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IN THE COMPETITION COMMISSION

Case No. 1007/2/3/02

APPEAL TRIBUNAL

New Court,
Carey Street,
London WC2A.2JT

21st January, 2003

Before:
SIR CHRISTOPHER BELLAMY
(President)

PROFESSOR JOHN PICKERING
DR ARTHUR PRYOR CB

BETWEEN:

FREESERVE.COM PLC

Applicant

and

THE DIRECTOR GENERAL OF TELECOMMUNICATIONS

Respondent

supported by

BT GROUP PLC

Intervener

Mr Nicholas Green QC (instructed by Messrs Baker & Mckenzie)
appeared for applicant.

Mr Jon Turner (instructed by The Director of Legal Services (Competition), Office of
Telecommunications) appeared for the respondent.

Mr Barling QC (instructed by the Head of Competition and Public law, BT Retail) appeared for the
intervener.

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PROCEEDINGS
DAY TWO

1 THE PRESIDENT: Good morning everyone. Yes, Mr Turner?
2 MR TURNER: May it please you, Sir, if I may, following the discussion yesterday, I would wish to
3 return briefly to the issue of cross-subsidy because my clients consider it is vital that the
4 Director's position on this point should be properly understood so that the context is
5 appreciated.
6 THE PRESIDENT: Yes.
7 MR TURNER: I should wish to adopt the framework of the three analytical questions I posed at the
8 beginning, namely, what was the complaint that was made? Was the Director General's
9 rejection of it on the basis that there was no evidence of anti-competitive behaviour justified as
10 a matter of substance; and thirdly, was the basis for the rejection on this point sufficiently
11 clearly explained in the decision as three separate matters.
12 THE PRESIDENT: Yes.
13 MR TURNER: So far as the complaint is concerned, if the Tribunal would bear with me and just
14 open it once more.
15 THE PRESIDENT: Yes, of course.
16 MR TURNER: I have already made the point yesterday that in the first paragraph there is this
17 reference across to the previous margin squeeze investigation in the first sentence.
18 THE PRESIDENT: Where is this?
19 MR TURNER: This is under the heading "Cross-subsidy".
20 THE PRESIDENT: Yes.
21 MR TURNER: It begins in January last year and that sets the scene for this part of the complaint.
22 Then in the second paragraph there is the reference to the business case, and what it is said to
23 show.
24 THE PRESIDENT: Yes.
25 MR TURNER: In the third paragraph it does continue: Whirlpool "*We believe there to be a prima*
26 *facie case of unlawful cross-subsidy in this instance on the basis that the business case, in so*
27 *far as we have been able to interpret it, is not sustainable.*"
28 Then, Sir, as you pointed out, it does continue:
29 "*We believe BT Openworld cannot be generating sufficient revenues to cover its*
30 *variable and incremental costs.*"
31 Then there is the reference to AKXO. But one factor that the Tribunal then needs to
32 appreciate is that as the complaint was subsequently explained at the meeting, that allegation it
33 became absolutely clear was not in issue, and if I may I would ask the Tribunal just to have to
34 hand Freeserve's note of the meeting, and how they recorded their explanation of the complaint
35 to the Director. I have spare copies.
36 THE PRESIDENT: We will find the note of the meeting, where?
37 MR TURNER: It was attached to Mr Flynn's skeleton at an earlier hearing. So it may be
38 convenient if I just pass these up. [Same handed]

1 Now what you see there in paragraph 2 is Freeserve setting out specifically what it
2 said it had explained to the Director were its concerns, and the relevant complaint is here at 2.3
3 at the bottom of that page.

4 *"Freeserve also queried the financial viability of BT Openworld's business case, in*
5 *particular the fact that their revenues were not capable of covering their long run incremental*
6 *costs, arguing that their position could only be supported on the basis of cross-subsidies, and*
7 *that they were engaged in predatory pricing aimed at driving out any effective competition".*

8 So the point that one draws from that is that unsurprisingly when the point was
9 discussed with the Director it was put on the basis, not of variable and incremental costs in
10 AKZO terms at all, but on the basis of long run incremental costs. While you have the
11 document to hand, may I ask the Tribunal---

12 THE PRESIDENT: I do not know that they have necessarily dropped AKZO. It is true that this note
13 does not particularly refer to AKZO but you could still say that was all part of the general
14 context.

15 MR TURNER: Well, Sir, I cannot get away from the fact that it is mentioned in those terms in that
16 reference.

17 THE PRESIDENT: Yes, anyway they have picked up long run incremental costs.

18 MR TURNER: This is their clarification of what they say their case was. Then in Oftel's response,
19 if you look at paragraph 3:

20 "Re: Predatory Pricing. Oftel reviewed BT/BT Openworld's business case in the
21 context of approving the wholesale price reductions in February. They believed their business
22 case to be viable and, absent any further information, are unlikely to reopen this debate."

23 They knew that that is what Oftel's position was at that stage. Then if one goes down to
24 the "Conclusion" and just reads number 2:

25 *"Complaints relating to cross-marketing, brand leverage, cross-subsidy and predation*
26 *need greater articulation and more stringent legal analysis if they are to be picked up by Oftel*
27 *and form the basis for an investigation whether on the basis of breach of licence or abuse of*
28 *dominant position".*

29 Then, to finalise the Tribunal's appreciation of the context, if you would just refer to
30 the Director's parallel note of the meeting, which you will find at tab 1 of the disclosure bundle.
31 The only points I would ask the Tribunal to remember is these two vitally important action
32 points under the heading "Cross-subsidy" at the foot of the first column, and at the top of the
33 second column.

34 The first relates to the request that Freeserve should produce the three year analysis,
35 and then of equal importance in my submission, over the top of the following column, that:

36 *"Freeserve agree to provide Oftel with its own business case when completed in order*
37 *to compare with BT Openworld's".*

38 Now in relation to the three year business case, the Tribunal knows that Freeserve have

1 set out their stall in the submissions that were received on 7th January, and what they say is that
2 it was not an agreed action point but they do recollect the suggestion that a three year case
3 could be helpful, but they say it was the Director who failed to follow it up.

4 Just on that point, we say that such an approach cannot be accepted, that it is for
5 Freeserve, a complainant in Freeserve's position, to come forward with the evidence otherwise,
6 as they themselves appreciated, absent further information they knew that Oftel was unlikely to
7 reopen the debate about the business case.

8 Then on the second point about producing their own business case, that is a significant
9 point, and in relation to what, if I may term it, the "Sphinx" issue, with the Director General
10 standing as the inscrutable teller of riddles, and the complainant as the sort of helpless
11 questioner. The reason is that in this context the Director is the outsider in reality. It is
12 Freeserve who has important material which might throw light on the cross subsidy issue.
13 Freeserve, who has the same retail product as BT Openworld, and is also producing a business
14 plan, will also have its own forward looking assumptions. By reference to that, of course, the
15 Director General would be better placed to review any judgment about the reasonableness or
16 plausibility of the BT Openworld business case.

17 The guts of the point is that if there is substance in a complaint of this sort it must be
18 expected of complainants such as Freeserve that they will be able to produce some evidence
19 with some bite which will show, or suggest that the BT Openworld business case is
20 unsustainable, and perhaps that the assumptions that the Director General had been working on
21 were wrong.

22 THE PRESIDENT: Just as a matter of factual background, is it the Director's practice to send this
23 kind of note of this kind of meeting to the people who were at the meeting?

24 MR TURNER: The Director did not, in this case, I believe send it to Freeserve but, if I may, I will
25 just take instructions. It is not a general policy, no.

26 Just concluding there then, that is how matters stood before the decision. Then one
27 turns to the question of whether the complaint rejection that was made on this issue was
28 justified on the merits - to use an apt phrase - and for that I would ask the Tribunal to turn up
29 again the decision itself. The relevant paragraphs are, of course, 14 to 17, and in particular
30 Oftel's view on this point, in paragraphs 15 and 16.

31 THE PRESIDENT: Yes.

32 MR TURNER: 15 I do not dwell on because it is essential background. it says that Oftel only
33 recently has closed detailed investigations into the subject matter which is complained of, and
34 at the end points out that he then concluded that there was no evidence of a margin squeeze.

35 So one moves to paragraph 16. The first two sentences refer to the activity of other
36 service providers and in particular Freeserve in relation to pricing. It says that it "indicates" a
37 sufficient retail margin to allow competition with BT Openworld. Pausing there, it was, of
38 course, one of Mr Green's submissions that what was said was that this was proof that it was the

1 decisive consideration. It was not. It was, however, a relative and indicative factor.

2 Moving on then, one comes into the third and fourth sentences, which were canvassed
3 yesterday, and which lie at the heart of the Director's reasoning. These sentences refer to
4 Freeserve's new evidence, namely the hypothetical spreadsheet, and point out that it is for only
5 one year. Then it goes on to say that the fact that a service makes a loss in the first year does
6 not mean that the pricing is to be judged predatory in competition law terms, and so on -
7 provided it shows a positive return in a reasonable period.

8 In my submission, the essential reasoning there is that a one year profile is not
9 sufficient to draw conclusions that there is - and then we come to this phrase - "*a predatory*
10 *price in competition law terms*"

11 THE PRESIDENT: Yes.

12 MR TURNER: I will come back to precisely unpacking that phrase in a moment, but just to
13 conclude one should then look at the fifth and sixth sentences, beginning:

14 "*BT Openworld's own business case presented to Oftel shows payback will occur over*
15 *a longer period than one year and that Oftel has accepted that BT Openworld's business case is*
16 *not implausible in the recent investigations.*"

17 Pausing there, one stands back and asks whether there is any reason advanced by
18 Freeserve to suppose that the Director General was wrong to conclude, as one can plainly see
19 from that paragraph, that there was no evidence of anti-competitive behaviour on the material
20 that had been submitted to him. Just approaching it at that level, the answer must plainly be
21 "no".

22 So let me then return to the question of the adequacy of the explanation in that
23 sentence. Was the basis of the complaint rejection sufficiently clearly explained? I begin again
24 by emphasising that the guidelines are vital and that they must be treated as part of the
25 "analytical framework" - to use Freeserve's term - that was used by the Director. I would invite
26 the Tribunal to test that ideal by just imagining what would have happened if the Director
27 General had departed from the guidelines in the complaint rejection letter. Imagine for a
28 moment that he had said that there was no evidence of anti-competitive behaviour because on
29 *AKZO* principles X, Y and Z. In such a situation it is barely conceivable that Freeserve would
30 not have said "Just look at your own published guidelines, this is a clear departure, and is
31 wrong as a matter of principle".

32 May I ask the Tribunal to turn to the Notice of Appeal, just to make good this point? I
33 have already referred you to one paragraph, but if you go to paragraph 7.5, which is on page
34 28, you will see there one reference towards the end of that paragraph to the approach of the
35 Director General in Competition Act and in relation to the sectoral regime defined, and footnote
36 67 takes you to the Competition Act strategy which the Tribunal have in their papers in the
37 disclosure bundle.

38 THE PRESIDENT: That is a later document.

1 MR TURNER: That is a later document, but if you go to that Competition Act strategy it builds
2 upon the Competition Act guidelines, and I can take the Tribunal to that if necessary, but I was
3 not proposing to do so. It simply contains a reference back to how the Director will operate in
4 accordance with the Competition Act guidelines. If they are aware of that, and aware of all
5 these other documents that they footnote, it is absurd to suggest that they did not have well in
6 mind the guidelines.

7 One other reference at 7.7(iv), you will see the way that it is put there, that the 19th
8 May statement states that it forms guidance for the respondent in his assessment of complaints
9 or investigations on potential breaches of the Chapter II prohibition. They conclude that the
10 case closure letter must be read in the light of the 19th May statement, and that the analytical
11 framework is directly followed in the case of closure letter.

12 Then at footnote 74, although the case closure letter does not expressly refer to 19th
13 May statement, the two are intrinsically linked. Then a reference to the fact that they were
14 produced within a short time period, and that both documents addressed the same subject
15 matter, and so on, and that the respondent's views are entirely in line with the policy framework
16 laid out in the 19th May statement. Their conclusion is that the case closure letter has to be read
17 in the light of that.

18 May I ask the Tribunal just to turn up again the guidelines, because there are parts of it
19 that I did not show the Tribunal yesterday. Those, as the Tribunal knows, are annex 3 to the
20 defence file. If the Tribunal goes to page 27, which is in Chapter 7. What you will see is really
21 the strength and detail of the guidance which is set out here on how the Director General
22 approaches the issues that are relevant to the subject matter of this case. At 7.5 under the
23 heading "*Measuring the Cost of Providing Telecommunications Service*" the Tribunal will see
24 that as a general point the guidelines explain how the Director General will measure the cost of
25 providing telecommunications services. There is a discussion of the special characteristics of
26 the industry in 7.6 and then under the heading "*The Use of Long Run Incremental Cost*" there is
27 a discussion of first what the term means, and then over the page at 7.10 a reference to why
28 AKXO is generally inappropriate to use in network industries, in so far as it refers to average
29 variable costs. A reference across to the Commission Access Notice on that point, and finally
30 further description of the use of LRIC in practice. So that says that this is the relevant measure
31 of cost that the Director General will use and explains very fully why in his competition
32 investigations.

33 Under the heading "*Predatory Pricing*" which follows at 7.15 to 7.16 in particular it is
34 made explicit that in testing for predatory pricing the Director uses the same measure of cost
35 and, for example, at 7.15 there is a reference in the first sentence to the use of LRIC in this
36 context.

37 So there you are told that in such a matter you compare price with long run incremental
38 cost, and it is my submission again, referring back to the complaint, there was no illusion about

1 that. Both the complaint and the decision was singing from the same hymn sheet.

2 Then, when one moves over the page to cross-subsidy, that is dealt with at 7.20 to 7.24,
3 one sees as I mentioned yesterday, at the end of 7.21 that the relevant test again in this context
4 concerns whether revenue would exceed the LRIC, and that if it does the service would be
5 sustainable in the long term.

6 7.22 says that when you are dealing with cross-subsidies, as opposed to predatory
7 pricing there is a further mile that you have to travel because you would also wish to examine
8 whether common costs are covered in that context, and so a combinatorial test is applied. But
9 that is a second stage and in both the predatory pricing analysis, and cross-subsidy, there is a
10 common technique which is to determine whether prices are above long run incremental costs.

11 7.23, which was not expressly looked at yesterday, tells how the Director would
12 generally find it useful to assess revenue in relation to LRIC, and specifically refers to what
13 you do where there are new services in start-up phases, when it is often reasonable to expect
14 initial losses to be incurred, then in the final sentence:

15 *"Evidence of abuse may be provided however where a business case is based on*
16 *unjustified and implausible assumptions".*

17 Finally to round this off, and in relation to Mr Green's reference to the mobile air time
18 point, if you look a 7.24 there is reference to a different approach that may be adopted for
19 mature services - a different situation.

20 So, standing back, it is my submission that when you are armed with the guidelines
21 there is no difficulty with the concept, or the approach which was applied by the Director
22 General in the decision to the question whether there is evidence, provided by the hypothetical
23 spreadsheet of anti-competitive behaviour.

24 THE PRESIDENT: Are we right in assuming - I think we are, but just let us see - that a LRIC test
25 will be, generally speaking, less favourable from the incumbent's point of view than an average
26 variable cost test would be?

27 MR TURNER: Almost invariably.

28 THE PRESIDENT: In other words, it is a higher hurdle---

29 MR TURNER: It is a higher hurdle.

30 THE PRESIDENT: ---for the allegedly dominant firm.

31 MR TURNER: It is a much higher hurdle, particularly with the service in the start-up---

32 THE PRESIDENT: It would be one that hypothetically BT would find easier to meet.

33 MR TURNER: Yes.

34 THE PRESIDENT: It may not be possible to go too far into this, is it possible to give us some
35 general indication of the length of time of the sort of business case that is referred to in these
36 guidelines is likely to be looking at? The analysis could be quite sensitive to the length of time.
37 We notice in the note of the meeting you have just referred us to that Freeserve was, according
38 to that note, asked to produce a plan over three years so it could be compared to a BT plan. A

1 business case over three years might look rather different from a business case over, say, 15
2 years with all the imponderables about interest rates and so forth long into the future. But is
3 there any general background you can give us on that?

4 MR TURNER: There are two points - I have discussed this with the officials. The first is, and I was
5 just going to come on to this, that when you are assessing a period it is wrong to suppose, as
6 was firmly impressed on me, that you are looking at a fixed period - let us say, five years or
7 four years, or something of that kind, and you say well that is the economic life time, and that is
8 the period that you assess.

9 THE PRESIDENT: Yes.

10 MR TURNER: What is done is that a range is taken and sensitivities are carried out.

11 THE PRESIDENT: That is what we would expect.

12 MR TURNER: In this case, in answer to your direct question, as far as I understand it, anything
13 between three or eight years may be looked at and a range of periods could be taken. One looks
14 to see whether, on any of those scenarios, you find that there is pricing below cost, whether
15 there is a failure to recoup the investment---

16 THE PRESIDENT: Over a three year period?

17 MR TURNER: Or a five or a six.

18 THE PRESIDENT: Or whatever.

19 MR TURNER: Yes, and if one finds, for example, that there is no failure to recover the costs over a
20 short period, a three or four year period, you do not then need to look at the longer period.

21 There is an additional point - a useful one - that has been made to me by the relevant
22 economist, which is that as you go further in time, say from five to eight years, because of the
23 discounting the impact of the costs or additional revenues becomes much, much smaller and so
24 the sort of interest from the economists' point of view diminishes as you get ever longer time
25 frames.

26 THE PRESIDENT: Just to complete this so our trains of thought are on the table as well, one could
27 - in theory at least - imagine a situation where in businesses one would automatically say a
28 three year period is the sort of period that almost all businessmen would look at, but if you are
29 in a situation where cost recovery could only occur over, shall we say for argument's sake, a ten
30 year period, you might find some allegedly dominant enterprises more able to sustain a
31 situation in which you do not actually get a pay back over a longer period than other smaller
32 competitors who might need to get the pay back over some shorter period - in theory.

33 MR TURNER: Yes, that is an interesting point because it actually highlights the importance of, for
34 example, here Freeserve producing their own business case and then you can see the
35 assumptions that it makes about the pay back period, volumes, and so on, and it enables you to
36 see whether the BT business case has anything fishy about it.

37 THE PRESIDENT: Presumably first of all you need to assume that you are not necessarily dealing
38 with BT or Freeserve or whoever, you are dealing with a reasonably efficient operator in this

1 industry.

2 MR TURNER: Yes.

3 THE PRESIDENT: You could not do it on the basis of somebody who was not operating efficiently.

4 MR TURNER: And similarly you could not do it if part of the assumption was that after a
5 particular period in the business case submitted, prices shoot up and that that is the reason why-
6 --

7 THE PRESIDENT: The only reason that you made a return is that over this ten year period
8 everybody else has given up---

9 MR TURNER: Because competition has been weakened.

10 THE PRESIDENT: ---and then you have your pay back in years seven to ten.

11 MR TURNER: Yes.

12 THE PRESIDENT: That would be a nonsense too, would it not?

13 MR TURNER: Yes.

14 THE PRESIDENT: Then you presumably have to take some sensible assumption over the period
15 over which a prudent investor would expect a return?

16 MR TURNER: Yes.

17 THE PRESIDENT: I can see Mr Russell there nodding.

18 MR TURNER: It is right.

19 THE PRESIDENT: Forgive us going over ground that probably seems self-evident to you but I
20 think it is important that we all understand the principles.

21 MR TURNER: It was not self-evident to me as outside counsel, but it is the stuff that OfTel live and
22 breathe---

23 THE PRESIDENT: Yes.

24 MR TURNER: ---and they wanted to explain it to me so that there is no misunderstanding, and
25 they have drawn my attention to the way that it is explained in the guidelines.

26 THE PRESIDENT: Yes, thank you, Mr Turner.

27 MR TURNER: That takes us on neatly to this phrase that you find in the decision about a positive
28 return in a reasonable period, because what was sought to be suggested was that that might be
29 something different to the test that you find in the guidelines. What has been impressed upon
30 me is that it is not. The reference to the word "reasonable" incorporates this question of what
31 the reasonable view of the economic life time will be from the point of view of the investor. It
32 is a question of judgment.

33 There is no fixed number that comprises the economic life time. What it boils down to
34 is the period over which you are going to be earning from this product before it is superseded,
35 or before the revenues start to decline before the sunset period takes over. There is no certainty
36 about that. What you do is to choose a reasonable period and you apply sensitivities, and that is
37 all that is being referred to here in relation to making a positive return in a reasonable period.

38 So what about the phrase which was also criticised about the plausibility of BT's

1 business case? The paragraph concludes:

2 "*Oftel has accepted that BT Openworld's business case is not implausible.*"

3 Well in relation to that I have drawn the Tribunal's attention to the phrase in the
4 guidelines, and as BT pointed out in their skeleton Freeserve, of course, itself uses the term in
5 its complaint itself. It deploys it, and deploys it by reference to the findings in the previous
6 margin squeeze investigations. It is difficult to see how it can say now that it does not
7 understand that term.

8 So I wish to stand back with that and ask again the question whether the paragraph in
9 context sufficiently clearly explains why the Director has concluded that there is no evidence of
10 anti-competitive behaviour by BT. In my submission it passes the test amply of whether
11 Freeserve was able to understand that point. I would add finally that the s.47 letter, as it has
12 been called - the June letter to put it more neutrally - did not mention an absence of knowledge
13 about the legal test that had been applied for predation as a concern at all. This is a point which
14 has subsequently occurred.

15 My clients have asked me also to point out that there is a further explanation of the way
16 that the Director General proceeds in these circumstances in the *Bulldog* predatory pricing
17 decision. That, Sir, as you pointed out yesterday, was a third decision made on 28th March.

18 THE PRESIDENT: It is a bit difficult to keep track, but we have four decisions altogether, have we
19 not? We have the earlier January, 2001 decision, and then we have three decisions on 28th
20 March, 2002.

21 MR TURNER: Yes. Well that had not featured in the case of either party.

22 THE PRESIDENT: Which the *Bulldog* decision?

23 MR TURNER: No, it was attached to my skeleton in an earlier hearing, but we had not gone into
24 the substance at all.

25 THE PRESIDENT: No.

26 MR TURNER: But as, Sir, the Tribunal is aware of it, perhaps to complete the context it would be
27 appropriate just to look at that decision.

28 THE PRESIDENT: Yes.

29 MR TURNER: I do not know whether the Tribunal has copies.

30 THE PRESIDENT: Just remind me where it is to be found - it was your original skeleton. Right.

31 MR TURNER: Now before we go into this I would like to make a number of preliminary points.
32 The first and critical point is that you are now looking not at an informal complaint rejection
33 because it did not contain evidence to prompt an investigation. What you are looking at is a full
34 investigation, or rather two conjoined investigations, over a period of some half a year, under
35 circumstances where the Director General did consider that there was cause to investigate, and
36 that in that context it was felt appropriate to set out the results of the detailed investigation and
37 of the principles that had been applied in more detail.

38 The second point before we turn to it in detail is that it sets out the test for predatory

1 pricing and cross-subsidy, and you will see, without the need to refer back that it does broadly
2 copy the guidelines, and in some places lifts the relevant parts word for word, but there is no
3 detail on matters of quantum, such as the payback period.

4 There is explanation that you apply sensitivities, and what base case was looked at, but
5 that the confidentiality of the numbers, in so far as Freeserve saying well, it ought to be able to
6 see BT's business case to kick against it. That just cannot be produced.

7 Thirdly, you will see from this decision that it does show the same principle in action,
8 both when you are looking at predatory pricing which it does, and cross-subsidy, because the
9 two were considered. The relevant question in each case that is looked at primarily is whether
10 the price is above long run incremental cost.

11 THE PRESIDENT: Yes.

12 MR TURNER: Then if there is a cross-subsidy you go on to consider the combinatorial test as well,
13 as appropriate in this case.

14 Leaving aside the introduction, the investigations beginning with paragraph 4, relate to
15 what the investigations are and when they were opened, and you will see there the time period.
16 In paragraph 6 you see that *Bulldog*, who was the complainant for one of the investigations, had
17 made an allegation that special offers on the connection prices of two wholesale products were
18 predatory and, interestingly, because this was not picked up in the decision we are concerned
19 with, there is then a reference to the fact that the Director in that case also considered that
20 special offers were consistent with legitimate commercial practice aimed at stimulating
21 demand, and referred to the shortness of the duration of the special offers.

22 What the Director did do was to agree with *Bulldog* that the pricing and the question of
23 whether it might be anti-competitive required further investigation.

24 So as a result these detailed investigations then took place. Under predatory pricing
25 then - there is a heading "Predatory Pricing", a cross-subsidy above paragraph 12. The first
26 topic is predatory pricing and there is a discussion of what the term means, and a reference at
27 paragraph 15 to the guidelines.

28 Paragraph 17 summarises the point that if a dominant undertaking can be shown to be
29 pricing below LRIC the director would presume it is intending to engage in predatory pricing.

30 If it can be shown to be pricing above, but below average total cost it may be engaging
31 in predatory pricing but there would be no presumption.

32 Then the test of cross-subsidy is also considered, and again the language of the
33 guidelines is mimicked as you go through down to paragraph 24, but that in paragraph 22 in
34 particular again you see the same point.

35 *"The Director will consider whether revenue over the life time of the Service would*
36 *exceed the LRIC including the cost of capital. If the revenue generated by the Service exceeds*
37 *the LRIC the Service will be sustainable in the long term, and will not be in receipt of a cross-*
38 *subsidy."*

1 Then, where there is a group of services sharing common costs, you apply this further
2 test.

3 23 makes the point that it is useful to perform the discounted cash flow analysis, and
4 refers at the end to the unjustified or implausible assumptions that need to be looked for.

5 Then there is the summary of the findings. Under "*Alleged Abuse*" at paragraph 29 to
6 30, there is a summary of what the Director has done, and at 30 is an explicit statement that an
7 understanding of the LRICs of the products is central to both the tests - predatory pricing and
8 cross-subsidy in other words. It then proceeds to look at pricing below cost and there is quite a
9 detailed, and I say actually quite impressive explanation of how the Director has built up the
10 long run incremental cost floor for the supply of these products.

11 At 35 it is interesting to note in the course of that, in the third sentence, that as part of
12 the information that the Director used to build this up, the Director also considered unsolicited
13 submissions made by Bulldog and another operator concerning these calculations, because it is
14 useful to have input from the industry so one can test the reliability of one's assumptions.

15 Then at the end of that paragraph there is the sentence that "*Because confidential BT*
16 *information was used to generate the cost floors, the Director is not in a position to publish*
17 *them.*"

18 36 is the conclusion on predatory pricing on that element, but the Director does not
19 believe, having looked at them has priced, or is now pricing, below the relevant cost floors, i.e.
20 LRIC.

21 I leave aside the next section which is an examination of whether there was any intent,
22 and turn to cross-subsidy, paragraph 43. Reference back first to the point that the Director does
23 not believe that IP stream and data stream are priced below LRIC and goes on to say:

24 "*The Director is also satisfied that there is sufficient combined margin in the aggregate*
25 *of these products to allow for full recovery of the common costs of supplying the services. The*
26 *Director therefore considers the combinatorial tests are satisfied.*"

27 Then finally there is the conclusion, and the only point to draw there is 47, which is of
28 interest to this case.

29 "*Since he is satisfied that BT's conduct would not infringe, the Director, using broadly*
30 *the same approach as he adopted in his investigation to wholesale DSL terms and conditions,*
31 *does not consider it necessary to reach any conclusions on the relevant markets, and whether*
32 *BT might be dominant in them*".

33 That goes to Mr Green's point that here dominance in this investigation is, of course,
34 assumed as a given.

35 Finally, there is an annex, and just to illustrate the point of how sensitivities are looked
36 at in establishing "reasonable period", if you turn to paragraph A12 on page 11, you will see the
37 approach that was taken there in order to annualise cash flows in the cost model, and a
38 reference to the fact that the Director has chosen a five year cost recovery period as a base case.

1 Then over the page, just at the top of the final page, a reference to the fact that for cost
2 recovery periods in excess of five years the Directors used a tilted annuity which brings
3 forward cost recovery.

4 At 18, sensitivity analyses: "*The Director undertook numerous sensitivity tests around*
5 *his base case with each key assumption being significantly varied to test the robustness of the*
6 *results.*"

7 So there one has it. Plainly, in that case the Director set out in detail what he had done,
8 the tests that had been applied and so forth. As a point of substance, if you are just asking the
9 question whether, on the merits, it means that in this case there is anything amiss, in my
10 submission plainly it does not do that. On the question of form, as to whether this might
11 suggest that paragraph 16 should have been expanded in that way, I would submit again that
12 that is not the case; that it is necessary to appreciate the totally different context in which this
13 decision arose. This is a complaint rejection on the basis that it does not get to first base
14 because the hypothetical spreadsheet which had been presented as evidence extends only for
15 one year.

16 THE PRESIDENT: Can I just ask a couple of questions, Mr Turner? One thing that has been
17 troubling me throughout is whether, at the end of the day there is much difference in practice
18 between a predatory pricing allegation and a cross-subsidy allegation.

19 One notes in this *Bulldog* case that having dealt with the predatory pricing allegation
20 the Director was able, quite quickly, to decide that there was not a cross-subsidy problem
21 either. I am still not completely sure that I completely understand in what circumstances you
22 can have the one without the other.

23 MR TURNER: The point that was made to me by the officials in relation to this decision is what on
24 earth are Freeserve saying in relation to this allegation about paragraph 16? Because the fact
25 that we have concluded that there was not an unlawful cross-subsidy itself means that there was
26 no concern about predation. It means we have, in fact, gone further in concluding that there was
27 not a cross-subsidy. We in particular looked at this combinatorial---

28 THE PRESIDENT: The combinatorial test is a further element.

29 MR TURNER: It is a further element, yes.

30 THE PRESIDENT: It does not come into predatory pricing necessarily.

31 MR TURNER: The key point is that the relevant test of pricing above or below LRIC is common to
32 the two. It is the same step for both, and that is why it is particularly puzzling that it should be
33 said that somehow there is some different test which has not been looked at.

34 THE PRESIDENT: I may be wrong about this, but I suspect cross-subsidy is a phrase that is found
35 more in the regulatory context than it is in some competition law contexts.

36 MR TURNER: Yes.

37 THE PRESIDENT: The stronger concepts in traditional competition law analysis and margin
38 squeeze, and predatory pricing. Cross-subsidy either could result from some sort of cross-

1 subsidy, but you do not necessarily regard cross-subsidy as a self-standing abuse in competition
2 law terms because of the enormous difficulty of knowing from what bit of which business the
3 alleged losses are being funded from. All businesses to some extent have a common pot out of
4 which things are paid for.

5 MR TURNER: And really one is looking in both contexts as was made clear in the original
6 submission at this point of whether there is a material effect on competition from all of this.
7 That is an element on which the Director General needs help from the industry.

8 Just on that point, it is perhaps of interest also to note that in the standard textbook
9 "*Bellamy & Child*", at paragraph---

10 THE PRESIDENT: I do not particularly like being referred to it, Mr Turner.

11 MR TURNER: No, no, but nevertheless it is interesting to note that in the particular chapter on
12 Telecommunications, there is a paragraph headed "*Predation and cross-subsidisation*", the first
13 sentence of which asserts:

14 "*Predation invariably involves the dominant company in cross-subsidising its*
15 *activities.*"

16 THE PRESIDENT: I think the answer is that predation almost necessarily involves some kind of
17 cross subsidy, but a cross-subsidy does not necessarily involve classic predation, because you
18 can still have a situation where you are covering costs but overall by not very much.

19 MR TURNER: Yes.

20 THE PRESIDENT: Is that possible?

21 MR TURNER: Well you may overall, I believe, even be making a sufficient margin so you queried
22 the phrase in the explanation given in the additional submission about a service viewed end to
23 end.

24 THE PRESIDENT: Yes.

25 MR TURNER: I do not think it is necessary to turn that on but the supposition might be, for
26 example, that the wholesale arm charges an excessive price to everyone, including to its own
27 retail arm, and this prevents the retailers, both the tied and the independent, from being able to
28 make a reasonable margin. Looking at BT as a whole you may not observe that there is a failure
29 to cover costs because of the need to take into account the wholesale as well as the retail arm of
30 the activity, and that was all that was meant there. So in that sense cross-subsidy does not
31 necessarily involve predation, but predation in this case will - generally at any rate - involve a
32 cross-subsidy.

33 THE PRESIDENT: The point Professor Pickering is raising is that what is being said here by the
34 Director is that we have done all this in the two previous margin squeeze inquiries, 28th March.
35 Those inquiries were regulatory inquiries under the licence conditions. Do we know that the
36 same criteria are being applied in regulatory inquiries under the licence conditions in those
37 cases as are being applied in the Competition Act Guidelines to which you have referred us?

38 MR TURNER: Yes. The answer to that is, in a nutshell, "yes". I included a passage on that in the

1 additional submissions that were furnished on 7th January. Perhaps it might be useful to---

2 THE PRESIDENT: Well we can turn them up in due course.

3 MR TURNER: Essentially the answer is "yes", that when you are looking for unlawful cross-

4 subsidy in that context, the regulatory context you are covering exactly the same ground.

5 THE PRESIDENT: It is the same ground?

6 MR TURNER: Yes.

7 THE PRESIDENT: In relation to the *Bulldog* case, you have referred us to paragraph 35 of the

8 submissions made by *Bulldog*. Are we to infer that the complainant in that case was providing

9 the Director with the sort of information that, according to the Director, he asked Freeserve to

10 give, but they did not give, as it were.

11 MR TURNER: I am not familiar with the detail of this and so in a sense I refer only to ---

12 THE PRESIDENT: The language of the decision.

13 MR TURNER: ---to paragraph 35 because it is obtaining submissions from *Bulldog* and another

14 operator concerning the calculations which were the financial analyses of the products, and

15 what it says that he used that for was to look at and probe BT's financial analyses of the

16 services in relation to his own cost model - so he is taking that into account.

17 I am informed that *Bulldog* provided its business case.

18 MR GREEN: I must say I am somewhat concerned about the way in which evidence is being given

19 because it is not apparent from paragraph 35 that that was the case.

20 THE PRESIDENT: We have to go by the decision, you are right.

21 MR GREEN: It refers to "...submissions made by *Bulldog* and another operator concerning these

22 calculations", which does suggest that the Director would have given to *Bulldog* and third

23 parties some information and said "These are the assumptions I am operating on, please

24 comment". We really do not know and to the extent that evidence is simply being given about

25 what might or might not happen---

26 THE PRESIDENT: No, quite.

27 MR TURNER: Leaving that aside then, the point remains that were Freeserve to have provided the

28 business case it would have been helpful.

29 I think I can turn directly to the activation fee waiver.

30 THE PRESIDENT: Yes, that is very helpful.

31 MR TURNER: If I may I will adopt the same three pronged analysis that I have adopted before.

32 The first question I would like to ask is: what was the complaint that was made in relation to

33 which this decision is a response, and what is the supporting evidence that is presented to the

34 Director.

35 THE PRESIDENT: Yes.

36 MR TURNER: If the Tribunal would not mind turning up the complaint again. There is nothing

37 specific in the text under the heading "Cross-subsidy", but if one turns the page to "Action

38 required" and looks at that, there is where it comes in. The first sentence says Oftel should

1 immediately investigate and challenge the viability of the business case behind Openworld's
2 current offers and in particular their waiver of the connection charge, itself an administration
3 charge imposed by BT and payable by all other Internet Service Providers.

4 That is it because the notes of the meeting at any rate do not reveal that this was raised
5 as a specific topic at all, and I do not propose to go to them to prove the negative.

6 Sir, that is how matters stood and then one comes to the Director's conclusion on the
7 issue, taking that as the basis for the complaint, and the evidence. This was addressed again in
8 the section on cross-subsidy and the first question that I would ask the Tribunal to consider is,
9 having read this and having read all the other material, was the decision justified on the merits
10 in concluding that there is no evidence of anti-competitive behaviour arising from the
11 activation fee waiver.

12 Paragraph 16, which we have just considered, relates to the sustainability of BT
13 Openworld's recent business case, and has pointed out that it has been accepted. It therefore
14 covers the point that the complaint had asked that the business case should be tested to see
15 whether, in the light of special offers, the case was sustainable or not.

16 Now, it is true that there is no specific reference in that paragraph to the fact that the
17 special offer was expressly taken into account. I cannot get away from that. However, as stated
18 at paragraph 61 of the defence, explicitly, it did include effect of the special offer.

19 What you get in paragraph 17 is a rather different approach which is to consider, not as
20 had been asked the viability of the special offer in the context of the overall business case, but
21 the question whether this technique, this competitive tool of a special offer was, or there was
22 evidence of it being, anti-competitive; whether it is a legitimate device to stimulate demand.
23 That is where paragraph 17 comes in. Just dealing with it briefly, the first sentence does no
24 more than define---

25 THE PRESIDENT: A kind of loss-leader defence, you mean?

26 MR TURNER: Yes. It is examining the question whether or not this had been specifically raised,
27 whether this particular technique itself is apt to distort competition abusively in favour of BT
28 Openworld.

29 The first sentence defines what the offer was and then in the second, third and fourth
30 sentences, there is reference to the fact that a previous offer of similar duration had been found
31 to be a legitimate commercial practice, and not to affect competition materially.

32 Then the fifth and sixth sentences, that is the sentence beginning:

33 *"Of tel also notes that a number of ISPs have special offers on connection and set up*
34 *charges and Freeserve currently has a special offer which exactly matches the BT Openworld*
35 *offer."*

36 That is pointing out in this context that other service providers are doing the same
37 thing, which indicates normal competition at least - "indicates".

38 The conclusion is that follows from that that it does not provide evidence of anti-

1 competitive behaviour by BT. In my submission, that finding on the merits is perfectly
2 justified. There was then, and is now, no reason to think that that special offer on the merits
3 distorted competition and was abusive.

4 The Director relies on the fact that it had been looked at in the context of the overall
5 business case, and that there appeared to be nothing unusual about this technique of a special
6 offer. Freeserve had an exactly identical one.

7 Turning then to the separate issue - was this decision sufficiently clearly reasoned on
8 the point? In my submission, "yes", because in response to the point that had been raised in the
9 complaint what is said is that we have looked at the business case very recently, and it does
10 show a sustainable result and that that is the relevant touchstone for assessing either predatory
11 or, if you like, cross-subsidy behaviour.

12 In relation to the practice looked at as a discrete competitive tool [para.17] yes, because
13 there the Director General points out in clear terms that there is no reason to regard this practice
14 as out of the ordinary, as abnormal competition.

15 Then one turns to the subsequent extension of the waiver, a further topic. This is raised
16 in the s.47 letter, the June letter. It is plainly not in the decision because the decision pre-dates
17 the extension. Nevertheless, in my submission, in relation to the extension, Freeserve were
18 informed expressly and clearly that the impact of the extension had been factored into Oftel's
19 analysis of the business case. On that I would like to take the Tribunal to a document annexed
20 to the Notice of Appeal itself, at annex 7 on page 53.

21 What the Tribunal sees there is an email, copied for the purpose of the appeal by
22 Freeserve, from an Oftel official - Naaz Rashid, to Simon Persoff of Freeserve. The date is
23 14th June, therefore, roughly a week before the June letter is written. One needs to begin with
24 the questions at the bottom, that were sent by Mr Persoff. Half way down he says:

25 *"I refer to a press release on BT Openworld's website concerning an extension of BT*
26 *Openworld's offer to waive the £65 activation fee for Home, 500 and Business 500 plug and*
27 *play products. I would appreciate if you would answer the following questions: 1. Did Oftel*
28 *know of this extension and assuming so did Oftel give permission for the extension? 2. Does*
29 *this further extension have any bearing on the now closed Openworld margin squeeze*
30 *complaints..."* - those are the two investigations in the file - *"...where Oftel stated that the then*
31 *extension's duration was insufficient to have a material effect on competition? 3. Did Oftel*
32 *know of and factor in this further subsidy when analysing and subsequently dismissing the*
33 *complaint against Openworld and margin squeeze? 4. Would Oftel allow BT Openworld*
34 *further extensions? 5. At what stage..."* - and this is important - *"...would Oftel consider such*
35 *further extensions to have a material effect on competition?"*

36 Then looking at the answers, the first relates to when Oftel was informed of the
37 extension, at the same time as Openworld announced it was extending the special offer. In
38 relation to the question about the relationship with the margin squeeze complaints of whether

1 the further subsidy was factored in, paragraph 3 says:

2 *"Of tel did not have any prior knowledge of the extension of the special offer when*
3 *concluding the margin squeeze investigation. However, since the special offer was extended,*
4 *Of tel has considered the impact of that extension and has concluded that it would not affect the*
5 *decision of 28th March."*

6 4 points out that it is not for Of tel to approve any special offer Openworld chooses to
7 run; and 5, which I think is drawing to your attention:

8 *"It is not the case that a special offer of X duration will automatically have a material*
9 *effect on competition. Of tel has no evidence to suggest that there has been a material effect on*
10 *competition as a result of the special offer. We would be interested in any evidence you have*
11 *which suggests otherwise."*

12 So one sees from that, first of all, that they were informed that the extension of the
13 special offer was considered by Of tel, and at least in the submissions of 7th January, because
14 this was raised at the hearing before Christmas, have explained how that was taken into
15 account. It was factored into the DCF calculation by reflecting simply a loss with no
16 assumption of a corresponding increase in volume prompted by it. One looked to see whether,
17 even on that basis, the business case was sustainable.

18 In my submission on the substance, on the merits again, there is no reason advanced in
19 this appeal to think that something has gone amiss.

20 Furthermore, in relation to question 5 it is important to emphasise yet again that it is for
21 people in the position of the complainant to explain how some effect on competition from an
22 apparently ordinary special offer will arise. As a matter of commonsense it must be for the
23 industry to say, "but you must appreciate that this can cause terrible losses for us and that we
24 are not in a position to respond on the level playing field of fair competition in some way.

25 In relation to form I cannot again escape the fact that there was no substantive answer
26 to the June letter. However, can it really be said that Freeserve had not been told about the
27 reason for not investigating the extension of the waiver. Only the previous week Of tel had
28 specifically explained its position as you see here. My submission is that therefore there was a
29 sufficient explanation of their position as a matter of form.

30 Finally, Sir, I turn to the telephone census. The telephone census is an issue that was
31 not addressed at all in my friend's oral submissions, and it is only faintly addressed in Mr
32 Green's skeleton. I would like to apply the same set of questions. First of all, to remind the
33 Tribunal to look first of all at what was actually being said in the complaint. That is the last
34 page of the examples in anti-competitive behaviour under paragraph 4. Without reading it
35 through, there are two things which are said. The first is an objection to a question in this
36 census or survey - question 5 in section C where BT/BT Openworld are mentioned together.
37 You can see that by briefly leafing forward because the survey is set out and you see it on the
38 penultimate page - I do not know if the Tribunal has it, there is a list of questions?

1 THE PRESIDENT: Yes.

2 MR TURNER: "*Who is your main Internet Service Provider for home internet use?*" One of them
3 listed is BT/BT Openworld.

4 The second objection is that the Internet questions in the survey would provide BT with
5 market information resulting solely from its dominance in retail voice telephony. Against that
6 background, and I do not believe that the notes of the meeting take that materially further at all,
7 one turns to the decision in the case closure letter, and asks whether the decision to reject it on
8 the merits as providing insufficient evidence of anti-competitive behaviour is justified?

9 There are paragraphs 19 and 20 on point, paragraph 20 addresses the first point,
10 namely, the brand differentiation argument. I do not dwell on that. It makes the same point that
11 BT is entitled to use its brand because that has not been pursued subsequently in this appeal.

12 Paragraph 19 has been pursued, and therefore that is the one to focus upon. What the
13 Director does in that paragraph is to point out in the second sentence that the questionnaire is
14 generic, and in the third sentence a corollary, it is not targeted to customers on the basis of
15 customer billing information which only BT has access to.

16 The fourth sentence then makes the point that it is not prohibited to gather information
17 in that way, and points out in the fifth sentence that other companies can undertake similar
18 exercises either by using their own customer lists or by buying in such information. The sixth
19 sentence: that many Service Providers already have extensive address lists in order to send out
20 marketing information.

21 So, on that basis the Director says there is no reason to conclude that there is anti-
22 competitive behaviour here. It is apparently a normal competitive tool available to other
23 providers, and that there is no evidence to suggest that either Freeserve or any other company
24 could not readily carry out its own surveys.

25 Freeserve incorporates by reference explicitly in its Notice of Appeal the reasoning
26 given in 19th May statement, and I rely on that as well.

27 Turning then to the question whether the basis for this decision is clear to Freeserve or
28 not? My answer is "yes", it was. In particular there is 19th May statement, and I return to a
29 point that Mr Green made in relation to the Director's note of the meeting - perhaps the
30 Tribunal might just turn to that?

31 Mr Green made the point in relation to the heading at the second column, "*Rules*
32 *Governing BT's Marketing of Internet Services*" that at the end of that paragraph "*Oftel agrees*
33 *that it would be helpful if there was transparency on the rules about marketing of internet*
34 *services and said that it would consider making some form of public statement*".

35 Mr Green infers from that that there is an acceptance that the decision needs to be
36 closely reasoned. In fact, the reference is dealt with by the marketing statement, the public
37 statement that was produced, which is the Statement of 19th May. Indeed, it is Freeserve's
38 express case that that does have to be read together with the decision. Once that is accepted

1 there can be no question but that the decision is perfectly adequately reasoned.

2 Finally on that issue, what about the June letter - did that add anything new on this
3 limb of the complaint? I will turn to that in a moment, but it is said only that evidence would
4 follow to show that the assumption made in the decision about matchability, the ability of other
5 companies to do what BT did was wrong, it added nothing new.

6 Certain additional points are now raised in the Notice of Appeal and those are
7 summarised in the defence and for speed I will just give the Tribunal the reference - paragraph
8 83. In his skeleton Mr Green really only majors on one point although two are raised at
9 paragraph 141, and this is the point at 141(ii) that the Director has not analysed the cost that is
10 needed for someone like Freeserve to spend in order to obtain its own database.

11 An important point arises on that, like so many other instances in this appeal,
12 Freeserve is reversing the burden of proof on this issue. It is for Freeserve and for parties such
13 as Freeserve to show that it would be very costly to them to generate a database of their own.
14 The Director does not know that, the Director cannot surmise that. In the absence of Freeserve
15 actually coming forward with evidence about the difficulty in practice of generating a database
16 similar to BT's - what is the Director to do? It is puzzling that Freeserve should attack the
17 Director for not searching for evidence when it does not offer any itself.

18 Lastly, I will deal with one or two of the points made by Mr Green in his oral
19 submissions. First, his argument that the Director unlawfully cut Freeserve short from
20 providing its case on the evidence, so that what you are looking at is an artificially truncated
21 statement of the evidence.

22 I have a number of submissions on that. First, that s.47(ii) expressly requires the s.47
23 application to set out its reasons. It is not, as Mr Green said, the start of a dialogue. It is not a
24 taster. It is not an initial salvo - either the reasons given are there or they are not.

25 THE PRESIDENT: Yes.

26 MR TURNER: Secondly, on its own terms it is not fair to say that the Director cut short Freeserve,
27 and I would just invite the Tribunal to turn up the letter of 20th June, because what it actually
28 says is that a more detailed description of the reasons for this application will follow shortly. It
29 does not say that a more detailed description of the reasons are going to follow, together with a
30 report that will be sent within six to eight weeks. It promises reasons shortly. Well, none came
31 within a period of roughly three weeks.

32 Thirdly, in relation to this submission that somehow Freeserve have been suppressed
33 from drawing relevant facts to the attention of the Director or the Tribunal, it is appropriate to
34 bear in mind that nothing had come out of the April meeting, and at the April meeting Oftel
35 said - and Freeserve well appreciate it, that further material of particular kinds was going to be
36 needed. They were told that and in their own note of the meeting, they reflected the need for
37 that information.

38 Fourthly, contrary to what Mr Green said in relation to the letter of 8th July, which

1 concluded: "*We will, of course, consider on its merits any fresh complaint that Freeserve wishes*
2 *to make*", the meaning of that was not that the Director had a closed mind on the issues in this
3 case. For example, in relation to cross-subsidy the Director was not saying "If you bring
4 forward further evidence of cross-subsidy we are just not looking at it, we will not entertain it".
5 It was a decision on the evidence, and the Director was saying to Freeserve "If you bring
6 forward further evidence, we will look at it", and it was a general statement rather than a
7 reference to separate subject matter alone.

8 Fifthly, the point that nothing of substance actually is contained in the attachment to
9 the s.47 letter in any event such as to call for a variation of the decision, or should the Tribunal
10 ever get that far, to the issue of remitting the issue back to the Director. I will make the points
11 briefly on this.

12 Under "Cross-marketing" what the letter does is to raise a contention that their
13 argument all the time was that advertising tailored specifically to broadband should be paid for
14 by the businesses which benefit. That is what is said there. In other words, it says that it was
15 actually an allegation of cross-subsidy. That has been dealt with on the merits in the defence,
16 paragraphs 27 to 32, and you have heard my submissions on that.

17 In relation to cross-subsidy itself, the point is made---

18 THE PRESIDENT: Before we go to cross-subsidy, just at the bottom of the first page of those
19 reasons on this so-called leveraging point it says: "*Further evidence on this will follow*". I am
20 not completely clear we have ever had any further evidence.

21 MR TURNER: Sir, that is a theme that runs throughout this, because one sees the same point on the
22 facing page at the bottom of cross-subsidy - "*Further evidence will follow*". Under "*Telephone*
23 *Census*" page 3, just above the title "*Advanced notification*", "*Further evidence will follow*".

24 THE PRESIDENT: Yes.

25 MR TURNER: That is my next point after this, the point that even now, even in this appeal it is all
26 very well for Freeserve to say that they were cut short and have not been able to bring forward
27 evidence, but even if it were true then, here we are in the appeal and you have not got anything.

28 I was just saying in relation to cross-subsidy the point they make in this letter is that it
29 is wrong to base a decision essentially on the fact that other ISPs are undercutting or matching
30 BT's prices, and that that is wrong in principle - I dealt with that in the defence at paragraph 75.
31 The point was that the decision did not say that. It said that it was irrelevant, it was an
32 indicative factor, not that it was the decisive factor in assessing cross-subsidy to see whether
33 other people are pricing at or below BT's prices.

34 On the issue of the waiver, which is contained within this cross-subsidy section, the
35 points that are made is that it is wrong to assume that three months might not have a material
36 effect on competition and also the point at the end of that section that the waiver was extended.

37 It is all very well to assert that but again there is nothing new to suggest that there is
38 anything in it. As a proposition it is stated, but there is no reason to think, and none has yet

1 been given that there is a material effect on competition.

2 So far as extension of the waiver is concerned, that had been addressed and I took you
3 to the document of the previous week.

4 The telephone census point, in relation to that there is nothing in that other than a
5 promise of evidence to follow on matchability, and to date you have not received such
6 evidence.

7 Lastly, on the advanced notice point, the only point that is made specifically is that
8 there was a failure - this is the bullet point at the top of the final page - to address the question
9 of why Openworld did not order additional modems following the announcement of the
10 wholesale price reductions. In relation to that in particular it was specifically addressed in the
11 defence at paragraph 43, where it was pointed out that the decision does not say that there was
12 no ordering of modems in response to demand. It just says that BT Openworld got its act
13 together by arranging for suppliers of modems at an early stage, with call up arrangements on a
14 monthly basis.

15 So there is nothing new in that and the final point as, Sir, you picked up, is that even
16 now at this appeal there is nothing new of substance that has been produced on these issues. In
17 particular, although there might have been a suggestion, as I read the cover letter, that the
18 expert report, the economist's report, that was promised would be relevant to the issues in this
19 appeal because it said at the top of the letter on the second page:

20 "*In support of the new complaint and the more detailed description of the reasons for*
21 *this s.47 application, Freeserve.com has instructed an economist.*"

22 Well, here we are at the appeal and there is no economist's report. The conclusion is
23 that there is no reason to remit the decision if your judgment is that there is an insufficiency of
24 reasoning to investigate any further matters raised in the June letter. All the points so far as they
25 go are addressed in the defence.

26 Next Mr Green said that the contents of the meeting of 16th April were of no weight
27 essentially because of the letter that followed from Ofcom on the following day, relating to the
28 preliminary investigation and its terms. You will recall that.

29 THE PRESIDENT: He says they thought - so it is said - that they were expecting some kind of
30 further dialogue, or opportunity to say something to happen and then they got the case closure
31 letter and they felt a bit miffed.

32 MR TURNER: Oh no, I have not understood it to be that. I understood him - but he will clarify - to
33 have been saying in relation to the s.47 letter, that they suddenly got the letter of 8th July and
34 then felt miffed.

35 THE PRESIDENT: That point was certainly made. I thought there was another point made. Have I
36 misunderstood, Mr Green?

37 MR GREEN: Sir, you are quite right, the 17th April letter followed one day after the meeting. The
38 minute simply said that they are now going to consider their reasons and they would let us

1 know some time before 28th May what their position was, and so far as Oftel was concerned,
2 the letter suggested that was the end of it and they were now thinking about what they were
3 doing. They would pursue their investigation, because that is what the letter says.

4 THE PRESIDENT: Yes.

5 MR GREEN: Freeserve was in the position of thinking well, if they need us to assist they will tell
6 us, and nothing in the letter refers to any of the matters which Mr Turner is referring to, for
7 example the extra business case or anything like that, and we are looking at a period now of
8 just a few weeks, ultimately before 28th May, when the Director is going to come to his
9 provisional conclusion.

10 THE PRESIDENT: Yes.

11 MR TURNER: All right, well that is very helpful.

12 THE PRESIDENT: Well, it is true, as you are no doubt about to point out, there is no contemporary
13 complaint about this - the letter of 21st June, or otherwise.

14 MR TURNER: No.

15 THE PRESIDENT: Nor indeed in the pleadings.

16 MR TURNER: No. But leaving aside the formality as well, it was a rather remarkable submission
17 to hear Mr Green make because this is a standard letter that is written setting out the terms of
18 the preliminary investigation.

19 THE PRESIDENT: Yes.

20 MR TURNER: It is not a mini-decision in itself, nor does it shut out Freeserve from providing the
21 information that had been asked for the previous day. That is not how it can be read at all.

22 MR TURNER: The point about the meeting is that it forms part of the essential context for the
23 Tribunal when you are considering the justifiability of Oftel's conclusions, that there was no
24 evidence of anti-competitive behaviour, and secondly whether Freeserve understood the
25 reasons for that view.

26 Lastly, Mr Green's contention that there is no close relationship between the complaint
27 and the decision responding to the complaint. This was again a surprising submission, because
28 as I understood Mr Green, Freeserve's case is that if you are concerned with an important area
29 of, here the telecom sector, the emerging broadband market, that the Director is somehow
30 bound to act on a complaint because a complainant such as Freeserve cannot realistically hope
31 to bring all the necessary information to the Director General's attention. Only the Director
32 General sitting there like the spider in the centre of the web, or like the inscrutable Sphinx has
33 got the background knowledge to take an investigation forward.

34 There are two points: first, the Director's background knowledge cuts the other way. It
35 provides a reason in an appropriate case for being able to dismiss a complaint summarily as
36 here because of the acknowledged background of the recent margin squeeze investigations
37 against which the hypothetical spreadsheet also had to be borne in mind.

38 Secondly, again I return to the point that on the essential issue of whether there is a

1 material effect on competition, the industry is far better placed than the regulator to know what
2 is going on. Similarly, with respect to, for example, the forward looking assumptions in a
3 business plan such as BT Openworld's, and whether those are reasonable or not, the Director
4 requires help from the industry, from a complainant, to take matters forward.

5 In conclusion, Sir, the Director General, and this is a point I am asked to emphasise,
6 does have to be able to deal with complaints proportionately, if he is going to be able to fulfil
7 his functions and prioritise his work.

8 This has to be seen for what it was. It is a complaint supported by precious little
9 evidence. There was a helpful meeting, evidence is asked for, it does not come, and where you
10 are dealing with an industry party against the context of the guidelines. In those circumstances
11 this decision was sufficient and adequate.

12 Secondly, where a complaint is made, as a general matter the Director is entitled to
13 expect that it will be supported by evidence. It cannot be right, as Freeserve's fundamental
14 submission appears to be, that a party can force the Director to carry out a detailed
15 investigation merely by making assertions: "Please investigate cross-subsidy as a matter of
16 urgency".

17 Thirdly, in particular it is the parties in the industry who are best placed to draw on the
18 material effects on competition, and to draw them to the Director General's attention. Here,
19 Freeserve has chosen not to do so.

20 Fourthly, and finally, the basis of this complaint rejection is that there was no evidence
21 of anti-competitive behaviour. That is the refrain in the decision letter concluding with the final
22 conclusion in those words. That conclusion, in my submission, remains robust today in the light
23 of the welter of allegations that were in the Notice of Appeal, and then in the skeleton, and I
24 refer to the defence as a whole. The Tribunal can have confidence in the conclusion, and there
25 is no cause in these proceedings to remit.

26 Sir, those are my submissions.

27 THE PRESIDENT: Thank you Mr Turner. Mr Barling, I hope it is not inconvenient, I think we will
28 rise for five minutes to collect our thoughts before we hear from you.

29 MR BARLING: It is not at all inconvenient, no.

30 (Short break)

31 MR BARLING: Sir, you and your colleagues will be relieved to know that while Mr Turner has
32 been on his feet I have been doing my best to cross through as many submissions as possible. It
33 is quite a difficult exercise as I know you well appreciate.

34 THE PRESIDENT: You take whatever time you need, Mr Barling.

35 MR BARLING: I am very grateful, but I am conscious----

36 THE PRESIDENT: Within limits! [Laughter]

37 MR BARLING: Two of our primary concerns, of course, in seeking to intervene in this appeal
38 were first of all to protect BT's confidential and sensitive information, and in particular the

1 business plan which was faced with a pretty wide application for disclosure by Freeserve, and
2 secondly to argue against Freeserve's submission that the Tribunal should entertain the
3 substantive issue of whether there was an infringement, including issues of dominance and so
4 on and so forth.

5 So far as disclosure is concerned, of course they abandoned that application before
6 Christmas, and have now all but abandoned, but with an important reservation, the argument
7 that the Tribunal should go on to look at the question of infringements. Certainly it has
8 abandoned any suggestion that such a finding should be made at this stage, but I think there is
9 sufficient reservation there that I need to just say one or two words about that in due course.

10 MR GREEN: Perhaps I can shorten my friend's submissions if I make clear now what we are
11 asking the Tribunal to do to save Mr Barling the trouble of having to address you on it?

12 THE PRESIDENT: Yes.

13 MR GREEN: We will be asking the Tribunal, if you are with the applicant in this case, simply to
14 remit it to the Director. We are not asking you to make any findings of infringement of BT, we
15 will simply be asking for remission. We will make submissions as to the conditions we suggest
16 that may be appropriate.

17 THE PRESIDENT: Thank you.

18 MR BARLING: Well that is very helpful and it probably means that the Tribunal does not have to
19 go into the very interesting question of its vires so far as entertaining issues with which the
20 Director has not grappled.

21 THE PRESIDENT: Yes.

22 MR BARLING: We will have to leave that for another day by the sound of it.

23 So two of our concerns have effectively gone away. The other issues, of course, are
24 both procedural and substantive. We have put in quite full written submissions both in the form
25 of a skeleton and a statement of intervention. We ask the Tribunal to take those submissions as
26 read---

27 THE PRESIDENT: Yes.

28 MR BARLING: ---there is certainly no way I am going to repeat them as such, and really try and
29 focus today upon the key points, particularly those which have been debated by the Tribunal
30 itself, and my learned friends.

31 May I deal with five, or in the light of what my learned friend has said possibly now
32 four, preliminary points. I want to touch on, if I may, the burden of proof, the question of
33 whether to remit, which was the question you asked both Mr Turner and Mr Green yesterday.

34 THE PRESIDENT: Yes.

35 MR BARLING: Perhaps I could say a word or two about that, then s.47 application issue, and then
36 points shortly on dominance, and then if I may I will go on to deal with the specific complaints,
37 majoring on the predation matter.

38 THE PRESIDENT: Yes.

1 MR BARLING: Turning then to the first of the preliminary points, the burden of proof. Mr Turner
2 took you to Oftel's skeleton argument which touches on that when he deals with the level of
3 scrutiny - for your note, Sir, it is paragraph 22(a) of Mr Turner's skeleton.

4 We would really only add this: Oftel refers to the burden and standard of proof in
5 infringement cases and refers you to this Tribunal's words in the Napp case, in the final Napp
6 decision, paragraphs 91 onwards where you deal very fully with the standard and burden of
7 proof in an infringement case. Of course, in such cases it must be right that the burden rests on
8 the Director as prosecutor, and that is inevitable if one is going to comply for no other reason
9 with Article 6 of the Convention and respect the presumption of innocence given that it is
10 established now that infringement cases are criminal for the purposes of the Convention.
11 However, in our submission, it by no means follows that that approach should apply in relation
12 to third party appeals, and in particular appeals against the rejection of a complaint. We would
13 submit that, on the contrary, the logic is that the burden in such an appeal should rest on the
14 third party complainant to establish to the requisite standard that the Director's decision was
15 wrong and should be set aside. We say that is the logical result for three interrelated reasons.

16 The first reason: because the presumption of innocence in such a case works in the
17 opposite direction. Freeserve here seeks to persuade the Director that BT is guilty of what is, in
18 convention terms, a criminal infringement. Or, at least to persuade the Director that there is
19 sufficient evidence that justifies him concluding there are reasonable grounds to open a full
20 s.25 investigation.

21 The Director then goes on to consider that complaint, and rejects it. If Freeserve
22 wishes to disturb the finding by an appeal and put Freeserve's presumption of innocence in
23 question, then the burden of proof in the appeal properly (and naturally) lies we submit on
24 Freeserve who make the allegation of infringement and are now in effect in the position of the
25 prosecutor.

26 The second reason is that, all other things being equal, normally the presumption is that
27 it is the person who brings the case upon whom the burden lies of establishing its allegations.
28 Here, Freeserve brings the appeal and must establish its case.

29 THE PRESIDENT: Yes.

30 MR BARLING: Thirdly, and this may be looking at the same point the other way round, there is no
31 possible justification for a presumption that a decision of the Director rejecting such a
32 complaint as this is wrong, so that the Director would have the burden of establishing its
33 correctness.

34 In any event, nothing that we say about those points in relation to the burden of proof
35 detracts from the over arching submission that wherever the burden lies here in the present
36 case, the matter has clearly been established, we submit, for the reasons also given by Mr
37 Turner, that the decision is justified and properly reasoned, and that Freeserve's challenge to it
38 is extremely weak to the point of being without substance.

1 THE PRESIDENT: I think on this point, Mr Barling, at least provisionally as far as I am concerned,
2 one would accept the general proposition that the person who brings the appeal has the burden
3 of showing that the appeal should succeed. Whether it is necessary in a case such as this to get
4 into any more detailed examination of the civil standard of proof, and matters of that sort, I am
5 not quite sure. It is a somewhat hybrid sort of proceedings - somewhat factually - in that there
6 may be some facts, there may be some administrative law, etc. etc.

7 MR BARLING: Certainly.

8 THE PRESIDENT: And one would not want to fit oneself into a sort of straightjacket.

9 MR BARLING: No, no, with respect I would entirely accept - and I have not for that reason
10 addressed the Tribunal on the standard of proof. That is obviously a matter which has some
11 inbuilt flexibility depending on what the possible outcomes are---

12 THE PRESIDENT: Yes, quite.

13 MR BARLING: ---of any particular proceedings and I accept that entirely that it will have to
14 remain flexible as to how high a burden it is, but where it is we submit should not be in doubt.

15 I leave the matter of the Tribunal powers in relation to infringement for reasons that we
16 now know about, and turn if I may - slightly in the wrong order, but it is quite important so it
17 might as well come up front---

18 THE PRESIDENT: Yes.

19 MR BARLING: ---the question about remission that you put to both my friends yesterday. As I
20 understand it the question was what they considered the Tribunal should do if it found, for
21 example, that the decision was inadequately reasoned in any respect, or if it found that Oftel did
22 not deal properly with the s.47 application, and in particular whether the Tribunal should, in
23 those circumstances, remit the matter to the Director for further consideration.

24 Our submission on that question, Sir, is that in a case such as the present there are no
25 circumstances which would justify remitting anything to the Director. If I may just explain that
26 submission by a series of propositions.

27 The first proposition is that the Tribunal should only grant relief which has utility. It is
28 a fairly trite principle that applies throughout the courts of the land. That courts are most
29 reluctant ever to grant a form of relief which really serves no purpose, and it cannot be sensible
30 to call upon the Director to re-examine matter just as a formality when the result is going to be
31 the same, or for example, when the matter is going to be academic because the overall position
32 will inevitably have moved on. That is the first proposition.

33 The second one is that no such relief is necessary in a case such as this for the simple
34 reason that Freeserve can avail itself at any time of the opportunity to make a fresh complaint.

35 Thirdly, to require the Director to reopen an investigation, let alone to require him to
36 make any specific findings in such an investigation - that may not have been something that the
37 Tribunal was asking about - but on any view, even to require him to reopen it, would be to risk
38 usurping the role and discretion of the Director, and may fetter him undesirably.

1 Fourthly, given the power of Freeserve to make a new complaint, all that would be
2 necessary in the situation that we were hypothetically envisaging, would be for the Tribunal to
3 identify any shortcomings in the decision and provide any appropriate guidance, either as to the
4 law or procedure, which should apply and to identify those shortcomings and provide that
5 guidance in its Judgment. Subject obviously to any question of appeals the Director would then
6 be obliged faithfully to follow the Tribunal's rulings in considering any further complaint.

7 Those propositions, we submit, hold good even where the Tribunal's findings are that
8 the Director's decision would or might well have been different had the defect not existed. Even
9 where the overall industry situation still calls for a decision on the matter, but obviously the
10 matter is even stronger - I do not know whether one is allowed to say *a fortiori* - but the matter
11 is even a stronger case in circumstances where, absent the defect, the result would almost
12 certainly have been the same, or where the industry situation may have moved on sufficiently
13 to render it an academic question.

14 So here we submit that even if - which we do not accept and in fact in supporting the
15 Director on this point we would vigorously dispute - even if there was a defect, or an
16 inadequacy of reasoning relating to, for example predation, the rejection of this complaint
17 would have been inevitable in the circumstances. On that point it is probably better if I deal
18 with that under the heading of "Predation" as to why the result would have been inevitable.

19 THE PRESIDENT: Yes.

20 MR BARLING: May I then turn to the s.47 question, which was also part and parcel of the
21 Tribunal's inquiry, in relation to a possible remission to the Director for further consideration?
22 As we have submitted, we submit that a s.47 issue cannot justify remission even if, which we
23 dispute, the Director acted other than lawfully in regard to the s.47 matter. Again, the reason for
24 that is that the result was inevitable in the circumstances.

25 There is a further issue which Mr Turner touched on this morning, namely, the question
26 of whether and to what extent there was a proper s.47 application here, and if I may just briefly
27 submit how we put it on that. We assume that what matters in these questions is substance and
28 not form. When one looks at the relevant steps that were taken they are as follows - well
29 familiar now - the complaint was in on 26th March. There was then a meeting between Oftel
30 and Freeserve in April at which Freeserve agreed to do three things. First, to supply a three
31 year business plan so that it could be compared with the BTOW case, where it was put in
32 Oftel's note of the meeting.

33 Secondly, to provide their own business case to enable a comparison to be made
34 between the two; and thirdly, to ask their parent company, Wannadoo, for permission to show
35 the Statement of Objection in that investigation.

36 Then there was a letter of 17th April from Oftel informing Freeserve that its
37 preliminary investigation would be achieved within 30 days or so, and that they hoped to do it
38 by 28th May at the latest, inform them of their conclusions. Notwithstanding that timing we

1 now know that Freeserve did not send any of the promised material to Oftel, and then we have
2 the decision on 21st May.

3 Then we have a letter from Freeserve, 20th June letter, which purports to be a s.47
4 request for a variation or withdrawal, but on close examination is actually asking Oftel not to
5 make a s.47 determination for what would be on any view a period of several months, because
6 they say they have commissioned an economist and his report will not be available for six to
7 eight weeks, and they want to put in further detailed reason and also lodge a new complaint. So
8 one is looking at least at six weeks before material is going to come in - probably longer - and it
9 then obviously has to be considered. It is not at all unreasonable to think that that might be
10 three months down the road before, on the basis of that request, Oftel would have been in the
11 position to determine the s.47 matter.

12 So contrary to the requirements of s.47(ii)(b), the application did not, and I quote:
13 "...give the applicants reasons for considering that the relevant decision should be withdrawn
14 or varied. It simply promised reasons in the future."

15 THE PRESIDENT: Well it gave some reasons, Mr Barling.

16 MR BARLING: I was coming on to that. The so-called reasons attached to the letter of 20th June,
17 amounted to no more than a restatement of the complaint. It contained nothing that was not in
18 the complaint, or that was said at the April meeting, and it amounted, apart from that, to
19 nothing other than a series of bald statements of Freeserve disagreeing with Oftel's conclusions.
20 It gave a repeated promise of "*further information will follow*" which it has not done,
21 apparently, and an allegation that Oftel should have investigated more vigorously.

22 THE PRESIDENT: The reasons may be thin, and you may be able to criticise them, perhaps
23 legitimately, for not being very convincing, but they are still reasons I would have thought.

24 MR BARLING: Well, if the Tribunal so finds, then obviously something else follows from that.
25 But, in our submission, reasons ought to be reasons for variation, not simply repetition of
26 material that has already been adverted to either in the complaint or in a meeting and that does
27 more than just state disagreement and promise further reasons. On any view it was incomplete -
28 it did not include all the reasons that they wanted the s.47 decision to be based on. So it
29 certainly did not comply with the spirit of s.47(ii)(b) on any view.

30 THE PRESIDENT: Yes.

31 MR BARLING: On that basis we submit, first, that it was defective, and not a proper s.47 request.
32 But if, on the other hand, s.47 did apply to it then the alternative submission would be that
33 Oftel also complied with it, for this reason: that they notified Freeserve in the letter of 8th July
34 that the decision would not be varied. That was clearly the effect of that letter of 8th July.

35 THE PRESIDENT: Yes.

36 MR BARLING: Even if it was not expressed correctly, Freeserve were left in no doubt that the
37 decision would not be varied or withdrawn. All that they are required to do under s.47 is to give
38 notice to them of what the result is.

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THE PRESIDENT: Yes.

MR BARLING: If the point were to be made well, yes, but what about the reasons for not withdrawing it? We would submit that there is no requirement on Oftel to repeat the reasons which it had already given, and that is where the absence of any real, substantive new material is relevant - there was nothing of any substance in those reasons attached to the 20th June letter that was new. Therefore there is no substantive requirement to give any further reasons, they have already been given. That is our alternative submission on s.47.

The next alternative is even if that is wrong there is no possible ground for remitting to the Director in relation to this aspect of the case, the refusal to vary, etc. because of the reasons that have already been outlined it was quite inevitable what the result would be in the circumstances, and there would be no utility in remitting it.

THE PRESIDENT: Yes.

MR BARLING: Sir, that is all I was going to say on s.47 and may I now go on to say a word or two about the issue of the scope of the Director's review - the question of whether he should have looked at dominance and so on, and whether he made any assumptions.

This again we have dealt with quite fully at paragraphs 12 - 19 of our statement, and in our skeleton at paragraphs 33 to 35. In his skeleton the Director has confirmed that, contrary to the somewhat surprising suggestion made in the Freeserve skeleton, in fact he made no finding as to market definition or dominance of BT in any relevant product market. Indeed, no such findings and no assumption to that effect was necessary, and the Tribunal will have seen how they dealt with it, interestingly, in the *Bulldog* case. Similarly, even after a full investigation in that case, having opened it under, I think, s.25, and having dealt fully with the question of whether there was an abuse, predation, they found it was not necessary to go on to deal with the questions of dominance and so on, they become irrelevant.

In our submission it is quite extraordinary for Mr Green to suggest that somehow it was incumbent on them, given the conclusions they reached, to then go into what was a very complex question of market definition and questions of dominance when the result was inevitable in any event, in the light of their finding that there was no abuse.

In any event, no such assumption could possibly be made as to dominance without a full investigation of the specific case. The Tribunal has well in mind, no doubt, the Coke-Cola decision which is in the bundle of authorities, which makes quite plain that there has obviously got to be a finding - one cannot rely upon previous findings. In a case of infringement, even if one has analysed market definitions and dominance, one has to look at it in the context of the particular case. No such investigation was carried out here, or needed to be carried out. Had it been done properly it would have had to involve BT with all the procedural safeguards.

So far as the ATM direction, which you will remember there was some reference to by Freeserve in referring to market power. That, of course, was in the context of regulation, not competition law. I hope the Tribunal have seen, and may find helpful - certainly I found it

1 extremely helpful - the paper that BT prepared, which we annexed to our written answers to the
2 questions the Tribunal posed, dealing with the regulatory history of how these concepts have
3 evolved over the years since the 1970s - well established operator, then significant market
4 power, and so on and so forth.

5 Obviously, in the context of regulation, and we put in the bundle the decision of the
6 Irish High Court in the *Meridian* case, a Judgment of O'Higgins J., who makes perhaps the
7 obvious point in paragraph 37 of his Judgment in that case, that the two concepts, that is of
8 significant market power, or market power, are different and irrelevant the one to the other.

9 THE PRESIDENT: That does not arise in this case, but it is obviously an issue we shall have to deal
10 with sooner rather than later.

11 MR BARLING: That may well be right. That is all I was going to say by way of the preliminary
12 points.

13 THE PRESIDENT: In relation to the question of whether the Director should tackle dominance in
14 these sorts of decisions without necessarily talking about this specific case, one can imagine
15 Competition Act cases, as distinct from regulatory cases, where the whole analysis will, or
16 might, turn to some extent on what markets you are talking about in the first place. One can
17 well imagine some cases in which, without necessarily finding dominance, or making any
18 specific conclusion the Director says "For the purposes of argument I am going to assume that
19 the markets I am talking about are this, that and the other." There is no other way of setting a
20 basis for the analysis upon which you are about to embark.

21 MR BARLING: There may be a case for, I accept, sensible assumptions of that kind. If one just
22 takes the present case, it was common ground, as it were, no one particularly took issue with
23 what product one was looking at, it was the pricing of that product.

24 THE PRESIDENT: Well to take the present case by way of example, had the Director wished, you
25 could imagine that a slightly different case could be mounted, for example theoretically
26 speaking, in relation to the telephone census where you have an important, if not dominant,
27 position in retail voice telephony, and the argument is that that position is being used to help in
28 another market.

29 MR BARLING: Yes.

30 THE PRESIDENT: That might be a different sort of case, analytically under competition law from,
31 for example, the predation case where there does not seem to be, and no one has so far alleged
32 that BT was at the time dominant in retail broadband, but there is a connection sought to be
33 made with wholesale broadband, and possibly retail voice telephony, possibly both.

34 MR BARLING: Yes.

35 THE PRESIDENT: But exactly what that connection is not perhaps as straight forward or clear as
36 might be the case, and you could imagine in some cases it being necessary to explore, at least to
37 some extent, these sorts of issues, without necessarily reaching conclusions.

38 MR BARLING: No, no. In some sorts of cases certainly, because by exploring the issues one

1 might, as it were, be able to find other reasons, particularly in a rejection case for saying "It is
2 just not on, your basic factual premise is mistaken" - very much as did happen to some extent
3 here in relation to some of the complaints, and I accept that. But it may even turn out to be a
4 semantic matter---

5 THE PRESIDENT: Yes.

6 MR BARLING: ---as to whether one has assumed dominance or not. If one simply does not need to
7 deal with an issue, but one does go on to deal with the substance of the complaint, goes straight
8 to the end, as it were, rather than bothering with any of the intermediate steps, and knocks out
9 the last, essential plank---

10 THE PRESIDENT: I suppose what is partly at the back of our minds is that if you take this
11 particular decision - and I mean no criticism of anybody, far from it - it does not completely
12 leap to the eye from the page whether it is being done in, as it were, the classic, well established
13 regulatory mode, or whether it is being done in the new world of the Competition Act. It may
14 be some kind of adjustment in the way one approaches these things in the Competition Act
15 context is perhaps something to be thought about.

16 MR BARLING: Well of course, maybe, but I think it has been because there is a statement by
17 Oftel---

18 THE PRESIDENT: Indeed there is.

19 MR BARLING: ---that says where there is overlap they will---

20 THE PRESIDENT: Absolutely.

21 MR BARLING: ---look at it very much through the---

22 THE PRESIDENT: Which came shortly after this particular decision. This particular decision is
23 probably on the cusp of the changeover.

24 MR BARLING: Yes. But of course where there is overlap Oftel have been well used to looking at
25 matters with two sets of spectacles on, but what you say, Sir, is no doubt correct. The emphasis
26 will now inevitably change.

27 THE PRESIDENT: You say that there is no reason to criticise this decision for failing to address
28 dominance.

29 MR BARLING: No, and on the contrary it was an utterly sensible approach to have taken---

30 THE PRESIDENT: Yes.

31 MR BARLING: ---given the complexities that that would have involved.

32 THE PRESIDENT: Yes.

33 MR BARLING: And the obvious answer in a sense - we would say that wouldn't we - but at least
34 the answer that they found no difficulty arriving at in relation to the last essential plank of
35 abuse.

36 THE PRESIDENT: Yes.

37 MR BARLING: So with those preliminary points may I then turn to the specific grounds of appeal,
38 and make one or two general points about those specific grounds? Interestingly, Freeserve has

1 changed the order of its allegations, as may have been noticed. The complaint and the appeal
2 application both dealt with cross-marketing, advanced notification, and cross-subsidisation, and
3 the telephone census in that order. But in the skeleton they have dealt with: predation 1 and
4 predation 2, equivalent to the old cross-subsidy heading, first. And cross-marketing and
5 advanced notification are now relegated, it appears, into third and fourth place respectively.

6 Correspondingly, Mr Green devoted a huge amount of pages to his predation
7 arguments, whereas a much smaller - almost derisory - scope was given to the cross-marketing
8 and the advanced notification, and the telephone census barely gets a mention. So I will,
9 therefore, following his lead, largely confine my remarks to the questions of predation, and I
10 think that was reflected also in Mr Green's oral submissions. I will make a number of points
11 about it.

12 First, and this was picked up by Mr Turner, but I do want to emphasise it, nowhere
13 does Freeserve give any details of any loss, damage, suffered by itself as a result of the alleged
14 abusive conduct on the part of BT, or even suggest that its interests have been damaged by the
15 alleged conduct. This is surprising, or would be, if there were any substance in the complaint,
16 given that we are now talking about conduct which began a year or so ago, so there has been
17 plenty of time to show the results of what was termed in that complaint "an orchestrated
18 campaign of anti-competitive behaviour by BT".

19 It is also noticeable that until yesterday, when Mr Green gave some unsubstantiated
20 evidence himself on the hoof, Freeserve has not asserted that it is losing money at the price it is
21 charging its own customers, which is either identical to, or very similar to, BT's retail
22 broadband price.

23 Was any such loss expected by Freeserve, and if so why did it not fulfil its promise in
24 April, to supply Oftel with its own business plan? In a sense that would have been the classic
25 confirmation that there was anything in this complaint at all. It could only have helped its case
26 if, as it asserted at that time, the price that it was being obliged to charge itself was predatory,
27 although it is a very curious allegation to have made in a market where BT has 18 per cent. of
28 the share of that market, or 20 per cent. depending upon whether you include narrow band---

29 THE PRESIDENT: I am sorry?

30 MR BARLING: 18 per cent. is BT's market share if you take narrow band and broad band together--
31 --

32 THE PRESIDENT: I am sorry - narrow band?

33 MR BARLING: That is right, if you take narrow band and broadband together, internet access -
34 call that the internet access---

35 THE PRESIDENT: Yes.

36 MR BARLING: ---they have an 18 per cent. share.

37 THE PRESIDENT: BT has?

38 MR BARLING: BT. AOL have 19, or these figures were, as Oftel say, "good as at August" last

1 year. AOL has 19 per cent., and Freeserve has 20 per cent.

2 THE PRESIDENT: And if you take broadband by itself?

3 MR BARLING: If you take broadband on its own, BT has 20 per cent, NTL has 38 per cent.

4 THE PRESIDENT: This is including cable?

5 MR BARLING: Yes, yes, and Telewest just 21 per cent. These are figures from Oftel, that Oftel
6 put in in the answers to the Tribunal's questions.

7 THE PRESIDENT: Yes, quite. And the figure that we do not have is what the shares are for ADSL
8 broadband.

9 MR BARLING: ADSL broadband is approximately 40 per cent. If you look at all the broadband
10 supplies it is roughly 60 per cent. cable, 40 per cent. ADSL.

11 THE PRESIDENT: But within ADSL we do not know quite how it breaks down, do we?

12 MR BARLING: We can probably find out, there may be some figures available for that. Can I pass
13 on that for a second and others will have a look at that.

14 THE PRESIDENT: Yes, it might just dot an "i" or cross a "t" for us.

15 MR BARLING: Well if it is helpful we will find that. Perhaps I can continue while other heads
16 think about it.

17 THE PRESIDENT: Yes, carry on. We are coming up to lunch.

18 MR BARLING: That is true, we can have a look at it then. Forensically, one is also prompted to
19 ask why, given the alleged urgency of the situation, and as Mr Turner pointed out, the word
20 "urgent" occurred four times in that letter of 26th March, last year, enclosing the complaint,
21 why did they then ask Oftel to delay dealing with it, in terms of the s.47 application, for
22 upwards of several months. "Wait for the economist's report", "wait for this, wait for the other".

23 THE PRESIDENT: Yes.

24 MR BARLING: We submit that the reason is because Freeserve then tacitly acknowledged that
25 their complaint was hopeless as it stood. Indeed, far from being able to allege that they are
26 losing money or being forced to adopt a particular pricing strategy, Freeserve have been busy
27 boasting about their new price offering and about being a price leader, and generally getting off
28 the stocks first in such matters. One can see confirmation of that if one looks at the little
29 paginated clip of documents in annex 7 to the application. I was not proposing to take the
30 Tribunal to it, but just simply to give you the reference to that press release. It is at page 25 of
31 that little clip. "*Freeserve today announces it will offer broadband internet for £29*".

32 THE PRESIDENT: Yes, that is the day before BT, is it not?

33 MR BARLING: Yes, that is the day before BT. "*Freeserve was first to launch the pay-as-you-go
34 market. We were ahead of BT then. We beat them to the launch of ADSL...*" and so on and so
35 forth. "*All new and existing broadband customers will automatically get the new lower
36 price...*". I suppose it might be said "Oh, well, that is just marketing talk". But on the other
37 hand, it is very enthusiastic sort of talk, and it does not look as though someone is saying
38 "Gosh, we will have to predict what BT are going to come out with. We do not want to, but we

1 are going to be forced to adopt what for them is a predatory price".

2 THE PRESIDENT: Yes.

3 MR BARLING: Further, nowhere has Freeserve sought to meet Oftel and BT's point that far from
4 being obliged to adopt a loss-making policy, other Internet Service Providers, including
5 Freeserve, were ahead of us in fixing their new retail prices, and quite a few of those were
6 lower than BT's. I do not know if you have seen those, Sir, but if you turn to page 35 in the
7 same clip you get a little cross-section of the prices that people were actually coming up with
8 that bought BT. The top of page 35: "*Around 200 ISPs by broadband products from BT
9 Wholesale, and may have already reacted to this news. Freedom2Surf is planning to drop its
10 price to £22.50 per month...*", that is quite a lot lower "*...from 1st April, in the cheapest deal
11 announced yet. Pipex is close behind with £23.44 per month. BT Openworld's price point of
12 £29.99 is the same as that announced by Freeserve yesterday.*"

13 THE PRESIDENT: This is from whom, this document?

14 MR BARLING: Graeme Weardon. It is an industry news thing, ZD Net UK, whoever they are.

15 THE PRESIDENT: Yes.

16 MR BARLING: Similarly, we submit there is not one jot of evidence to support Freeserve's oft
17 repeated assertion, repeated by Mr Green yesterday, that consumers have a predisposition to
18 take broadband from BT if they are BT voice customers - there is not a scrap of evidence.

19 On the contrary, after several months of prices that are being complained of, as at
20 August, as I have already said BT were still third in terms of market share.

21 THE PRESIDENT: That is narrow band and broadband together.

22 MR BARLING: That is narrow band and broadband together.

23 THE PRESIDENT: That is why I asked about broadband ADSL separately.

24 MR BARLING: Right, well that is no doubt underway, and we will hopefully come back with
25 some sort of an answer after lunch.

26 THE PRESIDENT: Yes, even if it is just in a range, we do not want a precise figure.

27 MR BARLING: Yes. Just for the Tribunal's note, all the market shares that I have referred to you
28 find at annex 10 to Oftel's answer to your questions, pages 13 and 14.

29 Now, I come on then to the alleged inadequacy of the Director's reasons for predation. I
30 suppose it is possible, I do not know whether it is convenient, that if the Tribunal thought this
31 was a convenient moment, I might even be able to do further pruning which is to everyone's
32 satisfaction.

33 THE PRESIDENT: I am so encouraged, Mr Barling, at such an invitation. Yes, I think we will rise
34 there and start at 2 o'clock.

35 (Adjourned for a short time)

36 THE PRESIDENT: Yes, Mr Barling?

37 MR BARLING: Two short points arising from this morning, just to get them out of the way. The
38 Tribunal was interested to know BT's share in the market of ADSL customers and it has been

1 pointed out to me in Oftel's answers to the Tribunal questions at paragraph 3.8 of their answers,
2 page 13 Oftel's view is that BT has about 50 per cent. of the ADSL customers. They have just
3 over half of those - the 20 per cent. they talk about is in the gross retail broadband market
4 including cable and everything else.

5 THE PRESIDENT: Right, thank you, yes.

6 MR BARLING: The figure for ADSL alone is about 50 from that. I ought to say that BT does not,
7 of course, accept that broadband DSL is in itself a market in an economic sense, because there
8 are other technologies. There is any one of about six types of main technologies that are
9 capable of delivering the same service, including cable, wireless, satellite, 3G and something
10 called "Powerline Communication", and something even more erudite called "Mesh Radio". So
11 those are all candidates for inclusion as and when this issue ever comes to be decided. Also, of
12 course, narrow band itself may be said to constrain the prices for broadband, so there are all
13 those issues that have to be determined, but if one just isolates DSL that is the position.

14 THE PRESIDENT: Yes, thank you.

15 MR BARLING: The second point. It is perhaps not surprising that you, Sir, and your colleagues
16 may have had furrowed brows when I was dealing with s.47 because I have been reminded that
17 at the end of the last Judgment on the appealability issue, you did make a finding in relation to
18 s.47, and it may be worth turning to that, if we may, for a second. It is in the authorities' bundle,
19 tab 7. If one goes right to the very end of it, to absolutely the last paragraph, 127. You discuss
20 the terms of Freeserve's letter. You say that they did ask them to withdraw their decision.

21 THE PRESIDENT: Yes.

22 MR BARLING: "...the fact that on a cross-marketing issue Freeserve contended that....did not in
23 our view alter the fact the request was properly made". That point appears to doom to failure
24 my first submission that s.47 was not engaged on the basis there was not a proper application.

25 THE PRESIDENT: Yes, well I had thought in the back of my mind that we had probably dealt with
26 it, but I was not confident enough to say so.

27 MR BARLING: In the same paragraph, however, if one just continues reading, you go on to say:

28 *"Since that request was rejected by the Director in his letter, it seems to us that the*
29 *requirements of s.47(iv) are satisfied."*

30 So by the same token my learned friend, Mr Green's submission, at least in part, is
31 doomed to failure, that there has been a breach of s.47(iv). That was my alternative submission
32 this morning, Sir, that if they complied with s.47 and made a proper request then Oftel also
33 complied because their letter of 8th July can be interpreted only as a rejection of any suggestion
34 there should be withdrawal or variation. All that that left then was the possible argument that
35 there were no reasons given for that and, Sir, the Tribunal already has both mine and Mr
36 Turner's submissions that there is no possible justification for requiring the same reasons to be
37 given all over again when there is no new material of substance in what was attached to the
38 letter of 20th June - the reasons have already fully and adequately given. So I do therefore

1 stand by my alternative way of putting it, which is that Oftel also complied.
2 Turning then to the main themes, I have done a bit of pruning and hope now to be able
3 to take---

4 THE PRESIDENT: I think we have covered quite a lot of ground now, Mr Barling.
5 MR BARLING: You have, and I am going to take this as briefly now as I can.
6 THE PRESIDENT: Yes.
7 MR BARLING: I cannot believe I am going to take longer than about 15 to 20 minutes on
8 everything.
9 THE PRESIDENT: Yes, good.
10 MR BARLING: Mr Turner, this morning, dealt very comprehensively with what the complaint
11 alleges, so I am not going to go into that, and also with the April meeting. Then he took you
12 again in some detail to the decision letter. Just one point on that that one must bear in mind, and
13 Mr Turner touched on it also, I just want to emphasise it.

14 Oftel obviously cannot properly reveal BTO's business secrets. What the assumptions
15 of BT are as to costs, volumes, its return and so on, and the period, are all highly confidential
16 parts of the business plan. Therefore, one sees what does Oftel do in its decision? Oftel relies
17 upon the following: the mock business plan is one year and therefore unrealistic and you
18 already have well in mind the submission that they ask for the kind of business plan they
19 thought would help them, which they did not get. It is unrealistic because it is permissible for a
20 new service to make a loss in its first year without being predatory provided it shows a positive
21 return over a reasonable period. They then did go so far as to reveal that BTOW's own business
22 case showed a reasonable, positive return - payback - over a longer period than one year,
23 pointing to the fact that they had already accepted in the other investigation that the business
24 plan was not implausible.

25 So it vital to see - well it may be just repeating it - what they are saying. They are really
26 saying that Freeserve's evidence takes the matter nowhere for the reason that all that they had
27 was the one page spreadsheet over an inadequate period, and the BTO plan which did show
28 what was required to be shown to exclude any possibility of the complaints that were being
29 alleged.

30 Mr Green sought to obtain some support from the *Deutsche Post* case, but the Tribunal
31 may have picked up that even in the passage that he took you to - paragraph 36 - it makes the
32 Director's case, because the crucial reasoning in that paragraph was that Deutsche Post had
33 remained in the market "*without any foreseeable improvement in revenue*". So its assumptions
34 were not plausible other than in terms of some anti-competitive behaviour, and contrast the
35 position found here by the Director.

36 Mr Turner has dealt with the *AKZO* issue, and I can leave that on one side.
37 THE PRESIDENT: On this side of things, for understandable reasons it is a slightly asymmetric
38 case, because you know what was in the business case, the Director knows what was in the

1 business case, Freeserve does not and the Tribunal does not, so we are in that situation, and
2 that arises because of the nature of the case.

3 MR BARLING: I am not sure though that the asymmetry is an unfair one.

4 THE PRESIDENT: I am not saying it is, it is just the situation---

5 MR BARLING: No, no, I was just going on to---

6 THE PRESIDENT: It is not a wholly satisfactory situation from the point of view of any Tribunal
7 trying to get to the bottom of something, it just happens to be the situation that we are in.

8 MR BARLING: Yes, but perhaps I can say this, that one is not completely in the dark. Oftel has
9 revealed as much as it can about the business plan, as much as it felt it could properly do and so
10 you know something about that plan.

11 THE PRESIDENT: Yes, indeed. If you could help me on this point. The question is in some ways
12 how strict or formal should one be? Paragraph 16 of the contested decision, and indeed
13 paragraph 17 and paragraph 15, refer back to the business case, and the previous investigations
14 into the cross-subsidy in the market.

15 We have learned in the course of the case that the underlying principles are those that
16 are set out in the Director's guidelines, and in particular assessment of LRIC. This decision does
17 not actually make any reference to the guidelines or to LRIC. We are then taken back to the
18 earlier margin decisions, and they do not make any reference to the guidelines or to LRIC
19 either, and they are regulatory decisions, not Competition Act decisions. So up to a point the
20 Tribunal, and perhaps the applicant are being asked to take quite a lot on trust, as it were. I am
21 not saying that anyone is trying to mislead us, of course, I am sure they are not, but there is a
22 sort of gap from the point of view of an outsider trying to understand how got to where one has
23 got to.

24 MR BARLING: Perhaps all one can say about that is that one has to look at this in the continuing
25 spectrum of a specialist Regulator - respectable public Body - who has gone on record as
26 saying that these were the principles that he did apply in assessing BT's business plan. BT's
27 business plan, after all, was with him for other reasons, and this is a Regulator who is
28 acknowledged historically as one of the most stringent Regulators of all, and has an intimate
29 knowledge of BT's financial arrangements.

30 In our submission, given the burden of proof, if one is in any doubt, as it were, we
31 would submit there is no room for any doubt in a case of this kind, but if there is, as you say,
32 Sir, an element of we have to take something on trust then I think in weighing that side of the
33 balance, bearing in mind some of the factors we referred to today - not least the burden of proof
34 - to see whether there is anything in the balance to counterweigh the need to take that on trust
35 which could have been provided. Sir, you and your colleagues have well in mind the absence of
36 any real assistance from Freeserve who could have provided, for example, their own business
37 plan. It would not have been doing anything that BT is not required to do, on a fairly regular
38 basis, in supplying that to the Regulator and that might well have thrown light on the findings

1 that are revealed in the decision. So it is not something that the Tribunal is being asked to take
2 on trust in a vacuum. There is whole range of background factors, such as the burden of proof,
3 the absence of any real assistance from the complainant, that must be borne in mind.

4 In those circumstances we say, absent anything to show that they got it wrong, or that
5 they did something, or were mistaken in saying that they had approached it on the basis of the
6 guidelines, or looking at LRIC, etc., there is also the inherent implausible improbability that the
7 Regulator would approach it in any other way than the way in which he has publicly said that
8 he does approach these questions, and has for some time said that he approaches these
9 questions---

10 THE PRESIDENT: I am not suggesting that we have not been told correctly what he did, I am
11 simply trying to apply the standard rubric that the decision needs to be reasoned to explain to
12 the applicants and enable the Tribunal to bring its mind to bear on it.

13 MR BARLING: Exactly, and in relation to that we submit that even if you did not get into the
14 detail of the guidelines, that just taking the statements made in paragraph 16 at their face value
15 in any commonsense meaning of the term, they cannot live in the same world with an allegation
16 of predation.

17 THE PRESIDENT: Could you kindly at some point just confirm - this is a slightly different point on
18 the timescale - that the business case, which is referred to on the last page of Miss Theresa
19 Brown's letter of 22nd April, which says that: "*Oftel was given a copy of our business case that*
20 *evening when we had finalised all the figures, that is to say the business case of 26th*
21 *February*", is the same or a different business case from the one that is referred to in paragraph
22 5 of the retail margin squeeze decision - page 24 of the Director's supplementary bundle,
23 paragraph 5.

24 MR BARLING: The residential one, yes. So whether the business case that is referred to in the
25 residential margin squeeze case closure---

26 THE PRESIDENT: Is the same business case---

27 MR BARLING: Is the same business case as the one---

28 THE PRESIDENT: In the letter to Mr Russell at 22nd April?

29 MR BARLING: We will check that.

30 THE PRESIDENT: If you would check it for me at some time.

31 MR BARLING: Thank you, I am grateful. I was touching on the factors, as it were, which one
32 bears in mind when one is dealing with assessing the adequacy of the reasons and there are a
33 number of others too - some of them are referred to in our written material - if I may just list
34 them very quickly without going to any of the material. A position does not need to taken on all
35 arguments relied on by the persons concerned, only matters of decisive importance - Mr
36 Turner, I think, did refer to that.

37 THE PRESIDENT: Yes.

38 MR BARLING: And only those matters need be mentioned, that is the case of the acronym

1 *BEMIM.*

2 THE PRESIDENT: We have that.

3 MR BARLING: And more recently the VAT case which says that you do not have to go into every
4 point of fact and law - rather baldly stated at paragraph 165. Also, and perhaps of particular
5 significance here when faced with a poorly argued complaint under the Competition Act the
6 Director is in principle entitled to give only brief reasons for rejection, and that was this
7 Tribunal's statement at paragraphs 100 and 124 of the earlier Judgment in this case.

8 THE PRESIDENT: Yes.

9 MR BARLING: There is another factor too that one has to bear in mind, and I have touched on it
10 but I just want to develop it slightly for a second. Oftel cannot tell a competitor what BT's
11 assumptions are, as I have said, and it has the information only because of its specialist
12 regulatory role. It relies very heavily upon those it regulates, such as BT, to be full and frank at
13 all times when dealing with information. It is a matter of crucial importance to Oftel obviously
14 that they are, and correspondingly it is a matter of crucial importance to those regulated that
15 matters are kept confidential.

16 The idea that all you have to do is to make a weak complaint to be able to force Oftel to
17 expand in undesirable detail its reasons for rejecting that complaint would, in our submission,
18 be contrary to the public interest and of the efficient regulatory arrangements including the
19 encouragement of competition.

20 So, summing it up on predation, Sir, why was it in all these circumstances incumbent
21 upon Oftel to go into more detail than it did? We submit that Freeserve have not even begun to
22 justify any change of view, anything that would justify setting aside this decision.

23 On the waiver of the activation charge, again Mr Turner has dealt very fully with that. I
24 am tempted to say almost nothing about it at all. He has confirmed the position, I think, what
25 actually happened in relation to that.

26 THE PRESIDENT: Do you have any comment to make about the timing of the extension?

27 MR BARLING: So far as the extension is concerned he referred to the exchange of emails at
28 paragraph 53 that you have seen - annex 7 to the application. He has stated that Oftel did not
29 have any prior knowledge of the extension, and although he did assess its impact he found its
30 impact was immaterial. Oftel asked Freeserve for any evidence it had to a contrary effect, and
31 they did not give any?

32 THE PRESIDENT: No, what I was wondering was whether we should read anything into the fact
33 that the extension seemed to come into being about an hour after the rejection of the complaint,
34 whether BT had been waiting for the result of the complaint before announcing the extension?

35 MR BARLING: You should not read anything into that, in the light of what Oftel have said that
36 they had no prior knowledge of that. Neither would BT have had any knowledge of precisely
37 when Oftel were going to deal with the closure, and I can take instructions on that specific
38 point, Sir, if it will help you, but my understanding is that the information that was given,

1 certainly to Freeserve, was that they could expect a decision by 28th May at the latest.

2 THE PRESIDENT: Yes, I am not necessarily saying it is anything to be criticised, but a cynic might
3 imagine - or not necessarily even to be cynical, just to be realistic, they might imagine that BT
4 was waiting to see what would happen to the complaint before deciding whether to extend the
5 offer or not, I just do not know.

6 MR BARLING: Can I make some inquiries about that as well, and interject at a suitable moment.

7 THE PRESIDENT: Certainly, thank you.

8 MR BARLING: In relation to this, Mr Green did refer to the fact that we had, in our answers,
9 accepted that the waiver was designed to stimulate demand, and we make no apologies for that.
10 It simply in fact repeats what Of tel had already said at paragraph 17 of its decision letter. BT is
11 perfectly entitled to stimulate demand, that is normal commercial conduct.

12 That is all I was going to say on predation, and I will just pick up, if I may, any
13 additional points that I think ought still to be made in relation to the other complaints. You
14 raised a question, in the course of I think it was Mr Green's or possibly Mr Turner's
15 submissions, about the cross-marketing issue as to Of tel had made the point that because of the
16 factual misapprehensions that Freeserve were labouring under about what actually the websites
17 did refer to, and the fact that when one looked at them, they actually referred to all the ISPs
18 including Freeserve, and therefore benefitted all of them equally. The only point I was going to
19 underscore on that was since none of the other beneficiaries have been required to pay anything
20 towards the advertising which benefits them, then there is no particular reason why BT
21 Openworld should pay anything either.

22 THE PRESIDENT: I see, everyone has a free ride, in other words?

23 MR BARLING: Certainly that would be the symmetric approach if there was said to be a benefit.

24 THE PRESIDENT: Yes.

25 MR BARLING: And it is difficult to see that BT would, in practice, gain significantly or at all
26 more than any of the other Internet Service Providers who were also identified on their website.
27 These days if people get to the stage of looking at a website they are actually, almost always,
28 well versed enough to be looking for the best deal and what they are looking for would be no
29 doubt the deal they thought gave them the best and most efficient use of the internet for their
30 own requirements. One only has to see that there is a plethora of detail available on the internet
31 about how they all stack up together and what various offers are and who is really rated the
32 best.

33 So far as the advanced notification complaint, again that has all been dealt with. There
34 is only just one thing I want to say about that, and that is the Tribunal asked rhetorically
35 yesterday whether the Director should, as a matter of procedure, require supporting documents
36 to verify the information that it requests? The answer to that is they sometimes do. There was
37 no hard and fast rule about it. As and when they think they need further information, or they
38 need to see the "horse's mouth" as it were, and take a view, they do require the documents,

1 however on other occasions the do not.

2 THE PRESIDENT: Yes.

3 MR BARLING: But what they are quite familiar with is the fact that there are criminal sanctions
4 available for any false information or incomplete information and, although this was not the
5 subject of a formal request, the Tribunal has seen in our answers to your questions that we treat
6 them as formal requests in terms of the audit trail and so on. Therefore, with great respect we
7 would invite the Tribunal not to suggest any general principle that should apply in such cases, it
8 is very much a matter for the Judgment of the Regulator, otherwise matters would come
9 unwieldy, given the number of requests or complaints that are actually put out over the course
10 of the year. I am not going to say anything about the telephone census.

11 We submit for those reasons, in support of Oftel, that all aspects of the complaint were
12 rightly rejected by the Director, for the proper reasons, and there is no substance in the s.47
13 appeal either, and no grounds for setting aside the decision in any respect.

14 As soon as I have any information on that matter, Sir, we will come back to you.

15 THE PRESIDENT: Thank you very much, Mr Barling. Mr Green?

16 MR GREEN: Sir, I am going to be selective in the points I deal with, dealing with those which I
17 think are the most controversial between the parties.

18 THE PRESIDENT: Yes.

19 MR GREEN: And it is not necessarily in a logical order, I will take them in the order which Mr
20 Turner and Mr Barling have dealt with them.

21 Very briefly, by way of introduction, can I make an observation on the point made by
22 Mr Barling in relation to the standard of proof. Sir, you said that you did not necessarily think it
23 was a relevant issue today, but I would like to make one observation. Freeserve accepts that it
24 must show that its application should succeed. We seek to persuade the Tribunal that the
25 Director erred in terms of the duty to give reasons.

26 If the applicant succeeds, then the Tribunal might have a discretion in the ordinary case
27 to remit or decide. In the present case the applicant would invite the Tribunal to remit and not
28 to decide. If, hypothetically, the Tribunal in a given case were to go on to decide then BT
29 would be in a position of a defendant who might at the end of a procedure face a criminal
30 penalty. At that stage there may be an argument that the *Napp* standard of proof would be
31 applicable to the proceedings, but we are not at that stage. At this stage this is more akin to a
32 Judicial Review of the adequacy of the reasons contained in a decision, and it does not involve
33 the guilt or otherwise of any defendant. All it entails is a regulatory decision which Freeserve
34 seeks to have set aside so that the matter can be remitted.

35 Can I turn to the next issue, which is a response to Mr Turner's analysis of the legal
36 duty to give reasons, and I have some short points to make. Again, we set out our case fully in
37 writing.

38 He referred to the *Max Mobil* case at tab 11 of the authorities. Could I invite the

1 Tribunal in due course to examine paragraph 55 and onwards, which makes clear that in a
2 rejection of complaint case, the duty to give reasons is still quite a high duty. The duty to give
3 reasons involves a statement in clear and unequivocal terms of the elements of the case, and the
4 court says in the context of an investigation by the European Commission it is under a duty to
5 conduct its inquiries in a diligent and impartial manner. The court also relied upon the principle
6 of sound administration and the proper application of competition rules which meant that
7 complainants must be able to take their case forward to a court in order to have the decision
8 reviewed, and in this regard the court relied upon Article 47 of the Charter of Fundamental
9 Rights entitling a person, including a complainant, to an effective remedy. That is contained in
10 paragraphs 55 and onwards. It is worth just pointing out that on the facts of that case it was a
11 feature that there was no material dispute as to the elements of the facts, that is set out in
12 paragraph 75, nor was it ever in doubt but that the applicant was fully aware of the approach
13 adopted by the Commission (see para.79).

14 In the present case, as you know, there was one meeting at an early stage of the inquiry.
15 There is a dispute between the Director and Freeserve as to what was said, and what was asked
16 for in relation to the hypothetical business case, and I will return to that in a moment.

17 Immediately following the 16th April meeting, the Director wrote to Freeserve. It is
18 suggested that it was a standard form letter, but that is only true in part because it referred to the
19 previous meeting and to the date on which the Director proposed to come to his provisional
20 view. But it could, quite easily, have set out a list of matters which the Director sought
21 assistance from Freeserve in respect of.

22 We know that subsequent to that letter the Director took additional steps in terms of
23 contacting BT in order to advance his inquiry, and Freeserve was unaware of the nature of
24 those steps, or the Director's conclusions.

25 The Director's own decision in the *Bulldog* case, concerning predatory pricing in the
26 upstream market, is also a reflection, at least, of the fact that the Director is perfectly able to
27 draft a decision which does, at least in some detail, address the relevant predatory pricing,
28 *AKZO* type of issues, and I will come back to that in relation to a number of other issues,
29 because there are some interesting points arising from it.

30 So far as Mr Turner's submission that the reasons incorporate the guidelines are
31 concerned, there are a number of points to make. First, the law on the duty to give reasons by
32 reference to documents incorporated in the decision is set out in our skeleton in paragraph 15.
33 We simply submit that on the basis of case law that test is not complied with. However, the
34 Director's case is inconsistent, because in the preliminary issue case, he said he did not think
35 that this was a Competition Act case at all, and he believed that at the time. How can he now
36 say - I would pose the question rhetorically - that on the contrary he did take the Competition
37 Act guidelines into account. With respect, his argument is somewhat artificial.

38 However, even in relation to decided precedents referred to in the decision itself, in

1 particular the March, 2002 margin squeeze decisions, he now says in his skeleton, emphatically
2 that he did not adopt the reasoning, even of those decisions. That is his skeleton paragraph 36,
3 page 15. So even in relation to a form of guidance expressly identified in the decision he denies
4 its reasoning, and he cannot therefore say that a document not even referred to in the decision
5 was incorporated as to its reasoning. But this is not stated to be the case in the decision in any
6 event. With respect, nowhere is it apparent that the Telecommunications Act test is necessarily
7 in all regards the same as the Chapter II test. The Telecoms. Act does not involve any
8 consideration, for example, of the notion of a special responsibility under Chapter II because it
9 is not necessarily concerned with dominance.

10 Indeed, another inconsistency in the Director's position emerged today when Mr Turner
11 said that the complaint included a reference to LRIC, en passant yesterday the Director
12 submitted that the case was based squarely on cross-subsidy and nothing else, and that was
13 nothing to do with predatory pricing.

14 In his skeleton on the preliminary issue, and I will give it to you, the reference for your
15 note - paragraphs 48 to 51 - no reference is made to predatory pricing, or anything connected
16 with predatory pricing. That was the skeleton on the preliminary issue.

17 Turning now to what I would describe as "business case assumptions", today we have
18 had laid out an extremely broad explanation of some of the criteria which went through the
19 Director General's mind. We have been told, and I am not certain whether this was on
20 instructions or not, that there was a range of periods which might or might not have been
21 factored into the business case of anything between three and eight years. We have been given
22 a hint as to what the meaning of the life cycle of the activity might be. We have been informed
23 that the test was LRIC pricing and given an indication of how it might or might not apply to
24 *AKZO* pricing, and we have been given an indication of whether, in the Director's view, it is
25 more or less favourable, to a complainant. We have also been told that the Director might,
26 though it is not apparent, have used the combinatorial test - see paragraph 7.11 of tab 3, the
27 Director's defence, where that is referred to.

28 All of this highlights starkly the paucity of information in the decision on these
29 important issues. In this broad context I would like to pick up some of the observations of Mr
30 Turner and Mr Barling.

31 The first point concerns the alleged failure to provide further business case evidence.
32 As you know, there was a difference of recollection between Freeserve and the Director
33 General, and we have set out our recollection in paragraph 2.10, page 15 of the Freeserve
34 response to the Tribunal's questions, and Freeserve say there that the issue of the three year
35 business case arose as Freeserve was leaving Oftel's building and it was hinted that it might or
36 might not be of value to Freeserve. It was never suggested that it should necessarily be
37 provided. Freeserve attendance note of the meeting does not record Oftel's suggestion that
38 there should be a meeting; the Director General does suggest that as an action point. However,

1 the Director General never raised it in his 17th April letter, or indeed at any subsequent point.

2 Perhaps the more significant fact is that if the Director General had wanted further
3 information, he should have asked Freeserve for information on an entirely different set of
4 matters, none of which would have been self-evident to Freeserve. They have become more
5 evident as a result of the developments in this case, but the sorts of questions that should have
6 been asked would have included the following, and I am going to give you a list, and they will
7 be on the transcript so it is not necessary to write them all down.

8 First, what is the expected life of the activity or service? We know the Director says it
9 could be anything between three and eight years - I do not know if that was a suggestion by Mr
10 Turner, or based on instructions - but Freeserve could have been asked for its view on that
11 important question. The Director General could have identified a range, be it three to eight, or
12 some other range, and asked for comments. He could have asked also "What is the typical
13 period of a subscriber contract?" And he could have asked whether predatory pricing should be
14 measured over the life cycle of the activity or of the contract? He could have asked at what
15 point in the life of the activity or the contract was it reasonable to expect BT to recover its
16 costs, and he could have asked what Freeserve's view was on the assumptions to be made about
17 the discounted cash flow rates. He could have asked for Freeserve's observations on whether
18 LRIC pricing was, in fact, the correct cost base for application to the retail market. In that
19 respect can I make this observation? Freeserve does not view it as a self-evident proposition
20 that LRIC is favourable to complainants in a retail market. It may be more relevant in a market
21 where all or the preponderant part of the costs are fixed, and where marginal cost is virtually
22 zero, and therefore it would be very difficult to fall below average variable cost. But in a retail
23 market fixed costs are far less likely to constitute a high percentage of total cost. So it is not a
24 self-evident proposition, at least from Freeserve's perspective, that LRIC is the appropriate
25 benchmark. If that is the benchmark which the Director was applying Freeserve's views could
26 have been canvassed on that issue.

27 Crucially, Freeserve could have been asked as to the impact of various assumptions
28 upon its market share, upon its perception of BT's market share, and perhaps generally for
29 rivals to BT. It could have been asked as to the impact of the various assumptions on the
30 profitability of Freeserve and importantly on incentives to enter the broadband market. It could
31 have been asked as to the effect of these assumptions on the ability of rivals to BT to fund
32 promotions such as mass media campaigns, or waiver of activation charges, because if you are
33 strapped for cash as a rival to BT you are less able to engage in media marketing campaigns
34 than is BT. You might have been asked about the assumptions as to market growth which
35 would flow from a variety of the preceding assumptions.

36 Those are the questions which the Director could have canvassed with Freeserve and
37 possibly with others, based upon what we now know to be, in broad outline, the way in which
38 the Director has addressed the case, but those propositions were far from evident to Freeserve

1 and the Director never gave a hint that those were the matters going through his mind.

2 THE PRESIDENT: Could I ask a factual point, Mr Green - sorry to interrupt you.

3 MR GREEN: Yes.

4 THE PRESIDENT: If you go back to these two margin decisions of 28th March, one is the business
5 decision, and that seems to have been provoked by a complaint from something called the ex-
6 DSL Wholesale Industry Group, and Freeserve.

7 MR GREEN: Yes.

8 THE PRESIDENT: However, the retail decision refers to the "ex-DSL Industry Group" having
9 complained. Is Freeserve part of the ex-DSL Industry Group?

10 MR GREEN: Freeserve was not party to the residential complaint, it was in a low level way a party
11 to the business---

12 THE PRESIDENT: Not part of the residential complaint.

13 MR GREEN: That is right. As I understand things, and it is the rough proportions which I want to
14 convey, for every million residential customers, you expect about 40,000 business customers,
15 and so the proportion of business to residential is an important one. There are far, far more
16 residential customers, and that is where the market is growing.

17 THE PRESIDENT: Yes.

18 MR GREEN: In this regard it is quite significant that in the *Bulldog* predatory pricing case, the
19 Director General was able to conduct an analysis, apparently without the assistance of third
20 parties. You had read to you this morning paragraphs 31 through to 36 of the decision. What
21 happened there was that the Director, with the assistance of external consultants, put together
22 his own hypothetical model of how costs should operate. He then asked BT for data, and he
23 compared the two models. He does not say that he used third party information in order to
24 come to any form of conclusion as to the correctness of BT's analysis. Indeed, he simply
25 records that he considered unsolicited submissions made by Bulldog and another operator
26 concerning these calculations. The reason that I interjected this morning was because it seemed
27 to me reading those words in their ordinary sense, the Director indicated at least something of
28 his calculations to Bulldog and others for them to comment on. But he certainly was not relying
29 upon the third party to come to any conclusions of his own.

30 I want to return to Freeserve's business case because there is a point which certainly Mr
31 Barling will not have been aware of because it is contained in the confidential part of our
32 response, and the Director presumably should have been aware of, but I have instructions that
33 the relevant paragraph is not to be treated as confidential. The business case which was
34 advanced to the Director was based upon Freeserve's own costs and this was explained in
35 paragraph 2.6 on page 2 of our supplementary information.

36 THE PRESIDENT: You had better just hang on there. The first logical question that would arise is
37 whether there is anything in the document that the Director actually had, or anything in the
38 exchange that shows that the Director was aware that Freeserve was working on the basis of its

1 own costs?

2 MR GREEN: I am afraid without instructions I do not know the answer to that.

3 THE PRESIDENT: I do not think there is anything in the documents that suggest that.

4 MR GREEN: I really do not want to get into who said what to whom at the meeting of 16th April,
5 there is enough controversy over that in any event, but one would have surmised, at least
6 hypothetically, that Freeserve would have made that clear, and that the Director General would
7 have assumed that at least a great deal of the figures and the statistics would have been based
8 upon Freeserve's own costs. Paragraph 2.6 says:

9 *"To a large extent the business case presented to the Director was based on*
10 *Freeserve's own costs, supplemented by discussion with industry participants such as*
11 *equipment suppliers."*

12 Then the next sentence refers to the reformulated table below.

13 In terms of the impact BT's own business case, and the Director's analysis of it, one
14 thing I think has become clear that the Director's conclusion that there was sufficient margin for
15 Independent Service Providers was predicated upon his acknowledgement that in the short, and
16 possibly medium term, BT was going to be making a loss. That is a necessary corollary of what
17 we now understand to be his methodology that over a period of a number of years BT was loss
18 making, and this may have covered a number of generations of subscriber contract. BT was loss
19 making, and it is a point I think we have referred to in the Notice of Appeal, it is a reasonable
20 inference to assume that others who may be less, or equally efficient, or have similar at least
21 comparative cost structures, will either be barely making a profit or making a loss, or hovering
22 around the total cost or probably making a significant loss if BT is also expected to make a
23 significant loss for a period of years.

24 It would seem to be an inevitable conclusion from the Director's explanation that he
25 accepted that for a number of years everybody must have been making a loss, because if BT
26 was driving the price, and driving the input costs, and BT was loss-making, then it is hardly
27 conceivable that all the other rival suppliers will have been highly profitable.

28 THE PRESIDENT: Not a particularly unusual situation where everybody is trying to build their
29 market share to cover their investment.

30 MR GREEN: That may be a different issue which may go to the objectivity or legality of the
31 business case as a whole in relation to ----

32 THE PRESIDENT: It might be of some use for you to tell us, having taken instructions, just exactly
33 what Freeserve is saying is wrong with the pricing structure. Is it that BT's retail price is too
34 low, and it ought to go up over £30? Or is it that the wholesale price is too high and ought to
35 come down, or what?

36 MR GREEN: It is very difficult to be precise when one does not know what BT's own parameters
37 are.

38 THE PRESIDENT: Or is it a separate complaint all about the marketing side of it?

1 MR GREEN: Well the marketing side I think is different.

2 THE PRESIDENT: Yes. But you went to great length to tell us that there was no margin squeeze
3 allegation in the Freeserve complaint, which would suggest that the basic retail/wholesale
4 prices and the difference between them is not something that is at the heart of your---

5 MR GREEN: I was at pains to make that clear because, as a fact that was not the burden of 26th
6 March letter. The burden of that letter was there was predatory pricing which was BT was
7 making a loss, but given that BT is providing the input to the ISPs' own services then if BT is
8 making a loss, and one is asking is there an exclusionary effect from this alleged predatory
9 pricing, and one of the conclusions one is driven to is that for a number of years BT and new
10 entrants to the market who are rivals will also be forced to make a loss - we submit that is
11 relevant to the analysis of predatory pricing.

12 There may have been a misunderstanding - if I have been suggesting that Freeserve
13 was profitable, that is not Freeserve's position. I do not have information as to the precise level
14 of profitability of Freeserve. If it would help the Tribunal I can take instructions, or make sure I
15 provide clear information to the Tribunal, but I am not certain that would be of assistance.

16 THE PRESIDENT: Well I think we have probably reached the stage of the case where we have to
17 decide it on what we have got, I think, Mr Green.

18 MR GREEN: I am not anxious to provide new information because I think that just opens
19 potentially a can of worms. One of the reasons is that the thrust of our case is upon the
20 inadequacy of the reasons in the decision and that in a sense is a different issue to the merits of
21 the underlying decision.

22 THE PRESIDENT: Yes.

23 MR GREEN: It is very difficult to assess the underlying merits.

24 THE PRESIDENT: You have not got the reasons.

25 MR GREEN: We do not have the reasons and we are all speculating as to what happened and then
26 criticising what we speculate did happen. That is one of the difficulties.

27 Can I move from that, please, to cross-marketing and deal with a number of the points
28 which were raised. It is certainly true that I am not focused on the marketing activities in the
29 course of these oral submissions because Freeserve's case is set out and I want to concentrate
30 on the issue which is of greatest moment to Freeserve, that is not to say that these other issues
31 are not equally important in their own way.

32 The first point in relation to cross-marketing is that the Director's position is
33 inconsistent. His position in the preliminary issue was that he had not decided upon the issue -
34 he had expressed no opinion or position on the issue. Now, he says he decided it in favour of
35 BT and his reasoning is impeccable. The Director's position in oral submissions was that the
36 advertising which BT engaged in was to be categorised by him as "generic". By this the
37 Director was referring to that advertising whereby BT's name is present - he describes this as
38 generic advertising. We have attached examples of this to the Notice of Application. I wrote

1 down, when Mr Turner was making the submission, the following, and the transcript will
2 record whether I have recorded his words correctly:

3 *"BTOW did not need to pay or reflect the cost of generic advertising".*

4 With respect, we submit that that is precisely the point that we make. BTOW did not
5 and does not, because its campaigns continue, pay for advertising which benefits it. Yet, as you
6 will have seen from the national press and the television these advertisements are extremely
7 high profile and no doubt inordinately expensive. They are splashed across the television and
8 across the national media. But if BTOW had to pay a proper proportion of these costs then its
9 business case would, we submit, look very different.

10 We set out the law on this in our skeleton. We submit that a cross-subsidy of this nature
11 is capable of being a clear abuse. I understand Mr Turner's submissions yesterday to be that he
12 does not dispute our analysis that a cross-subsidy, *per se*, can in appropriate circumstances be
13 an abuse. In any event we have set out the CFI's ruling and the Commission's decision in *EPS*
14 and I will not repeat that is said there. We do submit that if a dominant undertaking cross-
15 subsidises in the manner described, that is capable of being an abuse.

16 So far as advance notification is concerned, again there is this elementary inconsistency
17 in the Director's approach between the position adopted in the preliminary issue, and the
18 position adopted now.

19 A couple of minor points I would like to make in relation to advanced notification.
20 First, the Director said that the complaint did not address the question of the CD lead time. As a
21 matter of fact that simply is not correct, we do address it in the complaint letter itself at tab 1,
22 s.2(3) which specifically deals with this matter.

23 Secondly, is the Director under a duty to verify BT's answers? We know what the
24 Director's questions to BT were, they are set out in tab 6, and we know what BT's answers
25 were. With respect to the author of BT's answer, it is an extremely carefully crafted answer.
26 The question "did any one at BTOW know?" was not posed by the Director. The answer
27 suggests that certain people at BTOW did not know, but it is consistent with other people
28 knowing. Now, it is possible that we read too much into those words, but the Director ought,
29 routinely, to have demanded supporting documents so that he could have verified and
30 corroborated the nature of the answer. It is not to say that the author of the letter was acting in
31 bad faith, but it is a fact of life that in answering questions of a broad nature, you may give a
32 broad answer which, with the best of intentions, conceals some of the detail and it was a very
33 carefully crafted answer. It is page 13 of the disclosed documents by the Director. It is the
34 sentence at bullet point one: *"Those working on the BT Openworld plug and go launch after the
35 trial had no prior knowledge of price changes, nor did we need it to prepare ourselves. It is
36 only identifying what might be a relatively small number of people within BTOW."*

37 Now, we do not know who else in BTOW had knowledge, and one of our complaints is
38 that it is people beyond BTOW, also involved in broadband, within BT, who may be relevant to

1 some of these issues. I do not want to suggest that that was a Machiavellian answer, one simply
2 does not know. My point is that the Director should have corroborated the accuracy of that
3 answer and did not do so.

4 Turning to the question of waiver, the Director says that new information was factored
5 into the business case analysis and discounted cash flow calculation. We asked the question
6 how? In the decision he says that he took account of the March, 2002 decision, but I have made
7 my submissions on that. He did not, he only took it into account in the business decision and
8 then only in relation to a 50 per cent. discount.

9 The subsequent exchange of emails between Freeserve and Oftel does not say that
10 Oftel reworked the business case, it is far more bland than that. The Director nowhere explains
11 why he did not know that there was an extension of the waiver, and it is plain that had he asked
12 BT earlier BT would have given him the information, and it would have given him the
13 information, as Mr Barling freely accepts, that the waiver of the activation is highly material,
14 designed to stimulate demand plainly in favour of BT.

15 We submit that the law on the duty to give reasons makes it clear that attempts by
16 decision makers to justify a failure by an after the event explanation is not sufficient to
17 immunise the decision from challenge, and again for the transcript, our skeleton argument
18 paragraph 14, and the authorities cited at footnote 9.

19 Moving from there to the question of dominance and product market. Clearly the
20 Tribunal is not in a position to analyse BT's dominance. Can I give you one or two references,
21 and one or two facts and figures? Mr Barling has finally conceded that the evidence as to BT's
22 market share was before the Tribunal in Oftel's responses, and it is that they have over 50 per
23 cent. of the ADSL broadband market.

24 MR BARLING: I said "delivery" it was not a market share. It was a share of ADSL.

25 THE PRESIDENT: A share of ADSL. What is the market---

26 MR BARLING: ---is another issue.

27 THE PRESIDENT: It is another issue.

28 MR GREEN: It is indeed, what is the market? I would like to just explain first that the Director has
29 already taken the view that narrow band and broadband are separate markets. We have set out
30 the material for that in the notice of application and it is in his documents.

31 So far as broadband itself is concerned, plainly the Tribunal is not in a position to
32 express a view, but can I just explain in very broad terms where some of the issues and
33 parameters because they are relatively straightforward to grasp. The real battle is between
34 cable and ADSL. Cable operates at a speed of 128 kilobytes, that is 128,000 bytes of
35 information per second. ADSL operates at 512 kilobytes. There are gradations of cable which
36 are a bit faster, but most of it is slow compared to ADSL, it is four times slower. This is
37 reflected largely in price. Cable at the moment is around £14 and ADSL is circa £27 to £30.
38 That suggests, at least, that it is not exercising a competitive constraint upon ADSL.

1 Now, cable modem services cover only about 38 per cent. of the United Kingdom.

2 In other words, at the moment, they do not get 62 per cent of potential subscribers. So
3 in terms of coverage there is a big difference.

4 THE PRESIDENT: I think it is a little late in the day to be going into all these new facts, Mr Green.

5 MR GREEN: The reason I am giving you these is simply to make what is the principle point in
6 relation to dominance, which is that it is not a fanciful or remote case for the Director to assume
7 that ADSL would be its own product market, and for BT to have now 50 per cent. plus would
8 give rise to a strong inference of dominance. I made that not because you are going to rule on
9 it, because obviously you cannot, but to show the importance of the case, to show the speed in
10 which BT has grown. The 50 per cent. plus figure was taken from statistics which Oftel
11 produced at the beginning of November, so they are already three months out of date.

12 Our submission in relation to the duty to give reasons is that the Director should have
13 set out the assumptions that he made in relation to dominance, in much the same way as he did
14 in his *Bulldog* decision - I can give you the references rather than ask you to turn it up.
15 Paragraph 10 and footnote 1 - the Director says he has indicated provisional views concerning
16 relevant product markets. He refers to his *ATM* direction, which was then in draft form, and in
17 paragraph 47 of the same decision he says "well, I do not have to come to a final view on
18 dominance", but he is perfectly prepared to express provisional views on dominance, and the
19 assumptions made in respect of dominance without necessarily coming to a firm view on that.
20 He refers, for his inspiration, to the *ATM* decision, which is the decision that we rely upon for
21 one of the relevant product markets. The Director could have provided similar reasoning. It
22 would have informed Freeserve and the industry. He did it in another case, it is clear he could
23 have done it in this case.

24 Finally on dominance, can I just clarify one point which perhaps I was not sufficiently
25 clear on yesterday in relation to our Notice of Application and the wholesale market, really just
26 for purposes of clarification. We submit that there is a clear link or nexus between the network
27 and retail ADSL broadband. Now, BT has well over 90 per cent. of the market for the provision
28 of the ADS network. The only other operator is Kingston. So we are talking about 90 per cent.
29 plus.

30 Now residential ADSL network is provided through use of this main network. Every
31 ISP and TSP both packages and resells BT's wholesale product. So there is a clear link between
32 the upstream network market, and residential ADSL and again I am not going to ask you to turn
33 it up but we have set out this analysis in the following paragraphs of our Notice of Appeal, at
34 5.22(d) and then generally the section from 5.13 onwards, but particularly 5.13 and 5.36.

35 The final matter I wish to address concerns the question of remission and whether there
36 should be an order of remission if the Tribunal is with us, and the relevance of the s.47 letter,
37 and then that completes my reply points.

38 So far as the s.47 letter is concerned, Baker & McKenzie's letter was a s.47 letter, as the

1 Tribunal found in paragraph 127 of its decision. The Director's explanation that he would have
2 received further information had it been proffered is, with respect, contrived. It is quite plain
3 that the Director knew that in rejecting the s.47 application he was forcing Freeserve to appeal
4 or risk being time barred. It was therefore inevitable that Freeserve would appeal, and the entire
5 issue would translate to a battle before the Tribunal. When this matter became litigious
6 attention has switched to the forensic exercise of challenging the decision and as to that we
7 made clear right at the outset of our application paragraph 1.2 that the main point we were
8 seeking to challenge was the adequacy of the reasons. We are not suggesting that it was
9 necessary therefore to adduce an enormous amount of economic evidence to address these
10 issues. We made it clear at the very outset of our notice paragraph 1.2 that the main thrust of
11 the application is lack of transparency, inadequacy of reasons. The word "fresh" in the
12 Director's letter can only sensibly be construed as a reference to the new, fresh complaint which
13 he knew was to be advanced.

14 A point which Mr Turner in particular made was that there was no new material which
15 Freeserve put into the application and that this reflects in some way a lack of substance in
16 Freeserve's case. Not only was that an impracticable suggestion for Freeserve to follow, but it
17 was in fact quite wrong. For example, in relation to the waiver we put in a considerable amount
18 of statistical new evidence, and I will give you the references. It is the Notice of Application,
19 tab 7, pages 55 to 61, which gives statistical data and evidence on the effect of the waiver and
20 we have set out the position in paragraph 7.30(ix) of the Notice of Application. We have also
21 explained there that the impact became evident to Freeserve in August, 2002, after the decision,
22 and the evidence is set out in the notice. But the impact, as Mr Barling accepts, was apparent to
23 BT long before that.

24 As of the date of the s.47 application Baker & McKenzie had instructed economists to
25 assist. The Director suggests that these economists should have continued their work. That was
26 plainly illogical. If the Director had accepted the invitation by Freeserve to engage in further
27 dialogue, it is entirely possible - and indeed, probable - that the nature of this case would have
28 changed dramatically. If there had been a fruitful exchange one would then have had, possibly,
29 one is speculating necessarily, new evidence submitted. The Director might have revealed more
30 about his thinking in the way that he has made his submissions over the course of these
31 proceedings and Freeserve would then have been in a position to comment. This is a very
32 important case, not just for Freeserve but for other ISPs. Can I again, just for the purpose of the
33 transcript at this stage, give you the following reference: tab 3 to the Director General's
34 disclosure, which contains email exchanges between Freeserve and the Director, in which
35 Freeserve were saying "What new information do you want from us? What sort of financial
36 data are you seeking from us?"

37 Finally, on the s.47 letter, just as to Mr Barling's submission that your Judgment the
38 first time round deals a death blow to my submission. With respect, we do not accept that. We

1 do submit that the Director's response was an unlawful one. S.47 imposes a duty on the
2 Director to consider the s.47 application. As a matter of principle it is quite possible to have a
3 lawful rejection and an unlawful rejection. As a fact, there was a rejection and it is the fact of
4 the rejection which was relevant to the admissibility issue, i.e. whether there was a decision as
5 to whether or not the Act had been infringed. But a finding that there was rejection is quite
6 different to a conclusion that the Director adhered to the requirements in the Act.

7 The Director emphatically was not addressing himself to the new reasons or seeking to
8 engage his previous reasons. He said he did not believe this was a Competition Act case and
9 that he had any duty to address his mind to any of the issues in the s.47 letter. So there was a
10 rejection, but it was not a lawful rejection because he did not act as the Statute says he should
11 have done.

12 Very finally, so far as remedy is concerned can I make the following brief points? My
13 comments here are, of course, upon the assumption that the application is successful. As I have
14 now made clear our principal submission is as to the inadequacy of reasons and if the Tribunal
15 agrees with us on this we submit that the matter should be remitted to the Director.

16 Freeserve is concerned, however, that if that happens the complaint should not slide
17 into a regulatory backwater. We would invite the Tribunal to impose some form of timetable
18 for any new decision. Given the complexity we would suggest that a period of 12 months is
19 appropriate. This is the timescale that the Director himself says he can decide cases in, and if he
20 is to go back to the drawing board, we would accept that that is an appropriate timescale for all
21 the parties to be properly involved and for a decision to be produced.

22 THE PRESIDENT: On this point, Mr Green, are you saying that he should re-look at the original
23 decision, because we are aware, as I am sure you are, that quite a lot has happened over the last
24 year. There has been the arrival of BT Broadband, that is to say the "no frills" product, there
25 have been quite a lot of changes in market share. There has been a whole series of new offers of
26 one sort or another, from all sorts of people. It could perhaps not be particularly fruitful to look
27 again at the picture as it was when the original complaint was made. If anyone is going to look
28 at anything it would have to be brought up to date, would it not?

29 MR GREEN: There is no doubt that it would need to be brought up to date. We would suggest, and
30 submit quite strongly, that the history does need to be looked at because the position on the
31 market place, whether BT, for example has been selling in a predatory way - whether this has
32 distorted the market already - would need to be taken into account in deciding how matters
33 proceed in the future. We find it very difficult to see how the past can be unwoven from the
34 present or the future. It is not a very long period - we are not looking at an exercise in
35 archaeology - we are looking at 12, 18, 24 month period which the Director already has a great
36 deal of the groundwork done on, but we think it would be artificial if you simply pretended that
37 today was day zero and moved forward, when there may already have been on our hypothesis
38 harm incurred in the market place.

1 The final point I would wish to make is simply this, we would invite the Tribunal to
2 consider the modus operandi of any future complaint and investigation. Of course, it is for the
3 Director General to decide upon his own procedure, but certainly Freeserve would welcome the
4 Tribunal's views on such matters as the relevant assumptions to be made for predation and all
5 the issues which we have canvassed, and issues relating to the disclosure of information about
6 the Director's conclusions on BT's business case, because although Mr Barling says to the
7 contrary, we do not necessarily accept that all of the assumptions which the Director has in his
8 possession are necessarily confidential. For example, we would not accept that if BT's view is
9 that the life cycle of the activity is 8, 10, 12 years that is necessarily a confidential matter, and
10 there may be certain high level information which could be quite properly be disclosed by the
11 Director for Freeserve and others to comment upon without prejudicing BT's legitimate
12 confidential rights.

13 Sir, those complete my reply submissions, unless I can be of any further assistance?

14 THE PRESIDENT: Thank you very much, Mr Green.

15 MR TURNER: Sir, just one or two points that arise. You put a question to Mr Barling, I think it is
16 probably for us on reflection---

17 THE PRESIDENT: Yes.

18 MR TURNER: --- and that relates to confirmation that the business case referred to in Miss
19 Brown's letter was that referred to in the margin squeeze decision, but we really know about
20 that - it was, and you can also pick that up from paragraph 61 of the defence and footnote 37.
21 Secondly, it is a necessary point of clarification, I have been given a note on this, this was the
22 timing of the extension of the waiver - I do not believe that anything turns on it - as a matter of
23 accuracy what appears to have been the case is that the decision was concluded by Mr Russell,
24 it was sent off as the Tribunal has seen.

25 THE PRESIDENT: Yes.

26 MR TURNER: The confirmation about the extension of the waiver, a copy of which is in the file,
27 came an hour later. It is believed that someone may have spoken to OfTel a little bit earlier on -
28 although the author of the decision letter did not know that - to warn them that something was
29 coming. But as a point of accuracy the Tribunal ought to know that.

30 Finally, two points of clarification---

31 THE PRESIDENT: But whoever was spoken to at OfTel to be warned that something was coming
32 did not get in touch, or have time to get in touch with Mr Russell?

33 MR TURNER: That is correct.

34 THE PRESIDENT: Though I think you were telling us that OfTel would not necessarily expect to be
35 told in advance of the extension. It turns out they probably were told shortly beforehand?

36 MR TURNER: May I just take instructions on that? [Counsel takes instructions] Sir, I am not able
37 to take that any further at present. If it will help I will arrange for the Tribunal to be appraised
38 of the full situation once we have been able to go back and check with the relevant person. But

1 at any rate, what is stated in the defence, and what has been said is absolutely right that Mr
2 Russell had no knowledge of that and the confirmation from BT that the offer was coming did
3 not arrive until later after the decision.

4 Finally, Sir, two simple points of clarification. First, Mr Green said about my own
5 submissions, and I had not picked this up before, that I had said that the reasoning in the margin
6 squeeze decisions was not incorporated.

7 THE PRESIDENT: Paragraph 36.

8 MR TURNER: That is right, paragraph 36. Well lest it be misunderstood, if you go to that
9 paragraph that is not quite the submission. What it says is that the Director did not incorporate
10 by reference in the decision letter the detailed reasoning in the margin squeeze investigations,
11 which is purely responsive to Mr Green's submission in his skeleton.

12 The point is that bearing in mind the nature of this decision, no evidence of anti-
13 competitive behaviour, there is reference back to the fact that he recently concluded the margin
14 squeeze investigations. It is not saying therefore that all the detail falls to be opened up again in
15 this inquiry.

16 THE PRESIDENT: No, but I thought you were telling us that if we go back to the margin squeeze
17 investigation, particularly the retail one at paragraph 5, which says "*BT has drawn up another
18 business case... incorporates a number of forward looking assumptions in terms of market
19 share and cost structure, sensitive to volumes and input price. Oftel believes no cross-subsidy
20 or margin exists on the new wholesale and retail price.*" All that sort of work done then was the
21 work that the Director was relying on---

22 MR TURNER: Yes, and I stand by that in the general sense, absolutely. He is relying on the result.
23 What he is saying is that we are not reopening all of the detail in the way that we believe Mr
24 Green was suggesting for the purpose of this decision, so that as it were, Freeserve, who were
25 by the way allied to a complaint as the letter at the end of tab---

26 THE PRESIDENT: The retail complaint?

27 MR TURNER: The residential complaint. I have referred at previous hearings to the letter of 13th
28 May, which is at the back of tab 7 of the defence, which related to that. I am sorry, Sir, that was
29 the point I made on the previous hearing, that there was this letter purporting to be a s.47 letter
30 challenging the retail---

31 THE PRESIDENT: No, no, that is the decision a year earlier.

32 MR TURNER: No, it is not. At the very back of tab 7 there are two pages, and it is printed on both
33 sides, it is a letter of 13th May, 2002.

34 THE PRESIDENT: I see, I am sorry, yes.

35 MR TURNER: If you turn to the end of that "Companies supporting this application".

36 THE PRESIDENT: Thank you.

37 MR TURNER: That was all. I am sorry, that was not the point I was making. The point I was
38 making was only that this was not another opportunity for Freeserve to go into all of the

1 reasoning and assumptions in the margin squeeze investigations. That was the only point that
2 was being made.
3 MR BARLING: Just two points. May I deal with the point Mr Turner has dealt with from his
4 perspective, and that is the timing of the notification to Oftel. What we have been able to glean
5 about this while we have been sitting down is that BT tell Oftel out of courtesy before going
6 public. They do not have to in relation to price changes of this kind, although with some others
7 they do have to. However, as a matter of practice they do tell them because they do not want
8 Oftel to be wrong-footed by a journalist asking them about it and they have not heard about it,
9 so they tell them in advance. They tell them only a day or so before going public in case the
10 plans change.

11 In this case the first waiver offer was about to end, it had but nine or ten days to go, so
12 BT told Oftel on 22nd, just before they made it public. I do not have the exact timing of when
13 it was made public, but I expect other people know that here already - it is in the documents.

14 The timing of making it public was entirely for operational reasons. They do not want
15 to do it too soon. They have to time it very carefully, and equally they do not want to rush, so
16 the timing here was based on operational grounds, and that in a sense dictated when they told
17 Oftel about it. They would have told them at this time whether or not Oftel's decision had
18 come first. BT had no knowledge of Oftel's timing of their decision on the complaint, except
19 they thought that Oftel wanted to give it by the end of June, and I can confirm that normal
20 procedure on these occasions is to phone in advance to say that something is coming.

21 THE PRESIDENT: So it is largely coincidence.

22 MR BARLING: It is entirely coincidence by the sound of it. That is the first point.

23 In relation to Mr Green's argument that he developed in his reply - he did not refer to in
24 his opening - his remarks about what he called the "carefully crafted reply" of Miss Brown in
25 the letter of 22nd April, 2002, where she says:

26 *"Those working on the BT Openworld plug and go launch after the trial had no prior*
27 *knowledge of price changes, nor did we need it to prepare ourselves."*

28 This was all about the operational decisions, to order CD-Roms, to place TV
29 advertising, those are the things that Freeserve has been complaining about, and the people who
30 take those operational decisions are precisely the people that Miss Brown is referring to, those
31 working on the BT Openworld plug and go launch. Those are the people to whom the
32 knowledge would have been useful, or might have been useful on Freeserve's case.

33 THE PRESIDENT: Those ordering the CD-Roms, would they have been placing the TV
34 advertisements?

35 MR BARLING: Well as I understand it that covers all the people working on those projects.

36 THE PRESIDENT: Yes.

37 MR BARLING: Thank you very much.

38 MR GREEN: Can I just be tail-end Charlie and correct one matter, I am afraid I do stick by my

1 explanation that Freeserve was not a party to the complaint which was referred to in the
2 decision. I do not want there to be any doubt about this. The letter which Mr Turner was
3 referring to of 13th May, which is the Director's defence, tab 7, and I am afraid it is a pain, but
4 would you also have open at the same time tab 11 of the Director General's supplementary
5 disclosure which has the relevant residential decision in it.

6 THE PRESIDENT: Yes.

7 MR GREEN: You will see the first paragraph of 13th May letter refers to a decision contained in a
8 letter from Chris Kenny of 25th April, which ruled out the possibility of finding that BT had
9 breached Chapter II of the Competition Act.

10 If you turn over to the next page there is a reference to the decision. It refers to a case
11 closure summary of 27th March, 2002, which cited the relevant instrument for the investigation
12 as Condition 78(12) and then it says:

13 *"The summary found that BT was guilty of conducting a margin squeeze during the*
14 *period May, 2000 to August, 2001. This had a material impact on competition. However it*
15 *made no reference to breach of the Competition Act. A finding of breach of the Competition Act*
16 *could have followed from the findings of margin squeeze and impairment of competition*
17 *coupled with Oftel's December, 2001 finding that BT had market power in the upstream*
18 *wholesale market."*

19 Then there is a reference to without a finding of breach there is no prospect of a claim
20 to the courts. What that is referring to is paragraph 2 of the residential decision, and that
21 paragraph where the Director did find a breach, but the part of this decision which is referred to
22 in the impugned decision is the subsequent price reduction of BT, not the period when the
23 Director found a breach. The s.47 letter to which Freeserve put its name was in relation to the
24 earlier period where there had been breach of the licence. That is rather nuance, but it is quite
25 clear that that part of this decision, which is under the heading "Review" and which then finds
26 no breach of BT's licence, was not the subject of this s.47 application. This is simply referring
27 to the historical part of it and Freeserve was not a party to the complaint which led to the
28 exculpatory finding by the Director at the end of the line of the various price reductions.

29 THE PRESIDENT: Yes.

30 MR TURNER: Sir, I am not going to extend the debate, the Tribunal can read for themselves.

31 MR BARLING: Sir, can I just say finally, Mr Parmigiano has dug up one more bit of detail on that
32 answer I gave you.

33 THE PRESIDENT: Thank you very much for your efforts.

34 MR BARLING: It looks as though the phone call was on 15th May. There is a note of 15th May,
35 BT advised Oftel they were going to extend the free offer and they offered to meet them and
36 talk it through.

37 THE PRESIDENT: On 15th?

38 MR BARLING: On 15th May, that was the phone call presumably that Mr Turner was referring to.

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That is our note anyway - whether that coincides with what he---

MR TURNER: I have no knowledge, I will check the position.

THE PRESIDENT: So that leads one to wonder why that had not filtered up to the case officer who was working on the complaint.

MR BARLING: Yes.

THE PRESIDENT: Thank you very much everybody. We appreciate the enormous amount of work that goes into these cases and we do appreciate the help everybody has had, that we have had, and the help that you have been able to give us.

We will give Judgment in due course - it will not be for a few weeks, I am afraid - we will do it as soon as we can. Thank you all very much indeed.
