IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1102/3/3/08
1103/3/3/008

Victoria House,
Bloomsbury Place,
London WC1A 2EB

27 June 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 Intervener

- v -

THE OFFICE OF COMMUNICATIONS Respondent

AND

TELEFÓNICA O2 UK LIMITED Appellant

- v -

THE OFFICE OF COMMUNICATIONS Respondent

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HEARING DAY TWO

A P P E A R A N C E S

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

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

Miss Dinah Rose QC, Mr. Josh Holmes and Mr. Ben Lask (instructed by the Director of Telecommunications and Competition Law, Office of Communications) appeared for the Respondent.

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THE CHAIRMAN: Miss Rose?

MISS ROSE: Madam, in the course of his submissions yesterday Mr. Pannick made the suggestion that Ofcom was vigorously pursuing this jurisdiction point in the hope of gaining some tactical advantage by being able to pursue the matter in the Administrative Court. I have been asked to raise this with the Tribunal because it is a matter of great concern to Ofcom that that wholly unfounded suggestion should have been made. Ofcom is a responsible regulator, acting in the public interest. It is not a private commercial party seeking to litigate to further its own aims. As the Tribunal will have seen, this is an important general issue of principle on which there is currently no authority, and which it is important for Ofcom to have clarity about.

It should also be noted, of course, that the issue of jurisdiction is not one which can be waived. Even if Ofcom had not taken this point there would have been an obligation on the Tribunal, when seeing s.192, to examine for itself whether it had jurisdiction. Finally, of course, as you know only too well, Ofcom is probably about the best customer that this Tribunal has. To suggest that we are trying to evade it is, frankly, absurd.

THE CHAIRMAN: We are not taking it personally.

MISS ROSE: Madam, I certainly would not have considered that you were, but my clients wanted me to put that very firmly on the record.

We have set out the questions that this Tribunal needs to resolve to determine the preliminary issue at para. 2 of our skeleton argument. It would be a good idea if you would keep that to hand throughout my submissions. It is at the front of Ofcom's additional authorities bundle. You can see that we have identified there four questions. Also, what we say is the right order in which to approach them. So, first, the question whether the Tribunal has jurisdiction to hear the appeals under s.192 interpreted in accordance with its ordinary natural meaning; secondly, if it does not have jurisdiction on that basis whether there is any breach of the United Kingdom's obligations under Article 4 by reason of the fact that this appeal would have to go to the Administrative Court, and that raises the two issues of availability of appropriate expertise and due account of the merits; thirdly, the question whether there is jurisdiction to hear the appeals either through a *Marleasing* construction or through direct effect. So, those are the four issues that we identify.

We make the following submissions: first, we say that it is clear on the proper construction of s.192 and Schedule 8 to the 2003 Act, read with s.14 of the 2006 Act, that the Tribunal does not have jurisdiction to hear this appeal. The decision that is challenged was taken under s.14 and it will be given effect to by regulations made under that section which have not yet been made.

On that basis we say, first of all, that this not an appealable decision by virtue of s.192(1) and Schedule 8, para. 40, and, in any event, we say no decision has yet been made within the meaning of s.192 because under s.192(8), which I am going to come to in a minute a decision is to be treated as made only when the power to make the regulations is exercised.

Now, I should stress that Mr. Pannick, with all due respect, does not appear to have understood our position on this. We are not suggesting that there is no decision that has been made that is amenable to judicial review. On the contrary, it is common ground in this case that the High Court does have jurisdiction to judicially review this decision. The point is a different one - that s.192 sets up a self-contained statutory scheme for appeals which includes a definition of what is to be treated as a decision for the purposes of s.192. I will come back to this point in a little while.

MR. SCOTT: Presumably you are going to take us through why you think that this is a s.14 decision.

MISS ROSE: Yes, I am. At the moment I am just summarising the submissions. I am coming back to them. So, the first is to say: not an appealable decision, both by virtue of s.192(1) and para. 40 and by virtue of s.192(8). The second submission is that we say there is no basis for the appellant's submission that Ofcom is acting under any power other than the power under s.14. The position is that Ofcom has made a policy decision to go ahead now with the auction of the whole of the 2.6 spectrum. That decision will be brought into effect by regulations under s.14 which establish the process for the auction. If no such regulations are made the decision that Ofcom have made will not, and will never, come into effect. It will never have any effect on anybody. Ofcom's policy decision only has a legal effect when the regulations are made.

We say, thirdly, that this result - that the Tribunal does not have jurisdiction - accords fully with the intention of Parliament as expressed in the clear language of the legislation. To the extent that the explanatory notes are of assistance, we say that they do not suggest any different result. There is nothing in the explanatory notes which states, or indicates, that all matters within the scope of Article 4 of the Directive are to be appealable to this Tribunal. On the contrary, the notes clearly indicate that Parliament's intention was that decisions such as that in issue in this case should not be appealed to this Tribunal, but should be referred to the High Court for judicial review. Even if the explanatory notes did not make that clear, in our submission they could not override the clear language of the legislation itself.

Our fourth submission is that the conclusion that the Tribunal has no jurisdiction is in no way incompatible with the United Kingdom's obligations under Article 4 of the Framework Directive. The Administrative Court has ample powers to take due account of the merits -

which is what Article 4 requires it to do - and the suggestion that the Administrative Court does not have sufficient expertise available to it to hear a claim of this type is, frankly, absurd and has only been faintly pursued by the appellants in these proceedings.

Fifthly, if we are wrong about that we submit that it is not possible to construe s.192 and Schedule 8 so as to be compatible with the directive. The appellants, with respect, have entirely ducked the question of how such a construction is to be achieved, and how s.192 and Schedule 8 could, on their case, be construed so as to be compatible with Article 4. I am going to come in more detail to look at Schedule 8 because in fact para. 40, which we have been looking at, is not an isolated paragraph in Schedule 8. It is typical of the type of provision in Schedule 8. On their case, if the sort of decision we are looking at today ought properly to go to the Tribunal, then so ought a whole host of other decisions that are reserved to the High Court by virtue of Schedule 8. We submit that in that situation it is impossible to adopt a *Marleasing* approach.

Now, of course, this submission does not only go to the *Marleasing* point because what it tells you is also something very significant about the intention of Parliament. The appellants have got to explain to the Tribunal how it is consistent with their case that Parliament intended all matters within Article 4 to come to this Tribunal, but Parliament has actually made detailed and specific provision for a whole number of matters which fall within Article 4 not to be appealable to this Tribunal. They simply have not grappled with that problem at all.

Finally, we submit that it is not permissible in this case simply to dis-apply parts of s.192 and Schedule 8 and by that means to give the Tribunal jurisdiction by direct effect of European Law.

MR. SCOTT: There are two parts to what you have just said. What you have said was that it is not permissible in this case to dis-apply. I take it that you are conceding that it is sometimes appropriate to dis-apply.

MISS ROSE: Yes.

MR. SCOTT: But you are going to argue that this is not one of those cases.

MISS ROSE: That is correct. Our submission is that there is a distinction to be drawn between the type of case where a Tribunal has jurisdiction to hear a claim, but where there is some restriction on the process of the claim or the grant of a remedy, or there is a defence to the claim which is inconsistent with European law. If there is a directly effective right in that situation you can dis-apply the national legislation which prevents the victim from getting a remedy. That is distinct from the situation where the national court does not have jurisdiction at all to deal with the claim under national law. If it does not have jurisdiction at all then the

direct effect of European law cannot bestow upon it jurisdiction by some free-standing European principles. The right solution in that case is, in my submission, that the matter is referred to the High Court, and the High Court deals with it compatibly with Article 4, because the High Court does have jurisdiction.

So, those, in summary, are the submissions that we make.

Can I come now to the first issue which is the question as to whether the Tribunal has jurisdiction under UK law under the statute? Can we start by looking at the decision which is in the core bundle at Tab 4. The Executive Summary internal p.1, and you can see the decision that has been made at para.1.1.

> "This Statement sets out our decisions on the award of the frequency bands 2500-2690 MHz (the 2.6 GHz 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."

So the decisions that are made are that "We are going to proceed with the award, we will proceed with the award of the whole of that spectrum. We will do so as soon as possible and here are the proposals under which the award will proceed." Those are the decisions.

Then if you go down to 1.5 they say:

> "Alongside this statement we are also publishing:
>
> * a notice of our proposal to make four statutory instruments comprising the draft regulations and order which will give effect to our policy decisions for the award."

Essentially O2 are seeking to appeal against the first part of the decision referred to in 1.1, namely the decision to proceed with the award of the whole of the spectrum, and T-Mobile are seeking to appeal the second part, namely, that the award should be made as soon as possible because they say it should be delayed until Ofcom has made a decision on the 2G refund.

There are important points to note about this decision because it is quite different from the sorts of decisions of Ofcom that this Tribunal is now perhaps rather too familiar with. The sort of decisions that the Tribunal is used to looking at are regulatory acts that have an immediate binding effect on particular parties. To give some examples a decision that mobile operators have significant market power in the mobile call termination market, and therefore a decision to impose a price control upon them obviously affects the rights and obligations of those parties because the prices they can charge for their services are limited by virtue of that decision, or a decision resolving a dispute between the parties and fixing the price that can be

charged between the parties – again the decision fixes the legal rights and obligations of those parties; or a decision in relation to the system for mobile number portability which has the effect that the players in the market come under an obligation as a result of the decision to introduce direct routing within a particular timetable and a recipient led porting system.

MR. SCOTT: Or a decision to revoke a licence, or partially to revoke a licence in the 2G area?

MISS ROSE: Yes, absolutely. We absolutely agree that if a decision is made to revoke an operator's licence that would be made under schedule 1 of the 2006 that certainly would be an appealable decision, it certainly would.

MR. SCOTT: What about a failure to make a decision in that area?

MISS ROSE: Yes, that is potentially appealable, but the circumstances in which an appeal can be brought against a failure to make a decision are limited under s.112 by the nature of the request that has been made and so our objection to T-Mobile's point about a failure to make a decision is simply they have never made a request that we should grant or revoke any licence and in those circumstances they are not in a position to appeal about the failure to do so.

MR. SCOTT: So a lack of a 192(8) request?

MISS ROSE: 192(7).

MR. SCOTT: Yes.

MISS ROSE: Yes, lack of a 192(7) request. We do not dispute that a decision to revoke a licence is appealable, but this is a decision of a completely different nature. The publication of this decision does not change anybody's legal rights or obligations. What it is is a public announcement of a policy which is going to lead to legislative action by Ofcom, and Ofcom is very unusual as being a regulator that has the power to legislate. There are some other examples, I am aware that the GMC, for example, can make statutory instruments, but it is quite unusual for a regulator to be allowed to legislate. But, as you will see, when Ofcom does make a statutory instrument it is to be treated as if it were a Minister of the Crown making a statutory instrument, and its statutory instruments are scrutinised by the Parliamentary Joint Committee on statutory instruments, they are proper legislative instruments. So this is a decision of a completely different character from the regulatory decisions which are the bread and butter of this Tribunal.

We do submit that, as a matter of policy and stepping back for a moment from the detailed statutory construction that we are going to be embroiled in very shortly, it is entirely understandable as a matter of policy why Parliament should consider that it is appropriate that a decision to legislate and the legislation produced pursuant to that should be subject to review in the Administrative Court because it is classically a matter for the Administrative Court to

consider the lawfulness of secondary legislation. It would be highly unusual to give a Tribunal, which is itself a creature of statute, the power to decide whether other legislation were or were not valid.

So that brings me to the national legislation. We say that the proper starting point for this appeal is not to consider Article 4, the proper starting point is to consider the national legislation and decide what it means, because if the Tribunal has jurisdiction over this appeal anyway there is simply no need for the Tribunal to consider the implications of Article 4 and what that requires, and whether the Administrative Court would satisfy its requirements. The first step must be to look at the national legislation and say: "Do we have jurisdiction?" Then, to say: "If we do not, what are the implications of that in European terms?" This is, in fact, the approach that was adopted by the House of Lords in the case of *Webb v EMO Air Cargo*. If I can just show you that very briefly, it is in the Ofcom bundle of authorities at tab 6. This was a case brought by a pregnant woman who was employed on a temporary contract to cover for somebody else's maternity leave and then immediately went off on maternity leave herself and, perhaps not entirely surprisingly, was dismissed. The question was whether it was unlawful sex discrimination to dismiss her, and it had always been the perceived wisdom under the Sex Discrimination Act that it was only discriminatory to dismiss a pregnant woman if you would treat a man who was going to be absent from work for a similar time more favourably; you compared the pregnant woman with a man.

It was argued in *Webb v EMO Air Cargo* that that approach was inconsistent with EC law which required special protection to be given to pregnant women. If we can just look at the approach. What happened was there was a hearing in the House of Lords in which the House of Lords decided that the Sex Discrimination Act, read in accordance with its ordinary meaning did not permit the claim to be brought. Then they referred the matter to Luxembourg for clarification of the European position. The matter came back, the ECJ having said that European law did require the woman to be protected, and the House of Lords then used *Marleasing* to adopt a strained construction of the Sex Discrimination Act, so you can see the two stage process there. First, they considered the construction of the Sex Discrimination Act as an ordinary matter of national law and then they considered a strained construction under *Marleasing*, and you can see that at p.1023 at H.

> "It was held by the industrial tribunal, the Employment Appeal Tribunal, the Court of Appeal and this House that on a proper construction of the relevant provisions of the Act of 1975 the dismissal of the applicant did not constitute unlawful discrimination against her on the ground of her sex. However, it appeared to your Lordships that it

was necessary to obtain a preliminary ruling from the European Court of Justice upon the true construction of article 2(1) of the Council Directive, to see whether the dismissal of the applicant was contrary to that article and if so to consider whether it was possible to construe the relevant provisions of the Act so as to accord with the ruling of the Court of Justice."

That, we say is the right approach.

THE CHAIRMAN: Do you say that when you are dealing with a statutory provision which is designed to implement a Directive that unless and until you get into *Marleasing* territory you do not take into account at all what the Directive says when looking at the domestic legislation? I think Mr. Pannick's point was that you have to look at the Directive to see the context of the domestic legislation which, even if you never get to a *Marleasing* construction issue, nonetheless it is helpful to look at what Europe says in order to come at the domestic legislation.

MISS ROSE: It is certainly right that if you are looking at the purpose of the legislation the desire to implement Article 4 is a relevant factor. That, of course, will not answer the question, what the legislation actually achieves in terms of its own meaning. That has to be looked at first, and then you say, "Is that result incompatible with Community law?"

Let us now come to the Statutory Scheme. It is in volume 1, tab 5, and can we go to s.192 p.48 of the bundle. We have looked already at s.192(1)(a), which is the decision which bestows the appellate jurisdiction on this Tribunal. It does so by giving jurisdiction over decisions by Ofcom:

"… under this Part of any of Parts 1 to 3 of the Wireless Telgraphy Act 2006 that is not a decision specified in Schedule 8."

So that is a single provision that defines the scope of the Tribunal's jurisdiction. It could have done it a different way. It could have simply set out a list of all the provisions under which appeals could come to the CAT, but one would suspect that it was probably a lot shorter and simpler to specify the matters that did not come to the CAT. This is not a case of general jurisdiction plus an exception, it is a single provision that establishes the limit of jurisdiction.

Then looking at s.192(2), and I am not sure if we have looked at this before:

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

That, of course, is the wording that you would expect which reflects Article 4. It raises an interesting point because one of the arguments that appears perhaps more in my learned friends' written submissions than was developed orally was that perhaps an explanation for the

exclusion of some of the matters in Schedule 8 was that they were not Article 4 matters at all, because they were decisions which did not directly affect people. I am going to come back to that submission later and explore its implications, because in fact its implications are catastrophic for the appellants' arguments.

There is an interesting and basic point here which is if the decisions in Schedule 8 were decisions which Parliament considered did not affect a person there would have been no need to list them in Schedule 8, because nobody would have been able to appeal against them anyway. A person can only appeal against a decision which affects them. Therefore, if there are certain types of decision by Ofcom which could never affect a person there would be no need to exclude them from the CAT's jurisdiction. The structure of this section is that the provisions of Schedule 8, even if they affect somebody, may not be appealed to the CAT.

We are going to come on in a minute to look at the detail of Schedule 8. As you will see, there are a number of provisions in Schedule 8 which are specifically identified in the explanatory notes to the Act as having been adopted to implement parts of the Communications Directives. We therefore have a situation where there are decisions relating to obligations under the Directives which may affect somebody which Parliament has chosen to exclude from the jurisdiction of this Tribunal. We submit that that position is fundamentally inconsistent with the argument mounted by the appellants that Parliament intended that all matters covered by Article 4 should be appealed to the CAT. It is an impossible submission.

In fact, let us go now to the list of decisions. I have prepared a little document. I say "I", of course I really mean people much more industrious than me.

MR. SCOTT: Sticking for a moment with 192(2), 192(2) seems to me to be there for two reasons which relate, first, to Article 4 as it is written; and secondly, to the experience, as I said yesterday, in some Continental countries of only addressees of a decision being able to ----

MISS ROSE: The *Tele2* issues.

MR. SCOTT: The *Tele2* issues, so in that sense what Parliament is doing there is making it clear that you do not have to be an addressee of a decision in order to appeal.

MISS ROSE: That is right, and that reinforces my point when we look at some of the decisions that are included in Schedule 8, because it is impossible to see how these could be seen to be decisions that do not affect people.

I hope you have a document that looks like this. On the front there is a summary schedule where we have listed a number of paragraphs in Schedule 8. We have then listed next to them the UK statutory provision to which they refer, then in the next column the European provision

which the explanatory notes identifies as being implemented by that particular section of the domestic legislation. Then finally is the relevant paragraph in the explanatory notes.

There is a slight complicating factor as you can see from the footnotes, which is that when originally enacted Schedule 8 dealt with the 2003 Act in relation to radio telegraphy, but that is now dealt with under the Wireless Telegraphy Act 2006. So there are some changes in section numbers, but they are equivalents.

I would like to look particularly at the Wireless Telegraphy Act ones because they are obviously the ones that are most directly relevant to this case. If you look towards the bottom of the schedule, you will see para.39 of Schedule 8 referring to s.7 of the 2006 Act. If we can take that up together with authorities bundle, tab 5, p.52, Schedule 8, you can see at p.54 that one of listed decisions is, "A decision under section 4 or 7". That is para.39, a decision under s.4 or 7 of the Wireless Telegraphy Act.

If you then go s.7 of the Wireless Telegraphy Act, p.59, you will see it is headed "Special duty in relation to television multiplexes":

> "(1) This section applies where Ofcom, in the exercise of the radio spectrum functions, have reserved frequencies for the broadcasting of television programmes.
>
> (2) Ofcom must, in carrying out those functions, exercise their powers so as to secure, so far as practicable, that the requirement in subsection (3) is satisfied.
>
> (3) The requirement is that sufficient capacity is made available on the reserved frequencies for ensuring, in the case of every licensed television multiplex service, that the qualifying services are broadcast by means of that multiplex service."

The exercise of those powers is obviously going to affect the owners of multiplexes, self-evidently.

If we look then in the explanatory notes, para.359, they are attached to the back of this document, p.73, special duty in relation to television multiplexes:

> "If Ofcom reserve frequencies for the broadcasting of television programmes, they are under a duty … to secure sufficient multiplex capacity is available ... This is in accordance with condition 1 of the Part B of the Annex to the Authorisation Directive."

So clearly a European function which will affect parties.

THE CHAIRMAN: Sorry, which paragraph of ----

MISS ROSE: Sorry, it is para.359 of the explanatory notes on p.73, attached to the back of our schedule.

THE CHAIRMAN: Why does it say s.158?

MISS ROSE: The reason it says s.158 is -- If you can see Footnote 1 on front, s.7 of the 2006 Act derives from s.158. This is the point. All of these section numbers are different because the 2006 Act came in afterwards. But, it is the same point.

MR. SCOTT: While we are in this area, it is probably worth noting before we look at the provisions of the next part, that this is unusual in that it refers to particular radio spectrum. One of the strangenesses of the next part is that for historical reasons it is all written around wireless telegraphy stations and wireless telegraphy apparatus.

MISS ROSE: Yes, it is very strange.

MR. SCOTT: In a rather antiquated way.

MISS ROSE: It is extremely antiquated and hard to understand.

MR. SCOTT: Because of the way it is written we are going to have to ask ourselves the question, "What is the scope of s.14?" But, you have helpfully taken us to a part of the legislative framework which is talking about radio spectrum. We will have to see what the implications of that are in terms of how you make decisions when the Act is not talking about specific parts of the radio spectrum.

MISS ROSE: I take that on board. We will come back to it.

If we just go back to the Schedule at para. 40 -- This is the front page schedule. There is a reference to para. 40 in Schedule 8. If you look at that paragraph there is a reference there to a decision given effect to by regulations under s.30 of the 2006 Act. If we go in the explanatory notes to para. 372 onwards you see the heading 's.168 Spectrum Trading'. S.168 is what is now s.30.

> "This section gives Ofcom a power to make regulations authorising the holder of a wireless telegraphy license, or the holder of a grant of RSA to transfer the rights and obligations under their license or grant of RSA to another person".

It is spectrum trading. So, again, the making of regulations under that section expressly carved out by Schedule 8. Again, self-evidently a decision that may affect people, and, as you can see from the middle column on the front page, it is a decision taken under the Framework Directive and the authorisation directive.

The next one down - para. 40(b) of Schedule 8 - refers to an order under s.29 of the 2006 Act. That is dealt with at para. 367 of the explanatory notes - 'Limitations on Authorised Spectrum Use'.

> "Where Ofcom consider it appropriate to limit the number of wireless telegraphy licenses or grants of RSA on certain frequencies or for certain uses for the purpose of

securing efficient spectrum use, they must make an order imposing the limitations. The purpose of this duty is to ensure fairness between potential users".

Now, that is a particularly striking example, in my submission, because there is a power to make an order limiting the use of radio spectrum between users for the purpose of ensuring fairness between those users expressly excluded from the ambit of the CAT's jurisdiction. Now, we submit that consideration of Parliament's intention cannot be focused, as the appellants have sought to make it, purely on the provisions of para. 40 of Schedule 8 to an issue in this case. You have to look at Schedule 8 as a whole, and look at the kinds of decisions that Parliament had identified as being decisions in relation to which appeals would not go to this Tribunal. We can see from the samples that I have given that manifestly Schedule 8 deals with decisions that the DTI itself acknowledged in the explanatory notes were provisions that were implementing the European directives; clearly decisions that affect parties (if they did not affect parties, they would not need to be listed anyway), but no jurisdiction to the CAT. We submit that that is not a possible situation if the appellants are right and the intention of Parliament was that all decisions that gave rise to an Article 4 right of appeal should go to the CAT. It is impossible. It cannot have been Parliament's intention.

That, of course, goes to two points: firstly, the intention of Parliament's domestic construction, and, secondly, a *Marleasing* point.

MR. SCOTT: By implication are you saying that what happens under the combination of Authorisation Directive Article 7, Framework Directive Article 9, and Framework Directive Article 8, all the interactive processes there flow into eventually s.14 in this case?

MISS ROSE: No. I am not saying they are going to s.14. I am saying that these are examples of other decisions by Ofcom that Parliament has identified and decided should not be appealable to this Tribunal. These are plainly decisions that would be appealable under Article 4, and that it was known by the government at the time fell within the ambit of Article 4 because they identify in the explanatory notes the European provisions that they are implementing, and that therefore it cannot have been Parliament's intention that all Article 4 appeals go to the CAT.

THE CHAIRMAN: So, your point is that if the appellants are right in answer to my question yesterday, "Well, how much of Schedule 8 would you have to set aside in order to correct this implementation of it?", your point is that it is not just the reference to s.14 that you would have to set aside, but you would have to set aside quite large chunks of the rest of Schedule 8.

MISS ROSE: Yes, and at that point it becomes obvious that Parliament's intention is not as they assert it to have been, because this is not a slip of the pen - it is a deliberate policy choice.

If we go back now to s.192, and to s.192(7), (a) and (b) here are both important.

"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".

Just pausing there for a moment. That is the answer to one of the questions that was raised by the Tribunal yesterday, which is that after Ofcom has made its regulations, if it acts under powers under the regulations would decisions that it takes in the exercise of those powers be appealable to this Tribunal? The answer is, "Yes". The reason that the answer is "Yes" is that an act done by Ofcom pursuant to its powers under the regulations would be the performance of a power conferred under an enactment because it would be the performance of a power conferred under s.14, but it would not fall within the scope of the exception in para. 40 because it would not be given effect to by the making of regulations under s.14. It would be the performance of a power bestowed by those regulations. So, it would be appealable to the CAT.

MR. SCOTT: Just going to the steps set out in Table 10 in the statement, my recollection is that there is a parallel moment in which you make the regulations and you propose a time, and then you appoint the time after that.

MISS ROSE: Yes.

MR. SCOTT: So, that eventual appointment of the time, you would say, is a decision made under the regulation, and that would be appealable at the appropriate time.

MISS ROSE: Yes, at the appropriate time, because the second point -- In fact, we will come to time in a minute. Let us deal with time now. That is s.192(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".

So, you cannot appeal against a decision to appoint a particular time until the power is exercised. You will have seen in the draft regulations that there are a number of specific provisions in those regulations that give Ofcom the power to appoint time for bids and so forth, but you cannot appeal against those now.

THE CHAIRMAN: You cannot appeal to the CAT against those now.

MISS ROSE: Absolutely. Of course the premise for this is that of course you can judicially review the policy decision but you cannot appeal to the CAT now against the decisions that have been taken.

Let us come back to 192(7)(b) because this is the failure to act provision:

> "(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 …"

So in order to invoke that you have to say: "Please will you grant me a licence? Please will you revoke my licence." There is only one document that T-Mobile have ever referred to as containing any such request, it is a letter of 7th May and if you look towards the end of the second paragraph you will see that they say:

> " Accordingly we must ask that if the 2.6 MHz auction is to go ahead on the published timetable then Ofcom must first rectify its failure to make a decision on refarming which it has been considering and consulting upon for more than three years."

And that is the only request to make a decision on refarming, in other words asking Ofcom to make a general policy decision, it is not a request for the grant or revocation of any licence. Indeed, they know perfectly well that Ofcom would not have the power to do that at the moment because at the moment the GSM Directive prohibits it. So, in my submission, they cannot begin to get a case based on 192(7) off the ground.

Those are the important general provisions of s.192, if we come on now to para.40 of Schedule 8, p.55, a decision given effect to by regulations under s.14, that is the scope of the exclusion. What does that mean? What does it mean to give effect to a decision? In my submission what it means is simply that the decision you make crystallises and has legal force. At the moment there is a decision here which has no legal force at all. There is a policy decision and some draft regulations. The only way that this decision will have any effect is when the regulations are made.

Giving effect to a decision is the process by which a decision on policy comes to have concrete legal effects.

There were some strange submissions, with respect to him, made by my learned friend, Mr. Pannick, yesterday t o the effect that this was a decision that had already been given effect to because it was final and it was not going to be altered by any subsequent regulations. With great respect, that misses the point. Yes, of course, this is a final policy decision and that is why we accept it is judicially reviewable, but it has not yet been brought into effect, nobody can now bid for the 2.6 spectrum because there is no legal framework permitting them to do that.

I am going to return to this point but there were some other provisions that the appellants sought to rely on as being the source of the power exercised by Ofcom in this case, and in particular they identify two – one was s.3 of the 2006 Act, and the other was s.1(3) of the 2003 Act. If we can just take a look at these for a second. Tab 6 is the 2006 Act, s.3 at p.57:

"Duties of Ofcom when carrying out functions." "In carrying out their radio spectrum functions, Ofcom must have regard, in particular, to …" and there are a number of factors listed. Self-evidently this is not a section that gives Ofcom the power to do anything at all. It is a section that instructs Ofcom as to the factors that it must have regard to when it exercise its powers under other provisions of this Act.

If my learned friends were right and this decision was taken under s.3 the whole of the parts of Schedule 8 that refer to the 2006 Act would be completely nugatory because every time Ofcom takes a decision under the 2006 Act it is bound to have regard to these factors and in that case what on earth would be the point of those provisions that we have just looked at in Schedule 8 for the 2006 Act . Again, we say this is a hopeless proposition.

They also relied on s.1(3) of the 2003 Act (tab 5).

> "Ofcom may do anything which appears to them to be incidental or conducive to the carrying out of their functions, including borrow money".

Well, with respect we say that simply is not apt to cover the making of a major general policy decision to be brought into force by regulations under s.14. But, even if they are right, and this decision was made under s.1(3) of the 2003 Act it does them no good whatsoever, because a decision under s.1(3) is not appealable to the Competition Appeal Tribunal , and so it is a futile submission in any event.

THE CHAIRMAN: Is that because it is included in Schedule 8?

MISS ROSE: No, if you go back to s.192(1)(a):

> "This section applies to the following decisions. A decision by Ofcom under this Part or any of Parts 1 to 3 of the Wireless Telegraphy Act 2006."

So it does not apply to decisions under Part 1 of the Communications Act. There were some other provisions that were raised by my learned friends, in particular s.8 of the Wireless Telegraphy Act was referred to, which is the provision in relation to grant of licences. Again, we say self-evidently this is not a decision concerning the grant or revocation of any licence. It is a policy decision which is going to result in the award of spectrum.

That brings us to s.14: "Bidding for Licences". This, we submit, is quite plainly the power that Ofcom was exercising when making this decision which will be implemented by the making of regulations under this section.

"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.

(2) The regulations may make provision with respect to –

(a) the grant of the licences to which they apply; and

(b) the terms, provisions and limitations subject to which such licences are granted …"

and then we have subsection (3) which sets out a number of non-exhaustive provisions that may be included, because it says: "The regulations may, in particular …" and there are various issues. But we say it is quite clear from s.14(1) and (2) that the scope of the regulations is not restricted to the examples of conditions set out at 14(3), That is, first of all, clear from the opening words of s.14, "Having regard to the desirability of promoting the optimal use of the electromagnetic spectrum". It is clear that these Regulations are intended to pursues policy aims.

Then the reference to "in such cases as may be specified in the Regulations", which gives Ofcom the power to specify in the Regulations the cases to which it would apply.

Then the provision at 14(2)(a), the provision with respect to the grant of the licences to which they apply and the terms, provisions, and so on.

We submit that it is clear from those provisions that the Regulations may include, in particular, specific references to the lots of spectrum for which bids will be received, as well as the whole process of the auction.

That power is to be read together with s.122(7) of the 2006 Act, which is in the Ofcom authorities bundle at tab 1. It is towards the back of the tab and it is p.72 of the internal numbering:

"Every power of Ofcom to make Regulations or an order under this Act includes power –

(a) to make different provision for different cases (including a different provision in respect of different areas);

(b) to make provisions subject to such exemptions and exceptions as Ofcom think fit; and

(c) to make such incidental, supplemental, consequential and transitional provisions as Ofcom think fit."

We submit that this power under s.14 is the only power that has been exercised and is still being exercised in this case. Ofcom has made a policy announcement about the regulations which it intends to make for an auction for the award of particular spectrum, and has made it clear that it intends to make those regulations as soon as possible. That is a decision made under s.14 and it is a decision which will come into effect when the regulations are made under s.14.

THE CHAIRMAN: It is your case that all decisions taken using the power under s.14 are decisions which are given effect to by regulations made under s.14? As I understood the appellants' case they accept as one of their alternative bases for the *vires* for making the decision that is made under s.14, but yet, they say, it is not one of the decisions under s.14 which is given effect to by regulations under s.14. I wondered whether you accepted that there was any such category of decisions and, if so, where one drew the line between those decisions and decisions which fall within para.14.

MISS ROSE: The answer is, yes, I do accept that. The only power that Ofcom has under s.14 is a power to make regulations under that section, but the regulations themselves that are made under s.14 may bestow further powers on Ofcom. If Ofcom then acts pursuant to the powers bestowed upon it under s.14 that would be a power under the enactment that would be an appealable decision. That would be a power under s.14, but it would be appealable. Yes, I accept that.

THE CHAIRMAN: As far as decisions which are taken antecedent to the making of the regulations are concerned, which include both high order decisions about the kind of spectrum that is going to be included or how the auction is going to be conducted right down to the nitty-gritty, I understood Mr. Fordham as saying, look at s.14, that deals with the nitty-gritty part, and those are the kinds of decisions to which the regulations give effect, but there are all sorts of earlier high level decisions about the auction into which category they say these challenged decisions fall, which are not decisions under the regulations but are decisions that are taken before you get to the level of decisions which are given effect to by the regulations. My question is, do you accept that there is that category of decision?

MISS ROSE: No, madam, we do not accept that, essentially for two reasons. The first reason is that any such high level policy decision would not come into effect unless and until the regulations were made. To take the example of decisions in this case, we are going to auction of the whole of the 2.6 spectrum, we are going to do it as soon as possible. That decision means nothing, it

has no effect at all. It is only when the regulations are made setting out the detail of the process of the auction and identifying all the lots of spectrum that that policy decision is brought into effect. The policy decision is brought into effect by the regulations under s.14. Otherwise it means nothing. It can only be brought into effect by those regulations. If regulations are not made under s.14 that policy decision will never come into effect. That is the first reason.

The second reason is s.192(8), which is that, in any event, the exercise of the power is not to be treated as being done when the policy is formulated, but when the actual power is exercised – in other words, when the regulations are made.

So you do not have a decision for the purposes of s.192 when the policy announcement is made, you only have a decision when the regulations are made, and the decision is brought into effect by those regulations. So those are the two interlocking reasons.

MR. SCOTT: One of the things which we are recognising is that the word "decision" is a problematic word. It is a word that is scattered about in a variety of ways. We understand that Ofcom has taken a decision to postpone the auction because of the legal proceedings before us and before the Administrative Court.

MISS ROSE: Let me just take some instructions, I do not think that is quite right. (After a pause) Ofcom has agreed not to call for qualifying bids at this stage.

MR. SCOTT: I have to say that one of the things that I find quite difficult about the Wireless Telegraphy Act is that because we have started from the historic position that we started from it does not fit terribly well with the scheme provided for in the Articles I mentioned earlier on from the Authorisation Directive and the Framework Directive, and nor was the scheme of what has been happening in terms of sorting out radio spectrum in the European Union, and that, it seems to me, is one of the reasons why you end up having to treat s.14 in the way that one has to treat it, because one has to read in to s.14 that which is not made explicit about having the structure of the radio spectrum that you are actually auctioning there and that you have chosen to have bids for under s.14 rather than going for the s.12 ----

MISS ROSE: If you are going to auction radio telegraphy licences ----

MR. SCOTT: You have got to decide what it is.

MISS ROSE: -- there has got to be something to licence. The licences can only be for spectrum. So, it is implicit that what you are licensing is spectrum. Therefore it is also implicit that your regulations will have to say what spectrum you are licensing. So, the decision that you make -- To take O2's appeal, which is essentially against the decision to license the whole of the spectrum instead of only a part of it, the decision that you make to auction the whole of the

spectrum can only be given effect to by the regulations. In fact, we can see it precisely. If we just take up the core bundle where we have the draft regulations, and if you go to Schedule 1 at p.150 of Tab 3 -- this is Schedule 1 to the draft regulations. You can see all the lots of spectrum identified. We say that self-evidently that is an indication of how these regulations give effect to the decision that O2 are complaining about, because if the proposal had been accepted there would not be as many lots.

What is a more interesting and difficult question is whether the regulations give effect to the decision about the timing of the auction. That is a much more difficult and interesting question.

MR. SCOTT: Absolutely. In Table 10 it looks as though the timing is distinguished from the making of the regulations.

MISS ROSE: Yes. Not only that, but if you look at the substance of the draft regulations themselves, you can see in fact how the timing is going to be dealt with. If you just go back to the beginning of the regulations at p.112 -- If we go to 118 - 'Application', "Only a body corporate may apply to Ofcom for a license". Then, at (iii)(a), "To apply for a license, a body corporate must on the day specified by Ofcom for receipt of applications --" and so forth. Then, at (b), "-- by a deadline specified by Ofcom on their internet website", and then at (iv), "Ofcom shall publish the day, time and deadline on their internet website". Then, the qualification stage, again at (5)(i), "Where before the date on which Ofcom notifies applicants in accordance with Regulation 9 of their determination ----" and so on. If you go through these regulations you will see that throughout a power is given to Ofcom to fix the date for the different stages. That is the point I was making about s.192(8).

The part of the decision that T-Mobile are complaining about can be characterised in one of two ways: you can look at it broadly and say, 'It was a decision to go ahead with the auction now'. That decision is brought into effect by these regulations because until these regulations are made, and without the regulations, you cannot have an auction. Or you can adopt a more granular approach and say, 'The decision on the timing of the auction is not given effect to by the regulations, but in fact is given effect to by the grant in the regulations of specific powers to Ofcom to set particular deadlines'. That means that that decision, when made, would be appealable to the CAT, but has not yet been made.

MR. SCOTT: Sticking with that, what you are saying is that if we were the Administrative Court we might say that we could review the process that is being pursued in accordance with the Authorisation and Framework Directives, and decide whether that was a proper process, but we would not have a crystallised decision before us to review.

MISS ROSE: No, because there is a difference between what is a decision for the purposes of the Administrative Court ----

MR. SCOTT: Of s.192.

MISS ROSE: -- and what is a decision for s.192. So, I have made the submission that s.192(8) gives you a statutory definition of what constitutes a decision. It is when the power is exercised. So, currently, no decision on timing on that analysis. But, the Administrative Court does not have to be troubled by any of this. The Administrative Court will look at the policy decision that Ofcom has made and say, "This policy decision is a public law decision. It is a reviewable decision now". That is another very good reason why it would be much better for this claim to proceed in the Administrative Court now rather than during the auction process by way of challenge to particular deadlines which will cause total chaos. They get what they want more efficiently in the Administrative Court.

There is another way forward potentially -----

THE CHAIRMAN: Let us be clear. Are you saying that the power under the regulation -- Suppose the regulations are made in this form and there is therefore a power for Ofcom to publish the day, times and deadline. Are you saying that when they exercise that power that is a decision that is appealable the CAT under s.192?

MISS ROSE: Yes, because if you go back to s.192, the starting point is that s.192 applies to a decision under Parts 1 to 3 of the Wireless Telegraphy Act that is not specified in Schedule 8. Then, when you go to s.192(7),

> "… 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".

The crucial words are 'under an enactment'. So, it is not just the performance of a power given by s.14, but the exercise of a power bestowed under s.14. In other words, a power bestowed under the regulations made under s.14. Then we see at s.192(8) that that decision is to be treated for the purposes of this provision as being made when the power is exercised - in other words, when the date is set.

Of course, none of this, for the purposes of s.192, is currently a crystallised decision at all. The regulations are only in draft. So, Ofcom might, for example, decide to amend the regulations and to make them in a form in which they included specified dates. That could be done. In that event, of course, the timetable would become a decision brought into effect by the regulations. None of that is crystallised at the moment. That, again, reinforces the point that at the moment there simply is not s.192 decision for the purposes ----

THE CHAIRMAN: If they were changed to set out all the deadlines in the regulations, does that then fall within para. 40?

MISS ROSE: Yes.

THE CHAIRMAN: It is a rather odd result, is it not - that if it is included in the regulations then it is only appealable by judicial review, but if it is published on the website it is appealable on the merits to this Tribunal.

MISS ROSE: We can come on to the question of whether there is any substantive difference between judicial review and the type of review this Tribunal would give, because it is going to be my submission that there is not actually in this type of case. But, in terms of the oddity of it, well, that flows from the statutory scheme because the statutory scheme distinguishes, as Mr. Fordham showed us yesterday -- the statutory scheme distinguishes between a decision given effect to by regulations and a decision given effect to by a power bestowed under regulations. The former is judicial review and the latter is CAT. The principal reason is that the Administrative Court reviews the lawfulness of secondary legislation, and the CAT reviews the merits of executive decisions by a regulator. That is the difference. The oddity, of course, here is that the regulator is also the legislator, but that, again, is Parliament's choice.

THE CHAIRMAN: Thank you.

MISS ROSE: So, that, we say, is the statutory scheme. Lord knows, it is not straightforward, but we do say that that is the right analysis.

That brings us then to the question of the intention of Parliament, as expressed in the explanatory notes. Our first submission is that, in fact, the meaning of this legislation is perfectly clear from the provisions we have just been looking at, and that that there is no ambiguity and the policy is also clear. We do submit that explanatory notes are helpful in casting light on the factual context in which legislation was enacted, and the objectives of the legislation, but that they cannot be used to override the construction of clear and unambiguous statutory language, and you have seen already the relevant passages in the NAAT's case. The appellant's argument is that they say that the explanatory notes show that it was the intention of Parliament that all appeals under Article 4(1) should be brought to this Tribunal and we submit that they do not show anything of the sort.

If we now turn up the Explanatory Notes in volume 3 of the authorities bundle, tab 60. We have looked at two sets of notes, those that were attached to the Bill and those that were attached to the Act but in fact there does not seem to be any material distinction. If we look at tab 60, p.1711, this is the crucial provision – referring to s.192:

> "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 … 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."

It is immediately clear from that that Parliament is not intending to say that everything that engages Article 4 is to go to the CAT. That would only be possible if you adopted a very narrow construction of Article 4(1) as applying only to decisions that had direct effect on a person, but we know that is not the right construction of Article 4(1). Of course, the "or" demonstrates that it is both legislative decisions and decisions that are outside the scope of the Communications Directive, so this provision specifically envisages that there are decisions within the scope of the Communications Directive that will fall within Schedule 8, and you have already seen today the provisions in the Explanatory Notes dealing with particular provisions that are dealt with in Schedule 8 identifying a particular provision for directives that they implement, so we submit that that cannot be right.

They rely heavily on para. 400, which says that: "The appeals mechanisms in the Act have been devised to meet the specific requirements of Article 4", and they say Article 4 in effect requires any person affected by a decision of Ofcom – and you will note it does not say "directly affected" there – "… which relates to networks or services … must have a right of appeal on the merits against that decision to an appeal body …" and so on.

A little further down that paragraph you will see there is a reference to "specified exceptions", which again of course is picked up at the note referring to s.192 and explained. What para.400 does not say is "all appeals under Article 4 will only be brought to the Competition Appeal Tribunal".

Mr. Pannick sought to derive some benefit from the paraphrase used by the DTI here of the words in Article 4(1) as being a right of appeal on the merits. Well, with great respect, the words used by a civil servant in the DTI when writing explanatory notes on clauses are wholly irrelevant to the question of the proper construction of Article 4(1). He says "it is helpful", with respect it is irrelevant.

They also rely on the appendix to these Explanatory Notes at 1715, and particularly to the part half way down the page which says that Article 4(1) is implemented by s.192 to 196 and

Schedule 8. They say: "Oh well, if they had meant to say 'judicial review' they would do." Well it is interesting that they say Schedule 8, you would expect them to say simply "s.192" on my learned friend's case, but the implication of including Schedule 8 is that the Schedule 8 decisions do fall within Article 4(1) but they simply have a different appeal route.

Secondly, and this is a point that Mr. Scott picked up yesterday, my learned friend said: "These provisions are exhaustive and they refer to any provision of national law that implements these Articles" but, as you pointed out yesterday, sir, they clearly are not exhaustive, because there is a reference to Article 4(2) and it says: "does not apply: appeal body in Act is judicial" , but of course we know from bitter experience that s.193 requires price control matters to be referred to the Competition Commission and that is not a judicial body. So we know that the very Act that this is purporting to be the explanatory notes of does contain provision implementing Article 4(2) and it is not mentioned, so the submission again that this is an exhaustive list of all provisions in national law, implementing the Directive, and the fact that judicial review is not mentioned proves that it was not intended again goes nowhere.

There is an interesting wrinkle to this point which is that there was a submission that appeared in the skeleton arguments of both O2 and T-Mobile which they were very quiet about orally and one can see why because if they had developed it, it would have caused them big problems. Both of the appellants in their skeleton arguments said positively that a decision that does not have direct or immediate effect on a person falls outside the scope of Article 4, and that is how they sought to explain the rubric referring to s.192 in the explanatory notes.

Let us just pick this up in their skeleton arguments. It is in T-Mobile's skeleton argument at annex B, para. B11.2, p.32 of the skeleton argument of T-Mobile:

> "The explanatory notes thus indicate, what may be seen from close examination of the Schedule 8 exceptions in any event, that the exceptions from jurisdiction under section 192 relate to:
>
> B11.1 decisions on matters falling outside the scope of the Communications Directives and
>
> B11.2 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. In such a case Article 4 is *not engaged*."

So they positively make the submission that Article 4 is not engaged by a legislative, or quasi-legislative act that requires a further act or decision to be given effect .

We see the same in O2's skeleton argument at para.36, p.9/10:

> "But the exceptions in Schedule 8 are … decisions which '*do not have immediate effect on a person*', in contrast with decisions that would '*would actually have effect on any person*.' It is submitted the clear basis for the Schedule 8 exceptions is not an intention that Article r4(2) rights should be fulfilled by proceedings in the High Court, but the hypothesis that such decisions do not have an effect on any person, and as such fall outside the scope of Article 4(1)."

If that were the right ----

THE CHAIRMAN: Wait one moment, please.

MR. SCOTT: Sorry about this, for some reason my set of papers does not have this.

MISS ROSE: I am sorry. (After a pause) Of course, if it were right that Article 4(1) only applied to a decision that had an immediate effect on a person and did not apply to a legislative decision that required further action before it came into effect then this would not be a decision within the scope of Article 4 at all, because this is precisely such a decision. That is not Ofcom's position. We say this does fall within the scope of Article 4, and that in fact what the Explanatory Notes show is that Parliament was not intending to reserve all Article 4 cases to the CAT.

There is another problem with the appellants' analysis there which is that they have ignored s.192(2), because they say, "Oh, well, they are listed in Schedule 8 because no one is directly affected by them and therefore they do not fall within Article 4". In that case, why is there any need to list them at all because s.192(2) will have the same effect? So for those reasons we submit that analysis fails.

MR. SCOTT: I think it is just worth saying for the record that neither 192(2) nor Article 4(1) qualifies the word "affected".

MISS ROSE: Absolutely, and of course para.400 that we looked at does not qualify the word "affected" either. It is only para.116 dealing with s.192 that uses the words "immediately affected" to explain why these decisions are not CAT decisions, not to suggest or explain that they are not within the scope of Article 4(1).

So we submit that the appellants cannot maintain the position, whether from the statutory language or from the legislative history, as shown in the Explanatory Notes, that whatever the intention of Parliament all Article 4(1) appeals should go to the CAT.

There were some other arguments that were raised by the appellants in relation to the proper construction of Schedule 8. First there was their argument that this was a separate policy decision that was not going to be given effect by the regulations, and you have my submissions

on that point, that essentially these decisions have no effect until the regulations come in. Either they will be given effect by the regulations or by action under the regulations.

Of course, in relation to the split auction decision, the way that they put it is just another way of describing the decision to auction the whole spectrum, which is manifestly given effect by Schedule 1.

Mr. Pannick actually made the submission that para.40 of Schedule 8 is concerned with regulations which actually implement the decision of which complaint is made. Well, Schedule 1 does implement the decision of which his clients complain.

Could we turn to our skeleton argument at paras.10 to 16. We have identified there a number of points that were raised in the skeleton arguments of the appellants. Most of these were not developed by them orally but I simply refer the Tribunal to paras.10 to 16 of our skeleton argument to show our response to the points that they made on construction in their skeleton arguments. We do say it is of interest that they have, with respect, cast about for a way to put their case. Indeed, the most spectacular example of the way in which the appellants have desperately cast about for a way to find that this Tribunal has jurisdiction under national law is the whole Smorgasbord of different statutory provisions that they have sought to invoke at different stages as being the provision under which Ofcom's power to make this decision was made.

We have prepared a little note showing the evolution of the appellants' case on this question, which has been handed up. Looking at p.1, we see that in T-Mobile's original letter before claim – of course, the Tribunal will recall that proceedings were issued in the Administrative Court before there was any appeal here – was sent on 28th April. At that time T-Mobile appeared to be accepting our position that the decision was to be given effect by regulations. You can see the quote we have set out here:

> "Ofcom has confirmed the decision is to be given effect to by Regulations, drafts of which were published for consultation on 4th April."

So at that stage they were quite content with that analysis.

Then there was their letter on jurisdiction of 9th May where they relied on s.3 of the 2006 Act and you have already have my submission on that.

They also made their failure to act point, and again you have my submission on that.

Then in the Notice of Appeal we have s.3 appearing again, and now we have some more sections coming in, s.8 and s.9 on Schedule 1 of the 2006 Act, contrary to 192(7)(b), so this is the failure to grant or revoke licences, even though they have not requested it.

Another new one, 1(1)(b) of the 2006 Act.

Then O2's Notice of Appeal, s.3 and s.4 of the Communications Act were relied on. Those, as you know, are Ofcom's general statutory duties to promote the interests of consumers, and they are open to precisely the same objections as we canvassed earlier. Firstly, they do not give Ofcom any powers at all, the just indicate the duties that it is under when it performs its powers; and secondly, they are not decisions that are appealable to the CAT because they are under Part 1 of the 2003 Act.

Then over the page, T-Mobile's skeleton, we see how they put it there; O2's skeleton now relying for the first time on s.1(3) of the 2003 Act; and rather vaguely on Parts 1 to 3 of the Wireless Telegraphy Act, but now no reference to s.3 or s.4 of the 2003 Act.

Then in oral submissions Mr. Pannick was saying that he relied on s.1(2) of the 2003 Act; or alternatively, s.3 of the 2006 Act; but Mr. Fordham taking a different approach saying it was under Parts 1 and 2 of the 2006 Act which were to be regarded as a cluster which in some way bestowed power; and then pinning his colours to s.3 of the 2006 Act, but making some references to s.192(7)(b) and s.8 and s.9 point.

We say, finally, that they relied on ten different provisions in their attempts to find some statutory power other than the obvious one, which is the power under s.14.

THE CHAIRMAN: They did seem to be relying on power under s.14, albeit saying that this particular exercise of that power was not a decision given effect to by regulation.

MISS ROSE: I accept that was said as well, and you have my submissions on that. The point I am making here is that we can see from these submissions and the inconsistency of them a certain desperation in the appellants' approach as they try to find some means by which the Tribunal has jurisdiction. It is normally fairly obvious what power a regulator has acted under.

THE CHAIRMAN: The reason why it is not obvious in this case may not be entirely their fault. Could you just repeat perhaps your submissions in relation to this idea of there being decisions taken under s.14 which are not decisions taken under regulations which precede the making of the regulations but which are nonetheless not decisions given effect to by regulations.

MISS ROSE: We say that there is no such decision because a decision under s.14, which is neither given effect by regulations are given effect by powers introduced under regulations has no other legal means of coming into effect. There is no way that Ofcom can implement its policy on the auction of the spectrum without bringing it into effect through regulations under s.14. If it does not do that it is just words on paper, it has no legal force. So there is no power under s.14 except the power to make regulations. So, there are two types ----

THE CHAIRMAN: Included in that power to make regulations is the power implicitly to do everything necessary that you need to do in order to arrive at the content of those regulations.

MISS ROSE: Yes, madam. But, when you ask, "How is the decision given legal effect?", it is given effect through the regulations, either directly, in which case judicial review, or through powers in the regulations, in which case appeal.

MR. SCOTT: In 17 of the note you have just handed up you referred to Mr. Fordham and the failure to -- Can I just be clear about this? As I understand it you are not saying that there could not be a proper appeal if there had been a proper request, followed by a failure to act in relation to *Refarming*, but you are saying to us that in terms of the requirements of the super ordinate European framework, the time for that is not yet.

MISS ROSE: That is certainly true. It would not be lawful for Ofcom to grant or revoke any licenses to liberalise the 2G spectrum at the moment. It would have no power to do so. That does not go to jurisdiction. It is a reason why the appeal is misconceived, if you like.

MR. SCOTT: It is just that in thinking about that point, without going into the substance, one just wants to contextualise it.

MISS ROSE: Yes, that is right. That is right, we do say hat.

THE CHAIRMAN: So, is this right: that s.192(7) - you would accept that insofar as there is a very wide category of decisions which can be within Article 4(1) and within Article 192, any failure to make any of those decisions can crystallise into a decision if there is a requests to make it. So, you are not saying that any other form of request to make a decision has to be read as meaning a decision like the grant of an application or something like that -- that the trigger for the failure can be a request, to whichever powers that failure relates.

MISS ROSE: It could not be a request to make regulations under s.14. If you go back to s.192(7), in this section and Schedule 8 the references to a decision under an enactment include references to a failure to make a decision and failure to exercise a power only where the failure constitutes a failure to grant an application or any other form of request to make the decision -- So, that is saying that a decision, as defined in this section and Schedule 8, includes a failure to comply with a request. But, of course, if the decision is itself excluded by Schedule 8, a failure to make that decision would not be appealable either.

THE CHAIRMAN: No. I understand. But, you are not saying that there is some narrower category of failures to take a decision than positive decisions.

MISS ROSE: No, but there must be a request to make that particular decision.

THE CHAIRMAN: Thank you.

MISS ROSE: That concludes my submissions on the first issue of domestic construction, and brings me to the question of whether if the CAT does not have jurisdiction there is a breach of Article 4(1) of the Directive.

In order to succeed the appellants must satisfy you that the High Court, with its enormous experience, its inherent jurisdiction and its broad powers is incapable - incapable - of meeting the requirements of Article 4. We say that is a pretty ambitious task that they have set themselves. We start with Article 4 itself. It is worth going back to it because it has been somewhat misquoted by the appellants. As we shall see in a moment it is a very carefully drafted provision which was the result of a compromise. There was obviously something of a turf war over the scope of Article 4 between the Council and the Parliament.

MR. SCOTT: Just before you proceed, in other contexts your regulatory brethren have argued before us for a very narrow construction of judicial review. I am conscious that what you are about to argue you are arguing before us and not before the High Court, but that what you are about to argue is an argument that may, in due course, be cited against you by the other parties.

MISS ROSE: Am I being arrested and cautioned?

MR. SCOTT: It is only proper to caution you.

MISS ROSE: I take due cognisance of the caution. Of course, our position is a little more subtle than that. We are not saying, "There is no problem because the High Court can conduct a full appeal on the merits". What we are saying is, "This is not the type of decision in which it would be appropriate for the CAT to conduct a full appeal on the merits". But, it makes no difference, given the nature of the particulars, whether you were to have this as an appeal in the CAT or as a judicial review in the High Court. In either case what you are looking at is a high level exercise of discretion by a regulator in an area of economic policy going far beyond the narrow considerations, "Does this company have SMP? How do we resolve this dispute?" Whether you are in the CAT or in the High Court you would give a margin of discretion to the regulator in that situation.

So, what our submission is, coming back to Article 4, is that Article 4 clearly does not require an appeal on the merits. We heard so many times yesterday from my learned friends that it did. But, what it does require is that Member States shall ensure that the merits of the case are duly taken into account. That is quite different. Of course, the question of what it means for merits to be duly taken into account is likely to be high context-sensitive. There will be some decisions where the CAT feels that it is in as good a position as a decision-maker to make that decision. It has seen the evidence. It is going to decide 'Yes' or 'No', what is the right price for this particular service. It is going to make a decision. Indeed, it will make a decision on that very question.

However, there will be other decisions - and particularly where the CAT is looking at exercises of discretion - and particularly in policy areas - where the CAT will not be saying, "What is the

right or wrong answer" -- where the CAT will not be trying to substitute its judgment for the judgment of Ofcom, or to re-take the decision. What the CAT will be looking at is whether there are any errors of approach, errors of fact, errors of analysis; whether different factors have been properly balanced; whether a proper proportionality exercise has been undertaken. In performing those functions, we submit, the CAT's function is not very different from the High Court's.

Now, it is right that traditionally, in regulatory judicial review, the High Court has taken a particularly hands-off approach. I do accept - I do accept - that that approach would not be appropriate in this judicial review because that approach has to be mediated through Article 4. Therefore the High Court must take due account of the merits. But, of course, that is precisely what the Administrative Court does every day of the week when it is considering human rights claims; when it is considering other European law claims. It is very familiar with dealing with questions of proportionality, and error of fact is a very well-established classic ground of judicial review.

So, the question that we pose to the appellants is, "What on earth is it that you are saying that the CAT can do that the High Court cannot?"

THE CHAIRMAN: They answered that question by listing large chunks of their notice of appeal here, which have been taken out of the judicial review application as referring to the merits which would not then be something that the High Court would entertain. Do you say that they have applied an over-enthusiastic, self-denying ordnance and in fact there need not be any difference between their pleadings in the two jurisdictions?

MISS ROSE: We say two things. First, we do not necessarily accept that their pleading before the CAT is appropriate and in particular where they say things in their pleadings such as this decision was wrong, we certainly do not accept that that is the right approach for the CAT to apply when considering a policy decision like this, so we certainly do not accept that.

Secondly, the obvious points that those are self-serving documents, drafted by them in the knowledge that they were going to have a jurisdiction hearing in front of the CAT, and therefore the fact that they tried to draw some kind of a line between the case that they are running in the CAT and the case they are running in the Administrative Court perhaps ought not to come as a great surprise to anybody. Also, O2 have not actually brought proceedings for judicial review. All that they have done is to intervene in T-Mobile's claim for judicial review, and in those circumstances again it is not surprising that they are proceeding on a somewhat narrower basis in the Administrative Court than in this Tribunal, but again that was their choice. We say that that certainly cannot assist them, it is a matter of principle.

On this, my learned friend, Mr. Pannick was spectacularly unhelpful to this Tribunal because first of all he said that it would be 'folly' for him to suggest that there was a fixed standard applicable under Article 4, so he accepts that Article 4 is a flexible standard, but he declined the opportunity to enlighten the Tribunal as to what he said was the degree of flexibility, and he said the Tribunal did not need to decide that.

The difficulty with that is that if he will not say what is the ambit of giving due account of the merits under Article 4, how is he in a position to make the submission to the Tribunal that the Administrative Court cannot fulfil those functions. He has not defined the standard that he says applies under Article 4 before making the submission that the Administrative Court cannot meet the same standard.

THE CHAIRMAN: Well he says that the standard under Article 4 is that there has to be an appeal on the merits and however stretchy judicial review is, so the House of Lords said in various authorities, it is still not an appeal on the merits.

MISS ROSE: Well, madam, the first problem with that is that of course Article 4 does not say that it is an appeal on the merits.

THE CHAIRMAN: Well that is the primary answer to that.

MISS ROSE: Yes, that is the primary answer. The second point is that it is, with respect, over simplistic to say that the judicial review court does not consider the merits. Now, at this point I would like to show the Tribunal what Mr. Pannick so eloquently referred to as "The Book", Mr. Fordham's book, and I hope some extracts have been handed up. I am not just citing this to tease him, it is relevant as well. Interestingly he has a section in which he deals with what he calls "The forbidden method", this is at p.305, the first page you have here:

> "Judges will not intervene as if matters for the public body's judgement were for the Court's judgment."

At 15.1 he refers to what he calls the "forbidden substitutionary approach."

> "Every public body has its own proper role and has matters which it is to be trusted to decide for itself. The Courts are careful to avoid usurping that role and interfering whenever it might disagree as regards those matters. There are various ways of formulating the warning against impermissible interference. But however it is expressed, the idea of a forbidden approach is essential in understanding and applying principles of judicial review."

And he says that is at the heart of "soft" review. Then he goes through a number of the formulations. If you go over the page to 307, para.15.2 "Not an appeal".

"This is a first, and favourite, formula for warning against the forbidden substitutionary approach. But it is not the best one. There is in the law no universal model of an 'appeal', and many appeal models (eg. Appeal 'on a point of law') are very similar to judicial review. Whether judicial review is like 'an appeal' depends on what sort of 'appeal' and what sort of issue, is in mind. And on some issues (eg. Questions of law or precedent fact), judicial review is like even a 'substitutionary' appeal."

Then at 15.3: "Not the decision but the manner of reaching it".

"This is another formula for identifying the approach which is impermissible on judicial review. It is found typically in procedural unfairness cases, in which context it is self-evidently a description of the Court' focus. It can also be apt for cases about examining the public authority's reasoning, including questions such as whether all relevancies and no irrelevancies featured. But as a general statement of principle, it is surely over-simplistic. In certain circumstances, of which unreasonableness and substantive unfairness are good examples, the Court is indeed called upon to examine the ultimate decision …"

And I stress the words: "to examine the ultimate decision." "What matters is how the court should go about doing so."

Then at 15.6 "Legality not correctness":

"This formulation draws an important distinction between (1) arguing that a decision-maker merely went 'wrong' (impermissible) and (2) arguing that there was a recognisable 'public law wrong' (necessary). There are two pitfalls. First, that 'legality' needs to be understood in its broader sense of all grounds for judicial review (including questions such as reasonableness and fairness). Secondly, that 'legality' can itself involve a 'correctness'-review, for example where the question is whether the public body went wrong (incorrect) on a question of law or precedent fact."

Then at 15.5 (p,310) "Not the merits".

"This is another favourite formulation of the warning against the forbidden substitutionary approach. It works, provided that what is ruled out is (1) substitutionary (correctness) review, in relation to (2) 'soft' questions (eg judgment, discretion, policy). Beyond t hose restrictions, there may well be 'merits review' (a term which is perhaps apt to mislead), at least in 'correcting' certain hard-edged questions and closely scrutinising others (eg justification for rights-interference)."

So what Mr. Fordham is saying there is "yes", you will not substitute for judgment discretion policy, but you will scrutinise the substance of decisions for errors, including errors of fact. Then at 15.6: "Court does not substitute its own judgment".

> "This is perhaps the best of the different formulations … it reflects the idea that the warning applies only to certain types of questions (labelled here as matters of 'judgment'). Secondly, it explains what it is that judges should not do, in relation to such questions; the court reviews the matter and can intervene and does not do so by imposing or substituting its own conclusion, as if it were the primary decision-maker."

and we say neither does the CAT. "Thirdly, it also reflects the position as to remedy: if the Court intervenes it will be to remit the matter."

Then at 31.6 "Flexi-principles".

> "Courts rightly have an aversion to hard and fast rules in administrative law. They prefer to formulate principles which have an in-built capacity to accommodate the context and circumstances of any given case. The most celebrated of judicial review's flexi-principles is procedural fairness though in truth all review principles display a similar adaptability."

Again, we say that is significant because of course the High Court considering judicial review in this case would do so in the context of Article 4.

Then there are some more paragraphs – these do not follow on but from later passages in the book: 32.4 "Other modified review situations".

> "There are many identifiable situations where, because of the particular context and subject-matter, judicial review is available on some only of the 'conventional' grounds, or only in an adapted way. Not that there are any neat pigeon-holes or rigid adjustments. For all grounds for judicial review are invariably contextual and capable of modification so as to accommodate the interests of justice in the particular context and circumstances. In truth, it is now 'conventional' wisdom that judicial review is adaptable to fit any particular context."

Then at 58.5 "Latitude and intensity of review":

"Hand in hand with proportionality principles is a concept of 'latitude' which recognises that the Court does not become the primary decision-maker on matters of policy, judgment and discretion. Rather, public authorities should be left with room to make legitimate choices. The width of the latitude (and the intensity of review which it dictates) can change, depending on the context and circumstances. In other words, the proportionality is a 'flexi-principle'. This latitude connotes the appropriate degree of restraint by court towards public body. In the

Strasbourg jurisprudence the concept of latitude comes with a health warning: it has a second super-added deference .."

And so forth.

> "This means that Human Rights Act review needs its own distinct concept of latitude (the 'discretionary area of judgment'). The need for restraint should not be overstated. It remains the role and responsibility of the Court to decide whether, in its judgment, the requirement of proportionality is satisfied."

We submit that those statements admirably express concisely express the power and flexibility of judicial review and its ability to adapt to particular circumstances. What remains constant, certainly, is respect for the exercise of judgment of the decision maker who has exercised discretion. But we submit that is inevitable when you are looking at a decision of the type that you are looking at here. Any other approach will be wrong in principle, and would exceed the requirement of giving due consideration to the merits that is required under Article 4.

MR. SCOTT: Just while you are on p.944 we put to Mr. Pannick, and he responded on the subject of proportionality, I see proportionality gets cut off here.

MISS ROSE: These are small "bites", yes.

MR. SCOTT: I understand. The question would arise in the case of the Administrative Court having to ask itself the question, how does it apply Article 4, the extent to which it overrides normal domestic approaches to reasonableness and proportionality and substitutes European concepts of reasonableness and proportionality. I wondered, having heard from Mr. Pannick, whether you wanted to say more on that particular point?

MISS ROSE: It is absolutely commonplace for the Administrative Court to do that. It does it all the time in human rights cases where it substitutes Strasbourg concepts of proportionality and it does it in EC law cases when it substitutes European notions of proportionality. It is the bread and butter of the Administrative Court.

There are two cases of this Tribunal that illustrate the flexibility of the approach that the CAT will adopt. They are cases that I know you are familiar with, the *H3G* decision and the *T-Mobile* decision, in each of which you can see a different formulation by the CAT of its approach. Can we just pick up the *H3G* case, which is at tab 50 at the back of volume 2. It is para.164. This of course was whether or not it was proportionate, correct, to oppose a price control, so not an exercise in discretion in the sense that we are talking about at all, not a policy decision, a decision in which Ofcom was considering the circumstances of an individual operator, looking at the facts surrounding that operator and asking, is it or is it not appropriate

to impose a price control. There the Tribunal took a strict and rigorous approach, and particularly the last sentence said:

> "The question for the Tribunal is not whether the decision to impose a price control was within the range of reasonable response but whether the decision was the right one."

There was a different approach taken by this Tribunal in the T-Mobile case when considering the dispute resolution power. That is at tab 51 in volume 3, paras.80 to 82. We looked at this yesterday. Here the Tribunal takes a different approach to the suggestion that there may be more than one reasonable response. It says at para.82:

> "It is also common ground that there may, in relation to any particular dispute, be a number of different approaches which Ofcom could reasonably adopt in arriving at its determination. There may well be no single 'right answer' to the dispute. To that extent, the Tribunal may … be slow to overturn a decision which is arrived at by an appropriate methodology even if the dissatisfied party can suggest other ways …"

- and so on. So clearly there the CAT not seeking to substitute its own judgment for that of Ofcom. That is an approach that I accept the Administrative Court could not adopt. It would be very surprising to see the Administrative Court deciding to substitute its judgment on a matter of policy and discretion for that of the Regulator.

That is not the approach the CAT adopts here either. It says that, provided that the Regulator has adopted an appropriate methodology and has come to a reasonable result and provided that you cannot attack the underlying approach, analysis or findings of fact, then the decision will stand. What of course was significant in that case that the methodology was hopelessly flawed. That had to be demonstrated.

It must be said that the points that were made in that appeal could just as well have been made in the Administrative Court. Of course, this decision is *a fortiori* the *TRD* decision, because in the *TRD* decision, yes, you are looking at an exercise of discretion, but in a very confined area where it is simply a dispute between a number of MNOs. Here you are looking at a macro policy decision which considers the conflicting interests of a very wide range of parties. Today you have got the incumbent operators who want to develop high speed mobile broadband before anyone else can get into the market. Intervening are parties like BT and Intel who want to get into the market and who see that there is a limited window opportunity for them to get into it. There are other parties who may be smaller who may have other new technologies that they want to develop. Then there is the public interest, what is best going to serve consumers, what is the most efficient use of the spectrum?

There are other problems that Ofcom has to grapple with such as its own knowledge of its internal processes in relation to the 2G refarm, how long is it going to take before it makes a decision, how long will it take before that decision can be implemented given the current uncertainty at European level? There are a whole range of factors which involve parties, all of whom are very unlikely to be before any individual Tribunal, and assessments of judgment about the public interest that, in my submission, are not appropriate for any court or tribunal. Whether this was the CAT or the Administrative Court the approach, in my submission, would be the same and it would involve assessing the appropriateness of the methodology, the correctness of the facts but not substituting the judgment of the CAT for the judgment of the Regulator.

That, we submit, is entirely in accordance both with s.192 and with Article 4. We submit that, in fact, Article 4 represents a carefully crafted compromise between a full merits review and leaving it up to the Member States to decide what kind of appeal process to have.

I would just like to follow through the legislative history on that point. We have dealt with this in our skeleton argument at para.32. We explain at 32.1 that the origin of this requirement can be traced from the European Parliament's first reading. The text adopted at that stage read:

> "The appeal body shall 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."

You have that document at tab 14 of Ofcom's authorities bundle. This is March 2001.

THE CHAIRMAN: Are there any points that you want to draw to our attention other than the point that ----

MISS ROSE: Yes, madam, I do not think I need to turn it up, but the point that we make at 32.2 is that the text is amended to require only that due account is taken of the merits, and that that requirement was imposed on the Member States leaving national legal orders to decide on the method. We also make a point about recital 12, that it is without prejudice to the division of competence within national judicial systems. So the policy choice made in the course of a passage in the Directive is to water down the requirement and to say to take due account of the merits whilst respecting the national legal systems.

MR. SCOTT: The national legal systems are in what one might describe as a "dynamic" state.

MISS ROSE: They are, and you can see this also in our skeleton argument where we have set out the comparative material. You can see that the great majority of Member States do not have a specialist tribunal. Most of them use their administrative law courts and indeed we have given the example of Ireland which did have a specialist tribunal which has bitten the dust, and the decision has been taken by Ireland to refer the matter to the Administrative Court. That point,

of course, is particularly relevant on the question of availability of expertise, because again we submit that is fatal to the suggestion of the appellants that you have to have a specialist court. I am going to come on to expertise in a moment.

THE CHAIRMAN: We do not know whether those High Courts across Member States, what kind of tests or standards they apply, but they are not a specialist court.

MISS ROSE: They are not a specialist court, no. That point goes more to the question of availability of expertise than it does to due account of the merits.

Now, there is some case law that I want to show you briefly. First of all, the case of *Daly*. This is about the flexibility of judicial review. It may not be necessary to labour the point too greatly, but if we go to Volume 2, Tab 39, at p.547, just between E and F there is a passage we looked at yesterday by Lord Steyn where he is discussing the difference between proportionality and *Wednesbury*. He says,

> "First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision-maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interest and considerations. Thirdly even the heightened scrutiny test developed in *R -v- Ministry of Defence, ex parte Smith* is not necessarily appropriate to the protection of human rights".

For the record, and mindful of the caution, I am not conceding that that is the approach that the High Court should adopt in this case. It will certainly be for argument before the High Court - assuming that we were to win here - as to what is the right approach to be adopted by the High Court in accordance with Article 4. My submission would be that that is actually somewhat more intrusive than the level of review that is appropriate in this case because what is being discussed there is the kind of strict proportionality analysis appropriate to a violation of a human right. But, what it shows certainly is the power that the Administrative Court has to consider the balance, to consider the weight given to particular factors -- It is a rigorous level of scrutiny. When you combine that with the court's power to identify errors of fact, then in our submission there simply is no jurisdictional problem with the High Court on the merits. What this case -and also the Denbigh case that was cited yesterday, which I do not need to go back to -- What these cases show is just how adaptable and flexible judicial review is. We have a jurisdiction that only a few years ago was limited to the classic grounds of illegality, irrationality and unfairness, which has now expanded massively to cope with new obligations derived both from human rights and EC law, and yet the submission of the appellants is that

that court is incapable of accommodating the requirements of Article 4. We submit that that is just not right.

MR. SCOTT: How do you respond to the point made by Lord Steyn in para. 28 where he says,

"This does not mean that there has been a shift to merits review"?

MISS ROSE: The answer is that this is a semantic point because it depends what you mean by 'merits review'. That was the significance of the passages that I was showing you from Mr. Fordham's book because what he usefully discusses in the first of those passages at 15.1 to 15.6 is how these phrases are used, but they do not actually mean very much. What they really mean is that you do not substitute your judgment for the judgment of the decision-maker. That is what he means there by 'merits review'.

THE CHAIRMAN: But if Mr. Pannick is right to say that what Article 4(1) requires is a full merits appeal, do you accept that that would then require that to come here? I mean, is it an essential plank of your case that there is a difference between an appeal on the merits and an appeal which takes due account of the merits so that the paraphrase, as you put it, by the civil servant at the DTI in para. 400 of the explanatory notes was actually not right - that it is not to read Article 4(1) as requiring a full merits appeal.

MISS ROSE: There are some circumstances in which it would be difficult to see the Administrative Court conducting the level of scrutiny that this Tribunal would, because there are some circumstances in which this Tribunal would be coming very close -- indeed, in some circumstances substituting its decision for that of the decision-maker. It is fair to say that I am not at the moment submitting what is the ceiling of the Administrative Court's jurisdiction -- What is the point beyond which it cannot go? I think the truth is that nobody knows the answer to that question. Nobody can point to a case where the Administrative Court has said, "We've actually got an obligation to do this under EC law, but we are not going to. We cannot". It has never happened.

THE CHAIRMAN: So, if the Communications Act had not conferred any jurisdiction on the CAT and simply allowed the revocation of licenses, decisions, etc., all to be done by way of judicial review, you do not have to go so far as to say, "Well, that would still be a proper implementation ----"

MISS ROSE: I do not have to go so far as that, but I do not concede that it would not have been.

THE CHAIRMAN: No. But, what you say is that whether it is the CAT or judicial review, you have to look at the decision and see what is the appropriate extent to duly take account of the merits.

MISS ROSE: Yes, and, of course, it is not the individual decision - it is the type of decision. That, of course, is highly significant because, of course, is highly significant because, of course, this is the type of decision that Parliament wanted to go to the Administrative Court. The reason that Parliament wanted it to go to the Administrative Court is for all the reasons that we have been discussing - because this is an exercise of policy and discretion, and not an individual regulatory determination about the rights and obligations of a particular MNO.

So, there is a kind of overlap between the policy in Schedule 8 and the points that I am making about the jurisdiction of the CAT and of the Administrative Court.

MR. SCOTT: I suppose one of the things which interests me about the matters that have been cited before us is that they have been domestic - largely domestic - and one of the issues that is going on across the Member States at the moment is the question about how far there is an interaction between the jurisprudence in Luxembourg of review in Europe and national jurisdiction so that in some Member States what happened in *Tetra Laval* has been seen as a more intrusive standard of review to the standard of review in that Member State, and in some Member States that has been seen as less intrusive. That is what I meant by the dynamic that is going on.

MISS ROSE: Yes, I see that.

MR. SCOTT: People are trying to work out, "How do we handle matters like this which come up from the regulatory body to whatever appellate or reviewing body is appointed by the national system?"

MISS ROSE: That, of course, makes it even more unattractive to submit that the Administrative Court, with its dynamic and flexible jurisdiction, is incapable of accommodating that standard, which is itself dynamic and flexible.

If I can just refer you to paras. 34 to 37 of our skeleton argument? We have there set out some authorities about the adaptability of the judicial review standard. I do not seek to go to them, but I simply invite you to look at them. I think you have probably got the point by now - I have slightly laboured it.

The final point though is that if there was some problem with the normal scope of the Administrative Court's jurisdiction, the answer is that that jurisdiction can be developed. That is the *Unibet* case, at Volume 1, Tab 20. The relevant paragraph is para.44 at p.749 (619 at the bottom of the page).

"Moreover, it is for the national courts to interpret the procedural rules governing actions brought before them, such as the requirement for there to be a specific legal relationship between the applicant and the state, in such a way as to enable those

> rules, wherever possible, to be implemented in such a manner as to contribute to the attainment of the objective …. Of ensuring effective judicial protection of an individual's rights under Community law."

So if there were a shortfall it would be the duty of the Administrative Court to make it up. Those are our submissions on taking due account of the merits, and if I can now turn, somewhat more briefly, I hope, to the question of expertise. It is fair to say that Mr. Pannick's confidence in the submission did not appear to be terribly great and he was keen to stress that it was a free-standing point and that he did not need to succeed on it. With respect, he was right to take that cautious approach because it really is an unsustainable approach to suggest that the Administrative Court does not have available to it the necessary expertise, and I stress "available to it" because particularly in the skeleton argument of O2 the words "available to it" appear to have got lost and what appear to be being considered was whether the court itself had the necessary expertise which, of course, is not the test again under Article 4.

Once again, if we take up our skeleton argument, if you go to para. 25 we have set out the legislative history in relation to the question of expertise. Just one point I would make here is that the account that Mr. Pannick gave to you of the legislative history left out a crucial first step, because Mr. Pannick suggested that the first step was that which was adopted in September 2001, but in fact the first version is that which was produced in March 2001 which was by the European Parliament where we see quite an intrusive text which required Member States to ensure that the appeal body has the appropriate expertise, so the opening gambit at the European Parliament was that the appeal body itself must have the appropriate expertise. The Council watered that down, took out references to expertise and just said that it must be consistent with legal constitutions and judicial traditions. Then the Parliament put it back in, but then the text that was eventually adopted was different, "whether the appropriate expertise available to it" instead of "has the appropriate expertise". So again, you can see a process of negotiation there between the Council and the Parliament resulting in a compromise, but the court itself need not have the appropriate expertise, but it should have the expertise available to it. It is in that context that we have pointed to the wide variation in the way that these provisions have been implemented and the fact that, in fact, an expert court such as this Tribunal is the exception rather than the rule.

There are, of course, many mechanisms open to the High Court to ensure that it does have available to it the appropriate expertise and the most obvious and commonly used is the receipt of expert evidence, which may be either joint or from each side independently, and the purpose of expert witnesses is to assist the court with their objective and independent views. But if the

court considered that to be inadequate, and again I am not suggesting that will be necessary in this case, the court has the power to appoint expert assessors, and that power is under s.70 of the Supreme Court Act. You can see that in Ofcom's additional authorities bundle at the front, the first tab.

> "In any cause or matter before the High Court the court may, if it thinks it expedient to do so, call in the aid of one or more assessors specially qualified, and hear and dispose of the cause or matter wholly or partially with their assistance."

There are provisions under the Civil Procedure Rules for doing that which you have at tab 17 of the same bundle.

MR. SCOTT: I asked Mr. Pannick and Mr. Fordham if they had any experience of that being done, knowing that that is the way forward that Guernsey has now selected. They had no experience of that having happened. Have you experience of that?

MISS ROSE: I have no experience of that happening and of course that does not matter, all that matters is that they have the power of the court that says it could appoint them. The use of expert evidence to assist in relation to the establishment of proportionality in judicial review is again well established, that is the *Seahawk Marine Foods* case, again Ofcom's bundle of authorities tab 8, and paras. 34 to 35.

THE CHAIRMAN: I think we can look at that.

MISS ROSE: Yes, I simply give you that reference. We have made the points in our skeleton argument at paras. 30 and 31 about the wide range of highly technical issues that the High Court grapples with, and it is not irrelevant to make the point that appeal from this Tribunal goes to the Court of Appeal. The Court of Appeal, yes, of course, will only be considering points of law, but it will have to do so in the highly technical context of the matters considered by this Tribunal.

Mr. Scott made a reference yesterday to *Launder* which is at tab 31 and to the point that was made there about the court lacking expertise. Without having to turn it up can I just give you the reference, it is tab 31, p.857C to D. But this is a completely different type of expertise that is being talked about because that was a case in which the claimant was complaining that he was going to be extradited to China and that China would not comply with its international treaty obligations. The exercise of judgment that the decision maker had had to make was, as the court said, a hearts and minds judgment – what is the attitude of the Chinese. You can entirely see why on that question of high diplomatic relations the House of Lords were saying: "We do not have the expertise to grapple with that question", it is a million miles away from a court having an expert witness to assist it on the niceties of the low mobile spectrum.

So we submit that for those reasons there would be no breach of Article 4, even if this matter has to go to the High Court because the High Court has both the expertise available to it and can take due account of the merits.

That then brings me to the last issue that we have identified, which is question 3. If the conclusion that the CAT has no jurisdiction means the UK would be in breach of Article 4 can the CAT take jurisdiction either on the *Marleasing* principle, or by the direct effect of Article 4. I can deal with this briefly – partly because it is our fallback fallback position, and also because we say, at least on one of these points, it is relatively straightforward.

So far as *Marleasing* is concerned, we submit it is quite obvious that you cannot use *Marleasing* to construe s.192 and Schedule 8 compatibly with Article 4, if the appellants are right (and we say they are not) in what they say Article 4 requires. Because if the appellants are right in their submissions that the High Court is not adequate, as I have shown to the Tribunal it is not just para.40 of schedule 8, but a whole tranche of provisions under Schedule 8 that would cause enormous problems, and it is plainly not possible to construe the legislation to cure those defects.

So the final recourse that my learned friends are driven to is to suggest that this Tribunal could take jurisdiction in a situation in which it does not have jurisdiction by statute, by the direct effect of Community law, and they cite a number of authorities for that proposition.

We submit that they are eliding two different concepts. First, there is a case in which a court or tribunal has jurisdiction over a particular claim but there is a barrier to the claim succeeding before it, either because relief cannot be granted or because the defendant has a defence to the claim, and it is found that the barrier to relief is inconsistent with Community law. In that situation, the court can disapply the inconsistent provisions of national law and give the relief. A good example of that is the *EOC* case that my learned friend cited yesterday. In the *EOC* case you have a woman who is able to bring a claim for a redundancy payment. There is no doubt at all that the employment tribunal has jurisdiction over a claim for a redundancy payment. Her claim is met with a defence from the employer. The employer's defence is, "You work less than 16 hours a week, and under the Employment Protection Consolidation Act 1978 you are not entitled to complain that you are entitled to a redundancy payment because you do not work enough weekly hours". She says, "That provision is contrary to my right to equal pay under Article 119, as it then was, of the Treaty, because more women than men work part-time and therefore you must disapply the 16 hour threshold".

That is a situation where the Tribunal clearly has jurisdiction to hear her claim, and the effect of that ----

THE CHAIRMAN: That depends how you describe the jurisdiction. Is the jurisdiction to hear redundancy claims or it is to hear redundancy claims from people who work more than 16 hours a week? That is what I was trying to explore Mr. Pannick, whether there is actually a difference which is something above and beyond a rather touchy-feely difference which you give effect to by this semantic exercise of how you describe the jurisdiction and how you describe the barrier.

MISS ROSE: The ultimate answer can only be through a process of statutory construction because you have to look at the statute and ask, is this a situation where the Tribunal has jurisdiction to hear the claim but the success of the claim is barred by some restriction or barrier is this a case where the Tribunal does not have jurisdiction to hear the claim at all? That is a question of construction. We say the *EOC* case fell one side of the line and we say this case falls the other side of the line.

That analysis, in my submission, you can see in the *Barber* and *Manson* cases. Can we just turn those up. First of all, *Barber*, which is in volume 2 at tab 30. Can we go to p.395B of the report. Here Lord Justice Neill is quoting from Mr. Justice Mummery in *Biggs*:

> "'(a) The industrial tribunal has no inherent jurisdiction. Its statutory jurisdiction is confined to complaints that may be made to it under specific statutes, such as the Employment Protection (Consolidation) Act [and so on]. We are not able to identify the legal source of any jurisdiction in the tribunal to hear and determine disputes about Community law generally. (b) In the exercise of its jurisdiction the tribunal may apply Community law. The application of Community law may have the effect of displacing provisions in domestic law statutes which preclude a remedy claimed by the applicant'."

I stress "preclude a remedy". So there you can see the analysis. There is no inherent jurisdiction. If you bring a claim under one of the statutes but your claim is barred by some procedural problem and that is inconsistent with Community law you can displace it. But the pre-condition is that you must have jurisdiction to hear the claim in the first place.

We see again just below F that they say it is not a free-standing claim:

> "'Her claim is within the structural framework of the employment protection legislation …'."

Then:

> "Article 119 can be relied upon by an applicant to disapply barriers to a claim which are incompatible with Community law. The statutory conditions which have to be

satisfied before compensation can be obtained can therefore be disapplied if they are discriminatory …"

Then at the bottom of the page:

"But, as I understand the matter, the impact of Community law on claims brought before industrial tribunals is that Community law can be used to remove or circumvent barriers against or restrictions on a claim but that Community law does not create rights of action which have an existence apart from domestic law."

Then there is a reference to the *Francovich* type damages. Then:

"But unless Parliament otherwise decided, such a claim …"

- i.e. a *Francovich* claim -

"… would not come within the jurisdiction of an industrial tribunal."

That, in my submission, is an analysis of the difference between the claim that the Tribunal has jurisdiction to hear, but where there is a barrier to its success, and a claim which the Tribunal does not have jurisdiction to hear, where you cannot simply create jurisdiction through EC law.

We see the same analysis in *Manson*. It is tab 45 in the same volume. In the headnote you can see the important in the holding between F and G:

"… regulation 13(2) … did not purport to disapply the Regulations entirely in the case of service as a member of the reserve forces but only in so far as that service consisted in undertaking certain types of training obligations … the employment Tribunal had jurisdiction over complaints that an employer had infringed a part-time worker's right …"

- and so forth. So again the pre-condition is that the tribunal of this claim, but there is some barrier to its success.

We see the analysis by Lord Justice Keene, first of all, at 19 where he says:

"It is crystal clear that, when Mummery J was dealing with the limits on the Tribunal's jurisdiction, he was concerned to emphasise that claims based on 'freestanding' rights derived from European Community law could not be entertained by the tribunal. He was not referring to the ability of such a tribunal to disapply a restriction or exclusion found in domestic law on a claim based on a domestic law right …"

So that is the way he puts it, that the claim must be based on a domestic law right.

Then at 22:

"The reality is that employment tribunals are given by statute jurisdiction over complaints that an employer has infringed a part-time worker's right not to be treated

less favourably than a comparable full-time worker. That is the effect of regulation 8(1). In the same way, in *Biggs* the tribunal had jurisdiction over claims for unfair dismissal. In both situations the tribunal has, in my judgment, jurisdiction to disapply a restriction in domestic law on the right relied on if that restriction is incompatible with Community law. The claimant in the present case was not making a claim based on a 'freestanding' right founded only in Community law. His claim was based on a right recognised in domestic law but subject to a restriction …"

That is the distinction.

We say that when you look at this case, remembering that this point only arises if, *ex hypothesi*, the Tribunal has found, first, there is no jurisdiction to hear this claim; and secondly, that situation is incompatible with Community law.

We say in that situation there is no jurisdiction to hear this claim. There is no domestic appeal that can be brought by statute before this Tribunal. There simply is not.

THE CHAIRMAN: So they would have to be relying on a "free-standing" right derived from Article 4.

MISS ROSE: Because, *ex hypothesi*, this situation only arises if you conclude that we do not have jurisdiction.

MR. SCOTT: What do you say would happen if the proceedings before the Administrative Court proceeded, but the Administrative Court were, themselves, to find, in response to argument from Mr. Fordham and Mr. Pannick, that they did not constitute a proper forum for an Article 4(1) appeal, so that we were in a situation where the Administrative Court was saying that Parliament had, in its wisdom, failed to provide adequate Article 4(1) provisions? Would you then expect Mr. Fordham and Mr. Pannick to return to us and say, "We tried the Administrative Court, the Administrative Court said it was not on, can we have another bite at the provisions that we have just been talking about in *Barber* and *Manson*?" I think what you would say is you cannot do that because we would never get jurisdiction at all, and the proper course then would be ----

MISS ROSE: You could complain to the State. You could bring a *Francovich* claim.

MR. SCOTT: Absolutely, or the Commission could bring an infringement action against the United Kingdom.

THE CHAIRMAN: Yes. Just going back to what I said about the free-standing right, I think I am probably wrong in that. I think what they would say is that they do have jurisdiction under s.192(1)(a) and you just have to disapply the reference to Schedule 8. We will hear what they say.

MISS ROSE: That is how they put it. That is why this is a difficult case on this point and on the borderline. Normally, what you are talking about – in the other cases we have looked at – is a case where there is clearly jurisdiction to hear a complaint by a part-time worker or for a redundancy payment, but there is some bar in that complaint succeeding. Here is the bar is in the jurisdiction provision. That is why it is a difficult case. What they are seeking to do is say, "Well, just blue pencil the reference to Schedule 8". My submission is that you cannot do that because that really is semantic. Effectively what s.192(1)(a) is doing is defining the scope of this Tribunal's jurisdiction. It could have done it either by saying, "This Tribunal has jurisdiction to hear appeals in relation to decisions brought under the following sections", which would have been a very, very long way of doing it; or it could say, "This Tribunal has jurisdiction over the following except those that are in Schedule 8". Whichever way you do it it comes to the same thing in the end which is that it is defining the scope of jurisdiction. Because you are a statutory Tribunal there is not any other basis on which you can get jurisdiction except from s.192.

The final point is *Connect Austria*, which is at volume 1, tab 18. If I can just deal with this point, I think that will be it. Maybe it would make everybody happy if I deal with it before lunch. Tab 18 of Volume 1.

> "It follows that a national court or tribunal which satisfies the requirements of Article 503 and [and this is the crucial bit] which would be competent to hear appeals against the decision of the National Regulatory Authority if it was not prevented from doing so by provision of national law which explicitly excluded its competence has the obligation to supply that provision".

So, this is a situation where the court has a general jurisdiction to hear appeals of this type which is then excluded. We say, of course, that this Tribunal does not have a general jurisdiction - it only has the statutory jurisdiction given to it in this case by s.192.

THE CHAIRMAN: This case is also interesting because it does give a little insight into how very different some jurisdictions are in terms of the scope of appellate jurisdiction.

MISS ROSE: Absolutely. Of course, the constitutional court in that case had a very, very narrow jurisdiction. Of course, that was also the predecessor of the section.

Before I sit down there is one point I would like to make which is in relation to the timing of the decision. I know this Tribunal has very much in mind the extreme time sensitivity of this case ----

THE CHAIRMAN: The timing of our decision?

MISS ROSE: Yes, because the whole problem that Ofcom faces here is of the conflict between the interests of the incumbents and those who wish to enter the market. Delay is victory for the appellants in this case. Therefore, we do respectfully invite the Tribunal to make its decision as fast as it can. I realise that that may be an unreasonable request, but I know that the Tribunal understands the difficulties that Ofcom faces.

THE CHAIRMAN: What kind of timescale are you urging us to make the decision?

MISS ROSE: Well, if it was possible to do it in less than a week?

THE CHAIRMAN: We will discuss that.

MISS ROSE: I am not asking for it this afternoon! (After a pause): The difficult is that we need to take a decision about whether the auction is to go ahead, or not. There may come a point where the auction has to go ahead regardless.

THE CHAIRMAN: Whichever way our decision goes on jurisdiction, there is still going to be some kind of challenge to the ----

MISS ROSE: Yes. As the Tribunal may know, notwithstanding this hearing, preparation for the Administrative Court hearing has been continuing. So, the claimant's evidence is already in in the Administrative Court. Our evidence is about to be filed. So, we would be ready to have an expedited hearing very soon.

THE CHAIRMAN: We hear what you say.

MISS ROSE: I am sorry, but you understand why I make the request.

THE CHAIRMAN: I understand.

MISS ROSE: I do not know if there are any questions? If not, those are my submissions.

THE CHAIRMAN: Thank you very much. Mr. Pannick, Mr. Fordham, can you indicate how long you are likely to be in reply?

MR. PANNICK: Maybe an hour.

MR. FORDHAM: I will be no more than half an hour.

THE CHAIRMAN: We will come back at ten past two then.

(Adjourned for a short time)

MR. PIKE: Madam, if I may rise briefly? Richard Pike on behalf of Hutchison 3G. I just wanted to record that Hutchison 3G is represented at this hearing, but that we are not planning to make any submissions on the preliminary issue.

THE CHAIRMAN: Mr. Pannick?

MR. PANNICK: Thank you. Chairman, members of the Tribunal, it suffices for our purposes to establish three propositions. Proposition 1 is that Article 4 confers on us a right to a merits

assessment. Proposition 2 is that judicial review does not provide a merits assessment. Proposition 3 is that this Tribunal is obliged to remove any restriction or exclusion which stands in the way of a merits assessment in this Tribunal. That is enough for our purposes. Can I deal with those points, and then I will deal with the statutory construction points which also arise, and which I do want to make submissions on, but which are not essential for my purposes? That is why I say the proper approach to this case is to look first at Article 4 and what it requires. *Webb*, the case that Miss Rose relied upon in the House of Lords (Tab 6 of their authorities), is not authority to the contrary. One must, of course, adopt the approach that is most appropriate in the particular case being heard. Here, the statute, the Communications Act, is designed to implement the Directive. One looks first to the Directive to see what is the object and purpose, and what are the requirements.

Article 4. It is now clear - Miss Rose was uncharacteristically coy yesterday when she stood up in my submissions and I asked her the direct question - that there is no dispute that this case does fall within Article 4(1) of the Directive. That is not understood. We are, for the purposes of Article 4(1), a person who is affected by a decision, and therefore we have all the rights, whatever they are, that Article 4(1) confers.

There is also no dispute, therefore, that we are also a person affected by a decision for the purposes of s.192(2) of the 2003 Act. There are two questions: What does Article 4(1) require; and Does judicial review satisfy it? Those, essentially, are the two questions of Community law that arise in this respect.

Miss Rose's submissions to you this morning emphasise that what Article 4(1) requires is that the merits of the case are duly taken into account. That was her point. That is all it requires, she says. Now, we say that even if she is right that all that is required is a merits assessment in the sense that the merits are duly taken into account judicial review does not suffice. Judicial review, as I will turn to in a moment, is not such a merits assessment.

However, we go further. We say, with respect, that Miss Rose is not right to give Article 4(1) such a narrow approach because it is necessary, as I submitted in opening, to take account of the contrast between Article 4(1) and 4(2) - the distinctions between an appeal and a review - and it is important also to give some purpose to the requirement in Article 4(1) - the specific requirement in this context - that the body hearing the case must have the appropriate expertise available to it to enable it to carry out its functions. That is what it says. Now, leave aside the dispute about whether the High Court have it or they do not have it, the question is: Why does Article 4(1) include that requirement? We say that it obviously includes such a requirement because the community legislature here intended that the body hearing the appeal should have

a very active role of considering the merits of the case. There is no other reason for requiring the body to have appropriate expertise if it were merely a review.

So, our position is that at the very least merits assessment is required. Any other approach would destroy the purpose of 4(1) and give no effect to appropriate expertise and to the contrast with Article 4(2). But, we also say that, if necessary, it goes further and it requires an actual appeal on the merits. But, again, it is not necessary for my submission. Merits assessment of some lower form would suffice for our purposes.

Now, Miss Rose then says, "Well, what is it that this Tribunal can do that the High Court cannot do on judicial review?" There are two answers to this. We invite the Tribunal to look first at what the High Court can do, and then at what this Tribunal can do. In respect of the High Court the position is very clear indeed: we have House of Lords' authorities - *Daly* (Volume 2, Tab 39) and *SB* (the Denbigh High School case) (Volume 2, Tab 47) - each of which says that a judicial review is not a merits assessment. Miss Rose's answer to the point is to say that that is a semantic point. That was her phrase. Now, with the greatest of respect to Miss Rose, neither Lord Steyn in *Daly*, nor Lord Bingham in *SB*, regarded this as a semantic point. They emphasised the point because they thought this was a matter of some substantive importance. It is no answer - no answer - for Miss Rose to say, as she did, "Nobody knows the full extent of the scope of judicial review". That was her submission. "It could go much wider." Well, with respect, this Tribunal does know the full extent of judicial review. It knows it because the House of Lords in those binding authorities has told this Tribunal, and everybody else, that judicial review, however broad it may be, is not, cannot be a merits assessment.

It is also no answer, with respect, for my learned friend to rely on Mr. Fordham's book. He will speak for himself. We have the advantage of Mr. Fordham being here. But, if I may be permitted to give my understanding of his book, nowhere in his book is he suggesting that judicial review provides for a merits assessment - far less an appeal on the merits. The great respect I have for Mr. Fordham, were he to have said that I would have greater respect - and do have greater respect in a legal sense - for the judgments of Lord Steyn and Lord Bingham. It does not matter what Mr. Fordham says. The law is as stated by Lord Bingham for their Lordships and Lord Steyn for their Lordships.

Miss Rose referred to a number of other authorities which we were not taken to, and I do not criticise her, she referred to her skeleton argument, paras. 34 to 37, none of those cases dispute that judicial review is not a merits' assessment, nor could they without being inconsistent with *Daly* and *SB*. So that is the clear position in relation to judicial review. The other part of the

assessment, what does this Tribunal do that is different from the Administrative Court? Well, it is very clear, this Tribunal does provide a merits assessment, see s.195(2), that is what you are told you must provide – an appeal on the merits.

My friend referred to the case law, the T-Mobile case – I went through that in opening – I am happy to turn it up again if it would assist, but this Tribunal made it clear, you said so expressly at para.82, that the appeal to this Tribunal is a merits review, and albeit that you may in some context confer a margin of appreciation to some extent on the regulator, that nevertheless does not mean that the distinction between a merits' assessment and a judicial review disappears, there is a fundamental difference between the two and, as I said in opening – and Miss Rose did not dispute this, nor could she – Parliament has recognised that distinction in that this Tribunal is told in some contexts that you should confine yourself to a judicial review test.

Then Miss Rose said some other countries in Europe provide for a court to hear Article 4(1) issues. No doubt that is indeed what happens, but it does not take us any further forward for two reasons. First, we do not know the criteria applied by the courts in those other jurisdictions, the extent to which they provide a merits' assessment, and secondly, they may have got it wrong, they may also be in breach of Article 4 (1).

Finally, under this head of merits' assessment, Miss Rose suggested that the High Court could change its approach if necessary – let them change, let them comply in the Royal Courts of Justice with EU law, and now provide a merits' assessment. Well if judicial review is to develop so radically as Miss Rose suggests in breach of the principles stated so recently and authoritatively in *SB* and in *Daly*, with great respect it is not for this Tribunal to tell it to do so, it would have to be, I suppose, for the House of Lords to say so. Any decision to contrary effect would conflict with t hose judgments.

But in any event , it is wrong in principle for Ofcom to say that the basic principles of Administrative law must be altered to provide a merits' assessment when this Tribunal is charged by Parliament with the task of merits' review for the purposes of Article 4(1), and this is the same point that I am coming on to in relation to the employment law cases and *Connect Austria*, and coming to that is exactly the same point, is it for this Tribunal to apply its role, or is it a case of a free-standing matter, and it is the same issue, and I am going to come on to that in a moment.

Before I do so, could I just mention the appropriate expertise point which is the other basis on which we have suggested a judicial review would not suffice. Miss Rose made two points, she said that expert evidence would be available in the High Court. Our answer is that Article 4(1)

is not concerned merely with the evidence available to the court, it is concerned with an institutional arrangement to ensure that appropriate expertise is available. If Article 4(1) were merely talking about access to evidence it is very difficult to see why specific mention was made of it in this context.

Miss Rose's other point was that the High Court could appoint expert assessors under s.70 of the Supreme Court Act. Miss Rose did not dispute the answer I gave to the Tribunal that in the experience of Mr. Fordham and myself this had never been used, which we say is a very good indication that Article 4(1) is not satisfied by some theoretical option that in practice is never adopted and, of course, the absence of any use of expert assessors confirms that judicial review is not, never has been, a merits assessment.

So we say the position, with respect, is very clear indeed, judicial review will not suffice for the purposes of Article 4(1) whether Article 4(1) confers a right of appeal on the merits as we submit, or something less than that that is a merits' assessment, that looks properly and assesses the merits of the case. In neither case is judicial review sufficient .

If that is right, then the next question that arises, we say, is that it is sufficient for our purposes to succeed in this case if we can persuade this Tribunal that it is obliged by the authorities to dis-apply any statutory provision which stands in the way of this Tribunal now conferring the right of appeal on the merits. My friend's position is that this Tribunal lacks jurisdiction to hear the matter.

The position, we say, is very simple indeed, if we go to tab 5 of vol.1 and go again to the 2003 Act. The position in 192(1) is very simple.

> "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."

Now, subject to what follows there is no dispute that we are within the scope of those words, subject to what follows, you have jurisdiction. There are, as I understand it, two reasons why it is said you lack jurisdiction. The first reason is the words that follow in 192(1), "that is not a decision specified in Schedule 8", in other words there is an exception or limitation. The second reason why it is said that you do not have jurisdiction is 192(8), that is exception or limitation that provides that you must wait until matters become concrete.

> We say that the position here is very clear indeed in terms of the employment law cases and *Connect Austria*. The position is that you do have jurisdiction subject to exceptions or limitations – exceptions or limitations specified by Parliament. We say our case is no different from the employment law cases where Parliament has

authorised a Tribunal to hear particular categories of case – equal pay cases or unfair dismissal cases or redundancy cases but has specified that this jurisdiction is confined or is limited by the exclusion of particular circumstances or particular categories such as part-time workers. Can I take you back, please, to the authorities that my friend Miss Rose showed you so that I can make good why we say we fall into the same principle.

Barber is Volume 2, Tab 30. We say that when one searches for a principle one is told by Lord Justice Neill, at p.395, adopting and approving Mr. Justice Mummery's judgment in *Biggs*, that there are two essential concepts that one must focus upon. The first concept is between D and E. You must ask the question whether the Acts - that is, the domestic legislation - contains a barrier which prevents the claim from succeeding -- that that barrier is incompatible with Community law. If it is, then it is displaced. That is the first concept: Is there a barrier. The second concept, between E and F, is whether or not the claim is free-standing. We are told by Mr. Justice Mummery,

> "'Free-standing' means not supported by a structural framework, not attached or connected to another structure".

Now, if we focus, as we invite the Tribunal to do, on those two concepts we say it is plain beyond argument that what we have here is a barrier - the barrier that is contained on the construction that Miss Rose adopts, which I will come to. But, assume she is right on her construction. There are statutory barriers to the Tribunal hearing the case. The last words of 192(1)(a) and 192(8) - they are barriers which prevent the claim from succeeding, but which are incompatible with Community law. Our claim is not free-standing. Our claim is based on the structural framework - the detailed structural framework - that Parliament has set up conferring on this Tribunal the general power to hear appeals, subject to the limitations and restrictions, with all the detail that is set out as to how the Tribunal should hear the appeals. There is no way in which our arguments are free-standing, and not supported by a structural framework not attached or connected to that framework.

We see the same in *Manson*, which is at Tab 45.

THE CHAIRMAN: The point that I was making to Miss Rose is that you say your right of appeal derives from s.192. You do not have to go directly to Article 4. Your right of appeal is not derived in a free-standing way from Article 4, but derives from s.192 once you have got rid of the barriers.

MR. PANNICK: Yes, that is precisely so. One must ask the question: Is our claim free-standing? Well, no. We point to a statutory scheme set up by Parliament conferring the obligation on this

Tribunal to hear appeals in this general context. There is nothing unusual about the Tribunal hearing an appeal on the merits that is concerned with an Article 4 issue. To put it at its lowest, Parliament has plainly decided that in a large number of Article 4(1) cases this Tribunal should hear an appeal. I do not have to say - and I do not say - that Parliament has decided that every appeal that is within Article 4(1) should come to you any more than in the employment cases Parliament decided that every case that came within the equal pay legislation should go to the industrial Tribunal. Plainly, Parliament decided there were some that should not. That is the part-time workers' cases. However, Parliament has said that, "You have a jurisdiction, a detailed jurisdiction, in relation to Article 4(1) matters". Parliament has also decided to exclude, or limit, that jurisdiction. Insofar as I have persuaded the Tribunal that the restrictions or limitations are inconsistent with Article 4, then this Tribunal is obliged to dis-apply them. That is what *Barber* says. There is nothing novel about this, in my submission. It is well-established principles of law which are confirmed then in *Manson*.

We find *Manson* at Tab 45. We see the same test summarised by Lord Justice Keene. At para. 19 we see the two concepts. I am conscious that the Chairman asked me yesterday for guidance on what the principles are here. I am conscious that my answer was not as helpful as it should have been. I focus again at para. 19 on these two concepts. Mr. Justice Mummery was concerned to emphasise that claims based on free-standing rights could not be entertained by the Tribunal.

> "He was not referring to the ability of such a Tribunal to dis-apply a restriction or exclusion found in domestic law on a claim based on a domestic law right if the restriction or exclusion was found to be incompatible with Community law".

That is what we have here. No-one, we say, could seriously doubt on reading the 2003 Act that it has been decided to confer on this Tribunal a jurisdiction relating to Article 4(1) claims but to restrict it, to limit it to include in the legislation exclusions, all of which Miss Rose relies upon. But, if they are incompatible with Community law, then they must be dis-applied by the Tribunal which is given the general jurisdiction by Parliament.

We see the same thing at para. 21, which rejects the argument to the contrary .

> "In the end Mr. Bowers' argument seems to come down to an assertion that the wording of regulation 113(2) robs the Tribunal of jurisdiction to consider whether or not that restriction should be dis-applied for reasons of incompatibility with European Community law".

In other words, while the Tribunal is entitled to consider whether the regulation applies, it cannot consider whether the same regulation should be dis-applied. That would seem to be an

inherently surprising proposition. He cannot see that the regulation has that effect. The regulation 13(2) is at p.358. We see the detail. It does not matter, but at p.358, para. 3, Regulation 13(2), "The regulation shall not have effect in relation to specified matters".

> So, Lord Justice Keene is making the point that it is surprising for it to be said that the employment tribunal can construe the exclusion or limitation, but it cannot dis-apply it if it is in conflict with Community law. That is exactly what Miss Rose is saying. She is saying to you, "Yes, you can construe s.192(1)(a) read with Schedule 8, read with s.192(8). Yes, construe it, but if it is in conflict with Community law you cannot dis-apply it". That is plainly wrong.

The same principle is seen in Connect Austria. Can I just go back to Volume 1, Tab 18? The same principle is seen at the Community law level. Paragraph 41 on p.509. All of this has been read before, but let me just go back to the central statement.

> "It follows that a national court or tribunal which satisfies the requirements of [the Directive] …"

– well, this Tribunal does –

> "… and which would be competent to hear appeals against the decisions of national regulating authorities if it was not prevented from doing so by a provision of national law which explicitly excluded its competence … has the obligation to disapply that provision."

That is our position. You have a competence to hear this appeal if, and only if, you were not prevented from doing so by the provisions on which Miss Rose relies, the end of 192(1)(a) and 192(8) and Schedule 8. But for those provisions you would have jurisdiction. Those provisions on her construction explicitly exclude your competence, and that is enough.

We can see the content of the relevant Austrian provisions at p.499 of the bundle, p.5227 of the report. It is para.13:

> "Article 130(1)(a) … states that [the court] shall rule on applications challenging the lawfulness of decisions … including independent administrative chambers …"

Then the exclusion provision, Article 133 sets out exclusions, in particular item 4. That is what we have here. We have a provision which confers a jurisdiction subject to limitations and exclusions. That is the answer to this case, or it is one answer to this case. That suffices for our purposes. If I am right on that then we say that this Tribunal does have jurisdiction.

MR. SCOTT: Mr. Pannick, just one point on 192(8), are you saying that the domestic provision about timing is also overridden by Article 4(1)?

MR. PANNICK: Certainly, because there is no dispute in this case that we have now the rights that are conferred by Article 4(1) of the Directive. Miss Rose accepts that Article 4(1) confers on us now a right of appeal, whatever that means, because we are affected by a decision. It is no part of her case to say that we may enjoy Article 4 rights at a later stage. She concedes, and rightly so, that we enjoy Article 4 rights now, and she also does not dispute that we fall within s.192(2). We are affected by a decision.

It is not surprising that she does not dispute those matters because, as I said yesterday, it is plain that the decisions when made have a very considerable immediate effect on my clients who have to take, and have taken, major decisions of a financial nature consequent upon Ofcom's award. There was no challenge to any of that by Miss Rose. So it is not good enough, in my respectful submission, to say, well, this is only a matter of delay, we enjoy a right of appeal under Article 4 now, particularly in circumstances when we do not know when Ofcom are going to implement the matter. Article 4 gives us the right of appeal at this stage. So that is sufficient for our purposes, but we also submit, if we need to, that consistency between Community law and the domestic legislation can be achieved by means of interpretation of the domestic legislation, in particular through the use of *Marleasing*, that you must seek to construe the domestic legislation consistently with Community law so far as it is possible to do so.

Miss Rose's approach came down to suggesting implicitly that *Marleasing* adds very little to the normal rules of statutory interpretation, but it requires on this Tribunal the task of seeking to ensure that there is consistency. Consistency, if we are right on the requirements of Community law, can be achieved, in our submission, by one of two methods. The first way to ensure consistency is to adopt the approach that this case is not within para.40 of Schedule 8 because this is not a decision given effect to by regulations under s.14 of Schedule 1. Why is that? Because those words, as I submitted in opening and Mr. Fordham submitted in opening, require that there is a decision, the specific content of which is embodied in the regulations. What we have here (see the Draft Regulations) are regulations which do not address at all the timing decision. Therefore, it is not difficult on a *Marleasing* approach to say that this is not a decision, the timing decision of which we complain, that is given effect to by the regulations, even assuming that they are made, even assuming in Miss Rose's favour that they are regulations that are made under s.14 of the 2006 legislation.

Both T-Mobile and my clients are concerned with the timing decision. T-Mobile is challenging the timing decision as to the whole of the auction; and we are challenging the

timing decision as to some of the spectrum, that is the outer bands, in that we say the auction should not go ahead now in respect of those outer bands.

None of that, the question of timing, is addressed at all in the draft regulations. So that is the first way in which one can achieve consistency, even if, absolute Community law, you were to be persuaded that Miss Rose's approach to construction would be correct. If we are right on Community law and one is approaching this on the basis, can we properly, without doing violence to the words of the regulations, ensure consistency? You can through that means.

The other way in which you can ensure consistency without doing violence to the words is to adopt the approach that Ofcom are not in fact in this case, or not, in law, in this case acting within s.14 at all.

If one goes back to the 2006 Act, we have all agreed, I think, that the legislation is not drafted as tightly or as helpfully as it might be. One does have to move from section to section to try to bring within the scope of the legislation that which on any view Ofcom must have been intended to have general powers to achieve. If we go to s.14 in tab 6 it is not immediately obvious on a *Marleasing* approach that this is the power that Ofcom are using:

> "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 …

2.50

… in the regulations applications for 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", etc. and there is a lot of detail. It is not doing violence to that in order to secure consistency with Community law to say that where Ofcom make a timing decision as to when they are going to proceed, which is not a matter that is within the content of the draft regulations anyway they are not acting within the scope of s.14 at all, they are acting pursuant to powers which must be implicit in Part 1 and Part 2 of the 2006 Act, partly by reference to the functions which they have under s.3 of the 2006 Act, partly by reference to s.1(3) of the 2003 Act which, I accept, does not itself confer a right of appeal under s.192, but we say it is perfectly permissible if you are seeking to achieve a *Marleasing* approach, perfectly permissible, you are not doing violence to the language of the Act to say this is not in fact a s.14 case at all.

The same point arises in relation to s.192(8) because Miss Rose also says that that stands in the way of a right of appeal on statutory construction. If we go back to s.192 in tab 5:

> "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."

We say that the decision is one that is made, certainly for *Marleasing* purposes, at the time when the award is promulgated, it is not a decision to which effect is given by the exercise or performance of a power or duty conferred or imposed by or under enactment or some later time, it is the decision that is taken at the time when the award is promulgated which is why that decision as to timing is not a part of the regulations that are made in draft. Again, I do not need to persuade you that this is the correct interpretation. I am focusing for my purposes on whether, within *Marleasing* this is a permissible approach that it is possible to adopt and I say this is certainly a permissible approach once it is accepted – and it is accepted – that the decision is one within Article 4(1) and it is a decision which has immediately an effect upon us. Miss Rose says that the purpose of all these provisions is to ensure that questions are addressed at the time when they have legal effect and she emphasises that the award has no legal effect until later in the process when the auction begins. Our focus, by contrast, is on the practical effect that the decision undoubtedly has at the time when the decision, the award is made and, as I have said, that practical effect is accepted and conceded by Miss Rose, otherwise we would not have an Article 4(1) appeal. I say it is perfectly permissible on a *Marleasing* approach to construe 192(8) as focusing on practical effects in this context.

One other matter that I forgot to mention was that Miss Rose relied on the *Unibet* decision in relation to the issue of whether or not the Tribunal should be curing this problem or it should be left to the High Court. Can I take you back to that, I should have dealt with it earlier. It is vol. 1 tab 20. Miss Rose drew attention in particular to p.619 of the bundle, at para. 44. She cited para.44:

> "It is for the national courts to interpret the procedural rules governing actions brought before them, such as the requirement for there to be a specific legal relationship between the applicant and the state, in such a way as to enable those rules, wherever possible, to be implemented in such a manner as to contribute to the attainment of the objective … of ensuring effective judicial protection of an individual's rights under Community law."

In other words, the state has a discretion in these areas. That is not in dispute subject – subject – to the *Barber, Manson, Connect Austria* point. Where the state, as here, has decided that a

particular judicial body – this Tribunal – should have a jurisdiction, subject to exceptions and limitations then if those exceptions and limitations or some of them are in conflict with Community law then what follows is, as I have submitted, the Tribunal must dis-apply the relevant provisions.

So our position is that we should succeed either on the basis of dis-applying any provisions of the statute that stands in the way of an appeal in our case, or *Marleasing* enables you to interpret those provisions in order to ensure that there is consistency with Community law.

One other matter, and it may be entirely my fault I may be mistaken, but it is important to try to clarify this so we all know what the position is, I understood Miss Rose at one stage to be accepting that when the decision is made at some time in the future by her clients as to when the auction will commence, and that decision is not contained in the actual regulations there would then be a right of appeal on the merits against that decision, that is timing, to this Tribunal; that was my understanding and you, Chairman, put to Miss Rose: "Does that mean that it all depends on whether the timing decision is put on the website, or is put in the draft regulations? " I may have misunderstood but that was my understanding of the debate between you, Chairman, and Miss Rose.

If I am right, and that is what Miss Rose is conceding, if she is accepting that there is a right of appeal on the merits at some later stage when they decide what the position is as to the timing of this auction, then it does throw into very considerable focus of whether or not on a Barber/Manson/Connect Austria basis this is in general terms a matter within the jurisdiction of this Tribunal or not because we would say that it is even plainer then that this Tribunal does have jurisdiction subject to exceptions/limitations that are very fine indeed - they are exceptions or limitations that go essentially first to the date at which the decision is made, Miss Rose recognising will [?] within the scope of the jurisdiction of the Tribunal some way down the line. The only other factor is whether they choose to put the timing decision on the website or they choose to put it in the regulations. But, these are very fine distinctions indeed. They make it, in my submission, even more impossible for Ofcom to submit that we are somehow seeking to raise before this Tribunal, if we are right on Article 4, some sort of free-standing appeal that is dis-associated from the structure of the legislation that this Tribunal is on any view charged with enforcing. It makes Ofcom's position technical in the extreme. For my part we are very concerned as to the technicality of the distinctions that are now being drawn by Ofcom which we say cannot sensibly be reconciled with the purposes of Article 4(1) and its proper implementation.

I thought it right just to raise that matter.

THE CHAIRMAN: The reason why she took us to those provisions of the draft regulations is that that is where she says the sequencing decision is given effect to in the regulations. But, you said earlier that you do not accept that there is anywhere in the regulations that the sequencing decision -----

MR. PANNICK: I accept the force of Miss Rose's point that if you look in the Schedule it does contain, when it lists the spectrum -- It does implicitly, which is good enough for her purposes, contain a recognition that some spectrum are included and others are not. That is implicitly a rejection of a split approach. That, I have to accept. But, what the regulations nowhere address - and I do not think Miss Rose begin to suggest to the contrary - is any decision as to when the auction of those listed spectrum is going to take place. It does not address that at all.

THE CHAIRMAN: That is what she says is addressed in those timing ----

MR. PANNICK: The timing provisions, with respect, only deal with the stages that take place after Ofcom has waved the flag. Once you have set off, then I entirely accept the regulations say you have got so many days here, and so many days there. But, our point is that you should not be starting the process at all. Ofcom have decided, "We are going to start the process". The regulations do not address when. It is entirely consistent with the regulations - entirely consistent with the draft regulations - that they do not start the process for five years. There is nothing in the regulations that either requires them to do so, or specifies that they will. That is the point that we are making as to the regulations. It was in the context of that that Miss Rose was asked, "Well, do you accept that once the decision is taken to set off, to start the auction, the decision to start the process would, if it is not contained in the regulations, as it is not contained in the draft, give a right of appeal to this Tribunal?" The answer, as I understood it, was, "Yes" That is when the Chairman said, "Well, that means it all depends on whether it is in the regulations or it is on the website". But, there is nothing. We can look at the regulations again----

THE CHAIRMAN: We were shown the Schedule which lists all the lots of the spectrum. But, is there anything in the regulations which requires them all to be auctioned at the same time or could they still, on the basis of these draft regulations, actually have a split auction?

MR. PANNICK: It would be very difficult for them, consistently with the regulations, given that they set out the ----

MR. SCOTT: The regulations are in the Ofcom bundle.

MISS ROSE: You could not split it under the regulations because there is a single timetable for the auction.

MR. PANNICK: I accept that. I do accept that. My point is that if you go through all of these draft regulations there is nothing that addresses when all of this is going to occur. Nothing at all. There is no dispute about that. Once they decide, "We're off", then I entirely accept there are various time limits -- timetabling points therein.

MR. SCOTT: Table 10 in the statement gives you the indicative timetable.

MR. PANNICK: Absolutely. Nothing in Table 10 deals with the starting points - the point, sir, you made yesterday. I respectfully agree. That is why we say that gives us, at the very least, the *Marleasing* approach that one can distinguish the decision with which we are concerned to go ahead notwithstanding that the 2G matter remains undetermined. It is not a matter that is addressed in the regulations at all, and therefore, for the purposes of s.192 read with Schedule 8, it is not a decision given effect to by regulations. I do not need to persuade you that on the normal principles of statutory construction that that is the right answer. I say it is the *Marleasing* answer.

MR. SCOTT: Just sticking with the Refarming for a moment, we had the point that at the moment it would be premature to Refarm because of the GSM directive. I take it that it would still be your contention that it is possible for Ofcom to do something about what they would do once the GSM directive is past and they have the freedom - in fact probably the obligation.

MR. PANNICK: They would have to reconsider. Were there to be fresh developments they can at any time reconsider the position and make a determination. This is not a once and for all matter. But, of course, this Tribunal has to assess things as they are at the moment.

THE CHAIRMAN: You then seem to be conceding that insofar as the O2 appeal is challenging the rejection of the split auction alternative, that that is something which is given effect to in the regulations because they list the lots and it is accepted that the timing cannot be different under the regulations for the different lots. We did go through, early on in your opening, the relationship between your appeal and T-Mobile's appeal, but the fact that you are still on your feet must indicate that you do not then regard that as having put an end to your jurisdiction problem because you still ----

MR. PANNICK: This problem, if problem it be, is a problem as to statutory construction. It has nothing to do with the disapplication. If I am right on Article 4 that we have the rights under Article 4 then anything that stands in our way must be disapplied – that is the first answer. The second answer in relation to *Marleasing* and statutory construction is that we are entitled to say, and do say, that like T-Mobile we are challenging the timing decision. We are challenging the timing decision on the basis that they should not be going ahead now as to

some of the spectrum. Mr. Fordham has a broader target. He says they should not be going ahead now as to any of the spectrum.

Our complaints that they are going ahead now as to some of the spectrum is not a decision that they are going now – that is the emphasis – is not a decision that is embodied in the regulations for the reasons that I have given. So we are in the same position as Mr. Fordham. That is how I put it.

Unless there are other questions or I am asked from behind by Mr. Richards to add anything, those are my submissions. I have taken slightly longer than I promised. I apologise.

THE CHAIRMAN: That is very clear, thank you very much. Mr. Fordham?

MR. FORDHAM: I imagine you have heard enough, but may I make some submissions in addition on behalf of my client, please. We agree with what Mr. Pannick has said in his reply and we adopt it.

Can I pick up on two points which he ended with. In relation to refarming in answer to Mr. Scott's question, may I make clear our position. Certainly Ofcom can provide the certainty. That is what this is about. It is about providing the information on the notice board that tells you what you need to know so that you can behave accordingly and efficiently. It has never been suggested in all those paragraphs of the Decision document that deal with this that they are precluded by some legal prohibition from providing that certainty. As we understand it, it is said that if we had written a slightly different letter or write a different letter tomorrow, or perhaps Monday, dealing with refarming, more specifically asking for them to provide that information as to their intentions as regards licences and revocation and the like, we would have a merits appeal now. The only point my learned friend Miss Rose had in relation to the failure on which we rely as regards refarming – that is one of the ways that we put it – her only point is, "You did not write the right kind of letter", which is a very odd position indeed, not the only odd position that they adopt.

Secondly, in relation to this point, refarming, may I also make clear that the GSM Directive does not prevent refarming of 1800. It was only a point that would relate to 900 in any event.

The second thing that came up at the very end there is the merits appeal once the flag has been waved and what is it that the regulations embody as to sequencing. Mr. Pannick, we say, is quite right in relation to what Ofcom now say, and he is quite right as to what it is that the regulations embody, and they do not embody. What they deal with is the act of waving the flag. That is the way in which the train leaves the station. The auction will take place once there has been a notification that we are going ahead. That is embodied in the regulations. The guard gives the signal, the train leaves the station.

What it does not deal with is the crucial question in relation to which much of the decision document is taken up and which is the subject matter of our appeal. That was the decision as to whether that is going to happen before the notice board shows you some information about the fast train, so you can plan, and we do not have inefficient allocation with people getting on the wrong train, or the one after – before or after. You are handed these regulations and there is no answer to that all. As I said in opening, and my learned friend Miss Rose had no answer to this, if they had reached the opposite decision or reached the opposite decision on Monday, the regulations would be exactly the same. This train leaves when we wave the flag. We know that, but our concern is with the distinct decision as to whether that is going to be before or after we have the certainty that allows this to be an efficient allocation auction rather than an inefficient allocation auction. That is not embodied in the regulations at all.

It is very striking indeed that where we now are is that the consequence of Miss Rose's own argument and characterisation of the statute, because she says it is embodied in the regulation somehow, where it gets her is, "We will see you soon", because her position is, "You are premature, you have a merits appeal, this matter is embodied in regulations and we wave the flag and just before the train leaves, and you had better be quick particularly because we are so anxious about timing and delay, you have your right of appeal on the merits to that decision". That is her position because she accepts that a decision made under regulations is appealable. She has to accept that because para.40 only carves out a decision given effect to by regulations. I showed you para.42, which is an example of a carve-out that covers both that and a decision under regulations.

She said at one point, and we were somewhat troubled to hear it, that if they were to go away and rewrite the regulations so that they did embody – which was a bit of a give-away – the sequencing question and they dealt with the question of timing, was it going to be before or after passengers knew where efficiently to put themselves, then that would be different and there would be no right of appeal on the merits. That cannot be right, and it cannot be right because the very provisions on which she relies in accepting that you can appeal a decision made under the regulations are provisions that deal with the performance of (a) a power; and (b) a duty. So assume for a moment, and it is not on the table and it would be an odd thing for a public authority to do, given what the objective of that would be – leaving all of that to one side, if you had regulations that now said the flag shall be waved in this way and at this time and before something else has happened, that would be the performance of a duty under the regulations, and because all that is carved out is a decision given effect to by regulations, not a decision under regulations, whether it is the exercise of a power or a duty as Parliament

expressly said in both the provisions on which she relied, then we will be back. Either way, this is a nonsense. On this analysis we have our merits appeal. The judicial review court by the way will say, "You have got an alternative remedy, why should I, the judge, in a judicial review case, on whatever basis it is said I should either, under existing judicial review principles or something else for hearing a case, why should I do that if it is accepted, as it now is, that once you have received the notification under the regulations you have your right of appeal on the merits to the CAT?" The position, very unsatisfactory though it would be and rather futile though it would have made these two days and the delay that has been consequential on having the jurisdictional issue, would be, hang on to the files, because you know our grounds, you know what our challenge is going to be on the merit of this. All she has succeeded in showing is that we are actually a little bit too early and it should be later when there is what she describes as the "great practical difficulties" of us exercising our legal right. So that is the striking nature that ultimately you have, and may I ask you, just drawing the threads together, to keep well in mind, as I know that you have, what is common ground. It is common ground that this sequencing decision was a decision now, she accepts that. She accepts it can be judicially reviewed as a decision now.

It is also common ground that it is an aspect that is a decision in its own right in relation to which we are persons affected; she has not taken her stand on the provision that says you have to be affected in order to have a merits appeal. Crucially, she still accepts (and rightly so) that Article 4 applies to that decision now. So there is no question here, there cannot be any question here of somehow floodgates being opened and a new cascade of challenges being brought forward. We are doing no more than ventilating what she accepts is our directly effective entitlement under the Directive to have a merits appeal now against a decision with a Tribunal with expertise – I appreciate she would not use the 'merits appeal' phrase, but the Directive does say "appeal" and it does say "merits".

Then may I just complete the reply by dealing with three topics. First is the approach to the statute and whether you start with or without the Directive, and the answer is you start with the Directive, because the purpose is to implement it through the appeal mechanisms in the Act, that is what the explanatory note said. This is the point you made a month ago at para.81 of the T-Mobile case. I am not going to turn up further authority, I just give you for your note, if I may, we have included one illustration – rather a good one – in the House of Lords in a case called *Mullen* where the House of Lords were interpreting a statutory compensation provision. It is tab 44 in the authority's bundle, and you will only need to look – wishing to trace this point down – at the headnote. What the House of Lords does is take the section, the fact that it

is intended to bring into domestic law a provision of the ICCPR, and the key to its interpretation is that provision of the ICCPR. So it is even more straightforward than an EC law point. If you have a provision, the purpose of which is to bring something into effect, then that is the key to its interpretation and its application. You do not need to go through an artificial approach where you ignore that, you do a different exercise, come to a conclusion that you then test and start all over again.

It is perhaps worth bearing in mind that when the House of Lords interpreted that statutory provision in order to match the reach of the provision that it was intended to implement they did so notwithstanding that in the background was an *ex gratia* compensation scheme. It was no answer to say "interpret the statute to go as far as it seems to on its own wording, because the slack will be picked up by decisions that can be made elsewhere. You interpret the statutory provision against the purpose that it had, which we well know was the implementation of Article 4.

Two final topics, if I may. First, some brief observations on the statutory scheme in reply, and the second are some observations, not on a textbook, but on the subject of judicial review. The first of those, the statutory scheme. I have dealt with the Refarming position, and there what is said is that we should have written a different letter. We do not accept that, we made a perfectly plain request in relation to Refarming, it is implicit in that, of course, that that involves decisions relating to the revocation of licences.

The second point in relation to interpretation is to pick up on something Miss Rose said in relation to s.8 because it is common ground that we have a decision and a lawful decision, and a decision that is within Part 2 and a decision that would be appealable but for the carve out in s.192. When she got to s.8 my learned friend said that s.8 is concerned with decisions "which will result in the grant of licences". Now, given that nobody, and we take on the chin the fun that she had with the document that she handed up and referred I think to us as being desperate in relation to the *vires* point which, Chairman, you rightly pressed Mr. Pannick and me on, but it is right to record that nobody in this case has pointed to a provision of the statute and said: "This is the power to make a decision about sequencing", no party has done that, so we are in a position where a conundrum it may be, but nobody is approaching it in that way.

We are also in a position that ultimately there is no difficulty at least between the parties because we all accept that it is a decision and it is an *intra vires* decision. Given that that is the position, if s.8 carries with it powers which are ancillary to licensing and, as she put it, "decisions which will result in the grant of licences". Well, if she is able to say a decision about sequencing is connected to the design of an auction we are certainly entitled to say a

decision about sequencing is connected to decision making involving the grant of licensing. It is plainly, we say, within the ambit of that provision, and we would therefore agree with Mr. Pannick that one does not need to get to s.14 in this case for that reason among the others. But even if one gets to s.14, as she has put her case, ultimately her fundamental difficulty, even as a matter of statutory interpretation, is that she goes from saying that this was a decision under s.14 to saying that this was a decision given effect to by regulations under s.14. The problem is that that simply does not follow. That transition does not follow, even if she is right that this is a decision under s.14 Parliament chose deliberately the phrase decision given effect to by regulations. It could have said: "Decision under s.14" and it did not. I showed you the other provisions of the statutory scheme which do involve different language. My learned friend herself showed you para.39 of schedule 8, and para.39 of schedule 8 says: "a decision under s.4 or 7" (p.54 in the numbered bundle of authorities). I had showed you two pages earlier phrases like "a decision relating to" [para.3 and para.10]". So para.39 "a decision under", but para.40 is "no"… and when pressed my learned friend had to adopt a rather curious position. She said in relation to decisions which post-date the regulations you could have decisions under s.14 albeit that they are not decisions given effect to by regulations and, in particular, she said you could have a decision under the regulations that you have made under s.14.

THE CHAIRMAN: She said you could have decisions under the regulations, I do not think she was accepting that after the regulations there was then some category of decision which was neither a decision under the regulations nor a decision given effect to by regulation. She certainly accepted that decisions under regulations made under s.14 were not ----

MR. FORDHAM: So one immediately has the fact that para.40 does not occupy the field of s.14, on her own argument.

MR. SCOTT: And that is emphasised when you contrast it with para.42.

MR. FORDHAM: Yes, quite so. So she has already accepted that para.40 is a subset of what she herself was relying on, decisions under s.14 are not the same as decisions given effect to by regulations, because it could be a decision under the regulations and that would be appealable. If it is at that stage, why would it be a decision under the regulations? Suppose the regulations had been made, but the flag has yet to be waved. No decision has been made to wave the flag, but a sequencing decision is being taken. She accepts that it is a decision, she accepts that it is *intra vires*, and she accepts that it could be judicially reviewed. It must, therefore, on her argument be a decision under s.14, but it is not a decision under the regulations. The regulations have not given a power to decide sequencing - nor can they have - because Ofcom could have decided sequencing before it made the regulations, as it has done in this case.

But, there is one further aspect to this conundrum. It is this: instead of pressing 'fast forward', press 'rewind' and go back then to the time before the regulations are made. My learned friend has to say - and was driven to say - that any decision you make under s.14 must necessarily be a decision given effect to by regulation. Well, that is a leap that simply does not follow. It is not supported by the statutory language. This case is a paradigm example where we have got what is common ground, is a decision, which she says is a decision under s.14, but having looked at the regulations as we have it is not embodied in them at all. They could have deferred this point and still made those as draft regulations.

THE CHAIRMAN: The test is not whether it is embodied in the regulations. This is why I asked you in opening about absences as well as presences in the regulations. A decision can be given effect to by the regulations by leaving out something that you would have included in the regulations if you had decided in the opposite direction.

MR. FORDHAM: I entirely accept that. I would include that within 'embodied within', but I entirely accept that that is right. It can be tested in this straightforward way: Do you get the answer reading the regulations to the question, "How did they decide to deal with this?" So, if it is deposit, for example -- or, if the inclusion of one condition which necessarily means they rejected another, you read the regulations, and I would say it embodies the decision not to do something else. If you read s.14 and you read the regulations you can see, it tells you, what conclusion they have come to. But, that does not work for the sequencing decision.

MR. SCOTT: I think to make sense of this you have got to go to s.9 because it is in s.9 that 'a wireless telegraphy licence may be granted subject to such terms, provisions and limitations as Ofcom think fit'. Then they have got to decide: Are they going down a s.12 route or are they going down a s.14 route? They are helped in this regard by sub-section (8) of s.9 and by sub-section (5) of s.12 in that they have got to clarify which route are they going on. So, those are decisions precedent to moving on to s.14, circumscribing the way in which the bidding is going to be done, and what Miss Rose says to us is that that circumscription includes the lots in which spectrum will be allocated and various other matters which she tells us may, or may not, include the timing and in this case she is proposing not to include the dropping of the flag.

MR. FORDHAM: What we have is a decision document which includes that distinct decision, and it does not purport to decide to implement that decision in regulations. There is nothing in the decision document that says, "We're going to have regulations which are going to deal with this aspect". It is a distinct, but linked, matter. It is not unlike the point I made about revoking people's licences .You will find within the decision document that they are going to revoke people's licences. That does not mean that that is carved out of the appeal by virtue of para. 40.

So, we say that one does ultimately have to come back to, firstly, the decision document itself, and whether it treats the matter as a distinct decision or whether it is something which is to be built into the design of the regulated auction under the regulations - and here the answer is crystal clear from the decision document -- They have shown you the draft regulations, which reinforces the point. You look at s.14 itself, which further reinforces the point. But, even if it were different, the consequences would be twofold: firstly, on her own argument, "Keep the files because we get the right of appeal on the merits". It is just a bit later, as a first consequence. But, the second consequence, as Mr. Pannick explained, is that if Article 4(1) applies you have to dis-apply the carve-out anyway. It is exactly the same as Austria which had a jurisdictional provision making an exception - as do we in Schedule 8.

I do not propose to try and do a trawl in relation to the other aspects of Schedule 8 which fall alongside para. 40. We do not accept that Miss Rose has begun to make good the suggestion either that Parliament was not intending to implement the directive, or that there would somehow be a floodgate situation of applications or appeals if the logic of the argument is right. The logic of the argument is straightforward: if you have got an Article 4(1) right, then on the structure of this legislation the Tribunal should hear the case. In relation to decisions given effect to by regulations, it was crystal clear in the explanatory notes that what was going on here was that if you have got a situation where it is going to be embodied in a regulation with a decision coming further down the line, the reason why you are in Schedule 8 is because you will get your merits appeal, and you just have to be patient. That is what the explanatory notes were saying in relation to the purpose of the legislation on that point. There is no reference at all to intending that the Article 4(1) appeal be dealt with by judicial review.

That then takes me to the final topic, if I may. Judicial review. May I make some points in relation to this? Miss Rose said that she was not going to endeavour to identify a ceiling. But, you have seen that even in proportionality review the one thing that is said, and repeated, at the highest level that it is not a merits review. That is striking not least because the case on which Miss Rose relies for the approach she says would be the appropriate one here -- We do not accept that it would; we would say the approach in the H3G case, which was itself a matter of economic judgment, would be applied in this case, but that is another matter for another day. Even taking the case on which Miss Rose relies, what we see from the T-Mobile case is, firstly, the Tribunal recognising that the point of the statutory appeal on the merits is to implement the directive. "Wrong now" [?], says Ofcom, "In fact, judicial review would perfectly well do it. There was no need to have an appellate mechanism [but, on that authority, para. 82 of T-Mobile] whilst still conducting a merits review." So, on the approach that she is

putting forward as being the one that would apply in this case, the Tribunal is crystal clear that it would be conducting a merits review, and the judicial review cases are equally crystal clear that that is not what the Administrative Court does on judicial review..

I am not going to repeat Mr. Pannick's points in relation to judicial review. Of course, there is one publisher who would be delighted for you to cite with approval passages from a textbook. I am not going to make any further observations in relation to that.

I do want to make one final point on this. What Miss Rose has said is, look at the T-Mobile or H3G, whichever one is the appropriate approach, look at what the Tribunal does on an appeal under s.192 and you can see that the Administrative Court would be in a position to do that applying judicial review principles in the current context. That is her position and that is why judicial review can meet the challenge, she says.

What is so very striking about that position in the context of this Tribunal is that this Tribunal knows very well the distinction between judicial review principles, whatever they are on the one hand, whichever textbook you read, and on the other hand an appeal on the merits. The structure of the legislation is based on that distinction. They are not the same thing. The statutes would not make sense if they were the same thing.

If you look, for example, at the *IBA* case – again we do not need to turn it up – the Court of Appeal in the *IBA v. OFT* were making precisely this point. It is the supplementary authorities bundle at tab 11, and there is a helpful discussion for the assistance of the Tribunal of the distinction between appeal on the merits and judicial review principles. Several textbooks are referred to under the heading "Principles of Judicial Review" that starts at para.88. There is a reference to the very regulatory economic judgment judicial review cases, like *Cellcom*, and so on, which my learned friend Miss Rose has conceded would not be an adequate approach in a case such as the present if Article 4(1) had to be satisfied on judicial review. So flexible though it may be, as there discussed by the Court of Appeal between paras.88 an d 100 in the *OFT v. IBA* case, it is not the same as an appeal to the Tribunal. It is not the same as a merits review. The statute tells you that, the House of Lords several times tells you that. The statutory scheme in relation to other functions and Article 4(1) and (2) are all based on the fact that there is a real distinction, and it may be that, whatever textbook you were to consult, you would find sufficient recognition of that distinction.

Unless there are any further questions for me those are the points that we wish to make in addition to Mr. Pannick by way of reply.

MR. SCOTT: One of the parties provided to us the *London & Continental Stations & Property* case. That is a case in which reference was made to the *Cellcom* case, which was referred to in *IBA*.

The point which occurred to me from it was how it ends at para.116 and the conclusions of Mr. Justice Moses.

MR. FORDHAM: I have got this loose, it was not us, but I am happy while I am on my feet to assist. Mr. Justice Moses, November 2003, I think you invited my attention to 116.

MR. SCOTT: It is merely to reflect upon the way in which Mr. Justice Moses expresses his conclusions which are mostly about entitlements. They do not look like merits of an appeal, they look like a more classical judicial review. This is a relatively recently regulatory ----

MR. FORDHAM: I do not think, to be fair, there is any divergence on this point. I understood Miss Rose to accept, although at one point she referred to what is done day in, day out in the Administrative Court, that the approach that has been adopted in judicial reviews of regulatory decisions on matters of economic judgment is very much on the review side and certainly nothing approaching a merits review, I venture to submit that in line with these authorities, Mr. Justice Lightman in *Cellcom*, Mr. Justice Moses in this *Railways* case, even if one had submitted to the court, "I would now like to refer you to an expert report please", and the judge says, "Why?" and you say, "It is so you can take account of the merits", the judge on judicial review would say, "That is no part of my function at all". Miss Rose has not pointed to a single authority which even involves a judge saying, "I am not going to decide it on the merits, but I will appraise the merits so that I can form a view and take account of my view on the merits". I would respectfully agree and suggest that this case well illustrates what we would get on a judicial review from a judge who has read the guidance of the House of Lords.

Unless there is anything else, those are our submissions.

THE CHAIRMAN: Thank you, Mr. Fordham. Miss Rose, I think there was a reference to *Mullen*, an authority that had not been cited in opening.

MISS ROSE: Yes. In fact, the only authority I wanted to reply was the *London & Continental Stations* point. The point about this authority is that this is the Administrative Court doing pure judicial review without reference to any EC law obligations.

MR. SCOTT: I accept that.

MISS ROSE: The distinction is that the Administrative Court, when performing its judicial review function, would have regard to Article 4. That would completely change its approach to the extent necessary to enable it to take due account of the merits.

Finally, just to remind you of the *Sea Hawk Marine* case where you can see the judicial review court admitting expert evidence to make a finding on proportionality in an EC law context.

MR. SCOTT: Thank you.

THE CHAIRMAN: Mr. Pannick and Mr. Fordham, do you have anything to say the urgency of ----

MR. PANNICK: It is entirely a matter for the Tribunal. It is no part of my function to seek to persuade you other than to give a judgment as soon as you reasonably capable of doing so, having regard of course to the other commitments of the Tribunal. It is entirely a matter for the Tribunal.

THE CHAIRMAN: Thank you everybody for your written and oral submissions. It has been very helpful. This is a complicated and difficult matter and although we will endeavour to resolve it as speedily as we can it is important to get it right as well as to get it done quickly. So we will notify you in the usual way as to when we are ready to hand down the Decision.

Thank you.

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