Neutral citation [2008] CAT 15

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1102/3/3/08
1103/3/3/08

Victoria House
Bloomsbury Place
London WC1A 2EB

10 July 2008

Before:

VIVIEN ROSE
(Chairman)
DR ARTHUR PRYOR CB
ADAM SCOTT TD

Sitting as a Tribunal in England and Wales

BETWEEN:

T-MOBILE (UK) LIMITED

Appellant

- supported by -

HUTCHISON 3G UK LIMITED

Intervener

-v-

OFFICE OF COMMUNICATIONS

Respondent

TELEFÓNICA O2 UK LIMITED

Appellant

-v-

OFFICE OF COMMUNICATIONS

Respondent

JUDGMENT ON THE PRELIMINARY ISSUE

APPEARANCES

Mr. Michael Fordham QC and Mr. Meredith Pickford (instructed by Lovells LLP) appeared on behalf of T-Mobile (UK) Limited.

Mr. David Pannick QC, Mr. Thomas de la Mare and Mr. Tom Richards (instructed by Ashurst LLP) appeared on behalf of Telefónica O2 UK Limited.

Ms. Dinah Rose QC, Mr. Josh Holmes and Mr. Ben Lask (instructed by the Office of Communications) appeared for the respondent.

I. INTRODUCTION

1. Two appeals have been brought before the Tribunal challenging the way in which the respondent ("OFCOM") has decided to conduct the auction of two bands of spectrum which can be used for providing telecommunications services. T-Mobile (UK) Limited ("T-Mobile") lodged its appeal on 16 May 2008 (Case No: 1102/3/3/08: "the *T-Mobile* appeal") and Telefónica O2 UK Limited ("O2") lodged its appeal on 3 June 2008 (Case No: 1103/3/3/08: "the *O2* appeal"). OFCOM has disputed the jurisdiction of the Tribunal to hear the appeals and argues that the appellants must proceed with their challenge by way of judicial review proceedings in the High Court. T-Mobile and O2 both assert that the Tribunal does have jurisdiction under section 192 of the Communications Act 2003 ("the CA 2003"). Proceedings have been commenced by T-Mobile in the High Court on a precautionary basis and O2 has intervened in those proceedings in support of T-Mobile.

2. At a case management conference held in the *T-Mobile* appeal on 30 May 2008, the Tribunal ordered that the issue of jurisdiction be determined as a preliminary issue; we set a tight timetable for the hearing of the preliminary issue. Once the *O2* appeal had been lodged, the Tribunal by order of 4 June 2008 applied the same timetable to the hearing of the preliminary issue in that appeal. Hutchison 3G UK Limited has been granted permission to intervene in the *T-Mobile* appeal but did not make submissions on the preliminary issue. The hearing of the preliminary issue took place on 26 and 27 June 2008. We are grateful to the parties for their cooperation in bringing this issue on quickly.

(a) The domestic statutory provisions

3. So far as the domestic law is concerned, the parties are agreed that the relevant statutory provision which may or may not confer jurisdiction on the Tribunal is section 192 of the CA 2003. That provides, so far as material:

> "**192 Appeals against decisions by OFCOM, the Secretary of State etc**
>
> (1) This section applies to the following decisions—

(a) a decision by OFCOM under this Part [or any of Parts 1 to 3 of the Wireless Telegraphy Act 2006] that is not a decision specified in Schedule 8;

…

(2) A person affected by a decision to which this section applies may appeal against it to the Tribunal.

…

(7) In this section and Schedule 8 references to a decision under an enactment—

(a) include references to a decision that is given effect to by the exercise or performance of a power or duty conferred or imposed by or under an enactment; but

(b) include references to a failure to make a decision, and to a failure to exercise a power or to perform a duty, only where the failure constitutes a failure to grant an application or to comply with any other form of request to make the decision, to exercise the power or to perform the duty;

and references in the following provisions of this Chapter to a decision appealed against are to be construed accordingly.

(8) For the purposes of this section and the following provisions of this Chapter a decision to which effect is given by the exercise or performance of a power or duty conferred or imposed by or under an enactment shall be treated, except where provision is made for the making of that decision at a different time, as made at the time when the power is exercised or the duty performed."

The reference in section 192(1)(a) to the Wireless Telegraphy Act 2006 was inserted by that Act.

4. Schedule 8 to the CA 2003 lists various decisions under that Act and under the Wireless Telegraphy Act 2006 ("the WTA 2006") which are decisions not subject to appeal to the Tribunal under section 192(1)(a). So far as the exclusion of decisions under the WTA 2006 is concerned, the relevant paragraph for present purposes reads as follows:

"**40** A decision given effect to—

(a) by regulations under section 8(3), 12, 14, 18, 21, 23, 27, 30, 45 or 54 or paragraph 1 of Schedule 1 or paragraph 1 of Schedule 2;

(b) by an order under section 29 or 62."

5. The preliminary issue therefore raises points concerning the proper construction of the domestic legislation, namely does the decision under challenge constitute a decision

which falls within section 192(1)(a) having regard to paragraph 40 of Schedule 8 to the CA 2003.

6. The preliminary issue also raises points of European Community law, namely do the appellants have a directly effective Community right to bring their appeal before the Tribunal and, if so, how must the Tribunal give effect to that right.

(b) The appellants' challenge

7. An unusual aspect of this case is that the parties are not agreed as to the nature and source of the power that was exercised by OFCOM when it took the decision being challenged. T-Mobile's Notice of Appeal describes the decision in the following terms:

> "4. By this appeal, T-Mobile challenges the decision of OFCOM as to the sequencing of two regulatory matters within its control. That sequencing decision ("the **Sequencing Decision**") is embodied in:
>
> 4.1 the decision (the "**Award Decision**") to proceed with the award of available radio spectrum in the ranges 2500 – 2690 MHz and 2010 – 2025 MHz (the "**2.6 GHz Award**"); in combination with
>
> 4.2 its (advertent and ongoing) failure (the "**Refarming Failure**"), despite requests so to do, first to take a decision in relation to its policy on the liberalisation and potential reallocation ("**Refarming**") of spectrum in the 900 MHz and 1800 MHz ranges (respectively, the "**900 MHz Spectrum**" and the "**1800 MHz Spectrum**" and together the "**Existing Spectrum**")."

8. T-Mobile's complaint, put simply, is that until OFCOM has decided what it is going to do about Existing Spectrum as there defined – and in particular whether it is going to require holders of Existing Spectrum such as T-Mobile to give up some or all of that spectrum – T-Mobile does not know how much spectrum in the new 2.6 GHz Award, if any, it needs to bid for. By holding the auction of the new spectrum before informing holders whether they will retain all their Existing Spectrum, OFCOM is acting unreasonably and in breach of its various statutory duties. OFCOM is, according to T-Mobile, creating a situation in which T-Mobile has to decide whether and how much to bid for new spectrum in a state of uncertainty over its future needs. That state of uncertainty is not due to circumstances beyond OFCOM's control but to OFCOM's own failure to take a decision about Refarming.

9. O2's Notice of Appeal describes the decision under challenge in its appeal in the following terms:

> "The decision that is the subject of O2's Appeal ("**the Decision**") is Ofcom's decision to reject the possibility of proceeding with the award by way of split auction ("**the Split Auction Alternative**"). As a consequence Ofcom has decided not to reserve the auction of licences for frequencies between 2500 and 2570 MHz and 2620 and 2690 MHz ("**the Outer Bands**") until a later date, but instead to auction the entirety of the 2.6 GHz Band forthwith. The Decision was taken under sections 3 and 4 of [the CA 2003] and Parts 1-3 of [the WTA 2006] in particular its section 3. The Decision is contained (along with a number of other decisions) in a document entitled '*Award of available spectrum: 2500 – 2690 MHz, 2010 – 2025 MHz*' published by Ofcom on 4 April 2008 ("**the 4 April Document**")."

10. In its written submissions O2 identified two decisions which it alleges OFCOM has taken "in sequence or in a linked fashion": the "Timing Decision", which is the decision that it would be inappropriate to delay the auction of the available spectrum; and the "Split Auction Decision", by which it rejected the alternative of proceeding only with the auction of the Centre Band. During the course of the hearing O2 focused its complaint on the decision as to the timing of the auction. The difference between the two appeals is that whereas T-Mobile complains about the timing of the whole auction, O2 complains only about the timing of the auction of the Outer Bands, asserting that the auction of the Outer Bands should be postponed until after OFCOM clarifies the position as regards Existing Spectrum. O2 is content for the auction of the rest of the spectrum ("the Centre Band") to take place now.

11. In this judgment we refer simply to "the decision" being challenged by the appellants in the instant appeals. It may in fact not be a single decision which is being challenged and it may not be the same decision or decisions in each appeal but that does not matter so far as the preliminary issue is concerned.

(c) The Award Decision

12. Both appellants therefore rely, at least in part, on what T-Mobile calls the "Award Decision", that is the document entitled "Award of available spectrum: 2500-2690 MHz, 2010 – 2025 MHz" published by OFCOM on 4 April 2008. We will also refer to that document as the Award Decision.

13. The first section of the Award Decision is the Executive Summary. The opening paragraph provides:

> "1.1 This Statement sets out our decisions on the award of the frequency bands 2500- 2690 MHz (the 2.6 GHz band) and 2010-2025 MHz (the 2010 MHz band). It explains that we have decided to proceed with the award and why we have decided to do so as soon as possible, and it explains the way in which the award will be structured and the conditions that will attach to the licences to be awarded."

14. The Executive Summary describes the importance of the range of spectrum on offer and the consultation process in which the various "stakeholders" had participated. It then refers to the fact that at the same time as publishing the Award Decision, OFCOM is also publishing: (a) a notice of its proposal to make four statutory instruments comprising the draft regulations and order which will give effect to the policy decisions for the award ("the Notice"); and (b) an information memorandum setting out relevant information to help parties interested in participating in the auction to make their own decisions in respect of the award ("the Information Memorandum").

15. The Information Memorandum describes the "Award Process" which will be conducted in accordance with regulations made by OFCOM pursuant to powers under section 14 of the WTA 2006. The licences will be granted following the procedures which will be set out in those regulations. The Notice, also issued on 4 April 2008, was published pursuant to OFCOM's obligation under section 122(2) of the WTA 2006 to consult before making regulations. That section provides that regulations are made by OFCOM as statutory instruments and that before making them OFCOM must consult on their "general effect". Of the four draft statutory instruments annexed to the Notice, the principal instrument is The Wireless Telegraphy (Licence Award) (No.2) Regulations 2008, comprising 80 regulations and nine Schedules.

16. OFCOM refers in the Executive Summary of the Award Decision to the controversy over the timing of the auction. It states:

> "1.6 In making decisions in relation to this award, we have given careful consideration to the duties imposed on us by both the European legislative framework and by UK legislation. Taking into account the relevant facts and circumstances, we consider that our principal duty under the Communications Act 2003 to further the interests of consumers, where appropriate by promoting competition, is of particular importance to this award. In fulfilling this duty, we consider that our duties to secure optimal use of spectrum, promote innovation, and

> secure the availability of a wide range of electronic communications services are also of particular significance.
>
> 1.7 We consider that a decision to hold an award for the 2.6GHz and the 2010MHz bands, and to do so as soon as possible, is the decision that best meets these duties."

The same point is made in the main body of the Award Decision at paragraphs 3.20 – 3.21.

17. We were not taken to any statement in the Award Decision setting out unequivocally the power under which the document was published. Section 3 of the document headed "Legal Framework, method and timing of award" again summarises the decisions OFCOM has taken, namely: to award all the spectrum bands that are currently unused; to proceed with the award of the 2.6 GHz band as soon as possible "rather than take a conscious decision to delay the award until some later date (e.g. beyond 2008)"; to award the 2010 MHz band as part of the same award process; and to award both bands via auction.

18. The discussion in section 3 of the Award Decision refers to provisions of the European regulatory framework and to OFCOM's duties under the CA 2003 and the WTA 2006. It sets out how OFCOM justifies its decisions as being compatible with those various duties. Much of this discussion canvasses the views that have been expressed during the consultation process about whether to auction the spectrum now or to delay the whole or part of the auction. It concludes that OFCOM considers that awarding the whole band as soon as possible is likely to generate greater overall benefits for citizens and consumers (see paragraph 3.197 of the Award Decision).

(d) The European context

19. Regulation of electronic communications across Europe is now based on the European Common Regulatory Framework ("CRF") which was promulgated in April 2002 and had to be implemented by the Member States by July 2003. This superseded earlier EU regulatory instruments. The CRF comprises (amongst other instruments) Directive 2002/21/EC on the common regulatory framework for electronic communications networks and services OJ L 108/33, 24.4.2002 ("the Framework Directive"), four other directives referred to in the Framework Directive as the Specific

Directives and the Spectrum Decision, which establishes a framework for harmonisation of radio frequency (Decision No 676/2002/EC on a regulatory framework for radio spectrum policy in the European Community OJ L 108/1, 24.4.2002).

20. Under the Framework Directive the Member States must designate a national regulatory authority to carry out the regulatory tasks set out in the CRF. Such regulatory authorities must be independent of the government of each Member State and must exercise their powers impartially and transparently. OFCOM is the United Kingdom's designated regulatory authority.

21. Article 4 of the Framework Directive (hereafter "Article 4") provides:

> "4. **Right of Appeal**
>
> 1. Member States shall ensure that effective mechanisms exist at national level under which any user or undertaking providing electronic communications networks and/or services who is affected by a decision of a national regulatory authority has the right of appeal against the decision to an appeal body that is independent of the parties involved. This body, which may be a court, shall have the appropriate expertise available to it to enable it to carry out its functions. Member States shall ensure that the merits of the case are duly taken into account and that there is an effective appeal mechanism. Pending the outcome of any such appeal, the decision of the national regulatory authority shall stand, unless the appeal body decides otherwise.
>
> 2. Where the appeal body referred to in paragraph 1 is not judicial in character, written reasons for its decision shall always be given. Furthermore, in such a case, its decision shall be subject to review by a court or tribunal within the meaning of Article 234 of the Treaty."

22. It is common ground that the decision challenged in the instant appeals is "a decision" for the purposes of Article 4 to which the rights conferred by that Article therefore attach. OFCOM also accepted both that Article 4 has direct effect (and thus creates in those "affected by a decision" a right to an appeal of the kind described in the article) and that the appellants are undertakings providing electronic communications services who are affected by the decision. The issue between the parties is whether the CA 2003 provides that an appeal against some decisions falling within Article 4 must be by way of judicial review before the High Court and, if so, whether this is a proper implementation of Article 4.

II. THE PRELIMINARY ISSUE

(a) How to approach the issue

23. O2's and T-Mobile's argument can be summarised as follows. They urged as the starting point a consideration of the proper interpretation of Article 4. They rely on various phrases in Article 4 as pointers to the fact that what is required by Article 4(1) is a full appeal on the merits, or at least a merits assessment, and not simply a review. There is no doubt that an appeal to the Tribunal will comply with that requirement. There is equally no doubt, they assert, that judicial review in the High Court does not constitute either an appeal on the merits or a merits assessment and hence would not be a proper domestic implementation of their rights under Article 4(1).

24. The appellants assert that it is the clear intention of Parliament that section 192 should indeed confer a right to an appeal on the merits for decisions falling within Article 4, having regard in particular to the Explanatory Notes produced by the Government to accompany the draft of the Communications Bill and those that were published when the Bill was enacted. That being the case, the Tribunal must find that it has jurisdiction to hear the appeals. The appellants argued that there was no need to identify which particular provision of the CA 2003 or the WTA 2006 the decision was taken under. It was enough that OFCOM accepts that the decision falls within the first part of section 192(1)(a), namely that it is a decision by OFCOM under Part 2 of the CA 2003 or under a provision in Parts 1 to 3 of the WTA 2006.

25. If, contrary to their primary contention, there is an obstacle in the statutory provisions to the Tribunal hearing these appeals, the appellants submit that such an obstacle can -- indeed must -- be overcome in one of two ways. First, the Tribunal could apply the well-known principle of construction set out in the judgment of the European Court of Justice in Case C-106/89 *Marleasing v La Comercial Internacional de Alimentacion* [1990] ECR I-4135, paragraph [8]. That principle is that the national courts of the Member States are obliged, when applying domestic legislation, to interpret that legislation, so far as possible, in the light of the wording and purpose of a directive in order to achieve the result sought by that directive. If that is not possible, then the contrary statutory provisions could be regarded as barriers or restrictions on the Tribunal's jurisdiction. The Tribunal is then obliged to set these aside in order to give

effect to the appellants' Article 4 right of appeal. Either way, the Tribunal could find that the right to an appeal to the Tribunal on the merits under section 192(1)(a) is established.

26. OFCOM urged the Tribunal to approach the matter from the other direction. First, OFCOM argued, the Tribunal must identify the domestic law power that has been used by OFCOM to take the decision under challenge. OFCOM's case is that the decision is a decision under section 14 of the WTA 2006. Section 14(1) provides:

> "Having regard to the desirability of promoting the optimal use of the electromagnetic spectrum OFCOM may by regulations provide that, in such cases as may be specified in the regulations, applications for wireless telegraphy licences must be made in accordance with the procedure that involves the making by the applicant of a bid specifying an amount that he is willing to pay to OFCOM in respect of the licence."

27. Further, OFCOM submits that it is a decision to which effect will be given by regulations made under section 14. Accordingly, it is excluded by paragraph 40 of Schedule 8 to the CA 2003 from the category of decisions in respect of which jurisdiction is conferred on the Tribunal by section 192(1)(a).

28. OFCOM argues that the intention of the legislature was clear that some decisions of OFCOM should be subject to an appeal on the merits to the Tribunal and some should be subject to challenge by way of judicial review. This intention was entirely compliant with the appellants' Article 4 rights because the High Court is fully able to take the merits of the case duly into account and has available to it the necessary expertise. According to OFCOM therefore, judicial review can fully meet the requirements set by Article 4, given that the court conducting the review will have regard to the fact that in doing so it must comply with the requirements of Article 4.

29. Even if, contrary to that primary submission, the exclusion of jurisdiction for these appeals did deprive the appellants of their Article 4 rights, OFCOM submits there would be nothing that the Tribunal could do to remedy this. It is not possible to read the statutory provisions as conferring jurisdiction on the Tribunal even adopting the principles of construction in the *Marleasing* case. Further, the provisions excluding the Tribunal's jurisdiction were not the kind of barriers or restrictions that the Tribunal has power, as a statutory body, to set aside itself. Rather they are limitations on the

Tribunal's jurisdiction itself and the Tribunal, being a statutory body with no inherent jurisdiction, cannot exercise a jurisdiction which the statute does not confer upon it.

(b) The domestic statutory provisions

30. In our judgment the proper starting point for any dispute about the Tribunal's jurisdiction must be an analysis of whether the CA 2003 confers jurisdiction to hear these appeals. That does not mean that the European background is irrelevant or that Article 4 should be left out of account unless and until we arrive at a position where we are applying the *Marleasing* principle of statutory construction. The fact that section 192 and Schedule 8 are clearly designed to implement the United Kingdom's obligations under Article 4 is something that we need to bear in mind when considering the proper construction of the statutory provisions.

31. The first question is therefore whether, as the appellants contend, it is apparent from the drafting of section 192 together with Schedule 8 to the CA 2003 that Parliament's intention was to confer a right of appeal on the merits in respect of all decisions falling within Article 4(1).

32. In support of this contention, we were referred to the Explanatory Notes published by the Government to accompany the draft of the Communications Bill and also to those accompanying the CA 2003. There was no material difference between the two sets of Notes. As to the extent to which a court is entitled to rely on Explanatory Notes, we were referred to the judgment of Brooke LJ in *Tarlochan Singh Flora v Wakom (Heathrow) Ltd* [2006] EWCA Civ 1103 and the opinion of Lord Steyn in *Westminster City Council v National Asylum Support Service* [2002] 1 WLR 2956. Lord Steyn in the latter case stated that in so far as the Explanatory Notes cast light on the objective setting or contextual scene of the statute and the mischief at which it is aimed, then they are admissible as aids to construction. However, his Lordship warned against treating the wishes and desires of the Government as reflecting the will of Parliament since the aims of the Government in respect of the meaning of the clauses as revealed in the Explanatory Notes cannot be attributed to Parliament.

33. We were taken to two passages in the Explanatory Notes accompanying the CA 2003 once enacted. The first was the passage introducing Chapter 3 of the Act which concerns disputes and appeals. The Notes say:

> "400. The appeals mechanisms in the Act have been devised to meet the specific requirements of Article 4 of the Framework Directive. Article 4 of the Framework Directive, in effect, requires that any person who is affected by a decision of OFCOM or the Secretary of State which relates to networks or services or rights of use of spectrum **must have the right of appeal on the merits** against that decision to an appeal body that is independent of the parties involved. The Act **therefore sets out a mechanism for appeal on the merits to the Competition Appeal Tribunal** (CAT) against any decision (with specified exceptions) taken by OFCOM under Part 2 of the Act or the Wireless Telegraphy Acts 1949 or 1998, against certain specified decisions of the Secretary of State and against directions, approvals and consents pursuant to conditions under section 45. Once the CAT has reached its decision it must remit the decision under appeal to OFCOM, the Secretary of State or the person responsible for the direction, approval or consent as appropriate, with such directions, if any, as it considers necessary." (emphasis added)

34. This is important in two respects, say the appellants. First, it shows that the author of the Notes interpreted Article 4 in the same way as the appellants now urge upon the Tribunal, namely as requiring a "right of appeal on the merits". Second, it shows that the intention of section 192 was to provide an appeal to the Tribunal in respect of decisions falling within Article 4.

35. The second passage was where the Notes comment specifically on section 192:

> "**Section 192: Appeals against decisions by OFCOM, the Secretary of State etc.**
>
> 416. This section provides for appeal to the Competition Appeal Tribunal (CAT) against decisions (with specified exceptions) made by OFCOM under Part 2 of the Act and the Wireless Telegraphy Acts 1949 and 1998 and against decisions made further to a condition of entitlement set under section 45. The specified exceptions are set out in Schedule 8 and are either (i) decisions that do not have immediate effect on a person, but are of a legislative or quasi-legislative nature that require a further act or decision to be given effect, or (ii) decisions on matters which fall outside the scope of the Communications Directives. For example, a decision taken by OFCOM relating to the making or revision of a statement of policy on information-gathering under section 145 would not have immediate effect on any person. It would only be where OFCOM exercised their powers under section 135 to require the provision of information, in accordance with that statement, that there would be a decision that would actually have effect on any person. Another example is decisions under section 175 (special procedure for contraventions by multiplex licence holders), which fall outside the scope of the Directives."

36. The appellants argue from this that the intention behind section 192 and Schedule 8 was to provide an appeal on the merits for all decisions falling within Article 4 on the part of someone who is "affected" by that decision, the exclusions applying only to decisions which do not have such an immediate effect and hence fall outside Article 4. The Sequencing Decision is, the appellants say, a decision which has an "immediate effect" on them in the sense that they have to make important and irrevocable financial and business decisions on the basis of it. It does not therefore fall within the category of decisions which the Notes indicate it was intended to exclude from the scope of the Tribunal's jurisdiction.

37. The appellants also point to the transposition table published with the Notes which identifies where the provisions of the European Directives have been implemented by the sections of the CA 2003. In the entry in the table for Article 4 the implementation is said to be by section 192 and Schedule 8 not, the appellants stress, by a combination of a merits appeal and judicial review.

38. The Tribunal does not consider that the Explanatory Notes can bear the weight placed on them by the appellants. With all due respect to the author of the Notes, we do not regard the paraphrase in paragraph 400 as to the effect of Article 4 to be helpful in construing what Article 4 actually requires. Further, we do not consider that it should be relied on as an indication that it was the considered view of the Government at the time that a full appeal on the merits before the Tribunal was the only proper implementation of the Article 4 rights. On the contrary, we accept OFCOM's submission that the reference in paragraph 416 to two kinds of decisions which are not to be appealed to the Tribunal, only one of which was a kind of decision falling outside the scope of the Community Directives, indicates to the contrary.

39. It is implicit in paragraph 416 that some decisions which are **within** the scope of the Community Directives can nevertheless be "decisions that do not have immediate effect on a person, but are of a legislative or quasi-legislative nature" and hence fall within the exceptions to the section 192 jurisdiction. Moreover, Ms Rose on behalf of OFCOM demonstrated that a number of the provisions of the WTA 2006 which are referred to in Schedule 8 (and are therefore excluded from section 192(1)(a) of the CA 2003) are provisions which were carried forward from the CA 2003 and which the Explanatory

Notes to the CA 2003 expressly identify as being intended to implement specific provisions of the Community Directives. The transposition table to which the appellants refer is not, and is not intended to be, a definitive statement of the implementation of the Directives. As was pointed out by OFCOM, it is not exhaustive since it does not refer to the two stage procedure under section 193 of the CA 2003 whereby a non-judicial body, the Competition Commission, considers price control matters and is reviewed by the Tribunal.

40. It is not helpful, in our judgment, to focus on the question whether the decisions challenged here have "immediate effect" as opposed to being "of a legislative or quasi-legislative nature". That is not a distinction that is drawn either in Article 4 or in the words of section 192 or in Schedule 8 to the CA 2003. The wording of the relevant provisions rather directs the Tribunal to consider whether the appellants are affected by the decision – and it is common ground that they are – and whether the decision is of the kind specified in Schedule 8.

41. We also accept the argument put forward by OFCOM that it is not possible to construe the Explanatory Notes as meaning that Schedule 8 only excludes from the Tribunal's jurisdiction decisions which do not "affect" anyone within the meaning of Article 4. Section 192(2) already provides that a right of appeal is only conferred on those affected by a decision. It cannot be the purpose of Schedule 8 to exclude decisions which do not affect anyone.

42. The Tribunal concludes therefore that Parliament's intention, as manifested in section 192 and Schedule 8 to the CA 2003, was that some decisions falling within Article 4 should be subject to an appeal on the merits before the Tribunal but that some should be subject to challenge only by way of judicial review.

(c) Identifying the power used by OFCOM in taking the decisions under challenge

43. The next issue is therefore whether the decisions which are the subject of these appeals are indeed decisions within Schedule 8 and therefore outside the scope of the Tribunal's jurisdiction.

44. O2's Notice of Appeal (paragraph 4) stated that the decision was taken under sections 3 and 4 of the CA 2003 and Parts 1 to 3 of the WTA 2006, in particular its section 3. In the later section of the Notice of Appeal, where the arguments concerning jurisdiction are set out, O2 states that the decision is made "under any of Parts 1 to 3 of the WTA 2006, and in particular in purported exercise of OFCOM's obligations under section 3 of WTA 2006".

45. During the course of the hearing, O2 modified this stance. They submitted that given that no one was suggesting that OFCOM was acting *ultra vires* in adopting the decision, OFCOM must have power to take "incidental" decisions of a kind challenged and that power must come from somewhere in the provisions referred to in section 192 of the CA 2003. O2 stressed that for the purposes of their case, they needed only to show that the decision fell within Article 4. But they clarified their position to some extent as being:

(a) the decision was taken under section 14 of the WTA 2006 but was not a decision "given effect to by regulations under section 14" for the purposes of paragraph 40 of Schedule 8; alternatively that

(b) the decision was taken under section 1(3) of the CA 2003 in conjunction with section 14 of the WTA 2006. Section 1(3) of the CA 2003 provides that OFCOM may do anything which appears to it to be incidental or conducive to the carrying out of its functions; alternatively that

(c) section 3 of the WTA 2006 in conjunction with section 14 of that Act confers on OFCOM the function of taking a decision of the kind challenged here. Section 3 sets out a number of factors to which OFCOM must have regard in carrying out their radio spectrum functions, for example the extent of available spectrum and the economic and other benefits that may arise from its use.

46. T-Mobile's Notice of Appeal asserts (paragraph 49) that "the Sequencing Decision is, inter alia, a decision under section 3 of the 2006 Act" and in the alternative they argue that it is a decision taken under section 1(1)(b) of the WTA 2006. Section 1(1)(b)

provides that it is a function of OFCOM to provide such services as they consider appropriate for the purpose of facilitating or managing the use of the spectrum. In its skeleton argument, T-Mobile argues in the further alternative that the matter is appealable as an omission or failure to take a decision. This is because the Sequencing Decision "necessarily includes the Refarming Failure" (that is, the failure to decide what to do about the possible reallocation of Existing Spectrum). According to T-Mobile, in May 2007 it asked OFCOM to take a decision on Refarming and, according to section 192(7)(b), this failure can be treated as a decision within the meaning of section 192(1)(a).

47. At the hearing, Mr. Fordham for T-Mobile argued that their case was also made out even if the power to make the Sequencing Decision is the power under section 14 of the WTA 2006. This is because not all decisions *taken under* section 14 are within paragraph 40 of Schedule 8. That paragraph of Schedule 8 only excludes those decisions which are "given effect to" by regulations under section 14 WTA 2006.

48. In the Tribunal's judgment, the Sequencing Decision and the Decision to reject the Split Auction Alternative are clearly decisions taken under section 14 of the WTA 2006. None of the other provisions referred to by the appellants assists them:

(a) **section 1(3) of the CA 2003**. We do not consider that this adds anything to the powers inherent in section 14 WTA 2006 to take all the decisions needed preparatory to the making of regulations. In any event, this does not avail the appellants since this section is in Part 1 of the CA 2003 and not in the same part as section 192 (which is in Part 2). Hence decisions taken under this power do not fall within section 192(1)(a);

(b) **sections 3 and 4 of the CA 2003.** In so far as these were still relied on by O2, we do not find that they assist, both because they fall within Part 1 and not Part 2 of the 2003 Act (and hence are not included in section 192) and also because they do not confer self-standing functions on OFCOM, but rather provide how OFCOM is to exercise functions conferred by other provisions;

(c) **section 1(1)(b) of the WTA 2006.** We do not consider that the decision to proceed with the award of spectrum is a decision about the provision of a "service" within the meaning of section 1(1)(b);

(d) **section 3 of WTA 2006.** We accept the argument put forward by OFCOM in its Defence (paragraph 14) as regards reliance on this provision. Section 3 of the WTA 2006 does not confer any power or duty on OFCOM to take a decision but rather specifies the matters to which OFCOM is to have regard when carrying out its radio spectrum functions under other provisions of the WTA 2006. We also accept the point made by OFCOM that if the appellants were right in their contention that any decision to which section 3 applied could be a decision under Part 1 of the WTA 2006 for the purposes of applying section 192 of the CA 2003, that would widen the scope of section 192. Section 3 applies to functions conferred under all the Parts of that Act, not simply Parts 1 to 3 and to some of the powers referred to as excluded in Schedule 8;

(e) **failure to take the Refarming Decision.** T-Mobile's Notice of Appeal states clearly that the decision under challenge is the Sequencing Decision and not, as a separate matter, the alleged failure to take the Refarming Decision. This is reflected in the relief sought in the appeal, which is not that OFCOM should take the Refarming Decision but rather that OFCOM take no steps to proceed with the 2.6 GHz Award "until such time as it has made a final decision in relation to its policy on Refarming". T-Mobile's written submissions on the preliminary issue state (at paragraph 8) that the absence of a Refarming decision is not "objectionable in its own right". We do not consider that it is open to T-Mobile to recast its case by relying on the alleged failure to take the Refarming Decision.

(d) The application of paragraph 40 of Schedule 8

49. The key question for the Tribunal to consider at this stage is therefore whether, having concluded that the Sequencing Decision was taken under section 14 of WTA 2006, the Tribunal also concludes that it is a decision "given effect to by regulations under section 14".

50. The appellants argued that there is a category of decisions which are taken under section 14 and which predate the making of the regulations but which are not "given effect to" by regulations made under that section. Mr. Fordham postulated a test as to whether the decision is "embodied" in the regulations in the sense that an astute reader concerned with a particular aspect of policy can tell, reading through the regulations, what decision OFCOM must have taken as regards that policy. This might be either because something is expressly stated in the regulations, for example that applicants must pay a deposit to OFCOM, or because something is absent, for example that there is no provision requiring the payment of a deposit. But, he said, the test is whether you get the answer, reading the regulations, to the question "How did they decide to deal with this?". Applying this test, T-Mobile argues you cannot read through the draft regulations that OFCOM proposes to make (which were published at the same time as the Award Decision) and see from those what decisions OFCOM has taken about the sequence of the award of the 2.6 GHz spectrum as compared with the timing of the decision on Refarming. The Sequencing Decision is thus not embodied in the regulations in that sense and hence is not a decision "given effect to by regulations" for the purposes of paragraph 40.

51. In the Tribunal's judgment this gives too narrow a meaning to the words in paragraph 40. We start from the proposition that section 14(1) confers on OFCOM a power to make regulations. Subsections (2), (3) and (7) flesh out that power by listing the kinds of provisions that can be included in the regulations. Subsections (4), (5), (6) and (8) deal with other matters concerning the eventual grant of licences. But none of the subsections confers on OFCOM a power to do anything other than make regulations. OFCOM accepted that decisions taken pursuant to powers conferred by those regulations are not covered by the exception in paragraph 40. The wording of paragraph 40 makes no mention of decisions taken under regulations whereas other paragraphs in Schedule 8 refer both to decisions given effect to by regulations and decisions under those regulations. But here we are concerned with decisions which precede the making of the regulations.

52. It is clear that in preparation for making regulations under section 14, OFCOM undertook lengthy and detailed consultation. The process which has culminated in the publication of the Award Decision and the draft regulations is described in section 2 of

the Award Decision. This sets out how OFCOM has, since January 2005, issued a series of consultation documents, a discussion document and an interim statement; OFCOM has held seminars during the course of 2006 and 2007 to prepare the consultations and to explain its proposals; OFCOM has engaged extensively with stakeholders and had discussions with a range of interested parties in the UK.

53. This is typical of how a responsible regulatory body, having regard to the principles of transparency, gradually narrows down the many options available to it as to how to exercise its power. By this process a regulator puts itself in the best position to make the dozens, if not hundreds, of individual decisions which shape and ultimately determine the content of the regulations promulgated. At the end of each stage of the consultation process OFCOM may announce the results of its deliberations thus far, setting out which options it has discarded and why. The process of making regulations begins with decisions of a high order of generality putting in place the basic building blocks of the regulator's policy about the award. The process moves gradually through different levels of detail until the regulator arrives at the stage when it must consult on the wording of the proposed regulations themselves - the stage at which OFCOM is now. All along the way, those whose task it is to make the regulations take decisions and many of those decisions may please some stakeholders and displease others.

54. We disagree therefore with O2's contention in its written submission that the timing or sequencing decisions taken by OFCOM are "wholly independent of and to some extent logically prior to the creation of the auction rules" (paragraph 69(2) of O2's skeleton). Those decisions are not separate from the regulation making power itself; they are part and parcel of the exercise by OFCOM of the power to make regulations. In the Tribunal's judgment those decisions are ultimately decisions "given effect to by regulations" whether or not they can be seen to be "embodied" expressly or by necessary implication in the regulations in the sense suggested by T-Mobile.

55. The Tribunal concludes, therefore, that there is no category of decisions antecedent to the making of the regulations which can be described as decisions under section 14 but which are not given effect to by regulations under section 14 WTA 2006.

56. If the Tribunal's conclusion on that is wrong, we consider that OFCOM's decision to reject the Split Auction Alternative (as challenged by O2) is embodied in the draft regulations which were published at the same time as the Award Decision. Schedule 1 to the draft regulations lists the 38 lots into which the available spectrum is divided for the purposes of the auction. It was accepted by the appellants that under the current wording of the draft, it was not possible for these lots to be auctioned at different times. It therefore appears to the Tribunal that the decision to auction all the available spectrum at the same time is indeed apparent from the draft regulations and would not therefore fall into the category posited by the appellants, if such a category existed.

57. The Sequencing Decision, that is the decision to hold the auction (or all parts of it) before taking the decision on Refarming, is more difficult to identify in the draft regulations. OFCOM referred to regulation 4 which refers to the "day specified by [OFCOM]" for the receipt of applications and the deadline for the payment of the initial deposit of £100,000. But we accept the point made by the appellants that these timings refer to the progress of the auction once it has been decided to go ahead – they do not say anything about whether that process is to start before the Refarming decision is taken. However, since the Tribunal has concluded that it is not necessary for the content of the decision to be manifest from a reading of the regulations in order for the decision to be given effect to by those regulations, the Tribunal does not need to explore the draft regulations further in this regard.

(e) Section 192(8) of the CA 2003

58. OFCOM also referred the Tribunal to section 192(8) of the CA 2003. The relevant parts of this provision read:

> "For the purposes of this section … a decision to which effect is given by the exercise or performance of a power ... shall be treated … as made at the time when the power is exercised …."

59. This provision recognises the fact that OFCOM arrives at any decision as to how to exercise its powers in stages and that those stages are made public in the form of consultation documents and statements made at the close of consultations. The aim of the provision is clearly to prevent challenges being brought before the Tribunal during the preparatory stages before the actual exercise of the power.

60. The provision does not purport to preclude the High Court from exercising its judicial review function in respect of any decision taken at any time during that process. It is a matter for the High Court to consider any question of prematurity as and when a challenge is brought before it. OFCOM has made it clear that it does not contest the bringing of the judicial review challenge by T-Mobile on such grounds. But so far as the Tribunal's jurisdiction is concerned, the Tribunal considers that subsection (8) is a further pointer to the fact that the merits review is intended to arise at the time when the power conferred by the legislation is actually exercised and not during the lengthy antecedent process.

61. For the reasons set out above, the Tribunal concludes that the challenged decision is given effect to by regulations made under section 14 of the WTA 2006 and, by virtue of Schedule 8, falls outside the jurisdiction conferred on the Tribunal by section 192(1)(a) of the CA 2003.

III. IS THIS RESULT COMPLIANT WITH ARTICLE 4?

(a) The scope of the rights conferred by Article 4

62. The appellants argue that if OFCOM is correct that section 192 and Schedule 8 preclude them bringing their appeals before the Tribunal and limit them instead to a challenge by way of judicial review, then this deprives them of directly effective rights conferred on them by Article 4. If that is right, then the Tribunal must either strive to interpret the domestic legislation in a way which is compliant with those rights or must set aside the statutory restrictions on their right to an appeal on the merits.

63. It is common ground that Article 4 does confer directly effective rights on the appellants to have an appeal which complies with that Article. This follows, OFCOM accepts, from the jurisprudence of the Court of Justice in Case C-462/99 *Connect Austria Gesellschaft für Telekommunikation GmbH v Telekom-Control-Kommission* [2003] ECR I-5197 ("*Connect Austria*") and Case C-426/05 *Tele2 Telecommunication v Telekom-Control-Kommission* (judgment of 21 February 2008 not yet reported). The issue between the parties is whether judicial review proceedings in relation to the decisions under challenge is a lawful implementation of those directly effective rights

or whether those rights are only properly implemented by an appeal on the merits before this Tribunal.

64. The appellants point to three particular aspects of Article 4(1) which, they say, indicate clearly that all those affected by decisions of the national regulatory authority are entitled to an appeal on the merits.

65. Firstly, they contrast the reference to a "right of appeal" in paragraph 1 of Article 4 with the reference to a decision of a non-judicial appellate body being "subject to review" *per* paragraph (2) of Article 4. This contrast means that the right of appeal must require something more than is likely to result from judicial review proceedings in the High Court. Secondly, they rely on the requirement imposed on Member States to "ensure that the merits of the case are duly taken into account". They interpret this as meaning that there must be an appeal on the merits rather than a judicial review, and they point to the Explanatory Notes to the Communications Bill and to the CA 2003 which, as we have seen, appear to interpret these words in the same way. Thirdly, they rely on the fact that the appellate body must have "appropriate expertise available to it to enable it to carry out its functions". Why, the appellants ask, would it be necessary to stipulate this unless it was intended that the specialised appellate body gets to grips with the detail of the factual and technical aspects of the case in the course of a merits appeal.

66. The appellants went on to argue that a challenge by way of judicial review would not fulfil the requirements set by Article 4. Although the appellants accept that judicial review has developed over recent years to allow for a more intensive level of scrutiny in some circumstances, the case-law clearly establishes that judicial review is still different from an appeal on the merits.

67. We were referred to a number of authorities on this point, including some which emphasise the difference between the test on judicial review and a merits appeal even where the court is assessing proportionality in a human rights context. For example, *R v Secretary of State for the Home Department ex parte Daly* [2001] 2 WLR 1622, p. 548, paragraph [28] was a case under the Human Rights Act 1998 where the court was considering the proportionality of the policy by which prison authorities read the

correspondence of prisoners. In that case Lord Steyn emphasised the difference in the intensity of review between the traditional grounds of judicial review and the proportionality approach. But he went on to say that "[t]his does not mean there has been a shift to merits review".

68. This was reiterated by Lord Bingham speaking for the House of Lords in *R v Denbigh High School Governors ex parte Begum* [2006] 2 WLR 719. Lord Bingham recognised that the courts' approach to an issue of proportionality must go beyond that traditionally adopted to judicial review in a domestic setting. But he confirmed Lord Steyn's statement that there is no shift to a merits review even though the intensity of review is greater than would normally be appropriate.

69. In the Tribunal's judgment it is important when construing Article 4, as with any Community legislation, not to import into it concepts and distinctions which are familiar to us in England and Wales but which may not be common to all Member States. The obligation imposed on the United Kingdom Government by Article 4 is also imposed on the other 26 Member States of the European Union where the degree of scrutiny applied by different courts in their legal system may be different.

70. Mr. Pannick for O2 took us to the different provisions in the domestic legislation governing the Tribunal's jurisdiction where the legislator is clearly drawing a contrast between cases in which the Tribunal must undertake a full merits appeal (such as appeals under section 192 CA 2003) and cases where the Tribunal must apply the principles which would be applicable under a judicial review (such as merger cases under section 120 of the Enterprise Act 2002). In construing domestic legislation it is entirely legitimate to treat these references as drafted against the background of the English law concepts of merits appeals and judicial review. But we cannot assume that those adopting the wording in Article 4 had in mind the same distinction.

71. We do not therefore accept that the reference to a "right of appeal" in Article 4(1) and the reference to "review" in Article 4(2) are making a similar distinction. The kind of review by a second instance court or tribunal under Article 4(2) may be different from the appeal conducted by the first instance, non-judicial appellate body whose decision the second instance court is reviewing. But that does not mean that the appeal body

referred to in Article 4(1), whether it is "judicial in character" or not, is required to conduct a full appeal on the merits as that concept is understood in English administrative law.

72. Similarly, we do not agree that the requirement that the appellate body must take the merits of the case duly into account should be interpreted as indicating that only an appeal on the merits of the kind conducted by this Tribunal is adequate. It is not right to paraphrase those words in Article 4 as conferring a right to a full merits appeal.

73. This conclusion is supported by OFCOM's analysis of the different language versions of Article 4(1). Many of the language versions require only that due account be taken of the facts or circumstances of the case or of the substance of the case. The links between the words used in the English language version – "merits" and "review" – to different kinds of appellate jurisdictions – "appeal on the merits" and "judicial review" – may not be apparent in the other language versions of the Article. The Tribunal accepts, as O2 submitted, that the words used in Article 4 were meant to strengthen the right of appeal as compared with Article 5a(3) of the earlier directive establishing an internal market for telecommunications services, Directive 90/387/EEC (OJ L192/1, 24.7.1990). This earlier provision was discussed by the Court of Justice in *Connect Austria*, cited above. In that case Austrian legislation provided for a right of appeal to the Verfassungsgerichtshof (the Constitutional Court) and excluded the jurisdiction of the Verwaltungsgerichtshof which was the administrative court generally having jurisdiction over applications challenging the lawfulness of decisions by the administrative authorities. The jurisdiction of the Verfassungsgerichtshof was limited to cases where the applicant complained of the infringement of a constitutionally guaranteed right or the application of an unlawful regulation, an unconstitutional statute or an unlawful international treaty. The Verfassungsgerichtshof in rejecting the appeal found that its own jurisdiction was too limited to amount to a proper implementation of the right of appeal conferred by the directive. Relying on the direct effect of Article 5a(3) to override the statutory exclusion of the Verwaltungsgerichtshof's jurisdiction the Verfassungsgerichtshof referred the case to the Verwaltungsgerichtshof. The Court of Justice held that it had been correct to do so. But this case shows how varied the different appellate arrangements are in the different Member States and how limited a

right of appeal some Member States had conferred on potential applicants in purported implementation of the earlier directive.

74. Certainly *Connect Austria* is not authority for the proposition that an appeal to the Administrative Court would be inadequate, either under Article 5a(3) of the earlier directive or under Article 4. The appellants referred us to the European Parliament Recommendation for the second reading of what became the Framework Directive, but that does not, in our judgment, assist them. The Parliament proposed an amendment to Article 4 to include the words "The appeal body should be able to consider not only the procedure according to which the decision was reached, but also the facts and the merits of the case". The distinction being stressed here was that the appeal should not be limited to allegations of procedural unfairness or impropriety in arriving at the decision.

75. There are many different kinds of decisions taken by a national regulatory authority under the Community Directives. OFCOM argued, and we agree, that the fact that Article 4(1) requires the merits to be "**duly** taken into account" indicates that the level of scrutiny required may not be the same for all decisions covered by the Article. Thus OFCOM did not put their case so high as to argue that a right to judicial review would have been an adequate implementation for all decisions covered by Article 4 (although they did not concede that it would not be). Mr. Pannick for O2 accepted that the degree of scrutiny involved in an appeal on the merits might also have some flexibility so that not all appeals to the Tribunal from decisions falling within Article 4 would necessarily be treated in the same way. The difference between the parties is that the appellants maintain that there would be a substantial and important difference between the test applied in a review of the decision by the Administrative Court and an appeal on the merits before the Tribunal. OFCOM contends that given the nature of the decision under challenge there would in effect be little difference between an appeal conducted in the Administrative Court adopting a flexible judicial review standard and an appeal conducted in the Tribunal adopting an appeal on the merits which accorded an appropriate margin of appreciation to the regulator.

76. In respect of a decision of the kind under challenge in this case, the Tribunal concludes that a right to bring judicial review proceedings is capable of being fully compliant with

the appellants' directly effective rights under Article 4(1). This is the case even if, as the appellants contend, there is a clear difference between the approach that the Tribunal would adopt when engaged in a full merits appeal of this kind of regulatory decision and the degree of scrutiny that the High Court is likely to bring to bear during a judicial review.

77. We recognise that the parties may in due course make submissions to the High Court as to the test that should be applied when that court is operating as the appeal body referred to in Article 4. OFCOM accepted that the judicial review jurisdiction is a flexible one which may need to adapt for the purpose of fulfilling this role, as it has adapted for the purpose of assessing proportionality in the human rights context. Our decision that a right to challenge the Sequencing Decision by way of judicial review is a proper implementation of the appellants' rights under Article 4 in this case does not in any way prejudge any such submissions. We have not formed any view as to whether any such adaptation of the judicial review test would be necessary -- the High Court is the appropriate forum for that debate. Nor have we found it necessary to form a view on the submissions made by OFCOM in its skeleton argument as to the relevance of article 6 of the European Convention on Human Rights to the proper interpretation of Article 4.

78. As regards the reference in Article 4 to the appeal body having the appropriate expertise available to it to enable it to carry out its functions, we do not interpret that as meaning that the appeal must come before a specialist tribunal rather than before the ordinary administrative courts. We do not accept that this requirement is a pointer to the need for a merits review; error of fact is now established as a ground of challenge in judicial review proceedings. In this case the High Court may have to grapple with technical issues concerning the use of spectrum by different potential applicants for the bandwidth lots. The High Court is well able, in the Tribunal's judgment, to put itself in a position to decide such issues.

79. We agree with the point made by OFCOM, based on the legislative history of the text of what became Article 4, that the wording as adopted had moved away from a requirement that the appellate body *itself* had to have the expertise necessary to hear the appeals to a requirement that the appellate body had available to it that expertise.

OFCOM told us that the majority of Member States have not interpreted the Article as requiring them to set up a specialist tribunal where none existed at the time of implementation.

(b) *Marleasing*

80. Since we have rejected the appellants' contention that their directly effective rights under Article 4 can only be safeguarded by an appeal on the merits to this Tribunal, we do not need to decide the other issues raised by them as regards the application of the *Marleasing* principles of construction and the power of the Tribunal to set aside the putative limitation on the Tribunal's jurisdiction under section 192 of the CA 2003.

81. However, the matters were argued fully before us and in deference to those submissions we make the following observations on those issues.

82. The Court of Justice in *Marleasing* held that a Member State's obligations to achieve the result envisaged by a directive is binding on the courts of the Member State when those courts are called upon to interpret national law:

> "It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter…"

83. OFCOM's position on this was that decisions under section 14 of the WTA 2006 were not the only kind of decisions which fall within Article 4 but are nonetheless excluded from the jurisdiction of the Tribunal by section 192 in conjunction with Schedule 8. Many other paragraphs of Schedule 8 (though not all) would need to be disregarded if the Tribunal were to attempt in all cases to construe section 192 as conferring a right of appeal in all cases covered by Article 4. This goes beyond what is possible even under the *Marleasing* principle.

84. Mr. Pannick on behalf of O2 argued that there were two ways in which the Tribunal could approach this case to ensure consistency with Article 4. The first was to identify the Sequencing Decision as a decision taken under section 14 but not as a decision given effect to by regulations under section 14. The second approach was for the Tribunal to conclude that where OFCOM makes a timing decision, it is not acting

within the scope of section 14 at all, but is rather acting pursuant to powers which must be implicit in Parts 1 and 2 of the WTA 2006, partly by reference to the functions which they have under section 3 of the WTA 2006 and partly by reference to section 1(3) of the CA 2003.

85. As regards the second of these approaches, this appears to the Tribunal to be moving away from what is generally understood to be the principle derived from the *Marleasing* case. That principle is an aid to construing the wording of legislation; it is not a general injunction to the court that where it appears that relevant legislation is inconsistent with Community obligations, the court should strive to make findings of fact or law which mean that the inconsistency does not disadvantage the appellant on the facts of the particular case before it. We do not therefore regard the *Marleasing* principle as extending to the characterisation of the Sequencing Decision or to the issue as to which statutory function was being performed by OFCOM in arriving at that decision.

86. As to the first approach, there could be far reaching implications (going beyond the facts of this case) if the Tribunal were to decide, in order to avoid an inconsistency with Community law, that a sectoral regulator's statutory power to make regulations also conferred a power to take antecedent decisions which were not given effect to by those regulations. We do not consider it is appropriate to say anything further about it.

(c) The duty of the Tribunal to set aside the limits on its jurisdiction

87. The appellants submitted that if the Tribunal found that the domestic legislation was not a proper implementation of their Article 4 rights but that it was not possible to cure the defect by construing the legislation under the *Marleasing* principle, then the Tribunal was obliged to set aside the limitations placed on that jurisdiction and hear these appeals.

88. We were referred to a number of authorities which consider the circumstances in which a tribunal with no inherent jurisdiction can nonetheless disregard statutory provisions which purport to limit its handling of cases in ways which are inconsistent with Community law. The point can be summarised by citing the judgment of Neill LJ in *Staffordshire County Council v Barber* (CA) [1996] ICR 379 where he said that a

provision of the EC Treaty can be relied on by an applicant "to disapply barriers to a claim which are incompatible with Community law":

> "… Community law can be used to remove or circumvent barriers against or restrictions on a claim, but … it does not create rights of action which have an existence apart from domestic law"

89. We were also referred to the judgment of the Employment Appeal Tribunal in *Biggs v Somerset County Council* [1995] ICR 811 (approved by the Court of Appeal: [1996] ICR 364). There Mummery J confirmed that a statutory tribunal has no inherent jurisdiction and so cannot consider "free standing" claims which derive directly from EC Treaty provisions but are outside its statutory jurisdiction. But this did not prevent a tribunal "in the exercise of its statutory jurisdiction" from disapplying provisions of domestic law which were inconsistent with Community law if that was necessary to give effect to directly effective Community rights.

90. The *Connect Austria* case referred to earlier makes a similar point in holding:

> "If national law cannot be applied so as to comply with the requirements of [the] directive, a national court or tribunal which satisfies those requirements **and which would be competent to hear appeals against decisions of the national regulatory authority if it was not prevented from doing so by a provision of national law which explicitly excludes its competence**, such as that at issue in the main proceedings, has the obligation to disapply that provision." (emphasis added)

91. The domestic authorities and the Court of Justice in *Connect Austria* thus appear to draw a distinction between a limitation on competence and an absence of jurisdiction. The dispute between the appellants and OFCOM here was as to on which side of the line the final words of section 192(1)(a) fell. OFCOM argued that the effect of the subsection was the same as if the statute had listed all those decisions in respect of which the Tribunal had jurisdiction. The exclusion of the Schedule 8 provisions was not a "barrier or restriction" but part of the definition of the scope of jurisdiction itself. The appellants argued that section 192(1)(a) conferred a general jurisdiction on the Tribunal to hear appeals from decisions under Part 2 of the CA 2003 and parts 1 to 3 of the WTA 2006 and the carve out of the provisions listed in Schedule 8 was a limitation on that jurisdiction which the Tribunal had power to disregard if it was inconsistent with Community law.

92. Ms Rose for OFCOM accepted that this was a borderline case. The Tribunal sees the force in the arguments put forward by OFCOM that where the "limitation" is contained in the provision which confers jurisdiction it is not something which the Tribunal has power to circumvent or remove. However, we do not express a concluded view on the issue.

IV. CONCLUSION

93. For the reasons set out above, the Tribunal is unanimous in finding that it does not have jurisdiction under section 192(1)(a) of the CA 2003 to hear these appeals.

Vivien Rose Arthur Pryor Adam Scott

Charles Dhanowa
Registrar Date: 10 July 2008