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**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case No. 1154/3/3/10

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

11<sup>th</sup> June 2010

Before:

**THE HON. MR JUSTICE GERALD BARLING**  
(President)

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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**CASE MANAGEMENT CONFERENCE**

## APPEARANCES

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

Mr. Josh Holmes (instructed by the Office of Communications) appeared for the Respondent.

Mr. Ewan West (instructed by Regulatory Counsel, T-Mobile) appeared for the Interveners T-Mobile UK Limited/Orange.

Mr. Brian Kennelly (instructed by Baker McKenzie LLP) appeared for the Intervener Hutchison 3G UK Limited.

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

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1 MR. DE LA MARE: Sir, I appear with Mr. Richards for O2 in this matter. Ofcom appears by Mr  
2 Holmes, T-Mobile, as I shall call them for simplicity, by Mr West, Mr. Kennelly is here for  
3 H3G, and Mr. Woodrow for Vodafone.

4 There are on my analysis really three issues arising, and quite what is the logical order is  
5 something I have debated much. The first issue is really the question of expedition.

6 Closely related to that is the question of the scope of this particular appeal and the necessity  
7 for evidence, because the two go hand in glove in terms of what measure of expedition is  
8 obtainable. The third issue is the precise directions that should be made in the light of the  
9 decision as to what sort of time frame the appeal should come on in.

10 THE PRESIDENT: There is the question of interventions as well.

11 MR. DE LA MARE: There is no objection taken, I do not think, by anyone to the interventions  
12 subject to the caveat that we are concerned that the intervention scope should be properly  
13 controlled so that unnecessary evidence and unnecessary delay is not injected into these  
14 proceedings.

15 The competitive driver for this appeal, for want of a better word, is pretty clear. O2 has the  
16 largest 3G customer base and as a legacy of its exclusivity on the iPhone from 2007 to 2009  
17 it has very appreciable levels of 3G traffic, but it also has the smallest amount of 3G  
18 spectrum. It has 2x10 MHz of 3G spectrum i.e. 2 x 5 MHz carriers in technical terms,  
19 compared to its commercial rivals who have at least three carriers, i.e. 3 x 5 MHz – that is  
20 the position that Vodafone and H3G are in, or 4 x 5 MHz – the position of the newly  
21 merged T-Mobile entity. O2 has been and is publicly suffering from some substantial  
22 capacity constraints or congestion on its network. You have seen from the witness  
23 statement of Mr. Blades that that is something that its competitors are actively trading upon  
24 in their battles to win customers.

25 To date O2 has taken all the steps it can to maximise the capacity on its network using its  
26 existing carriers and it fears there will come a time when all that it can do is use its 900  
27 spectrum, which is currently only authorised for use for 2G services, for UMTS, and that is  
28 the way it wishes to address capacity constraints. It does not take a rocket scientist in those  
29 circumstances to work out that the parallel competitive drivers for those who are not  
30 suffering from such capacity constraints ----

31 THE PRESIDENT: Just parking for a moment the impetus, as it were and the question of  
32 expedition, you mentioned the issues. According to O2 it is a pure issue of law, a pretty  
33 narrow issue of law as to whether there is a directly effective right basically to have the 900

1 spectrum made available for UMTS technology. One of the points I wanted to clear my  
2 mind on was to what extent everyone sees it in that way and in particular Ofcom.

3 MR. DE LA MARE: I believe Ofcom agree with our analysis that this is a straight forward point  
4 of law not requiring any evidence, and I certainly understood from Vodafone that that is  
5 their position.

6 THE PRESIDENT: The point of law as I have indicated and as it is set out in your notice of  
7 appeal would not require any evidence, it is purely a matter of construing the relevant  
8 directives and Commission decision order and the legislation.

9 MR. DE LA MARE: It is very important to emphasise at the outset that it is no part of our case to  
10 deny that liberalisation may lead to competitive distortions. That much is embedded in the  
11 Directive The Directive recognises the potential for that. The issue is whether or not some  
12 form of prior competition assessment or reallocation of spectrum must occur before rights  
13 crystallise, or whether rights crystallise in any event and what must be done is to  
14 address ----

15 THE PRESIDENT: *Ex post facto* as it were, you redistribute something that you say is granted to  
16 you automatically.

17 MR. DE LA MARE: So proceeding on the somewhat wife beating assumption that our case must  
18 be premised on the acceptance that there will be severe distortion of the market arising from  
19 liberalisation, if we are to proceed without evidence, really is not very helpful. The  
20 Directive recognises that potential, but I suggest it is wrong in principle to seek to use the  
21 actual exigencies of competition in any particular market within the 25 Member States to try  
22 and construe a Directive that is meant to apply in basically the same way across the internal  
23 market. So that is our position in a nutshell. We simply do not understand what evidence is  
24 required for.

25 It may be the case that Ofcom wishes to put in some evidence explaining its position and  
26 the instruction to it from BIS and of course that is perfectly acceptable for them to do. I do  
27 not anticipate that putting in that evidence is at all burdensome in terms of times and  
28 logistics, and I think Ofcom are envisaging doing that by 25<sup>th</sup> June that is absolutely fine.  
29 Equally, if the other interveners wish to put in background evidence of that type of  
30 generality, not directed to trying to argue the competition case on its merits but simply  
31 putting it in context that too is permissible; that should not take any considerable time or  
32 effort not least because the positions of all of the various parties have been amply rehearsed  
33 in the various consultations that have proceeded the 9<sup>th</sup> May and in their arguments to the  
34 Department of Business and Industry.

1 THE PRESIDENT: Mr. De La Mare, that is very helpful. Shall we see what Mr. Holmes says  
2 from Ofcom's perspective?

3 MR. HOLMES: Sir, I am grateful. We share O2's view that this case raises short points of law  
4 which should not require substantial evidence to consider the competitive position of the  
5 mobile network operators following liberalisation of the 2G spectrum.

6 As we understand O2's case, and Mr. De La Mare has confirmed it today, it is no part of  
7 O2's case to say that there will not be competitive distortions or that on balance this is the  
8 right decision for consumers and for competition. His case is that as a matter of law those  
9 considerations are not relevant to Ofcom's action in response to O2's application to amend  
10 the 2G licences and that O2 enjoys directly effective rights by virtue of which Ofcom is  
11 obliged to remove the restrictions on the use of that spectrum. So we agree with O2 that  
12 there may be some helpful contextual evidence which can be put before the Tribunal but we  
13 think that can be prepared in relatively short order, and you will have seen the timetable  
14 which, as I understand it, is basically agreed between the principal parties.

15 THE PRESIDENT: You envisage putting that in with your let us call it "defence" for the  
16 moment, because it may be that we can conflate skeletons and defences and so on, but you  
17 envisage putting in any evidence you want to put in of that type, contextual evidence, you  
18 would put that in at the same time?

19 MR. HOLMES: Yes, Sir. You will have seen that we thought that it would be helpful both to the  
20 Tribunal and to the parties to have two rounds of written submissions whatever they might  
21 be called. Our reason for that was past experience in cases – even cases that raise pure  
22 questions of law – there is a certain refinement and clarification of parties' positions. I  
23 mean no criticism by this but Mr. De La Mare's case is admirably concise in its pleading  
24 and it may be somewhat expanded subsequently, and so that all of the arguments are clear  
25 and on the table we thought it would be helpful to have the two rounds, namely the  
26 pleadings and subsequently skeleton arguments. There is some minor difference between  
27 O2 and Ofcom as to whether the second round is described as a "reply and a rejoinder" and  
28 is confined to the principal parties, or whether there are skeleton arguments in which all the  
29 parties participate. We see merit in the latter option because we would like to see in writing  
30 the fully developed position of the interveners apart from anything else, but we see no good  
31 reason why they should be shut out of that second round of written submissions.

32 THE PRESIDENT: Are you in a position, Mr. Holmes – if you are not, you are not – to give me  
33 an inkling of the general line? Presumably your argument will be there is not an automatic  
34 directly effective right.

1 MR. HOLMES: Yes, Sir. You will appreciate that we are still formulating our position.

2 THE PRESIDENT: You will not be held to it but ----

3 MR. HOLMES: Broadly speaking that will be our position. We do not accept that there is a  
4 disjuncture between Article 1(2) of the Directive and Article 1(2) of the Directive, the two  
5 things need to be read together, and it would not be appropriate to order or require the  
6 liberalisation without a consideration of the competitive position, that cannot have been the  
7 intention of the legislature and we say that that is not the correct construction of the  
8 Directive, the two have to be considered together.

9 THE PRESIDENT: I am also interested in the draft Direction, which I suppose we still call it a  
10 “draft Direction” – I do not know whether it has been put before Parliament yet?

11 MR. HOLMES: It has been laid before Parliament, Sir, but Parliament has not yet I think directed  
12 its attention to it.

13 THE PRESIDENT: And to what extent that reflects the approach that Ofcom takes in arguing the  
14 point of law that we are concerned with.

15 MR. HOLMES: Sir, the Direction, in our submission, constitutes the Government of the time’s  
16 assessment of the delicate balance which needs to be struck between competitive conditions  
17 between the mobile network operators on the one hand and liberalisation on the other hand,  
18 so it includes, as I understand the position, plans for the auctioning of spectrum which the  
19 MNOs would to varying degrees be permitted to bid for, and the availability of that  
20 spectrum addresses, or is the way in which the Government intended to address the  
21 competitive distortions which they considered might otherwise result. So it was a package  
22 which precisely enshrines the two stages of assessment, which we say must be combined  
23 under Article 1 of the Directive.

24 THE PRESIDENT: I have not read it very carefully but it seemed it did include a fairly  
25 categorical requirement on Ofcom to vary each of the licences effectively to do what ----

26 MR. HOLMES: It did, Sir, but equally clearly that was part of a package in conjunction with the  
27 release of other spectrum.

28 THE PRESIDENT: That is to follow on, the other bits seemed to be, I am not sure, but the  
29 appearance was that they would follow on in particular combined auction.

30 MR. HOLMES: Yes. Sir, you will appreciate that I do not want to get too far involved in the  
31 merits of the case now, but as I understand the matter the Government nonetheless  
32 addressed its mind to the situation *ex ante* before taking any action and decided upon a  
33 package of measures which would meet the concerns about competitive distortions.

34 THE PRESIDENT: Meet the auctions as well.

1 MR. HOLMES: Indeed.

2 THE PRESIDENT: Are you able to say – if you are not, do not – whether that is still the  
3 position?

4 MR. HOLMES: Sir, you will understand I cannot speak for the current government. They  
5 certainly have not withdrawn the Direction as drafted; that I believe is the position.

6 THE PRESIDENT: But what you are clear about, as I understand it, is that you are contesting the  
7 automatic, as it were, variation approach?

8 MR. HOLMES: Yes, Sir.

9 THE PRESIDENT: And you mentioned that unexpected things can happen, do you envisage  
10 yourself any circumstances in which this can be expanded where we could find ourselves  
11 looking at significantly expanded issues of law or fact or anything?

12 MR. HOLMES: Sir, I think that could only happen by amendment of O2's notice of appeal. In  
13 the absence of any amendment the issues are as defined, as crystallised in the notice of  
14 appeal.

15 If I might be permitted just to make a brief observation on the question of expedition?

16 THE PRESIDENT: Yes.

17 MR. HOLMES: We heard Mr. De La Mare place reliance on Mr. Blades' statement, and the  
18 Tribunal may have some concern that the mobile network operators only recently saw a  
19 redacted version of that. For our part, Sir, it seems that every case should be heard as  
20 expeditiously as possible, indeed I know that to be the Tribunal's position. Regardless of  
21 Mr. Blades' evidence it seemed that the questions were relatively short questions of law,  
22 such evidence as was needed could be relatively rapidly collated. The materials actually  
23 and specifically relied upon by O2 in connection with the notice of appeal as opposed to the  
24 application for expedition, are all basically all legal or statutory materials and materials of  
25 that nature can easily be collated by Ofcom and by the mobile network operators. So our  
26 position is simply that the case can be heard quickly, and there is no good reason for it not  
27 to be heard quickly irrespective of the evidence contained in Mr. Blades' statement.

28 THE PRESIDENT: I do not think we should spend too much time on expedition for those  
29 reasons really. If this is indeed, as it appears to be, a discrete albeit important point of law,  
30 that alone indicates that it ought to be decided as soon as is practicable.

31 MR. HOLMES: Sir, I am grateful.

32 THE PRESIDENT: Because after all the decision in the Tribunal is quite possibly not going to be  
33 the last word on it and therefore the sooner that one gets the ball rolling the better.

1 MR. DE LA MARE: Before the other Intervenors obviously have their say, there are a couple of  
2 points I should make absolutely clear.

3 First, if you are with us on expedition we are content for Mr. Blades' witness statement to  
4 drop out of the equation.

5 THE PRESIDENT: I just do not want to bother about expedition, because it is not going to make  
6 any difference, frankly. Given the nature of the case it is going to be heard probably in the  
7 sort of time frame that you would regard as being expedited.

8 MR. DE LA MARE: I doubt whether Mr. Kennelly and Mr. West are necessarily going to let that  
9 pass unchallenged, so I will reserve what I have to say.

10 THE PRESIDENT: I will hear them in a moment, but that is our view at the moment. Who  
11 would like to go first? Mr. Kennelly?

12 MR. KENNELLY: Sir, I am grateful. Mr. De La Mare accurately anticipates our concern,  
13 because we also would like the appeal determined as promptly as possible. Our concern  
14 arises from Blades' evidence.

15 THE PRESIDENT: It is a point of law, we have established that. Mr. Blades' evidence is not  
16 going to play a role as far as expedition is concerned. We are going to hear the case as soon  
17 as we can reasonably and fairly hear it, regardless of Mr. Blades' evidence, so you need not  
18 worry about that.

19 MR. KENNELLY: So you appreciate why we are worried. Mr. Blades' evidence is not just on  
20 the question of expedition, there are parts of it that go to the benefits to competition  
21 generally and liberalisation which are hotly contested points. I appreciate the Tribunal  
22 knows how to construe statutes but there is the risk that it could colour the Tribunal's view  
23 as to which construction most accurately reflects the purpose of the legislation.

24 THE PRESIDENT: I think Mr. De La Mare is saying he is quite happy to withdraw it, he only  
25 relies upon it for expedition.

26 MR. KENNELLY: If it is withdrawn, sir, that may well make a difference to our view, because  
27 currently in that statement, apart from anything else it refers to the practice in other Member  
28 States, and you can see, even on a point of law, it may be relevant to consider how the  
29 legislation has been implemented in other Member States.

30 THE PRESIDENT: That is a matter I could see forming part of a submission – it may not be a  
31 very powerful point, but I think you could exclude something about what has actually  
32 happened as a matter of practicality – one often sees those points made.

33 MR. KENNELLY: Indeed, but it is in Blades, Sir, and we would want to respond to it because  
34 we disagree with what Mr. Blades says about that.

1 THE PRESIDENT: As I say, I would not get too exercised, Mr. Kennelly, about Mr. Blades’  
2 evidence.

3 MR. KENNELLY: We have your assurance, and if Mr. De La Mare is prepared to withdraw it  
4 then the point falls away; if he is not then we would want to put something in short of that  
5 point.

6 THE PRESIDENT: Let us see where we get to on timetabling. No one objects to your clients or  
7 the other applicants intervening, but insofar as it is a point of law I think one wants to be  
8 very sure that you are not going to trespass into other areas ----

9 MR. KENNELLY: Indeed, Sir.

10 THE PRESIDENT: -- other than is absolutely necessary in a contextual context. There is no  
11 objection – certainly someone said there was no objection –I think you did, Mr. De La  
12 Mare?

13 MR. DE LA MARE: For background contextual evidence.

14 THE PRESIDENT: But what we do not want is a huge expanded argument on the competitive  
15 situation.

16 MR. KENNELLY: No. Mr. De La Mare’s intervention is helpful. You will appreciate, Sir, in  
17 their letter they said they wanted an order from the Tribunal barring any further evidence in  
18 response to Mr. Blades or otherwise, which we obviously oppose; it would not be fair to  
19 have Blades before you and nothing else.

20 THE PRESIDENT: I am not going to do that, but what is pretty clear is that the Tribunal will not  
21 want to waste its time looking at peripheral material of an evidential nature that is simply  
22 put in, as it were, to stake a case for another day. It is purely matters which are useful when  
23 looking at the point of law.

24 MR. KENNELLY: Indeed, and we hear you, Sir, and we will take it on board. Just by way of  
25 background to this whole matter, before we get to timetable, because we have seen,  
26 obviously, a very rapid timetable proposed by Mr. De La Mare and Mr. Holmes referred to  
27 Ofcom and O2 being the principal parties, in fact in substance the MNOs are key players in  
28 this case because what O2 seeks is a very immediate commercial and competitive advantage  
29 over the other MNOs, regardless of the legal point, and you have seen you need propagation  
30 characteristics of the 900 spectrum, it is a very valuable spectrum. If O2 gets to use it  
31 straight away it cuts across the carefully balanced deregulatory packaged contained in the  
32 draft desire. The draft desire was the product of lengthy and detailed consultation.

1 THE PRESIDENT: That is the argument that will arise on the question of distortion. But if O2  
2 are right then they are entitled to it as a matter of law. If they are not right then your  
3 concerns would probably be less.

4 MR. KENNELLY: Yes, but my point is more about how we approach the timetable. Because it  
5 is a very important commercial and competitive point we must not be bounced into a very  
6 rapid timetable.

7 THE PRESIDENT: It is a point of law, Mr. Kennelly. Your clients must have considered this  
8 point of law themselves.

9 MR. KENNELLY: We have, of course, and we have considered it in consultation but the  
10 timetable we have seen at the moment is very rapid and we will make submissions about  
11 that when we come to it at the next stage.

12 THE PRESIDENT: Well do you want to make them now because I do not want to drag this on  
13 for ever.

14 MR. KENNELLY: Shall we turn up then, O2's letter, and the expedition request is at para.2

15 THE PRESIDENT: Yes. Is this the letter dated 10<sup>th</sup> ?

16 MR. KENNELLY: Yes, it is.

17 MR. HOLMES: It is p.1559 of the clip.

18 THE PRESIDENT: Yes, I have it, thank you very much.

19 MR. KENNELLY: You see that Ofcom is to file and serve its defence by 25<sup>th</sup> June, and  
20 obviously we have nothing to say about that, if Ofcom is content that is all to the good. You  
21 will see then that for the purpose of statements of intervention there are only three working  
22 days provided to submit a statement of intervention and any contextual evidence in the  
23 limited way you have described, Sir, that we want to put in with the statement of  
24 intervention. Three working days is far too short, in circumstances where we have not seen  
25 Ofcom's case on the substance. We hear from Mr. Holmes that Ofcom opposes O2's  
26 construction but we have not actually seen that, the first we will see of it is in the defence  
27 and there are only three working days according to this timetable to put in our SOI and the  
28 contextual evidence. So we would say that that is far too short, and the second broad  
29 concern we have is that we are cut out in this timetable from putting in a second round of  
30 submissions – whether it is called a “reply” or a skeleton argument does not matter, but we  
31 have no right to put in something at the end of the round of pleadings.  
32 Mr. Holmes very helpfully said they in fact preferred a situation where the interveners, who  
33 should have a key role in this, have the right to put in a further skeleton argument, i.e. a

1 further submission in addition to the statement of intervention, and that is not provided from  
2 this timetable. Those are our two broad concerns.

3 So for the purposes of the SOI we would seek two weeks to put in our SOI but only a week  
4 to put in our skeleton because, as you understand, sir, the big whack is for the SOI, that is  
5 where the substance is done, the skeleton can be done quite quickly.

6 THE PRESIDENT: I am not sure that is right, really, Mr. Kennelly, in this case. We are dealing  
7 with legal arguments primarily. There may be a witness statement or something contextual  
8 to say who you are, what you do and how this affects you and so on, but the real work is  
9 going to be in working up the legal arguments. I agree on this timetable you are not going to  
10 have very long. Therefore some leeway needs to be given to you. Normally one would not  
11 want you to be repeating things that are dealt with by Ofcom for example, but here I think  
12 the Tribunal will be somewhat sympathetic because a lot of your work would have to be  
13 done prior to seeing the way they put the legal argument, but it does not stop you  
14 formulating the legal argument and you do not need to see what they are saying provided  
15 some leeway is given and people do not say “You are duplicating and you should not be” it  
16 should not be too difficult.

17 MR. KENNELLY: I understand that and the reason why I have asked for more time at the first  
18 stage is because since really all we are dealing with is legal argument that is where the bulk  
19 of the work will be done at stage and the skeleton then will really be in reply and will be as  
20 short as possible dealing with any further points that emerge, that is why I put it in that way.  
21 But certainly, on any view, three days is far too short, and also it is not necessary for the  
22 purpose of having a hearing before the summer vacation.

23 THE PRESIDENT: Perhaps I should reveal there is no guarantee the Tribunal is going to hear it  
24 in July, we are going to see if we can, but if we do it will almost certainly be in the last  
25 week rather than the week of 19<sup>th</sup>. We might be able to grab a day or so extra. That is the  
26 position at the moment. I am not going to be in a position this morning to tell you because  
27 inquiries have to be made. What is proposed there is Wednesday 30<sup>th</sup> June, it may be we  
28 can move things a little bit.

29 MR. KENNELLY: But if it is for the last week of July there is all the more reason to allow the  
30 interveners the bare minimum to put in their statements of intervention and have an  
31 opportunity to put in a short reply or a skeleton so that their position is properly amplified  
32 and that will ultimately save time at the hearing and avoid ambush, as Mr. Holmes correctly  
33 submitted.

1 I take the point, Sir, that whether or not we are going to be damaged competitively is not  
2 relevant to the legal argument, but it must be relevant to how the Tribunal conducts the case  
3 because it is of critical importance to the MNOs. O2, if successful, will obtain a very  
4 substantial commercial advantage, and all we ask is that the case is approached in a proper  
5 considered way allowing us a fair opportunity to deal with the legal submissions, with the  
6 short legal point, but there may be detailed points of law ----

7 THE PRESIDENT: The oral hearing is for that, is it not?

8 MR. KENNELLY: Well if it is canvassed ----

9 THE PRESIDENT: You are going to be able to take part in the oral hearing.

10 MR. KENNELLY: If it is canvassed fully in writing, Sir, it should save time at the oral hearing.

11 THE PRESIDENT: I agree.

12 MR. KENNELLY: I hope so at least, I think I can add no more.

13 THE PRESIDENT: Thank you very much. So who is next – is it Mr. West or Mr. Woodrow?

14 MR. WEST: I have the great advantage of having heard the submissions of my learned friend so I  
15 think I can be relatively brief. Mr. Holmes has very helpfully outlined the general direction  
16 Ofcom will come from and that of course is helpful, because we would contend that this  
17 cannot be limited to looking simply at Article 1(1). We need to go into the interplay of  
18 Article 1(1) and 1(2). In particular we do not accept the analysis of para. 63 of the notice  
19 of appeal which effectively relates to this interplay between Article 1(1) and 1(2).  
20 We hear, of course, very strongly, Sir, the points that you have made about the need for  
21 evidence. In that regard I will join my submissions entirely I think to those of Mr.  
22 Kennelly. We hear the message you are giving on Mr. Blades' statement. The situation  
23 will, of course, be completely different if Mr. Blades' statement is withdrawn as opposed to  
24 it sitting on the record. If it sits on the record it does raise material issues that we would  
25 need and want to address in witness evidence.

26 I would also echo Mr. Kennelly's concerns about the timetable in relation to the statements  
27 of intervention, the period given is very short. Allied to that too is the point that we are, of  
28 course, looking at the purpose of interpretation of Community legislation and consequently  
29 whereas we obviously need to avoid the need for extensive evidence there may well be a  
30 body of evidence that needs to go in, we need time to put it in and to consider that, so we  
31 do think the timetable is too tight. It seems that if the Tribunal were to hear this in the last  
32 week of July that there would be scope for moving the timetable out in particular to take  
33 care of that concern.

1 All of these comments are subject to the very important point which is that we have not yet  
2 seen the extent to which Mr. Blades' statement may stay on the record, we have not seen it  
3 unamended – if it is withdrawn that point is taken care of, so I have to protect my position  
4 in that regard. Likewise the passages of the notice of appeal that have been redacted, and of  
5 course we have also not seen what Ofcom says in detail, but effectively it looks as though,  
6 commensurate with the normal position where interveners are not duplicating but merely  
7 supplementing, that we should be able to deal with that sort of timetable but with more time  
8 for the statements of intervention, and for the skeletons likewise.

9 THE PRESIDENT: Let us see where we get to on the timing, that is very helpful, thank you, Mr.  
10 West. Yes, Mr. Woodrow?

11 MR. WOODROW: I am here on behalf of Vodafone, Sir. I can be very brief as well. On  
12 expedition we have no objection. In relation to the second question that Mr. De La Mare  
13 raised in terms of evidence, again we agree that we would be concerned if this case were to  
14 get diverted into the substance of the competition assessment. I think what we are talking  
15 about here is when the obligation to liberalise actually crystallised, and I think it is  
16 important to remember that the obligation applies to all the relevant frequencies that are the  
17 subject of a Directive and the decision, no matter who holds them, so there is an obligation  
18 to liberalise, so the competition assessment then just decides who actually holds them. So  
19 no matter what the results of the competition assessment there is still an obligation to  
20 liberalise all the 70 MHz of 900 spectrum. So I think we would be concerned if the  
21 Tribunal were to be diverted into that substantive competition assessment, which we do not  
22 dispute has to happen, but I think the dispute here is all about what the order is, whether that  
23 has to happen prior to liberalisation.

24 THE PRESIDENT: It is being put on a very narrow basis. The argument is that there is an  
25 automatic right – I think the word “automatically” occurs in the notice of appeal somewhere  
26 – in other words probably the legal position that is being argued for is that they could in fact  
27 go ahead now and deploy, they have a Community law right to deploy GSM technology,  
28 and the only thing that probably stops them is the good order of not wishing to do it when,  
29 on the face of it, there is a licence condition ----

30 MR. WOODROW: On the face of it, it would be a criminal offence.

31 THE PRESIDENT: Well it would not be, of course, would it ----

32 MR. WOODROW: Subject to the Community law right.

33 THE PRESIDENT: It would not be a criminal offence if you succeed. You, very understandably,  
34 do not want to take the chance.

1 MR. WOODROW: Vodafone holds 900 MHz spectrum as well. As at 9<sup>th</sup> May we had not made  
2 a request for a variation of our licence, and we did consider whether we could not request a  
3 variation and then just take the view that there was a directly effective right to use it, and so  
4 we have a Euro defence in terms of anybody then suggesting that we could not use the  
5 MTS technology for the spectrum.

6 THE PRESIDENT: You decided also to take the prudent approach.

7 MR. WOODROW: Correct, sir. I think we have nothing else to add, but that then dictates our  
8 view on timetable, that we think it can happen quickly, Sir.

9 THE PRESIDENT: Thank you very much all of you for that.

10 MR. DE LA MARE: I hope this is a sensible suggestion. One of the things we sought to do with  
11 Mr. Blades' witness statement was to exhibit some of the background materials, various  
12 consultations that had occurred.

13 THE PRESIDENT: It has some of what I think everyone would call contextual material as well  
14 as material that goes specifically to the question of ----

15 MR. DE LA MARE: Yes, that is because part of what Mr. Blades' witness statement was trying  
16 to explain was why this litigation arose now, and why we are coming to court now, and in  
17 the light of a two and a half year, three year process suddenly asking ----

18 THE PRESIDENT: Which I think would be helpful to a Tribunal deciding this.

19 MR. DE LA MARE: Absolutely. My suggestion was really this, Sir, which is that the parties  
20 should try and liaise between them, instead of having some incredibly unhelpful process  
21 where different materials are put forward.

22 THE PRESIDENT: Why do you not put forward a doctored version?

23 MR. DE LA MARE: A proposal as to the relevant background materials and then if any of the  
24 other parties say there is a general document, or a document which would also be helpful as  
25 part of the background proceedings for the Tribunal to have a look at then we can do that.

26 THE PRESIDENT: There might not be time for a great deal of liaison, my suggestion was a more  
27 limited one, that you do a pruned version of Mr. Blade that others are happy should go in as  
28 your contextual evidence, and they no doubt want to put in additional bits and pieces and  
29 see whether you can agree it like that, it would be much more preferable from our point of  
30 view.

31 MR. DE LA MARE: I hope that counsel for the other parties, who are known to be very sensible  
32 people, can agree something sensible.

33 THE PRESIDENT: I hope so.

1 MR. DE LA MARE: The other point is what it seems to me perfectly permissible to do by way of  
2 evidence is to set out, if you like, what your stall is in terms of: “We say this is pro-  
3 competitive; in broad terms we say this is anti-competitive.” No one is inviting the Tribunal  
4 to resolve that issue, that is the very competition assessment in question.

5 THE PRESIDENT: There is no decision to appeal on that basis, so we are not going to,  
6 obviously.

7 MR. DE LA MARE: Exactly, but it seems right that the Tribunal should be told where the  
8 respective parties are coming from, and that is all we have ever sought to do. I must admit I  
9 was a little unhappy to see part of para.64 of our notice of appeal being cited out of context,  
10 it rather suggests we are inviting the Tribunal to decide that issue of substance, and not the  
11 sentence at the end of that paragraph which said: “However, as O2 made clear in its  
12 application to Ofcom, these merits questions are irrelevant for present purposes” etc. That  
13 is our position.

14 THE PRESIDENT: Shall we leave it that you will try and do that?

15 MR. DE LA MARE: Yes.

16 THE PRESIDENT: You will submit a version which just contains the context that is from O2’s  
17 perspective and see if you can agree that.

18 MR. DE LA MARE: We can do that by, say, close of play, say, on Wednesday, next week.

19 THE PRESIDENT: Well do it pretty quickly because they may find that there are things they do  
20 not need to bother with themselves that are set out there. I do not know to what extent  
21 others have seen this document – no one has, presumably.

22 MR. DE LA MARE: Everyone has seen Mr. Blades’ witness statement, a redacted version.

23 THE PRESIDENT: A redacted version?

24 MR. DE LA MARE: Yes, but the materials in the exhibits are, I think almost without exception,  
25 of some emails between us and Ofcom, entirely unredacted, they are consultation papers  
26 and matters of that kind.

27 THE PRESIDENT: Does that seem a workable way forward? Does anyone feel it is not a  
28 workable way forwards in terms of Mr. Blades.

29 MR. KENNELLY: It may be better to produce an agreed statement of facts to extract from Mr.  
30 Blades.

31 THE PRESIDENT: My experience is that agreed statements of facts are terribly hard to do in  
32 such a shortish period.

33 MR. KENNELLY: That is very true, but what is being proposed is something akin to that, we are  
34 being asked to agree or to be content with a particular contextual document being produced,

1 and in view of the short time available I would urge O2 to produce something pretty banal  
2 in order to get ----

3 THE PRESIDENT: It is obviously going to be from O2's point of view, and you are going to be  
4 writing it from T-Mobile's point of view, so I do not think one need worry too much about  
5 the fact that they are emphasising the points because you will do the same the other way  
6 around. We do not want to get into an argument about this really, I think one has to be  
7 sensible.

8 MR. KENNELLY: Then it seems like a sensible solution; we will go with that.

9 MR. HOLMES: On timetabling, I understood what you said, Sir, about the availability of time, I  
10 know you have the construction appeals to deal with which will take up most of July.

11 THE PRESIDENT: Do not worry about that, but your timetable was based on a hearing that  
12 could be as early as 20<sup>th</sup> or something, so bearing in mind it cannot be that early, it is going  
13 to be at least a week later at the very earliest.

14 MR. HOLMES: Yes, then there should be some consequential adjustment.

15 THE PRESIDENT: What I am going to suggest, if I may, is that I just rise for 10 minutes and  
16 you adjust para. 2 of your letter of 9<sup>th</sup> June, the dates there I think we try and adjust them in  
17 a way that would, if there could be a hearing on 26<sup>th</sup> or in the week of 26<sup>th</sup>, including  
18 possibly 26<sup>th</sup> July, that would then reflect the same kind of position and give you a bit extra  
19 along the chain of dates.

20 MR. HOLMES: The only two points of detail that arise is whether or not there is need for  
21 separate skeletons, etc. For my part I think that is really a question of form over substance.

22 THE PRESIDENT: I think that is probably right. I think the defence effectively ought to stand,  
23 just do a skeleton argument, put the evidence obviously you want to put in with it, it can be  
24 called a "defence" if you wish.

25 MR. HOLMES: Sir, my only concern about that is that we will not have seen the statements of  
26 intervention by then, and as I have previously said – you have heard me on why, in our  
27 submission, two rounds would be sensible; it can certainly be accommodated in the time  
28 required between now and 26<sup>th</sup> July.

29 MR. DE LA MARE: I do not dispute that Mr. Holmes should have an opportunity to respond to  
30 our reply.

31 THE PRESIDENT: No, no, exactly.

32 MR. DE LA MARE: I am perfectly content for Mr. Holmes to do that whether the document is  
33 called a "response" or a "skeleton argument" matters not, he should have ----

34 THE PRESIDENT: I would quite like your defence to be your main skeleton argument.

1 MR. HOLMES: Sir, we will bear that in mind, but if it were possible we would like to ----

2 THE PRESIDENT: You should have a chance to have a supplementary skeleton or whatever it is  
3 called – I think that is built into this, is it not?

4 MR. HOLMES: It is. What I am presently not persuaded by is the need for the other interveners  
5 to have that same opportunity, because Ofcom is, with respect, in quite a different position  
6 from them in that respect, but it is not something I propose to die in a ditch about, at the  
7 moment I just do not see why, as you indicated earlier, they need to be able to do that and  
8 then turn up and argue the point at the oral hearing. It is obviously important that Ofcom's  
9 defence is as full as possible, not least for this reason: I think there are two points that no  
10 one can sensibly dispute. One is that some obligations must have hit the United Kingdom  
11 on 9<sup>th</sup> May 2010, what we are arguing about is what those obligations were and whether or  
12 not they created directly effective rights. Nothing has in fact been done and I think it is  
13 very important that we know as soon as possible what Ofcom says that the United  
14 Kingdom should be doing to comply with its obligations under the Directive, if it does not  
15 create directly effective lines.

16 THE PRESIDENT: Bearing in mind what I have just said about the defence that there should be  
17 full legal submissions as well in that, and I hope that will not put you under too much  
18 pressure – presumably ----

19 MR. HOLMES: Sir, when we discuss the timetable, given the additional week it may be that  
20 there can be slight movement on the date for the defence.

21 THE PRESIDENT: Well I was rather hoping there would not need to be from your point of view,  
22 because then there could be a bit more slack in the middle bit. That means that the  
23 interveners, all of them, will have seen the full range of arguments on both sides. I am  
24 sympathetic to what Mr. Kennelly and others have said about the shortness of time for them,  
25 so in your discussions in a moment can you try and give them the maximum time beyond  
26 30<sup>th</sup> June, because this is effectively their one written shot. There will be an opportunity for  
27 oral submissions by the interveners and therefore I think that provided they have sufficient  
28 time they already have the arguments effectively on O2's side, and they will then have seen  
29 the arguments on the other side.

30 So try and agree as generous a time as you can, consistent with O2's need to have a  
31 reasonable time to reply and obviously Ofcom. Mr. West?

32 MR. WEST: You have already covered the point but I would like to come back on it, which is the  
33 fact that we only have one go at a written submission. Obviously, as my learned friend, Mr.

1 Kennelly said, the matters of issue here are extremely important to us, it would be very  
2 helpful to have a chance of a skeleton.

3 THE PRESIDENT: This is your skeleton, this is your legal submissions.

4 MR. WEST: Well we would appreciate having an opportunity to see what responses come ----

5 THE PRESIDENT: You will see both sides, you will see both the main parties' arguments, and I  
6 would have thought that is okay, but then you get your second bite of the cherry when you  
7 come along and make submissions at the hearing.

8 MR. WEST: I think as much as anything there are issues between the interveners.

9 THE PRESIDENT: You have an opportunity at the oral hearing to deal with that then.

10 MR. KENNELLY: Sir, very quickly – I understand entirely why we are left for the oral hearing,  
11 but it may save everyone time, and it may save the Tribunal some time if we have an  
12 opportunity to put something in short week before the oral hearing on the replies.

13 THE PRESIDENT: That means you have a last word, you see.

14 MR. KENNELLY: We could be strictly limited to responding to the submissions in the replies.  
15 We may well diverge from Ofcom, Sir, and that is the concern, we may make a different  
16 point.

17 THE PRESIDENT: It will be clear whether you diverge from Ofcom when you see their main  
18 written submissions, and you will be putting it in your written submissions.

19 MR. KENNELLY: First of all we will not see Ofcom's reply, its final word, and we will not see  
20 Vodafone, we will not see one another's.

21 THE PRESIDENT: Well you can show it to one another if you want to. You can show each other  
22 drafts. It is perfectly normal to have one set of written submissions on a point of law. I do  
23 not want to have a multiplicity of these if we can avoid it. I think it is fair enough for the  
24 main parties, but ----

25 MR. KENNELLY: We are the main parties.

26 THE PRESIDENT: Well you should have brought an appeal or a challenge of some sort.

27 MR. KENNELLY: The problem we have ... (Laughter) ... we have nothing to appeal against,  
28 this is our concern. The point is I think it would save the Tribunal time if we had an  
29 opportunity to put in something very short shortly before the hearing; it simply would mean  
30 the Tribunal knew in advance what we were going to say and that must be sensible.

31 THE PRESIDENT: See what you can agree along the lines of what I have indicated so far.  
32 Everybody is going to have an opportunity to say what they want on a point of law, but  
33 what we do not want is a mass of written material coming at the last moment, so I think that  
34 is the way we will go.

1 I will rise now until half past eleven.

2 (Short break)

3  
4  
5 THE PRESIDENT: Mr. De La Mare, it is all sorted, is it?

6 MR. DE LA MARE: It is. My hopes as to the reasonableness of all concerned have proved well-  
7 founded. I have a timetable, the relevant dates being: 28<sup>th</sup> June ----

8 THE PRESIDENT: What is 28<sup>th</sup> now – defence?

9 MR. DE LA MARE: That is the defence, yes.

10 THE PRESIDENT: Oh, you have allowed Mr. Holmes a bit of extra time, have you?

11 MR. DE LA MARE: Notwithstanding your very clear indication, Sir. (Laughter)

12 THE PRESIDENT: Defence/main skeleton 28<sup>th</sup>, yes?

13 MR. DE LA MARE: Then the interveners should have until 7<sup>th</sup>. O2 should have until 14<sup>th</sup>, and  
14 Ofcom until 21<sup>st</sup>, hearing in the week commencing 26<sup>th</sup>.

15 THE PRESIDENT: So Mr. Kennelly, Mr. Woodrow and Mr. West, I know you are not totally  
16 happy with that, but it is a bit better.

17 MR. KENNELLY: Well we are content with that.

18 MR. WOODROW: We are happy too.

19 THE PRESIDENT: Fine. Then the hearing to be listed for – it sounds as though it probably  
20 could be a day there must be a significant danger it is going to go into another day?

21 MR. DE LA MARE: I suspect the case is going to end up being a day and a half, but it is prudent  
22 to allow two days.

23 THE PRESIDENT: Two days, first available date ----

24 MR. WEST: We feel that might be two days with a day in reserve potentially, might be more  
25 prudent.

26 THE PRESIDENT: I would be surprised really, bearing in mind there will be some pretty  
27 powerful written submissions coming in, I would have thought it ought to be easily cleared  
28 up in two days, I hope so anyway. We will leave it as it is, on the first available date on or  
29 after Monday 26<sup>th</sup> July. I emphasise I cannot guarantee it will be heard then, but we will do  
30 our best.

31 MR. DE LA MARE: I confess my ignorance, Sir, whether I should be asking now in advance for  
32 some sort of certificate that it is fit for vacation business.

33 THE PRESIDENT: I do not think we have such a thing here.

34 MR. DE LA MARE: I do not think there is, no.

1 THE PRESIDENT: Well we do not have a vacation.

2 MR. DE LA MARE: You do not have a vacation at all – my commiserations.

3 THE PRESIDENT: I do! Is there anything else that occurs to anyone? We will let you have an  
4 order reflecting what you have agreed here today and we will notify you as soon as we have  
5 a date.

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