



[2005] CAT 7

IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1026/2/3/04

Victoria House
Bloomsbury Place
London WC1A.2EB

18th March 2005

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

THE PRESIDENT:

- 1 This is the latest in a long running series of Case Management Conferences in this long running matter, the last previous CMC being on 14 December 2004 (See [2004] CAT 25).
- 2 The history of the matter up to that point is fully set out in the Tribunal's judgment of 29 November 2004 ([2004] CAT 20) and I will not take time repeating that.
- 3 The issue before the Tribunal is still whether this Appeal should now be set down for hearing in the near future – probably in the first week of July – or whether it should wait for the completion of an ongoing investigation by OFCOM of BT's broadband pricing that is still in train. The Appeal was lodged on 20 January 2004 against a decision taken by OFCOM on 20 November 2003. That decision in turn was in relation to an original complaint lodged by Wanadoo (formerly Freeserve) in March 2002. The Decision covers the period from March to May 2002, which was the initial stage of the first launch of the relevant broadband product by BT.
- 4 The Decision appealed against follows the setting aside by the Tribunal in its judgment of 16 April 2003 ([2003] CAT 5) the original Decision taken by the Director General, Telecommunications, of 21 May 2002 rejecting Wanadoo's original complaint of 26th March 2002. The present appeal has thus been on foot for 14 months. The pleadings are complete and the Tribunal has a great deal of information. In our judgment, the present Appeal is, in principle, ready for hearing, the only further matter of preparation being the oral submissions.
- 5 Up to this point various parties have at different times urged us to wait for the ongoing investigation by OFCOM to catch up so that any appeal from a decision resulting from that investigation can be heard together with the present Appeal. As far as the ongoing investigation is concerned, it now appears that a further document is expected to be issued by OFCOM in June, which would either be a decision of non-infringement, or a further Statement of Objections. If a further Statement of Objections then a decision would not be taken before the end of 2005.
- 6 It seems to us that for planning and working purposes we need to assume that the document to be issued in June 2005 will, in fact, be a further Statement of Objections, but we do not think our decision depends on whether it is a non-infringement decision or a Statement of

Objections. On the assumption that the decision by OFCOM is not in practice to be expected much before the end of 2005 – it may, perhaps, be a little earlier but not significantly – that means that any appeal from that second decision would not be lodged in practical terms much earlier than February 2006, which means, again in practical terms, that the hearing in that second appeal would not take place before 2007, and probably in the first part of 2007. That would mean that the present Appeal (which relates back to the original complaint in 2002 and was lodged in 2004) would not be decided before 2007, assuming that it was heard together with any second appeal by Wanadoo, or BT as the case may be, against the second decision to be taken by OFCOM.

- 7 Although there is some overlap between the two matters, that is to say the present appeal and the ongoing investigation, in our view the present Appeal does raise a discrete issue, namely, what is the proper approach by a dominant firm to pricing of a new product in a new market by what may be called loosely “penetration pricing”? Behind that question is an issue of real public importance, which is the extent to which the Regulator can intervene on an *ex ante* basis in a case of alleged predation and, if the Regulator does so, on what basis should predation be judged in the very early stages of development of a new market? In particular, should any alleged predatory conduct be assessed on the basis of business or economic projections of what the business may reasonably have known of foreseen at that time, or should the matter be judged on the basis of such historical cost information that is then available, or subsequently becomes available to the Regulator in the course of investigating the complaint, and the decision is taken?
- 8 That is an issue upon which the present decision appealed against takes a position; and that Decision stands until set aside or withdrawn and, as long as it stands, it constitutes OFCOM’s approach. It is in our view of importance that those concerned in the telecommunications industry, and those concerned more widely with the application of competition law in this area, do need to know whether OFCOM’s approach on this particular issue is correct. OFCOM itself has told us today that it feels that it does need the Tribunal’s guidance on this point.
- 9 We are of the view that it is in the general interest that these discrete issues in this appeal should be decided sooner rather than later, and that a delay until 2007 before that can be done would not be satisfactory. The question is how far a Regulator can intervene to “nip in the bud” alleged predation when there is, as yet, no developed market? It seems to us that that is a matter with which we should now grapple as best we can in the context of the present appeal.

- 10 It has, however, been submitted to us that we should nonetheless wait until the second BT investigation has been completed for various practical reasons. We have encountered a somewhat complicated situation because in their written submissions before this case management conference the appellants, Wanadoo, said that they did want the appeal to be brought on as soon as possible, and the respondent (OFCOM) and BT resisted that. The Tribunal having, at the start of today's hearing, indicated various preliminary views, the result was that OFCOM thought that after all it probably was a good idea to bring this appeal on sooner rather than later in July, whereas as the discussion progressed Wanadoo became significantly less enthusiastic about that possibility. BT, as has been pointed out, did not however move its position and continues to have reservations about the desirability of bringing on this appeal in July. BT is, however, the intervener, and we think we must give a certain degree of weight to the submissions made by the two principal parties.
- 11 The general points that are made that would point towards delaying the matter are said to be that the matter is now of historical interest; that there could be an overlap with the present investigation; and that unless we fully understand what the present investigation is all about and consider the allegations made in the present investigation we run some risk of either arriving at some kind of inconsistent decision or in some way derailing the present investigation, or generally muddying the waters. OFCOM, however, sees no real difficulty in us proceeding, and at the time that they submitted their written submissions shortly before this case management conference Wanadoo saw no real difficulty in us proceeding either.
- 12 We have to take a decision and it is, as I have indicated, impossible to please everyone. We are not persuaded that there would be a fatal or even significant difficulty in us hearing the present appeal while the other investigation is still ongoing. In our judgment the two matters are discrete and for the two reasons that I have given, namely the general case management reason of bringing on appeals that have not been withdrawn as soon as expeditiously possible; and the general interest of the matters raised in this appeal, point towards hearing it as soon as possible. Although it may be as between the parties to some extent of historical interest, the underlying points that need to be addressed in the appeal remain of importance and are of current importance and not simply of historical interest in our judgment.
- 13 For all those reasons, balancing as best we can what is not an entirely straightforward decision, in our judgment the Appeal should come on now for hearing and we are led to understand, as

between at least the two principal parties, that the first week of July 2005 is a convenient slot for this hearing. As to the extent to which we should be apprised of the Statement of Objections in the parallel investigation, our position is that the Tribunal does not wish of its own motion to ask for that document but if Wanadoo wants to put it in we understand that there is no objection to that course from OFCOM. We completely understand BT's hesitations about that particular issue but it seems to us that whether and to what extent the Tribunal would look at the Statement of Objections if it were to be suggested that it should be put in, whether it is relevant, whether we ought to see at least part of BT's response or understand BT's response, are matters that we think we ought to reserve for further decision.

- 14 Our present view is that the focus of the present appeal, with which we are concerned, is very much what was happening at the date of the launch of this product and the question of what approach the Regulator should have adopted on the original complaint at a relatively early stage of the launch of the new product. The launch was not issued at the time this particular appeal was lodged and, indeed, the Statement of Objections, as we understand it, dates from August 2004 whereas the appeal was lodged in January 2004 in relation to events taking place in 2002. So we propose at the moment simply to reserve our position on the relevance and future handling (if necessary) of the Statement of Objections in the current investigation.
 - 15 That, I think takes us on to the practicalities of the hearing now envisaged for the first week in July and, as far as we can see at present, the only matter that we need to further address is the question of a possible timetable for skeleton arguments and any further elaboration of what we think are the main issues to be addressed on the occasion of that hearing. As indicated in the course of discussion the two main issues as we see it are first, whether in fact OFCOM's approach in the decision was one that was, in principle, open to it to have adopted, or whether it was a materially flawed approach; and secondly, if the approach itself was in principle open to OFCOM, were there errors in that approach which vitiate the decision to which OFCOM arrived. It is, I think, now a matter for the convenience of the parties whether they wish to address the question of the timetable for skeletons now, or whether that is a matter that can be conveniently done through the Registry in the next few days.
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