Neutral citation [2010] CAT 25

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1154/3/3/10

Victoria House
Bloomsbury Place
London WC1A 2EB

7th October 2010

Before:

THE HONOURABLE MR JUSTICE VOS
(Chairman)
ANN KELLY
PROFESSOR JOHN PICKERING

Sitting as a Tribunal in England and Wales

BETWEEN:

TELEFÓNICA O2 UK LIMITED

Appellant

- supported by -

VODAFONE LIMITED

Intervener

- v -

OFFICE OF COMMUNICATIONS

Respondent

- supported by -

EVERYTHING EVERYWHERE LIMITED
HUTCHISON 3G UK LIMITED

Interveners

Heard at Victoria House on 27th and 28th July 2010

JUDGMENTS

APPEARANCES

Mr. Michael Beloff Q.C., Mr. Thomas de la Mare and Mr. Tom Richards (instructed by Ashurst LLP) appeared for the Appellant.

Miss Dinah Rose Q.C., Mr. Josh Holmes and Mr. Ben Lask (instructed by the Office of Communications) appeared for the Respondent.

Mr. Michael Fordham Q.C. and Mr. Meredith Pickford (instructed by Everything Everywhere Limited) appeared for Everything Everywhere Limited.

Mr. Nicholas Woodrow and Ms Belinda Joanne Ampah (of Vodafone Group Legal Department) appeared for Vodafone Limited.

Miss Monica Carss-Frisk Q.C. and Mr. Brian Kennelly (instructed by Baker & McKenzie LLP) appeared for Hutchison 3G UK Limited.

Mr Justice Vos and Ann Kelly

Introduction

1. This is the majority opinion of the Tribunal. Professor John Pickering has prepared his own dissenting opinion, which follows this majority opinion.

2. Telefónica O2 UK Limited ("O2") has appealed to the Tribunal against the Office of Communications' ("OFCOM") failure to grant its application for a variation of its licence so as to allow it to use, with effect from 9th May 2010, UMTS (Universal Mobile Telecommunications System) technology in the 900 MHz and 1800 MHz frequency bands.

3. The substantive relief that O2 seeks in its notice of appeal dated 25th May 2010 is that the matter should be remitted to OFCOM with a direction that it should "*take appropriate steps to give effect to O2's directly effective rights*". The directly effective rights referred to are those allegedly contained in Directive 2009/114/EC of 16 September 2009 (the "GSM Amendment Directive"), and in Commission Decision 2009/766/EC of 16 October 2009 (the "900/1800 MHz Decision"). It is O2's case (and indeed common ground) that all factual merits questions are irrelevant for present purposes and that the issue to be decided by the Tribunal is one of pure law.

4. UMTS technology has, up to now, been used mainly in a range of frequency bands between 1920 and 2025 MHz. In late 2009, however, European legislation amended the earlier GSM Directive (as hereinafter defined) by requiring Member States, by 9th May 2010, to make the 900 and 1800 MHz bands available for UMTS systems (which are 3G systems) as well as for the

earlier second generation (or 2G) systems. This 2G technology has now largely been overtaken by 3G technology. 3G technology can be deployed successfully in the 900 and 1800 MHz bands as well as in higher frequency bands.

5. O2's appeal is brought under section 192(1)(a) and (2) of the Communications Act 2003 ("CA 2003"), and article 4.1 of Directive 2002/21/EC of 7th March 2002 on a common regulatory framework for electronic communications and services (the "Framework Directive").

6. The question of whether O2 has a directly effective EU[1] law right to require OFCOM to amend O2's licence so as to permit it to use UMTS technology in the 900 and 1800 MHz bands turns primarily on the proper construction of:-

   i) The GSM Amendment Directive amending Council Directive 87/372/EEC (the "GSM Directive") on the frequency bands to be reserved for the coordinated introduction of public pan-European cellular digital land-based mobile communications in the Community. Article 1.1 of the GSM Amendment Directive provides that: "*Member States shall make the [900 MHz Band] available for GSM and UMTS systems …*"; and

   ii) The 900/1800 MHz Decision on the harmonisation of the 900 MHz and 1800 MHz frequency bands for terrestrial systems capable of providing pan-European electronic communications services in the Community,

[1] This judgment will refer interchangeably to the European Community (EC) or the European Union (EU), whether in citations from judgments or otherwise, notwithstanding that the European Community was subsumed into the European Union by the Treaty of Lisbon with effect from 1 December 2009.

of which article 4(2) provides that: "*[t]he 1800 MHz band shall be designated and made available for [UMTS systems], subject to the conditions and implementation deadlines laid down [in the Annex]*".

7. It is common ground that these provisions are to be construed against the legislative background provided primarily by:-

   i) The Framework Directive;

   ii) Directive 2002/20/EC on the authorisation of electronic communications networks and services (the "Authorisation Directive"); and

   iii) Decision No 676/2002/EC on a regulatory framework for radio spectrum policy in the European Community (the "Radio Spectrum Decision").

8. The following parties (the "Interveners") were granted permission to intervene in this appeal on 11th June 2010:-

   i) T-Mobile UK Limited and Orange Personal Communications Services Limited (now known collectively as Everything Everywhere Limited ("EE"));

   ii) Vodafone Limited ("Vodafone"); and

   iii) Hutchison 3G UK Limited ("Three").

Vodafone intervenes in support of O2, whilst EE and Three intervene in support of OFCOM. O2 and the Interveners are the only mobile network operators ("MNOs") currently operating in the UK.

9. For mainly historical reasons, MNOs are each licensed to use a varying patchwork of spectrum. O2 and Vodafone, as the successors to the first operators to be granted licences in the UK, are licensed to use certain frequencies within the bands 880-915 MHz and 925-960 MHz (the "900 MHz band"). O2, Vodafone and EE are licensed to use certain frequencies within the bands 1710-1781.7 MHz and 1805-1876.7 MHz (the "1800 MHz band"). All four MNOs have licences to use frequencies in the range between 1920 and 2170 MHz.

10. The 900 MHz band is said to be of particular value due to its good propagation characteristics by comparison with higher frequency bands used by mobile operators. This enables it to cover greater distances and to pass through obstacles more easily than higher frequency bands, and allows modern voice, data and multimedia services to be extended to less populated and rural areas.

Issues

11. The following inter-related issues arise between the parties:-

    i) What is the proper meaning of the requirement in the GSM Amendment Directive and the 900/1800 MHz Decision to "*make available*" the 900MHz and 1800 MHz Bands for UMTS systems by 9th May 2010?

ii) Whether O2 has a directly effective right to the removal of the conditions in its licences limiting the use of the 900 and 1800MHz bands to GSM technology, pursuant to the GSM Amendment Directive and the 900/1800 MHz Decision, and whether OFCOM was obliged to give effect to that right by 9th May 2010?

Factual background and legislative chronology

12. The GSM Directive was promulgated on 25th June 1987. Article 1 provided simply that "*Member States shall ensure that the [900 MHz band is] reserved exclusively for a public pan-European cellular digital mobile communications service by 1 January 1991*". Article 3 provided that the service should mean one provided "*in each of the Member States to a common specification*", and article 4 provided that "*Member States shall bring into force the provisions necessary to comply with this Directive within 18 months of its notification*".

13. The Framework Directive and four accompanying specific directives (the "Specific Directives") on authorisation of, access to, universal service and users' rights in, and protection of privacy in, electronic communications were all promulgated on 7th March 2002. The relevant terms of two of these directives, the Framework Directive and the Authorisation Directive, are particularly important to the issues that we have to decide and are set out below.

14. On 2nd August 2005, OFCOM issued a public wireless network licence numbered 249663 to O2 to establish, install, and use radio transmitting and receiving stations and/or radio apparatus subject to its terms ("O2's Licence").

Paragraph 7 of and schedule 1 to O2's Licence provided that O2 might only operate radio equipment which complied with certain technical standards prescribed for GSM systems.

15. On 23rd June 2009, a Working Document (the "Working Document") was published by the EU's Radio Spectrum Committee (which was established by article 3 of the Radio Spectrum Decision). Some reliance is placed on its contents by OFCOM. It is, however, said on its face not necessarily to reflect the Commission's official position, and not to bear any legal character. Nonetheless, the document provided as follows:-

> "*The concept of "**making a band available**" requires some clarifications. The Commission services' view can be summarised as follows. Making available a spectrum band means preparing all the necessary steps so that the authorisation process can start if a potential user so requests, and therefore letting potential users know that they will have the possibility to access a frequency band under specific conditions. In practice this involves adopting or amending national legal acts that would regulate the use of the radio frequencies in a more detailed way. This requires several steps that must be completed within the deadline set by the Decision:*
>
> - *freeing the band if individual rights of use were granted for another application than the one foreseen …*
>
> - *in cases where spectrum use is subject to general authorisation, adopting the national legal text which submits a category of applications to general authorisation and includes the relevant technical conditions of use,*

- *in cases where spectrum use is subject to individual rights for electronic communication services, launching the public consultation on a possible limitation of the number of rights of use (under Article 7(1)(b) of the Authorisation Directive)*" (emphasis in original).

16. On 16th September 2009, the GSM Amendment Directive was promulgated. Its relevant terms are set out below.

17. On 16th October 2009, the Commission issued the 900/1800 MHz Decision. Again, its relevant terms are set out below.

18. On 2nd March 2010, O2 applied to OFCOM for a licence variation under section 10 and paragraph 6 of Schedule 1 to the Wireless Telegraphy Act 2006 (the "WTA 2006"), to allow it to deploy UMTS in the 900 and 1800 MHz bands. As we have said, the previous (and still existing) terms of O2's Licence prevent it from using the 900 and 1800 MHz bands with anything except GSM technology. O2 said in its application that, pursuant to the GSM Amendment Directive and the 900/1800 MHz Decision, OFCOM was under an absolute duty to grant the variation sought by 9th May 2010.

19. On 9th March 2010, a draft statutory instrument was laid before Parliament (the Wireless Telegraphy Act 2006 (Directions to OFCOM) Order 2010) for purposes including the implementation of the requirements set out in the GSM Amendment Directive and the 900/1800 MHz Decision (the "first draft direction"). The first draft direction was never brought into effect, however, because of the dissolution of Parliament on 12th April 2010.

20. On 22nd April 2010, OFCOM responded to O2's application saying (a) that the Department of Business, Innovation and Skills ("BIS") had asked it not to take any action in respect of O2's Licence variation request, (b) that BIS thought it inappropriate for OFCOM to take action before the next Government had had an opportunity to consider the first draft direction, and (c) that any action would be inappropriate as it was in a period of purdah pending the general election.

21. The deadline for implementation provided for in the GSM Amendment Directive and the 900/1800 MHz Decision was 9th May 2010.

22. On 25th May 2010, O2 filed the notice of appeal, to which we have already referred, initiating these proceedings.

23. On 4th June 2010, Vodafone wrote to OFCOM requesting a variation of its licence to remove the restrictions on its use of the 900 and 1800 MHz bands.

24. On 10th June 2010, OFCOM responded to Vodafone's request in similar terms to those of its 22nd April 2010 response to O2.

25. On 15th June 2010, O2's solicitors requested OFCOM to identify how it contended that the UK had made the 900/1800 MHz bands available for UMTS technology. No substantive answer was given to this request.

26. On 28th July 2010, a revised draft statutory instrument also entitled the Wireless Telegraphy Act 2006 (Directions to OFCOM) Order 2010 was laid before Parliament (the "revised draft direction") in somewhat more straightforward terms than the previous version. It was again, however, expressed to be made for purposes including the implementation of the

requirements of the GSM Amendment Directive and the 900/1800 MHz Decision. The revised draft direction provides by paragraph 4(b) that OFCOM must exercise its powers under section 10 of and paragraph 6 of schedule 1 to the WTA 2006 to vary each 900 and 1800 MHz licence to permit the licensee to use the licensed frequencies for both GSM and UMTS systems. In addition, the revised draft direction requires OFCOM to auction licences in the 800 and 2600 MHz frequency bands, to assess likely future competition in markets for the provision of mobile electronic communications services, and to put in place appropriate measures to promote competition after the conclusion of the auction.

27. In promulgating the revised draft direction, the Minister for Culture Communications and Creative Industries at BIS wrote a letter explaining it. He said this: "*I have considered any possible competitive imbalance that might be created by the liberalisation of the 900MHz and 1800Mhz spectrum. As part of this consideration, I have taken into account the rapid growth of smart phones and similar devices. This has resulted in the greater need for capacity on existing networks and I believe that this requirement cancels out any potential advantage of sub-1GHz [i.e. under 1,000MHz] spectrum in terms of rural reach and in-building … I believe therefore that we have met the obligation set out in the GSM [Amendment] Directive to consider the competitive effect of liberalisation and that this direction to Ofcom will permit the earliest possible release of this important spectrum, benefiting business, the consumer and the telecommunications industry alike*".

<u>The provisions of the GSM Amendment Directive</u>

28. Recital 4 provided that: "*…the use of the 900 MHz band should be available to other technologies for the provision of additional compatible and advanced pan-European services that would co-exist with GSM*".

29. Recital 6 provided that: "*The liberalisation of the use of the 900 MHz band could possibly result in competitive distortions. In particular, where certain mobile operators have not been assigned spectrum in the 900 MHz band, they could be put at a disadvantage in terms of cost and efficiency in comparison with operators that will be able to provide 3G services in that band. Under the regulatory framework on electronic communications and in particular [the Authorisation Directive] Member States can amend or review rights of use of spectrum and thus have the tools to deal, where required, with such possible distortions*".

30. Recital 7 provided that: "*Within six months of the entry into force of this Directive [which date is, in fact, 9th May 2010], Member States should transpose [the GSM Directive]. While this does not in itself require Member States to modify existing rights of use or to initiate an authorisation procedure, Member States must comply with the requirements of [the Authorisation Directive] once the 900 MHz band has been made available in accordance with this Directive. In doing so, they should in particular examine whether the implementation of this Directive could distort competition in the mobile markets concerned. If they conclude that this is the case, they should consider whether it is objectively justified and proportionate to amend the rights of use of those operators that were granted rights of use of 900 MHz frequencies and, where proportionate, to review these rights of use and to*

redistribute such rights in order to address such distortions. Any decision to take such a course of action should be preceded by a public consultation".

31. Recital 8 provided as follows: "*Any spectrum made available under this Directive should be allocated in a transparent manner and in such a way as to ensure no distortion of competition in the relevant markets*".

32. Recital 14 provided as follows: "*In order to allow new digital technologies to be deployed in the 900 MHz band in coexistence with GSM systems [the GSM Directive] should be amended and the exclusive reservation of this band for GSM should be removed*".

33. Article 1 provided for the following new article 1:-

> "*1. Member States shall make the 880-915 MHz and 925-960 MHz frequency bands [the 900 MHz band] available for GSM and UMTS systems as well as for other terrestrial systems capable of providing electronic communications services that can coexist with GSM systems, in accordance with technical implementing measures adopted pursuant to [the Radio Spectrum Decision]*.
>
> *2. Member States shall, when implementing this Directive, examine whether the existing assignment of the 900 MHz band to the competing mobile operators in their territory is likely to distort competition in the mobile markets concerned and, where justified and proportionate, they shall address such distortions in accordance with Article 14 of [the Authorisation Directive]*".

34. Article 3 provided for the following new article 3:-

"*1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 9 May 2010. They shall forthwith communicate to the Commission the text of those measures and a correlation table between those measures and this Directive.*

When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication …"

35. The explanatory memorandum accompanying the Commission's proposal for the GSM Amendment Directive (the "Explanatory Memorandum") included the following:-

i) "*The objective is to allow a wider choice of services and technologies and thereby to maximise competition in the use of the bands … To this end, the use of this spectrum would be allowed not only for GSM, but also for pan European electronic communication services other than GSM. As a first step, this would include UMTS …This requires new harmonised technical conditions for the spectrum band in question, which would be defined in a Commission Decision to be adopted under [the Radio Spectrum Decision]*".

ii) "*Ensuring the harmonised use of the 900 MHz band to meet Community Policy needs cannot be accomplished satisfactorily by Member States acting individually and can be better achieved at Community level by internal market measures adopted under the Radio Spectrum Decision*"

iii) "*The amendment of the GSM Directive and the adoption of coexistence conditions for GSM and UMTS, with provision for other systems to coexist in these bands as well, through a binding Community harmonisation measure, are necessary to ensure the timely and harmonised introduction of the new spectrum usage conditions in the Member States. Without such a measure, no harmonised and timely solution can be guaranteed*".

The provisions of the 900 and 1800 MHz Decision

36. Recital 2 provided as follows: "*The [GSM Amendment Directive] … opens the [900 MHz band] to the [UMTS] … systems … in accordance with technical implementing measures adopted pursuant to [the Radio Spectrum Decision]. Technical measures should therefore be adopted to allow the coexistence of GSM and other systems in the 900 MHz band*".

37. Recital 3 provided that: "… *[t]he 1800 MHz band should also be opened under the same conditions as the 900 MHz band …*".

38. Recital 11 provided that: "*[t]he results of the mandate to the CEPT [European Conference of Postal and Telecommunications Administrations] should be made applicable in the Community and implemented by Member States without delay …*".

39. Recital 13 provided as follows: "*Radio spectrum technical management includes the harmonisation and allocation of radio spectrum. This harmonisation should reflect the requirements of general policy principles identified at Community level. However, radio spectrum technical*

management does not cover assignment and licensing procedures (including their timing) …"

40. Article 1 provided as follows: "*This Decision aims to harmonise the technical conditions for the availability and efficient use of the 900 MHz band, in accordance with the [GSM Directive], and of the 1800 MHz band for terrestrial systems capable of providing electronic communications systems*".

41. Article 4.2 provided as follows: "*The 1800 MHz band shall be designated and made available for those other terrestrial systems capable of providing electronic communications services that are listed in the Annex [including UMTS systems], subject to the conditions and implementation deadlines laid down therein*". The implementation deadline laid down in the Annex for UMTS systems is 9th May 2010. In addition, the Annex provided that "*[t]he following technical parameters shall be applied as an essential component of conditions necessary to ensure coexistence* …", and the technical parameters shown for UMTS systems provided for specific carrier separations between two neighbouring UMTS networks on the one hand, and neighbouring UMTS and GSM networks on the other hand.

<u>The provisions of the Framework Directive</u>

42. The Framework Directive established a common regulatory framework for electronic communications networks and services.

43. Recital 5 provided that the "*convergence of the telecommunications, media and information technology sectors means all transmissions networks and*

services should be covered by a single regulatory framework" consisting of the Framework Directive and the four Specific Directives.

44. Recital 18 provided as follows: "*The requirement for Member States to ensure that national regulatory authorities take the utmost account of the desirability of making regulation technologically neutral, that is to say that it neither imposes nor discriminates in favour of the use of a particular type of technology, does not preclude the taking of proportionate steps to promote certain specific services where this is justified ...*".

45. Recital 19 provided as follows: "*Radio frequencies are an essential input for the radio-based electronic communications services and, in so far as they relate to such services, should therefore be allocated and assigned by national regulatory authorities [NRAs] according to a set of harmonised objectives and principles governing their action as well as to objective transparent and non-discriminatory criteria …*".

46. Article 3 headed "*[NRAs]*" provided as follows:-

> "*1. Member States shall ensure that each of the tasks assigned to national regulatory authorities in this Directive and the Specific Directives is undertaken by a competent body. …*"

47. Article 8 headed "*Policy objectives and regulatory principles*" provided as follows:-

> "*1. Member States shall ensure that in carrying out the regulatory tasks specified in this Directive and the Specific Directives, the national regulatory authorities take all reasonable measures which are aimed at*

achieving the objectives set out in paragraphs 2, 3 and 4. Such measures shall be proportionate to those objectives. …

2. The national regulatory authorities shall promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services by inter alia:

(a) ensuring that users, including disabled users, derive maximum benefit in terms of choice, price, and quality;

(b) ensuring that there is no distortion or restriction of competition in the electronic communications sector;

(c) encouraging efficient investment in infrastructure, and promoting innovation; and

(d) encouraging efficient use and ensuring the effective management of radio frequencies and numbering resources".

48. Article 9 headed "*Management of radio frequencies for electronic communications services*" provided as follows:-

"*1. Member States shall ensure the effective management of radio frequencies for electronic communication services in their territory in accordance with Article 8. They shall ensure that the allocation and assignment of such radio frequencies by national regulatory authorities are based on objective, transparent, non-discriminatory and proportionate criteria.*

2. Member States shall promote the harmonisation of use of radio frequencies across the Community, consistent with the need to ensure effective and efficient use thereof and in accordance with the [the Radio Spectrum Decision]".

The provisions of the Authorisation Directive

49. The Authorisation Directive laid down rules regarding the authorisation of individual operators to make use of the radio spectrum through the allocation, amendment and withdrawal of rights of use.

50. Recital 3 provided that the objective of the Authorisation Directive was to create a legal framework to ensure the freedom to provide electronic communication networks and services.

51. Recital 7 provides that: "*[t]he least onerous authorisation system possible should be used to allow the provision of electronic communications networks and services in order to stimulate the development of new electronic communications services and to allow service providers and consumers to benefit from the economies of scale of the single market*".

52. Recital 8 provided that the stated aims "*can be best achieved by general authorisation of all electronic communications networks and services without requiring any explicit decision or administrative act by the [NRA] and by limiting procedural requirements to notification only*".

53. Recital 11 provided that: "*[t]he granting of specific rights may continue to be necessary for the use of radio frequencies … Those rights of use should not be*

restricted except where this is unavoidable in view of the scarcity of radio frequencies and the need to ensure the efficient use thereof".

54. Recital 15 provided that: "*[t]he conditions, which may be attached to the general authorisation and to the specific rights of use, should be limited to what is strictly necessary to ensure compliance with requirements and obligations under Community law and national law in accordance with Community law*".

55. Recital 33 provided that: "*Member States may need to amend rights, conditions, procedures, charges and fees relating to authorisations, and rights of use where this is objectively justified. Such changes should be duly notified to all interested parties in good time, giving them adequate opportunity to express their views on any such amendments*".

56. Article 3 provided as follows under the heading: "*General authorisation of electronic communications networks and services*":-

> "*1. Member States shall ensure the freedom to provide electronic communications networks and services, subject to the conditions set out in this Directive…*
>
> *2. The provision of electronic communications networks or the provision of electronic communications services may, without prejudice to the specific obligations referred to in Article 6(2) or rights of use referred to in Article 5, only be subject to a general authorisation. The undertaking concerned may be required to submit a notification but may not be required to obtain an explicit decision or any other administrative act by*

the national regulatory authority before exercising the rights stemming from the authorisation. Upon notification, when required, an undertaking may begin activity, where necessary subject to the provisions on rights of use in Articles 5, 6 and 7.

3. The notification referred to in paragraph 2 shall not entail more than a declaration by a legal or natural person to the national regulatory authority of the intention to commence the provision of electronic communication networks or services and the submission of the minimal information which is required to allow the national regulatory authority to keep a register or list of providers of electronic communications networks and services…".

57. Article 5 provided as follows under the heading: "*Rights of use for radio frequencies and numbers*":-

"*1. Member States shall, where possible, in particular where the risk of harmful interference is negligible, not make the use of radio frequencies subject to the grant of individual rights of use but shall include the conditions for usage of such radio frequencies in the general authorisation.*

2. Where it is necessary to grant individual rights of use for radio frequencies and numbers, Member States shall grant such rights, upon request, to any undertaking providing or using networks or services under the general authorisation, subject to the provisions of Articles 6, 7 and 11(1)(c) of this Directive and any other rules ensuring the efficient use of those resources in accordance with [the Framework Directive] …".

58. Article 6 provided as follows under the heading "*Conditions attached to the general authorisation and to the rights of use for radio frequencies and for numbers, and specific obligations*":-

> "*1. The general authorisation for the provision of electronic communications networks or services and the rights of use for radio frequencies and rights of use for numbers may be subject only to the conditions listed respectively in parts A, B and C of the Annex. Such conditions shall be objectively justified in relation to the network or service concerned, non-discriminatory, proportionate and transparent*".

59. Article 7 provided as follows under the heading "*Procedure for limiting the number of rights of use to be granted for radio frequencies*":-

> "*1. Where a Member State is considering whether to limit the number of rights of use to be granted for radio frequencies, it shall inter alia:*
>
> *(a) give due weight to the need to maximise benefits for users and to facilitate the development of competition …*".

60. Article 8 provided that "*Where the usage of radio frequencies has been harmonised, access conditions and procedures have been agreed, … Member States shall grant the right of use for such radio frequencies in accordance therewith …*".

61. Article 14 provided as follows under the heading "*Amendment of rights and obligations*":-

"*1. Member States shall ensure that the rights, conditions and procedures concerning general authorisations and rights of use or rights to install facilities may only be amended in objectively justified cases and in a proportionate manner. Notice shall be given in an appropriate manner of the intention to make such amendments and interested parties, including users and consumers, shall be allowed a sufficient period of time to express their views on the proposed amendments, which shall be no less than four weeks except in exceptional circumstances.*

2. Member States shall not restrict or withdraw rights to install facilities before expiry of the period for which they were granted except where justified and where applicable in conformity with relevant national provisions regarding compensation for withdrawal of rights".

62. Paragraph B of the Annex was headed: "*Conditions which may be attached to rights of use for radio frequencies*", and included the following at paragraph 1: "*Designation of service or type of network or technology for which the rights of use for the frequency has been granted …*".

The provisions of the Radio Spectrum Decision

63. Recital 11 provided as follows:-

"*Radio spectrum technical management includes the harmonisation and allocation of radio spectrum. Such harmonisation should reflect the requirements of general policy principles identified at Community level. However, radio spectrum technical management does not cover assignment and licensing procedures …*".

64. Article 1 sets out the aim of the Decision, which was to establish a policy and legal framework to ensure the coordination of policy approaches, and, where appropriate, harmonised conditions with regard to the availability and efficient use of the radio spectrum necessary for the establishment and functioning of the internal market.

65. Article 4 provided as follows under the heading "*Function of the Radio Spectrum Committee*":-

> "*1. In order to meet the aim set out in Article 1, the Commission shall submit to the Radio Spectrum Committee, in accordance with the procedures set out in this Article, appropriate technical implementing measures with a view to ensuring harmonised conditions for the availability and efficient use of radio spectrum, as well as the availability of information related to the use of radio spectrum, as referred to in Article 5*".

66. Article 10 provided that "*Member States shall take all measures necessary, by laws, regulations and administrative provisions, for the implementation of this Decision and all resulting measures*".

UK domestic legislation

67. Section 8 (1) of the WTA 2006 provides that "*[i]t is unlawful- (a) to establish or use a wireless telegraphy station, or (b) to install or use wireless telegraphy apparatus, except under and in accordance with a licence … granted under this section by OFCOM*".

68. Paragraph 6 of schedule 1 to the WTA 2006 provides that OFCOM may "*revoke a wireless telegraphy licence or vary its terms, provisions or limitations – (a) by notice in writing given to the holder of the licence; or (b) by a general notice applicable to licences of the class to which the licence belongs, published in such a way as may be specified in the licence*".

69. It is common ground that OFCOM's failure to grant O2's application to vary the Licence can be appealed to the Tribunal under section 192 of the CA 2003 (implementing article 4 of the Framework Directive).

The relief sought by O2

70. The detailed relief now sought by O2 is as follows:-

i) Pursuant to section 195(3) and (4) of the CA 2003 that the Tribunal should decide that OFCOM is obliged to liberalise the rights of use for the 900 and 1800 MHz bands.

ii) Pursuant to section 195(4) of the CA 2003 that the Tribunal should remit the matter to OFCOM with a direction that within an appropriate period OFCOM should exercise its undoubted powers of licence modification to vary O2's Licence so as to permit O2 henceforth to use its Licence to deliver UMTS as well as GSM in the 900 and 1800 MHz bands, thereby securing the UK's compliance with its obligations under the GSM Amendment Directive and the 900/1800 MHz Decision.

iii) That the Tribunal should direct OFCOM to modify O2's Licence in the form proposed by O2 within 14 days.

Issue 1: What is the proper meaning of the requirement in the GSM Amendment Directive and the 900/1800 MHz Decision to "*make available*" the 900MHz and 1800 MHz Bands for UMTS systems by 9th May 2010?

71. The central question in this appeal is whether the requirement to make the 900 and 1800 MHz bands available for UMTS systems requires:-

i) (as O2 submits) the UK as the Member State (and therefore OFCOM) to remove any licence restrictions which prevent the deployment of UMTS in the 900/1800 MHz bands, or

ii) (as OFCOM submits) the UK to remove any legal obstacles which might preclude it from proceeding to authorise the use of the 900/1800 MHz bands for UMTS technology, or, put another way, to take all the necessary steps so that an authorisation process can start if potential users request it.

72. Four matters are, however, common ground:-

i) That the EU regulatory framework makes a distinction between the allocation of spectrum and the award of rights of use of radio frequencies on the one hand, and the harmonisation of technical conditions for the use of radio frequencies on the other.

ii) The GSM Directive, the GSM Amendment Directive, and the 900/1800 MHz Decision relate to the harmonisation of technical conditions for the use of radio frequencies and do not in themselves regulate the award of rights of use or allocation of spectrum by Member States.

iii) A key policy objective of the EU regulatory framework is the promotion of competition.

iv) That policy objective is embedded in the GSM Directive, the GSM Amendment Directive, and the 900/1800 MHz Decision, which make it clear that Member States are to use their powers under the Authorisation Directive to address any competitive distortions resulting from the liberalisation of the 900 and 1800 MHz bands.

73. Following this common ground, two clear disparities arise between the approaches of O2 and OFCOM:-

i) OFCOM says that O2 is claiming to be entitled to be awarded a right to use the 900/1800 MHZ bands, whilst O2 says that it has already been awarded that right, and all it is seeking is the removal of technical restrictions preventing the deployment of UMTS technology in those bands.

ii) OFCOM says that O2's claim runs against the grain of the legislative purpose of promoting competition, whereas O2 argues that no prior competition analysis is required as it would be for the grant of a new licence. O2 says that the GSM Amendment Directive envisages that a competition analysis will follow the lifting of the restriction on the licence, and that all that is initially required is a review of the effects of the relaxation of the technical conditions preventing UMTS deployment.

74. O2 relied heavily on the fact that OFCOM had not previously advanced these arguments as supporting the proposition that they must be wrong. Indeed, it is striking that OFCOM and BIS appear to have published documents at various points prior to the inception of these proceedings that seemingly supported O2's arguments. In our view, however, these changes of position are not something that we can take into account in reaching our decision, however startling they may have been. It is preferable to deal with the arguments addressed to the Tribunal on their legal merit rather than starting from any pre-conceived position arising from the way the matter has previously been approached, whether by the parties or otherwise. Nor do we attach great importance to OFCOM's initial response to O2's application, even though it was, in itself, plainly an inadequate one. It is more important to determine what the words "*make available*" mean, and whether OFCOM has complied with the UK Government's obligation to make the 900/1800 MHz bands available for UMTS systems.

75. It is common ground that it is appropriate to adopt a purposive or teleological construction to the interpretation of EU legislation (see In Re Smith Kline & French Laboratories Ltd [1990] 1 AC 64 at page 75 per Dillon LJ, and at page 82 per Balcombe LJ). Lord Steyn considered the approach to construction of European legislation in Shanning International Ltd v. Lloyds TSB Bank plc [2001] 1 WLR 1462 at paragraph 24 as follows:-

> "*There is an illuminating discussion in Cross, Statutory Interpretation, 3rd ed (1995), pp 105-112 of the correct approach to the construction of instruments of the European community such as the regulation in*

question. The following general guide provided by Judge Kutscher, a former member of the European Court of Justice, is cited by Cross, at p 107:

> *"You have to start with the wording (ordinary or special meaning). The court can take into account the subjective intention of the legislature and the function of a rule at the time it was adopted. The provision has to be interpreted in its context and having regard to its schematic relationship with other provisions in such a way that it has a reasonable and effective meaning. The rule must be understood in connexion with the economic and social situation in which it is to take effect. Its purpose, either considered separately or within the system of rules of which it is a part, may be taken into consideration."*

Cross points out that of the four methods of interpretation—literal, historical, schematic and teleological—the first is the least important and the last the most important. Cross makes two important comments on the doctrine of teleological or purposive construction. First, in agreement with Bennion, Statutory Interpretation, 2nd ed (1992), section 311, Cross states that the British doctrine of purposive construction is more literalist than the European variety, and permits a strained construction only in comparatively rare cases. Judges need to take account of this difference. Secondly, Cross points out that a purposive construction may yield either an expansive or restrictive interpretation. It follows that Regulation No 3541/92 ought to be interpreted in the light of the purpose of its

provisions, read as a coherent whole, and viewed against the economic and commercial context in which the regulation was adopted".

76. It is as well to remember also that any construction adopted for the GSM Amendment Directive and the 900/1800 MHz Decision must work in all Member States whatever particular means they have adopted to implement previous EU legislation. It was for that reason that we found Three's evidence as to the factual position in other member states of some contextual importance. As Ms Carss-Frisk Q.C., counsel for Three, submitted, some 16 member states had enacted some form of generally applicable bar to UMTS use in the 900/1800 MHz bands, and it was those generally applicable bars that many of them had sought to remove before 9th May 2010 in response to the GSM Amendment Directive. Most Member States had also not at the time of the hearing, in fact, moved on to amending licences or taking other necessary administrative or authorisation steps to allow usage of the 900/1800 MHz bands for UMTS systems.

77. As the citation we have set out above also shows, EU legislation cannot be construed in the same way as domestic legislation. That is not surprising as EU legislation performs a different purpose. In this case particularly, we have already seen from the recitals and the provisions of the relevant directives that what has been established is a framework for the regulation of the electronic communications networks and services and for harmonisation with regard to the availability and efficient use of the radio spectrum. Each Member State will have established its own NRA (OFCOM, of course, in the UK), and that NRA is charged with undertaking its regulatory activities in accordance with

the policy objectives and regulatory principles laid down in article 8 of the Framework Directive. For our purposes, the most important of these are the promotion of competition as a means of ensuring maximum benefits for consumers, avoiding distortion of competition, and achieving efficient investment in infrastructure and efficient use and management of radio frequencies. In addition, each Member State will have its own legislative and administrative structure to give effect to the Directives we have mentioned.

78. Of course, none of this means that EU legislation cannot be directly effective. The reverse is true. EU legislation can be and often is directly effective. But to be so, the provision in question must be unconditional and sufficiently precise (see, for example, paragraph 40 of Arcor AG v. Germany (Joined cases C-152/07, C-153/07 and C-154/07) [2008] 3 CMLR 37). We shall return to this point when we deal with the second issue.

79. Against this background, the primary arguments of the parties may be summarised as follows.

80. Mr Michael Beloff Q.C.'s three primary points for O2 were:-

i) First, that the meaning of the GSM Amendment Directive is obvious, because the words "*make available*" bear the dictionary definition of "*capable of being made use of*". O2 cannot, it says, make use of the 900 and 1800 MHz bands with UMTS technology unless the restrictions on its licence are lifted.

ii) Secondly, the EU legislation makes a clear distinction between rights of use of frequency bands on the one hand and the conditions attaching

to those rights of use on the other hand. Thus, once an operator is granted a right to use a particular band, that right could only be 'modified' by the removal of some of the bandwidth, but not by varying the conditions attaching to the right of use.

iii) Thirdly, recitals 6-8 and article 1.2 of the GSM Amendment Directive make clear that the competition issues can be resolved by a competition analysis, and a process of licence revocation, variation and new allocations taking place after the restrictive conditions in O2's Licence have been lifted and "liberalisation" of the bands has taken place.

81. Conversely, Ms Dinah Rose Q.C.'s primary submissions on behalf of OFCOM were that:-

i) Section 8 of the WTA 2006 makes it a criminal offence to use wireless telegraphy apparatus except under and in accordance with a licence granted by OFCOM, so that O2's only existing right is to use the 900 and 1800 MHz bands with GSM technology. It could only be granted a right to use the 900 and 1800 MHz bands with UMTS technology if and when OFCOM decides to grant it such a licence.

ii) The scheme of the European legislation requires Member States to ensure that in carrying out their regulatory tasks, they avoid distortion of competition, and promote the harmonisation of the use of radio frequencies across the EU. A directive requiring immediate lifting of restrictions in licences allowing usage of the 900 and 1800 MHz bands with UMTS technology by the incumbent licence holders, without

regard to competition or harmonisation criteria, would run counter to these objectives.

iii) Article 6.1 of the Authorisation Directive allows conditions restricting the technology for which the bands may be used, and article 14 requires Member States to ensure that such conditions may only be amended in appropriate cases after proper consideration. If the GSM Amendment Directive had direct effect and required lifting of the restriction to GSM technology without such consideration, it would cut across those central parts of the legislative framework.

iv) Properly construed, the provisions of the GSM Amendment Directive do not require any immediate lifting of the restrictions in O2's Licence, but simply require the UK to clear the domestic legislative path (if necessary), so that the 900 and 1800 MHz bands can be used in a timely fashion after a proper competition analysis and proper consideration by OFCOM after 9th May 2010.

82. In supporting OFCOM, Mr Michael Fordham, Q.C. for EE, drew attention to the fact that, if O2 were right, whilst it would have a directly enforceable right under article 1.1 of the GSM Amendment Directive to the removal of the conditions attaching to its licence, an operator like Three, who had no existing licence in the 900/1800 MHz bands, would have no such right. This, says Mr Fordham, would be a very surprising outcome, when the GSM Amendment Directive and the 900/1800 MHz Decision are so generally framed. If there really were a special and immediate and automatic right for one category of operator, it would have been clearly spelled out.

The distinctions made in the relevant directives

83. It is clear from what we have already said that a number of important distinctions are made in the relevant directives. All sides accept that article 9 of the Framework Directive draws a vital distinction between the effective management of frequencies by allocation and assignment, on the one hand, and the harmonisation of the efficient technical use of frequencies in accordance with the Radio Spectrum Decision on the other hand. Indeed, recital 11 of that Decision expressly records that radio spectrum technical management does not cover licensing procedures.

84. In effect, therefore, the regime that is established, before one even reaches the Authorisation Directive, distinguishes between technical harmonisation and authorisation procedures. The Authorisation Directive then makes clear that it is concerned with the methods by which operators should be authorised to use radio frequencies, in effect once technical harmonisation has been achieved. The Authorisation Directive places great emphasis on ease of authorisation, and its preference for general authorisation without any specific administrative act, like the grant of a licence, being required. It nonetheless acknowledges in recital 11 and article 5 that it may be necessary in some cases to grant individual rights of use for radio frequencies.

85. In our judgment, it is at this point that Mr Beloff's distinction between rights of use and conditions comes into focus. Once the harmonisation of technical usage requirements has been dealt with in accordance with the Radio Spectrum Decision, and it has been decided that authorisation will need to be achieved by some licensing or other administrative act, the Authorisation

Directive turns to consider the details of how that should be regulated. Mr Beloff's distinction between rights of use and the conditions attaching to them is found in the difference between articles 5 and 6 of the Authorisation Directive, as he submitted forcefully in reply. But equally, it is clear from article 14 of the Authorisation Directive that conditions attaching either to general authorisations or specific authorisations in the form of rights of use can only be amended in certain delineated situations, in particular after notice has been given and a consultation exercise has been undertaken. This is a mandatory provision, and we think it would be more than surprising if a subsequent directive were to cut across it without making it clear that it was doing so.

86. Thus, as it seems to us, Mr Beloff's distinction is of less structural significance to a proper understanding of the framework of the EU legislation than is the distinction between harmonisation of the technical usage requirements, and allocation or authorisation of usage rights. The grant of rights of use is but one way in which the Authorisation Directive envisages operators being authorised to use particular bands, and the conditions attaching to a right of use are just one way in which certain specified matters delineated in the Annex can be regulated, for example the use of specific types of technology within the band allocated.

87. With this preliminary understanding of the landscape, one can move to a consideration of the meaning of the GSM Amendment Directive. We should say first, however, that we did not gain much assistance from a consideration of the terms of the GSM Directive itself, save to say that the GSM Directive

cannot have provided for any directly effective right of use in any particular operator. All it was saying was that the 900 MHz band should be reserved for GSM technology provided to a common specification. The GSM Directive, therefore, seems to have been addressing technical harmonisation rather than authorisation, allocation or licensing. Moreover, it does not advance matters to submit that the GSM Directive was implemented by the grant of licences, so that one might expect the GSM Amendment Directive to be implemented by the variation of those licences. The GSM Directive was implemented in different Member States by different mechanisms, including legislation, regulation and administrative acts. In the UK, it was implemented by a strategic process of authorisations undertaken without legislation after proper consultation pursuant to the Authorisation Directive. One method of implementing the GSM Amendment Directive might indeed be to amend those authorisations, but that is not the only possible way.

The meaning of the GSM Amendment Directive

88. The GSM Amendment Directive begins by setting out the history in recitals 1-3. Recital 4 then refers to the need to maximise competition as indicating that the 900 MHz band should be available to other compatible technologies. Recitals 6-13 then seek to deal with some of the potential consequences of the measure being adopted. Before going any further, we would wish to caution against seeking to construe any of the recitals as a deed. They are to be viewed broadly and purposively and that is how we have tried to read them. In that way, however, they do provide valuable guidance as to the intended meaning of the directive:-

i) Recital 6 averts to the possibility that 'liberalisation' could result in competitive distortions. "*Liberalisation*" cannot have been intended as a synonym for "*make available*" in article 1.1. They are quite different words with different meanings. Liberalisation is referring to the outcome of the whole of the process which the GSM Amendment Directive is considering. Likewise the second sentence of recital 6 is not assuming that the effect of the GSM Amendment Directive is to allow operators to demand the lifting of restrictions on their licences, it is considering that that may be the ultimate outcome, and that, if it were, it could lead to competitive disadvantages to other operators. It concludes by making clear that the Authorisation Directive provides tools to allow Member States to deal with these problems by amending or reviewing the terms of rights of use. We understand the submission that Recital 6 can be read as giving some temporal guidance, in that, on one reading, it seems to envisage liberalisation before the competition considerations are addressed. But we do not think this is an inevitable construction. Ultimately, it seems to us to be neutral as to timing, and to be addressing the whole process of liberalisation without indicating, one way or another, whether the GSM Amendment Directive will result in immediate licence changes, making clear, importantly we think, that the procedures for licence amendment in the Authorisation Directive are to be employed.

ii) Recital 7 has been the subject of understandable, if inappropriate, minute textual analysis in the course of argument. It seems to us that its meaning is quite straightforward. Its first sentence says that

Member States should "transpose" or amend their own domestic regime to conform with the GSM Amendment Directive. That much is clear from article 3. The second sentence of recital 7 was then central to the argument. Mr Beloff argued that in saying that the directive did not "*in itself require Member States to modify existing rights of use*", it was simply referring to withdrawing parts of the bandwidth, but it was not referring to amending the conditions of licences. We do not agree. It seems to us that the references to "*modification of existing rights of use*" and initiation of authorisation procedures is shorthand for the gamut of authorisation activities possible under the Authorisation Directive. Existing rights of use can be modified in numerous ways, but certainly by amendments to conditions under article 14 of the Authorisation Directive, or by withdrawal of wavebands – also under Article 14. Authorisation procedures could involve anything under the Authorisation Directive, including allocation of wave bands under licences. The remainder of recital 7 endorses our understanding. The words refer to the need for competition considerations to be taken into account and for a public consultation to take place, emphasising the need to comply with the Authorisation Directive in undertaking any authorisation processes, whether that might be allocation, amendment of rights of use, or otherwise. There is no indication in recital 7 that the GSM Amendment Directive is to have immediate effect on existing authorisations or licences, and even less indication that article 14 of the Authorisation Directive is to be abrogated. In fact, exactly the reverse is expressly indicated. The recital gives no warrant for Mr Beloff's

argument that there should be lifting of the restrictions first, and a competition analysis later.

iii) Recital 8 once more supports our approach. It indicates that "*making available*" spectrum under the directive is separate from allocation of spectrum. The use of the word "*allocate*" is most likely intended to refer to authorisation more generally, and the recital is simply saying that authorisation procedures must be transparently undertaken once the spectrum has been made available technically and in a harmonised way under article 1.1. Again, it reverts to the injunction that allocation must be done in such a way as to avoid distortion of competition.

iv) Recital 9 also deals with authorisation by suggesting technical usage conditions to avoid harmful interference. Recital 10 suggests a means by which harmonisation of technical conditions can be achieved.

v) Recitals 11-13 deal with the opening up of the 900 MHz band to UMTS systems, and recital 14 makes clear how that is to be done, namely by removing the exclusive reservation of the 900 MHz band for GSM technology.

89. We come then to article 1.1 of the GSM Amendment Directive. We see much force in O2's dictionary construction to the effect that "*make available*" should mean "*capable of being made use of*". But, looked at in context, we do not think that, when the directive says that Member States shall make the 900 MHz band capable of being made use of, it is referring to authorisation, rights of use, or licensing. Instead, it is simply saying that any harmonisation

measures necessary should be put in place to ensure that, by 9th May 2010, the 900 MHz band can be authorised for use with UMTS technology.

90. That construction is reinforced by article 1.2 which says that when putting the necessary harmonisation measures in place, it should also examine whether authorising the existing operators to use the UMTS technology would distort competition, and if so, the problem should be addressed by amendments made under article 14 of the Authorisation Directive. The mention in article 1.2 that competition distortions are to be addressed under article 14 of the Authorisation Directive cannot be construed as meaning that article 14 is otherwise to be ignored. Such a construction would be untenable. In addition, article 1.2 itself has no relevant temporal connotation. It is not saying that the lifting of restrictions must be done first, and the competition considerations considered later. That would cut across everything that we have already seen contained in the Framework Directive, the Authorisation Directive and the recitals to the GSM Amendment Directive. It is simply saying that competition considerations should be considered "*when implementing this Directive*" i.e. as Mr Beloff put it "*in connection with*" implementing the Directive or at the same time as implementing it. It is not indicative that implementation means removing conditions from existing licences. Article 1.2 is looking ahead to what will follow under article 14 of the Authorisation Directive, once the technical harmonisation has taken place and the way has been cleared for the authorisation process to begin.

91. Article 3 of the GSM Amendment Directive does not take the matter much further. It is in a very common form, found, for example, in article 10 of the

Radio Spectrum Decision. It was, by the end of the argument, common ground that "*administrative provisions*" could be interpreted as encompassing restrictions imposed by licence. This is not surprising. Some Member States seem to have implemented the requirement set out in the original GSM Directive through laws or regulations, and others have done so by a strategic authorisation process limiting authorisations to GSM technology. Moreover, a licence is, as Mr Woodrow submitted on behalf of Vodafone, a public law instrument or administrative act and not a contract (see, for example, OFCOM v. Floe Telecom Ltd [2009] EWCA Civ 47 at paragraph 103 per Mummery LJ).

92. Before turning finally to the words that have to be construed, we should mention one more important matter. O2 does not contend that the GSM Amendment Directive itself takes effect, without any action by OFCOM, to remove its licence restrictions. This concession is, in our judgment, fatal to O2's approach. Once it is accepted that OFCOM must act to 'make available' the 900/1800 MHz spectrum for UMTS technology by removing the licence conditions, OFCOM is thrown inexorably back to article 14 of the Authorisation Directive. OFCOM cannot ignore that provision, which is, as we have already said, mandatory in its terms. We would go so far as to say that it is almost inconceivable that the legislators could have intended to dis-apply or over-rule the provisions of article 14 without expressly saying so. The whole of the GSM Amendment Directive is to the reverse effect, namely that article 14 and the Authorisation Directive as a whole are to be applied.

The meaning of the 900/1800 MHz Decision

93. Mr Beloff sought to draw comfort from the different wording of the 900/1800 MHz Decision, but in our judgment, it did not avail him. It is true that the important recitals 6-9 of the GSM Amendment Directive are absent from the 900/1800 MHz Decision. But it is common ground that the effect of the two instruments is the same. The meaning of "*make available*", in particular, must be the same. Apart from the confusing use of the word "*allocation*" in the first sentence of recital 13, it seems to us that that recital makes clear that the 900/1800 MHz Decision is about technical harmonisation rather than authorisation or licensing. Articles 1 and 4(2) reinforce that distinction by saying expressly that the technical conditions are to be harmonised. The conditions are specified in the Annex as being the carrier separation requirements. This is not, as Mr Beloff submitted, the only technical requirement needed to amend O2's Licence to make it fit for UMTS usage. It is, in fact, a demonstration that what is being achieved here is the mechanism for technical harmonisation in preparation for the authorisation process contained in the Authorisation Directive. That is referred to in recital 14.

The proper construction of the words "*make available*"

94. It is already clear what we think the words "*make available*" mean. They mean that any measures necessary should be put in place to ensure that, by 9th May 2010, the 900 MHz and 1800 MHz bands are available throughout EU Member States to be authorised for use with UMTS technology, and are thereby capable of being made use of.

95. In this connection, we should say that, in our view, the purposes of the GSM Amendment Directive and the 900/1800 MHz Decision should drive their proper construction in accordance with the guidance we have already set out. The overall purpose of the regime in terms of policy objectives and regulatory principles is set out in article 8 of the Framework Directive. The promotion of competition is reinforced as an important purpose of the GSM Amendment Directive in recitals 4, 6, 7, and 8 and in article 1.2. Mr Beloff submitted that the underlying purpose of the GSM Amendment Directive was liberalisation, with ancillary competition objectives, which could later be dealt with. It does not seem to us to matter if he were right. It is true that liberalisation is a purpose of the GSM Amendment Directive. But liberalisation will be achieved as much on our construction as on Mr Beloff's. That liberalisation will be (as the whole of the legislation makes clear) for the benefit of service providers and consumers alike – indeed it is more likely to promote competition than to distort it. But that is not the point. A purposive construction cannot be used to conclude that the legislation must be construed as requiring two steps to be taken at once, when the whole structure of the background directives make clear that the two steps are separate, and nothing in the GSM Amendment Directive says expressly that the detailed mandatory licence amendment processes in the Authorisation Directive is to be taken as having been over-ruled. Making bands available for different technological usage is what is achieved by the first step in the GSM Amendment Directive by 9th May 2010. The second stage concludes liberalisation by the implementation of the necessary authorisations and licence amendments under the Authorisation Directive. The two stage approach ensures that

liberalisation does not occur in such a way as to be likely to distort competition. If the purpose were liberalisation alone, it would, as we have said, cut across the regime that has been created by the directives and decisions to which we have referred in detail. If the purpose were to achieve liberalisation in one stage, an absurd result could occur in numerous situations across the EU. For example, if O2 and Vodafone were indeed entitled to have their licence restrictions lifted without consideration of competition issues, they would have been able to start operating UMTS technology in the 900/1800 MHz band at once. If a subsequent competition evaluation had decided that such a result distorted competition, one or both could then have lost that right very soon thereafter, creating chaos for service providers and consumers alike. Such an obvious possible scenario militates in favour of the construction we have adopted.

96. Our construction of the GSM Amendment Directive and the 900/1800 MHz Decision accords also with those materials that we have been shown. It accords with the Working Document, albeit that we acknowledge that such a document is not a compelling aid to construction, bearing in mind the caveats on its face. It accords with the Explanatory Memorandum, and in particular the distinction we have relied upon between technical harmonisation and authorisation is referred to in that document when it says that the new measures will be to "*ensure the timely and harmonised introduction of the new spectrum usage conditions in the Member States*".

97. We gained little assistance from the precise terms of the revised draft direction, which seems to us to have a more far-reaching objective than just

the implementation of the GSM Amendment Directive and the 900/1800 MHz Decision. It is true that the revised draft direction contemplates a new competition assessment after the auction of the 800 and 2600 MHz bands, but that does not in any way gainsay that OFCOM would apply the Authorisation Directive in amending the licences under paragraph 4 of the revised draft direction. And indeed, the Minister said in his letter that BIS had already considered any possible competitive imbalance.

98. We do not accept that O2 already has an inviolable right to use the 900/1800 bands. Nor do we accept that O2 is simply seeking to remove some technical restrictions preventing the deployment of UMTS technology in those bands. Its only right is to use the 900/1800 MHz bands for GSM systems. To obtain any expanded rights in these bands, it needs to be authorised under the procedures laid down in the Authorisation Directive, as the GSM Amendment Directive itself envisages. We also accept OFCOM's submission that O2's claim runs against the grain of the legislative purpose of promoting competition. In our judgment, much clearer words would have been used, had it been intended that licence restrictions on the use of UMTS technology should be lifted without any prior evaluation of the competition implications or any compliance with the Authorisation Directive.

Issue 2: Whether O2 has a directly effective right to the removal of the conditions in its licences limiting the use of the 900 and 1800MHz Bands to GSM technology, pursuant to the GSM Amendment Directive and the 900/1800 MHz Decision, and whether OFCOM was obliged to give effect to that right by 9th May 2010?

99. In the light of the decision we have reached as to the proper construction of the GSM Amendment Directive and the 900/1800 MHz Decision, this issue does not really arise.

100. It is, however, common ground, as we have already said, that for a directive to be directly effective it must be unconditional and sufficiently precise. In addition, it is common ground that:-

i) As a matter of EU law, the UK's obligations under the GSM Amendment Directive and the 900/1800 MHz Decision are binding on public authorities including OFCOM (see Jimenez Melgar v. Ajuntamiento de los Barrios (Case C-438/99) [2001] ECR 1-6915 at paragraph 32.

ii) OFCOM, therefore, has a domestic statutory duty under section 2(1) of the European Communities Act 1972 to "*enforce, allow and follow*" EU law.

iii) There is no legal bar in the UK preventing O2 deploying UMTS in the 900/1800 MHz bands except the terms of O2's Licence.

iv) Under the EU framework, the control of conditions on rights of use of radio frequencies is assigned to the NRA (article 5(3) of the Authorisation Directive), that is OFCOM in the UK.

v) Under the UK's domestic law framework, the variation of licence conditions is OFCOM's specific responsibility under section 10 of and schedule 1 to the WTA 2006.

101. As it seems to us, therefore, the UK had to put in place any harmonisation measures that were necessary to ensure that, by 9th May 2010, the 900 and 1800 MHz bands were available to be authorised for use with UMTS technology. In the UK, however, unlike many other Member States, no such measures were necessary as OFCOM was always able to licence usage of the 900 and 1800 MHz bands for UMTS technology, subject to the GSM Directive. Once that was abrogated by the GSM Amendment Directive, OFCOM had simply to proceed with the process of liberalisation under the terms of the Authorisation Directive and the WTA 2006. In the specific circumstances pertaining to the UK, the GSM Amendment Directive and the 900/1800 MHz Decision did not require OFCOM to do anything specific, and therefore O2 had no directly enforceable right to force OFCOM to do anything specific thereunder. Had O2 wanted to complain about the speed at which OFCOM took action under the Authorisation Directive, it would have to have made that complaint. It did not do so. Instead, it took its stand on the direct effect of the GSM Amendment Directive, which in our view was clearly addressing only the precursor to the authorisation process.

102. Our answer to the 2nd issue is, therefore, that O2 had no directly effective right to the removal of the conditions in its licences limiting the use of the 900 and 1800MHz Bands to GSM technology, pursuant to the GSM Amendment

Directive and the 900/1800 MHz Decision, and OFCOM was not, therefore, obliged to remove those conditions by 9th May 2010.

103. Our conclusion is not such a surprising result as Mr Beloff's submissions assumed. As we remarked earlier, EU legislation is applicable throughout the Member States. These measures are all about harmonisation. The GSM Amendment Directive and the 900/1800 MHz Decision were put in place to ensure the technical harmonisation that would allow the 900 and 1800 MHz bands to be available for authorisation and subsequent use with UMTS technology. That is what they achieved. As Three's evidence demonstrated, few Member States have actually yet authorised UMTS usage of the 900/1800 MHz bands, but they are, like the UK and OFCOM, now in the course of doing so under the framework and procedures laid down in the Authorisation Directive. The revised draft direction, if brought into force by Parliament in October 2010 as envisaged, will ensure that that procedure is accelerated.

104. Finally, we should say something more about OFCOM's initial reaction to O2's application for a licence variation. Parliamentary purdah was no excuse for inaction, whoever was right about the proper construction of the GSM Amendment Directive and the 900/1800 MHz Decision. Whilst BIS's request to do nothing may have put OFCOM in a difficult position, we find aspects of its conduct unattractive. It would, for example, have been better if OFCOM had not published a draft consultation in February 2009 containing an erroneous (albeit provisional) view of the proper meaning of the draft GSM Amendment Directive. Having done so, it was unfortunate that OFCOM did not properly inform O2 of its new view of the law (whenever it acquired it),

until it filed its defence on 28th June 2010. In this context, we found OFCOM's responses to O2 to have been surprising. We would express the earnest hope that OFCOM will now move speedily to ensure that liberalisation occurs very soon. The two stage process should not be used as an excuse for further delay. The legislation envisaged speedy liberalisation for the benefit of service providers and consumers. It would be a tragedy if yet further legal wrangles caused more delay in opening up the 900/1800 MHz bands in the UK to UMTS technology.

Conclusion

105. Having decided the meaning of the GSM Amendment Directive and the 900/1800 MHz Decision, we would dismiss the claims for relief made by O2. It remains only for us to thank the counsel and solicitors in the case for their concise and impressive written and oral argument.

Professor John Pickering[2]

Background

106. In this case O2 appealed OFCOM's failure to grant its application for a licence variation to allow it to deploy a form of 3G technology known as UMTS in the 900 and 1800 MHz radio frequencies, consequent upon the GSM Amendment Directive and the 900/1800 MHz Decision. It claims that these instruments give O2 a directly effective right to deploy UMTS in those bands and that OFCOM, as the NRA in the UK, is obliged to give effect to that right.

[2] The abbreviations and terminology used by the Tribunal in the majority opinion are adopted in this opinion.

107. At the present time, O2 (and Vodafone which intervened in support of O2) have "ownership" (the term used by OFCOM in *Application of Spectrum Liberalisation and Trading to the Mobile Sector*, 20 September 2007 ("OFCOM Consultation Paper 2007")) of the 900 MHz spectrum and rights of use for the earlier 2G/GSM technology. This was awarded by OFCOM on the basis of "comparative selection" in 1985. However, a licence condition allows only 2G services to be delivered through it. The 1800 MHz band is "owned" by O2, Vodafone, Orange and T-Mobile, having been awarded the spectrum on the basis of "comparative selection" by OFCOM in 1991. Some 80% of that spectrum is owned by Orange and T-Mobile which, in the UK, have recently created a joint venture to merge their UK mobile telephony activities. This spectrum is also subject to a licence restriction limiting use to 2G technology. The licence restrictions in both the 900 and 1800 MHz bands are a consequence of the GSM Directive.

108. The 2100 MHz band is more evenly shared between the four operators already named and Three, a more recent entrant to the UK mobile telephone network market. The recent Orange/T-Mobile merger gives the merged firm, now known as Everything Everywhere, marginally the largest individual share. The assignment of this spectrum was made in 2000 on the basis of an auction. Licences for use of 3G technology apply here. (See OFCOM Consultation Paper 2007, pp 38-39 and *Application of spectrum liberalisation and trading to the mobile sector - A further consultation*, 13 February 2009 ("OFCOM Further Consultation Paper 2009"), p 14.)

109. The mobile electronic communications sector is characterised by rapid technological progress and falling costs to operators and consumers. It offers increasingly high speed delivery with rich content. As a consequence, mobile broadband services are being taken up rapidly and are becoming increasingly portable and popular. The 2G technology is said to be rapidly becoming obsolete. In contrast, 3G technology, particularly UMTS, is attractive since it can coexist in the same radio frequency band with 2G technology. The 900 MHz band is considered particularly attractive for this since it offers good propagation characteristics, covers greater distances than higher radio frequencies and allows the extension of modern voice, data and multimedia services to less populated and rural areas: see recital 3 of the GSM Amendment Directive.

110. The 1800 and 2100 MHz frequencies seem to be similar in their characteristics but are less attractive than the 900 MHz frequency. While UMTS technology is being developed for use in the 900 MHz spectrum, this appears not to be the case in the 1800 MHz frequency, which may become more important for use with 4G technology. However, it is now anticipated (in the OFCOM Further Consultation Paper 2009) that the 800 MHz band will also become available for mobile telecommunications, with comparable characteristics and attractiveness to that offered by the 900 MHz frequency. Further spectrum for mobile telecommunications is likely to become available in the 2600 MHz band.

Public Policy Objectives

111. Mobile telephone communications are not confined by national boundaries. Consequently, this is an area of particular policy focus for the European institutions. By a series of initiatives commencing with the GSM Directive which restricted the 900 MHz band to GSM technology in pursuit of a public pan-European cellular digital mobile communications service; through a group of Directives in 2002 concerning the development of a single regulatory framework for electronic communications networks and services; to the recent GSM Amendment Directive and the 900/1800 MHz Decision; the Council of the European Union, the European Parliament and the European Commission have sought to establish a harmonised approach to mobile communications.

112. The purposes behind these instruments are variously stated to include: the development of a truly pan-European internal market in electronic radio communications; an information society; promotion of the economic development of the European Community; consumer and citizen benefits through a wide choice of services and technologies and the development and deployment of new technologies; the optimal use of the available radio spectrum; and meeting the increasing demand for radio spectrum.

113. The means to achieve these ends are recognised to include: the harmonisation of technical conditions; the pursuit of economies of scale; technological and service neutrality; avoidance of unnecessary limitations on rights of use; provision of greater certainty to encourage investment by operators; the promotion of competition, which in places seems to be treated as an end in its own right, as well as a means to the end of the public policy purposes. The

promotion of competition itself will be assisted by widening the choice, for consumers, of services.

114. British domestic policy emphasises similar considerations and has recently been reflected in such sources as the Digital Britain Final Report (June 2009); the views of BIS and OFCOM.

Construction of European Legal Instruments

115. The overriding task of the Tribunal in this case under section 192 of the CA 2003 is to reach a considered view on the meaning of the term "make available". This refers to the action required of OFCOM under the GSM Amendment Directive and the 900 and 1800 MHz Decision. In construing European legislation, it is important to bear in mind that different Member States of the EU have different systems of law, many of which are not founded on the common law which is central to the English legal system.

116. Even in the English legal system, the approach to the construction of laws has changed through the years, with increasing emphasis on a purposive approach in which, as far as possible, legislation is interpreted in the light of its overall purpose. Assistance with this may be available from the short and long titles of the statute concerned and, in the EU context, the recitals in the preamble to legislation. It is helpful that this is also the approach adopted by the Court of Justice.

117. During the hearing, our attention was directed to two judgments that specifically addressed this issue. *In Re Smith Kline & French Laboratories Ltd* [1990] 1 AC 64 the Court of Appeal addressed the construction of the term "demonstrate" in an EU context. Dillon, Balcombe and Staughton LJJ

confirmed the importance of an appropriately purposive, rather than a narrow semantic, approach to the interpretation of Community (now Union) legislation. Dillon LJ held that "the purposes of the Directives are indicated in the recitals in the Directives" (at page 76). He stated, in that case, that the word "demonstrate" should be interpreted in the same ordinary sense as in the recital in the relevant Directive (at page 77). He noted that a passive approach is not consistent with the role a licensing authority should play (ibid).

118. In Shanning International Ltd v. Lloyds TSB Bank plc [2001] 1 WLR 1462, Lord Bingham warned that different national approaches "… would give rise to distortions of competition between operators in different countries, thus affecting commercial policy" (at page 1467). In his view harmonisation and competition go together. In construing the Council Regulation in question, a broad purposive approach should be followed, giving due weight to *travaux préparatoires* and the recitals (at page 1470). Lord Steyn added that the economic and social situation in which a rule is to take effect should be recognised, as should also the stated purpose of the measure (at page 1473). However, Lord Hope advised that the binding instrument is the Regulation itself. Where this is clear and precise, it is not necessary to look elsewhere to determine the purpose and scope of the provision (at page 1476).

119. On behalf of O2, Mr Beloff argued that the Tribunal should adopt a purposive approach to the interpretation of the term "make available". This did not appear to be challenged by the other parties. Indeed, they made extensive reference to the recitals in particular in the development of their submissions.

In this case, the recitals to the various instruments are more substantial than the articles themselves, and are of considerable potential relevance.

Interpreting the term: "make available"

120. Superficially, it was common ground that the term "make available" means "capable of being made use of". However, the parties' understanding of the implications of this definition and the actions required to reach that outcome were widely apart.

121. Mr Beloff argued that O2 (and Vodafone) already had a right of use of the 900 MHz spectrum. However, by the GSM Directive, that frequency could only be used for GSM technology. There was also a specific restriction to the same effect imposed by OFCOM in the UK. That distinction between rights of use and conditions attaching to those rights was clearly reflected in articles 5 and 6 of the Authorisation Directive.

122. As part of the EU's policy to harmonise the technical conditions for the use of mobile telecommunications, the GSM Directive is to be transposed by the GSM Amendment Directive, by lifting the earlier restrictions and exclusive reservation of the 900 MHz band for GSM. No new right of use of the spectrum is required or envisaged, merely the lifting of the existing restrictions. A date has been set – 9 May 2010 – by which this liberalisation must be achieved and there is no leeway for OFCOM to work to another timetable or to fail to lift the licence restrictions.

123. Thus, in Mr Beloff's view, to make the 900 MHz band available required a change to the technical conditions limiting O2's rights to use only GSM technology in that band. In support of his interpretation, Mr Beloff called in

aid the OFCOM Further Consultation Paper 2009 on spectrum liberalisation; the stated intentions of BIS; and the Radio Spectrum Decision itself.

124. In response to the suggestion that such liberalisation would only take place once any competitive distortion had been addressed, Mr Beloff argued that this was secondary to the pursuit of harmonisation. Further, such prior, competitive assessment was not required under the GSM Amendment Directive and this view was also in keeping with the general overall approach set out in article 14 of the Authorisation Directive. A competition assessment is not a condition precedent, but rather a separate obligation. Recital 6 of the GSM Amendment Directive specifically recognised that liberalisation could favour an incumbent operator. Recital 7 requires a competition assessment to be undertaken "once the band has been made available", or "when implementing" the Directive under Article 1.2.

125. While it would have been open to OFCOM to address this matter in advance of 9 May 2010, it was not permissible for OFCOM to delay the liberalisation beyond that date merely because it had not undertaken the necessary assessment earlier. Without liberalisation there would be no competitive distortion, so any action on this issue is consequent upon the amendment of the licence conditions.

126. Mr Beloff pointed out that, according to the Authorisation Directive, any action that might be taken to amend existing rights of use had to be objectively justified, proportionate and the subject of prior public consultation. The ability of OFCOM to deal with competitive distortions was ongoing. The

mere action of lifting the technical restrictions is competition-promoting since it widens the choice of systems and technologies.

127. Mr Woodrow on behalf of Vodafone (intervening in support of O2) claimed that all parties were agreed that liberalisation and authorisation (allocating spectrum) are separate issues. "Making available" means liberalisation and OFCOM was mandated to liberalise the spectrum placed in the hands of all "MNOs that held the relevant spectrum, by 9 May 2010". OFCOM had no discretion about this. A competition assessment is a separate requirement and OFCOM was therefore wrong to claim that liberalisation must follow a competition assessment. He pointed out that any subsequent action to vacate spectrum in order to address any competition distortions would take time.

128. Miss Rose for OFCOM explained that the delay in the determination of the application by O2 for licence variation was at the request of the government. She described the purpose of the EU legal instruments as being to ensure that Member States promote the harmonisation of the radio frequencies by removing the legal obstacle in the original GSM Directive, in order that the 900 and 1800 MHz bands can be used with UMTS technology. It is not obliged to grant a right to any individual undertaking or operator to use or deploy the spectrum. The obligation to "make available" is not a directly effective right to use the spectrum for UMTS as O2 had claimed, since the provisions were not sufficiently precise and unconditional.

129. To construe the term "make available" used in the GSM Amendment Directive, it is not appropriate to use the ordinary dictionary definition since the term is used in a technical sense to refer specifically to radio spectrum

management. Consequently, a contextual and purposive construction is required. In that sense "make available" is to be understood to mean the removal of the prior legal impediment on use of the 900 MHz spectrum for UMTS, but not, OFCOM argued, to secure the immediate relaxation of existing (restrictions on) rights of use. In support of this interpretation, OFCOM referred to the Radio Spectrum Committee Working Document of 23 June 2009 which stated that there was no obligation to amend existing rights of use (although it was recognised this document has no binding authority). The authorisation process under Article 14 of the Authorisation Directive could start, if requested by an operator, once the GSM Amendment Directive came into force. A clear distinction should be recognised between the act of making available and the allocation of the spectrum.

130. In OFCOM's view, a fundamental purpose of EU communications legislation is to avoid competitive distortion: the whole structure of the common regulatory framework is to protect against this, in particular through the provisions of the Authorisation Directive. The basis of the European legislative scheme is to achieve a fair balance between relaxing existing restrictions and avoiding competitive distortion.

131. Competitive distortion is a particular concern of OFCOM in this case, since the 900 MHz band offers significant advantages over other bands used for mobile telecommunications. OFCOM reported that while, in its spectrum liberalisation consultation in 2009, it had proposed removing some 900 MHz spectrum from O2 and Vodafone to allow a third operator to compete using that band, this solution had not been supported by the 'Report of an

Independent Spectrum Broker' (commissioned as part of the 'Digital Britain' project and published on 13 May 2009) or BIS both of whom were in favour of allowing the current licensees to use GSM and UMTS technologies in that spectrum without further amendment.

132. OFCOM's interpretation was therefore that a two stage process is involved. First, the removal of the domestic legal barriers would be required, under Articles 1.1 and 1.2 of the GSM Amendment Directive, by 9 May 2010. This is the transposition process, which OFCOM considered did not require any action on its part. The second stage, under the provisions of Article 14 of the Authorisation Directive, supported by the Framework Directive, involves the competition assessment which, OFCOM says, must precede the relaxation of the technical (licence) restrictions to allow UMTS to be used. At that point, the case for modification of individual licences and reallocation of spectrum can be addressed. No timetable is indicated for those steps, but OFCOM observed that it would not be proportionate for Member States to maintain, indefinitely, restrictions on the rights of use.

133. Thus, according to OFCOM's analysis, it is not obliged to make any spectrum available for use with UMTS without restriction, since it must address competition distortion issues. The obligation to "make available" is therefore conditional on various other steps being taken. Any authorisation of rights of use would occur after 9 May 2010. OFCOM does not have to grant an amendment of rights of use to any particular operator, since this is separate from, and subsequent to, the act of making spectrum available to particular operators. Consequently, O2 has no directly effective right.

134. The comments from Everything Everywhere and Three largely reinforced the points made by Miss Rose for OFCOM. Mr Fordham, who appeared on behalf of EE, argued that *transposing* the GSM Amendment Directive means removing any national restriction, which is the act of "making available". *Implementation* of the GSM Amendment Directive involves a licensing decision and is therefore different. Article 14 of the Authorisation Directive specifically governs amendment of rights of use and is the mechanism by which O2 should seek a licence variation. Mr Fordham also argued that the interests of those operators who are not licensed for use of 2G technology in the 900 MHz band, but wish to use 3G technology there, must also be taken into account: the GSM Amendment Directive is for them as well as existing licence holders.

135. For Three, Miss Carss-Frisk also argued in favour of a two stage procedure: first removing the general prohibition under Recital 7 of the GSM Amendment Directive in order to make the band available; then addressing individual rights (grants of new rights and modification of existing rights) under Article 14 of the Authorisation Directive. She argued that O2 had, incorrectly, conflated the two distinct actions of "making available" on the one hand and assignment/modification/authorisation of rights of use on the other. Attention was drawn to evidence of the practice of other Member States of the EU which she claimed supports the claimed dichotomy. It was found that many Member States have needed to remove a generally applicable barrier to the use of UMTS in the 900 and 1800 MHz bands, but only a few have, so far, granted individual rights to use UMTS in those bands, the delay often being due to the need to conduct a competition assessment.

A Purposive Approach

136. To come to a view on the meaning of the obligation on OFCOM to "make available" the 900 (and 1800) MHz frequency bands for both GSM and UMTS systems, together with any other compatible technologies, has not been easy. Several problems can be identified, particularly:

i) the fact that the spectrum in question is already in use, with rights of use having been granted to various operators;

ii) the circumstances arising in 2009/2010 were not necessarily envisaged or provided for by the package of general provisions relating to mobile phone spectrum harmonisation and policy implementation in 2002;

iii) the linguistic problem that several words are used which may, or may not, have the same meaning and implications;

iv) no steps (e.g. relevant definitions) have been taken in the instruments to assist interpretation and clarify the intentions of the legislators; and

v) the UK has proceeded by means of specific authorisations, using licensing, in contrast to the practice in most Member States and the indicated preference, in the Authorisation Directive, for use of general authorisations.

137. It is therefore pertinent to adopt a purposive approach which takes into account, where appropriate and necessitated by the wording of the instruments, the current context in which UMTS and other 3G technologies are deployed and the stated EU policy objectives (including the recitals to the Directives) for electronic communications networks and services and the

regulation of radio spectrum. For what follows, it seems particularly relevant to identify the following considerations.

138. Technological developments are proceeding apace. The future of GSM technology is considered uncertain and new generations of mobile phone technology may rapidly ensue. There is keen demand for spectrum and a continually growing demand for the increasingly advanced outputs and services that are being produced. New frequencies are likely to be made available for these developments and different frequencies have differing characteristics and attractions. It takes time to clear a frequency to be available for a new use. All this contributes to a complex and dynamic market, to which policy should respond and not constrain.

139. The objective of greater harmonisation of spectrum across the European Community to create a pan-European electronic communications service is intended to assist the development of the internal market and to contribute to economic development. Efficient and effective use of the "scarce and valuable" spectrum is sought, through scale economies and encouragement of investment and innovation. By promoting competition and addressing significant competitive distortions where they arise, the system will offer benefits to consumers in terms of wider choice, keener prices and better quality.

The Instruments

140. The starting point for review of the legislative instruments, in so far as they relate to the issues under consideration in this case, is the GSM Directive.

This provided for the 900 MHz band to be reserved, as quickly as possible, for a pan-European digital mobile telecommunications service by 1 January 1991.

141. The Framework Directive aimed to establish a common regulatory framework. It specified the tasks of the NRAs and established a set of procedures to achieve harmonised application of the regulatory framework throughout the Community. It provided that radio frequencies should be allocated and assigned by the NRAs on objective, transparent and non-discriminatory criteria (Recital 19).

142. As its name suggests, the Authorisation Directive addresses authorisation of electronic communications networks and services. It records a preference for general authorisation of all networks, without explicit decisions having to be taken (Recitals 8, 11, Article 3.2), and for the adoption of the least onerous authorisation system (Recital 7). Specific rights of use should not be unnecessarily restricted (Recitals 11, 15, Articles 5.2, 7.1). Member States may only amend rights and conditions where this is objectively justified (Recital 33). The transposition of the Directive and alignment of existing licences with the new rules were to take place in parallel (recital 36).

143. Member States should not normally prevent an undertaking providing electronic communication networks and services (Article 3.1 of the Authorisation Directive), nor the use of radio frequencies subject to individual rights of use. Rather, they should include them in the general authorisation (Articles 5, 6, 7). When considering whether to limit the number of rights of use to be granted, Member States are to "give due weight to the need to maximise benefits to users and to facilitate the development of competition"

(Article 7.1). They should not impose further conditions that would restrict, alter or delay implementation (Article 8). Rights of use or rights to install facilities may only be amended in justified cases and in a proportionate manner (Article 14.1).

144. The Radio Spectrum Decision addressed issues of technical management of the spectrum. The purpose was to create a policy and legal framework in the EU to achieve coordination for the benefit of the internal market (Article 1.1). The focus was on harmonisation, assisted by strategic planning and the efficient use of the spectrum (Article 1.2). However it did not address assignment and licensing procedures (Recital 11).

145. Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services ("the Universal Service Directive") is of less practical significance for this case, but is relevant in its emphasis that the liberalisation of the sector, increasing competition and choice go hand in hand with parallel action to create a harmonised regulatory framework (Recital 1).

146. Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities ("the Access Directive") aims to achieve a progressive reduction in sector-specific rules as competition in the market develops, in order to achieve sustainable competition, interoperability of electronic communication services and consumer benefits (Article 1). Noting that the term "access" has a wide range of meanings (Recital 3), this Directive

defines its use here as "the making available of facilities or services … under defined conditions …" (Article 2(a)).

147. The GSM Amendment Directive observes that the future use of the 900 MHz spectrum and GSM as the reference technology are matters of strategic importance (Recital 5). The GSM Amendment Directive abrogates the GSM Directive which exclusively reserved the band for GSM: specifically, it requires Member States to make the band available ("make open", see Recital 13) for GSM and UMTS and other compatible technologies in order to contribute to the development of the internal market and to maximise competition (Article 1.1). All actions to comply with the GSM Amendment Directive are to be completed by 9 May 2010. The Directive notes that the liberalisation of this band could possibly result in competitive distortions, especially due to cost and efficiency disadvantages faced by operators not assigned spectrum in that band (Recital 6). Accordingly, Member States are, when implementing the Directive, encouraged to examine whether, as a result of liberalisation, the existing assignment of the band is likely to distort competition. If so, where justified and proportionate and after public consultation, they may address such distortions (Article 1.2, Recital 7).

148. The 900 and 1800 MHz Decision distinguishes radio spectrum technical management from assignment and licensing procedures (Recital 13). Its purpose is to harmonise the technical conditions for the availability and efficient use of the 900 and 1800 MHz bands. It notes that "differences in existing national situations could result in distortion of competition" and notes

that "[t]he existing regulatory framework gives Member States the tools they need to deal with these problems …" (Recital 14).

Analysis

149. The purpose of this group of European legal instruments may be described as harmonisation, not only of the technologies but also of procedural approaches. Achievement of economic benefits to consumers and the development of the single market are important. A resultant further competitive stimulus from these developments is expected to assist the continuing transition from monopoly to competition in the mobile electronic communications sector. However, the instruments draw attention to the need to be alert to possible competitive distortions as a consequence and to deal with them as appropriate.

150. There are two related primary issues that need to be addressed in this case: the nature of the actions required to "make available" the spectrum; and the issue of continuity and updating of rights of use that have already been granted.

151. On the question of the understanding of the requirement to "make available", O2 argues that this mandates the removal of the licence restrictions that have hitherto prevented it using UMTS in the 900 and 1800 MHz bands. OFCOM, in contrast, claims that it means merely to remove the domestic legal obstacles in order to allow the authorisation process to commence if users so request.

152. As the NRA responsible for managing the frequencies for electronic communication services in the UK, OFCOM's guidance on this was undoubtedly important to the operators. Its initial interpretation of the implications of the proposed legislative action was that "…to meet this requirement we will have to liberalise all the 900 MHz band licences by the

deadline, allowing the deployment of UMTS as well as GSM technology, irrespective of the situation at the time, or other steps that we might take in regard to this spectrum, for example to promote competition or to secure efficient use of the spectrum … notwithstanding that this may allow the incumbent licensees to deploy new technology in the band for a short period in advance of any acquirer" (see OFCOM Further Consultation Paper 2009, paras. 8.46-47).

153. Subsequently, OFCOM adopted the more limited interpretation indicated earlier. No explanation has been given for this significant change of view. It may however be relevant that in June 2009 the EU's Radio Spectrum Committee produced the final version of its Working Document which interpreted "make available" as "prepare all necessary steps so that the authorisation process can start if a potential user so requests and therefore letting potential users know that they will have the possibility to access a frequency band under specific conditions" (page 4).

154. This would involve adopting or amending national legal acts that would regulate the use of radio frequencies in a more detailed way. By the implementation deadline of 9 May 2010 set out in the 900 and 1800 MHz Decision this would require:

- freeing the band, if individual rights of use were granted for another application, to the extent that such rights could prevent any use of the band in line with the Decision;

- where spectrum use is subject to individual rights, launching the public consultation on a possible limitation of the number of rights of use, under Authorisation Directive Article 7.1(b).

155. There would then, according to OFCOM, be a second stage, for which no deadline was specified, in which the liberalisation process would be completed, including the investigation of competitive distortions and involving the authorisation process.

156. This is not convincing and does not appear to accord with the relevant legal instruments. Thus, the Amendment Directive (Recital 11) and the Harmonisation Decision (Recital 2) describe the effect as making the frequency "open" (I note the use of the present tense in the latter instrument). The Amendment Directive (Recital 6) refers to "liberalisation" as the possible cause of any competitive distortions, so it would not be correct to address competitive distortions unless the use of the spectrum has been liberalised. This is reflected in the phrase "when implementing" in Article 1.2. The Access Directive (Recital 6, Article 2(a)) defines access as "making available". Reversing this would define "making available" as "granting access". The access required is by one or more operators.

157. On this basis, a single stage action of liberalising the 900 (and 1800) MHz bands for UMTS and other compatible technologies is the appropriate interpretation. This requires not just technological harmonisation but the creation of a situation of pro-active use by operators with authorisation to use UMTS technology in the spectrum. In further support of this interpretation, it is noted that Recital 36 of the Authorisation Directive requires that the process

of national transposition of that Directive and of aligning the existing licences should take place in parallel. No doubt that requirement can be assumed to carry over to the Amendment Directive. Indeed, Article 1.3 of the Amendment Directive requires Member States to "bring into force the laws, regulations and administrative provisions necessary to comply with this Directive, by 9 May 2010."

158. Thus, to make the band available requires all steps to be taken in one stage to remove the restrictions and allow existing holders of rights to use that spectrum to offer UMTS technology there. The various terms "make available", "transpose", "liberalise", "open", "access", should, in this context, be understood as essentially synonymous with each other. Once this has happened, or is in progress, the consideration of competitive distortions and their possible implications can commence. Recital 6 of the Amendment Directive expressly recognises that whatever the risk of competitive distortions to the potential disadvantage of others, existing incumbents of that band also obtain at least a short term advantage.

159. In its submissions, OFCOM denied that it was obliged to give an immediate right to any operator already using the 900/1800 MHz band to deploy UMTS technology in those bands. It also claimed that amendment or reallocation of rights is a separate and subsequent matter once the 900 band had been made available (in OFCOM's sense of that term). Both propositions seem to be doubtful.

160. The obligation to remove the licence restrictions on the use of UMTS is imposed by the Amendment Directive. This is a legal requirement and Recital

6 clearly envisages that operators will take up the opportunity to use this technology. Further, OFCOM seems in danger of ignoring the fact that O2 (and Vodafone) have been authorised to use the relevant spectrum. That right was described in the OFCOM Consultation Paper 2007 as "ownership", and in the OFCOM Further Consultation Paper 2009 as a "holding". This suggests a property right which should be appropriately respected. However, that right might be withdrawn or amended by OFCOM under the provisions of Article 1.2 and Recitals 6, 7 of the Amendment Directive. This could occur if the liberalisation were judged likely to give rise to competitive distortion. If this is believed to be the case, Member States must consider whether it would be objectively justified and proportionate to amend the rights of use and redistribute such rights. Any such action must be preceded by public consultation.

161. Some reliance has been placed on the requirement for Member States to implement the GSM Amendment Directive consistently with Article 14 of the Authorisation Directive. This does not seem to offer much help to OFCOM and those who rely upon that argument. First, it has to be recognised that the Authorisation Directive expresses a preference for general authorisation rather than the individual licensing approach adopted by OFCOM. Secondly, the link of Article 14 of the Authorisation Directive to Recital 7 and Article 1.2 of the GSM Amendment Directive is only in relation to the possible amendment of 900 MHz spectrum assignment on grounds of competitive distortion. Further, the requirements of the GSM Amendment Directive undoubtedly constitute sufficient objective justification for amendment of rights of use as referred to in Article 14 of the Authorisation Directive.

162. In summary, OFCOM does not have to authorise the use of the spectrum since that has already been assigned to O2 and Vodafone. Further, on this interpretation, OFCOM is mandated by the Amendment Directive and the 900 and 1800 MHz Decision to lift the restriction on the use of UMTS in these bands. Consequently, the related licence constraints should have been lifted by 9 May 2010. The expectation that this technology will now be used is clearly reflected in Recital 6 to the GSM Amendment Directive. Recital 8, regarding the allocation of spectrum under this Directive, does not apply since there is (understood to be) no further 900 or 1800 MHz spectrum available. All that is open to OFCOM, once the spectrum has fully been made available – i.e. the licence and other restrictions removed – is to consider whether there is a competitive distortion such that it would be objectively justified and proportionate to amend or withdraw the existing rights of use.

163. It was argued that those operators without 900 MHz spectrum would be disadvantaged if O2's arguments prevailed. Several brief responses are pertinent. First, Three, although a relatively new entrant into this market, has been successfully using 3G technology in a different frequency band, particularly with mobile broadband products. Secondly, Article 1.2 and Recital 6 of the GSM Amendment Directive explicitly recognise this situation may arise, but only offer a permissive, not obligatory, solution. Finally, it must be recognised that the ultimate objective is benefit to consumers, not (at least directly) to assist the providers.

164. A subsidiary point which flows particularly from the consequences of OFCOM's interpretation of "make available" is the matter of the timetable

within which the requisite action should be taken. A number of comments from OFCOM give cause for concern, in particular: the suggestion that immediate liberalisation was not required; the suggestion in its Defence that it was not possible for operators to apply for a variation of their rights before 9 May 2010; the view that it needed to take no action to "make available" by that date; the submission in paragraph 17 of its skeleton argument dated 21 July 2010 that "it would not be proportionate for a Member State to maintain restrictions on rights of use indefinitely"

165. In contrast, the delay in liberalising this spectrum is failing to meet the clear needs of consumers, so giving rise to a loss of benefit which is (as OFCOM recognises) substantial and cannot be retrieved. Equally, while the spectrum is not being used for UMTS technology, efficiency gains are lost and the competition that would come from enhanced choice to consumers and from business incentives to innovate is, at best, muted. Harmonisation is not achieved when use is delayed.

166. The imperative of the need to exploit the opportunities presented by UMTS technology is therefore also a relevant factor to be taken into consideration in the purposive approach to interpretation of this legislation.

Possible Competitive Distortion

167. One matter on which all the parties are agreed is the requirement to consider whether liberalisation would give rise to competitive distortion such that it might require remedial action. This is specified in the GSM Amendment Directive, which also refers, procedurally, to Article 14 of the Authorisation Directive. However, rather than a natural safeguard, OFCOM appears to see

this as a major issue and justification for its lack of timely action. It seems to over-emphasise the significance of the references to competition assessment and corrective action, by not taking due account of the conditional nature of those provisions. They only call for action where: competition is likely to be distorted; the intervention is objectively justified; the measures taken proportionate; and following public consultation. Only then may OFCOM take remedial action, but it is not obliged to do so.

168. OFCOM claims that the approach of the legal instruments is to achieve a "fair balance" between relaxing restrictions and avoiding competitive distortions, and that the avoidance of competitive distortions is a fundamental purpose of EU electronic communications legislation. O2 formed the view that OFCOM was thereby arguing that an investigation of possible competitive distortion was a condition precedent for the removal of restrictions in its licence in order to allow it to use UMTS in the 900 MHz spectrum. OFCOM claimed that asymmetries in the existing distribution of spectrum in the 900 and 1800 MHz bands were a potential basis of competitive distortion.

169. While not wishing to pre-judge or pre-empt such competition assessments as may take place (at the case management conference on 11 June 2010 it was agreed the Tribunal would not hear detailed argument on the competitive effects), some general comments may be relevant. Competition may need to be analysed across radio frequency bands and products, not just within a band. Indeed, the European authorities anticipate that harmonisation will also generate competition in inter-state trade. Competition is generally seen as a

dynamic process rather than a static structure, though even structural asymmetries may be a spur to competition.

170. The recent, largely favourable, decision of the European Commission dated 1 March 2010 on the formation of a joint venture between Orange and T-Mobile (respectively, the UK subsidiaries of France Télécom and Deutsche Telekom), and the evidence on which it was based, does not suggest a serious competitive imbalance (Case No COMP/M.5650). Indeed, OFCOM's own view is that the UK market for mobile telecommunications services is more competitive than in a number of other Member States. The successful positioning of the Mobile Virtual Network Operators in the UK suggests that new entry is not unduly difficult. There are means, through the price mechanism etc., by which the relative advantages and disadvantages of different radio frequencies can be made more equal and the prospect of new spectrum becoming available for use with UMTS technology may affect materially the situation in the near future.

171. The promotion of effective competition is a means to serve other economic and consumer interests. The legal instruments addressed in this case tend not to clarify the relation (if any) between competitive distortion as in the GSM Amendment Directive and significant market power / dominance / joint dominance which is the focus of the relevant provisions of the Framework Directive. By virtue of its concurrent competition powers under Part 1 of the Competition Act 1998 and Part 4 of the Enterprise Act 2002, OFCOM has an ongoing opportunity to address any significant competitive market failures. In

any case, by its recent actions, BIS has pre-empted OFCOM's role in assessing the competitive effects of this required liberalisation.

Conclusion

172. In my view, there is no justification for the interpretation of "make available" adopted by OFCOM, as a two stage procedure (even discounting the competition assessment). The full liberalisation of the 900 and 1800 MHz bands for UMTS is mandated by the GSM Amendment Directive and clearly satisfies the "objective justification" requirement of Article 14 of the Authorisation Directive.

173. Only when rights of use are granted as the GSM Amendment Directive (and the 900 and 1800 MHz Decision) require will the spectrum be made available. In the UK, this requires the lifting of the relevant licence restrictions, imposed many years ago in quite different circumstances, on those operators already allocated spectrum in those bands.

174. Not only is that consistent with due construction of the European legal instruments, it is also fully compatible with the wider considerations to be taken into account in a purposive approach to the legislation and its stated purposes.

175. For the reasons set out above, I would therefore uphold O2's appeal and remit the matter for prompt action by OFCOM.

Mr Justice Vos:

176. Accordingly, by a majority, the Tribunal will dismiss the claims for relief made by O2.

177. The Tribunal will be pleased to receive any written submissions that the parties would wish to make, within 21 days, as to what orders are appropriate in the light of these opinions, and as to costs.

Mr Justice Vos Ann Kelly Professor John Pickering

Charles Dhanowa
Registrar Date: 7th October 2010