



COMPETITION APPEAL TRIBUNAL

**NOTICE OF APPEAL UNDER SECTION 192 OF THE COMMUNICATIONS ACT 2003**

**CASE: 1102/3/3/08**

Pursuant to rule 15 of the Competition Appeal Tribunal Rules 2003 (SI 2003, No. 1372) (“the Rules”), the Registrar gives notice of the receipt of an appeal on 16 May 2008, under section 192 of the Communications Act 2003 by T-Mobile (UK) Limited (“the Appellant”) against a decision of the Office of Communications (“OFCOM”) as to the sequencing of two regulatory matters within its control in relation to the allocation of radio spectrum. According to the Appellant that decision as to the sequencing of the relevant two matters (“the Sequencing Decision”) is embodied in:

- a) OFCOM’s decision to proceed with the award of available radio spectrum in the ranges 2500 – 2690 MHz and 2010 – 2025 MHz (“the Award Decision”); in combination with
- b) OFCOM’s 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 (“the Refarming Failure”).

The Award Decision is contained in a document entitled ‘Award of available spectrum: 2500 – 2690 MHz, 2010 – 2025 MHz’ published by OFCOM on 4 April 2008. OFCOM proposes to start the process set out in the Award Decision by inviting applications in July 2008. According to the Appellant, the Refarming Failure is evidenced by, *inter alia*, the stance taken by OFCOM in the Award Decision and its decision to consult further on Refarming after August 2008.

The Appellant challenges the exercise by OFCOM of its discretion in arriving at the Sequencing Decision, which, the Appellant contends, is neither soundly based nor adequately justified. Further, the Appellant submits that OFCOM has erred in fact and in law in arriving at the Sequencing Decision. In particular the Appellant states that:

- a) OFCOM has fundamentally erred in not properly addressing the inter-relationship between the Award Decision and the Refarming Failure, each falling within its regulatory control and informing the overall balance of interests. OFCOM has unduly restricted its balancing exercise by treating delay in deciding on its Refarming policy as a given exogenous constraint rather than a matter within its own regulatory control; and
- b) OFCOM has characterised benefits and disbenefits of its sequential approach, in each case on bases and/or involving conclusions which are erroneous and/or inadequately justified.

The Appellant has also brought proceedings on a protective basis before the Administrative Court due to a dispute between the Appellant and OFCOM as to the appropriate forum in which to hear the proceedings. The Appellant submits that judicial review of the Sequencing Decision before the Administrative Court would not fulfil the requirement set out in Article 4 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common

regulatory framework for electronic communications networks and services (“the Framework Directive”). On 30 May 2008 the Tribunal, by an Order of the Chairman, directed that the following question be determined by the Tribunal as a preliminary issue: whether the Tribunal has jurisdiction under section 192 of the Communications Act 2003 or otherwise to determine the appeal brought by the Appellant in these proceedings (“the Preliminary Issue”).

The Appellant seeks the following relief from the Tribunal:

- a) the setting aside of the Award Decision insofar as it relates to the timing of the process set out therein;
- b) a direction that OFCOM take no steps to proceed with the process set out in the Award Decision until such time as it has made a final decision in relation to its policy on Refarming;
- c) a direction that OFCOM pay the Appellant’s costs in this appeal; and
- d) the granting of such further or other relief as may be necessary or appropriate.

Any person who considers that he has sufficient interest in the outcome of the proceedings may make a request for permission to intervene in the proceedings, in accordance with rule 16 of the Rules.

A request for permission to intervene in relation to the Preliminary Issue should be sent to the Registrar, The Competition Appeal Tribunal, Victoria House, Bloomsbury Place, London, WC1A 2EB, so that it is received by no later than **5.00pm on 6 June 2008**.

A request for permission to intervene in relation to any of the other matters raised by the Appellant’s appeal should be sent to the Registrar so that it is received within **three weeks** of the publication of this notice.

Further details concerning the procedures of the Tribunal can be found on its website at [www.catribunal.org.uk](http://www.catribunal.org.uk). Alternatively, the Tribunal Registry can be contacted by post at the above address or by telephone (020 7979 7979) or fax (020 7979 7978). Please quote the case number mentioned above in all communications.

*Charles Dhanowa OBE*  
Registrar

2 June 2008