Neutral citation [2004] CAT 20

IN THE COMPETITION APPEAL TRIBUNAL

Case: 1026/2/3/04

Victoria House
Bloomsbury Place
London WC1A 2EB

29 November 2004

Before:

Sir Christopher Bellamy (President)
Professor John Pickering
Ms. Patricia S Quigley WS

BETWEEN:

WANADOO UK PLC
(formerly FREESERVE.COM PLC)

Appellant

-v-

OFFICE OF COMMUNICATIONS

Respondent

-supported by-

BT GROUP PLC

Intervener

Mr. Keith Jones (of 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.

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

Heard at Victoria House, Bloomsbury Place, London, on 10 September 2004.

JUDGMENT (OBSERVATIONS ON PROCEDURE AND BINDING COMMITMENTS)

I INTRODUCTION

1. This judgment deals with certain preliminary matters raised over the course of the two most recent case management conferences, held on 2 August 2004 and 10 September 2004. Essentially, the Tribunal must decide whether to publish an *ex tempore* judgment it gave provisionally on an *in camera* basis on 2 August 2004, together with the transcript of part of the case management conference of that date.

2. The Tribunal also wishes to make several observations on the new regime for the acceptance of commitments in the light of the rather unusual circumstances of the present case.

II BACKGROUND

3. These proceedings have a relatively long history. We set out the rather tangled background in so far as necessary to explain the context and to determine the issues before us. Much of the background can be found in the judgments of the Tribunal in *Freeserve.com plc v Director General of Telecommunications (Admissibility)* [2002] CAT 8 and *Freeserve.com plc v Director General of Telecommunications (Validity)* [2003] CAT 5.

4. ADSL, or broadband, internet access was launched in the UK in 2000. At that stage, an engineer had to call at the user's premises before ADSL could be installed. On 25 May 2000 the xDSL Wholesale Products Industry Group ("xDSL") complained to the Director General of Telecommunications ("the Director") (as he then was; his functions passed to the Office of Communications ("OFCOM") pursuant to the Communications Act 2003 with effect from 29 December 2003) that the BT Group ("BT") was engaging in a margin squeeze by subsidising the supply of retail ADSL services by BT Openworld, BT's retail arm of residential internet products, from the profits of its wholesale activities.

5. The Office of Telecommunications ("Oftel") (as it then was) reached a conclusion on that complaint in its first margin squeeze decision of 8 January 2001. According to the published summary of that decision, Oftel considered the matter on the basis of Condition 75 (prohibition on cross-subsidy) of BT's Licence. However, the full unpublished copy of the decision, supplied by Freeserve on 19 March 2003 in response to a question from the Tribunal, indicates that the matter was also considered under Chapter II of the Competition Act 1998 ("the Act").

6. In that decision Oftel considered, without deciding, whether BT might have market power in the wholesale market for ADSL services, and then went on to consider "whether BT Openworld's business case is so implausible as to suggest a margin squeeze is in operation". Oftel concluded:

> "... Oftel cannot demonstrate that the business case is implausible. ... In recognition of the uncertainties in what is very much an emerging market, Oftel will continue to monitor BT Openworld's performance against its current business case to assess whether in practice its assumptions are realistic. Any departures would need objective justification. Oftel proposes to do this on a six monthly basis over the next year. … The case has therefore been formally moved into compliance … ."

7. In October 2001 xDSL and Freeserve.com plc ("Freeserve") , made a further complaint to Oftel, alleging that BT was engaging in a margin squeeze by subsidising the supply by BT Openworld of retail ADSL services aimed at business customers.

8. Meanwhile, towards the end of 2001 BT Wholesale conducted trials of new "self-install" broadband products with the participation of many Internet Service Providers. Such self-install products allow consumers to install the ADSL line themselves, without the need for an engineer to visit their home to make the necessary technical adjustments, thus reducing costs at the wholesale level.

9. A self-install broadband product was launched at the wholesale level by BT Wholesale in January 2002. On 26 February 2002 BT announced a reduction in

the wholesale line rental price for broadband charged by BT Wholesale from £25 to £14.75 a month from 1 April 2002. On the same day, Freeserve announced a £10 reduction in the monthly charge for its residential broadband services from 1 April 2002.

10. The next day, 27 February 2002, BT Openworld announced a price reduction of £10 for its residential broadband services. BT Openworld also announced that its new self-install product would be available at retail level from 5 March 2002, with a special offer to waive the £65 activation charge for orders received up to 31 May 2002. (This offer was subsequently extended to 31 August 2002.)

11. On 8 March 2002 BT Openworld announced a major broadband advertising campaign including television advertising, press advertisements and the distribution of two million CD-ROMs.

12. In the early spring of 2002 BT sent a "Telephone Census" to its residential retail voice telephony customers, in some cases including the census in the envelope with the ordinary regular telephone services bill (known as the "blue bill"). The census included questions about internet use levels, who was the customer's ISP, and whether the customer would be interested in broadband internet access in the future.

13. On 26 March 2002 Freeserve made a complaint to the Director. In broad terms, the complaint focussed on alleged abuses of a dominant position through cross-marketing activity between BT and BT Openworld and unlawful cross-subsidy within BT of BT Openworld on the basis that BT Openworld's revenues were not sufficient to cover its variable and incremental costs, thus amounting, in Freeserve's opinion, to predatory pricing.

14. On 28 March 2002 the Director adopted three decisions. The first was adopted under Condition 78.12 of BT's licence and concerned the alleged residential margin squeeze ("the residential margin squeeze decision of 28 March 2002") stemming originally from xDSL's complaint of 25 May 2000 (see paragraph 4 above). The second, also adopted under Condition 78.12, related to the

complaint made in October 2001 by xDSL and Freeserve concerning an alleged margin squeeze in the business sector (see paragraph 7 above). In both cases, Oftel "closed the case". The third decision was a rejection of a complaint made by Bulldog Communication Ltd that BT was engaged in predatory pricing in relation to its pricing of certain DSL products at the wholesale level. The Director in that third decision set out his approach under the Act to the issues of predatory pricing and unfair cross-subsidy alleged to arise in that case.

15. The residential margin squeeze decision of 28 March 2002 completed Oftel's monitoring of BT's wholesale and retail margins (see paragraph 6 above) and took into account BT's recently announced price reductions. It appeared that the Director consulted with ISPs, including Freeserve, in the course of his review. Paragraph 5 of the residential margin squeeze decision of 28 March 2002 reads:

> "5. This [wholesale] price, effective from 1 April 2002, is £14.75 a month, which is 50% less than the current price. In response to this reduction BT Openworld has drawn up another business case and reduced its retail price by 25% to £29.99. The Openworld business case incorporates a number of important forward looking assumptions, in terms of market share and cost structures, and is sensitive to volumes and input price. Having analysed BT Openworld's new business case, Oftel believes that no cross subsidy or margin squeeze exists at the new wholesale and retail prices. The current retail business case and the assumptions on which it is based are not implausible in the light of current market information. Oftel believes that the new margin between the wholesale price of IPStream 500 [BT's wholesale product] and BT Openworld's retail price is sufficient to allow service providers to compete. Indeed there are numerous service providers offering ASDL services to residential consumers at prices below BT Openworld's. There is therefore no evidence to justify any enforcement action under the Telecommunications Act. Accordingly, Oftel has closed the case."

16. On 1 April 2002 BT Wholesale's price reductions came into effect. BT Openworld's television advertising campaign entitled "Broadband Briton" also commenced on 1 April 2002.

17. On 16 April 2002 representatives of Freeserve met officials of Oftel to discuss Freeserve's complaint of 26 March 2002. The outcome of that meeting was that Oftel conducted a preliminary investigation.

18. On 21 May 2002 Oftel rejected Freeserve's complaint of 26 March 2002. Enclosed with the rejection letter was a memorandum referred to as "a case closure summary". Oftel's conclusion, at paragraph 22 of the memorandum, was that:

> "the information supplied by Freeserve for the complaint does not provide evidence of anti-competitive behaviour by BT and the Director does not consider that these issues warrant further investigation. Therefore Oftel has closed this case."

19. On 20 June 2002 Messrs. Baker & McKenzie, Freeserve's solicitors, wrote to the Director. The letter stated that Freeserve considered the letter of 21 May 2002 and accompanying case closure summary to be a decision within sections 46 and 47 of the Act, i.e. an appealable decision. An application was made in that letter for the Director to withdraw or vary his decision. That letter disclosed, moreover, that Freeserve was preparing a new complaint providing information on additional concerns over BT's behaviour regarding broadband products and services, together with an economist's report. The Director was invited to delay his decision on whether to withdraw or vary the decision of 21 May 2002 until the expanded complaint had been submitted. The letter of 20 June 2002 stated that:

> "At the same time as providing the more detailed description of the reasons in support of this application, Freeserve.com will submit a new complaint that will raise additional concerns in relation to BT's behaviour regarding broadband products and services.
>
> In support of the new complaint and the more detailed description of the reasons for this section 47 application, Freeserve.com has instructed an economist to prepare a report addressing the issue of abuse of dominance by BT in relation to broadband products and services and, in particular, issues relating to the new BT Broadband "no-frills" product. We anticipate that we will be in a position to send you this report within 6 to 8 weeks.
>
> We would suggest that you decide on the merits of this section 47 application at the same time as taking a decision regarding the new complaint we will submit. We consider that this would be the most efficient and convenient way to deal with the matter. It follows, therefore, that we will not be asking you for an early determination of

> this section 47 application (in order to avoid it becoming divorced from the new complaint)."

20. By letter dated 8 July 2002 the Director of Broadband at Oftel set out Oftel's position that the case closure documents did not constitute an appealable decision.

21. On 22 July 2002 Baker & McKenzie sent a letter to the Director stating as follows:

> "Further to our letter on behalf of Freeserve.com plc ("Freeserve") dated 20 June 2002, and the letter of acknowledgement from Mr Keith Loader dated 27 June 2002, we write to update you on timing.
>
> We plan to send to you in the week beginning 29 July 2002 the additional material referred to in our letter in relation to BT's behaviour regarding broadband products and services. You will then be in a position to consider the merits under the Competition Act 1998. We look forward to discussing our significant substantive competition concerns once you have had the opportunity to review the additional material.
>
> In addition, we acknowledge receipt of the letter of Jim Niblett, Director of Broadband, dated 8 July, the content of which we are considering with Freeserve. For the avoidance of doubt, Freeserve reserves its rights in relation to this matter."

22. No further material was in fact submitted to the Director at that stage.

23. On 9 September 2002, Freeserve lodged its notice of appeal with the Tribunal (case no. 1007/2/3/02). Freeserve contended that the Tribunal had jurisdiction to hear the appeal and set out detailed grounds to show why the Director was wrong not to withdraw or vary his decision of 21 May 2002. The Director maintained his position that he had not taken a decision which was capable of appeal to the Tribunal under the Act. Following a case management conference on 3 October 2002, the Tribunal ordered the question of the Tribunal's jurisdiction to be determined as a preliminary issue.

24. Freeserve eventually submitted a second complaint to Oftel on 22 October 2002, relating mainly to the use of the so-called "blue bill" for billing BT Broadband

services (see paragraph 20 of *Freeserve: Validity*) and the use of the 150 telephone service. That complaint did not overlap significantly with the areas of alleged abuse which are the subject of the present proceedings. That complaint was rejected by the Director on 11 July 2003. There was no appeal to the Tribunal against that decision.

25. On 11 November 2002 the Tribunal gave judgment on the question of admissibility, holding that the Director's letter of 21 May 2002 constituted a decision as to whether the Chapter II prohibition had been infringed within the meaning of section 46(3)(b) of the Act, and that, by his letter of 8 July 2002, the Director had refused to withdraw or vary that decision within the meaning of section 47(1) and (4) of the Act. Accordingly, Freeserve's appeal was admissible before the Tribunal by virtue of section 47(6) of the Act.

26. The case then proceeded to a main hearing on the validity of the contested decision. That hearing took place on 20 and 21 January 2003.

27. The Tribunal gave its judgment on validity on 16 April 2003 ([2003] CAT 5). In the judgment the Tribunal rejected a number of Freeserve's complaints, including its complaints about the Broadband Briton advertising campaign and BT's telephone census. However, it set aside paragraphs 15 to 17 of the decision of 21 May 2002, which dealt with Freeserve's allegations of unlawful cross-subsidy and predatory pricing. The Tribunal held that the Director's reasoning was deficient in three respects: first, the contested decision did not sufficiently describe the analytical approach undertaken; secondly, even in the light of the Director's elaboration of his reasons before the Tribunal, that analysis remained unclear in important respects; and thirdly, the Director had not sufficiently explained why the principles applicable in his view to a case of cross-subsidy were transposable to the issue of predatory pricing raised by Freeserve.

28. At [262] of *Freeserve:Validity* the Tribunal said:

> "On the question whether "the matter" should be remitted to the Director under paragraph 3(2)(a) of Schedule 8 of the 1998 Act, we are

> aware that there have been developments in this new, expanding market since the Director took the contested decision. It is also open to Freeserve to submit a new and, if so advised, more fully supported complaint."

29. 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 the same day: [2003] CAT 6.

30. In that judgment of 16 April 2003 the Tribunal provided the Director with some guidance as to the matter to be reconsidered (see pages 3-4):

> "Without expressing a definitive view, we think provisionally that the "matter" within the meaning of paragraph 3(2)(a) of Schedule 8 is Freeserve's original complaint as elaborated in its section 47 letter of 20 June 2002 and in its submissions to the Tribunal. It is now for the Director, therefore, to reconsider the issues raised by paragraphs 15 to 17 of the Decision and most notably, but not necessarily exclusively, the allegation of BT's predatory pricing.
>
> He should, in our view, reconsider that matter, not only in the light of the considerations that he originally had in mind but (as he submits) failed to express in the Decision, but also in the light of the Tribunal's judgment and the material that is now before him, including the material that has been produced in the course of these proceedings.
>
> The issue that needs to be addressed in that reconsideration is the Director's response to Freeserve's allegation that BT's pricing policy infringes the Chapter II prohibition. That may involve the Director distinguishing between margin squeeze, cross-subsidy and predatory pricing and expressing the Director's view as to the criteria to be applied in relation to these inter-related but distinct concepts. The Tribunal has not at this stage expressed any view on the merits of the case one way or the other.
>
> It is apparent that the focus of the reconsideration will necessarily be the issue of predatory pricing, because that is the issue upon which the Tribunal's judgment focuses, but the relationship between predatory pricing and other concepts involved may need to be explained in any further decision that the Director chooses to take.
>
> Such a reconsideration by the Director should, in our view, in principle be recommenced with an open mind. Despite the mental gymnastics that may possibly be involved, the Director should not, in our view,

> approach his reconsideration with a closed mind with a view to inevitably reaching the same conclusion."

31. The upshot of the discussion at the hearing of 16 April 2003 was an Order made by the Tribunal on that day and drawn up on 24 April 2003. That Order provided 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."

32. That Order also provided for liberty to apply.

33. The period of 3 months referred to in paragraph 2 of that Order was arrived at after a certain amount of discussion as to the procedure the Director should adopt following the Tribunal's *Freeserve:Validity* 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 of 16 April 2003 ([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."

34. 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 that Order, such extension to be to 5 p.m. on Wednesday 3 December 2003. That was an extension of just over 4½ months, which would have made the total time allowed to the Director to take the further decision that he undertook to adopt to just over 7½ months in total (i.e. from 16 April 2003 to 3 December 2003).

35. The reason given by the Director for seeking the extension of time was set out in the second paragraph of the letter of 3 June 2003, in the following 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."

36. In its judgment of 15 July 2003 dealing with the requested extension of time, the Tribunal made the following observations (see [2003] CAT 15):

> "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)."

37. The Tribunal therefore decided on 15 July 2003 as follows:

> "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."

38. The Tribunal in that decision of 15 July 2003 requested from the parties a report on the progress of the Director's reconsideration by 16 September 2003. In that progress report, dated 16 September 2003, the Director set out the steps he had taken since the Tribunal's *Validity* judgment of 16 April 2003. He noted that he had informed both BT and Freeserve on 13 May 2003 that his new investigation would cover certain current pricing practices as well as the pricing issues raised by Freeserve in March 2002, and that the scope of that new investigation had been published on-line in Oftel's Competition Bulletin. The Director then detailed the work that had been undertaken, indicating that the details were given only for matters relevant to his reassessment of the 2002 pricing issues.

39. In view of the tasks still outstanding, the Director sought a further extension of time until 20 November 2003. He stated further that, if he were minded to issue a notice pursuant to rule 14 of the Competition Act (Director's Rules) Order

2000 (SI No 293 of 2000) ("rule 14 notice") to BT, yet further time would be required. Both Freeserve and BT were prepared to agree to the further extension.

40. After noting that a considerable amount of work had been done by the Director on the case but that there appeared to be more still to be done, the Tribunal commented in its decision of 8 October 2003 on that request ([2003] CAT 22) as follows:

> "9. The Tribunal continues to be concerned about the apparently slow progress of these proceedings, particularly given the importance of broadband to the economy, and the need to preserve a competitive market in that regard. The Tribunal also notes that, despite several previous investigations, it apparently took the Director until August 2003 to formulate his views on an appropriate methodology, on the application of which, apparently, much work remains to be done. On the other hand, it appears that Freeserve missed a deadline by some six weeks (paragraph 19 of the progress report). The Director also says he was held up during August by the absence of BT personnel."

41. The Tribunal concluded as follows:

> "10. Since the priority at this stage is the effective completion of his work by the Director, the Tribunal has decided, albeit reluctantly, to grant the Director's request for an extension of time until 5 p.m. on 20 November 2003. The Tribunal's view is that that must be regarded as a final extension. In the event of default, the matter will be restored for hearing, with a view to considering the possible exercise of the Tribunal's powers under paragraph 3(2) of Schedule 8 of the Competition Act 1998."

42. On 20 November 2003 the Director adopted a new decision finding that BT had not infringed the Chapter II prohibition in relation to the pricing of BT Openworld's consumer broadband products ("the decision of 20 November 2003"). That decision covered only BT's pricing practices in the period from 26 March 2002 to 21 May 2002. We also note that, in that decision, the Director determined that the potential abuse outlined in Freeserve's original complaint of 26 March 2002 as to BT's pricing practices was best addressed in the context of a margin squeeze investigation: see paragraph 3.60 of that decision.

43. It thus became apparent that the decision of 20 November 2003 did not cover BT's "current pricing practices" insofar as they had developed since March 2002, notwithstanding the Director's letter of 3 June 2003 indicating that BT's current pricing practices were being investigated alongside Freeserve's original complaint (paragraph 35 above).

44. It was later brought to the Tribunal's attention by Freeserve under cover of a letter of 20 February 2004 that Oftel had written to Freeserve on 23 July 2003, after the Tribunal's judgment of 15 July 2003, to inform Freeserve of the decision taken by the Director to "vary the structure of the current investigation". In that letter Oftel continued:

> "The Director does not believe that he can conclude both investigations, i.e. of the 2002 and the current pricing issues, by [16 October 2003]. The Director has therefore decided to split the investigation."

45. As far as we are aware, that letter was not copied to the Tribunal, either by the Director at all or by Freeserve until 20 February 2004.

46. By splitting the investigation Oftel had apparently decided that it would, in the first instance, only consider whether, during the period March 2002 to May 2002, BT's conduct amounted to an abuse of a dominant position. The result, as we understand it, was that as from 23 July 2003 Oftel halted its investigation of BT's pricing practices in the period from May 2002 onwards.

47. Although it is correct that paragraph 8 of the progress report of 16 September 2003 states, in the second and third sentences, that "the Progress Report only refers to matters of relevance to the Director's reassessment of the 2002 pricing issues", it does not in our view emerge from the progress report that the Director had, in fact, stopped work altogether the previous July on the post-May 2002 pricing issues. The first sentence of paragraph 8 of the progress report states in terms that in a letter of 13 May 2003 the Director had informed the parties that his "new investigation" would cover current pricing issues as well as the issues raised by Freeserve's original complaint. That is confirmed by paragraph 9 of

the progress report. However, the progress report did not refer to Oftel's letter to Freeserve of 23 July 2003 to the effect that the Director had decided to split the investigation.

48. As a result, the Tribunal was not aware of the fact that in July 2003 Oftel had decided to stop its investigation of current pricing issues until that fact emerged in February 2004.

49. It is of concern to the Tribunal that, the Director having asked in his request of 3 June 2003 for an extension of time to 3 December 2003, partly so that the work on the investigation of both the original and the current pricing issues "can be efficiently integrated" (letter of 3 June 2003), and the Director having on that basis obtained an extension to 16 October 2003 and later to 20 November 2003, he did not clearly inform the Tribunal that he had, in fact, stopped work on the current pricing issues in July 2003.

50. By way of a notice of appeal lodged at the Tribunal on 20 January 2004 (case no. 1026/2/3/047) Freeserve challenged the decision of 20 November 2003 which, as we have said, covered only the period from March 2002 to May 2002. In summary, the grounds of appeal relied on by Freeserve are as follows:

(a) in assessing BT's alleged pricing abuses the Director should have used historical models based on actual market data rather than forward-looking economic models (including the "Discounted Cash Flow" approach, also known as the "Net Present Value" approach, and the so-called "cohort" approach, both of which were applied by the Director). The Director's approach had been rejected by the Office of Fair Trading ("OFT") in its decision in *BSkyB* (Decision no. CA98/20/2002) and by the European Commission in its decision in *Wanadoo Interactive* (COMP/38.233) ("*Wanadoo Interactive*");

(b) the Director erred in disregarding or failing to consider discrete periods of below cost pricing by BT Openworld; and

(c) generally, the Decision is inconsistent with *Wanadoo Interactive*.

51. OFCOM (as it had then become) wrote to Freeserve on 13 February 2004 with regard to the investigation into BT's later (including current) pricing practices which, as it now emerges, had effectively been suspended in July 2003.

52. In its letter to Freeserve of 13 February 2004 OFCOM indicated that it was now taking forward what it described as "the new investigation". That letter continued:

> "The new investigation will therefore assess the period from May 2002 to see whether BT should have revised its retail prices and restored itself to profitability in the event that its forecasts proved incorrect."

53. At a case management conference on 27 February 2004, Counsel for OFCOM elaborated on the timetable then envisaged by OFCOM for completion of the ongoing investigation of current pricing issues. It was explained that OFCOM aimed to complete the investigation (in the sense of arriving at a decision) within six months in the event that OFCOM were to arrive at a non-infringement decision and within twelve months in the event that it were to arrive at an infringement decision. For the purposes of calculating when those time periods would end, OFCOM was treating the ongoing investigation as having commenced with its letter of 13 February 2004, notwithstanding that in May 2003 the Director had announced, and later told the Tribunal, that he was investigating current pricing issues as well as Freeserve's original complaint.

54. At a case management conference on 4 June 2004, Counsel for OFCOM confirmed that OFCOM would adhere to the timetable set out at the case management conference on 27 February 2004. At the case management conference on 4 June 2004 a further case management conference was fixed for 30 July 2004 in order that progress in the ongoing investigation of current pricing could be reviewed. At the same time an additional case management conference was provisionally fixed for 10 September 2004 to review the future progress of the present appeal (1026/2/3/04) on the hypothesis that OFCOM were to comply with the timetable set out at the case management conference of

4 June 2004, namely that OFCOM would, by the end of August 2004, either come to a non-infringement decision or issue a statement of objections in respect of the ongoing investigation. Were OFCOM not to adhere to that timetable, it was indicated that the Tribunal would proceed to the main hearing in these proceedings on 22 September 2004 rather than await the outcome of the ongoing investigation.

55. The Tribunal's Order, following the case management conference of 4 June 2004, contained the following:

> "**AND UPON** considering the potential relevance of the respondent's ongoing investigation into BT's pricing of certain residential broadband products from June 2002 ("the ongoing investigation")
>
> **AND UPON** hearing Counsel for the parties at a case management conference on 4 June 2004
>
> **AND UPON** Counsel for the respondent stating that the respondent still intended, in relation to the ongoing investigation, to conform to its general guidelines as to timeframes for reaching infringement and non-infringement decisions
>
> **AND UPON** the Tribunal provisionally listing a case management conference for 10 September 2004 at a time and location to be notified to the parties to consider the future conduct of the proceedings, to take place in the event that the respondent can commit by 30 July 2004 either to taking a non-infringement decision or to issuing a statement of objections in respect of the ongoing investigation by the end of August 2004
>
> **AND UPON** the Tribunal provisionally listing the full hearing of the proceedings for 22 September 2004 with a time estimate of 1 to 2 days at a time and location to be notified to the parties, to take place in the event that the respondent cannot commit by 30 July 2004 either to taking a non-infringement decision or to issuing a statement of objections in respect of the ongoing investigation by the end of August 2004
>
> **IT IS ORDERED THAT:**
>
> …
>
> 4. A further case management conference be listed for 30 July 2004 at a time and location to be notified to the parties to discuss the question of the progress of the ongoing investigation and any other matters.
>
> …"

56. The date of the case management conference scheduled for 30 July 2004 was subsequently altered to 2 August 2004.

57. As set out in its letter to the Tribunal of 15 June 2004, OFCOM was under the impression following the case management conference of 4 June 2004 that it was, by the end of July 2004, to indicate that it would be in a position by the end of August 2004 either to issue a non-infringement decision or to give an indication that it would be serving a statement of objections. OFCOM was therefore concerned by the last two recitals to the Order following that case management conference, which contemplated OFCOM committing by the end of July 2004 either to taking a non-infringement decision or actually to issuing a statement of objections by the end of August 2004. The Tribunal indicated that this matter should be raised at the next case management conference.

58. There then followed the case management conference on 2 August 2004, part of which was held *in camera*. At that hearing OFCOM confirmed that it would be in a position by the end of August 2004 to issue either a non-infringement decision or a statement of objections. It was disclosed by Counsel for OFCOM that the Board of OFCOM had taken a decision as to the future course of action in relation to the ongoing investigation but that the resulting documentation would not be finalised before the end of August. Both OFCOM and BT were of the view that, if the Tribunal wished to be appraised of the sense of the decision, the hearing should continue *in camera*.

59. It became apparent, however, that OFCOM had already divulged the sense of the decision taken by the Board of OFCOM to BT. Thereafter, the Tribunal decided to continue with the case management conference *in camera*. In view of the fact that in this judgment we have decided that the judgment given *in camera* at that case management conference should be published (see below), we mention here the contents of the transcript of the *in camera* proceedings which has similarly been withheld until the handing down of the present judgment.

60. There took place, first, a discussion as to the possibility of establishing a confidentiality undertaking to be signed by the legal advisors to Freeserve, various senior executives of Freeserve (which had by then been renamed "Wanadoo UK plc" (and referred to hereafter as "Wanadoo UK") following the acquisition of Freeserve by Wanadoo SA), and various senior executives of BT. Once such a confidentiality ring had been established, OFCOM was prepared to reveal the sense of its decision to the named representatives of Wanadoo UK.

61. The Tribunal decided, however, against the disclosure to the Tribunal by OFCOM of the sense of the decision at that stage. In its *ex tempore* judgment of 2 August 2004 at that case management conference ([2004] CAT 13), handed down provisionally *in camera*, the Tribunal stated that it was distinctly reluctant to make orders against named individuals. Any such orders would have the effect of High Court Orders, which might then involve the individuals in potentially serious sanctions for contempt of court if there were a breach of those orders. The Tribunal also took into account the fact that it was unclear to what extent the information had already been made known within BT: see paragraph 10 of that judgment.

62. In the circumstances, the Tribunal felt that the least unsatisfactory of outcomes was for the Tribunal simply to note OFCOM's assurance that the Board of OFCOM had taken a decision and was on course to issue the resulting documentation by the end of August 2004.

63. In that *ex tempore* judgment the Tribunal expressed some surprise at the course of events that had unfolded, namely that OFCOM had apparently given advance notice of the nature of the decision of the Board of OFCOM to BT without at the same time informing other interested parties or making any public announcement. That, the Tribunal felt, could have created an asymmetry as between what BT knew and what Wanadoo UK knew. The Tribunal noted the importance it attached to proceedings being conducted in an even-handed and arm's-length way: see paragraph 8 of that judgment.

64. The Tribunal also noted that if the information as to the sense of OFCOM's decision were price sensitive, it should be made publicly known at the earliest opportunity rather than be disclosed on some restricted basis; if the information were not price sensitive, then plainly there would be little weight behind the price sensitivity argument: see paragraph 9. Counsel for OFCOM was, however, in the difficult position of being unable to explain how the situation had come about without at the same time divulging the very sense of that decision.

65. In the light of this state of affairs, combined with the Tribunal's decision not to inquire further of OFCOM as to the sense of the decision its Board had taken, the Tribunal requested from OFCOM an explanation in writing by the end of August 2004 of the circumstances in which it came to disclose the sense of its decision to BT without at the same time informing the complainant or making any public announcement. The case management conference was then adjourned: see paragraph 12 of the judgment.

66. It ought to be added that the Tribunal's remarks in that *ex tempore* judgment were made without having the benefit of OFCOM's explanation: as we said in paragraph 12 of that judgment, we should not be taken as making any criticism of what had occurred. The Tribunal did not, at that stage, know the whole story but felt it necessary to clarify the situation in the interests both of fairness to the appellant and of the proper functioning of the competition system set up under the Act.

67. On 31 August 2004 OFCOM wrote to the Tribunal in accordance with the directions issued at the case management conference on 2 August 2004. That letter noted that OFCOM would that same day be issuing a rule 14 notice to BT in respect of the ongoing investigation into BT's pricing policies since May 2002.

68. Enclosed under cover of that letter were OFCOM's submissions on the issues raised at the case management conference on 2 August 2004. OFCOM explained that the reason for early disclosure to BT of the sense of its decision in relation to the ongoing investigation was to explore the possibility of

commitments on the part of BT. It stated that at its meeting on 27 July 2004 the Board of OFCOM decided that it should issue a statement of objections to BT unless BT were able to offer appropriate commitments to address OFCOM's concerns.

69. Following that Board meeting, OFCOM entered into discussions with BT to explore whether appropriate commitments could be offered. It was of course necessary for OFCOM to reveal to BT that it would, in the event that appropriate commitments could not be offered at that stage, issue a rule 14 notice.

70. OFCOM's submissions next noted that those discussions took place between the date of the Board of OFCOM's decision, on 27 July 2004, and 30 July 2004, on which date OFCOM and BT discovered that it was not possible to agree an acceptable form of commitments. It was against this background that OFCOM indicated its position at the case management conference on 2 August 2004.

71. Following OFCOM's letter of 31 August 2004 and those submissions, in a letter dated 6 September 2004 Wanadoo UK made submissions to the Tribunal on the issue of the appropriateness of commitments in the circumstances of the ongoing investigation.

72. There then followed a case management conference on 10 September 2004 at which the future conduct of the present proceedings before the Tribunal was discussed, together with the course of events described above.

73. During that case management conference, and after hearing argument from the parties, the President set out the questions on which the Tribunal sought further submissions. These were as follows:

    (a) how far should the OFT's draft *Guideline on Enforcement* (OFT 407a, April 2004) ("*Draft Guideline*") be taken into consideration as a working document until it is finalised in the context of the new commitments regime introduced by virtue of The Competition Act 1998 and Other

Enactments (Amendment) Regulations 2004 (S.I. 2004 No. 1261) ("the 2004 Order") with effect from 1 May 2004?

(b) Was the ongoing investigation one in respect of which it was appropriate to invite commitments, bearing in mind that, in the *Draft Guideline*, the OFT states that it will not, as a general rule, accept binding commitments in cases involving a suspected serious abuse of a dominant position, defined in the *Draft Guideline* as including predatory pricing?

(c) Is it appropriate for the regulator to raise with the prospective defendant company the question of commitments? More specifically, is there any risk that the procedure will be seen to lack even-handedness if the regulator takes the initiative to suggest to the prospective defendant that it may wish to offer commitments?

74. The parties responded to those questions both briefly at the case management conference and more fully in subsequent correspondence.

III COMMITMENTS

The parties' submissions on the question of commitments

- OFCOM's submissions

75. OFCOM submits that the way it approached the question of commitments in this case was appropriate. In particular, it submits that it was appropriate to explore the possibility of commitments in respect of the behaviour investigated by it; and that it was appropriate for OFCOM to initiate negotiations with BT in light of the unusual circumstances surrounding the ongoing investigation. OFCOM submits that it acted in conformity with the *Draft Guideline*.

76. OFCOM submits that it is implicit in the procedural arrangements for the acceptance of commitments now set out in Schedule 6A to the Act, as amended by the 2004 Order, that there must be clearly defined proposed commitments on

which consultation should take place. It would not be possible to formulate such proposed commitments in the absence of discussions with the party who would be offering the commitments. It was for this reason that there were discussions between OFCOM and BT. OFCOM submits that wider consultation is, however, often likely to be inappropriate prior to establishing a firm basis for consultation. Such wider consultation would in OFCOM's view cut across the procedures provided for in Schedule 6A to the Act.

77. OFCOM further submits that it was appropriate in the circumstances of this case for OFCOM to raise the question of commitments itself with BT. The *Draft Guideline* leaves it entirely open as to whether a regulator might ask whether an undertaking might wish to offer commitments.

78. In this case, an approach was made by OFCOM on a tentative basis and in the particular circumstances of the unusual situation. OFCOM was under the impression, following the case management conference on 4 June 2004, that it had to reach a decision by the end of July in respect of the ongoing investigation. Therefore, once the Board had made a decision on 27 July 2004 as to the sense of the decision it would take, there was only a very limited time frame of two to three days in which to explore the possibility of commitments. OFCOM wished to deal with that issue quickly and, if it came to nothing, put it aside, given that a great deal of work was required leading to the finalisation of the statement of objections.

79. OFCOM submits that there is no inappropriate inequality caused by such a procedure: should commitments be proposed, a complainant will always have a right to make representations in relation to them before any decision by OFCOM as to whether to accept them. Furthermore, the party subject to investigation may wish initially to explore the possibility of commitments on a "without prejudice" basis; the process needs to be capable of accommodating such a wish.

80. That those discussions should take place confidentially is, in OFCOM's submission, fully consistent with the judgment of the Court of Justice in Cases 142 and 156/84 *BAT and RJ Reynolds v Commission* [1987] ECR 4487. There is

no obligation on OFCOM under the *Draft Guideline* to produce a summary of its competition concerns for the benefit of third parties; such a summary is produced for the party under investigation. Indeed, in this case, given the short time frame, BT was itself not given a written summary of OFCOM's concerns but rather an awareness of what OFCOM's concerns were resulting from its investigation. That was done orally.

81. In any event, OFCOM submits, the complainant may not be the only party with a legitimate interest in commenting on any such commitments: others may be equally affected and should be treated on an equal basis. Finally, if commitments are not forthcoming it may well be inappropriate to reveal that they were ever discussed: the disclosure of discussions in relation to possible commitments is not contemplated in the scheme set out in the Act.

82. For these reasons OFCOM did not consider that it was appropriate to inform Wanadoo UK at the time in question that it was exploring the possibility of commitments to deal with the competition concerns in the ongoing investigation. OFCOM submits that this case is an unusual one: the Board was required to take a decision prior to the case management conference on 2 August 2004 as to a step that it would not actually be in a position to carry forward until the end of August 2004. Normally there would not be such a two-stage process.

83. OFCOM did accept, however, during its oral submissions that it would have been possible to make a public announcement that it was OFCOM's intention to issue a statement of objections addressed to BT upon which BT could have said that it was not in a position to respond or comment until it had the document.

84. Finally, OFCOM submits that whilst the *Draft Guideline* does state that the OFT will not in general accept commitments in cases involving a serious abuse of a dominant position, that is merely stated to be the general rule.

- Wanadoo UK's submissions

85. First, Wanadoo UK submits that OFCOM should not have been considering commitments in a case such as the ongoing investigation. The ongoing investigation involves a suspected serious abuse of a dominant position, namely predatory pricing or margin squeeze. The OFT's *draft Guideline* states that commitments are not appropriate in such a case.

86. Wanadoo UK submits that there are very good reasons against the acceptance of commitments in cases of serious infringements. Accepting commitments would only address future conduct, whilst Wanadoo UK's complaint related to the period from June 2002 to date. It is important to spell out whether BT has infringed competition law during this period so as to set a precedent for the future. Moreover, OFCOM would undermine deterrence by not making a decision, especially given that it has never issued a rule 14 notice. Referring to the *Draft Guideline* at paragraph 4.4, Wanadoo UK contends that it should only be in exceptional circumstances that OFCOM should consider commitments in pricing abuse cases.

87. Secondly, Wanadoo UK submits that the process adopted by OFCOM excluded Wanadoo UK from making observations at the appropriate time. OFCOM should have made an announcement through the appropriate channels on 28 July 2004 that it intended to issue a rule 14 notice to BT. Even if there were exceptional circumstances justifying the exploration of commitments, Wanadoo UK should have been closely associated with that stage of proceedings.

88. OFCOM could, in Wanadoo UK's view, have provided Wanadoo UK with a brief summary of (i) its reasons for its provisional view that BT had engaged in anti-competitive behaviour, and (ii) why it considered that there were exceptional circumstances in relation to the ongoing investigation, which would have allowed Wanadoo UK to comment on whether commitments would address all of OFCOM's concerns. Wanadoo UK would then have been able to put forward its view, set out above, as to the appropriateness of commitments.

89. Wanadoo UK submits that the fact Wanadoo UK would have been consulted on any commitments agreed with BT is no substitute for involving an active complainant such as Wanadoo UK, especially in cases of serious abuse. By the time OFCOM had reached agreement with BT, it would have largely formed a view as to whether or not commitments were appropriate. Wanadoo UK submits it would have faced an uphill battle to persuade OFCOM that it should issue a rule 14 notice in such circumstances.

90. Whilst Wanadoo UK accepts that there is a need for competition authorities to enter into confidential negotiations in order to allow the companies concerned to bring their practices into conformity with the competition rules, it submits that OFCOM's approach here did not accord with paragraphs 4.18 and 4.19 of the *Draft Guideline*. According to that guidance, there are in Wanadoo UK's submission four steps:

    (a) the alleged infringer states that it wishes to offer commitments;

    (b) the competition authority publishes a summary of its concerns, giving third parties an opportunity to comment;

    (c) the alleged infringer offers commitments (unless already provided) and the competition authority starts to consider them, taking account of third party comment; and

    (d) the competition authority enters into discussions with the alleged infringer if considered appropriate.

91. In Wanadoo UK's submission, OFCOM did not comply with the above procedure. OFCOM was the party that sought commitments; it did not publish a summary of its concerns; and it entered into discussions with BT without making any announcement or contact with any third party. Moreover, *BAT and RJ Reynolds v Commission*, on which OFCOM relies, is distinguishable: that case did not concern a case of serious abuse of a dominant position.

92. As to OFCOM's explanation for raising the issue of commitments, viz. that the timetable for action was condensed, Wanadoo UK submits that OFCOM was not under time pressure to come up with a decision by 30 July 2004; it needed merely to be in a position to indicate to the Tribunal at that time that it would commit to reaching a decision or issuing a statement of objections by the end of August 2004.

93. Thirdly, Wanadoo UK submits that the process conducted by OFCOM reduces transparency and the balance of the process. As mentioned above, it is difficult for third parties to change OFCOM's position as to the appropriateness of commitments once it has drawn up draft commitments on which it invites comment. It is important to avoid a perception that OFCOM and BT have agreed a "carve-up", leading complainants to the view that any settlement between them will be merely "rubber-stamped" by any subsequent consultation exercise. Wanadoo UK submits that OFCOM should be seen to be operating at arm's-length from stakeholders at all times, especially when using its competition law powers in relation to a serious abuse. Excluding third parties from initial considerations into accepting commitments is also, in Wanadoo UK's submission, contrary to the OFT's procedure.

94. Fourthly, Wanadoo UK submits that the process perpetuated for a significant period the asymmetry of information as between BT and the regulator on the one hand and third parties, including Wanadoo UK, on the other. It was clear by 30 July 2004 that it had not been possible to agree an acceptable form of commitments, yet OFCOM declined to inform third parties of the nature of the decision until over a month later. OFCOM's press release of 1 September 2004 is wholly uninformative, not even addressing the nature of the abuse or the time period involved. OFCOM could easily have issued a very similar press release after the case management conference on 2 August 2004. Wanadoo UK submits that any objections BT may have had were without foundation, since it must have been informed of the essence of the rule 14 notice in late July for there to have been any meaningful discussions as to commitments.

95. Finally, Wanadoo UK submits that it is preferable that decisions of regulators that may be price sensitive be publicly announced as soon as possible, so that the risk of such information leaking is reduced.

- BT's submissions

96. BT notes, first, that no commitments were acceptable to BT and none were offered to OFCOM. BT submits that, in these circumstances, the issues raised by the Tribunal as to the procedures followed at the end of July by OFCOM now seem to be academic.

97. BT also notes that the Tribunal necessarily has only very limited information about the ongoing investigation at this stage. BT submits that this makes it very difficult for the Tribunal to express views as to, for example, whether the ongoing investigation does concern a case of serious abuse.

98. As to whether OFCOM should take the *Draft Guideline* into account when considering the issue of commitments, BT submits that some regard should be paid to it, but it should be remembered that its contents may not be reflected in the final published guidance. Moreover, BT submits, guidance is just that. The OFT and OFCOM must have regard to it pursuant to section 31D(8) of the Act as amended but may depart from it where it is necessary and can be justified in the particular circumstances of the case.

99. As to whether it was appropriate for OFCOM itself to raise the issue of commitments, BT submits that the *Draft Guideline* builds in adequate safeguards for the protection of the parties, including the requirement for a summary of competition concerns to be made available.

100. As to the supposed asymmetry of information, BT points out that the asymmetry should not be exaggerated: BT did not have any real sense of the reasoning or the remedies that OFCOM proposed.

101. BT submits that it would not have been appropriate for OFCOM to have made a public announcement at the time that the Board of OFCOM came to a decision on 27 July 2004. BT points out that generally there would be no announcement that OFCOM has come to a decision to issue a rule 14 notice until that rule 14 notice has been prepared under OFCOM's normal practice and has been made available to the addressee. This is, BT submits, for very good reasons. For example, OFCOM may not be able to issue the rule 14 notice in line with its predictions, or perhaps a significant development occurs which changes the course of events. Further, the addressee needs to have an opportunity to prepare its response to that public announcement by OFCOM. To take a hypothetical case, if a press release mentions the possibility of fines being imposed, the addressee would like to be prepared to answer that point bearing in mind OFCOM's reasoning.

The Tribunal's analysis

- Statutory framework

102. The commitments regime is a recent addition to the Act. It gives the power to the OFT (which includes for this purpose regulators such as OFCOM exercising concurrent powers) to accept commitments from a prospective defendant in respect of any competition concerns it has.

103. Section 31A of the Act (introduced by the 2004 Order) provides in material part as follows:

> "(1) Subsection (2) applies in a case where the OFT has begun an investigation under section 25 but has not made a decision (within the meaning given by section 31(2)).
>
> (2) For the purposes of addressing the competition concerns it has identified, the OFT may accept from such person (or persons) concerned as it considers appropriate commitments to take such action (or refrain from taking such action) as it considers appropriate.
> …
> (4) Commitments under this section -
>
> (a) shall come into force when accepted;

…

(5) The provisions of Schedule 6A to this Act shall have effect with respect to procedural requirements for the acceptance, variation and release of commitments under this section."

104. Section 31B of the Act provides:

"**31B Effect of commitments under section 31A**
(1) Subsection (2) applies if the OFT has accepted commitments under section 31A (and has not released them).
(2) In such a case, the OFT shall not -
(a) continue the investigation,
(b) make a decision (within the meaning of section 31(2)), or
(c) give a direction under section 35,
in relation to the agreement or conduct which was the subject of the investigation…"

105. There is also provision in the Act for continuing the investigation and making a decision in certain circumstances, such as where the relevant authority has reasonable grounds for suspecting that the party has failed to adhere to one or more conditions, and for reviewing the effectiveness of commitments: see sections 31B(4) and 31C.

106. Schedule 6A of the Act provides in so far as material as follows:

"1. Paragraph 2 applies where the OFT proposes to
(a) accept any commitments under section 31A;
…
2. (1) Before accepting the commitments or variation, the OFT must -
(a) give notice under this paragraph; and
(b) consider any representations made in accordance with the notice and not withdrawn.
(2) A notice under this paragraph must state -
(a) that the OFT proposes to accept the commitments or variation;
(b) the purpose of the commitments or variation and the way in which the commitments or variation would meet the OFT's competition concerns;
(c) any other facts which the OFT considers are relevant to the acceptance or variation of the commitments; and
(d) the period within which representations may be made in relation to the proposed commitments or variation.
…"

107. The above provisions mirror a similar development at Community level: see Article 9 of Regulation 1/2003 (OJ 2003 L 1/1), which provides:

> "1. Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission.
>
> 2. The Commission may, upon request or on its own initiative, reopen the proceedings:
>
> (a) where there has been a material change in any of the facts on which the decision was based;
>
> (b) where the undertakings concerned act contrary to their commitments; or
>
> (c) where the decision was based on incomplete, incorrect or misleading information provided by the parties."

108. As to the role of the Tribunal, section 47 of the Act (as amended) provides, so far as material:

> "(1) A person who does not fall within section 46(1) or (2) may appeal to the Tribunal with respect to -
>
> …
>
> (c) a decision of the OFT to accept or release commitments under section 31A…"

109. Schedule 8 of the Act (as amended) provides, so far as material:

> "**3A.** (1) This paragraph applies to -
>
> …
>
> (b) any appeal under section 47(1)(b) or (c).
>
> (2) The Tribunal must, by reference to the grounds of appeal set out in the notice of appeal, determine the appeal by applying the same principles as would be applied by a court on an application for judicial review."

- OFT Guidance

110. Pursuant to section 31D of the Act, the OFT is under a duty to publish guidance as to the circumstances in which it may be appropriate to accept commitments. That section provides:

> " (1) The OFT must prepare and publish guidance as to the circumstances in which it may be appropriate to accept commitments under section 31A.
> (2) The OFT may at any time alter the guidance.
> (3) If the guidance is altered, the OFT must publish it as altered.
> (4) No guidance is to be published under this section without the approval of the Secretary of State.
> (5) The OFT may, after consulting the Secretary of State, choose how it publishes its guidance.
> (6) If the OFT is preparing or altering guidance under this section it must consult such persons as it considers appropriate.
> (7) If the proposed guidance or alteration relates to a matter in respect of which a regulator exercises concurrent jurisdiction, those consulted must include that regulator.
> (8) When exercising its discretion to accept commitments under section 31A, the OFT must have regard to the guidance for the time being in force under this section."

111. The OFT's provisional view finds expression in the *Draft Guideline*, referred to above. The material provisions of the *Draft Guideline* are set out below:

> "4.4. The OFT will not, other than in very exceptional circumstances, accept binding commitments in cases involving secret cartels between competitors… Nor will the OFT accept binding commitments in cases involving serious abuse of a dominant position."

112. The footnote at the end of this passage reads:

> "It is the OFT's assessment of the seriousness of an abuse and its effect on competition which will be taken into account in determining whether commitments are appropriate in a particular case. When making its assessment, the OFT will consider a number of factors, including the nature of the product, the structure of the market, the market share(s) of the undertaking(s) involved, entry conditions and the effect on competitors and third parties. The damage caused to consumers whether directly or indirectly will also be an important consideration. This assessment will be made on a case by case basis,

taking account of all the circumstances of the case. However, as a general rule, the OFT will regard predatory pricing as a serious abuse."

113. The passage at paragraph 4.4 is reproduced in the Annexe to the *Draft Guideline* at paragraph A13.

114. The *Draft Guideline* continues:

> "4.5. The OFT will not accept binding commitments in circumstances:
>
> - where compliance with and the effectiveness of any binding commitments would be difficult to discern, and/or
> - where the OFT considers that not to complete its investigation and make a decision would undermine deterrence.
>
> …
>
> **Procedure**
>
> 4.16. There is no requirement for a person to offer binding commitments to the OFT at any time.
>
> 4.17. A person or persons may offer binding commitments to the OFT at any time during the course of an investigation and until a decision is made. However, the OFT is unlikely to consider it appropriate to accept commitments offered at a very late stage in its investigation (for example, after the OFT has considered representations in relation to its statement of objections).
>
> 4.18. If a person or persons wish to offer commitments prior to the issue of the OFT's statement of objections and the OFT considers that the case is one in which commitments may be appropriate, the OFT will issue a summary of its competition concerns. Such summary is not a replacement for a statement of objections. It will set out the OFT's competition concerns and a summary of the main facts on which those concerns are based. However, it will not generally include detail of the source of the facts on which the OFT relies.
>
> 4.19. Once commitments have been offered, the OFT may enter into discussions with the person or persons in order to reach agreement as to the form and content of commitments which would be acceptable to the OFT.
>
> …
>
> 4.21. Where the OFT proposes to accept commitments, it will give notice to such persons as it considers likely to be affected by the commitments providing a summary of the case and setting out the proposed commitments and stating the purpose of the commitments and the way in which they meet the OFT's competition concerns. Interested third parties will have an opportunity to make

> representations within a time limit fixed by the OFT (being not less than 11 working days starting with the date the notice is given)."

- The status of the Draft Guideline

115. The first question, it seems to us, is the extent to which it is appropriate for a regulator to rely on the *Draft Guideline* in the absence of final published guidance on the exercise of the OFT's powers under the commitments regime introduced by the 2004 Order.

116. Although the *Draft Guideline* does not necessarily represent the OFT's final published guidance, that *Draft Guideline* does, it seems to us, have persuasive force pending the issuance of the final version. Furthermore, in view of the OFT's statutory duty, pursuant to section 31D(1) of the Act, to publish guidance, it seems to us appropriate to regard the *Draft Guideline* as the published guidance until such time as the OFT publishes its final guidance. Otherwise, the OFT could be regarded as in breach of its statutory duty under section 31D of the Act.

117. We accept that guidance published under section 31D remains guidance, rather than binding rules. It is, however, in our view to be generally followed by the regulatory authorities unless there are compelling reasons to the contrary.

- The situation in this case

118. The situation that arose in this case was affected by the fact that there was, and is, an appeal pending before the Tribunal in respect of OFCOM's decision of 20 November 2003 relating to BT's pricing practices in the period March to May 2002. That appeal had been set down for hearing on 22 September 2004. It was critical to the Tribunal's decision as to whether to maintain that hearing date to know what OFCOM's position was in relation to its investigation of BT's pricing practices since May 2002.

119. That investigation had been commenced in May 2003, was shelved at the end of July 2003 and then recommenced in February 2004. Pursuant to its guidelines on handling competition complaints, OFCOM's target date for completing that investigation was 13 August 2004 if there were to be a non-infringement decision, and 13 February 2005 if there were to be an infringement decision. It was highly relevant to the Tribunal's management of the existing appeal due for hearing on 22 September 2004 to know whether or not a further decision from OFCOM was imminent. If a further non-infringement decision were imminent, there were obvious case management advantages in not proceeding with the hearing set for 22 September 2004 in the existing appeal, allowing any anticipated new appeal against the second non-infringement decision to "catch up", and then hearing both appeals together. On the other hand, if it were OFCOM's intention to issue a rule 14 notice in the second investigation, that too was potentially relevant to the existing appeal because it might imply that OFCOM's approach to the period since May 2002 was different from its approach to the period before May 2002, in which case it would become relevant to consider whether, as OFCOM submits, a different approach is justifiable.

120. It was in these circumstances that the Tribunal thought it necessary to press OFCOM to state its position as to its timetable for completing the post-May 2002 investigation at the case management conference which in the event took place on 2 August 2004. The Tribunal's Order of 4 June 2004 reflected the Tribunal's concern.

121. It was, we are told, then agreed at the OFCOM Board meeting of 27 July 2004 to issue a rule 14 notice against BT in the post-May 2002 investigation unless BT was prepared to enter into commitments. As regards commitments we do not, however, know the nature of the suggestion that was being made, nor would it be proper for the Tribunal to have details of any such discussions at this stage. However, discussions between OFCOM and BT then took place orally. These discussions terminated without result three days later, on 30 July 2004. It was in those circumstances that BT came to know the sense of OFCOM's proposed action while Wanadoo UK, which was not involved at all in these events, did not.

122. Against that background, we take this opportunity to make some general observations on how the new regime of binding commitments may be intended to operate. Our comments are directed to possible future cases, and should not be used to draw any inferences as regards the particular events of this case.

- The binding commitments regime

123. Within the express terms of the *Draft Guideline*, the onus would appear to rest on the prospective defendant undertaking itself to approach the regulatory authority to discuss the possibility of offering commitments. It would be a matter for the regulatory authority's discretion as to whether to consider accepting any binding commitments that may be offered.

124. The Tribunal has already recognised in *Pernod-Ricard v Office of Fair Trading* [2004] CAT 10, at [243], that it is desirable for there to be mechanisms through which settlements can be arrived at in appropriate cases. On the other hand, the success of the Act also depends to a large extent on its deterrent effect, which means that there is also an important public interest in infringement cases proceeding to a decision and, if necessary, the imposition of a penalty. Public censure is also an important aspect. At the same time, a reasonable flow of decisions is likely to enhance the visibility of the Act, develop the scope of the Chapter I and Chapter II prohibitions, and deepen the knowledge and understanding of the business community of what is, or is not, prohibited.

125. In higher profile cases the impact of the course to be followed on the development of the modernised regime for handling EC competition cases under Regulation 1/2003 may also need to be considered. For example, in the present case the European Commission has taken a decision imposing a fine on a subsidiary of Wanadoo UK's parent company in circumstances, so Wanadoo UK alleges, which are analogous to the present case. The interests of complainants, who under Article 27(1) of Regulation 1/2003 and recital 8 to Regulation 773/2004 (OJ 2004 L123/18) are to be given the possibility to be "associated

closely with the proceedings", may also be relevant, as may the interests of other third parties, including consumers.

126. Much will depend on the nature and seriousness of the infringement alleged, and the likely effectiveness and practicability of any undertakings offered. The fact that the case raises important issues or affects an important sector of the economy may point to the desirability of proceeding to a decision. Cases in which smaller companies are suspected of having infringed the competition rules may equally warrant decisions, for reasons of deterrence, visibility or educational effect. It is for the OFT or other regulator to balance all of these various considerations, also taking into account available resources.

127. In relation to procedure, as we read the *Draft Guideline*, especially at paragraphs 4.16 to 4.19, it is the prospective defendant undertaking which will propose the offer of binding commitments to the regulatory authority. In most cases the prospective defendant will be able to judge whether to propose to offer binding commitments or not. It is then for the OFT or other regulator, in the exercise of its discretion, having regard to the *Draft Guideline*, to decide whether it wishes to discuss the question of commitments, and if so, the nature of any such commitments. However, it is in general up to the prospective defendant, rather than the regulatory authorities, to take the initiative in exploring the possibility of offering binding commitments.

128. An administrative decision by the OFT or other regulator to respond to the prospective defendant's wish to offer possible commitments does not of course imply that acceptable undertakings will be forthcoming or that the case will ultimately be resolved without a formal decision. But such a step by the regulatory authority does, in our view, tend to imply, or could be seen as implying, at least a tentative view to the effect that the case may not be so serious as to warrant a decision of infringement, or that it may be appropriate to resolve the matter without a decision, or that the interests of deterrence, transparency, third parties or consumers may not reasonably require a decision to be taken. An administrative decision to discuss commitments with a prospective

defendant is thus an important step which should not, in our view, be undertaken without careful and appropriate balancing of these various issues.

129. Indeed, as the *Draft Guideline* indicates, at paragraphs 4.4 and 4.5, it may be inappropriate to discuss binding commitments at all in certain cases, including serious cases of infringement or where deterrence would be undermined.

130. If the stage is reached in a case where it is appropriate to discuss commitments, the *Draft Guideline* indicates that that should be done on the basis of a written document setting out a summary of the regulatory authority's competition concerns and a summary of the main facts on which the concerns are based (paragraph 4.18). Such a document is in our view necessary, in fairness to the prospective defendant, and to show that matters have proceeded appropriately at arm's-length. In addition, such a document should help to ensure that all relevant considerations are taken into account and, indeed, should assist the regulatory authority in satisfying itself that the case is one where commitments may be appropriate. Since, at a later stage of the proceedings, the OFT or other regulator would be required to give a public notice under paragraph 2 of Schedule 6A of the Act setting out the relevant competition concerns, the way in which any proposed commitments are expected to meet those concerns, and the relevant facts, we would have thought that it would be a wise precaution for matters affecting those issues to be reduced to writing at an appropriately early stage.

131. As regards the position of the complainant, the Tribunal in *Pernod-Ricard*, cited above, accepted that negotiations as to what, if any, commitments may be appropriate may need to be confidential at an initial stage, if only to permit a defendant undertaking to approach the regulatory authority on a "without prejudice" basis. To that extent there is, inevitably, some asymmetry between the positions of the prospective defendant and the complainant. The complainant is protected in at least two ways: first, by being able to respond to the public notice issued under paragraph 2 of Schedule 6A of the Act, and secondly, by being able to bring any decision of the regulatory authority before the Tribunal by way of judicial review under section 47(1)(c) and paragraph 3A of Schedule 8

of the Act. (The relationship between this latter procedure and an appeal by a third party under section 47(1)(a) of the Act may have to be determined at some future date.)

132. However, in our view in the course of any negotiations about binding commitments, the regulatory authority should bear in mind, among other appropriate matters, the position of the complainant. The weight to be given to a complainant's interests may well vary from case to case. To that extent, the provisions of the EC modernisation regime referred to above, requiring the complainant to be "associated closely with the proceedings", may indicate that in particular exceptional circumstances some kind of consultation with a complainant before the stage of the notice under Schedule 6A is reached should not necessarily be ruled out. This may particularly be so where the complainant has a detailed knowledge of the market and/or may be closely affected by the outcome.

133. Since the appeal in respect of the 2002 pricing issues is currently before the Tribunal and since there may or may not at some stage be further proceedings before the Tribunal in relation to OFCOM's post-May 2002 investigation, we make no comment, one way or the other, on the events leading up to the last case management conference on 10 September 2004. In so far as, at first sight, the way in which matters proceeded in this case may appear to be somewhat out of the ordinary, we emphasise that the circumstances of the present case are themselves unusual. We do not know enough about what transpired to express any view about the particular facts of the present case, nor would it be right to do so.

134. The above comments are intended to do no more than indicate in a general way the Tribunal's provisional thinking in the context of a new regime the details of which remain to be worked out, and which may sometimes have to be applied in unforeseen circumstances.

IV PUBLICATION OF *IN CAMERA* JUDGMENT

135. The final issue to be resolved is whether the *ex tempore* judgment handed down on 2 August 2004 should be published.

136. OFCOM submits that it is not appropriate to publish the judgment given provisionally *in camera* on 2 August 2004, since the judgment was handed down necessarily without the Tribunal being aware of what was actually happening in relation to the ongoing investigation. OFCOM submits that although the Tribunal did not intend in that judgment to criticise OFCOM, it did include comments that might appear to an outsider to be critical in circumstances where no criticism can attach.

137. Wanadoo UK submits that it is content for the judgment of 2 August 2004 to remain *in camera* but that it welcomes the general openness and transparency of the Tribunal in relation to case management conferences.

138. BT did not make any submissions in respect of this issue.

The Tribunal's conclusion

139. As we indicated above, we think we should publish that judgment of 2 August 2004. First, there is little in it going beyond what was said by the parties in open court in the course of the case management conference at which it was handed down. As the President said shortly after handing down that judgment (transcript of *in camera* proceedings, p 8, ln 16 *et seq*):

> "We are not at the moment conscious of any reason why the judgment we have just given should not be treated as a judgment made in open court. The announcement that there has been a decision and that the resulting document was to be produced by the end of August was itself made in open court and really whatever we have said in our judgment flows from that."

140. Secondly, the Tribunal regards as important that it adhere closely to the general rule that proceedings are to be as open and transparent as possible.

141. We do accept, however, the submissions of OFCOM that it was appropriate not to publish that judgment until the Tribunal had seen OFCOM's explanation for divulging the sense of its decision only to BT some time before disclosing it to Wanadoo UK. Having noted OFCOM's written submissions in this respect, we can see why OFCOM considered it necessary to tell BT the sense of its intended decision and not Wanadoo UK. As we have said, whether OFCOM's approach to BT was appropriate in the circumstances is not a matter we can or should decide in this judgment one way or the other.

Christopher Bellamy   John Pickering   Patricia Quigley

Charles Dhanowa
Registrar   29 November 2004