Neutral citation: [2002] CAT 8

IN THE COMPETITION COMMISSION

APPEAL TRIBUNAL Case No. 1007/2/3/02

New Court
Carey Street
London WC2A 2JT

11 November 2002

Before:

SIR CHRISTOPHER BELLAMY
(President)
PROFESSOR JOHN PICKERING
DR ARTHUR PRYOR CB

Sitting as a tribunal in England and Wales

BETWEEN:

FREESERVE.COM PLC

Applicant

-v.-

DIRECTOR GENERAL OF TELECOMMUNICATIONS

Respondent

supported by

BT GROUP PLC

Intervener

Mr Nicholas Green QC and Mr James Flynn (instructed by Messrs Baker & Mckenzie) appeared for the applicant.

Mr Jon Turner (instructed by The Director of Legal Services (Competition), Office of Telecommunications) appeared for the respondent.

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

Heard at New Court, London, on 22 October 2002.

JUDGMENT (Admissibility)

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I. Introduction

1. By a notice of appeal dated 9 September 2002, Freeserve.com plc ("Freeserve") seeks to challenge:

   (a) the decision of the respondent, the Director General of Telecommunications ("the Director"), of 21 May 2002 to close the file in respect of Freeserve's complaint of 26 March 2002 regarding an alleged abuse of a dominant position, in breach of the Chapter II prohibition imposed under section 18 of the Competition Act 1998 ("the 1998 Act"), by the intervener, BT Group plc ("BT") in relation to broadband access to the internet; and

   (b) the Director's decision of 8 July 2002 refusing to withdraw or vary the decision of 21 May 2002 under section 47(4) of the 1998 Act.

2. The Director contends that, except in one respect, he has not taken a decision which is capable of appeal to the Tribunal under the 1998 Act. If the Director is correct, the Tribunal has no jurisdiction to consider much of Freeserve's appeal. Following a case management conference on 3 October 2002, the Tribunal ordered the question of the Tribunal's jurisdiction to be determined as a preliminary issue. This judgment deals only with that preliminary issue.

II. Background

3. We set out the background only to the extent necessary to explain the context and determine the preliminary issue. The Tribunal is not, at this stage, making any findings on the underlying facts of the case.

Internet services

4. A person wishing to access the internet does so using a modem device installed in (usually) his personal computer which connects the computer to the internet via a communications link. The link is (usually) provided either via a normal telephone line or, where a cable television connection has been installed, via that cabling. Currently most residential internet users have "narrowband" or "dial-up" access. Characteristics of narrowband access (whether via the telephone or cable networks) are that each time the user wants to access the internet, he has to dial a particular number in order to connect to it; unless a second telephone line is installed, the telephone cannot be used whilst the internet connection is active; and once the user has finished using the internet, he must disconnect.

5. “Broadband” access, which has only recently developed in the United Kingdom, is a faster link to the internet. In addition, an internet user with broadband access does not need to dial-up or disconnect, as a broadband connection is always active. Moreover, the ordinary telephone line can be used at the same time as the broadband connection – no second telephone line is necessary. The faster speed of a broadband link compared to a narrowband link means that, for example, large files can be downloaded more quickly. We have seen statements by BT in its “Broadband Briton” advertising campaign that broadband access can be up to 40 times faster than narrowband access.

6. Broadband, like narrowband, can be supplied via a telephone or cable link. To provide a broadband link over a telephone line in the United Kingdom, it is necessary for the local telephone exchange to be “broadband enabled”. As part of this enabling process, BT is upgrading local exchanges with ADSL lines. “ADSL” stands for “asymmetric digital subscriber line”, and refers to one of the technologies that transforms a normal telephone line into a high-speed digital line capable of giving broadband access.

The parties

7. Freeserve is an internet services provider (“ISP”), which competes against other ISPs in the United Kingdom for the provision of internet access services. In addition to internet access, Freeserve also provides “value-added” services such as e-mails and web space. Freeserve offers internet access services for use with either narrowband or broadband connections. Freeserve is part of the France Telecom group, forming part of the Wanadoo division.

8. The Director, in whose name the decisions of 21 May 2002 and 8 July 2002 were taken, is responsible for the sectoral regulation and licensing regime for telecommunications under the Telecommunications Act 1984, as amended (“the 1984 Act”). In addition to his powers under the 1984 Act, the Director is empowered to enforce the prohibitions imposed by the 1998 Act concurrently with the Director General of Fair Trading in relation to commercial activities connected with telecommunications: see section 54 and schedule 10, paragraph 2, of the 1998 Act. The Director carries out his functions under the 1984 Act and the 1998 Act through the Office of Telecommunications (“Oftel”).

9. BT, whose predecessor company enjoyed a statutory monopoly in telephony and related services, is a provider of a wide range of telecommunications services. Under section 7 of the 1984 Act, BT has a licence to operate a fixed line public telecommunications network in the United Kingdom. By virtue of its operating licence, BT is subject to sectoral regulation by the

Director under the provisions of the 1984 Act, in addition to being subject to the provisions of the 1998 Act.

10. BT is divided into a number of business divisions, which include BT Wholesale, BT Retail and BT Openworld (also referred to as "BTOW").

11. BT Wholesale is one of the BT businesses which provides, among other things, wholesale narrowband and broadband services to ISPs. Essentially, as we understand it, BT Wholesale sells to ISPs capacity on the BT network. ISPs such as Freeserve use the capacity obtained from BT Wholesale to sell broadband internet access to their retail customers, provided the customer has a BT line installed.

12. BT Retail is responsible, among other things, for BT's retail telephone network.

13. BT Openworld is an ISP which provides retail narrowband and broadband internet access services to consumers in competition with Freeserve and other ISPs. Like Freeserve, BT Openworld is a "value-added" ISP, offering an internet access package which includes e-mail services and a home page with information, website links and search engine facilities. As a retail provider, BT Openworld is a customer of BT Wholesale's wholesale products and services.

14. Freeserve and other ISPs are thus both customers of BT Wholesale for narrowband and broadband access, and competitors of BT Openworld in the supply of both narrowband and broadband residential internet access services. This case, however, is concerned with recent developments in relation to broadband access, and the alleged activities of BT in that regard.

Some factual background to Freeserve's complaint

15. As we understand it, at the end of 2001, BT Wholesale conducted trials of new "self install" broadband products with the participation of many ISPs. Such self install products allow consumers to install the ADSL line themselves, without the need for an engineer to visit their home to make the necessary technical adjustments, thus reducing costs at the wholesale level.

16. A self install broadband product was launched at the wholesale level by BT Wholesale in January 2002. On 26 February 2002, BT announced a reduction in the wholesale line rental price for broadband charged by BT Wholesale from £25 to £14.75 a month from 1 April 2002. On the same day, BT launched an advertising campaign called "Broadband Briton". Also on

the same day, Freeserve announced a £10 reduction in the monthly charge for its residential broadband services from 1 April.

17. The next day, 27 February 2002, BT Openworld announced a price reduction of £10 for its residential broadband services. BT Openworld also announced that its new self install product would be available at retail level from 5 March, with a special offer to waive the £65 activation charge for orders received up to 31 May. (This offer was subsequently extended to 31 August 2002.)

18. On 8 March 2002, BT Openworld announced a major broadband advertising campaign including television advertising, press advertisements and the distribution of 2 million CD-ROMs. On 1 April 2002, BT Wholesale's price reductions came into effect. BT Openworld's television advertising campaign also commenced on 1 April 2002.

19. During the Spring of 2002, BT sent a "Telephone Census" to its residential retail voice telephony customers, in some cases including the census in the envelope with the ordinary regular telephone services bill (known as the "blue bill"). The census included questions about internet use levels, who was the customer's ISP, and whether the customer would be interested in broadband internet access in the future.

Freeserve's complaint

20. On 26 March 2002, Freeserve sent a complaint to the Director with a covering letter of the same date from Freeserve's Chief Executive Officer. The covering letter of 26 March 2002 states as follows:

> "Urgent action is needed now, if your stated ambition of achieving "effective and sustainable competition" in the provision of broadband internet access in the UK is to be achieved.
>
> Following the announcement of wholesale price reductions by BT on 26th February, Freeserve has been working hard to develop a credible retail offer which we intend bringing to market shortly after the wholesale price reductions take effect, on 1st April of this year.
>
> We find however, that BT's own ISP, BT Openworld, by their own public admission, are already signing up "8,000-10,000 customers per week" (comments from the BTOW Chief Executive, Alison Ritchie to the BBC on 20th March) and we fundamentally believe that this is the direct result of an orchestrated campaign of anti-competitive behaviour, aimed at achieving dominance by the incumbent in the market for retail ADSL services.
>
> Attached to this letter is a paper outlining the basis for our claim and the action needed to ensure that this position is not allowed to happen. The issues raised will require urgent investigation by Oftel if the market for ADSL services is not

to be effectively "handed over" to BT, a position which would have significant long-term consequences for the health, vibrancy and competitive nature of the market as a whole.

I look forward to your urgent confirmation that Oftel will exercise both its regulatory powers and its powers under the Competition Act to prevent this situation from arising."

21. The paper accompanying Freeserve's letter of 26 March 2002 stated as follows:

"Examples of Anti-competitive behaviour by BT

1. Cross marketing activity between BT and BT Openworld

Immediately following the wholesale price reduction by BT, BT began a series of ostensible "broadband britain campaigns". Whilst these purport to demonstrate the wider benefits of a broadband connection, they are presented as adverts from BT, targeted directly at the consumer (i.e. not BT Wholesale's ISP customer base) and refer the reader to BT.com/broadband. The positioning of the BT ads is grossly misleading when one considers that BT.com provides a direct link to BTOW with no reference to other competing ISPs whatsoever. Examples of the advertisements referred to are attached together with "screen grabs" which show the BT.com homepage, and the link from that page to BT Openworld. The effect of this advertising is to make BT synonymous with ADSL to the exclusion of other Service Providers.

These cross-marketing activities ensure BTOW benefits from BT's name, reputation and brand awareness. The European Commission has recently claimed in a case in France that an ISP's ability to benefit from the incumbent's reputation and brand awareness is evidence of abuse of a dominant position.

Action required

Oftel should require BT to immediately cease all ADSL cross-marketing activity, and ensure that BTOW are not unduly preferred in the market for the supply of ADSL internet access to the consumer by leveraging corporate campaigns by BT Group. In addition, to ensure equal treatment, BT should be required to notify Oftel and all ISPs of any material product changes or announcements at least 30 days prior to their introduction (we estimate that BTOW are informed well in advance of this timing). Oftel should also as a minimum require BT.com to link to the BT/Broadband site, thereby ensuring even distribution of all competing Service Providers, not just BTOW.

2. Advance Notification of wholesale price reductions

BTOW have reported (see copy of "Revolution" magazine dated 13th March attached) that BTOW will shortly launch a £10m advertising campaign, including TV advertising. In addition, BTOW are arranging for the distribution of some 2 million access disks via a variety of retail outlets including BP petrol stations and we understand that that activity is taking place at the moment (see announcement from BTOW's Chief Executive Officer dated 21st March attached). In addition, affiliate partners of BTOW are being positioned to provide links through to the BTOW sign-up page.

These comments and activities demonstrate that BTOW must have received advanced notification of the wholesale price cuts with a view to positioning themselves within the market, ahead of the competition.

We would remind you of similar allegations raised by Freeserve on the introduction of ADSL in the UK. Last year, Oftel determined that "sufficient safeguards" were in place to ensure that BT's legal, data protection, and unfair trading obligations were being met. That now appears manifestly, not to be the case.

Action required

We ask that Oftel immediately investigate:-

i. The timing of the TV campaign about to be launched by BTOW – when and by whom was the TV campaign booked with the TV companies concerned? When was the campaign conceived within BTOW and when did the agency concerned receive instructions to commence work on the campaign? If prima facie evidence suggests that this campaign was planned before the wholesale price announcement on 26th February, (as we believe it must have been) Oftel should insist that it is deferred, and only allowed to be broadcast in a timescale consistent with that available to the rest of the industry.

ii. Oftel should investigate the order placement process between BTOW and its modem supplier. Our own experience suggests that modems are in relatively short supply, we therefore require Oftel to analyse the dates when orders for modems were placed by BTOW, the call off arrangements between BTOW and their modem suppliers and the stocks of modems presently available to BTOW in order to meet their current demand.

iii. Our experience as one of the largest purchasers of CD access disks, again suggests long lead times and careful planning is required in order to fulfil the manufacturing and logistical requirements to distribute circa 2 million access disks across a variety of different retail outlets. We ask Oftel to investigate the order placement process behind this promotion in order to determine when CD access disks were first ordered by BTOW.

In summary, our experience suggests that it is inconceivable for BTOW to be in the position they now enjoy in relation to TV advertising, CD access distribution, and modem provisioning, unless they received clear notification of the wholesale price reduction prior to 26th February.

3. Cross subsidy

In January last year, Oftel determined that a cross subsidy would be unfair, in circumstances where a margin squeeze was taking place and it was having a material effect on competition. That determination was in response to complaints relating to the alleged existence of cross subsidies within the BT group which were allowing BTOW to provide short term promotions, subsidized connection fees, and in some instances zero cost connection, to the consumer. At that time, given the uncertainty of the emerging broadband market, Oftel was unable to demonstrate that BTOW's business case in such circumstances was implausible, and no action was taken.

Attached on a strictly confidential basis, is our own analysis of the BTOW business case which (1) reflects their position in the market for DSL products at the present time, and (2) assumes a £10m advertising commitment from the second quarter of this year. You will see that this results in a circa £9m loss for the company which has already posted a £100m loss for the nine months ending December 2001.

We believe there to be a prima facia case of unlawful cross subsidy in this instance, on the basis that the business case (insofar as we have been able to interpret it) is not sustainable. We believe BTOW cannot be generating

sufficient revenues to cover its variable and incremental costs – prima facie evidence of predatory pricing pursuant to the principles laid down in the AKZO case. As such, we believe this constitutes abuse of a dominant position. This is entirely consistent with BT's published aim of reaching 1 million DSL customers by the end of the first quarter next year.

Action required

Oftel should immediately investigate and challenge the viability of the business case behind BTOW's current offers, in particular their waiver of the ADSL connection charge, (itself an administration charge imposed by BT) and payable by all other internet service providers. In this regard, we believe the matter to be so critical that Oftel should consider drawing on its powers under the Competition Act to conduct an immediate cross subsidy/predatory pricing investigation in order to prevent BT securing an unassailable position in the marketplace. In addition, we believe that given the prima facia evidence of abuse set forth herein, until the conclusion of such investigation, BTOW should be prevented from introducing any promotions unless Oftel and other ISPs are given sufficient advance notice.

4. BT's "Telephone Census"

We attach a copy of the BT census which we understand has been issued by BT Retail to their entire customer base. We draw your attention to Section C "You and the Internet" where you will see in section 5 the reference to BT/BTOW, further eroding the distinction in the customers mind between BT and BTOW. We believe that the internet questions raised in the Census will provide market information which results solely from BT Retail's dominance within the market for retail telephony, and will prove invaluable in developing targeted offers to potential customers of BT/BTOW. This represents an abuse of BT's dominant position in the market for retail telephony.

Action required

Oftel should immediately require BT to withdraw the census, in order to clarify the distinction between BT and BT Openworld. BT should ensure that any subsequent census which will allow BT to achieve a significant competitive advantage over its competitors within the internet access market, should only be allowed to the extent that such information is made available generically, and without cost to all internet service providers, not just BT Openworld.

Freeserve.com plc
Ref: DCM
26th March 2002"

22. On 28 March 2002, Oftel issued two "case closure summaries" (entitled "Installation Price of Business Plus Offer (Business Products Margin Squeeze)" and "ADSL margin squeeze; Possible cross-subsidy"), rejecting, under the 1984 Act, complaints alleging that BT was engaging in a margin squeeze by subsidising the supply by BT Openworld of retail ADSL (i.e. broadband) services aimed at business and residential customers, respectively. In both cases, the main complaint was that BT used profits from the sale of its wholesale business products to subsidise losses in its retail activities with the result that other ISPs were unable to compete

in the retail broadband market. In relation to residential broadband customers, the Director concluded in particular:

> "5. ... Having analysed BT Openworld's new business case, Oftel believes that no cross-subsidy or margin squeeze exists at the new wholesale and retail prices. The current retail business case and the assumptions on which it is based are not implausible in the light of current market information."

23. According to the Director, Freeserve was one of the parties to the complaints rejected by the Director on 28 March 2002.

24. On 16 April 2002, representatives of Freeserve attended a meeting with Oftel officials. Freeserve and the Director have produced their respective notes of the meeting.

25. On 17 April 2002, the responsible Competition Case Manager of Oftel wrote to Freeserve, stating:

> "Following your letter of 26 March and our meeting on 16 April I am writing to let you know that I am investigating the issue(s) you have raised.
>
> In dealing with representations and complaints Oftel normally adopts a two-phase approach:
>
> - The preliminary investigation phase when initial consideration is given to decide whether there is a case to answer which requires further investigation.
> - The full investigation phase when further information is gathered and assessed to decide whether there has been a breach of obligations under telecommunications or competition laws. If a breach has occurred consideration will be given to the appropriate action needed to rectify the breach and if necessary the appropriate penalties for the breach.
>
> We aim to complete the preliminary investigation phase within 30 working days and the full investigation phase within a maximum of a further 6 months, provided that we receive the relevant information promptly from the parties involved.
>
> Section 49 of the Telecommunications Act 1984 places a duty upon the Director General of Telecommunications ("Director General") to consider any non-frivolous representations made to him in respect of commercial activities connected to telecommunications. The Director General may investigate such representations under the Competition Act 1998 where he is satisfied that this is the most appropriate way of proceeding.
>
> I hope to inform you of the conclusions of our preliminary investigation by 28 May, at the latest.
>
> You should also note that Oftel exercises its powers under the Competition Act 1998 concurrently with the Office of Fair Trading ("OFT"). Oftel and the OFT will agree on which authority will consider your complaint if the Director General considers it more appropriate to investigate your complaint under the Competition Act 1998. If it is considered to be more appropriate for the OFT to investigate your complaint, Oftel will close its own case and transfer your

> complaint to the OFT for it to take the matter forward. You will be informed if the complaint is transferred to the OFT.
>
> …"

26. Oftel has disclosed to the Tribunal documents showing the steps it took to follow up the complaint made by Freeserve. Those documents show, notably, that Oftel provided a copy of Freeserve's complaint to BT and raised certain factual questions with BT, to which responses were provided in correspondence, e-mails and conversations.

27. On 19 May 2002, Oftel published a document entitled "Oftel statement on BT's marketing of Internet services and use of joint billing" ("the Statement of 19 May 2002"). The document states in a number of places that BT is dominant in the provision of residential local and national voice calls and outlines the approach which Oftel will take in relation to BT's marketing of internet services and use of its residential "blue bill" for joint billing for telephony and broadband services, both in relation to the conditions of BT's licence and under Chapter II of the 1998 Act. That document concludes, in effect, that there is no objection to BT using "the blue bill" in certain circumstances, the key question being, in Oftel's view: "How far are the advantages that BT has in marketing and billing for Internet access unmatchable by its competitors?" (paragraph 2.3 of the Statement of 19 May 2002).

The Director's decision of 21 May 2002

28. On 21 May 2002, Oftel rejected Freeserve's complaint of 26 March 2002 in a letter which enclosed a memorandum referred to as "a case closure summary". The letter of 21 May 2002 stated as follows:

> "I am writing to let you know that Oftel has decided to close its preliminary investigation into your recent complaint. I attach a case closure summary which sets out the reasons for Oftel's decision in relation to the various issues you have raised.
>
> I also enclose a complainant satisfaction questionnaire which I would be grateful if you could complete and return to me. A summary of this complaint will appear in the next issue of Oftel's Competition Bulletin."

29. The text of the case closure summary is set out in full below:

"Case closure summary

Case number	CW/00518/04/02
Case title	BT's Broadband Marketing
Case opened	16 April 2002
Case closed	21 May 2002

Complainant Freeserve.com PLC

Target of Complaint BT

Issue

1. Freeserve has written to Oftel requesting that it take action under the Telecommunications Act and Competition Act against BT's “orchestrated campaign of anti-competitive behaviour aimed at achieving dominance by the incumbent in the market for retail ADSL services”. Summaries of the different sections of Freeserve’s complaint and Oftel’s findings are set out below.

Oftel’s findings

Cross marketing activity between BT and BT Openworld

Freeserve’s complaint

2. BT’s ‘Broadband Briton’ newspaper adverts were targeted at consumers and designed specifically to benefit its own ISP, BT Openworld (BTOW). Freeserve also claims that the hyperlink on the adverts for ‘bt.com/broadband’ advantaged BTOW as the website ‘bt.com’ has a direct link to BTOW. In summary, Freeserve believes that BT is using its corporate brand to cross market BTOW and make BT synonymous with ADSL to the exclusion of other Service Providers. It argues that this behaviour constitutes abuse of dominance. Freeserve has asked Oftel to require BT to immediately cease all ADSL cross marketing activity. It also believes that BT should be required to notify Oftel and all ISPs of any material product changes or announcements at least 30 days prior to their introduction. In addition Freeserve believes that Oftel should require ‘bt.com’ to link to the BT/broadband website “thereby ensuring even distribution of all competing Service Providers, not just BTOW”.

Oftel’s view

3. There is no prohibition on BT advertising its brand and services collectively or individually. BT is entitled to trade on its brand awareness and use that to promote its Internet services. Other service providers including Freeserve can also advertise their services in order to create brand awareness of themselves as broadband service providers. Many ISPs such as Freeserve already undertake substantial mass media campaigns for their narrowband products and are beginning to do this for broadband.

4. BT’s ‘Broadband Briton’ newspaper adverts make no reference to Openworld and the Internet address they contain refers consumers to the BT.com/broadband website and not to the general BT.com website. The BT.com/broadband website has no links to BT.com and lists all service providers using BT’s wholesale products, including Freeserve. The list of service providers also gives links to further information on their services and their own websites. It is likely that Openworld derives benefit from the general BT broadband adverts. However, it is Oftel’s view that all SPs benefit from this advertising through specific links to their own services.

5. Freeserve requests a 30 days notice for BT product changes. In the case of wholesale price changes there is already a 28 day notice period for material changes. The recent wholesale price drops only came into force on 1 April after a 28 [day] notice period. Oftel does not believe that the addition of 2 more days to this notification period would be materially different to the existing regime. In relation to notification of price changes to BT retail products (whether or not they are also sold to resellers) Oftel has recently concluded a public consultation on this issue. Oftel’s statement can be found on its website at:

http://www.oftel.gov.uk/publications/licensing/2002/noti0302.htm

6. Freeserve states that in a recent case the European Commission claimed that an "ISP's ability to benefit from the incumbent's reputation and brand awareness is evidence of abuse of a dominant position". This is a reference to the Commission investigation into predatory pricing by the France Telecom ISP Wanadoo. From the information Oftel currently has the Commission has concentrated on France Telecom's pricing practices and not its use of its brand for marketing purposes.

7. In conclusion the information supplied by Freeserve for this portion of the complaint does not provide evidence of anti-competitive behaviour by BT and the Director does not consider that this issue warrants further investigation.

Advance Notification of wholesale price reductions

Freeserve's complaint

8. Freeserve alleges that the speed with which BTOW began marketing its reduced price broadband service meant that it must have had advanced notice from BT of wholesale price cuts. Freeserve has asked that Oftel investigate the timing of BTOW's recent marketing campaign to determine: when it had developed and booked tv adverts, when it had ordered broadband modems and when it had ordered CD access disks to be distributed through retail outlets. Freeserve's overall view is that, "it is inconceivable for BTOW to be in the position they now enjoy in relation to TV advertising, CD access distribution, and modem provisioning, unless they received clear notification on the wholesale price reduction prior to 26th February". As part of its preliminary investigation Oftel has obtained information on these issues from BT.

Oftel's view

9. Oftel considers that BT Openworld (BTOW) could have moved quickly once BT's pricing announcement was made to agree an advertising spend to promote its broadband services. BTOW has confirmed to Oftel that it decided its marketing budget for promoting its retail price reduction on 26 February after the wholesale announcement earlier that day. It should be noted that Freeserve announced price reductions for its broadband retail products on the same day as BT's wholesale price reductions and a day before BTOW's own announcement.

10. BT's pricing announcement was made on the 26 February and heavily trailed by BT's chief executive, Ben Verwaayen, at BT's 3rd quarter results announcement on 7 February. Oftel has confirmed that BTOW's recent tv adverts were first broadcast on 1 April and that they are re-edited versions of old cinema adverts shown last year. BTOW has stated that slots for these adverts were booked on 20 March. Oftel considers this to be a reasonable timetable to prepare and launch this campaign given that the adverts effectively pre-dated any announcement of wholesale price cuts.

11. It should also be recognised that the price reductions announced on 26 February were just that and did not involve the introduction of a new product. BT Wholesale launched its self install broadband service on 15 January 2002 with a number of ISPs launching their own retail services on the same day. The trial of the self install wholesale products was originally announced by BT to industry on 17 October 2001 with the trial starting on 3 December 2001. It would have been possible for Freeserve to bring a product to market at any stage after that date. BTOW has told Oftel that it began to plan for its increase in the supply of modems once it applied to join the trial. BTOW did not fully launch its self install retail product until after the 26 February price reductions. This means

BT had a period of over 3 months to order modems in preparation for its launch of self install. Oftel accepts BT's contention that it was the development of self install and not the wholesale price cuts which caused it to begin ordering modems.

12. BTOW's promotional cd roms have been available since last year. Oftel has confirmed that content of these cd roms is generic to BTOW's broadband service and has no specific reference to self install or a reduced price. BTOW has stated that it instructed its advertising agency to amend the sleeves and point of sale material to reflect the new self install prices on 27 February. Copy cds were pressed between 5-7 March and shipped to shops on 15 March. Oftel accepts that BTOW could have moved quickly following the announcement of wholesale price reductions to amend existing cd-roms and place them in shops to a short timetable.

13. In summary, given BT's existing broadband marketing activities Oftel considers that it could have moved quickly after 26 February to promote the new price point for BTOW making some adaptions to its existing adverts and promotional cd roms. In addition, Oftel also believes that ordering of modems was based on preparation for the launch of a self install service. In conclusion, the information supplied by Freeserve for this portion of the complaint does not provide evidence of anti-competitive behaviour by BT and the Director does not consider that this issue warrants further investigation.

Cross subsidy

Freeserve's complaint

14. Freeserve has presented Oftel with a hypothetical business case for BTOW. This claims that up to March 2003 BTOW makes a loss. Freeserve believes that this shows that BT is unfairly cross subsidising BTOW. Freeserve also believes that BT's current special offer of a reduced connection and set up charge for its Home 500 product is anti-competitive.

Oftel's view

15. Oftel has recently (28 March 2002) closed detailed investigations into cross subsidy and margin squeeze by BTOW. Oftel looked at whether the margin between the wholesale price of IPStream 500 and the retail price charged by BTOW for its At Home product was insufficient to allow other service providers to compete effectively with BT Openworld. Oftel considered the impact of the latest reduction in the wholesale price of IPStream 500 as part of its investigation into these allegations and concluded that there was no evidence to suggest a margin squeeze was currently in operation.

16. Several SPs are undercutting BTOW's new monthly rental price (£29.99) indicating that there is a sufficient retail margin to allow competition with BTOW. Freeserve's own price for its residential broadband product is the same as BTOW's. The business case Freeserve has presented only covers 1 year, 02-03. It is perfectly possible for a service to make a loss in the first year without the pricing being judge [sic] predatory in competition law terms, provided that the product shows a positive return in a reasonable period. BTOW's own business case presented to Oftel shows payback will occur over a longer period than one year. Oftel has accepted that BTOW's business case is not implausible in its recent margin squeeze investigations.

17. BTOW's £65 reduction on its connection and set up charges is a 3 month special offer which was announced on 27 February 2002 and finishes on 31 May 2002. As part of its business margin squeeze investigation, which was closed on

28 March 2002, Oftel has already investigated a complaint from Freeserve that a previous 3.5 months half price connection offer by BTOW was anti-competitive. In that specific case Oftel considered that the special offer was a legitimate commercial practice aimed at stimulating demand. Also, as the offer only lasted 3.5 months, Oftel did not consider that it had a material effect on competition. Oftel also notes that a number of ISPs that are using BT's wholesale broadband products have special offers on connection and set up charges. Freeserve currently has a special offer which exactly matches the reduction in set up charges in the BTOW offer. In conclusion the information supplied by Freeserve for this portion of the complaint does not provide evidence of anti-competitive behaviour by BT and the Director does not consider that this issue warrants further investigation.

BT's "Telephone Census"

Freeserve's complaint

18. BT has sent a questionnaire to a large amount of its customer base called a 'telephone census' which asks for information on their use of telephony, tv and Internet services. Freeserve believes that questions in the census on Internet use, "will provide market information which results solely from BT Retail's dominance within the market for retail telephony, and will prove invaluable in developing targeted offers to potential customers of BT/BTOW." Freeserve believes that this represents an abuse of BT's dominant position in the market for retail telephony. There are further concerns from Freeserve that the wording of questions in the census refer to 'BT/BT Openworld' together and that this erodes the distinction for customers between BT and BTOW.

Oftel's view

19. Oftel is aware that BT is conducting the 'telephone census' to gather information on its customer base. These questionnaires are generic and have been sent to the majority of BT's residential customers. There is no specific targeting to customers on the basis of customer billing information which only BT has access to. There is no prohibition on BT gathering information on its customers in this way in order to market services to them in the future. Other companies can undertake similar exercises using their customer address lists or by buying in such information. Many SPs already have extensive consumer address lists in order to send out marketing information.

20. The one question in the census which refers to BT Openworld asks "who is your main ISP for home Internet use?", then gives 'BT/BT Openworld' as one of the options to tick. There is no specific obligation for BT to maintain a marketing distinction between BTOW and other parts of its business. BT is entitled to exploit the brand awareness it enjoys as a horizontally and vertically integrated company. It is important to note that costs of advertising and marketing activities must be correctly apportioned between different parts of BT's business to ensure that anti-competitive cross subsidy does not take place. However, Oftel has already examined BTOW's costs in its margin squeeze investigations which, as mentioned above, it has recently closed.

21. In conclusion, the information supplied by Freeserve for this portion of the complaint does not provide evidence of anti-competitive behaviour by BT and the Director does not consider that this issue warrants further investigation.

Overall recommendations

22. In conclusion, the information supplied by Freeserve for the complaint does not provide evidence of anti-competitive behaviour by BT and the Director does

> not consider that these issues warrant further investigation. Therefore Oftel has closed this case."

30. The case closure summary was copied to BT by Oftel. It was also published in the June 2002 edition of Oftel's "Competition Bulletin".

Freeserve's letter of 20 June 2002

31. On 20 June 2002, Messrs. Baker & McKenzie, Freeserve's solicitors, wrote to the Director, opening as follows:

> "We act on behalf of Freeserve.com plc ("Freeserve.com"). We refer to the case closure letter dated 21 May 2002 from Trevor Wood to David Melville, Company Secretary and General Counsel of Freeserve.com, enclosing Oftel's case closure summary. We also refer to Oftel's statement dated 19 May 2002, entitled "Oftel statement on BT's marketing of Internet services and use of joint billing" (the "Statement"). We consider that the case closure letter and summary constitutes a decision of the Director General of Telecommunications within the meaning of section 46 of the Competition Act 1998 (the "1998 Act"). We apply, pursuant to section 47 of the 1998 Act, for this decision to be withdrawn or varied."

32. The letter of 20 June 2002 attached a document setting out the reasons why Freeserve considered that the decision should be withdrawn or varied, but stated that "[a] more detailed description of the reasons for this application will follow shortly." The letter of 20 June 2002 also informed the Director that Freeserve was preparing a new complaint providing information on additional concerns over BT's behaviour regarding broadband products and services, together with an economist's report. The Director was invited to delay his decision on whether to withdraw or vary the decision of 21 May 2002 until the expanded complaint had been submitted.

33. The document enclosed with the letter of 20 June 2002 in support of Freeserve's request that the Director withdraw or vary his decision of 21 May 2002 begins with a section on BT's market position in the following terms:

> *"BT is dominant in a number of relevant markets with a position approaching monopoly in certain markets*
>
> The Director General's Statement assumes that BT is dominant in a number of relevant markets … Freeserve.com agrees with the conclusion of the Director General in this regard. In this document, we refer to BT's dominant position in a number of relevant markets, in particular residential access lines, residential voice telephony, (narrowband) dial up internet access services, asymmetric broadband residential access services and wholesale broadband services.

> The Director General will no doubt bear in mind that BT has a position approaching monopoly … in certain of these markets and so has a heightened special responsibility not to undermine competition. This legal principle is highly relevant in assessing BT's behaviour, in particular where BT possesses advantages which are unmatchable (i.e. cannot be replicated) by competitors.
>
> The reasoning of the Director General, which underlies the Statement [of 19 May 2002] and the case closure summary, is that where BT exploits these advantages which cannot be matched by third parties, this not only entrenches BT's dominant position but also gives rise to an anti-competitive abuse of that dominant position (see in particular paragraph 2.3 of the Statement)."

34. Freeserve's document then gave 4 pages of detailed reasons as to why the decision of 21 May 2002 should be withdrawn or varied.

The Director's letter of 8 July 2002

35. On 8 July 2002, the Director of Broadband at Oftel wrote to Baker & McKenzie in these terms:

> "Thank you for your letter of 20 June 2002 addressed to the Director General requesting that he withdraws or varies the "decision" set out in the case closure summary attached to Trevor Wood's letter of 21 May 2002 to David Melville at Freeserve.com.
>
> The contents of the above documents to which you refer in your application do not constitute an appealable decision under the Competition Act 1998. The Director General's consideration of the Freeserve complaint of 26 March 2002 was not conducted using his powers under the Competition Act and the closure documents do not offer any opinion of the Director General "as to whether the Competition Act has been infringed" as set out in s. 46(3).
>
> As the closure documents do not constitute a "decision" for the purposes of s 46, s. 47(1) does not apply. We will of course carefully consider on its merits any fresh complaint that Freeserve.com wishes to make."

The notice of appeal of 9 September 2002

36. On 9 September 2002, Freeserve lodged its notice of appeal with the Tribunal. In its notice of appeal, Freeserve contends that the Tribunal has jurisdiction to hear the appeal and sets out detailed grounds – over some 45 pages plus annexes – to show why the Director was wrong not to withdraw or vary his decision of 21 May 2002. For present purposes, however, it is relevant to note that the allegation that was set out in the original complaint under the heading "Cross marketing activity between BT and BT Openworld" (see paragraph 21 above) is dealt with in the notice of appeal under the heading "Cross subsidy" (see for example paragraphs 1.5(a), 7.12(b) and 7.28 of the notice of appeal).

III Arguments of the parties

The Director's arguments

37. The Director now concedes (i) that the case closure documents of 21 May 2002 disclose a "decision"; (ii) that the Director considered and closed Freeserve's complaint under the 1998 Act; and (iii) that, as regards the telephone census issue, the Director did reach a decision that the Chapter II prohibition had not been infringed by BT's conduct.

38. Accordingly, the Director does not contest, in relation to the telephone census issue, that the case closure documents of 21 May 2002 contain a "relevant decision" for the purposes of section 47(1), being a decision of the type set out in section 46(3)(b) of the 1998 Act.

39. As regards the remaining three heads of the case closure summary, the Director draws attention to the Tribunal's decision in *Bettercare v Director General of Fair Trading* [2002] CAT 6, [2002] CompAR 226. In that case there was a statement of a carefully considered and, to all appearances, final view by the OFT which was held to be an appealable decision. However, *Bettercare* shows that a decision to reject a complaint need not necessarily give rise to a decision as to whether there has been an infringement; it all depends on the facts, viewed objectively.

40. In this case, submits the Director, there is a "decision", but (apart from the telephone census issue) there is no "definitive" decision that the conduct of BT does not amount to an infringement of the Chapter II prohibition. The Director considers that, to be appealable under the 1998 Act, a non-infringement decision must be final or definitive, closing something off or ruling something out.

41. The Director invites the Tribunal to take account of the circumstances surrounding the case closure documents. These include the facts that on 28 March 2002 the Director closed his investigations into alleged "margin squeezes" by BT in favour of BT Openworld, in the course of which the Director considered the reasonableness of BT Openworld's business case; that the Director's letter of 17 April 2002 makes clear that at the first stage there would be a preliminary investigation only; and that Oftel's stance at the meeting of 16 April was that the evidence in Freeserve's complaint was thin. The Director emphasises that Oftel remains receptive to complaints about possible anti-competitive conduct in the emerging broadband sector, and did not intend to rule anything out when closing Freeserve's complaint of 26 March 2002. The Director would not wish to prejudice the "on-going conversation"

between himself, BT and complainants such as Freeserve, which is a feature of the present system for handling complaints.

42. More generally, the Director invites the Tribunal to consider the issue of "institutional balance" in its interpretation of the requirements of sections 46 and 47 of the 1998 Act. In the Director's view, the "institutional balance" points to a limited interpretation of the notion of an appealable decision. It would be wrong if resource-intensive appeals to the Tribunal concerning rejections of poor quality complaints shifted the centre of gravity of Oftel's work. Oftel must be able to reject complaints of no merit by way of informal indications to a complainant without running the risk that such "informal indications" accidentally become appealable decisions. Article 6 of the European Convention on Human Rights ("ECHR") is not relevant here because in this administrative procedure there is no determination affecting Freeserve's civil rights. In any case, the Director has made no such determination. The case closure documents would not adversely affect proceedings before the High Court, including judicial review proceedings. That remedy is open to Freeserve.

43. As regards Freeserve's contentions about what is described in the notice of appeal as the "cross subsidy" issue, the Director submits that he did not take a decision on this issue within the meaning of section 46(3) of the 1998 Act. Moreover, Freeserve never asked for the position which the Director took in the case closure summary under the heading "Cross marketing activity between BT and BT Openworld", to be varied or withdrawn.

44. In essence, the Director argues that Freeserve has opportunistically reformulated this part of its original complaint from being about "cross marketing" to being about "cross subsidy". In its notice of appeal, Freeserve is asking the Tribunal to consider the cross subsidy issue for the first time. The case closure summary is focused solely on (and rejects) the complaint as regards cross marketing, but that original complaint on cross marketing is no longer in issue. Although the Director accepts that the "cross subsidy" issue was raised by Freeserve at the meeting of 16 April 2002, he says that that issue did not figure in the original complaint. Even if "cross subsidy" was part of the original complaint, it is not dealt with in the decision of 21 May 2002. Hence, Freeserve's remedy, if any, is a judicial review of the Director's failure to deal with the issue.

45. Concerning Freeserve's contentions in relation to the alleged advance notification to BT Openworld of BT Wholesale's price reductions, the Director contends that he has carried out only a preliminary investigation, and did not reach definitive conclusions of fact. The case closure summary contains provisional views as to what could plausibly have happened on the

basis of the limited evidence gathered, in order to judge whether the point was sufficiently promising to warrant opening a full investigation. According to the Director, he did not definitively establish the facts in the way that he would have done before reaching a final decision whether the Chapter II prohibition had been infringed, but merely reached a view on whether the evidence warranted proceeding further. That is a matter of administrative discretion, which is not susceptible of appeal.

46. Concerning Freeserve's contentions in relation to cross subsidy/predatory pricing, the Director submits that he declined to pursue this part of the complaint because, first, he had recently examined BT Openworld's business case in the context of the two sectoral regime investigations into allegations of "margin squeeze", closed on 28 March 2002, and found that business case to be plausible; secondly, he considered that it was perfectly possible for a service to make a loss in the first year without the pricing being judged predatory (Freeserve's estimated analysis of BT's costs covered only 12 months); and, thirdly, several service providers were undercutting BT Openworld's prices. Accordingly, this part of Freeserve's complaint did not provide sufficient reason to warrant opening a full investigation, a fact which was pointed out to Freeserve at the meeting on 16 April 2002. On this basis, there is no final decision as to whether the Chapter II prohibition had been infringed.

47. At the hearing, the Director submitted correspondence indicating that Freeserve was a party to the "margin squeeze" investigations closed on 28 March 2002 and that steps were taken to appeal and/or seek judicial review of those decisions. However, according to the Director, no such proceedings have been launched.

48. In relation to Freeserve's contentions regarding BT's three month special offer to waive connection charges, again the Director submits that he recently investigated a similar offer in the "margin squeeze" cases. He concluded that the previous offer was a legitimate commercial practice stimulating demand which, given its duration, had no material effect on competition. Other service providers (including Freeserve) had similar or matching offers. Again, the Director interprets the case closure summary as indicating that this issue was not considered sufficiently promising to warrant investigation: Oftel did not reach a definitive decision that the special offer did not infringe the Chapter II prohibition.

49. In relation to BT's telephone census, the Director submits that his concession on this part of the decision reflects the case officer's view that it was intended to decide the point of principle. This part of the case required no factual investigation and was a separate, self-contained point.

Freeserve's arguments

50. In reply to those arguments, Freeserve considers that the case closure summary constitutes an appealable decision that the 1998 Act has not been infringed, in accordance with the Tribunal's judgment in *Bettercare*. The fact that the Director has conducted only a preliminary investigation into a complaint does not preclude the end result of those deliberations constituting an appealable decision (indeed, the investigations in this case went further than in *Bettercare*). Moreover, the case closure documents can constitute a decision notwithstanding that the Director has not expressly stated that he has reached a decision. That is a question of substance, not form, to be determined objectively, and the Director cannot render an appealable decision unappealable simply by describing it as the exercise of administrative discretion.

51. According to Freeserve, a broad construction of the notion of an appealable decision is required in order that the position of a complainant under the 1998 Act is consistent with the requirements of Article 6 of the ECHR. If the decision is not challengeable before the Tribunal, it would be difficult for Freeserve to obtain an alternative remedy in the High Court. Moreover, the Tribunal should be alert to risks which Freeserve characterised as "regulatory squirm" and "regulatory lockjaw", where the regulator seeks to camouflage a negative conclusion by felicitous crafting of a closure letter ("regulatory squirm") or conceals a negative conclusion by declining to express a firm position ("regulatory lockjaw"). The Tribunal should ensure that substance prevails over form.

52. As to each of the four aspects of Freeserve's complaint, Freeserve notes that the wording of the conclusion at the end of each section is the same, that it is firm and unequivocal, and that it should be interpreted as meaning "there is no abuse" in this case. Freeserve considers the Director's concession that there is a non-infringement decision in relation to the telephone census – where the same wording is used – to be entirely inconsistent with his analysis of the other parts of the case closure summary. Even if the context was a preliminary investigation, the Director nonetheless came to the clear view that there was "no case to answer" on any of the matters raised.

53. Concerning the part of its complaint relating to cross marketing/cross subsidy, Freeserve argues, on the basis of the findings in the case closure summary, that the Director reached a firm conclusion which constitutes a decision that BT was not in breach of the Chapter II prohibition. The letter of 20 June 2002 clearly requests that decision to be withdrawn or varied. According to Freeserve, it is not relevant to the issue of admissibility that a

complainant's arguments have been developed in documents produced subsequently to the relevant decision, nor does the inadequacy of the Director's investigation, or the fact that an issue has not been dealt with, prevent the resulting decision from being appealable.

54. Concerning the part of its complaint relating to the alleged advance notification of wholesale price reductions, Freeserve again argues, on the basis of the findings in the case closure summary and the Director's exchange of correspondence with BT, that the Director investigated the matter, accepted BT's version of events and, after weighing the evidence, reached a firm conclusion that there was no evidence of an infringement.

55. Concerning the part of its complaint relating to cross subsidy/predatory pricing, Freeserve again argues, on the basis of the findings in the case closure summary, that the Director reached a firm conclusion. Furthermore, on the issue of whether BT Openworld's losses indicated an abusive cross subsidy, the Director has made a finding which amounts to a statement of legal principle that it is not an abuse for BT to price its new service at below cost for a period in excess of 12 months. As regards the issue of the waiver by BT Openworld of the £65 connection fee, Freeserve analyses the case closure summary as showing that the Director considered the impact to be *de minimis*, and, applying a previous precedent, concluded that there was no infringement.

56. Finally, Freeserve considers that the procedure envisaged by section 47 of the 1998 Act has been observed through Freeserve's letter of 20 June 2002. The Director's letter of 8 July 2002 constitutes a rejection of Freeserve's section 47(1) application.

IV Analysis

The statutory framework

57. It is common ground that the Director has powers concurrent with those of the Director General of Fair Trading to enforce the provisions of the Competition Act 1998. That arises from sections 50(3) and 50(3A) of the Telecommunications Act 1984 which were inserted by Part II of Schedule 10 of the 1998 Act:

> "50.(3) The Director shall be entitled to exercise, concurrently with the Director General of Fair Trading, the functions of that Director under the provisions of Part I of the Competition Act 1998 … so far as relating to –
>
> (a) agreements, decisions or concerted practices of the kind mentioned in section 2(1) of that Act, or
>
> (b) conduct of the kind mentioned in section 18(1) of that Act,

which relate to commercial activities connected with telecommunications.

(3A) So far as necessary for the purposes of, or in connection with, the provisions of subsection (3) above, references in Part I of the Competition Act 1998 to the Director General of Fair Trading are to be read as including a reference to the Director …"

58. Section 18 of the 1998 Act provides that "any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom": section 18(1). This prohibition is known as the Chapter II prohibition: section 18(4). Examples of prohibited conduct are set out in section 18(2). By virtue of section 60 of the Act, questions arising under Part I of the 1998 Act in relation to competition within the United Kingdom are to be dealt with, so far as possible, and having regard to any relevant differences, in a manner consistent with Community law: see sections 60(1) and (2).

59. Under the 1998 Act the Director has power to conduct investigations (section 25), obtain documents and information (section 26) and enter premises with or without a warrant (sections 27 to 29). The Director may also make directions with a view to bringing infringements of the Chapter I or Chapter II prohibitions to an end (sections 32 to 34), adopt interim measures (section 35) and impose penalties (section 36).

60. Although Part I of the 1998 Act does not deal expressly with complaints, it is not disputed that in principle, the Director has jurisdiction to consider and act on a complaint made in relation to an alleged breach of the Chapter II prohibition concerning commercial activities connected with telecommunications, such as Freeserve's complaint against BT.

61. As regards appeals from decisions of the Director, section 46 of the 1998 Act provides:

"46.(1) Any party to an agreement in respect of which the Director has made a decision may appeal to the Competition Commission against, or with respect to, the decision.

(2) Any person in respect of whose conduct the Director has made a decision may appeal to the Competition Commission against, or with respect to, the decision.

(3) In this section "decision" means a decision of the Director –

(a) as to whether the Chapter I prohibition has been infringed,

(b) as to whether the Chapter II prohibition has been infringed,

(c) as to whether to grant an individual exemption,

(d) in respect of an individual exemption –

(i) as to whether to impose any condition or obligation under section 4(3)(a) or 5(1)(c),

(ii) where such a condition or obligation has been imposed, as to the condition or obligation,

(iii) as to the period fixed under section 4(3)(b), or

(iv) as to the date fixed under section 4(5),

(e) as to –

(i) whether to extend the period for which an individual exemption has effect, or

(ii) the period of any such extension,

(f) cancelling an exemption,

(g) as to the imposition of any penalty under section 36 or as to the amount of any such penalty,

(h) withdrawing or varying any of the decisions in paragraphs (a) to (f) following an application under section 47(1),

and includes a direction given under section 32, 33 or 35 and such other decision as may be prescribed. …"

62. Section 46 is thus directed to appeals by a person who is either a party to a relevant agreement, or a person in respect of whose conduct the Director has made the contested decision. Section 47 of the 1998 Act, however, creates a mechanism for appeals by a third party. That section provides:

"47.(1) A person who does not fall within section 46(1) or (2) may apply to the Director asking him to withdraw or vary a decision ("the relevant decision") falling within paragraphs (a) to (f) of section 46(3) or such other decision as may be prescribed.

(2) The application must –

(a) be made in writing, within such period as the Director may specify in rules under section 51; and

(b) give the applicant's reasons for considering that the relevant decision should be withdrawn or (as the case may be) varied.

(3) If the Director decides –

(a) that the applicant does not have a sufficient interest in the relevant decision,

(b) that, in the case of an applicant claiming to represent persons who have such an interest, the applicant does not represent such persons, or

(c) that the persons represented by the applicant do not have such an interest,

he must notify the applicant of his decision.

(4) If the Director, having considered the application, decides that it does not show sufficient reason why he should withdraw or vary the relevant decision, he must notify the applicant of his decision.

> (5) Otherwise, the Director must deal with the application in accordance with such procedure as may be specified in rules under section 51.
>
> (6) The applicant may appeal to the Competition Commission against a decision of the Director notified under subsection (3) or (4).
>
> (7) The making of an application does not suspend the effect of the relevant decision."

63. By virtue of section 48 of the 1998 Act, the appeal to the Competition Commission referred to in sections 46 and 47 lies to this Tribunal: section 48(1). A further appeal from this Tribunal lies, on a point of law or the amount of any penalty, to the Court of Appeal, Court of Session or Court of Appeal in Northern Ireland, as the case may be. Appeals to the Tribunal are governed by the provisions of Schedule 8, Part I of the 1998 Act and the Competition Commission Appeal Tribunal Rules 2000 (SI 2000 no. 261) ("the Tribunal rules"). Paragraph 3 of Schedule 8 of the 1998 Act provides:

> "3.(1) The tribunal must determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal.
>
> (2) The tribunal may confirm or set aside the decision which is the subject of the appeal, or any part of it, and may –
>
> > (a) remit the matter to the Director,
> >
> > (b) impose or revoke, or vary the amount of, a penalty,
> >
> > (c) grant or cancel an individual exemption or vary any conditions or obligations imposed in relation to the exemption by the Director,
> >
> > (d) give such directions, or take such other steps, as the Director could himself have given or taken, or
> >
> > (e) make any other decision which the Director could himself have made.
>
> (3) Any decision of the tribunal on an appeal has the same effect, and may be enforced in the same manner, as a decision of the Director.
>
> (4) If the tribunal confirms the decision which is the subject of the appeal it may nevertheless set aside any finding of fact on which the decision was based."

64. It is to be noted that a decision rejecting a complaint is not as such included in the list of "relevant decisions" under section 46(3). A complainant who wishes to bring an appeal before the Tribunal against the rejection of a complaint must therefore establish, first, that the Director has taken a "relevant decision", that is to say a decision of the type listed in section 46(3)(a) to (f) of the Act. He must then establish that he has requested that decision to be withdrawn or varied in accordance with sections 47(1) and (2). Finally he must establish that he has been notified of the Director's refusal to do so, either under section 47(3) or under section 47(4).

65. If all those requirements are fulfilled, the complainant has a right to appeal to the Tribunal pursuant to section 47(6). Although, technically speaking, the appeal is against the Director's decision to refuse to withdraw or vary his earlier "relevant decision", the effect of the appeal is to seize the Tribunal of both decisions: see generally *Institute of Independent Insurance Brokers and Association of British Travel Agents v Director General of Fair Trading* [2001] CAT 4, [2001] CompAR 62, especially paragraph 23.

66. In the present case, it is necessary for Freeserve to establish, first, that the Director, in rejecting Freeserve's complaint, has taken a decision "as to whether the Chapter II prohibition has been infringed" within the meaning of section 46(3)(b). If so, there is a "relevant decision" which Freeserve was entitled to ask the Director to withdraw or vary under section 47(1).

The judgment in Bettercare

67. The issue of whether a letter written on behalf of a Director rejecting a complaint under the 1998 Act can constitute an appealable decision has been considered by the Tribunal once before, in its judgment on admissibility in the *Bettercare* case, cited above. In that case, the Director General of Fair Trading had rejected a complaint in the course of correspondence on the grounds that the entity complained against, The North & West Belfast Health and Social Services Trust, was not an "undertaking" for the purposes of the Chapter II prohibition. At paragraph 61 of that judgment the Tribunal identified the relevant questions:

> "(a) Does the correspondence between the Director and Bettercare contain "a decision"?
>
> (b) If so, does any such decision constitute an "appealable decision" as to whether the Chapter II prohibition has been infringed?
>
> (c) If so, has the procedure envisaged by section 47 been observed?"

68. In relation to the first question, the Tribunal stated at paragraph 62:

> "There is no definition in the Act of what constitutes "a decision". On the ordinary meaning of words, to take "a decision" in a legal context means simply to decide or determine a question or issue. Whether such a decision has been taken for the purposes of the Act is, in our view, a question of substance, not form, to be determined objectively. If there is, in substance, a decision, it is immaterial whether it is formally entitled "a decision": otherwise the decision-maker could avoid his act being characterised as a decision simply by failing to affix the appropriate label."

69. At paragraph 73, having analysed the exchange of correspondence in question, the Tribunal concluded:

"Accordingly it seems to us that a "decision" has been adopted by the Director in this case. That conclusion, as we understand it, is not seriously disputed by the Director, whose position was that he had adopted an act of a sufficiently determinative character to be subject to judicial review. Whether such an act was to be described as a decision was, submitted counsel for the Director, "a matter of semantics"."

70. On the second question, namely whether the decision constituted a "relevant decision" for the purposes of section 47(1), the Tribunal stated at paragraphs 80 to 89 of *Bettercare*:

"80. Thirdly, and correctly in our view, Bettercare does not challenge in any way the Director's main submission that he has a discretion under the Act whether or not to conduct an investigation, and whether or not to proceed to a decision, whether on an application under section 14 or section 22, or otherwise. It may possibly be (we express no view as to the position in Northern Ireland, England & Wales or Scotland, respectively) that the exercise of the Director's discretion not to proceed to a decision, or even conduct an investigation, could be susceptible to judicial review on the basis of such cases as *R v General Council of the Bar ex parte Percival* [1990] 3 WLR 323. Subject to that possibility, we for our part would accept that the Director has a discretion under the Act whether to (i) open an investigation under section 25, or (ii) proceed to a decision as to whether or not there has been an infringement. In particular, in our view, a complainant has no right to compel the Director to proceed to take a decision that there *has* been an infringement, subject only to the as yet unexplored possibility of judicial review of the exercise of his discretion.

81. These matters are, however, not in issue in the present case. The issue in this case is not whether the Director has a discretion to take a decision as to whether or not the Chapter II prohibition is infringed, but whether he has in fact done so.

82. That takes us on to the main question, which is how the Director's decision to reject Bettercare's complaint in this case is to be analysed. Is it, as the Director submits, to be analysed merely as the exercise of the Director's discretion not to conduct an investigation under section 25 for lack of reasonable grounds to suspect an infringement? Or is it, as Bettercare submits, a decision that the Chapter II prohibition is not infringed because North & West is not acting as an undertaking when purchasing social care?

83. In addressing this central issue, it is not in our view helpful to use the concept of a "decision to reject a complaint" because such a term is ambiguous. The Director may decide to "reject a complaint" for many reasons. For example, he may have other cases that he wishes to pursue in priority (compare Case T-24 and 28/90 *Automec v Commission* [1992] ECR II-2223); he may have insufficient information to decide whether there is an infringement or not; he may suspect that there may be an infringement, but the case does not appear sufficiently promising, or the economic activity concerned sufficiently important, to warrant the commitment of further resources. None of these cases necessarily give rise to a decision by the Director as to whether a relevant prohibition is infringed.

84. On the other hand, the Director may, in fact, decide to reject a complaint on the ground that there is no infringement. Nothing in the Act prevents the Director from taking a decision, following a complaint, that there has

been no infringement. The Director has already done so in a number of decisions which seem to be plainly decisions, within the meaning of section 46(3)(a) or (b), to the effect that the Chapter I or Chapter II prohibitions has not been infringed, for example because there is no dominant position: (see e.g. Dixon Stores Group Limited/Compaq Computer Limited/Packard Bell NEC Limited UKCLR [2001] 670; Consignia plc and Postal Preference Service Limited UKCLR [2001] 846; ICL/ Synstar UKCLR [2001] 902.

85. It is true that the decisions of this kind so far taken have a more formal appearance, have apparently been more fully investigated and are more fully reasoned than in the present case. However, we see nothing in the Act to exclude the possibility that the Director may legitimately decide that there is no infringement without conducting a formal investigation, and giving only brief reasons, because in his view the matter is sufficiently clear to enable him to reach a decision without further ado.

86. In our view that is the reality of the situation in this case. As already indicated, in our opinion the correspondence viewed objectively does disclose a decision by or on behalf of the Director to the effect that North & West is not an undertaking within the meaning of section 18 of the Act when acting as a purchaser of social care. As Bettercare submits, the question whether the conduct in question is that of "an undertaking" within the meaning of section 18 is one of the essential ingredients in establishing an infringement of the Chapter II prohibition. We therefore accept Bettercare's submission that, in deciding that North & West is not acting as an undertaking in the relevant respect, the Director has necessarily decided that the Chapter II prohibition is not infringed as regards the subject matter of Bettercare's complaint. It follows that, in our respectful view, the Director, in this case, has taken a decision as to whether or not the Chapter II prohibition has been infringed, within the meaning of section 46(3)(b) of the Act.

87. It is true that, on the contested view of the facts and the law he takes, the Director's decision that North & West is not an undertaking also precludes him from launching an investigation under section 25 of the Act since, on the Director's view, it necessarily follows that he has "no reasonable grounds for suspecting" an infringement. However, in our view, one cannot convert what is in substance an appealable decision into an unappealable decision by the simple device of describing it as the exercise of the Director's administrative discretion not to proceed further on the basis of lack of reasonable grounds for suspecting an infringement. It all depends on the substance. In our view, if, as a matter of substance, the Director's statement that he has no reasonable grounds for suspecting an infringement in fact masks a decision by the Director that the Chapter II prohibition is not infringed, there is still a "relevant decision" for the purposes of section 47(1). In the present case, in our view, the Director has, in effect, decided that the conduct in question does not infringe the Chapter II prohibition, *with the consequence* that he cannot proceed under section 25. But that consequence, in our view, is merely the secondary result of the primary decision that there has been no infringement.

88. We thus reject the Director's submission that the decision in this case should be characterised merely as an unappealable exercise of his discretion not to proceed further on the ground that the Director "has no reasonable grounds for suspecting an infringement" under section 25. There may well be cases where the Director feels he has insufficient

material in his possession to conduct an investigation under section 25, without being in a position to decide whether or not there is, in fact, an infringement. But in this case, it seems to us, the statements in the letters of 25 September and 2 November 2001, that the Director has "no reasonable grounds for suspecting an infringement", while correct as far as they go, should not be allowed to conceal the fact that the Director has, in reality, decided that there is no infringement.

89. It is also plain on the facts of this case that the Director considered that he has sufficient information before him to decide that, as a matter of law, North & West is not acting as an undertaking in the relevant respect. As we see it, the Director had no statutory obligation, either to launch an investigation under section 25, or to inform North & West, before coming to that conclusion. It is true that the decision taken by the Director is taken on the basis of the facts known to him at the time, but that is true of all decisions taken by the Director. The question whether the factual basis for the Director's decision was satisfactory is a different issue. In our view it is clear from his letters of 25 July, 21 September and 2 November 2001, that the Director considered himself sufficiently informed to take a decision on the question whether North & West was acting as "an undertaking"."

71. In relation to submissions by the Director General of Fair Trading regarding the availability of judicial review as a remedy for a complainant whose complaint has been rejected, the Tribunal said, at paragraphs 90 to 93 of *Bettercare*:

"90. As to the various arguments concerning the availability of judicial review to Bettercare in the circumstances of this case, it seems to us, respectfully, that the position is relatively straightforward. If there is a relevant decision for the purposes of section 47(1), then a disappointed complainant has an appeal to this tribunal. If, on a true analysis, there is no relevant decision, but only an exercise of discretion not involving a decision whether the Chapter I or II prohibition has been infringed, then a disappointed complainant may have a remedy, if at all, by way of judicial review at common law. Which route applies depends solely on whether there is a "relevant decision" or not.

91. As we see it, possible complications arise only if too narrow a view is taken of what constitutes a "relevant decision" for the purposes of section 47(1). On the Director's approach, so it seems to us, quite a lot of substantive issues under the Act could arise in judicial review proceedings. In the present case, it is true, the issue is limited to whether North & West is an undertaking, albeit that that question is not a particularly straightforward matter in a competition law context. In other cases, however, the issue could be whether there was a dominant position, or an abuse, or, in respect to the Chapter I prohibition, whether there was an agreement, or a restriction or distortion of competition. Those are legal and/or economic issues, or questions of mixed law or fact, which this Tribunal is supposed to be equipped to deal with, notably by virtue of the requirements governing the appointment of chairmen (Schedule 7, paragraphs 4(3) and 26(2)), the process of appointment of appeal panel members, and the training of appeal panel members (Schedule 7, paragraph 24). The Tribunal is also a single tribunal for the United Kingdom.

> 92. In those circumstances, we are not ourselves convinced that acts of the Director which go beyond the mere exercise of a discretion, and constitute a decision on the substance, were intended by Parliament to be susceptible to judicial review in whichever of the three domestic jurisdictions is appropriate, rather than "funnelled", as it were, through the Tribunal.
>
> 93. There will, no doubt, be borderline cases where it is debatable whether the Director has "taken a decision that there is no infringement" or merely "exercised a discretion not to proceed". That question, so it seems to us, has to be decided by the Tribunal on the facts of each case. If the matter is disputed, it must be decided by the Tribunal at the outset: *R (Commissioners of Customs & Excise) v VAT Tribunal (Belfast)* [1977] NILR 58. While the fact that the Director has not labelled the act in question as "a decision" may be relevant, the absence of such a label is not in our view determinative of the issue whether there is a decision: it all depends on the facts, viewed objectively.
>
> 94. As to the Director's submission that, if Bettercare is right, "the effective operation of the Act would become almost impossible", his argument in this case is not whether Bettercare has *any* remedy; the argument is about *which* remedy is available to Bettercare, namely an appeal to the Tribunal, or judicial review. Indeed, the Director rests a large part of his argument on the submission that Bettercare could have sought judicial review, presumably under Order 53 of the Rules of the Supreme Court of Northern Ireland. In those circumstances, we do not quite see why the Act would be workable had Bettercare sought judicial review, but becomes unworkable if Bettercare can appeal to the Tribunal. In either case there would be proceedings, both sets of proceedings would involve resources, and there would, presumably, be a determination of "the undertaking" issue, in one form or another. On the facts of this case, we do not therefore accept the argument that, if Bettercare is right, there would be a material effect on the efficient use of the Director's resources, nor the argument that his administrative priorities may in some way become "skewed"."

72. In relation to the third question, whether the section 47 procedure had been observed, the Tribunal stated at paragraph 123 of *Bettercare*:

> "123. We have come to the conclusion that we should not insist on too much formality as regards the section 47 procedure. Complainants may be unrepresented, or represented by those who (quite understandably) have had few or no encounters with this particular Act. While it is no doubt preferable that matters are clearly set out, the Director has not taken a point on the wording of the correspondence in this case."

Is there "a decision"?

73. At the hearing on 22 October 2002 counsel for the Director conceded that the case closure letter of 21 May 2002 constituted a "decision". In our view that concession was rightly made.

74. The Director's letter of 21 May 2002 enclosing the case closure summary states that Oftel has "decided" to close its preliminary investigation, and indicates that the case closure summary

"sets out the reasons for Oftel's *decision*" (emphasis added). The case closure summary then sets out in detail what are described (in paragraph 1) as "Oftel's findings". Moreover, it is common ground that the result of the case closure letter is to "close" the matter as far as Oftel is concerned. From Oftel's point of view, Oftel has conducted its investigation, expressed its view and dealt with the matter. From Freeserve's point of view, its complaint has been rejected, and Oftel will not take the matter any further in the absence of new material.

75. In those circumstances it is abundantly clear to us that the letter of 21 May 2002 is expressed to be, and is, a "decision" in the sense indicated in *Bettercare*, at paragraphs 62 and 73, cited above.

Is there a decision under the Competition Act 1998?

76. This question did not arise in *Bettercare*, but it arises in the present case since in his letter dated 8 July 2002, cited in paragraph 35 above, the Director stated expressly "The Director General's consideration of the Freeserve complaint of 26 March 2002 was not conducted using his powers under the Competition Act …". The case closure summary states that Freeserve's complaint was made under "the Telecommunications Act and Competition Act" but does not state expressly under which statutory provision Oftel dealt with the matter.

77. However, despite the express wording in the letter of 8 July 2002, at the case management conference on 3 October 2002 counsel for the Director conceded that the case closure letter of 21 May 2002 did, in fact, close Freeserve's complaint for the purposes of the 1998 Act. It was explained to us that the letter of 8 July 2002 came to be written in the way it was because the Director's practice at the time was to investigate matters initially under the Telecommunications Act 1984, and to consider the Competition Act 1998 only at a later stage. However, bearing in mind that Freeserve's complaint was made both under the 1984 Act and under the 1998 Act, and that the case closure letter expresses views about anti-competitive behaviour, the Director was prepared to accept, before the Tribunal, that the case closure letter did, in fact, constitute the closure of Freeserve's complaint for the purposes of the 1998 Act.

78. Again, we consider that that concession was correctly and responsibly made by counsel for the Director. Freeserve's letter of 26 March 2002 alleged "an orchestrated campaign of anti-competitive behaviour, aimed at achieving dominance by the incumbent in the market for retail ADSL services", and invited Oftel to "exercise both its regulatory powers and its powers under the Competition Act". The general tenor of the complaint (set out at paragraph 21 above) is that of an allegation of abuse of dominant position. In response to that complaint,

Oftel's case closure summary of 21 May 2002 repeats that the complaint concerns "an orchestrated campaign aimed at achieving dominance", and states that it is made both under the 1984 Act and the 1998 Act (paragraph 29 above). The case closure summary then examines Freeserve's allegations in terms of whether those allegations amount to "anti-competitive behaviour" and concludes, both generally and in respect of each allegation, that the complaint "does not provide evidence of anti-competitive behaviour by BT". In setting out the reasons for that conclusion, the case closure summary makes various references to Freeserve's allegations of "abuse of dominance" (paragraphs 6 and 18) and to the effect of "competition law" (paragraph 16).

79. We add that in his statement "Oftel's Competition Act Strategy" published on 1 July 2002, the Director stated that, where behaviour could contravene both the 1998 Act and the sectoral regime, his approach will be to investigate under the 1998 Act from the start.

80. In those circumstances, there is no doubt in our mind that the case closure letter did, in fact, close the matter under the 1998 Act. It is, in our view, regrettable that the letter of 8 July 2002 gave the contrary impression. At the least, the Director's denial that the matter had been considered under the 1998 Act indicates an inadequate analysis of which legislative regime was used to deal with the complaint.

81. Since, however, it is now accepted that the matter was dealt with under the 1998 Act, we do not have to consider, for the purposes of this judgment, the relationship between the Director's powers under the 1984 Act and the 1998 Act respectively.

Is there an appealable decision?

— *Consideration of the matter in the round*

82. On the analysis thus far, it is common ground that the case closure letter constitutes a decision under the 1998 Act. However, it is still necessary for us to address the further question as to whether that decision constitutes a decision "as to whether the Chapter II prohibition has been infringed" within the meaning of section 46(3)(b) of the 1998 Act. If it does so, it is a "relevant decision" which Freeserve was entitled to ask the Director to withdraw or vary under section 47(1).

83. In the letter of 8 July 2002 the Director stated "the closure documents do not offer any opinion of the Director General 'as to whether the Competition Act has been infringed' as set out in S.46(3)".

84. However, in his skeleton argument and at the hearing on 22 October 2002 counsel for the Director – quite rightly in our view – further conceded that part of the case closure summary, namely paragraphs 18 to 21 under the heading "BT's Telephone Census", did constitute or contain a "decision as to whether the Chapter II prohibition has been infringed" within the meaning of section 46(3)(b) of the 1998 Act.

85. Despite that concession, the Director maintains that the remainder of the case closure summary does not constitute or contain any such "appealable decision". In particular, the Director invites us to examine in detail each of the other three aspects of the complaint, by reference to the context of Freeserve's original complaint, the wording used by the Director, and Freeserve's notice of appeal, with a view to finding that the Director did not, in fact, reach a relevant decision "as to whether the Chapter II prohibition had been infringed" as regards these other three matters in issue.

86. We observe, first, that once again the letter of 8 July 2002 has turned out to be incorrect. Despite the fact that that letter asserted that the case closure documents "did not offer any opinion" as to whether the Competition Act was infringed, it is now conceded that the case closure summary did, in fact, constitute not merely "an opinion", but a "decision" as to whether the Chapter II prohibition had been infringed as regards BT's telephone census. In this further respect, the letter of 8 July 2002 is, in our view, flawed.

87. In this case, in our view, the Director was dealing with one overall complaint that was particularised under four aspects, the whole allegedly forming part of "an orchestrated campaign of anti-competitive behaviour, aimed at achieving dominance" (Freeserve's letter of 26 March 2002). In relation to that single complaint, the Director dealt with the various arguments advanced in a single document and arrived at a single overall conclusion, namely that "the information supplied by Freeserve for the complaint does not provide evidence of anti-competitive conduct by BT" and that "the Director does not consider these issues warrant further investigation" (paragraph 22 of the case closure summary). In arriving at that conclusion, the Director gives his reasons over 5 pages, under the general heading "Oftel's findings". In each case he sets out what he understands Freeserve's contentions to be, and what his response is. Albeit for different reasons, each individual aspect of the complaint is ultimately rejected on an identical basis, namely that the information supplied "does not provide evidence of anti-competitive behaviour by BT", and that the Director does not consider that the matter warrants further investigation (see paragraphs 7, 13 (last sentence), 17 (last sentence), 21 and 22 of the case closure summary).

88. In our view it would be highly surprising if, in one and the same document, a conclusion to the effect that the material before the Director "does not provide evidence of anti-competitive behaviour" signifies, in one part of the document, that the Director has taken an appealable decision, but means something different in another part of the document. That result respectfully seems to us to be contrary to common sense.

89. In particular, as regards the telephone census issue the Director has conceded that there is an "appealable decision" resulting from his conclusion, in paragraph 21 of the case closure summary, that "the information supplied by Freeserve for this portion of the complaint does not provide evidence of anti-competitive behaviour by BT and the Director does not consider that this issue warrants further investigation".

90. We would need a lot of persuading that exactly the same words, used in paragraphs 7, 13, 17 and 22 of the case closure summary, do not have the same effect.

91. More generally, in our view the test for what is an "appealable decision" should be as straightforward as possible, notably so that complainants, in particular, may know what their rights are and interlocutory skirmishes on whether there is "an appealable decision" or not are avoided. However, if the Director's approach were correct, it would be very difficult for a complainant to know whether, in a given case, a closure letter was appealable or not, since, on the Director's approach, everything turns on a close textual analysis of different parts of the same document. The Director's approach also involves the Tribunal going a considerable way into the substance of the case in order to determine whether, in different parts of the same document, the shades of meaning behind the Director's conclusion are sufficiently "definitive" to constitute an appealable decision. Such an exercise would greatly complicate the appeal process. Moreover, in our view, the Director's approach would mean that an appellant wishing to challenge the decision in its entirety would risk having to bring two sets of proceedings, namely an appeal before the Tribunal on those parts of the document which are judged sufficiently definitive to be an "appealable decision", and an application to the High Court for judicial review of other parts of the document judged insufficiently definitive to be appealable to the Tribunal but sufficiently "decisional" to be susceptible to judicial review. We think it unlikely that Parliament would have intended such a result.

92. In our view the correct starting point is to begin by looking at the case closure summary and the covering letter of 21 May 2002 as a whole. Those documents indicate that what the Director did in the present case was to conduct a preliminary investigation. According to the Director's letter to Freeserve of 17 April 2002, the procedure at the time was to conduct an

investigation in two stages. The first stage was to conduct a preliminary investigation "to decide whether there is a case to answer which requires further investigation". If the Director decided there was "no case to answer" that, it seems, was the end of the matter. If, however, the Director considered that the matter required further investigation, the investigation then moved to the second stage, namely what is described in the letter of 17 April 2002 as "the full investigation phase".

93. In the present case the Director decided, in effect, that there was "no case to answer", so the matter never progressed beyond the first, or preliminary, stage of investigation. The Director's overall conclusion is in these terms:

> "In conclusion, the information supplied by Freeserve for the complaint does not provide evidence of anti-competitive behaviour by BT and the Director does not consider that these issues warrant further investigation."
>
> (paragraph 22 of the case closure summary).

As we have just pointed out, the Director also reached the same conclusion, in the same terms, as regards each individual head of complaint.

94. In those circumstances, it seems to us, the question that arises is relatively straightforward: does this decision by the Director under the 1998 Act to the effect that the information before him "does not provide evidence of anti-competitive conduct" amount to a decision as to "whether the Chapter II prohibition has been infringed" within the meaning of section 46(3)(b)?

95. It seems to us that, in answering that question, we should follow the approach set out in the Tribunal's judgment in *Bettercare*, cited above. Counsel for the Director did not submit that *Bettercare* was wrongly decided. The respondent in *Bettercare*, the Director General of Fair Trading, who is the "lead regulator" for the purposes of the 1998 Act, did not appeal the Tribunal's judgment in *Bettercare*. The transcript of the public hearing in *Bettercare* implies that other regulators would be consulted before a decision was reached on whether to appeal (hearing of 26 March 2002, at page 2 of the transcript). Following *Bettercare*, the Director General of Fair Trading has published at least one other decision of a similar type, rejecting a complaint on the grounds that the evidence did not establish a relevant dominant position (see *Harwood Park Crematorium Limited*, published on 6 August 2002).

96. In our view the test which emerges from *Bettercare* is this: if, when rejecting, or closing the file on a complaint, the substance of the matter, judged objectively, is that the Director has decided, either expressly or by necessary implication, that on the material before him there is

no infringement of the Chapter II prohibition, then he has taken a decision "as to whether the Chapter II prohibition has been infringed" within the meaning of section 46(3)(b) of the Act: see *Bettercare*, cited above, at paragraphs 84 to 87 of the judgment.

97. In the present case, the documents concerned state that Oftel has taken a decision. That decision is set out under the heading "Oftel's findings". Under each head of complaint, Oftel sets out Freeserve's arguments and proceeds to reject them. In our view, the language used, cited at paragraph 29 above, is not provisional, uncertain, or even particularly informal, but definite in nature. Despite the Director's argument to the contrary, we can detect no real distinction between the language used regarding the "telephone census" issue – where a decision is conceded – and that used in the remainder of the complaint. Each part of the decision reaches a conclusion, which is expressed to be "In conclusion". The reasoning given for the conclusions is clearly set out over 5 pages and is fairly full. That reasoning amounts, in our view, in substance to a finding that the evidence does not establish "an abuse", as can also be seen from our detailed analysis of each part of the decision set out below. Since the existence of "an abuse" is one of the essential ingredients of an infringement of the Chapter II prohibition, it seems to us to follow that the Director has, by necessary implication, found that that prohibition is not infringed on the material before him. In addition, unlike the situation in *Bettercare*, the decision in this case has been communicated to the undertaking complained against, BT, and published by Oftel in its Competition Bulletin.

98. Moreover as *Bettercare* itself establishes, there is no reason why the Director should not take a non-infringement decision at a preliminary stage if he considers that he has sufficient information to do so (see *Bettercare*, at paragraph 89.) In the present case it is expressly conceded that the Director took such a decision at the end of the first stage of his investigation as regards the "telephone census" issue. In our view, it follows from the language used that he also did so in respect of the other aspects of the complaint.

99. It is true that the Director's decision is taken on the evidence available to him, but that is true of all decisions he takes under the 1998 Act. We understand the Director's concern that, in a case such as the present, he does not wish to preclude himself from reviewing his position if new material or further circumstances come to his attention. In our view, the fact that the case closure documents give rise to a "relevant decision" within the meaning of section 47(1) of the 1998 Act does not prevent the Director from reopening or further pursuing the matter if further material comes to his attention. Indeed, in fast changing circumstances in a developing market of high importance to the economy, the Director may well need to intervene again if he has good reason for doing so. But that future possibility does not, in our view, mean that the

decision of 21 May 2002 was not a decision to the effect that, on the evidence provided, there was no infringement of the Chapter II prohibition.

100. We therefore reject the Director's argument that there are subtle "grades" of decision in which some decisions on the substance are insufficiently "final" or "definitive" to constitute "appealable" decisions. In our view, there is either a decision on the substance or there is not. It may be that some non-infringement decisions are more fully reasoned than the present decision, particularly where there is a non-infringement decision at the end of the second, rather than the first, stage of investigation. But in our view the matter cannot depend on how thorough the Director's investigation has been up to that point, how the Director describes the document, or how far he chooses to go into detail: any such approach would effectively give the Director himself the right to decide whether his decision was to be appealable.

101. As regards paragraph 83 of the *Bettercare* judgment, (cited at paragraph 70 above) it seems to us that there will be cases where the Director, or his colleague the Director General of Fair Trading, has genuinely abstained from expressing a view, one way or the other, even by implication, on the question whether there has been an infringement of the Chapter II prohibition. For example, the Director General of Fair Trading may receive a badly organised complaint. He might be tempted to write back to the effect "The material you have sent me does not enable me to form a view on whether or not the Act may have been infringed. Unfortunately the resources of this Office are limited. I regret that I am not able to take the matter any further." It is unlikely that such a letter would be a "decision as to whether the Chapter II prohibition has been infringed". Similarly, a reply by the Director to the effect "I am conducting a market investigation into the industry you mention, and do not propose to take a position on your complaint until that inquiry is completed", would not be an appealable decision either.

102. It is not in our view useful at this stage to speculate on any possible grey areas that may or may not arise in other cases. What we have to do is to decide the matter on the facts of the present case. Our conclusion on the documents before us is that the Director did, in substance, decide that the Chapter II prohibition was not infringed in respect of the allegations made by Freeserve in its complaint. The fact that the Director was prepared to publish the decision in his Competition Bulletin confirms that the Director was confident in the conclusion that he had reached.

103. Finally, the Director's argument that the correct analysis in this case (apart from the telephone census part of the decision) is that he has merely exercised an administrative discretion not to

proceed further because, to use the words from paragraph 83 of *Bettercare* "the case does not appear sufficiently promising … to warrant the commitment of further resources", is, in our view, unfounded. In our view, the situation is similar to that considered by the Tribunal in *Bettercare*, where the Director argued that he had merely exercised an administrative discretion not to proceed further with an investigation of the case. In *Bettercare* the Tribunal rejected that argument on the ground that it was not merely a question of exercising an administrative discretion: the Director's decision not to proceed further was merely the corollary of the decision that he had come to on the substance of the case.

104. It is true that the "undertaking" issue in *Bettercare* was an issue of law as well as fact, but in the present case there are also issues of law as well as fact. It seems to us that the same principle applies. The Director's statement in the case closure summary that "the Director does not consider that these issues merit further investigation" is the corollary of his conclusion, in his decision, that there is no evidence of anti-competitive behaviour. That conclusion, in turn, amounts, in our view, to a decision that the Chapter II prohibition has not been infringed within the meaning of section 46(3)(b) of the 1998 Act.

105. In our view, that conclusion follows from considering the document as a whole, in a commonsense way, applying the *Bettercare* test. However, in deference to the arguments resourcefully presented by counsel for the Director, we consider separately, in the alternative, the Director's findings under each of the three heads of complaint which remain in issue.

— *The Director's specific submissions on the three heads of complaint in issue*

"Cross marketing activity between BT and BT Openworld"

106. At paragraph 2 of the case closure summary, cited at paragraph 29 above, Oftel sets out what it considers Freeserve's complaint to be under the heading "Cross marketing activity between BT and BT Openworld". At paragraphs 3 to 7 of the case closure summary Oftel rejects that complaint, concluding at paragraph 7 that the information supplied by Freeserve "does not provide evidence of anti-competitive behaviour by BT". In reaching that conclusion Oftel made a number of definite statements. For example, at paragraph 3 Oftel states:

> "3. There is no prohibition on BT advertising its brand and services collectively or individually. BT is entitled to trade on its brand awareness and use that to promote its Internet services. Other service providers including Freeserve can also advertise their services in order to create brand awareness of themselves as broadband service providers. Many ISPs such as Freeserve already undertake substantial mass media campaigns for their narrowband products and are beginning to do this for broadband."

That statement seems to us, at first sight, to constitute a statement of principle of the circumstances in which the BT brand may be used in promoting the activities of BT Openworld. Oftel then goes on to reject, on the facts, Freeserve's allegations regarding the BT.com/broadband website, its request for a notice period for product changes, and the relevance of an investigation by the European Commission into the activities of France Telecom.

107. In the circumstances we are satisfied that paragraphs 3 to 7 of the case closure summary contain in substance a decision as to whether the Chapter II prohibition has been infringed as regards the matters summarised in paragraph 2 of that summary. As we understood it, that conclusion was not strenuously denied by counsel for the Director at the hearing.

108. The Director's main argument, however, is that Freeserve has effectively changed its case, and now alleges in its appeal that the vice in BT's conduct is not the use of the BT brand as such (cross marketing), but the fact that BT Openworld does not pay for the use of that brand and thus benefits from a "cross subsidy". The Director submits that he has taken no decision on this cross subsidy issue. (This cross subsidy issue is distinct from the cross subsidy dealt with at paragraphs 118 et seq below.)

109. We agree with the Director that, in principle, in complainants' cases, the Tribunal should be reluctant to permit an appellant to advance a wholly new case on an appeal before the Tribunal which the Director was not asked to consider at the administrative stage and had no obligation to do so.

110. However, this is an argument which in our view goes primarily to the merits of the case, and not to the preliminary question whether there is an appealable decision.

111. In any event, in the present case the issue involves an investigation of the facts and circumstances which it is not appropriate to undertake at this preliminary stage. In this case, the Director concedes that the argument that "BTOW should pay" for BT's Broadband Briton advertisements was raised by Freeserve at the meeting of 16 April 2002. There are therefore possible factual and other issues to be explored as to what was the full content of Freeserve's complaint, as elaborated at that meeting; how far Freeserve really has "changed its case" on appeal, or whether Freeserve's case on appeal constitutes a permissible elaboration, at the appeal stage, of a matter that was already before the Director; and whether or not, in any event, the "cross subsidy" point was an argument sufficiently obvious that a responsible Director

should have covered it in his response. It is not appropriate to go into these matters on what is, in effect, the equivalent of an application to "strike out" certain parts of the notice of appeal.

112. It is true, as the Director points out, that there is nothing about the "cross subsidy" point in the case closure summary. In our view, depending on how this aspect of the case unfolds, there are two main possibilities. The first possibility is that the cross subsidy point was never raised, and the Director did not need to deal with it. If so, it may well be that on this issue the appeal would fail, although of course we express no view on that, not least because we have not yet gone into what Freeserve's case is on this point. The second possibility is that the cross subsidy issue was raised, and/or that it was an issue that the Director should have dealt with, but did not do so. In those circumstances the Tribunal would be faced with a number of options, one of which would be to remit the matter to the Director for further investigation under paragraph 3(2)(a) of Schedule 8 of the 1998 Act, and Rule 17(2)(j) of the Tribunal rules. Until the Tribunal has advanced further into the substance of the case, it is in our view premature to form any view as to what course the Tribunal should take.

<u>"Advance notification of wholesale price reductions"</u>

113. At paragraphs 9 to 13 of the case closure summary, Oftel deals with Freeserve's complaint that BT Openworld must have had unfair advance notification of BT's wholesale price reduction announced on 26 February.

114. It is clear that Oftel investigated the factual aspects of Freeserve's complaint. It appears from the decision that, in effect, Oftel accepted BT's evidence on the points at issue. For example:

> "BTOW has confirmed to Oftel that it decided its marketing budget for promoting its retail price reduction on 26 February after the wholesale announcement earlier that day." (paragraph 9)
>
> "Oftel has confirmed that BTOW's recent tv adverts were first broadcast on 1 April and that they are re-edited versions of old cinema adverts shown last year. BTOW has stated that slots for these adverts were booked on 20 March. Oftel considers this to be a reasonable timetable to prepare and launch this campaign given that the adverts effectively pre-dated any announcement of wholesale price cuts." (paragraph 10)
>
> "Oftel accepts BT's contention that it was the development of self install and not the wholesale price cuts which caused it to begin ordering modems." (paragraph 11)
>
> "BTOW's promotional cd roms have been available since last year. Oftel has confirmed that content of these cd roms is generic to BTOW's broadband service and has no specific reference to self install or a reduced price. BTOW has stated that it instructed its advertising agency to amend the sleeves and point of sale material to reflect the new self install prices on 27 February. Copy cds were pressed between 5-7 March and shipped to shops on 15 March." (paragraph 12)

115. It is also clear that Oftel accepted that BT's explanations were consistent with the time scales involved. Thus:

> "Oftel considers that BT Openworld (BTOW) could have moved quickly once BT's pricing announcement was made to agree an advertising spend to promote its broadband services." (paragraph 9)
>
> "Oftel accepts that BTOW could have moved quickly following the announcement of wholesale price reductions to amend existing cd-roms and place them in shops to a short timetable." (paragraph 12)
>
> "In summary, given BT's existing broadband marketing activities Oftel considers that it could have moved quickly after 26 February to promote the new price point for BTOW making some adaptions to its existing adverts and promotional cd roms. In addition, Oftel also believes that ordering of modems was based on preparation for the launch of a self install service." (paragraph 13)

116. The use of the word "could" in these paragraphs does not, in our view, indicate a "provisional" conclusion. It indicates that, having weighed the evidence, Oftel accepts that it was practicable for BT to have done what it said it did in the time available and that, in consequence, Oftel has no reason to doubt BT's explanations. In our view it was on that basis that Oftel reached the conclusion, at paragraph 13, that "the information supplied by Freeserve for this portion of the complaint does not provide evidence of anti-competitive behaviour by BT".

117. In our view it follows that there is a decision as to whether the Chapter II prohibition has been infringed in respect of the alleged advance notice of BT's wholesale price reductions within the meaning of section 46(3)(b). Whether Oftel's conclusion was correct, and whether Oftel conducted a sufficient investigation before reaching that conclusion, are matters which go to the merits.

"Cross Subsidy"

118. At paragraphs 15 to 17 of the case closure summary Oftel rejects Freeserve's complaint that BTOW is making a loss and thus pricing in a predatory fashion; that BT is unfairly cross subsidising BTOW; and that BT's special offer of a reduced connection charge is anti-competitive.

119. The essence of Oftel's conclusion is at paragraph 16:

> "Several SPs are undercutting BTOW's new monthly rental price (£29.99) indicating that there is a sufficient retail margin to allow competition with BTOW. Freeserve's own price for its residential broadband product is the same as BTOW's. The business case Freeserve has presented only covers 1 year, 02-03. It is perfectly possible for a service to make a loss in the first year without

> the pricing being judge [sic] predatory in competition law terms, provided that the product shows a positive return in a reasonable period. BTOW's own business case presented to Oftel shows payback will occur over a longer period than one year. Oftel has accepted that BTOW's business case is not implausible in its recent margin squeeze investigations."

120. That paragraph seems to us to contain several elements, collectively indicating, in substance, a decision that the Chapter II prohibition has not been infringed. These include evidence that there is a sufficient retail margin; that in Oftel's view, "competition law" does not object to a loss over a period of one year or more "provided the product shows a positive return in a reasonable period"; that BT Openworld's business case is "not implausible"; and that, at least by implication, BT Openworld has sufficient prospect of "a positive return in a reasonable period" to show that the Chapter II prohibition is not infringed. It is in the light of those considerations that Oftel rejects Freeserve's evidence to the contrary, which was apparently founded on Freeserve's own estimates of BT's business case, limited to a one year period.

121. Whether the Director was entitled to come to the decision he did on this point is, once again, a matter for a later stage of this case. In that connection, we see the force of the Director's submission that he was entitled to rely on, or at least refer to, his earlier decisions of 28 March 2002, and that a complainant such as Freeserve, having (apparently) not challenged these earlier decisions, needed to present compelling new evidence if it wished to persuade the Director to take a different view. But that issue goes to the merits, which we are not dealing with at the present stage of admissibility.

122. The same considerations apply to Oftel's conclusions, at paragraph 17 of the case closure summary, as regards BT's special offer on its connection and set up charges. In that paragraph, in our view, Oftel considers, in effect, that the offer was a legitimate commercial practice aimed at stimulating demand, and has had no material effect on competition. The fact that, in reaching that conclusion, Oftel referred back to its decision on a particular offer in the business margin squeeze investigation closed on 28 March 2002, does not, in our view, undermine the conclusion that Oftel did in fact decide that BT's offer did not constitute an infringement of the Chapter II prohibition.

123. We therefore reach the conclusion that, considered individually, the Director did, in fact, take a decision as to whether the Chapter II prohibition had been infringed in relation to each of the aspects of Freeserve's complaint.

124. As regards, finally, the Director's arguments regarding "institutional balance", like the Tribunal in *Bettercare* we are unpersuaded by the arguments based on the alternative option of judicial review, the opening of the floodgates, or the disproportionate diversion of the Director's resources: see paragraphs 90 to 94 of that judgment, cited above. In particular, the Tribunal would not expect the Director to change his practice in dealing with complaints. The Director is entitled in principle to deal with complaints giving only brief reasons, especially when faced with a poorly argued complaint.

125. In any event, it seems to us that the question of the adequacy of the Director's investigation and of the appropriate level of scrutiny by the Tribunal in a case of the rejection of a complaint are matters which go to the merits. We would expect to hear argument on this aspect in the further course of the appeal, bearing in mind what the Tribunal has already said at paragraph 96 of the judgment in *Bettercare.*

126. More generally, the overall position that is reached in this judgment and in *Bettercare*, is that a decision on the substance of the case, whether positive or negative, is in principle appealable to the Tribunal. That, in our view, does achieve a balance between the different interests involved, looking at the system of the 1998 Act as a whole. In particular the office of the Director is, by its nature, one of central importance in the telecommunications sector, and the view he takes is likely to be decisive on many issues. We doubt whether "institutional balance" in its broadest sense would be achieved if we were to hold that the present decision was not appealable to the Tribunal.

The section 47 procedure

127. In view of the express terms of Freeserve's letter of 20 June 2002, we think it clear that Freeserve did ask the Director to withdraw or vary his decision of 21 May 2002, with supporting reasons. The fact that on the cross marketing/cross subsidy issue Freeserve contended that the Director had misunderstood its arguments does not, in our view, alter the fact that a request within the meaning of section 47(1) of the Act was properly made. Since

that request was rejected by the Director in his letter of 8 July 2002, it seems to us that the requirements of section 47(4) are satisfied. Accordingly Freeserve is entitled to appeal to the Tribunal under section 47(6).

Christopher Bellamy	John Pickering	Arthur Pryor

Charles Dhanowa

Registrar	Delivered in open court	November 2002