



Neutral citation: [2003] CAT 15

IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1007/2/3/02

New Court
Carey Street
London WC2A 2JT

15 July 2003

Before:

SIR CHRISTOPHER BELLAMY
(President)
PROFESSOR JOHN PICKERING
DR ARTHUR PRYOR CB

Sitting as a tribunal in England and Wales

BETWEEN:

FREESERVE.COM PLC

Applicant

-v.-

DIRECTOR GENERAL OF TELECOMMUNICATIONS

Respondent

supported by

BT GROUP PLC

Intervener

DECISION ON A REQUEST FOR AN EXTENSION
OF TIME TO RECONSIDER A PREVIOUS DECISION

1. We gave judgment in this matter on 16 April 2003: [2003] CAT 5. In that judgment we set aside paragraphs 15 to 17 of the respondent Director's decision of 21 May 2002 rejecting a complaint by Freeserve of 26 March 2002, and dismissed the remainder of the appeal. Paragraphs 15 to 17 of the decision in question dealt with that part of Freeserve's complaint that alleged that BT's pricing policy was in breach of the Chapter II prohibition imposed by the Competition Act 1998 ("the 1998 Act"). Those paragraphs of the decision were set aside in their entirety.
2. Following the delivery of that judgment, there was some discussion at the hearing on 16 April 2003 as to what should happen next. Much of this discussion is recorded in the Tribunal's judgment of 16 April 2003: [2003] CAT 6. The upshot of that discussion was an Order made by the Tribunal on that day and drawn up on 24 April 2003. That Order provides as follows, so far as relevant:

"And upon the respondent undertaking through counsel that he will adopt a further decision on the pricing issues raised in the applicant's complaint of 26 March 2002 ("the pricing issues") which the respondent rejects in paragraphs 15 to 17 of his decision of 21 May 2002 which paragraphs have now been set aside

And upon the respondent further undertaking through counsel that before reaching any further decision adverse to the applicant the respondent shall give the applicant and the intervener the opportunity to be heard (whether by providing a copy of any draft decision to the applicant and the intervener and inviting them to submit comments on it, or otherwise) and to make such further submissions as they may see fit

It is ordered that:

1. There is no order pursuant to paragraph 3(2)(a) of Schedule 8 of the Competition Act 1998 to remit any part of the matter to the respondent.
2. The further decision which the respondent has undertaken to adopt in relation to the pricing issues is to be taken within 3 months of the making of this order, namely by 5 pm on Wednesday 16 July 2003 unless further time is allowed by the Tribunal."

That Order also provided for liberty to apply.

3. The period of 3 months referred to in paragraph 2 of the Order was arrived at after a certain amount of discussion as to the procedure the Director should adopt following the Tribunal's judgment. The period of three months was designed to include a sufficient amount of time to enable the Director to put to the parties any matters upon which he considered they should be heard before a new decision was adopted. The President of the Tribunal said at page 6 of the judgment [2003] CAT 6:

"It is true that if this procedure results in a certain amount of further time being taken, it may be that longer than the original two months suggested by the

Director is necessary. We think it is more important for a sound conclusion to be reached on these issues than it is for the matter to be rushed.

What we would propose is that any new decision should be taken by the Director within 3 months of today's date but there should be a general liberty to apply to the Tribunal for further time if that proves necessary. The Tribunal is likely to be sympathetic to any such applications."

4. It was fully and properly accepted by the Director that in reconsidering the matter with a view to adopting a further decision, he should do so with an open mind.
5. By letter of 3 June 2003 the Director applied to the Tribunal for an extension of time in respect of the period set out in paragraph 2 of the Order, such extension to be to 5 pm on Wednesday 3 December 2003. That is an extension of just over 4½ months, which would make the total time allowed to the Director to take the further decision that he has undertaken to adopt to just over 7½ months in total (i.e. from 16 April 2003 to 3 December 2003).
6. The reason given by the Director for seeking the extension of time is set out in the second paragraph of the letter of 3 June 2003, in these terms:

"The Director is aware that the market for residential broadband services has developed since the Director took [his] decision in May 2002. The Tribunal expressly acknowledged this in its judgment. In the light of these changes, the Director considers that it is sensible, in one and the same investigation, to look at BT's current business model (insofar as it may have developed since March 2002) and current pricing policies in the context of the re-assessment of Freeserve's original complaint."
7. After referring to further contentions by Freeserve to the effect that BT's pricing strategy has continued to infringe the Chapter II prohibition since Freeserve made its original complaint, the Director goes on in the fourth paragraph of the letter of 3 June 2003 in these terms:

"For the avoidance of doubt, the Director does not seek in any way to extend the scope of the Tribunal's Order to cover an investigation into BT's current pricing practices, but only to extend the time for compliance with the Tribunal's Order so that work can be efficiently integrated into that investigation. In order to do so, the Director respectfully requests an extension of the time period specified in Section 2 of the Order to 6 months from the date of this letter, expiring at 5:00 p.m. on Wednesday 3 December 2003. The extended six months time period would be in line with Oftel's new targets for investigation under the Competition Act 1998."
8. Also on 3 June 2003, BT wrote to the Director confirming that it had no objection to the Director seeking an amendment to paragraph 2 of the Tribunal's Order, to insert a date of 6 months from the Director's application to the Tribunal. BT did however state "In agreeing to a time extension, we are not in any way agreeing the basis upon which Oftel is investigating

the current pricing, or that the Section 25 “reasonable grounds to suspect” threshold has been met with regard to current pricing issues. We intend to address such concerns separately with Oftel.”

9. Finally on 3 June 2003 Freeserve also confirmed to the Director that it would agree to a request by the Director seeking an extension of the time allowed by the Tribunal for the Director’s new decision to 6 months from 3 June 2003. The Tribunal notes that Freeserve has not, at least in the correspondence copied to the Tribunal, evinced a marked sense of urgency in seeking to have its concerns resolved. Thus, in a letter to the Director dated 20 June 2002 (paragraph 86 of the Tribunal’s judgment) Freeserve indicated that it was instructing an economist in relation to BT’s broadband activities, but Freeserve produced no such evidence before the Tribunal. Freeserve’s letter of 23 May 2003 to the Director of Broadband and International Affairs at Oftel indicates that, even now, further time is being sought by Freeserve for the preparation of expert evidence.
10. The Tribunal therefore finds itself in a situation in which this is, in effect, an application by consent for an extension of time of 4½ months to take a new decision following the setting aside of the previous decision by the Tribunal in its judgment of 16 April 2003. Although it is not wholly clear, it appears that the ground on which the application is made is that, in parallel with work necessary to adopt the new decision that the Director has undertaken to adopt in respect of the matters covered by the original complaint, the Director proposes to undertake an investigation into BT’s current pricing practices which post-date the original complaint, and considers that it is sensible to conduct these two matters within the same time frame.
11. The Tribunal attaches importance to the speedy resolution of matters remitted by it to the relevant competition authority, or where, as in this case, the competition authority concerned has undertaken to take a new decision to replace an earlier decision set aside by the Tribunal. The public interest in matters being disposed of quickly and efficiently is self-evident, from the point of view of both the complainant (in this case, Freeserve) and the undertaking complained against (BT). In addition, the matter is not confined to the interests of the immediate parties, nor those of the competition authority: the wider public interest in the existence of a fair competitive market for the benefit of consumers and users is of paramount importance.
12. These considerations apply particularly in a case where the allegation is one of predatory pricing or margin squeeze in a fast developing market of national importance such as broadband. Strategies employed in the early stages of establishing such a new market may

well have a disproportionate influence on the competitive structure, and therefore need to be investigated with an appropriate sense of urgency.

13. The Tribunal notes that the matter of BT's pricing policy in relation to the launch of broadband has been the subject of previous complaints, leading to decisions by the Director of 8 January 2001 and 28 March 2002, as well as the Director's decision of 21 May 2002 which was the subject of the Tribunal's judgment of 16 April 2003. In addition, as we understand it, the broadband market is one that is monitored by the Director as part of his general statutory functions. This is not therefore a matter in which the Director is starting from scratch. By now the Director must have, or should have, sufficient background information to be able to conduct any further investigation speedily.
14. The Tribunal also notes that the Director's letter of 3 June 2003 to the Tribunal does not say explicitly on what legal basis any further investigation of BT's pricing policies subsequent to Freeserve's complaint of 26 March 2002 is or would be conducted.
15. The Tribunal would not wish to limit the Director's ability to conduct his investigations in the manner which he considers most efficient. However, the Tribunal would also wish to emphasise that the matters about which the Director has undertaken to take a further decision – i.e. BT's pricing policies in the period considered by the Tribunal in its judgment of 16 April 2003 – are discrete from any investigation which the Director may undertake in respect of matters which have arisen subsequently.
16. More generally, and in particular bearing in mind the importance of the broadband sector to the economy, the Tribunal is concerned about the length of the extension sought by the Director. In cases such as the present the Tribunal is reluctant to countenance a period of more than six months, at the most, for the adoption of any new decision on a matter already considered. In many, if not most, cases, the period will need to be much shorter, normally within three months. In the present case, a six-month period from 16 April 2003 would take one to 16 October 2003, rather than to 3 December 2003.
17. The Tribunal also notes that there are two possible outcomes of the Director's reconsideration of his decision of 21 May 2002, or indeed of any further investigation the Director may undertake. The first possible outcome is that the Director concludes, having heard the parties, that an infringement of the Chapter II prohibition is not established. The second possible outcome is that the Director considers that there is, after all, a case to answer in relation to a possible infringement of the Chapter II prohibition. In that latter event, if the provisions of

section 31(1) of the 1998 Act are satisfied, the Director would have to follow the procedure envisaged in that regard by section 31(2) of the 1998 Act and Rule 14 of the Director's Rules (S.I. 2000 No. 293).

18. Taking all these considerations into account, the Tribunal at this stage, on the somewhat scanty information before it, can see little justification for extending time for the reconsideration of the Director's previous decision beyond the six month period that should ordinarily be regarded as the maximum in cases of this kind, i.e. to 16 October 2003. The Tribunal is therefore prepared to grant an extension of time, for the adoption of a further decision in respect of the matters which are the subject of the Tribunal's judgment of 16 April 2003, to no later than 5 pm on Thursday 16 October 2003.
19. In the event that the Director considers that the provisions of section 31(1) of the 1998 Act are satisfied, the Tribunal would expect him to issue the notice referred to in Rule 14 of the Director's Rules no later than Thursday 16 October 2003, in lieu of the deadline referred to in paragraph 18 above.
20. Given the particular circumstances of this case, the Tribunal would wish to have a report on progress from the Director, Freeserve and BT by Tuesday 16 September 2003 at 5.00 p.m. In the event that, at that stage, a further extension of time is sought, any such application would need to be supported by detailed reasons, identifying areas of work outstanding, if any.
21. There is general liberty to any party to apply to the Tribunal for any further directions. An order giving effect to the Tribunal's decision is attached.

Christopher Bellamy

John Pickering

Arthur Pryor

Charles Dhanowa
Registrar

15 July 2003