by the Telecommunications Act 1984, the Office of Gas Supply (Of gas) established by the Gas Act 1986, The Office of Electricity Supply (Of er) established by the Electricity Act 1989, the Office of Water Supply (Of wat) established by the Water Act 1989, superceded by the Water Industry Act 1991, and the Office of the Rail Regulator (ORR) established by the Railways Act 1993.

⁷ Telecommunications Act 1984 s. 47.

⁸ Telecommunications Act 1984 s.17

⁹ Telecommunications Act 1984 s.49.

¹⁰ Telecommunications Act 1984 s.3(1).

¹¹ Telecommunications Act 1984 s.3(2).

The chief powers possessed by the Director General are to enforce licence conditions (noted above), modify licence conditions¹² and to collect information from licensees and others.¹³ The main statutory procedural duties applying to the exercise of these powers are the duty to hold a 28 day consultation on any proposed licence modification,¹⁴ and the requirement of 28 days notice prior to the issuing of any provisional or final order against a licensee in respect of an alleged licence breach.¹⁵ In each case the director has a duty to consider representations and objections from the licensee affected and from third parties. In the case of a provisional or final order the licensee has a limited right to appeal to the High Court on grounds either that it is *ultra vires* or that procedural requirements were not satisfied.¹⁶ It is a characteristic of the utilities regimes in general that they were designed with a view to restricting the scope for legal challenges to regulatory decisions. The issuing of orders is, in theory, of great importance, since it is this and not the breach of a licence condition itself, which triggers the right of the Director General to enforce the order through the court, and the right of third parties adversely affected by the breach to claim damages. In practice Oftel made little use of its formal enforcement powers before 1996, reflecting the close and consensual nature of relations with British Telecom, its principal regulatee. The ultimate sanction against a licensee, the revocation of its licence, is reserved to the Secretary of State through provisions in the licence.

¹² Telecommunications Act 1984 ss.12,13.

¹³ Telecommunications Act 1984 s.53.

¹⁴ Telecommunications Act 1984 s. 12(2).

¹⁵ Telecommunications Act 1984 s.17(3).

¹⁶ Telecommunications Act 1984 s. 18.

It is within such statutory frameworks that licences, authorisations, appointments and franchises were granted to the various telecommunications, gas, electricity, water and railway companies which provide utilities services to the public. These latter instruments contain the chief obligations of the companies. Though generally issued by the Secretary of State (or the regulator, if the powers are delegated), they are subject to oversight and modification at the initiative of the various regulators (within the constraints noted below). The legislation and licences between them empower the regulators to issue orders in respect of breach of licence conditions and determinations of various forms of dispute both between licensees (for example in the case of telecommunications interconnection¹⁷) and between licensees and their customers.¹⁸ Additionally various sub-legal instruments, or instruments of 'soft law', have been developed.¹⁹ These include circular letters from regulators to the licensees,²⁰ guidelines issued by regulators,²¹ and codes of practice,

¹⁷ Licence Issues to British Telecommunications plc (1984, as amended), Condition 13.

¹⁸ Eg Telecommunications Act 1984 (as amended by Competition and Service (Utilities) Act 1992) ss. 27F-27I.

¹⁹ The term 'soft law', widely used in discussion of European Community legal instruments, refers to legally non-binding instruments which are, nevertheless intended to have normative effect: R. Baldwin, *Government and Rules* (Oxford, Oxford University Press, 1995) at 226-230, 248-252.

²⁰ Eg, the "Dear Regulatory Director" and "Dear Managing Director" letters issued by Ofwat.

²¹ Notably the Oftel *Guidelines on the Operation of Fair Trading Condition* (London, Oftel, 1997) which are to some degree modelled on the European Commission *Guidelines on the Application of EEC Competition Rules in the Telecommunications Sector* OJ 1991

developed by licensees with the encouragement of the regulators, for example governing relations between companies and their customers.

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Alongside the statutory framework is the general common law which applies to the administrative activities of public bodies such as regulatory offices. Thus ministers and regulatory offices, and perhaps also dominant firms (see below), may be subjected to judicial review of administrative action on grounds of illegality, unfairness or irrationality. Notwithstanding the rather limited duties in respect of consultation and transparency contained within the statutory frameworks, of which the Telecommunications Act 1984 (noted above) is an exemplar, in practice the regulatory offices, led by the Office of Telecommunications, have developed more elaborate procedures for consultation on licence modifications than required by the legislation.²²

²² See Oftel, *Improving Accountability: Oftel's Procedures and Processes*, London, Office of Telecommunications, 1997; National Audit Office, *The Work of the Directors General of Telecommunications, Gas Supply, Water Services and Electricity Supply* (House of Commons Paper No. HC 645 Session 1995-96).

To view administrative activity through the lens of judicial review brings with it particular effects. A loosening of principles of standing, and greater use of social science data in litigation has mitigated some of the problems of the private law model of adjudication on which judicial review actions were historically based.²³ Loughlin goes further, suggesting that a distinctive model of public law adjudication has developed in recent years, which reduces some of the worst problems of viewing what are essentially public policy disputes from a litigation perspective. He notes that:

"the scope of the action is not exogenously given but is shaped by the parties; the party structure is not rigidly bi-polar but amorphous; fact inquiry is predictive and legislative rather than historical and adjudicative; relief is forward-looking, flexible and with important consequences for absentees; the remedy is not imposed but negotiated; its administration requires the continuing participation of the court; the judge plays an active role throughout; and the action concerns a grievance about the operation of public policy."²⁴

But we may question whether such adaptation reflects a wish within the judiciary to be better equipped to adjudicate in judicial review cases, or an unrealistic belief that the courts are better equipped than they in fact are to understand the effects of the application of its supervisory jurisdiction for the actors in the sectors concerned.

There are two important aspects to the litigation which has occurred. First the pattern of cases indicates the circumstances under which litigation occurs. This analysis suggests that

²³ G. Richardson and M. Sunkin, "Judicial Review: Questions of Impact." [1996] *Public Law* 79-103 at 86.

²⁴ M. Loughlin, *Legality and Locality - The Role of Law in Central-Local Government Relations* (Oxford, Oxford University Press, 1996), at 403.

licence enforcement decisions remain largely subject to a consensual model as between regulator and licensee, and that litigation is used by third parties to prise open procedures which are relatively opaque and which lead to unsatisfactory conclusions for such third parties. At the level of regulatory enforcement pressure for greater formality also comes from the concerns of third parties, who need reassuring that dominant firms are being policed, for example in relation to consumer obligations or anti-competitive conduct. Conversely the modest incidence of recent actions brought by licensees against their regulators in respect of licence modification suggests that in this area of regulatory activity the consensual model is beginning to break down. Such a breakdown in the consensual model may be a response to changes in market structure, and thus the behaviour of regulators and regulatees in the face of liberalization. In the telecommunications sector the willingness and capacity of BT to litigate may also be a spill-over from its success in challenging ministerial rule-making through litigation in respect of the government's European Community obligations. Paradoxically the self-regulatory aspect of telecommunications regulation has been the least consensual when measured against the relatively high incidence of litigation to challenge self-regulatory decisions.

The second question which is raised by the litigation which has occurred is to what extent any pattern is discernible in the approach taken by the courts to the extent and manner of any intervention in regulatory decisions. There is a view that the courts take a more restrictive attitude to judicial review in cases involving commercial regulation.²⁵ This is evidenced by the fact that though the courts are willing to expand the ambit of their

²⁵ R. Gordon, "Declaratory Judgements and Judicial Review". Paper presented at IBC conference *Rights and Remedies in Regulated Industries*, London, 1995. See also the discussion of this issue in the chapters by Hopper and Walker in this volume.

supervision of regulatory activities, for example to cover self-regulatory bodies²⁶ they take a non-interventionist approach to the substantive activities of the regulatory body. This contrasts with the greater willingness to intervene with decisions of ministers and local authorities. This may partly be explained by a juridical conception of regulators as independent and expert bodies.²⁷ Paradoxically the courts may show greater respect for non-democratic institutions than for democratic ones. Consequences of this restrictive approach have been said to include the general non-availability of the prerogative orders, application of stringent time limits, and application of restrictions on discovery and cross-examination to cases involving challenges to regulators whether brought by judicial review or some other form of action.²⁸ Overall, though we may form a view as to the characteristics of any particular decision, a pattern is difficult to detect.

²⁶ *R v Panel on Takeovers and Mergers ex p Datafin* [1987] 1 QB 815.

²⁷ See, for example, the judgement of Lord Denning MR in *Laker Airways v Department of Trade* [1977] 2 WLR 234; R. Baldwin, AA British Independent Regulatory Agency and the "Skytrain" Decision. [1978] *Public Law* 57.

²⁸ R. Gordon, "Declaratory Judgements and Judicial Review". Paper presented at IBC conference *Rights and Remedies in Regulated Industries*, London, 1995.

The discussion which follows in this section explores key regulatory events and relationships, in order to secure an understanding of which regulatory issues have been contested through litigation. It starts with the issuing of licences, a process which has attracted virtually no litigation. The discussion proceeds to the two central regulatory issues, in terms of relations between regulators and firms, the enforcement and modification of licences. These processes provide the central powers through which regulators seek to secure the desired behaviour of their regulatees. The final three parts of this section focus on others with actual or potential importance in the regulatory landscape, ministers in respect of their powers to issue guidance or directions to regulators, and their powers to make rules through statutory instruments, and self-regulatory bodies which have a growing importance with the marketing of utility services in liberalized markets. Inevitably, discussion within an administrative law framework of the key functions and relationships in the utilities sectors focuses on those exercising public power. Thus one of the weaknesses of the administrative law lens is that the substantial private power held by utilities firms through their possession of information, and through their market power, is almost completely obscured.²⁹

2.1 Issuing of Licences

The decisions of the President of the Board of Trade concerning who to licence in the telecommunications sector have never been subjected to judicial review, nor have any other licensing decisions in the utilities sectors privatized since 1980. This is not surprising as the licensing procedure is opaque. Since the ending of the BT-Mercury Duopoly, the

²⁹ C.Scott, C.Hall and C.Hood "Regulatory Space and Institutional Reform: The Case of Telecommunications" in P.Vass (ed) *CRI Regulatory Review 1997* (London, Centre for the Study of Regulated Industries, 1997)

government has, in principle, been willing to licence all applicants who meet financial criteria for public telecommunications operators' (PTO) licences. Though provided for in the licensing instruments licence revocation is not a plausible sanction against a utility firm, because it is so drastic and because it is likely to affect customers adversely, and no licence has yet come up for renewal.

The closest form of litigation to this issue has been concerned with the issue of broadcasting licences for the regional ITV broadcasters. These licences are used to allocate valuable monopoly rights in competitive bidding. The form of competition anticipated by these licensing procedures is different from that which applies in the case of gas, electricity and telecommunications since the broadcasting licensee is competing for the field, and once it has won the franchise it has the exclusive control of it. In this respect it is closer in character to railway franchising under the Railways Act 1993. It is understandable that the moment at which the franchise is awarded should be more liable to litigation given that the award of a monopoly follows, than is the case in other sectors. Attempts to challenge such decisions, have, however, been unsuccessful. The principle that the licensing authority should, in certain circumstances, give reasons for decisions, set out by the House of Lords in relation to the ITC³⁰, has not been applied to the licensing functions of ministers. The principle set down in the *TSW case* was to apply to cases where an existing licence holder was applying for a new licence. No such renewal cases have yet occurred in the utilities sectors. In future the reasons for a ministerial or agency decision in respect of the grant of licences could be subject to a freedom of information

³⁰ See *R v ITC ex p TSW Broadcasting Ltd* [1996] EMLR 291. Notwithstanding the importance of this House of Lords decision to the broadcasting sector, it was only reported four years after the decision.

application,³¹ making future challenges to decisions easier.

³¹ See the Government White Paper “Your Right to Know” (Cm 3818, December 1997).

Recent litigation concerning broadcasting licences arose following the award of the Channel 5 licence. In *R v Independent Television Commission ex p Virgin Television Ltd*³² Virgin challenged the franchising process through an application for judicial review on the grounds that the successful applicant had been able to modify its bid, in respect of the shareholders' funding commitment, between application and award, and that the decision that Virgin failed to meet the quality threshold was irrational. Two other companies were also affected by the decision of the ITC. New Century was the only other bidder which met the quality threshold, while UKTV was in the same position as Virgin having failed to meet the quality threshold. Both were refused leave to apply for judicial review because they each were pursuing the first ground of Virgin's application. Each was also refused leave to appear during the course of Virgin's application. But at the hearing the Divisional Court did permit the other two firms to be heard. Recognising the limitations of the traditional assumptions of judicial review, Henry LJ said that "judicial review being often concerned with the identification of a public wrong, the conventional adversarial approach may often be too narrow."³³ The Divisional Court held that the request by the ITC for further information and provision of such information as to the finances of the successful applicant, Channel 5 Broadcasting (C5B), was anticipated by the statutory procedure for the issue of licences set down in the Broadcasting Act 1990 and that it was neither illegal nor unfair for such additional information to be provided.

³² [1996] EMLR 319.

³³ At 322.

In addressing Virgin's claim that the ITC acted irrationally in finding that Virgin failed to meet the statutory quality threshold, Henry LJ spoke pejoratively of attempts by counsel "to encourage an interventionist frame of mind" which were met by the caution that the court should neither "assume the mantle of the Commission itself (as the decision making body)" nor "allow itself to become a Court of Appeal from the decision making body when no such provision is made in the Act which created the Commission and vested it with clearly defined powers and duties."³⁴ Lord Templeman's caution in the *TSW case* (mentioned above) was cited with approval. Henry LJ set out in considerable detail the procedures used by the ITC to assess whether the quality threshold had been met and concluded:

"It is quite plain that the Commission approached its task of evaluating the application and the evidence provided by Virgin to support it with model care."³⁵

Thus the Divisional Court interpreted its supervisory role in respect of the licensing procedure to be a non-interventionist one. Having observed that in judicial review procedure lacks rigour, Henry LJ referred the "pick-out-a-plum= school of advocacy" is particularly dangerous in the absence of full discovery, cross-examination and the full rigour of pleadings, Henry LJ emphasised³⁶ that the area of decision making in question was not simply a quantitative exercise but involved qualitative analysis and judgement: it followed that a heavy burden fell on the applicant. The judicial caution in this case is thus based on a concern that the Court will not have sufficient expertise to form a view about the way in

³⁴ At 340.

³⁵ At 345.

³⁶ At 341.

which the Commission exercised its statutory duties in respect of the qualitative elements in licensing decisions.

2.2 Enforcement of Licences

It is well established that in carrying out licence enforcement functions utilities regulators are subject to judicial review,³⁷ though to date there has not been a great deal of litigation. The Divisional Court in particular has generally shown itself unwilling to intervene with the discretion of regulators in relation to licence enforcement. This non-interventionist stance has been revealed both in relation to positive actions of the regulator, for example, in withdrawing recognition of a Code of Practice, which effectively closed down one class of service providers,³⁸ and the refusal to act to prevent British Telecom using its market power for the similar purpose of regulating the market in sexline services.³⁹ However, dicta in the *Maystart* case reveal a perception on the part of the Court of Appeal of Oftel discretion being highly constrained. Simon Brown LJ said of the Director General, in relation to power to enforce BT's licence, or to modify it if it did not cover the undesirable

³⁷ *R v Director General of Gas Supply ex p Smith* (Divisional Court, 1988); J. McEldowney, "Law and Regulation: Current Issues and Future Directions." In M. Bishop, J. Kay and C. Mayer. (Eds) *The Regulatory Challenge* (Oxford, Oxford University Press, 1995) at 419.

³⁸ See *R v Director General of Telecommunications, ex p Let's Talk (UK) Ltd* (QBD 6 April 1992).

³⁹ *Maystart Ltd v Director General of Telecommunications* (Court of Appeal, 17 February 1994).

action complained of:

“Had he any doubts about its desirability, he must inevitably, as it seems to me, have followed the course outlined in his letter, first attempting modification of the licence under section 12, failing which he could have ordered a section 13 reference.”

These dicta suggest that whereas on the wording of the statute Oftel has considerable discretion in ordering priorities, in the Court's view, if he found that the actions of BT acted against the public interest Oftel, would be obliged to seek a licence modification, and perhaps then seek an MMC reference if BT did not agree it. This leaves little space for Oftel to come to a view about the adverse public interest consequences of a PTO's activities, but to decide not to act against it because it is not a matter of priority, or because the likely benefit of such action would be too small.⁴⁰ It was held that even had there been an arguable case (which there was not), the ten week delay between receipt of Oftel's letter and Maystart's applying for leave was so great that the Court should probably have refused the application in any case. This aspect of the decision indicates a judicial conception of the sector as one in which time may well be of the greatest importance: the requirement in Order 53 rule 4 that applications for leave to move for judicial review must be made promptly will therefore mean that in such cases the applicant would have to show particularly good reason for any delay, even within the three month long-stop period identified in that rule.

⁴⁰ cf. Telecommunications Act 1984 s. 16(5) which permits the Director General not to proceed with enforcement of a licence condition where such enforcement would be inconsistent with his duties, or the breach is trivial.

This view of regulators as having highly constrained discretion was acted on in a case in which the electricity regulator, Offer, refused to intervene in a dispute between a regional electricity distribution company (Manweb) and a number of house builders who were unhappy at the steep rise in connection charges for new homes levied by the company. A number of the building firms involved referred the dispute to Offer, relying on the provisions of the Electricity Act 1989 which state that any dispute between a licensed supplier and a person seeking supply of electricity may be referred to Offer for determination or reference to an arbitrator.⁴¹ Offer held that the charges were excessive. Subsequently a further group of builders, who had paid the contested connection charges and sat on the sidelines of the dispute referred to Offer sought to have a determination from Offer that the charges for connection which they had paid were also excessive. Offer refused to make such a determination, claiming that once the charges were paid there was no dispute and it was powerless to intervene.

Schiemann J held that restricting the definition of dispute to "unresolved dispute" or dispute in which payment has not yet been made was to restrict the natural meaning of the words. Therefore Offer would be required to make a determination on the dispute.⁴² The decision purports simply to apply the natural meaning of the statute in defining Offer's jurisdiction to resolve disputes. In fact it seems to take a wide view of the legitimate dispute-resolving jurisdiction of Offer and to give the regulator a more substantial role in regulating what are basically contractual disputes than the regulator had felt was appropriate. Thus this represents a more interventionist decision than that applied to the Oftel case noted above.

⁴¹ Electricity Act 1989 s.23.

⁴² *R v Director General of Electricity Supply ex p Redrow* 21 February 1995 (QBD).

These decisions do not provide any clear indication as to the circumstances in which a court is likely to intervene. Such interventionist indications as exist are likely to encourage licensees and those affected by regulatory decisions to seek judicial review, as they see courts more actively as providing mechanisms for appeal. Given the concentration of interest concerning the activities of regulators in the regulated firms as compared with third parties it is surprising that much of the licence enforcement litigation has been brought by third parties. This suggests that, notwithstanding a modest shift in regulatory practice towards more formal enforcement, the intended consensual regime still remains central as regards relations between licensees and regulators, and that third parties, whether new service providers or major customers, fall outside the regime and are likely to escalate disputes to litigation more willingly. Breakdown in consensual relations between licensees and regulators is more evident in relation to licence modification.

2.3 Rule-Making by Licence Modification

The power of the Director General to modify the conditions contained in the licensing instruments provides, in practice, the main mechanism by which regulatory rules can be amended and supplemented. This is because the main regulatory rules are contained in licences and similar instruments, and the regulators possess few powers to issue more general regulatory rules. The use of licences for the main regulatory rules in the utilities sectors is said to provide a greater protection against the risk that the regulator or a future government might substantially alter the regulatory regime. It was important to the government to demonstrate a commitment to the continuity of the regimes established by the privatising legislation in order to encourage the new investment which privatization was

intended to deliver.⁴³ Where the existing licence regime does not cover a situation which the regulator thinks ought to be regulated the only option is to seek to modify the licences of those firms to whom the new rule ought to apply. Additionally one of the central planks of the regimes established by the privatizing legislation, the application of price controls in respect of services where a substantial element of monopoly was retained, was framed in such a way that the price controls contained in licences were to expire after four or five years. Such price controls could only be retained (in their original or modified form) through licence modification.

Given the importance of the statutory procedures for modification of licence conditions by the regulators it is perhaps surprising that the first litigation to challenge a regulator's actions only occurred in 1996, twelve years into the life of the telecommunications regime, and seven years after the Electricity Act 1989. It is less surprising when we notice that the statutory regimes were established in such a way as to encourage consensual bargaining between licensees and regulators (though this was apparently not anticipated by the government), and only as the regulators have grown in experience and knowledge of the sectors they oversee have they sought to use licence modifications to make radical changes to the so called "regulatory contract"⁴⁴ established between licensees and regulators by the government on privatization.

⁴³ B. Levy, and P. Spiller, *Regulation, Institutions and Commitment* (Cambridge, Cambridge University Press, 1996) at 20.

⁴⁴ C. Veljanovski, C. "The Regulation Game." In C. Veljanovski (Ed.), *Regulators and Markets - An Assessment of the Growth of Regulation in the United Kingdom* (London, Institute of Economic Affairs, 1991).

The provisions for licence modification, substantially common to the telecommunications, gas, water, electricity and rail sectors, set out two ways in which licensing instruments can be modified. Modifications may occur by agreement between the regulator and licensee, or without agreement following a reference to the Monopolies and Mergers Commission (MMC). The MMC reference procedure is filled with uncertainty for both sides. The regulator is not restricted to referring the matters contained in the proposed licence modification, but can draw a reference more widely. The MMC is to apply distinct statutory criteria to the evaluation of the matters referred. Provided that the MMC concludes that the matter referred acts against the public interest, and that a licence modification can remedy the matter, the regulator can make any licence modification which appears “requisite” to remedy the matters identified in the report. Thus, as a matter of statute, the regulator is not bound to implement the MMC recommendation as to the nature of the licence modification needed. The time consuming and uncertain nature of the MMC reference procedure gives both licensees and regulators powerful incentives to reach agreement on proposed licence modifications.⁴⁵ Inevitably the bargaining process is somewhat hidden, so that even the best efforts of regulators to make licence modification decisions transparently do not provide a procedure for making regulatory rules for the sectors concerned which is fully inclusive. The power reserved by the Secretary of State to require an agreed modification to be referred to the MMC, designed to guard against capture of the regulator,⁴⁶ though requiring the Secretary of State to be kept informed of proposed

⁴⁵ M. Armstrong, S. Cowan, and J. Vickers, *Regulatory Reform* (Cambridge, MA, MIT Press, 1994) at 360; C. Graham, and T. Prosser, *Privatising Public Enterprises* (Oxford, Oxford University Press, 1991) at 213, 230.

consensual licence modifications, has never been used.

The interaction of licence modification procedures with judicial review raises intriguing questions about the extent to which the courts will overlay administrative law principles on the statutory procedures, and how the courts deal with the use by the legislature of an individuated licence modification procedure for the making of rules for a whole sector.⁴⁷ Two recent cases have addressed issues relating to the extent to which licence modifications can be used to substantially amend the regulatory regime, and whether a licensee can reopen a consensual modification through a judicial review action. The extent of the regulator's discretion to reject an MMC recommendation has not been addressed by the courts.⁴⁸

⁴⁶ This provision was introduced in the 1982 Telecommunications Bill, lost due to the 1983 general election, but retained in the Bill which became the Telecommunications Act 1984. See HC 1982-83, Standing Committee H, Vol VI, 22/2/83, Col 1180 (Mr Baker).

⁴⁷ These issues are more fully addressed in my "Regulatory Discretion in Licence Modifications: *The Scottish Power Case*." [1997] *Public Law* 400-409. See also C.Graham "Regulatory Responses to MMC Decisions" in P.Vass (ed) *CRI Regulatory Review 1997* (London, CRI, 1997).

⁴⁸ But it has been held that the similar powers exercised by the Secretary of State on receipt of an MMC report under the Fair Trading Act 1973 leave the Secretary of State free to disregard the MMC recommendation: *R v Secretary of State for Trade ex p Anderson Strathclyde plc* [1983] 2 All ER 233. The recent decision of the Northern Ireland Electricity Regulator to reject an MMC recommendation in respect of a licence modification for Northern Ireland Electricity (NIE) has triggered a judicial review action, undecided at the time of writing. The background to this litigation is described by A.McHarg "Reviewing Electricity Price Controls in Northern Ireland" (1997) 8 *Utilities Law Review*

159-163. McHarg's assessment (at 162) is that following the *Anderson Strathclyde* case "unless NIE can persuade a court that the Director General's proposals render it incapable of financing its licensed activities or they are otherwise perverse or irrational, a legal challenge is unlikely to succeed".

The *British Telecom* and *Scottish Power* cases were each judicial review actions brought by licensees following a consensual modification to their licence conditions.⁴⁹ The essence of British Telecom's case was that the modification of its licence so as to include within it a general prohibition on anti-competitive conduct was *ultra vires* because it denied to BT the protection of an individual licence modification and possibility of an MMC reference for each instance of anti-competitive conduct not covered by BT's licence which Of tel sought to regulate. Scottish Power's case was that the Director General of Electricity Supply should have reopened the consensual modification to the Scottish Power licence when the MMC recommended a more favourable licence modification in the case of the other Scottish electricity company, Scottish Hydro-Electric. In each case the licensees were seeking to challenge by judicial review licence modifications which they had consented to under the statutory procedure.

The modification to which BT had agreed was part of a package of changes introduced by Of tel which actually reduced the burden of regulation on British Telecom. The so-called Fair Trading Condition (FTC) was seen by Of tel as a necessary accompaniment to a

⁴⁹ *R v Director General of Telecommunications ex p British Telecommunications plc* Divisional Court, 20 December 1996, unreported, unofficial transcript; *R v Director General of Electricity Supply ex p Scottish Power* Court of Appeal, 3 February 1997, unofficial transcript. I have considered these cases more fully in my published notes, on which parts of the analysis which follows are based: "Regulatory Discretion in Licence Modifications: The Scottish Power Case." [1997] *Public Law* 400-409; "Anti-Competitive Conduct, Licence Modification and Judicial Review in the Telecommunications Sector" (1997) 8 *Utilities Law Review* 120-122. See also A.McHarg AA Duty to be Consistent? *R v Director General of Electricity Supply, ex p Scottish Power plc* (1998) 61 *Modern Law Review* 93-101, at 99-100.

series of relaxations in regulation which had seen the removal of the RPI+2 cap on BT's line rental charges, the reduction in the scope of the retail price cap from more than 60% of BT's revenue to about 25 % and a plan to replace annual consultation over BT's interconnection charges, hitherto set by Oftel, with a wholesale price cap which would operate automatically without the need for regulatory bargaining. These changes gave BT greater market freedom in relation to pricing, and carried with them the risk that BT would use its monopoly power to act anti-competitively. In the face of such liberalization the new condition was to compensate for the inadequacies of British competition law, as Oftel saw them.

The FTC licence modification proposed by Oftel (which became Condition 18A of BT's licence) was designed to introduce new norms of conduct based on Articles 85 and 86 of the EC Treaty, prohibiting abuse of dominant position and restrictive agreements with anti-competitive effect. The new Condition 18A would supplement and extend the existing prohibition in Condition 17 of BT's licence on undue preference and undue discrimination. The new licence condition was intended also to give Oftel greater capacity for rapid and effective enforcement of these new norms. The condition provided that in applying the Condition the DGT would have regard to European Community jurisprudence (ECJ decisions, Commission decisions and notices), pronouncements of the Director General of Fair Trading and Monopolies and Mergers Commission and any guidelines issued by Oftel. The Condition empowered the DGT to make an initial determination, after giving BT an opportunity to comment. Similarly BT was to have an opportunity to comment before the making of a final determination or order by the DGT. BT might require the DGT to take into account the views of an Advisory Body, established by Oftel, before making a final determination. The value to BT of this procedure is demonstrated by the fact that on the occasion of the making of the first provisional order against BT for breach of the new condition, a subsequent reference of the matter to the Advisory Body prevented Oftel from

proceeding to a final order, because of a finding by the Advisory Body that Oftel=s conclusion that the condition had been breached was incorrect.⁵⁰

By bringing a judicial review action, BT was attempting to sever the changes to the price control regime, which it found acceptable, from the new controls on anti-competitive conduct, which it did not find acceptable.⁵¹ Considering the statutory procedure for modifying licence conditions, Phillips LJ expressed the general principle governing the DGT's discretion in the following terms:

“The discretion as to the terms of a licence condition must be exercised in accordance with the express requirements of the Act and in a manner calculated to promote the policy and objects of the Act, as determined from the Act when read as a whole.”

This proposition, supported by authority, was supplemented by a further principle

“A condition must not be inserted in the licence which is so unclear as to be void for uncertainty.”

Given that the DGT has a statutory duty, *inter alia*, to 'maintain and promote effective

⁵⁰ Report of the Advisory Body on Fair Trading in Telecommunications: Draft Final Determination Under Condition 18A of BT=s Licence; BT Chargecard Report by ABFTT: Oftel=s Views (London, Oftel, December 1997).

⁵¹ C.Graham "Judicial Review and the Regulators" (1997) 6 *Utilities Law Review* 107-8, at 107.

competition' in the telecommunications sector (noted above), BT were likely to have some difficulty in demonstrating that the exercise of discretion by the DGT fell outside these principles.

The main substantive grounds of claim put forward by BT were that one way or another Condition 18 upset the statutory balance between the DGT and general domestic and EC competition authorities, as set out in the Telecommunications Act 1984, and more generally in other legislation and Treaty obligations. Addressing these claims, which were framed in a number of ways, Phillips LJ held that the specific powers of the DGT to regulate conduct by reference to modification and enforcement of licences was bound to "do most of the job in that field which would otherwise have fallen to be done, as best it could, under the general powers of the 1973 and 1980 [general competition] Acts". Put slightly differently the more specific telecommunications regime was held to take precedence over the powers exercised by the DGT and by the other competition authorities under general competition legislation. Somewhat different arguments apply to the relationship between Condition 18A and EC competition law. BT argued that to introduce norms based on Articles 85 and 86 created the risk that they would be interpreted differently from Community law, with no mechanism for resolving such conflict. The Court found this assertion devoid of merit. The Court might have reflected on the extensive voluntary alignment of domestic competition regimes with EC norms, both within EC Member States and outside, most of which alignments would be open to the same complaint, but none of which have been challenged by the European Commission.⁵²

The Court accepted that there was a degree of uncertainty about the way in which

⁵² I.Maher "Alignment of Competition Laws in the European Community" (1997) 16 *Yearbook of European Law* 223-242.

condition 18A was framed, notwithstanding Oftel's intention to rely on the European Community jurisprudence to interpret the prohibitions, but rejected BT's claim that this rendered the condition *ultra vires*. This rejection was based on the observation that BT had already to live with some uncertainty as to the interpretation of its licence, and Condition 18A did not significantly add to that uncertainty. Phillips LJ's remarks suggested approval for a new licence condition which would save delay and uncertainty associated with the need to modify licences to address specific forms of anti-competitive conduct which could be addressed economically by the new Condition 18A.

The argument which the Court found most troubling was BT's claim that by the use of general anti-competitive conduct condition in a licence modification unlawfully by-passed the statutory provision that licence modifications should, where not consented to by the licensee, be subject to review by the MMC and possible veto by the Secretary of State. By removing the need for further licence modification to address specific forms of anti-competitive conduct the DGT was seeking to by-pass this protection to licensees. Phillips LJ responded to this argument in circular fashion, indicating that since BT had agreed to the proposed licence modification, they had had the statutory protection, which is based on consent. The Secretary of State had the power to veto the modification which he had not exercised.

The issue in the *Scottish Power* case was not that the Director General of Electricity Supply (DGES) had failed to implement the MMC proposals in respect of Scottish Hydro-Electric (SHE), the company on whose licence the report was carried out, but rather whether the other company, Scottish Power (SP) which had agreed to the proposed modifications, should be permitted to benefit from the more favourable regime proposed by the MMC, through further licence amendment by the DGES. The proposed licence modification which SP had accepted and SHE had rejected concerned the price control on

the charges made to franchise customers taking under 100kW of supply a year. Because the two Scottish companies both generated and supplied electricity, and in contrast with England and Wales there was no market element to the determination of supply prices, the generation component of the price control had been fixed in relation to the price paid by Regional Electricity Companies (RECs) in England and Wales. Both the Scottish companies had argued that in modifying the price control in 1995 this component, the Great Britain Yardstick (GBY), should be modified to reflect the price the RECs paid in relation to electricity for its smaller customers, a higher figure, rather than an averaged out figure which included the cheaper electricity it supplied to its larger customers.

When the DGES proposed a modification which retained the GBY in its original form, both companies protested, but whereas SP reluctantly accepted the licence modification, SHE rejected it forcing a MMC reference. The MMC Report supported the view of SHE that the GBY should be modified as they had proposed to the DGES. The MMC concluded that to fail to modify the GBY would hold the price of supply to the franchise market 'below the level which would prevail in a free market' and that this acted against the public interest as it would prevent the development of competition. Though this would result in increasing SHE's revenue by ,18M a year, ,17M of this would effectively be clawed back in the MMC's modification on the price control on distribution. The DGES implemented the MMC's proposed licence modification fully in respect of SHE. The DGES informed SP that he did not propose to make a further modification to its licence to change the GBY. He noted that the GBY was just one of a number of factors affecting competition in the sector and the MMC had not commented on the implications of their proposed modification that SP and SHE would have different GBYs. The DGES stated that it was not possible to know what attitude the MMC would have taken to SP's position because they were not asked and did not comment on it.

The Court of Appeal (per Sir Ralph Gibson) overturned the Divisional Court's decision that the DGES had acted rationally, quashed his decision not to modify SP's licence, and remitted the issue back to the DGES for a fresh decision. The Court held that the reasons given for the DGES's decision were not valid. In particular the argument made by the DGES that he had had regard to the whole picture and had concluded that increasing the generation component would upset the revenue and price aspects of the package of modifications which had been agreed by SP was not a valid reason because he could have proposed additional modifications which would have reduced SP's revenue by corresponding amounts, as happened approximately with SHE. The failure to propose a modification, on the reasons advanced, was both irrational and unfair. The DGES decided not to proceed with an appeal, resolving the dispute with a consensual modification to SP's licence under which SP secured the benefit of the revised GBY, but agreed "to reduce prices to its franchise customers equivalent to 2 per cent of the total annual bill".⁵³ The

Regarding the relationship between regulatory activity and judicial review, in *Scottish Power* the fact that the licensee agreed to the proposed modification is not directly stated to be a ground for refusing to grant judicial review. This absence is puzzling given the importance in principle of determining whether a licensee given the statutory protection of an MMC reference should be entitled to elect to challenge a regulatory decision by judicial review without availing itself of the statutory procedure.⁵⁴ There are considerable resource implications for the regulator in having to reopen issues relating to a set of licence conditions, and corrections to particular aspects of a licence arising from changes in the regulatory environment might ordinarily be made, if thought necessary, at some later

⁵³ Office of Electricity Regulation Press Release R22/97, May 19, 1997.

⁵⁴ C.Graham "Judicial Review and the Regulators" (1997) 6 *Utilities Law Review* 107-8, at 108.

modification stage by the regulator.

In general, the *Scottish Power* decision sits uneasily with the Divisional Court decision in *British Telecom*. If the Directors General have a broad discretion to propose licence modifications, subject to the principles laid down by Phillips LJ in *BT*, and subject to the protections of the licence modification procedure, it is difficult to see why the review of a proposed modification of one company's licence should affect the duties of the regulator in respect of the licence of another company, beyond the general duty to keep the sector, and therefore licence conditions, under review. The difference in approach appears to be based on differing perceptions of the relationship between regulator and licensee envisaged by the statutory regimes. In *British Telecom* the implicit assumption is that provided procedural requirements are met and the powers are used to advance the purposes of the statute, the court is unlikely to intervene. In contrast, the *Scottish Power* decision views the relationship between regulator and licensee as one in which the regulator engages not in general policy making, but rather individuated decision making in respect of the particular licensee. The licensee is to be protected not only by the statutory protections of the legislation (notably the right to reject a licence modification and force an MMC reference), but also by the common law doctrines which protect the individual who is the subject of individuated decision making. Thus SP was, *prima facie*, entitled to have its licence modified to correspond to the modification of SHE's licence, and, at the very least, was entitled to a full set of reasons as to why its licence was not to be so modified.

2.4 Executive Rule-Making

Although the British utilities regimes do not provide much scope for executive rule making, membership of the European Union has resulted in new forms of rule making both by the EU institutions and by the UK government to secure the development of EC policy in

relation to the utilities sectors. At both levels these processes have resulted in considerable tension and litigation. Thus British Telecom took its challenge to the manner of implementation of the EC Utilities Procurement Directive through the Divisional Court and Court of Appeal to the European Court of Justice before new regulations were implemented after a further Divisional Court hearing.⁵⁵ In similar fashion BT challenged the UK's implementation of the ONP Leased Lines Directive.⁵⁶ In each case BT was using judicial review to challenge the way in which its position in the UK market was treated by the UK government, arguing that it should not be burdened with all the duties which attached to dominant monopolists, where, because of the relatively advanced state of liberalization in the UK, it no longer held legal monopolies in any parts of the sector. A substantial part of the problem has arisen because the EC legislation has been targeted at regimes which are not liberalized, and fit poorly with the liberalized UK regime.⁵⁷ Further tension is possible as the UK government takes further steps to implement EC regimes for liberalization of telecommunications, energy and possibly postal sectors.

The autonomous legislative capacity of the European Commission under Article 90(3) of the EC Treaty has been challenged, substantially unsuccessfully, on three occasions by Member State governments.⁵⁸ This legislative power has been used to greatest effect to

⁵⁵ Case C-392/93 *R v HM Treasury ex p British Telecommunications plc* [1994] 1 CMLR 621 (QBD, Court of Appeal); [1996] ECR I-1631.

⁵⁶ Case C-302/94 *R v Secretary of State for Trade and Industry ex p British Telecommunications plc* [1996] ECR I-6417.

⁵⁷ A. Hunt "Regulation of Telecommunications: the Developing EU Regulatory Framework and its Impact on the United Kingdom" (1997) 3 *European Public Law* 93-115, at 110.

⁵⁸ Joined Cases 188-90/80 *France, Italy, and UK v Commission* [1982] ECR 2545;

provide for the liberalization of the telecommunications sector without the involvement of the other EC institutions. While the Commission has substantially won its legal battles over its competence to issue such general Article 90(3) legislation, political considerations have meant that legislation to liberalize other EC utilities sectors has generally been proposed under Article 100A EC which requires the cooperation of the Council and the Parliament.⁵⁹

2.5 Relations Between Agencies and Ministers

There is no strong tradition of independent regulatory agencies in the United Kingdom. Typically where government has created new agencies rule making powers have been substantially retained by the government, together with other powers to veto agency decisions and/or to issue guidance or instructions as to how agencies are to carry out their tasks. Because of this there is inevitably scope not only for ministers and agencies to dispute their respective roles, but also for third parties to attempt to exploit such relationships. Legislative regimes define the extent and manner in which ministers may intervene in the conduct of agency business. For a minister to overstep that boundary or for an agency to refuse to recognise the statutory authority of the minister may result in judicial review. No other route is likely to be open to a third party to achieve its objective.

Case 202/88 *France v Commission* [1991] ECR I-2223; Joined Cases C-271/90 etc, *Spain, Belgium, and Italy v Commission* [1992] ECR I-5833.

⁵⁹ C. Scott, "Changing Patterns of European Community Utilities Law and Policy: An Institutional Hypothesis." In J. Shaw & G. More (Eds.), *New Legal Dynamics of European Union* (Oxford, Oxford University Press, 1996) at 209.

This potential is well demonstrated by the celebrated *Laker Airways* case.⁶⁰ The Civil Aviation Act 1971 empowered the Minister both to issue guidance and directions to the Civil Aviation Authority. The powers to issue directions were restricted to ensuring that national security was protected and that UK international obligations were met or international relations maintained.⁶¹ No such limitations were placed on the issue of guidance. Laker was caught up in a change of government, and an attempt by an incoming government to end proposals for competition on air routes. The government removed the designation which had been given to Laker and purported to change the policy by issuing guidance requiring the CAA not to licence a second operator, save that within British Airways' sphere of influence, a second operator could be licensed with BA's consent. In a judicial review action by Laker Airways, which had its licence revoked after the issue of the fresh guidance, the Court of Appeal held the guidance to be *ultra vires* because it sought to change the policy rather than simply amplify, explain or supplement the general objectives.⁶² Only directions could be used actually to change the policy, and directions could only be issued in limited circumstances which did not apply in this case. The decision was criticised by Baldwin as failing to recognise the character of the new regulatory agencies, which were not judicial in character and did not therefore need protecting from ministerial intervention.⁶³ This approach of the Court of Appeal would

⁶⁰ *Laker Airways v Department of Trade* [1977] QB 643.

⁶¹ Civil Aviation Act 1971 s.4.

⁶² per Lord Denning MR.

⁶³ R.Baldwin, "A British Independent Regulatory Agency and the 'Skytrain' Decision" [1978] *Public Law* 57 at 79-80; C. Harlow and R. Rawlings *Law and Administration* (London, Butterworths, 2nd ed. 1997) at 83-90.

provide an explanation for a non-interventionist approach to agencies generally as expert bodies, less subject to the kind of irrational decision making of other public bodies which the courts have become involved in supervising.

A more contemporary case throws up a similar problem, but in a form that the agency failed to follow a lawfully issued direction. At the time of the passage of the Railways Act 1993 there was considerable concern in Parliament that the privatization of rail routes by means of franchising would result in a considerable reduction in services. To appease Parliament the Secretary of State issued an instruction, as he was empowered to do,⁶⁴ to the Office of Passenger Rail Franchising (OPRAF), that in setting out minimum service levels for franchisees OPRAF should base these on the existing British Rail timetable. Thus the government was attempting to free railway operators to make commercial decisions about frequency of service, while at the same time attempting to meet political concerns that service levels should not be reduced. The two objectives were not consistent with each other and collided in OPRAF's franchising decisions. A pressure group brought an application for judicial review against OPRAF in respect of the first franchises on the ground that minimum service levels fell well short of the existing British Rail timetable. In *R v Director of Passenger Rail Franchising ex p Save Our Railways*⁶⁵ the Court of Appeal held that to comply with the instruction changes to timetables permitted by OPRAF could only be 'marginal, not significant or substantial' (per Sir Thomas Bingham MR). In each case service levels were set below 90 per cent of the old BR timetable, in some cases considerably below, as low as 45 per cent. Five of the seven franchises were held to be clearly unlawful as not complying with the instruction of the Secretary of State. This case is

⁶⁴ Railways Act 1993 s.5.

⁶⁵ The Independent, 20 December 1995.

one in which the Secretary of State was rather caught out, in that he used the power to issue instructions in such a way that he was able to reassure Parliament, but in so doing undermined some of the intent of the legislation in providing greater commercial freedom in respect of time-tabling. Perhaps the factor of greatest interest here is that it was a pressure group which was able to exploit this inconsistency through litigation. Their victory, however, was a pyrrhic one, as the minister acted to change the rules, legalising the minimum service levels.⁶⁶

2.6 Self-Regulation

⁶⁶ J. Goh "Privatisation of the Railways and Judicial Review" (1996) 7 *Utilities Law Review* 42-43.

In the telecommunications sector considerable use has been made of self-regulation, particularly over content and contract conditions for the information services which have been provided by a large number of small companies since the mid-1980s. In *R v ICSTIS ex p Firstcode*⁶⁷ the parties were agreed that the decisions of the Independent Committee on Standards in Telecommunications Information Services (ICSTIS) were subject to judicial review. ICSTIS sought that the grant of leave by Sedley J be set aside on the merits. The decision of Owen J to not to set aside the grant of leave was appealed to the Court of Appeal. ICSTIS is a private body, created by a contractual agreement between British Telecom and all other network operators, under which ICSTIS issued a Code governing the activities of Premium Rate Service (PRS) providers such as Firstcode. The Code provided for ICSTIS to determine whether in any particular instances the Code had been breached. The Code recorded that each contract between the network operator and the PRS provider contained a provision obliging the PRS provider to comply with the Code. ICSTIS is independent of BT and other telecommunications firms. Applying the decision of the Court of Appeal in *R v Panel on Takeovers and Mergers, ex p Datafin plc*,⁶⁸ Kennedy LJ concluded that ICSTIS was exercising a form of public law jurisdiction, rather than being simply a body whose sole source of power is consensual submission to its jurisdiction. ICSTIS' decisions were therefore judicially reviewable. The basis for this conclusion is not at all clear. We may observe that all PRS providers have to submit to ICSTIS' jurisdiction, but this is only because the providers' contracts with BT and all other network operators include a requirement to abide by the ICSTIS Code. It was precisely Firstcode's argument in this case that their contract with BT had been modified to restrict ICSTIS' jurisdiction in the case of Firstcode. But Russell LJ held that since ICSTIS' jurisdiction was not

⁶⁷ Court of Appeal, 24 February 1993, Lexis transcript.

⁶⁸ [1987] 1 QB 815.

dependent on contracts between the provider and ICSTIS, the provisions of any contract between the provider and BT could not affect its jurisdiction. Where a contract could be relevant was in limiting the scope for BT in applying the sanctions required by ICSTIS to the provider. The reasoning on these issues seems to be circular and unsatisfactory.

A stronger argument, which was not referred to in the decision of the Court, would be to point out that BT's licence⁶⁹ requires there to be a code of practice approved by the Director General of Telecommunications before BT is able to offer its network for use for chatline, interactive game, and live conversation message services. Thus it is clear that the code only exists because of the activity of public officials in issuing, modifying and enforcing licences. This might justify the conclusion that ICSTIS' jurisdiction is a public law one, not dependent on contract and because of that its activities cannot be fettered by any particular contract. It seems that the Court of Appeal reached its conclusion that ICSTIS was a public body subject to judicial review under conditions where both parties accepted this premise and therefore the alternative case was not argued. An alternative view would be to suggest that since its sanctions are only capable of being implemented by contract then that is the source of its power. The Court overturned the decision to give leave for judicial review on the ground that it was not arguable that the terms of Firstcode's contract with BT could affect ICSTIS' jurisdiction. Thus we find that in applying the principles of public law to this small corner of telecommunications regulation, what seems to be a private body, established by, and deriving its jurisdiction from contract, takes on the characteristics of a public law body, with universally applicable jurisdiction.

Though it seems clear that the courts will regard ICSTIS as a body exercising public law functions, and therefore subject to judicial review, the scope of such review is not likely to

⁶⁹ Condition 33A.

be as full as would be possible for genuine public authorities exercising statutory powers. In a first instance decision Kennedy J, when refusing leave to move for judicial review, observed (obiter) that the case concerned interpretation by ICSTIS of the provisions of its own code. This juridical interpretation of a self-regulatory body accords it the status of a 'fuller' regulator than it would in the case of Oftel, in the sense that it both makes and enforces the rules.⁷⁰ Accordingly Kennedy J would, if necessary, have adopted the general approach of Lord Donaldson in *R v Panel on Take-Overs and Mergers ex p Guinness*⁷¹ to the effect that in the case of the Takeover Panel illegality would certainly apply where the Panel acted in breach of the general law, but is more difficult to apply in the context of an alleged misinterpretation of its own rules by a body which under the scheme is both legislator and interpreter.

⁷⁰ *R v ICSTIS Ltd ex p Telephone Entertainment Service*, 6 February 1992, Lexis Transcript. The distinction between >full= and >partial= regulation is more fully explored in C.Hood and C.Scott >Bureaucratic Regulation and New Public Management: Mirror-Image Developments?= 321-345, 336-337.

⁷¹ [1990] 1 QB 146 (at 159). Lord Donaldson added that an alleged misinterpretation by the Panel of its own rules would only ground a finding of illegality where it was so far removed from the natural and ordinary meaning that a body subject to the rules could be misled.

Self-regulation in advertising generally is becoming increasingly important as liberalization has rendered advertising a very important tool for gaining or retaining market share.⁷² British Telecom's advertising campaigns appear to be aimed at keeping the company very much in the public eye, increasing the use of telecommunications by its customers, and proclaiming the significant price reductions which have, in many cases, been imposed by the regulatory framework. For new entrants to the market, advertising is used to make customers aware of the choices of provider in many aspects of the market, and of the significantly reduced prices which, in many cases, they are able to offer when compared with British Telecom. It is inevitable that marketing campaigns in this sector have been subject to large numbers of complaints by competitors, both through the print advertising self-regulator, the Advertising Standards Authority,⁷³ and through the Independent Television Commission and a self-regulatory unit handling the regulation of commercial broadcast advertising, the Broadcasting Advertising Clearance Centre.

⁷² Other regulatory issues have also come to the fore, notably the way in which personal data on customers and former customers is used by dominant incumbents to defend market share. Both the Data Protection Registrar and the sectoral regulators for gas and telecommunications have raised concerns about the legality of the use of such information by BT and British Gas.

⁷³ Numerous examples of complaints brought under the ASA code by competitors include, for example, the complaint brought against BT in respect of a national newspaper campaign claiming that its ISDN lines was cheaper than using couriers for firms using a courier at least once a week. The complaint was partially upheld on the grounds that the costs were not clearly set out and that comparisons made were unfair: Advertising Standards Authority (1997) 79 *ASA Monthly Report* 14-15.

It is not surprising that the pressure being put on advertising regulation should have spilled over into litigation in *R v British Advertising Clearance Centre ex parte Swiftcall*.⁷⁴ The applicant, Swiftcall, was a company offering reduced rate international calls via a 0800 number and credit card. The BACC, which provides a pre-clearance service for the ITV companies which own it, rejected the advertisement on the grounds that it did not inform customers of the total cost of the service as it neglected to include both the local connection charge and VAT. Swiftcall added information to their advertisement, indicating in general terms that local connection charges and VAT applied and the BACC gave clearance. Subsequently BACC received a complaint from British Telecom about the advertisement, indicating their view that it was still misleading and drawing the BACC's attention to a similar complaint by BT about Swiftcall which was pending with the Advertising Standards Authority. Swiftcall was informed of this complaint and asked to respond. During this correspondence BACC informed Swiftcall that charges quoted would have to include VAT and the local access charge. Swiftcall indicated that they could not include such charges without remaking the advertisement and refused. Swiftcall sought judicial review on the basis that it had a legitimate expectation that it would be permitted to broadcast the advertisement, which had been breached. Swiftcall also said that BACC was not acting fairly as between operators, by not requiring BT to include VAT in the calculation of call charges in its advertisement, nor to indicate precisely the basis on which BT discounts applied.

Carnwath J indicated that he was unwilling even to address the two preliminary arguments made on behalf of the BACC; first that it was not a body amenable to judicial review; second that the BACC had not actually made a decision. With regard to the second point

⁷⁴ Divisional Court, 16 November 1995, Lexis Transcript. See also *Vodafone Group plc v Orange Personal Communication Services Ltd* [1997] EMLR 84

he thought that the correspondence made it clear what BACC's decision would be, although they were only at the stage of exchanging views. Nevertheless the judge was not prepared to intervene with the action of the BACC. He dismissed the substantive basis of the application fairly rapidly, holding that decision makers must be able to change their minds on policy issues, and that in this case there had been no breach of legitimate expectation. He held also that there was no evidence that the BACC had acted unfairly.

It appears from these decisions that self-regulatory bodies, though liable to judicial review where meeting the *Datafin* criteria, are subject to lesser supervision than would be true of public authorities. The *ICSTIS* cases suggest that the courts will take a less interventionist approach to the interpretation of ICSTIS' rules. The *Swiftcall* case seems to suggest a lower standard of legitimate expectations will be applied to self-regulatory bodies than would applied to public authorities. For those who think judicial intervention in regulatory activity to be inherently undesirable, the greater use of self-regulation offers a possible way to limit the scope of such intervention.

3. Contractual Disputes

The privatization and liberalization of the UK utilities sectors has substantially transformed the nature of legal relationships, such that many matters which were previously governed by bureaucratic or statutory principles are now governed by contracts. This is true not only of relations between utilities suppliers and their customers (with some variation from sector to sector), but also of relations between owners of network facilities and service providers seeking to use those facilities. These latter wholesale relationships were, during the period of nationalized ownership, substantially intra-organizational, and thus bureaucratically governed. Liberalization has made these new wholesale contracts extremely important both

to dominant incumbents seeking to maintain market position, and new entrants seeking to develop market share. The presence of contracts does not of itself suggest that juridification is likely to occur. Socio-legal research on long-term commercial contracts has demonstrated that these relationships subsist without frequent recourse to lawyers or legal rules.⁷⁵ But in the utilities sectors it appears that one of the effects of placing so much emphasis on the use of contracts to achieve objectives previously pursued through administrative instruments is to create the risk that the actors will begin to see these relationships in juridical terms, and, to some degree, litigate to determine their rights and obligations.

Where contractual relations are being tested in the courts against the background of the legal framework of the Telecommunications Act 1984 and associated licences, a hybrid contractual form is emerging which has some characteristics of private law and some characteristics of public law. The relations which give rise to litigation arise partly from commercial negotiation and partly from the broader framework of activity within the regulated sector. The effect is for contractual principles to be mediated by the legal principles of the telecommunications sector, but also for the legal principles of the telecommunications sector to be shaped in unexpected ways by the values of contractual litigation.

⁷⁵ S.Macaulay A Non-Contractual Relations in Business. (1963) 28 *American Sociological Review* 55; H. Beale and T. Dugdale. "Contracts Between Businessmen: Planning and the Use of Contractual Remedies." (1975) 2 *British Journal of Law and Society* 45; M.Hviid "Relational Contracts and Repeated Games" in D.Campbell and P. Vincent-Jones (eds) *Contract and Economic Organisation* (Aldershot, Dartmouth 1995).

Contractual disputes are classically regarded as private matters between the two parties. There is a tendency for the courts to see the legal instrument of contract being used “and assume that it is being used in the way the law recognises: as an instrument of exchange between broadly equal parties. In fact, society uses the legal instrument in a multitude of different ways...”.⁷⁶ The consequence of this is that when contractual disputes are litigated the courts are unable to adapt their approach to the use of contract as a regulatory instrument, or in a regulated sphere, and only look at the respective rights and duties of the two parties, and not at the interests or views of third parties.⁷⁷ However, the emergent juridical conception of contractual relations in the telecommunications sector does not seem entirely to fit this classical conception. On the one hand commercial contracts between telecommunications firms have the potential to be shaped by the duties owed by Public Telecommunications Operators (PTOs) under their licences from the Secretary of State, duties traditionally conceived of as being of a public law character, rather than giving rise to private rights. On the other hand there is potential to treat a dispute that is fundamentally about the regulatory regime, that is the exercise of public duties, through the lens of contract law.

3.1 Wholesale Contracts

⁷⁶ J. Black, “Constitutionalising Self-Regulation” (1996) 59 *Modern Law Review* 24-55 at 42.

⁷⁷ Though the courts are able to look at some issues of public policy in contractual litigation, for example relating to illegality and restraint of trade. And legislation such as the Unfair Contract Terms Act 1977 has imported new regulatory principles into contractual litigation.

The main experience of wholesale contractual litigation in the telecommunications sector post-privatization has concerned first the terms of interconnection between BT and Mercury Communications Limited (MCL) and secondly the rights of the dominant incumbent, British Telecom, to cut off the services provided by it to companies using BT's network to provide premium rate services (PRS) or other types of service to their customers. Both forms of dispute have effectively been litigated as if they were contractual disputes.

One of the most important cases taken in the telecommunications sector is the action by MCL challenging the basis on which BT charged it for interconnection. This issue is absolutely central to the regulation of the liberalizing market, and has been subject to sustained regulatory activity over the past few years. The action was framed as a commercial law case concerning contractual interpretation, though it might equally well have been framed as a judicial review action challenging the interpretation by the regulator of BT's licence obligations in relation to interconnection. In *Mercury Communications Limited v Director General of Telecommunications*,⁷⁸ MCL was seeking to challenge Oftel's interpretation of BT's licence in relation to interconnection charges. At issue in the case was the interpretation of Condition 13 of BT's licence which required it to permit interconnection to its network through contract with other licensed operators. In the event that BT and an interconnecting operator failed to agree a contract for interconnection, the Director General of Telecommunications was empowered to determine the terms of

⁷⁸ [1996] 1 All ER 575. The analysis of the case which follows is substantially based on my note: "The Life (and Death?) of *O'Reilly*" (1995) 6 *Utilities Law Review* 20-21. See also A. McHarg, "Regulation as a Private Law Function" [1995] *Public Law* 539-551; P Craig "Proceeding Outside Order 53: A Modified Test?" (1996) 112 *Law Quarterly Review* 531-5. Notwithstanding the importance of this House of Lords decision for public law generally it took nearly a year to reach the law reports.

interconnection.⁷⁹ In the event that this licence condition was invoked the Director General was required to ensure, *inter alia*, that the interconnecting operator paid for "the cost of anything done pursuant to or in connection with the agreement including fully allocated costs attributable to the services to be provided and taking into account relevant overheads and a reasonable rate of return on attributable assets." Oftel and BT both interpreted this requirement to refer to charging of costs on the basis the actual use of the network, whereas MCL sought an interpretation on the basis of the total capacity of line used by MCL. To allow capacity charging at this wholesale stage, MCL argued, would give it greater flexibility to establish pricing to its customers which would distinguish it from BT in the market.

At the time at which MCL's case was brought there was in fact an interconnection agreement in place between themselves and BT. The DGT had issued a determination in December 1993 which *inter alia* replicated a clause from the 1985 interconnection agreement which provided that either party might at any time seek a review of the contract with the other party, and where agreement could not be reached a determination could be sought from the DGT, on the same terms as provided for in Condition 13 of BT's licence. The declaration sought by MCL related to the interpretation of the basis for charging which was in the current interconnection agreement and which the DGT *would* make if called upon so to do under clause 29 of the interconnection agreement (which at that time had not actually been incorporated into the interconnection agreement).

⁷⁹ Licence Issued to British Telecommunications plc (1984, as amended) Condition 13.5.

Both Oftel and BT sought to have the proceedings brought by MCL struck out. They complained that the way in which the proceedings were brought allowed MCL to avoid the procedural protections given to public authorities by the procedure for judicial review, which require applicants to seek leave from the Court, and to do so promptly (and in any event within three months). The House of Lords refused to strike out the proceedings.⁸⁰ This case marked a significant new point in the trend towards the relaxation of the general principle laid down in *O'Reilly v Mackman*⁸¹ that public law rights may only be pursued through actions for judicial review.⁸² By construing the *Mercury case* as involving private law rights, the decision may substantially have undermined the public/private distinction argued for in that case, with the adverse practical consequences which may follow relating to the certainty of regulatory decisions.

⁸⁰ But Lord Slynn did say (at 582) "In dealing with the originating summons the trial judge can have regard to, even if he is not strictly bound by, the procedural protection which would be available to a public authority under the provisions of Order 53." For the making of orders by the Director General of Telecommunications section 18(3) of the Telecommunications Act 1984 creates an even shorter period, of six weeks, outside which an order cannot be challenged.

⁸¹ [1982] 3 All ER 1124.

⁸² See *Roy v Kensington and Chelsea Family Practitioner Committee* [1992] 1 AC 624; P Craig "Proceeding Outside Order 53: A Modified Test?" (1996) 112 *Law Quarterly Review* 531-5.

The primary basis of the action by BT and Oftel to have the action struck out was that the relationships involved between BT, MCL and the DGT were entirely governed by public law, and the action could only be properly brought by way of judicial review (following *O'Reilly v Mackman*).⁸³ Such a contention had been rejected at first instance and in the Court of Appeal. In the House of Lords Lord Slynn noted the possibility of an exception to the general principle of *O'Reilly* in Lord Diplock's speech "particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties objects to the adoption of the procedure by writ or originating summons."⁸⁴ Lord Slynn himself said "It is of particular importance, as I see it, to retain some flexibility as the precise limits of what is called "public law" and what is called "private law" are by no means worked out."⁸⁵ Applying this analysis to the case before the House Lord Slynn said that although it was clear that the DGT was acting under statutory powers that "does not mean that what the Director General does cannot lead to disputes which fall outside the realms of administrative law any more than a Government department cannot enter into a commercial contract or

⁸³ [1983] 2 AC 237. In recommending the reforms to the procedure for judicial review, which occurred in 1977, the Law Commission had anticipated that actions for declarations could still be brought by ordinary action, as well as by the new Order 53 procedure. However the courts very rapidly sought to close off the option of an ordinary action, taking the view that the new Order 53 procedure lacked the disadvantages of its predecessor and that public authorities ought to be protected by leave requirements and time limits from the uncertainties associated with an ordinary action. See Wade and Forsyth *Administrative Law* (7th ed 1994) at 680-695.

⁸⁴ At 285.

⁸⁵ At 581.

commit a tort actionable before the court under its ordinary procedures."⁸⁶ In this case the provision for determination by the DGT arose because of the *contract* between the parties, "the dispute in substance and in form is as to the effect of the terms of the contract even if it can also be expressed as a dispute as the terms of the licence."⁸⁷ Furthermore, in Lord Slynn's view an action in the Commercial Court might be better suited to resolve an issue of this sort.

⁸⁶ The distinction draw here between administrative law on the one hand, and liability of public authorities in contract and tort on the other suggests that his Lordship was not prepared to view contractual and tortious liability of public authorities as administrative law. Such a distinction is not supported by, *inter alia*, Wade and Forsyth *Administrative Law* (7th ed 1994) chapter 20.

⁸⁷ At 582.

MCL's appeal against the striking out action was allowed, which permitted MCL to proceed with the action, and had the potential to unravel many months of consultation over the interconnection regime between the industry and Oftel. Mercury chose not to proceed with the action, as regulatory developments effectively overtook the dispute. In any case the DGT had said publicly that if MCL had succeeded in the action, and this had led to unsatisfactory developments, then he would propose licence modifications to render the regime workable once more.⁸⁸ Perhaps the more important aspect of the House's decision was the encouragement which it gives to regulated firms to challenge the decisions of regulators by way of litigation. At a practical level, to permit the Commercial Court to resolve a dispute of this type may be quite helpful. However, taking this course required the House of Lords to hold that the dispute to be essentially one of private law, and thus deny the patent public law background to the contract, and determination, both which owed their existence to the duties contained in regulatory legislation and licences.⁸⁹ Thus a radical public/private law divide effectively prevents the courts from fully recognising the hybrid nature of many contracts, not just in the utilities sectors, but in other areas such as public procurement.⁹⁰

⁸⁸ Director General of Telecommunications, Introductory Speech to ICAS Workshop, 28 March 1994.

⁸⁹ The decision may have a wider application to the public/private divide in heralding "a new and yet more liberal test for deciding when an applicant can pursue a claim by way ordinary action than previously existed." P Craig "Proceeding Outside Order 53: A Modified Test?" (1996) 112 *Law Quarterly Review* 531-5, at 531.

⁹⁰ The term "hybrid" has been used to describe arrangements which consist of a mixture of market and hierarchical ordering. For example, Hutter and Teubner use the concept to explore "just-in-time organizations, franchising systems, money transfer networks and other networks in such sectors as energy, transportation and telecommunication." M.

Hutter and G.Teubner "The Parasitic Role of Hybrids" (1993) 149 *Journal of Institutional and Theoretical Economics* 706-715. Thus the concept precisely captures the notion of relationships in the utilities sectors which are partly based on contractual notions of exchange and partly on the basis of administrative law notions of hierarchical decision making. For the hybridising implications of privatization for law generally see G.Teubner "After Privatisation? Invoking Discourse Rights in Private Governance Regimes" (1998) *Current Legal Problems* (forthcoming)

The second set of cases which are broadly wholesale in character are concerned with the rights of BT to cut off those service providers who it supplies with network facilities. Though the litigation has been contractual, the issues fell to be determined against a background of regulatory principles. In these cases there emerged a juridical conception of the relationship between BT and the chatline firms which, although akin to a regular commercial contractual relationship, may also be subject to the specific regulatory requirements of the telecommunications sector, and the more general requirements of contract law and competition law. It is of particular interest that firms have sought to rely on the duties contained in BT's licence, which though enforceable by the DGT (via cumbersome enforcement processes noted above), were not originally conceived of in terms whereby they gave enforceable rights to customers.⁹¹ In these cases the potential to draw public law duties into commercial contractual relationships, and thus the hybrid character of the relationships, was recognised.

⁹¹See *Megaphone International Ltd v British Telecommunications plc*, *The Independent* 1 March 1989.

The construction of a juridical conception of the relationship between BT and its commercial, service providing customers was taken furthest in an interlocutory hearing. In *Timeload Ltd v British Telecommunications Plc*⁹² the Court of Appeal was asked to consider the relationship between statutory regulation and BT's contract terms. The case was an appeal from a decision that one of BT's commercial customers should be granted an interlocutory injunction to prevent withdrawal from that customer of the use of a particular 0800 (freephone) telephone number. Because, once more, the proceedings were interlocutory, rather than the full hearing of the case, the law was not fully argued. The Court of Appeal suggested that the presence of a statutory scheme of regulation might result in the incorporation of licence obligations placed on a service provider into service contracts as implied terms.

The plaintiffs had set up an information service called Free Pages, consisting of a service where customers called the freephone number when looking for a particular type of service serving a particular locality. The service was provided free to the customer, but the businesses listed paid to be included. The service competed directly with BT's own Talking Pages service, offered on a 0345 number, and therefore charged at the local call rate. By means which are uncertain (either due to a mistake at BT or due to a breach of duty by an employee) the plaintiff managed to obtain from BT the use of the number 0800 192192, and had with BT a standard contract for its use, and were thus able to exploit the public's knowledge of the 192 BT Directory Enquiries number. The plaintiffs had operated the service since June 1993 and spent large amounts of money advertising and promoting the Free Pages service. BT alleged that the plaintiff's marketing campaign sought to

⁹² [1995] EMLR 459. The discussion of the case draws on my fuller note: "Regulated Contracts in the Telecommunications Sector" (1994) 5 *Utilities Law Review* 12-13.

associate the service with BT and amounted to passing off, and wrote to the plaintiffs asking Free Pages to cease advertising and to cease using the 0800 192 192 number. Subsequently BT wrote to Free Pages informing them that the use of the 0800 192 192 number would be terminated in one month from the date of the letter. Timeload, the owners of Free Pages, sought an injunction to restrain termination of the service until the dispute was resolved through litigation.

The Judge granted an interlocutory injunction, applying the principles in *American Cyanamid v Ethicon*⁹³ to the effect that there was a serious issue to be tried in relation to the construction and effect of clause 18(1) of BT's standard terms, and because of the possible application of section 3 of the Unfair Contract Terms Act 1977. Clause 18(1) reads:

"Termination of service by notice. At any time after service has been provided this contract or the provision of any service or facility under it can be ended."

"(1) by one month's notice by us; or

(2) by seven days' notice by you."

At first instance the judge had held that Clause 18(1) should be read with Clause 6 of the contract which permitted interruption of service for operational reasons but with an obligation to restore service as soon as reasonably practical. He suggested that the terms of the two clauses were inconsistent.

Without deciding determinatively on the correct mode for interpreting a contract in a regulatory setting, in the Court of Appeal Sir Thomas Bingham MR suggested that in

⁹³ [1975] AC 396.

dealing with contracts issued by a regulated utility company a classical approach to the interpretation of clause 18(1) might not be appropriate. The Court of Appeal accordingly had regard to the conditions of BT's licence, and in particular Condition 1(1) which requires BT to provide telecommunications services to all who request it. The Master of the Rolls said:

"I can see strong grounds for the view that in the circumstances of this contract BT should not be permitted to exercise a potentially drastic power of termination without demonstrable reason or cause for doing so."⁹⁴

Furthermore he said that he shared the judge's view that clauses 6 and 18(1) might be regarded as inconsistent and that the strict interpretation of clause 18(1) suggested by BT seemed to fly in the face of what the plaintiffs intended, the plaintiffs being unlikely to have invested large sums in advertising a service if they believed that BT could suspend it at a month's notice without giving good reasons.

The Master of the Rolls indicated that he thought it unclear whether section 3(2) of the Unfair Contract Terms Act 1977 (noted above) should apply to a clause of a contract defining the service to be performed, rather than a right to deliver something less than provided for in the contract. But he added that

"[i]t seems to me at least arguable that the common law could, if the letter of the statute does not apply, treat the clear intention of the legislature expressed in the statute as a platform for invalidating or restricting the operation of an oppressive clause in a situation of the present, very special, kind."⁹⁵

⁹⁴At 467.

⁹⁵ At 468.

A further issue arose in relation to the question whether the Director General of Telecommunications could be taken to have approved the contractual provision, thereby exempting it from the scope of UCTA, by virtue of section 29(2) of that Act. The Master of the Rolls said he doubted whether the fact the DGT had seen a provision could lead to the conclusion that he had approved it, especially as the DGT had no statutory jurisdiction or function in relation to approval of terms and conditions of such contracts. The Master of the Rolls concluded that there was a serious issue to be tried and Hoffman and Henry LJJ concurred in this view. If, as the Court of Appeal suggested, the licence conditions take effect as generating implied terms which favour customers then BT's capacity to impose harsh terms on customers would be much reduced. Furthermore the Court of Appeal decision suggested that the courts will be extremely hostile to harsh terms in the contracts issued by regulated utility companies, and, if unable to use the Unfair Contract Terms Act 1977 to regulate such terms, they may be willing to extend common law regulation of harsh terms in the special conditions of contracts set against a background of statutory regulation.⁹⁶ Notwithstanding the fact of continued legal tussles, ultimately settled in 1996, the Freepages service, now trading as Scoot, (which had at one time been owned by Timeload Communications) was, by 1997, capitalised at , 200 million on the basis of its continued useage of the very valuable 0800 192 192 number.⁹⁷ The dicta of the Master of the Rolls effectively recognise the value in the "new property" in telephone numbers.

⁹⁶ In similar circumstances, but in relation to another company, BT itself issued legal proceedings against one of its own customers to restrain the customer from passing itself off as being part of BT directly and through its marketing strategy: *British Telecommunications plc v Freephone Directory* (Chancery Division, 1992), Lexis Transcript.

⁹⁷ N.Gilbert "The Great Telephone Fiasco" *Independent on Sunday* 1 June 1997.

The approach of the Court of Appeal in *Timeload Communications* is reflected in the more recent Court of Appeal decision in an interlocutory action, *Zockoll Group Ltd v Mercury Communications Ltd*.⁹⁸ Zockoll sought to exploit the possible development of alphanumeric phone numbers, widely used in the United States, which allow customers to dial freephone numbers by remembering the letters corresponding to the numbers on the keypad. Anticipating the commercial possibilities arising out of the possible development of alphanumeric keypads in the UK Zockoll contracted with Mercury Communications Limited (MCL) to use thousands of freephone numbers, most of which were not particularly memorable as numbers, but would be of great value should the alphanumeric keypad take off, because the letters were memorable. These numbers included 0500-PLUMBER and 0500-FLIGHTS. Zockoll was intending to franchise the use of these numbers at such time as they acquired value. MCL notified Zockoll that it intended to withdraw the 0500-FLIGHTS number from them, as it had another customer who would make more immediate use of it, and, following Zockoll's failure to secure an interlocutory injunction in the Chancery Division did withdraw and reallocate the number. In the Court of Appeal Zockoll sought to have the number restored to them by grant of a mandatory injunction, pending a full hearing of their argument that any provision in the contract with MCL which permitted the withdrawal of the number was void by virtue of section 3 of the Unfair Contract Terms Act 1977 (noted above).

Clause 8.1 of the contract between MCL and Zockoll purported to permit MCL "to withdraw or change any telephone number used by the Customer on giving the Customer reasonable notice in writing" and provided that "[t]he Customer accepts that it shall acquire no rights

⁹⁸ Court of Appeal, 27 August 1997, unreported, Lexis transcript. It should be noted that the heading for this case on the Lexis database is incorrectly listed as 'Zockoil' rather than the correct 'Zockoll'.

whatsoever in any telephone number allocated by Mercury...". Zockoll attempted to rely on the decision in the *Timeload* case in support of its argument for an injunction. At first instance the Vice-Chancellor had distinguished this case on the basis that the *Timeload* contract only involved one number, so "withdrawal of the number necessarily involved termination of the contract." In *Zockoll* the contractual right exercised by MCL was the withdrawal of one of 53 numbers which were the subject matter of the contract. He thought there "no reasonably arguable basis for alleging that in this case there has been a breach of contract by Mercury in withdrawing the 0500 354448 number." Zockoll's appeal was made on the basis that the Vice-Chancellor had been wrong, as MCL knew the purposes for which the contract was made, and the withdrawal of the number would defeat that purpose. MCL responded by arguing first that the requirement of "reasonable notice" for the withdrawal of a number rendered the clause itself reasonable, as, depending on the circumstances, such reasonable notice might extend to a period as long as ten years and second that the withdrawal of one of 53 numbers did not render the contractual performance "substantially different" from what was reasonable expected, as required by s3(2) of the Unfair Contract Terms Act 1977.

Phillips LJ rejected MCL's contention that the withdrawal of one number before it could reasonably have been expected to become profitable for Zockoll could not render the performance of the contract "substantially different", and said that Sir Thomas Bingham MR's arguments about "the potential operation of the common law" could not be ignored. Furthermore he thought it untenable for MCL to claim that the requirement of reasonable notice for the withdrawal of a number rendered clause 8(1) of the contract reasonable when it had in fact only given 14 days' notice, in circumstances that would not allow Zockoll the anticipated benefit of the contract in respect of that number. Thus he held that Zockoll had an arguable case. Nevertheless, there being "substantial issues both of fact and law" to be resolved, a mandatory interlocutory injunction was not appropriate. On the

facts Zockoll's position would not be improved by the grant of such an mandatory injunction nor would justice be better served. From a commercial perspective Zockoll needed a speedy determination of the substantive issue, and Phillips LJ indicated that he was prepared to grant an order that the trial be expedited.

The wholesale contracts cases reveal the difficulties which the courts have in dealing with commercial relationships through the lens of contract law. In the *Mercury* the logic of treating a regulatory relationship as a public law matter was denied. Conversely in the *Timeload* and *Zockoll* cases it was suggested that the interpretation of commercial agreements should not be blind to the regulatory framework within which they are made. Similar signs that the courts have difficulty in processing contractual relationships which have hybrid public and private law characteristics can be detected in the following discussion of retail relationships.

3.2 Retail Contracts

Disputes between customers in the retail market and their service provider do not appear ever to have been litigated in the telecommunications sector. The lack of litigation may in part be explained by doubts as to whether retail telecommunications services are supplied as a matter of statute or contract. It has recently been held that the pre-privatization position has not been affected by the Electricity Act 1989 and that when electricity is supplied to retail customers under the statutory duty of the undertaker no contract exists.⁹⁹ The position of other utility sectors was not addressed by the Court. But there is a general assumption that in relation to telecommunications retail customers do have contracts with

⁹⁹ *Norweb v Dixon* [1995] 3 All ER 952.

their service providers and BT recognises this.¹⁰⁰ Furthermore EC legislation now requires Member States to legislate to make it clear that customers have contracts with telecommunications providers.¹⁰¹ However some of the factors in the *Dixon* case (a duty to supply, absence of bargaining between the parties) seem to apply at least to arrangements between BT and residential customers.

¹⁰⁰ I.Harden, *The Contracting State* (Milton Keynes , Open University Press, 1992) at 38-41.

¹⁰¹ EC Directive 95/62/EC on application of ONP to Voice Telephony OJ L 321, 30.12.95 p6,, Article 7.

A second explanation for the absence of litigation in the telecommunications sector is that the regulator remains very active in overseeing conditions for customers in the market generally. Many matters about which customers might complain are effectively channelled through the regulator. Additionally, in the case of consumer contracts, the Office of Fair Trading has recently taken on new powers to regulate contract terms generally, and has been extremely active in seeking the re-writing of contracts in plain English and so as to avoid the use of unfair terms.¹⁰² The absence of sectoral regulators and extensive regulatory obligations in most of the privatized New Zealand utilities sectors has led to much greater emphasis being placed on the potential of the common law to secure satisfactory service for customers.¹⁰³ In the UK litigation is only likely to spill out when the regulator declines to help or fails to provide the assistance sought.

One case in the electricity sector resulted in the apparent failure of the Director General of Electricity Supply to resolve the dispute. In *Gwenter v Eastern Electricity*¹⁰⁴ the plaintiff was essentially asserting the right to service, under conditions where the electricity supplier alleged that the meter had been tampered with and had cut the customer off. The

¹⁰² Unfair Terms in Consumer Contracts Regulations 1994 SI No 3159. See for example the report from the Unfair Contract Terms Unit of the Office of Fair Trading on the extensive re-drafting which it required of the mobile phone contracts of Vodacall Limited, a subsidiary of Vodafone Group plc: Office of Fair Trading (1997) 3 *Unfair Contract Terms Bulletin* 45-50. This redrafting substantially altered the content of the contracts in favour of consumers.

¹⁰³ M. Taggart, "Public Utilities and Public Law." In P. Joseph (Ed.), *Essays on the Constitution* (Wellington, Brookers, 1995).

¹⁰⁴ Court of Appeal, 7 February 1995, Lexis transcript.

interlocutory action was for an order restoring supply pending the full trial. The judge made such an order, relying on section 16 of the Electricity Act 1989, which requires a statutory supplier to give supply, subject to exceptions which include the circumstances where the offence of tampering with a meter has been committed and the matter not remedied. The judge held that there was sufficient evidence for the plaintiff to have an arguable case that no offence had been committed and the balance of convenience lay very much in favour of requiring reconnection. She held that the delay by the plaintiff in making the application should not disqualify her, specifically because during this time she had been attempting to find a resolution through the Office of Electricity Regulation (OFFER). The Court of Appeal upheld this decision, Waite LJ holding that there was 'an overwhelming case for interim restoration'. In such cases the courts seem keen to adopt a 'consumer-welfarist' approach, quite different from that adopted in relation to the PRS cases.

The somewhat arbitrary nature of the public/private divide in the utilities sectors is demonstrated by the fact that in subsequent litigation in a similar dispute the Northern Ireland High Court held that the monopoly private electricity supplier, Northern Ireland Electricity (NIE) was subject to judicial review.¹⁰⁵ Kerr J said in *Sherlock and Morris*¹⁰⁶ that he considered "the discharge of functions by NIE under the [Electricity (Northern Ireland) Order 1992 (SI 1992/231)] falls clearly within the field of public law." It was the public nature of the function, rather than the nature of the body supplying the service, which

¹⁰⁵ A possibility argued for by Paul Craig in *Administrative Law* (3rd ed., London, Sweet and Maxwell, 1994) at 240.

¹⁰⁶ Queen's Bench Division (Northern Ireland), 29 November 1996, noted by A. McHarg (1997) 8 *Utilities Law Review* 123-125, 137.

determined its amenability to judicial review. NIE was carrying out the same functions as a private company as it had been as a public corporation prior to privatization. A nationalized industry was clearly amenable to judicial review.¹⁰⁷ Furthermore he thought it would be anomalous to treat privatised utility companies as state authorities for purposes of European Community Law,¹⁰⁸ but as wholly private entities for the purposes of judicial review. This aspect of the decision has been criticised on the basis that it is difficult to draw the lines between privatised utility companies operating in competitive markets, to whom it may not be appropriate to apply judicial review, and those retaining monopolies, who, on Kerr J's view are so amenable. Furthermore to treat companies in different ways for different purposes is defensible and need not be regarded as anomalous, where the purposes of treating privatised bodies as state bodies in Community law is to prevent governments evading responsibilities for failing to implement directives simply by changing the status of public bodies.¹⁰⁹ Perhaps the strongest criticism is to point to the anomaly of the Government attempting to free utility providers from the restrictions applying to public bodies, while establishing "comprehensive regulatory regimes" only to have the courts reapply one of these restrictions, the availability of judicial review.¹¹⁰

¹⁰⁷ *Mercury Energy Ltd v Electricity Corporation* [1994] 1 WLR 521 (Privy Council). See also *Foster v British Gas* [1990] ECR I-3313 (European Court of Justice).

¹⁰⁸ Here he referred to the decision of Blackburne J to the effect that the privatised South West Water Services was to be regarded as a state authority for the purposes of the application of the EC Collective Redundancies Directive: *Griffin v South West Water Services Ltd* [1995] IRLR 15.

¹⁰⁹ A.McHarg (1997) 8 *Utilities Law Review* 123-125,137, 125

¹¹⁰ A.McHarg (1997) 8 *Utilities Law Review* 123-125,137,137.

In practice, Kerr LJ seemed to recognise the importance of channelling the dispute through the regulatory regime in preference to judicial review. Though NIE had failed to consider the representations of the applicants as to why their electricity supply should not be restored, the discretion of the court was exercised so as not to grant the applications. Effectively he was giving approval to the channelling of the applicants' dispute through the more appropriate mechanisms of (i) settlement of the matter between NIE and the applicants (ii) determinations on the individual disputes by the Director General and (iii) regulatory encouragement to changes in the policy for dealing with allegations of theft by NIE. NIE had offered on the hearing of the application of interim relief to instal prepaid meters to both applicants' homes. Furthermore both applicants had applied to the regulator for review of the withdrawal of electricity supply, and a determination had been issued in one case. Finally a policy for dealing with allegations of theft of electricity between the regulator and NIE, and a statement issued by NIE which substantially addressed the issue. Consequently Kerr J elected to refuse the applications for judicial review as an exercise of the Court's discretion.

4 Future Litigation

Further litigation in the UK utilities sectors is likely in the future, with pressures for such change coming from a number of sources. First, the new Labour government's review of the utilities sectors is likely to lead to some measure of legislative reform, and ministers have already demonstrated a greater inclination to intervene in the utilities sectors than was evident with the previous government.¹¹¹ Second, EC utilities regulation, based in Treaty

¹¹¹ McHarg notes, for example, that in his first six months the new energy minister had "twice invoked a power to require reports on specific issues from the Director General of Electricity Supply (DGES) [footnote omitted], a provision used only once during the Conservative Party's whole term of office." A. McHarg "Government Policy Towards the

principles directed towards the creation of a single market, is more law-based in character than the traditional discretionary UK regimes.¹¹² Lawyers are already heavily involved both in lobbying on new legislation, and working through the requirements of existing regulatory requirements.¹¹³ British Telecom has used litigation aggressively as a means to enforce the application of EC rules in other Member States so that it may secure access to their markets.¹¹⁴ Third, with liberalization of the utilities sectors, a comparatively late aspect of institutional reform, competition law is likely to take on a greater and central importance. As this occurs the juridical potential of the competition law regimes of both the UK and the EC is likely to be tested.¹¹⁵ Pressures for juridification may occur "in less obvious ways, for example freedom of information legislation and the incorporation of the European Convention on Human Rights into UK domestic law."¹¹⁶

Electricity Industry under Labour" (1997) 8 *Utilities Law Review* 203-206, at 204.

¹¹² T. Prosser *Law and the Regulators* (Oxford, Oxford University Press, 1997), 56.

¹¹³ E. Tucker "Lessons in Dealing with Brussels" *Financial Times* 22 August 1997 at 6.

¹¹⁴ A. Cane "BT Issues Legal Deadline for Telekom to Provide Figures" *Financial Times* 15 December 1997, at 18. The article notes continuing action against the German dominant operator, Deutsche Telekom, and legal action taken against Telecom Italia, France Telecom, Belgacom (Belgium) and KPN (Netherlands).

¹¹⁵ One commentator has remarked that it is surprising that there has to date been little evidence of challenges to competition policy decisions and procedures generally in the courts, given that the firms or sectors reviewed do not have a continuing client relationship with the competition authorities, and consequently have little to lose by way of good relations in testing the boundaries and procedure of the competition jurisdiction: P. Craig, *Administrative Law* (3rd ed., London, Sweet and Maxwell, 1994) at 219.

¹¹⁶ C. Graham "Judicial Review and the Regulators" (1997) 8 *Utilities Law Review*

107-108, at 108. This will depend in part on how the utilities sectors are treated by the legislation. The Government has expressed a preference for treating utilities firms as part of the public sector or the purposes of freedom of information. In any case the application of freedom of information and human rights legislation to the regulatory offices is likely to have far-reaching consequences for their relations with firms they regulate and third parties.

There seem to be number different routes by which a process of juridification of competition policy in relation to the utilities sectors might occur as processes of liberalization are worked out. The most obvious of these is via the activities of the MMC in reviewing licence modifications (noted above in the *Scottish Power* case). Other routes include the application of general competition law principles (provided for in the utilities statutes) and application of mergers principles. UK law is highly discretionary in this area and has not yet been highly juridified. The application of EC competition law in the UK is likely to be more juridical in form, as there is a considerable amount of jurisprudence and a well-developed practitioner community. This development is anticipated by the moves of the Director General of Telecommunications to establish himself as a competition authority applying EC norms with an expert advisory committee and a new procedure of publishing details of investigations and precedents.¹¹⁷ The Competition Bill, passing through Parliament at the time of writing, will significantly enhance the powers of all the utilities regulators to apply competition rules based on EC norms.¹¹⁸ If the application of such competition principles become central to the work of the UK regulators we may expect that competition law will provide a major source of juridical activity in the utilities sectors, as it has done in New Zealand which avoided completely an intermediate regulatory stage between public ownership and the application of general competition law in the utilities sectors.¹¹⁹

¹¹⁷ Oftel, *Procedural Notes of the Advisory Body on Fair Trading in Telecommunications* (London, Office of Telecommunications, 1997); Oftel, *Fair Trading Condition - Enforcement Procedure*, (London, Office of Telecommunications, 1997).

¹¹⁸ Oftel, *Dealing with Anti-Competitive Behaviour in Telecoms*, (London, Office of Telecommunications, 1997) at para 3.11.

¹¹⁹ H. Janisch, "From Monopoly Towards Competition In Telecommunications: What Role for Competition Law." (1994) 23 *Canadian Business Law Journal* 239-278. See

also the decision of the Privy Council in *Clear Communications v New Zealand Telecommunications Ltd* [1995] 1 NZLR 385 (PC) which provides a fairly clear warning about the risks of leaving the determination of rules for interconnection of telecommunications firms to the market subject only to the application of general competition rules prohibiting anti-competitive conduct.

5. Why Juridification?

In this chapter we have explored one set of indicators that the utilities sectors are becoming juridified - the pattern of litigation. This pattern reveals that certain issues and relationships have been more prone to litigation than others, and that there is evidence of increasing frequency. In this section we look at possible explanations for the increasing frequency in litigation, and broader processes of juridification.

The simplest explanation for juridification in the utilities sectors is to link it to privatization. However, privatization in itself did not provide the conditions under which lawyers and legal values would be drawn into day-to-day relations. Though lawyers were heavily involved in the privatization process, once this had occurred neither regulators nor regulated firms showed early inclinations to redefine relations in juridical terms. Though privatization may have increased the expectation that utilities providers be held legally accountable, as are other private companies, for the quality of what they provide to wholesale and retail customers, this expectation was at least balanced by the duty and capacity of the new regulatory offices to resolve disputes and encourage the development of principles which would avoid further disputes. Thus, while the number of complaints against utilities companies has risen markedly since privatization, these rarely spill over into litigation against the company involved. *Sherlock and Morris*¹²⁰ provides a rare example.

¹²⁰ *Supra* n.106.

The separation of the regulatory functions in the utilities sectors from the service provision functions may also be thought to have created the conditions for juridification, in the sense that regulators and service providers might be expected to have divergent interests and a considerable stake in using law, among other instruments, to advance those interests. In fact the combination of the new legislative structures for regulation, with market structures which substantially retained existing monopoly supply arrangements, encouraged the regulators and service providers to negotiate their new relationships in a manner which was substantially consensual, and within which it was rare to resort to the legal framework or to lawyers to resolve disputes. The separation of functions between regulators and service providers has been important because it has required a fresh attempt to describe those relationships in legislation and other instruments such as licences. The new relationships and rules governing them have been a necessary prerequisite to juridification in the utilities sectors, as in other areas of public sector reform.¹²¹ However these changes do not, in themselves, explain why the juridical potential of the new arrangements is being taken up. Where regulatory separation is seen as a factor in juridification is in a quite distinct and small number of cases resulting from the perceived failure of a regulator to secure for customers a particular outcome in terms of the conditions of service provision (*Gwenter*,¹²² *Smith*,¹²³ *Redrow Homes*,¹²⁴ *Maystart*¹²⁵). This litigation by >outsiders= to the system does

¹²¹ See J.Broadbent and R. Laughlin “Contracts, Competition and Accounting in Recent Legal Enactments for the Health and Education Sectors in the UK: An Example of Juridification at Work?” in S.Deakin and J.Michie (eds)*Contracts, Co-Operation, and Competition* (Oxford, Oxford University Press).

¹²² *Supra* n.104.

¹²³ *Supra* n.37.

¹²⁴ *Supra* n.42

not necessarily reflect the ways of thinking of >insiders=: regulators and licensees. Sporadic litigation by outsiders could leave day-to-day operation of the regime in a substantially non-juridified state.

The key change in the arrangements governing the utilities sectors which has led to a process of juridification is the development of policies of liberalization. These policies have led to the potential or actual multiplication of service providers, often with complex new contractual arrangements between themselves, or with the regulatory offices of both. Under conditions of liberalization the incentive to maintain consensual relations between regulator and licensees is diminished, as the health of the sector is no longer so closely identified with the well-being of the dominant incumbent. To understand fully the way in which juridification is occurring we would need to examine how these relationships are conducted on a day-to-day basis, to ask to what extent the interpretation of legal rules now guides behaviour which was previously governed by administrative or commercial values. Litigation provides only one indicator that a juridification process may be occurring because of liberalization.

¹²⁵ *Supra* n.39.

The key instances of litigation have occurred under circumstances where restrictions which had hitherto applied have been lifted, or have been in the process of being lifted. Thus we have seen dominant incumbent firms seeking to improve the regulatory conditions as they face competition (the *BT*¹²⁶ and *Scottish Power*¹²⁷ cases), a dominant incumbent challenging the UK implementation of EC liberalization measures (in relation to procurement and leased lines¹²⁸), new entrants seeking to improve the conditions of entry (the *Mercury* case¹²⁹), new entrants seeking to establish ground rules for the governance of valuable new commodities such as the right to use a particular telephone number (*Timeload*¹³⁰ and *Zeckoll*¹³¹), and a pressure group challenging the relaxation of minimum service levels (*Save our Railways*¹³²). The hypothesis that liberalization provides the main pressure for juridification is supported by the observation that the greatest incidence of litigation has been in the telecommunications sector, where liberalization is most advanced, and that there has been virtually no litigation in water, the least liberalized sector.¹³³

¹²⁶ *Supra* n.49.

¹²⁷ *Supra* n.49.

¹²⁸ *Supra* nn.55,56.

¹²⁹ *Supra* n.78.

¹³⁰ *Supra* n.92

¹³¹ *Supra* n.98.

¹³² *Supra* n.65.

¹³³ But it was reported in early 1998 that a group of local authorities had succeeded in a judicial review action against the water regulator, Ofwat, in which it was held a card payment system for water was unlawful because it would allow customers in difficulties over payments to be cut off, in breach of a statutory code: N.Bannister "Pre-Paid Water

Meters Banned" *The Guardian* 21/02/98.

Though liberalization has been the main factor leading to juridification, other factors have, independently, made litigation a more attractive mechanism for resolving public law disputes. The more expansive attitude taken to judicial review generally by the Divisional Court since the 1960s has entered the consciousness of those whose activities are connected with public administration of one form or another.¹³⁴ This may make it more likely that those affected by administrative decisions conceive of those decisions in juridical terms instead or as well as in administrative terms.

6. The Impact of Juridification

¹³⁴ See G.Mezsaros, M. Sunkin and L.Bridges *Judicial Review In Perspective* (London, Cavendish Publishing, 2nd ed, 1995).

The effects of drawing the legal framework into the regulatory relations within the utilities sectors can be examined in a number of different ways. Orthodox analyses point both to the advantages for decision making of holding regulators to account in terms of the grounds of judicial review - illegality, unfairness, irrationality - and the risks associated with slowing decision making down,¹³⁵ interfering with expert decisions or the wishes of democratically elected government.¹³⁶ Such analyses have long recognised that any assessment of the precise impact of judicial intervention is problematic, particularly where looking for ripple effects within public administration generally from the comparatively small number of decisions which are judicially reviewed.¹³⁷ Any simple assumption that

¹³⁵ But it has been commented that judicial review actions, and appeals, can actually be disposed of remarkably quickly. See generally M.Loughlin, *Legality and Locality - The Role of Law in Central-Local Government Relations* (Oxford, Oxford University Press, 1996) at 401-2, and in relation to the *TSW* case, *supra* n.29, Prosser points out that the administrative process was not unduly delayed as the whole procedure from publication of the initial licence decision to the House of Lords handing down its decision in the judicial review action was less than four and a half months: T.Prosser, "Regulation, Markets and Legitimacy." In D. Oliver and J. Jowell (Eds.), *The Changing Constitution* (pp. 237-260). (Oxford, Oxford University Press, 1994) at 258.

¹³⁶ See, eg, R. Baldwin, and C. McCrudden (eds) *Regulation and Public Law*. (London, Weidenfeld and Nicolson, 1987) at 59-61 ; A. Ogus, *Regulation: Legal Form and Economic Theory* (Oxford, Oxford University Press, 1994) at 115-117. A robust critique of the growth of judicial review is provided by R. Cranston, R. "Reviewing Judicial Review." In G. Richardson & H. Genn (Eds.), *Administrative Law and Government Action* (pp. 45-80). (Oxford, Oxford University Press, 1994).

¹³⁷ G. Richardson, G., and M. Sunkin, "Judicial Review: Questions of Impact." [1996]

administrators, whether in regulatory offices or elsewhere, attempt to act legally, rationally and fairly and that such behaviour is the outcome of potential or actual judicial control is clearly questionable.

Public Law, 79-103.

Part of the difficulty for the courts lies in the almost exclusive focus on public power and on the moments at which particular administrative decisions are made by regulatory agencies. But regulators do not possess a monopoly of power. Though independent, regulatory offices are constrained in their actions by powers retained by government ministers (both explicitly and implicitly), and held by licensees, both as part of the statutory framework and as a product of their virtual monopoly over commercial information needed by the regulator.¹³⁸ Thus, at a practical level the attentions of the legal system are not necessarily directed towards the actors who exercise the power. At a theoretical level the problem of the lack of capacity of regulatory law directly to control actions in the regulated sphere is as much a problem for regulators as it is for courts.¹³⁹

¹³⁸ C.Scott, C.Hall and C.Hood "Regulatory Space and Institutional Reform: The Case of Telecommunications" in P.Vass (ed) *CRI Regulatory Review 1997* (London, Centre for the Study of Regulated Industries, 1997).

¹³⁹ G.Teubner, "Juridification - Concepts, Aspects, Limits, Solutions." In G. Teubner (Ed.), *Juridification of Social Spheres* (pp. 3-48). (Berlin, Walter de Gruyter, 1987) at 21.

Theoretical accounts question the capacity of the legal system to apply fully its values to other activities. The question of the relationship between law and other systems is one of the central themes of contemporary sociology of law. In some instances there is a reasonably good fit, for example between industrial organisation and exchange in the economic system, and company law and contracts respectively in the legal system.¹⁴⁰ The fit between the emerging law of public utilities and the provision of services is clearly not as strong. The question such an analysis raises for the relationship between the courts and utilities sectors is to what extent the involvement of legal values and courts can be supportive of activity in the utilities sectors, and under what conditions it might go beyond the capacities of the legal system. This problem of capacity applies equally to regulators as to courts. For both sets of state institutions, the capacity for direct control over the utilities sectors is limited. Indirect control may be possible to the extent that the signals sent out to utilities firms and others in the sector are suitable for recognition and adaptation to the new environment.

¹⁴⁰ What is present here, in the language of systems theory, is a "structural coupling" between the economic and legal systems in the institutions of the company and the contract: G. Teubner, "Juridification - Concepts, Aspects, Limits, Solutions." In G. Teubner (Ed.), *Juridification of Social Spheres* (pp. 3-48). (Berlin, Walter de Gruyter, 1987).

We can identify two sets of activities among utilities firms which might usefully be the subject matter of indirect intervention. The first is the drafting of contracts and the second is the drawing up and application of self-regulatory codes. A number of the regulators have been at their most effective when regulating indirectly, through encouraging firms to develop and publicise self-regulatory principles.¹⁴¹ Such developments have allowed regulators to influence areas in which they have no formal statutory powers. Attention to the drafting and operation of contracts from the courts has done much to protect the investment of new firms seeking to offer innovative new services in the telecommunications sectors.

¹⁴¹ cf G.Teubner, "Juridification - Concepts, Aspects, Limits, Solutions." In G. Teubner (Ed.), *Juridification of Social Spheres* (pp. 3-48). (Berlin, Walter de Gruyter, 1987) at 21. Some reservations have been expressed about the deployment of a model of "enforced self-regulation" in the UK utilities sectors. Prosser, notably, sees limits to the appropriate degree of delegation to firms "because of the existence of strong public interest elements in matters such as price control, and because of the existence of divergent interests on the part of different firms in relation to regulation for competition", T.Prosser *Law and the Regulators* (Oxford, Oxford University Press, 1997) 271.

Judicial control over the activities of regulators is likely to be most effective when it seeks to build upon existing features of regulatory regimes, promoting the use of existing extended procedures of consultation and public discussion of reasons for decisions and the exercise of dispute resolution functions.¹⁴² Within such an approach "the official function of law, which is to decree changes in behavior recedes into the background, whereas its latent function, which is to regulate systems of negotiation becomes crucial."¹⁴³ Decisions exemplary of this approach include the judicial review applications of *Sherlock and Morris*,¹⁴⁴ which sought to channel the dispute into the most appropriate procedures, and the *BT* case,¹⁴⁵ in which the Divisional Court gave recognition to the organic development of the telecommunications regime through licence modification, and reinforced the general principles for such change which were implicitly being applied by the regulator. In each case the use of the court as a means to subvert the regulatory mechanisms provided in the legislation was effectively prevented.

Where the courts risk overstepping the capacities of the legal system is where they redefine regulatory activities in ways which are unfamiliar to those operating them, with the consequence that the courts apply unfamiliar or inappropriate procedures or values. The

¹⁴² Cf T.Prosser *Law and the Regulators* (Oxford, Oxford University Press, 1997) pp281-286. Prosser argues for a process of learning from United States experience. By contrast my argument is for organic development of existing UK procedures.

¹⁴³ G.Teubner, "Juridification - Concepts, Aspects, Limits, Solutions." In G. Teubner (Ed.), *Juridification of Social Spheres* (pp. 3-48). (Berlin, Walter de Gruyter, 1987) at 34.

¹⁴⁴ *Supra* n 106.

¹⁴⁵ *Supra* n.49.

Scottish Power decision¹⁴⁶ provides an example of such difficulties. The court found it very difficult to determine whether to regard a licence modification as an instrument of general policy (which should properly be applied to all companies in similar positions) or an instrument of individuated decision making (carrying with it protections of procedural, and perhaps substantive fairness associated with such administrative decisions). The decision fully reflects such ambivalence applying inappropriately rigorous standards of decision making to the regulator to the particular event which was litigated, and permitting a licensee to subvert a statutory decision making procedure. This argument is not intended to provide a criticism of the judges, who we must recognise "are, to an extent, prisoners of the way the parties construct their arguments".¹⁴⁷ But it highlights the risks associated with inappropriate judicial control in upsetting the organic development of regulatory procedures.

¹⁴⁶ *Supra* n.49.

¹⁴⁷ C.Graham "Judicial Review and the Regulators" (1997) 8 *Utilities Law Review* 107-8,108.

Moreover, attempts by the court to impose an ideal-world decision making model on a regulator do not necessarily mean that such a model is adopted. The first Director General of Telecommunications, Sir Bryan Carsberg, has admitted that the development of competition in the sector had been hampered by his refusal to provide reasons for his early decisions on interconnection. "As with all things, my inclination was to explain exactly what I had done and why I had done it."¹⁴⁸ But he had been advised that to give reasons would risk having them challenged in litigation, and that he should avoid this. Subsequently Oftel has developed a model of consultation and reason-giving which eschews fear of litigation, and which is widely recognised as a model not just for other regulators, but for Whitehall more generally.¹⁴⁹ This did not happen directly through litigation or threat of litigation, but in spite of it.

7. Conclusions

This chapter has provided a discussion of one aspect of the process by which legal values are seeping into the provision and regulation of utilities services. A deeper investigation would encompass also a consideration of change in the day-to-day role of lawyers in bringing legal values to commercial and regulatory discussions within firms and regulatory offices. The activities of such legal actors are important in shaping organic changes in the way in which firms and regulators perceive their relationships, for example

¹⁴⁸ Sir Bryan Carsberg, "Telecommunications Competition in the United Kingdom: A Regulatory Perspective. " (1992) 37 *New York Law School Review* 285-299, 291.

¹⁴⁹ Details of this procedural model are set out in Oftel , *Improving Accountability: Oftel's Procedures and Processes*, (London, Office of Telecommunications, 1997).

the increasing formality in enforcement relationships. The development of competition law principles in the utilities sectors is likely to increase the pressures for juridification associated with liberalization. This is likely to occur as commercial decision making is displaced to some degree by consideration of how to comply with competition rules, and administrative processes governing regulatory relations are increasingly shaped by the more formal and juridical processes of competition law.

Notwithstanding this limitation to the discussion, there is ample evidence of the greater incidence of litigation concerning regulatory relationships in the utilities sectors. I have offered the view that the main pressure encouraging greater use of litigation is the shift towards policies of liberalization.

The central question raised by this chapter is what are the appropriate boundaries to the application of juridical values in the utilities sectors? The answers to this question lie in seeking to avoid having the legal system exceed its capacities to control activities outside the legal system, while, at the same time seeking to exploit the capacity of the legal system to shape regulatory relations indirectly through fostering the values and practices which develop organically within the sectors themselves which most closely accord with legal values.¹⁵⁰ This may mean that different indirect interventions are appropriate in different sectors.

¹⁵⁰ See the discussion of the relationship between law and regulatory systems in W.Clune "Implementation as Autopoietic Interaction of Autopoietic Organizations" in G.Teubner and A Febbrajo (eds) *State, Law and Economy as Autopoietic Sytems* (1991/92 *Yearbook in the Sociology of Law*) (Varese, Giuffre, 1992) at 501-3.

Just as regulation is most effective when responsive to organic developments in the regulated sector, so is legal intervention in regulation likely to work well when fostering such organic development.¹⁵¹ For this reason the activities of lawyers in firms, regulatory offices and government departments may be as or more important for the development of legal values as the activities of the courts. With sensitivity it may be possible to avoid the twin problems that the legal system becomes too fragmented to maintain claims to universal legitimacy on the one hand, and that it damages the regulated sectors through attempts to apply inappropriate universal norms of administrative, contract and competition law on the other.

¹⁵¹ See I. Ayres, and J. Braithwaite, *Responsive Regulation - Transcending the Deregulation Debate* (Oxford, Oxford University Press, 1992).