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IN THE COMPETITION

Case No. 1026/2/3/04

APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A.2EB

18th March 2005

Before:

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

Sitting as a Tribunal in England and Wales

BETWEEN:

WANADOO UK PLC
(formerly FREESERVE.COM PLC)

Appellant

and

OFFICE OF COMMUNICATIONS

Respondent

supported by

BT GROUP PLC

Intervener

Mr Nicholas Green QC (instructed by Messrs Baker & McKenzie) appeared for the Appellant.

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

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

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CASE MANAGEMENT CONFERENCE

1 THE PRESIDENT: Good morning, ladies and gentlemen. Mr. Green, I suspect that it may be useful
2 to begin this Case Management Conference by a rather informal discussion of where we are in
3 this case and perhaps I could share with you all in an informal way some of the thoughts that
4 are going through the Tribunal's mind at the moment. Let me just see if I can explain how we
5 are thinking, and I genuinely do mean that this is a very informal and not particularly
6 structured part of the discussion at the moment.

7 We have an Appeal against a Decision that was taken on 20th November 2003. That
8 Appeal was launched on 20th January 2004. We are now at 18th March 2005. The Decision
9 that was taken in November 2003 relates back to a complaint that was originally lodged in
10 March 2002, so we are now nearly three years down the line from the original matter that gave
11 rise to these proceedings. As I understand it at the moment Wanadoo (the Appellant) is
12 inviting us to continue with the Appeal and Ofcom (the Respondent) and the BT (the
13 Intervener) are expressing doubts as to whether that is a useful thing to do having regard to the
14 parallel investigation that is now looking at a wider time frame than the original Appeal.

15 From the Tribunal's point of view, as long as we are seized of the Appeal it is very
16 difficult not to do anything about it, just sort of leave it there, especially since the Appeal raises
17 some quite important points about how competition law should be applied in what is basically
18 an *ex-ante* situation, by which I mean a very early period in the launch of a new product while
19 business is basically trying to establish itself in a new market. That is an issue which has wide
20 implications for business generally and, of course, BT in particular in the circumstances of this
21 particular case.

22 Against that background, one of the questions we have asked ourselves is what is the
23 relationship – or potential relationship – between the present Appeal and any further Appeal
24 that there might be against any further Decision that might or might not be taken in the context
25 of the on-going investigation. Our thinking at the moment in a very provisional way is, as
26 I think broadly speaking Ofcom has submitted on previous occasions – and maybe BT too – is
27 that the existing Appeal does raise issues that are discrete from (and are likely to remain
28 discrete from) any further decision that may be taken. There are clearly matters of fact that
29 may overlap. The question what you are supposed to do in an *ex-ante* situation when you have
30 not at the time got historical information over a sustained period is going to remain quite an
31 important and independent question.

32 On that point Wanadoo's principal argument is that Ofcom should have used
33 historical information and not adopted the forward looking approach that it did adopt. Ofcom
34 replies (and BT supports this) that we were fully entitled to look forward and see whether BT
35 was making reasonable assumptions. That, it would seem to us, gives rise to two main issues

1 that are of some importance, that are already very fully elaborated in the documents that we
2 have.

3 First, was Ofcom necessarily, and as a matter of law, when looking at the short period
4 from March to May 2002 obliged to consider the matter predominantly on the basis of
5 historical information or was Ofcom entitled to look at BT's business projections and test those
6 projections against a number of reasonable assumptions to see whether at that time there were
7 grounds for regulatory intervention. If Ofcom was in principle entitled to do that then the
8 second issue is whether there are relevant flaws in the analysis that they in fact carried out.

9 Those issues, it seems to us, are likely to remain whatever the fate of the ongoing
10 investigation which is going to look at historical data apparently. So if one looks at it in that
11 light and one bears in mind that in the existing Appeal the matter has already been very fully
12 argued and there is a great deal of material that we have and that the issues are of some general
13 importance, at the moment the view we are tending to is that perhaps we should bring this
14 Appeal on, as we originally said we would in December despite the hesitations and reluctance
15 of the Respondent and the Intervener, in order to dispose of those quite important issues that
16 are outstanding. The question of exactly when we bring it on is another matter. There is
17 a window in the Tribunal's diary in the first week of July, and it may well be, in the light of the
18 full argument we have already had, that we do not really need, I do not think, a great deal more
19 than we have, at least to start on the issues of principle that I have mentioned. It may well be
20 that a hearing on those two issues which I have just identified although complicated would not
21 be particularly onerous in terms of time, or inappropriate at this stage.

22 So, Mr. Fowler, Mr. Barling and Mr. Green, that is basically a sort of our inner
23 thinking in so far as our brains are engaged at all, that is the way that we have so far been
24 looking at it. I do not know whether that is helpful or not to the parties here present. It may be
25 that you would like us to rise for a few minutes to enable you to think about what I have said,
26 or it may be that you are in a position to react.

27 MR. GREEN: I would like a couple of minutes, if I could.

28 THE PRESIDENT: Yes, I think it would probably be helpful. Mr. Fowler, would you like a few
29 minutes to react?

30 MR. FOWLER: Yes, please.

31 THE PRESIDENT: Well, having said that why do we not resume at 11.30 and then see where we
32 are.

33 (The hearing adjourned at 11.20 a.m. and resumed at 11.35 a.m.)

34 THE PRESIDENT: Yes, I think the easiest way is to go round and see what everyone's position is.

1 MR. GREEN: Can I start by making a number of general observations about the position that we are
2 in.

3 THE PRESIDENT: Yes, of course.

4 MR. GREEN: We, as you know, set out position in our observations not having seen what BT or
5 Ofcom said. We did so from a state of not quite “blissful” but thorough ignorance of the state
6 of affairs between BT and Ofcom. We are distant participants in the procedure, and we have
7 very little knowledge of what is going on. We did not know therefore that BT believed that
8 a Decision could be produced by Ofcom by November/December, and I understand from
9 Ofcom’s skeleton, and from Mr. Fowler, that that is a distinct possibility, that a final Decision
10 could be produced by November/December and that, as Ofcom puts it, a Board decision on
11 next steps will be taken in the next month or so – fairly imminently.

12 In that context our position has shifted slightly. We perceive there to be this
13 complication, that if the Tribunal were to issue a Judgment on what I will call the “second”
14 Decision ----

15 THE PRESIDENT: The Decision appealed against?

16 MR. GREEN: The Decision appealed against, yes. If the Tribunal were to take a decision on that,
17 even on the two identified potential preliminary issues, and I will turn to those in a moment.
18 There is, we think, a risk that you would be expressing views about law and principle which
19 relate to matters which are covered by the Statement of Objections. We have a copy of the
20 Statement of Objections in its non-confidential form. We would have thought it would have
21 been helpful for the Tribunal to have had a copy but we did not feel that we could produce one,
22 given ----

23 THE PRESIDENT: No, you may well be right, Mr. Green, it is a missing-piece of the jigsaw from
24 our point of view.

25 MR. GREEN: We fear it might be, and I need to be careful what I say because we have a
26 non-confidential version. It is really up to the parties to disclose it to the Tribunal but the
27 sensitivity analyses in the Statement of Objection about whether BT is in profit or in loss cover
28 the two month period of the Decision under Appeal ----

29 THE PRESIDENT: Right, so you mean the Statement of Objection covers the same two month
30 period?

31 MR. GREEN: Yes, the evidence, the need to distinguish between the evidence in the Statement of
32 Objections and the proposed period of Decision, but no doubt BT will be responding to the
33 evidence in the Statement of Objections.

34 THE PRESIDENT: You mean the evidence in the Statement of Objections covers this period, but
35 not necessarily the proposed findings – but we do not know?

1 MR. GREEN: That is a matter for Ofcom at the end of the day.

2 THE PRESIDENT: Yes, well we may get a bit of clarification for this.

3 MR. GREEN: It seems to us that inevitably when Ofcom produces a final Decision either way,
4 whether it is a negative or positive decision, it will be on the basis of evidence covering the
5 period of the present Decision and whether that is used as simply historical context to the third
6 Decision or whether it becomes part of the Decision, it still seems to us to be the case that
7 Ofcom will be forming a view which may well overlap with the period of the second Decision.
8 What we would not want, from our perspective to happen is for the Tribunal to issue
9 a Judgment which then brought the battle between BT and Ofcom to a halt, and which then
10 made it unlikely that Ofcom would produce a Decision by the end of the year.

11 THE PRESIDENT: I am sorry, can you just say that again – why would that be a risk? What
12 sequence of events are you envisaging?

13 MR. GREEN: Two fears that we have. One is that when we argue the Appeal on the basis of
14 a Decision which has now become something of an oddity because it covered such a short
15 period of time and in somewhat unusual circumstances. Ofcom, for example, may be pulled
16 both ways as to what it wishes to argue in the light of its Statement of Objections – there are
17 inconsistencies.

18 THE PRESIDENT: Well it is always said that it is a quite distinct point.

19 MR. GREEN: That is one of the difficulties you have not having seen the Statement of Objections.

20 THE PRESIDENT: Yes, I see.

21 MR. GREEN: We feel that the argument that may be put to you may be somewhat strained, and we
22 feel that not having been able to see the entire case in the round you may come to Judgments
23 and Decisions which you might otherwise have finessed or ----

24 THE PRESIDENT: So you say we are partly in the dark at the moment?

25 MR. GREEN: That is our fear, and if a complete argument goes ahead in a half light there is a risk
26 that a Judgment which you might not otherwise have given will emerge – it is only a risk, it is
27 something we perceive as ----

28 THE PRESIDENT: But we have a full Appeal, and it is fully pleaded and it is all there.

29 MR. GREEN: Absolutely.

30 THE PRESIDENT: We will just have to leave on one side the other matter.

31 MR. GREEN: This is our problem. We take some comfort in the fact that both BT and Ofcom
32 believe that a Decision will be available before the end of the year. If it is a Decision in favour
33 of B T it appears likely to be in the summer. If it is against BT it will be before the end of the
34 year. From my client's position we would prefer to see a negative Decision against BT and if

1 it is by the end of the year, and BT says it will reconcile its rights of defence within that
2 timescale, then so be it, somewhat reluctantly we see the force of that. We are not certain
3 a great deal of benefit is to be achieved by pursuing another Appeal during the pendency of
4 this ongoing process. On the one hand we would love to gown down the Appeal route ----

5 THE PRESIDENT: So you are slightly torn?

6 MR. GREEN: We are torn but we feel on balance that we see the force of the position BT has taken,
7 that if they can reconcile their rights of the Defence within the confines of a timetable leading
8 to the final Decision at the latest, as they put it by the end of November, that we see the force
9 of that and we would be reluctant to see something happen which might railroad or derail that
10 process.

11 THE PRESIDENT: Why should it derail the process? I do not see that?

12 MR. GREEN: For the reason that we have just given, that we would be arguing this rather strange
13 two month Decision on the basis of principles – you will not have the benefit of the Statement
14 of Objections, we will not be able to make arguments about the Statement of Objections to
15 you. Ofcom will make arguments where they are trying to protect their present position and
16 defend the past position, and it appears to us to be a somewhat unsatisfactory basis on which to
17 proceed with an Appeal – it is an unusual basis.

18 THE PRESIDENT: One of the difficulties from the Tribunal’s point of view is that although you
19 refer to the unusual nature of the Decision just covering a couple of months, behind that
20 relatively short period is quite an important point for business generally, and the development
21 of competition in this area, namely, what on earth do you do when you are launching a new
22 product and you are adopting what I think is called in the jargon “penetration pricing”? What
23 are the ground rules that you are supposed to have in mind and what are the ground rules that
24 BT has in mind? While there is a decision by Ofcom on that very important principle, and
25 that is challenged, it is quite difficult for the Tribunal just not to do anything about
26 it – especially after this length of time.

27 MR. GREEN: We understand that. The Statement of Objections will raise those issues. So far as
28 the suggested preliminary issues are concerned, one can certainly identify an evidential
29 approach, whether or not one looks at historical information, or one looks at future projected
30 assumptions. Our case is slightly more nuance than that, because our case is ----

31 THE PRESIDENT: Yes, I did not do it justice, Mr. Green.

32 MR. GREEN: There was a fairly long period of history that we say Ofcom should have taken into
33 account. Had they taken that into account it would not necessarily be wrong to use that
34 information to guide future assumptions, so I do not think we would be arguing that it is

1 a binary choice between A or B. We would be saying it is simply a matter of taking account of
2 all of the evidence, and I am reminded of the European Commission's SMP guidelines which
3 say precisely that. You look at such historical data as you have, but you also take account of
4 any *ex-ante* analysis that you think is appropriate in the light of, and guided by the historical
5 data you have. It may be from our point of view that it would be simply a matter of saying that
6 the evidence is the evidence you should take every bit into account and Ofcom went wrong for
7 that reason.

8 THE PRESIDENT: Yes.

9 MR. GREEN: The second limb of the preliminary issue is that if Ofcom was entitled to take account
10 of future assumptions, were these right? It is a fairly detailed factual question which we think
11 would be guided by many of the issues which are adumbrated in the Statement of Objections.
12 We do think it is a practical problem for the Tribunal not having sight of the Statement of
13 Objections, and we think this really is a problem for Ofcom and BT to resolve. We do not feel
14 we could in all fairness produce it, which is why we suggested Ofcom did. I am not certain
15 I can take matters further.

16 THE PRESIDENT: Let us see how the discussion develops.

17 MR. GREEN: Yes.

18 THE PRESIDENT: Thank you. I think. Mr. Fowler, it is probably you next. We are really looking
19 for help to find a solution to this deeply intractable situation we are all in.

20 MR. FOWLER: It does seem to us that the issues that you have identified are issues that could be
21 dealt with separately. It has always been our position that the Decision we took originally
22 related to that short period of time was governed by different considerations than those we are
23 now examining in the context of the current Statement of Objections . We do not consider that
24 the current Statement of Objections is in any way inconsistent with the position in the original
25 Decision.

26 THE PRESIDENT: I think that has always been your case, has it not?

27 MR. FOWLER: That has indeed always been our case, and we have offered to let you have a sight
28 of the Statement of Objections. I am not sure really it is a very attractive way forward because
29 of the possibility in the future of an appeal ----

30 THE PRESIDENT: Yes, well we have not so far wanted particularly to go down that road, but we
31 might – we will see how we get on, it might be useful just to glance at it to get an idea of what
32 the framework is. I just do not know.

33 MR. FOWLER: We do not have any objections to that in principle; we are perfectly prepared, as we
34 have offered, to make that available to you.

35 THE PRESIDENT: Yes, thank you.

1 MR. FOWLER: It does seem to us that the point you have identified would be helpful to be
2 determined, there are different points from the points arising on the Statement of Objections,
3 which is adopting an historical as well as a forward looking approach, and there are important
4 points for the future. So we would be content to proceed on the basis that you have outlined,
5 and we do not believe that that would interfere with the process of the ongoing investigation,
6 which is and would remain on target indeed with the dates my friend, Mr. Green, has
7 mentioned.

8 THE PRESIDENT: What do you say – Mr. Green says we might get into a frightful confusion if we
9 did not understand what the Statement of Objections was saying and we might in some way
10 risk derailing either the timetable or the other Decision, if there is one?

11 MR. FOWLER: We do not think it would derail the timetable on the current ongoing proceedings,
12 because the points are discrete points, and we do not think it would get into a confusion of any
13 sort of conflict between the view that the Tribunal took on the original Decision and the view
14 that it might take on whatever ultimate Decision we have on the ongoing proceedings. It is,
15 and always has been our position, that the matters are quite distinct, and the approach to be
16 adopted in the two cases is quite different.

17 THE PRESIDENT: Yes.

18 MR. FOWLER: It does not seem to me, at any rate, that the Tribunal would need to examine in
19 detail the approach we have adopted on an *ex-post* basis in the current proceedings in order to
20 form a view about the approach you adopted in the original Decision.

21 THE PRESIDENT: Well it might be useful to have sight of the Statement of Objections simply to
22 have an idea of what it is all about but not, I think, for the purpose of trying to form a view as
23 to whether the Statement of Objections was on the right lines, because that would be the
24 subject of a further Decision or not, as the case may be, which would be heard in due course if
25 there was an Appeal either by this formation or some other formation – we have no idea who
26 would hear the final Appeal in the second case, if there was one.

27 MR. FOWLER: As I say, we do not think that it would cast light on the approach we adopted in the
28 quite different circumstances of the original Decision.

29 THE PRESIDENT: Right, so from your point of view, just to descend to practicalities for a moment,
30 a hearing on the two issues that I identified in very broad terms – probably inadequately – but
31 in, for example, the first week of July would not be a course that you would necessarily
32 oppose?

33 MR. FOWLER: No, we would not oppose that, indeed we would quite welcome that.

34 THE PRESIDENT: You would quite welcome that.

1 MR. FOWLER: We believe it would be helpful to us to know where we stand on those important
2 issues.

3 THE PRESIDENT: Where we are, quite, yes. I think we are all looking to know what on earth the
4 answer is on some of these points. Yes, thank you very much. Yes, Mr. Barling?

5 MR. BARLING: Sir, we are only interveners and so to some extent our view is perhaps ----

6 THE PRESIDENT: Yes, but you are fairly closely affected, I think.

7 MR. BARLING: We are. Surprisingly, I find myself on this matter today more aligned with
8 Mr. Green than Mr. Fowler, who seems to have shifted his views slightly.

9 THE PRESIDENT: Everyone seems to be shifting a little.

10 MR. BARLING: We are not shifting, if that is any consolation. We fully understand the feeling in
11 the Tribunal. You have had an Appeal before you for quite a long time now and, up to know,
12 Wanadoo has been very much encouraging the Tribunal to push it along, and we can therefore
13 see that when the Appellant wants, as it were, to have his day in court there must be a strong
14 inclination on the part of the Tribunal to do that. That has somewhat changed in a sense today
15 in the light of Mr. Green's submissions in that they have put forward reasons which we very
16 much associate ourselves with as to why it would not be very helpful in the context of this
17 litigation for those discrete matters to be decided now.

18 THE PRESIDENT: You had better elaborate, I think, on that.

19 MR. BARLING: Yes. We entirely accept that the matters the Tribunal has identified, the two
20 points, are matters of importance upon which the guidance of the Tribunal would be of great
21 assistance to industry in general, and no doubt telecoms. in particular. However, the course
22 that we have proposed does not mean that that guidance would not be forthcoming from the
23 Tribunal because if the Tribunal were to go down the other route, rather than pushing ahead
24 with a separate hearing, where it is pretty clear that there is going to be a final decision from
25 Ofcom either in June – and that is in a very short space of time if it is non-infringement – or by
26 the end of the year. Even if there is some slippage one would hope it would not be much, and
27 so one is looking at a final Decision in the current investigation.

28 What would then be envisaged is that one side or other is going to appeal that
29 Decision and there is no reason – unless the Appellants took the view they wanted to abandon
30 this Appeal – why those Appeals should not be conjoined so that all these points, including the
31 two that you have identified, would be before the Tribunal we would submit in probably
32 a more efficacious way than dealing with them in a sequential way. So all these things could
33 be looked at in the round and appropriate guidance given in a case which really mattered.

34 THE PRESIDENT: On the basis of a Decision at the end of the year ----

1 MR. BARLING: Well at the end of the year at latest. We very much hope that they will be
2 persuaded that they have not got a case, in which case ----

3 THE PRESIDENT: Let us say ----

4 MR. BARLING: Let us say the end of the year.

5 THE PRESIDENT: -- the end of the year, for argument's sake, or November/December, that would
6 mean in practical terms, if we just sink it through in practical terms, an Appeal would come in
7 by some time in February 2006 and it would not really be feasible to get such an Appeal on
8 probably before the Autumn of 2006, and no doubt that second Appeal, assuming just at the
9 moment by hypothesis that it was an infringement Decision, would (or might) contain all kinds
10 of points about dominance, and the difference between narrowband and broadband, and this,
11 that and the other, and might very well be a lengthy and complicated Appeal to deal with.

12 MR. BARLING: Yes.

13 THE PRESIDENT: The result of which, if we came on in the autumn of 2006, would probably mean
14 we would not have a Decision on that Appeal much before 2007.

15 MR. BARLING: That is realistic.

16 THE PRESIDENT: Whereas here we are in 2005 on the existing Appeal virtually ready to go in
17 terms of the pleading and the work that has gone into it.

18 MR. BARLING: Let me come on to that. What is the utility of the alternative course of action,
19 namely to bring on this Appeal? In terms of this investigation it is to some extent ancient
20 history. It is three years ago and I think everyone accepts – even Ofcom accepts for the
21 moment – that they have taken a different approach to the current investigation than they took
22 then. Whether they are right or wrong in so doing is another matter, but they have regarded it
23 as being a different situation. I think the Tribunal's assumption is that this is a point, as it
24 were, about the launch products in the new market, where guidance generally might be useful.
25 But in terms of the current situation it is usefulness is more limited – if indeed it has any.

26 As for it being something which is ready to go I would just hazard a guess that it is
27 going to be a lot more complicated than might have been indicated up to now. It is going to be
28 hugely important to BT because if there is going to be guidance on new products then
29 obviously everybody is going to be interested. It is going to be a question of whether the
30 actual Decision contained flaws so that it might be reversed; then, as Mr. Green has said, there
31 will be a great deal of examination of the analysis that was carried out by Ofcom, and one
32 should not underestimate it, you have seen how much there was in terms of s.26 Notices and
33 financial information.

34 THE PRESIDENT: We have all the pleadings, and we have all the stuff. If people were kind enough
35 to waive their hearing we could decide it now on the basis of the written submissions.

1 MR. BARLING: Well, may be that would be one way.

2 THE PRESIDENT: It may be one solution!

3 MR. BARLING: It is not going to provide any guidance, as I understand it. If Mr. Fowler is saying
4 it is not going to delay at all their current investigation, which we find slightly surprising given
5 that they apparently devoted very considerable resources – equivalent to seven full-time people
6 over six months – to this investigation, and you have seen the degree of activity that is still
7 continuing in terms of information being sought from BT, that preparing for even the kind of
8 truncated Appeal that the Tribunal is envisaging is not going to cause them problems – it
9 would certainly cause us some problems, but that is probably of less importance in the
10 Tribunal’s thinking.

11 The other matter we are most concerned about is the suggestion that the Statement of
12 Objections, and in our submission this indicates the depth; we are getting into an unusual
13 situation here, the Statement of Objections, which is certainly no longer going to be the
14 operative Statement of Objections in this current investigation given what Ofcom has
15 said ----

16 THE PRESIDENT: You are expecting another one, you mean?

17 MR. BARLING: Well we are either expecting another one or expecting a non-infringement.

18 THE PRESIDENT: Yes, I see.

19 MR. BARLING: We all know that there is another document due in June and it can only be one or
20 the other. So the current statement of objections, whilst no doubt interesting and of some
21 importance, is not going to be the document if this matter goes ahead as an infringement
22 Decision. If you go to look at that you will almost certainly need to look at BT’s response to
23 it, and I can tell you we are dealing here not with simple documents ----

24 THE PRESIDENT: No, there are thousands of metres of material.

25 MR. BARLING: There is an awful lot of material and it is extremely dense, so we are not sure
26 anyway that it would be an appropriate thing for this Tribunal to do in an investigation with
27 which you are not seized, so that is a matter of concern for us.

28 THE PRESIDENT: Well I think Mr. Green was inviting us to look at that on the basis that it would
29 enable us to understand whether or not there is some overlap between the existing Appeal and
30 the current investigation. I am not sure it actually matters whether there is an overlap your not.
31 You have the existing Appeal and there it is.

32 MR. BARLING: One also slightly wonders whether if the utility that the Tribunal has in mind is
33 simply to give guidance to the general public, to the industry generally, whilst accepting in
34 effect that it cannot affect the way the current investigation is proceeding because if

1 Mr. Fowler is right they are just bashing on anyway and it is not going to delay the process,
2 therefore they are not going to await the Tribunal's guidance which may not be available itself
3 until perhaps the Autumn.

4 THE PRESIDENT: No, it is most unlikely to be available before then.

5 MR. BARLING: We do question why the rush? These are important points, why not just tie them in
6 an orderly way with an Appeal from whatever Decision Ofcom is now going to produce? We
7 maintain, and we have not shifted, that there is not much utility now in going forward with this
8 and that it would be better in a way to get on with the real one that matters. So I do not know
9 if I can really say much more than that.

10 THE PRESIDENT: Thank you. Yes, Mr. Green, do you want to come back?

11 MR. GREEN: Just a couple of points. First, so far as the overlap is concerned, I think if the
12 Tribunal went ahead with its issues 1 or 2, or variants of them, it would be our position that we
13 would want to say to the Tribunal "Look at the glaring inconsistencies regardless of what
14 Mr. Fowler says between Ofcom's approach then and now". We will want to say that their
15 approach then was illogical evidentially based and they have now corrected their position,
16 having seen our pleadings in this case. Again, you are at a disadvantage not having the
17 document in front of you, but as I have just been saying ----

18 THE PRESIDENT: When your Appeal was pleaded you did not have the existing Statement of
19 Objections and I can understand you might want to bring it in on what used to be loosely
20 described as "prej. grounds", but is it really relevant?

21 MR. GREEN: Never one to forgo prejudice, but on this occasion what we have said in the first
22 Appeal is that Ofcom had adopted an entirely illogical approach towards the evidence. What
23 we now see is that they are adopting the approach that we suggested in the pleadings and one
24 can actually see it can lead to almost directly opposite results. They still say in the Statement
25 of Objections: "This is an immature market" and their approach would therefore be based upon
26 the best historical data plus the future looking DCF cohort approach. What we have been
27 saying to them all along is now reflected in the statement of objections. It is perfectly possible
28 we can go forward and argue the case on the basis of our existing pleadings, but we would
29 wish to pray in aid that Ofcom has adopted our submissions and no one has remotely suggested
30 that the Statement of Objections is somehow different from the two month period in issue, then
31 we can easily established that that is bunkered by reference to the Statement of Objections
32 itself. We think it is going to be artificial for you to close your minds to the Statement of
33 Objections. You may decide to go ahead with preliminary issues, but we do not think you can
34 do it in ignorance of the Statement of Objections. That, for the reasons Mr. Barling has just

1 given, then invites the question “How far do you open the door towards not just the Statement
2 of Objections, but variants of the Statement of Objections, s.25/26 requests ----

3 THE PRESIDENT: Well he says “You cannot look at the Statement of Objections without at least
4 looking at what our answer is to the Statement of Objections because that would not be fair”.
5 He says that this Statement of Objections is about to be replaced by something else, either
6 another Statement of Objections or something that takes ----

7 MR. GREEN: The first Statement of Objections takes the data up to a certain period in time, and
8 I am speculating but the second Statement of Objections could very logically just extend the
9 time period for the data, but that is a speculation.

10 THE PRESIDENT: So you say we would need know about it?

11 MR. GREEN: That is part of the concern that we have. Our visceral reaction would be to go
12 forward to an Appeal because we want to get rid of this first Decision because if we ever want
13 to bring a claim for damages it stands in the way. It stands as a Decision which is dangerous to
14 my client’s business and so on. However, on the other hand we feel that the second Decision
15 is more important, and we think there is a blurred distinction between the two now.

16 THE PRESIDENT: On the timetable as I was sketching out a moment ago if we allow it all to wait
17 we are at least we are at least two years away from any ruling on your present Appeal that was
18 introduced 18 months ago.

19 MR. GREEN: That is undoubtedly true, it is a long period of time on any view. If this were a major
20 Decision covering a long period of time in respect of which events had not moved on I think
21 we would be deeply concerned about it, but it is an odd Decision concerning a two month
22 period, and if it were the case *ex hypothesi* that a new and negative Decision against BT were
23 to emerge, then it is something we could live with. At some point we would wish to see that
24 Decision addressed, but we would have thought it would be better in the light of a Decision on
25 the main issues, when you had looked at everything in the round, it would be a relatively
26 straightforward task to deal with the two month period. So as a matter of practicality it does
27 not seem to us to be a major problem.

28 PROFESSOR PICKERING: I wonder whether I could put a thought to you? Let me start by saying
29 that in the last Case Management Conference you are recorded – I think it is on p.8 – as saying
30 that Article 82 is “prophylactic”, intended to prevent harm rather than cure a problem that has
31 already arisen. The way this discussion is going seems to me to raise a very important
32 question as to whether or not your clients – and by implication anybody in the future in
33 a similar sort of situation – would be right to raise a complaint within the very early months of
34 the introduction of a new product into the market. I know that your argument has been that
35 you should wait for historic data, and not look at forward looking information whether it be on

1 financial models or business models. But what are the implications of this position if
2 advanced as a general proposition now in terms of the ability of a company that feels it is being
3 harmed by another organisation that it claims to be dominant in the early stages. If something
4 needs to be nipped in the bud surely it is then and not to wait for some much more significant
5 period of time so that one can see what the historic financial and other consequences are. Do
6 you see the point?

7 MR. GREEN: I have entire sympathy with that point. I am not certain it necessarily coincides with
8 the facts of this case, because the Decision was taken at a time in this case when there was
9 historical data, so it was not a prophylactic complaint before something had ever happened
10 saying that there is plain evidence there is going to be an abuse, do something about it. It was
11 “Here is the complaint, you have X months worth of evidence, you should look at that
12 evidence and see that there is an abuse, do not ignore it”. Ofcom is saying “No, no, we will
13 just look at it on a forward looking basis”.

14 THE PRESIDENT: You mean by 20th November 2003 there was historical information subsequent
15 to May 2002?

16 MR. GREEN: Yes.

17 THE PRESIDENT: Which might have thrown light on what the situation was in
18 March ----

19 MR. GREEN: Yes, there was historical data as of the date of the complaint, and as of the date of the
20 Decision and prior to the date of the two months which is in issue.

21 THE PRESIDENT: Your original complaint was in March 2002, was it not?

22 MR. GREEN: It was, yes.

23 THE PRESIDENT: You said “We cannot make any money out of this market”, basically?

24 MR. GREEN: That is right, and that original complaint, of course, was dealt with by the Tribunal at
25 an early stage, and then we moved on.

26 THE PRESIDENT: Well, we moved – how far we moved I am not sure!

27 MR. GREEN: We shuffle forward! That issue could have arisen in Appeal 1, but Appeal 2 starts
28 someway down the line when there is a track record, so I entirely take the point, but I am not
29 certain it necessarily coincides with the facts of this case. The point we make on this Decision
30 is a slightly different one.

31 THE PRESIDENT: You said I think that you had two points to make?

32 MR. GREEN: I think I elided one and two in my opening submission.

33 THE PRESIDENT: So we have both your points?

34 MR. GREEN: Yes.

1 THE PRESIDENT: Thank you. I think we had better retire and consider what we are going to do.
2 We will not come back until half past 12, at the earliest.

3 (The hearing adjourned at 12.10 p.m. and resumed at 12.45 p.m.)

4 (For Ruling see separate transcript)

5 MR. BARLING: Sir, can I just say I am very grateful that the Tribunal has reserved any question of
6 looking at the Statement of Objections. Can I just say for the record that BT “objects” rather
7 than “hesitates”, we would strongly object ----

8 THE PRESIDENT: I may have understated that.

9 MR. BARLING: -- to that being looked at by the Tribunal, it being before the Tribunal because we
10 feel it would be wrong in principle, but I think the Tribunal has already said there will be the
11 opportunity for further argument about that should that become a live question.

12 THE PRESIDENT: Yes.

13 MR. BARLING: Yes, I am grateful.

14 THE PRESIDENT: Thank you. Yes, Mr. Green?

15 MR. GREEN: Just a few points. As you will have gathered we have been rather torn about this, and
16 we are somewhat comforted, although our jaws dropped when Ofcom said it would not derail
17 the timetable, and so we take a great deal of comfort in that and no doubt Ofcom will progress
18 in the manner that they have identified. Can I clarify one issue concerning the scope of the
19 issues and of course our Appeal is defined by our Notice of Appeal. The Tribunal has
20 identified what I think we should understand as the context to the issue which you find to be
21 relevant, which is the “nipping in the bud” and “penetration pricing”, but the manner in which
22 the Tribunal latterly addressed or identified the two main issues are ones we are comfortable
23 with which is the approach of Ofcom, and whether it was correct; and secondly, if the
24 approach was correct whether there were errors in its application. Again, in broad terms we
25 are happy with those, because I think those then encapsulate the three main issues that one
26 could summarise our Notice of Appeal as reflecting, which are: first, was Ofcom right to
27 examine only May and June 2002 as of November 2003? That I think falls within the rubric of
28 general approach; and secondly, if they were correct, was it correct to examine the case only on
29 the basis of forward looking evidence of BT’s business plans? Again, I think that falls into the
30 general question of their approach. Thirdly, was the Decision consistent with relevant
31 principles of EC law? I think that would generally fall within both because s.60 would plainly
32 come into play.

33 THE PRESIDENT: Yes.

34 MR. GREEN: I think the second way in which the Tribunal has identified the broad issue, namely
35 were there errors in application, again I think are evidential and factual matters governed by

1 our Notice of Appeal. So unless I have misunderstood the Tribunal you are not departing from
2 the Notice of Appeal.

3 THE PRESIDENT: No, absolutely. But in so far as the latter you might just help me, I am just
4 quickly reminding myself, on the question of errors of application, how far is that actually
5 a live issue?

6 MR. GREEN: It is not a major part of our Notice of Appeal.

7 THE PRESIDENT: Because your Notice of Appeal is really meeting the thing head on on a basis of
8 principle.

9 MR. GREEN: It is, yes. I think the nearest one gets to that is in s.10, the data relied upon in the
10 undertaking to the Tribunal, but it is a fairly broad attack upon the approach adopted.

11 THE PRESIDENT: Yes, you do say it is based on flawed economic investment models and matters
12 of that sort, but the basic points may well be encapsulated in those three first points that you
13 have just made, I think.

14 MR. GREEN: I only rose to deal with this because on our Notice of Appeal there is a distinct
15 question of timing and coincidence of different timings, and that is really the thrust of our
16 analysis.

17 THE PRESIDENT: Quite, well that is the main point, yes.

18 MR. GREEN: So far as dates are concerned, if we did it in the first week of July it would start on
19 a weekend! We are probably, I think, contemplating 4th, 5th, 6th?

20 THE PRESIDENT: Those are the dates we had in mind.

21 MR. GREEN: We may well do it in less than three days, but it may be sensible to reserve a three
22 day window.

23 THE PRESIDENT: I would have thought the 4th and 5th July, with a possible third day for the
24 6th, but I doubt whether we are going to need it.

25 MR. GREEN: So it is a three day window, but hopefully finished within the first two days.

26 THE PRESIDENT: Yes.

27 MR. GREEN: I think Mr. Barling will probably take some comfort from the fact that so far as the
28 statement of objections is concerned, we will be putting it forward to show the approach of
29 Ofcom. We will not be inviting you to rule that it is correct or incorrect ----

30 MR. BARLING: No.

31 MR. GREEN: -- but no doubt he will not take any comfort!

32 THE PRESIDENT: We would not be able to rule on that anyway.

33 MR. BARLING: We will need to have a hearing about this, Sir, in that case, because we need to
34 fully argue whether it is at all appropriate for that to be put before the Tribunal.

1 THE PRESIDENT: Is there some way – he wants to make the forensic point that they have changed
2 their view.

3 MR. BARLING: It is more than that actually. I have to be careful what I say about it, but it is clear
4 from the Statement of Objections that Ofcom had certain evidence available to it as of
5 November 2003, and it was able to derive certain conclusions as to profitability as of that date
6 – that is set out in certain tables. So we know what Ofcom’s position was as of the date of the
7 instant decision and we know what they would have arrived at by way of factual conclusion
8 had they done the exercise we invited them to do. That demonstrates, we will submit, an
9 elementary point about Ofcom’s approach which is that they should have looked at historical
10 data when they took their decision and they would have arrived at certain conclusions.

11 THE PRESIDENT: What I am just wondering particularly, Mr. Green and Mr. Barling, is whether
12 there is some way in which this kind of point can be put before the Tribunal without the
13 Tribunal needing to actually read the Statement of Objections? If the point is that they had
14 some evidence and they should have used it, I would have thought that point could be made
15 without us looking at the Statement of Objections, could it not?

16 MR. BARLING: It may be that there can be some admissions made by Ofcom or something of that
17 kind.

18 THE PRESIDENT: Admissions could be made, or some procedure could be devised which will
19 enable Mr. Green to make his point to protect the ----

20 MR. BARLING: I am not sure how it takes it much further forward because his point is that the
21 approach was completely wrong and there were some errors in actually what they did. How
22 does it help to show you could have done something else?

23 THE PRESIDENT: I do not know how it helps or not.

24 MR. BARLING: I do not understand the point.

25 THE PRESIDENT: But the only question is how we can enable Wanadoo to put what they think is
26 their case while protecting your interests as best we can.

27 MR. BARLING: But their case on this Statement of Objections is not at all anywhere yet. We do
28 not know what they ----

29 THE PRESIDENT: Well it is obviously not in the Notice of Appeal ----

30 MR. BARLING: No, it cannot be.

31 THE PRESIDENT: -- because it is a long way subsequent to the Notice of Appeal, which is no
32 doubt the first point you will make if and when we have to argue the matter.

33 MR. BARLING: Until we know quite what they want to use it for it is very difficult to know
34 whether they should be allowed to.

35 THE PRESIDENT: Could you give some thought to this, Mr. Green, and see whether there is

1 a sensible way of cutting this particular Gordian knot?

2 MR. GREEN: We will do indeed.

3 THE PRESIDENT: Yes, thank you. If you need to make an application you will have to make one
4 and then we will have to argue it.

5 MR. BARLING: It may be a point of principle that obviously needs to go further.

6 THE PRESIDENT: It may be, Mr. Barling, but let us cross that bridge if and when we get there.

7 MR. GREEN: I do not think I have anything further unless I can assist you?

8 THE PRESIDENT: A date for a skeleton?

9 MR. GREEN: Can we leave that to be sorted out between the parties and with the Registry?

10 THE PRESIDENT: If you can come up with a proposed timetable between the parties I think that
11 would be helpful. Mr. Fowler, is there any observation you would wish to make?

12 MR. FOWLER: Only on the Statement of Objections I think it ought to be possible, as the Tribunal
13 suggested, to arrive at some means of identifying what it is that is said to have changed or
14 altered, and I am sure we can agree what we have done in the Statement of Objections, and
15 explain why what we have done in the Statement of Objections is different from what we
16 normally do or the Decision.

17 THE PRESIDENT: Well so long as it can be done in a way that protects what BT understandably
18 sees as a rather sensitive issue; I hope that that can be done. Very well, thank you all very
19 much indeed.

20 (The hearing concluded at 1.15 p.m)