Case closure summary

Case number    CW/00518/04/02
Case title    BT’s Broadband Marketing
Case opened    16 April 2002
Case closed    21 May 2002
Complainant    Freeserve .com PLC
Target of Complaint    BT

Issue

1. Freeserve has written to Ofetl requesting that it take action under the Telecommunications Act and Competition Act against BT’s “orchestrated campaign of anti-competitive behaviour aimed at achieving dominance by the incumbent in the market for retail ADSL services”. Summaries of the different sections of Freeserve’s complaint and Ofetl’s findings are set out below.

Ofetl’s findings

Cross marketing activity between BT and BT Openworld

Freeserve’s complaint

2. BT’s ‘Broadband Briton’ newspaper adverts were targeted at consumers and designed specifically to benefit its own ISP, BT Openworld (BTOW). Freeserve also claims that the hyperlink on the adverts for ‘bt.com/broadband’ advantaged BTOW as the website ‘bt.com’ has a direct link to BTOW. In summary, Freeserve believes that BT is using its corporate brand to cross market BTOW and make BT synonymous with ADSL to the exclusion of other Service Providers. It argues that this behaviour constitutes abuse of dominance. Freeserve has asked Ofetl to require BT to immediately cease all ADSL cross marketing activity. It also believes that BT should be required to notify Ofetl and all ISPs of any material product changes or announcements at least 30 days prior to their introduction. In addition Freeserve believes that Ofetl should require ‘bt.com’ to link to the BT/broadband website “thereby ensuring even distribution of all competing Service Providers, not just BTOW”

Ofetl’s view

3. There is no prohibition on BT advertising its brand and services collectively or individually. BT is entitled to trade on its brand awareness and use that to promote its Internet services. Other service providers including Freeserve can also advertise their services in order to create brand awareness of themselves as broadband service providers. Many ISPs such as Freeserve already undertake substantial mass media campaigns for their narrowband products and are beginning to do this for broadband.
4. BT’s ‘Broadband Briton’ newspaper adverts make no reference to Openworld and the Internet address they contain refers consumers to the BT.com/broadband website and not to the general BT.com website. The BT.com/broadband website has no links to BT.com and lists all service providers using BT’s wholesale products, including Freeserve. The list of service providers also gives links to further information on their services and their own websites. It is likely that Openworld derives benefit from the general BT broadband adverts. However, it is Oftel’s view that all SPs benefit from this advertising through specific links to their own services.

5. Freeserve requests a 30 days notice for BT product changes. In the case of wholesale price changes there is a already a 28 day notice period for material changes. The recent wholesale price drops only came into force on 1 April after a 28 notice period. Oftel does not believe that the addition of 2 more days to this notification period would be materially different to the existing regime. In relation to notification of price changes to BT retail products (whether or not they are also sold to resellers) Oftel has recently concluded a public consultation on this issue. Oftel’s statement can be found on its website at:

6. Freeserve states that in a recent case the European Commission claimed that an “ISP’s ability to benefit from the incumbent’s reputation and brand awareness is evidence of abuse of a dominant position”. This is a reference to the Commission investigation into predatory pricing by the France Telecom ISP Wanadoo. From the information Oftel currently has the Commission has concentrated on France Telecom’s pricing practices and not its use of its brand for marketing purposes.

7. In conclusion the information supplied by Freeserve for this portion of the complaint does not provide evidence of anti-competitive behaviour by BT and the Director does not consider that this issue warrants further investigation.

**Advance Notification of wholesale price reductions**

**Freeserve’s complaint**

8. Freeserve alleges that the speed with which BTOW began marketing its reduced price broadband service meant that it must have had advanced notice from BT of wholesale price cuts. Freeserve has asked that Oftel investigate the timing of BTOW’s recent marketing campaign to determine: when it had developed and booked tv adverts, when it had ordered broadband modems and when it had ordered CD access disks to be distributed through retail outlets. Freeserve’s overall view is that, “it is inconceivable for BTOW to be in the position they now enjoy in relation to TV advertising, CD access distribution, and modem provisioning, unless they received clear notification on the wholesale price reduction prior to 26th February.” As part of its preliminary investigation Oftel has obtained information on these issues from BT.

**Oftel’s view**

9. Oftel considrs that BTOpenworld (BTOW) could have moved quickly once BT’s pricing announcement was made to agree an advertising spend to promote its broadband services. BTOW has confirmed to Oftel that it decided its marketing
budget for promoting its retail price reduction on 26 February after the wholesale announcement earlier that day. It should be noted that Freeserve announced price reductions for its broadband retail products on the same day as BT’s wholesale price reductions and a day before BTOW’s own announcement.

10. BT’s pricing announcement was made on the 26 February and heavily trailed by BT’s chief executive, Ben Verwaayen, at BT’s 3rd quarter results announcement on 7 February. Oftel has confirmed that BTOW’s recent tv adverts were first broadcast on 1 April and that they are re-edited versions of old cinema adverts shown last year. BTOW has stated that slots for these adverts were booked on 20 March. Oftel considers this to be a reasonable timetable to prepare and launch this campaign given that the adverts effectively pre-dated any announcement of wholesale price cuts.

11. It should also be recognised that the price reductions announced on 26 February were just that and did not involve the introduction of a new product. BT Wholesale launched its self install broadband service on 15 January 2002 with a number of ISPs launching their own retail services on the same day. The trial of the self install wholesale products was originally announced by BT to industry on 17 October 2001 with the trial starting on 3 December 2001. It would have been possible for Freeserve to bring a product to market at any stage after that date. BTOW has told Oftel that it began to plan for its increase in the supply of modems once it applied to join the trial. BTOW did not fully launch its self install retail product until after the 26 February price reductions. This means BT had a period of over 3 months to order modems in preparation for its launch of self install. Oftel accepts BT’s contention that it was the development of self install and not the wholesale price cuts which caused it to begin ordering modems.

12. BTOW’s promotional cd roms have been available since last year. Oftel has confirmed that content of these cd roms is generic to BTOW’s broadband service and has no specific reference to self install or a reduced price. BTOW has stated that it instructed its advertising agency to amend the sleeves and point of sale material to reflect the new self install prices on 27 February. Copy cds were pressed between 5-7 March and shipped to shops on 15 March. Oftel accepts that BTOW could have moved quickly following the announcement of wholesale price reductions to amend existing cd-roms and place them in shops to a short timetable.

13. In summary, given BT’s existing broadband marketing activities Oftel considers that it could have moved quickly after 26 February to promote the new price point for BTOW making some adaptions to its existing adverts and promotional cd roms. In addition, Oftel also believes that ordering of modems was based on preparation for the launch of a self install service. In conclusion, the information supplied by Freeserve for this portion of the complaint does not provide evidence of anti-competitive behaviour by BT and the Director does not consider that this issue warrants further investigation.

Cross subsidy
Freeserve’s complaint
14. Freeserve has presented Oftel with a hypothetical business case for BTOW. This claims that up to March 2003 BTOW makes a loss. Freeserve believes that this shows that BT is unfairly cross subsidising BTOW. Freeserve also believes that BT’s current special offer of a reduced connection and set up charge for its Home 500 product is anti-competitive.

Oftel’s view
15. Oftel has recently (28 March 2002) closed detailed investigations into cross subsidy and margin squeeze by BTOW. Oftel looked at whether the margin between the wholesale price of IPStream 500 and the retail price charged by BTOW for its At Home product was insufficient to allow other service providers to compete effectively with BTOpenworld. Oftel considered the impact of the latest reduction in the wholesale price of IPStream 500 as part of its investigation into these allegations and concluded that there was no evidence to suggest a margin squeeze was currently in operation.

16. Several SPs are undercutting BTOW’s new monthly rental price (£29.99) indicating that there is a sufficient retail margin to allow competition with BTOW. Freeserve’s own price for its residential broadband product is the same as BTOW’s. The business case Freeserve has presented only covers 1 year, 02-03. It is perfectly possible for a service to make a loss in the first year without the pricing being judge predatory in competition law terms, provided that the product shows a positive return in a reasonable period. BTOW’s own business case presented to Oftel shows payback will occur over a longer period than one year. Oftel has accepted that BTOW’s business case is not implausible in its recent margin squeeze investigations.

17. BTOW’s £65 reduction on its connection and set up charges is a 3 month special offer which was announced on 27 February 2002 and finishes on 31 May 2002. As part of its business margin squeeze investigation, which was closed on 28 March 2002, Oftel has already investigated a complaint from Freeserve that a previous 3.5 months half price connection offer by BTOW was anti-competitive. In that specific case Oftel considered that the special offer was a legitimate commercial practice aimed at stimulating demand. Also, as the offer only lasted 3.5 months, Oftel did not consider that it had a material effect on competition. Oftel also notes that a number of ISPs that are using BT’s wholesale broadband products have special offers on connection and set up charges. Freeserve currently has a special offer which exactly matches the reduction in set up charges in the BTOW offer. In conclusion the information supplied by Freeserve for this portion of the complaint does not provide evidence of anti-competitive behaviour by BT and the Director does not consider that this issue warrants further investigation.

BT’s “Telephone Census”

Freeserve’s complaint
18. BT has sent a questionnaire to a large amount of its customer base called a ‘telephone census’ which asks for information on their use of telephony, TV and Internet services. Freeserve believes that questions in the census on Internet use,
“will provide market information which results solely from BT Retail’s dominance within the market for retail telephony, and will prove invaluable in developing targeted offers to potential customers of BT/BTOW.” Freeserve believes that this represents an abuse of BT’s dominant position in the market for retail telephony. There are further concerns from Freeserve that the wording of questions in the census refer to ‘BT/BT Openworld’ together and that this erodes the distinction for customers between BT and BTOW.

**Oftel’s view**

19. Oftel is aware that BT is conducting the ‘telephone census’ to gather information on its customer base. These questionnaires are generic and have been sent to the majority of BT’s residential customers. There is no specific targeting to customers on the basis of customer billing information which only BT has access to. There is no prohibition on BT gathering information on its customers in this way in order to market services to them in the future. Other companies can undertake similar exercises using their customer address lists or by buying in such information. Many SPs already have extensive consumer address lists in order send out marketing information.

20. The one question in the census which refers to BT Openworld asks “who is your main ISP for home Internet use?”, then gives ‘BT/BTOpenworld’ as one of the options to tick. There is no specific obligation for BT to maintain a marketing distinction between BTOW and other parts of its business. BT is entitled to exploit the brand awareness it enjoys as a horizontally and vertically integrated company. It is important to note that costs of advertising and marketing activities must be correctly apportioned between different parts of BT’s business to ensure that anti-competitive cross subsidy does not take place. However, Oftel has already examined BTOW’s costs in its margin squeeze investigations which, as mentioned above, it has recently closed.

21. In conclusion, the information supplied by Freeserve for this portion of the complaint does not provide evidence of anti-competitive behaviour by BT and the Director does not consider that this issue warrants further investigation.

**Overall recommendations**

22. In conclusion, 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.

**Competition Case Officer**

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