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IN THE COMPETITION APPEAL TRIBUNAL

Case No 1026/2/3/04

Victoria House
Bloomsbury Place
London WC1A 2EB

Friday 4 June 2004

Before:

The President
SIR CHRISTOPHER BELLAMY QC
(Chairman)

PROFESSOR JOHN PICKERING
and
MS PATRICIA QUIGLEY

B E T W E E N:

FREESERVE.COM PLC

Applicant

- and -

OFFICE OF COMMUNICATIONS

Respondent

MR NICHOLAS GREEN QC and MR KEITH JONES appeared on behalf of the Applicant.

MR RICHARD FOWLER and MR MEREDITH PICKFORD appeared on behalf of the Respondent.

MR GERALD BARLING QC and MR PAOLO PALMIGIANO appeared on behalf of the Intervener (BT Group Plc).

CASE MANAGEMENT CONFERENCE

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1 THE CHAIRMAN: We have a number of things to discuss this
2 afternoon in our agenda. I think before doing so there
3 are two particular matters that we would like to explore
4 further. The first of those is the now envisaged
5 timetable, if there is one, for the conclusion of Ofcom's
6 ongoing investigation and the second, in a little more
7 detail, is the relationship between this case and the
8 Wanadoo proceedings and what, if anything, we should do
9 about that.

10 If I could take the first issue first and address
11 myself in general towards Ofcom, Mr Fowler, we take the
12 view that in very general terms it is essential that
13 regulators should be able promptly and effectively to
14 take decisions on matters affecting alleged anti-
15 competitive activities. Otherwise markets may simply
16 suffer from anti-competitive consequences while the
17 investigation is going on. That seems to us particularly
18 important in a market of significance to the national
19 economy, like the Broadband market. It is, in our view,
20 important that one should reach a decision one way or the
21 other as soon as possible because, in the first place,
22 that enables any appeal proceedings to take place and, in
23 the second place, and even more importantly that enables
24 all the parties to know where they are. In this
25 particular case, faced with a serious issue, we do not
26 find much evidence yet of Ofcom being able to address
27 itself, within any reasonably envisaged timetable, to the
28 need to take a decision. I think we would be very glad
29 now to have some pretty firm indication of when Ofcom
30 expects to complete its investigation into the matters
31 that are still under investigation. Can you help us on
32 that?

33 MR FOWLER: Sir, Ofcom is of course entirely conscious of
34 the importance, as you say, of taking decisions as
35 quickly as possible. We are in fact proceeding in line
36 with the timetable, as I indicated at the last CMC on 27
37 February when I referred to the guidelines providing for
38 a non-infringement decision in six months and an

1 infringement in twelve months and indicated that we were
2 looking at that in the context of a commencement date for
3 the current ongoing investigation, if I can call it that,
4 starting with the letter that was sent at the beginning
5 of February.

6 THE CHAIRMAN: Can I just be clear on that point, as a matter
7 of fact. As we have now understood it, the so-called
8 ongoing investigation was in fact, as it turns out,
9 parked between 20 July or mid July last year and then
10 recommenced this February.

11 MR FOWLER: That is effectively the position, yes.

12 THE CHAIRMAN: So what can you now tell us about what the
13 timetable is?

14 MR FOWLER: We are on track within that timetable. We have
15 issued various section 26 Notices, conducted inquiries
16 and had meetings, and so on and so forth, collecting
17 data. The data has been evaluated in the course of that
18 process and is continuing to be evaluated. At the moment
19 Ofcom are hopeful that they will be able, if there is a
20 non-infringement decision, to come to that in the course
21 of August. That is obviously to some extent dependent
22 upon the degree of cooperation they get from BT on
23 various outstanding issues, but that is the programme
24 that is currently anticipated.

25 THE CHAIRMAN: It would presumably be the case that it would
26 be possible to arrive at either a non-infringement
27 decision or a decision, so you serve a Rule 14 Notice
28 within a roughly similar time frame?

29 MR FOWLER: The actual service of a statement of objections.

30 THE CHAIRMAN: Yes, a statement of objections. Do we call it
31 a statement of objection now?

32 MR FOWLER: Yes. The preparation of that would probably
33 require additional time on that timescale. That is to
34 say, it would require further practical material and
35 preparation to get the statement of objections in order,
36 but it would be possible, we believe, to give an
37 indication of which direction we were heading in some
38 time after the August date if we were heading to

1 somewhere other than a non-infringement decision.

2 It may help if I say that my friends and I have
3 discussed this. Obviously the timetable is of concern
4 to all parties and how that can be made to fit in with
5 the current proceedings, which are looking at a much more
6 limited decision which, rightly or wrongly, is the
7 decision which was taken on 20 November. It appeared to
8 us that it might be a good idea if the present date for
9 the hearing could be vacated and the CMC adjourned to a
10 date after August, at which date either we will have
11 issued a non-infringement decision on the current
12 timetable or we would be in a position to give some
13 indication in camera as to the direction in which the
14 investigation is going. Then it would be possible to
15 look at the matter in the round if by then we had issued
16 a non-infringement decision. That is a course which
17 seems to be acceptable to both BT and Wanadoo.

18 THE CHAIRMAN: Let us see what the other two parties say
19 about that specific issue.

20 We are just on timing at the moment, Mr Green.

21 MR GREEN: As Mr Fowler explained, we would not be adverse
22 to the notion of this hearing being adjourned to a date
23 in September. If there is a non-infringement decision
24 the Tribunal will have two decisions before it and we can
25 make a much more sensible judgment as to how to proceed
26 on the range of issues as they then will be fully set
27 out. If there is to be an infringement decision, at
28 least we will know the timescale for the second decision.

29 THE CHAIRMAN: Yes, at that stage a proposed infringement
30 decision.

31 MR GREEN: Absolutely, proposed. But then, in a sense, my
32 client would be less concerned because plainly it is then
33 on a winning wicket rather than a losing wicket, if I can
34 put it in those terms. The real concern for my client
35 has always been that this matter goes off into the never
36 never, which was the real fear in relation to Ofcom's
37 application for a stay. We have no great problem with a
38 delay of two or three months if it has the effect of

1 enabling us, if it turns out that way, to see the second
2 decision, then to see all of the issues in the round and
3 then to run a much more effective appeal to the Tribunal
4 thereafter. We have less problem with that.

5 THE CHAIRMAN: At the moment 5th July is the date we have
6 pencilled in.

7 MR GREEN: Yes. That would be the date which we would
8 vacate, unless it were to be saved for another CMC. We
9 do have to deal with the other procedural issue about
10 pleadings in front of the CFI, which may take some time,
11 if we decide to go down that route, to obtain them,
12 absorb them, and so on. But so far as Mr Fowler's
13 suggestion is concerned, we are in agreement with the
14 notion of a short term adjournment.

15 THE CHAIRMAN: Yes. Mr Barling?

16 MR BARLING: Sir, we have got no problem with the notion of
17 a short term adjournment either. We certainly think that
18 there is very little merit, if any, in having any further
19 stay, if we are going to stay, with the CFI. But that
20 seems now to be receding as a prospect.

21 We do, however, have one major concern, as my learned
22 friend, Mr Fowler, has put forward and that relates to
23 the timing of any indication that there might be an
24 infringement decision because, as far as we can see,
25 there is no real reason why there could not be either an
26 indication that there was a non-infringement decision by
27 the end of August or a statement of objections, because
28 the guidelines that Ofcom have laid down for themselves
29 put twelve months for an infringement decision. I cannot
30 remember for the moment whether that is the actual
31 decision following the statement of objections and
32 everything else, which is encompassed in the twelve
33 months, or whether it is just the time required to get up
34 to a statement of objections.

35 THE CHAIRMAN: I think it is the decision. I have understood
36 it to be the decision.

37 MR BARLING: Yes. That is our understanding too. But as I
38 understand it, the suggestion is that even if the

1 decision is going to be to issue a statement of
2 objections we may not get the statement of objections
3 until some indeterminate time beyond the end of August.
4 That is what gives us a matter for concern. This
5 particular investigation started in April 2003. It was
6 suspended in July, but the reason for its suspension was
7 that they were going to do a twin track approach and one
8 of those twin tracks came to an end in November with
9 their November decision. So they have had from April to
10 July and then last November to August potentially. We
11 make that about twelve months in all. It is about 16
12 months and if you knock off the four months in between
13 you are down to twelve months. It seems to us that we
14 ought to be in a position by the end of August either to
15 have a non-infringement decision or a statement of
16 objections. We are worried that it is left in rather
17 vague terms, as it appears to be.

18 THE CHAIRMAN: At an earlier stage in this case, in the first
19 Freeserve case, if I remember rightly, in our various
20 extension orders giving a bit more time we did in the end
21 order that the dates for either a non-infringement
22 decision or the service of a Rule 14 Notice should march
23 together, there being no real reason why they should not.
24 Your point there is taken.

25 MR BARLING: Sir, whilst we would be happy with the vacation
26 of these dates, we do agree that the sensible thing would
27 certainly be to perhaps pencil in a CMC, if the Tribunal
28 has the time available in September, so that there is at
29 least a focal point and then the Tribunal perhaps gives
30 whatever pressure it can for there to be either a
31 statement of objections or a non-infringement decision by
32 a date earlier than the one proposed by Mr Fowler.

33 THE CHAIRMAN: Yes. Do you want to come back on any of that,
34 Mr Fowler? Your clients must know by now, roughly
35 speaking, in what direction the thing is going.

36 MR FOWLER: There are some very considerable difficulties
37 with the data which has been produced, which is being
38 evaluated, giving rise to all sorts of quite complicated

1 issues. That is one of the reasons why a decision
2 relating to the current proceedings is unlikely to cast a
3 great deal of light on the approach to be adopted in the
4 ongoing proceedings. But I leave that aside, Sir.

5 The timetable to which my clients have been working
6 is the timetable which I indicated in February and, of
7 course, they have to prioritise their time with a great
8 many other investigations. They have been working to
9 that timetable, which envisaged a non-infringement
10 decision, if there were to be one, in August and an
11 infringement decision, if there were to be one, six
12 months after that, not necessarily by any means having a
13 statement of objections on the same time frame as the
14 non-infringement decision because of the amount of work
15 required in order to prepare such a document, which
16 inevitably takes the time further forward from that date.

17 But my clients would certainly be in a position to give
18 an indication if the CMC were to be adjourned into
19 September, as Mr Green suggests, or, if there had been no
20 decision by then, of the direction in which it was going
21 and how long it was expected to take at that stage.

22 THE CHAIRMAN: Thank you. We are going to rise for a moment.
23 (The Tribunal adjourned from
24 2.17 pm until 2.35 pm)

25 THE CHAIRMAN: Mr Fowler, one of the reasons why we were
26 having a discussion just then is that the Tribunal wants
27 to avoid a repeat of what seems to have happened so far
28 in this case. I think it is fair to say that we, the
29 Tribunal, did not fully appreciate that the ongoing
30 investigation had just been parked, with nothing
31 happening in the crucial period of eight months from July
32 2003 until February 2004. Had we known that, that might
33 have made a considerable difference to the approach we
34 have taken to the orders we have made in the earlier
35 case.

36 We are also, without certainly today trying to decide
37 the issue, somewhat concerned about the approach in the
38 existing decision, which was to the effect that the

1 original complaint was only about the period from March
2 to May and did not expressly or impliedly include the
3 ongoing behaviour that was still going on at the time the
4 complaint was made and the original decision was taken,
5 especially, as we recall it, we did specifically ask the
6 Director to take into account facts and matters that had
7 emerged since the original decision and in the course of
8 the original proceedings. We are very concerned about
9 the delay in the procedure which has so far happened in
10 this case.

11 What we have in mind to do at the moment, subject to
12 any further submissions there may be, is to vacate the
13 existing date of 5 July but to fix a further CMC in this
14 case for the end of July (we have in mind Friday 30 July)
15 so that we can keep track of what is going on here. If
16 there is for some reason further slippage, and the
17 history of these proceedings does not give grounds for
18 optimism, we have two courses available to us.

19 The first course is simply to hear the existing
20 appeal in any event. It is an appeal that is on foot.
21 It raises a number of significant issues. It has been
22 appealed against. It is pending before the Tribunal.
23 There is no particular reason why we should not hear it.

24 We propose provisionally to fix a further date for the
25 hearing of this appeal in the third week of September -
26 that is to say, September 22 and 23 - dates which could
27 be subject to being vacated if by then there was a new
28 decision but if there is not a new decision and there is
29 further slippage then the first option for the Tribunal
30 is simply to go ahead with the appeal on those dates.

31 The other option which has also arisen in another
32 recent case where there has been significant slippage in
33 regulatory timetables, is simply to take the view that
34 there comes a point at which the Director is deemed to
35 take an implied decision of refusal and to treat that as
36 a decision against which Freeserve, if so advised, could
37 appeal and treat that as a second appeal and determine it
38 on the basis of an implied decision, that resulting from

1 a failure to act, which is now a well-established
2 principle in community law.

3 Those are our proposals at the moment.

4 It does seem to us that it should by now be possible
5 for the Director to take a position by the end of August
6 as to whether or not he intends to serve a statement of
7 objections. We are not persuaded that it would be
8 impossible to serve a statement of objections, if so
9 advised, by the end of August but he should at least be
10 in a position to tell us what he is proposing to do about
11 that by the end of August. Those arrangements are all
12 made on the understanding that the timetable of the end
13 of August will be adhered to, but if it is not adhered to
14 those are the steps that we propose to take.

15 As I think we have already indicated, we do feel it
16 important in these cases that regulatory action is
17 capable of being taken promptly one way or the other. We
18 are somewhat concerned that in some respects there may be
19 a temptation for the wood to get lost in the trees, with
20 too much concentration on detail and not enough attention
21 to what is actually happening in terms of the market,
22 which is after all what is at issue here, especially when
23 quite a short period of anti-competitive behaviour may
24 have a significant effect on a market. I am not at all
25 suggesting at this stage that there has been any anti-
26 competitive behaviour. I am simply remarking on the
27 difficulties everybody is put in if there is no decision
28 one way or the other.

29 The other point that we would like to make is that we
30 did specifically indicate in our earlier judgments that
31 one of the matters that should be dealt with in further
32 decisions is the issue of anti-competitive pricing looked
33 at from the point of view of predatory pricing. There
34 may or may not be arguments that in certain respects a
35 margin squeeze is the same as predation, or can involve
36 the same kind of problems as predation, but we do note
37 that the existing decision under appeal manages to arrive
38 at a conclusion without apparently any reference to

1 existing EC jurisprudence on predation in the
2 **Akzo/Tetrapak** cases, among others. I simply note that in
3 case it becomes relevant to the regulatory approach in
4 any further decision that may be taken.

5 That is how we see the timetable for this present
6 case. There will be a further CMC at the end of July and
7 a provisional hearing date in September if there is
8 further slippage.

9 MR GREEN: Could we suggest one addition, which is that on
10 the assumption that Ofcom complies with the timetable
11 that you have set out, which is either a decision in
12 August or a statement of objections, there would be a CMC
13 at the beginning of September to review next steps on
14 that hypothesis? We could then theoretically have two
15 decision both rejecting complaints, in which case there
16 would be two ongoing appeals, which we would need to
17 review.

18 THE CHAIRMAN: Yes. I think that is in principle a sensible
19 idea. That completes both sides of the sandwich, as it
20 were. We may not be able today to fix a date, though it
21 is desirable that we do. (After a pause) The dates will
22 have to be provisional, but at the moment, provisionally
23 speaking, it probably is a good idea to have at least
24 pencilled in the possibility of a further CMC on 10
25 September, which is a Friday.

26 MR BARLING: Sir, assuming that that has virtually dealt
27 with that point, may I say something for the record. I
28 am sure that Mr Fowler did not intend to imply, when he
29 said that his timetabling was dependent upon receiving
30 cooperation from BT, that he was not getting cooperation,
31 but can I for the record say that BT, over the last few
32 months, has spend an enormous number of hours answering
33 at extremely short deadlines, usually within days, very
34 complex requests for information under section 26. For
35 the seven months up to November last BT actually clocked
36 them at 3,200 person hours in responding to Oftel.

37 THE CHAIRMAN: Up to November last?

38 MR BARLING: Up to November last, yes, and there have been

1 quite a lot more.

2 THE CHAIRMAN: Was that in relation to the existing decision
3 or the ongoing?

4 MR BARLING: That probably encompassed both, because they
5 have included the period when the two investigations were
6 running in tandem up to July last. That was from April
7 to November. Since then we have had three discrete
8 requests dealing with this new investigation and a huge
9 amount of time and money is spent doing this, as I said.

10 THE CHAIRMAN: I appreciate that. Have they been dealt with,
11 or are they still being dealt with? What is the
12 situation?

13 MR BARLING: There are the ones that we received on 1 June,
14 a couple of days ago, that are still being dealt with and
15 I think we are still within whatever the deadline is to
16 answer them. But certainly in terms of cooperation we
17 have endeavoured to cooperate.

18 THE CHAIRMAN: You had earlier indicated your client's
19 interest in getting this matter resolved.

20 MR BARLING: Precisely.

21 THE CHAIRMAN: Let me say for the record that nothing that I
22 have said today carried any adverse implications for BT.
23 It is just a question of getting this case to a
24 resolution one way or the other at this stage.

25 MR BARLING: I am very grateful.

26 THE CHAIRMAN: Have we dealt with the timetable for the
27 present case? (confirmed)

28 I think that now takes us on to Wanadoo and what, if
29 anything, we should do about that.

30 MR GREEN: This is in relation to the pleadings?

31 THE CHAIRMAN: It is, I think, first of all in relation to
32 the pleadings and, secondly, more generally in relation
33 to any procedural steps that we should be taking at this
34 point having regard to either Ofcom's or our own duties
35 to take account of Commission decisions and how we should
36 handle it in this particular circumstance.

37 MR GREEN: Can I take it in two stages. Firstly, the formal
38 question of pleadings. I think we have made it clear

1 that we are happy to produce our pleadings. For internal
2 reasons we would prefer it pursuant to a Tribunal order
3 and we would do that. We would invite the Tribunal to
4 request the Commission to produce its pleadings. We
5 think that that is probably better than the Tribunal
6 asking us to invite the Commission.

7 THE CHAIRMAN: Well the Commission has made it fairly clear
8 that they would like the request to come from us, I
9 think.

10 MR GREEN: The other administrative matter relating to that
11 concerns the annexes to our application. There are a
12 very large number of annexes and we rather doubt that
13 they are going to be of relevance. Most of them are in
14 French. What we would suggest is that we are happy to
15 produce them.

16 THE CHAIRMAN: Annexes to your appeal to the CFI?

17 MR GREEN: Yes, and we could then have a sensible debate
18 possibly informing us as to which documents anybody
19 thinks are relevant and then, if necessary, we can then
20 address the question of translation.

21 THE CHAIRMAN: So we could make an order. The pleadings
22 themselves are in French.

23 MR GREEN: Yes, and the annexes are in French. In the first
24 instance we would be happy to produce a list of the
25 annexes.

26 THE CHAIRMAN: But if we made an order asking you to produce
27 the pleadings without annexes in the first instance, and
28 no doubt it would have a *bordereau de pièces*, we could
29 then see whether we actually needed any of the annexes,
30 but the pleadings ought at least to define the issues.

31 MR GREEN: Yes.

32 THE CHAIRMAN: Then we could see what the Commission's
33 attitude was to its own pleadings. We would probably
34 want to write to the Commission once we got your
35 pleadings, as it were, so that we would then be able to
36 say now we have got half the picture and we need to know
37 the other half of the picture.

38 MR GREEN: Yes, and if we could have addressed to us a

1 Tribunal order?

2 THE CHAIRMAN: Yes, quite. There will be an order requiring
3 Freeserve to do those things.

4 We would like to know whether anyone has submissions
5 to make as to whether at this stage we should ask the
6 Commission for anything else, other than its pleadings,
7 for example. There are now provisions for the Commission
8 to be asked for other information, for its views, to turn
9 up as an amicus, to do all sorts of things. Maybe we
10 have not yet reached that stage. That is the first
11 point.

12 The second point is, while we are all here I think we
13 would like, if possible, a little more elucidation as to
14 how all parties see the relevance of the Wanadoo case to
15 these proceedings. The situation has certain shades of
16 irony in it, as one party is challenging that decision
17 but relying on it and another party is saying 'I think it
18 is irrelevant, but we really ought to wait until it is
19 decided before we can go anywhere'. We would be glad to
20 have a little bit more elucidation on that point as well.

21 MR GREEN: Shall I just deal with the administration point?

22 THE CHAIRMAN: Yes.

23 MR GREEN: I think our feeling, as far as inviting the
24 Commission to assist further is concerned, is that that
25 is probably a matter best left until September. If Ofcom
26 does produce a decision in August, we will then be better
27 placed to know what additional, if any, information we
28 want from the Commission and the Commission itself may
29 have a better feel as to whether it wishes to intervene
30 or not. If, on the other hand, Ofcom comes to the
31 Tribunal and says 'we are in the process of issuing a
32 statement of objections', at least we will know. But on
33 one hypothesis we will have two decisions, one of which
34 is far more extensive than the other. At that stage you
35 will then be able to see the full range of pleadings
36 before the CFI and I think we will all be better placed
37 to know.

38 THE CHAIRMAN: Where have we got to in the CFI? Are we in

1 the reply stage now?

2 MR GREEN: I think we are at the stage of reply. The
3 Commission's defence has been served. We are in the
4 first stage of reply at the moment, so the pleadings are
5 not yet closed.

6 THE CHAIRMAN: When we have made an order and you have
7 supplied the pleadings, I think it would be helpful if
8 you were able to tell us what stage it had reached so
9 that we can know to ask the Commission for their *Duplique*
10 as well as for *la Défense*.

11 MR GREEN: In terms of production of the pleadings, there
12 may be confidential matters contained within them. In
13 the first instance I do not suppose there is a problem in
14 the Tribunal seeing confidential matters but there may be
15 a problem with BT seeing confidential matters. We will
16 have to arrange that. Possibly it can be done informally
17 without the Tribunal, or we will have to overcome that
18 difficulty.

19 THE CHAIRMAN: Your parent company is presumably in
20 possession of these pleadings?

21 MR GREEN: Yes.

22 THE CHAIRMAN: It is just that you do not feel able to
23 divulge them without the Commission being approached
24 first?

25 MR GREEN: We will divulge our own pleadings pursuant to
26 this Tribunal's order but we cannot divulge the
27 Commission's pleadings on the basis of the court's
28 present case law. I think the Commission will have to do
29 that pursuant to its duty of cooperation with the
30 Tribunal.

31 THE CHAIRMAN: Yes.

32 MR GREEN: But we do not have a difficulty in divulging our
33 own pleadings to you. I think under the Court of
34 Justice's present case law we could not divulge any part
35 of the pleadings which revealed somebody else's
36 pleadings, but that won't be the case because it is our
37 application.

38 That I think deals with the mechanics of the

1 pleadings.

2 So far as Wanadoo generally is concerned, we are as
3 aware of the "irony" as anybody, because my client's
4 position is that across Europe it wants consistency. It
5 operates in a number of member states and it is as
6 anxious to secure consistency of approach across Europe
7 as it is to secure a particular result. It has different
8 interests in different member states and it makes no
9 bones of the fact that that is its principal objective.
10 At the moment the Commission's decision in Wanadoo is
11 intended by the Commission to have some precedent value.

12 Ofcom takes the position that it has no relevance to the
13 present case and therein lies a difference between us.
14 We believe that it is an important decision. As you will
15 have seen, it takes the **Akzo** approach and modifies it to
16 take account of the fact that this is an emerging and new
17 market, so it does take **Akzo** and **Tetrapak** and develops
18 the case law. We do believe that Ofcom should be taking
19 that into account. Ofcom says otherwise. Pursuant to
20 this Tribunal's informal guidance today it may very well
21 be the case that Ofcom takes the view that in any new
22 decision it will address **Wanadoo**. Even if it is simply
23 to dismiss it, it will explain its reasoning for
24 dismissing it and then we will have a clear cut issue to
25 bring back in front of the Tribunal, if that is what
26 happens, for the Tribunal to rule upon and we will be
27 able to argue as to whether it is or is not relevant.

28 So far as a stay is concerned, we are very much
29 opposed to that and we will be inviting the Tribunal at
30 an appropriate point, whether in Decision 1 or in
31 relation to Decision 2, to rule upon the correct
32 approach. The Tribunal is dealing with principles which
33 will apply not just in the United Kingdom but across the
34 rest of Europe and Wanadoo is of the firm view that the
35 Tribunal is an appropriate body to express a view, if I
36 may say so, whether right or wrong, to express a view
37 which will further substantially the debate as to the
38 correct approach. We are, to a degree, in uncertain

1 territory and we would welcome that guidance. We will be
2 urging the Tribunal not to engage in any consideration of
3 a stay but to have a go. We very much welcome that
4 approach.

5 THE CHAIRMAN: What we probably need to do as a first step is
6 to establish what the issues are in the Wanadoo appeal,
7 then to see whether any of those issues have any bearing
8 on what it is we have to decide and then to see where we
9 go from there. We have a certain issue to think about,
10 which is developing what you have just called 'a
11 consistent approach across Europe' in the context of an
12 existing appeal. The rather unhappy experience in
13 Masterfoods was that anti-competitive practices continued
14 in Ireland for ten years as a result of the fact that
15 everybody was waiting for the end of the proceedings
16 before the Court of Justice - not a particularly
17 attractive option in a case such as the present. We need
18 to find our way through this maze.

19 MR GREEN: The position is quite different because we do
20 have a Commission decision, so there cannot be a risk of
21 conflict. We will be inviting you simply to apply
22 Wanadoo. If in the mean time the CFI rules, which is
23 extremely unlikely given the timescale for any appeal,
24 but if that were to be the case then plainly the Tribunal
25 would take that into account. But *pro tem* we do have the
26 decision.

27 THE CHAIRMAN: Well the decision has not been suspended.
28 There has been no application for suspension, so it takes
29 effect as it does at the moment.

30 MR GREEN: Indeed it is presumed lawful at the moment.

31 THE CHAIRMAN: Yes. Thank you.

32 I think I will go to Mr Fowler next and see where we
33 are on that.

34 The proposition, Mr Fowler, is that we should order
35 Freeserve to produce its own pleadings and invite the
36 Commission to supply us with its pleadings in Wanadoo.

37 MR FOWLER: As far as that is concerned, that seems a
38 sensible line to take. I would only point out that

1 Wanadoo did agree at the last CMC to make available such
2 information that it had.

3 THE CHAIRMAN: Which they have. They have made a summary
4 available, but it is probably better to go underneath the
5 summary to see the actual documents.

6 MR FOWLER: Indeed, but that information, of course, was
7 included in the information that was available to them.

8 THE CHAIRMAN: You mean they could have produced the
9 pleadings anyway?

10 MR FOWLER: Anyway, pursuant to the agreement that they
11 made.

12 THE CHAIRMAN: I see what you mean.

13 MR FOWLER: So far as the question of asking for anything
14 else from the Commission is concerned, at this stage we
15 do not see anything in particular that we would want you
16 to request the Commission to provide.

17 On the question of the relevance of the Wanadoo
18 decision we say, for the reasons that we have set out in
19 our defence, that it is distinguishable on the facts.
20 Its main relevance and the relevance of the pleadings,
21 insofar as Wanadoo's case, is based upon the economic
22 appropriateness of a particular test situation such as
23 this and then it is relevant to look to see whether there
24 are any consistencies or inconsistencies between the
25 arguments that they have advanced in the two different
26 fora.

27 THE CHAIRMAN: But that would be an argument, as it were,
28 about the merits of their arguments rather than an
29 argument about the correctness or otherwise of the
30 Wanadoo decision.

31 MR FOWLER: Indeed, that is what we say. The correctness,
32 or otherwise, of the Wanadoo decision is not really
33 relevant because it is distinguishable on the facts, so
34 it is only on that latter point.

35 THE CHAIRMAN: I am not tying you down today at all. I am
36 just trying to get a feel for it. We are not in the
37 position, according to you, where we have to wait for the
38 CFI's judgment in Wanadoo in order to address what you

1 say the issues of principle are.

2 MR FOWLER: On our case, it is certainly not, Sir, and the
3 suggestion that there should be a stay pending the
4 decision in Wanadoo is based upon the way in which my
5 friend puts his case. That is why he says it is ironic
6 that we should be applying for a stay, but I am not
7 pursuing that.

8 THE CHAIRMAN: The view that I think we would be
9 provisionally taking is that the Wanadoo decision is
10 there. It stands until it is overthrown and unless there
11 was a reasonable prospect of it being overthrown on some
12 issue that was critical to our own determination of this
13 case we would simply proceed on the basis of hearing this
14 case and taking account of the Wanadoo decision, so far
15 as it is relevant, which you say it is not.

16 MR FOWLER: Exactly so. That is how we put our case and
17 that is how we put our case in the defence.

18 THE CHAIRMAN: Yes. So we do not perhaps need to get into
19 too convoluted a procedural debate as to what we should
20 do viz-a-viz the fact that there is an appeal pending in
21 the Wanadoo case, because you are basically saying that
22 whether Wanadoo wins or loses, it is still not relevant
23 really to your approach and your decision.

24 MR FOWLER: Indeed yes, Sir.

25 THE CHAIRMAN: Could I ask you while you are on your feet, as
26 it were, whether Ofcom is giving thought in the possible
27 new decision to Article 3 of the Modernisation Regulation
28 and the need to apply, in this case Article 82, as well
29 as the Chapter II prohibition in a case where there is an
30 effect on trade between member states, if there is one?

31 MR FOWLER: That is a matter that is being considered.

32 THE CHAIRMAN: That is a matter that is being considered.
33 Thank you.

34 Yes, Mr Barling?

35 MR BARLING: We seem to recall that we got a letter saying
36 they are applying Article 82.

37 THE CHAIRMAN: You got a letter?

38 MR BARLING: Yes. I am not imagining it, I think.

1 THE CHAIRMAN: I do not think that is something that we have
2 got. Do I take it that the second possibly envisaged
3 decision is an Article 82 decision as well as a Chapter
4 II decision, or perhaps just an Article 82 decision?
5 MR BARLING: That was our understanding, that it would
6 certainly encompass Article 82, but Mr Fowler may have
7 some more up to date information. It is being considered
8 as both but the letter my friend refers to is a letter
9 that was sent on 1 May in relation to all the ongoing
10 matters.
11 THE CHAIRMAN: All the ongoing matters.
12 MR BARLING: So far as they were capable.
13 THE CHAIRMAN: Be aware that we know it is 1st May now and we
14 have not forgotten.
15 MR GREEN: We can hand in this letter which we have had from
16 Ofcom, which is dated 29 April: "I am writing to let you
17 know that as of 1 May Ofcom will be continuing this
18 investigation under Article 82 of the Treaty in addition
19 to Chapter II." If it is helpful for your file you can
20 have this copy.
21 THE CHAIRMAN: I do not think we need it at the moment, Mr
22 Green. Thank you very much indeed.
23 Mr Fowler, what is your point of view on this?
24 MR FOWLER: Sir, on the pleadings we will obviously
25 cooperate informally at first and if there are
26 redactions, and so on, we will obviously be able to deal
27 with that I hope without troubling the Tribunal.
28 THE CHAIRMAN: You have not intervened in the Wanadoo appeal,
29 have you?
30 MR GREEN: No.
31 As far as the Wanadoo appeal is concerned, we are
32 rather with Mr Fowler in thinking that it is certainly of
33 interest to the case but if one just looks, for example,
34 at paragraph 331 of the decision in that case: "This
35 decision therefore finds fault with the company not so
36 much for setting prices at the end of 2000 at the low
37 cost levels, as to subsequently maintaining those prices
38 at that level as part of a wide-ranging strategy of

1 market pre-emption deployed at national level."

2 It seemed to us that it was very much a case about an
3 anti-competitive strategy and the evidence for that,
4 rather than just about deciding whether historical models
5 were permissible in any circumstances, other than
6 historical models were permissible. One of the reasons
7 we would have opposed any stay pending the CFI is because
8 we are far from clear that the CFI will answer the points
9 of issue that are going to be raised if this appeal goes
10 ahead so, with respect, we think it is of interest and no
11 doubt of some relevance but not by any means likely to be
12 conclusive.

13 So far as asking for anything else from the
14 Commission, we would have thought, as Mr Green has said,
15 that it is probably premature and that can be revisited
16 in due course.

17 THE CHAIRMAN: Yes, thank you.

18 I think on that issue we will proceed on these lines
19 and there will be orders accordingly.

20 What does that now leave? I think that leaves the
21 formal request for you to change your corporate trading
22 name, Mr Green. I do not think that is opposed.

23 MR GREEN: Yes.

24 THE CHAIRMAN: And any further issue raised or directions
25 sought that anybody else wants to raise at this stage. I
26 think we have really dealt with the stay side of things
27 for the time being, Mr Fowler. I am not sure that that
28 is being pressed particularly today as I understand it.

29 Is there anything you want to raise?

30 MR GREEN: Just as a matter of record we want to check that
31 the Tribunal did in fact receive two pleadings, which are
32 not referred to in the list of pleadings and the agenda.

33 We assume that it is just an oversight. There is the
34 reply of Wanadoo dated 30 April and Ofcom's response to
35 BT's statement of intervention.

36 THE CHAIRMAN: We have got both of those.

37 I think we ourselves have one outstanding question
38 about some illegible documents. (I am told that that has

