Neutral citation: [2007] CAT 3

IN THE COMPETITION APPEAL TRIBUNAL **Case No. 1027/2/3/04**

Victoria House
Bloomsbury Place
London WC1A 2EB

22 January 2007

Before:
MARION SIMMONS QC (Chairman)
MICHAEL DAVEY
SHEILA HEWITT

BETWEEN:

VIP COMMUNICATIONS LIMITED
(in administration)

Appellant

-v.-

OFFICE OF COMMUNICATIONS

Respondent

supported by

T-MOBILE (UK) LIMITED

Intervener

Mr. Edward Mercer (of Taylor Wessing) appeared for the Appellant.

Mr. Rupert Anderson QC, Miss Anneli Howard and Mr. Ben Lask (instructed by the Director of Telecommunications and Competition Law, Office of Communications) appeared for the Respondent.

Mr. Meredith Pickford (instructed by Miss Robyn Durie, Regulatory Counsel, T-Mobile) appeared on behalf of the Intervener.

Heard at Victoria House on 13 December 2006.

JUDGMENT (ADMISSIBILITY)

I INTRODUCTION

1. VIP Communications Limited (in administration) ("VIP") has appealed against a decision of the Office of Communications ("OFCOM") dated 28 June 2005 that T-Mobile (UK) Limited ("T-Mobile"), the intervener, had not infringed Section 18 ("the Chapter II prohibition") of the Competition Act 1998 (the "1998 Act") or Article 82 of the EC Treaty ("Article 82") by disconnecting the services it was providing to VIP for use in telecommunications equipment known as "GSM gateways", while allegedly continuing to supply the same GSM gateway services to other companies.

2. In a Notice of Appeal lodged on 20 February 2004 and by a Further Amended Notice of Appeal registered on 31 August 2005 and by the Re-Amended Notice of Appeal registered on 22 December 2006 the appellant requests that the Tribunal:

   (1) set aside OFCOM's decision;

   (2) substitute its own finding that the Chapter II prohibition and/or Article 82 have been infringed; and

   (3) take or order such other steps as are incidental or consequential to such a finding and which the Tribunal regards as appropriate or pertinent to the particular circumstances; and

   (4) award costs to the Appellant.

3. T-Mobile challenges the jurisdiction of the Tribunal to substitute its own finding for that of OFCOM. T-Mobile submits that the Tribunal's power under paragraph 3(2) of Schedule 8 of the 1998 Act to "make any other decision which [OFCOM] could itself have made" is implicitly limited to decisions which OFCOM could itself have lawfully made at the time it took its decision. As, at the time it took its non-infringement decision, OFCOM had not completed the necessary procedural steps to issue an infringement decision, it follows, according to T-Mobile, that the Tribunal is precluded from making an infringement decision of its own.

4. For the reasons set out below, we unanimously find that the Tribunal's power under Schedule 8 of the 1998 Act is not restricted in the manner submitted by T-Mobile.

II BACKGROUND

A THE PARTIES

VIP

5. VIP was founded by Mr. Tom McCabe in 1998. When carrying on business, VIP was a provider of electronic communications equipment and services. VIP used GSM gateways to provide discounted mobile termination to UK companies. VIP entered into administration on 18 August 2005. Jeremy Charles Frost was appointed administrator.

OFCOM

6. The Telecommunications Act 1984 established the Director General of Telecommunications ("the Director") as the regulator of the telecommunications industry in the United Kingdom. The office of the Director became known as "Oftel". The Director and Oftel were abolished by the Communications Act 2003 (the "2003 Act") and the Director's functions were transferred to OFCOM. We make no distinction for the purposes of our judgment between the Director and OFCOM.

7. By virtue of section 371(1) of the 2003 Act OFCOM was empowered with effect from 25 July 2003 to exercise the relevant functions of the Office of Fair Trading ("OFT") under the provisions of Part 1 of the Competition Act 1998 (see Communications Act 2003 (Commencement No. 1) Order 2003, SI 2003/1900, paragraph 2(1) and Schedule 1).

T-Mobile

8. T-Mobile, the intervener in these proceedings, is a Mobile Network Operator. T-Mobile holds a licence under section 1 of the Wireless Telegraphy Act 1949

to establish, install and use equipment comprising a mobile telecommunications network using the GSM radio spectrum. "GSM" stands for Global System for Mobile communications.

B OFCOM'S INVESTIGATIONS AND THE APPEAL PROCEDURE

9. On 22 July 2003, the Appellant submitted a complaint to the Director alleging, amongst other things, that T-Mobile had infringed the Chapter II prohibition by periodically suspending VIP's GSM Gateway services on the grounds of unlawful activity yet still permitting GSM Gateway services by others, including its own service providers.

10. OFCOM investigated the complaint and on 22 December 2003 issued a decision in which it concluded that T-Mobile had not infringed the Chapter II prohibition.

11. The appellant lodged its appeal against OFCOM's decision with the Tribunal on 20 February 2004. On 12 March 2004, T-Mobile applied for permission to intervene in the proceedings. Permission was granted on 19 March 2004. A first case management conference was held on 2 April 2004, at which the relationship between VIP's appeal and an appeal by Floe Telecom Limited in case 1024/2/3/04 (lodged with the Tribunal on 2 January 2004) was considered. The Floe case concerned a decision by OFCOM that Vodafone Limited had not infringed the Chapter II prohibition by disconnecting GSM Gateway services it had been providing to Floe Telecom Limited. VIP's appeal was stayed pending determination of the appeal in the Floe case.

12. The Tribunal's first main judgment in *Floe Telecom Limited v. OFCOM* was handed down on 19 November 2004 (see [2004] CAT 18). In that judgment the Tribunal set aside OFCOM's decision concerning Floe Telecom Limited's complaint against Vodafone Limited and remitted the matter to OFCOM for further investigation.

13. OFCOM subsequently applied for permission to withdraw its decision of 22 December 2003 concerning T-Mobile and VIP and offered to undertake to

reinvestigate the matter. A hearing was held on 1 December 2004 at which the Tribunal ordered that OFCOM's decision of 22 December 2003 be set aside, and that the matter be re-investigated.

14. OFCOM re-investigated both the Floe Telecom Limited and VIP complaints and issued second decisions in respect of both complaints on 28 June 2005. Each of Floe Telecom Limited and VIP respectively lodged a revised notice of appeal against the OFCOM decision concerning it. On 20 September 2005, the Tribunal ordered that the VIP appeal be stayed pending resolution of the Floe appeal.

15. The Tribunal's second main judgment in *Floe Telecom Limited v. OFCOM* was handed down on 31 August 2006 (see [2006] CAT 17). The Tribunal confirmed OFCOM's decision that Vodafone Limited had not abused a dominant position but, in so far as OFCOM's reasoning and conclusions in the decision differed from the reasoning set out in the Tribunal's judgment, it set aside the decision in part as being misconceived (as is set out under the Summary of the Tribunal's judgment at paragraphs 12(1) and 12(5) and (6)) and as being inadequately reasoned (as is set out under the Summary of the Tribunal's judgment at paragraphs 12(3) and (4)). The Tribunal did not remit any part of the matter to OFCOM for further re-investigation.

16. A directions hearing was held on 13 September 2006 at which the stay on VIP's appeal was lifted and VIP was ordered to file and serve a document amplifying its notice of appeal by 11 October 2006, subsequently extended by further Order to 20 October 2006. The proposed re-amended notice of appeal was sent to the Tribunal by fax at 17.45 on 20 October 2006 and registered, in accordance with the Tribunal's Rules, the following working day, 23 October 2006. A further case management conference was arranged for 1 November 2006.

17. The question of the scope of the Tribunal's powers to grant the relief requested was first raised by T-Mobile in written submissions filed on 31 October 2006, in advance of the case management conference on 1 November 2006. At that

case management conference the issue of jurisdiction was reserved to a further case management conference fixed for 13 December 2006.

18. On 22 November 2006, OFCOM filed submissions stating that it did not intend to make a formal challenge to the Tribunal's assumption of jurisdiction and took no issue with the scope of the Tribunal's powers under paragraph 3(2)(e) of Schedule 8 of the 1998 Act to substitute its eventual judgment for any decision that OFCOM could have made. On 29 November, T-Mobile further supplemented its earlier submissions in respect of the jurisdiction issue. The appellant filed its submissions in reply on 8 December 2006.

19. The jurisdiction issue raised by T-Mobile was considered at a hearing on 13 December 2006.

III SUBMISSIONS

T-Mobile's submissions

20. T-Mobile submits that the Tribunal should be entitled to engage in detailed scrutiny of OFCOM's findings of fact but that its power does not extend further.

21. T-Mobile submits that paragraphs 3(2)(d) and (e) of Schedule 8 of the 1998 Act do not give the Tribunal power to take its own decision in relation to the issues of market definition, dominance, authorisation and other objective justifications.

22. T-Mobile submits that the power in paragraph 3(2)(e), on a plain and ordinary meaning, must be limited to decisions which OFCOM could itself lawfully have made at the time it took its decision.

23. T-Mobile submits that before reaching any conclusions on market definition, dominance, authorisation and other objective justifications OFCOM would have had to have conducted a more detailed factual investigation and would have had to issue a Statement of Objections covering these matters. It did not

do so: it did not reach any conclusion on these matters. Accordingly T-Mobile submits that since OFCOM could not itself have made a decision on these matters at the time it took its decision, nor can the Tribunal do so in the present case.

24. T-Mobile submits that if OFCOM conducts an investigation and makes a non-infringement decision and that non-infringement decision is successfully appealed then the Tribunal must remit the matter to OFCOM: it has no jurisdiction to take its own infringement decision under paragraph 3(2)(e) of Schedule 8. T-Mobile relies for this submission on Community law and domestic law jurisprudence in relation to administrative investigations concerning competition law.

25. T-Mobile submits that under domestic law, competition investigations are subject to a very clear two-tier structure: first an administrative investigation and a Statement of Objections and second a right of appeal to the Tribunal on the facts.

26. T-Mobile relies for Community law on the "*Cement*" case, Cases C-204/00P etc. *Aalborg Portland A/S v. Commission* [2004] ECR I-123 (paragraphs 66, 67), Cases T-191/98 etc. *Atlantic Container Line AB and Others v. Commission* [2003] ECR II-3275 (paragraph 162); Cases T-68/89 etc. *Italian Flat Glass, Re Società Italiano Vetro SpA v. Commission* [1992] ECR II-1403 (paragraph 319). It also relies on *Pernod Ricard SA v. OFT* [2004] CAT 10 (paragraph 229) as to the requirement of consistency with Community law provided for by section 60 of the 1998 Act. T-Mobile submits that the Tribunal is obliged under section 60 to adopt the same approach as would be adopted under Community law.

27. T-Mobile referred to the rules of procedure of the CFI and to the powers of the CFI to hear witnesses and to deal with disputed issues of fact (in particular Article 68).

28. As to the relevant domestic jurisprudence T-Mobile relies on *Napp v. DGFT* [2002] CAT 1 (paragraph 133), *Aberdeen Journals v. DGFT* [2002] CAT 4 (paragraphs 175-177) and *Argos & Littlewoods v. OFT* [2003] CAT 16 (paragraphs 64 – 66). T-Mobile submits that this issue as to the jurisdiction of the Tribunal was not raised in *Burgess v. OFT* [2005] CAT 25 ("*Burgess*"). It draws attention to paragraph 129 and 136 - 139 of the judgment in *Burgess*. It distinguishes *Burgess* because T-Mobile submits that in *Burgess* the principal facts were largely common ground, and they are not in the present case, and in addition in *Burgess* there was no question of a penalty which again is not the position in the present case. Finally T-Mobile submits that there was no live issue remaining in the *Burgess* case as the dispute had been resolved between the parties, which distinguishes that case from the present position being considered.

29. T-Mobile submits that the matters that the Tribunal would be required to investigate in order to determine VIP's appeal in relation to the authorisation go well beyond what was ever considered or investigated by OFCOM. T-Mobile submits that OFCOM did not investigate as a matter of fact whether T-Mobile had authorised VIP under its licence because OFCOM proceeded on the basis that there could not have been any authorisation because the licence did not cover GSM Gateways. T-Mobile referred the Tribunal to paragraphs 121 and 191 of the decision and submitted that paragraphs 224 and 225 of the decision had to be read in the context of those earlier paragraphs.

30. T-Mobile submitted that the factual investigation which OFCOM needed to carry out would cover, for example, what precisely was communicated by VIP to T-Mobile; to whom it was communicated within T-Mobile, and when; what would have been required within T-Mobile to provide authorisation under the licence, for example, did T-Mobile itself have procedures in place, or means of dealing with authorisations under its licence; and were those steps taken in this particular case; did the T-Mobile board or did its legal department have any knowledge of the agreement; what is the factual matrix against which the agreement between T-Mobile and VIP is to be construed and which may be relevant to whether the terms sought to be implied by VIP are to be implied.

31. T-Mobile submits that an important feature of the administrative investigation is the power of OFCOM to compel parties to provide information to it pursuant to its powers under section 26 of the 1998 Act (which is not a power that the Tribunal has).

32. T-Mobile submits that to construe paragraph 3(2)(e) so as to give the Tribunal jurisdiction would transform the Tribunal from its role as an appellate body into a primary decision-maker and would undermine the procedural protection provided by an effective administrative procedure where the party alleged to have infringed competition law is afforded clear rights of defence and the protection afforded by a right to appeal on fact. As to the relationship between the Tribunal's jurisdiction and the regulator's functions T-Mobile referred to the Court of Appeal decision in *OFCOM and OFT v. Floe Telecom Limited* [2006] EWCA Civ. 768 ("*Floe*") (paragraph 34).

33. T-Mobile submits that the proper course is for the Tribunal either to allow the appeal to the extent that it sets aside OFCOM's decision on the basis of inadequate and/or incorrect reasoning, leaving OFCOM with an incomplete investigation which it will need to pursue (subject to its administrative priorities) or to deal with points of law arising on the assumed basis that VIP's allegations of fact are supported.

34. T-Mobile submits that Rule 19 of the Tribunal's Rules is a means of curing effectively relatively limited defects in the decision but it should not be used where there are a large extent of issues that were never considered. Its use should be confined to where there is a hole in the investigation but otherwise the Tribunal is effectively in a position to come to a conclusion. For example, where there has been an infringement decision after a complete investigation into market definition, dominance, other objective justifications and everything else, but there had been inadequate investigation of the facts, for example, in relation to authorisation: the Tribunal can remit that issue to OFCOM under Rule 19. There can then be a limited statement of objections in relation to that issue and then the matter can come back to the Tribunal.

35. Alternatively T-Mobile submits that if, contrary to its primary submissions, there is no absolute jurisdictional bar to the Tribunal making its own findings in respect of these matters, that as a matter of procedural fairness, the Tribunal should exercise its discretion not to do so.

36. T-Mobile finally submits that if VIP does not have confidence in OFCOM it can bring its own private law proceedings against T-Mobile in the Chancery Division.

OFCOM's submissions

37. OFCOM submits that there is no statutory bar, as a matter of construction of paragraph 3(2)(e) of Schedule 8 of the 1998 Act, on the Tribunal making an infringement decision. OFCOM submits that the phrase "any decision that [OFCOM] could have made" would include an infringement decision. OFCOM could have made an infringement decision. It did not. OFCOM submits that as a pure matter of statutory construction there is no bar on the Tribunal investigating the question of authorisation. OFCOM also submits that it is probably appropriate for the Tribunal to do so in this case having regard both to procedural fairness and other safeguards which the Tribunal can manage.

38. OFCOM referred to its first decision where it came to the conclusion there was no written authorisation having investigated the matter in the belief that as a matter of law T-Mobile could grant an authorisation. That decision was set aside, reinstating the investigation. OFCOM did not need to take a view on authorisation for the purposes of its second decision but at paragraph 267 on the question of authorisation, it concluded that if it had looked at the question of authorisation it would have reached the view that there was no written authorisation. OFCOM submits that on the question of authorisation the appropriate course is for the Tribunal to consider that issue rather than the rigmarole of sending it back to OFCOM and then the issue coming back to the Tribunal. OFCOM submits that, in the circumstances of this case, the better

course is for the Tribunal to hear and decide that issue rather than to use Rule 19.

VIP's submissions

39. VIP submits that the Tribunal is entitled to determine the issues of fact as part of determining the appeal on the merits (see paragraph 3(1) of Schedule 8 to the 1998 Act). It submits that the Tribunal is entitled to make findings of fact separate to that made by OFCOM (see paragraph 3(4) of Schedule 8 to the 1998 Act). VIP submits that interpreting paragraph 3(2) of Schedule 8 to the 1998 Act so as to limit the Tribunal's power to determine issues of fact raised in a notice of appeal would rob the Tribunal of any effective authority in respect of fact finding.

40. VIP submits that once the Tribunal has made its findings of fact then it must decide under Schedule 8 paragraph 3(2)(e) what to do next. It might be that the Tribunal considers it has enough information not merely to allow the appeal, but to substitute its own decision – or, it may consider that the correct path is to order that OFCOM issue a statement of objections. VIP submits that there are ways of using paragraph 3(2)(e) to be able to achieve the fair and just result in the circumstances according to the information before the Tribunal. VIP submits that this outcome fulfils the two tier structure, which includes an appeal on the merits.

41. VIP submits that the question of authority was live and extant and was presumably investigated by OFCOM in connection with its first decision.

42. VIP submits that T-Mobile's submission that the Tribunal has no jurisdiction in an appeal from a non-infringement decision of a regulator to determine the facts and to make an infringement decision, is misconceived since T-Mobile's submission could result in an interminable process which would not give the appellant any effective right of appeal.

IV TRIBUNAL'S ANALYSIS

43. Paragraph 3 of Schedule 8 of the 1998 Act provides:

> "(1) The Tribunal must determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal.
>
> (2) The Tribunal may confirm or set aside the decision which is the subject of the appeal, or any part of it, and may –
>
> (a) remit the matter to [OFCOM[1]],
>
> (b) impose or revoke, or vary the amount of, a penalty,
>
> (c) …
>
> (d) Give such directions, or take such other steps, as [OFCOM] could itself have given or taken, or
>
> (e) Make any other decision which [OFCOM] could itself have made.
>
> (3) Any decision of the Tribunal on an appeal has the same effect, and may be enforced in the same manner, as a decision of [OFCOM].
>
> (4) If the Tribunal confirms the decision which is the subject of the appeal it may nevertheless set aside any finding of fact on which the decision was based."

44. Schedule 8 paragraph 3 gives the Tribunal a wide jurisdiction. We consider that the true construction of paragraph 3(2)(e) of Schedule 8 refers to the types of decisions OFCOM can make (i.e. infringement/non-infringement etc.) and not to the procedure by which it makes them. As the Court of Appeal (Lloyd LJ, with whom Chadwick and Sedley LJJ agreed) said in *Floe*, cited above, at paragraph 25, the Tribunal's options are as follows:

> "If the appellant challenges a decision by a regulator, and establishes, on grounds taken in the notice of appeal, that the decision was wrong, whether as a matter of procedure or because of some misdirection of law or because the CAT takes a different view of the facts on the evidence before it, the Tribunal has a choice of a number of courses open to it. It may set aside the decision and remit the case to the regulator. It may feel able to decide itself what the correct result should have been, so that no remission or reference back is necessary. It may wish to retain for itself the task of deciding the eventual outcome but require further findings from the regulator, in which case it will not remit but may refer all or part of the decision back under rule 19(2)(j), with a view to deciding the appeal with the benefit of the result of that referral."

45. T-Mobile submits that the words "lawfully at the time it took its decision" should be inserted into paragraph 2 (d) and (e) and accordingly, where the decision appealed against is a non-infringement decision, the Tribunal has no

[1] OFCOM in this case exercises the power of the OFT pursuant to section 54 of the 1998 Act.

jurisdiction to make an infringement decision. The Tribunal considers that this submission is totally misconceived. The submission fails to give any effect to the appeal on the merits jurisdiction of the Tribunal. It fails to recognise that the appeal on the merits jurisdiction protects the rights of defence of an intervener, such as T-Mobile. The appeal on the merits jurisdiction provides the intervener with a right of defence at least equivalent to that which it would have at the statement of objections stage. Since an appeal on the merits also provides public hearings, *inter partes* submissions and a right to call and cross-examine witnesses, the intervener's rights of defence are more extensive than those available to it at the statement of objections stage. Accordingly procedural fairness which is safeguarded by a statement of objections at the administrative stage is also fully protected at the appeal stage before the Tribunal.

46. Moreover T-Mobile's submission would give no effect to the appeal on the merits jurisdiction since in every case where the Tribunal held that the decision of the regulator should be quashed because of an error of fact or inadequate investigation of the facts, the Tribunal would have to remit the case to the regulator and could not itself decide the case on the merits.

47. As the Tribunal observed in *Napp v. DGFT* [2002] CAT 1:

> "117. If and when a matter moves to the judicial stage before this Tribunal, what was previously an administrative procedure, in which the Director combines the rôles of "prosecutor" and "decision maker", becomes a judicial proceeding. There is, at that stage, no inhibition on the applicant attacking the Decision on any ground he chooses, including new evidence, whether or not that ground or evidence was put before the Director. The Tribunal, for its part, is not limited to the traditional rôle of judicial review but is required by paragraph 3(1) of Schedule 8 of the Act to decide the case "on the merits" and may, if necessary and appropriate, "make any other decision which the Director could have made": paragraph 3(2)(e). If confirming a decision, the Tribunal may nonetheless set aside a finding of fact by the Director: paragraph 3(4) of Schedule 8. Unlike the normal practice in judicial review proceedings, the Act and the Tribunal Rules envisage that the Tribunal may order the production of documents, hear witnesses and appoint experts (see Schedule 8, paragraph 9 of the Act, and Rule 17 of the Tribunal's Rules) and may do so even if the evidence was not available to the Director when he took the decision: see Rule 20(2) of the Tribunal's Rules.
>
> 118. In elucidation of these provisions, we refer to the statement made in the House of Commons by the then Minister for Competition and Consumer

Affairs (Mr Griffiths) during the passage of the Competition Bill on 18 June 1998 (Hansard Col 496):

> "It is our intention that the tribunal should be primarily concerned with the correctness or otherwise of the conclusions contained in the appealed decision and not with how the decision was reached or the reasoning expressed in it. That will apply unless defects in how the decision was reached or the reasoning make it impracticable for the tribunal fairly to determine the correctness or otherwise of the conclusions or of any directions contained in the decision. Wherever possible, we want the tribunal to decide a case on the facts before it, even where there has been a procedural error, and to avoid remitting the case to the director general. We intend to reflect that policy in the tribunal rules. This is an important aspect of our policy, and I shall explain the rationale behind our approach. The Bill provides for a full appeal on the merits of the case, which is an essential part of ensuring the fairness and transparency of the new regime. It enables undertakings to appeal the substance of the decision including in those cases where it is believed that a failure on the part of the director general to follow proper procedures has led him to reach an incorrect conclusion. The fact that the tribunal will be reconsidering the decision on the merits will enable it to remedy the consequences of any defects in the director general's procedures."

…

> 133. …in principle, the Director should not be permitted to advance a wholly new case at the judicial stage, nor rely on new reasons. To decide otherwise would make the administrative procedure, and the safeguards it provides, largely devoid of purpose; the function of this Tribunal is not to try a wholly new case. If the Director wishes to make a new case, the proper course is for the Director to withdraw the decision and adopt a new decision, or for this Tribunal to remit.
>
> 134. However,… it is virtually inevitable that, at the judicial stage, certain aspects of the Decision are explored in more detail than during the administrative procedure and are, in consequence, further elaborated upon by the Director. As already indicated, these are not purely judicial review proceedings. Before this Tribunal, it is the merits of the Decision which are in issue. It may also be appropriate for this Tribunal to receive further evidence and hear witnesses. Under the Act, Parliament appears to have intended that this Tribunal should be equipped to take its own decision, where appropriate, in substitution for that of the Director."

48. As this Tribunal noted in *Burgess*, cited above, (paragraphs 129 and 130) in deciding whether to take its own decision, the Tribunal is mindful of the fact that it is an appellate tribunal from an administrative decision and should not therefore turn itself into the primary decision maker without good reason. However the Tribunal has acted, in effect, as the decision-maker in cases where the evidence relied on by the OFT is challenged, very often on the basis of extensive new material introduced by the appellant and rebuttal evidence introduced by the OFT. As to whether to remit or decide, in *Burgess* the

Tribunal cited *Freeserve v. Director General of Telecommunications* [2003] CAT 5 at paragraph 113:

> "Everything will depend on what is necessary to meet the justice of the individual case, bearing in mind both the overriding need for fairness, and the need for expedition and saving costs."

The Tribunal continued at paragraph 132:

> "In our judgment on the above basis the Tribunal should, if necessary, take its own decision rather than remit if (i) it has or can obtain all the necessary material (ii) the requirements of procedural fairness are respected and (iii) the course the Tribunal proposes to take is desirable from the point of view of the need for expedition and saving costs. Such an approach in our view is compatible with the overriding objective of deciding cases justly."

49. The two tier structure and the right of appeal referred to by T-Mobile must be considered in the context of the appeal on the merits jurisdiction of the Tribunal and the Tribunal's powers to take its own decision in an appropriate case.

50. It was submitted by T-Mobile that the Tribunal is obliged to adopt the same approach as would be adopted under Community law and that the Community law approach is that the court cannot re-make the contested decision. However the Tribunal is not assisted by Community law in this regard because the jurisdiction of the Court of Justice and the Court of First Instance in competition cases is limited by the wording of Article 230 of the EC Treaty and does not give those courts the power to take their own decision on appeal. By contrast, under paragraph 3(1) of Schedule 8 of the 1998 Act the Tribunal's jurisdiction is more widely expressed being "on the merits" and gives the Tribunal the express power in paragraph 3(2)(e) to take any decision OFCOM could itself have taken.

51. We were referred to Section 60 which requires the Tribunal to determine questions arising under Part 1 of the 1998 Act so far as is possible and having regard to any relevant differences between the provisions concerned, in a manner which is consistent with the treatment of corresponding questions arising in Community law in relation to competition within the Community. We accept that it is, generally, desirable that there is consistent application of the competition regime in the United Kingdom and in the Community,

particularly since the coming into force of EC Regulation 1/2003 OJ [2003] L1/1 on 1 May 2004. However, it may not always be possible or appropriate to achieve absolute uniformity, particularly if the relevant statutory provisions are different. The jurisdiction of the Tribunal under paragraph 3(1) and (2) of Schedule 8, as we have said, is wider than that of the European Court of Justice or the Court of First Instance. Therefore, to the extent that the specific powers of the Tribunal are expressly different to those of the European courts, in our view, there is a "relevant difference between the provisions concerned" (see *Aberdeen Journals v. DGFT (No. 1)* [2002] CAT 4 at paragraph 190). Accordingly we do not consider that section 60 of the 1998 Act requires the Tribunal to follow the approach which is applicable in the Community concerning the remaking of contested decisions of the regulator.

52. The Tribunal also notes that T-Mobile's submission that the factual matters relevant to the authorisation issue were not considered by OFCOM is not borne out on a proper analysis of OFCOM's first and second decisions (see paragraphs 48-51 of the first decision and paragraph 224 of the decision of 28 June 2005).

53. The Tribunal considers that the statute permits the Tribunal to exercise the jurisdiction to substitute its decision for that of the regulator and that there is no other jurisprudence which prohibits such an approach by the Tribunal in an appropriate case (see paragraphs 48 and 50 above).

54. Finally we note that OFCOM did not support T-Mobile in its submissions on the point of statutory construction of paragraph 3(2)(e) of Schedule 8 of the 1998 Act. For the reasons we have set out above the Tribunal accepts the submissions of VIP and OFCOM as to the jurisdiction of the Tribunal provided for by that provision.

Marion Simmons QC Michael Davey Sheila Hewitt

Charles Dhanowa 22 January 2007
Registrar