Neutral citation [2005] CAT 14

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1024/2/3/04

Victoria House
Bloomsbury Place
London WC1A 2EB

05 May 2005

Before:

Marion Simmons QC (Chairman)
Mr Michael Davey
Mrs Sheila Hewitt

BETWEEN:

FLOE TELECOM LIMITED
(in administration)

Appellant

-v-

OFFICE OF COMMUNICATIONS
(formerly the Director General of Telecommunications)

Respondent

supported by

VODAFONE LIMITED

and

T-MOBILE (UK) LIMITED

Interveners

Monica Carss-Frisk QC and Brian Kennelly (instructed by Edward Mercer of Taylor Wessing) appeared for the Appellant.

Peter Roth QC and Gerry Facenna (instructed by the Director of Telecommunications and Competition Law, Office of Communications) appeared for the Respondent.

The Interveners did not appear and were not represented.

Heard at Victoria House on 5 April 2005

JUDGMENT

Application to set aside paragraphs 2 and 3 of the Tribunal's Order dated 1 December 2004

I BACKGROUND TO THE APPLICATION

1. The Tribunal handed down judgment in this case on 19 November 2004 (see: [2004] CAT 18). In that judgment the Tribunal set aside the decision of the Director General of Telecommunications (the "Director") dated 3 November 2003 (the "Decision") that Vodafone Limited had not infringed section 18 of the Competition Act 1998 (the "Chapter II prohibition") by disconnecting the telecommunications services it was providing to Floe Telecom Limited ("Floe").

2. The Director's powers under the Competition Act 1998 (the "1998 Act") have now been transferred to OFCOM and under section 371(1) and (2) of the Communications Act 2003 OFCOM exercises functions under the 1998 Act concurrently with the Office of Fair Trading ("OFT") insofar as relating to electronic communications matters. Section 371(3) of the Communications Act provides that for these purposes references to the OFT in Part 1 of the 1998 Act are to be read as including references to OFCOM (except in respect of certain specified provisions or where the context otherwise requires). The present application is made by OFCOM in the context of OFCOM's concurrent powers under the 1998 Act.

3. Following the handing down of the Tribunal's judgment on 19 November 2004 a directions hearing was held on 1 December 2004 to consider the consequential orders and directions that should be made in this case and in a related case before the Tribunal (case 1027/2/3/04 *VIP Communications Limited v Office of Communications*). All parties submitted written submissions in advance of that hearing as to the consequential orders that should be made and there was a full discussion of those matters at the hearing.

4. A major issue to which the written and oral submissions of the parties were directed before the Tribunal at that hearing was the terms upon which the matter should be remitted to OFCOM following the setting aside of the Decision.

5. OFCOM proposed to offer the Tribunal an undertaking to re-investigate the matter. It proposed that that undertaking would be to use its best endeavours to complete the re-investigation in accordance with its "*Guidelines for the handling of competition*

complaints and complaints and disputes about breaches of conditions imposed under EU Directives" issued in July 2004. That would have had the implication, notably, that OFCOM would undertake to subject itself to using its best endeavours to complete the reinvestigation in accordance with its guideline for the maximum time that an investigation should take being six months, if OFCOM considers there are no grounds for further action, and twelve months if OFCOM decides to issue an infringement decision.

6. On 22 November 2004 the Tribunal wrote to OFCOM asking it to provide an indicative timetable for OFCOM's view of the further steps required in the investigation. On 26 November 2004 OFCOM provided written submissions for the hearing on 1 December 2004 in which it was stated: "It is not possible to set out an indicative time scale for each step in the new investigation because some of the steps listed are likely to be carried out concurrently and the length of time they will take will be highly dependent on the information that OFCOM receives during the course of its investigation". Accordingly, the Tribunal had no assistance from OFCOM on 1 December 2004 as to the likely time required for further steps in the investigation other than OFCOM's proposal to give an undertaking in accordance with its guideline.

7. Counsel for OFCOM also submitted at the hearing, in response to a question from the Tribunal and having taken instructions from those instructing him, that no degree of priority would or should be given to the re-investigation by OFCOM of this matter and that OFCOM would allocate resources to this case having regard to resources needed for cases that OFCOM considers are deserving of priority. In particular, counsel for OFCOM submitted that this case, in contrast to other cases which it is investigating, is at the "bottom of the scale" in terms of the public interest. Floe strongly contested those submissions both in writing and orally at the hearing. Floe submitted that as a direct result of being disconnected by Vodafone it had suffered severe financial consequences and was now in administration. The appeal was being conducted by the administrators and from its point of view the matter must be dealt with expeditiously.

8. Having heard counsel for the parties at the hearing on 1 December 2004 the Tribunal issued a ruling (see: [2004] CAT 22). The Tribunal did not consider that OFCOM's *Guidelines*, which apply to matters which OFCOM has never previously considered and which are being examined *ab initio*, should determine the approach to be taken where the Tribunal remits a matter to OFCOM following the setting aside of a decision under the 1998 Act. In particular, the Tribunal held that account should be taken of the time which has already occurred during the period of OFCOM's original investigation and during the appeal process before the Tribunal. The Tribunal noted that in cases under the 1998 Act delay may have significant consequences for the public, for the appellant and, in particular, for the existence of a fair competitive market for the benefit of consumers.

9. In our ruling of 1 December 2004 we disagreed with OFCOM's characterisation of this case in terms of the public interest and the priority which should be given to the matter upon remittal to OFCOM. In that regard the Tribunal noted, in particular, that during the course of the proceedings before the Tribunal OFCOM had changed its position as to the interpretation to be given to the terms of licences issued to Mobile Network Operators ("MNOs") under the Wireless Telegraphy Act 1949. At the substantive hearing before us OFCOM had sought to advance an entirely new interpretation of those licences, different to the interpretation relied on in the Decision and supported by the former Radiocommunications Agency, (the body which, at the material time, issued and enforced those licences on behalf of the Secretary of State).

10. Therefore, the Tribunal considered that OFCOM ought to prioritise the re-investigation of this case and to do so with a view to issuing a non-infringement decision or a statement of objections in a shorter period than OFCOM's usual maximum period in its Guidelines and should therefore do so within five months. The Tribunal provisionally fixed a case management conference at the end of that period. OFCOM was not prepared to give an undertaking to the Tribunal that the matter be dealt with on the basis that OFCOM would seek to complete the re-investigation within five months and accordingly, in view of the priority which the Tribunal considered should be given to the matter, the Tribunal so ordered. The Tribunal's order made on 1 December 2004 was in the following terms:

"**UPON** considering the Respondent's Decision dated 3 November 2003 finding that Vodafone Limited had not infringed section 18 of the Competition Act 1998 by disconnecting the telecommunications services it was providing to the Appellant on or about 18 March 2003 (the "Decision").

AND UPON considering the Appellant's Amended Notice of Appeal dated 20 February 2004, the Respondent's Defence dated 14 May 2004 and the Interveners' respective Statements of Intervention dated 28 May 2004.

AND UPON hearing the legal representatives of the parties at a hearing held on 19 and 20 July 2004.

AND UPON the Tribunal unanimously deciding in a judgment dated 19 November 2004 (the "Judgment") that the Decision should be set aside on grounds of incorrect and/or inadequate reasoning.

AND UPON hearing the legal representatives of the parties at a directions hearing held on 1 December 2004.

AND UPON the Respondent having undertaken through counsel at the hearing to open a new investigation into the matter and consider whether Vodafone infringed section 18 of the Competition Act 1998 by disconnecting Floe's telecommunications services, taking account of the Judgment (the "Undertaking").

AND HAVING REGARD to the wider public interest in the matter.

IT IS ORDERED THAT:

1. Pursuant to paragraph 3(2)(a) of schedule 8 of the Competition Act 1998 (the "1998 Act"), the matter, being the Decision in its entirety, is remitted to the Respondent.

2. Pursuant to the Undertaking, the Respondent re-investigate the matter with a view to issuing either:

   (a) a new non-infringement decision pursuant to section 31 of the 1998 Act; or

   (b) a statement of objections pursuant to rule 4 of The Competition Act 1998 (Office of Fair Trading's Rules) Order 2004 (SI 2004 No. 2751)

   in either case within 5 months of the date of this Order.

3. A further case management conference is provisionally fixed for 5 May 2005 at a time to be notified to the parties.

4. The Respondent pay the Appellant's costs in respect of this matter on the standard basis, the parties to reach agreement as to the amount of costs recoverable, and failing agreement, such costs to be assessed pursuant to rule 55(3) of the Tribunal's rules following an application by either party.

5. There be general liberty to apply"

11. Although the Tribunal has, in the past, given directions as to the time within which a competition authority should take further steps following remittal of a matter to the authority by the Tribunal this is the first occasion on which the Tribunal's power to do so has been challenged. In previous cases concerning such directions the Tribunal has noted the importance, not only for a complainant and for an undertaking complained of, but also for the existence of a fair competitive market that the competition authority act expeditiously when a matter is remitted to it following an appeal before the Tribunal. In *Freeserve.com plc v Director General of Telecommunications* [2003] CAT 15 the Tribunal had set aside various paragraphs of the Director's decision. The Director undertook to issue a new decision on the pricing issues raised in the appellant's complaint and to give the appellant and the intervener an opportunity to be heard before doing so. The Tribunal directed that the further decision be issued within a period of 3 months. The Tribunal's order provided for liberty to apply. The Director subsequently applied to the Tribunal for an extension of that time limit. In its ruling on that application the Tribunal noted:

> "11. The Tribunal attaches importance to the speedy resolution of matters remitted by it to the relevant competition authority, or where, as in this case, the competition authority concerned has undertaken to take a new decision to replace an earlier decision set aside by the Tribunal. The public interest in matters being disposed of quickly and efficiently is self-evident from the point of view of both the complainant (in this case Freeserve) and the undertaking complained against (BT). In addition, the matter is not confined to the interests of the immediate parties, nor those of the competition authority: the wider public interest in the existence of a fair competitive market for the benefit of consumers and users is of paramount importance."

12. At paragraph 16 of its judgment in that case the Tribunal said:

> "16 More generally, and in particular bearing in mind the importance of the broadband sector to the economy, the Tribunal is concerned about the length of the extension sought by the Director. In cases such as the present, the Tribunal is reluctant to countenance a period of more than six months, at the most, for the adoption of any new decision on a matter already considered. In many, if not most, cases the period will need to be much shorter, normally within three months. In the present case, a six-month period from 16 April 2003 would take one to 16 October 2003 rather than 3 December 2003".

13. In that case the Tribunal saw little justification for extending the time limit beyond the six months that the Director ordinarily regards as the maximum period for investigation in such cases and ordered that the Director adopt a further decision in

respect of the matters which were the subject of the Tribunal's earlier judgment no later than 5pm on 16 October 2003. The Tribunal also (at paragraph 19 of its ruling) made clear that if the Director subsequently considered that he should issue a Rule 14 Notice (the term formerly used for "statement of objections") then the Tribunal expected such a notice to be issued within the same deadline. The Tribunal also ordered that the parties provide the Tribunal with a report on progress by 16 September 2003.

II OFCOM'S APPLICATION

14. On 20 December 2004 OFCOM submitted an application to the Tribunal: (a) for an order that paragraphs 2 and 3 of the Tribunal's order dated 1 December 2004 (the "Tribunal's Order") be set aside; or (b) alternatively, pursuant to section 49 of the 1998 Act, for permission to appeal against paragraphs 2 and 3 of the Tribunal's Order to the Court of Appeal. OFCOM sought an oral hearing of the application.

15. The grounds relied on by OFCOM in its notice of application are the following:

(a) The Tribunal is a creature of statute and established under the Enterprise Act 2002. The Tribunal derives its jurisdiction from the 2002 Act, the 1998 Act and the Communications Act 2003. Unlike the High Court, the Tribunal has no inherent jurisdiction. In any event, any power that the court may have over the way in which other bodies conduct their proceedings does not fall within its inherent jurisdiction but depends on statutory authority (*Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping* [1981] AC 909 at 977-78).

(b) The powers of the Tribunal on an appeal from a non-infringement decision under the 1998 Act are set out in section 46 and Part I of Schedule 8 of the 1998 Act. Sub-paragraphs (d) and (e) of paragraph 3(2) of Schedule 8 which refer to the Tribunal's power to give directions or take such other steps as the OFT could itself have given or taken and to making any other decision which the OFT itself could have made clearly concern steps or directions that the OFT (or sectoral regulator with powers to apply the 1998 Act concurrently) could have

adopted in the decision under appeal (e.g. as regards the remedy ordered) and do not refer to steps the OFT might take in the course of a re-investigation.

(c) The power of remission is accordingly set out in paragraph 3(2)(a) of Schedule 8 and it is pursuant to that power that the Tribunal acted in the present case (para [340] of the judgment).

(d) Paragraph 3(2)(a) of Schedule 8 does not give the Tribunal any power to make supplementary directions to the OFT or sectoral regulator as to how to conduct a further investigation upon remission. The powers under paragraph 3(2)(a) of Schedule 8 are to be contrasted with the power of the Tribunal under paragraph 3A(2) of Schedule 8 which give power to the Tribunal, acting by way of judicial review on a decision about commitments under section 46(3)(g) or (h) or section 47(1)(b) or (c) of the 1998 Act, to remit the matter to the OFT with a direction to reconsider and make a new decision in accordance with the ruling of the Tribunal.

(e) Even the power to give a direction to make a new decision in accordance with the ruling of the Tribunal (which does not apply in this case but only in judicial review of commitment decisions) simply corresponds to the power of the High Court when remitting a matter to the decision-maker when making a quashing order (see CPR, rule 54.19(2)). This follows the former RSC Ord. 53, rule 9(4) concerning the order of certiorari. When granting such an order the court does not direct the time within which the body whose decision was quashed must make a fresh decision (see the judgment of Lord Wright in *General Medical Council v Spackman* [1943] AC 627, at 647 and also *West Glamorgan County Council v Rafferty and others* [1987] 1 All ER 1005).

(f) Moreover, in planning appeals against an order of the Secretary of State regarding an enforcement notice there is a statutory power in the High Court to remit the matter back to the Secretary of State: Town and Country Planning Act 1990, section 289 and RSC Ord. 94, rule 13(7). That power of remission is similar to the power set out in paragraph 3(2)(a) of Schedule 8 of the 1998 Act. When it makes an order for remission under the Town and Country Planning

Act the court does not direct a timetable within which the Secretary of State must make a fresh determination which would be to trespass into the province of the Secretary of State in a manner not authorised by statute.

(g) With regard to EC competition law the Community Courts have no jurisdiction to issue directions to the European Commission as to how it should conduct matters following either a decision of annulment under Article 230 (ex Article 173) of a Commission decision (see Case T-102/92 *Viho v Commission* [1995] ECR II-17, paragraphs 28-29; Case T-127/98 *UPS Europe v Commission* [1999] ECR II-2633, paragraphs 48-50). Although the EC statutory framework is, of course, different to the 1998 Act the Tribunal has sought to decide procedural principles as regards the enforcement of the competition rules, so far as possible, consistently with the corresponding provisions of EC law: *Pernod-Ricard v OFT* [2004] CAT 10 at paragraph 229).

(h) Whereas the Tribunal has conduct of the proceedings in a case pending before it and can make directions in that regard, including the setting of a timetable for the proceedings, where a case is subject to investigation by a competition authority, whether before an appeal or on a re-investigation following the remittal of the matter by the Tribunal, the setting of a timetable falls within the province of the competition authority. Accordingly, the Tribunal may not prescribe a timetable within which an authority must take further steps. If the competition authority is dilatory in carrying out its duty it is subject to control by way of judicial review.

III PROCEEDINGS BEFORE THE TRIBUNAL

16. Following the submission of OFCOM's application a directions hearing was held on 17 February 2005. At that hearing Floe's position with regard to the costs of the application were discussed and OFCOM offered to pay the reasonable legal costs of Floe's administrators in relation to its application before the Tribunal. Having heard submissions from both parties the Tribunal decided to consider OFCOM's application under the liberty to apply provision in the Order dated 1 December 2004 and directions for the hearing of the application were made.

17. The hearing of the application, at which OFCOM was represented by Peter Roth QC and Gerry Facenna and Floe was represented by Monica Carss-Frisk QC and Brian Kennelly, took place on 5 April 2005.

18. The parties' submissions in their skeleton arguments and at the hearing were grouped under three broad headings:

    (a) the true construction of paragraph 3(2) of Schedule 8 to the 1998 Act;

    (b) the European Convention on Human Rights; and

    (c) European Community law.

19. Accordingly, we consider the parties' submissions, and the Tribunal's analysis of them, under each of these headings below.

IV THE RELEVANT LEGISLATION

20. The Tribunal's predecessor (the Competition Commission Appeal Tribunal) was originally set up under the 1998 Act and the Tribunal itself is now constituted under sections 12, 14 and 15 and Schedules 2 and 4 to the 2002 Act. The Tribunal consists of a President, Chairmen (who include the judges of the Chancery Division of the High Court) and a panel of members with expertise in the subject matter of proceedings before the Tribunal: section 12 of the 2002 Act.

21. The Tribunal's powers on an appeal under the Act are set out in paragraph 3 of Schedule 8 of the Act which, after amendment by the Enterprise Act 2002[1] and the Competition Act 1998 and Other Enactments (Amendment) Regulations 2004[2], provides as follows:

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1 See Enterprise Act 2002, ss 21, 278, Sch 5, paragraphs 1, 8, Sch 25, paragraphs 38(1), 54(b), Sch 26.

2 SI 2004/1261, regulation 4, Sch 1, paragraph 53

Decisions of the Tribunal

3. – (A1) This paragraph applies to any appeal under section 46 or 47 other than –

(a) an appeal under section 46 against, or with respect to, a decision of the kind specified in subsection (3)(g) or (h) of that section, and

(b) an appeal under section 47(1)(b) or (c)

(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 the OFT,

(b) impose or revoke, or vary the amount of, a penalty,

(c) (…)

(d) give such directions, or take such other steps, as the OFT could itself have given or taken, or

(e) make any other decision which the OFT 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 the OFT.

(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.

3A. - (1) This paragraph applies to –

(a) any appeal under section 46 against, or with respect to, a decision of the kind specified in subsection (3)(g) or (h) of that section, and

(b) any appeal under section 47(1)(b) or (c).

(2) The Tribunal must, by reference to the grounds of appeal set out in the notice of appeal, determine the appeal by applying the same principles as would be applied by a court on an application for judicial review.

(3) The Tribunal may -

(a) dismiss the appeal or quash the whole or part of the decision to which it relates; and

(b) where it quashes the whole or part of that decision, remit the matter back to the OFT with a direction to reconsider and make a new decision in accordance with the ruling of the Tribunal.

22. The parties referred to various other provisions of the 1998 Act said to assist as to the true construction of the provisions of Schedule 8. The sections of the 1998 Act referred to were:

> **"10 Parallel exemptions**
>
> (1) An agreement is exempt from the Chapter I prohibition if it is exempt from the Community prohibition –
>
> (a) by virtue of a Regulation, or
> (b) because of a decision of the Commission under Article 10 of the EC Competition Regulation.
>
> (2) An agreement is exempt from the Chapter I prohibition if it does not affect trade between Member States but otherwise falls within a category of agreement which is exempt from the Community prohibition by virtue of a Regulation.
>
> (3) An exemption from the Chapter I prohibition under this section is referred to in this Part as a parallel exemption.
>
> (4) A parallel exemption –
>
> (a) takes effect on the date on which the relevant exemption from the Community prohibition takes effect or, in the case of a parallel exemption under subsection (2), would take effect if the agreement in question affected trade between Member States; and
> (b) ceases to have effect –
>
> (i) if the relevant exemption from the Community prohibition ceases to have effect; or
> (ii) on being cancelled by virtue of subsection (5) or (7).
>
> (5) In such circumstances and manner as may be specified in rules made under section 51, the OFT may -
>
> (a) impose conditions or obligations subject to which a parallel exemption is to have effect;
> (b) vary or remove any such condition or obligation;
> (c) impose one or more additional conditions or obligations;
> (d) cancel the exemption.
>
> (6) In such circumstances as may be specified in rules made under section 51, the date from which the cancellation of an exemption is to take effect may be earlier than the date on which notice of cancellation is given.
>
> (7) Breach of a condition imposed by the OFT has the effect of cancelling the exemption.
> (8) In exercising its powers under this section, the OFT may require any person who is a party to the agreement in question to give it such information as it may require.
>
> (9) For the purpose of this section references to an agreement being exempt from the Community prohibition are to be read as including references to the prohibition being

inapplicable to the agreement by virtue of a Regulation [other than the EC Competition Regulation] or a decision by the Commission.

31 Decisions following an investigation

(1) If as a result of an investigation the OFT proposes to make a decision, the OFT must -
(a) give written notice to the person (or persons) likely to be affected by the proposed decision; and
(b) give that person (or those persons) an opportunity to make representations.

(2) For the purposes of this section and sections 31A and 31B "decision" means a decision of the OFT -
(a) that the Chapter I prohibition has been infringed;
(b) that the Chapter II prohibition has been infringed;
(c) that the prohibition in Article 81(1) has been infringed; or
(d) that the prohibition in Article 82 has been infringed.

31A Commitments

(1) Subsection (2) applies in a case where the OFT has begun an investigation under section 25 but has not made a decision (within the meaning given by section 31(2)).

(2) For the purposes of addressing the competition concerns it has identified, the OFT may accept from such person (or persons) concerned as it considers appropriate commitments to take such action (or refrain from taking such action) as it considers appropriate.

(3) At any time when commitments are in force the OFT may accept from the person (or persons) who gave the commitments –

(a) a variation of them if it is satisfied that the commitments as varied will address its current competition concerns;
(b) commitments in substitution for them if it is satisfied that the new commitments will address its current competition concerns.

(4) Commitments under this section -

(a) shall come into force when accepted; and
(b) may be released by the OFT where –
(i) it is requested to do so by the person (or persons) who gave the commitments;
(ii) it has reasonable grounds for believing that the competition concerns referred to in subsection (2) or (3) no longer arise.

(5) The provisions of Schedule 6A to this Act shall have effect with respect to procedural requirements for the acceptance, variation and release of commitments under this section.

32 Directions in relation to agreements

(1) If the OFT has made a decision that an agreement infringes the Chapter I prohibition or that it infringes the prohibition in Article 81(1), it may give to such

person or persons as it considers appropriate such directions as it considers appropriate to bring the infringement to an end.

(2) …

(3) A direction under this section may, in particular, include provision –

(a) requiring the parties to the agreement to modify the agreement; or
(b) requiring them to terminate the agreement.

(4) A direction under this section must be given in writing.

33 Directions in relation to conduct

(1) If the OFT has made a decision that conduct infringes the Chapter II prohibition [or that it infringes the prohibition in Article 82, it may give to such person or persons as it considers appropriate such directions as it considers appropriate to bring the infringement to an end.

(2) …

(3) A direction under this section may, in particular, include provision

(a) requiring the person concerned to modify the conduct in question; or
(b) requiring him to cease that conduct.

(4) A direction under this section must be given in writing.

35 Interim measures

(1) Subject to subsections (8) and (9), this section applies if the OFT has begun an investigation under section 25 and not completed it (but only applies so long as the OFT has power under section 25 to conduct the investigation)

(2) If the OFT considers that it is necessary of it to act under this section as a matter of urgency for the purpose –

(a) of preventing serious, irreparable damage to a particular person or category of person, or

(b) of protecting the public interest

it may give such directions as it considers appropriate for that purpose.

…
(5) A direction given under this section may if the circumstances permit be replaced by

(a) a direction under section 32 or (as appropriate) section 33, or

(b) commitments accepted under section 31A

but, subject to that, has effect while this section applies.

Appeals

46 Appealable decisions

(1) Any party to an agreement in respect of which the OFT has made a decision may appeal to the Tribunal against, or with respect to, the decision.

(2) Any person in respect of whose conduct the OFT has made a decision may appeal to the Tribunal against, or with respect to, the decision.

(3) In this section "decision" means a decision of the OFT –

(a) as to whether the Chapter I prohibition has been infringed,
(b) as to whether the prohibition in Article 81(1) has been infringed,
(c) as to whether the Chapter II prohibition has been infringed,
(d) as to whether the prohibition in Article 82 has been infringed,
(e) cancelling a block or parallel exemption,
(f) withdrawing the benefit of a regulation of the Commission pursuant to Article 29(2) of the EC Competition Regulation,
(g) not releasing commitments pursuant to a request made under section 31A(4)(b)(i),
(h) releasing commitments under section 31A(4)(b)(ii),
(i) as to the imposition of any penalty under section 36 or as to the amount of any such penalty,

and includes a direction under section 32, 33 or 35 and such other directions under this Part as may be prescribed.

(4) Except in the case of an appeal against the imposition, or the amount, of a penalty, the making of an appeal under this section does not suspend the effect of the decision to which the appeal relates.

(6) Part I of Schedule 8 makes further provision about appeals.

47 Third party appeals

(1) A person who does not fall within section 46(1) or (2) may appeal to the Tribunal with respect to -

(a) a decision falling within paragraphs (a) to (f) of section 46(3);
(b) a decision falling within paragraph (g) of section 46(3);
(c) a decision of the OFT to accept or release commitments under section 31A, or to accept a variation of such commitments other than a variation which is not material in any respect;
(d) a decision of the OFT to make directions under section 35;
(e) a decision of the OFT not to make directions under section 35; or
(f) such other decision of the OFT under this Part as may be prescribed.

(2) A person may make an appeal under subsection (1) only if the Tribunal considers that he has a sufficient interest in the decision with respect to which the appeal is made, or that he represents persons who have such an interest.

(3) The making of an appeal under this section does not suspend the effect of the decision to which the appeal relates.

23. Pursuant to section 46(3) and 47(1)(f) of the 1998 Act regulations have been made prescribing further decisions for the purposes of sections 46 and 47 of the Act. Regulation 2 of the Competition Act 1998 (Appealable Decisions and Revocation of Notification of Excluded Agreements) Regulations 2004 provides:

> **2 Appealable decisions**
>
> The following are prescribed as decisions for the purposes of sections 46 and 47 of the Competition Act 1998:
>
> (a) a decision of the OFT imposing conditions or obligations subject to which a parallel exemption is to have effect;
> (b) a decision of the OFT imposing one or more additional conditions or obligations subject to which a parallel exemption is to have effect; and
> (c) a decision of the OFT varying or removing any such condition or obligation.

24. Reference was also made to rule 19 of the Tribunal's rules of procedure (Competition Appeal Tribunal Rules 2003 (SI 2003/1372) (the "Tribunal's Rules")) which provides as follows:

> **19 Directions**
>
> (1) The Tribunal may at any time, on the request of any party or of its own initiative, at a case management conference, pre-hearing review or otherwise, give such directions as are provided for in paragraph (2) below or such other directions as it thinks fit to secure the just, expeditious and economical conduct of the proceedings.
>
> (2) The Tribunal may give directions -
>
> (a) as to the manner in which the proceedings are to be conducted, including any time limits to be observed in the conduct of the oral hearing;
> (b) that the parties file a reply, rejoinder or other additional pleadings or particulars;
> (c) for the preparation and exchange of skeleton arguments;
> (d) requiring persons to attend and give evidence or to produce documents;
> (e) as to the evidence which may be required or admitted in proceedings before the Tribunal and the extent to which it shall be oral or written;
> (f) as to the submission in advance of a hearing of any witnesses or expert reports;
> (g) as the examination or cross-examination of witnesses;
> (h) as to the fixing of time limits with respect to any aspect of the proceedings;
> (i) as to the abridgement or extension of any time limits whether or not expired;
> (j) to enable a disputed decision to be referred back in whole or in part to the person by whom it was taken;
> (k) for the disclosure between, or the production by, the parties of documents or classes of documents;

(l) for the appointment and instruction of experts, whether by the Tribunal or by the parties and the manner in which expert evidence is to be given;
(m) for the award of costs or expenses, including any allowances payable to persons in connection with their attendance before the Tribunal;
(n) for hearing a person who is not a party where, in any proceedings, it is proposed to make an order or give a direction in relation to that person.

(3) The Tribunal may, in particular, of its own initiative –

(a) put questions to the parties;
(b) invite the parties to make written or oral submissions on certain aspects of the proceedings;
(c) ask the parties or third parties for information or particulars;
(d) ask for documents or any papers relating to the case to be produced;
(e) summon the parties' representatives or the parties in person to meetings.

(4) A request by a party for directions shall be made in writing as soon as practicable and shall be served by the Registrar on any other party who might be affected by such directions and determined by the Tribunal taking into account the observations of the parties.

25. Section 54 and Schedule 10 to the 1998 Act provide that the functions of the OFT under Part 1 of the 1998 Act are exercisable concurrently by "regulators", as defined in section 54(1) (see also the Competition Act 1998 (Concurrency) Regulations 2004 SI 2004/1077 made pursuant to section 54(4) and (5) of the 1998 Act). Pursuant to section 371(5)(a) of the Communications Act 2003 OFCOM is a "regulator" for the purposes of that section. Accordingly, although the provisions of the 1998 Act refer to the powers and functions of the OFT we use the term "competition authority" where relevant to include the OFT as well as the "regulators" with concurrent powers under the 1998 Act.

V THE TRUE CONSTRUCTION OF PARAGRAPH 3(2) OF SCHEDULE 8

(a) OFCOM's submissions

No express power in paragraph 3(2) of Schedule 8

26. OFCOM submits that the Tribunal is a creature of statute established under the Enterprise Act 2002 and derives its jurisdiction from that Act, the 1998 Act and the

Communications Act 2003. Unlike the High Court the Tribunal has no inherent jurisdiction.

27. OFCOM submits that the provisions of paragraph 3(2) of Schedule 8 of the 1998 Act are to be interpreted against the background of a competition authority's powers under the Act and the directions and decisions a competition authority can make against which an appeal can be brought before the Tribunal. The words of sub-paragraphs (d) and (e) of paragraph 3(2) refer to "decisions", "directions" or "such other step" as the authority itself could have taken.

28. OFCOM submits that there is a fundamental distinction between the decisions that a competition authority can take internally as part of its management of matters before it, on the one hand, and directions, decisions or other steps that the authority may take with legally binding force in determination or conclusion of such an investigation. The competition authority will make many internal decisions and take many steps in the course of an investigation, such as deciding whether or not to use economists or technical experts for the investigation and may well set target dates for the completion of the investigation, which it may announce to the parties or more widely. The authority will also decide which of its statutory powers, if any, to use. Those are all matters the authority will decide and steps that it will take. However, power over that sort of matter is emphatically not given to the Tribunal under Schedule 8 of the 1998 Act. Paragraph 3(2) of Schedule 8 was not intended to give the Tribunal complete jurisdiction to "micro-manage" re-investigations of matters that are remitted to the authority and it would therefore be inappropriate to read the words of subparagraphs (d) and (e) of paragraph 3(2) literally.

29. Accordingly the word "decision" in sub-paragraph (e) of paragraph 3(2) must refer to a decision under section 46 of the 1998 Act. The word "directions" must refer to directions under sections 32 and 33 of the 1998 Act and the words "such other steps" must refer to legally binding steps that the authority can take to conclude an investigation, such as cancelling a parallel exemption. The words of paragraph 3(2)(d) and (e) are intended to refer to legally binding directions, decisions and steps which are given to a third parties at the conclusion of an investigation and not to directions, decisions and steps taken as part of the management of the re-investigation

which is the sole province of the competition authority and not the Tribunal. Accordingly paragraph 3(2)(d) and (e) do not contain any power to direct a timetable for the authority's work.

30. OFCOM referred to section 120 of the Enterprise Act 2002 (the "2002 Act") which gives the Tribunal jurisdiction to hear applications for judicial review from decisions of the OFT, OFCOM, the Secretary of State and the Competition Commission in merger cases. Section 120(5) provides that the Tribunal may dismiss the application or quash the whole or part of the decision to which it relates and, where it quashes the whole or part of the decision, refer the matter back to the original decision maker with a direction to reconsider and make a new decision in accordance with the ruling of the Tribunal. OFCOM submits that in merger cases time is of the essence and both such cases which the Tribunal has dealt with to date have been heard with great expedition. The wording of section 120(5) of the 2002 Act comes from the wording of the power of the High Court on judicial review, which is now set out in Part 54 of the Civil Procedure Rules ("CPR"). OFCOM submits that it is clear that in cases under section 120(5) of the 2002 Act which include in certain circumstances decisions of the Secretary of State, there is no power to set a timetable for reconsideration of a decision that is quashed.

31. OFCOM also referred to paragraph 3A of Schedule 8 which was inserted in 2004 in the schedule by statutory instrument following the changes made to the 1998 Act to take account of the "modernisation" of the competition law and the abolition of notifications to competition authorities and the possibility of accepting commitments. OFCOM submitted that there is no difference in the Tribunal's powers under paragraph 3(2)(a) of the 1998 Act (which applies to merits appeals against decisions of the competition authority) and paragraph 3A(3) of the 1998 Act which applies on applications for judicial review of an authority's decision with regard to commitments under section 31A of the 1998 Act. OFCOM submitted that the difference in wording of paragraph 3A(3) and paragraph 3(2)(a) merely reflects the fact that paragraph 3A(3) was written more recently and in accordance with plain English. Had paragraph 3(2)(a) been written today it would have been written in exactly the same terms as paragraph 3A(3).

General principles

32. As an aide to the construction of paragraph 3(2) of Schedule 8 OFCOM referred to general principles derived from the case law of the Administrative Court which, in OFCOM's submission, demonstrate that it is not for the Tribunal to set out time limits when remitting a matter to a competition authority under the 1998 Act. OFCOM referred first to the judgment of the House of Lords in *General Medical Council v Spackman* [1943] AC 627. In that case a doctor who had been struck off because he had been named as a co-respondent in divorce proceedings involving his patient wished to adduce evidence before the GMC challenging the finding of the Divorce Court with regard to adultery. The GMC refused to let the doctor adduce evidence. On the construction of the relevant section of the Medical Act 1858, the House of Lords held that the GMC had been wrong to refuse to allow the doctor to challenge the finding of the Divorce Court and that the matter should be reheard. OFCOM referred to a passage in the judgment of Lord Wright, commencing at page 645, where he said:

> "Thus, in my opinion, in the present case the council has to take up the inquiry afresh. There is, in my opinion, no force in certain objections which have been raised. The council very properly have treated the decree of the divorce judge as prima facie evidence. So it is, and very strong evidence too, especially considering the respondent did not appeal but paid the *l*1000 of damages awarded against him. That, however is no reason for refusing him the full and fair opportunity of stating his case before the council…In my opinion, the decision which has been brought up to the court on *certiorari* ought not to stand. The council ought to take up the inquiry again. I do not seek in any way to suggest or forecast how they will hold it. The discretion and responsibility for the procedure are theirs. I would dismiss the appeal."

33. OFCOM submits that this passage enunciates a very obvious feature of the process of retaking a decision after the original decision has been quashed. That is to say that the matter is back in the province of the original decision-maker and the court should not and cannot circumscribe how the original decision-maker acts unless there is some statutory provision enabling the court to do so.

34. Counsel for OFCOM also referred to the case of *R (on the application of Mackay) v Dagenham and Barking London Borough Council Housing and Council Tax Review Board* [2001] EWHC Admin 234. In that case the claimant sought judicial review of

a decision of the Review Board of the London Borough of Barking and Dagenham which had refused to overturn a decision that he should not be entitled to housing benefit. Collins J held at paragraph 52 of his judgment that the council's decision could not stand and must be quashed and accordingly he remitted the matter to the council for reconsideration. Counsel for OFCOM provided a "Westlaw UK" transcript of the judgment in that case at the end of which there was some discussion between the judge and counsel for the Claimant (Mr Knaffler) which was reported, so far as relevant, as follows:

> "53. There has been far too long a delay already since the Claimant has been awaiting a proper decision for over two years. Accordingly, this must take priority when it is reconsidered by the authority.
>
> Mr Knaffler: My Lord, I ask for a quashing order, as it is now called.
>
> (…)
>
> Mr Justice Collins: The decision will be quashed and there will be an order for costs…
>
> Mr Knaffler: Yes. My solicitor has raised a very interesting point which is whether it would be possible to put a time limit on the reconsideration.
>
> Mr Justice Collins: I do not think I can do that. I do not think I have the power to do that. I have indicated my view that it ought to be done as soon as possible because of the delay that has occurred…"

35. Counsel for OFCOM accepted that this passage did not amount to a reasoned decision but submitted that it was a powerful illustration of a judge of huge experience of public law both in practice and on the bench in a case where he was clearly concerned about delay, refusing to put a time limit on the reconsideration because, in his view, he had no power to do so. He could only give an indication. Counsel for OFCOM submitted that the Tribunal can likewise give such indications as to priority and time, and further submitted, on instruction, that OFCOM would always endeavour to follow any such indications. However, neither the court nor the Tribunal had the power to make an order as to timing and will not seek to control the decision-making process.

36. OFCOM further referred to *West Glamorgan County Council v Rafferty and others* [1987] 1 All ER 1005 as a further illustration of the way that the court, in judicial review, will not control the decision-making process, even by way of declaration although OFCOM accepted that the Administrative Court undoubtedly has

jurisdiction to make declarations. In that case the council was held to be in breach of a duty to provide adequate accommodation for gypsies residing in or resorting to its area. The council had obtained a possession order to evict gypsies from a site but did not offer alternative accommodation to the gypsies. The possession order was quashed on judicial review. The judge further made a declaration that the council was not entitled to seek possession of the site until it had made reasonable alternative provision for gypsies occupying the site.

37. The council appealed against the quashing order, the declaration and the setting aside of the possession order to the Court of Appeal. The Court of Appeal held that the council's appeal against the quashing order and the possession proceedings would be dismissed. However, the declaration in the judicial review proceedings would be set aside because the council ought to be left free to deal with the situation as it thought best, having regard to its statutory duties and powers. In relation to the declaration Ralph Gibson LJ said, at page 1022:

> "I would set aside that declaration, which I think should not have been made. It is not possible for the court to decide in advance that any decision to claim possession of the land at Briton Ferry, or any part of it, must be perverse unless the county council has first made "reasonable" alternative provision for the accommodation of gipsies. The circumstances of the site have changed since 19 September 1985 and continue to change…The county council, is free and must be left free, to deal with the situation as it thinks best having regard to its duty and powers, which will have been clarified by the judgment of Kennedy J and by the decision of this court. It would be wrong for this court, as I think, to try to indicate what sort of plan or provision for recovery of possession of this site would be "reasonable". We have neither the right nor the knowledge to formulate any such suggestion and the county council does not need guidance from us. There is no reason to suppose that the county council will again make a decision with reference to this matter which could again be described as perverse. If any such challenge is made hereafter to any further decision of the county council the matter will have to be considered and decided in the usual way."

38. OFCOM submitted that similarly, setting a timetable for a re-investigation involves deciding, in advance, what is reasonable and is done before one knows how many representations are going to be made to the authority and what issues they will raise and what sort of follow-up investigation or fact-finding may need to be made. For the reasons given by Ralph Gibson LJ in the passage quoted above no attempt should be made by the Tribunal to perform such an exercise in advance, particularly as OFCOM submits that there is no reason to suppose in advance in this case that OFCOM is

going to set out to take an unreasonable time. No element of bad faith arises in this case.

No implied power

39. OFCOM submitted that if there is no express power for the Tribunal to impose time limits in paragraph 3(2) of Schedule 8 there is no implied power either. OFCOM submitted that the Tribunal should be very cautious about implying further powers which are not set out in the statute, particularly where the result of implying further powers is to extend the Tribunal's own jurisdiction over another statutory body. OFCOM submitted that there is a risk that the Tribunal would amend an Act of Parliament in its own favour in this case.

40. Where a statute expressly sets out the jurisdiction of a court or public body there is implicit only such powers as are incidental to the statutory jurisdiction to enable it properly to be exercised, having regard to the purpose of that jurisdiction. OFCOM accepted that there will be implicit powers that are truly necessary or incidental to the express power, so that it can properly be exercised. OFCOM submitted that an example of an implied power that is truly necessary was considered in *Bodden v Commissioner of Police of the Metropolis* [1990] 2 QB 397 (CA). The key issue in that case concerned the construction of section 12 of the Contempt of Court Act 1981. Counsel for OFCOM referred to the following passage in the judgment of Beldam LJ at page 405E:

> "In argument before us it was contended for the plaintiff that the power given to magistrates to order the detention of the offender under section 12(2) did not include a power to order the defendant's officers to bring the plaintiff before the magistrate; the only power given was to take him into custody and detain him until the rising of the court. It was further contended that the magistrate had no power to inquire into the circumstances of the interruption for the purpose of deciding whether the person detained was acting wilfully.
> In giving the magistrates' court jurisdiction to deal with the different kinds of contempt referred to in section 12(1)(a) and (b), Parliament obviously intended to confer all incidental powers necessary to enable the court to exercise the jurisdiction in a judicial manner. After all, the powers were being conferred on justices who could be expected to discharge their functions as responsibly as when they were exercising their ordinary criminal jurisdiction. It is, moreover, clear from the construction of section 12(2) that the purpose of the power to detain an alleged offender until the rising of the court was to ensure that the magistrates dealt with the

> matter as soon as they conveniently could without thereby interrupting the proceedings of the court; further, before committing the offender to custody, it is obvious that magistrates would, in cases where the circumstances demanded it, have to inquire into them because they can only exercise this further power "if [they think] fit."

41. OFCOM submitted that in this case, by contrast to the situation in *Bodden*, the statutory power to remit matters to the competition authority is not designed to deal with delay by the authority. Its clear purpose is to enable the authority to take a fresh decision in the light of the Tribunal's ruling, in circumstances where the Tribunal considers it more appropriate for the authority to take a new decision than for the Tribunal to do so itself. It is not necessary or ancillary to the exercise of that power for the Tribunal to attach time limits when remitting matters. Indeed, there have been cases where the Tribunal has, in the past not found it necessary to do so. Although the Tribunal may think it desirable in some cases to attach a time limit there is no principle of statutory construction that gives the Tribunal jurisdiction to do whatever is desirable.

42. An implied power to impose a time limit would not fit with the overall statutory scheme and indeed would be contrary to it. Neither the 1998 Act nor the 2002 Act provide a statutory time period for a competition authority to conduct investigations of alleged infringement of the Chapter I prohibition or the Chapter II prohibition. By contrast, the provisions of the 2002 Act relating to merger and market investigations do set out time limits. If Parliament had intended that matters under the 1998 Act would be dealt with in specific time periods it would have said so.

43. OFCOM referred to two other fields which in OFCOM's submission are useful analogies. OFCOM referred first to the jurisdiction of the Tribunal under section 195 of the Communications Act 2003 which provides:

> "**195 Decisions of the Tribunal**
>
> (1) The Tribunal shall dispose of an appeal under section 192(2) in accordance with this section.
>
> (2) The Tribunal shall decide the appeal on the merits and by reference to the grounds of appeal set out in the notice of appeal.

(3) The Tribunal's decision must include a decision as to what (if any) is the appropriate action for the decision-maker to take in relation to the subject-matter of the decision under appeal.

(4) The Tribunal shall then remit the decision under appeal to the decision-maker with such directions (if any) as the Tribunal considers appropriate for giving effect to its decision.

(5) The Tribunal must not direct the decision-maker to take any action which he would not otherwise have the power to take in relation to the decision under appeal.

(6) It shall be the duty of the decision-maker to comply with every direction given under subsection (4).

(7) In the case of an appeal against a decision given effect to by a restriction or condition set by regulations under section 109, the Tribunal must take only such steps for disposing of the appeal as it considers are not detrimental to good administration.

(8) In its application to a decision of the Tribunal under this section, paragraph 1(2)(b) of Schedule 4 to the Enterprise Act 2002 (c 40) (exclusion of commercial information from documents recording Tribunal decisions) is to have effect as if for the reference to the undertaking to which commercial information relates there were substituted a reference to any person to whom it relates.

(9) In this section "the decision-maker" means -

(a) OFCOM or the Secretary of State, according to who took the decision appealed against; or
(b) In the case of an appeal against –
  (i) a direction, approval or consent given by a person other than OFCOM or the Secretary of State, or
  (ii) the modification or withdrawal by such a person of such a direction, approval or consent,

that other person.

44. OFCOM submitted that the wording of section 195(2), (3) and (4) of the 2003 Act is clearly very different from the form of words in paragraph 3(2) and 3A of Schedule 8 of the 1998 Act and is clearly giving the Tribunal a more "interventionist" power of direction. OFCOM submitted that it is therefore clear that if Parliament wishes the Tribunal to have an "interventionist power" it provides for that expressly.

45. Secondly, OFCOM referred to the powers of the High Court on planning appeals against an order of the Secretary of State regarding an enforcement notice. Section 289 of the Town and Country Planning Act 1990 provides a statutory power for the High Court to remit the matter back to the Secretary of State which OFCOM submits is a very similar power to that of the Tribunal set out in paragraph 3(2) of Schedule 8 of the 1998 Act. OFCOM submitted that when the High Court makes an order for

remitting the matter to the Secretary of State under section 289 of the 1990 Act it does not direct a timetable within which the Secretary of State must make a fresh determination as that would be to trespass into the province of the Secretary of State in a manner not authorised by the statute.

46. Section 289 of the 1990 Act provides:

> "**289 Appeals to the High Court relating to enforcement notices and notices under s 207**
>
> …
>
> (5) In relation to any proceedings in the High Court or the Court of Appeal brought by virtue of this section the power to make rules of court shall include power to make rules -
>
> (a) prescribing the powers of the High Court or the Court of Appeal with respect to the remitting of the matter with the opinion or direction of the court for re-hearing and determination by the Secretary of State; and
>
> (b) providing for the Secretary of State, either generally or in such circumstances as may be prescribed by the rules, to be treated as a party to any such proceedings and to be entitled to appear and to be heard accordingly.

47. Rules of court were made pursuant to section 289(5) of the 1990 Act and are set out in RSC Order 94, rule 13, which provides as follows:

> "**Rule 13 Proceedings under sections 289 and 290 of the Town and Country Planning Act 1990 and under section 65 of the Planning (Listed Building and Conservation Areas) Act 1990**
>
> …
>
> **(2)** An appeal shall lie to the High Court on a point of law against a decision of the Secretary of State under subsection (1) or (2) of section 289 or under subsection (1) of section 65 at the instance of any person or authority entitled to appeal under any of those subsections respectively.
>
> …
>
> **(7)** Where the court is of the opinion that the decision appealed against was erroneous in point of law, it shall not set aside or vary that decision but shall remit the matter to the Secretary of State with the opinion of the court for re-hearing and determination by him."

48. OFCOM did not refer to any decided authority dealing with the above provisions but referred to the case of *Kingswood District Council v Secretary of State for the Environment* [1988] JPL 248. In that case the deputy judge considered the predecessor to section 289 of the 1990 Act and held that when a decision of the Secretary of State is quashed pursuant to that legislation the matter is remitted back to

the Secretary of State for complete reconsideration *de novo*. The way in which the Secretary of State starts *de novo* is entirely a matter for the Secretary of State, subject to the statutory provisions and rules which bind him. But the Secretary of State has a discretion, subject to those provisions, to deal with the matter as he wishes and the court will not give any directions as to how, when and in what manner the Secretary of State proceeds. Counsel for OFCOM submitted that in more than thirty years of consistent practice in planning cases and countless planning appeals directions as to a timetable had never been made.

49. As to the previous practice of the Tribunal in other cases Counsel for OFCOM submitted that the issue of the Tribunal's jurisdiction has never previously been challenged and the previous practice of the Tribunal could not be relied upon as a precedent. A practice of the Tribunal, however consistent, could not confer a jurisdiction on the Tribunal that did not exist in the statute. In any event, it is less than four years since the first judgment of the Tribunal and no consistency of practice could be discerned from decisions over such a limited period of time. Floe, in fact could only point to two cases where the Tribunal has previously directed a timetable after remitting a matter to a competition authority and there are two other cases where the Tribunal did not set such a timetable.

50. OFCOM submitted that in the case of *Freeserve* upon which Floe relies the matter arose in a very special way. Oftel had offered an undertaking to the Tribunal to take a further decision expanding on its reasons that had been found insufficient by the Tribunal and offered an unqualified undertaking to make such a new decision in a period of two months. The Tribunal in fact directed that it was more important that sound conclusions be reached on the issues than it was for the matter to be rushed and that therefore a new decision should be taken in three months and made an order accordingly.

51. OFCOM submitted that if it was relevant to consider the practice of the Tribunal on remitting matters to competition authorities under the 1998 Act then the Tribunal's practice under section 120 of the 2002 Act in merger cases is also relevant. OFCOM submitted that in both cases to date in which the Tribunal has reviewed decisions of the Office of Fair Trading in merger cases under the 2002 Act the Tribunal has

imposed very tight timetables for the hearing and case management of those cases but has not included any timetable on remittal. Both cases involved matters of considerable urgency, being merger cases, but the Tribunal had not imposed a timetable on the authority.

52. OFCOM submitted that the *Argos* case on which Floe relies was not a case of remittal under paragraph 3 of Schedule 8. The matter was remitted to the competition authority with a detailed timetable in that case but that was an exercise of case management powers under rule 17 of the then applicable rules of procedure (now rule 19 of the Tribunal's Rules) *before* a hearing and judgment in a different situation to that which the Tribunal is dealing with here. Although the Tribunal has very broad case management powers and has the power to make directions as to time limits as a matter of case management during the period before a final hearing of an appeal the Tribunal's powers at the final conclusion of the appeal are quite different. There is a clear contrast between the Tribunal's powers of case management under rule 19 of the Tribunal's Rules and the Tribunal's powers when giving final judgment in Schedule 8 of the 1998 Act.

(b) Floe's submissions

Express power in paragraph 3(2) of Schedule 8 to direct a timetable

53. Floe submits that the Tribunal's powers on an appeal from a non-infringement decision under the 1998 Act are set out in section 46 and Part I of Schedule 8 of the 1998 Act. The wording of paragraph 3(2) of Schedule 8 is clear and extremely widely drafted. Floe submitted that it was very important to note that OFCOM had not disputed that on the ordinary meaning of the words used in those provisions, the setting of a time for an investigation is a decision or direction which OFCOM could itself have made. Floe submitted that OFCOM's submissions on the construction of Schedule 8 of the 1998 Act, and leaving aside Community law and human rights, amounted to a submission that for some reason the Tribunal should read down the ordinary meaning of the words in paragraph 3(2) to give them a narrower scope than the meaning the words have on their ordinary and natural meaning in the context. Floe submitted that there is no jurisprudential basis, and none had been suggested by

OFCOM, for that kind of exercise in reading down the ordinary meaning of the statute.

54. With regard to the wording of paragraphs 3(2)(e) and (d), Floe submitted that there is nothing in Schedule 8 to indicate that the words "decision", "directions" or "step" are limited to directions issued to a third party at the end of an investigation or steps aimed at third parties at the end of an investigation. OFCOM's submissions are to the effect that one has to find such an artificial limitation in construing the statute. OFCOM submitted that the word "decision" in paragraph 3(2)(e) means an appealable decision at the end of an investigation. Floe submitted that it is notable that the 1998 Act contains provisions that do define the word "decision" and those definitions are different. In each case the extent of the application of the relevant definition is clearly stated. The definition of the word "decision" contained in section 31 of the 1998 Act clearly states: "*for the purposes of this section and sections 31A and 31B*, decision means…". It is a very specific definition confined to those sections and not expressed to extend to the use of the word "decision" anywhere else in the 1998 Act and certainly not in Schedule 8. Equally, the definition of the word "decision" in sections 46 and 47 of the 1998 Act states "*in this section* decision means". Those definitions expressly do not apply to the word "decision" in Schedule 8 of the 1998 Act and accordingly OFCOM's submission that the word "decision" in Schedule 8 should be read as if those definitions applied is misconceived. Floe submitted that the word "decision" in sub-paragraph 3(2)(e) of Schedule 8 is not anywhere defined. Accordingly, the word "decision" in that sub-paragraph should be given its ordinary and natural meaning. Floe submitted that it is not attempting to suggest that setting a timetable is a "decision" for the purposes of section 46(3) of the 1998 Act but OFCOM does not and cannot dispute that setting a timetable is a "decision" on the ordinary meaning of that word that OFCOM itself can take.

55. Floe further submitted that there is nothing in the wording of paragraph 3(2) of Schedule 8 to indicate that paragraphs 3(2)(d) and (e) are limited to directions, steps or decisions aimed at third parties and exclude directions, steps or decisions that OFCOM might make internally in relation to a matter remitted to it for reconsideration. The wording of those provisions is extremely and deliberately widely drafted in order to grant the Tribunal a wide jurisdiction to enable it to secure

the effective implementation of its decisions and give the Tribunal express power to make the order of 1 December 2004.

Implied power to direct a timetable

56. Floe submitted that, in any event, an express statutory power carries implied ancillary powers where needed. Whatever may fairly be regarded as incidental to or consequential upon those things which the legislature has authorised ought not (unless expressly prohibited) be held to be *ultra vires* (*A-G v Great Eastern Rly Co* (1880) 5 App Cas 473 at 478 *per* Lord Selbourne LC). Therefore Floe submitted, in the alternative, that a power to direct a timetable is implicit in the power to remit under paragraph 3(2)(a) of Schedule 8. Floe submits that orders as to the timetable to be followed when a matter is remitted to the competition authority have regularly been made by the Tribunal and refers to the cases of *Aberdeen Journals Limited v Director General of Fair Trading [2002]* CAT 4; *Freeserve.com plc v Director General of Telecommunications* [2003] CAT 6; [2003] CAT 15; *Argos Limited and Littlewoods v The Office of Fair Trading* [2003] CAT 16. Floe also submits that it was clearly understood by OFCOM at the directions hearing in this case on 1 December 2004 that the Tribunal had jurisdiction to remit the matter to OFCOM with a direction as to timing. OFCOM, in resiling from that position now, asks the Tribunal to accept that it has consistently misunderstood and misapplied its powers under paragraph 3 of Schedule 8 of the 1998 Act and that this error went unnoticed by the competition authorities, including OFCOM's predecessor and the Office of Fair Trading in *Freeserve*, *Aberdeen Journals* and *Argos.*

57. In Floe's submission the authorities upon which OFCOM relied relate to other jurisdictions which may readily be distinguished. The statement of Lord Wright in *GMC v Spackman* simply re-confirms the principle that, in general, a decision-maker is the master of its own procedure. In *West Glamorgan County Council v Rafferty* the Court of Appeal disagreed with a part of the relevant declaration because it sought to intervene in the substance of the county council's decision following remission (the council was ordered to provide "reasonable accommodation"). A time-limit for an investigation and a decision is a procedural matter which does not pre-judge or dictate

in any way the decision which the competition authority may make on the substance of the matter to be reconsidered.

58. Floe submits that, in any event, comparisons with case law on remission in judicial review cases from the Administrative Court are hardly in point. Unlike the Administrative Court, the Tribunal is a specialist body which is intended to apply its knowledge and expertise not only of the law but of the relevant business sector. Moreover, appeals to the Tribunal are required to be decided "on the merits" and not by reference to *Wednesbury* reasonableness. The Tribunal is required to consider the substance of the matters in dispute to an extent impossible in the Administrative Court on a claim for judicial review. The Tribunal is therefore deliberately empowered in terms of its composition and rules to adopt a more interventionist approach to proceedings before it than would ordinarily apply in the Administrative Court.

59. OFCOM's reliance on a comparison with the wording in paragraph 3A(3) of Schedule 8 adds nothing and begs the question of the Tribunal's powers in paragraph 3A(3). Floe submits that it would be very surprising if the Tribunal's powers under paragraph 3A(3) of Schedule 8, where the Tribunal acts by way of judicial review and does not consider the merits, were *wider* than those available to the Tribunal when it makes orders consequential on a full merits appeal. In addition, OFCOM's comparison with the statutory power of remission in planning cases under section 289 of the Town and Country Planning Act 1990 is misconceived.

60. Floe submits that OFCOM itself recognises that section 195 of the Communications Act 2003 deals with appeals that are of a very different nature from decisions under the 1998 Act and this section is not therefore of assistance in interpreting the provisions of Schedule 8. In particular, section 195 of the 2003 Act requires the Tribunal to decide what action the decision-maker should take on remission and to give such directions as the Tribunal considers appropriate for giving effect to its decision.

(c) The Tribunal's analysis

Whether the Tribunal has an express power to give directions as to time limits

61. The issue before the Tribunal is whether the wide statutory powers contained in paragraph 3 of Schedule 8 of the 1998 Act include a power on remitting a matter to a competition authority to give directions as to the time within which the competition authority should take a new decision. OFCOM submits that Schedule 8 of the 1998 Act contains no express and no implied power to do so. Floe submits that such a power is expressly given to the Tribunal in sub-paragraphs 3(2)(d) and (e) of Schedule 8 and, in any event, is a power which can be implied in the power in sub-paragraph 3(2)(a) to remit the matter to OFCOM.

62. We consider that when construing the Tribunal's powers in sub-paragraphs 3(2)(a), (d) and (e) of Schedule 8 it is vital to appreciate the overriding function of the Tribunal set out in sub-paragraph 3(1) of Schedule 8:

> "The Tribunal must determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal".

63. The Tribunal is therefore required under that sub-paragraph to "determine the appeal on the merits". This requires the Tribunal to arrive at a decision on the merits of the matter before it and not merely to quash or set aside the competition authority's decision or to remit the matter to the competition authority for a reconsideration by the authority of the matter *de novo*. The powers set out in sub-paragraph 3(2) of Schedule 8 are subordinate to this overriding function of the Tribunal provided for in sub-paragraph 3(1).

64. The jurisdiction of the Tribunal provided for in sub-paragraph 3(1) of Schedule 8 is to be distinguished from a judicial review jurisdiction. This distinction is important, since the authorities cited to us were concerned mainly with judicial review. We consider that for this reason alone such authorities are not directly relevant to the matters under consideration. In any event, *Spackman* and *Rafferty* were concerned with whether the court on judicial review ought to interfere with a decision-maker's discretion as to its determination of a substantive issue whereas the present direction relates to the time for taking a new decision. The analogy which OFCOM sought to draw with planning appeals is similarly of no assistance as to the true construction of

paragraph 3(2) to Schedule 8 since there is no analogy between the jurisdiction of this Tribunal and the jurisdiction of the court in respect of planning appeals, which are in any event, limited to points of law. Nor do we find the *obiter dicta* of Collins J in *Mackay* of any assistance as the comments to which we were referred were made without the benefit of any submissions on the point and, in any event, OFCOM conceded at the hearing before us that the Administrative Court, in appropriate cases, has the power to direct time limits if it makes a mandatory order. OFCOM also sought to rely on the only two judicial review applications in respect of merger decisions before the Tribunal pursuant to section 120 of the 2002 Act that have proceeded to a final judgment (*IBA Health Limited v Office of Fair Trading* [2003] CAT 27 and *Unichem v Office of Fair Trading* [2005] CAT 8). In those cases on remittal the Tribunal did not direct a time within which the OFT was required to take a new decision. Again, we do not derive any assistance from those authorities and note, in any event, that in taking decisions under the 2002 Act in merger cases the OFT is subject to statutory deadlines or well understood administrative guidelines that provide for such decisions to be taken within a maximum period of 40 days.

65. The distinction between judicial review proceedings and proceedings before this Tribunal has been emphasised in past decisions of the Tribunal, including *Napp Pharmaceutical Holdings Limited and subsidiaries v The Director General of Fair Trading* [2002] CAT 1 (see, in particular, paragraphs 117 and 118) where the Tribunal referred to the following statement of the Minister for Competition and Consumer Affairs during the passage of the Competition Bill in committee on 18 June 1998:

> "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 in an important aspect of our policy, and I shall explain the rationale behind the 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."

66. As to the construction of paragraph 3(2) of Schedule 8, Floe submits that giving directions for a time period within which a new decision is to be taken is a power within the Tribunal's power to give "directions" or "take such other step" as the OFT could itself have given or taken. It is not disputed that setting such a time period is a direction or step that a competition authority can give or take in the course of an investigation. The issue between the parties is whether setting a time period for an investigation is the kind of direction or step with which sub-paragraph 3(2)(d) is concerned. Floe submits that there is no basis for "reading down" the express words of sub-paragraph 3(2)(d) which Floe submits intentionally give the Tribunal very wide powers and accordingly on the ordinary and natural meaning of those words the Tribunal has the express power to set time limits under that provision.

67. Taking sub-paragraph 3(2)(e) first (the power to make any other decision which the OFT could itself have made), OFCOM submitted that the word "decision" in that sub-paragraph must, in the context, refer to decisions which can be appealed to the Tribunal at the conclusion of an investigation listed in section 46(3) of the 1998 Act. We note that the 1998 Act contains more than one definition of the word "decision". For example there is a definition of the word decision in section 31 of the Act which applies for the purposes of that section. There is a definition of "decision" for the purposes of appeals to the Tribunal in section 46(3) of the Act and, in respect of appeals by third parties, in section 47(1) of the Act. The list of decisions that can be appealed by third parties to the Tribunal in section 47 corresponds to the list in section 46 as far as these are relevant to third party appeals. Section 46(5) provides that Part I of Schedule 8 to the 1998 Act makes further provision about appeals. Notwithstanding the differing definitions of the word "decision" to be found elsewhere in the 1998 Act we are prepared to accept OFCOM's submission that the proper meaning to be given to the word "decision" in sub-paragraph 3(2)(e) is a reference to decisions of a type defined in section 46 and 47 of the Act.

68. OFCOM further submitted that the words "directions" in sub-paragraph 3(2)(d) (the power to give such directions, or take such other steps, as the OFT could itself have

given or taken) referred only to directions for the purposes of sections 32, 33 or 35 of the 1998 Act and that the phrase "such other steps" referred to the OFT's powers to impose conditions or obligations subject to which a parallel exemption is to have effect for the purposes of section 10(5) of the 1998 Act. We consider that this submission overlooks the definition of the word "decision" in sections 46 and 47. The directions, conditions and obligations that can be imposed by the OFT (or other competition authority) under sections 32, 33 and 35 of the 1998 Act and the power to impose conditions or obligations subject to which a parallel exemption is to have effect expressly fall within the definition of the word "decision" in sections 46 and 47 (the latter are directions that have been prescribed as appealable decisions in the Competition Act 1998 (Appealable Decisions and Revocation of Notification of Excluded Agreements) Regulations 2004 (SI 2004/1078)). Accordingly, the Tribunal's power to make any other decision provided for in sub-paragraph 3(2)(e) of Schedule 8 includes imposing such directions, conditions or obligations.

69. In our judgment it would be incorrect to construe sub-paragraph 3(2)(d) and 3(2)(e) so that they gave the Tribunal identical powers. On our analysis of these provisions the "directions" referred to in sub-paragraph 3(2)(d) are not the directions or steps provided for under sections 32, 33 and 35 and must therefore refer to other matters. Furthermore, sections 32, 33 and 35 are the only provisions which give a competition authority the power to give "directions" to a third party under the 1998 Act. Accordingly, OFCOM's submission that sub-paragraph 3(2)(d) encompasses only directions to a third party at the conclusion of an investigation, in our judgment, must be misconceived. We note that the 1998 Act contains a plethora of defined terms which apply only for the purposes of particular sections of the Act. However, there is no definition of the words "direction" or "step" for the purposes of sub-paragraph 3(2)(d). In our judgment, in order to give a separate meaning to sub-paragraph 3(2)(d) "direction" in that provision must refer to directions other than those encompassed by 3(2)(e). Accordingly, in our judgment, on a proper analysis of these provisions in the 1998 Act OFCOM's submissions as to the meanings of "direction" and "such other step" in sub-paragraph 3(2)(d) are misconceived.

70. As noted above, in our view sub-paragraph 3(2) is to be read in the context of the Tribunal's overriding function set out in sub-paragraph 3(1). In that context the

power to remit the matter to the competition authority under sub-paragraph 3(2)(a) may not necessarily fulfil the overriding obligation of the Tribunal which is to determine the merits of the appeal by reference to the grounds of appeal. There may be cases, as was the position in this appeal, where it transpires that notwithstanding the competition authority's investigation of the matter there is a deficit of evidence which makes it difficult for the Tribunal to reach a conclusion as to the merits of the appeal.

71. The Tribunal's rules of procedure give the Tribunal wide powers to give directions of its own initiative for the production of evidence and documents and the appointment and instruction of experts (see, in particular the Tribunal's powers in rule 19(3) of the Tribunal's Rules). However, the Tribunal may form the view in particular cases that it is more appropriate, depending on the extent of the further investigation required or for the purposes of respecting the rights of defence in the Statement of Objections procedure, to exercise the power to remit the matter to the competition authority in order to allow the authority to investigate the matter further in accordance with the Tribunal's decision. It may also be appropriate to remit the matter for further investigation by the competition authority having regard to the far greater resources OFCOM and the other competition authorities have at their disposal compared with the resources of the Tribunal. The identification of the need to take such a course may only become apparent at a hearing or as a consequence of the hearing. But, notwithstanding that a hearing has taken place, any decision of the Tribunal will not, in those circumstances, then satisfy the Tribunal's function under paragraph 3(1).

72. In our view, on remitting the matter to the competition authority under sub-paragraph 3(2)(a) the Tribunal under sub-paragraph 3(2)(d) has the power to "give such directions" or "take such other steps" as the competition authority could have given or taken. We consider that under this sub-paragraph the Tribunal could have directed OFCOM to consider the matters set out in paragraphs 338 and 339 of the judgment of 19 November 2004. It is only when these matters have been considered and decided by OFCOM that the Tribunal will be in a position to fulfil its overriding function to determine Floe's appeal on the merits. This appeal has taken a different course to earlier appeals such as *Napp*. At the hearing in *Napp* the Tribunal had the benefit of additional evidence and submissions from the parties and so was in a position to

determine the appeal on the merits. In the present appeal this is not the case so far. In this appeal on the material and submissions before us we were not yet in a position to determine the merits of all of Floe's grounds of appeal in particular with regard to: (a) whether OFCOM's interpretation of the relevant legislation was in conformity with relevant European legislation; (b) whether OFCOM's new interpretation of Vodafone's licence, contrary to the view expressed in the Decision, was indeed correct; and (c) if OFCOM's new interpretation is correct, whether Vodafone's conduct was or was not objectively justified for the purposes of the Chapter II prohibition. Therefore, the substance of the merits of the issues which were conveniently set out in Floe's "First Alternative Argument" and "Second Alternative Argument" have not yet been determined and accordingly remain before the Tribunal. In all these circumstances the Tribunal is not functus officio if it sets aside the decision of the competition authority and exercises its powers provided for by sub-paragraph 3(2) of Schedule 8.

73. For the reasons given above, we consider that sub-paragraph 3(2) of Schedule 8 must be read in the context of sub-paragraph 3(1). It was not contested that setting a time period was a direction or step that a competition authority can itself give or take. We therefore accept the submissions of Floe that the ordinary and natural meaning of the words in sub-paragraph 3(2)(d) cover the directions we made in paragraphs 2 and 3 of our order of 1 December 2004.

74. In judicial review proceedings the Court's power to quash and remit necessarily incorporates the power to give directions, as is illustrated by the wording of CPR Part 54.19 (and sub-paragraph 3A(3)(b) of Schedule 8). If this is so for judicial review then necessarily it must be so in relation to a determination on the merits. However, what directions it is appropriate to make will be different depending on the jurisdiction of the court. Remitting a matter to the competition authority in the context of an appeal which the Tribunal must determine on the merits may be appropriate where, as in this case, the competition authority has not adequately investigated the matter which has been appealed to the Tribunal. The result of that may be that at that stage the Tribunal is not in a position to make the determination required by sub-paragraph 3(1) or take a "decision" itself under sub-paragraph 3(2)(e) (see also paragraph 275 of our judgment of 19 November 2004 where we indicated

that it will normally not be appropriate for the authority to seek to argue the merits of the appeal before us on a basis that is without any foundation in the decision at all). At that stage the competition authority may be better placed than the Tribunal to conduct the further investigation required. The directions which the Tribunal gives will therefore need to be focused on the need for the Tribunal to fulfil its function under sub-paragraph 3(1). In contrast, in judicial review proceedings, the directions given are focused on the requirement for the decision-maker to reconsider the matter *de novo* in the light of the court's judgment.

75. It was submitted by OFCOM that the powers of the Tribunal under Schedule 8 should be contrasted with the powers under section 195 of the 2003 Act. It was submitted that section 195 gave the Tribunal a more interventionist power of direction than Parliament had provided for in Schedule 8 of the 1998 Act. We do not consider that the construction of section 195 is directly relevant to the construction of paragraph 3 of Schedule 8 but in any event do not consider that OFCOM's submission is correct. Subsection (4) of section 195 requires the Tribunal to remit the decision with such directions (if any) as the Tribunal considers appropriate for giving effect to its decision. This is, on its face, a very wide power. However, subsection (5) provides that the directions that can be given are limited to those which the decision-maker had power to take in relation to the decision under appeal. The drafting of section 195 of the 2003 Act is prescriptive as to the remedy whereas schedule 8 of the 1998 Act leaves the remedy to the discretion of the Tribunal. However, notwithstanding this difference and the difference in the form of drafting used in section 195 of the 2003 Act as compared with the more telescoped form of drafting used in schedule 8 of the 1998 Act it appears to us that on a proper analysis of the two provisions there is no difference in substance between them. In our view both provisions give the Tribunal the same interventionist power to give directions.

76. In addition, we note that the former paragraph 9 of Part II of Schedule 8 of the 1998 Act (now paragraph 17(4) of Schedule 4 to the Enterprise Act 2002) provided a power to make rules for "enabling the Tribunal to refer a matter back to the director if it appears to the Tribunal that the matter has not been adequately investigated". In our view, sub-paragraphs 3(2)(a) and (d) themselves reflect the very wide power contemplated by this provision. It is clear from the former paragraph 9 of Schedule 8

(and now paragraph 17(4)) that one of the issues before the Tribunal on an appeal may be whether the matter has been adequately investigated by the competition authority. These provisions make it clear that Parliament intended the Tribunal to have a supervisory function in that regard. This must be contrasted with the jurisdiction of the court on judicial review and with the jurisdiction of a court of first instance or on appeal when dealing with an inter partes dispute in civil litigation. The Tribunal is not restricted when deciding the merits of the appeal solely to the evidence which is put before it by the parties but may require further and better investigation by the competition authority. Accordingly, this provision reinforces the construction we have placed on sub-paragraphs 3(2)(a) and (d).

77. OFCOM accepted in its submissions that the Tribunal does have the power to give directions imposing time limits as a matter of case management as provided for by rule 19(2)(h) of the Tribunal's Rules. OFCOM submitted that the powers in rule 19 did not apply to the circumstances of this case as the Tribunal had issued a judgment following a hearing on the merits. We do not accept OFCOM's submission that the issue of the judgment on 19 November 2004 concluded the appeal in this case. As we have explained above, it is clear from our judgment that the Tribunal has not determined all of Floe's grounds of appeal on the merits since, having regard to OFCOM's change of position, the Tribunal was not yet in a position to determine the grounds of appeal. We note also that there is an express power in rule 19(2)(j) of the Tribunal's Rules "to enable a disputed decision to be referred back in whole or in part to the person by whom it is taken". In our view, in order to secure the just, expeditious and economical conduct of the further proceedings the Tribunal has the power in rule 19 as well as paragraph 3(2)(d) of Schedule 8 to refer the matter back to OFCOM with the directions to OFCOM set out in paragraphs 2 and 3 of the Tribunal's order of 1 December 2004.

78. We note that rule 19(1) expressly provides that the Tribunal "may at any time" give directions to secure the just, expeditious and economical conduct of the proceedings. It expressly provides for directions to be made "otherwise" than at a case management conference or pre-hearing review. The constraint to the use of rule 19 is that the purpose of the directions is to secure the just, expeditious and economical conduct of

the proceedings. In our judgment the proceedings in this appeal are still on foot, the Tribunal is not functus officio and accordingly rule 19 applies.

79. We accept Floe's submission that it would be anomalous if, as is accepted by OFCOM, the Tribunal has the power to refer the matter back to OFCOM with directions as to a time limit at any stage before the commencement of the final hearing but loses that power once the hearing in the case had commenced. If OFCOM were correct as to this it would mean that if a matter arises at the hearing (when the Tribunal will have a greater understanding of the issues in the appeal than would be the case at an earlier stage) which indicates a need for further investigation and therefore for the matter to be to remitted or referred back to the competition authority then, at that stage, the Tribunal has no power to give directions as to time limits. However, if the same matter had arisen at a case management conference at an earlier stage (but when the Tribunal's understanding of the issues will be less advanced) the Tribunal does have the power to give directions as to time. Floe's construction of paragraph 3(2) of Schedule 8 avoids such an anomalous conclusion and this is a further reason why we consider OFCOM's submissions as to the construction of the Tribunal's powers in paragraph 3(2) of Schedule 8 to be wrong.

80. Accordingly, for the reasons given above, in our view the Tribunal has an express power to give a competition authority directions as to time limits under paragraph 3(2)(d) of Schedule 8 of the 1998 Act when remitting a matter to it under paragraph 3(2)(a). Furthermore, in this case, primarily because of OFCOM's change of position as to important matters in the decision under appeal, the Tribunal was not yet in a position to determine the merits of all of Floe's grounds of appeal in its judgment. Accordingly, those grounds of appeal remain before the Tribunal and, in this case, the Tribunal also had the power to make the Order of 1 December 2004 in the terms that it was made pursuant to rule 19 of the Tribunal's Rules.

Whether the Tribunal has an implied power under the 1998 Act to give directions as to time limits

81. It is accepted by OFCOM that a power can be implied if it is necessary and incidental to a statutory jurisdiction. OFCOM submits that no such power can be implied into

sub-paragraph 3(2)(a) of Schedule 8. OFCOM accepts that the Tribunal has power under this sub-paragraph to remit the matter to it and to direct it to make a fresh decision in accordance with the judgment of the Tribunal. OFCOM also accepts that the Tribunal can state in a judgment that it "expects" OFCOM to give priority to the re-investigation and to make a fresh decision within a specified period of time. Indeed, counsel for OFCOM submitted that OFCOM would normally comply with any such indication as to the Tribunal's expectation. However, OFCOM submits that the Tribunal has no power to direct a time limit and that an appellant's remedy if OFCOM were unreasonably to delay taking further steps in the re-investigation is to apply to the Administrative Court (or, presumably, to the Court of Session in an appropriate case) for judicial review.

82. We consider that OFCOM's submissions fail to take account of the overriding function of the Tribunal to which we have referred above. We consider that it would be contrary to that purpose if, following remittal of the matter to the competition authority, an appellant had no redress before this Tribunal in respect of a failure by the competition authority to make a new decision in accordance with the judgment of this Tribunal and was forced to make a separate application to the Administrative Court or Court of Session in respect of OFCOM's failure to make a new decision in accordance with the Tribunal's judgment.

83. OFCOM relied on *Bremer Vulcan* (cited above) as authority that a court or tribunal only has such inherent or implied powers which the court needs must have in order to maintain its character as a court of justice. OFCOM submitted, by analogy with the practice of the Administrative Court on judicial review when making quashing orders, that a power to direct time limits following the setting aside of a decision and remittal to the decision-maker is not a power that the Tribunal needs must have. *Bremer Vulcan* considered the court's jurisdiction to issue an injunction restraining parties who were otherwise outside the jurisdiction of the English courts from proceeding with an arbitration in England under the Arbitration Act 1950. The facts of that case were thus very different to the circumstances of this case. When deciding that the court had no jurisdiction to grant such an injunction the House of Lords noted, in particular, that an arbitration is consensual and voluntary, unlike an action in which the defendant is obliged to submit to the jurisdiction of the court. In any event, we

consider that once it is appreciated that the overriding function of the Tribunal in appeals to which paragraph 3(2) of Schedule 8 applies is to determine the matter on the merits as provided for in sub-paragraph 3(1) of Schedule 8, and that the Tribunal is not necessarily functus officio following remittal of a matter to a competition authority, then it is clear from *Bremer Vulcan* that the power to give directions as to the time within which further steps in the proceedings are to take place is a power that the Tribunal needs must have.

84. We note, in that context, as OFCOM accepted at the hearing, that the Administrative Court does, in appropriate circumstances, give directions as to the time within which steps are to be taken by administrative bodies when making a mandatory order in judicial review proceedings (see for example *R v Bolton Metropolitan Borough ex parte B* [1985] FLR 343[3] where on an application for judicial review and mandamus Wood J directed the local authority to take certain steps within 14 days).

85. Similarly, we consider that it is necessary and incidental to the express duties and powers of the Tribunal that it can impose time limits within which a competition authority should take a new decision having regard to the Tribunal's judgment. OFCOM submits that the fact that the Tribunal was given express powers in rule 19 of the Tribunal's Rules to set time limits is a contra-indication since, according to OFCOM rule 19 is inapplicable in the present circumstances and had it been necessary to give the Tribunal such powers, they would also have been expressed in sub-paragraph 3(2)(a) and (d). We do not accept that submission. Even assuming OFCOM was correct as to the inapplicability of rule 19 in this case (which we have decided above is not correct) we have already decided above that subparagraph 3(2)(d) contains the express power to make the order of 1 December 2004. In any event, in our view, it must be necessary and incidental to the power in sub-paragraphs 3(2)(a) and (d) that the Tribunal can, in appropriate circumstances, impose time limits in support of its power to remit and to give directions where it appears to the Tribunal that the matter has not been adequately investigated by the competition authority. If this were not so, the powers granted to the Tribunal to remit and to give directions would be in jeopardy.

[3] see also "Halsbury's Laws of England", vol 1(1) 4th ed (2001 Re-issue) Administrative Law, para 135

86. When faced with a deficit of evidence this Tribunal has various procedural options. The appropriate option will depend on the circumstances of the particular case. One option is for this Tribunal not to remit the matter to the competition authority but instead to give directions for the filing of additional evidence necessary to determine the outstanding issues with a view to making a decision which the competition authority could itself have made. Another option is for this Tribunal to remit the matter to the competition authority for the latter to reconsider the matter and then for the Tribunal to hear the merits of the appeal. When this Tribunal remits the matter we consider that it may also make any appropriate directions including the fixing of time limits. Such an order will provide that any party has permission to apply for further directions.

87. If OFCOM's submissions were correct then it would still be open to the tribunal to take the first option, although it would not be able to take the second option summarised above. We do not consider that such an outcome can be in accordance with the purpose of the competition regime since it would often be more appropriate for the competition authority to conduct the necessary investigation and to give its consideration to the evidence in the first instance, and then for the Tribunal to exercise its appeal on the merits jurisdiction.

88. Moreover, the consequence of OFCOM's submissions would be that in appropriate cases, such as where the Tribunal would otherwise have directed a time period within which the competition authority is to act but would not have made directions as to the steps to be taken in the investigation, the Tribunal will have to consider taking a more interventionist route by making more extensive directions with a view to dealing with the matter itself.

VI HUMAN RIGHTS ACT 1998

89. Before considering the submissions of the parties on the Human Rights Act 1998 it is convenient to set out the relevant statutory provisions.

90. Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (the "Convention") provides:

> "In determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of private life of the parties so require or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

91. The Human Rights Act 1998 provides, so far as relevant, as follows:

> "**3 Interpretation of legislation**
>
> (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.
>
> (2) This section -
>
> (a) applies to primary legislation and secondary legislation whenever enacted;
> (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
> (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.
>
> …
>
> **6 Acts of public authorities**
>
> (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
>
> (2) Subsection (1) does not apply to an act if –
>
> (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
>
> (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights the authority was acting so as to give effect to or enforce those provisions.
>
> (4) In this section "public authority" includes –
>
> (a) a court or tribunal; and
>
> (b) any person certain of whose functions are functions of a public nature,

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

(4) In subsection (3) "Parliament" does not include the House of Lords in its judicial capacity.

…

(5) "An act" includes a failure to act but does not include a failure to -

(a) introduce in, or lay before, Parliament a proposal for legislation; or

(b) make any primary legislation or remedial order.

7 Proceedings

(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may -

(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or

(b) rely on the Convention right or rights concerned in any legal proceedings

but only if he is (or would be) a victim of the unlawful act.

(2) In subsection (1)(a) "appropriate court or tribunal" means such court or tribunal as may be determined in accordance with rules; and proceedings against an authority include a counterclaim or similar proceeding.

…

8 Judicial remedies

(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be unlawful), it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

(2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.

…

(a) OFCOM's submissions

92. OFCOM accepted for the purposes of the hearing before us, without formally conceding the point, that the substantive issues in this case involved a determination of Floe's civil rights and obligations.

93. OFCOM submitted that although Floe had based its submissions on human rights on section 3 of the Human Rights Act 1998 the same principles apply under European

Community law. OFCOM referred to Article 6 of the Treaty on European Union and in particular Article 6(2) which states:

> "the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4th November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law."

94. OFCOM also referred to the case of *Baustahlgewebe GmbH v Commission* [1995] ECR II-987 which was an appeal against a cartel decision of the European Commission under Article 81 of the EC Treaty. The appellant appealed against the decision to the Court of First Instance which reduced the amount of the fine imposed on the appellant but dismissed its appeal against liability. On a further appeal to the European Court of Justice ("ECJ") the appellant alleged that the Court of First Instance had infringed its right to a hearing within a reasonable time for the purposes of Article 6(1) of the Human Rights Convention. The ECJ noted that the appeal in that case was lodged on 20 October 1989 and the CFI handed down its judgment on 6 April 1995 and that the duration of the proceedings was, accordingly, approximately five years and six months. The court noted that the duration of the proceedings before the CFI was, at first sight, considerable. However, the reasonableness of such a period must be appraised in the light of the circumstances specific to each case and, in particular, the importance of the case for the person concerned, its complexity and the conduct of the appellant and of the competent authorities. The court found that it had not been established that the appellant contributed, in any significant way, to the protraction of the proceedings and held that notwithstanding the relative complexity of the case, the proceedings before the Court of First Instance had not satisfied the requirements concerning completion within a reasonable time.

95. OFCOM submitted that as regards Floe's submissions on human rights issues there are two questions: first, is there on the facts of this case an actual or imminent breach of the Article 6 requirement for determination within a reasonable time? Secondly, if "no" is there a basis for imposing a time limit when there is no breach of a reasonable time requirement because, in theory, there might be one in the future?

96. OFCOM referred to the case of *Hornsby v Greece* [1997] 24 EHRR 250. That case concerned British citizens living on the island of Rhodes who applied for an authorisation to set up a private school ("frontistirion") to teach English on the island. The application was refused on the basis that only Greek citizens could be granted such an authorisation. The applicants complained to the European Commission which referred the matter to the ECJ. The ECJ found that Greece was in breach of its Community law obligations. Following that judgment the applicants again applied to the relevant administrative authority for authorisation to set up an English school and were again refused. They appealed to the Supreme Administrative Court which set aside the administration's decision as unlawful. The applicants again applied for authorisation and received no reply. They brought proceedings in three separate jurisdictions, including an action for damages in the Rhodes Administrative Court. The European Court of Human Rights held that Article 6(1) was applicable to that case and had been breached. At paragraph 40 of the judgment the court said:

> "40. The Court reiterates that, according to its established case-law, Article 6 para. 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal; in this way it embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect…However, that right would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6 para 1 should describe in detail procedural guarantees afforded to litigants – proceedings that are fair, public and expeditious – without protecting the implementation of judicial decisions; to construe Article 6 as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention…
>
> 41. The above principles are of even greater importance in the context of administrative proceedings concerning a dispute whose outcome is decisive for a litigant's civil rights. By lodging an application for judicial review with the State's highest administrative court the litigant seeks not only annulment of the impugned decision but also and above all the removal of its effects. The effective protection of a party to such proceedings and the restoration of legality presuppose an obligation on the administrative authorities' part to comply with a judgment of that court. The Court observes in this connection that the administrative authorities form one element of a State subject to the rule of law and their interests accordingly coincide with the need for the proper administration of justice. Where administrative authorities refuse or fail to comply, or even delay doing so, the guarantee under Article 6 enjoyed by a litigant during the judicial phase of the proceedings are rendered devoid of purpose."

97. OFCOM submitted that the principle in *Hornsby* has been applied many times including in *Burdov v Russia* (2002) ECHR 59498/00. OFCOM submitted that in all those cases the breach was not that the court did not direct a timetable for enforcement but that for a very long period following judgment enforcement was not effective. The result of this jurisprudence, in OFCOM's submission, is that the reasonable time obligation applies to all aspects of the determination, to OFCOM's investigation, the Tribunal and the hearing of the appeal and OFCOM's re-investigation on remittal and, if there were to be an infringement decision, it would apply to the enforcement of that decision against Vodafone. OFCOM also referred to *St Brice v Southwark London Borough Council* [2002] 1 WLR 1537 where Rix LJ observed, in the context of eviction proceedings, at [40]: "There is nothing in the articles of the Convention relied upon, or in Strasbourg jurisprudence, which requires the intervention of the court at each stage of the process from initiation of a claim for possession to eviction."

98. OFCOM referred to cases of the European Court of Justice considering the length of time taken by the European Commission to conduct competition law investigations. OFCOM referred in particular to Cases T-213/95 and T-18/96 *SCK and FNK v Commission* [1994] ECR II-1739, Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969 and Case T-67/01 *JCB v Commission* [2004] 4 CMLR 24. OFCOM submitted that in none of those cases did the Court find, despite the extensive time taken in the investigation, that there had been a breach of the reasonable time requirement. That did not mean that the Commission could not have conducted its investigations more quickly or that it was not sometimes rather slow. However, there is no breach of a fundamental right, whether under Article 6 or a parallel fundamental right derived from the general principles of Community law, even in the case of very extensive and long investigations by a competition authority.

99. OFCOM referred to the judgment of the Judicial Committee of the Privy Council in *Dyer (Procurator Fiscal, Linlithgow) v Watson and another* [2002] UKPC D1 and, in particular, to the speech of Lord Bingham of Cornhill at paragraphs 51 and 52, which stated:

> "51. …While, for the reasons already given, it is important that suspects awaiting trial should not be detained longer than reasonably necessary, and proceedings (including any appeal) should be determined with reasonable expedition, there is also an important countervailing public interest in the bringing to trial of those reasonably suspected of committing crimes and, if they are convicted, in their being appropriately sentenced. If the effectiveness and credibility of the administration of justice are jeopardised by excessive delay in bringing defendants to trial, they are liable to be jeopardised also where those thought to be guilty of crime are seen to escape what appear to be their just deserts.
>
> 52. In any case in which it is said that the reasonable time requirement (to which I will henceforward confine myself) has been or will be violated, the first step is to consider the period of time which has elapsed. Unless that period is one which, on its face and without more, gives grounds for real concern it is almost certainly unnecessary to go further since the convention is directed not to departures from the ideal but to infringements of basic human rights. The threshold of proving a breach of the reasonable time requirement is a high one, not easily crossed. But if the period which has elapsed is one which, on its face and without more, give grounds for real concern, two consequences follow. First, it is necessary for the court to look into the detailed facts and circumstances of the particular case. The Strasbourg case law shows very clearly that the outcome is closely dependent on the facts of each case. Secondly, it is necessary for the contracting state to explain and justify any lapse of time which appears to be excessive."

100. OFCOM submitted that the initial complaint in this case was made to OFCOM's predecessor body on 18 July 2003. A decision was taken by the Director General of Telecommunications on 3 November 2003 which in no sense could be said to be an excessive period. Two months later Floe's notice of appeal was submitted to the Tribunal. One month after that Floe applied to amend its notice of appeal, which application was opposed by OFCOM. In April 2004 the Tribunal, after hearing counsel for the parties, gave Floe permission to amend its notice of appeal. The hearing of the appeal took place on 19 and 20 July 2004 and the Tribunal handed down judgment on 19 November 2004. On 1 December 2004, after hearing counsel for the parties, the Tribunal remitted the matter to OFCOM with a timetable. OFCOM submitted that on that timetable there is no conceivable basis for saying either that the past conduct of OFCOM nor its proposed undertaking to use best endeavours to deal with the matter in accordance with its published guidelines could amount to a breach of the reasonable time requirement under Article 6(1) ECHR. As to the first question posed by OFCOM the answer was clearly "no" – there is no basis for considering that there is any actual or imminent breach of Article 6(1) in this case.

101. As to the second question, OFCOM submitted that there is no basis for imposing a time limit when there is no actual or imminent breach of the reasonable time

requirement because "in theory" there might be a breach in the future. It is always possible to imagine a hypothetical case. Schedule 8 of the 1998 Act does not itself violate the Convention and does not prohibit the exercise of any fundamental right. In those circumstances it is not open to the Tribunal to use section 3 of the Human Rights Act 1998 to say that Schedule 8 must be interpreted in a certain way in order to address a purely hypothetical case which is not before the Tribunal. The Human Rights Act 1998 cannot be used to achieve sweeping amendments of legislation to an extent that is not required to avoid a breach of fundamental rights under the Convention. It can only be done to the extent necessary where there is an actual or imminent violation.

102. OFCOM also referred to the judgment of Patten J in *Bennett v Customs & Excise Commissioners (No. 2)* [2001] STC 137. That case considered whether section 73 of the Value Added Tax Act 1994 was incompatible with Article 6 of the Convention. That section allowed the withdrawal of an initial tax assessment and its replacement with a new assessment after the Tribunal had ruled on an appeal against the first assessment. That was said by the applicant to be a violation of Article 6. After referring to various cases, including *Hornsby* cited above, the judge said:

> "49. These cases demonstrate that the right to a fair hearing by an impartial tribunal embodied in Article 6 ought not to be regarded as satisfied unless the judicial process not only guarantees a hearing which is procedurally fair but also provides for effective enforcement of the decision of the tribunal. Miss Lonsdale submits that this requirement could not be satisfied in relation to appeals under s. 83 of the 1994 Act if the Commissioners may exercise the power contained in s. 73(1) so as to make a new assessment following an adjudication and so nullify the effect of the tribunal's decision or to use the words in *Hornsby* to render the proceedings devoid of purpose.
>
> 50. …it seems to me that the exercise of the power contained in s. 73(1) so as to make the 1998 assessment was neither a refusal to give effect to the decision in the first appeal nor something which in any sense rendered that decision nugatory…The central assessment had been set aside by the tribunal as not made to best judgment and no appeal was entered against that ruling. Mr Bennett was therefore not deprived of his success on the appeal. The only practical consequence of the 1998 assessment was to shift the re-hearing of the issues of liability and quantum form the re-hearing of the appeal against the 1996 assessments as ordered by Carnwath J to a new appeal hearing against the 1998 assessment. The issues to be determined will, however, be the same. The making of a new assessment has of course deprived Mr Bennett of the argument that the 1996 central assessment was not made to best judgment but by withdrawing that assessment the Commissioners, unlike the Greek Government in *Hornsby* have chosen to recognise and give effect to the ruling of the tribunal.

> Similarly by making the 1998 assessment in the sum of £46,402 the decision of the tribunal was fully respected.
>
> 51. It therefore seems to me that the challenge under Article 6 on grounds of lack of an effective remedy fails for those reasons alone. But if one takes into account the additional safeguards provided to the taxpayer by the operation of the doctrines of issue estoppel and *res judicata* and by the remedy of judicial review as outlined in this judgment then a challenge becomes impossible. It is of course dangerous to consider questions of infringement of the Convention at too high a level of generality. What needs to be determined is whether the acts or events complained of in the particular circumstances in which they occur amount to a contravention having regard to the remedies available. Judicial review with its objective approach and the absence of any de novo consideration of the merits may be an insufficient safeguard in certain cases…The adequacy of judicial review in a Human Rights context must depend upon the subject matter of the decision which was appealed against, the nature and content of the dispute and the nature of the issues arising for determination. Judicial review will in my judgment be a perfectly adequate remedy for controlling attempts by Customs and Excise to re-litigate issues already decided in earlier tribunal proceedings. I therefore reject the challenge based on lack of remedy."

103. OFCOM submitted that one cannot say in advance that unless there is a decision within "x months" there will be a breach of the fundamental right to a decision in a reasonable time. That can only be assessed with hindsight when all the circumstances are known. The analysis is *ex post* and cannot be done *ex ante*. OFCOM submitted that there is not a single decision in the jurisprudence of the courts in Strasbourg, Luxembourg or in England where the court says in advance that unless a step is taken within a certain time there would be a breach of the reasonable time requirement in Article 6. If such a breach were to occur then, as Patten J made clear in his judgment quoted above, a remedy is available in this country in the form of judicial review in the Administrative Court and the court can make a mandatory order. The Administrative Court exists and has the appropriate powers to deal with this and there is therefore no basis for interpreting paragraph 3 of Schedule 8 to the 1998 Act to give the Tribunal powers which it otherwise does not have to make the directions made in the order of 1 December 2004.

(b) Floe's submissions

104. Floe submitted that, to the extent that it is needed, Floe relies on section 3 of the Human Rights Act 1998 to say that the Tribunal must construe paragraph 3(2) of Schedule 8 of the 1998 Act compatibly with the Convention. Floe submitted that that means that the Tribunal must construe those provisions to give the Tribunal power to

ensure compliance with Article 6 by directing a timetable where that is appropriate and that it was appropriate to do so in this case.

105. Floe submitted that although OFCOM had accepted for the purposes of the proceedings before the Tribunal that Article 6(1) of the Convention applies but sought formally to reserve its position on that question, there was no doubt that Article 6(1) of the Convention did apply in this case. The jurisprudence of the European Court of Human Rights is clear that if the subject matter of a dispute is of a pecuniary nature then one is concerned with civil rights and obligations and Floe referred to the judgment in *Tre Traktörer Aktiebolag v Sweden* (judgment of 7 July 1989, Series A no. 159) which was concerned with the revocation of a licence to serve alcohol in a restaurant and Article 6 was held to apply because, in effect, the matter concerned the commercial interests of the company whose business had been affected by the removal of the licence. Floe also referred to *Editions Periscope v France* (judgment of 26 March 1992, Series A no. 234-B) which concerned a failure by the French tax authorities to grant a certain beneficial tax status to the applicant. The applicant claimed damages because of the actions or inactions of the French authorities. That was sufficient to put the matter within the realm of pecuniary subject matter and Article 6(1) applied. If its complaint were to be successful Floe would similarly have a right to bring an action for damages pursuant to section 47A of the 1998 Act and there was, in Floe's submission, no doubt at all that the present case concerns Floe's civil rights and obligations for the purposes of Article 6 of the Convention.

106. Floe submitted that it is absolutely clear from the jurisprudence of the European Court of Human Rights that Article 6(1) of the Convention is taken to apply to the enforcement of any judgment or decision following a hearing (see *Hornsby v Greece* cited above). Floe submitted that it is also clear from the judgment of the Court in *Hornsby* of the importance that the Court attached to administrative bodies, being part of the State, complying with the need for expedition and not being engaged in undue delay. The judgment of the Court in *Hornsby* amounts to a particular obligation on administrative bodies to act expeditiously in implementing any judgment given against them.

107. Floe submitted that, although OFCOM had submitted that the overall time period from the date of initial submission of Floe's complaint to date was not so bad that was not the correct way of looking at the matter. What should be focused on in this context is not the overall time from the date of the initial submission of the complaint but what amounts to a reasonable time for OFCOM to reconsider the complaint in the light of the Tribunal's judgment of 19 November 2004 and reach either a new decision or to provide a Statement of Objections. That is the key question.

108. Floe submitted that it did not go so far as to say that the mere fact that the Tribunal finds that OFCOM gets it wrong in an initial decision means that the Tribunal is immediately in the territory of unreasonable time or delay simply because the matter has to be remitted. The jurisprudence emphasises the need to look at the particular circumstances of each case. But, having said that, it is a very relevant factor in this case that an earlier decision was taken which was found to be wanting and the matter has had to be remitted. There is inevitably a period of delay because the Tribunal remitted the matter to OFCOM. It is also relevant, in Floe's submission, that it ought to be possible for OFCOM to move more quickly in a case which it has already investigated previously and in which it already has a degree of background knowledge and information.

109. Floe submitted that the effect of OFCOM's submissions was that OFCOM adopted an absurd approach. OFCOM had accepted that if it had been clear that an unreasonable time period had already elapsed when the Tribunal examined the issue on 1 December 2004 then, at that stage, the Tribunal could have intervened. However, because it was not clear on 1 December 2004 that an unreasonable time had already been taken and the unreasonableness would only arise in the future if OFCOM were not to proceed with expedition then it is impossible for the Tribunal to intervene. That demonstrated, according to Floe, the absurdity of OFCOM's submissions.

110. Floe submitted that for the purposes of the Convention, the State and its public authorities must act in a way that safeguards the rights enshrined in the Convention. The authorities must ensure that rights are not breached. In this regard Floe referred to the judgment of the European Court of Human Rights in *Sporrong and Lönnroth v Sweden* [1982] 5 EHRR 35. Floe submitted that although the subject matter of that

case was about property rights it demonstrated the need to secure rights which are practical and effective. That plainly means, submitted Floe, that it is not sufficient under Article 6 of the Convention to wait for rights to be breached on the basis that the courts can supply remedies afterwards. It is for the state primarily to ensure that breaches of rights do not occur in the first place. Floe submitted that execution of a judicial decision cannot be unduly delayed and justice must be administered "expeditiously" (*Mitchell and Holloway v United Kingdom* [2003] 36 EHRR 951).

111. Floe therefore submitted that if the Tribunal reaches a conclusion that, in order for its judgment to be effective and to be implemented within a reasonable time, there has to be a timetable on remitting the matter to the competition authority, then Article 6 requires that the Tribunal direct a timetable. Section 3 of the Human Rights Act 1998 requires that the Tribunal interpret paragraph 3(2) of Schedule 8 in such a way as enables the Tribunal to do that. Otherwise the Tribunal would be left in the position where appellants such as Floe would indeed be able to claim that their rights under the Convention have been breached. The only remedy available to an appellant in Floe's position, absent a timetable being directed, is to apply for judicial review in the Administrative Court. Floe, which is now in administration, would have to raise further funds to start separate legal proceedings in another court to establish, after the event, that its rights had been breached. It would, however, at that stage be "too late". What could Floe expect to obtain at that stage? A declaration that its rights had been breached; the possibility of damages, although that is a discretionary matter under the Human Rights Act; and possibly, at that stage, a mandatory order with a timetable at that stage being imposed by the Administrative Court. In Floe's submission it does not make any conceivable sense in terms of time, resources or effectiveness to say that where it is necessary for the competition authority to act with expedition that a timetable can only be directed at the stage after Floe's rights have already been breached having brought a separate action in a separate court. OFCOM's submissions therefore make no sense under the scheme of the Convention or under the scheme of the 1998 Act.

112. Floe submitted that it was not the case that Article 6 requires the Tribunal to impose a timetable in every case. There has to be material before the Tribunal on which the Tribunal can form the view that the direction of a timetable is required to safeguard a

party's Article 6 rights. Floe submitted that in this case there is ample material before the Tribunal because the Tribunal investigated with OFCOM what its position was and counsel for OFCOM made submissions to the Tribunal in that regard on 1 December 2004. OFCOM indicated that it wished to have a longer timescale for the re-investigation and made it very clear that that was how OFCOM was minded to proceed if left to its own devices. OFCOM had submitted that the matter was not a priority for them. The Tribunal had taken the view that that was not good enough. The Tribunal had formed the view that OFCOM were proposing to act in a timescale that was not reasonable and not effective to give effect to the Tribunal's judgment and therefore not in compliance with Article 6 of the Convention. It was therefore open to the Tribunal on 1 December 2004, even if Floe is wrong on its submissions as to the express power or implied power in Schedule 8 of the 1998 Act, to impose a timetable in order to prevent a breach of Floe's Article 6 rights under the Convention.

113. Floe submitted that this case was really a case of the Tribunal itself acting compliantly with the Human Rights Act by ensuring that its own decision is implemented effectively and within a reasonable time rather than restraining OFCOM's breach of human rights so it was not necessary for Floe to show that it is possible for the court to restrain a possible breach of human rights under sections 7 and 8 of the Human Rights Act. However, in that regard, counsel for Floe also referred to a passage in Lester & Pannick "Human Rights Law and Practice" (2nd ed., 2004), paragraph 2.7.2 where it is stated "To establish that they are 'victims', individual complainants do not need to show that their rights have been violated by 'an individual measure of implementation'. It suffices that they 'run the risk of being directly affected by' the measure of which complaint is made."

114. Floe submitted that OFCOM's references to past cases in the European Court of Justice in which quite long periods of time for competition law investigations by the European Commission were not found to have given rise to an infringement of Article 6(1) were not relevant. It is accepted by both sides that the Tribunal must look at the all the facts and circumstances of each individual case for the purposes of Article 6 of the Convention. Here, what was relevant was that OFCOM had set itself guidelines for when it should investigate and should be able to complete investigations. Those guidelines provided for a maximum period of six months for a non-infringement

decision and twelve months for an infringement decision. That was the context in which reasonableness had to be judged in the present case. The Tribunal's conclusion that, taking account of all the facts and circumstances of this case, OFCOM ought to give this matter priority and be able to proceed to an initial non-infringement decision in a period of five months was, submitted Floe, an unassailable conclusion as to what was required for an effective remedy in this case in order to protect Floe's Article 6 rights. It was therefore of no assistance to OFCOM to say that in other cases in other jurisdictions and with other facts and contexts, longer time limits have been acceptable.

115. Floe submitted that Lord Bingham's observation in *Dyer v Watson* (cited above) that the threshold for proving a breach of the reasonable time requirement is a high one has to be seen very much in the context in which it was made. The context, as is clear from paragraph 51 of the judgment, was a concern that it would not be possible to bring alleged criminals to justice if it was said that the time that had elapsed made it unreasonable to continue prosecution. Clearly, in that case, there was a very strong countervailing public interest and one can readily see how, in that situation, Lord Bingham was prompted to refer to a high threshold. That was a very different situation to the one in this case. The other cases to which OFCOM refer, such as *St Brice* and *Bennett* are likewise not on point and arose in an entirely different context. In any event, Floe does not suggest that the Tribunal must intervene at each stage of the proceedings before OFCOM.

116. So far as the operation of section 3 of the Human Rights Act is concerned, Floe submitted that if the Human Rights Act applies then the strong interpretative obligation in that section does provide the basis for the Tribunal to have power in paragraph 3(2) to direct a timetable if it was not otherwise there. Floe referred to *Ghaidan v Godin-Mendoza* [2004] UKHL 30 per Lord Nicholls at [25] to [33] and Lord Steyn and [44] to [50] which Floe submitted makes clear how strong that interpretative obligation is so that one can read out words and read in words, even in cases where there is no ambiguity in the statutory language. However, in this case, Floe submitted that there is no need for reading-in or reading out or otherwise doing any violence to the statutory language at all as all that is required is a very straightforward reading of paragraph 3(2).

117. Floe submitted that there are two answers to OFCOM's concern that that the Tribunal cannot be in a position to say in advance how the investigation will proceed and whether circumstances might change. First, in this case the Tribunal had a good deal of information before it and had investigated the position and had a good understanding of what further work was required on re-investigation. Secondly, if circumstances do change then it is always possible for OFCOM to come back to the Tribunal under the liberty to apply provision and say that "the following has now occurred and that should now be taken into account in the timetable."

(c) The Tribunal's analysis

118. OFCOM has accepted for the purposes of this application that Floe's rights under Article 6(1) are engaged. It is common ground between the parties that Article 6(1) requires that the judgments and orders of the Tribunal are effectively implemented (see *Hornsby* cited above).

119. OFCOM, however, submits that a court only has jurisdiction *ex post facto* to declare that the appellant's rights have been infringed and that the court has no jurisdiction *ex ante*. We consider that this submission is misconceived. If the Tribunal in a case before it determines that OFCOM proposes to act in a way which would result in an infringement of the appellant's rights under Article 6 then, in our judgment, the Tribunal is under a duty to take such measures as are necessary to prevent such infringement from taking place. The authorities cited to us by OFCOM including *Baustahlgewebe*, *SCK and FNK*, *Irish Sugar*, *JCB*, *Dyer v Watson* and *Bennett* are accordingly not in point. The fact that the subject matter of these authorities involved past breaches does not mean that the court or tribunal has no jurisdiction to act in order to prevent prospective breaches. It is, moreover, clear from the wording of section 7 of the Human Rights Act that future breaches are within the jurisdiction of the court. Accordingly, where it appears to the Tribunal that the competition authority is not intending to implement the Tribunal's decision within what the Tribunal determines is a reasonable time the Tribunal can intervene to prevent what would otherwise become a breach of Article 6. We also accept Floe's submission that the Tribunal must examine all the circumstances of each individual case for the

purposes of Article 6 of the Convention and that OFCOM's reliance on authorities from other courts in other cases with other circumstances provides this Tribunal with little, if any, assistance in this case.

120. On 1 December 2004 OFCOM submitted that it would only be appropriate to give a best endeavours undertaking to act in accordance with its Guidelines (cited above) and that it could not be guaranteed that the re-investigation of the matters of which Floe has complained would not take place within a longer period than the usual maximum period. OFCOM submitted that it was simply not possible to indicate to the Tribunal with any degree of precision the length of time required to undertake the further steps required. As to the priority which OFCOM proposed to give to this matter, in response to a direct question from the Tribunal and having taken instructions from OFCOM, counsel for OFCOM submitted to the tribunal as follows:

> "Counsel: In terms of priorities, first of all OFCOM has to prioritise those matters it has a statutory duty to deal with in accordance with a statutory timetable. Once it has prioritised those matters then there is no magic in the difference between an investigation and a re-investigation. The question of whether to prioritise any type of investigation will depend on the subject matter that is at stake and, in particular, for example, where there is a potential for serious consumer detriment, that matter will be prioritised. So it is perfectly possible that one will have an initial investigation with serious consumer detriment that would be prioritised over a new investigation if that was felt to be appropriate. There is no magic in a new investigation; it depends on the subject matter.
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> The Chairman: Can I refer you to paragraph 11 of the *Freeserve* case? We should have your submissions on that.
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> Counsel: Madam, yes. That is one of the factors to be taken into account and in *Freeserve* what was at issue was the provision of broadband, which you will see at paragraph 12 is where it is developed:
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> > 'These considerations apply particularly in a case where the allegation is one of predatory pricing or margin squeeze in a fast developing market of national importance such as broadband.'
>
> Clearly, nationwide broadband market, I would submit is of greater importance than the particular commercial activities that are at dispute in the present case. So yes, that is one of the factors but if we are talking about the wider public interest *Freeserve* was up **there** on the scale but with respect, Floe is approaching the bottom of the scale."

121. At the hearing Floe submitted that a considerable period of time had already elapsed since it had first made its complaint under the 1998 Act and that the matter should now be given priority by OFCOM. Floe submitted that OFCOM's re-investigation

should be completed by April 2005 and challenged OFCOM's characterisation of Floe's case as being at the bottom of the scale in public interest terms. Floe emphasised the importance of the issues in this case for small companies who have been either suppliers or users of GSM Gateway services and of the fact that Floe is in administration and that its future might be dependent on the results of OFCOM's re-investigation. Time was accordingly of the essence to Floe in the circumstances of this appeal. We note the importance of OFCOM dealing with matters promptly in a fast-moving sector of the economy such as telecommunications is expressly recognised in section 8 of the 2003 Act.

122. Having heard those submissions and for the reasons given in our ruling of 1 December 2004 ([2004] CAT 22) we consider that on 1 December 2004 OFCOM was proposing to act in contravention of Article 6. In that context the Tribunal considers that it was necessary under the Human Rights Act, to have directed a time limit for the implementation of its decision so as to comply with Article 6.

123. Any time period provided in a direction by the Tribunal can be abridged or extended and is therefore not set in stone. Accordingly if the time period provided for in the order thereafter appeared to OFCOM to be too short and therefore unreasonable, it could apply to the tribunal for an extension of the time period. If cause was shown the period would be extended by the Tribunal.

124. The Tribunal does not, however, need to rely on the Human Rights Act for its power to impose time limits since we have already decided above that on a true construction of the relevant provisions of the 1998 Act the power to do so is available to it in paragraph 3 of Schedule 8. Section 3 of the Human Rights Act provides that legislation must be read and given effect to in a way that is compatible with Convention Rights. Had there been any ambiguity as to the true construction of the relevant provisions in this regard then section 3 could have assisted the Tribunal in resolving that ambiguity in favour of construing the relevant statutory provisions so as to give the Tribunal the power to make the order of 1 December 2004 in the terms that it was made in the circumstances of this case.

125. As we have set out above, in our judgment the true construction of paragraph 3(2)(a) and (d) gives power to the Tribunal to direct a time limit as directed by it in paragraphs 2 and 3 of the order of 1 December 2004. In exercising its discretion to direct such a time limit we consider that the Tribunal was entitled to take into account the submissions of OFCOM in respect of the priority which OFCOM proposed to give to the matter which we had remitted to it as well as the submissions of Floe as to what in the circumstances of this case amounted to a reasonable time for OFCOM to implement the Tribunal's judgment. It was submitted to us that directing a time limit in this case was tantamount to accusing OFCOM of bad faith. This submission is without foundation. Each party makes submissions to the Tribunal in good faith. The Tribunal, having heard the submissions, must decide the appeal in accordance with its obligations under paragraph 3 of Schedule 8. In the course of so doing a party's submissions may be accepted or rejected by the Tribunal. In making its decision and giving directions there is no aspersion of bad faith. This is so whether the party affected is a private party, an organ of the state or a public or competition authority.

126. If a competition authority proposes to offer an undertaking to the Tribunal in relation to the remittal of a matter to it under Schedule 8 of the 1998 Act and can demonstrate that the undertaking which it proposes is reasonable in the circumstances then it may not be considered necessary to direct a time limit at that stage. However, the Tribunal may well consider it appropriate to fix a hearing date for progress to be reviewed so that the Tribunal can be kept informed as to the progress of the re-investigation and implementation of its judgment and so that it can be satisfied there is compliance with Article 6. The previous jurisprudence to this Tribunal that was cited to us, such as the cases of *Argos and Littlewoods* and *Freeseve.com* is illustrative of the exercise of this power.

VII EC LAW

(a) OFCOM's submissions

127. OFCOM accepts that it is a fundamental principle of Community law that a remedy given under Community law must be effective and that applies particularly to the fundamental provisions of Community law which include competition law. The

principle of effectiveness was established by the Community courts and applies to the administration of Community law by those courts as well as to the administration of Community law by national courts. However, the Community courts have not themselves found that the power to direct a timetable for a decision by the Commission is a necessary or implicit power required to fulful the principle of effectiveness when the court exercises its power to annul a Commission decision or grant a declaration of failure to act. The Community courts have no power to give directions for such a timetable (Case T-102/92 *Viho v Commission* [1995] ECR II-17, paragraphs 28 and 29 and Case T-127/98 *UPS Europe v Commission* [1999] ECR II-2633, paragraphs 48 to 50).

128. OFCOM further submits that it would be paradoxical if Community law required the Tribunal to have the power to direct a timetable for matters remitted to a competition authority in the United Kingdom whereas the Community courts hearing appeals against acts of the European Commission have no such power. This is particularly so since the coming into force of Regulation 1/2003 on 1 May 2004.

129. OFCOM submits that far from section 60 of the 1998 Act requiring the Tribunal to adopt a position that is different from that which applies under the decisions of the Community courts section 60 requires the Tribunal, so far as possible, to deal with questions in a manner that is consistent with the way they are dealt with by the Community courts. The Tribunal has held that this applies to matters of procedure as well as substance in appropriate cases (*Pernod Ricard v Office of Fair Trading* [2004] CAT 10 at [229]). Therefore section 60 of the 1998 Act precludes the Tribunal from giving directions for a time table to a competition authority.

(b) Floe's submissions

130. Floe submits that OFCOM seeks to rely on the fact that the Community Courts have no jurisdiction to give directions to Community institutions in proceedings under Article 230 EC (actions for annulment) and Article 232 EC (declaration of failure to act). However, this ignores the fact that under these provisions and under the Rules of Procedure of the European Court of Justice ((2001) OJ C34/1) there is a complete absence of any power to give any directions to the Commission in any circumstances.

In contrast, paragraph 3(2) of Schedule 8, as well as paragraph 3A(3) of Schedule 8 and section 195 of the 2003 Act all make express reference to a power on the part of the Tribunal to issue directions to the competition authority. Floe submits that, in making such express provision, Parliament was concerned to ensure that the remedies ordered by the Tribunal were effective, as required by Community law. The Tribunal, in applying these provisions, is also bound to secure the effective protection of the parties' Community law rights. This is particularly important where competition law is concerned as the competition rules are fundamental provisions which are essential for the accomplishment of the tasks entrusted to the Community (see Case C-126/97 *Eco Swiss China Time Limited v Benetton International NV* [1999] ECR I-3055, paragraph 36 and Case C-453/99 *Courage v Crehan* [2001] ECR I-6297, paragraph 20).

131. Floe submitted that national courts must apply the provisions of Community law (and national rules made to give effect to Community law) in areas within their jurisdiction so as to ensure that those rules take full effect and must protect the rights which they confer on individuals (Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR paragraph 16 and Case C-213/89 *R v Secretary of State for Transport ex p Factortame* [1990] ECR I-2433, paragraph 19). Furthermore, the Tribunal is required to apply the principle of effectiveness to ensure that the exercise of Community law rights is not rendered excessively difficult (Case C-261/95 *Palmisani v INPS* [1997] ECR I-4025, paragraph 27 and Case C-453/99 *Courage v Crehan* [2001] ECR I-6279, paragraph 29).

132. In pursuance of the principle of effectiveness it may be appropriate for the Tribunal to set deadlines or timetables for competition authorities if their decisions have been set aside and the matter remitted to them. This secures undertakings' rights under Community law to a speedy resolution of competition law complaints by competition authorities (see *Baustahlgewebe v Commission*, cited above, paragraph 21).

133. Moreover, the Tribunal is bound by section 60 of the 1998 Act to deal with matters relating to section 18 of the 1998 Act under which Floe has complained to OFCOM in a manner which is consistent with the treatment of corresponding questions arising in Community law in relation to competition within the Community.

134. Floe further submits that the Tribunal must construe the words of paragraph 3(2) of the 1998 Act in a manner compatible with Community law (Cases C-240/98 to C-244/98 *Oceano Groupo Editorial* [2000] ECR I-4491.

(c) Tribunal's analysis

135. We are not assisted by the parties' submissions regarding Community law. We accept that competition law is a fundamental principle of Community law and that remedies under Community law must be effective. However, we consider that Community law neither precludes nor requires the Tribunal to give directions as to time limits when remitting a matter to a competition authority.

136. We note that no party has suggested that the substantive issues in this appeal raise an issue of Community law and the matter is being investigated under the 1998 Act. We do not consider that in enacting paragraph 3(2) of Schedule 8 of the 1998 Act Parliament can have been taken to have intended to ensure that the remedies ordered by the Tribunal were effective as a matter of Community law as, at the time the 1998 Act was enacted the competition authorities in the United Kingdom and the Tribunal had no power to apply Community law in its own right. The 1998 Act was concerned solely, at that time, with the domestic system of competition law.

137. We note that the Community courts do not have the power to give directions to the European Commission either when a Commission decision is annulled or when the Court declares that the Commission has failed to act. In those circumstances we are not persuaded that the principle of effectiveness of Community law on which Floe sought to rely is of assistance in the circumstances of this case.

138. A further reason we are not assisted by Community law is because the jurisdiction of the Court of Justice and the Court of First Instance in competition cases is limited by the wording of Article 234 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 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 the OFT could itself have taken.

139. We do not consider that section 60 of the 1998 Act requires or precludes the Tribunal from giving directions as to time limits. Section 60 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.

140. 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 Regulation 1/2003 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 (No. 1)* at paragraph [190]). Accordingly we do not consider that section 60 of the 1998 Act precluded us from making the order of 1 December 2004 in the terms in which it was made.

VIII THE TRIBUNAL'S PREVIOUS JURISPRUDENCE

141. In support of their submissions both parties have referred us to previous decisions of this Tribunal. It is interesting to note those decisions in which this Tribunal has given a direction as to time periods to the competition authority. In *Aberdeen Journals (No 1)* (cited above) the Tribunal remitted the matter to the OFT and directed that a new rule 14 notice be issued within two months of the date of judgment and that any final decision be issued within two months of the completion of the procedure envisaged by rule 14 of the then applicable Director's Rules. The Tribunal did not find it necessary in that case to explore the relationship between the power to remit under paragraph 3(2)(a) of Schedule 8 and the power to refer back contemplated by the then

paragraph 9 of Part II of Schedule 8 and now paragraph 17(4) of Schedule 4 to the 2002 Act (see paragraph 190 of the judgment in that case). In that case the timetable was met. A new appeal was lodged against the new decision but the new appeal was consolidated with the existing appeal (which had remained on foot) and the points raised in both appeals were dealt with together: see *Aberdeen Journals (No 2)* [2003] CAT 11. In *Argos and Littlewoods*, cited above, the decision was again remitted to the OFT with a timetable (see [2003] CAT 16). The timetable was again met. The OFT issued a new decision which was incorporated into the existing appeals, which remained on foot. No separate appeal in relation to the new decision was issued. The subject matter of the existing appeal then included the new decision (see [2004] CAT 24, paragraph 47). In the proceedings concerning *Wanadoo* (formerly *Freeserve.com*) there was no order to remit the matter to OFCOM but, following a substantive hearing, OFCOM undertook to adopt a further decision in relation to the pricing issues raised in the appeal. The Tribunal directed that this further decision was to be taken by OFCOM within 3 months unless additional time was allowed by the Tribunal (see [2003] CAT 5 and 15). The initial time period was extended by the Tribunal on OFCOM's applications. The further decision which was issued by OFCOM has become the subject of a new appeal. That appeal is due to be heard shortly.

142. These decisions illustrate the importance of this Tribunal's power to give time period directions to the competition authority. It has proved a useful and flexible power in ensuring an effective procedural framework under the 1998 Act. It enables the Tribunal to ensure that investigations are completed within a reasonable time period so that the party being investigated is not exposed to being under investigation for an indeterminate and unreasonable period of time as well as to ensure that complaints are dealt with within a reasonable time.

IX CONCLUSION

143. For the reasons given above, we unanimously dismiss OFCOM's application to set aside paragraphs 2 and 3 of our order dated 1 December 2004.

Marion Simmons QC Sheila Hewitt Michael Davey

Charles Dhanowa 05 May 2005
Registrar