



COMPETITION APPEAL TRIBUNAL

NOTICE OF APPEAL UNDER SECTION 192 OF THE COMMUNICATIONS ACT 2003

CASE: 1103/3/3/08

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 3 June 2008, under section 192 of the Communications Act 2003 (“the 2003 Act”) and Article 4 of Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications and services (“the Framework Directive”) by Telefonica O2 UK Limited (“the Appellant”) against a decision of the Office of Communications (“OFCOM”) to reject the possibility of proceeding with the allocation of radio spectrum by way of split auction (“the Decision”).

According to the Appellant 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 and was taken under sections 3 and 4 of the 2003 Act and Parts 1 – 3 of the Wireless Telegraphy Act 2006, in particular section 3.

The Appellant appeals the Decision on the grounds that:

- a) It is substantively wrong, being: based on errors of fact and/or no sufficient evidence; wrong in law, not least because of its discriminatory effect and impact upon the efficiency of spectrum allocation; and, insofar as it was a decision within OFCOM’s lawful discretion (which on the Appellant’s primary case it was not), the wrong decision to reach; and
- b) In any event, OFCOM has made the Decision by an unlawful process, in that OFCOM has breached its domestic obligations and obligations under the Treaty establishing the European Community (“the EC Treaty”) to consult upon and adequately to acquaint itself with the facts relevant to the allocation of radio spectrum by way of split auction.

The Appellant seeks the following relief from the Tribunal:

- a) the remission of the matter to OFCOM for it to reconsider the Decision;
- b) a direction that OFCOM:
 - i. proceed with the allocation of radio spectrum by way of split auction (the precise form of which should be consulted upon by OFCOM); or, alternatively
 - ii. conduct a consultation on the split auction alternative and thereafter reconsider the split auction alternative in the light of the Tribunal’s judgment on the law and the merits; and
- c) a direction that OFCOM pay the Appellant’s costs in this appeal.

The Appellant submits, inter alia, that Article 4 the Framework Directive provides it with a directly effective right to a full merits appeal before the Tribunal and that the relevant provisions of the 2003 Act and Wireless Telegraphy Act 2006 must be construed and given effect as far as possible in the light of principles of EC law. In this regard the notice of appeal raises a similar jurisdictional point to that at issue in Case 1102/3/3/08 before the Tribunal (T-Mobile (UK) Limited v OFCOM) concerning the jurisdiction of the Tribunal and which the Appellant notes will be contested by OFCOM on a similar basis, that is, that the Decision falls within the exceptions set out in Schedule 8 to the 2003 Act.

On 4 June 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 2003 Act or otherwise to determine the appeal brought by the Appellant in these proceedings (“the Preliminary Issue”).

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. 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

4 June 2008