



IN CAMERA HEARING

[2004] CAT 15

IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1026/2/3/04

Victoria House
Bloomsbury Place
London WC1A.2EB

2nd August 2004

Before:

SIR CHRISTOPHER BELLAMY (President)
PROFESSOR JOHN PICKERING
MS PATRICIA QUIGLEY

BETWEEN:

WANADOO (UK) PLC
(formerly FREESERVE.COM PLC)

Applicant

and

OFFICE OF COMMUNICATIONS

Respondent

supported by

BT GROUP PLC

Intervener

Mr Keith Jones (of Messrs Baker & McKenzie) appeared for the Applicant

Mr Richard Fowler QC and Mr Meredith Pickford (instructed by The Director of Legal Services (Competition), Office of Communications) appeared for the Respondent.

Mr Gerald Barling QC (instructed by the Head of Competition and Public Law, BT Retail) appeared for the Intervener.

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JUDGMENT

THE PRESIDENT:

1. In this case the Tribunal is currently hearing an Appeal lodged by Freeserve.Com PLC (now renamed Wanadoo UK PLC) that was lodged on 20th January 2004 against a decision taken by the respondent, OFCOM, of 20th November 2003 which, in effect, held that the BT Group had not abused a dominant position.
2. The situation is that while that Appeal has been in progress there has been a parallel investigation being conducted by OFCOM in relation to matters that may have arisen after the time frame with which the Decision of 20th November 2003 is concerned. At a number of case management conferences both the Tribunal and the parties have been of the view that the progress of the existing Appeal should be kept under review depending on whether and when the Respondent (OFCOM) is in a position to take a further position on the parallel investigation that I have just mentioned.
3. At the last case management conference in this matter on 4th June last, the Tribunal invited OFCOM to be in a position by the end of August 2004 either to have taken a decision rejecting the Appellant's complaint in that parallel proceeding, or to issue a Statement of Objections against BT. We fixed this case management conference for today with a view to reviewing developments in the meantime, and we have a date fixed for 10th September in order to further review the situation. At the moment the existing Appeal is provisionally listed for hearing in September but plainly that would have to be reviewed if there was a significant development in the parallel investigation by the end of August.
4. In our view a somewhat tangled situation has now arisen which we have not found entirely straightforward to resolve. We are told that the Board of OFCOM has, in fact, taken a decision in the parallel investigation and that it aims to produce (and is on course to produce) the resulting document by the end of August. The Tribunal has not, at this stage, been told in what sense that decision is. We have been told that it is not usual for OFCOM to indicate in advance the nature of its decision, which would normally be announced accompanied by such documents as may be appropriate. It has been submitted that any premature announcement of the fact that OFCOM has taken a decision yet to be fully formulated would be price sensitive.

5. OFCOM has invited us either to be content with the information that has been given to us, namely, that they have taken a decision and are intending to produce the resulting document by the end of August or, if the Tribunal in exercising its case management function needs further information, the Tribunal should go *in camera* in order to hear that information. It is in addition suggested that any further information should be the subject of confidentiality restrictions that would apply to the persons currently before the Tribunal this afternoon and to named persons at Wanadoo UK who are senior executives, as well as up to I think seven named executives of BT.
6. The object would be that those persons would all keep confidential the information to be given to the Tribunal about the nature of the decision to which the Board of OFCOM has come. It is suggested that that order should be registered in accordance with the relevant Schedule to the Enterprise Act 2002 as a Judgment of the High Court, and should be enforceable accordingly by the normal processes of contempt of court and the like. BT supports that suggestion on the basis that it would be in a very ambivalent position if it were publicly known that the Board of OFCOM had come to a decision but it was not yet in a position to give its reasons. In those circumstances BT supports OFCOM's view that no one could properly comment in a public domain. BT would not be able to defend its own interests properly and an unsatisfactory and rather confusing situation would result.
7. On the other hand, Wanadoo submits that if the matter is price sensitive there is no reason why an announcement on the Stock Exchange could not be made immediately, and that in general Wanadoo does not see why confidentiality should be maintained in the period between today and the end of August when we are assured the relevant documents will be ready. That is essentially the position. We have, as a precaution, gone *in camera* in order to hear more of the argument, so at this stage this Judgment is being delivered in that context.
8. What we have gathered in the course of the hearing is that OFCOM has apparently communicated the nature of the decision of the Board of OFCOM to BT. We are somewhat surprised at that course of events, and we have asked ourselves whether other public authorities in this area, such as the Office of Fair Trading or the Competition Commission, would in fact give advance notice of a particular decision to only one of the parties without at the same time telling other interested parties, or making any public announcement. That seems to us to be a procedure that has given rise to the difficulties in this case. In particular

it has created an asymmetry of information between what BT knows and what Wanadoo knows. As a Tribunal we attach particular importance to proceedings of this kind being handled in an even handed and arms' length way and we are at present concerned about the procedures that have been followed.

9. As far as the price sensitivity of this information is concerned, it seems to us that if the information is in fact price sensitive it should not have been disclosed in the first place on some restricted basis and should be made publicly known at the earliest opportunity. If, on the other hand, the information is not price sensitive then plainly little weight can be attached to the price sensitivity argument. In addition, we are not particularly persuaded by the argument that BT would be put in a difficult situation if a short announcement were made that OFCOM had come to a decision and the decision would be available at the end of August. Such would be the case and observers of the situation would simply need to wait until the end of August to know what it is. Again, we struggle to see the justification for BT being in the know but other relevant parties not being in the know.
10. That takes us to the question of what we should actually do in practical terms as far as this afternoon is concerned. We are, on reflection, distinctly reluctant to make orders against particular named individuals in the particular circumstances of this case. It would have the effect of High Court Orders and might involve those individuals in potentially serious sanctions for contempt of court if there was a breach of the order. Those order making powers, it seems to us, should be reserved in this Tribunal for circumstances in which they are really needed. We are not satisfied at the moment to what extent this information is known within BT, or might be leaked in one way or another by accident or otherwise. It therefore seems undesirable to make such orders against particular persons unless there are strong reasons for doing so. It does not seem to us in these particular circumstances that there is a strong reason for making the orders suggested.
11. The other practical route the Tribunal could take at this stage is to accept the invitation advanced by counsel for OFCOM for the Tribunal itself to be satisfied for the moment with the statement that the Board of OFCOM has taken a decision and that it is on course to produce the resulting document by the end of August. We think, in this somewhat complicated situation, that that is the least unsatisfactory of the various unsatisfactory alternatives that we are left with. Therefore at this stage we take the view that we should

not go down the route of making confidentiality orders. We should simply proceed on the assumption (which we take to be a virtual certainty) that there will be a proper document accompanying the public announcement on these matters by the end of August in this year. That leaves, however, Wanadoo UK in the undesirable position of not yet knowing what is coming, whereas BT (or at least certain senior executives in BT) do know what is coming – apparently.

12. We think at this stage the right course for the Tribunal is to seek some more information from OFCOM as to the circumstances in which this situation has arisen with a view to ensuring the overall fairness of the existing proceedings, and any future proceedings there may be, and clarifying so far as necessary and appropriate the procedures that should be followed in a case such as this. We would therefore invite OFCOM to send us a written submission by 31 August 2004 explaining the circumstances in which it came to disclose to BT the sense of its intended decision without at the same time informing the complainant, or making any public announcement. We are not at this stage making any criticism of what has occurred, but we are concerned by the situation that has arisen, and think it appropriate to clarify that situation in the interests of fairness to the appellant and in the interests of the proper functioning of the competition system in this country, particularly having regard to the practice of other competition authorities exercising a parallel jurisdiction.

13. In those circumstances we propose to make no further Order at this stage in this case management conference today, but to adjourn the case management conference to the date already fixed for 10th September, in the meantime inviting OFCOM to write to us in the sense that we have just indicated, so that we may be fully apprised of the circumstances that have arisen. In our judgment that is as far as we can take this matter at the moment.
