COMPETITION APPEAL TRIBUNAL

SUMMARY OF APPEAL UNDER SECTION 47 OF THE COMPETITION ACT 1998
CASE NO 1026/2/3/04

Pursuant to rule 15 of the Competition Appeal Tribunal Rules 2003 ("the Rules"), the Registrar of the Competition Appeal Tribunal gives notice of the receipt of an appeal, dated 20 January 2004, under section 47 of the Competition Act 1998 ("the Act") by **Freeserve.com plc** ("Freeserve") in respect of a decision dated 20 November 2003 ("the Decision") made by the **Director General of Telecommunications** ("the Director").[1]

In the Decision[2] the Director found that British Telecommunications plc ("BT") had not infringed the prohibition on abuse of a dominant position contrary to the Chapter II prohibition contained in section 18 of the Act in relation to BTOpenworld's ("BTOW") consumer broadband products.

By way of relief Freeserve requests the Tribunal to:

1. set aside the Decision in all respects;

2. either use its powers in Schedule 8(3) to the Act to, for example, direct the Respondent to issue a Rule 14 Notice on the basis that BT has infringed the Chapter II prohibition;

3. in the alternative to 2 above, remit the matter to the Respondent for yet further consideration;

4. award costs to Freeserve.

The summary of the principal grounds of appeal relied on in notice of appeal is in the following terms:

1. the facts and analysis relied on;
2. the law followed; and
3. the reasons given/the procedure followed

In principle historical models based on actual market data, rather than forward looking economic models (both the 'Discounted Cash Flow' (also known as 'Net Present Value') approach and the cohort approach as applied by the Director) which rely on projections as to the future and speculative assumptions, should be used to assess anti-competitive pricing abuses. The use of the latter has been rejected by both the Office of Fair Trading ("OFT") in *BSkyB* (Decision No CA98/20/2002 of 17 December 2002) and the EC Commission in

[1] Under section 408(5) and Article 3(2) of the Office of Communications Act 2002 (Commencement No.3) and Communications Act 2003 (Commencement No.2) Order 2003 SI no 3142 anything which was done by the Director prior to 29 December 2003 is to have effect after that time as if it had been done by the Office of Communications ("OFCOM").

[2] The text of the decision may be found at http://www.oft.gov.uk/NR/rdonlyres/ec2a2j6gocwrfdw464raylz22v7exxek47crefr3ihviwhdobukaryzhtsng43wahpfpfiyvjj4k22gudlhhhmu37ih/freeserve.pdf

Wanadoo as being unsuitable for assessing pricing abuses. Therefore, as a matter of law, the Director should use historic models to assess pricing abuses. the reasons for this, as identified by the Commission and/or the OFT, include: forward-looking models risk concealing the abuse to be assessed; they are circular in their approach; they cannot assess anti-competitive pricing behaviour over discrete historical periods; and they rely on speculative cost data and forecasts. The Director fails to use the historic approach. As a result, the Decision suffers from all the defects identified.

The Director could and should have used historic models to assess the issues. the commission in *Wanadoo* and the OFT in BSkyB used such models in relation to expanding markets. The Director had sufficient historic data available to him. Nevertheless, he adopted a forward-looking approach. He gave a number of justifications for this, each of which is flawed and which, overall, renders the Decision divorced from reality.

- The Director believed he should place himself in the same informational conditions as BT at the time the pricing policy was made and implemented. He considered it appropriate to limit himself to assessing the position ex ante. In doing so, the Director erred in law in applying the test for what constitutes a pricing abuse. The Director only sought to assess BT's behaviour on the basis of BT's own speculative business plans at the time when BT formulated its pricing strategy. he did not address the question of whether, in fact and on actual market data, there was a pricing abuse. However, the test for a pricing (as with any) abuse under the Chapter II prohibition is strict. Moreover, there is an ongoing special responsibility, not just at the time a business plan is created. a forward-looking approach based on the business plan as at the time the pricing policy was implemented does not assess whether or not an abuse exists based on actual market data.

- Second, the Director described the market as 'immature'. This mischaracterises the nature of the market (which was in fact comparable in size and development to that in *Wanadoo*). In any event, the Director sought to modify the standard application of the Chapter II prohibition in pricing cases as a result. A number of justifications for firms to incur losses and recoup them over time were given. Each of these have been rejected by the Commission in *Wanadoo* or is otherwise flawed in its analysis. The Director has therefore erred in law.

- Third, the Director viewed his task as evaluating the initial decision in the light of market data available at the time. As such, the Director said the data available was limited to 2 months. However, the Director disregarded significant amounts of relevant data, almost 20 months' worth, from the residential broadband market for the period March 2002 to October 2003 as well as the period prior to February 2002. This is an error in terms of the facts relied on, the effect of which is material through its impact on BTOW's coverage of costs.

- The Director relies in part on the undertaking given to the Tribunal on 16 April 2003 as a reason to limit himself to looking at the position as at February 2002. this is a clear misinterpretation of the undertaking given and constitutes an error of law.

There are numerous other errors. The Director, for example, erred in law in disregarding or failing to consider discrete periods of below cost pricing. Freeserve considers that, in fact, the Director's analysis shows that, using BT's own data,

BTOW has been pricing below long run incremental cost ("LRIC") from at least April 2002 until at least March 2003. At the same time, the Director appears to accept that BTOW was incurring losses for a number of months or years prior to this. Whether under a predatory pricing analysis (i.e. a proper application of *AKZO Chemie v Commission* (Case C-62/86) [1991] ECR I-3359.in the light of *Wanadoo*) or for margin squeeze, the fact that prices are below LRIC for a significant period should be sufficient to establish an abuse.

As is clear from the above, the Decision is materially inconsistent with EC competition law, in particular *Wanadoo* Despite meeting the Commission in late August, the Director makes no reference to the approach adopted in *Wanadoo* or other relevant cases (in particular Case Comp/C-137.451 *Deutsche Telekom AG* OJ 2003 L263/9). If the Commission's approach in *Wanadoo* had been followed (or indeed the OFT's in *BSkyB*), the Director would have concluded that BT had engaged in an abusive pricing strategy. Similar cases are being analysed differently from the Commission for no good reason. This is contrary to section 60.

In line with either *Wanadoo* or *Deutsche Telekom* the Director should have taken the view that there is a strong and compelling case of predatory pricing or margin squeeze by BT – over a significant period – contrary to the Chapter II prohibition. A Rule 14 notice should have been issued. The Decision should therefore be quashed.

Any person who considers that he has sufficient interest in the outcome of the proceedings may make a request for permission to intervene in the proceedings, in accordance with rule 16 of the Rules.

A request for permission to intervene should be sent to the Registrar, The Competition Appeal Tribunal, New Court, 48 Carey Street, London WC2A 3BZ, so that it is received within **three weeks** of the publication of this notice.

Further details concerning the procedures of the Competition Appeal Tribunal can be found on its website at www.catribunal.org.uk. Alternatively the Tribunal Registry can be contacted by post at the above address or by telephone (020 7271 0395) or fax (020 7271 0281). Please quote the case number mentioned above in all communications.

Charles Dhanowa

Registrar
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