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IN THE COMPETITION

Case No. 1026/2/3/04

APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A.2EB

10th September, 2004

Before:

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

BETWEEN:

WANADOO UK PLC
(formerly FREESERVE.COM PLC)

Applicant

and

OFFICE OF COMMUNICATIONS

Respondent

supported by

BT GROUP PLC

Intervener

Mr Keith Jones (of Messrs Baker & McKenzie) appeared for the Applicant

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

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

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CASE MANAGEMENT CONFERENCE

1 THE PRESIDENT: Good morning ladies and gentlemen. As far as we can see we have two main
2 questions to address this morning. The first is what should happen in relation to the appeal
3 that is presently pending before us. The second is what, if anything, should we do or say
4 about the matters that arose last time and, in particular, the question of whether, to what
5 extent and in what circumstances the then state of play on 2nd August 2004 as between
6 OFCOM and BT should have been disclosed to the complainant or to the Tribunal on or
7 before the Case Management Conference of 2nd August. Those are the two issues that I am
8 aware of – there may be others. But let us first address the question of what should happen
9 to the present appeal, and I think I should look first at Wanadoo if I may, and ask you,
10 Wanadoo, what you really want to happen?

11 MR. JONES: As Wanadoo UK tried to outline in its response to the Tribunal's request on 7th
12 September, it has been slightly difficult for Wanadoo UK given that it has not actually seen
13 a copy of the Rule 14 Notice in whatever form. Wanadoo UK sees a lot of force in the
14 procedure whereby we continue with the present appeal because the existing Decision
15 stands. There are potential arguments that there are inconsistencies with the Rule 14 Notice
16 and that this may complicate matters going forward in the ongoing investigation. There is
17 also the fact that Wanadoo in principle thinks that the Decision being flawed should be
18 quashed as soon as possible.

19 THE PRESIDENT: Yes.

20 MR. JONES: The other side of the matter is that Wanadoo also sees the force of the argument –
21 albeit it has not been able to see the Rule 14 Notice yet – that it would be better for the
22 Tribunal, in the likely event of there being a second appeal or an appeal in relation to the
23 ongoing investigation – whether it be in relation to a non-infringement, or an infringement
24 decision – and that the Tribunal, in terms of its appeal process, would be best placed to look
25 at these two things together. There seems a great deal of force in relation to that.

26 THE PRESIDENT: We should look at them together?

27 MR. JONES: Yes. It would be easier for Wanadoo to come to a firm view if it had seen the Rule
28 14 Notice. On balance it favours what has been termed “Option B” – vacating the hearing
29 scheduled for 22nd September, having a CMC scheduled for some point in the future to
30 review the progress of the ongoing investigation to determine whether or not it would then
31 be possible, given such progress has been made, to have a hearing or not in the present
32 appeal. If sufficient progress is being made then all well and good and the question of
33 having a substantive hearing in the present appeal can be put off until we see the outcome of
34 the ongoing investigation. If there is significant delay for some reason, perhaps they are not

1 anticipated, then it may be that the matter is reviewed and we proceed to a hearing in the
2 current appeal. On balance, Wanadoo UK prefers Option B, but it does see a lot of force in
3 Option A – proceeding with the present appeal.

4 The other point Wanadoo would make (although no doubt OFCOM may disagree
5 with this) is that given the response of OFCOM to the comments made by Wanadoo in
6 response to the Tribunal's invitation to comment on the process of appeal, i.e. the fax from
7 OFCOM whereby it stated that given it had adopted the historic economic analysis and had
8 adopted the Rule 14 Notice – Wanadoo UK has basically achieved what it wanted to out of
9 the present appeal – that Wanadoo should withdraw. Now, it seems to Wanadoo UK that
10 the reality is that the points made by OFCOM point to OFCOM withdrawing the decision
11 rather than any withdrawal by Wanadoo UK of the appeal. If one examines the summary of
12 the appeal made by Wanadoo UK and compares that with the fax sent by OFCOM and
13 indeed the Rule 14 Notice, one could potentially put a tick next to the points raised by
14 Wanadoo in the current appeal. For that reason – those points going to the heart of the
15 OFCOM Decision of 20th November – one could see merit if it were not in wholly
16 exceptional circumstances of striking out the OFCOM defence.

17 Wanadoo UK notes the comments by the Tribunal in the Judgment in the *Napp*
18 case in August 2001 where it said that it was only in wholly exceptional circumstances that
19 there would be any such striking out of a defence. For that reason Wanadoo UK has made
20 no representations on that but that would be another option open to the Tribunal and the
21 parties, particularly given BT's comments have been that the Rule 14 Notice means that the
22 Decision is insignificant compared to the ongoing investigation, that could be another way
23 forward in relation to the present matter.

24 THE PRESIDENT: Thank you, Mr. Jones. I think, Mr. Fowler, it would help us to know what
25 OFCOM's position is. I think we have one difficulty and one matter on which we would
26 like some more information. Our principal difficulty is we have not actually got the
27 Statement of Objections, so it is somewhat difficult to evaluate arguments as to what effect
28 the Statement of Objections has on the present appeal without quite knowing what is in the
29 Statement of Objections – that is one point. Although a number of people tell us what is in
30 it, we do not know what is in it, and Wanadoo UK itself does not seem yet to know what is
31 in it, though I may need to be updated on that point. That is the first point.

32 The second point is whether you can sketch out for us a little what the expected
33 timetable now is of this second proceeding that has apparently been started against BT?

1 MR. FOWLER: First, on the SO – at the moment there is an informal non-confidential version of
2 the SO, that is to say the version that has been prepared by BT in something of a hurry so
3 that it could be made available to Wanadoo’s advisers.

4 THE PRESIDENT: Yes, which they seem to have – they seem to have something

5 MR. FOWLER: Which they have, and so that the excisions from that are without prejudice to
6 whatever BT may, on fuller consideration, wish to claim confidentiality for. That will then
7 be made available to Wanadoo as well as to its advisers. So it is a temporary position at the
8 moment.

9 THE PRESIDENT: Yes, and when do we hope to resolve that?

10 MR. FOWLER: On the 14th. That is when the representations that will be made by BT finally as
11 to what ----

12 THE PRESIDENT: As to what is confidential and what is not?

13 MR. FOWLER: Yes.

14 THE PRESIDENT: So that is next Tuesday, yes.

15 MR. FOWLER: If the Tribunal wanted to see a copy of the non-confidential version as it stands
16 at the moment we have copies available, but it may be that you would think it is not
17 appropriate for you to get involved in a process which may well end up before the Tribunal
18 in the future.

19 THE PRESIDENT: Our only interest at the moment is working out what to do with the present
20 appeal and it is only in relation to the relationship between the present appeal and the SO (if
21 there is one) that we would be interested – or might be interested, or it might be relevant - to
22 know what the SO contained. It would not be to do with deciding in any way whether the
23 SO was right or not.

24 MR. FOWLER: But the submissions my friend makes obviously are from the point of view of his
25 clients who have not seen even the redacted version.

26 THE PRESIDENT: No, quite – it may be that we can manage without actually seeing it.

27 MR. FOWLER: Certainly. Our position is there is absolutely no inconsistency between the
28 position adopted in the original decision, and the decision adopted in the SO. The reason
29 why the SO ----

30 THE PRESIDENT: No inconsistency?

31 MR. FOWLER: No inconsistency.

32 THE PRESIDENT: So they are two self-standing documents, both of which in your submission
33 stand in their own right.

1 MR. FOWLER: Which are consistent, and indeed stand in their own right but obviously are
2 closely inter-related, and the reason why the SO appears to address some of Wanadoo's
3 concerns is because it is performing a different exercise, looking ex post at past events, over
4 the past two years, whereas of course the original Decision was focused looking forward on
5 the basis of two months of launch of the product. In those circumstances, we say, the test
6 adopted in the one case was different, necessarily different, from the test adopted in the
7 other one and there is absolutely no inconsistency between the two.

8 At the same time, however, because they plainly are so closely related it does not,
9 in our submission, make sense to attempt to analyse and criticise the approach in the
10 Decision standing alone without seeing it in the context of the approach ----

11 THE PRESIDENT: It would not be right to do the one without the other.

12 MR. FOWLER: -- when we had the opportunity to take into account the historic data. We say,
13 effectively, that we would support what Wanadoo described as "approach B".

14 THE PRESIDENT: Which is?

15 MR. FOWLER: That the present appeal be either stayed or adjourned.

16 THE PRESIDENT: Yes.

17 MR. FOWLER: So that when we are in a position to see the response of BT to the SO we are
18 better placed to evaluate matters like timetable and how much work is going to be involved,
19 because the Tribunal will appreciate -- well you will not appreciate because you have not
20 seen the SO, but if you had seen the SO you would appreciate - the very substantial amount
21 of work that has gone into what is an extremely detailed analysis running to some 160 pages
22 representing from a resource point of view the largest devotion of resources accounting for
23 a third of the personnel working in the Competition and Markets Investigation Team, as
24 well as outside support.

25 THE PRESIDENT: Yes.

26 MR. FOWLER: There is a very substantial resource issue, obviously, in going forward as well
27 and that resource issue will be aggravated if, whilst OFCOM were seeking to address the
28 concerns in the SO and BT's response to it, they were also being called upon to deal --
29 through the same team -- with an ongoing appeal.

30 THE PRESIDENT: We see that, yes.

31 MR. FOWLER: And so that would not be an appropriate course of action. Indeed, it is likely to
32 be detrimental to the process and to the resolution of the overall situation.

33 THE PRESIDENT: So far I have not detected a great difference between your position and the
34 position of Wanadoo.

1 MR. FOWLER: On the net result – on the reason for getting there, certainly, but on the net result,
2 no.

3 THE PRESIDENT: Yes, thank you. Good morning, Miss Lee.

4 MISS LEE: Good morning. The Tribunal will have seen from our letter sent earlier this week
5 that, in fact, we are in agreement with what the net position is. We suggest that the current
6 appeal should be stayed or adjourned pending the decision one way or another in the
7 ongoing investigation. Really, the reasons that have already been elaborated by my learned
8 friends go to the point, it is a question of it being sensible to deal with the issues in the
9 round, resource problems in terms of having to deal with two things at the same time, both
10 from OFCOM's point of view and from BT's point of view, and of course the importance of
11 the Rule 14 Notice in the ongoing investigation should not be underestimated, it has a very
12 broad scope. As we said in our letter, it is much broader than the scope of the November
13 2003 Decision, and it is very important that the matter is considered properly. So for all of
14 those reasons we suggest that it is appropriate to stay or adjourn the current appeal until
15 such time as the final decision is taken.

16 THE PRESIDENT: Yes, thank you, Miss Lee. Mr. Fowler, I did not, I think, ask you – or
17 perhaps I asked you but I do not remember getting an answer to the question – about what
18 the timetable of the present administrative proceedings is, or could be envisaged to be?
19 There is an SO, there has to be a reply to the SO.

20 MR. FOWLER: The reply to the SO is due on 27th October. The oral representations (the oral
21 hearing) are due to take place at some time before 10th November.

22 THE PRESIDENT: Yes.

23 MR. FOWLER: Whether those dates will be adhered to will obviously depend in part on BT's
24 evaluation of the SO, but at the moment that is what we are heading for.

25 THE PRESIDENT: I think I have seen in the papers that it is suggested that the overall timetable
26 for the case, if normal guidelines were followed, and one appreciates it is probably quite a
27 heavy case, one would expect a decision quite early in the New Year?

28 MR. FOWLER: I think that would be rather wishful thinking, Sir.

29 THE PRESIDENT: Would it?

30 MR. FOWLER: As the case has developed, and the amount of detail that has developed, and the
31 amount of analysis that is involved, and that is why we think an appropriate course would
32 be for a CMC after the oral hearing has taken place when we will be in a position to
33 evaluate the sort of work that is required ----

34 THE PRESIDENT: To see where we are.

1 MR. FOWLER: -- in responding to whatever BT has said in response to what we have said.

2 THE PRESIDENT: Quite. So a CMC at some early date in December might be a sensible
3 solution for everybody.

4 MR. FOWLER: Yes, Sir.

5 THE PRESIDENT: Yes, okay.

6 (The Tribunal confer)

7 THE PRESIDENT: It seems to us in the light of the submissions we have heard that it would be
8 right to simply adjourn this Case Management Conference to a date in early December to
9 allow the administrative procedure in the proceedings that have recently been commenced
10 by OFCOM against BT to run its course. The reply to the Statement of Objections that was
11 apparently issued on 31st August is due, we are told, on 27th October and the oral
12 representations are to be held on or around 10th November. On that timetable it would seem
13 to us appropriate to fix a Case Management Conference in this case, our present case, in the
14 week commencing 6th December so that we are in a position to review progress in order to
15 decide the ultimate fate of the appeal with which we are currently seized. We can see force
16 from a number of points of view in the various largely agreed submissions that it would not
17 be right to proceed with the present appeal unnecessarily in view of the pending possibility
18 of a second decision or other solution emerging in the new proceedings that have been
19 commenced. We are not, however, in our judgment yet sufficiently informed of the state of
20 the new proceedings and the relationship between the new proceedings and the existing
21 appeal, to be in a position to say one way or another what the proper course to adopt is in
22 relation to the existing appeal.

23 So in our judgment the appropriate and the fairest solution is simply to adjourn the
24 Case Management Conference today to the first open date available in the first week of
25 December. It may be that we are in a position to actually fix a date – you may want to just
26 briefly consult amongst yourselves while I consult amongst the Members of the Tribunal to
27 see whether we can agree a date here and now. (After a pause) The 8th or 9th December
28 would be convenient for the Tribunal.

29 MISS LEE: We can manage either with a slight preference towards 9th.

30 MR. JONES: Either is fine.

31 MR. FOWLER: Either is fine.

32 THE PRESIDENT: Let us say 9th December. The second matter we ought just to revert to,
33 Mr. Fowler, is the situation as regards the last Case Management Conference for which we
34 went into camera, and in which we gave a Judgment, and we have at some stage to decide

1 whether we are going to publish that and, if so, what is to be said and exactly how the
2 course of proceedings in fact developed. Perhaps, lying behind that are some wider issues
3 as to how one can proceed with settlement negotiations of one sort or another under the new
4 regime. I am not sure at the moment whether we necessarily want to take a position on what
5 the right procedure is. We can see that there are strong public policy reasons for
6 encouraging settlements. We can also see at an early stage in the procedure it is perhaps
7 inevitable that such discussions will take place privately between the party complained
8 against and the relevant regulatory authority. Questions that arise, however, are on what
9 basis the regulatory authority engages in such discussions, what information it needs to
10 communicate to the prospective defendant what the discussions are about, and whether
11 there is any need to involve the complainant in the decision to actually engage in such
12 discussions.

13 In this particular case, as we understand it, the Board of OFCOM decided, on 27th
14 July, to proceed in principle to the issue of a Statement of Objections unless satisfactory
15 commitments were available. There then appears to have been quite a short period of
16 discussion with BT between 27th July and 30th July about those commitments, although it is
17 not completely clear to us on what basis that happened. But by 30th July it was apparently
18 evident that BT was not, in fact, in a position to give any sufficient or relevant
19 commitments. That raises the question, it seems to us, as to whether when we got to the
20 Case Management Conference on 2nd August there still was anything that was, strictly
21 speaking, confidential that needed to be kept back from Wanadoo, from the Stock Market or
22 from Wanadoo itself. So we are somewhat perplexed – I use that word in a neutral sense at
23 the moment – we are somewhat perplexed at the state of affairs that arose, and at this stage I
24 simply invite you, on behalf of OFCOM, to make any comments you feel appropriate in the
25 light of what I have just said.

26 MR. FOWLER: As to what there was that was confidential at the time of the last CMC, it was as
27 we discussed at that time, the fact that a decision had been taken, the public announcement
28 of which would cause problems both for OFCOM and BT, it was not in a position to
29 comment on the detail of the Decision – the Decision being a decision to issue an SO.

30 THE PRESIDENT: Forgive me for intervening, what we have not completely understood is what
31 is the nature of those problems, why can you, OFCOM, not announce that you have taken a
32 decision and the document will be available shortly, and BT say: “Well, we will comment
33 when we get the document, but we are convinced we have done nothing wrong”, or words

1 to that effect. What is the problem? Since the document is not a public document anyway,
2 what is the difficulty?

3 MR. FOWLER: That BT would not be in a position to respond or comment on the nature of the
4 allegations being made against it.

5 THE PRESIDENT: Well it can simply say: "We are not in a position to respond or comment
6 until we have the document".

7 MR. FOWLER: That is a possibility, Sir. I accept that is a possibility.

8 THE PRESIDENT: It would not want to comment anyway, publicly, would it? It might do, but it
9 would hardly be wishing to engage in a debate in the press as to whether or not the case was
10 a good case.

11 MR. FOWLER: We could, at the CMC on August 2nd, have told you what the Decision was in
12 camera, and we were prepared to do that.

13 THE PRESIDENT: I know you were, but we were not too keen on being told in camera and
14 sending Sir Christopher Bland and others to jail if by some chance there was a leak!

15 MR. FOWLER: For that reason it appeared to us best therefore that the matter not be disclosed.

16 THE PRESIDENT: What I am trying to tease out is whether there is a real problem here, or
17 whether there is not so much of a problem as may at one stage have been thought. We are
18 not seeking to be in any way critical of the way that it has been approached at this stage. It
19 is partly a matter of thinking together as to how these sorts of things should be handled. It
20 is partly a matter of ensuring that there is a degree of even-handedness vis-à-vis all the
21 parties. It is partly a matter of concern that sometimes certain parties are closer to the
22 Regulator than other parties, and one needs procedures that guard against that perception,
23 and possibly a completely unfounded perception, one does not know, which is why I think
24 we are exploring this – or trying to explore it – a little further.

25 MR. FOWLER: Of course, the situation that arose was, in itself, an unusual situation in that the
26 Board was required to take a decision prior to the CMC as to a step that it would not be in a
27 position actually to carry forward until the end of August, given the timetable that had been
28 set out. In the normal way of things that two stage process would not, generally speaking,
29 arise. There would still be the possibility of something happening, obviously the direction
30 would be set and the ship would be steaming ahead in one direction, but no final decision
31 would necessarily have been taken in normal circumstances, so it was a rather unusual
32 situation that gave rise to this position. Having said that, so far as the discussion about
33 commitments was concerned that, in my submission, was a perfectly normal discussion that

1 would take place almost, we say, earlier necessarily in confidence between the parties under
2 investigation ----

3 THE PRESIDENT: Yes.

4 MR. FOWLER: -- and the Regulator, and I would submit that it is entirely consistent with the
5 European Court of Justice Decision in *BAT and RJ Reynolds* which you referred to in your
6 *Pernod* Decision, that those discussions should take place confidentially without the
7 involvement of the complainant.

8 THE PRESIDENT: Yes.

9 MR. FOWLER: Provided, of course, that at the end of the day before any decision is taken third
10 parties have an opportunity to be heard. In this case, had the discussions proceeded
11 anywhere and reached agreement, or at least in principle a view, on potentially acceptable
12 commitments, then there would necessarily have been a statutory procedure for
13 consultation. So there is no asymmetry of information involved, it is no different from the
14 asymmetry of information that would arise in any normal case involving a discussion about
15 commitments, save to the extent that in this particular case it had been a decision taken by
16 the Board to issue an SO in the absence of satisfactory commitments, but in the normal way
17 of things, although there would not necessarily be a decision taken, in that formal sense, it
18 would be perfectly apparent, or was likely to be apparent to the party under investigation,
19 which way the wind was blowing, and it would be apparent to him, but necessarily not to
20 third parties. We say that is just a perfectly normal feature of a process of this sort. As you
21 said yourself it is a process which is desirable to the ends of good administration that there
22 should be the opportunity to dispose of matters if at all possible. We say that that is a
23 perfectly reasonable state of affairs. Wanadoo raise in their letter various points about that
24 and they say that this was a serious infringement and we should not even have been
25 considering commitments in that connection. We say that had commitments been proposed
26 it would have been open to them to make representations of that sort at the appropriate time
27 as envisaged by the statutory procedure – that is to say at the time of the consultation. Of
28 course, it did not come to that, but that would be the appropriate stage at which to make
29 representations of that sort.

30 THE PRESIDENT: Had commitments ever been agreed then that was the time to make
31 representations.

32 MR. FOWLER: It is not agreed, it is offered ----

33 THE PRESIDENT: Offered, yes.

34 MR. FOWLER: -- because the consultation is a consultation.

1 THE PRESIDENT: Yes, quite, they are not yet agreed.

2 MR. FOWLER: The Regulator is required to take into account any representations that may be
3 made about the acceptance of any suggestion of the sort advanced by Baker & McKenzie
4 that in some way we had already decided, our mind would be set on the course of action, is
5 inconsistent with the structure of the statutory regime, and certainly would be a totally
6 improper position for OFCOM to adopt and it certainly would not adopt it, but the statutory
7 regime envisages the process happening in that way, as does *BAT* and *RJ Reynolds*. The
8 statutory regime introduces the more specific topic of consultation. Before leaving that
9 subject, Baker & McKenzie also suggest in their letter that under the OFT's guidelines on
10 this whole question, had there been the possibility of commitments arising the OFT would
11 publish a statement of its competition concerns before proceeding to consider with the party
12 under investigation the question of commitments, and that we should have done the same.
13 As to that, that is simply based upon a mis-reading of the draft guidelines that the OFT have
14 produced, what those guidelines say is that if a person wishes to offer commitments then the
15 OFT will issue a summary of its competition concerns, and that is not a replacement for an
16 SO but its statement of concerns.

17 THE PRESIDENT: Sorry, you are reading from where?

18 MR. FOWLER: I am reading from the OFT's enforcement guidelines.

19 THE PRESIDENT: Which I am not sure that I actually have to hand in front of me. [Same
20 handed to the Tribunal] Thank you very much, Mr. Jones. Page?

21 MR. FOWLER: This starts at p.13. You will see 4.18 talks about the issue of summary of its
22 competition concerns, and it goes on to talk in the next paragraph about once commitments
23 have been offered there is no discussion about any sort of consultation in the meantime,
24 which makes it clear that the issue is not an issue to the public at large, or to third parties, it
25 is simply provision to the party under investigation, and it is thereafter at 4.21 where the
26 OFT proposes to accept commitments, it will give notice, and that is the statutory
27 requirement.

28 THE PRESIDENT: Yes.

29 MR. FOWLER: The OFT indeed have confirmed to OFCOM that that is their intention, even if
30 there is some ambiguity in the word "issue", that is their intention. It is not their intention
31 to have a two stage consultation process. It is a one stage consultation process in which the
32 initial offering and discussion takes place between the Regulator and the party in question.

33 THE PRESIDENT: To issue a summary of its competition concerns is a procedure not unlike that
34 adopted by the OFT in merger cases, and by the CC in merger cases, and is presumably

1 there to help focus the mind on the person who wishes to offer commitments on what it is
2 that the commitments need to address.

3 MR. FOWLER: Exactly so, Sir, but it is between those two parties, it is not with the world at
4 large or with complainants.

5 THE PRESIDENT: The point I suppose that is at the back of one's mind, but is not really to do
6 with Wanadoo, is how BT was expected to cope with the situation over what was apparently
7 a two or three day period at the end of July if it did not have that summary of competition
8 concerns, but perhaps it did, we do not know.

9 MR. FOWLER: It is very much more in the former, as I understand it, not a summary of the
10 concerns but an awareness of what the concerns were resulting from the investigations that
11 preceded it, and the information that preceded it. The whole process was, of course, driven
12 by the need to comply with the timetable in this case, and it was very specific.

13 THE PRESIDENT: So the process was somewhat telescoped, you say, because of the ----

14 MR. FOWLER: It was very specifically driven, and the whole question of having a decision of
15 the Board was driven by the requirements of this case, rather than by the normal process, so
16 it is in that sense very much a one-off situation in any event. But even so, in our
17 submission, the approach adopted by OFCOM was fully consistent with the approach
18 proposed, and still being consulted on by the OFT in those guidelines, albeit that it did not
19 have the formal step of an issue of a summary of competition concerns.

20 THE PRESIDENT: But is there a document of some sort – or was there a document of some
21 sort?

22 MR. FOWLER: No, it was done orally because of the time available, but that is really a nicety in
23 the context of the concern that the Tribunal is raising, about asymmetry of information.

24 THE PRESIDENT: Yes, the complaint about the asymmetry of information is not really on this
25 point, it is about not knowing that it was going on at all.

26 MR. FOWLER: Indeed, but that is inherent in the process.

27 THE PRESIDENT: You say that is inherent in the process.

28 MR. FOWLER: It is inherent in the process and it is inherent in the process envisaged by the
29 Court of Justice in *BAT and RJ Reynolds*.

30 THE PRESIDENT: Yes.

31 MR. FOWLER: Indeed, in that case, of course, there was a longer delay before the complainants
32 became aware of what had gone on than in this case.

33 THE PRESIDENT: Yes.

34 MR. FOWLER: This was very much a transient state of affairs.

1 THE PRESIDENT: Yes.

2 MR. FOWLER: In my submission it really is not a case in which there is cause for criticism of
3 OFCOM's handling, or any proper concerns that could arise about any asymmetry of
4 information, and we are concerned that the Judgment that was given in camera on the last
5 occasion ----

6 THE PRESIDENT: May not be completely fair to you.

7 MR. FOWLER: -- although it did not intend to criticise us nevertheless it did include comments
8 that might appear to the outsider to be critical in circumstances where, in my submission, no
9 criticism can attach.

10 THE PRESIDENT: Yes. Thank you.

11 MR. FOWLER: Unless there is anything else I can say on that?

12 THE PRESIDENT: No, I think we have gone over it. I am still worrying about whether, on 2nd
13 August, there was any real objection to everybody being put in the picture, but I think you
14 have made your point on that. Thank you. Yes, Mr. Jones, do you want to elaborate on the
15 situation that has arisen?

16 MR. JONES: Given what has been said Wanadoo UK is happy, if the Tribunal so decides, for the
17 comments to remain in camera, although Wanadoo UK welcomes the general openness and
18 transparency of the Tribunal in relation to the CMCs, if it so decides then Wanadoo has no
19 objection for that to remain in camera.

20 Wanadoo has certain amount of sympathy with what has been said by OFCOM in
21 relation to the procedures, and can see certainly that there is at least some ambiguity in
22 para.4.18 of the draft OFT guideline which perhaps could be either dealt with in terms of
23 expressly stating that this is meant to be just to the alleged infringer, or the issue of
24 transparency further considered and decided whether or not it is appropriate in some cases
25 for this to be announced more widely, at least to include the relevant complainant. It does
26 seem to Wanadoo that it has expressed its position quite fully in its letter to the Tribunal and
27 to OFCOM. OFCOM can no doubt take those points into account going forward, and
28 decide whether or not it would be appropriate to adopt a procedure that takes into account
29 such comments. It does seem to Wanadoo that the draft guideline is quite clear as to the
30 wholly exceptional circumstances where commitments are appropriate to be sought in terms
31 of serious abuses and this is indeed the case, as Wanadoo UK sees it, that it would be a
32 serious abuse. We are however where we are on the matter, there was only a few days
33 when OFCOM was considering that up to the CMC on 2nd August.

1 As to the asymmetry of information since then Wanadoo UK has heard OFCOM. It
2 still has some concerns as to what has been said. It still is likewise concerned, and considers
3 that it may have been possible, as the Tribunal has indicated, for a suitable press release to
4 be issued. It does not seem to Wanadoo that there are any good reasons why BT and
5 OFCOM could not have dealt with the matter in a suitable way, i.e. no comment is needed
6 at this point in time until a Rule 14 Notice is issued, and as the Tribunal has said that is not
7 a public document in any event. I think that is probably sufficient for today's purposes
8 from Wanadoo UK's perspective.

9 THE PRESIDENT: Yes, if we just look for a moment at your letter of 6th September, Mr. Jones,
10 the first point:

11 “OFCOM should not have been considering commitments in the case of serious abuse
12 of dominance”

13 OFCOM's answer to that is that that is a matter that you should raise at the stage where you
14 reach the statutory procedure. The next argument that Wanadoo UK was excluded from
15 making observations to OFCOM at an appropriate time is dealt with by OFCOM by saying
16 that the statutory procedure does not envisage a two stage process whereby the complainant
17 is first heard on whether there should be any explanation of commitments, and is then heard
18 again in the statutory procedure on what the commitment should be, or whether the
19 commitment should be adopted, that there must be a stage at which the Regulator can
20 confidentially approach the defendant or vice versa – normally vice-versa – without the
21 complainant at that stage being involved.

22 The third point on transparency probably goes with the second point that, although it
23 is important that there should be arms' length transparency, there are situations in which
24 you cannot really begin to explore commitments without approaching the Regulator, and
25 similarly on asymmetry of information OFCOM has done its best to inform everybody as
26 soon as possible. I do not know if you want to come back on any of those points – that is
27 how we understand the argument.

28 Forgive me for a moment, Mr. Jones - I suppose in this case, Mr. Fowler, it is just
29 slightly odd that it should be the Regulator who takes the initiative. It is normally the
30 defendant who usually comes along to offer commitments, is it not?

31 MR. FOWLER: Again, I think that is driven by the short timetable. It is something that has to be
32 done, and has to be done quickly. If there is going to be any question of commitments it had
33 to be dealt with immediately, if we were going to get out an SO by the end of August,

1 which we were committed to. Therefore, it was simply a matter of fitting within that
2 constraint.

3 THE PRESIDENT: I see, very well. Yes, Miss Lee, do you want to add anything to this debate?

4 MISS LEE: There are two points of clarification. The first is the one that the Tribunal has which
5 is that the discussion of commitments was a sudden and rather telescoped procedure
6 instigated by OFCOM, and BT reacted by having discussions over a very short period of
7 time. That is the first point of clarification.

8 THE PRESIDENT: So they came to you, as it were?

9 MISS LEE: Sir, yes. The second point is in relation to some comments in Baker & McKenzie's
10 letter of 6th September, which is that it must have been the case that BT knew of the essence
11 of the Rule 14 Notice, and that we want to correct because what BT knew at that stage was
12 the nature of this decision, i.e. which way it was going to go. Other than its general
13 background, as Mr. Fowler has said, in relation to what has happened in the past in the
14 investigation and the letters of request, and the previous discussions and so on, BT did not
15 have, as Mr. Barling said at the last hearing in August, any detail as to the essence, the
16 reasoning, or those remedies or anything like that, it simply had knowledge of the Decision,
17 in terms of which way it would go. I want to make those two matters clear.

18 So in terms of asymmetry of information, the asymmetry is not as great as ----

19 THE PRESIDENT: You did not have much information either, is what you are saying.

20 MISS LEE: Indeed, that is right.

21 THE PRESIDENT: How, in those circumstances was it possible to engage usefully in a
22 discussion of commitments if you had no issues letter and no knowledge of the reasoning?

23 MISS LEE: Well, Sir, one can ask the question rhetorically, it is rather difficult in those
24 circumstances, but as it has turned out all of this is historic and in a sense is academic
25 because there were no acceptable commitments that BT wanted to offer, and that has moved
26 on, as Mr. Jones has said, with the issue of the Rule 14. So in a sense the question of the
27 correct procedure, where there are discussions, have discussed commitments, and whether
28 commitments would have been appropriate at all in this case is academic now.

29 THE PRESIDENT: It is all academic now.

30 MISS LEE: That is right. The last point I really wanted to address was the question of whether
31 there was a problem, or a reason why there should not have been an announcement around
32 the 2nd August.

33 THE PRESIDENT: Yes, now what is the problem from your point of view?

1 MISS LEE: Sir, two points I wanted to make. The first is obviously generally there is no
2 announcement of a Rule 14 decision until the document is ready and prepared under
3 OFCOM's normal practice ----

4 THE PRESIDENT: Yes.

5 MISS LEE: -- until it is ready and available, and the parties do have it in advance, or at least the
6 target of the Decision has it in advance, and is able to prepare and to at least know what its
7 reaction will be in advance, and that, we submit, is for obvious and very good reasons, for
8 example, it may be that the document cannot be got out in time at OFCOM by the deadline,
9 maybe something significant happens to change the course of events. There may be a
10 change. Secondly, that the target of the decision has the opportunity to prepare. It all
11 depends really on the circumstances of what the decision is and what the press release might
12 be. As I said, we did not have very much information at that stage, we knew which way the
13 Decision was going but nothing else, and a press release may or may not have caused
14 problems, but it is a perfectly reasonable reaction, we submit, at that stage to say that there
15 was no objection, if the matter is being heard in camera, to Wanadoo knowing, or the
16 Tribunal knowing, but in terms of a public announcement it may have been – for example,
17 to take a hypothetical case, if the press release mentions fines then you would like to know
18 of the reasoning or at least be prepared to deal with it. It seems to us that there are concerns
19 potentially in cases, and that looking at the matter forward with the benefit of hindsight, we
20 submit it is a reasonable approach for OFCOM, and reasonable for BT to support that
21 approach. I think that is all I want to say, Sir.

22 THE PRESIDENT: Thank you very much, Miss Lee. Is there anything you want to come back
23 on there, Mr. Fowler?

24 MR. FOWLER: Just on the question of your point that in the absence of any knowledge of what
25 was in the SO how could anybody talk sensibly about commitment. I think the parties were
26 in a position to have discussions along the lines of what the sort of things that would meet
27 our concerns would be, if that was something that you would consider was acceptable to
28 you, that sort of discussion is feasible without any knowledge on BT's part of what was
29 complained of anyway.

30 THE PRESIDENT: Yes, thank you. We will rise for a few moments.

31 (The hearing adjourned at 11.55 a.m. and resumed at 12.15 p.m.)

32 MISS LEE: Sir, I wonder if, before we start, I could just be permitted to make one brief point.

33 THE PRESIDENT: Of course, yes, do.

1 MISS LEE: It is this, I hope I did not go too far when I tried to explain the position BT had found
2 itself in at the time of the discussions with OFCOM. As Mr. Fowler said, I think in
3 response to me, that there obviously was some oral discussion of background and so on, the
4 point I wanted to get across was that there was no knowledge of any detail of any decision
5 such as we now see in the Statement of Objections. I do not want to put the matter too high
6 when I should not have done.

7 THE PRESIDENT: No. Thank you, Miss Lee. Mr. Fowler, we are not going to give a judgment
8 today on the matters we have been discussing, we need to reflect a little further about what,
9 if anything, we are going to do. Could I just put three matters to you for possible comment?
10 If we go back to the order that we actually made on 10th June 2004, although we may
11 perhaps ourselves have not been entirely free from ambiguity, we were under the
12 impression that what we wanted was a commitment by 30th July to do one thing or the other
13 by the end of August, that is to say, I do not think we were actually asking for a decision by
14 30th July as to which it was going to be, but a decision to be taken one way or the other by
15 the end of August. So it may be that the Board of OFCOM felt it was moving a little ahead
16 if it thought that it had to decide one way or the other by the end of July, that is the first
17 point although, having said that, it was apparent to everybody by that stage that there was a
18 need to bring this matter to an early conclusion whichever way it went. That is the first
19 point to raise.

20 The next point is in three parts. It refers to the OFT's draft guidelines that went out
21 for consultation in April 2004. The first point is: how far those draft guidelines should be
22 taken into consideration as working documents until they are finalised in the context of the
23 new commitments regime.

24 The second point is that in paragraph A13 the OFT states that it will not accept
25 binding commitments in cases involving serious abuse of a dominant position and in the
26 footnote to that paragraph at para.7, the OFT states that it will regard predatory pricing as a
27 serious abuse. That raises a question as to whether this was a case in conformity with the
28 guidelines, whether one could invite commitments.

29 Finally, paragraphs 4.16 through to 4.18 in particular seem to suggest that it is for the
30 person concerned, i.e. not the Regulator, to offer binding commitments. In this particular
31 case, this investigation has been going on for some time, it would presumably have been
32 possible to offer commitments if it wished to do so. The question in our mind is is it
33 appropriate for the Regulator to raise with the prospective defendant company the question
34 of commitments, and is there any risk of the procedure being seen to lack even-handedness

1 if the Regulator takes the initiative to suggest to the defendant, certainly in a case such as
2 the present, that they may wish to offer commitments. That arises particularly in a case
3 where, as we understand it, this initiative was at OFCOM's suggestion and one in which
4 where there was no summary of the competition concerns then available. I do not know
5 whether you feel able to deal with those questions now, or you would prefer to write to us,
6 or the parties would prefer to make any observations they wish on those questions at this
7 stage.

8 MR. FOWLER: Could I just make one or two points now?

9 THE PRESIDENT: Yes, I think it would be entirely appropriate if you wished to follow it up
10 with any further submission you may want to make.

11 MR. FOWLER: As to the first question about what was meant by the order of 10th June, we
12 certainly proceeded on the basis that it meant "decide one way or the other" by the end of
13 July, and it was on that basis that the Board felt the need to reach a decision.

14 THE PRESIDENT: Yes.

15 MR. FOWLER: That was certainly the basis on which we were proceeding. As to the OFT draft
16 guidelines, plainly they are only draft guidelines. They were, at least, about to go to the
17 Secretary of State, as I understand it because they need to be put in place by order of the
18 Secretary of State.

19 THE PRESIDENT: They were published in April, apparently, according to this.

20 MR. FOWLER: For consultation.

21 THE PRESIDENT: For consultation, yes.

22 MR. FOWLER: And the consultation has closed, and so they were about to go to the Secretary of
23 State is my understanding, but the OFT is concerned about the consequences of what was
24 said in this matter and what would be said today, plainly insofar as it might impinge upon
25 anything that was in the guidelines.

26 THE PRESIDENT: They have not turned up to make any representations to us.

27 MR. FOWLER: They would want an opportunity to be heard if they thought that anything was
28 going to be said about the guidelines.

29 THE PRESIDENT: What are they worried about? They had better turn up and tell us what they
30 are worried about, if they are worried about something.

31 MR. FOWLER: In my submission it would not be appropriate for the Tribunal on a single
32 incidence, particularly one arising out of what is in a very exceptional circumstance, to
33 express a general view.

1 THE PRESIDENT: There is, if I may say so, force in your point that this was a somewhat one-off
2 situation in a number of respects, and we are all in a very early stage of working out how
3 these procedures do or should work. When we said in our Judgment last time that we did
4 not imply any criticism we did actually mean it - we do not particularly. But now that the
5 matter has been raised it probably is appropriate to try to get to the bottom of it, and clarify
6 for everybody where we are.

7 Are you telling me that these guidelines have in some way been held up because of
8 these proceedings?

9 MR. FOWLER: I gather it is more in relation to the *Pernod* case in particular.

10 THE PRESIDENT: *Pernod* – I see, yes.

11 MR. FOWLER: Taking advice on the matter, it is that that has held it up.

12 THE PRESIDENT: Well *Pernod* is *Pernod*, there is nothing we can do about *Pernod* now, it is
13 there. So it is not this case?

14 MR. FOWLER: I misunderstood it.

15 THE PRESIDENT: I see, very well.

16 MR. FOWLER: As to the annex and the reference in the footnote to predatory pricing being a
17 serious infringement, that is of course said as a general rule.

18 THE PRESIDENT: Absolutely.

19 MR. FOWLER: The approach here was on a tentative basis. It was made in particular
20 circumstances of this unusual situation in a need to address whether or not commitments
21 might be appropriate and get that out of the way (if they were not going to be appropriate)
22 as soon as possible, and that I think is also what I would like to say in relation to the further
23 point about the person who, as it were, initiates any such discussion. The guidelines do
24 refer to “if a person or persons wish to offer”, it does leave it entirely open whether the
25 Regulator might ask if they do wish to offer, and that plainly is a matter that may, in certain
26 circumstances arise, and it may be appropriate in certain circumstances for the Regulator to
27 raise that question – for whatever reason it might not have occurred to the person under
28 investigation or whatever it may be. There does not seem to be anything inconsistent with
29 the Regulator raising the question to see if there is a desire, or possibility of commitments
30 being offered. But, as I say in the particular case in question it arose in the very unusual
31 situation and the shortage of time as we saw it ----

32 THE PRESIDENT: Yes, absolutely.

33 MR. FOWLER: -- to get that question out of the way.

1 THE PRESIDENT: It is not wholly clear – to me at least – if we ever reached the stage of having
2 a person who wished to offer commitments, it is not completely clear on what we know and
3 perhaps we should not go further into it, whether BT ever did wish to offer commitments.

4 MR. FOWLER: It may not have been their wish and no doubt that is why in three days it came to
5 nothing.

6 THE PRESIDENT: That OFCOM thought it ought to establish whether it was that wish or not.

7 MR. FOWLER: To get that out of the way because a great deal of work was required leading to
8 the finalisation of the SO, a commitment of a very substantial amount of resources which
9 had already been committed and needed to continue to be committed throughout August.
10 That was the circumstances in which it arose.

11 THE PRESIDENT: I see. Thank you very much. Does anybody want to come back on any of
12 that? Mr. Jones, did you want to say anything else?

13 MR. JONES: I think merely one point. Wanadoo UK is still bemused as to why there was a need
14 to get it out of the way, particularly given the seriousness of pricing abuses and the issue of
15 deterrents, and plus the point raised at 3.3 of the letter that the policy issue of the Regulator
16 not just acting but appearing to act at arms' length from relevant parties in the industry. I
17 think they are things which perhaps OFCOM could further consider in any submission it
18 makes to the Tribunal, but Wanadoo UK remain slightly bemused.

19 THE PRESIDENT: Anything from BT, Miss Lee?

20 MISS LEE: Sir, nothing from BT at this stage, other than to reflect and if we have any further
21 thoughts we will accept the Tribunal's invitation to put it in writing.

22 THE PRESIDENT: Yes. Good, thank you very much. We will simply adjourn now and consider
23 the situation.

24 (The hearing concluded at 12.30 p.m.)