



Neutral citation: [2004] CAT 25

**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case No. 1026/2/3/04

Victoria House  
Bloomsbury Place  
London WC1A.2EB

9 December 2004

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

Sitting as a Tribunal in England and Wales

BETWEEN:

WANADOO UK PLC  
(formerly FREESERVE.COM PLC)

Appellant

and

OFFICE OF COMMUNICATIONS

Respondent

supported by

BT GROUP PLC

Intervener

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

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

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

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**RULING: FUTURE CASE MANAGEMENT**  
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1 THE PRESIDENT:

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3 1 We have been discussing this morning various case management issues that arise in relation to  
4 Wanadoo's pending Appeal against OFCOM's Decision of 20 November 2003 in which  
5 OFCOM found that BT had not abused a dominant position contrary to the Chapter II  
6 prohibition in the two month period following March 2002.

7  
8 2 The difficulty with managing the present appeal is that OFCOM is conducting a parallel  
9 investigation into the broadband market which commenced in April 2003, was shelved in July  
10 2003 and recommenced in February 2004, but is not yet completed. In that parallel  
11 investigation OFCOM is investigating the period subsequent to that dealt with in the existing  
12 Decision of 20 November 2003.

13  
14 3 As we understand it OFCOM served a statement of objections in that parallel investigation and  
15 an oral hearing has recently taken place. OFCOM tells us that in the light of BT's response to  
16 the statement of objections it feels it needs until June 2005 or thereabouts to issue a new  
17 statement of objections with a view to arriving at a Decision thereafter – whether a Decision of  
18 infringement or non-infringement is obviously not at this stage clear.

19  
20 4 The result of this somewhat tangled situation is that the present appeal is effectively blocked  
21 by the existence of the parallel proceedings unless the Tribunal is able to take appropriate  
22 action to move matters along. We have had in our view a useful discussion this morning, and  
23 we have been much assisted by the presence of a senior OFCOM partner and executives in  
24 helping us understand the present situation. The obvious importance of competition law being  
25 able to be enforced expeditiously and by reference to rules that are manageable, reasonably  
26 clear, and publicly known, needs no further emphasis from us.

27  
28 5 BT, the interveners in the present appeal, have protested vigorously this morning about the  
29 time being taken by the parallel investigation and about the burden that that places on BT's  
30 resources. Mention has been made in particular of issues that surround Broadband Basic,  
31 apparently introduced in March last year but which was not a subject of the first statement of  
32 objections in the parallel investigation, but is apparently now to be included in that  
33 investigation. Also, BT has particularly expressed concern about the lack of any cut-off date  
34 for the investigation.

1 6 Wanadoo, the appellant, has equally expressed concern about delay in this case and about the  
2 effectiveness of the underlying competition regime.  
3

4 7 OFCOM has told us that one issue that has arisen subsequently to the statement of objections is  
5 the question of the relevant market and particularly whether narrowband and broadband should  
6 be included in the relevant market. We would have hoped that that issue, which would (we  
7 would have thought) have been subject to regulatory reflection in some detail over the years,  
8 should not unduly prolong the existing investigation. We are also assured that Broadband  
9 Basic is not a cause of the further time apparently required; although it is said to be part of the  
10 investigation it is not “on the critical path” of the inquiry in timing terms.  
11

12 8 We think, if we may say so, in that latter regard that OFCOM’s letter of 29 November  
13 2004 to us was somewhat misleading in that respect and we would take this opportunity to  
14 emphasise the importance of clear and accurate information being given to the Tribunal.  
15

16 9 The essential reason for the further investigation is therefore, as OFCOM tells us, that there are  
17 further lines of inquiry to be pursued, but quite properly we have not been able (and would not  
18 wish) to go into any detail as to what those lines of inquiry are.  
19

20 10 No party is particularly enthusiastic about the present appeal being brought on before the  
21 parallel investigation being completed but, on the other hand, our experience in this case to  
22 date does not give grounds for tremendous optimism that existing timetables will necessarily  
23 be adhered to. The history of this matter is set out in some detail in the Tribunal’s recent  
24 Judgment of 29 November 2004 in this case.  
25

26 11 The Tribunal is therefore faced with a somewhat intractable situation. Quite apart from the  
27 interests of the parties, which we feel we must do our best to protect, this case is taking up a  
28 great deal of the Tribunal’s own resources, which has a knock-on effect on other litigants in  
29 other cases before the Tribunal. We are also concerned that in this very important area there is  
30 a need for a clear decision on what the ground rules are in this particular market, and that is a  
31 problem that arises from the situation in which we find ourselves. It seems to us that the  
32 determination of what the ground rules are is quite an important consideration that we should  
33 bear in mind in deciding what we should do for case management purposes for the present  
34 appeal.

1 12 In our view, the best we can do, but it is to some extent the least of the various evils with  
2 which we are faced, is indeed to now set a provisional date for the hearing of the existing  
3 appeal, which we propose to set provisionally for the first open date after 1 July 2005. We  
4 would envisage that between now and then we would attempt to refine the issues in the  
5 existing appeal, so that that appeal would not be unduly burdensome in terms of resources, and  
6 would address certain important points of principle. Although there is an obvious downside to  
7 bringing the Appeal on, if it is brought on in a managed and measured way that would at least  
8 enable the Tribunal to address the points of principle that underlie the issues in this case, and  
9 give guidance on these points which, in the existing vacuum, we feel is urgently needed.

10  
11 13 In order to follow that course we would need to adjourn the present Case Management  
12 Conference to a further Case Management Conference the date of which we propose to fix in  
13 consultation with the parties in early March. We do very much hope that everyone will bear in  
14 mind the importance of being able to observe deadlines in this particular sphere and where  
15 appropriate the dangers associated with allowing cut-off dates for investigations to be  
16 extended. We do draw attention to the fact that the Competition Commission (which operates  
17 under a regime of strict statutory deadlines) is able to deal with very complicated issues within  
18 the time available, and we do hope that that is an example that others can follow where  
19 appropriate in the circumstances.

20  
21 14 We fully understand that all concerned in this case are grappling as very best they can with the  
22 very difficult issues that the proceedings present but that, as I have outlined it, is the view that  
23 we take from the point of view of case management in this particular case.

24  
25 Thank you all very much for your help this morning.

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