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IN THE COMPETITION APPEALS TRIBUNAL

Case No. 1007/2/3/02

New Court,
Carey Street,
London WC2.

Tuesday, 22nd October, 2002

Before:

SIR CHRISTOPHER BELLAMY
(The President)

PROF JOHN PICKERING
DR ARTHUR PRYOR

B E T W E E N:

FREESERVE.COM PLC

Applicant

and

THE DIRECTOR GENERAL OF TELECOMMUNICATION

Respondent

supported by

BT GROUP PLC

Intervener

MR JAMES FLYNN appeared for the Applicant.

MR JON TURNER appeared for the Respondent.

MISS KELYN BACON appeared for the intervener.

*Transcribed from the shorthand notes of
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PROCEEDINGS

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THE PRESIDENT: Good afternoon, Mr Turner, yes?

MR TURNER: May it please the tribunal, I appear today for the Director General. Mr Flynn for Freeserve and Miss Kelyn Bacon for BT.

THE PRESIDENT: Yes.

MR TURNER: Before beginning, Sir, may I just raise two housekeeping matters?

THE PRESIDENT: Yes.

MR TURNER: First, very briefly, I hope the tribunal has now received the two patent cases that I notified you of.

THE PRESIDENT: I am not sure that we have.

MR TURNER: I passed copies to the Registrar, I have additional copies, but you did ask me for those cases last time round.

THE PRESIDENT: Oh yes.

MR TURNER: They are not relevant to today's hearing. The second issue is an issue of timetable.

THE PRESIDENT: That is on confidentiality, is it not?

MR TURNER: That is on confidentiality. They are decisions of the Court of Appeal in that area, where they considered precisely the sort of thing that we were discussing last time.

THE PRESIDENT: Yes.

MR TURNER: The second matter is the timetable. Of course, the tribunal has produced a timetable giving slots for people to do the oral submissions today. The timetable was produced on 16th October, and that is before my learned friend put in his rather large skeleton, and as the tribunal knows I have 30 minutes for my opening submissions in total. My friend then has a 15 minute break to consider what I have said and a 45 minute response. I had a 15 minute reply. I shall endeavour to do what I can to fit everything in, but there are a mass of points that I would love to address the tribunal on. I will be as economical as I can and I am hopeful that the tribunal will extend some flexibility.

THE PRESIDENT: We will try not to cut you short, Mr Turner. There is a good deal of latitude built into that timetable - I say

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1 "good deal", some latitude. We may not need those slots for
2 short adjournments, so you take your own course and I will stop
3 you if I think you are taking too much time.

4 MR FLYNN: If I may, I think Miss Bacon and I are slightly confused.
5 We had understood the timetable to be that the applicant would
6 start and have the half an hour and that Mr Turner would have
7 the three quarters of an hour should he need it.

8 THE PRESIDENT: Oh, I see.

9 MR FLYNN: And for his information, I am not proposing to be as
10 long as half an hour on the basis that it is a full skeleton,
11 the tribunal will have read it and so will Mr Turner.

12 MR TURNER: Well, in that case I am in your hands, Sir. I had
13 understood that as I was the applicant on this application that
14 that meant me, but if that is the tribunal's desire I am
15 perfectly happy.

16 THE PRESIDENT: Well I think on the last occasion when we were
17 dealing with an issue of this kind it was the Director who
18 started, Mr Flynn, he is the one who is trying to persuade us
19 that there is no decision, so I think he has the right to start.

20 MR FLYNN: I am not objecting to that at all.

21 MR TURNER: No, it is an understandable confusion.

22 THE PRESIDENT: Yes, I think it is you to start, Mr Turner.

23 MR TURNER: Very well. I shall attempt to deal with matters in this
24 way, Sir, and to organise submissions as follows under five
25 heads, taking the first four as quickly as possible. First, to
26 address some preliminary remarks on Freeserve's general approach
27 to the case and the overriding tone. Secondly, to refer to the
28 essential test for what is an appealable decision giving the
29 tribunal jurisdiction. Thirdly, to refer to matters of
30 underlying principle relevant to that issue, matters of
31 institutional balance that I wish to draw attention to, and also
32 the matters that are referred to by Mr Green and Mr Flynn in
33 their skeleton - for example, Human Rights considerations.

34 THE PRESIDENT: Yes.

35 MR TURNER: Fourthly, I shall refer to the importance in this case
36 of the course of dealings between the parties and other aspects

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1 of the context in appreciating whether there has been a final
2 decision on infringement on any of these issues.

3 Then I shall, fifthly, return to discuss some of the four
4 heads of complaint by reference to the matters set out in
5 Freeserve's skeleton.

6 THE PRESIDENT: Yes.

7 MR TURNER: If I may begin then with a preliminary remark. Plainly,
8 as one sees from the skeleton Freeserve wishes to paint the
9 Director General in this case as having changed his tack and
10 recasting the true history of events with a view to avoiding an
11 appeal, and there is a section of skeleton on page 9, paragraph
12 19(3) in which he accuses the Director General of "regulatory
13 squirm" and "regulatory lockjaw" which apparently means
14 camouflaging or concealing a negative decision that has, in
15 fact, been made.

16 Since that point has been made in those terms, I will deal
17 with it very shortly and immediately. I can see that it is our
18 duty at this stage to ensure that the contents of the Director's
19 skeleton argument do reflect the true intention of the official
20 responsible for drafting the case closure letter who, by the
21 way, is not a lawyer, and to do so as closely and faithfully as
22 possible. It is that aim that explains the position that has
23 been taken on each point in my skeleton, and it does explain in
24 particular why we felt it appropriate to say that although
25 perhaps a borderline case in relation to the so-called
26 "telephone census" that Oftel had decided there that there was
27 no infringement. But there is no recasting and there is an
28 honest attempt to transmit to this tribunal what was actually
29 intended by the officials in question, and you will be the
30 judges of which party has embroidered its original case.

31 Moving to the essential test for an appealable decision.
32 The first observation which it is necessary to make is---

33 THE PRESIDENT: By the officials in question do we mean the
34 gentleman who signed----

35 MR TURNER: Mr Russell, John Russell.

36 THE PRESIDENT: Yes.

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1 MR TURNER: On the essential test for an appealable decision, it is
2 first necessary of course, and this is not controversial, to
3 distinguish whether a decision has actually been made and then
4 whether that decision is an appealable decision. That was the
5 analysis that the tribunal conducted in the Bettercare case, and
6 it is not controversial.

7 In this case it is not disputed that the case closure
8 letter has decisional quality. Oftel did not intend to
9 investigate any further the points that Freeserve had raised.

10 THE PRESIDENT: So it is a decision in other words?

11 MR TURNER: Yes. But the case closure letter does not contain
12 definitive decisions about compatibility of BT's conduct with
13 the Chapter 2 prohibition in the Act, and I leave to one side
14 the telephone census point in this.

15 The way we say the issue has to be approached is as
16 follows: one asks the question has the Director General
17 definitively decided that certain conduct on the part of BT does
18 not amount to an infringement of the Act. In such an analysis it
19 is important that the conduct as whole is the relevant subject
20 matter of inquiry, not any individual point that is made about
21 that conduct in the complaint.

22 May I illustrate that by way of a crude example? Suppose
23 that a complainant were to say to Oftel that BT's pricing was
24 discriminatory as between Firm A and Firm B, and that it was
25 also predatory - they were pricing below cost by some relevant
26 measure. Oftel investigates the complaint and it says there is
27 no discrimination and that the matter does not warrant further
28 investigation in its view.

29 At that point the complainant resurfaces and says that the
30 Director General has completely forgotten to address the
31 predatory pricing question and that indeed the real issue all
32 the time was predatory pricing. The Director General's response
33 is that he does not propose then to spend further time on the
34 matter. In those circumstances it cannot be said that the
35 Director General has decided that BT's pricing (which is the
36 relevant conduct) does not infringe the Act. He has addressed

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1 one contention by way of a reasoned decision. He has declined to
2 spend further resources on looking at the other issue which has
3 been raised in relation to BT's pricing.

4 THE PRESIDENT: If we just stop there on that example, the finding
5 on discrimination you have just described as a reasoned
6 decision, so that is a decision?

7 MR TURNER: It has a decisional quality, yes, it is a reasoned
8 decision.

9 THE PRESIDENT: That is a reasoned decision, but the other one is
10 just not, it has just not done anything, as it were, and he says
11 he is not going to do anything.

12 MR TURNER: Yes.

13 THE PRESIDENT: And that is not a decision as to whether or not
14 there is an infringement.

15 MR TURNER: And it is important to look at the conduct concerned.
16 The question is whether the conduct, which is BT's pattern of
17 pricing, let us say, during a particular period, does not
18 infringe the Act.

19 The complainant raises a number of points and the Director
20 General says "I will give you a view on one of those but for
21 whatever reason I am not pursuing the other contentions, I am
22 not looking at that". What I say is, in those other
23 circumstances it cannot be said that the Director General has
24 decided that BT's pricing does not infringe the Act. He has
25 addressed one contention raised in relation to the pricing, but
26 he has declined to spend further resources looking at the
27 pricing.

28 THE PRESIDENT: It might be that he has decided that BT's pricing
29 does not constitute - in its discriminatory aspect - an
30 infringement of the Act.

31 MR TURNER: He may have done that. If so, that does not meet the
32 test for an appealable decision in my submission, particularly
33 in circumstances where, and the analogy with circumstances of
34 this case may become apparent in a moment, the point that is
35 sought to be taken on appeal is only the predatory pricing point
36 which has not been looked into and on which the Director General

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1 has not reached a decision.

2 THE PRESIDENT: So on this analogy, if it is the predatory pricing
3 point that is raised on appeal you say in these circumstances
4 there is no appealable decision---

5 MR TURNER: Yes.

6 THE PRESIDENT: ---for that purpose?

7 MR TURNER: There are two possible ways of analysing this, namely,
8 that either one looks at the conduct as a whole, the pattern of
9 pricing, what BT has actually done, and one sees whether the
10 Director General has proved the negative - the Director General,
11 on the available evidence has said "nothing in this constitutes
12 an infringement of the Act". In my submission, if he plainly has
13 not looked at one element that has been presented to him he has
14 not made that decision.

15 Alternatively, one says he has made a decision in relation
16 to one contention. He has rejected that contention.

17 THE PRESIDENT: Yes.

18 MR TURNER: If it is so construed then one might say that one could
19 appeal in relation to that decision, here the discriminatory
20 pricing, but where what is sought to be taken to the tribunal is
21 an altogether fresh point which has not been considered in the
22 first instance.

23 Now, there are two ways of looking at it. I submit that
24 the former way is the right way to analyse this by reference to
25 the terms of the Act. But even if the second way is the
26 appropriate way to view matters, in relation to certainly the
27 first head of complaint here - the cross marketing activity
28 complaint where there is a close analogy - similarly we say that
29 there is no jurisdiction. Just to complete the analogy, as I am
30 now on that of course, what has happened in relation to the
31 cross-marketing complaint is that there were perhaps two issues
32 that were raised by the complainant. We say that the major
33 thrust was always on cross-marketing - what has been referred to
34 as "brands' leveraging". The only point that is sought to be
35 taken on appeal relates to cross-subsidy - issues that, when
36 one looks at the document fairly and in its context, the

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1 Director General just did not go into. Freeserve knows, as I
2 have put in our skeleton, perfectly well that the Director
3 General threw out the point about brand leveraging that did not
4 go into the cross-subsidy issue.

5 If I may turn from that, which was intended to be by way
6 of a sort of general, analytical framework, to issues of
7 principle and institutional balance, and invite the tribunal
8 just to turn up paragraph 19 of Freeserve's skeleton. I think
9 the relevant part is on page 8 with the Roman numerals. There is
10 a number of points taken to support the proposition that the
11 tribunal should lean liberally in favour of finding jurisdiction
12 in a case such as the present, and my submission - and I shall
13 deal with this only very briefly - is that the arguments are
14 profoundly misconceived. The first point, which it is necessary
15 to address, is that a broad view is needed if the Act is going
16 to be consistent with Article 6 of the Human Rights convention.

17 THE PRESIDENT: Yes.

18 MR TURNER: Article 6 requires a fair hearing where there is a
19 determination of civil or criminal rights or obligations. That
20 is misconceived for two reasons. First, there is not a
21 determination of Freeserve's civil rights here. Freeserve is
22 inviting the Director General to take up a complaint
23 administratively. If the Director does not do so, Freeserve can
24 go to the civil courts and sue BT directly. The hearing before a
25 civil court might constitute a determination of Freeserve's
26 civil rights. This administrative procedure does not.

27 Secondly, and equally fundamentally, Article 6 assumes
28 that there is a determination of civil rights, and looks then at
29 the fairness of the procedure. But here, the very question is
30 the threshold one---

31 THE PRESIDENT: The argument goes round in circles.

32 MR TURNER: Yes, it goes round in circles. The second point that is
33 taken is that recourse to the civil courts is somehow
34 unsatisfactory, and we say briefly that that is odd. If
35 Freeserve is talking about a civil action against BT there is
36 nothing in its way here, particularly since Freeserve nakedly

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1 complains that Oftel have not addressed its complaints properly
2 - not that it has done so and cogently rejected them in terms
3 that might influence a High Court Judge.

4 If, on the other hand, what Freeserve is saying here is
5 that it is the constraints of Judicial Review that matter, the
6 short point is that the Judicial Review procedure reflects the
7 fact that the Director General has an important decision not to
8 reach a final, appealable decision in a particular case.

9 What we say on this issue is that the considerations tell
10 rather in the reverse direction; that there are crucial
11 considerations of institutional balance that should make the
12 tribunal think very hard indeed before finding an appealable
13 decision in this case, least where it is not admitted.

14 It perhaps goes without saying but the focus of this
15 Director, and the other Directors, is on investigating possible
16 significant infringements of the Act, and it would be gravely
17 contrary to policy in my submission if this tribunal was too
18 ready to find that informal indications to a complainant were
19 accidentally appealable decisions. These appeals are obviously
20 resource intensive, and it would be wrong if disproportionate
21 resources were being spent on considering whether an appealable
22 decision had or had not been made every time one came to close
23 the file on a poor quality complaint because that would shift
24 the centre of gravity away from the Office's more important
25 work.

26 THE PRESIDENT: Do you characterise this decision as an informal
27 indication to a complainant?

28 MR TURNER: On the three heads I do, yes, and consciously not a
29 formal decision as to infringement of the Act.

30 Next, if I may briefly turn to the importance of the
31 course of dealings between the parties, and other aspects of the
32 context in this case. It is common ground that one needs to take
33 into account the full context in this case, and deciding whether
34 an appealable decision has been made, that is in both parties'
35 skeletons. In my submission, that includes first the fact that a
36 recent Telecommunications Act investigation into cross-subsidy

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1 issues had been concluded on 28th March, and although there is
2 an appeal mechanism under the Telecommunications Act that has
3 not been pursued, and this is, of course, I shall say relevant
4 to the cross-subsidy complaint. It needs to be borne in mind in
5 considering that part of the letter.

6 Secondly, of course, the fact that this was in the nature
7 of a preliminary investigation of the facts, a full
8 investigation of the facts was never meant to be undertaken, and
9 that was consciously conveyed to Freeserve.

10 THE PRESIDENT: So it stopped at the end of the preliminary stage?

11 MR TURNER: Yes. Now, Freeserve says that that just goes to show -
12 at best that is neutral, because it just goes to show that if
13 there is no case to answer that maybe because a decision on the
14 merits was taken. I accept that it is neutral where one is
15 dealing with issues of principle, for example, such as arose in
16 the Bettercare case. But if one takes here the advance
17 notification complaint, one is dealing with an investigation of
18 factual matters - what actually happened. Did BT wholesale give
19 advance notice to BT Openworld, or not? Part of the steps that
20 one must take before arriving at a final decision is to come to
21 a conclusion on those facts, and if one is at the stage of a
22 preliminary investigation where confessedly one is not
23 investigating the facts in detail, then it makes it at the least
24 very unlikely that a final conclusion on the facts, on what
25 actually happened, will have been reached, and that is the
26 extent of my submission in that regard.

27 Thirdly, it is necessary for the tribunal to take into
28 account what happens at the meeting between the parties on 17th
29 April. There are two notes now as to what occurred at that
30 meeting, but both notes do at least say - in slightly different
31 terms - that Oftel emphasised at the time that the material
32 Freeserve was putting forward on the cross-subsidy issue was too
33 thin to warrant re-opening its former investigation.

34 It was not saying therefore that chapter is closed and we
35 will not re-open it. It was saying we may re-open it provided
36 cogent evidence is put forward, a more thought out complaint but

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1 what you have put forward does not satisfy that test.

2 Fourthly, and finally, in relation to context, and I shall
3 not dwell on this but give the tribunal the references. I note
4 that at paragraph of Freeserve's skeleton there is an indication
5 that the Director General refused a meeting and truncated the
6 entire procedure. That is just not what happened. The truth is
7 quite the reverse, and it can be seen from the series of e-mails
8 at tab 3 of the Director's disclosure bundle, and perhaps the
9 tribunal might also subsequently wish to look at the letter from
10 Baker & McKenzie at tab 4 referring to a plan to send in
11 additional material in the week beginning 29th July.

12 What those e-mails show, in short, is that the issue of
13 anti-competitive conduct in the emerging broad band sector
14 remains very live; that Oftel stress that it was receptive to
15 any new and well thought out complaint; that Freeserve declined
16 a meeting, preferring to put in a new complaint that it always
17 said was coming, but which has not yet arrived.

18 THE PRESIDENT: There has been no new complaint?

19 MR TURNER: No, although in the "Financial Times" this morning
20 there is a reference to a complaint having been lodged one has
21 not arrived.

22 THE PRESIDENT: This is the only complaint extant?

23 MR TURNER: This is the only extant complaint, but if you look at
24 that series of e-mails you will see that all of those facts
25 emerge, and what it shows is that issues of predation, cross-
26 subsidy, cutting across the issues raised by this case closure
27 letter have not been ruled out at all. The necessity is for the
28 complainant to put forward a well thought out complaint. Just
29 before leaving that point and turning to some detailed
30 observations, I do invite the tribunal to look at the note
31 attached to Freeserve's skeleton argument, the note of the
32 meeting of 17th April. At the end there is a part of it which is
33 entitled "conclusion", and if one looks at what is said at
34 paragraph 2, in my submission that sums up the reality of the
35 situation.

36 *"Complaints relating to cross-marketing, brand leverage,*

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1 *cross-subsidy and predation need greater articulation and more*
2 *stringent legal analysis if they are to be picked up by Oftel*
3 *and form the basis for an investigation whether on the basis of*
4 *undue preference, competition law, or both."*

5 Turning then, lastly to the detailed observations on the
6 four heads of complaint, and I will endeavour to be very, very
7 fast.

8 THE PRESIDENT: Just before you go on, Mr Turner, I think there is
9 possibly a conceptual issue to be explored here at some stage,
10 which is when we are tackling this question of whether or not
11 the Chapter II prohibition has been infringed, to have a
12 decision, do you have to have something that is, in your words
13 "final" or "definitive", or closes something off or rules
14 something out?

15 MR TURNER: Yes.

16 THE PRESIDENT: Which is, as it were, the Director's concept of a
17 decision, and I can fully understand why he so submits? Or can
18 you have something that is still a decision when he says "This
19 is my decision on the basis of the information that you have
20 given me, that is still my decision. If you want to give me some
21 more information, of course, I will look at it, but you asked me
22 to decide on the basis of what you told me, and on the basis of
23 what you told me I decide that there is no infringement."

24 MR TURNER: My submission is the former. One comes to a very neat
25 grey area when one discusses the issue of making a decision on
26 the basis of the available evidence.

27 THE PRESIDENT: Yes.

28 MR TURNER: And perhaps the right way to address it is to ask
29 oneself whether, conscious that there may be other aspects out
30 there, the Director expresses himself as dealing with a
31 particular argument or contention, but consciously not endorsing
32 conduct in this case, as not infringing the Chapter II
33 prohibition.

34 THE PRESIDENT: Hang on. I am sorry, I lost you, "...consciously not
35 endorsing..."

36 MR TURNER: The argument that the conduct concerned does not

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1 infringe the Chapter II prohibition. I accept that of course all
2 courts and tribunals make decisions on the basis of the evidence
3 presented to them.

4 THE PRESIDENT: Yes.

5 MR TURNER: But where what is known by that court or tribunal is
6 that there are other elements out there which would need to be
7 taken into account before the conduct concerned could be said
8 not to infringe the Act then one has not made an appealable
9 decision.

10 If the tribunal or court concerned, or here the director,
11 makes the decision on the available evidence saying well that is
12 good enough for me, this conduct does not infringe the Chapter
13 II prohibition, that is a different matter.

14 THE PRESIDENT: If we just test that a moment, just for argument's
15 sake, by looking at the decision, which is in tab 3 to the
16 application, if you look at the first complaint, that started
17 off as a cross-marketing complaint, but you say it is now a
18 cross-subsidy complaint?

19 MR TURNER: Yes.

20 THE PRESIDENT: If we just assume, for the sake of argument, that it
21 was and remained a cross-marketing complaint, and it is that
22 that the Director was dealing with in his decision, when we get
23 to paragraph 3 of this document, under the heading "OfTel's
24 View", it is said:

25 *"There is no prohibition on BT advertising its brand and*
26 *services collectively or individually. BT is entitled to trade*
27 *on its brand awareness, use that to promote its internet*
28 *services. Other service providers can do it. They undertake*
29 *substantial mass media campaigns, and are beginning to do*
30 *it...."* etc.

31 Then there is a reference across to BT.Com Broadband
32 website, and so forth. Is the Director not, as it were, taking a
33 fairly clear position on that argument, as it were, point of
34 principle, he would be entitled to use his product?

35 MR TURNER: Yes, he is taking a firm decision on those points.

36 THE PRESIDENT: So is this not a decision on those points? It may be

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1 they are no longer in contention and your best point is that he
2 dealt with the complaint, and that is what he did.

3 MR TURNER: It comes down to this. If the true analysis is that the
4 Director is saying "I am aware that there are other things that
5 one might consider before one could give this conduct a clean
6 bill of health, but I am able to address these particular
7 points, and to be helpful to you I will do so, to explain to you
8 as a matter of good administration why these points are
9 misconceived".

10 THE PRESIDENT: Yes.

11 MR TURNER: My primary submission is that that does not create an
12 appealable decision, in part for the very reason that has arisen
13 in this case that, assuming that to be the case, the only point
14 that is coming to the tribunal is the cross-subsidy issue,
15 everything else has been jettisoned, and that cannot be the way
16 that the Act was intended to operate.

17 THE PRESIDENT: It is a question of where, analytically, you put the
18 point about cross-subsidy. You could say, I would have thought,
19 or arguably you could say - looking at it now from your point of
20 view - the original complaint was about cross-marketing. We
21 dealt with cross-marketing. It is a perfectly plain statement of
22 principle about cross-marketing. If you want to ask me whether
23 that is a decision about cross-marketing, OK, it is a decision
24 about cross-marketing.

25 MR TURNER: Yes.

26 THE PRESIDENT: What has now come up is a quite different argument
27 about cross-subsidy, I never dealt with that, so there is
28 nothing in this decision about cross-subsidy.

29 Then I think the question for the tribunal would be "Was
30 there ever in this complaint a suggestion of cross-subsidy or
31 not?" There is some evidence about it in one of the notes of
32 the meeting, but it is probably not in the original complaint.
33 Is it something that is raised? If it was raised but not dealt
34 with, where do we go from there? Is it a sort of "no decision"
35 situation?

36 MR TURNER: Yes.

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1 THE PRESIDENT: Or is it something that we simply say has not been
2 dealt with - has not been dealt with, we cannot go into it - and
3 we leave them to make another complaint, or what? I am not sure
4 that the argument - yes, I see where you are coming from, you
5 are saying on that point your main argument is that they have
6 shifted the ground, and the new ground to which they have
7 shifted is not a ground upon which the Director has ever taken a
8 decision?

9 MR TURNER: Yes. As a matter of fact, and subject to what my
10 learned friend says I regard it unarguable that cross-subsidy
11 was not dealt with by the Director in this document. The only
12 reference indeed that one finds when the Director deals with the
13 Wanadoo proceedings, before the European Commission---

14 THE PRESIDENT: So he has not dealt with it?

15 MR TURNER: He has not dealt with it and yet the peculiarity is
16 that this is the point that they want to take to the tribunal.

17 THE PRESIDENT: Yes.

18 MR TURNER: That is the factual situation, and I say that one can
19 analyse it in two ways, both of which lead to the same
20 conclusion.

21 THE PRESIDENT: Yes.

22 MR TURNER: I think, Sir, you have that.

23 THE PRESIDENT: Yes, I have got the way you put it now. Just to
24 complete that exchange, if we were still on the question, if
25 they were still pursuing cross-marketing would the terms of
26 paragraph 3 in your submission have decisional quality - I mean
27 in the same category really as the telephone census conclusion,
28 that the fact you were using your brand, in itself, is not an
29 infringement of Chapter II prohibition?

30 MR TURNER: Yes, there are two possibilities again, and Freeserve
31 would be the last to say that this was not the case, cross-
32 subsidy is there as part of the original complaint, and it has
33 not been dealt with. The result is that the Director has not
34 formed a final view on the conduct and its compatibility with
35 the Act, in which case the fact that a view has been expressed
36 on a particular contention does not result in an appealable

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1 decision. The narrower view is that if the Director has, in a
2 reasoned way, rejected a particular contention about the
3 conduct, and I accept that he has done that in relation to the
4 brand leveraging point, for the avoidance of doubt. So that
5 point can be appealed to this tribunal. The Director has dealt
6 with it, one predicates that the applicant has come back and
7 said that that decision in relation to brand leveraging was
8 wrong for the following reasons, and should be withdrawn or
9 varied, and if the Director refuses to do so it goes on appeal.

10 THE PRESIDENT: Yes.

11 MR TURNER: But none of that has happened in this case.

12 THE PRESIDENT: Yes, I see. Thank you.

13 MR TURNER: Cross-marketing activity, just turning then directly to
14 that by way of some very brief observations on the detail.

15 The cross-marketing activity complaint, to be clear,
16 relates to a series of newspaper advertisements which I
17 understand were placed over a short period from, I believe, 26th
18 February to the end of March. That is the aspect of conduct
19 which is now in issue, and it is over, that campaign.

20 The essential point which, Sir, you now have well on
21 board, in our submission is that the Director General just did
22 not investigate or decide on issue of cost apportionment, and
23 however one analyses it he did not reach a final decision that
24 there was no abuse of cross-subsidy.

25 THE PRESIDENT: And you say you cannot, by the device of asking
26 somebody to vary a decision, get into play a contention that you
27 never raised in the first place?

28 MR TURNER: Yes. There is one point to add as the discussion has
29 gone in this direction, which is that it is not just a black and
30 white situation with brand leveraging on the one hand, and
31 cross-subsidy on the other. I note in particular what is said in
32 my friend's skeleton at paragraphs 23 (iii) and 25, in relation
33 to what are the last two sentences of paragraph 4 of the case
34 for closure letter, and if the tribunal could just look at the
35 last two sentences of paragraph 4 first of all.

36 THE PRESIDENT: Yes.

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1 MR TURNER: What you see there is Mr Russell saying that it is
2 likely that Openworld derives benefit from the general BT
3 broadband adverts. However, it is Oftel's view that all service
4 providers benefit from this advertising by specific links to
5 their own services. It is interesting to see what Freeserve say
6 about that in their skeleton. If the tribunal then turns to
7 paragraph 23(iii) which is on page 11, what you see is that that
8 part is quoted, and then at the bottom of the page:

9 *"The conclusion of the Director is that there is no abuse,*
10 *as all internet service providers derive some benefit from the*
11 *advertising, no matter whether one service provider derives*
12 *disproportionate benefit."*

13 So that has been focused into a proposition on non-abuse.
14 The same point is then picked up and reinforced just two pages
15 on, at paragraph 25 on page 13, and three lines into that, after
16 saying that this is not leaving the file open, which is not in
17 issue, we have:

18 *"...rather he finds nothing untoward in any of the*
19 *advertising conducted by BT, concluding that all service*
20 *providers derive some not necessarily equal benefit, and that*
21 *this is sufficient for there to be no abuse."*

22 The puzzlement that we have is where that last clause
23 comes from: *"and this is sufficient for there to be no abuse"*,
24 because the Director is not making any conclusion there about
25 abuse. The Director is simply saying that everyone benefits from
26 the general advertisements to an extent and nothing more than
27 that, and it is perfectly consistent as a sentiment with the
28 proposition that it is not considered worth conducting any more,
29 investing any more resources into looking at that matter.

30 THE PRESIDENT: What he concludes is that what he has been supplied
31 with does not provide evidence of anti-competitive behaviour -
32 that is what he concludes.

33 MR TURNER: What he concludes, yes, that is so. That is a wrap-up.

34 THE PRESIDENT: That conclusion is expressed in the same terms as
35 his conclusion about the telephone census.

36 MR TURNER: Now, that is a separate point. If I may deal with that,

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1 it is quite true that in relation to each the same tag is used,
2 but to draw from that the inexorable conclusion that in each
3 case a non-infringement decision has been arrived at is wrong.
4 One needs to look at the substance, not the form. If that were
5 to be the argument then I would say that in relation to the
6 telephone census as well it was not necessarily the case that a
7 decision was intended to be made.

8 What I have done is to approach it in terms of the
9 substance of the decision and not to give decisive weight to
10 matters of that kind, because in truth it is neutral. There are
11 two parts to that tab for one thing. It says that the
12 information supplied does not provide evidence of anti-
13 competitive behaviour, that is one thing. Then it goes on to
14 say "*and the Director does not consider that this issue warrants*
15 *further investigation*", and with that qualification one
16 indicates that the matter may not be deserving in some areas of
17 further investigation.

18 THE PRESIDENT: It means he is not going to go on to the next stage,
19 that is really what it means, is it not?

20 MR TURNER: Or that he is not going to look at it any further to
21 decide either way whether in some relevant respects there is an
22 abuse or not, because he has looked at it, and this is a good
23 example, really, the question of the web pages and whether
24 Openworld derives benefit where the other service providers do
25 not. The reality is that it has been looked at and one sees a
26 web page which refers to a whole range of service providers, and
27 Oftel is saying "Each of them benefits to an extent. I am not
28 going to go further into this matter to examine with a fine
29 toothcomb whether there may be some disproportionate benefit if
30 one tries to quantify this accruing to BT Openworld".

31 In truth, that is the sentiment expressed in those
32 sentences. It is not, when read in context and fairly, a
33 conclusion that there has been no abuse. Similarly, in the same
34 vein Freeserve says in its skeleton at paragraph 23 (iv) which
35 you need not turn up, that the Director General has made a
36 definitive finding that it is not abusive to have a 28 day

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1 notice period for price changes rather than a 30 day period, and
2 he has concluded on the merits that the complaint is *de minis*.
3 In fact, looking at this in the real world, all that Oftel is
4 doing is correcting an apparent misapprehension that Freeserve
5 has exhibited in the original complaint, appearing to believe
6 that there was no mandatory notice period at all. That language
7 is perfectly consistent with the desire to be helpful on the
8 part of the official by saying "There is a 28 day notice period
9 anyway which you may not have appreciated". But to turn that
10 round and characterise it as a non-infringement decision is not
11 warranted.

12 The last matter that I desire to draw attention to on this
13 issue is significant. It is that the attack on my skeleton,
14 which is sustained throughout the Freeserve skeleton proceeds on
15 a false premise. At paragraph 26, this is a short point but it
16 is important, in the Freeserve skeleton it is said that we
17 assert in paragraph 4 of ours that "there has been no decision",
18 and it does not say that. If you look at paragraph 4 of our
19 skeleton it says that there was no decision, that there was no
20 unlawful cross-subsidy. That must be incontestable.

21 Sir, I am taking too long so I shall go very quickly to
22 advance notification and cross-subsidy---

23 THE PRESIDENT: Yes.

24 MR TURNER: ---make a few points and then sit down.

25 THE PRESIDENT: Thank you.

26 MR TURNER: Advance notification. Freeserve's case depends on two
27 propositions. First, that the Director General ascertained the
28 facts to its satisfaction; and secondly, that the Director
29 concluded that those facts did not amount to an infringement.
30 Neither of those is accurate.

31 So far as the facts are concerned, Freeserve seeks to
32 distance itself from that letter of 17th April, in which the
33 Director General made clear that he was going to carry out only
34 a preliminary investigation into the facts. Indeed, at paragraph
35 41(i) of their skeleton, Freeserve says:

36 "The Director nowhere says in the decision that his

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1 *investigation was preliminary."*

2 They urge that the decision must not be read in the light
3 of that letter. But, of course, in the last sentence of
4 paragraph 8 of the case closure letter, that is precisely what
5 is said. As part of its preliminary investigation, it said,
6 Oftel has obtained information on these issues from BT.

7 THE PRESIDENT: At the moment I think the tribunal is looking at it
8 as a case closure letter at the end of a preliminary
9 investigation.

10 MR TURNER: Yes, but what is important is in relation to the facts.
11 It may not be worth developing this much more, but we say that
12 in relation to the conclusions, for the reasons given in our
13 skeleton, they are of a provisional nature as to what actually
14 occurred, and Oftel never intended to make definitive findings
15 on the question of advance notification. Having obtained
16 information after an investigation that was limited in scope
17 Oftel decided not to go further.

18 Lastly then, cross-subsidy - the general cross-subsidy
19 complaint. Our position is simple. The complaint that was made
20 on 26th March was framed in terms of a general cross-subsidy
21 problem. They said that BT Openworld was not generating enough
22 revenue to cover its costs. It was supported by a very thin
23 document, a hypothetical one year business case. Oftel had
24 recently investigated cross-subsidy issues in this precise area
25 and there had not been any appeal from that, although I
26 understand today that a group, including Freeserve, did
27 apparently suggest that Oftel had made a Competition Act
28 decision at that time, and indicated an intention to appeal, and
29 we can produce the documentation should it become necessary.

30 Sir, with the best will in the world, Oftel was not
31 inclined to re-open that investigation on the basis of such thin
32 material and it said so. One sees that both from the Director
33 General's note of the meeting which Freeserve urges you to
34 disregard, and Freeserve's note of the meeting. My point of
35 principle is that to decide that the evidence presented does not
36 justify opening a full investigation into something is not the

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1 same as reaching a final decision that the underlying conduct
2 does not infringe the Act.

3 If a better, cogent complaint were submitted the Director
4 General would consider it on the same subject matter.

5 Finally, simply as a matter of fact, the tribunal will
6 probably already have spotted that Freeserve, in their skeleton,
7 characterised this, as a determination that BT is pricing its
8 new service at below cost for over 12 months. There is nothing
9 of that kind in it, it is failure to cover its costs, to achieve
10 sufficient revenue to cover its costs, viewed over a particular
11 time period, but not pricing below cost for a period of more
12 than 12 months as appears to have been suggested.

13 Perhaps it would be sensible if, with that, I were to sit
14 down and let my friend respond.

15 THE PRESIDENT: Yes, that is very helpful, thank you, Mr Turner. Mr
16 Flynn, we had adjournments built in to the timetable, but if it
17 is convenient to you to go on, I think it is probably sensible
18 just to plough straight on.

19 MR FLYNN: I will endeavour to pick up Mr Turner's points as we go
20 along.

21 THE PRESIDENT: Do you need time, would you like five minutes?

22 MR FLYNN: Five minutes to talk to my instructing solicitor would
23 be helpful, if we can be given that. I do not think I am going
24 to take the time that I had thought was allotted to him!

25 THE PRESIDENT: Well, because it takes a little time to get up and
26 get down, and sort it out, let us say 10 minutes, and then it
27 will probably save time in the end.

28 MR FLYNN: I think so.

29 (Short break)

30 THE PRESIDENT: Yes, Mr Flynn.

31 MR FLYNN: I am grateful to the tribunal for the short adjournment,
32 I hope that will enable a more cogent presentation. If I could
33 just briefly present Mr Green's apologies for not being able to
34 attend today.

35 Sir, I think we are agreed that there are the three
36 questions to be asked following the Bettercare analysis, namely,

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1 was there a decision? Is it appealable; and have the
2 requirements of s.47 been complied with?

3 THE PRESIDENT: Yes.

4 MR FLYNN: Those are the agreed three conditions that the tribunal
5 has to consider. As I understand the Director's position now,
6 clearly he is no longer taking the point that the case closure
7 letter has nothing to do with the Competition Act. That
8 reasoning in the 8th July letter has been disowned. He accepts,
9 as I understand it, that all three of those points are made out,
10 are satisfied as regards the telephone census issue, and
11 therefore the appeal must proceed on that head of complaint.

12 We are grateful for that concession and it is properly
13 made, and nothing said in the skeleton or what I intend to say
14 today is to be taken as any criticism of Mr Turner for making
15 that concession. But it does leave us wondering where the
16 distinction is to be drawn in relation to the other three heads
17 of complaint where the Director is maintaining his view that
18 there is no decision which the Tribunal can review. Now, in the
19 skeleton the phrases "Regulatory squirm", "Regulatory lockjaw"
20 were minted for the actually serious purpose of trying to
21 characterise the position where a Director has made, obviously
22 in the applicant's submission, an underlying decision as to
23 infringement, but will not acknowledge that in the
24 correspondence between the parties, which has to be brought to
25 this tribunal. It is a sort of position as if he had seen or
26 heard that there is no evil in this case, but he will not speak
27 that - he will not state his conclusion. It is for that reason
28 that we submit in the strongest possible terms that it is
29 undesirable for appeals to this tribunal to turn on the fine
30 distinctions as to the words that are used in the
31 correspondence, in the exchanges between the parties. We submit
32 the tribunal's job is to cut to the quick, cut to the core of
33 what was actually done, and if it does not do that it will find
34 that it is faced with many more hearings of this kind in which
35 we spend time arguing how many angels are dancing on the head of
36 a particular pin.

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1 I think it is substance that has to prevail over form, as
2 Mr Turner said. But if the tribunal allows this Director, or the
3 other Directors over whom it has jurisdiction to hide behind
4 formulae about informal indications to complainants, or not
5 worth investing further resources in this particular
6 investigation or other such phrases, of the kind that are,
7 perhaps, hinted at in paragraph 83 of the Bettercare judgment,
8 and the admissibility point, then appeals to this tribunal will
9 be shut off and stifled.

10 Mr Turner has accepted, I think, that in all respects this
11 case closure letter contains a decision, and we clearly agree
12 with that characterisation. Under each head of the complaint the
13 reasons given for not proceeding have the necessary character or
14 the finality. That analysis is, in our submission, reinforced
15 and not undermined by the Director, and strong reliance on his
16 17th April letter, which is tab 2 in his disclosure, and that
17 two stage approach which is set out there - Sir, I think you
18 already indicated that the tribunal is approaching this on the
19 basis that this is a case closure letter at the end of the
20 preliminary investigation set out in that letter. It is worth
21 just reminding our selves what the terms of that letter are in
22 relation to the preliminary investigation phase. That is a phase
23 when the *"Office will give initial consideration to decide*
24 *whether there is a case to answer which requires further*
25 *investigation"*.

26 THE PRESIDENT: Do you want us to look at it?

27 MR FLYNN: I have read the sentence, Sir, that is the sentence:
28 *"...initial consideration is given to decide whether there is a*
29 *case to answer."* I think both those phrases "to decide" and
30 "case to answer" are worth stressing. What has happened, if an
31 investigation is closed at the end of that preliminary phase,
32 the Director has positively decided not to take up the complaint
33 because there is no case to answer. There is no suggestion of an
34 infringement in that complaint that is worth pursuing. So it is
35 a positive decision not to take it any further, and he closes
36 his file. He is not at that point waiting for any further

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1 information, any additional details from the complainant, or
2 indeed from anyone else. He has decided that he will take no
3 further action. That was the Director's stance in this case as
4 we see from 8th July letter, where although Baker & McKenzie had
5 promised further reasons and information in their letter of 20th
6 June he nevertheless confirms the position that as far as he is
7 concerned that investigation is over.

8 We are not saying that the Director would not consider a
9 further complaint, or new material if it was suggested, but as
10 far as he was concerned that complaint was over and his file was
11 closed. Just on a point of information, Sir, I am authorised to
12 say that a further new and wider complaint by Freeserve will -
13 if it has not been already - be served on the Director today.

14 Sir, if I could just spend a couple of minutes on s.47 - I
15 do not know if my friend is taking any points on s.47. Our
16 submission is that in line with the approach which the tribunal
17 took in Bettercare, one perhaps does not have to be unduly
18 sophisticated about it, to the extent that the case closure
19 summary contained a decision or decisions within s.46. The 20th
20 June letter from Baker & McKenzie plainly called on the Director
21 to withdraw or vary that decision, and gave reasons for that
22 request. In my submission, if the request in the Bettercare case
23 was sufficient for those purposes, as the tribunal held that it
24 was, albeit with reservations then it must meet the criteria
25 here. Just for your notes, I am referring to paragraphs 123 and
26 124 of Bettercare. It is plain that the Director refused to
27 withdraw or vary his decision if one is made, albeit on the
28 basis that he is no longer relying on it.

29 There is one point raised in the skeleton where my friend
30 I think is saying on the cross-subsidy newspaper advertisement
31 point, that Freeserve did not call on the Director to withdraw
32 or vary that decision. I am referring to paragraphs 27, 28 and
33 30(b) of his skeleton point.

34 THE PRESIDENT: Well he says that the cross subsidy point was never
35 really raised in the complaint, so he never took a decision on
36 it. The request to withdraw cannot really be used to ask him to

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1 vary something about which he has not done anything.

2 MR FLYNN: Sir, yes, and our response to that, as you will see, is
3 first, that that is a point which is, as it were, subsequent to
4 the decision. It does not stop his decision on the points which
5 he did make being an appealable one. Our position is that he did
6 make a decision on that point, albeit that he misunderstood the
7 point that was being made to him by Freeserve. He reached the
8 wrong conclusion, possibly because he asked himself the wrong
9 questions, and did not see the point which was being made to
10 him. Nevertheless, that is the conclusion he reached.

11 THE PRESIDENT: Supposing we have a situation, for argument's sake,
12 where he has not addressed the cross-subsidy point at all, he
13 has just not said anything about it. What is the right legal
14 analysis from the tribunal's point of view. Can we be seized of
15 an appeal about something he has not addressed?

16 MR FLYNN: He has considered the conduct. If you take an overall
17 look at those paragraphs of the case closure summary. He has
18 considered the conduct that was put initially and he has said
19 that there is no evidence of anti-competitive conduct put
20 forward by Freeserve. So he has assessed the conduct claimed of
21 - he may not have fully understood the implications of what was
22 being said to him, he may not have put it very clearly, I do not
23 know, but for whatever reason he may not have been *ad idem* as to
24 where we were going, but he has assessed the conduct and he has
25 come to a conclusion on it. We can appeal that and whether we
26 are right, or whether we are embroidering the case, or making a
27 completely new point is a matter for the substantive hearing.
28 That would be my response.

29 So essentially, Sir that is a good illustration of my
30 point, that you should not be drawn into detailed textual
31 inquiries into individual phrases. You have to look at the
32 correspondence in the course of dealings between the parties as
33 a whole.

34 That brings me to another more general point about the
35 analysis here. It does not matter, it is not relevant for the
36 tribunal how thin the Director's analysis or how thin the

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1 complaint is, or how detailed or how broad brush his
2 investigation is, or his consideration of the issues, or indeed
3 how firm his conclusion. The legal question is whether he has
4 expressed, come to a conclusion of the type coming within s.46
5 and here relevantly sub-paragraph (b) of that provision.

6 Our submission overall is that here he carried out a
7 limited investigation, one can call it a preliminary
8 investigation if one likes, but he came to a firm conclusion. He
9 found in his own terms, in his own language that there was no
10 case to answer, and he has closed his file. No case to answer is
11 a very strong phrase. He had been able to satisfy himself that
12 there was nothing in the complaint. It is quite similar to a
13 strike out in civil proceedings. That may be a robust, a rough
14 and ready consideration, if a Judge comes to the view the case
15 is unwinnable - a short circuited investigative process, if you
16 like. It is shorter than a trial, not all the evidence will have
17 been heard. Reasons are going to be cursory, but nonetheless it
18 is a firm conclusion. This is the phrased Mr Turner used - "a
19 good enough for me" decision. He has looked at what has been put
20 in front of him. He has asked BT the questions he thinks he
21 needs to ask BT, and he has come to a firm view.

22 Indeed, Sir, as you will remember from Bettercare, this is
23 a case where the Director has gone further than Bettercare,
24 because he has actually spoken to the party whose conduct was
25 complained of. One of the issues that was put to you in that
26 case was that the Director could not have taken the decision
27 because he had not even spoken to the undertaking whose conduct
28 was complained of. The tribunal said I do not see why, if he is
29 able to reach a conclusion without doing that he should not do
30 that in principle. Here he has gone a little bit further and he
31 has asked BT the questions that he feels he needs to put to them
32 for the purposes of assessing whether there is a case to answer.

33 He reaches at the end of each section in the complaint an
34 identically worded formulaic conclusion that the information
35 that Freeserve has provided does not provide evidence of anti-
36 competitive behaviour, and he does not consider that the issue

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1 warrants further investigation. But that formula, in each case,
2 follows an analysis which we have been through this in detail in
3 the application in the skeleton. But in each case an analysis
4 under which he regards each head of complaint as not disclosing
5 an infringement, and it is true you will not find the words
6 "There is no abuse" in there, that is our inference from what he
7 is saying about not finding any anti-competitive conduct. We say
8 those conclusions are expressed in a firm and unequivocal
9 fashion and lead him to close his file on that.

10 He accepts that in relation to the telephone census. He
11 said that the Director was able to reach conclusions on that
12 point. If you compare that with most of the other heads it is in
13 my submission hard to see the distinction between them. If you
14 take the third head, for example - because it is easier to have
15 the two open together if your copies are double-sided - the
16 cross-subsidy point say, on the last two pages of the case
17 closure summary in tab 3, and you read through again and I am
18 not going to read them out to the tribunal, but read through
19 again the paragraphs 15 to 17, let us see there is clarity and
20 firm conclusions in everything he has to say. He refers to a
21 recent, thorough investigation into cross-subsidy and margin
22 squeeze.

23 I think the point is taken against us that Freeserve has
24 not sought to appeal that finding. I do not think I am in a
25 position to give a detailed response to that, but my
26 instructions are it is not accepted that Freeserve had the
27 ability to do that, and it is not a party to the group that
28 expressed a view as to whether there was a possibility of an
29 appeal under the Telecommunications Act, but if it is necessary
30 to go into that in detail then we may need to come back to you
31 on that.

32 But the Director refers to that recent inquiry where he
33 clearly had reached firm conclusions. He notes, in paragraph 16,
34 that other providers are undercutting BT's rental price and that
35 Freeserve is charging the same price. The inference is in that
36 case there is probably nothing wrong with the BT price. He says

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1 it is perfectly possible for a service to make a loss in the
2 first year without the price being judged predatory in
3 Competition Law terms. That appears to be a statement of legal
4 principle, to rebut what Freeserve had to say in its business
5 cease, which has been criticised as thin because it was thin and
6 it covered only one year.

7 Sir, he does not need Freeserve's projection in order to
8 reach his conclusion. He has taken it from the horse's mouth. He
9 has looked at BT Openworld's own business case, and found that
10 it is not implausible, and he has found that payback will occur
11 albeit in a period longer than one year. Likewise in paragraph
12 17 as to the special offer point, he is also able to reach firm
13 conclusions because he has looked at it recently, and he knows
14 there are other such offers around including one from Freeserve.

15 In our submission it is plain he is saying "I have looked
16 at this conduct, there is no infringement here, there is no case
17 to answer, and I am going to close my file. There is nothing
18 further to investigate." That seems to us is every bit a
19 decision, it has exactly the same qualities as his findings in
20 relation to the telephone census point - similar firm language
21 and definite conclusions, and in paragraph 20 reliance again on
22 his recent margin squeeze investigation. What is the difference
23 between the two? We are not able to see one and we suggest that
24 any differences as there are not relevant to the issue of
25 whether there is an appealable decision.

26 In relation to the first two heads of complaint,
27 essentially it is the same story, the same analysis. Firm and
28 unequivocal conclusions that he thinks there is nothing in what
29 we have had to say. We have already discussed the first head of
30 the complaint where we say for the purposes of preliminary issue
31 it cannot be relevant that we consider that his reasons for
32 dismissing it are the wrong ones. He reached a firm conclusion.

33 Likewise as to the second head of complaint there is
34 nothing tentative about those conclusions at all. True, he uses
35 the phrase "could have" in a couple of places, but if you read
36 it in context it is plain, we submit that he was entirely

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1 satisfied and satisfied from explanations that he had sought
2 from BT, that there was nothing in the discrimination point that
3 Freeserve was raising, and accordingly it necessarily follows
4 there is no infringement of the Chapter 2 prohibition.

5 THE PRESIDENT: He says, I think, and Mr Turner can put it much
6 better than I can, that on that last point he did not actually
7 reach any final views about what had in fact happened. He asked
8 BT some questions, he got the answers, the answers did not
9 support Freeserve's allegations and he, the director, thought
10 that that was sufficient to persuade him not to take the matter
11 further. That, I think, says Mr Turner is not sufficient to have
12 a decision as to whether or not there has been an infringement,
13 i.e. the Director is not actually taking a position on whether
14 there has been an infringement, if I have understood the
15 argument correctly, he is simply deciding "I am not going to
16 take this complaint any further".

17 MR FLYNN: Indeed, Sir, I think that may be how he is putting it,
18 but if one reads the wording it is not "We take no position on
19 that", he balances the evidence. He looks at what we say. He
20 looks at what BT have had to say, and he accepts their view of
21 events. There is nothing provisional about it. If you look at
22 the last sentence of each of paragraphs 10, 11 and 12 of the
23 case closure summary, there are clear conclusionary statements.
24 "OfTel considers this to be a reasonable timetable". "OfTel
25 accepts BT's contentions that it was the development of self-
26 install and not the wholesale price cuts which caused it to
27 begin ordering modems". The conclusion of paragraph 12: "OfTel
28 accepts that BT Openworld could have moved quickly following the
29 announcement of wholesale price reductions." So there is nothing
30 provisional, that "could have" phrasing is perhaps misleading
31 there. OfTel has accepted that they could have done that. They
32 are quite clear on that.

33 So their summary in paragraph 13: "OfTel considers that
34 given BT's existing broad band marketing activities it could
35 have moved quickly after 26th February. OfTel also believes that
36 the ordering of modems was based on preparation for the launch

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1 of a self-install service. That leads him to his conclusion: "We
2 have not provided evidence of anti-competitive behaviour".

3 Once again he has assessed the conduct, he has made the
4 inquiries that he felt that he needed to, and he has come to a
5 firm conclusion. It is not expressed, so far as we can see, in
6 language, it is expressed in firm language and even if he had
7 said "So far as we can see they did", he would have been
8 reaching the conclusion that there was no infringement on the
9 basis of the material he had in front of him, an in my
10 submission that would be an appealable decision.

11 I do not think that is the case that we have before us
12 because he clearly has assessed the story from each side.

13 THE PRESIDENT: What do you say about Mr Turner's general argument
14 on principle which I think goes something like this, and I will
15 articulate it so that I can be put right in a moment by counsel.
16 I think the argument is that there are really only two sorts of
17 decisions under this Act. One is whether there is an
18 infringement decision and that is fairly obvious and clear,
19 there is no particular difficulty about it.

20 The other is where there is a, quote, "decision of non-
21 infringement". So the Director says "A decision of non-
22 infringement is a rather important step for me to take. It is
23 rather the definitive measure, because I am really saying that
24 taking a public position in the certain activity does not amount
25 to infringement. So in order to reach a position of non-
26 infringement I have really got to explore it pretty thoroughly
27 to be satisfied that there really is no infringement here, and
28 that is what I do in some cases. I get that far and I arrive at
29 a decision of non-infringement. That is what the Act is talking
30 about".

31 "The Act is not really taking about a situation", says the
32 Director, "...where I am dealing with a complaint. I get lots of
33 these complaints. I have up to a point got to deal with them". I
34 am now putting words in the Director's mouth", "...up to a point
35 I have to deal with them in a way that is cheap and cheerful, as
36 it were, and get through the work within the six weeks that has

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1 been allotted to me. I cannot look into every complaint, into
2 the depth I would wish to look at it if I was going to take a
3 formal decision of non-infringement. So what I do after the end
4 of the preliminary stage is to say to myself whether the
5 complaint is worth taking any further. If I say it is not worth
6 taking any further, that does not mean it is an appealable
7 decision, it simply means I am not prepared to take it any
8 further".

9 If we interfere with that then we will upset the whole
10 balance of the way the Act is supposed to work, and put the
11 Director in an impossible position.

12 MR FLYNN: If he had written back to Freeserve "You may be right,
13 you may be wrong. I have not got time and resources, I have got
14 other things on my plate. You can go to the civil courts. Why
15 don't you do that and let us know how you get on?" It is not
16 part of our case that that would have to be an appealable
17 decision. That would be a decision in the sort of terms you have
18 described. He has other things to do and he was not going to
19 take a position.

20 THE PRESIDENT: But you say he has taken a sufficient position---

21 MR FLYNN: He has taken a sufficient position---

22 THE PRESIDENT: ---on the fact of this case.

23 MR FLYNN: Yes, he has fallen, if you like, between two stools. He
24 has fallen between the one that says - there is a range of
25 things that could say and some of them are sketched out in your
26 Judgment in Bettercare. He can say "It sounds very interesting
27 but I have not got the resources". "It does not sound very
28 interesting at all. It is not on my priority list. Come back to
29 me with more information and I might think about it." Or he can
30 go and come up with a non-infringement decision after what was
31 described at some point in Bettercare as an "all singing, all
32 dancing" investigation. But our submission is that he has fallen
33 between the two stools. He has made something of an
34 investigation and he has come to a conclusion and that
35 conclusion is a conclusion of non-infringement.

36 THE PRESIDENT: Yes.

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1 MR FLYNN: Essentially the submission is that this is a decision of
2 the type described in paragraph 85 of Bettercare. He
3 legitimately - "legitimately" in the sense that he is entitled
4 to do that - concluded - and I am paraphrasing the wording a
5 little - he has concluded that there is no infringement without
6 carrying out a formal investigation, whatever that might
7 involve, second stage investigation probably under his letter,
8 he has given only brief reason for the view that he has come to,
9 because in his view the matter is sufficiently clear to enable
10 him to reach a decision without further ado. That is essentially
11 what paragraph 85 of Bettercare says. In our submission that is
12 the case we have here on each of the four heads of complaint,
13 and therefore the appeal is admissible.

14 THE PRESIDENT: Yes.

15 MR FLYNN: Sir, I think I have probably dealt, at least I hope I
16 have, with most of the big points that Mr Turner made.

17 It is on the Convention and access to courts, our
18 submission is that these points are interlinked in that if we go
19 to court in relation to the substantive infringement at a time
20 when there is a complaint, or a complaint has been made and has
21 been dealt with by the Regulator, we will either be stayed or we
22 will be told that the Regulator did not think very much of it so
23 why should the court? This affects our ability to have our civil
24 rights determined. I think the points are seen as linked, linked
25 in that fashion. We are put in an invidious position if he
26 chucks out our complaint in this fashion.

27 I have been passed a note about the Telecommunications Act
28 investigation and appeal, but I think that is a point on which I
29 shall take detailed instructions, if that is seen to be---

30 THE PRESIDENT: I am not sure that it is going to affect the legal
31 issue one way or the other at this stage.

32 MR FLYNN: No. In that case, sir, unless there are further
33 questions from the tribunal, I should leave it there for the
34 moment.

35 THE PRESIDENT: Is there any submission BT would like to make, Miss
36 Bacon?

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1 MISS BACON: No, Sir.

2 THE PRESIDENT: Mr Turner, I think we, or I at least have one or two
3 things in my head that I would like to ask - not much, but one
4 or two points just to clear up.

5 MR TURNER: Yes.

6 THE PRESIDENT: It might be convenient if I just ask the questions
7 and then we rise for a few minutes and give you time to collect
8 your thoughts if you would like to.

9 MR TURNER: I am obliged, Sir.

10 THE PRESIDENT: I suppose the first thing that is in my mind is what
11 on earth are we to make of this letter of 8th July, when in so
12 far as it says, the Competition Act has not entered into it, or
13 words to that effect. I know you have, no doubt advisedly,
14 abandoned that position, but I am interested to some extent to
15 know how this letter came to be written in the terms that it
16 did, or how the writer came to think that he was not dealing
17 with the Competition Act, because it is a somewhat curious
18 position to have adopted. That, I suppose, is the first
19 question.

20 The second point is really this. I think we can all
21 understand the desire of Oftel to help the tribunal and to
22 arrive at a solution that is the correct solution for the
23 system, as it were. But is it not somewhat difficult for the
24 tribunal to, as it were, look into Mr Russell's head with the
25 benefit of such *ex post facto* explanations as are forthcoming
26 and work out what he thought he was deciding, as distinct from
27 looking at what the documents actually say. Have we not got to
28 go objectively by the documents?

29 I suppose, related to that, what are the consequences of
30 the submission that the telephone census point is an appealable
31 decision but the rest of the document is not. Does that mean,
32 strictly speaking, appeal proceedings before the tribunal on
33 that point but Judicial Review on the rest of the decision in
34 some other jurisdiction and what are the consequences that would
35 flow from that sort of analysis?

36 I think, for me at least, lastly, the Director's statement

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1 of policy of 1st July, 2002, which I am just trying to turn up.

2 MR TURNER: It is tab 12.

3 THE PRESIDENT: Yes, I am there, thank you. If we look at paragraph
4 3.13, if we look at the last six lines or so, what is being said
5 - I am picking it up at the question:

6 *"Where there is a case to answer, we will conduct a more*
7 *in-depth investigation and will generally use our formal powers*
8 *to gather information. Where we decide to close an investigation*
9 *because the Director General has concluded that the CAct has not*
10 *been infringed, we will continue our policy of publishing a*
11 *non-infringement decision. Such decisions will appear*
12 *simultaneously on the public register held by the OFT."*

13 That would suggest that the concept, or perhaps it does,
14 my question is: Does this suggest that the concept of closing an
15 investigation at the end of the preliminary stage is consistent
16 with the idea of having what is called here a non-infringement
17 decision? In other words, I suppose the question is does
18 paragraph 3.13 throw any light on this case or not?

19 So those are some points that I had in mind. I do not know
20 if my colleagues have got any particular points they want to
21 raise? [No questions]

22 THE PRESIDENT: Very well, we will rise for 10 minutes.

23 MR TURNER: I am obliged, sir.

24 **(Short break)**

25 THE PRESIDENT: Yes, Mr Turner?

26 MR TURNER: Sir, if I may begin with the questions that you posed
27 before the short adjournment, they do overlap to some extent
28 with the remainder of my points. I shall take them in turn, if
29 I may.

30 The fair question that the tribunal raised about the
31 letter of 8th July - how was it thought that the issues did not
32 relate to the Competition Act. The answer to that is, rightly or
33 wrongly, in tab 2 of the disclosure bundle, which I invite the
34 tribunal to turn up. That was the letter sent to Freeserve in
35 relation to its complaint, talking about procedure. Now, the
36 standard way of doing things at that time in Oftel was if the

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1 eye travels down to the bottom of the page, it refers to s.49 of
2 the Telecoms Act placing a duty on the Director to consider non-
3 frivolous representations and so on. Then it goes on:

4 *"The Director may investigate such representations under*
5 *the Competition Act where he is satisfied that this is the most*
6 *appropriate way of proceeding. I hope to inform you of the*
7 *conclusions by 28th May at the latest."*

8 Now, as I understand it, at least within Oftel as they
9 considered it analytically, they thought of themselves as
10 first of all looking at matters under the Telecommunications
11 Act, in accordance with the s.49 duty, and then having done so
12 if they formed the view that it was appropriate to pick up the
13 investigation and consider matters under the competition Act
14 they would then do so, and you will at the bottom of that page
15 and just going over the top of the following page that it is
16 said explicitly that "Oftel exercises its powers concurrently
17 with the OFT and Oftel" and "The OFT will agree on which
18 authority will consider your complaint if the Director General
19 considers it more appropriate to investigate your complaint
20 under the Competition Act, 1998."

21 So the structure that was envisaged was that first of all
22 you look at it under the Telecommunications Act, and then
23 subsequently you reflect and decide what to do, and you may
24 consider to travel on with the case under the Competition Act.

25 Now, in this particular case on reflection we considered
26 that the way that it had been approached in substance meant that
27 the matter had been closed for the purpose of the Competition
28 Act as well, and so we decided that we would not pursue the
29 point which had been taken in the 8th July letter, that as a
30 matter of procedure what had happened was that a particular
31 process that had been followed. We accept that when you read the
32 case closure letter it is, as Freeserve says, rejecting the
33 complaint in a broad sense, and that therefore it is appropriate
34 to take into account the Competition Act as well. But I hope
35 that that explains for the tribunal how matters arose.

36 Secondly, the tribunal asks is it not difficult for the

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1 tribunal to look into Mr Russell's head as distinct to focusing
2 on what the document actually says and respectfully we agree
3 with that - that has always been our position as well. But my
4 overriding submission is that one needs to bear in mind at the
5 outset the two strong points. First is context, and the second
6 is the issue of institutional balance. In relation to context I
7 say that it is necessary not just to look at the case closure
8 letter in isolation, which is what one naturally first does, but
9 to bear in mind that it is part of an ongoing conversation
10 between a regulated party and a Regulator, who are constantly
11 talking to each other, the letter is written in the flow of the
12 stream, as it were.

13 THE PRESIDENT: So there is an ongoing conversation between Oftel
14 and BT, you mean?

15 MR TURNER: And Freeserve, between Oftel and Freeserve. There are
16 discussions on issues of concern to Freeserve on a fairly
17 regular and informal basis, and I invite the tribunal to look
18 again after the hearing, perhaps, just at the tone and tenor of
19 the e-mails in tab 3 of this bundle, which really gives you a
20 picture of the sort of relationship that one has, and I ask the
21 tribunal not to ignore that, because it is part of the way in
22 which the Regulator does business.

23 As well as that one sees the meeting that took place to
24 discuss the complaint on 17th April, and everything that was
25 said there. Freeserve says it is not directly referred to in the
26 case closure decision. Of course, it is not, that is right, but
27 it would be very wrong not to take that into account.

28 Secondly, the previous cross subsidy investigation which
29 it is necessary to know a little bit about for the purpose of
30 understanding that portion of the case closure letter,
31 Freeserve was of course a party to those matters, and had been
32 centrally involved in it. I do not ask the tribunal to turn this
33 up at the moment, but if you go to the margin squeeze decisions,
34 one for residential, one for business, you see that Freeserve
35 is explicitly a party for one of those, and an industry group,
36 which includes Freeserve, is a party to the other.

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1 THE PRESIDENT: Yes.

2 MR TURNER: And one matter that my instructing solicitor has had
3 copied, and I have passed to my learned friend, I would desire
4 to show to the tribunal briefly. [Same handed to the tribunal]

5 The first of these is a letter from a man called Richard
6 Sweet, of the relevant industry group, and you will see there
7 that he wrote, interestingly enough, a s.47(1) letter about the
8 margin squeeze investigations, saying that that had all taken
9 place under the Competition Act as well, or should be so
10 construed. If you just turn to the end of the letter, you will
11 see that on page 3 at the bottom, Freeserve is specifically
12 identified as one of the companies supporting that application,
13 so that there is a history there.

14 The language really needs to be viewed in the context of
15 the experience that this was, as I say, part of an ongoing
16 conversation.

17 Thirdly, it would be wrong to ignore the letter reminding
18 Freeserve that this was in the nature of a preliminary
19 investigation because that does bear on the issue of the degree
20 of factual conviction that the Director General held, and that
21 is particularly relevant for the advance notification complaint.

22 The other matter, which needs to be borne in mind, and
23 which I do urge on the tribunal to consider carefully because it
24 is a matter of considerable concern, is the issue of
25 institutional balance, that the Directors, and here the Director
26 General of Telecommunications has to be able to deal with the
27 flow of complaints in as helpful a way as possible---

28 THE PRESIDENT: Yes.

29 MR TURNER: ---without feeling that if it puts a foot wrong or is
30 too helpful that someone is going to say "Well, there you are,
31 you have made an appealable decision, or so we construe it, and
32 that an awful lot of resources are then needing to be devoted to
33 this sort of exercise.

34 There is a desirability in some certainty for the
35 Regulator that they are able to engage in this function of
36 dealing with complaints on an informal basis, although in

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1 exceptional circumstances one quite sees that a non-infringement
2 decision of a definite kind may be made, the tribunal ought in
3 my submission to think hard before concluding in a particular
4 case that that has occurred.

5 I do not know if there are any particular points that the
6 tribunal has in mind in relation to looking into Mr Russell's
7 head, but as a general matter that is my response.

8 THE PRESIDENT: The only point I had in mind, and I do not know
9 whether it really takes one anywhere, is that you explained to
10 us very, fairly, very openly, that the reason why a different
11 approach had been taken to the telephone census point, as
12 distinct from the rest of the letter, was that Mr Russell
13 subjectively thought that that was a point on which one could
14 fairly be said to have taken the decision, whereas he was not
15 quite so sure about the other three.

16 MR TURNER: I understand. I am sorry to have given that
17 impression entirely. That does, in truth, accord with reality,
18 but I do rely on the fact ----

19 THE PRESIDENT: It does accord with reality?

20 MR TURNER: That statement does accord with reality. Mr Russell
21 does consider on that point that ---

22 THE PRESIDENT: That is very helpful background.

23 MR TURNER: He reached a view on that. But I ought to explain that
24 on objective grounds the telephone census part of the complaint
25 can be distinguished, and is sensibly distinguished, and I have
26 not yet done that, so I will now.

27 The telephone census part of the complaint is different
28 from the three other parts. It is different from the advanced
29 notification part of the complaint, because in the advanced
30 notification part of the complaint the clear fact is that Oftel
31 did not ascertain the facts in detail. It drew short of that. It
32 saw where matters were going and decided that it would not
33 proceed further.

34 By contrast, the telephone census part of the complaint
35 involves a neat and self-contained issue, and there was no
36 question of detailed factual information needed to be done, so

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1 that makes it different from that.

2 So far as cross-subsidy is concerned, as the tribunal is
3 aware our simple point there is that Oftel decided it was not
4 prepared to re-open its previous Telecommunications Act
5 investigation on the basis of thin evidence.

6 THE PRESIDENT: Yes.

7 MR TURNER: And that distinguishes it from the telephone census
8 portion of the complaint. The one that is more interesting is
9 the cross-marketing part of the complaint, and there are two
10 points of distinction here which we consider to be relevant. The
11 first is that the issue of cross-subsidy, the point that
12 Freeserve now seeks to take on appeal was raised, at least in
13 the meeting, with Oftel before a decision was taken, and it was
14 brought into the frame. The distinction between that and the
15 telephone census complaint is that although Mr Russell makes
16 reference, as an aside, to issues of cross-subsidy, something to
17 be borne in mind, in the case closure letter, it is not - and
18 never was - in the frame. It was never raised and indeed is
19 still not raised in any of the documents up to the notice of
20 application as being a part of the point on the telephone
21 census.

22 THE PRESIDENT: On the telephone census?

23 MR TURNER: On the telephone census. You will not find it in the
24 s.47(1) letter, or the reasons attached, or in the notes of
25 application, or anywhere. It is a different point.

26 Moreover, secondly, when one looks at the telephone census
27 complaint, one sees that the appeal that is sought to be brought
28 to this tribunal is on the same lines as that which the Director
29 rejected. Dispute is taken with the Director's conclusion, and
30 fair enough, in the Director's view, that makes it different
31 from each of the three other heads of complaint.

32 The third point, Sir, that you asked me to address was
33 what are the consequences of a submission, that the telephone
34 census point is appealable but the rest is not and, Sir, you
35 said specifically would that mean that Judicial Review is
36 available on the remainder, and what consequences flow from that

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1 analysis?

2 The first point to note is that this does all appear in
3 one document, but it is - to use an expression - an omnibus
4 complaint. There are four discrete matters that appear in one
5 document. They were presented as such and have been treated as
6 such at every stage. It would be wrong, therefore, to think that
7 one was dividing up a single animal in some peculiar way, in
8 fact they are four separate matters.

9 Secondly, there is, of course, no suggestion of Judicial
10 Review in this case, on any of the other heads. Assuming that an
11 appealable decision was not made on any of those other matters--
12 -

13 THE PRESIDENT: Yes.

14 MR TURNER: --it does not appear to be suggested, or would now be
15 suggested for the first time that that was an irrational step,
16 that the Director should, reasonably----

17 THE PRESIDENT: From the point of view of analysis and principle,
18 the remedy of Judicial Review would, in principle, be available
19 on the other three points. That is to say if they did wish to
20 challenge the other three points the only available avenue would
21 be Judicial Review. Is that right?

22 MR TURNER: Yes. It would be challenging, strictly speaking, the
23 Director's discretion.

24 THE PRESIDENT: The exercise of his discretion.

25 MR TURNER: Yes, the exercise of his discretion.

26 THE PRESIDENT: So you would have to show an error of law or a
27 misdirection or a wrongful exercise of discretion, or whatever?

28 MR TURNER: Yes. Finally, sir, you asked me to address the
29 statement of policy of 1st July, and the implications of that. I
30 have taken instructions. If the tribunal would not mind
31 referring again to paragraph 3.13 of that, for ease of reference
32 it is again at tab 12.

33 THE PRESIDENT: Yes.

34 MR TURNER: This paragraph is explaining what will happen after the
35 new regime to be brought into force, as from 1st July. There
36 will no longer be preliminary investigations, it is different

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1 from the situation that obtains on the facts of this case so
2 when, at the end of paragraph 3.13, Oftel says "When we decide
3 to close an investigation because the Director General has
4 concluded that the Competition Act has not been infringed. We
5 will continue with our policy of publishing a non-infringement
6 decision." The first point to note is that one is talking about
7 after a full investigation. The second point is that the
8 qualification is important because the Director General has
9 concluded that the Competition Act has not been infringed. That
10 is to say, where the Director General considers that he has
11 concluded that the Competition Act has not been infringed, which
12 is the very issue in this case, he has, and will continue with
13 his policy of publishing non-infringement decisions. I think I
14 attach to our skeleton argument an example of such a document,
15 and that is what is meant. But that is not to say that in every
16 case previously where a preliminary investigation was undertaken
17 that it necessarily follows from ending the preliminary
18 investigation that a non-infringement decision has been taken.

19 I have only a few remaining points.

20 THE PRESIDENT: Yes.

21 MR TURNER: First, on the issue of language. One of Freeserve's
22 principal submissions is that the Director General should not be
23 able to hide behind language. Well, true enough substance must
24 prevail over form, but Mr Flynn then relies strongly - having
25 said that - on the formula appearing at the end of each section
26 in the case closure letter. The two propositions are not
27 obviously compatible.

28 More particularly, in relation to the advance notification
29 issue, Sir, you probed Mr Flynn on what Oftel ought to have
30 done, beyond what appears in the document itself to flag up that
31 it had not reached a final decision. As I understood it, Mr
32 Flynn's response was to say that certain other things could have
33 been done. Oftel could have come back and said "We have not
34 reached a final view either way, but..." and so on.

35 In my submission, to do that is to essentially advocate
36 regulatory squirm; to say that particular language needs to be

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1 adopted is wrong. It is helpful to have language that indicates,
2 if it be the case, that a decision has not been reached, we say
3 that a fair reading of the advance notification part of the
4 complaint is that one sees that it has not been reached, and I
5 do not go back over the old ground.

6 Next, you asked Mr Flynn how he deals with the point that
7 if a decision on a narrow contention can then be used as a basis
8 for opening up a new front before the tribunal, which has not
9 been addressed by the Director, does that not come into tension
10 with the scheme of the Act? That was specifically in reference
11 to the cross-marketing activity part of the complaint. The
12 response was the Director General has assessed the conduct, and
13 so we can appeal that. It comes back, in my submission, to the
14 point that if you are looking at the conduct as a whole, and we
15 agree that you should, then that conduct does include other
16 aspects of the complaint that are in the frame.

17 For the cross-marketing complaint, the issue of cross-
18 subsidy had, albeit likely been raised, and there the Director
19 General plainly has not addressed the issue. Yet that is the
20 issue sought to be appealed.

21 THE PRESIDENT: That raises the question for us, I think, whether
22 what we have got is a decision on those matters that he has
23 addressed and if it is, what do we do about the questions that
24 he has not addressed? I think, conceptually speaking, there are
25 three possibilities. One is there is no decision in that
26 respect, so there is nothing we can go into.

27 Two is that because he has not taken a decision there is
28 nothing for us to do except decide that the matter has not been
29 investigated and remitted under the power to remit things that
30 have not been yet investigated; or three, simply to say this
31 matter was never sufficiently, or clearly raised and we are not
32 going to go into it, and if anybody wants to raise it then they
33 must make another complaint.

34 MR TURNER: Yes.

35 THE PRESIDENT: It may not matter from your point of view which of
36 the three we take, except conceptually speaking it would matter,

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1 of course. But the end result I think is the same.

2 MR TURNER: Yes.

3 THE PRESIDENT: The fact that we might hold that there is a decision
4 on the matters he has decided, if I may use the tautology, does
5 nth mean that this point about cross-subsidy is suddenly at
6 large or in the appeal, or needs to be gone into in any depth.
7 They are separate issues.

8 MR TURNER: Yes, leaving aside the precise conceptual analysis,
9 where a matter has not been addressed by the Director, and
10 plainly not, then in my submission it would be wrong for the
11 tribunal to consider it as if it were sharing a jurisdiction of
12 First Instance with the relevant director in that regard.

13 THE PRESIDENT: Yes. A somewhat similar point arises in relation to
14 the predatory pricing allegation. It may very well be sensible
15 for the Director to be able to say: "Look, I have just gone
16 into all this in another case, and you did not appeal that other
17 case and you come to me with new information that frankly does
18 not add up to anything, so I am not going to do any more about
19 it", as a result that may be a very sensible result---

20 MR TURNER: yes.

21 THE PRESIDENT: ---depending on how one analyses the facts, looked
22 into the facts. As a result one can see that. One question is
23 whether you get to that result by saying that there is no
24 appealable decision, or whether you get to it by saying "Yes,
25 there is an appealable decision, but frankly, the Director was
26 completely right to take that view."

27 MR TURNER: Yes.

28 THE PRESIDENT: In other words, there is a sense in which - I know
29 the Director and probably all Regulators are very concerned
30 about institutional balance, but there is also a sense in which
31 the conversation of which you speak simply goes on a bit further
32 in front of the tribunal and does not necessarily result, I
33 would have thought, in catastrophe from the Regulator's point of
34 view, it is simply a case of the tribunal surveying what has
35 been done, and seeing whether the result on what he had was a
36 sensible result.

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1 MR TURNER: It must depend on the circumstances. If one takes the
2 cross-subsidy investigation, there was an investigation under a
3 different Statute. Freeserve was a party to that investigation
4 and, Sir, you will have seen from that letter that it was also a
5 party to the indicated then Competition Act appeal.

6 THE PRESIDENT: That would apparently have been appealable either
7 under the Telecommunications Appeals Regulations, or under the
8 Competition Act - it might be both I suppose, but nobody has
9 really explored the relationship between the two.

10 MR TURNER: No, perhaps if the tribunal would care just to look at
11 the little piece of legislation accompanying the letter---

12 THE PRESIDENT: Yes.

13 MR TURNER: ---because on page 2, there is a new insertion into the
14 Telecommunications Act by virtue of these regulations, and it is
15 entitled "Appeals, Section 46(b)" and it is a section that
16 applies to certain decisions of the Secretary of State or the
17 Director, and the relevant one for current purposes is over the
18 page on page 3, at letter "J":

19 *"Any other decision in respect of which the rights or*
20 *interests of a person...wishing to provide any*
21 *telecommunication service by means of a system are materially*
22 *affected".*

23 We say that would appear to include Freeserve and then one
24 sees the provisions for appeal that follow, in particular, that
25 there is a time limit set in subsection (vi).

26 In a case such as the present where a party has not
27 availed themselves---

28 THE PRESIDENT: You cannot get round the time limit by making a new
29 complaint to the same effect and then saying "You have not dealt
30 with my new complaint and therefore I appeal effectively the
31 decision that I forgot to appeal before.

32 MR TURNER: Yes, and it reinforces the point where what has been
33 offered a very thin basis for proceeding. The party has a
34 discussion with the Regulator at a meeting and is told this is
35 too thin and we do not set our faces against it, but we need
36 more meat than this. The matter is rejected on that basis, that

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1 it would be wrong to say that a decision on the merits has been
2 made, which incorporates all of the previous reasoning, from the
3 previous investigation, and it is right to analyse that as a
4 decision not to proceed further with a thin complaint, because
5 what has been presented is too exiguous to justify the
6 investment of further resources.

7 Sir, unless the tribunal has any further questions those
8 are my submissions.

9 THE PRESIDENT: I think I just have one point to raise, and it is
10 just in the back of my mind, Mr Turner. It is true that the
11 appellate structure under the EC Treaty, when we are dealing
12 with complaints to the European Commission is different from the
13 one we have under the Act.

14 MR TURNER: Yes.

15 THE PRESIDENT: But it is also the case that under that structure
16 complainants have certain rights to have complaint rejections
17 examined by the court. We are shortly going to move through the
18 Commission's modernisation proposals, even closer to the
19 European system when national authorities have the power to
20 apply Articles 81 and 82.

21 MR TURNER: Yes.

22 THE PRESIDENT: The area of telecommunications is itself much
23 affected by Community Directives of various kinds, some of which
24 seem to be leading to changes in the regime of the
25 Communications Bill. Should we not at least in a general
26 background way bear in mind the position that complainants have
27 under the wider Community framework in helping us decide what
28 direction we should go in under this legislation that is broadly
29 speaking modelled on Community principles?

30 MR TURNER: Under the existing Community framework I think the
31 CICCE case says that there is no right to a final decision.

32 THE PRESIDENT: No, there is not, but there is a right to appeal the
33 rejection of a complaint. It may not get you very far because
34 you may be told "Well, there is no Community interest here" or
35 maybe the fact that you did not get a decision that you want is
36 not enough for you to win. There is at least a right to take the

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1 matter a certain distance. In a case where the authority has
2 actually investigated it and has actually formed a view just to
3 check that that view is not an untenable view and the law is
4 correct, and so forth.

5 MR TURNER: Yes.

6 THE PRESIDENT: I suppose the analogy here is that it is not the
7 same as a full appeal, but there is a certain degree of control
8 over the way the authority has approached the complaint in
9 question.

10 MR TURNER: Yes, I am sensitive to the fact that, of course, this
11 is the expert tribunal for dealing with matters of this kind. On
12 the other hand, the Act does, as currently constituted lay down
13 a clear distinction and says that where a final decision on
14 infringement has been made it comes to you, but in other cases
15 where the Director has exercised his discretion not to make such
16 a decision a control is available but by way of Judicial Review.

17 THE PRESIDENT: Yes, well that is your submission.

18 MR TURNER: Yes.

19 THE PRESIDENT: Yes. Good. Mr Flynn, do you have any reply you would
20 like to make?

21 MR FLYNN: Sir, I do not think there are detailed points to come
22 back on, but on the general issue that you have just been
23 ventilating with Mr Turner, our submission is that under the
24 structure of the Act as you have it at the moment, whatever
25 maybe in the pipeline, the tribunal's task, as we see it, is to
26 look at the correspondence as a whole, and to take a view as to
27 what it is the Director has actually decided and if that
28 approach is taken then we will get to the substance of
29 determining whether the decision is a correct one. As you said,
30 it may be that its decision is that "There is not very much in
31 this complaint, and go away". If that is his position then that
32 is the issue which should be before the tribunal, not this "Have
33 I gone sufficiently down the road of making my mind up?" The
34 position should be one in which he stands by the views that he
35 has expressed.

36 THE PRESIDENT: Yes.

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1 MR FLYNN: And that goes both to the admissibility and the
2 substance. That preserves in full his Automec discretion to
3 prioritise complaints or not invest resources in them. He must
4 not fall between two stools and present as "You haven't given me
5 enough to go on", what is in reality a decision "You have not
6 shown that there is an infringement, and I believe that there is
7 no infringement". In that sort of case then he should stand by
8 it.

9 THE PRESIDENT: Yes, thank you. We are going to reserve our
10 Judgment in this case, Mr Turner. I have just got my diary now
11 in front of me. Some of us have other duties to perform next
12 week, so I am not quite sure, contrary to earlier hopes, exactly
13 when we are going to be able to give Judgment in this case - I
14 hope at some stage within the next few weeks or so.

15 MR TURNER: Yes.

16 THE PRESIDENT: Certainly no longer than that. Are you able to
17 update me on how you are getting on with the defence, and how it
18 is looking from your point of view?

19 MR TURNER: I was intending to take stock on that really at the end
20 of this hearing and with some steer from the tribunal if
21 possible. I can tell you broadly what efforts have been made,
22 which is that on the substance of the alleged abuses, we know
23 what we say the answer is and from this hearing and the matters
24 leading up to it, I think the tribunal has a fair idea of what
25 we will say as well.

26 THE PRESIDENT: Yes.

27 MR TURNER: On the bigger issues of market definition, the
28 broadband sector, and dominance and so on, our plan at the
29 moment is to try to assist the tribunal by setting out sensible
30 where Oftel has got to in its analysis of this emerging part of
31 the market.

32 The chief economist at Oftel is heavily involved on
33 something else at the moment, in fact work for the other side of
34 the Commission, but we are working hard to try to produce
35 something which would be a sensible statement of Oftel's views
36 on those issues as soon as we can.

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1 THE PRESIDENT: That is very helpful.
2 MR TURNER: But I am not able to help the tribunal on timescale any
3 further than that.
4 THE PRESIDENT: If I may just make one point on that last issue. On
5 the point that seems, on any view, to be still in the case, that
6 is to say the telephone census, it might be that in that case
7 there is a dominant position in retail voice telephony - I do
8 not know, it might be.
9 MR TURNER: Yes.
10 THE PRESIDENT: And it might be that is the kind of issue that the
11 tribunal could tackle as an issue on agreed facts.
12 MR TURNER: Yes. I cannot speak definitely now.
13 THE PRESIDENT: I just mention it as something---
14 MR TURNER: Sir, you are quite right to say that on that particular
15 limb of the complaint, and that alone, there is a different
16 market definition issue. The retail voice telephony market, and
17 abusing a position in that.
18 THE PRESIDENT: That was the allegation anyway.
19 MR TURNER: Is the allegation there, and it may be easier for Ofcom
20 to produce its views on market definition and dominance there
21 than in relation to broadband. In fact, it almost certainly will
22 be.
23 THE PRESIDENT: Yes. Well what I was going to suggest, I think the
24 timing for the defence at the moment is 7th November, is that
25 right.
26 MR TURNER: I believe it may have been 5th.
27 THE REGISTRAR: Yes, it is 5th November.
28 THE PRESIDENT: I was going to suggest a further extension for the
29 defence of two weeks.
30 MR TURNER: Yes.
31 THE PRESIDENT: So that there is no question of you having to serve
32 a defence until the tribunal's position on the preliminary
33 question is clear from its Judgment.
34 MR TURNER: I am obliged, sir. On our side we can undertake that we
35 are continuing with the work and will do everything we can to
36 proceed expeditiously - we will not sit on our hands.

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1 THE PRESIDENT: No, well that is very helpful. So we will extend
2 that for two weeks, and BT's time is extended similarly for two
3 weeks. That I think deals with that, so thank you all very much
4 indeed for your submissions today.

5 (The hearing concluded at 4.30 pm)
6