IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1154/3/3/10

Victoria House,
Bloomsbury Place,
London WC1A 2EB

27 July 2010

Before:

THE HONOURABLE MR JUSTICE VOS
(Chairman)

ANN KELLY
PROFESSOR PICKERING

Sitting as a Tribunal in England and Wales

BETWEEN:

TELEFONICA O2 UK LIMITED — Appellant

– and –

OFFICE OF COMMUNICATION — Respondent

– and –

(1) T-MOBILE UK LIMITED/ORANGE
(2) HUTCHISON 3G UK LIMITED
(3) VODAFONE LIMITED — Interveners

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HEARING
DAY ONE

APPEARANCES

Mr. Michael Beloff QC, Mr. Tom De La Mare and Mr. Tom Richards (instructed by Ashurst LLP) appeared for the Appellant.

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

Mr. Mike Fordham QC and Mr. Meredith Pickford (instructed by the Regulatory Counsel) appeared for the Interveners Everything Everywhere.

Miss Monica Carss-Frisk QC and Mr. Simon Pritchard (instructed by Baker McKenzie LLP) appeared for the Intervener Hutchison 3G UK Limited.

Mr. Nick Woodrow and Miss Belinda Ampah (of Vodafone Group Legal Department) appeared for the Intervener Vodafone Limited.

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THE CHAIRMAN: Good morning, Mr. Beloff.

MR. BELOFF: May it please the Tribunal; I appear in this matter with my learned friends Mr. De La Mare and Mr. Richards for O2, who are the appellants. My learned friend Miss Rose appears with Mr. Holmes and Mr. Lask for Ofcom, who are the respondents. There are interveners. My learned friend Miss Carss-Frisk appears with Mr. Pritchard for H3G; my learned friends Mr. Fordham and Mr. Pickford appear for what is now known as EE, Everything Everywhere, and used to be known as TM and Orange; and finally, Mr. Woodrow and Miss Ampah appear for Vodafone, also as interveners.

Sir, the issue in this appeal, which is brought under s.192 of the Competition Act 2003, is whether the appellants have had since 9th May of this year, a directly effective right to deploy UMTS technology in addition to GSM technology at frequencies in the 900 and 1800 MHz bands of spectrum by reason of the so-called GS Amendment Directive, and the 900/1800 MHz decision; and, if so, whether Ofcom was obliged at once, indeed have earlier been obliged to remove the current restrictions on Ofcom's licence which purport to prevent exploitation of that technology.

Sir, as you and your colleagues will no doubt know, GSM is a digital mobile telephony technology, known as second generation or 2G technology, because it replaced the first generation of what was analogue technology. It is in this fast moving obsolescent, or will shortly be an obsolescent technology, and there is a new generation of 3G technology now deployed by all the mobile network operators in the core 3G spectrum, and the principle of such technology used in this jurisdiction is UMTS or, to develop the acronym, Universal Mobile Telecommunication Systems.

Ofcom refused to vary O2's licence by lifting the current restrictions on the use of UMTS, not on the basis that, contrary to O2's contention, O2 had no such rights but simply because Ofcom had been asked by the then government not to take any steps pending possible legislation, what is we say is an elevation clearly of convenience over justice and, more important, an elevation of convenience over the law.

When this appeal was actually instituted Ofcom advanced for the first time a submission that denied the existence of any such right at all. That was, as I shall demonstrate, a *volte face* from their previous position.

Ofcom are supported before the Tribunal by H3G and EE, who perceive that their commercial interests will be injured if O2 enjoyed the right that O2 claim. O2 for their part are supported by Vodafone, who perceive that their own commercial interests would be advanced if O2 are correct.

Unrepresented, of course, before the Tribunal are the customers, present and prospective, of O2 and Vodafone who would be, as is recognised in the Community Instruments, the intended beneficiaries of this significant technological advance.

Sir, you and your colleagues will recognise that these matters, the motivations of the disputant parties, are, of course, irrelevant to the outcome of the appeal which, despite the volume of material with which Ofcom and the interveners have indulged the Tribunal, raises, as the President recognised at the earlier directions hearing, a pure question of law. The domestic discussion about the implementation of UMTS, the debate about the implications for competition in the industry, the practices in other Member States, throw little, if any, light on the issue of this appeal which must, in our submission, be resolved by an acute focus on the substantive provisions of the EU Instruments in play, coupled with any legitimate aid to their construction.

The question of law pivots at its heart on the meaning of the phrase "make available" in Article 1 of the Amended GSM Directive, and equivalent vocabulary in Article 4.2 of the Commission Decision. O2's short and simple contention is that these words mean what they say, that something is made available if it can be used by the person to whom it should be made available, and if it cannot be used by that person it is not made available to him. The elusive interpretation which has been Ofcom, to which I shall come in due course, has, in our respectful submission, become quite detached from the ordinary and natural meaning of the words, an ordinary and natural meaning which is reinforced rather than undermined by the Community law context.

I shall return, as I have indicated, to the meaning that Ofcom propose, which is to be found in their skeleton argument at para.14, and has been adopted by the two interveners on their side. I will observe only at this juncture that also in their skeleton, as you will have seen at para.27(b), they suggest that making available on their construction obliges them, and obliged them, to do nothing whatsoever at all on the relevant date, 9th May of this year, a submission which we say casts, if I may respectfully put it this way, extreme doubt on the validity of the construction that they advance.

Sir, members of the Tribunal, subject to any contrary direction, I intend to develop my submissions under the following heads ----

THE CHAIRMAN: Mr. Beloff, just before you outline what you are going to say, I just wanted to identify some timing issues. We have obviously got quite a number of counsel here, some of whom may be wishing to speak and we only have two days to do it. Have you discussed a timetable between you?

MR. BELOFF: In broad terms, it is recognised that I should conclude, putting it in a mandatory way rather than merely prophetic way, by early this afternoon. Miss Rose said that she had not much to say, but it would be said, of course, with her usual style. I apprehend that my learned friends Miss Carss-Frisk and Mr. Fordham are unlikely to have much additional to that which Miss Rose says, and equally for our part, and I should have said observed of course that Mr. Woodrow will speak before Ofcom and the interveners, as the logical order. We are all confident that, on that broad timetable, we should conclude, as is recognised we must, within the two days.

THE CHAIRMAN: Very good. Mr. Beloff, that is absolutely fine, thank you very much.

MR. BELOFF: If I may just return then to the sequence of submissions that I would anticipate to develop in this order: firstly, to say something on spectrum and its control in the United Kingdom; secondly, to deal with the European Union legal framework overall; thirdly, to deal with the *Radio Spectrum* decision; fourthly, to deal with what I will now call the unamended GSM Directive; fifthly, to deal with O2's current licence; sixthly, to come to the amended GSM Directive and the associated decision, which are at the heart of this matter; seventhly, to deal with the application for the variation of O2's licence and the response that was made; eighthly, to dwell a little on the previous position adopted both by Ofcom and by the Department from which Ofcom's present stance is so radical a departure; ninthly, then to summarise the submissions on law that we make; and tenthly and lastly, to deal with the consequences in terms of the relief that we seek. Sir, you and the members of the Tribunal may identify that as a long and somewhat indigestible menu, but I can at least promise you that some of the dishes are very small indeed, though none, alas, could be described as an *amusé buche*, or anything of that kind.

Sir, may I come to the first head of submission, introduction to spectrum. As this Tribunal no doubt knows, a radio spectrum is the range of frequencies of radio waves that are used for radio communications, and at present the United Kingdom mobile network operators have licences to use different parts of the spectrum from which to operate their mobile networks. There are three different bands of spectrum in use for these purposes. In particular, germane to the present contest, O2 and Vodafone are licensed to use certain frequencies within the 900 MHz band. O2, Vodafone and EE are licensed to use certain frequencies within the 1800 MHz band and all the UK MNOs, and I will use the acronym, if I may, have licences to use certain frequencies in the core 3G spectrum at a range of frequencies bands between 1920 and 2025 MHz, as it were, off the range for the purposes of this appeal.

It may be useful very briefly, as it is the last matter I touch on under this heading, just to show you the current state of the holdings in graphic form, which is in file bundle 2A, p.696. This is part of a consultation document that Ofcom published in 2007, and if you look at the diagram at p.696 of the bundle, or p.38 of the document itself, you will see a summary of the ownership of bands and dates of spectrum assignment. Then if you look at para.5.34, the authors of the document say:

> "The result of this history of mobile spectrum decisions is the set of current assignments shown in Figure 5 above and Table 2 below."

where one sees the concept of paired and unpaired spectrum allocations. It is worth noting that the entirety of the 900 MHz spectrum is assigned to only two operators, Vodafone and O2. The 1800 MHz spectrum is assigned to four operators, but most is held by two operators, Orange and T-Mobile, now EE, and finally there is one operator, H3G, which holds neither of those two spectra – if that is the appropriate plural of the word.

Therefore, one sees that within particular spectrums there may be, as it were, disparate amounts of holding, and that is important when one comes to consider the way in which, if there are any competition concerns arising out of what we say is the necessary liberalisation of the restrictions, and they can be addressed.

I pass then, if I may, to a *tour d'horizon* of the general EU legal framework. That is the second head of submission. The regulation of electronic communications services and networks is governed by a common EU regulatory framework, and EU framework compromises a Framework Directive, which you have in the first bundle at tab 5, and four other directives known as Specific Directives, and they together, the five, the quintet, compromise the general architecture of telecoms regulation in the Community. As we noted in our notice of appeal at para.13, there is prospective amendment of these directives, but that amendment has not yet taken place, and all parties are basing their submissions on the directives in their current form.

Can we turn first to the unamended EU Framework Directive which is at tab 5 of the first bundle. For these purposes I think it is unnecessary to look specifically at the recitals which discuss the development and purpose of a Common Regulatory Framework for this particular industrial technological sector, but if one goes to Article 3.1, which is at p.23 of the bundle, one sees under the rubric Chapter II, the introduction of the concept of a national regulatory authority, and the provision specifies that:

> "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."

For the purposes of the United Kingdom, Ofcom represents that competent body.

One of the key purposes of the Framework Directive, unsurprisingly, is the concept of technical harmonisation. If one goes to Article 9, under the rubric "Management of radio frequencies for electronic communications services" at p.26, one sees at sub-para.2 that Member States are under an obligation, as it is put, and:

> "… 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 [Radio Spectrum] Decision …"

to which I shall come in a moment.

Materially, what this means is that pursuant to that obligation imposed on Member States the use of radio frequencies throughout the Community must be the same in terms of the technology that may be deployed, whether it be 2G or 3G, so that a person with a mobile phone purchased in the United Kingdom who goes on holiday, be it in France or Spain or elsewhere in the Community, will find that their phone works in exactly the same way as it would at home.

Among the tasks which are assigned of course to the national regulatory authority, here Ofcom, is the making of decisions on the rights of use of radio frequencies, and what is meant by "rights of use" is at the heart of the debate before this Tribunal. The Authorisation Directive, one of the four complementary Directives under the general Framework Directive, is to be found at tab 6. May I just take you briefly to some of the recitals. Let us start at p.35. The first recital refers to various public consultations on the Regulatory Framework for electronic communications and picking it up in the last four lines, that:

> "… has confirmed the need for a more harmonised and less onerous market access regulation for electronic communications networks and services throughout the Community."

Then in (3) one sees complementing this aim of harmonisation:

> "The objective of this Directive is to create a legal framework to ensure the freedom to provide electronic communications networks and services, subject only to the conditions laid down in this Directive …"

and if I may paraphrase, overriding Treaty obligations.

At (4) one sees that the scope is to cover:

> "… authorisation of all electronic communications networks and services whether they are provided to the public or not. This is important to ensure that both categories of providers may benefit from objective, transparent, non-discriminatory and proportionate rights, conditions and procedures."

In (5), again one sees the definition of scope.

> "[It] only applies to the granting of rights to use radio frequencies where such use involves the provision of an electronic communications network or service, normally for remuneration."

So it bites or bears upon the various parties, Ofcom apart, who are represented before this Tribunal.

Then in (7) one sees that the ambition of the Community, the least onerous authorisation system possible, and one sees partly:

> "… to allow service providers and consumers to benefit from the economies of scale of the single market."

So it is recognised unsurprisingly that the consumer and the benefit to the consumer is the ultimate objective. Then the way in which that is to be obtained is to be best achieved, as recital (8) says, by a general authorisation of all electronic communications networks, but if one goes to sub-para.(11), one can see that the granting of specific rights may continue to be necessary for the use of radio frequencies, and of course it is the granting of specific rights that is part of the United Kingdom regime.

Then at (15), it deals with the kind of conditions that:

> "… may be attached either to the general authorisation or 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."

That, of course, is an important aspiration set out in the recitals, and we respectfully submit must be achieved by giving effect to the substantive articles of relevant Community legislation.

Then if one goes to the substantive Articles, I ask the Tribunal, if they would, just to look at Article 5.2, again dealing with the question of individual rights of use, p.40:

> "Where it is necessary to grant individual rights of use for radio frequencies … Member States shall grant such rights, … subject to the provisions …"

then they refer to certain provisions of the Directive, and Article 6 is the only one that is of relevance here, and then again "certain any other Rules", etc.

It is important at this early juncture to recognise that the Community concept of rights of use is attached to radio frequencies. That is what rights of use are all about. It is a theme that percolates through all the instruments that I shall be showing you and are relevant to this particular appeal.

Article 6 deals with the "Conditions attached" – again omit "general authorisation" – "and to the rights of use for radio frequencies", and I omit again words immaterial to this particular appeal. There that dichotomy or distinction between, on the one hand, the rights of use for radio frequencies; and on the other the conditions that may be attached to those rights of use is manifest in the title of the Article. If one then goes on to look at the specific provision, again omitting references to general authorisation and picking it up in the second line:

> "… the rights of use for radio frequencies … may be subject to the conditions listed respectively …"

and then various parts of the annex are referred to.

> "Such conditions shall be objectively justified in relation to the network or service concerned, non-discriminatory, proportionate and transparent."

So again in the text of the Article, as in its title, the distinction between rights of use on the one hand and the conditions to which it can be subject on the other is made entirely clear.

Then if one goes to Part B of the annex to the Authorisation Directive, the conditions with which this Tribunal is now concerned, or the kind of condition with which it is concerned, is B1 at p.46:

> "Designation of service of type of network or technology for which the rights of use for the frequent has been granted, including, where applicable, the exclusive use of a frequency for the transmission of specific content or specific audiovisual services."

That is why, for example, as I shall show you, there has been original restriction to GS and G2 technology at certain spectra now to be liberalised by the amendment GSM Directive, which is the focus of this appeal.

Then, finally, if I may backtrack to the important Article 14 at p.43, one sees the concept of "Amendment of rights and obligations":

> "Member States shall ensure that the rights, conditions and procedures concerning …"

again omit general authorisation –

"… and rights of use …"

again omit the next phrase –

"… may only be amended in objectively justified cases and in a proportionate manner. Notice shall be given in an appropriate manner …"

and again there is, as it were, a procedural pre-condition reflecting general views as to fairness. Then:

"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."

The reason this is important is that there is a cross-reference to this Article in GSM Amendment Directive, which recognises that this is the way in which one can indeed the rights of use by, for example, withdrawal, re-allocation, cutting down, etc, etc. We will come back, if we may, in due course.

So heading three, the Radio Spectrum decision, the next document at tab 7.

THE CHAIRMAN: I am sorry, Mr. Beloff, where is the cross-reference?

MR. BELOFF: I am so sorry, the cross-reference I will show you when we come to the Amended GSM Directive.

The Radio Spectrum Decision, the next tab, tab 7, and it aims, as one can see, at the first of the substantive articles, at p.50:

"The aim of this Decision is to establish a policy and legal framework in the Community in order 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 in Community policy areas such as electronic communications …"

To that end, the balance of the Decision lays down a procedure for the development by the Commission with the assistance of a body, which is known as the Radio Spectrum Committee, and which is referred to in Article 4 across the page, and the Conference of European Postal and Telecomms Regulators, which is given the acronym CEPT, of technical implementing measures. They are referred to in the first paragraph of Article 4. Those are measures which then the Member States are obliged to adopt. One sees that obligation imposed at Article 10 across the page at p.52 where it is specified that:

"Member States shall take all measures necessary, by laws, regulations and administrative provisions, for the implementation of this Decision and all resulting measures."

No doubt intelligently recognising the various ways in which Member States may control this particular sector. There is a wide embrace there, whether the Member State does it by law, whether the Member State does it by regulation so far as distinct from law, whether the Member State does it by administrative provisions, in any or all of those circumstances, the Member State has to adapt the laws, regulations or administrative provisions in order to promote the implementation of that measure.

THE CHAIRMAN: That reflects, does it not, Mr. Beloff, the provisions of Article 3 of the GSM Amendment Directive?

MR. BELOFF: Indeed, Sir, yes, it presages it. It is a consistency as, Sir, you have aptly observed.

Then we come to, as it were, the *status quo* ante, which is the GSM Directive, 87/372, and that is the first document in this particular bundle. That provides, we can go straight to the substantive provisions in this particular case. "Member States shall ensure that" what are broadly the 900 MHz frequency bands, because they take, as it were, the golden *mesne* in the middle between two ranges:

"or equivalent parts of the bands mentioned in para.2 are reserved exclusively (1) for a public pan-European cellular digital mobile communications services by 1 January 1991."

Then Article 3 says:

"For the purposes of this Directive, a public pan-European cellular digital land-based mobile communications service shall mean a public cellular radio service provided in each of the Member States to a common specification …"

which then includes a particular feature, but they are there described. That leaves open the question, "What is the common specification?" and the answer to that is provided by two subsequent documents, the first being the Council Recommendation of the same date, 25th June 1987, and that is at tab 2. All one needs there to look at is the annex which is at p.7 of the bundle under the heading "Choice of transmission system":

"The transmission mode for the pan-European mobile system should be digital. The basis for the final choice of the technical option common to all the Member States within the digital mode was established by the telecommunications administrations in May 19087, on the basis of work carried out by CEPT and

particularly its special group for mobile communications, referred to as GSM (Groupe Spécial Mobile)."

That points one in the direction that it is going to be the specific technology, the common specification, is going to be a GSM specification. Then finally that is complemented by a later Instrument, the Council Resolution of 14th December 1990, which one finds at tab 3, p.9 of the bundle, and one sees that it is described as the "Council Resolution of 14 December 1999 on the final stage of the coordinated introduction of pan-European land-based public digital mobile cellular communications in the Community (GSM):

"THE COUNCIL OF THE EUROPEAN COMMUNITIES, Notes with satisfaction that substantial progress has been made on the basis of [the] recommendation … "

that we have just looked at, the Directive we have just looked at –

"… with the implementation of the pan-European digital mobile cellular GSM system …"

So the end product of this constellation of instruments was that Member States were required to reserve the 900 MHz band for GSM use only.

That Directive there, this is the fifth heading of submission, was implemented in the United Kingdom not by legislative Instrument, as it was open to the United Kingdom to do, by the licensing procedure. One sees the current licence that was granted by Ofcom at p.322 in this particular bundle, passing over the introductory passages, which identify its date. It is tab 15. It is a replacement licence. It is issued originally by the Secretary of State on 17th July 2002, p.321. One sees now that Ofcom is vested with the authority to grant the licence, and does so, the date of issue being 2nd August 2005, and one notes that it has a term at para.2, that it:

"… shall continue in force until revoked by Ofcom or surrendered by the Licensee."

At present, whatever the future might bring, O2 retains this particular licence.

The question as to for what it can be used is dealt with, firstly, in clause 7 and then in para.3 of schedule 1. Clause 7 you will find at p.322 under the rubric "Radio Equipment Use":

The Licensee must ensure that the Radio Equipment is constructed and used only in accordance with the provisions specified in Schedule 1 of this Licence. Any proposal to amend any detail … must be agreed with Ofcom in advance and implemented only after this Licence has been varied …"

THE CHAIRMAN: Just one moment, Mr. Beloff, if you would. Tab 15? It is p.322.

MR. BELOFF: It is somewhat confusingly put together. The pagination at the foot of the page is probably the easiest way of locating any reference. At any rate, para.322. One sees, if I just repeat or paraphrase, that the obligation of the licensee is to use the equipment only in accordance with the provision specified in schedule one. One turns to schedule one and one sees para.3 This is at p.325.

> "The Radio Equipment covered by this Licence shall comply with the appropriate interface requirement (IR 2014 - Public Wireless Networks) or for equipment …"

That is sufficient for present purposes. Again, one has to go further and ask oneself what is the appropriate interface requirement. One sees that if one goes back to p.314. There, there are a series of requirements emanating from the point of reference at 309. That describes it as being the UK interface requirement, 2014. If one looks for example at pages 314, 315, 316 or 317, one sees towards the foot of the pages references under box ten to frequency, planning assumptions and it is all GSN.

The position then is that historically the licence prevented O2, the appellants, from deploying any other type of mobile system and that of course was in accordance with the unamended GSM Directive. One then comes to heading six which is the GSM Amendment Directive and the 900/1800 MHz decisions which are at the heart of this appeal. What has happened of course is that times have changed and MNOs must, like others, change with them. Technical studies carried out, I accept, have shown that UMTS can be deployed compatibly with GSM in the relevant 900 MHz band. The CEPT study is at tab 17 of this bundle. It is a dense and technical document and I think, for present purposes, I only need to flag up a passage at p.379, which is at para.5.5.6. The first paragraph under that heading:

> "Taking into consideration the above mentioned CEPT and Commission decisions on the 900 MHz band, the coming scenario for the next few years seems to be a coexistence of GSM and UMTS systems in the 900 MHz band. UMTS might be deployed either in rural or less dense populated areas to fulfil coverage of service requirements, or in highly dense populated areas where there is a need for extending the UMTS network capacity."

That would be the purpose, but it is the technical co-existence which this report validated. In consequence of that and in consequence of a recognition that there was a compatibility or co-existence potential of GSM and UMTS systems in the 900 MHz band that the community legislature decided that UMTS should be deployed in that band by enacting the GSM Amendment Directive. This then takes one to tab 11 of this bundle.

Again, if I may on this occasion start with the recital, very briefly at p.267, one sees the first recital deals with the *status quo* ante the Directive which this is to amend. It refers to the recommendation and resolution, both of which I have shown you. Then one sees that this development of the mobile telephone communications networks is regarded:

> "In the interests of the economic development of the community, a unique opportunity offered by the move to second generation cellular digital mobile communication systems in order to establish truly pan-European mobile communications has also been recognised.

Then it refers to the *status quo* ante the GSM restriction and the bands to which that was applicable. Then at recital three one sees a reference to the new digital radio technologies and they see in particular at 900 MHz in the last four lines of recital three that its virtue is it has good propagation characteristics covering greater distances than higher frequency bands and allowing modern voice data and multimedia services to extend to less populated and rural areas.

At sub-para.(4) of recital four – I have to read this because it is part of the submission I shall develop later:

> "In order to contribute to the objectives of the internal market and of the Commission Communication of 1 June 2005 entitled 'I 2010 Initiative - a European Information Society for growth and employment', while maintaining the availability of GSM for users throughout Europe, and to maximise competition …"

– and I ask you to bear those words in mind –

> "… to maximise competition by offering users a wide choice of services and technologies, 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 coexist with GSM."

That is of course a reference to UMTS. Then, at recitals six and seven, these are recitals that are at the heart of the debate between the parties. Recital (6) at p.268:

> "The liberalisation of the use of the 900 MHz band could possibly result in competitive distortions."

I ask you just for a moment to dwell upon that sentence and its significance. It appears to contemplate that once there has been liberalisation that could result in competitive distortions. In other words, the one would follow from the other. The second sentence identifies the possible competitive distortions:

> "In particular, where certain mobile operators have not been assigned spectrum in the 900 MHz band, they could be put" – all this is contingent, you know – "at a disadvantage in terms of cost and efficiency in comparison with operators that will be able to provide 3G services in that band."

Then, the solution that is contemplated:

> "Under the regulatory framework on electronic communications, and in particular …"

the Authorisation Directive, I paraphrase –

> "… on the authorisation of electronic communications networks and services … Member States can amend and/or review rights of use of spectrum and thus have the tools to deal, where required, with such possible distortions."

In our submission, one may derive the following proposition from that recital: precisely that the concept of making available equates to liberalisation. To put it more crudely and pungently, that is what "making available" means. Secondly, it is anticipated clearly that something must happen on D-day, as I shall call 9 May 2010. Unless something substantive happened by way of liberalisation, there could be no competitive distortions because the *status quo* would have been preserved.

Thirdly, that the possible solution to any competitive distortion that were to be identified is to amend or review the rights of use of spectrum. What that clearly means, in our respectful submission, is that one could determine that rights of use previously allocated should be withdrawn; there should be re-allocation by whatever machinery is appropriate, always subject to procedural conditions and considerations of the rationale, the proportionality and the like. All this is to deal with the rights of use themselves, the rights of use being of the frequency of the band. It cannot mean that one can deny the liberalisation which is the condition precedent for the possibility of competitive distortion.

If one then goes on to recital (7) one sees, in our respectful submission, entirely the same pattern.

> "Within six months of the entry into force of this Directive, Member States should transpose Directive" – the unamended Directive – "as amended."

That is an imperative.

> "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 Directive" – that is 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 the 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."

This is obviously a matter of some significance to withdraw rights previously allocated or to re-allocate them. Again, firstly, one notes that this is imperative, though perhaps the language is somewhat less imperative than the substantive article. In any event, they should transpose.

THE CHAIRMAN: What does "transpose" mean, Mr. Beloff?

MR. BELOFF: To amend one's domestic regime. We put it in that broad way. I will take you to the substantive provisions in a moment. That really reflects, in our respectful submission, Article 3,1 or anticipates Article 3,1, to which I shall come.

THE CHAIRMAN: Does it not then say within six months of the entry into force? What is that date? It is the 20th day following 16 September, is it?

MR. BELOFF: Yes.

THE CHAIRMAN: That is some day in October which is not six months and does not get you to 9 May, does it?

MR. BELOFF: It enters into force on 20 May following its publication. That is Article 2 at p.269. It is not coincident with the date of the Directive itself or the date when it enters into force.

THE CHAIRMAN: It enters into force 20 days from 16 September 2009. Is that right?

MR. BELOFF: The publication is 20 October. One sees the characteristic OJ, Official Journal, heading, 20 October 2009. That is at the top of each of the pages.

THE CHAIRMAN: Entry into force, six months from the entry into force is 20 days following 20 October plus six months. What date is that, do you say?

MR. BELOFF: I hope it is 9 May.

THE CHAIRMAN: That is said to be 9 May?

MR. BELOFF: Yes. I am afraid I have made the assumption rather than counting on my fingers, as I usually do.

THE CHAIRMAN: Sorry, Mr. Beloff. I am just being a little focused about it. By 9 May then, you say, they have to amend one's domestic regime. Whilst this does not in itself require Member States to modify existing rights of use or to initiate an authorisation procedure. What do you say that means?

MR. BELOFF: Allocate new rights. The first part, we say, means decide whether to withdraw particular spectrum from particular operators or something of that kind.

THE CHAIRMAN: So "modify existing rights", you say, does not mean lift the restrictions on licences?

MR. BELOFF: Absolutely not, because the whole point is the liberalisation *ex hypothesi* means lifting the restrictions. It is the liberalisation that may have the capacity. The instrument itself recognises that it does not necessarily do so. It may have the capacity to create competitive distortions. The way in which those competitive distortions may be addressed is not by turning round and undermining the very purpose of the Directive which is to liberalise, but rather to restrain the use of particular holdings of spectrum.

THE CHAIRMAN: What may be said against you, which is why I focused on these two sentences, is that what has to be done by 9 May is, rather as Article 3 indicates, to bring into force laws, regulations and administrative provisions – i.e., transpose the Directive – and what does not have to be done by 9 May is to modify existing licences.

MR. BELOFF: Absolutely. First of all, can I make a linguistic point? The linguistic point is that rights of use are themselves of course subject to conditions. We see old restrictions. We see what will in fact be a liberalisation but still of itself be a new restriction, just a more generous restriction than before, but the conditions are not themselves the rights of use. That is what the essential point is, if I may say so, to grasp, something to which those on the other side of the Bar appear not to grasp or purport not to grasp.

The other point perhaps also to recognise is not only that is what the meaning of the modification of rights of use means or initiating authorisation procedure; indeed, the very fact that those two are coupled together sheds light on the meaning of each. Interestingly, the word "once" - must comply with the requirements of the Directive once the band has been made available – rather suggests that the liberalisation is going to proceed addressing the competitive distortions by action.

What we say this regime under this Directive envisaged was that it was open to the domestic regulator of course to anticipate the possibility of competitive distortions consequent upon liberalisation. If, through a mature and comprehensive consultation process, they had come to a particular conclusion that those competitive distortions that

were possible in fact would eventuate, then at the same time as it may be the liberalisation they could take these steps to address competitive distortion.

What has happened here is that Ofcom have not in fact carried out that assessment in advance. They therefore disabled themselves from the possibility of taking prompt action if it is required to modify the existing rights of use and they are relying upon their own failure to do something that they could have done before to postpone the liberalisation which is itself not complicated by the Directive.

THE CHAIRMAN: Could you just tell me precisely, if you can formulate it, what rights of use means as used in that recital?

MR. BELOFF: Rights of use of particular bands. You have been allocated holdings within a particular band. That is why I showed you and your colleagues the diagram at an early stage, just to illustrate graphically what was meant by rights of use.

THE CHAIRMAN: The words "rights of use" are not, you say, the licence under which you are authorised to use that band, subject to particular restrictions, but you say it is something more general than that.

MR. BELOFF: No. I do not put it quite as high as that. I say the rights of use are the rights to use particular bands. What I say is that the conditions may be attached to rights of use but if you modify rights of use what it means is you subtract the right to use spectra. You do not deny the right on those bands that you retain use of to deploy the new technologies. At an earlier stage, I did suggest to you in relation to earlier Directives, free standing of this, that the distinction between rights of use on the one hand and conditions to be attached to rights of use on the other – in particular Articles 5 and 6 of the Framework Directive ----

THE CHAIRMAN: I know Professor Pickering wants to ask you something.

PROFESSOR PICKERING: May I ask how licence conditions relate to modification or non-modification of existing rights of use? It would seem that on a reading of this the licence conditions prevailing in relation to the use of the 900 MHz band did not need to be amended. The restrictions did not have to be taken away on this wording. Is that right?

MR. BELOFF: I would go further than that. What I say is that a compulsion under the Directive – we will come to the substantive provisions in a moment; I suspect that you have been kind enough to read them before – a compulsion to liberalise, if you consider that there are competitive distortions, because the consequence of liberalisation is that those who enjoy the rights of use of a particular band then get an unfair competitive advantage because of the new technology they can deploy. Indeed, as you will recollect, those were the kinds of competitive concerns of distortion that was actually articulated in the recitals. In those

circumstances, the reaction is to remove in some way the rights of use to give you less holding within the 900 MHz band, but put a cap on any new holdings you might require, grant access to your competitors. There is a range of possible responses but the one thing you cannot do is to say, "I am not going to allow you to use this new technology on the bands that you retain." That is the point, because that would be entirely inconsistent with the thrust of the Directive, the main purpose of the Directive. If I can put it this way, if one approaches it just as a matter of language, could modification of rights of use in ordinary parlance mean doing something with restrictions, one might in an untutored way say yes; but when one actually reads it in the context not only of the Directive itself but of predecessor Directives it clearly does not mean that.

THE CHAIRMAN: That is why I want to go back, if you would not mind taking a second to do it, to Articles 5 and 6 of the Framework Directive.

MR. BELOFF: It is Article 6 that refers to the conditions that will be attached to rights of use. If one looks at recital (15) a little earlier at p.36, the conditions which may be attached to specific rights of use, they are two quite separate consequences. On the first, you have rights of use for radio frequency. That is what line three, Article 6.1 speaks of. The conditions are something separate. When you talk of modification of rights of use, what you are saying is you are not going to have as much right of use as you had before.

THE CHAIRMAN: You say it is an absolute thing. The right of use of a frequency band or a band is a right to use 902, if that is your frequency band. You can modify that only by not changing the conditions of use but by withdrawing ----

MR. BELOFF: Part of your right to the band, because you will notice in the diagram I showed you that some bands, some of the MNOs got wider scope than others. They got more of the band, to put it in lay terms. You could either take it away in part or you could say that they had to grant access to competitors or indeed you could look proactively to say that, if you are going to get new bands, then you will be capped as to the amount you can use etc.

THE CHAIRMAN: When you are granted a band, are you granted a band width or an individual band? Are you granted the right to use 900 to 910 or maybe 900 to 905?

MR. BELOFF: Yes.

THE CHAIRMAN: You could modify that right to use 900 to 910 by making it 900 to 909, for example.

MR. BELOFF: Yes. My learned friend, Mr. De La Mare, very helpfully points out that in the licence itself at 327 one sees the way in which the band is allocated. One sees then the potential for withdrawal, amendment or modification.

THE CHAIRMAN: Let me just look at it. This is where it says, "Base transmit, mobile transmit" and it has 930.1 to 935.1. If say, O2 is granted the right to use 930.1 to 935.1, can another operator also be granted the right to use that band?

MR. BELOFF: No. It is exclusive.

THE CHAIRMAN: You say you could modify the right to use the band by reducing the width, for example?

MR. BELOFF: Yes. I am reminded by Mr. De La Mare – "reminded" perhaps is a euphemistic way of putting it from my perspective – that there was an original proposal that we should, in consequence of any liberalisation, surrender certain MHz within a particular band. If one is looking, as we are at the moment, at recital seven now back at the GSM Amendment Directive, one sees actually a reflection of what is intended when one sees that the concept of reviewing rights of use and redistributing such rights in order to address such distortions. If there are distortions, some MNOs then can have more rights of use and others less; but the notion that somehow you are entitled to deny persons who retain rights of use the ability to deploy the particular technology would be wholly inconsistent with the thrust of the Directive and wholly inconsistent of course with any concept of harmonisation. It would be fragmentation, not harmonisation.

THE CHAIRMAN: This is negative so far, is it not? This does not say what you must do. It says what the Directive does not do. In other words, it does not require you to modify existing rights of use, so it is a negative point for you. You still have to win the positive point on the terms of the Directive itself.

MR. BELOFF: That I accept but of course, since the misconstruction of modification of existing rights of use is central to the submissions made by Ofcom and their supporters, it is obviously important to tackle this. With great respect, I also do derive support from the recital of the positive case in looking at the first sentence of recital six which says that liberalisation of the use of the 900 MHz band could possibly result in competitive distortion. The liberalisation, we say, is a simile for making available. It is the *sine qua non* possibility of competitive distortion and that assumes it is going to happen.

THE CHAIRMAN: That is boot straps, is it not, Mr. Beloff? That assumes that "liberalisation" means the same as "make available" which it may or may not.

MR. BELOFF: It may or may not. Let us ask the question however: what was the purpose of using something that was, as it were, entirely distinct. This is a recital. It is showing what the underlying themes of this Directive are. If one goes across to 607 that I have already read to you and your colleagues, I think recital 11 refers to the CEPT report and one sees, in

the fourth line, as a result of the discovery that there could be peaceful coexistence, if I can put it that way, of GSM systems in the 900 MHz band with UMTS systems, the 900 MHz band should therefore be opened to UMTS, a system that can coexist with GSM systems. This may again be different phraseology but the effect of it is quite clear. Those who have the particular use of this particular band are to be able to use UMTS on it. That is the point.

THE CHAIRMAN: I quite understand that. Plainly, the thrust of the Directive is to in some way facilitate, to use a neutral word, the opening of the 900 band to UMTS technology. You would not need I think to be a rocket scientist to see that. I know everybody has accepted this is a very simple point in a very simple case. It only actually turns on one question. What does "make available" mean? These recitals are all very interesting. They are aspirational and they say what the end result is going to be, but at the end of the day you still have to decide what "make available" means. I think if it does not mean what you say it means then, for all the aspiration in the recitals, you do not get home. If it does mean what you say it means, then for all the aspiration in the recitals you do get home.

MR. BELOFF: I say that subject to this: that recitals are, as you, Sir, and your colleagues no doubt well know, an appropriate aid to construction of community instruments. Therefore, to perceive a disharmony between the recitals and the substantive provisions when there is a harmonious reading possible, in our respectful submission, supports us.

THE CHAIRMAN: They may be looking beyond the specific provisions of the Directive. In other words, they may be looking to the consequences of the Directive being put into effect. If for example – I know you think this possibility is remarkable – Miss Rose was right ---

MR. BELOFF: I have never, ever in my forensic career entertained that as even the remotest possibility.

THE CHAIRMAN: Only when you have been on opposite sides, I imagine. In any event, we will leave all that on one side. The point I am making is, if she were right, that would set the stage for all the things in these recitals – namely, the liberalisation, to use the wording of recital 11, the opening up to UMTS technology – but it would not actually do more than force Member States to put legislation, regulations and administrative provisions in place to allow that to happen in future. The reason why I am putting that to you is because I think that she will place reliance on Article 3 which says that is what you are going to do.

MR. BELOFF: First of all, she said that meant we did not have to do anything, but put that on one side. First of all, I do not, with great respect, accept that there is any indication in the recitals that one is concerned with the distant future rather than the immediate implementation of the Directive. Secondly, if and in so far as one derives any notion of a

sequence of events, one can see from both six and seven that what is anticipated is liberalisation followed by action to address any competitive distortions. In those circumstances, we say that the substantive provisions are in fact all of a piece with the recitals. The only other recital perhaps I should refer to is 14, across to p.269. In order to allow new digital technologies to be deployed in co-existence, it should be amended. All this is actually anticipating, in our respectful submission, liberalisation or the ability of those who retain use of those particular bands to be able to deploy the new as well as the old technology in them.

As you, Sir, aptly point out, one is concerned here with timing. Therefore, one must look at the substantive provisions to see what is intrinsic to them in terms of the timing of the obligation. One sees Article 1.1 across the page:

> "Member States shall make …"

then there are two bands –

> "… available for GSM and UMTS systems … in accordance with technical implementing measures …"

which we have already looked at.

> "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 …"

which is the one I showed you earlier, "of the Authorisation Directive."

The word "when" is somewhat ambiguous there. It certainly does not mean "before". It could mean "at the time of". It could mean "after". Of course, if one juxtaposes it to once in recital seven, it looks more likely to mean "after" but I suggest, with respect, that what "when" means there is in effect in connection with. In other words, you have to bear in mind when you make these bands available that there may be competitive distortions as a result and you should assess and, if need be, address those. Our submission, were it necessary to do so, is that actually not only in not liberalising on 9 May of this year, Ofcom as an organ of the Member State were in breach of Article 1, but it is possible on one construction of Article 1(2) that they are also in breach of an obligation to examine the potential for competitive distortion; but it is not necessary for our particular case because indeed our preferred construction of the Directive in terms of the competition implications

is that it is looking substantially to *ex post* addressing of competitive distortions, rather than *ex ante*, even if there might be an assessment *ex ante* of such potential distortions.

THE CHAIRMAN: You would say, because Article 14 refers to varying licences and conditions, it must be looking to a stage after the implementation.

MR. BELOFF: Exactly. Even if it was not compulsory, it certainly facilitates that. It certainly envisages that the steps may be taken consequent upon the liberalisation. Indeed, it is difficult to understand how any steps could be taken prior to liberalisation because *ex hypothesi* there would be no competitive distortions until liberalisation had taken place. The high water mark of competition could be, well, we could do something at the same time.

THE CHAIRMAN: It could be said that you are only obliged to address, if I can put it in sort of normal terms, things that are likely to distort competition – i.e., that could be in the future – and, as you say, in connection with implementing the Directive. I suppose it could be neutral, in timing terms.

MR. BELOFF: Yes, it could be neutral. There are various hypotheses. The first thing I say unambiguously is you could not amend or presume rights of use before liberalisation because *ex hypothesi* nothing would have happened. The competitive distortions can only occur when you liberalise because those who have the existing bands then have the facility to use the new technology and that is the kind of competitive distortion that could in fact arise. One sees that at six. That is exactly what is envisaged in the recital. If one were able to make an authoritative assessment prior to liberalisation – if I can so describe it, prior to D-day – then it might be that simultaneously, following whatever procedures one needs to do immediately.

It is perfectly sensible, I imagine – I imagine your colleagues are better versed in this – that to examine how something does impact may be a more intelligent way of addressing an issue than to theoretically, as it were, create a model as to what might happen in the future.

THE CHAIRMAN: You would not normally try and have a situation, would you, where you produce an anti-competitive situation and then address it. You would rather create a model that was ----

MR. BELOFF: If you knew about it in advance. Do not forget, this is all contingent. There is a great deal of muttering on my left from people far more expert. All I am saying is this is all contingent. This is not that it is automatically going to create. Wait and see may be a practical and intelligent response.

If one looks then at Article 3, it is without any doubt imperative that they shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 9 May. Then they have to communicate to the Commission. Here, we are in the realm in the United Kingdom of administrative provisions being the way in which these restrictions are imposed. It is the mechanism by which the restrictions were imposed, those that were provided for by the unamended GSM Directive, and in order to bring into force administrative provisions necessary to comply with this Directive by 9 May 2010, what is necessary then is to amend the licence in order to comply with the obligation to make the bands available for those particular systems.

THE CHAIRMAN: Is there any authority for the proposition that administrative provisions can mean terms of licences to an MNO or to an operator to a private licence? I am just concerned with the meaning of administrative provisions in a Directive.

MR. BELOFF: I absolutely understand that. If there were such, Mr. De La Mare behind me would be aware of it. The real point is to recognise that the reason Article 3 is designed in the way in which it is is to catch every method by which one might impose a restriction. We have I think, in our skeleton argument, adopted for our own purposes two hypotheses: the legislative implementation in which one envisages a situation in which licences are granted but there is primary or secondary legislation, depending on the constitution of the particular Member State, which itself imposes the restrictions and which primary or secondary legislation could then be amended in order to comply with Article 3. We also have the licence implementation variant which is as in this country the restrictions are not imposed by primary or secondary legislation. What one has is Ofcom, as the NRA, being given the power to issue licences, subject to conditions, and those conditions reflect the restrictions in the Directive.

THE CHAIRMAN: Where is that in your skeleton argument? Which paragraph is that?

MR. BELOFF: Tab 13, p.6, sub-para.(6) of para.16. We have identified two possible models. With respect, one might for example if one were a purist say, from an English constitutional perspective, what is the difference between a law and a regulation? They are both types of law. One would be primary; one would be secondary. What the community instrument does is to recognise a variety of techniques for imposing or relaxing restrictions and they have sought within Article 3 to embrace every possibility. Administrative provision must, in my respectful submission, embrace licence conditions. It would be extraordinary if the community instrument actually left out of what was intended to be a comprehensive Article some particular method.

THE CHAIRMAN: Do you bring into force a licence amendment?

MR. BELOFF: It is not the happiest use of language. Can I just come back to where I was, looking with you, Sir, and your colleagues at the Directive itself, bring into force the law necessary to comply – if for example you have a law in Ruritania which said before 9 May 2010 those who have licences are subject to the restriction of using only 2GSM technology you would then say, "Actually, in order to meet the community demands, what you would do is to amend the law rather than bring it into force." It is meant to embrace doing something with these particular methods by 9 May to achieve this particular objective.

THE CHAIRMAN: That has happened in many Member States where they did have laws that provided for the restrictions.

MR. BELOFF: Absolutely so. There is no imperative in the community instrument to do it in any particular way. There is an imperative now that, whatever way you have done it, you have to amend now in order to achieve compliance. If it embraces administrative provisions, you, Sir, acutely focus on this. Take one of the two models. I do not say "even Miss Rose" because nothing is beyond her forensic ability but supposing the United Kingdom were a state which legislated these restrictions. Could it seriously be said that the United Kingdom in that hypothetical scenario would not be obliged by Article 3 to have amended the primary law by 9 May 2010? The answer is it would have to. If that is so and if administrative provisions are meant to capture matters outwith laws, primary or secondary, or regulation, then exactly the same must ensue.

THE CHAIRMAN: What may be said is you might have a law that encapsulated the revision and you might have a licence that contained a restriction as well, simply reflecting the statutory provision. I think what Miss Rose will say is this Article 3 says just repeal the law because that will make available legally, but it does not have a mandatory requirement that you actually go the second stage, because she will, I imagine, say that the competition requirements require her to look at the competition *ex ante*, as you would say.

MR. BELOFF: The answer to that would be that the three concepts embraced by Article 3(1), laws, regulations and administrative provisions, are all of the same chronological plane. If one had a situation, again hypothetical, in which in Ruritania one had both legislation and administrative provisions or licence provisions, then the obligation would be to amend both of them, not to do it in sequence, because you have to do it by 9 May.

THE CHAIRMAN: If an administrative provision is a restriction in an agreement. If an administrative provision is getting at some kind of – I do not know what – regulation or something that the executive might for example be allowed to lay down without, say,

parliamentary approval, I am just guessing really because I am not sure that administrative provision is a very clear term. I would be much assisted by any authority there was on what it means.

MR. BELOFF: Mr. Richards points out to me that it may be helpful just to go back to the unamended Directive which we have looked at, which is at tab one. One then sees historically in Article 4:

> "Member States shall bring into force the provisions necessary to comply with this Directive …"

That is at p.2 of the bundle. The submission that we base on that is simply that there has been a development of vocabulary rather than a word which might itself occasion debate. The Department has provided for sub-categories of that, whether they are regulations or whether they are administrative provisions.

THE CHAIRMAN: This is a different provision because Article 1 here simply says that the bands shall ensure that the particular bands are reserved exclusively for the network and they then ensure that necessary plans are prepared for it to be able to occupy that part of the network according to commercial demand as quickly as possible. Then it says you are bringing into force the provisions necessary which looks like an enabling requirement rather than a deadline. It could not be a deadline for actually having the network used.

MR. BELOFF: I would address you, with respect, on a different point. The point that you, Sir, were putting to me was: does administrative provision embrace a licence condition. I was pointing out that the pre-history of this suggests that in the antecedent Directive the word "provisions" was used in a somewhat general way. I am saying that now they have tried to make it more precise, but they still intend to capture everything.

Indeed, I do with great respect repeat: how can one have a harmonising Directive in which something is missed out because of the way in which a particular Member States does it? That is the imperative for giving it the broad construction that I say it bears. I say that administrative provision is something that is obviously envisaged to be distinct from a law or regulation. It is something that is imposed pursuant to Ofcom's statutory powers under the Wireless Telegraphy Act and therefore it deserves and certainly enjoys the description of ----

THE CHAIRMAN: Mr. Beloff, my point was vaguely apt in the sense that the term "provisions" there looks like it is talking about some kind of law bringing into force provisions necessary, and it is not necessarily as broad as administrative provisions. It certainly would not include a contractual licence restriction.

MR. BELOFF: That is several points, Sir. First of all, my respectful response is that it is precisely because someone thought that someone, Sir, of your ingenuity might restrict its meaning in that way, but they decided in the new Directive to rule that out as a possibility. Secondly, these are not, strictly speaking, contractual conditions. Ofcom is a statutory regulator with power to grant licences subject to something. I would not describe that as a contract. There are sanctions available, including criminal sanctions, for breach of conditions. There are other forms of enforcement of which, Sir, you are no doubt well familiar. There is apparently an authority in the bundle which makes it clear that they are distinct from contract, but I will wait until someone says otherwise, because I am very conscious of the commitment I have given, subject always to questions, as to the time ----

THE CHAIRMAN: I am sorry about the questions.

MR. BELOFF: Not at all, no, this is, with great respect, that at least our submissions can be clearly understood.

I have dealt with those particular provisions. I may need to return to them in due course when I am summarising our submissions, but as we go through under the stimulus, Sir, of the questions of yourself and your colleagues, many of the submissions I have subsequently developed will have a certain staleness and repetition about them, and I shall seek not to trouble you overmuch at that juncture.

Can I just deal with the decision, the complementary decision, because that is the one that bites in particular on the 1800 MHz frequency bands. That is at p.271, the next tab, tab 12.

The second recital, p.271, refers to the amending Directive we have just looked at and speaks of the co-existence, and the last sentence says that what it has done is to open it up to the new system, and it says:

> "Technical measures should therefore be adopted to allow the coexistence of GSM and other systems in the 900 MHz band."

Then at (3) one sees that that the 1800 MHz bands:

> "… have become available for GSM operation and are currently used by GSM systems across Europe. The 1800 MHz band share also be opened under the same conditions as the 900 MHz band to other terrestrial systems capable of providing electronic communications services that can coexist with GSM systems."

One is looking then, as it were, for parity of treatment of these two bands vis-à-vis this new technology.

Recital (10) refers back to the CEPT report and the virtues of such extension of the technology. Again recital (11) interestingly refers to:

> "The result of the mandate to the CEPT should be made applicable in the Community and implemented by the Member States without delay, given the market demand for the introduction of UMTS in these bands."

That is no encouragement to those who say that at the time and at the pace of their choosing they can postpone liberalisation until they have carried out a competition assessment.

Then if one looks at recital (14) that again refers to the possibility that could result in distortion of competition in different national situations, and again they refer back to the tools that are available under the Authorisation Directive and indeed the Framework Directive.

Then the substantive Articles across the page at p.273, the terrestrial systems capable of provide electronic communications services that can co-exist with GM systems in the 900 MHz band are listed in the annex. So that is a cross-reference. Article 4 deals with the 1800 MHz band designated and made available for GSM systems by 9th November. That is not material to this, it is the second sub-paragraph:

> "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, subject to the conditions and implementations deadlines laid down therein."

One then has to turn to the annex to see which are mentioned, and that is across the page and in the left box one sees it the UMTS system that is mentioned and one sees the words "implementation deadline", which, in our respectful submission, is again of significance and is exactly the same date. So there one has, in our respectful submission, why we contend it is not only the 900 MHz band, but also the 1800 MHz which should now be available for the new technology.

Again, one has the same argument of course as to what "made available", and I do not repeat my submissions on that. It would be astonishing if it meant one thing in the Directive and another thing in the Decision.

One then comes to the seventh head of submission, which is of some interest. That is the way in which Ofcom's application for a variation of their licence was dealt with. We made an application to Ofcom as the Wireless Telegraphy Act of 2006 entitles us to do. Just for a note, it is schedule 1, para.6 of that legislation which deals with variations. You will see, if you go to tab 18 of this bundle, the letter of 2nd March which was the formal application for variation. Then annexed to that letter is a document which, in my respectful submission, and I can say so with more confidence since I had no responsibility for its drafting

whatsoever, is an excellent summary and overview of the case that I am seeking to deploy before you today. Indeed, although I am not going to, conscious of the time, read it to you, if by any chance you are minded to reserve your judgment, as is no doubt a possibility, this is a document that I would invite you to study in due time.

What is interest without interest is that we made it entirely clear at para.28, which is at p.440, that we in making an application for variation, as you can read, said that any failure to make a determination by 9th May would amount to a denial of our entitlement and a frustration of what we say were our directly affected rights and we said, "Were you to deny us the variation that we seek, we will be compelled to deploy our appellate rights."

The form of variation that we sought is set out at 444 and 447. Again it is an amendment, unsurprisingly, of the provisions in the present licence to extend the capacity to use the technology beyond GSM to UMTS, and one can see at p.444, para.7, "in accordance with the provisions specified in", and then there is a new Schedule 2 by way of amendment, and the relevant Schedule 2 is to be found at p.446. That is 3:

> "The Radio Equipment covered by this Licence shall comply with the appropriate interface Requirement …"

that we have already seen, "or", and then another hypothetical interface requirement, UMTS Public Wireless Networks in the 900 MHz band, though we anticipated that there would be, as it were, a substitute requirement there that would allow the use of this new technology.

How was this application developed in the way it was dealt with.

I remind you, without reading it as I have said, that within the text of this particular document are articulated the major arguments of construction and legislative purpose that we have relied upon. "Were these then put in issue by the respondent?" a rhetorical question to which the answer is, they were not.

The response that we received is at the next tab, tab 19, and Mr. Louth of Ofcom, who is Director of Spectrum Markets, replied to Mr. Blades of O2 on 22nd April, having had a meeting:

> "… I am writing to confirm that BIS has written to us asking us not to take any action in respect of your request. This is because BIS considers that:
>
> (a) it would be inappropriate for Ofcom to take action before the next Government, and Parliament, have had an opportunity to consider the Direction that is before them; and

(b) any action in relation to this matter by Ofcom would currently be inappropriate in light of the fact that we are in a period of purdah pending the general election …"

which, as we all recollect, took place a few weeks later on 6th May.

"In the light of this, Ofcom is not presently proposing to take any action in relation to your licence variation request."

The reference to a direction is to draft directions that had been promulgated by the Department. I am return to those in a moment.

Would you just look at volume 2, tab 2, there should be the second witness statement of Mr. Blades, which just gives the background to this Directive. I just take you to p.528. Mr. Blades is the head of Regulatory Affairs at O2, and at p.528 he explains in para.23 and following the background to these draft directions. He explains at para.23 that there was a timetable to lay a statutory instrument by February 2010 which would, of course, have enabled liberalisation to take place on D-Day. He says in para.24 that by March 2010, however, O2 had become concerned that the Government's timetable was slipping and that there would not be adequate time, that is why we made the formal application for the licence to be determined. Then:

"On 9th March 2010 the Government laid its draft Direction before Parliament. Aspects of the proposed Direction were immediately criticised by O2 and other operators, particularly as regards the way in which the Government had responded to the Orange/T-Mobile merger …"

becoming EE –

"… and its clearance by the European Commission. Perhaps partly in light of such criticism, and partly in the light of the atmosphere of political uncertainty with an imminent General Election, the draft Direction did not progress through Parliament prior to its dissolution on 12 April 2010."

Then he says at the time that he gave this witness statement, 16th June, it was obscure as to what was to happen.

Actually we do now know, by happenstance, that what is proposed apparently is to publish draft directions tomorrow. They are to be laid in the libraries of the House of Commons and House of Lords during the course of today. We, of course, with respect, say it is neither here nor there. If we are right in our legal submission we were entitled to a removal of the restrictions on 9th May as a result of paramount Community law, and nothing the Government could do could deny us that right. It is also clear from Mr. Blades' witness

statement in relation to the previous directions that whatever directions may be published tomorrow are likely to excite not only controversy but, if need be, legal challenge by persons within the industry. So the notion, were that to be advanced, you and your colleagues could be tempted by the idea that we are now here on an academic exercise because this will also be resolved elsewhere within a short period of time is not, in fact, a representation of reality, and I felt it incumbent on me to inform the Tribunal about the fact, but we are not inviting you, certainly for our part, to take this as a reason for adjourning. We do not understand that any other party is going to make such an application. I have indicated how I would deal with it, were it to be made.

PROFESSOR PICKERING: Mr. Beloff, forgive me, I wonder whether this might be a point at which I might ask you two questions. I think you have given me the answer to one in what you have just said, but let me just check. The responsibility for implementation of the Directive and Decision, do you say that in the UK context that was solely the responsibility of Ofcom, or was it dependent or requiring guidance or instructions from the Department of Business? That is my first question.

The second question is this: I would be interested to know why your clients felt that they needed to make an application for licence variation?

MR. BELOFF: If I may say so, very pertinent questions. In relation to the first, the answer is this: the obligations by a Community Directive are imposed on a Member State and its agencies. They therefore bite on the Department as well as Ofcom. The way in which matters are organised here is that Ofcom has responsibility for the licensing regime, but the answer to your question, were the directions in some way to seek to prevent Ofcom, as we say they are obliged to, to lift the restrictions, they, themselves, would be inconsistent with a Member State's Community obligations. That is the answer to the first question.

In relation to the second question, why did we not go ahead, you are entirely right, and indeed if it is necessary I shall show you authority for the proposition, that if we have a directly affected right we could therefore proceed to make use of the technology on these bands. But, let us be realistic, were we wrong, we would be liable not only to potentially enforcement action but even to criminal proceedings, and therefore it makes, if I may say, prudent sense to have made an application for variation.

Let us assume, however, that we were bold in accordance with the thrust and not the question that you put to us, what would then happen? What would then happen, let us assume we were prosecuted, we would be entitled by way of defence to say that we have a directly effecting Community right, this prosecution must fail. At that juncture, if the

argument succeeded, we could walk free out of the dock. It is not a risk that any reputable commercial organisation would take. That is, as it were, one answer. The second answer is, even if, as is the position, we have a directly effecting right, nonetheless there remains under the Directive an obligation to take all the steps whether by law, administrative, amendment or otherwise, and therefore it does not mean that Ofcom can be excused. They cannot turn round and say, "Well, if you have got a directly effective right, there it is, we do not have to do anything". They are obliged, since they imposed the restriction, to remove the restriction. I hope that is an answer to both those questions.

PROFESSOR PICKERING: Indeed. Could I just suggest to you that there was perhaps a slightly less confrontational approach which O2 might well have assumed or expected, that in the light of the Directive, Ofcom would automatically take the actions to liberalise without you needing to make an application for the licence variation. Was that considered? I notice in the correspondence that there had been some previous discussions between O2 and Ofcom. I just wondered why it had not been expected to happen ----

MR. BELOFF: I do not think anyone has suggested that we have behaved in any way other than consistent with a desire to enforce the rights that we claim we have. No one has suggested that we have been unduly litigious, no one has suggested that we have been abrupt or discourteous. I think we have investigated, obviously, ways of resolving this issue without troubling the Tribunal with it. I think perhaps if one went back in Mr. Blades' first witness statement, which he produced for the purpose of requiring expedition may give a bit more of the background. I do not think, and again I can say this free from any responsibilities, any reasonable step was not taken to achieve what we wanted, and this is a step we have had to take because we have not been given what we have applied for. Indeed, the formal step no doubt was – you are absolutely right, it could have been a spontaneous gesture by Ofcom, cognisant of their responsibilities, but if they were not prepared to do that the only way that we could proceed was to apply for the variation.

The point that I wanted to make now, just looking at this email, is that there is no argument to the effect that "making available" did not equate to liberalisation. There is no argument to the effect that the liberalisation was not required by the Directive on the D-date. There is no suggestion that implementation of the Amendment Directive required nothing at all to be done by Ofcom on that date. There is no argument to the effect that the liberalisation obligation, such that it is, only arise after a competition assessment had been carried out, and even if Ofcom had failed to carry out such an assessment prior to 9th May. There is no hint of any such arguments or the variation of the arguments now advanced. This is the

famous dog in the Hound of Baskervilles, the dog that did not bark. It is a significant gap. Those arguments, if they had any force, could equally have been articulated then, and they were not articulated. What is more interesting is that not only were these arguments first deployed in the defence and skeleton argument, and I am not going to trouble the Tribunal with going into these inconsistencies between those two documents – I will address the argument, as it were, in its latest incarnation – but actually the argument now advanced is wholly inconsistent with the stance that Ofcom previously took as to their obligations. I can deal with this very shortly by taking you, if I may, to the passage in our skeleton argument. That is at tab 13, and if you go to para.19, which is at pp.8 and 9 of the skeleton argument, we recite three passages from the February 2009 consultation document of Ofcom, headed "Application of spectrum liberalisation and trading to the mobile sector: A further consultation". There had been an earlier one in 2007. We cite three passages there.

As to the first one, the only point that I would wish to draw to your attention – I am not going to read those out – is four lines from the foot of the page, the Directive would require Member State to make the changes necessary to implement the Directive within 6 months. That appears to recognise that something needed to be done, not as is presently argued, nothing needed to be done.

The second citation, I agree is consistent with our construction, but is not compulsive of it.

The third citation does, with great respect, require reading and understanding:

> "… it now seems likely …"

said Ofcom in February 2009 –

> "… that we will be required by European law to 'make available' the whole of the 900 MHz band for UMTS as well as GSM systems by no later than six months after the coming into force of the GSM Amendment Directive. It is our current understanding that to meet this requirement, we will have to liberalise all of the existing 900 MHz 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 spectrum.
>
> We therefore now think that we will be requested to liberalise the 900 MHz spectrum as soon as practicable. Delay to liberalisation is fairly unlikely, notwithstanding that this may allow the incumbent licensees to deploy new technology in the band for a short period in advance of any acquirer."

There are three points that stand out from that analysis. Firstly, that it was Ofcom's perception at that stage that by D-day what was meant by "making available" was the liberalisation of the licences to remove restrictions on UMTS in the relevant band. Secondly, that obligation subsisted irrespective of the outcome of any competition concerns; and thirdly, a recognition that the obligation did mean that incumbent licensees, such as O2 or Vodafone, would be in a different and more favourable position to possible new entrants in the future.

Of course, Miss Rose and her colleagues in the skeleton say that their view, whether provisional or not, are not themselves admissible aids to construction, and naturally we accept that. But, non-sequitur, that their first thoughts were not, in fact, their best thoughts, as we respectfully submit they clearly were. Although I have had, if I may say so, the most stimulating discussion, Mr. Chairman, with you about this and about the possible meanings of this word and that phrase, I am at least comforted that the arguments I have advanced are not inconsistent with Ofcom once, if not Ofcom now.

THE CHAIRMAN: It is a matter of statutory construction?

MR. BELOFF: It is of course ultimately a matter of statutory construction. It is also perhaps notable that they did not suggest at that stage that they needed to do nothing, and they did not suggest that a direction from BIS was unnecessary since they had already addressed all that they required.

Perhaps I did not tell you, but there is a letter from O2's solicitors in bundle 1, 13N. The purpose is just to draw your attention to the fact that we were somewhat perplexed, having received their defence, as to what Ofcom was saying they ought to do or have done by 9th May. You can see that is one of the questions in advance of the defence or main skeleton, that it makes clear what duties the United Kingdom is subject by reason of the Amended GSM Directive, and when Ofcom considers those duties arise. We are now told finally in the skeleton that actually there was nothing they needed to do before 9th May, everything that needed to be done had been done, and we, with great respect, find that a very peculiar position, not only as inconsistent with their previous position, but, in our respectful submission, not validated by the language of the Directive.

I can also, if I may, deal with this very shortly, that it is not only Ofcom who took the particular view that they did as to the obligations arising under the Directive. BIS, as it was then known and is still known, a somewhat immutable description of that particular Department of State, took precisely the same approach. Again, I can deal with this quite shortly. If you look at 221J, this is October 2009, it is a consultation on a direction to

Ofcom to implement the Wireless Radio Spectrum Organisation programme, and if one goes to para.3.13, one sees that Ofcom has been seeking in the centre of 3.13 to address competition raised by the liberalisation of 900 MHz as required by the revised GSM Directive which has been enacted by the European Commission. They refer to the consultation twice. Of course, it is not complete, because had it been complete they would be in a position to determine, or might be in a position to determine, whether there were indeed competition concerns which needed to be reacted to.

At 3.23, going two pages on, one sees again the third sentence:

> "Under the revised GSM Directive 900 MHz spectrum is to be liberalised to allow UMTS Services to be deployed in that band."

Then at 3.24 one sees, the third sentence:

> "The Government will direct Ofcom to liberalise to existing 2G licences in the hands of existing holders. Liberalising these licences will operators to deploy new technology that will benefit consumers in line with the revised Directive adopted by the Commission."

We see there, in our respectful submission, an equation of, on the one hand, making available and on the other liberalisation. (Mobile phone) There one sees mobile phone technology, even including in these august premises.

Can I note, however, and we say compulsively, if you go forward to p.1468, a commentary, BIS recognised that there had been some slippage in relation to the possibility of providing a ministerial direction. How did they anticipate the obligations under the Directive would be effected? If you look at 1468, the box on the right hand side, the second of the commentary:

> "If the ministerial direction to Ofcom is delayed past the date at which the revised GSM Directive must be implemented …"

that is 9th May –

> "… then licenses should be varied sufficiently to meet the requirements of the revised GSM Directive."

It could not be clearer that that is the way in which it was interpreted the Directive compelled to act.

That sets the context for the draft Direction. This is the last tab of the bundle, tab 20, p.501. One sees, firstly, the purpose set out at p.501, Part 1, under the rubric, "Purpose of Directions":

> "These Directions are given for the purposes of ensuring the release of additional electromagnet spectrum for use by providers of next generation wireless mobile broadband; allowing early deployment and maximising the coverage of those services; creating greater investment certainty for operators; and implementation of [the] Directive and the Decision …"

The mode in which those imperatives were to be implemented is set out quite clearly in 4(1), 4(2)(a) and 4(3)(c), the method is licence variation:

> "Ofcom must use its powers [under the provision of the Act] … to make provision as set out in this article …"

that is the introductory paragraph, and they must vary each existing licence to, and then one sees it provides for them to use the frequencies in that particular band to which the licence relates for both GSM and UMTS systems, and then a parallel provision (3)(a) in relation to the 1800 MHz. That was the method by which it was envisaged in the directions at that time, that making available was to be effected.

Could we go to p.514. That is the explanatory note which is again not without interest. This the explanatory note explaining the function the order. This order implements, and it refers to the Directive and the Decision for territorial systems capable of providing pan-European electronic communications services in the Community. So what is then envisaged, in our respectful submission, is that is the way it is going to be done. It is going to be done by liberalisation and it is going to be done at the due date.

I then come against that background to our submissions, many of which, of course, the Tribunal will be familiar with. The central issue as, Sir, you and your colleagues have already identified, is the true construction of Article 1.1 of the Directive and Article 4.2, using equivalent language, of the Decision, which require respectively the United Kingdom to "make available" those two bands respectively for the new technology.

I take it that the following matters are common ground. The first is that a Directive, in order to have direct effect, has to be both unconditional and sufficiently precise. That was established in a case which I remember for obvious reason with some affection called *Marshall (No.1)*, which is in the bundle at 22A, and is now form book law.

Secondly, it can be relied upon against Ofcom as an emanation of the State or State authority (see para.48 complementing para.45 of the same authority).

Thirdly, the same tests and the same consequences apply to decisions. That again is in a case called *Ernst Mundt*, which is tab 25 of the authorities bundle, paras.12 to 13.

Fourthly, that a directly effective Directive or Decision would automatically trump any inconsistent domestic law or indeed domestic provision. That has been the position ever since the enactment and bringing into force the European Communities Act, and an exposition of that basic principle of modern constitutional law is in the judgment of Lord Justice Laws in the *Thoburn* case, which dealt with the traders who insisted on trading in old measurements and rejecting new metric criteria. That is at para.69 of his judgment, authorities 28A.

Then fifthly, I take this again to be common ground – all these can be responded to if I have misunderstood – the pendency of putative legislation does not entitle the State to deny or to delay directly effective rights to the beneficiaries thereof. If they have such rights then the fact that the State is slow to respond to that cannot justify a court or tribunal vested with the power to give effect to those rights from doing so.

The rival constructions before the Tribunal are very well known. We and Vodafone say that what is meant by "making available" means that Ofcom should remove on D-day any restrictions which prevent the deployment of UMTS in the band in order to allow them to be used for UMTS systems and materially that requires amendment of the licence which presently restricts use of the bands to GSM technology and not extends it to UMTS technology.

Second, on the other hand, Ofcom, supported by EE and H3G, contend that the obligation to make available does not require it to remove the restrictions in O2's licence or to permit UMTS deployment by O2 on D-day but merely, as we understand it, to prepare all necessary steps so that some authorisation process can start if a potential user so requests.

I think it is worth looking at the defence here, because at that stage it is very opaque as to what actually was envisaged by Ofcom as being required. One finds, as best we can, and I trust I am not being in any sense unfair, the best clue to what Ofcom was seeking to advance as a construction of the phrase "make available" in their defence, p.12, paras.39 and 40. At para.39 they quote from the Working Document, and that say "making available a spectrum", which says in the second sentence in the italicised portion:

> "*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* …"

Then again, building on that it says that there is:

> "… no obligation to amend existing rights of use. Instead, the steps, if any, that may need to be taken in order for a spectrum to be '*made available*' will vary as between Member States. The core requirement is that the '*authorisation process can start if a potential use so requests'*. In some Member States …"

though incidentally this would not embrace the United Kingdom –

> "… this may involve '*adapting or amending national legal acts*'…"

that is if one restricts legal acts to statute or delegated legislation –

> "… '*that would regulate the use of the radio frequencies in a more detailed way'*…"

So again, paraphrasing, in broad terms it says, as it were, "clearing the decks so that if anyone applies we could grant them a licence which would include the ability to use the band for the new technology". We, with great respect, find that very difficult to align to acceptable use of the phrase "making available" something on a due date.

So against that we advance our argument, and we support it by three main propositions. The first is to consider what the purpose of the Directive and the Decision was. It is axiomatic that in this area courts and tribunals will adopt a purposive approach to the interpretation of Community legislation, first, no doubt, said by Lord Denning in the *Bulmer and Bollinger* case where we provided an example in the *Re Smith Kline* case, which we find in the authorities bundle, just for any note that you care to keep of this, at tab 24, judgment of Lord Justice Dillon at p.75F to G, and Lord Justice Balcombe at p.82G to H. This does not divide the parties. Miss Rose and her colleagues accept in their defence that that is the appropriate approach.

What we say is that the primary purpose of the Directive is to allow UMTS to be deployed on the relevant bands by removing any restrictions on its deployment. That was to be in the public interest, in the interests of consumers. To put it colloquially, that is what the Directive is all about.

We secondly observe, and you have recital (4) in particular at p.267, that actually it is regarded as a pro-competitive measure – "maximise competition" is the phrase used – by offering a choice of systems and technologies. We will come back to the significance as to how, as it were, large competition considerations bulk in the Directive when I address the second major argument of Miss Rose. At the moment we say that the primary source for ascertaining the purpose of a legislative instrument is obviously the instrument itself and in particular the recitals. I had a dialogue, Sir, with you at an earlier stage as to the relevance

of recitals, whether they bore on the substantive provisions. We say this is again well-established – see for example, and again I am conscious of the time, as I suspect this is uncontroversial, the *Silhouette* case, which is in the bundle of authorities, 26B, para.25. It is a trademark case and the use made by the European Court of Justice of the recitals is simply indicative of the way in which those matters are approached.

What does one then get from the provisions of the Instruments themselves? We start, and this is where I am retracing my steps but I hope to deal with it expeditiously, by going back, if you would, to the Directive itself and in particular recital (4). That is the one which refers to the maximising of competition. It also refers in order to contribute to the objectives of the internal market, and the Commission communication of 1 June 2005 entitled:

> "… entitled 'I 2010 Initiative – A European Information Society for grown and employment', while maintaining the availability of GSM for users throughout Europe. and to maximise competition by offering users a wider choice of services and technologies, the use of the 900 MHz band should be made available to other technologies for the provision of additional compatible and advanced pan-European services that would coexist with GSM."

So has, as it were, a pointer towards the Commission communication of 1st June. That is another document that is in the bundle, that is at 12K. That gives a further indication by cross-reference of the underlying purpose of this Directive. If you would go then further in the bundle to that, one can see that it is grandly entitled that we are going to develop an information society and at 308(k)((vi) – this is where the pagination is not as clear as it might be, but going through there is the introduction, the table of contents, then the substantive introduction, across the page "A Single European Information Space", and then the first objective on the next page relevant to this is that there should be "A Single European information space offering affordable and secure high bandwidth communications, rich and diverse content and digital services", and at the foot of the page it is noted that it is:

> "New high speed wireless applications are driving demand for radio spectrum."

That is really the major objectives relevant to this that one finds in that particular document. Then returning back to the Instrument itself, the Directive – again, I have already traversed with you the various recitals, (5) to (12), which address the practicalities and the competition consequences of making the band available to new technologies. Again, the primary legislative purpose, because the competition distortions, as it were, are reactive, they are consequent upon implementing the primary purpose. There is potential

competition distortions and there are therefore modes of dealing with those. Recital (13) says that the objectives are the internal market in electronic communications, and then (14) again to allow the new digital technologies to be deployed in co-existence with the previous systems. The way in which that is going to be achieved is the exclusive reservation of this band for GSM should be removed.

Then if one looks at the Decision, the next document, again something we have looked at before, again one sees in the second recital the need to adopt measures which will allow for the co-existence of GSM and other systems in the relevant band. The third recital says that it shall be open to the 1800 MHz bands on the same basis. Again, I have taken you to (11), which uses the phrase "without delay" for the implementation.

So what one gathers, in our respectful submission, from this is that there are three broad objectives, policy objectives, being pursued, the general objectives of the internal market, the objectives of the I 2020 Initiative, in particular securing interests of consumer high bandwidths and high speed and content and services, and finally the maximising of competition, rather than the undermining of competition, that maximising achieved by offering a wide choice of services and technologies, and those purposes are to be achieved by allowing the deployment of the new digital technologies in the 900 MHz bands, and again the Decision complements that in relation to the broader band, the 1800 MHz.

Those, in our respectful submission, are the legislative purposes underlying these two Instruments and throughout them the notion of speed, the imperative of "without delay", the reference to a due date, all of which, in our respectful submission, encourages the fact that something effective needs to be done on that day to promote those objectives.

That is, as it were, the first source.

The second source would be the explanatory memorandum accompanying the Commission's proposal for the GSM Directive, and here we return, Miss Rose, the compliment. She says that we are entitled to look to recitals and to purpose and we respectfully agree that equally one is entitled to look at a document such as the proposal itself. In our respectful submission, this document attached to the defence, the first document attached to the defence, confirms that the primary purpose of the GSM Amendment Directive is to allow the deployment of UMTS technology in a timely fashion.

Again, if one looks at the various paragraphs – I have shown you para.110, and I remind you – this is the first page of 5 – one has to look at these small numbers in the left hand column.

THE CHAIRMAN: Where are you? You are in tab?

MR. BELOFF: I am in tab 1 of the defence bundle, the Proposal.

THE CHAIRMAN: We have not looked at this before, have we?

MR. BELOFF: No, we have not looked at this before. I am just indicating that there are in the left hand margin a series of numbers. They do not appear to be entirely complete, but I can use them as points of reference. 110, which is under the rubric, "Context of the proposal", one sees that the proposal aims to amend what I call the unamended Directive, and the second sentence, four lines into 110:

> "The objective is to allow a wider choice of services and technologies and thereby to maximise competition in the use of the bands so far covered by the GSM Directive, which ensuring that services remain coordinated and safeguarding the continued operation of GSM."

Then they say that, therefore, the spectrum has got to be allowed for both.

If one then goes on one sees at 120 the general context is set out. Again they stress the value of deploying these new technologies on these particular bands, and they refer to the propagation characteristics, in particular the 900 MHz bands, and the fact that this is a general advance in technology providing better services to consumers and end users.

If one turns over the page one sees that there has been a long consultation of interested parties – I do not need to go through that in detail. Paragraphs 211 and 212 deal with those.

Then one sees the next general section is called "Collection and use of expertise". Again, that is obviously fed into this proposal, which matured into the amended Directive.

Then if one goes across the page which does see something which, in our respectful submission, is of considerable significance. 321:

> "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. However, the adoption of a new scheme requires amendment of the GSM Directive."

So they stress there obviously where they do not anticipate or desire Member States to be pulling in opposite directions.

Then at 324, having identified amendment of the old Directive as being the pre-requisite:

> "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."

May we just dwell for a short period of time on those two *desiderata*. First of all, timely: again, it is an emphasis that one finds in the subsequent Instruments on the need to implement by a due date without delay, etc. What we are now told by Ofcom is that their interpretation is that nothing need to be done at all until there has been comprehensive competition assessment which may lead to certain effects as to the amount of spectrum to be used by particular MNOs – open ended, no finishing point envisaged or specified. How, we ask, is this meant to be compatible with a timely introduction of the new spectrum usage. Harmonised: in those countries where there is legislation, and it is legislation that requires amendment, there is no escaping the fact that the imperative of Article 3 means that by or on 9th May that legislation, which imposes current restrictions as to GSM technology, will need to be amended to enlarge the permission to include UMTS technology. If that is done, and whether it has been done or otherwise in other Member States is neither here nor there, that is what the obligation is, then if Ofcom are right there will be a lack of harmony between the United Kingdom on the one hand and those Member States using the legislative implementation method which have complied with the obligation of Article 3. So we respectfully suggest that these kind of policy considerations obviously inform, or should inform, the way in which you approach, as you have identified it, Sir, of construction.

Then just at 511 one sees again the reference to the interests of consumers, as I say, not individually represented here.

At 514 again, new opportunities for mobile communications operators and for mobile users, in particular in rural areas. An unrepresented constituency, nonetheless must have their interests acknowledged.

Over the page at sub-para.(5) there is a reference to the competition considerations. It is obviously the predecessor of recitals (6) and (7). It is not articulated in exactly the same language, but nothing turns on it, in our submission, I just draw it to your attention.

We do, of course, accept and have never disputed that the legislation recognises that the easing of technical restrictions, albeit intended overall to maximises competition, may result in competitive distortions and that Member States are authorised to conduct a competition review and to take such action as their authorisation directive powers allow them to where they consider it appropriate. I am not going to go through all that again. You have the recitals, and our submission on the recitals, well in mind, but it is quite clear, in our submission, that the function of that part of the legislation – that is to say that which

envisages the possibility of regulatory intervention to adjust of anti-competitive effects is manifestly secondary to the primary function, which is the relaxation of technical restrictions in order to promote competition *inter alia*, but also to advantage the end user as well as certain operators. Certainly it is quite impossible to construe the Directive or the Decision of allowing competition considerations to trump the primary purpose I have identified.

Sir, if that is a convenient moment for you, it is for me.

THE CHAIRMAN: Very well, two o'clock.

(Adjourned for a short time)

MR. BELOFF: The third aid to construction, if that is the proper way of describing it, is of course to consider the literal meaning of the phrase "make available". Even in the context of community law, one need not detach oneself entirely from the ordinary and natural meaning of the words. As we have cited in our skeleton, the obvious meaning of "available" in this context would appear to be the dictionary definition of "capable of being made use of". Of course if that were right, it marries happily with our construction since the two bands to which we enjoy access would, in a real, effective sense, be capable of being made use of for UMTS technology once the technical restrictions are relaxed. Ofcom's construction with which we find it difficult to grapple sits most uneasily with what we say is the ordinary, natural meaning of the words because, on their construction whatever it may be, there is the obligation to make the bands available for UMTS technology by the D-date somehow can be satisfied without actually rendering them capable of being used by O2 or indeed by Vodafone.

In our skeleton, we have sought to suggest that the unusual construction of "made available" that they prefer is in fact unique to our knowledge among the various uses made of that phrase in various legislative contexts. We set out in para.71, p.31 of our skeleton, a variety of community contexts in which the phrase is used. Ofcom naturally and fairly retort that the context of those usages was different from the context of the present usage, so for our purposes all we say is that there is a remarkable or significant consistency of language. More impressive for the purposes of our argument is the language of earlier instruments, not in this instance discrete or separate, but in analogous fields. Those we cite at para.72 of the same document, p.31. Unless we have entirely failed to understand the skeleton argument of Ofcom, these remain wholly unresponded to.

Again, for brevity of submission, you will note that in earlier instruments there appeared to be a division of function. There would be an obligation on Member States, on the one hand,

to designate by a particular date and then subsequently to make whatever was designated available.

Indeed, we note that Ofcom, in its earlier consultation, took advantage of that division by recognising that they had a margin of discretion as to when to make certain spectrum available because subsequently, simply in terms of time, meant after without setting an end date to when that needed to be done. Of course, when they came to the consultation in 2009, faced as they then were with a draft which did not contain this dichotomy, they recognised then, though they have ceased to recognise now, that there was a significance in the difference between, on the one hand, using designation followed by making available and, on the other, simply making available without any kind of precursor.

In our respectful submission, the matter goes further than Ofcom's interpretation of the significance. What we respectfully submit is that, in this instance, using the concept of making available free standing of any concept of designating there is a conscious act of the community legislature to make concrete the date by which the spectrum is to be made available for the particular technology use in the Amendment Directive.

It is interesting, as you will no doubt have read with care the skeleton argument that has been produced by Ofcom, that in para.29 what they say in relation to this, what I might call, linguistic argument, though we say supported by proper contextual considerations, is on p.14, second last sentence:

> "The concept of making a particular frequency band available is a technical one specific to radio spectrum management."

At the moment, that remains an assertion supported by no illustration to confirm the interpretation that Ofcom seek to give to that phrase. In our respectful submission, one may juxtapose it to the passages that we have cited, in particular at para.72 which is indeed illustrative of a technical meaning attributable in this particular context, a technical meaning not divorced from but rather consistent with the ordinary and natural meaning.

Ofcom also rely in their defence on a variety of other documents and I will come, if I may, to those in due course. What they say to justify their *volte face* of interpretation on this point is that, when in the consultation document in February of 2009 they espoused exactly the construction that we now attribute to this critical phrase, there was an explanation for that. the explanation for that, as best they can contrive it, is to be found at para.11 of their skeleton argument.

What they said in a footnote was that it was based on a draft of the Directive as it stood at the time of the consultation. The draft did not contain the statement in recital seven of the

Amendment Directive that Member States are not required to modify existing rights of use or initiate the authorisation procedure.

With great respect, as an explanation, that falls far short of convincing and it may be the very fact that it is put in a footnote betrays a recognition of that fact. If I may resort for the second but last time to a canine reference, it is a classic example of seeking to make the tail wag the dog. What is more, it is premised of course on an entirely false construction, as I have already indicated, of what is meant by "modification of existing rights of use."

What we say in broad terms is that Ofcom's entire argument is vitiated by two fundamental errors. The first is to characterise our claim as to be entitled to deploy UMTS technology as if it were a claim to be entitled to be awarded a right of use of particular radio frequencies. We make no such claim. We need to make no such claim. We have already been awarded a right of use of the relevant radio frequencies within the two bands with which the Tribunal is familiar. That is the function and product of its licence. At the moment, that right of use is subject to certain technical conditions limiting our use to use for GSM systems. Our respectful submission is not that we are entitled to be awarded a third right of use of radio frequencies at all.

All we are saying is, granted that we have those rights of use, granted they have not been revoked, qualified or re-allocated, we are entitled by reason of the imperatives of the Directive and decision to have those restrictions removed. It is all about harmonisation. It is nothing to do at this juncture with allocation or assignment. The difference between the two concepts is one which is common ground between the parties. Therefore, it avails Miss Rose and Ofcom not at all as they do in referring in their defence to various other instruments, the proposal for the Directive which is stated not to affect the issuance by Member States of the right to use spectrum. They refer to that in their defence at para.32. They refer to another document emanating from the European Economic and Social Committee that the introduction of new operating conditions for radio spectrum is without prejudice to the grant of spectrum use rights.

We are not concerned with the grant of spectrum use rights. We already enjoy those. We simply request - and are entitled to be accorded a positive answer to our request – that the new, harmonised, technical operating conditions for these bands be respected and acknowledged in an amended licence.

I have already dealt in answer in particular to questions, Sir, from you as the Chairman as to what the proper meaning of modification of existing rights is in recital seven of the Amendment Directive. It is a matter on which there obviously is a division of view and

much emphasis, as you will have noted, is placed both in the defence and the skeleton argument of Ofcom on that phrase.

I would add this to what I have already said: the Directive itself has already required removal of the restrictions inhibiting use of UMTS on these particular bands. That being so, there is nothing further on the technical front that Ofcom could, as regulator, modify. That further supports the proposition that modification as a concept in this context can only apply to removal or amendment of spectrum rights.

We have also dealt, I hope sufficiently, with the fact that Ofcom's interpretation would produce fragmentation rather than harmony. I have already pointed out that if those Member States pay for their community obligations which have used the legislative technology impression technique so that what they need to do is to amend their primary legislation, so that their licensees enjoy the benefit of the new technology, if that is done as it must be done by 9 May and yet Ofcom are right that in a Member State which uses another form of implementation there is no obligation to allow the technology to be used as from that date, there would in fact be a disparity within the community.

It is notable that in H3G, who produced some evidence on this point, we are told that Latvia has indeed amended its legislation. This is at para.33 in volume four. Ofcom note this. They do not dispute it. What they say is that Latvia must have made a pre-judgment and assessment of the competition issues and we are therefore comfortable in amending the legislation, to which our response is there is no evidence of that and, in any event, their hands were tied. Using that particular model and given the imperative of the direction, if they were faithful to their community obligations, they had no choice.

The last point, which I owe to those instructing me, is this when you consider what is meant by, in particular, administrative provision. When the unamended Directive, the one that you have at the first tab of bundle one which we looked at, the first harmonising measure relating to G2 technology was concerned, the way in which that was brought into force in the United Kingdom was of course by provision of relevant restrictions in the relevant licences. That was the method of implementation and it would be very curious if a different methodology were to be used under the Amendment Directive. I think it would be very curious if in those circumstances one gave the reference to administrative provision any meaning other than that which does in fact embrace a licence condition.

There are other cases. It depends on whether Miss Rose seeks to pursue some argument that administrative provision and licence conditions are separable and one does not embrace the other. There is jurisprudence showing in other areas that the whole purpose of the

community legislation is not to be discriminatory between various methods by which implementation should be carried out in Member States, even for example in one well known case dealing with the Working Time Directive. An effective agreement was considered to be within the ambit of the way in which the national law was being applied. From its vantage point as it were the community institutions regard the way in which it is done in Member States as being very much a matter for them as long as they do it in some way and as long as when there is a community obligation imposed on them they take the relevant steps, whether by legislation, whether by regulation, whether by amendment of licence conditions, whether in overriding a collective agreement or otherwise, to implement what is in fact the obligation.

Ofcom place considerable reliance in their defence at para.39 to 40 on a working document of 23 June. You have that again annexed to item three, annexed to the defence. I considered in particular, conscious of the hour, over the short adjournment whether there is anything that I can say that is not actually said in para.67 and para.68 of our skeleton argument at pp.28 and 29. I have come to the conclusion, with which I hope the Tribunal will be happy, that I could find nothing there said that I would not be aimlessly repeating. May I absorb that by cross-reference within my submissions?

The second point that Ofcom makes, apart from the meaning of "making available" is to say that the argument that we advance, that we should have been entitled to deploy UMTS on these particular bands as from 9 May, would go against the legislative purpose of promoting competition.

Again, the Tribunal has my submissions no doubt well in mind at this juncture. They have been developed in the course of argument and discussion before the short adjournment. Just to summarise extremely briefly, the legislation recognises that liberalisation to allow UMTS deployment could, but not necessarily would, give rise to competitive distortions in national markets and they require at some point NRAs like Ofcom to review rights of use in order to address any such distortions.

We have already submitted that there is no requirement that the competition assessment should precede the relaxation of technical conditions, although accept that it might take place before that. It would have been open to Ofcom, had they completed any consideration of competition considerations and formed an evidenced and rational view that the response was in some way to reallocate spectrum or take some other course. They could have done that at any rate from the date of liberalisation, but we say they have not done so. They

cannot now take advantage, if the contrary construction be right that the should have done it before, of their own wrong in then postponing our right.

The oddity of their construction, a point I would like to leave you with, is this: if making available, as they would have you accept, does not itself have any effect on existing rights of use, such as those enjoyed by O2 and Vodafone, then *ex hypothesi* it cannot result in any distortion of competition. That is not merely a matter of the vocabulary of the Directive and its recitals. "Making available" can only mean taking of action by Ofcom that would or could result in distortion of competition and that can only be, as far as this Directive is concerned and this decision is concerned, by the liberalisation for which we contend.

That is all I wish to say in relation to Ofcom as a response, as we understand it to date. I mean no disrespect at all to my learned friends, Miss Carss-Frisk or Mr. Fordham, in saying that. We have dealt with the points that they have raised in their intervention in our skeleton argument, as far as H3G is concerned, between paras.27 and 29 and, as far as EE is concerned, between paras,30 to 31. They are following, if I may put it without any kind of pejorative implication, very much in Ofcom's slipstream as far as the points of construction are concerned.

There are just two additional points that I would like to make in relation to H3G. If you could take up the volume which contains the intervention notices and turn to H3G, you will see at para.77 it is stated that the complexity of the debate – that is the debate about how to respond to any competitive distortions that may result from any liberalisation – supports the argument that making the bands available for UMTS cannot simply result in automatic conferral of rights upon individual operators.

In our respectful submission, there is in that observation a simple *non sequitur*. It is of course true that a resolution of the debate may have certain consequences. It may be that nothing will be done. Maybe there will be reallocation of spectrum. It may be that new entrants will be permitted to enter. Who knows? There is no indication that the very complexity of the debate can justify a refusal of liberalisation.

The other point I would like to make refers to para.80, where it is said that Ofcom is entitled to take account of the draft directions when considering our licence modification application and to postpone any decision on that application in the light of the draft directions. They cite two cases. The cases are, if they are elaborated by my learned friends, in entirely distinct contexts.

If we are correct that we have a directly effective right, then in our respectful submission the fact that there may be draft directions or other indications of future legislative action is

neither here nor there. It cannot be a reason for Ofcom delaying decision on our application. If, on the other hand, we are wrong then the argument of course is, with respect, an unnecessary one.

Finally, before coming to questions of direct effect and consequential relief, can I just say that we have had the advantage of Mr. Woodrow's and Miss Ampah's skeleton on behalf of Vodafone which has been made available to us, as it has the Tribunal. I respectfully adopt with certainty the submissions made in that document and equally with confidence the submissions that Mr. Woodrow will shortly deploy before you.

Can I then deal by way of final submission with the consequences flowing from the obligation to make available if construed as we wish it to be construed? What we say is that the right to have removed technical restrictions on our deployment of UMTS in our licence is sufficiently precise, clear and unconditional to carry direct effect. If that is so, it means that Ofcom is obliged to give us the licence variation that we sought.

In answer to Professor Pickering this morning, there is an interesting case that I would venture just to show you about the significance and consequences of a directly effective right. This is the *Melgar* case at 27(B). This is a discrimination case and rights of pregnant women, a somewhat discrete circumstance but nonetheless the European Court of Justice did explain what the consequences of an effectively direct right were to be at para.31 through to para.34, p.10 through to p.11 of the judgment.

> "By its first question, the national court asks whether Article 10 of Directive 92/85 can have direct effect and is to be interpreted to the effect that, in the absence of transposition measures taken by a Member State within the period laid down by that Directive, it confers on individuals rights on which they may rely before a national court against the authorities of that State.
>
> 32. It is settled case law that Member States' obligations arising from a Directive to achieve the result prescribed by the Directive and their duty, under Article 5 of the EC Treaty … to take all appropriate measures, whether general or particular, to ensure fulfilment of that obligation is binding on all the authorities of the Member States … including decentralised authorities such as municipalities …
>
> 33. It must therefore be concluded that the provisions of Article 10 of Directive 92/85 impose on Member States, in particular in their capacity of employer, precise obligations which afford them no margin of discretion in their performance.

> 34. The answer to be given to the first question must therefore be that Article 10 of Directive 92/85 has direct effect and is to be interpreted to the effect that, in the absence of transposition measures taken by a Member State within the period prescribed by that Directive, it confers on individuals rights on which they may rely before a national court against the authorities of that State."

What is interesting, in answer to Professor Pickering's question, is that actually you were, if I may say so, Sir, quite correct in saying that we have the right even if transposition measures have not been taken here by Ofcom. Nonetheless, what is also clear from these paragraphs is it is anticipated and expected that the relevant authorities must embark upon transposition measures even if the right is a directly effective right.

The reason we say that this right is directly effective is that, given that we enjoy these particular bands, they can only be made subject to certain conditions of the kind that are referred to in Article 6.1 and Parts A, B and C of the Authorisation Directive which I drew to your attention before the adjournment.

The whole purpose of the Authorisation Directive is in fact to ensure that the nature of the conditions that can be imposed is narrowly circumscribed and that no conditions other than those that fall within that narrowly circumscribed range can be imposed. We make two points on the Authorisation Directive. One is in fact that it is supplementary or complementary to our point on law. On the assumption of course firstly that what we say about "making available" is correct, it is unlawful to continue to impose conditions on us that no longer vouch for and indeed are hostile to community law. Even if that were not so, we would actually say that, even if they are not unlawful, they cannot be objectively justified as the Authorisation Directive required because the community has already determined that this particular technology should both be neutralised and harmonised. Therefore, whatever conditions can be maintained, a condition which appears to outlaw the deployment of that technology cannot be justified.

Apart from that, we also suggest that the Authorisation Directive makes it clear that the rights that are conferred by reference to it and in the context of any Directive of the kind with which we are concerned with conditions are directly effective rights. The whole purpose of Article 6 of that Directive is to provide operators in this sector with concrete rights to object to licensing or regulatory inhibitions that do not comply with what the community instruments lay down as being appropriate restrictions.

These are the last authorities to which I will need to refer you. We can gather that from two cases, both of which are on predecessor Directives to the Authorisation Directive. This is in

the authorities bundle. Firstly, the *Albacom* case which is authority 29. These were all to do with a predecessor Directive. It was concerned with also the liberalisation of the telecommunications sector and the issue there was the charges that were proper to be imposed upon licence holders.

Between paras,30 and 42 one sees that the court wrestled with the issue as to whether or not the contested charge imposed in that instance by the Italian Government was contrary to the objective of the particular Directive therein, 97/13. They come to the conclusion that it was not in para.42. Without asking you to read the entirety now but just directing your attention to the entirety of those passages, one notes in para.38 that the Advocate-General argues in his opinion that the common framework of general authorisations and individual licences for telecommunications services which the directive seeks to establish would be rendered redundant if Member States were free to establish the financial charges to be borne by undertakings in the sector.

Again, one has the sense of harmonised, across community implemented Directives and that they confer individual rights upon licence holders not to be burdened with financial charges that are outwith the reach of the Directive itself.

A successor case to that is the *Arcor* case at tab 31, a similar Directive, a similar general issue. Again, if one takes it up at para.38, there is an intervention in relation to Deutsche Telekom. At 39:

> ""Having regard to the foregoing, the Court must determine whether Art.4c of Directive 90/388 and Art.12(7) … fulfil the conditions necessary to produce direct effect.
>
> 40. It is clear from settled case law that, whenever the provisions of a directive appear, so far as their subject matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the Member State where it has failed to implement the directive correctly …
>
> 41. First, the third paragraph of Art.4c of Directive 90/38 satisfies those criteria, given that it is clear that tariff rebalancing must, as a general rule, be completed before …" a particular date, "… or at the latest by …" another date, "and that that obligation is unconditional.
>
> 42. Secondly, the same is true of …"

another Article and another Directive –

"since the provision defines the restrictions to which charges such as those at issue in the main proceedings are subject.

43. Consequently, the provisions …" of each Directive, "fulfil all the conditions necessary to produce direct effect."

One has there an exact analogy. One has substantive provisions which define strictly the kind of restrictions to which charges can be made subject and, because of that, they are considered to be sufficiently precise to engage the concept of direct effect. The position is exactly the same here if we are right in our construction of the GSM Amendment Directive. The restrictions that thereafter its implementation are to be imposed are strictly defined. They do not include an inability to use UMTS technology on these particular bands and therefore, in our respectful submission, being both unconditional in that sense and sufficiently precise, they are directly effective.

In our respectful submission, that being so, the only issue that falls to be considered is the issue of relief, subject only to another argument that was put forward in H3G, para.80, saying, why do we not wait and see what the legislature or the Minister is going to do. Again, you have my submission. It was as pertinent to the draft directions in February as it would be to any directions that may emanate later this week. If we have a directly effective right, that must be given paramount implementation above anything that appears to contradict it. Anything that appears to support it of course we gratefully accept.

There is only one other very minor matter. You may have noted in para.36 of the skeleton argument of Ofcom that Ofcom suddenly say that, where we put forward our application for variation several months ago, the response had made no possible complaint about the way in which we sought to draft the proposed variation in terms of the technical standards. They should say, for the avoidance of doubt, Ofcom should not be taken to have accepted the terms of O2's proposed licence variation.

You will not be surprised to learn that those instructing me were immediately concerned that at a late stage some yet further argument appeared to be advanced as to why the court should not be able to grant us immediate relief and the response – we have a copy if needs be but I can recite it to you after what I might call the conventional, forensic badinage – simply says this materially: if O2 succeeds in its appeal, Ofcom would of course engage with O2 as to the precise formulation of any variation. Ofcom considers that it ought to be possible to conclude and effect any such process in a short period of time. For what we take it to mean, that reservation is: we cannot think of anything yet but we want to reserve our position in case we can. You may be consoled that our view is it is really not going to

postpone anything, so this issue about technical standards, as we understand it, evaporates. One is left then with: if we are right, a directly effective right and the relief that we seek consequent and necessarily and appropriately consequent upon that is set out in para.79 at pp.34 and 35 of our skeleton argument.

I need not recite and repeat but merely adopt that as the target of what we respectfully seek from this Tribunal. Unless I can assist you further, those are my submissions on O2's behalf in support of the appeal.

THE CHAIRMAN: Mr. Beloff, you actually do not seek an order lifting the restrictions. You simply seek an order with a direction that within an appropriate period they should exercise its powers of licence modification.

MR. BELOFF: Yes, and thereby lift the present restriction. It is just simply the usual respect that one pays for example to judicial review for who is the decision maker. It achieves the same effect.

THE CHAIRMAN: Do you want to specify? Do you say that the period should be specified as appropriate or do you just say it should be ----?

MR. BELOFF: We obviously say as soon as practicable.

THE CHAIRMAN: Do you say it should be 7 days, 14 days?

MR. BELOFF: I was about to say we proposed 14 days in sub-para.(3). I was going to say already several months have passed and seven should be sufficient but if those who drafted this are not with me at 14 I am not, unlike Ofcom, going to resile from the position previously taken.

THE CHAIRMAN: Thank you. Mr. Woodrow?

MR. WOODROW: I appear on behalf of Vodafone. We will not seek to duplicate what Mr. Beloff has said and the points that he has made but we would like to make a few additional points to address the key question in this case: what Ofcom or the UK authorities actually were obliged to do on 9 May in order to implement the GSM Amendment Directive. I am not sure that that question has actually been answered by Ofcom yet. As we see it, if we turn to the GSM Amendment Directive itself, which is at tab 11, Article 1 if I paraphrase I think requires three steps to be taken, whether it be by the Department for Business or Ofcom as appropriate. First of all, there is an obligation to make available the 900 MHz for UMTS.

We have had a debate about whether that means to liberalise, to remove legal or administrative obstacles, but we will come to that in a minute. One point I would like to

make is that that is an absolute obligation. It is not conditional. The Directive says that Member States shall make the band available.

Step two is there is an obligation to perform a competition assessment in Article 1.2. That is to identify any distortions that may result from liberalisation and determine what redistribution of spectrum should take place if there is a distortion which is identified. Again, this is not conditional. It has to be done. A decision has to be taken on whether remedial measures are necessary. That assessment has to be done under Article 1.2.

There is a third step. That is an obligation to address distortions that have been identified but only where justified and proportionate to do so. This would require the clearance of any spectrum to be vacated. I should point out that that is not a trivial task in relation to the European Commission's decision in relation to the creation of the T-Mobile Orange joint venture. Two years was allowed to clear the spectrum. It was required to divest as a condition of clearance. I just emphasise that this is an exercise which takes time. It would also require the withdrawal or modification of the licence and reallocation of spectrum through an authorisation procedure, whether by auction, comparative tender or otherwise.

Ofcom makes the assertion in para.35 of its skeleton, tab seven of your working file, that contrary to that assertion in para.35 of its skeleton it is clear from the plain language of the Directive that, in our submission, the steps envisaged are separate and only the final step is conditional.

The first two steps are unconditional. Article 3 then requires the UK to bring into force the laws, regulations and administrative provisions that are necessary to comply with this Directive. If we think about what the UK had to do by 9 May, I think everybody agrees that step three, in terms of the actual allocation procedure or authorisation procedure for the spectrum, in terms of awarding it, taking it away and then awarding it to another party if necessary, did not need to be completed by 9 May because it is clearly conditional and would take time to clear the spectrum, conduct the auctions, etc.

Indeed, such a process must also be proportionate. Ofcom must take into account the effect on the existing licensee when deciding the deadline for clearing any reallocated spectrum. There is therefore no obligation to complete the authorisation process before 9 May and I think everybody agrees on that.

In relation to steps one and two, liberalising the spectrum and conducting the competition assessment, ideally Ofcom should have done that all by 9 May in order to comply with the terms of the Directive. This appeal is only necessary because Ofcom, apparently on the

instructions of the Department for Business, did not do either step one or step two by 9 May.

The question we are left with is what did Ofcom actually have to do by 9 May. If we turn to Ofcom's defence, para.62, bundle three, Ofcom says that there were a number of options available there. It identifies two. If I paraphrase them, they are to liberalise all the relevant spectrum in the hands of those who held it or, secondly, to liberalise all the relevant spectrum but decide to reallocate some or all of it to other parties.

It does not suggest any other options but it did not take either of those options and to date has done nothing to implement the Directive. Hence the reason that we are here. Ofcom makes two arguments why it had nothing to do on 9 May. Firstly, it distinguishes the obligation to make available and the process of licensing, allocation or assignment. Mr. Beloff has talked at length about that. Secondly, it argues that the Article 1.1 obligation to liberalise cannot be directly effective because the obligation is conditional.

In relation to the second point, Ofcom argues that the liberalisation is subject effectively to a condition precedent, that a competition assessment has been completed and a decision taken under Article 1.2, whether the redistribution of some or all of the 900 MHz spectrum, because of the risk of a distortion to competition, was necessary.

Thus, any decision on redistribution must happen at the same time or before liberalisation for the risk of having a distortion of competition pending any redistribution.

We have a number of comments to make on these arguments. I would make very brief points in relation to the first one. The first one is in relation to the meaning of "making available". If we go back to the original GSM Directive which is tab one of the bundle, it was adopted under Article 100, now Article 115, of the Treaty for the function of the European Union. It is clearly a harmonisation measure. It is for the approximation of laws and we went through the implementation provision, Article 4, which said that Member States shall bring into force the provisions necessary.

I am not sure whether it is in the bundle – in fact, it is not – but if you go back to the original wording of the Treaty Article which underpins the GSM Directive it says that Member States shall adopt an approximation of the provisions laid down by law, regulation or administrative action. That then is consistent with the wording which is also in the GSM Amendment Directive which is actually under Article 114, the former Article 95, and that again refers to administrative provisions. Administrative provisions are clearly an anticipated method of implementation of the Directive.

As we have discussed before, the GSM Directive obliged Member States to ensure that the appropriate bands, the 900 MHz bands, are reserved exclusively to the GSM system. The obligation is to bring into force the provisions necessary to comply. As Mr. Beloff said, the UK implemented the restriction to UMTS usage by using restrictions in the licences of Vodafone and Cellnet which of course is now O2.

These licence restrictions are clearly public law instruments or administrative provisions as contemplated by the Directive. Mr. Chairman, you were asking whether there was any authority for the meaning of administrative acts, provisions or the actual status of the licence and I hope that we can assist on that. If you turn to tab 33 which is *Data Broadcasting International Limited v The Office of Communications*, this related to licences under the Broadcasting Act but I think the point is relevant here and helpful. If we look at para.88 which is on p.17 at the top under, very helpfully, heading (b), "The licences are public law instruments." Mr. Justice Cranston goes on to say:

> "In my view these licences are not contracts."

The debate in this particular case was whether they were contracts or some other form of public law instrument or act.

> "A contractual analysis distorts their juridical character. The licences are public law instruments."

I think that is very clear. In relation to the *Floe* case which Ofcom has cited in its response, that is the preceding tab, 32, if we go to para.103 of Lord Justice Mummery's judgment in that case, again:

> "The decision of the national regulatory authority to grant a licence and the carrying out of that decision is an administrative act done under and in accordance with the law."

I think it is clear that the licence is not a private law agreement. It is not a private law contract. It is a public law instrument or an administrative provision and therefore we would submit that it comes within the ambit of what is required to implement the Directive and what is required to amend the Directive.

Ofcom argues that the requirement of the Directive is just to remove legal obstacles to the deployment of UMTS and it does not extend to restrictions in the licence because they are not law. As Mr. Beloff I think has said, it would seem illogical when the form of implementation of the original Directive was restrictions in the licences. We would submit that this should not be a situation where the form of the implementation might defeat the

substance of the reform that the GSM Amendment Directive is aimed to deliver, which is to make UMTS 900 truly available.

Ofcom argues that it is only because of the choice of that mode of implementation that the UK is not obliged to liberalise 900 MHz band for use with UMTS technology. I would go further to say that the effect of that argument is that Ofcom never has to amend O2's or Vodafone's licence, or at least there is no time limit to implement it and it would never be under an obligation to do so. In Ofcom's view, the UK has already complied with Article 1.1 by doing nothing and so has no obligation to remove the licence restrictions and could frustrate the roll out of UMTS systems if it so wished.

I am not sure whether it can be right that a piece of harmonisation legislation should falter because of the choice of the original method of implementation.

One other point that I would make in relation to the *Floe* point. *Floe* is cited for various other reasons I think by Ofcom which I will not go into. One of the reasons in that case why they looked at the difference between a licence and the law in terms of statute or statutory instruments was that one of the features that distinguishes a licence from legal rules is that licensing decisions are made voluntarily. In para.104 of *Floe,* Lord Justice Mummery makes the point that licences may be different from a statute or statutory instruments because they have this element of being made voluntarily; whereas legal rules oblige the state entity to act in a particular way.

In this case, Ofcom does not have a choice whether to liberalise and allow the use of UMTS in the 900 band. It is mandated by the Directive. That brings me on to the second point that I would like to come to, which is the argument that liberalisation is conditional on the competition assessment being completed.

I think everybody agrees that a competition assessment has to be done in order to comply with Article 1.2. I do not think anybody is disputing that the impact on competition also has to be considered under Ofcom's broader duties under the European framework that we have discussed.

I also think that everybody agrees that it would have been fully compliant with the Directive to have completed the competition assessment before 9 May so that any reallocation procedure that might be considered necessary could commence immediately thereafter. Unfortunately, we are not in that position. The question is whether the Article 1.1 obligation to liberalise should have been complied with by 9 May in circumstances where the competition assessment has not been completed and a decision on any need for reallocation not yet taken.

The first point that I would make in that regard is that 9 May was a long stop date for implementation of the Directive. The spectrum could have been made available and the licence restrictions removed before 9 May. We debated earlier when the six month period for implementation started but effectively there was a window between 9 November and 9 May in which the spectrum could have been liberalised. If that had occurred, if the liberalisation had happened earlier, the competition assessment could have been completed later but before 9 May and still have been fully compliant with the Directive.

Ofcom's argument is that this would not have been compliant with the Directive because the competition assessment is part and parcel of the implementation obligation and it had to be completed at the same time or before liberalisation. We do not think this is correct and we do not think it is consistent with Article 1.2 and recitals six and seven which we discussed this morning.

We do not consider that it was necessary for the competition assessment to be completed for liberalisation to go ahead on 9 May, although it would have been desirable and fully compliant with the Directive. As I said earlier, everybody agrees that the second half of Article 1.2 in terms of any reallocation – my step three as I described it at the beginning – does not have to be done by 9 May. In fact it could not have been done for the various reasons I stated earlier in terms of the time required to complete it. There is also nothing that states that the competition assessment had to be completed before liberalisation either.

If we look at the recitals, we submit that recital seven shows that the competition assessment is more relevant to the allocation process. If we go back to tab 11 where the GSM Amendment Directive is included, this is because it says that the authorisation procedure and its concomitant competition considerations under the Authorisation Directive and the framework Directive should occur once the 900 MHz band has been made available in accordance with the Directive. This is in the middle of recital seven. Recital (7) then goes on to say that in doing so – and we would submit that that refers to conducting the authorisation procedure – Ofcom should in particular examine whether the implementation of this Directive could distort competition etc. and if necessary address any distortions. We would suggest that it is at least contemplated that the competition assessment, like the reallocation procedure, could follow liberalisation so we would submit that the obligation is separate rather than being a condition precedent for liberalisation itself.

It is also important to note that in the GSM Amendment Directive the competition examination is always mentioned explicitly in the context of the Authorisation Directive process.

We would direct you to recitals six, seven and Article 1.2 itself. It is agreed by all parties that the liberalisation process and the authorisation process are separate and they should not be conflated. The language of the GSM Amendment Directive merely signals to the Member States the framework and the tools to be used to address any competition problems subsequent to the unconditional obligation to liberalise.

The second point I would make in relation to conditionality is that Ofcom does not have any discretion whether to liberalise. The decision was taken in the GSM Amendment Directive by the EU legislators that all 70 MHz of 900 band spectrum and all 144 MHz of 1800 MHz spectrum would be liberalised by 9 May to allow the use of the UMTS technology, period. That was an unconditional obligation. Whatever the result of the competition assessment, which nobody disputes has to occur, and whether or not it was completed before or after 9 May, Ofcom and the UK Government are under an obligation to make available and remove all legal and administrative obstacles to the use of UMTS on those 70 MHz of 900 band spectrum.

Ofcom's conclusion to the competition assessment cannot be, "We will not liberalise that spectrum." The obligation in Article 1.1 is to liberalise. There is no choice. Nor can they decide to liberalise some parts of the relevant spectrum but not others. It all had to be liberalised by 9 May. That is what Article 1 says. Ofcom also could not choose when to liberalise because the deadline was set and it was 9 May. This is clear and unconditional so as to give rise to a directly effective right, in our submission. The legal and administrative obstacles to the use of UMTS and these bands had to be removed by 9 May.

The only discretion in the GSM Amendment Directive is in Article 1.2 and pertains to whether there should be some redistribution of that spectrum in terms of the reallocation process. That does not change the unconditional obligation in Article 1 which was to liberalise.

Contrary to Ofcom's assertion in para.17 of its skeleton which I think is in your working file at tab seven, Ofcom says that competitive conditions may supply justification for not immediately liberalising spectrum. I do not think Ofcom can point to any provision in the GSM Amendment Directive that stipulates circumstances where the 900 MHz band should not be liberalised and should not be made available. The Directive mandates that it is made available by 9 May and Member States must take all necessary steps to ensure that this is the case.

It is telling that the Directive does not say liberalise where justified and proportionate. This language only appears in relation to my step three, the reallocation process where measures

can be taken that are deemed necessary to address any distortions to competition which have been identified.

If 3 or Everything Everywhere or any other party considers that there may be a distortion of competition as a result of liberalisation, we would submit that they should be urging Ofcom or the Department for Business to complete their competition assessment expeditiously and take a decision whether any remedial action should be taken under Article 1.2.

However, we would submit that, for the reasons that the European Commission set out in concluding that Everything Everywhere must divest a significant amount of its spectrum as a result of the merger of T-Mobile and Orange's spectrum holdings, Vodafone does not consider that it has any material, competitive advantage in its spectrum holdings that would justify such a reallocation. I do not think that is a matter which the Tribunal has to consider today. It is purely an issue of whether the obligation to make available had direct effect.

Thank you.

THE CHAIRMAN: Thank you very much.

MISS ROSE: As you have heard more than once today, the GSM Amendment Directive and the 900/1800 decision require Member States to make available the 900 and 1800 spectrum for the purposes of 3G mobile technology, also called UMTS. O2's case in a nutshell is that because O2 already has a licence to use spectrum in those bands for one particular purpose – that is, for 2G GSM purposes – the effect of the GSM Amendment Directive and the decision is to bestow upon them an absolute and directly effective right with effect from 9 May this year to use the same spectrum for a different purpose, the UMTS or 3G network. They say that they have a right to the amendment of their licence by the removal of what they call the restriction, restricting them to GSM technology, whether or not the amendment of their licence in that way would cause distortions to competition in the market. They say that Ofcom is simply not entitled, when considering their application, to amend their licence even to take into account or assess the effects of the amendment of that licence to permit them to use that spectrum for UMTS or competition. That is their case.

We submit that that position is not mandated by the wording or the purpose of the Directive or the decision and that in fact it is contrary to the clear purpose of the European legislation and indeed contrary to one of the primary purposes of common regulatory framework which governs the regulation of electronic communications across the European Community and is embodied in the Framework Directive and its accompanying suite of specific directives. The intention of the legislation, we say, is to ensure that Member States remove legal obstacles to the use of these particular spectrum bands for UMTS, the purpose being that

across the European Union the 900 and 1800 bands previously restricted only to GSM use will not be available for UMTS as well. That is the purpose.

The purpose is not to grant a right to any individual undertaking or operator to use particular spectrum for UMTS. Those two purposes are not the same. It does not follow – and the whole of O2's and Vodafone's case hinges on their equation of those two things – from the fact that the United Kingdom is required to make the 900 and 1800 spectrum available for UMTS that O2 has the right to use the spectrum for UMTS any more than any other undertaking.

There is nothing in the legislation that gives O2 that right simply because it is O2 which happens to have a licence to use that spectrum for a different purpose at the date that the new legislation comes into effect.

On the contrary, we submit the whole scheme of the legislation expressly recognises – and we say "expressly" advisedly because we say it is very clear from the legislation – that the effect of broadening the uses to which the 900 and 1800 spectrum may be put could be to give an unfair competitive advantage to operators that historically were granted the use of this spectrum for another purpose, namely GSM. The legislation therefore envisages that the implementation of the new regime under the new Directive will involve two processes: the removal of domestic, legal barriers to the use of this spectrum for 3G technology and the taking of decisions in relation to individual licences as to whether they need to be modified, whether spectrum needs to be reallocated and so forth in order to avoid any distorting effects on competition.

Those two processes are both envisaged as being a part of the implementation of the Directive, Article 1.1 and Article 1.2 of the Directive.

We submit that on that interpretation O2's case is fundamentally inconsistent with the purpose of the Directive. Putting it simply, if Ofcom could implement this Directive by removing all of O2's spectrum and having it auctioned or gifting it to another operator, then it cannot be the case that this Directive gives to O2 a directly effective right to use the spectrum, because there are different ways in which the Directive may be implemented so as to avoid distorting effects on competition.

I want to say a few words, before I turn to the specific point of construction, about spectrum and the management of spectrum because the legislation has to be understood in the context of what radio spectrum is and why the management of its use is so important across the European Union. Radio waves can be broadcast at different frequencies and they have different characteristics at different frequencies. In particular, the 900 spectrum is

particularly suitable and useful for mobile telephony because it travels a long way and it penetrates through walls, so you can pick up the signal easily if you are inside a building and you do not need so many mobile base stations to boost the signal. That means that the 900 spectrum is particularly attractive.

The problem with spectrum is this: that if more than one person is broadcasting a signal over a particular frequency in a particular area the two signals will interfere with each other. What you get is interference which we are all familiar with from listening to the radio when we tune the station in wrongly or another station interferes with your station. That means that you have to manage the use of the spectrum by ensuring that particular grants are made to individual operators to use particular band width over particular areas for particular purposes and that there are buffer zones between the different allocated chunks of spectrum to ensure that there is not interference.

This means that spectrum is a limited resource and it is very valuable. As you have seen from the evidence in this case, the mobile phone operators are coming up against the problem of a lack of capacity on their existing networks, particularly as people become more used to using mobile broadband services which involve much bigger transfers of data so they need more spectrum. Everybody wants spectrum.

What O2 is essentially seeking to persuade the Tribunal is that the effect of this Directive is to give them individually, as a single, individual operator, because they historically were given this particular spectrum for their 2G network, an absolute right and priority to have it from the date of 9 May, regardless of what effect that will have on other mobile operators in the UK who did not have that benefit. We submit that is completely inconsistent with the whole structure of European law and in particular in this field, and contrary to the express wording of the Directive.

In the UK, as the Tribunal will have seen, there are now four competing mobile operators. There were five until Orange and T-Mobile merged. Each of them has licences to use particular bands of spectrum. The oldest of the MNO's are Vodafone and O2, you can see over at this side of the court, acting in the public interest for rural, isolated consumers and they got their licences in 1985. They were each given 900 spectrum.

Over on this side of the room is Everything Everywhere, formerly Orange and T-Mobile. They got their licences in the early 1990s and they got 1800 spectrum, also for the 2G network, also acting in the public interest, Mr. Fordham tells me.

Finally, we have the new boys, H3G, who entered a vastly over priced auction in the early years of this century in which all of the mobile operators paid massively over the odds for

spectrum in the 2100 band for the 3G networks. H3G only has a 3G spectrum in that band width and does not have any 1800 or 900 spectrum. That is the reason why Ofcom has spent the last three or four years trying to resolve the very complicated competition problems that arise from the proposal to liberalise the 900 and 1800 spectrum because what you have is essentially three camps who have the incumbency over different tranches of spectrum and who therefore have different commercial interests in what happens to that spectrum once its use is no longer restricted to the 2G network but it can be used for 3G. We submit that it simply is not right that O2 can seek to short-circuit the whole of that complicated process and say, "We have a directly effective right because we were holding the spectrum when the music stopped."

THE CHAIRMAN: Unless it means what they say it means.

MISS ROSE: Yes, but of course the submission that I make is it is quite surprising if that is what the European legislator intended. The submission that you have just heard from Vodafone is, oh well, Ofcom had six months to sort this out. We submit that, given the complexity and the difficulty of the competition issues that arise, it is with respect most unlikely that the intention of the European legislature was that all of the competition issues that may arise in relation to the effects of liberalising this spectrum were to be resolved in the six month period between October 2009 and May 2010.

You have seen what has actually happened which is of course that Ofcom conducted a prolonged and inconclusive consultation process. The Government then stepped in, appointed the independent spectrum broker. There was then a further discussion. A policy was adopted which was then embodied in the draft order and then the general election intervened.

One point that was made by Vodafone was that there are only two options. Either you liberalise all the spectrum in the hands of O2 or Vodafone or you reallocate it. As a matter of fact, there were many other options and you can see one of the options embodied in the draft order itself because what that draft order provided for was that O2 and Vodafone should keep their existing 900 spectrum. There would then be an auction of further spectrum that had become available in the 800 band which has similar propagation characteristics to the 900 band; and that there should be a cap placed on the overall holding of spectrum that individual operators were permitted to bid for in that band, so that in that way there would be attempts to balance the competing competition interests.

Whether that is or is not the solution that is finally adopted by the Government – and we all await with bated breath the new draft order which is due to appear tomorrow – we do not

know. The point is simply that you cannot say there is only one way the Directive can be implemented or there are only two ways the Directive could be implemented. What you have in particular in the United Kingdom because of the history of the way that the mobile telephony market has developed is a complicated situation in which the resolution of the competing competition interests is a difficult and complicated issue.

THE CHAIRMAN: Even if they are right, the Government could still legislate for the kind of solution that you have suggested they were going to put in place before.

MISS ROSE: Of course they could, Sir, yes. I am being told very firmly that, for the avoidance of doubt, we are not making any comment on the Competition Commission in the market or the way in which the spectrum should be made available. You may or may not think that there is some history behind that comment.

One thing I can say with some certainty is that whatever decision is made by the Government tomorrow it would probably be worth anybody's while to make a bet on somebody judicially reviewing it, because the commercial interests that are at stake here are massive. Whoever feels that they would lose out when the decision is made tomorrow is likely to go to court.

THE CHAIRMAN: You are not encouraging them to?

MISS ROSE: I am certainly not, no. It would be wonderful to put the spectrum behind us. We submit that, given that context – and that of course is the context in which the Amendment Directive was made – it would be very surprising if it really was the intention of the European legislator to cut through that whole process and to give those who happened to be the incumbent operators with their hands on the 900 spectrum the absolute right for which O2 contend.

Before I come on to the interpretation of the legislation, one more preliminary point which we say is, with respect to Mr. Beloff, irrelevant. That is the play that he has sought to make with what he calls Ofcom's *volte face* on the proper interpretation of the Directive. Sir, you yourself made the comment to him that this is a matter of statutory construction. What views Ofcom may have expressed in the past are irrelevant and the views that BIS may have expressed in the past are irrelevant. However, just to set the record straight ----

THE CHAIRMAN: It is a great forensic point.

MISS ROSE: Of course it is. It is a wonderful forensic point but only in front of a jury.

THE CHAIRMAN: We have elements of a jury here. We enjoyed it anyway.

MISS ROSE: We all enjoy Mr. Beloff's submissions, of course. The first point is that he relies on the email in volume one at p.499. This is the email from Mr. Louth. Mr. Louth, it should be said, is not a lawyer.

THE CHAIRMAN: Having told me it is irrelevant, you are not really going to ask me to go back to it, are you?

MISS ROSE: It is not only irrelevant but it was factually inaccurate and I do feel I need to put the record straight. It is at tab 19. Mr. Beloff made the point that this was the response to the detailed application for the variation of the licence that had been submitted by O2 and it did not rebut their arguments. That is not surprising because what Ofcom are saying in this email is that they are not presently proposing to take any action in relation to the licence variation request, so they are not responding to it at all. They are simply saying, "We have been asked by the Government to do nothing because the general election is imminent and it is the purdah period." This is a no comment response in the light of what BIS said. That is really not very surprising at all.

However, I am instructed that there were two subsequent meetings between Ofcom and O2 in April before this appeal was commenced and that in both of those meetings Ofcom made it clear to Mr. Blades that it was Ofcom's view that O2 did not have the directly effective right that they now claim. With great respect to Mr. Beloff, it is simply not correct that Ofcom did not make its position clear until it served its defence in these proceedings.

THE CHAIRMAN: Is there evidence of those meetings or is that just on instructions?

MISS ROSE: That is on instructions, Sir.

THE CHAIRMAN: Do we know the dates of the meetings?

MISS ROSE: Yes, we do. The dates of the meetings were 19 and 26 April of this year. The other document on which Mr. Beloff relied was the consultation paper which is at volume 2A of the documents bundle at p.1083.

THE CHAIRMAN: The BIS paper?

MISS ROSE: No. This is the Ofcom paper. I am not going to comment on what BIS said because obviously that is not a matter that we have any knowledge of.

THE CHAIRMAN: Which tab is it?

MISS ROSE: It is tab G in file 2A, p.1083. The paragraph on which Mr. Beloff relied in particular was para.8.46. The first point to note about that is that Ofcom is not expressing a definitive view. They say:

> "… it now seems likely that we will be required by European law to 'make available' the whole of the 900 MHz band … It is our current understanding that to

meet this requirement we will have to liberalise all the existing 900 MHz licences by the deadline …".

The second point is that the draft Directive that Ofcom was considering when it made that statement was significantly different from the Directive as finally made. It is interesting to compare the two texts. The draft Directive is annexed to Ofcom's skeleton argument. Can I ask you to have that open and at the same time to have open the Amendment Directive that was actually made. If you look recital (5) of the Draft Directive ----

THE CHAIRMAN: Is that the Proposal?

MISS ROSE: It is Proposal for a Directive, that is right. This was the state of the proposed legislation at the date of Ofcom's consultation paper. It has got the number at the top 2008/0214.

THE CHAIRMAN: This is the last page, is it not, or penultimate page?

MISS ROSE: I am not sure if we are looking at the same document. This was the one that was annexed to Ofcom's skeleton. If you go to the second page of that document you will see in the recitals, that there is a recital (5), which is in two paragraphs. You can see that the first of those paragraphs is equivalent to what eventually became recital (6) of the final text of the Directive. The second paragraph of recital (5) you can see eventually became the second half of recital (7). The words that were missing from the draft are the words:

"Within six months of the entry into force of this Directive, Member States should transpose Directive 87/372 as amended. 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 Directive 2002/20/EC …"

– that is the Authorisation Directive –

"… once the 900 band has been made available in accordance with this Directive."

Those words were missing from the draft. I am going to come back to consider what those words mean. It is our submission that they are very important in understanding what is meant by the obligation to make available in this Directive.

The other provision that was missing from the draft Directive is what is now recital (8):

"Any spectrum made available under this Directive shall be allocated in a transparent manner and in such a way as to ensure no distortion of competition in the relevant markets."

Again I am going to come back to consider that, but again we submit it is important to understanding the actual meaning of the obligation under the Directive.

So we do submit that in the light of those differences the view formed by Ofcom was not surprising, but it is in any event irrelevant.

Can I now then turn to the legislative scheme. Before we come to the European legislation, can we just remind ourselves of the domestic legal framework that relates to licences under the Wireless Telegraphy Act. The Wireless Telegraphy Act is in the authorities bundle, tab 14. This is the legislation which governs the efficient management of the radio spectrum. If you go to p.6, s.8 we see the heading "Licences and exemptions":

> "(1) It is unlawful –
>
> (a) to establish or use a wireless telegraphy station, or
>
> (b) or install or use wireless telegraph apparatus,
>
> except under and in accordance with a licence granted under this section by OFCOM."

So the point is that, as a matter of domestic law, it is a criminal use to use wireless telegraphy equipment without a licence under the Wireless Telegraphy Act.

One of the oddities about the way in which Mr. Beloff has put his case is that he has referred constantly to the licence imposing restrictions on O2's right to use the spectrum, whereas the position is that O2 has no right to use the spectrum except to the extent that it is licensed to do so under its licence. We submit that the dichotomy that Mr. Beloff has set up between the right to use particular bands of the radio spectrum and conditions attaching to that use is, with respect, false. You cannot consider a particular right to use a radio spectrum without asking what is its scope. The scope of the right is defined, firstly, by the band width that the individual is permitted to use; secondly, by the technologies that they are permitted to deploy on that band width; and there may be other conditions as well. You cannot simply refer to O2 having a right to use a particular piece of the 900 spectrum that has then be subjected to restrictions. There is no such right.

That is the domestic framework. Now I come to the European framework, and we start with the Framework Directive. That is in volume 1 at tab 5. This is the core test for European telecommunications law. It is the central legislative instrument. It is the place where you find the core functions of this system, the core functions and duties of the National Regulatory Authority. If we look at the recitals, starting with recital (5) you can see the function of the whole framework:

> "The convergence of the telecommunications, media and information technology sectors means all transmission networks and services should be covered by a single

regulatory framework. That regulatory framework consists of this Directive and four specific Directives."

There they are identified and one of is the Authorisation Directive, which is also central to this analysis.

We then come to recital (19):

"Radio frequencies are an essential input for 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 according to a set of harmonised objectives and principles governing their action as well as to objective, transparent and non-discriminatory criteria, taking into account democratic, social, linguistic and cultural interests related to the use of frequency. It is important that the alteration and assignment of radio frequencies is managed as efficiently as possible."

Then the Tribunal can see at the bottom of that paragraph that there is reference to the Radio Spectrum Decision, which:

"… establishes a framework for harmonisation of radio frequencies, and action taken under this Directive should seek to facilitate the work under that Decision."

We then come to Article 3, which Mr. Beloff showed the Tribunal, which establishes the national regulatory authorities as independent national regulators and of which Ofcom is one.

THE CHAIRMAN: Sorry, did you say Article 3?

MISS ROSE: Article 3, yes, which requires Member States to ensure that each of the tasks assigned to national regulatory authorities is undertaken by a competent body, and it must be independent. We see that from Article 3.2.

What Mr. Beloff did not show the Tribunal was the duties on the national regulatory authority under this Directive, and we find those at Article 8, "Policy objectives and regulatory principles":

"1. Member States shall ensure that in carrying out the regulatory tasks specified in this Directive and the Specific Directives …"

So this applies to the Authorisation Directive as well –

"… 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."

Then if we go over the page we see the objectives which must be pursued by the national regulatory authorities when they are carrying out their functions. Paragraph 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* …
>
> (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 number of resources."

I am sure the Tribunal can anticipate the submission that we make which is that these obligations apply to the national regulatory authority when it considering applications for the modification of licences under the Authorisation Directive. We submit it is wholly inconsistent with this legislative scheme for O2 to submit that Ofcom is bound to grant an application to modify its licence without taking effect of potential distortions of competitions that might arise from that modification without effect of the potential implications for the efficient use of the spectrum and efficient investment in infrastructure. What Mr. Beloff says is, "Well, yes, there has to be a competition assessment, but we are entitled now to come into our inheritance and to use the 900 spectrum from UMTS and all that Ofcom can do, because it has missed the boat, is to consider retrospectively whether that has a distorting effect on competition and if it does then they can remove the tranches"

THE CHAIRMAN: Does that not actually depend on the proper meaning of recital (7) and Article 1.2?

MISS ROSE: Yes, it does, Sir, but we submit that you have to construe those Articles in the light of this Framework. Those are provisions in the Amendment Directive intended to be a part of this over-arching legislative scheme.

THE CHAIRMAN: I do take your submission on board, but if they had clearly said, if Article 1.2 and recital (7) clearly said, "What we are doing here is lifting any restrictions, putting this spectrum into usage for UMTS technology and then you are going to do your distortion competition analysis and take steps in consequence of it", then that would be what the legislature was telling you to do.

MISS ROSE: I do not suggest that there would be no power in the European Union to legislate in that way, but my submission is that when you are considering what the intention actually was and what the legislation actually means, you have to take that Directive in the context of this Directive.

THE CHAIRMAN: You say it would be surprising?

MISS ROSE: It would be very surprising, but it is calculated to lead to inefficient investment in infrastructure. On Mr. Beloff's own case it would lead to a situation in which the incumbent operator starts to develop a 3G network on the 900 spectrum, because they come into it on 9th May, but then a year down the line the regulator may say, "Now we have completed our competition assessment, and we think that you need to divest yourselves of that spectrum", and it will be given to somebody else.

THE CHAIRMAN: The competing analysis is that it is a bit toothless the way you construe it and there is a deadline built in. They say, "What is the point of having a deadline if there is actually no deadline for the introduction of the usage of the spectrum?" You say, "We can take our time on that, but there is this absolute deadline to put in place the necessary enabling provisions", shall we say neutrally.

MISS ROSE: We do not say we can take our time on it. What I am going to submit is that our position is that from the date the Directive comes into force the Member States have to consider any application to use the 900 spectrum for UMTS, and they have to consider it in accordance with the Authorisation Directive. The onus on the Member States is to process applications, whether they are from an incumbent operator or from another operator, to use the spectrum for that purpose in accordance with the Authorisation Directive. That means taking into account potential effects on competition.

If the national regulator was simply to sit back and say, "We are not going to look at it, forget it" ----

THE CHAIRMAN: You have done that, have you not? (Laughter)

MISS ROSE: Sir, with respect, we have not.

THE CHAIRMAN: That was not a joke.

MISS ROSE: I know, but with respect we have not, because what we have said is that the situation is that BIS has conducted a competition assessment, came to a conclusion about what the right situation was in terms of the use of the spectrum, was on the verge of making an order that would direct Ofcom to implement it, then the Election intervened, BIS said, "Will you wait until we reformulate our policy?" We made the point in our defence that it has not been suggested that, as a matter of public law, our conduct in saying, "We will wait

to determine your application until we know what the legislative structure is in the United Kingdom", that has not been suggested to be unreasonable.

THE CHAIRMAN: They have not JR'd you?

MISS ROSE: They have not JR'd us. Indeed, they could have appealed to this Tribunal, arguing that it was wrong. They would not have even had to say it was irrational – that it was disproportionate or irrational for us to pause in considering the application to wait until the law was final. They never did that and no doubt for the very good reasons that Miss Carss-Frisk has outlined in her skeleton argument, that there is very good case law, not surprisingly, that says it is good administrative practice, it is good administration for a regulator to wait until there is a final legal policy position adopted by Parliament. We are not criticised for that.

We absolutely accept that after 9th May, subject to that situation, which is an unusual situation that has been caused by the timing of our Election, and subject to the need to conduct a competition assessment, we are indeed under an obligation to process applications in accordance with the Authorisation Directive, whether they are applications for the modification of existing licences or for the re-allocation spectrum. We do not say that we can simply sit back and do nothing.

The question was asked, "What were we obliged to do on 9th May?" The forensic point is made, "Ofcom say they were not obliged to do anything by 9th May". The reason for that is very simple. The reason is that there is no legal barrier in the United Kingdom to the use of 900 or 1800 spectrum for UMTS. Parties are already free to make the application that O2 has made. If of course were to have turned round to O2 and said, "Sorry, the 900 spectrum is reserved for GSM so we are not going to entertain your application for UMTS", that would have been a breach of the Directive. Ofcom have not said that.

PROFESSOR PICKERING: Could I ask a couple of points, first of all, a quick point: I think I heard you say just now, Miss Rose, that BIS did a competition assessment. Was my hearing correct?

MISS ROSE: Sir, what BIS did was instruct the independent spectrum broker to look at the whole situation. A proposal was put forward about the best way forward and that was in large part accepted by BIS as the right policy for avoiding competitive distortions. That was the basis for the draft direction that was given to Ofcom.

PROFESSOR PICKERING: Why did BIS engage in that, do you think, given that I think it was suggested this morning, to put no finer point on it, the responsibility and indeed authority was with Ofcom?

MISS ROSE: Sir, the answer to that, as I think was said also this morning, is that as a matter of European law both BIS and Ofcom have responsibilities in this area, and indeed, as a matter of domestic law as well under the Communications Act, BIS has the power to issue orders that give directions to Ofcom on policy matters.

PROFESSOR PICKERING: May I just ask you to dwell on Article 8.2 which talks about the responsibility to promote competition, and then to take into account some specified considerations which are clearly not the full list. The notion of promoting competition, I wonder how useful you find that instruction. What is competition in this context? I am trying to avoid abstract and abstruse questions, but do you see what I am wondering about? There are numerous ways in which one can define competition. This seems to give no guidance as how the NRA should approach it.

MISS ROSE: My understanding is that it refers to a market in which there is a choice and where market forces operate to introduce competition in prices and services in a wide choice of services for consumers. That is the normal understanding of competition.

PROFESSOR PICKERING: So some degree of choice, lowish barriers to entry in so far as that was possible, that sort of thing?

MISS ROSE: That sort of thing.

PROFESSOR PICKERING: The considerations that are set out in (a) to (d) may not necessarily be compatible with competition. I wonder whether you would agree with that.

MISS ROSE: No, sir, I would not because ----

PROFESSOR PICKERING: You would not?

MISS ROSE: No, because the legislation says "shall promote competition by *inter alia*, and these are given as instances of the ways in which the NRA is to promote competition. These are identified specifically as matters that would promote competition.

PROFESSOR PICKERING: They are actually outputs and consequences, are they not, rather than necessarily aids to competition? The emphasis on price, if there are economies of scale, and in a network industry then there are likely to be significant economies of scale, is there a trade-off between price and choice? Is there a trade-off between quality and competition? The question of distortion of competition, again not necessarily clear to me, how an NRA would interpret that, or indeed the emphasis in (b) is about the sector. What is the market in this case that Ofcom or BIS or the ISP have considered? Is it the 900 MHz band or is it all those bands within which 3G UMTS can be supplied?

MISS ROSE: Sir, I completely understand why, as an economist, you are asking me these questions. With respect, they are not actually the issues that arise on this appeal. It is right

to say that these issues have been grappled with by Ofcom in a whole series of consultation papers and subsequently by the independent spectrum broker and by BIS at enormous length, and I certainly do not purport to be in a position to tell you in fascinating detail exactly how they have analysed the market and exactly how they have considered what would or would not distort competition. I am not sure that going into that question is necessarily going to help the Tribunal to reach a decision on the question of the construction of the Directive.

PROFESSOR PICKERING: Can I tell you why I raise it. There are two considerations in my mind which both arise out of your submissions. First of all, you have spoken about the practical problems of implementation and the timing that would have been involved in having taken a number of relevant steps by 9th May. So practicality is relevant.

There is a second issue that was in my mind. It is this question of trade-offs. I suppose really I am saying, is this statement of aspirations at all a useful operational guide? If not, how does it leave us interpreting and applying the Directive as a whole? I fully take the point. Neither of us want to get into abstract debates, but I think that in the context of your very reasonable submissions that it is appropriate that I should ask how we go forward?

MISS ROSE: The first point to make is these are not aspirations, these are duties that are imposed on Ofcom.

PROFESSOR PICKERING: But they are conflicting duties, are they not, or potential conflicting duties?

MISS ROSE: Sir, there will obviously be different emphasises in the decisions that Ofcom makes. You, I know, will be very familiar with the provisions in the Communications Act that are parallel to this, s.3 of the Communications Act , that identify the range of statutory duties that Ofcom has to take into account when it fulfils its function, which are essentially based on this list of duties. Yes, there may be circumstances in which balancing acts have to be made. That does not mean that this is not the framework. This absolutely is the framework. This is the fundamental framework of duties that is binding on the NRA when performing all of its functions under this Directive and under the Authorisation Directive. The point that I make is a simple one, the application of this duty and the decision that it leads to is obviously a difficult matter for judgment for Ofcom in an individual case. The point I make is a much more simple one. The point that I make is that given that Ofcom has an obligation to comply with this duty when it entertains an application for the modification of a licence under the Authorisation Directive, we submit that O2 cannot be right to say that it has an absolute and unconditional and directly effective right to have its licence modified

irrespective of the outcome of that modification for competition. That is the only point I make. It is a pure point of statutory construction. It does not depend on how the regulator fulfil the duties in an individual case. The point that I make is that O2's case denies any power in Ofcom to act so as to fulfil its duty. That, we say, cannot be right.

PROFESSOR PICKERING: It seems to me that these cannot be instructions to maximise anything. They may be instructions to optimise across a range of considerations which would give anybody a wide margin of appreciation. I still would be interested to know whether, in your approach to this discussion, we are being encouraged by you to see the relevant market for analysis as the 900 band.

MISS ROSE: I cannot answer that question.

PROFESSOR PICKERING: You cannot answer it?

MISS ROSE: I cannot, no, because that is a question that goes to the application of this duty on the particular facts of the case. This is a situation where Ofcom is not in control of this process. BIS is about to make a decision. I have no idea what decision BIS is going to make or how it analysed the market when it took that decision.

PROFESSOR PICKERING: You see, it is not clear to me how, if we cannot clarify that, we can talk about avoiding the restriction or distortion of competition in the electronic communication sector. It is not clear to me whether we are talking about the possibility of giving O2 and Vodafone a monopoly in the 900 MHz band or whether it is about allowing them to compete at all in the provision of 3G services which some of those on this public interest side of the house already have.

MISS ROSE: They all have 3G services. They all have 3G spectrum. Sir, of course the considerations that you raise are precisely the sorts of things that have been said in the consultation process. Those are not matters, with respect, that we need to engage with. The point I make is simply that on O2's case all of this is irrelevant.

THE CHAIRMAN: And you would not be giving them a monopoly. Even if you are entirely wrong and there is a direct effect of the Directive, you are not giving them a monopoly because other competitors can come into the market and apply and their bands can be reduced or withdrawn.

MISS ROSE: Sir, I want to make it clear that I am not making any submission at all about there would or would not be any distortion of competition if O2 were permitted to use the 900 and 1800 band for 3G services. I am not taking any position on that, and Ofcom takes no position on that. The point I make simply is that it is inconsistent with the scheme of the

European legislation to say that Ofcom is obliged to modify the licence to permit 3G use without taking into account the effects on competition.

THE CHAIRMAN: Miss Rose, I understand all that, but we will be shown, will we not, the Government's view and the draft ----

MISS ROSE: I would hope that we would have it tomorrow, Sir.

THE CHAIRMAN: I think it is important that the parties have an opportunity, that it does not come in after we have reserved judgment, if that is what we do.

MR. BELOFF: Sir, although anticipation was that it would not become public until tomorrow those with access to modern technology have actually got it on screen now.

THE CHAIRMAN: Some of us have access to modern technology!

MR. BELOFF: What I am saying is, there it is, you could look at it this evening. I just felt, since you had raised it, I ought to tell you, and I was told literally three minutes ago.

THE CHAIRMAN: If you could send it by email to Mr. Hurley perhaps he can distribute it to the Tribunal so that we can actually see it overnight.

MR. BELOFF: Yes.

THE CHAIRMAN: I am sorry, Miss Rose.

MISS ROSE: Sir, we were just looking at Article 8. Can we now move on to Article 9 of the Framework Directive, which is also important. Mr. Beloff showed the Tribunal a part of Article 9, but not all of the relevant parts. Article 9 deals with the management of radio frequencies for electronic communications services. So this is dealing with management of radio spectrum. The Tribunal can see that there are two separate functions identified at Article 9.1 and Article 9.2. Article 9.1:

> "Member States shall ensure the effective management of radio frequencies for electronic communication services in their territory in accordance with Article 8."

So you note immediately the connection with the duties under 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."

So that is a duty to manage the radio spectrum in particular by allocating and assigning the use of particular frequencies to particular undertakings, and that must be done in accordance with Article 8. That, we say, is about the allocation of rights of use of the spectrum.

Then 9.2:

"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 Spectrum Decision …"

That, we say, is a separate function. What that is about is ensuring that across the European Union the same frequencies can be used for the same purposes, so you do not get problems of interference at boundaries, which is of course more of a problem for States that against each other at their frontiers than it is for us, and so you can economies of scale in the production of equipment. So if you have a single handset that is adapted for use in particular spectrum ranges you can use it all over the European Union. That is the function that we say is engaged by GSM Directive and the GSM Amendment Directive and the Decision, not the function in 9.1. This is not about the obligations in relation to allocation or assignment of spectrum, it is about harmonisation of the purposes for which spectrum may be used, and is a different function. We say that it has nothing to do with the licensing of individual users of the spectrum. I am going to follow that theme through when we look at the other legislation. We say the same theme appears consistently throughout the legislation.

So that the Framework Directive.

THE CHAIRMAN: I am sorry to go back on that. You say the purpose of the Amendment Directive is concerned with harmonisation?

MISS ROSE: Yes, to promote the harmonisation of use of radio frequencies across the Community consistent with the need to ensure effective and efficient use and in accordance with the Spectrum Decision. That is the function that we say is being addressed by the GSM and GSM Amendment Directives and by the Spectrum Decision and the 800/1800 technical implementation measure, not the assignment and allocation spectrum to individual users.

Sir, that is the Framework Directive. Then we come to the Authorisation Directive, which is concerned with the assignment and allocation of spectrum user rights to particular undertakings. That is what it is about.

Mr. Beloff showed the Tribunal some of the recitals here. I would like to look first at recital (11). He rightly pointed out that the objective of this Directive is to have as light a touch authorisation regime as possible in the interests of promoting competition and a single market, that the idea is that in general you should have general user rights and only where it is necessary have specific rights. Of course, one of the situations in which it is necessary to

have specific rights is where you are talking about the use of particular tranches of spectrum in particular areas because otherwise you get interference. We come to recital (11):

> "The granting of specific rights may continue to be necessary for the use of radio frequencies …"

They also refer to numbers which we are not concerned with.

> "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."

Then recital (15):

> "The 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."

We submit that where it refers to the conditions being restricted to what is necessary to ensure compliance with Community law, that includes compliance with the duties on the NRA identified in Article 8 of the Framework Directive, and that this has to be read together with Article 9.1 of that Directive, which also refers to Article 8. It is all one code.

Then recital (33):

> "Member States may need to amend rights, conditions …"

please note "conditions" –

> "… procedures, charges and fees relating to general authorisations and rights of use where this is objectively justified. Such changes should be duly notified to all interested parties in good time, giving adequate opportunity to express their views on any such amendments."

Then we come to the substance of this Directive. Article 3 deals with general authorisations. Then Article 5 deals with rights of use for radio frequencies.

> "5.2 Where it is necessary to grant individual rights of use for radio frequencies … 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 Directive 2002/21/EC (Framework Directive)."

So again, we are specifically told that the grant of rights of use must be done in accordance with the Framework Directive, and also that it is subject to Articles 6, 7 and 11(1)(c) of this Directive.

THE CHAIRMAN: Do you accept that rights of use means what Mr. Beloff says it means, namely the right to use a wavelength, a band width, and not the terms associated with that right?

MISS ROSE: No, we do not accept the rigid distinction that Mr. Beloff has sought to draw between rights of use and conditions that are attached to rights of use. We submit that you cannot tell what right you have to use spectrum without understanding the scope of that right, and that necessitates looking at the conditions attached to the right.

Just to pre-empt the essential point, Mr. Beloff suggested that the reference to the modification of rights of use that is in the GSM Amendment Directive did not apply to conditions, but only to the band widths. We submit that cannot be right because if you consider the situation, somebody has a licence that says you can use a band width between 910 and 915 MHz. He says that the only way that you could modify that would be by saying, "Now you can only use band width between 910 and 912 MHz". That, with respect, would not be a modification of your right to use a band width. What that is is a revocation of your right to use particular band widths. Modification must mean something different from revocation, whether it is whole or part. We submit that what that is talking about is the conditions on which you use the band width, whether you use them for GSM or UMTS.

THE CHAIRMAN: I think he relies on Article 6, and I know you have not got there yet ----

MISS ROSE: Yes, I want to follow this Directive through because it is crucial.

THE CHAIRMAN: We can go on to 4.30, just to make sure we are okay tomorrow.

MISS ROSE: If we go to Article 6, which is headed "Conditions attached to the general authorisation and to the rights of use", and he relies on that to draw a sharp distinction between conditions and rights of use. We submit that is not warranted, and it is simply a reflection of the reality that you have a right of use to which conditions are attached and that defines the scope of your right. You cannot talk about a right of use separately from the conditions. When we look at the nature of the conditions you will see what I mean. Article 6.1 says:

> "The general authorisation for the provision of electronic communications network … and the rights of use for radio frequencies … may be subject only to the conditions listed respectively in parts A, B and C …"

Then we are told they must be objectively justified, and so forth. The relevant section is B, "Conditions which may be attached to rights of use for radio frequencies", and 1 is:

> "Designation of service or type of network or technology for which the rights of use for the frequent has been granted …"

So that is why we submit that you simply cannot detach the condition from the identification of the nature and scope of the right of use, because it is meaningless to say, "I have the right to use the band width between 900 and 910 MHz". The question is, "For what do you have the right to use that band width, for what technology, in what area and for what services?"

THE CHAIRMAN: If you were band width 900.11 and you were using it with GSM technology, and somebody else came along and used it with UMTS technology presumably there would be interference?

MISS ROSE: There would.

THE CHAIRMAN: So it is a once and for all right?

MISS ROSE: In that instance it is, but not in the case of all allocations of band width. There are licences in which more than one person may use a particular band width in one area. An obvious example is businesses communicating using short wave radios or walkie-talkies where you will often have a situation where a number of businesses in the same area have a licence to use the same band width, but none of them has an exclusive licence to use it. The conditions will specify that they have to use equipment so that their receiver knows which counterparty is talking to it so that they do not start talking to each other by mistake, and there will be restrictions on the hours that they can use the band width. So it is not right to say that there are only exclusive rights of use of particular band widths.

I am grateful to Mr. Fordham, who makes the point that that is explicit in B1, which says:

> "… including, where applicable, the exclusive use of a frequency for the transmission of specific content or specific audiovisual services."

It is recognising that the designation of the service or type of service and the technology may not be an exclusive right to use particular band width.

We submit you simply cannot identify or define the right of use.

THE CHAIRMAN: You just say it is too simplistic.

MISS ROSE: It has no content.

THE CHAIRMAN: It is too simplistic just to say band width means right of use.

MISS ROSE: Of that type. Apart from anything else, in which area, because there are many circumstances in which, because people are only transmitting over a particular area, you

may have people using the same frequency but in different geographical areas. For example, local radio stations which have the right to transmit over a particular area. You simply do not know what the nature of your right of use is unless you know what the conditions are that are attached to it.

The suggestion that a modification of the conditions is not a modification of the right of use, we submit, is obviously wrong. That is Article 6.1.

Looking at Article 7, this deals with the procedure for limiting the number of rights of use to be granted for radio frequencies.

> "Where a Member State is considering whether to limit the number of rights of use to be granted for radio frequencies, it shall give due weight to the need to maximise benefits for users, facilitate development of competition …"

You can see there the various matters that will be taken into account which are entirely consistent with the duties under Article 8 of the Framework Directive. The next provision, Article 8, is not applicable to this case but is of some interest because it is so strikingly different from the provision on which Mr. Beloff relies and, we submit, gives the Tribunal an idea of what a provision in a Directive looks like if it is intended to confer a directly effective right to use a particular frequency. What Article 8 is talking about is a situation where the European Union as a whole takes a decision that a particular user is to have a right to use particular frequency. I am told this has in fact happened recently in relation to a satellite operator. If we look at Article 8:

> "Where the usage of radio frequencies has been harmonised, access conditions and procedures have been agreed and undertakings to which the radio frequencies shall be assigned have been selected in accordance with international agreements and community rules, Member States shall grant the right of use for such radio frequencies in accordance with their width. Provided that all national conditions attach to the right to use the frequencies concerned have been satisfied in the case of common selection procedure, Member States shall not impose any further conditions, additional criteria or procedures which would restrict, alter or delay the correct implementation of the common assignment of such radio frequencies."

That, I accept and indeed submit is a provision in the Directive which gives a directly effective, enforceable right to an undertaking that has been identified by that process to have assigned to it particular frequencies. It looks, as the Tribunal will see, very, very different from the obligation that is in Article 1 of the GSM Amendment Directive.

The other provision in this Directive which is of very great significance is Article 14 because it is Article 14 to which the GSM Amendment Directive looks as being the solution to problems about competitive distortion that might arise from the liberalisation of the 900 spectrum. Article 14:

> "Amendment of rights and obligations."

The first point I make is that the title refers only to the amendment of rights and obligations. If Mr. Beloff were right and there was some stark dichotomy between rights and conditions, one would expect this not to be concerned with conditions but only with rights and obligations. In fact, that is not so. If we look at Article 14.1:

> "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."

That is a mandatory process for the amendment of licences, including the conditions in licences, which confer rights of use of the radio spectrum. It was submitted by Mr. Beloff in response to a question from Professor Pickering that there was no obligation on O2 to have applied for the variation of its licence in this case. He suggested that they could simply have relied upon their directly effective European right to use the spectrum they had already been allocated for a different purpose without having to make an application for the modification of the licence. He relied in support of that on authorities suggesting that if a Member State has not implemented a Directive you can rely directly on your rights under the Directive.

With respect to him, the flaw in that argument is that it is European law itself which says that a right to use particular frequency cannot be amended unless the proper amendment process has been gone through, including consultation and, we submit, including consideration of the effects on competition. That is a mandatory process. "Member States shall ensure that conditions concerning rights of use may only be amended …" and so forth. It is mandatory.

We submit it would clearly be contrary to Article 14 of the Authorisation Directive for O2 to argue that its licence could be amended so as to permit it to use its spectrum for UMTS without going through this process.

If we are right about that, then the whole of O2's case collapses, with respect, because if we are right about that then it must follow that the NRA, in fulfilling its duty under Article 14 to examine the application for the modification of the licence, must do so in accordance with its duties under Article 8 of the Framework Directive which apply to all of its duties under the Authorisation Directive.

On that basis, it cannot be correct, as Mr. Beloff sought to submit, that Ofcom is under a duty to amend the licence without regard to potential distorting effects on competition. It is inconsistent with the European legislation.

PROFESSOR PICKERING: I am sorry to come in again but I wonder whether you have a view as to whether Article 14 is equally applicable to situations where a new technology may be about to be introduced and ongoing situations where the NRA is essentially the referee in a continuing, competitive struggle, whatever that means.

MISS ROSE: We submit that the scheme of this Directive is very clear. First of all, in a situation such as this where you are not talking about a general authorisation but a specific right of use, the first stage is that an application must be made in accordance with Article 6 and conditions will then be attached to the licence in accordance with part B of the annex. We know that in this case conditions have been attached, including a limit to GSM. Then, if the party wishes to have its licence amended, it must go through the process in Article 14 because that is a mandatory process. It says very clearly "may only be amended in objectively justified cases and in a proportionate manner." You cannot bypass Article 14. You cannot amend a licence without going through the Article 14 process.

THE CHAIRMAN: Indeed it is referred to in Article 1 to the Directive.

MISS ROSE: Indeed it is, Sir. That is why I have submitted that this is a crucial provision. It is completely inconsistent with O2's case. That then takes me to the original GSM Directive at tab one.

THE CHAIRMAN: It is refreshingly short.

MISS ROSE: It is refreshingly short. That is because it is old. One of the oddities about this case which the Tribunal might have been asking itself was why do we have an amendment to the GSM Directive dealing with the 900 spectrum but the 1800 spectrum is dealt with only through a decision. The answer to that is that the original decision to reserve the 900 spectrum only for 2G mobile telephony was taken before the original radio spectrum decision which dates back to 2002, so before the creation of the Radio Spectrum Committee which was producing decisions on the technical specification and harmonisation of spectrum. The decision to reserve the 900 spectrum was contained in a Directive before the

process for spectrum management that was devised in the spectrum decision was implemented.

That then led to a problem which held up this whole process at the European level because originally they tried to liberalise the 900 and 1800 spectrum through a decision and it was then said, "Hang on a minute. You cannot do that. You have to amend the GSM Directive because the 900 spectrum is limited to GSM by that Directive." That is why we have these two processes. If we look at the original GSM Directive, the purpose of this Directive is not to grant rights. It is to reserve the 900 spectrum exclusively for a particular purpose, namely 2G GSM technology. We submit that that is clear from Article 1 of the Directive.

> "Member States shall ensure that the 900 frequency bands are reserved exclusively for a public, pan-European cellular digital mobile communication service."

That is the purpose. It is to reserve the spectrum. We submit that you have to look at the Amendment Directive starting with this one, saying, "What was it changing?" The answer is it was not seeking to give individual, enforceable rights to particular undertakings. What it was seeking to do was to relax a restriction that was included in the original Directive that said you can only use spectrum for this purpose. That is the GSM Directive.

Next in time is the radio spectrum decision. I have that at tab seven. As you have already seen from the Framework Directive, this is regarded as an integral part of the common regulatory framework and the idea is that you have a committee which looks at spectrum on a pan-European basis and harmonises its uses so that you get efficient use of the spectrum on a European-wide basis. That is the point.

We see that explained at recitals one and two. I will not read them out but you will see that that is their general import at para.1, just opposite the second hole punch. That is the explanation.

Over the page, recital (11):

> "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, nor the decision whether to use competitive selection procedures for the assignment of radio frequencies."

Again, we submit that that relates back to the distinction between the two purposes that I identified in Article 9 of the Framework Directive. Firstly, the question of the assignment of rights of use to individual entities and, secondly, the harmonisation of the use of

spectrum at a European level. What is made very clear by this recital is that the technical management of the radio spectrum through this decision and through measures under it, including the decision on which O2 rely has nothing to do with domestic licensing processes and has nothing to do with the assignment of rights of use to individual entities. What it is about is ensuring that at a European level the same spectrum bands can be used for the same purposes, so you get economies of scale and efficient use of the spectrum.

If we then go to the Articles of the decision, we see the aim and scope at Article 1, to establish a policy and legal framework in the community in order 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.

Mr. Beloff made the submission that it would be very odd if the spectrum decision and the decision made under it were to be interpreted differently from the GSM Amendment Directive and we respectfully agree with that. They are clearly both having the same general aim which is to make particular spectrum available but if you look at the aim and scope of the spectrum decision here we submit it is a million miles away from conferring rights of use on particular undertakings to use particular tranches of spectrum.

Article 3.1 establishes the Radio Spectrum Committee and Article 4 which I think we have already looked at sets out the functions of the Radio Spectrum Committee and in particular the procedure by which that Committee is to produce technical implementing measures with a view to ensuring harmonised conditions for the availability and efficient use of radio spectrum. The decision that is in play in this case is one of those technical implementing measures that have been produced by the Radio Spectrum Committee.

That then brings us to the GSM Amendment Directive and that might perhaps be a convenient moment.

THE CHAIRMAN: Yes. We will probably be slightly familiar with that so we can come to it fresh again in the morning. We are reasonably on time, are we?

MISS ROSE: I would have thought we will finish comfortably tomorrow.

THE CHAIRMAN: We meet again at 10.30.

(Adjourned until 10.30 a.m. on Wednesday, 28th July 2010)