



Neutral citation: [2003] CAT 22

**IN THE COMPETITION**

**APPEAL TRIBUNAL**

Case No. 1007/2/3/02

New Court  
Carey Street  
London WC2A 2JT

8 October 2003

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

**FURTHER DECISION ON A REQUEST FOR AN EXTENSION  
OF TIME TO RECONSIDER A PREVIOUS DECISION**

1. On 16 April 2003 the Tribunal gave judgment in relation to an appeal by Freeserve against the decision of the Director General of Telecommunications to reject a complaint by Freeserve against BT in respect of BT's pricing policy for broadband. As a result of that judgment, the Director undertook to reconsider the pricing issues raised in the contested decision and adopt a new decision on these by 5.00 p.m. on 16 July [2003] CAT 6.
2. However, on 3 June 2003, the Director asked for an extension of time to Wednesday 3 December 2003. The Tribunal did not accept this application in full and, by Order of 15 July 2003, required the respondent Director to either: (i) adopt a further decision in relation to the pricing issues (as defined in the Tribunal's Order of 16 April 2003); or (ii) issue a notice pursuant to Rule 14 of the Director's Rules in relation to the pricing issues, as the case may be, by 5 p.m. on Thursday 16 October 2003. The Tribunal further ordered the parties to furnish a progress report to the Tribunal by 5 p.m. on Tuesday 16 September 2003 [2003] CAT 15.
3. In allowing this, more limited, extension the Tribunal commented at paras 11 - 13 of that decision

“11. The Tribunal attaches importance to the speedy resolution of matters remitted by it to the relevant competition authority, or where, as in this case, the competition authority concerned has undertaken to take a new decision to replace an earlier decision set aside by the Tribunal. The public interest in matters being disposed of quickly and efficiently is self-evident, from the point of view of both the complainant (in this case, Freeserve) and the undertaking complained against (BT). In addition, the matter is not confined to the interests of the immediate parties, nor those of the competition authority: the wider public interest in the existence of a fair competitive market for the benefit of consumers and users is of paramount importance.

12. These considerations apply particularly in a case where the allegation is one of predatory pricing or margin squeeze in a fast developing market of national importance such as broadband. Strategies employed in

the early stages of establishing such a new market may well have a disproportionate influence on the competitive structure, and therefore need to be investigated with an appropriate sense of urgency.

13. The Tribunal notes that the matter of BT's pricing policy in relation to the launch of broadband has been the subject of previous complaints, leading to decisions by the Director of 8 January 2001 and 28 March 2002, as well as the Director's decision of 21 May 2002 which was the subject of the Tribunal's judgment of 16 April 2003. In addition, as we understand it, the broadband market is one that is monitored by the Director as part of his general statutory functions. This is not therefore a matter in which the Director is starting from scratch. By now the Director must have, or should have, sufficient background information to be able to conduct any further investigation speedily."

At paragraph 16 of the same decision the Tribunal said:

- "16. More generally, and in particular bearing in mind the importance of the broadband sector to the economy, the Tribunal is concerned about the length of the extension sought by the Director. In cases such as the present the Tribunal is reluctant to countenance a period of more than six months, at the most, for the adoption of any new decision on a matter already considered. In many, if not most, cases, the period will need to be much shorter, normally within three months. In the present case, a six-month period from 16 April 2003 would take one to 16 October 2003, rather than to 3 December 2003."
4. The progress report required from the parties by 16 September was duly submitted. In it the Director seeks a further extension of time until 20 November 2003 and states that if he were minded to issue a Rule 14 Notice against BT yet further time would be required (paragraph 33 of the progress report).
  5. Freeserve, in a letter of 16 September 2003, states that it is prepared, reluctantly, to agree to the Director's request for an extension of time, but indicates that a Rule 14 Notice could and should be prepared and served on BT within the time requested, i.e. by 20 November 2003.
  6. BT states, in a letter of 19 September 2003, that it too is prepared to agree the extension of time requested. However, BT expresses concern about recent

further requests for information that it has received from the Director. The Director should not, according to BT, be encouraged to go into any more detail than he already has.

7. The Tribunal notes that, according to the progress report, the Director has now done a considerable amount of work on this case, including meeting and liaising with the parties, preparing a 42-page methodology paper served in draft on 14 August 2003, obtaining the parties' comments on that paper in early September 2003, serving three Section 26 notices on BT and one such notice on Freeserve, and holding further meetings with the parties. The Director has also been in contact with the European Commission, following a decision taken by the latter in relation to broadband pricing by Wanadoo in France.
8. The Director has explained to the Tribunal that he has further analyses to complete, particularly in relation to BT Openworld's March 2002 business model, notably by reference to what the Director notes as "the DCF approach" and "the cohort approach" respectively. The Director considers that, notwithstanding parallel work on different aspects, he requires some 32 working days from 16 September 2003 to complete his tasks of analysis and modelling, plus a further 15 days to reach a decision, making a further 47 working days in all. The upshot is that the Director is requesting a new extension of 25 days, from 16 October 2003 to 20 November 2003. As already noted (paragraph 4 above) he states that yet more time would be required to finalise a Rule 14 Notice if he was minded to issue one.
9. The Tribunal continues to be concerned about the apparently slow progress of these proceedings, particularly given the importance of broadband to the economy, and the need to preserve a competitive market in that regard. The Tribunal also notes that, despite several previous investigations, it apparently took the Director until August 2003 to formulate his views on an appropriate methodology, on the application of which, apparently, much work remains to be done. On the other hand, it appears that Freeserve missed a deadline by

some six weeks (paragraph 19 of the progress report). The Director also says he was held up during August by the absence of BT personnel.

10. Since the priority at this stage is the effective completion of his work by the Director, the Tribunal has decided, albeit reluctantly, to grant the Director's request for an extension of time until 5 p.m. on 20 November 2003. The Tribunal's view is that that must be regarded as a final extension. In the event of default, the matter will be restored for hearing, with a view to considering the possible exercise of the Tribunal's powers under paragraph 3(2) of Schedule 8 of the Competition Act 1998.
11. The Tribunal does not consider that the deadline for the possible issue by the Director of a Rule 14 Notice against BT should be any different from the deadline for any new decision that the Director may take on Freeserve's original complaint. Accordingly, the Tribunal sets the deadline of 20 November 2003 in respect of both those matters.
12. In the result, the Tribunal's Order of 15 July 2003 will be modified by substituting the date "20 November 2003" in lieu of "16 October 2003" in that Order.
13. The Tribunal expresses no view on the correctness or otherwise of the methodology being developed by the Director in relation to the pricing issues in question.

Christopher Bellamy

John Pickering

Arthur Pryor

Charles Dhanowa

Made: 8 October 2003

Registrar

Drawn: 8 October 2003