IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1154/3/3/10

Victoria House,
Bloomsbury Place,
London WC1A 2EB

28 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 TWO

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, Miss Rose

MISS ROSE: Sir, I hope the Tribunal have had an opportunity to look at the draft directions that have now been produced by the Department and the covering letter from the Minister, Mr. Vaizey.

THE CHAIRMAN: Yes.

MISS ROSE: It speaks for itself, but the Tribunal can see from the covering letter that BIS's position is that they have conducted a competition assessment and they have revised the previous directions by simplifying them. In particular, the requirement that was in the previous draft, which would have limited the amount of 800 spectrum that could be held, is no longer in the current draft. So it is a lighter touch, if you like, in terms of the future of the spectrum. They have proposed variations to the 3G licence so that those will be of indefinite duration.

THE CHAIRMAN: The Minister's letter – is that in this pile that you have ----

MISS ROSE: This is this letter of 27 July from Mr. Vaizey to Adrian Bailey of the Business, Innovation and Skills Committee.

THE CHAIRMAN: I am not sure we have got that.

MISS ROSE: I do not know if anybody has a spare copy.

THE CHAIRMAN: Perhaps we can get that copied for everybody.

MISS ROSE: Do you have copies of the letter?

THE CHAIRMAN: We do now.

MISS ROSE: If you look on the second page between the hole punches you can see that he says:

> "I have considered any possible competitive imbalance that might be created by the liberalisation of the 900 MHz and 1800 MHz spectrum. As part of this consideration I have taken into account the rapid growth of smart phones and similar devices. This has resulted in the greater need for capacity on existing networks and I believe that this requirement cancels out any potential advantage of sub-1GHz spectrum in terms of rural reach and in-building.
>
> We are therefore directing Ofcom to begin immediately with the 800 MHz and 2.6 GHz auction, but with a requirement to carry out an urgent competition assessment of the competitive position of operators in regard to further developments of 3G and future 4G networks."

Then he says:

> "I believe therefore that we have met the obligation set out in the GSM Directive to consider the competitive effect of liberalisation and that this direction to Ofcom

will permit the earliest possible release of this important spectrum, benefiting business, the consumer and the telecommunications industry alike."

The draft order will be laid before Parliament and is subject to the affirmative resolution procedure, so it will be debated in both Houses of Parliament. Since they are about to go into recess the expectation is that this will come into force some time in October hopefully. We submit again that this is consistent with our approach, not least because the Minister is envisaging a direction being made in October which will require the variation of the licences to permit 3G use with effect from October, and that the competition assessment has now been completed, and the overall plan, including the auction of further spectrum, is part of that overall solution.

THE CHAIRMAN: Could I just ask you one thing that we just want to be clear about. Is it possible, in theory, if not very likely in practice, for one operator to be granted a licence to operate UMTS technology in the same band as another operator operates in the GSM technology?

MISS ROSE: Can I just take instructions on that? (After a pause) The answer is not at the same frequencies – within the same band of course, but not the same frequencies because there would be interference.

THE CHAIRMAN: I am not sure that is quite the answer to my question. You have granted O2 a licence to operate GSM technology?

MISS ROSE: Nobody else could operate UMTS on the same frequencies in the UK.

THE CHAIRMAN: In the same band in the UK.

MISS ROSE: Yes, on the same frequency.

THE CHAIRMAN: Because of interference.

PROFESSOR PICKERING: Can I just be clear: a band contains a number of frequencies. So you could have GSM and UMTS technologies in use on the same band, or within the same band, so long as they were not using the same frequencies within that band. They can co-exist within a band, but not on the identical frequencies.

MISS ROSE: Yes, but what you would have then is you would have a licence to one operator identifying particular frequencies, and a licence to another operator identifying other frequencies, and you would have a buffer between the two to avoid interference.

THE CHAIRMAN: Yes, but of course O2's existing licence and Vodafone's existing licences identify bands and if you were going to grant UMTS licences separately from those, you would have to amend the GSM licence?

MISS ROSE: Yes, you would, you would have to take away from them some of the frequencies that they were currently allocated.

THE CHAIRMAN: Some of the frequencies they have been granted.

MISS ROSE: That is right.

THE CHAIRMAN: The reason for this enquiry is just because O2 claims that really the only obvious way of doing what it says that the Directive seeks to achieve is to get the restrictions on the licence. We were interested to see whether another way of doing it was for Ofcom to grant another operator UMTS rights in the same band, but that is not possible?

MISS ROSE: Not in the same band, no.

THE CHAIRMAN: You would have to amend the O2 licence first?

MISS ROSE: Essentially, if an application is made, as it has been, by O2 for an amendment to its allowance to allow it to operate UMTS, that would trigger the Article 14 process under the Authorisation Directive, and at that point Ofcom has to consider whether that modification is proportionate and justified; and in doing that it would consider whether that would introduce a competitive distortion. If it concluded that it would then what one would expect would be that it would remove part or all of the spectrum from O2 and either auction or give it to someone else.

THE CHAIRMAN: There are all sorts of possibilities.

MISS ROSE: Absolutely.

THE CHAIRMAN: The point that we were examining was Mr. Beloff's primary submission, which is that the implementation of the Directive can and should be brought about by removing the restrictions on the existing licence. I hope I am not unfairly paraphrasing his argument, they have an entrenched right to that waveband in the licence.

MISS ROSE: Yes.

THE CHAIRMAN: I know your argument is that they do not.

MISS ROSE: They do not, they only have a right to GSM, exactly. We say there would be a choice at that point, which is why there is no ----

THE CHAIRMAN: I understand the competing positions, I just want to understand the technicalities. Thank you.

MISS ROSE: We had just reached the GSM Amendment Directive, which is in either file 1 or file 8, depending on which one the Tribunal is using. I have been looking at it in file 8, I think Mr. Beloff was looking at it in file 1, where it is at tab 11. In file 8 it is at tab 19. Looking at the recitals, at recital (2) we get some history, and the fact that the 900 MHz frequency bands were reserved for a public pan-European cellular digital mobile

communications service to be provided in each Member State. Then the extension band became available. Together they are known as the 900 band. Then at (3) we have the fact that there are new digital radio technologies capable of providing innovative pan-European electronic communications, which can co-exist with GSM in the 900 MHz band in a more technologically neutral regulatory context than before. Then there is the point about the good propagation characteristics of this band.

Then:

> "In order to contribute to the objectives of the internal market and of the Commission Communication of the 1 June 2005 … 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."

The Tribunal can see the language there, which is not that individual licences should be amended, but that the use should be available across the EU for advance pan-European services. We say that reflects the fact that this is about Article 9.2 of the Framework Directive point, not Article 9.1.

Then we come to the crucial recitals (6) to (8). Starting with recital (6):

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

Mr. Beloff submitted that the phrase "the liberalisation of the use" that is used there is to be equated with the phrase "making available the band". We submit that is clearly incorrect, firstly, for the obvious reason that if the legislator had meant to say "the making available of the band" he would have said so. Instead it uses a different phrase, "the liberalisation of the use." Clearly, what it is talking about here is a situation in which an incumbent licensee obtains a variation to its licence liberalising the licence so that it can use UMTS as well as GSM. That is why it says "the liberalisation of the use of the 900 MHz band could possibly result in competitive distortions." What that means is explained in the next sentence:

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

That is the problem that is being addressed by this recital. If you simply liberalise in the hands of the incumbent, this is the problem that could arise. Then they say, the solution:

> "Under the regulatory framework on electronic communications and in particular the Authorisation Directive Member States can amend and/or review rights of use

> of spectrum and thus have the tools to deal where required with such possible distortion."

The Tribunal will recall that that paragraph was originally in the same recital as the second part of the next paragraph, paragraph seven, but that an extra chunk was inserted in the final draft of the Directive, which is the beginning part of paragraph seven. Within six months of the entry into force of this Directive, Member States should transpose Directive 87/372. That is the original GSM Directive as amended. That is the requirement to transpose by 9 May. Then this:

> "While this does not in itself require Member States to modify existing rights of use or to initiate an authorisation procedure, Member States must comply with the requirements of the Authorisation Directive once the 900 MHz band has been made available in accordance with this Directive."

We submit that is a clear statement that the requirement to transpose the Directive does not in itself require the modification of individual licences, but that once the Directive has been transposed – in other words, the bands have been made available for national use – the Member States at that point must use the Authorisation Directive process either to modify licences or to grant new licences, depending on the circumstances in the particular state. In doing so they should in particular examine whether the implementation of this Directive could distort competition in the mobile markets concerned. If they conclude that this is the case, they should consider whether it is objectively justified and proportionate to amend the rights of use of those operators that were granted rights of use of 900 MHz frequencies and, where proportionate, to review those rights of use and redistribute such rights to address such distortions. Any decision to take such a course of action should be preceded by a public consultation.

A number of points are clear, we submit, from this paragraph. First, that the transposition that is required by 9 May 1010 does not in itself entail the modification of individual licences. That we say strongly supports our construction of "make available". Second, that what is envisaged is a two stage process where, once the bands have been made available by 9 May, then Member States must use the Authorisation Directive to consider how those bands are actually to be put to use in the individual Member State avoiding distortion of competition. That process is clearly envisaged here as occurring after the transposition of the Directive within six months because they say that Member States must comply with the requirements of the Authorisation Directive once the 900 MHz band has been made

available in accordance with this Directive. It is clearly saying that that happens after the band has been made available.

The next point is that what is then envisaged is that the Member States must evaluate the potential effect on competition of the liberalisation of the use of the bands. In other words, it is not envisaging that the effect on competition will already have occurred because there will have been an automatic enlargement of the rights of the incumbents. It is envisaging that, when conducting the process under the Authorisation Directive, they should examine whether the implementation of this Directive could distort competition.

THE CHAIRMAN: That supports Mr. Beloff, does it not, that the implementation of the Directive must involve some change to the licensing position? Otherwise it would not distort competition.

MISS ROSE: There are two stages to the implementation of the Directive. The first stage is the making available of the bands which is to occur by 9 May and the second stage is subsequent to that. That is the use of the Authorisation Directive to determine use so as to avoid distortion of competition.

THE CHAIRMAN: That slightly begs the question of what "make available" means because I think you assumed in your favour that when it uses the term "has been made available in accordance with this Directive" it meant only the transposition. That is boot straps.

MISS ROSE: Sir, we submit it is not boot straps because that phrase occurs after the phrase "While this does not in itself require Member States to modify existing rights of use" so the first sentence of that paragraph is that within six months the Member States must transpose the amended Directive. Then we are immediately told that this does not of itself require modification of existing rights of use, but that Member States must comply with the requirements of the Authorisation Directive once the 900 MHz band has been made available.

THE CHAIRMAN: Why is Mr. Beloff not right in saying "modifying existing rights of use" simply refers to changing allocation of wave bands or withdrawing wave bands rather than changing restrictions?

MISS ROSE: That cannot be right because if we look later down in the paragraph what we have is "they should consider whether it is objectively justified and proportionate to amend the rights of use of those operators that were granted rights of use of 900 MHz frequencies and, where proportionate, to review those rights of use and redistribute those rights to address such distortions." There is a distinction drawn in the same paragraph between, on the one

hand, amending rights of use and, on the other hand, reviewing or redistributing. Those are regarded as separate activities.

We submit that on Mr. Beloff's interpretation of this paragraph that would be meaningless because the only form of amending that he considers to be permissible is redistribution. Therefore, what is the purpose of saying "amend the rights of use and, where proportionate, review and redistribute"?

THE CHAIRMAN: You say "modify" includes "amend"?

MISS ROSE: It must do. Of course, that has to be read together with the Authorisation Directive itself, if we just go back to the Authorisation Directive.

THE CHAIRMAN: I suppose you ought to be careful about construing a recital as a deed

MISS ROSE: Yes indeed, Sir, and I am going to come to the more purposive aspects but here I am just looking at the language. That recital must be read together with the Authorisation Directive and in particular Article 14 which is the Article that deals with the amendment of rights and obligations. It is absolutely clear that that includes the amendment of conditions because you see that in the first line of Article 14.1.

More generally and purposively and less technically, we ask the question why was this recital amended at a late stage of the legislative process to include the new first sentence? What was the purpose of that? We submit that the purpose of that was to make it clear that the transposition of the amended Directive by 9th May did not, in itself, require Member States to modify existing rights of use. That is the point that was added.

THE CHAIRMAN: It is a bit toothless if you are right, is it not?

MISS ROSE: No, Sir, we submit it is not toothless, because what you have is initially the requirement on Member States to remove the obstacles to the use of the 900 spectrum.

THE CHAIRMAN: Which does not apply to you?

MISS ROSE: No, it does not apply to us. What you then have is an obligation pursuant to the Authorisation Directive. This is all one code. You then have an obligation pursuant to the Authorisation Directive, and the presumption in the Authorisation Directive is that people get rights of use unless there is a good reason to restrict them. As you will recall, the whole premise of the Authorisation Directive is that there is to be the lightest possible regulatory regime. So you may only impose restrictions if it is proportionate and necessary to do so.

PROFESSOR PICKERING: If you are about to move on, I wonder whether I could ask you to see whether you could help me in relation to Mr. Vazey's letter, please. The paragraph to which you drew our attention – forgive me if I am being very obtuse – the comment about

the trade-off between capacity and performance of the sub-1 GHz spectrum, what is the practical implication of that?

MISS ROSE: Sir, I am really sorry, but I am not in a position to comment on the substance of the decision that has been ----

PROFESSOR PICKERING: Does Ofcom not have a view?

MISS ROSE: Sir, it is most unlikely that Ofcom would have a view since they only received this letter late yesterday evening. I am sorry, but I cannot assist.

PROFESSOR PICKERING: I understand.

MISS ROSE: You will appreciate that the difficulty of Ofcom's position – this is not Ofcom's policy.

PROFESSOR PICKERING: No, but Ofcom is being asked to apply a policy.

MISS ROSE: Yes, and of course Parliament will debate it and no doubt will ask questions similar to those that you are asking me now. This is still, of course, only a draft instrument. It is, with respect, impossible for Ofcom to take a position on the substance of the judgment that has been made by the Secretary of State at this stage.

PROFESSOR PICKERING: Thank you.

THE CHAIRMAN: And you would unnecessary to what we have to decide?

MISS ROSE: Yes, absolutely. The argument of O2 is that this is all immaterial. On O2's case, this draft order is, in itself, just further evidence of the breach of the Directive.

THE CHAIRMAN: You actually agree with that, do you not, that it is immaterial to what we have decide?

MISS ROSE: Yes, of course do.

THE CHAIRMAN: If it is directly effective then so be it; if it is not, this does not make any difference, this is just working out what ----

MISS ROSE: The parties are in agreement that this is a pure issue of construction.

THE CHAIRMAN: It is very interesting, but ----

MISS ROSE: It is interesting, but ultimately irrelevant, yes.

THE CHAIRMAN: We can put it on the pile of irrelevance.

MISS ROSE: If we just go back to the recitals, you have my point as to the question of why was the first part inserted. My answer that it can only have been inserted to make it clear that the obligation to transpose the Amendment Directive by 9th May did not, in itself, require the modification of existing rights of use; and that the phrase "modification of existing rights of use" must include amendment of conditions because otherwise it would be

inconsistent with the phrase later in the same paragraph, and would also be inconsistent with Article 14 of the Authorisation Directive itself. That is recital (7).

Sir, we submit that, properly understood, recital (7) is powerful material against Mr. Beloff's position.

The next point is that recital (8) was added at the same late stage. Recital (8) says:

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

We say that is also significant because there is a clear distinction there between the making available of spectrum and the allocation of spectrum. Mr. Beloff's argument depends on the contention that spectrum can only effectively be made available by being allocated, but he has a right to use it. He says the necessary corollary of it being made available is that he has a right to use it. We submit that it is clear from recital (8) that they are two different things and two different stages. This, again, we submit, reflects the scheme of the common regulatory framework as a whole as analysed in Article 9 of the Framework Directive. If we just go very quickly back ----

THE CHAIRMAN: You can, but he says – you must address his argument – the contrast is "make available" equals "lift the restriction in the licence, allocation is the second new stage, and you can do that if you have your competition analysis under the Authorisation Directive to decide our allocation thereafter". That is his argument. I think you say the two stages are different. Does it help either of you much?

MISS ROSE: What is clear is that "made available" is not the same as allocation.

THE CHAIRMAN: Of course.

MISS ROSE: We submit that on Mr. Beloff's case he says that the obligation to make available entails a right to have it allocated to you.

THE CHAIRMAN: I think you must be fair to his argument. His argument is not that, it is that he already has a licence for the wavebands and all you have got to do is lift a technical restriction. That is "making available", and allocation is some new process when you have take into account competition.

MISS ROSE: There are two flaws with that approach. The first is that, conceptually, to say he has a right to use the spectrum subject to a technical restriction. He only has a right to use the spectrum for the purpose for which it has been allocated.

THE CHAIRMAN: That is your s.8 point?

MISS ROSE: It is the s.8 point, but it is also the point from annex B, para.1 of the Authorisation Directive. It is clear from annex B, para.1 that you cannot detach the right of use from the purpose for which the right of use has been granted. If you ask the question, "What right does O2 have to use spectrum in a 900 band?" the answer is that it has the right to use it for GSM technology in a particular geographical area. It does not have the right to use the 900 spectrum, full stop. It never had that right.

THE CHAIRMAN: No, but if he were right that there were a distinction between conditions and band, if you like, allocation of band, if that were enshrined – he says go back to the Authorisation Directive. I know you want to go back to Article 9, and let us do it, but he says when you go back to the Authorisation Directive – I say "go back" because I am always in bundle 1 – you see that distinction which you shun in Article 6.

MISS ROSE: It is certainly true that Article 6 refers to conditions that are attached to the rights of use, that is quite true. It does not follow from that that when you talk about amending rights of use, that does not include amending conditions, because the provision for amending rights of use is Article 14, and Article 14 expressly includes the amendment of conditions. We just submit that the dichotomy – obviously there is a verbal distinction, but he seeks to erect it into two separate concepts.

THE CHAIRMAN: He has to because otherwise recital (7) is agin him.

MISS ROSE: That is right. We submit that recital (7) cannot bear that meaning. Just going back to its wording and the final sentence:

> "… amend the rights of use of those operators that were granted rights of use of 900 MHz frequencies and, where proportionate, to review these rights of use and to redistribute …"

So there is a distinction drawn between amending the rights of use and, where proportionate, redistributing them. On his case ----

THE CHAIRMAN: On one analysis, I suppose you would say that there really is not any difference between amendment, revocation, allocation?

MISS ROSE: No.

THE CHAIRMAN: This is Ofcom's business, this is the framework.

MISS ROSE: The licensing.

THE CHAIRMAN: You are the licensing authority, you are given the power under the framework to take into account competition. harmonisation, single market, all the ----

MISS ROSE: The duty – we have the duty to take those into account.

THE CHAIRMAN: You have the overriding objective, or whatever terminology you use.

MISS ROSE: That is right. Two points: firstly, looking at para.7 again, the sentence I have just read cannot be consistent with Mr. Beloff's submission.

THE CHAIRMAN: I understand that point.

MISS ROSE: That is his first problem. The second problem purposively, looking at recital (8), clearly the policy is, firstly, that "making available" is not the same as "allocation"; and secondly, allocation is to be done in such a manner as to ensure no distortion of competition. We submit, what is the policy justification from Mr. Beloff's perspective of saying, "Yes, we accept that the European legislature intended that allocation should be done in such a manner as to ensure no distortion of competition, but we say, notwithstanding that, because we were an incumbent and therefore most likely to have the competitive advantage at the date the Directive came in, we nevertheless have an unqualified right to the amendment of our licence, to use it regardless of whether that would distort competition.

THE CHAIRMAN: He would say speed, he would say get on with it and then you can spend ----

MISS ROSE: We submit that the whole structure of the Directive is that you must protect against distortion of competition, and the way you do that is by going through the process in the Authorisation Directive; and that you go through that process after the spectrum has been made available, as is stated explicitly in recital (7).

The contrary view envisages a situation in which the European legislature, of course knowing the complexity of the competitive situations in the Member States, nevertheless decided that it was going to grant an unqualified right which would rise to a significant risk of competitive distortions contrary to the basic objectives in Article 8 of the Framework Directive. We submit that you would need very, very clear language to be persuaded that that was the intention of the legislature, because it is so startling a result that the legislature intended a situation in which distortions of competition would occur and could not be remedied until after they had occurred.

Not only would that be contrary – if you just go back to the Framework Directive for a moment, Article 8 – it would be contrary to three of the policy objectives in Article 8. Firstly, at 8.2(b), it would be contrary to the objective of ensuring that there is no distortion or restriction of competition.

Secondly, it would be contrary to the objective of encouraging efficient investment in infrastructure and promoting innovation. Mr. Beloff's argument envisages a situation in which spectrum is liberalised in the hands of the incumbent and that there is then a consultation process which may result in it being taken away resulting in the incumbent not

being in a position to invest efficiently in the development of the 3G network on that spectrum. Again, we say that makes no sense in terms of the objectives of the Framework Directive.

Thirdly, at (d), encouraging efficient use and ensuring the effective management of radio frequencies. Again, we same objection applies, that his construction envisages a situation where there would be bound to be inefficient use of the radio spectrum while it was not clear who was to end up with it until after the consultation process.

PROFESSOR PICKERING: Am I right or am I wrong in your view, Miss Rose, to be concerned about the implication that competition takes place within a band rather than that the competitive analysis ought to take account of competition across bands?

MISS ROSE: Sir, I know you want to engage me in the competition analysis. I completely understand why you do.

PROFESSOR PICKERING: I do not want to do the competition analysis.

MISS ROSE: I am simply not in a position to answer that question. You are asking me a question of expert economic evidence which I am not in a position to answer and which is not an issue in these proceedings.

PROFESSOR PICKERING: It has quite significant implications, does it not?

MISS ROSE: Sir, what one can see is that the European legislator plainly envisaged that the effect of this Directive, if it were simply to be to give to the incumbent operators the UMTS use of the 900 band, could give rise to competitive distortions. There is no question but that that was the view of the European legislator. You may disagree with that. I am not in a position to comment, because I am not an expert economist. What is clear is that that what the legislation envisaged as a risk. It, therefore, included, in our submission, a process for mitigating that risk. The ways in which that was to be done were a matter for the Member States. As you know, there has been extensive consultation by Ofcom, followed by consultation by BIS, and now we have a policy which is said to cater for the problem. The merits of that, with respect, are not a matter for today.

PROFESSOR PICKERING: You have been helpful because you are telling me that the implication of this recital is that it is expected that the competition analysis should focus particularly on that 900 MHz band.

MISS ROSE: No, I have not said that, Sir, I am sorry.

PROFESSOR PICKERING: I thought that was what you were saying.

MISS ROSE: No, sir, what I said was that it was understood by the legislator that this legislation, if it resulted in the liberalisation of the 900 band in the hands of the incumbent, could result in distortions of competition. That is express in the legislation, and I go no further than that.

THE CHAIRMAN: It could have an anti-competitive effect by liberalising the 900 band, but that does not tell you which market is being considered?

MISS ROSE: Correct, and I do not seek to make any submissions about that.,

PROFESSOR PICKERING: Does recital (7) say anything about "in the hands of the incumbent operator"?

MISS ROSE: It is recital (6), sir:

> "The liberalisation of the use of the 900 MHz band could possibly result in competitive distortion, in particular where certain mobile operators have not been signed spectrum in the 900 band, they could be put at a disadvantage in terms of costs inefficiency in comparison with operators that would be able to provide 3G services in that band."

PROFESSOR PICKERING: And, of course, the implication of the pre-General Election approach on this was to suggest that one extra operator should be given access to spectrum – I think access to the 900 spectrum, but not the fourth operator.

MISS ROSE: We now have a different policy.

PROFESSOR PICKERING: If I have pursued a line that I should not have done I should not have I do apologise.

MISS ROSE: Sir, there is absolutely no apology required. It is simply that I cannot assist you on matters of expert economics.

PROFESSOR PICKERING: I understand.

MISS ROSE: I was making the submission about recitals (7) and (8), which are crucial, and I was making the point that recital (8) pre-supposes that "made available" is different from "allocate", requires that allocation should be done so as to minimise any distortion on competition. I made the submission that that is compatible with Article 9 of the Framework Directive. Can we just go to the Framework Directive. again. That is where you see the distinction between the allocation and assignment of radio frequencies by national regulatory authorities at 9.1, and the harmonisation of use of radio frequencies across the Community at 9.2. Our submission is that the division between those two functions is reflected in the distinction between the "making available" of spectrum and the "allocation" of spectrum.

THE CHAIRMAN: I did not really understand that submission yesterday, and I do not really understand it today. Are you saying that because 9.2 is talking about promoting harmonisation of the use of radio frequencies across the Community consistent with the technical Radio Spectrum Decision, that is equivalent to the making available, i.e. the transposition?

MISS ROSE: Yes, that is what we say.

THE CHAIRMAN: Why?

MISS ROSE: We say that, because the reason this is a Directive is because there was originally a GSM Directive before the spectrum decision existed. We are going to have to look at this together with the 1800 decision where this point becomes even clearer because the 1800 decision is a technical implementing measure that is made pursuant to the spectrum decision. Essentially, what these two measures are – the amendment of the GSM Directive and the 1800 decision – are European decisions about the harmonised use that should be made of spectrum across the European Union. The purpose of this Directive is to lift the restriction that was contained in the original GSM Directive because the original GSM Directive said 900 band to be reserved only for GSM.

The purpose of this Directive is not to give any individual undertaking a right to use spectrum for any purpose, but to lift the restriction in the GSM Directive that confined the use of spectrum to that single purpose and to say it must be made available for UMTS which can coexist with it. It is an amendment of the technical harmonisation of the uses to which spectrum can be put across the European Union. What it does not deal with is the licensing or the allocation or the assignment of spectrum to individual undertakings which must be separately considered on the basis of its impact on competition. Those are two separate matters and we submit that that dichotomy comes from Article 9 and is clear throughout the structure of the Directive that we are looking at here. It is clear in the recital we have just been looking at, recital (8), and we say then becomes integral to the structure of the Directive itself when we look at Articles 1.1 and 1.2, because we see the same distinction. Article 1.1:

> "Member States shall make the … (900 MHz band) available for GSM and UMTS systems, as well as for other terrestrial systems capable of providing electronic communications services that can coexist with GSM systems, in accordance with technical implementing measures adopted pursuant to the … Radio Spectrum Decision."

What you will note there is that that is doing two things. First of all, it is amending the original GSM Directive to lift the restriction and, secondly, it is providing for the further liberalisation of this band of spectrum when further technical implementing measures are put forward under the spectrum decision which indicate that there are other uses to which this spectrum can be put that coexist with UMTS. It is future proofing it so they do not have to pass another Directive when 4G comes in or whatever is the next technology.

It is significant that that Article refers you to technical implementing measures under the spectrum decision. That is 1.1. Then, 1.2:

> "Member States shall, when implementing this Directive, examine whether the existing assignment of the 900 MHz band to the competing mobile operators in their territory is likely to distort competition in the mobile markets concerned and, where justified and proportionate, they shall address such distortions in accordance with Article 14 of [the Authorisation Directive]."

That is dealing with the implications of the making available of the spectrum for the licences of individual operators. We submit that it is clear from Article 1.2 that the examination of the effect of the existing assignment is to take place when the Directive is being implemented and that what it leads you to is a process under the Authorisation Directive.

THE CHAIRMAN: That again begs the question of when is the Directive being implemented if the Directive is simply the making available – i.e., the clearing away of the legislative impediments? You see, that is the problem, is it not? Mr. Beloff says Member States shall, when implementing this Directive, must mean they shall when doing the allocation process or the lifting of restrictions on the licences ----

MISS ROSE: Yes, absolutely. We would agree with that, when lifting the restrictions of the licences or allocating spectrum but what Mr. Beloff chooses to do, Sir, is that he seeks to carve out from that the lifting of the restrictions on the licences. He says, yes, the Member States can consider the impact on competition in accordance with Article 14 when they are considering any other kind of reallocation or amendment but not considering whether the incumbent operators also get UMTS.

THE CHAIRMAN: You are saying too that Member States shall, when implementing the Authorisation Directive, pursuant to the implementation of this Directive.

MISS ROSE: I would respectfully not agree with that, Sir.

THE CHAIRMAN: I know you will not. I am just putting it. I am allowed to put it to you even if you do not agree.

MISS ROSE: Yes, but it cannot, with respect, be right. It is not a question of implementing the Authorisation Directive. The Authorisation Directive is already in force and has been in force for a number of years. Member States are bound to operate it.

THE CHAIRMAN: "Implementing" is perhaps the wrong word, but giving effect to the Authorisation Directive.

MISS ROSE: The point is more fundamental. The question is this: how does an incumbent operator, once this Directive has been implemented, once the 900 spectrum has been made available, how does an individual operator who has 900 spectrum for GSM get access to UMTS? My submission is that they can only get access to UMTS by applying for a modification of their licence under Article 14. This is another flaw in Mr. Beloff's argument because in order for him to succeed he has to contend that the mere coming into force of this Directive automatically bestows a right on O2 to use its allocated spectrum for UMTS. We submit that that cannot be right because that is inconsistent with Article 14 of the Authorisation Directive. At the moment what O2 has is a right of use pursuant to Article 6 with a condition limiting it to GSM.

THE CHAIRMAN: I understand your argument, I think, pretty clearly. I think the fundamental problem is that there is ambiguity in the language here between the concept of whether the Directive itself demands, to use Mr. Beloff's favourite word, the liberalisation or whether the Directive itself, if implemented, only gets you to what I would call first base, which is the clearing away of the legislative impediment.

MISS ROSE: That is the issue.

THE CHAIRMAN: The problem is that both of you have things to grasp quite legitimately within the language which give support to what you are saying. What I am struggling for at the moment is what is, if you like, the – I think I know your argument. You say the guiding principle is found in the whole framework and that Mr. Beloff has to, if you like, nit-pick and break down the framework in order to get where he wants to go to with the recitals, whereas you do not need to. There is ambiguity in there, is there not?

MISS ROSE: Sir, I imagine if there was no ambiguity at all we probably would not be here. Essentially, the first problem of Mr. Beloff's argument, as you have said, is that it involves him chopping up different types of modification of the licence. His second problem is a policy problem which is that he has to explain why the European Union thinks it is desirable to implement a Directive that risks causing distortions in competition and then try and deal with the damage later. He has to explain that. When you consider that it may be very

difficult to quantify what the distortion in competition has been or what the damage to any other individual operator has been ----

THE CHAIRMAN: That is a forensic point.

MISS ROSE: No, Sir. With respect, it is not a forensic point. It is about the purposive construction of the Directive.

THE CHAIRMAN: I understand that. It is a very strong point on the purposive construction of the Directive but if he were right that that is what it means then that is the effect.

MISS ROSE: Sir, what we are doing now is addressing your point that there are indicators both ways and therefore what you are looking for is principles of legislative construction that would give you an indicator as to which construction is correct.

THE CHAIRMAN: You say the principle is ensuring competition?

MISS ROSE: Yes, avoiding the distortion of competition. Mr. Beloff has to explain what was the overwhelming policy that meant that the legislature intended there to be a situation in which unquantifiable risks of distortion of competition would occur and where there was almost bound to be inefficient development of infrastructure and use of spectrum before the matter could be cured and why the Directive intended that result. He has to explain that.

The second point he has to explain is how this provision sits at all with the detailed structure for the amendment of rights of use contained in the Authorisation Directive. As I explained yesterday, what we have in the Authorisation Directive is a mandatory process where somebody seeks an amendment to their licence, expressly including an amendment to a condition.

He has to explain how it is that this Directive bypasses that. We submit he really cannot do that because not only is there no evidence at all that this Directive was intended to short-circuit Article 14 of the Authorisation Directive; on the contrary, it is abundantly clear from the text of the Directive that it intended the Directive to be read together with Article 14 and regarded Article 14 as an essential tool for the properly and orderly implementation of this Directive.

We submit that those two considerations, the policy consideration in relation to the effect on competition and the efficient growth of infrastructure in spectrum, and the processes that are already included in the Authorisation Directive which must be operated in accordance with Article 8 of the Framework Directive are powerful indicators that his construction is wrong.

His answer to that is to say, "Well, this was a risk that the legislator was prepared to take in the interests of speed." We can see this in his skeleton argument which is in volume one at tab 13. Para.65.

THE CHAIRMAN: This is O2's skeleton?

MISS ROSE: O2's skeleton argument. I have it at tab 13 of volume one. It is behind tab A. Paragraph 65(3). This is his answer to our policy argument. He says:

> "The risk of incumbent operators enjoying a competitive advantage pending the conclusion of a competition decision process does not 'run counter' to the purpose of the legislation. … Rather, it is a risk which the European legislature has evidently deemed worth taking in pursuit of the primary purpose of the legislation, namely to secure the timely deployment of UMTS …".

THE CHAIRMAN: That is what I put to you a few moments ago.

MISS ROSE: Yes. Our submission is that there is no evidence at all in the Directive that that was the intention. On the contrary. The recitals show a great anxiety to avoid a risk of distortion of competition and specifically an identification of the Authorisation Directive as the means by which that will be achieved.

We also submit that his points on delay have no substance because of the obligations under the Authorisation Directive. They cannot simply sit back and do nothing.

PROFESSOR PICKERING: I am sorry to come in again, Miss Rose, but in this context could I ask you to look at the Framework Directive, Article 9, para.4, which seems to recognise that an incumbent may give notice to transfer their rights to use a radio frequency which I assume to be, or probably is, between technologies? That then goes on to indicate what the NRA seeks to do. The wording is slightly different here because it says that they shall ensure that competition is not distorted as a result of any such transaction. It does not say that they shall conduct a competition assessment. I wonder whether you would agree that perhaps this does give an incumbent a particular position in relation to the deployment of the new technology in a band where they are already present.

MISS ROSE: With respect, it is difficult to see how that follows from Article 9.4. What Article 9.4 is simply saying in a situation where a state allows undertakings to transfer their rights to use spectrum to other undertakings – 9.3:

> "Member States may make provision for undertakings to transfer rights …".

It is where you have tradable spectrum effectively. What it is saying is that if an undertaking wants to trade its spectrum and a Member State is permitting the trading of spectrum the National Regulatory Authorities must ensure that there is no distortion of competition as a result of that trade.

I would submit that that assists my argument because that is a further indication of the recognition that you find at the heart of the common regulatory framework in the

Framework Directive itself. Because of the scarcity of spectrum and its value, if spectrum becomes concentrated in the hands of one player, there may well be distortions of competition. Therefore, if you are going to allow spectrum to be traded between undertakings, it is essential that the National Regulatory Authority supervises that process and ensures there is no distortion of competition.

We say again, given that policy revealed again, it would be even more surprising if the policy of the legislature in this case was that there should simply be an unregulated transfer of the right to use UMTS to incumbents without any evaluation of the effects on competition.

PROFESSOR PICKERING: You equate transfer of rights with trading between undertakings?

MISS ROSE: That is clearly what is meant at 9.3:

> "Member States may make provision for undertakings to transfer rights to use radio frequencies with other undertakings."

PROFESSOR PICKERING: Does that solely transfer to 4? Is there not a wider interpretation available under 4?

MISS ROSE: No, Sir.

PROFESSOR PICKERING: Okay. Thank you. You have helped me.

MISS ROSE: We submit that the analysis that we put forward of the GSM Amendment Directive is further fortified when you read that together with the 1800 decision.

THE CHAIRMAN: Just before you do, I have been interested ever since this case began really in Article 3 which you have not touched on.

> "Member States shall bring into force the laws, regulations and administrative provisions necessary …".

It appears that "administrative provisions" is a term that is widely used in the Treaty. That little formulation is widely used in the Treaty all over the place in European legislation. I took the rash step of looking at the French version which talks about "*les Ėtats membres mettent en vigeur les dispositions legislatives, réglementaires et administratives nécessaires …"*. The equivalent of administrative provisions is "*administratives nécessaires"* which would seem to indicate necessary administration rather than administrative provisions which in English has some connotation of something legislative. I do not think it is conclusive in any way but do you accept that that formulation would admit or encompass a construction that referred to variation or dealings with the licences which are public acts, as was pointed out yesterday?

MISS ROSE: Sir, two points. The "necessaire" there is referring to "necessary to comply".

THE CHAIRMAN: You are completely right.

MR. WOODROW: I think "administrative" is an adjective which actually goes back to "disposition" , which is the French word for "provision".

THE CHAIRMAN: So it is an administrative disposition?

MISS ROSE: Yes.

THE CHAIRMAN: Do you accept that? I am not sure that makes a lot of difference.

MISS ROSE: We do not take any separate point in relation to Article 3. We do not submit that the mere fact that in the United Kingdom there are licences brings that outside the scope of the term "administrative provisions". Our submission is a more fundamental one, which is that this Directive does not require the disposition of individual rights of use by 9th May. That is our submission.

THE CHAIRMAN: In theory then the term "administrative provisions" or "disposition" ----

MISS ROSE: We do not submit that that could not, as a matter of principle, include a public licence.

THE CHAIRMAN: That is very helpful. I had rather reached that conclusion myself, that it was not conducive.

MISS ROSE: We do not submit that. We submit that is neutral and that the relevant provisions are the recitals that we have looked at, Articles 1 and 2, read together with the Authorisation Directive and the Framework Directive.

THE CHAIRMAN: I understand all that, but I just wanted to be clear about Article 3. Thank you very much.

MISS ROSE: Can we go now to the decision on the 900 and 1800. We agree with Mr. Beloff that this decision is to be read consistently with the Amendment Directive.

THE CHAIRMAN: Yes.

MISS ROSE: The difference in structure is a reflection of the fact that the original GSM Directive predated the spectrum decision. If we look at the recitals, we have again the history at recital (1) about the reservation of the bands. Then recital (2) refers to the Amendment Directive. Then recital (3) that the 1800 band has become available for GSM operations, currently used by GSM systems. The 1800 MHz should also be opened under the same conditions. The 900 MHz band to other terrestrial systems, capable of providing electronic communication services that can co-exist with GSM systems.

Then over the page recital (13):

> "Radio spectrum technical management includes the harmonisation and allocation of radio spectrum. This harmonisation should reflect the requirements of general

> policy principles identified at Community level. However, radio spectrum technical management does not cover assignment and licensing procedures (including their timing), or any decision whether to use competitive selection procedures for the assignment of radio frequencies."

That is a significant provision which Mr. Beloff did not show the Tribunal yesterday. The same provision is found in the governing spectrum decision, which I showed you yesterday. We submit that that is a further indication of the two functions that I identified from Article 9, 9.1 being about the assignment of rights of use; 9.2 being about the harmonisation of spectrum across the EU. What this is about is the harmonisation of spectrum, it is not about licensing decisions.

You can see, Sir, that that recital immediately proceeds recital (14) identifying the fact that:

> "Differences in the existing national situations could result in distortion of competition. The existing regulatory framework gives Member States the tools they need to deal with these problems in a proportionate, non-discriminatory and objective manner, subject to Community law."

Then there is a specific reference to the Authorisation Directive and the Framework Directive.

If Mr. Beloff is right then Community law Community law does not give Member States the tools that they need to deal with distortion of competition, because if he is right Member States have no power to avoid the transfer of UMTS to O2, even if that will result in a distortion of competition, and can only patch up the problem later. We say again, recitals (13) and (14) are strong indications of the correctness of our analysis.

Then Article 1:

> "This Decision aims to harmonise the technical conditions for the availability and efficient use of the 900 MHz band … and of the 1800 MHz band …"

Then Article 4.2:

> "The 1800 MHz band shall be designated and made available … subject to the conditions and implementation deadlines laid down [in the annex]."

If you then look at the annex, what you see is, first of all, an identification of the system, which is the UMTS system, then the technical parameters, which is essentially simply talking about the buffer that you need to have between users to ensure that there is no interference:

> "Carrier separation of 5 MHz or more between two neighbouring UMTS networks."

That is to ensure no interference between networks. Then the implementation deadline, 9 May 2010.

What is striking is that there are no other conditions referred to there, and in particular no conditions that would be relevant to a licensing regime, or might deal with the effects on competition. The reason for that is that this Decision simply is not concerned with those issues. It is only concerned with the harmonisation of the uses of these bands at pan-European level and that is what it means by "making them available". It does not mean giving them to an individual user. That is dealt with under the Authorisation Directive.

That essentially is our analysis of the proper interpretation of the Directive and the Decision in the context of the common regulatory framework. We submit that that analysis is supported by other materials, and in particular the Working Paper of the Radio Spectrum Committee and the practice of other Member States. Can we look first at the Working Paper, volume 8, tab 36. It is fair to say, as Mr. Beloff points out, that this is a Working Paper of 23rd June 2009, so produced shortly before the Directive was finalised, and shortly before the Decision was finalised.

It is right, as Mr. Beloff points out. that on the first page it says:

> "This is a Committee working document which does not necessarily reflect the official position of the Commission."

However, this is a document produced for the guidance of the Member States by the Radio Spectrum Committee, which is the Committee that has responsibility, as we saw from the Spectrum Decision, for the harmonisation of the uses of spectrum across the European Union, and which proposed the 900/1800 Decision in the first place. So it is the expert body that produces these decisions.

We see in the introduction, the third paragraph, they say:

> "However, in view of the number of Decisions now adopted, and given the ever-growing importance of spectrum policy in the development of new technologies and services, in facilitating innovation and in assisting economic growth, it is necessary to ensure that the Decisions are fully and correctly implemented. In order to assess the effectiveness of implementation and monitoring, it is useful to recall and clarify the background to this activity."

Then we are told that a first version of the document was presented in December 2008, that it was further discussed at 27th RSC meeting, and:

> "This final version takes account of comments made by Member States as well as results of internal consultations within the Commission."

So this is a document that reflects the input of Member States and the Commission.

> "This document is only intended to provide non-exhaustive guidance to the Member States and to help establish a common understanding within Member States and between them and the Commission. It does not bear any legal character."

So, with the appropriate health warning, we look at what it says about the concepts of "designating and making available of frequency band", p.3:

> "A large number of spectrum harmonisation Decisions contain two obligations for Member States: to designate a frequency band for an application and to make it available under specific technical conditions.
>
> The concept of '**designating a band**' … does not seem to raise difficulties in terms of implementation. It would usually involve changing the national frequency allocation/utilisation plan or table to give legal certainty that particular radio frequencies are allocated to a particular use in accordance with the Decision. However the Commission services are of the view that the modification of an allocation table which does not contain all the required technical parameters is not sufficient to ensure the effective implementation of the Decisions.
>
> The concept of '**making a band available**' requires some clarifications. The Commission services' view can be summarised as follows:
>
> Making available a spectrum band means preparing all the necessary steps so that the authorisation process can start if a potential user so requests, and therefore letting potential users know that they will have the possibility to access a frequency band under specific conditions."

We say that is wholly supportive of our approach, that what it envisages is that making the band available is the step before the authorisation of the use of the band subject to specific conditions.

> "In practice, this involves adopting or amending national legal acts that would regulate the use of the radio frequencies in a more detailed way. This requires several steps that must be completed within the deadline set by the Decision:
>
> - freeing the band if individual rights of use were granted for another application than the one foreseen by the harmonisation Decision to the extent that such rights would prevent any use of the band in line with the Decision …"

That is a situation such as applied, I believe, in relation to the 2.6 spectrum, where you have spectrum that has been used for other uses which is then designated, say, for mobile

telephony, and you have to clear the other uses off the band otherwise it will not be available.

Then:

> "- in cases where spectrum use is subject to general authorisation …"

that is not this case –

> "… adopting national legal text which submits a category of applications to general authorisation and includes the relevant technical conditions of use,
> - in cases where spectrum use is subject to individual rights for electronic communications services, launching the public consultation on a possible limitation of the number of rights of use (under Article 7(1)(b) of the Authorisation Directive)."

What it is quite clear is not understood by the Committee as being encompassed within making a band available is the assignment of the new use to somebody who previously has a right of use for a different use. That is quite clearly not included, and what is understood there is that you commence the authorisation process under the Authorisation Directive. We say that that is that clearly consistent with what you find in the Directive itself. It cannot stand with Mr. Beloff's case.

The same point, although somewhat less explicitly, appears in some of the travaux preparatoires to the Directive. We have already looked at the changes. The strongest indication is the changes to the drafting of the recitals that we have already looked at. There is some indication in the explanatory memorandum – volume 3, tab 1. This is the document with the rather eccentric numbering, and if we go to page ----

THE CHAIRMAN: You call this the "Explanatory Memorandum", do you?

MISS ROSE: Yes. If you look at it at the top it says "Proposal for a Directive", and then it says "Explanatory Memorandum, context of the proposal". So this is the explanatory memorandum. It just above the first hole punch on p.1. It is horribly printed. If we look at p.3, at 320 they examine the proposal in accordance with the subsidiarity principle and they say it cannot be sufficiently achieved by Member States.

> "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 of internal market measures adopted under the Radio Spectrum Decision. However, the adoption of a new scheme requires amendment of the GSM Directive."

So they are saying that if you are trying to harmonise the use of a particular spectrum band you have to do it on the European level, not individual Member States. You would normally do it by decision under the Spectrum Decision, but you have to amend the GSM Directive in this case. They say that can only be amended by another Directive. Then:

> "Community action will be better able to achieve the proposal's objectives for the following reasons.
>
> The amendment of the GSM Directive and the adoption of coexistence conditions for GSM and UMTS, with provision for other systems to coexist in these bands as well, through a binding Community harmonisation measure, are necessary to ensure the timely and harmonised introduction of the new spectrum usage conditions in the Member States. Without such a measure no harmonised and timely solution can be guaranteed.
>
> The GSM Directive in its current version prohibits the use of the 900 MHz band by other pan-European systems, such as UMTS, and is therefore an obstacle to the development of the information society in the EU. Harmonised use of the 900 MHz band may support additional applications that meet current Community policy objectives."

So all consistent with the Article 9.1 objective in the Framework Directive.

Then:

> "Proportionality principle. The proposal complies with the proportionality principle for the following reasons …"

THE CHAIRMAN: It is Article 9.2, is it not – harmonisation is in 9.2?

MISS ROSE: Yes, it is.

> "The GSM Directive will be amended and new harmonised technical conditions for the 900 MHz band will be introduced by the Commission, acting with the assistance of the RSC, while preserving the operation of GSM services. The proposed measures are limited to spectrum bands relevant to electronic communications services for pan-European applications. Given the evolution of technology and consumer needs, these bands should be kept under review so that additional pan-European systems could also be introduced and coexist with GSM and UMTS. This measure does not affect the issuance by Member States of rights to use the spectrum."

So again we say, admittedly in a very short form, the same point that is made in recital (13) of the Decision. This is not about licensing, this is not about Article 9.1, this is about

harmonisation. That again, we say, is entirely consistent with the interpretation of the meaning of making available that the RSC itself has adopted in its Working Paper.

We say that our interpretation is also supported by the practice in other Member States. That is not simply a forensic point because this is legislation that was adopted collectively by the Member States in a real context, and has then been implemented by them.

If we look at the witness statement of Jane Jellis for H3G, volume 4, tab B, she gives a detailed analysis of the ways in which the Member States have implemented the Directive and the Decision, and she summarises the position at para.42 of her witness statement. She says:

> "Three's lawyers, Baker & McKenzie LLP, have directed questions to lawyers in each of the Member States of the European Union to ascertain what was necessary to allow UMTS use in [those bands] … and what has actually happened since the passing of the GSM Amendment Directive. It will be seen from the description below that many Member States have sought to remove generally applicable bars to UMTS use in the 900 MHz and 1800 MHz bands before 9 May 2010 but few have actually granted individual rights to use UMTS technology in those bands. In most cases the removal of the general prohibition has not in itself allowed MNOs to use UMTS technology … often mention's licences will still require amendment and (where the intentions have been made public) will usually be subject to some form of assessment of potential competitive distortion and/or measures to mitigate such distortion. In the majority of cases where Member States have already permitted the use of UMTS in the 900 MHz or 1800 MHz band, all MNOs operating UMTS technology in that particular Member State (in the 2100 MHz band) also already had licences to operate in the 900 MHz and/or 1800 MHz band prior to the passing of the GSM Amendment Directive. These Member States do not therefore face the same competition issues as the UK in this regard."

That is how she summarises the position.

If Mr. Beloff is right, then many Member States have failed properly to implement this Directive. We say he is not right and that they have implemented it in accordance with its terms, in accordance with the structure of the Common Regulatory Framework and in accordance with the guidance given by the Radio Spectrum Committee.

Can I briefly identify what we submit are the key flaws in the argument mounted by O2, and most of these we have already identified, and I will take them quickly. First, there is characterisation of O2's position as having a right to use the 900 and 1800 spectrum subject

to a restriction limiting it to GSM which must now be removed. We submit that is conceptually incorrect. In fact, O2 only has a right to use the spectrum for the purposes of GSM. There is no general right to use the spectrum. In order for it to obtain a right to use the spectrum for UMTS it must apply for the amendment of its licence as it of course has in fact done, and once it does that Article 14 applies.

Secondly, and closely linked to the first, is the dichotomy that Mr. Beloff sought to introduce between conditions and rights of use, and you already have my submission that they cannot sensibly be distinguished, and that his approach is inconsistent with the wording of Article 14 itself. The scope of the right can only be understood by reference to the conditions attached to it.

The next flaw is his equation of liberalisation of the use of spectrum with making the spectrum available, and we say that is simply a misreading of recital (6) of the Directive and has no basis.

The next flaw is his attempt to argue that O2 automatically acquired the right to use the spectrum for UMTS as at 9 May without needing to apply for the amendment of its licence. We say that is simply inconsistent with the structure of EU law, and in particular with the Authorisation Directive. Once one accepts that, his case does, in fact, collapse.

The next flaw is his argument that the reference to the modification of rights of use or the amendment of rights of use in recital (7) only applies to the redistribution spectrum. Again, we submit that is contrary to the express wording of recital (7), which distinguishes between "amendment" and "redistribution", and is also inconsistent with Article 14 with which recital (7) must be read.

The next flaw is his assertion that on our case there could simply be inaction on the part of the regulator. We submit that is not so, the regulator is subject to the duties under the Authorisation Directive and – a point I made yesterday – it has not been submitted that Ofcom has erred in its conduct of the Article 14 process. No breach of Article 14 is alleged.

Finally, there was his argument that the method of implementing the original GSM Directive was by the issuing of licences, and he said on that basis it would be very odd if there were a different method for implementing the Amendment Directive. We submit that is not correct conceptually. The United Kingdom implemented the original GSM Directive by reserving the 900 band for GSM only. The licences were not the implementation of the Directive, they were acts by the regulator that were consistent with the United Kingdom's obligations under the Directive. Since what the Directive did was to restrict the uses to which the 900 band could be put, the grant of licences was not implementation of the

Directive, but simply acts consistent with it. As a matter of fact, the UK did not undertake any specific legislation to implement the GSM Directive, it simply acted in accordance with it, as it is doing in accordance with the Amendment Directive.

Can I briefly address the adverse consequences if O2's argument is correct, and again I have already foreshadowed this and I can take it quickly. Our submission, as the Tribunal knows, is that the Tribunal should not lightly adopt a construction of this legislation which leads to undesirable consequences or to consequences that are contrary to a central purpose of the Common Regulatory Framework unless it is driven to do so by unavoidable language. We submit that O2's argument would have such consequences, as they acknowledge at para.65.3, because it would mean that O2 had a right to use the spectrum for UMTS even if doing so would distort competition and would be an inefficient use of spectrum or infrastructure, contrary to Article 8. We say that their answer that that is a risk the legislator was prepared in the interests of speed is inadequate.

Then fragmentation: they say that the result of our argument is that there may be inconsistent implementation across the EU, and that in countries where the GSM Directive has been implemented purely by a general piece of legislation saying, "Thou shalt only use the 900 spectrum for GSM and the licences do not include a limitation", amendment of the legislation will give the right to the licensee to use their licence for all the permissible purposes, including UMTS, and they say that is inconsistent with the position in other States being that they then have a consultation. There are two answers to that. The first is individual Member States choose the legislative framework that they want to adopt that is suitable for their own purposes, and States that do not have difficulties with competition are likely to adopt a more simply framework. If they found that it was problematic for competition they could of course adopt a different legislative framework at any time.

The second point is that the only State that has been identified by Mr. Beloff as a State which gives rise to this inconsistency is Latvia, and that perhaps is an indication of the significance that ought to be attached to that argument.

Further points on which, without any disrespect intended to the inhabitants of Latvia ----

MR. BELOFF: I hoped you were going to say Latvia.

MISS ROSE: The key point about Latvia is that all the MNOs in Latvia have access to the 900 spectrum, so there is no competition problem.

Further points on which they rely: they seek to rely on the dictionary definition of "make available" as being "capable of being made use of". We submit that that really is not going to assist in this case. It is entirely neutral as between the rival contentions of the parties.

Then they rely on the use of the words "make available" in other EU legislation, but Mr. Beloff fairly acknowledged in his oral submissions yesterday that they are in a very different context and it is difficult to derive anything from that legislation.

Mr. Beloff also drew attention to earlier decisions of the Spectrum Committee that are set out at para.72 of O2's skeleton argument, which call on States to designate spectrum by a particular date and make it available thereafter, and sought to contrast those decisions with this decision which requires the spectrum to be made available on the date of implementation. The difficulty with that argument is that it takes one nowhere when asking the question, "What does it mean to make available?" All it tells one is that in certain other decisions the making available did not have to be by a particular fixed date, but was after the designation. The best evidence as to what the RSC thinks is meant by "make available" is its own statement of June 2009, where it explains what it means by "make available".

Mr. Beloff also relied on the authorities of *Albacom* and *Arcor*. With respect to him, those did not appear to us to have any bearing on the issues that this Tribunal has to decide.

Finally, there were submissions made by Vodafone. I do not intend to deal with them in detail because, in my submission, they proceeded on the premise which is the issue that needs to be demonstrated in this case, namely they assumed that "make available" meant liberalise in the hands of O2 and Vodafone, and that is the very issue which this Tribunal has to decide.

Sir, unless I can be of any further assistance, those are the submissions of Ofcom.

THE CHAIRMAN: Thank you very much, Miss Rose. Mr. Fordham?

MR. FORDHAM: We agree. Although we are Everything Everywhere, I am told we are not in Latvia. To be fair to the Latvians, they too did not approach this Directive on the basis that, if you have a licence restriction, the duty to make available means that you have to lift it to allow an automatic licence amendment because, as Miss Rose has just explained, there were no licence restrictions in Latvia so the question did not arise.

The reason why there was an automatic follow through, having lifted the impediment, which is the national measure, was because of the competition landscape in Latvia. Can we just add, please, some submissions of our own, starting by identifying three components which are included in Mr. Beloff's clear, precise and unconditional directly effective right? The three components are these: firstly, the source of his right is squarely Article 1.1 and the duty to make available. If he is right on that he succeeds but if he is wrong on that he does not have anything else.

The second component, as you will have noted, is that he has a constituency, a category of people who benefit from this directly effective right. It is not everybody. The constituency who get the right are the licence holders within the 900 band. I want to look at that constituency in just a moment.

The third component the Tribunal will have noted in his directly effective right is that it includes a mechanism for delivering the right to that constituency. If you ask the questions: "What did the state do wrong? What should have happened? Where is the default? What are you appealing and what is your remedy?" all of those questions are answered by the same mechanism. What had to happen was an amendment of the existing licences and that of course is squarely Article 14 of the Authorisation Directive. That is what they applied for. That is what was refused. That is what is being appealed and that is what gives you jurisdiction.

If we look at the constituency, we need to remember that there are in fact two types of operator who stand to benefit from the consequence of the duty of mandatory availability, making available in Article 1.1, which is his source. The two types of operators who stand to benefit are, firstly, his category, the holders of a licensed right of use but, secondly, there are those who are not currently the holders of a licensed right of use. Each of those can stand to benefit when the band is made available for 3G. Moreover, each of them needs a licensing decision under the licensing procedures referred to in recital 13 in the decision document that Miss Rose has just shown you.

The first category, Mr. Beloff's constituency, needs an amendment of rights. That is not my phrase. That is the phrase in the legislation because it is the heading to Article 14 of the Authorisation Directive. That is squarely the licensing business of Ofcom.

The second category, the non-holders of any licensed right of use, needs an authorisation. That too is the licensing business of Ofcom under the licensing procedures.

If I can take the example we posited in our skeleton argument, our intervention, it was at para.7 of our document and I think our bundle is bundle five, we gave the Tribunal an example which I just would like to examine. P.3, para.7. We said:

> "… supposing that there is a company who specialises in 3G …"

like Miss Carss-Frisk's clients. They are not interested in 2G. They would never have a licence for 2G. They would dearly like to deploy UMTS. Then we say:

> "Suppose this is in a member state where not all the 900 MHz or 1800 MHz spectrum has been allocated."

It is not all fully used or perhaps some of it has been liberated because of previous competition actions to make some space for a new entrant. In any event, there is some spectrum and there is a company who wants to use it. Mr. Beloff emphatically submits that someone in that position does not have any directly effective right at all as a result of Article 1.1. He emphasises that it is only those who already hold the licences for 900 who simply need an amendment for a restriction to be removed who have the directly effective right. If you want a reference, you will find it in his skeleton argument at para.30(2), where he is responding to us. He says in terms that if they did not already have a licence they would have no directly effective right.

It is worth just asking some questions about that other category that is excluded from this suggested directly effective right. First question: do they benefit from the Amendment Directive or is the Amendment Directive only about existing licence holders? The answer to that is yes, they do benefit. Plainly they benefit because a company in the position I have just described is now going to be able to seek to provide 3G on this band. They could not do that before because it was GSM only.

Then ask this question: by what provision of the Directive do they benefit? There is only one show in town. There are not different provisions for different categories. The only provision is Article 1.1, "shall make available". That point is reinforced, if reinforcement were needed, by recital (8) because recital (8) as you have seen – Miss Rose has shown you – says in terms that spectrum made available is to be allocated and then to ensure no distortion of competition. We know that the Directive stands to benefit those who would like to have it but need a licensing decision by means of an allocation and we know that it is made available but is the platform for them to be able to do so. Moreover, they would be able to say, "What we need is administrative" because nobody is disagreeing on administrative provisions in Article 3. If it can be a licensing act to give a licensing amendment, it can be a licensing act to give a licence. Moreover, that company would be able to say, "Look, if it is not 9 May, then when? This is a bit toothless. This is supposed to be freed up and made available for us." If it does not have to be done by 9 May, there is no other date in this Directive that actually tells me when I am going to get it.

That again reinforces the answer that you have, which is that it is not toothless. It is just that it meshes with the authorisation provisions applicable to both of these categories under the Authorisation Directive. Does that company get a directly effective right? No, it does not.

Therefore, does "making available" in that context mean a concrete ability to use or a concrete right under a licence? No, it does not. What does it mean? It must mean removing any national, restrictive measure. That is what transposing is at the beginning of recital (7).

Whatever "implementing" means in this context, allocating – see recital (8) – being able to take advantage of the making available at the subsequent stages in the consequent steps, none of that changes the fact that there is no directly effective right by 9 May to have your concrete ability to use.

Of course all of this is reinforced in the recitals because the recitals tell us – and it is recital (7) – in terms that, having transposed the Directive – that is 9 May – that does not in itself require the Member State to initiate any authorisation procedure. That is this category. The authorisation procedure having made available the spectrum will proceed and it will proceed under the Authorisation Directive. The regulator will need to make a reasonable, fair and proportionate and competition informed decision and it will need to do so in an appropriate timetable.

Mr. Beloff's problems immediately, once one examines his constituency, include the following: he is relying on a provision, the source, Article 1.1, which does not refer to his beneficiaries, the people who are supposedly getting this right, at all. It is not limited to his constituency. The language it uses is general in its nature, "make available" and general in its application.

If there really were a special, immediate and automatic right for one category, you would expect it to be referred to both as to the who and as to the what. Each is absent. In fact, though we would not need it, we have recital (7) which, putting alongside the category which needs an authorisation procedure, we have the category which needs a modification. That is his constituency because the mechanism for the directly effective right is that they need a licence modification. It is straightforward. It is not a technical interpretation. The recital is straightforwardly identifying the two relevant constituencies. There is no third one missing in respect of whom the Directive does in itself require something to be done by 9 May. Modification – I think this is common ground – is another word for "amend".

Mr. Beloff has not taken his stand on the word "modify" and indeed later in the same recital we have the word "amend" in the same context: "amend the rights of use."

Existing rights of use plainly, for all the reasons Miss Rose has submitted, encompass conditions. They are really two sides of the same coin. You cannot separate out the right from the purpose and you only need to look at the way Article 14 describes itself and, for

good measure, the way it is described by O2 themselves in their notice of appeal to see that that is the sensible and natural use of the language.

I will just give you the reference in relation to the notice of appeal. It is para.18.

> "Article 14 of the Authorisation Directive specifically envisages and governs the amendment of rights of use."

The technicality is all on the other side of this court. We say the correct interpretation is straightforward. If the legislature had wanted to say that there was some automatic right of licence amendment for licence holders without reference to competition considerations, it would have said so. Thought is the first topic I wanted to just add some submissions in relation to.

Secondly, just so the Tribunal is aware of the point – but I will not labour it – in relation to removing the impediment and the national, legal acts to which the RSC decision at authorities tab 36 that Miss Rose showed you just a little while ago and in relation to those matters, I do not know whether the Tribunal noted in passing in the domestic legislation there is a statutory plan here in the United Kingdom as well. It is section 2. Mr. Beloff flirts with the point in his skeleton at paragraph 68(1) where he says they have not even amended the statutory plan in the United Kingdom. There are from our perspective two short answers to that which may explain why this is not a matter that has been raised or pursued.

The first is that that plan is not in the form of an impediment. It is an expressive plan. It is not a legally restrictive, national measure. Secondly, there has been no complaint or challenge in relation to the failure to have republished a plan referring to the availability of this spectrum for this technology. I perhaps ought to just add that that would not be an appealable decision to this Tribunal. You would not have any jurisdiction to consider that issue in any event because the statute excludes that matter. Section 2 decisions are not appealable to the Tribunal. I raise that for completeness, not least because if you do look at section 2 of the 2006 Act it is at least a national expressive measure which reflects and the word used is "available": section 2(2)(a)(ii).

The point goes nowhere because it does not take Mr. Beloff anywhere near the right that he needs and seeks to invoke. As you have just heard – and Miss Carss-Frisk may wish to take you through this in some more detail – there is a very strong European pattern where those countries who do have a plan which is restrictive in its effect each and every one of them had varied by 9 May that impediment so as to make available. It is Miss Jellis's witness statement, between paras.44 and 98. Sometimes you find a national table or a national

chart, regulation or technical requirement but there are many where it is a plan and they are duly varied because this is the way that Article 1.1 has been correctly understood. There is nothing to do here because there is no impediment here.

In relation to Mr. Beloff's mechanism, his constituency get their directly effective right, he says, but he has to accept that it is by means of a licence amendment. As you have heard, rule 1 for the licensing function under the European legislation is that you have regard to competition. It is not a power; it is a duty. There is nothing in this Directive to displace it or to qualify it or to bypass it. the duty is a prospective one because it is to avoid distortions. There is on any view and in any event, once one looks at the mechanism that needs to be followed, no clear, precise and unqualified right even if the deadline for a licence amendment were 9 May, which it is not. The default would be a failure to have assessed the competition implications and reach a competition informed decision as to whether to amend the licensing right. That necessarily is the legal position because that is the legal duty and it has not been qualified or displaced.

That leaves Article 1.2 about which I would like to make some brief submissions. the answer is already clear in relation to what you have heard and what we have sought to reinforce.

Article 1.2 of the Directive is the place within the instrument where we do encounter Mr. Beloff's constituency because it refers to mobile operators in the territory who are operating as a result of an existing assignment of the 900 spectrum. Those will be the licence holders. The Directive is very clear that in that context and in the consideration of their position Article 14 of the Authorisation Directive provides the toolkit. We encounter Mr. Beloff's constituency and his mechanism for it is Article 14 licensed amendment that he needs to deliver his suggested right. We also encounter the principle of competition and avoiding distortions of competition, that being the duty under Article 8 of the Authorisation Directive.

Here we find what we would expect to find. It is here that you address the position of those who have existing rights as a result of an existing assignment and now that the band has been made available for them and for others for other uses, far from there being a concrete, immediate licensed use for anybody, what there is through the mechanism of the licensing powers that the regulator enjoys is a duty – and it is a duty – to assess the future prospects for competition, reflecting the language of recital 6 which uses the future tense "will", operators will be able to provide 3G services.

Here is the mechanism providing the toolkit, the language used at the end of recital 6, to deal in an informed, integrated and competition literate way with what needs to happen. It has been accepted both by O2 and by Vodafone that under this Directive it would have been open to the national authorities to consider competition implications alongside delivering what they say was their directly effective right to their licence amendment. It would have been open to the Member State to have done so.

We say, yes, certainly it is open to the state to consider in parallel, concurrently competition issues when deciding whether and on what basis to amend licensed rights. That is the Article 14 toolkit, but it is more than that. If it is open and therefore consistent with this language when implementing this Directive, it is not a power. It is not an option. It is a duty. "Member States shall".

Even if one were to assume against us that implementing in Article 1.2 was reflective of the duty to make available by 9 May by considering licence amendment, even if one were to make that false assumption, that would only drive the conclusion that, far from having any absolute, unqualified right to an automatic licence amendment, what there is rather is a duty for the Member State to apply the tools that it has in order to avoid distortions of competition. That must be right, not least for this reason: on Mr. Beloff's argument, you pick up the tool once and you allow the licence variation. You do not use the tool in the way that you are duty bound to use it under the EU legislation because you disregard competition. You then put it down again and then, having given that right, you have a duty to pick up the tool again and this time apply it properly by reference to your competition duties. That is a bizarre thing for any legislator to have done. You would need the very clearest of wording to be persuaded that Article 14 arises in relation to this constituency twice. Of course we submit it does not. Unless there is anything else that I can assist on – I hesitate to raise that question lest it raises difficult issues in relation to competition matters – certainly no submission I am making turns on any answer to any of those interesting questions that have been raised.

The only other thing I perhaps ought to make clear – I hope this is already clear from the submissions that I have made – is that, whilst I do not propose to make submissions on the new draft statutory instrument which is very definitely in the interesting but irrelevant tray, I hope I have made clear that it is our position, if and when this is reached, that EU law requires as a duty the competition assessment referred to in Article 1.2 in parallel with the decision making – that is to say, prior to reaching the decision as to whether and on what basis to allow licensing authorisations and with what conditions. That, one suspects, is all

an interesting matter for another day, though that is, we say very clearly, the meaning of Article 1.2, which is why it deliberately uses the present tense in implementing.

Those are our submissions.

THE CHAIRMAN: Just one question before you sit down.

MR. FORDHAM: I knew I should not have said that.

PROFESSOR PICKERING: I am going to ask you a different question, if I may. One of the interest groups that one might have expected to hear something about is the citizen or the consumer. I understand and recognise that competition may advance the interests of consumers and I am duly on notice that I should not go there, but are there other aspects of the consumer interest that should bear upon our understanding and thinking about the issues raised in this appeal?

MR. FORDHAM: I dare say everyone would say they speak for the constituencies of the public. The regulator would say that they speak for the public as a whole. The Government are not here, although we insisted that they be served to assist you in relation to any matters. I am not going to suggest that there are not important public interest considerations that lie behind this statutory regime and its proper interpretation and its proper application. Of course I am not. Nor am I going to suggest that all of those public interest considerations are to be found under the heading of competition. Many of them will be but one can think of other examples within the Authorisation Directive going beyond competition considerations that plainly affect matters of public interest.

What I do submit is that there is no deficit in relation to representation or argument that need trouble the Tribunal in deciding this question of statutory interpretation. Whichever way the statutory interpretation falls, as a matter of considering the language, the purpose and the consequences and the arguments you have heard, that is because the legislature, having considered those aspects, has decided what provision to make and what duties to impose.

I hope that is not an unhelpful answer but what it comes to is it does not deflect the Tribunal from doing what it would otherwise do, which is to interpret this provision in the light of the arguments that you have heard. There is nothing, I would submit, to add or subtract to what has been said by reference to the perspective that you have asked me about. That is my answer.

MISS CARSS-FRISK: Sir, by now pretty much everything that could possibly said in resisting this appeal has probably been said, so I really will be brief. We gratefully adopt the submissions of Ofcom and indeed EE. Apart from making a couple of short points at the

end about the draft statutory instrument, I would like to just touch on three aspects of the case, if I may.

The first is O2's central distinction between having a right to use the spectrum and conditions attached to that right. The second aspect is the context in which this legislation – in particular the Amendment Directive – was enacted. The third aspect is about some of the consequences if O2 are right.

Looking first at the alleged distinction, what O2 say – and this is specifically directed at us, their reply skeleton, para.28 – is the entire thrust of 3's intervention is misguided because we failed to appreciate the distinction between a right of use and the removal of restrictions on a right.

Our response – and this does inevitably echo some of what has already been said – is that what they, O2, fail to acknowledge is that both the grant of a new right and any amendment or modification to an existing right, including any conditions that attach to such a right, must be dealt with under the Authorisation Directive, specifically Article 14 of that Directive. I venture to make that point again because although I think Miss Rose, Mr. Fordham and we also see that as an absolute killer point. That is leaving to one side all the policy considerations that have been mentioned. One has to accept what O2 want falls under the Authorisation Directive.

If you then look at recital (7) of the Amendment Directive, one sees that of course in the second sentence there it says in terms Member States must comply with the requirements of the Authorisation Directive once the 900 band has been made available. Just taking that part of the sentence, it could not be clearer. What you do is you comply with the requirements of the Authorisation Directive once the band has been made available. It follows inevitably, we say, that what O2 seek, a variation of their licence to be effected under Article 14 of the Authorisation Directive, comes after the band has been made available which, as we know, had to be done by 9 May. That is at the second stage of the process that the Amendment Directive clearly envisages.

That is a point that we, with respect, say O2 in their submissions, written and oral so far, have entirely failed to grapple with. It is of considerable interest, we would say, that when O2 came to look again yesterday at the relief they seek they pointed to the way it was set out right at the end of their reply skeleton, where you will remember perhaps in sub-paragraph 2 of para.79 of the skeleton they refer to remitting the matter to Ofcom with a direction that within an appropriate period Ofcom should exercise its undoubted powers of licence modification to vary their licence. The clearest possible recognition, we would say,

that they are inevitably within the territory of Article 14 of the Authorisation Directive and therefore also inevitably, at the second stage of the process envisaged by the Amendment Directive after the band has been made available.

Of course that fits perfectly well with Article 1.2 of the Amendment Directive that, as has been noted, refers expressly to Article 14 of the Authorisation Directive. That is leaving to one side the very powerful policy considerations about possible distortions of competition etc., and the obligations under the Framework Directive that always remain in play that Miss Rose in particular has referred to.

For us, the clincher in addition to all the other good points in our favour is really the interplay between particularly recital (7) of the Amendment Directive and Article 14 of the Authorisation Directive.

Turning then to the context in which the Amendment Directive was made, as has been mentioned, you have some fairly detailed evidence about the law and practice in other Member States in the witness statement of Miss Jane Jellis, who is head of legal, regulatory and competition for my client 3. We say this evidence is really important because it shows the background against which the community legislature acted when it made the Amendment Directive. It therefore casts very clear light, we would suggest, on what the legislature is likely to have intended with this Directive.

I am not of course going to take you through the details of the statement, but what we derive from it is that many – indeed most – Member States, and I have counted 16 out of 26 on a detailed reading of the evidence – have had or have some form of general prohibition on using the 900 band for UMTS. It is of course that sort of general prohibition that many Member States have sought to remove by the implementation date of the Directive, 9 May.

Against that background, we would say, it becomes particularly clear why the legislature did what it did by enacting the two stage process, first to remove the exclusive reservation of the band – i.e., sweep away any general prohibition. Then you address under the Authorisation Directive the whole business of individual rights.

O2 complains – now I refer specifically to paragraph 49 of their reply skeleton – that our interpretation of "making available" results in striking arbitrariness, they say, and Miss Rose already touched on this point, but I will elaborate a little bit.

This is the reference to Latvia, where O2 would say if a Member State has a general prohibition and that is then swept away and operators therefore get an immediate right in practice to use the band for UMTS, then it is very arbitrary if the same does not happen in a country such as the UK, where there is a different regulatory regime.

Of course what O2 completely ignores there is all the other evidence referred to in Miss Jellis's statement which shows what is done in many other Member States where it is not the case that the sweeping away of a general prohibition or reservation of the band for GMS has resulted in any immediate, practical rights for operators to use the band for UMTS. In fact, the evidence shows that in most – and I would say many – Member States there is the requirement of a further, separate step amending existing licences or granting new ones to enable operators to actually use 3G technology in the 900 band.

I do not know if it particularly assists you but I could reel off a list: Austria, Bulgaria, Cyprus, the Czech Republic, Germany, Hungary, Ireland, Lithuania, Luxembourg, the Netherlands, Portugal, Romania, Slovenia and Spain. The evidence also shows that in many of these states – indeed most, we would suggest – this business of moving on to the second stage and actually dealing with individual rights, amending licences and so forth, has not yet happened. Member States have not felt the compulsion in implementing the Directive to make sure that individual rights are dealt with and amended or new rights granted and indeed, as you will see – this is conveniently summarised in a table in Miss Jellis's statement – in many states, if not most, it is also decided that there should be a competition assessment before individual rights are dealt with by grant of new rights or modification so as to enable operators in practice to use the band for UMTS.

The stark fact is that if O2 are right many, if not most, Member States have miserably failed to implement the Amendment Directive correctly. We would suggest that the more obvious answer is that we are right in our construction, as indeed are those Member States.

Just finally picking up the point about striking arbitrariness again, of course we submit that whether or not a Member State has chosen to deal with this issue by general prohibition that is then removed or not having any general prohibition, but simply regulating matters through licences, does not matter. The phrase "make available" means what it means and it does not vary from Member State to Member State, depending on their domestic arrangements. The claimed arbitrariness simply is not there.

Looking then at the consequences if O2 are right, I am not now going to go over all the consequences in terms of an impact on competition that have been referred to, although of course we agree with all of those points that have been made. I have in mind just looking at some other consequences because O2's stark position is no other considerations are relevant for Ofcom to look at when they address the amendment application. No other considerations are relevant than the fact that O2 became entitled on 9 May to use UMTS in the 900 and 1800 bands.

That is how they put it – see particularly para.62 to 64 of their notice of appeal. Of course the logic of that position is that Ofcom is not only prevented from addressing any competition issues before the variation to the licence is granted but they are also seemingly unable to consider what other technical requirements or conditions might need to be imposed in this context if the licence is varied.

Yet, of course as you recall, Article 6 of the Authorisation Directive read together with Part B of the annex to that Directive sets out a whole raft of potential types of conditions that may need to be imposed in relation to the grant of an individual right.

For example, technical conditions to avoid harmful interference. That is just an example – see para.3 of Part B of the annex. It is striking, we say, that O2's own application for a licence of course has a load of what they call technical standards. You may recall from the licence application which you have at tab 18 of bundle 1 of the appeal bundles that there is a whole new schedule two that O2 have drafted which, as they accept, contains technical standards. I would be foolish to venture into the territory of explaining what those technical standards are all about and I do not need to. It is simply making the point that that is all part of the kind of licensing discretion that Ofcom should have and does have by virtue of Article 14 of the Authorisation Directive; as well as of course by virtue of the relevant domestic provisions.

That also, incidentally, picks up the question Professor Pickering put to Mr. Fordham about consumers' interests. Of course, as he already indicated – and we would agree – that is also the sort of consideration that Ofcom must be entitled to take into account and can consider under Article 14 of the Authorisation Directive and indeed under the domestic legislation. It all comes in there.

Just coming back to O2's own application, we say the very fact of the way that they have formulated their application, including the new schedule two, shows that they are constrained to accept that it is not as simple as saying, "We have a right on 9 May to use UMTS. That is the end of it. No other considerations are relevant."

Of course, they accept – so I do not really need to go into that – that if they do not have the sort of directly effective right that they contend for, then things like appending statutory instruments would certainly be relevant for Ofcom to take into account.

That really concludes what we would say about consequences. Finally, the new draft statutory instrument. The first and key point is really that, whatever the Government's approach as evidenced by that draft, the Government may or may not be right but at the end of the day the issue of law is of course one for this Tribunal.

The second – and I am not going to invite you to look at the detail of the draft – we just derive from it is this: it appears that the Government takes the view – see particularly the letter from the Minister that you have been shown – that there has been a competition assessment. I should make it absolutely clear that I am not now seeking to address at all and I make no concession as to whether it has been an appropriate competition assessment as envisaged and required by the Amendment Directive.

The point I do make is that what you get from this is that the Government is evidently considering that it is right that there should be some competition assessment before there is any question of varying individual rights. I am not trying to take it any further than that but just saying, to that extent, what the Government has done is clearly consistent with our position on the law. I do stress I would make no points otherwise as to whether that assessment complies with the community or the domestic law requirements, to the extent that there has been an assessment.

Of course, there is nothing in the draft SI in any way to undermine our assessment about how what O2 seeks plainly falls under Article 14 of the Authorisation Directive. The draft SI specifically refers to Ofcom exercising its licensing powers and that is of course precisely what they would do under Article 14. It takes in the various public interest considerations, technical, competition and otherwise that they are always entitled to take into account on such decisions.

Unless you were to have any questions for me, those are our submissions.

THE CHAIRMAN: Thank you very much.

MISS ROSE: Sir, may I just pick up one point that was made by Miss Carss-Frisk? She made the point that on O2's case the licence must be modified without consideration of any other questions by Ofcom. Of course, that is an essential part of O2's case because otherwise they would not have a precise and unconditional right sufficient to give rise to a directly effective right. Can I just draw the Tribunal's attention to Article 13 of the Authorisation Directive? This gives the Member State the power to permit the national regulatory authority to impose fees for rights of use and, when it does so, they are to take into account Article 8 of the Framework Directive. You then see over the page at B in the annex that condition 6 is usage fees in accordance with Article 13.

We submit that is another reason why O2 cannot be correct in saying that they have a directly effective right because on that basis they would be entitled to use UMTS without Ofcom having any power to impose a condition requiring them to pay the market rate for it.

THE CHAIRMAN: Mr. Beloff, would it be sensible to start at two o'clock with your reply?

MR. BELOFF: Indeed.

(Adjourned for a short time)

THE CHAIRMAN: Yes, Mr. Beloff?

MR. BELOFF: Sir, members of the Tribunal; you have heard that my argument has entirely collapsed from Miss Rose and that I am the victim of a killer point according to Miss Carss-Frisk. So the Tribunal may be surprised to see that I rise to my feet at all! Nonetheless, without resiling or retreating in any way from the submissions I developed on O2's behalf in opening, there are certain matters on which I would wish to reply. May I start where Miss Rose started this morning, that is yesterday's publications by the Government. At the start Miss Rose appeared to be indicating that this somehow supported the case that Ofcom were advancing on the interpretation of the Government's obligation under the Amendment Directive and Decision. If that were so, she was reading from documents entirely distinct from those that we had sent to the Tribunal.

Later it appeared that there was a unanimous chorus from Miss Rose, Mr. Fordham and Miss Carss-Frisk that these methods were entirely irrelevant to this Tribunal's adjudicative function. The reason that they were constrained to say this was because of course the attitude that is displayed in this documentation is entirely inconsistent with the argument advanced by Ofcom and the two interveners on that side of the Tribunal, and it is entirely consistent with our own. We are entitled, in our respectful submission, while recognising that, strictly speaking, it is not an aid to construction, to borrow and share upon the perception of the Department, with its experience in this sector; and secondly, to seek to undermine the submission most forcefully advanced by Miss Rose that our construction was simply incomprehensible to anyone versed in this particular sector because it would be destructive of various interests that were well perceived by those responsible for it.

May I then, and very briefly, just touch on certain aspects of the material that you have received. Firstly, we say, and I repeat, that it appears from this range of documents that the considered view of the Department as to the requirements of the Amended GSM Directive aligns precisely with ours; and in particular that the immediate response that is required is a liberalisation of the conditions of use of those incumbents who enjoy the particular bands, 900 and 1800 MHz.

If you look at the explanatory memorandum, in particular at para.4.2 and indeed 7.3, you will see that under the heading "Legislative context", this is designed to implement, or that it does implement, the statutory instrument that has been drafted, the Directive and the Decision, and that it will allow the deployment of improved mobile broadband frequencies

across Europe and the direction to Ofcom will require it to take a variety of actions in respect of existing spectrum holdings, competition and supporting the availability of higher speed mobile broadband services across the United Kingdom.

Then at 7.3, the policy background, one sees again that the work is designed to address a number of issues, the most significant being those around making the spectrum available for both GSM and UMTS systems to implement Directive 2009, the amending Directive and indeed the Decision. There is a reference to the process of engagement with stakeholders, the final brokers' report, and the like.

In those circumstances, one then sees, against that background, the letter to which Miss Rose referred you this morning, which at that stage you apparently did not have access to, but you now have access to it. This is the letter written by the incumbent Minister to Mr. Bailey, the Chair of the Business, Innovation and Skills Committee, in the House of Commons. You see that in the second paragraph on the second page the Minister announces that he has:

> "… decided to lay the revised statutory instrument before Parliament to give effect to a simplified direction to Ofcom. Ofcom will be directed to implement the EU's revised GSM Directive, which came into effect on the [due date] liberalising the use of [the] spectrum in the hands of the incumbents for new technologies, and the accompanying Commission Decision harmonising the use of 1800 MHz spectrum with 900 MHz."

So one there sees breast high with the analysis that we put forward that that is the character of the obligation to implement.

One then sees in the Impact Assessment document, which is attached to the Explanatory Memorandum, that two particular options were considered – the "do nothing" option and the "direction" option. Those are described at p.1 of the impact assessment, and one sees under the question ----

THE CHAIRMAN: I think that my colleagues have not got the Explanatory Memorandum or the Impact Assessment. I have, in fact, got both. I printed them out off the internet.

MR. BELOFF: We will make certain they have, otherwise this sequence of submissions will not be comprehensible. Do you and your colleagues now have this, and do they have the relevant page? The Impact Assessment is attached to the Explanatory Memorandum, and p.1 is actually, as it were, across the page, because of the way in which this has been set out. One sees what policy options have been considered, this is two-thirds of the way down the page, and "Option 0" is described as the "do nothing" option, Ofcom left to address the

issues through the normal regulatory process, and option 1 is described as "laying a direction to Ofcom specifying particular interventions on spectrum memorandum". Then if one goes to p.5, one sees the consequences of adopting option 1 saying that they leave to Ofcom to address the issues of the normal regulatory process.

The second paragraph says that Ofcom would still have to take action on a number of wide ranging issues relating to spectrum management – for example, it would still be required to liberalise the 900 MHz under the Directive and the 1800 MHz in accordance with Radio Spectrum Committee Decision:

> "Liberalisation means that specific technology and usage restrictions will be relaxed to allow mobile network operators to use these spectrum bands to deliver 3G services as well as 2G."

Then option 1 – that is the second of the two options, 0 and option 1 – one sees on the next page then:

> "Under this option, Ofcom would still take many of the decisions described in option 0 above. These include:
>
> - Liberalisation of 900 MHz and 1800 MHz in the hands of the incumbent operators so that it can be used to deliver 3G services as well as 2G services …"

O2 obviously being a classic example of an incumbent operator. Then it is notable that the main difference between Option 0 and Option 1 relating to timing:

> "Under Option 0, Ofcom would have to decide how best to implement the above EC legislation."

Then it goes on to deal with the problems that that would cause, and they say at the end of that paragraph that that could result in further delay between six to nine months before action is taken.

Under Option 1, specific action on these issues would be taken earlier – that is earlier than the six to nine months period forecast in the earlier paragraph.

> "This would enable …"

and I stress this and I shall return to this in due course –

> "… the potential benefits to businesses and consumers associated with universal coverage in 3G and next generation mobile services and the transition to next generation high-speed broadband services to be brought forward."

One sees there not only an equation of making available with liberalisation, and not only an equation of making available with liberalisation of a spectrum in the hands of incumbent operators so they are able to utilise the new technology, but a clear view that the way in

which this should be done, the earlier the better, in the interests not only of the business community involved in that sector, but also in connection with the interests of the user public.

I just return then briefly to the transposition notes at p.5 of the document that begins with the Explanatory Memorandum. It is in the fifth page. One has two pages, each written on both sides, of the Explanatory Memorandum, and then the transposition notes, which are meant to indicate the way in which the draft statutory instrument is aligned with and represents the implementation of the Directive. One sees in the main box there that they set out what the purpose of the new Directive is, and the second sentence:

> "Therefore, the exclusive reservation of the 900 MHz band for GSM systems needs to be removed.
>
> Article 1(1) of the Directive requires Member States to make [it] available …"

They quote the language of the Directive, and the Decision they refer to is a complementary document that requires the implementation of technical measures to allow the coexistence of GSM systems. Then they go on with Article 3 and the Annex to the Decision providing that they must comply with the various standards, and one sees all that going through.

Then you see towards the foot of the page, penultimate paragraph, the last sentence:

> "The Wireless Telegraphy Act 2006 (Directions to OFCOM) Order 2010 will give directions to OFCOM that will achieve the United Kingdom's compliance with the Directive and the Decision.
>
> At present, the wireless telegraphy licences granted by Ofcom to use the 900 MHz and the 1800 MHz band allow for the bands to be used for GSM systems. The directions will require Ofcom to vary the relevant licences to allow for use of those bands for both UMTS and GSM systems and to ensure that network operators comply with the technical parameters in the Decision."

So that is, as it were, the first point in relation to the perception of BIS.

The second point that I can take more shortly is that it is quite clear in the way in which the statutory instrument has been drafted that BIS and the Minister representing the Department are quite happy with the notion that although there has been, as they put it, a concluded competition assessment from their point of view, a matter which may engage, as I think Mr. Fordham has already indicated, the potential for debate, nonetheless they construe the sequence of events which are mandated by the Directive and the companion Decision as not requiring all these issues to be determined in advance of liberalisation. On the contrary, they consider that it can be addressed after that. One sees that perhaps again most

succinctly and helpfully in the letter that I referred you to earlier. Further down the second page, what Mr. Vaizey there says is:

> "I have considered any possible competitive imbalance that might be created by the liberalisation of the … spectrum. As part of this consideration, I have taken into account the rapid growth of smart phones and similar devices. This has resulted in the greater need for capacity on existing networks and I believe that this requirement cancels out any potential advantage of sub-1 GHz spectrum in terms of rural reach and in-building.
>
> We are therefore directing Ofcom to begin immediately with the 800 MHz and 2.6 GHz auction, but with a equipment to carry out an urgent competition assessment of the competitive position of operators in regard to further developments of 3G and future 4G networks. Ofcom will also consider the potential for new entrants and the measures that might be taken to encourage participation. This assessment will inform the design of the auction rules for spectrum."

Then, wrapping up, as it were, on that page, firstly, where he deals with the liberalisation; secondly, where he deals with future competition distortion potential, and says:

> "I believe therefore that we have met the … GSM Directive to consider the competitive effect of liberalisation and that this direction to Ofcom will permit the earliest possible release of this important spectrum, benefiting business, the consumer and the telecommunications industry alike."

That is all I wish to say about the current attitude of the Government, other than asking the Tribunal, with respect, whether they would read the transposition tables in their own time, because that shows with most precision how it is that the Government perceives that the directions that are incarnated in the statutory instrument will implement and be read across to the relevant provisions of the Directive and the Decision.

BIS have at least been consistent throughout. The change of administration from New/Old Labour to a Coalition Government has not engendered any alteration in their perception since, although there are modifications between the present directions and the previous directions. Nonetheless, the general notion, firstly, that making available equals liberalisation in the hands of incumbent operators, and secondly, that competition concerns can be addressed *ex post* rather than *ex ante* is a theme that animates both.

Ofcom, on the other hand, we have already indicated, had indeed changed their position. They are entitled to do so, but we are entitled again to ask why that which Miss Rose says is

such an extraordinary construction, violative of fundamental principles and interests in this industry, appeared not to engage similar concerns as recently as earlier this year.

Simply to correct a matter, and particularly because Miss Rose made a criticism of the way in which I opened this, we have put in a further witness statement in order to enlighten the Tribunal as to precisely at what stage the arguments now advanced by Ofcom were first ventilated. The point I made was that they had not been effectively ventilated until the defence. In our respectful submission, the meeting that took place in April was dealt with by Mr. Blades. Mr. Blades dealt with that in para.27 of his witness statement. In that he made no reference whatsoever to Ofcom denying that we have a directly effective right, and indeed the way in which he recorded that meeting was to contrary effect. There was no response from Ofcom by putting in a contrary witness statement saying, "You have insufficiently described what we said on that occasion". If one is going to make the criticisms of the way in which someone puts a matter in a witness statement it is usually prudent not to rely on counsel's instructions, but actually to put in a contrary witness statement if there is something to contradict. What we have now done is to produce a further statement elaborating these matters, and elaborating in particular by way of an attendance note what was recorded on our side in relation to this particular meeting. You will see, and I only ask you to look at para.10, that it is recorded ---- I will read para.6:

> "KD queried what this meant for timing of any next steps.£

KD representing O2:

> "PW [Polly Weitzman of Ofcom] reiterated that Ofcom wanted to deal with O2's request and have had discussions to that effect with the government. They now need to walk the government forward on this issue. PW noted O2's submission regarding the directly effective rights stemming from the GSM Directive. PW noted that Ofcom would not necessarily agree with 9 May being an absolute point by which liberalisation must occur, but it is clearly a start date to get moving. However, PW also stressed that this is not to say that on the basis of Ofcom's analysis liberalising in the hands of the incumbents be a near term date would not be the appropriate thing to do in the circumstances. PW emphasised that Ofcom are not sitting on their hands. They are considering the correct analysis under the GSM Directive in the light of their statutory obligations and at the same time are stressing to the government that they want to move this issue forward. At present Ofcom's analysis is focusing on the impact of the variation on consumers, including the current/anticipated capacity issues."

So at the most that is a reservation of position, but an indication that they wish to take the matter forward.

Then para.10:

> "Ofcom's current thinking is that they would not need to carry out a fully policy consultation. Rather, they would undertake a 'this is what we are minded to do' style consultation, which would be contained and focused on the request to liberalise in the context of the obligations in the GSM Directive. GL clarified that this would be a narrow consultation considering the licence variation request and would exclude a full consideration of competition problems that may arise. Such an analysis would likely occur *ex post*."

That again, in our respectful submission, indicates that at that juncture, firstly, reserve our position on directly effective right, put forward no contrary position at that point, indicated desire to move matters forward, and in so far as competition concerns are raised, those are going to be dealt with in an abbreviated process and *ex post*.

Then one also has, just for completeness, the fact that there was a further telephone conversation on 19 April. What was considered there was referred to in the exhibit to Mr. Blades' third witness statement, which is an email from us to Ofcom dated 27 April. There are various passages that are redacted. Obviously at this juncture O2 were concerned to ensure that if the variation that they had requested was not, in fact, granted to them the matter should be brought before this Tribunal as soon as possible. You will recollect the email from Mr. Louth which simply said, "We are parking the matter since the Government have requested us to do so", was on 22 April. One here has on 27 April a reference to a call that took place the previous day,:

> "Ofcom to agree that it will provide a decision no later than 18 May on the application by O2 for licence variation. That decision may simply be that there is no obligation on Ofcom by virtue of direct effect under the Directive, but it needs to be a decision which will give rise to the issue of direct being justiciable.
>
> 5. Agreement that the issues to be determined in this way will be limited to the application of he amended GSM Directive and whether or not it has direct effect. That is a narrow point of law which we believe [optimistically] can be dealt with on a summary basis by the CAT."

I am asked to read para.6:

> "In the meantime, both Ofcom and O2 will reserve all of their rights in relation to the application of the amended GSM Directive and the question of direct effect.

Delay in the period from now to 18 May will not be taken by either party as a point."

This, if I may respectfully say so, reinforces the point, rather than undermines the point, made in the previous paragraph that they are simply there reserving their position. They are articulating no positive case. Rather than, in fact, agreeing with what we assumed had been agreed and certainly desired, that they would refuse our application and in the course of that refusal indicate why it was they disagreed with the substantive arguments that we annexed to it, they never sent any further document, and the appeal to this Tribunal is brought on the basis in effect that they refused to address the issue.

With great respect to Miss Rose, it is quite clear that the highest Ofcom can put the matter is to say they reserved the position as to direct effect and no argument of a substantive kind was advanced until the defence on 28 June before this Tribunal.

Again, the only purpose of clarifying this matter is to indicate that the position that is now taken is not one that appeared so obvious to Ofcom at the time as to warrant or indeed enable them to make any substantive response to what was, on any view, a well reasoned and comprehensive application.

Against that background can I now deal with what I would respectfully call peripheral matters, and there are three. The first is the Working Paper of the Commission. We dealt with that, as I indicated in opening, at para.67 to para.68 of our skeleton argument. Since Miss Rose said nothing in effect that was not in her pleadings and skeleton argument we stand by that. I make three points only, if I may. The first is that as Miss Rose rightly said, reading from the document itself, one had to frank it with "Read with caution, these are provisional views". It is not only she who has to say that. As you will have seen from our skeleton argument and the citation from a case in the European Court of Justice, Sir Gordon Slynn, in his role as Advocate General also expressed reservations about the utility of such working papers as aids to construction, a point not undermined by the fact that in that case, as judges and persons in equivalent position often do, he said, "Notwithstanding that, if I had to construe it this is a point that I would make on it".

The second point is that on its face the Working Paper is a general document. It pre-dates both the Amendment Directive and the Decision. It is not specifically targeted on them in draft form or otherwise.

The third point is that in so far as it deals with the concept of making available in the passage that Miss Rose read, it is clearly addressing those Member States who implement the particular Directives or Decisions by legislative means. Indeed, it is explicable why

they should do that because, as Miss Carss-Frisk informed us, that is the way in the majority of Member States have sought to deal with these matters. So what is in any event a document with examples and does not purport to be exhaustive, its value is severely curtailed by reference to those considerations.

The next document that was referred to was the proposal. Again, I do not wish to reiterate what I said in opening. What is critical in the proposal is para.324, which speaks to the need for a solution which is both harmonised and timely. Whatever may or may not have been the practice of other Member States, if Miss Carss-Frisk tells us, and the evidence supports this, is that there are a variety of techniques that have been used and a variety of timeframes engaged in other Member States, that, in our respectful submission, is not to the point at all. If that be right, the harmonisation that the European legislature wished to take place will not have taken place. It is not unusual for Member States not to be entirely faithful to their Community obligations, but to say that merely because Member States have reacted at different stages and in different ways with the result that for a time there is no harmonisation but therefore one can allow the United Kingdom Government and Ofcom to act in the same way, in our respectful submission, elevates what we say would be imperfect, even improper, practice above principle. Equally, we suggest, to use the vernacular, that actually by having an implementation date of this kind the European institutions were envisaging, as it were, a big bang. It would all happen no later than that particular date.

The other of course is the timely solution. Although Miss Rose said that there is no reason to anticipate any particular delay and indeed it is further suggested that there were mechanisms by which matters could be accelerated, nonetheless on her analysis of the Directive and its effect there is no end point to the assessment and addressing of competition distortions that might eventuate from its implementation.

Again, we respectfully submit that while looking for what the objectives of these instruments were the way in which Miss Rose construes it is inconsistent with that second objective. In relation to practice, a matter on which Miss Carss-Frisk dwelt, in our respectful submission, the fact that not all Member States or even a few Member States are *communitaire* is neither here nor there in relation to the construction of the Directive. Of course one does not know what steps the Commission may or may not take in future vis-à-vis the other Member States.

I come then to the first major submission that Miss Rose made before the adjournment. She suggested, as you will recall, that our analysis or construction would produce results that were both astonishing and inconceivable. That is why of course I have laboured for a little

while the contrary apparent perception both of the department and, until the middle of this year, of Ofcom itself. It is difficult to assume that those two experienced bodies would have entertained the possibility of results that were astonishing and inconceivable which would flow from the construction that they then adopted.

The essence of her point was that the interpretation that required liberalisation without any prior competition assessment would cut across the fundamental goals of a common regulatory framework, as she put it elegantly and eloquently. We were attempting to short-circuit the long but inconclusive consultation process by seeking to play musical chairs. We happened to be in the chair when the music stopped and therefore we had on this allegedly arbitrary basis rights denied to others.

She said that would favour incumbents. As I shall show you, that is entirely recognised in the recitals to the key Directive itself. It says it ignores the competition goals inherent in Article 8 of the Framework Directive and that *ex post* regulation would not be a sufficient or effective way to promote those particular goals. She added in for good measure it would need efficiencies in the infrastructure that would be built for the use of UMTS for certain frequencies which might then become obsolete.

We say, with respect, that not only are these arguments overstated but that they are misdirected. Firstly, Miss Rose says O2's case is fundamentally inconsistent with the purpose of the Directive. If Ofcom could implement this Directive by removing all of O2's spectrum, then it cannot be the case that this legislation confers a directly effective right. Were that our case, one could understand its force but it is not. Our case is that whoever has the right of use in relation to this particular spectrum has an entitlement, as from 9 May, to use it not only for 2G but for 3G and UMTS. We may indeed have no absolute right to a right of use. There may indeed be no right to be an incumbent at the time of liberalisation, but as it is the case, we do have such a right of use. Ofcom, which might in certain circumstances and under certain procedures have taken it away, have not taken it away, so the status quo is that we enjoy the right of use and because of the imperatives of the Directive we cannot be prevented from exploiting UMTS deployment. Indeed, that is precisely what the Directive encourages to be done.

The second mischaracterisation of our case is that she suggests that we contend that we are entitled to deploy UMTS without any account being taken of competition consequences. At times, she appeared to modulate that to at least accept that, for our part, we recognise of course that the competition consequences could be taken into account. What divides us indeed is not whether a competition assessment should be carried out or whether

competition consequence should be taken into account, but when that should occur. Article 1.2, we readily accept, requires such an assessment to be done. That is what divides us.

Of course the second and more important point that divides us is this: if the national regulator, in this case Ofcom, declines to or fails to take a competition assessment prior to D-day, are they by reason of their own failure entitled to refuse to liberalise current licence holders?

We say that the response to the point that it was inconceivable that the European legislature should envisage incumbent licensees having – or as she would put it more evocatively "stealing" – a competitive march on other MNOs without access to the same bands being entitled in our case as an incumbent to deploy the new technology would not be something that could be entertained. One only needs to read the recitals to appreciate that that is precisely what the European legislature envisaged could in fact occur.

Can I ask you, I hope for the penultimate time, to go back to the GSM Directive itself? I do not wish to re-read and re-recite but one sees quite clearly that 6 and 7, which incidentally as Miss Rose identified have a common source even though they have been bifurcated and now certain language has been added to recital (7) which was not present in the unbifurcated para.5 in the proposal. Nonetheless, we respectfully submit firstly that that common source entitles them to be construed compatibly and, secondly, that in any event one needs to read this sequence of recitals in a way the one being consistent with the other.

A particular point that I wish to address at the moment – I will return briefly to a general point a little later – is this: in the second sentence of that recital 6 it says:

> "In particular where certain mobile operators have not been assigned spectrum in a particular band, they could be put at a disadvantage in terms of cost efficiency in comparison with operators that will be able to provide 3G services in that band."

In other words, the community legislature recognises that that position might occur. The position that would occur is the factual position that there would be operators who had the bands and are able to provide the services – that is a given. The possibility is that that might lead to competitive and unfair advantage over those mobile operators who have not been assigned spectrum in that band and who accordingly are not able to deploy the new technology. The recital, compatible again with Article 1.2 of the Directive, says, "This is the way you are going to address this" or, "This is the way you can address this. You have the machinery under the Framework Directive." I will come back to what is meant by amend or review rights of use for spectrum at a later stage.

One has to bear in mind that, although so much emphasis has been placed upon potential competition consequences in this context, the recitals themselves recognise that distortion is only a possibility and not a certainty. It is therefore important not to exaggerate the degree of concern or to assume presumptively that some assessment and addressing of issues post-liberalisation would automatically be incompatible with the rational perception of the legislature.

In any event, what Miss Rose's argument conflates is an analysis post-liberalisation with an analysis post-distortion. Just because an analysis post-dates liberalisation does not entail the consequence that it is incapable of nipping in the bud potential future distortions of competition. Indeed, we would respectfully repeat that it may be more prudent in circumstances where there is clear uncertainty about whether any such competitive distortions will result in waiting to see and then addressing them by the methodology that the Authorisation Directive in particular countenances.

Again, if one goes to the draft statutory instrument which has been now formulated by the present Minister, one will see that that is the way in which indeed it is envisaged in this jurisdiction, if this direction passes muster both by parliamentary and it may even be if necessary by legal process too, the way in which the competition assessment is to be carried out.

One sees under para.8 of that draft statutory instrument at p.3 – I will not recite it or read it to you – that that is something you are going to have to do now, after of course the earlier liberalisation.

We respectfully point out again that the way in which it is now put is wholly inconsistent with the way in which Ofcom were treating O2 at an earlier stage in spring of this year. If you again look at the paragraph I already read at para.10 of the note of 13 April – Miss Rose asked you to read para.6 as well which dealt with a separate point – one sees a very light touch of consultation and assessment was envisaged at this point.

The next point that we would make is that it is simply not true, as Miss Rose contended – I do not mean to say that what she said was deliberately false – it is not accurate to suggest that our interpretation of the Amendment Directive cuts across the grain of the goals of the Framework Directive. Professor Pickering was particularly interested in these goals. Can I just come back, without exposing myself, I hope, any more than my brethren and sisters at the Bar to detailed questions about competition consequences, to the Framework Directive and refer very briefly again to the relevant Article, Article 8. One sees under 2 the national regulatory authority's obligation to promote competition by a variety of means. As

Professor Pickering aptly said, it may very well be that an economist or others might say that (a) these means listed between (a) and (d) might sometimes be in tension the one with the other and (b) that it may not even be the case that in orthodox parlance one would regard these as promoting competition. Nonetheless, it is clear what the community legislature envisaged ought to be done. I simply draw your attention to the fact that there is the need in (a) to ensure that users, including disabled users, derive maximum benefit in terms of choice, price and quality which again emphasises the need not to be oblivious to the interests of that constituency in terms of the Directive and the decision; and also of course the promotion of innovation as a subset of sub-paragraph (c). Again, the earlier the better would stimulate that.

At this juncture of course Miss Rose throws in and indeed repeats this morning and seeks to discard our argument in relation to whether what we propose would result in inefficient investment in infrastructure. What she postulates is a position in which we and others in our position – that is to say for present purposes Vodafone – are given the opportunity which we claim to exploit this new technology and then at some stage down the line, whenever it may be, as a result of some competition assessment, distortion in the market is perceived and some redress must be taken by removing from us certain spectrum or redeploying or reallocating it to some other person in the sector.

In our respectful submission, the notion that our construction would tend to promote inefficient investment is a submission that would require evidence to support it. For example, it would require someone to say that if what I call a Domesday or quasi-Domesday scenario eventuated we would find ourselves with equipment that we had deployed, engaged, constructed or purchased for the particular purposes of the new technology which would of itself be incapable of redeployment for other uses in the spectrum that we retained; or indeed resale of such equipment to other persons who had a site that was reallocated to them.

In our respectful submission, there is simply no basis for assuming that that would happen but, at the end of the day, that is a commercial judgment that persons in my client's position have to take. If they perceive realistically that the so-called quasi-Domesday scenario might eventuate, then they will adjust the way in which they exploit or choose to exploit the new technology, as the case may be.

Finally, under the heading of how can you entertain a construction which means that without reference to any competition assessment you gain this automatic liberalisation with its potential for distortion down the line, she said, "Look, we only had six months

implementation period for the GSM Directive." That, in our respectful submission, is a submission that omits a chronological dimension. It is quite clear from the documentation before this Tribunal that liberalisation and the deployment of this new 3G technology has been a topic long on the table, both in the community and at the national level. One only has to look for example at the CEPT report which is at tab 17 of bundle 1, which was dated late in 2007 but was obviously the fruit of consultation, research and investigation over preceding months, to recognise that to speak of this as if it were being sprung upon Ofcom with only six months' notice is to depart from reality.

I will come back, if I may, as I promised – or perhaps more accurately threatened – to do to recital (7) because this becomes not only the lynchpin of the argument advanced by Miss Rose and those that side of the Bar, but indeed is the critical area of debate and dispute. We say that with all the respect to the point that the Chairman accurately made about the occasional imprecision and ambiguity of community documentation, reading it as the Chairman also said in a reasonable way, not construing it as one might a chancery deed or a national statute, the basic structure, purpose and intent is sufficiently clear.

The way in which Miss Rose puts the matter is this: she says the statement in recital (7) that Member States are not required to modify existing rights of use means that it is quite clear that Member States are not required to remove the technical conditions attached to the rights of use which prevent the deployment of UMTS. Her second argument is that the reference to the Authorisation Directive one finds in recital (7), as indeed one does in recital 6 and perhaps more imperatively in Article 1, sub-paragraph 2, shows that the Directive and decision do not in themselves require changes to existing conditions at all; but rather that they envisage that in every single case after the Directive has been implemented there must be a separate process taking place on application by an operator pursuant to Article 14 of the Authorisation Directive.

She indeed suggested that in relation to that, looking at the language of Article 14, there would need to be a consultation process in the case of an existing licence holder. We engage with that argument in a number of ways. First of all, in our respectful submission, although we recognise that the proposal, para.5, was bifurcated into recitals 6 and 7 and certain words were added, we for our part dispute that this could conceivably alter the meaning of the phrase "make available" which was in the proposal at para.4 and remained unchanged in the substantive text of Article 1.

The second point at which we engage with Miss Rose's argument is this: she relies upon the fact that under the domestic legislation we have a right only to use particular bands for

particular purposes and are currently restricted to G2 technology. Accordingly, she says that from the perspective of domestic law one cannot split rights of use on the one hand and conditions attached to the rights of use on the other. We respectfully submit that that approaches the issue from the wrong starting point.

The right of use is an autonomous EU law concept and right of use in terms of these instruments has to be construed as an EU law would construe it. It is nothing to the point that we would be liable for example to criminal prosecution if without the sanction of variation and without the ability to defend ourselves on the basis of directly effective right we might be vulnerable in the domestic courts.

The third point which follows from that is this: it is, in our respectful submission, crystal clear from the Directives and the decisions that there is a consistent dichotomy or distinction drawn between the concept of rights of use on the one hand and conditions attached to the rights of use on the other.

The Chairman himself referred this morning not only the titles to but also the text of Articles 5 and 6 of the Authorisation Directive. Miss Rose retorted by referring us to the annex to that particular Directive. Can we just look at that again? When a Directive so clearly deals with two subject matters in two distinct articles, the former being rights of use and the second being conditions attached to rights of use, it requires some imagination and some degree of forensic eloquence to be able even to contend that the two concepts are in fact identical.

In our submission, if one looks at the other matters to which Miss Rose referred, one sees for example at (b) in the annex the conditions which may be attached to rights of use for radio frequencies. Far from that amalgamating the two concepts into a single concept, it recognises once again the distinction between them. They are the conditions and those are conditions which may be attached to rights of use for radio frequencies. Indeed, for what it is worth, if one goes back to Article 14 to which I shall need to return shortly, one again sees that a distinction is drawn between on the one hand conditions and, on the other hand, rights. In certain circumstances, similar procedures may attach to them but nonetheless as entities they are regarded as distinct entities.

When one then, against that background, just looking at it as an ordinary matter of language, one sees that in recital (7) the phrase which is used is “modification of existing rights of use”. It does not say “modification of conditions attached to existing rights of use.” It does not say “modification of rights of use and also of conditions attached to rights of use.” It says what it means and it means what it says. In the context of the community

law background to which I have referred, it is entirely clear, in our respectful submission, that our interpretation is right.

We are at one with Ofcom in drawing a distinction between on the one hand the process of issuance of assignment and of allocation and, on the other, of harmonisation. Miss Rose from that correct premise derives an entirely false conclusion because we are not seeking again allocation of or issuance of or assignment of new spectrum. That is something we already enjoy. We are asking for the restrictions on use to which our spectrum may be put to be liberalised.

That is why Miss Rose chided me with not having referred to recital (8), the one after 6 and 7. The reason I made no reference to recital (8) is it is entirely irrelevant to the position of my client. It is concerned with circumstances in which an authorisation procedure is in fact initiated for example as envisaged by recital (7).

The next point, and we say the most fundamental error in Ofcom's argument, is that it is actually inconsistent with the entire thrust of the Directive and the Decision. What they are effectively saying is this: if transposition of the Directive and Decision does not, in itself, require Member States to modify existing rights of use or to initiate an authorisation proceeding and if removing a restriction on UMTS itself amounts to either the grant of a new right or the amendment of a new right of use, then on D-day what recital (7) is actually saying is that nothing need be done at all, and indeed that is Ofcom's final position. We respectfully submit that is wrong for at least three reasons. Firstly, if one looks at recital (7) and indeed recital (6) what its thrust is is that in consequence of implementing the Directive there may be potential distortions and distortions and if, in those circumstances, that occurs then certain steps may need to be taken. One has to start with something happening that could, in fact, result in a distortion.

If, according to Miss Rose, the notion of modifying existing rights of use equates to or includes modifying or removing conditions attached to present rights of use, then, in our respectful submission, what she is saying is inherently inconsistent. If there is no potential distortion arising from implementation of the Directive because, according to Miss Rose nothing need happen on D-day and therefore those conditions which would generate, or could generate, distortion will not occur, then there is therefore nothing to be done, as she also says. Then there is left unanswered this question: how do operators, such as those in my client's position, ever have their UMTS restrictions removed? The answer Ofcom have given is, by an application leading to an Article 14 procedure under the Authorisation Directive.

That means, if one pauses and teases out the logic of it, that in every case where there is to be a removal of restriction, Ofcom will have to consider the Article 14 criteria for that change and engage in a consultation process as envisaged by that Article. Yet it is quite clear in terms of the GSM Directive that it is not going to be mandatory in every case to carry out such an exercise. So there is a fatal inherent contradiction in Miss Rose's analysis.

The next point is that one needs to look to see what it is under the recitals that a Member State, in this instance Ofcom, is supposed to do if a distortion is identified. That is set out in the second part of recital (7). This is once, incidentally, the band has been available, so that is after something has happened which has generated actual results in the market. In doing so, they should in particular examine whether the implementation of this Directive could distort competition. If they conclude that this is a case, it is the whole sequence of contingencies that I referred to before, 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 frequencies and, where proportionate, review these rights of use and to redistribute such rights in order to address such distortions.

You, Mr. Chairman, put to Miss Rose, "If you are looking certainly at the second part of that encouragement or order to Member States or the NRAs, review rights of use and redistribute, one is obviously talking about re-allocation of spectrum and not about removal of conditions at all", to which Miss Rose swiftly responded, "That falls under the precedent passage", that is to say whether one is concerned here with amendment of rights of use or possibly review of rights of use. In our submission, again, that is attaching to the concept of rights of use an entirely different meaning in the course of the same sentence.

We suggest there are really two possible constructions of this passage, each of which has an inherent plausibility entirely lacking from the way in which Miss Rose is constrained to put it. The first is to say that it is actually a sequence. One starts off by considering in the circumstances envisaged whether it is objectively justified and proportionate to amend the rights of use. That is put in a very broad sense. Then, if you get to that stage, again applying proportionality, you have got a choice. You could review the rights of use – that is to say you could take them away, cap them, or something of that kind, or you can redistribute them. In other words, there is a sequence. The reviewing and redistribution is consequent upon the amendment.

The alternative way of looking at it is to look at amendment of rights of use as simply being to take steps to ensure that the rights of use that you enjoyed before are less than the rights

of use that you enjoy after amendment; or alternatively then, if you review and you decide not just to curtail the rights of use of existing operators, you might do that simply by curtailing them but at the same time redistributing them. That at least, with respect, gives a similar meaning to the phrase "rights of use" wherever it occurs and does not entail regarding the phrase "rights of use" as attached to conditions when it is after the verb "to amend" but, as the Chairman pointed out, necessarily when it is concerned with redistribution meaning "rights of use" without reference to the particular conditions that are attached to it.

Then we move to the Decision which both myself and Miss Rose have, in fact, looked at, but in our respectful submission, in particular in the light of the way in which Miss Rose approached it, achieves somewhat greater salience than may previously have been envisaged. If one looks, firstly, at the recitals of the Decision, in particular recitals (3) and (7) – as Miss Rose says, the earlier recitals deal with historic matters – what is abundantly clear is that the objectives of both the Amendment Directive on the one hand and the Commission Decision on the other are the same. What the Commission Decision does is to go further because, in the interests of harmonisation, it needs to specify what the technical implementing measures are. It is all about harmonisation, but here one needs the technical conditions to be harmonised and one sees that from Article 1, which refers to "the Decision aims to harmonise the technical conditions for the availability and efficient use of the 900 MHz, etc, and of the 1800 MHz band".

We pose the question, how are you to harmonise technical conditions unless you modify, consistent with the purposes of the instruments – that is to say the extension of the utility of the old technology to the new technology – how can you promote that objective, how you can achieve that harmonising aim, unless you modify technical conditions that presently impede that enlargement.

The next point is that in Article 3 one sees that there is a reference to what I termed earlier the peaceful co-existence of the systems now within the particular band, and one sees that they are to be subject to the conditions and implementation deadlines which are set out therein. Can I ask you to turn to the implementation in the annex and one sees that the heading to the annex says, "The following technical parameters shall be applied" – shall be applied – "as an essential component of the conditions necessary to ensure co-existence in the absence of bilateral, multilateral agreements between neighbouring networks without precluding less stringent technical parameters, if agreed, among the operators of such networks". So the conclusion of that is that one must modify, and they are obliged to

modify, any condition previous to the implementation deadline specified on 9 May which is inconsistent with these new technical parameters that are set out in the first two sections. What is also notable about this Decision is that there is not any equivalent to a recital of the kind that one finds (recital (6) and recital (7)) in the Directive itself. All that the Decision does in the recital, in so far as it bears upon competition issues, is to refer once again to the capacity to exploit the provision of the Authorisation Directive and, to the extent relevant, the Framework Directive. So all the arguments which have detained the Tribunal, in our respectful submission, which in the end in so far as solvable, solvable in our favour, are really peripheral to the main thrust of the Decision, which is that it complements the Directive by specifying those conditions that are mandated for the UMTS, which reinforces our point that if one needs to go back to the Directive and consider recital (7) it is premise is that those conditions have been mandatorily varied and the only reaction that may need to be taken to them is to use the Article 14 process to re-allocate or to redistribute spectrum. We say that that is the strong and consistent mechanism by which the harmonising message and policy of these two instruments is to be achieved, and it is incompatible with the Ofcom argument, which is a recipe for delay and for disharmony.

I did not read recitals (13) and (14), which Miss Rose did, because we say again they have nothing to do with the case. Recital (13) is all to do with licensing procedures – that is the only reference made to licensing – and (14), as I have said, simply directs one back to the Framework and Authorisation Directive.

The next point, and what was said to be the pillar point and the point at which all our arguments collapsed, was by reference to Article 14 of the Authorisation Directive. Can I ask you for the last time to go back to that particular document. The first point to be made, and it repeats perhaps a point I made earlier, is that this is envisaged in both the Directive and the Decision as something that may need to be engaged, not must be engaged, and certainly it is inconsistent with any argument which says that whenever there is going to be a liberalisation of conditions, in the sense of lifting of restrictions attached to a particular right of use, the Community legislature envisaged that this Article had to be used.

Secondly, its focus is on addressing competition distortions. One sees that from the recitals in the Directive, from Article 1.2 of the Directive, and indeed from recital of the Decision. So it is nothing to do with the need for harmonisation.

If one goes again to the Directive and to recital (7), one sees again, and perhaps this is again, alas, something I repeat, but it is worthy perhaps of repetition given the emphasis placed by Ofcom on the contrary argument, that in relation to the Directive – just for a

moment I have managed to dislodge, discard or otherwise the relevant recital from my bundle, but the point that I sought to make there is that there has to be, as you see, a process of consultation in relation to any circumstances in which Article 14 is engaged. Again recital (7) suggests that that consultation can only be required when a Member State's authorities have concluded that rights of use may have to be amended in order to address competition concerns.

Fifthly, and perhaps finally, Miss Rose's argument still has at its core a vacuum because she has not convincingly, or at all, explained how implementation of the Directive can distort competition unless something to be done on or before D-day that could have that actual effect.

Finally, it is suggested that Article 14 must be engaged in any circumstances where there is any anticipation of an alteration, be it of a right, be it of a condition or whatever. The argument, as we understand it, from that false premise runs to the following effect: it cannot therefore be an unconditional clear and precise right that you can claim as a matter of direct effect of Community law. It is very important to understand that Article 14 is directed towards the obligations of Member States. It is not concerned at all with changes that the European legislature has thought to be necessary and has laid down a directive to ensure it is brought into effect for purposes of harmonisation of technical conditions.

If Ofcom were right, in any circumstance, given what is regarded as the necessary procedure under Article 14, the need for notice, the need for interested parties to be consulted, the need for time to be used for views to be expressed, if they were right that this applies to harmonisation of common conditions it would in fact allow a disaffected party to use a challenge to exercise (by Member States of its powers under Article 14) as a way of challenging something that the Community legislature has regarded as an imperative.

The fact is, I repeat for the last time, that what the Directive and the Decision have done is to achieve harmonisation. What Article 14 is concerned with is that, in the limited conditions that are envisaged – that is to say where competitive distortions may result from liberalisation – it may be a consequence to address the distortion engendered that the rights of use are themselves abrogated, amended or re-allocated, and in those limited circumstances then again the Article 14 procedures can be followed. This is all consequent upon harmonisation, it is not a method as Miss Rose and her colleagues would have it, of somehow achieving harmonisation. It really, in our respectful submission, makes a nonsense of the imperative to harmonise on a due date that one has to deploy a procedure

that is envisaged only as a consequence of harmonisation as a means of actually achieving it.

Can I then deal briefly before coming to my concluding remarks with this: in Mr. Fordham's submissions – and again I mean no disrespect to either of my colleagues in not addressing those matters which were simply compatible with, or a continuation of, or reflection of Miss Rose's arguments – we do submit that "making available" in Article 1.1 equates to removing a restrictive measure. It may be in certain Member States a restrictive measure contained in legislation, it may be in our particular State a restriction in an administrative provision being a licence. In our respectful submission, the only persons who we assert have the directly effective right are those who are presently incumbents with the rights of use of particular bands to whom an obsolete restriction is presently attached. We say that there are not here two constituencies, there is a single constituency of whom O2 and Vodafone are the representatives, and solitary representatives. It is they who are entitled to the directly effective right. It is true that the Directive itself envisages that there may in future be authorisations given to newcomers to the field who equally at that juncture would not find themselves subject to any such restriction. They do not have directly effective rights at present. They are a constituency in the future, and therefore, in our respectful submission, it does no violence to our interpretation of the phrase "making available" in Article 1.1.

In relation to Article 1.2, Mr. Fordham's argument appears to be that we are not, in fact, embraced within Article 1.1 at all. We say, with respect, any person who is at the moment is a person with the relevant band width, the 900 MHz, and again for the Decision purposes the 1800 MHz, we have those frequency bands and they must be made available for our use of the new system. So we are, in our respectful submission, fairly and squarely within Article 1.1.

In relation to Article 1.2, in our respectful submission, of course it, in a sense, bites on our particular constituency in at any rate a contingent way. What it says is this: there are two obligations, as I would paraphrase, in connection with implementing this obligation. The first is to examine, and the second is to address. What is the sequence of events envisaged? What is envisaged here is that, pursuant to Article 1.1, persons in O2's position will have had their restrictions lifted. What do the Member States do in competition terms? They must examine whether in consequence of that those who have existing assignments, such as ourselves, of the 900 MHz bands, whether that, now coupled with the relaxed restriction in terms of the technology, should be deployed vis-à-vis others, is likely to distort competition

in the mobile markets concerned. Then, if that is a conclusion that is reached, the way in which the distortions will be addressed will be in accordance with Article 14 of the Directive, which I repeat has nothing to do with harmonisation and everything to do with the way in which one redresses any competitive distortions that may be perceived after that. I do stress again, it is interesting to note, and perhaps insufficient focus so far, that there are stages of both examination and then addressing which do not suggest it can be done simultaneously, it is certainly not compatible with recitals (6) or (7) that it necessarily has to be done before. Certainly the examination could take place before, and indeed the Department are now saying, "We have had a sufficient examination in this country", but addressing, *ex hypothesi*, can only take place after.

Finally to Miss Carss-Frisk. She suggests that the flaw in our argument in relation to direct effect – and perhaps I can just say parenthetically that if Miss Rose was unable to understand why we referred to the two licensing directive cases in relation to charges imposed on licensees, can I just remind you that it was simply for the purpose of indicating that this type of Directive is capable in appropriate circumstances of giving rise to directly effective rights. The analogy between our position and the licence holders' position in those cases, we say, is strong.

What Miss Carss-Frisk said is, "You do not have a directly effective right because there are other technical conditions and issues of a technical nature that would need to be resolved before the right that you claim could, in fact, be enforced". Therefore, it is, as I understood the thrust of her submission, in fact a contingent right and therefore not sufficiently clear or precise. The answer to that is to be found in the Commission Decision itself, because it is the Commission Decision itself – this is at tab 12 – that actually sets out in the annex what the technical parameters are. As long as the licence variation reflects those particular conditions, as well as, of course, dealing with both the UMTS systems now to be deployed in relation to these particular bands (that is the first box), technical parameters (that deals with the second matter), and that is it, there is not anything further. That is why there was this somewhat imprecise and fluid correspondence between ourselves and Ofcom in which they suggested that the way in which we have formulated our proposed variation might raise technical issues. In the end they said, "Actually, this is not going to postpone anything", which suggests, with great respect, that it is simply a question of drafting and reflecting what is in this annex, rather than anything at all of substance.

Can I then just deal with two final matters, one of which, in fact, makes use of the Chairman's resort to the French text of the Directive, because the French have a habit, if I

may respectfully say so, of using language which often is more imperative and more strong than the English equivalent, although in this instance one cannot detect any distinction in meaning between them.

If one looks at Article 3, one sees that:

> *"Les États membres mettent en vigeur les dispositions législatives réglemenaires et administratives nécessaires pour se conformer à la présente directive, au plus tard le 9 mai 2010."*

Here one sees then, and now this is conceded, what this means if one translates it literally, is that the Member States have to put into force dispositions whether they are legislative, whether they are regulatory, whether they are administrative, which are necessary to make certain there is compliance with the present Directive at the latest by 9 May 2010. That, with great respect, given that it is now accepted that *administrative disposition* includes licence conditions – a correct concession, if I may respectfully say so – suggests that by that particular date in order to achieve compliance with this harmonising Directive which extends the use of technology to the UMTS 3 generation technology, that must be done in all these ways in so far as the Member States' constitutional settlement requires one or other, or it may be both or all three.

THE CHAIRMAN: Does that not beg the question? The question is what is necessary to comply with Article 1 and therefore to say that Article 3 says that you must do everything that falls within an administrative provision – i.e., change all the licences to comply with Article 1 – simply raises the question of what Article 1 says you must do.

MR. BELOFF: With great respect, I see the force of that but there are only two answers to that. First of all, the first sentence of Article 3 in the French or in the English envisages that something has to be done. You then have to look at the particular situation of a Member State and ask what could be done. Here it is common ground that the way in which the previous Directive was implemented, as a consequence of the previous Directive, one had the restrictions in relation to second generation technology. Now one has a Directive which says third generation technology must be used. That is going to be in licensed conditions of incumbent licence holders and in order accordingly to take some steps in that particular context. The only response could be that you lift the restrictions in the licence.

THE CHAIRMAN: Could it not be read such that Member States shall bring into force the laws, meaning such laws, regulations and administrative provisions as are necessary to comply with this Directive? I am not sure that both of you did not start off with the correct position which is that Article 3 did not take the matter very much further.

MR. BELOFF: If I can use the headline beloved of *Daily Mail* commentators, I do suggest something must be done. That is what we say of the first sentence but it is reinforced, with respect, by the second sentence.

> "*Ils communiquent immédiatement á local authority Commission le texte de ces dispositions ainsi qu'un tableau de correspondence entre ces dispositions et local authority présente directive.*"

Not only must you do something but you must tell us what you have done and then again you see that what they require is not only to be told exactly what you have done but you must further tell us how that corresponds with each of the imperatives in the Directive. What could Ofcom say? They have not done anything and they say there is nothing to tell. We say, with great respect, that it is inconsistent with the plain meaning of the Directive. The correspondence is in the transposition document in the statutory instrument.

Finally, you, Sir, with the assent of your colleagues, asked a vital question. Let us assume that one could argue strongly and effectively on each side of the points of construction, just looking at the language. What is the underlying purpose of these Directives and this decision?

We say of course it is liberalisation and the competition issues. Liberalisation itself is regarded as pro-competitive. There may be ancillary, consequential distortions which will be dealt with in consequence of the liberalisation. The main point is why is liberalisation is important. Liberalisation is important because the purpose of this Directive and this decision was ultimately not to benefit O2, Vodafone or any other NMO, although no doubt they will gain commercial advantages depending upon what their stance is. The ultimate object of the Directive and the decision was indeed the end user.

I am aware of Mr. Fordham's capacity for light sarcasm. I do not stand here waving the flag of the rural dweller in a remote area in Latvia or indeed in any other area within the community, but what I do say is that when one looks in particular at the recital ---

THE CHAIRMAN: The Chairman of this Tribunal is a rural dweller in a part of the United Kingdom where the coverage of O2 is rather poor.

MR. BELOFF: At this stage, a collective application for you to recuse yourself, I fear, is not going to be forthcoming. If one looks at the epitome of the department's view about the value of implementing this Directive as soon as it may be, the Minister's statement said, "Under our plans, our mobile industry will have access to the 21st century infrastructure it needs to give UK consumers the latest technology and even better coverage for broadband on their mobile phones."

When you retire and debate the meaning, ask yourself the question: is the interpretation which compels the earliest possible granting of such rights and removal of such restrictions as will enable the UK consumer to gain access to these technologies; or do you favour a construction which allows further delay of an unspecified period? In our respectful submission, if one needs a key to turn to detect which is the correct interpretation, that is the guideline that we would commend to your attention.

I fear I have been some little while but the brevity of my friends allowed me to indulge myself a little, I hope unduly, unless there are any questions that I can answer.

THE CHAIRMAN: Thank you very much, Mr. Beloff, and indeed thank you to all counsel and solicitors for the excellent preparation and presentation of this appeal. I am afraid we will not accede to Mr. Beloff's indication yesterday that we might give judgment immediately but we will give judgment as soon as time possibly permits, understanding the urgent nature of the application and we will notify the parties in the usual way when that judgment is ready.

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