

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)

2 May 2006 \*

In Case T-328/03,

**O2 (Germany) GmbH & Co. OHG**, established in Munich (Germany), represented by N. Green QC and K. Bacon, Barrister, and by B. Amory and F. Marchini Camia, lawyers,

applicant,

v

**Commission of the European Communities**, represented initially by R. Wainwright, S. Rating and P. Oliver, and subsequently by É. Gippini Fournier, P. Hellström and K. Mojzesowicz, acting as Agents, with an address for service in Luxembourg,

defendant,

\* Language of the case: English.

APPLICATION for annulment of Articles 2 and 3(a) of Commission Decision 2004/207/EC of 16 July 2003 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/38.369: T-Mobile Deutschland/O2 Germany: Network Sharing Rahmenvertrag) (OJ 2004 L 75, p. 32),

THE COURT OF FIRST INSTANCE  
OF THE EUROPEAN COMMUNITIES (Fourth Chamber),

composed of H. Legal, President, P. Mengozzi and I. Wiszniewska-Białecka, Judges,

Registrar: K. Pocheć, Administrator,

having regard to the written procedure and further to the hearing on 7 December 2005,

gives the following

## **Judgment**

### **Background to the dispute**

- <sup>1</sup> O2 (Germany) GmbH & Co. OHG ('O2'), a wholly owned subsidiary of mmO2 plc, formerly BT Cellnet Ltd, a company previously controlled by British Telecommunications plc, operates digital mobile telecommunications networks and services in Germany, where it entered the market as the last of four operators based on a GSM

1800 licence (Global System for Mobile Communications) awarded in 1997. O2 was also awarded a UMTS licence (Universal Mobile Telecommunications System) in August 2000.

- 2 T-Mobile Deutschland GmbH ('T-Mobile'), wholly owned by T-Mobile International AG, in turn a wholly owned subsidiary of the incumbent operator Deutsche Telekom AG, is a German operator of digital mobile telecommunications networks and services. T-Mobile, which uses the GSM family of standards, provides GSM services in Germany based on a GSM 900 licence and was awarded a UMTS licence in August 2000.
- 3 The national regulatory framework in Germany and the licences awarded to O2 and T-Mobile provide, inter alia, for network roll-out requirements in terms of effective population coverage related to a specific timetable. That coverage was required to reach 50% of the population by the end of 2005.
- 4 On 6 February 2002 O2 and T-Mobile notified to the Commission a framework agreement dated 20 September 2001 concerning infrastructure sharing and national roaming for the third generation of GSM mobile telecommunications ('3G') on the German market; that agreement was amended by supplementary agreements of 20 September 2002, 22 January 2003 and 21 May 2003. T-Mobile and O2 requested either negative clearance under Article 81(1) EC and Article 53(1) of the Agreement on the European Economic Area (EEA) or, failing that, an exemption under Article 81(3) EC and Article 53(3) of the EEA Agreement.
- 5 On 7 December 2001 the German Regulatory Authority for Post and Telecommunications found that the agreement was in line with the national regulatory framework.

- 6 On 16 July 2003 the Commission adopted Decision 2004/207/EC relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/38.369: T-Mobile Deutschland/O2 Germany: Network Sharing Rahmenvertrag) (OJ 2004 L 75, p. 32; 'the Decision'). It concluded that it had no grounds for action pursuant to Article 81(1) EC and Article 53(1) of the EEA Agreement in respect of the provisions of the agreement relating to site sharing (Article 1). In addition, in accordance with Article 81(3) EC and Article 53(3) of the EEA Agreement, the Commission declares Article 81(1) EC and Article 53(1) of the EEA Agreement to be inapplicable to the provisions of the agreement relating to roaming in respect of the periods which the Commission specifies (Articles 2 and 3).
  
- 7 After presenting the legal and factual background to the recent development of mobile communications in the European Union, which is characterised by successive technological generations, the Decision states that the objectives of the agreement are inter alia to expand geographical coverage and to achieve faster deployment of the 3G network and services, and that it provides the basis for cooperation between the parties on site sharing, radio access network (RAN) sharing and national roaming (recital 24). The Decision adds that the agreement states that it will continue in force until 31 December 2011 and will, in principle, be renewed for a period of two years (recital 43).
  
- 8 The Decision states that 3G network sharing contains a number of levels, namely, in ascending order, shared use of: sites, base stations (Nodes B) and antennas, radio network controllers ('RNCs'), core networks, and frequencies (recitals 12 and 15).
  
- 9 It states that the RAN includes mast or antenna sites, site support cabinets and power supply, as well as antennas, combiners and transmission links, Nodes B and the radio network controllers (recital 13).

- 10 The Decision states that national roaming enables the relevant operators to use each other's networks to provide services to their own customers without sharing any network elements (recital 16).
- 11 It states that the national roaming provided for in the agreement consists, first, in O2 roaming on T-Mobile's network in the area subject to the obligation of providing 50% population coverage and, second, reciprocal roaming outside that area (points 4.3.1 and 4.3.2).
- 12 As regards the relevant product market, the Commission considers that in the telecommunications sector, which is at issue here, the network access and services markets primarily concerned by the agreement are, first, the market for sites and site infrastructure for digital mobile radiocommunications equipment and, second, the market for wholesale access to national roaming for 3G communications services. The Commission adds that two other markets are affected indirectly, namely the markets for wholesale access to 3G services, as well as the downstream retail markets for 3G services (recital 46).
- 13 The Commission takes the view that the relevant geographical markets are national and cover all Germany (recitals 60, 64 and 72).
- 14 As regards market structure, the Commission examines inter alia wholesale access to national roaming for 3G communications services and 3G retail services.

- 15 The Commission takes the view that T-Mobile has a 100% share in the market for wholesale access to national roaming for the second generation of mobile telecommunications ('2G') in Germany and that, for 3G national roaming, the main actual or potential competitors in wholesale access and services markets are the two other licensees that plan to roll out 3G networks and services in Germany, namely D2 Vodafone and E-Plus.
- 16 As regards the markets for 3G retail services, the Commission considers that the main competitors are D2 Vodafone and E-Plus and potential service providers such as Mobilcom and Debitel, on the basis of the available data relating to the situation for 2G retail services in respect of which the market shares were estimated in 2002 at 41.7% for T-Mobile, 38.3% for D2 Vodafone, 12.2% for E-Plus and 7.8% for O2 (recitals 74 to 77).
- 17 According to the Decision, the notified agreement is a horizontal cooperation agreement between two competitors that also involves certain vertical aspects. It does not have the object of restricting competition but it could have such an effect given that the parties to the agreement are competitors in the relevant markets (recital 92).
- 18 The Commission considers that the site sharing and exchange of information to which the agreement gives rise will not lead to restrictions of competition (recitals 95 to 103 and Article 1). Since RAN sharing was not foreseen at the time when the Decision was adopted, it has not been examined (recital 104).
- 19 By contrast, the Commission takes the view that national roaming between network operators who are licensed to roll out and operate their own digital mobile networks by definition restricts competition between those operators on its key parameters (recital 107).

- 20 The Commission considers, first of all, that roaming has effects on wholesale markets. It states that there is restriction of competition as regards, first, the scope and speed of coverage, since a roaming operator does not sufficiently roll out its own network, and, second, network quality and transmission rates, since a roaming operator is dependent on the technical and commercial choices made by the operator of the visited network. In addition, the wholesale rates charged by a roaming operator to purchasers of its services are dependent on the wholesale prices paid to the visited operator. The restrictive effects are more serious in areas where there is a clear economic case for the roll-out of parallel competitive networks, notably in core urban areas. The Commission takes the view that the restrictive effect on competition is significant because the markets in question are emerging ones in which barriers to entry are considerable owing to licensing requirements and investment requirements (recitals 107 to 110).
- 21 Next, the Commission takes the view that roaming has restrictive effects on retail markets since it leads at that level to a greater uniformity of the conditions for providing the relevant services. Moreover, the pricing system agreed between the parties could itself give rise to a risk of coordination on retail price levels (recitals 111 and 112).
- 22 The Commission also considers that the procedure for reselling roaming access rights to 'MVNOs' (Mobile Virtual Network Operators), the resale of which the agreement requires the prior approval of the other party, by restricting the type of customers, limits output and constitutes a restriction of competition (recitals 115 and 116).
- 23 By contrast it submits, as regards the other provisions of the agreement relating to roaming, that the minimum purchasing requirements by O2 from T-Mobile do not constitute a further restriction of competition (recitals 113 and 114) and that the restriction on the resale of roaming access rights to other licensed network

operators and the exchange of information relating to roaming do not constitute restrictions of competition (recitals 117 to 119).

24 The Commission also takes the view that the agreement has effects on trade between EEA Member States (recital 120).

25 The Commission then examines the agreement in the light of the conditions laid down in Article 81(3) EC and Article 53(3) of the EEA Agreement for the granting of an exemption.

26 First, the Commission takes the view that the agreement contributes to the production and distribution of the services concerned and promotes technical and economic progress.

27 As regards roaming within the 50% population coverage area, the Decision states that O2 will be able from the outset to offer better coverage, quality and transmission rates for its services than it would be able to do on a stand-alone basis during its roll-out phase in competition with the other providers of 3G wholesale and retail services (recitals 123 and 124).

28 As regards roaming outside the 50% population coverage area, the Decision states that O2 will be able to become active as a competitor offering nationwide coverage on 3G retail markets whereas without the agreement it would probably not have been able to satisfy the coverage obligation required by its licence in the area in question (recital 126). The resale of roaming access rights to MVNOs promotes competition in the market for 3G national roaming, in the wholesale airtime market,

and at retail level (recital 127). In addition, the agreement allows the parties, in particular T-Mobile, to make a more intensive and therefore more efficient use of their network, especially in less densely populated areas (recital 128).

29 Second, the Commission considers that the positive effect of 3G national roaming on O2's competitive position will enhance competition in digital mobile communications network and services markets, that competitors will have incentives to introduce new services into the market and that they will be under greater pressure to reduce prices. Furthermore, the Commission states that the cost savings resulting from increased competition at retail level are likely to be passed on to end-users (recitals 129 and 130).

30 Third, the Commission considers that, given O2's weaker position on the market, the clauses in the agreement are indispensable and proportionate in order to guarantee the benefits noted (recitals 131 to 133). The Commission regards the restriction on the resale of roaming access rights to Voice MVNOs, first, as necessary to ensure that the agreement is beneficial and, second, proportionate, since it is limited to voice services (recitals 134 to 136).

31 Fourth, the Commission takes the view that the competition between the four licensed operators of 3G networks and services that intend to roll out 3G networks in Germany and between service providers and MVNOs (with the exception of voice services) is enhanced by the agreement. It also leaves scope for effective competition between the parties to the agreement as the home network operator controls its own core network and can therefore offer differentiated services (recitals 137 and 138). In addition, the Commission states that the responsibility for pricing and billing remains with the home network operator and that the parties use different billing systems (recital 140). Finally, the Commission takes the view that the partial elimination of competition from MVNOs is compensated substantially by the overall pro-competitive effects of the agreement (recital 142).

32 In conclusion, after stating that the likely effects of the restrictions cannot be evaluated for a period that exceeds five years (recital 144), the Commission decided:

- not to initiate the procedure pursuant to Article 81(1) EC and Article 53(1) of the EEA Agreement in respect of the provisions of the agreement relating to site sharing, to the information exchange necessary to enable site sharing, and to the restriction on the resale of national roaming access rights to other licensed network operators (Article 1);
  
- to grant an exemption, pursuant to Article 81(3) EC and Article 53(3) of the EEA Agreement, in respect of the provisions of the agreement relating to the supply of 3G national roaming by T-Mobile to O2, within the area subject to the obligation of providing 50% population coverage by 31 December 2005 for the following periods:
  - from 6 February 2002 until 31 December 2005 in respect of the cities situated in an area consisting principally of urban regions (Area 1), except in the underground areas;
  
  - from 6 February 2002 until 31 December 2007 in respect of the regions situated in an area consisting of smaller urban regions of secondary commercial importance (Area 2), except in the underground areas;
  
  - from 6 February 2002 until 31 December 2008 in respect of the regions situated in an area consisting of smaller urban regions of lesser commercial importance (Area 3) and in any underground areas in the cities and regions listed in Areas 1, 2 and 3 (Article 2).

33 The Commission also grants an exemption, from 6 February 2002 until 31 December 2008, in respect of the provision of 3G national roaming between T-Mobile and O2 outside the area subject to the obligation of providing 50% population coverage by 31 December 2005, as set out in the agreement (Article 3(a) of the Decision), and in respect of the restriction on the resale of 3G national roaming access rights to MVNOs provided for in the agreement (Article 3(b) of the Decision).

### **Procedure and forms of order sought**

34 By application lodged at the Registry of the Court of First Instance on 25 September 2003, O2 brought the present action.

35 Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure by first carrying out a measure of organisation of procedure.

36 By way of measure of organisation of procedure notified on 26 October 2005, the Court of First Instance asked the Commission to specify the justification, based on legislation, case-law, economic analysis and its own guidelines, for its finding in recital 107 of the Decision that '[n]ational roaming ... by definition restricts competition' and asked O2 to specify the consequences of rolling out its network more rapidly on the obligation to buy the roaming access rights stipulated by the agreement and to indicate the specific characteristics of its pricing system.

37 The applicant and the Commission responded to those requests by registered letters of 24 November 2005.

38 The parties presented oral argument and replied to the Court's questions at the hearing on 7 December 2005.

39 O2 claims that the Court should:

- annul Articles 2 and 3(a) of Commission Decision 2004/207/EC of 16 July 2003 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/38.369: T-Mobile Deutschland/O2 Germany: Network Sharing Rahmenvertrag);
  
- order the Commission to pay the costs.

40 The Commission contends that the Court should:

- dismiss the action;
  
- order the applicant to pay the costs.

## **Law**

### *1. Concerning the admissibility and scope of the claims for annulment*

#### *Arguments of the parties*

41 The Commission argues that the Decision draws a distinction between the horizontal aspects of the agreement and its vertical aspects and that the applicant

disregards that distinction and misconstrues the case-law and its own contractual relationship with T-Mobile. It questions in this respect whether O2 has an interest in bringing this action, since the applicant seeks the annulment of Articles 2 and 3(a) of the Decision, which concern the horizontal aspects of the agreement, and not the annulment of Article 3(b), which concerns its vertical aspects. In so doing, the applicant concedes that that part of the agreement fell within the scope of the prohibition laid down in Article 81(1) EC and required an exemption.

42 Moreover, the Commission expressed doubts at the hearing about the applicant's interest in bringing the action on the ground that the Decision, which grants O2 an exemption which is binding on national authorities and courts, provides O2 with legal certainty which would be lost if the annulment sought were granted, for the Commission would not be able to issue a new decision, since Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1) brought to an end the system of prior notification of agreements for the purpose of exemption.

43 O2 submits that the Commission does not make any substantive objection, in particular from the point of view of the admissibility of its action, and that the parts of the Decision being contested produce binding legal effects and may therefore be the subject of an action for annulment.

### *Findings of the Court*

44 The Decision indicates that on 6 February 2002 O2 and T-Mobile notified to the Commission an agreement comprising two main parts, namely site sharing and national roaming, scheduled to last until 2011, automatically renewed for two years, in order to obtain negative clearance or, failing that, an exemption, and that the Commission granted negative clearance as regards the first part and, as regards the second part, an exemption until 2008. It is also clear from the notification that the

parties to the agreement took the view that it had neither the object nor the effect of restricting competition and that they sought an exemption only in the alternative. In addition, O2 submitted at the hearing that the temporal limitations that it and T-Mobile had agreed to incorporate into the agreement at the request of the Commission, and without which it would not have been able to obtain the exemption, presented them with practical problems in relation to complying with the time-limits thus set.

- 45 It must be observed, first, that the Decision, of which O2 is the addressee, gives it only partial satisfaction in the light of the wording of the notification and, second, that the applicant seeks the partial annulment of the Decision in so far as the Commission did not consider the provisions of Article 81(1) EC and Article 53(1) of the EEA Agreement to be inapplicable to the notified agreement, on the ground that the agreement does not restrict competition, and did not grant the negative clearance primarily sought. It must also be observed that the Decision, which lays down a binding timetable as regards the exemption granted, is such as to affect the applicant's interests on account of the binding legal effects which it produces.
- 46 Consequently, this action, which seeks annulment of the contested provisions only in so far as those provisions imply that the relevant clauses fall within the scope of Article 81(1) EC and Article 53(1) of the EEA Agreement, is admissible (see, to that effect, Case T-112/99 *M6 and Others v Commission* [2001] ECR II-2459, paragraphs 36 to 40 and 44).
- 47 That finding is not invalidated by the Commission's argument that annulment of the contested provisions of the Decision by the Court of First Instance would place O2 in a situation of legal uncertainty in so far as a new decision on the notification could not be taken since that procedure, provided for in Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (O), English Special Edition 1959-1962, p. 87), no longer exists under Regulation No 1/2003 which is now applicable.

- 48 In the event of such annulment with the retroactive effect that attaches to it, the Commission should take a new decision on the provisions of the notified agreement affected by that annulment and adjudicate in particular on the application for negative clearance, by reference to the date of notification and, consequently, by carrying out its examination under Regulation No 17 (see, to that effect, Case C-415/96 *Spain v Commission* [1998] ECR I-6993, paragraph 31). The fact that Regulation No 1/2003, which now governs the implementation of the rules on competition laid down in Articles 81 EC and 82 EC, put an end to the notification procedure which previously existed therefore has no effect on the enforcement of a judgment granting the applicant's application for annulment.
- 49 Furthermore, possible partial annulment of the Decision, if it were justified, as the applicant requests, by the finding of unlawful conduct of the Commission at the date on which it adopted the Decision, in refusing to grant negative clearance to all the clauses notified, cannot prejudice the applicant's legal certainty but reinforces it, provided that it follows from the grounds of such a judgment ordering annulment that the disputed clauses of the agreement relating to national roaming do not fall within the scope of the prohibition laid down in Article 81(1) EC and Article 53(1) of the EEA Agreement.

## 2. *Concerning the substance*

### *Preliminary considerations*

- 50 The applicant argues in its application that the Commission erred in law by finding that the agreement restricts competition because, first, there is no restriction of competition and, second, the alleged restriction does not stem from an agreement. It adds that 'the Commission's findings on these points are insufficiently reasoned, in breach of the duty to give reasons in Article 253 [EC]'.

- 51 That complaint must, notwithstanding its literal wording, be understood as seeking to contest the insufficiently detailed nature of the examination which led the Commission to find that the agreement restricted competition but could none the less be subject to exemption, a matter which goes to the substance of the Decision, and not to the question of the reasoning on which the contested act is based, which concerns the external lawfulness. Both the pleadings and the hearing were confined exclusively to the substantive questions raised by the dispute and O2 did not moreover provide any information accompanying its reliance on Article 253 EC which makes it possible to identify the paragraphs of the Decision which are allegedly vitiated by an absence of reasoning.
- 52 That complaint must therefore be merged with the two substantive pleas put forward by O2 in support of its action alleging errors of law by the Commission as regards national roaming organised by the agreement. First, the applicant submits that the Commission was wrong to conclude that the agreement led to a restriction of competition within the meaning of Article 81(1) EC and Article 53(1) of the EEA Agreement. The Commission, which had accepted that the agreement did not have as its object a restriction of competition, failed to carry out a full analysis of the competition situation by not examining that situation in the absence of the agreement, thereby disregarding settled case-law. Second, the alleged restriction does not result from an agreement within the meaning of those provisions, but from unilateral action by the applicant.

*Concerning the first plea, alleging that there is no restriction of competition and that the competitive situation has been insufficiently analysed*

#### Arguments of the parties

- 53 O2 submits that, while it is accepted that the agreement did not have as its object a restriction of competition, the Commission did not analyse the actual effects of the agreement on competition; in particular it did not examine what the conditions of

competition would have been in the absence of the agreement. Such an overall examination is necessary, according to the case-law, in respect of all agreements, horizontal or vertical, as moreover the Commission sets out in its guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements (OJ 2001 C 3, p. 2). Nor are the Commission's findings based on an analysis of the pertinent facts regarding the relevant market.

54 O2 asserts that the Commission's reasoning is based on an erroneous premiss that national roaming is of itself restrictive of competition since the agreement enables O2 to purchase wholesale services from T-Mobile, rather than providing those services itself. The Commission merely asserts that O2's dependence on T-Mobile's network constitutes a restriction of competition, without showing that this is the case or carrying out the economic analysis required by Article 81(1) EC.

55 The Commission thus confines itself to broad and general statements which are contradicted even by the findings of its Decision, according to which the agreement, far from restricting competition, would be beneficial to it (recitals 122 to 142 of the Decision). Furthermore, the Commission's findings are contrary to case-law and to administrative practice.

56 O2 submits, in that respect, that the agreement has positive effects on competition — as accepted in the Decision — in terms of population coverage, quality of services provided, transmission rates and prices. The applicant submits that, in the absence of the agreement, its competitive position would have been weakened and that it would probably have been unable to ensure, within the time frames provided for, the population coverage required for 3G services; the Commission agreed with this in its Decision.

- 57 The applicant further asserts that the agreement is necessary and indispensable to enable it, in the two roaming areas between which it draws a distinction, to be a competitive operator capable of offering coverage and quality services on the 3G mobile telecommunications market. By enabling O2 to supplement its population coverage capacity, the agreement benefits its market penetration rate and, therefore, competition.
- 58 O2 also submits that roaming will not have a negative effect as regards production, innovation, variety and quality of services, which the Commission also accepted.
- 59 As regards effects on prices, the applicant asserts that the fact that its wholesale prices depend to a certain extent on those charged by T-Mobile does not constitute a restriction of competition, since that is the situation of any undertaking which has recourse to providers in respect of some of its products or services. Moreover, the risk of price coordination or collusion envisaged in the Decision is purely speculative and is not based on any evidence or analysis.
- 60 The Commission submits that the applicant's reasoning regarding the examination of the competition situation in the absence of the agreement amounts to applying a rule of reason to the provisions of Article 81(1) EC, in contradiction to the case-law. The defendant states that since a horizontal cooperation agreement is involved, and in accordance with its guidelines, it first assessed the impact of the agreement on competition in the light of Article 81(1) EC, by examining any actual or potential restrictions of competition that would have existed in the absence of the agreement; it then carried out an assessment of its pro-competitive and anti-competitive effects for the purposes of the assessment under Article 81(3) EC.

- 61 The Commission asserts that roaming, as envisaged in the agreement, affects competition between the network operators, which has a particular impact on competition in mobile telephony markets. It states that in the present case the agreement, concluded between two competitors, is such as to influence their conduct with respect to key parameters of competition.
- 62 The defendant submits that even though O2 and T-Mobile are perfectly able to build their own networks and offer 3G services the agreement has the purpose of enabling the applicant partly to slow down, if not to limit, its network roll-out, hence cutting its infrastructure costs. The dependence of O2's network on that of T-Mobile resulting from the agreement necessarily affects, first, competition in areas where O2's network has been rolled out and, second, the planning of that network's future roll-out. In that regard, roaming, unlike other forms of cooperation such as shared use of sites or radio access networks, completely undermines competition on national mobile communications markets.
- 63 Roaming therefore restricts competition in terms of coverage, as O2 is reliant on T-Mobile in urban and rural areas alike. The applicant is also reliant on T-Mobile for the quality and speed of data transmission even if the agreement still leaves some scope for competition. Finally, the price charged by O2 is a function of the wholesale price paid to T-Mobile. In that respect, the Commission asserts that, by submitting that that price constraint will apply only to 10% of 3G telecommunications, the applicant plays down the importance of packet-switched transmission services which constitute the most important feature of 3G mobile telecommunication services.
- 64 The Commission maintains that it based its assessment on the information provided by the parties to the agreement, in particular as regards roaming tariffs, the use of

T-Mobile's network by O2, and O2's competitiveness. It asserts that the Decision is consistent, first, with its general position on the restrictive nature of roaming, a position which is shared by several national regulatory authorities and, second, with the position taken in an earlier decision concerning the British market.

## Findings of the Court

- 65 The dispute raises the main question whether the Commission, in its examination of the notified agreement in the light of the provisions of Article 81(1) EC and Article 53(1) of the EEA Agreement, lawfully justified its assessment that the agreement restricts competition and whether, in order to do so, it carried out the analysis required by those provisions as interpreted by the case-law. The applicant contends that the Commission worked from the premiss that national roaming in itself restricts competition and did not examine the situation in the absence of the agreement whereas, for the defendant, the applicant's criticism amounts to asking it to apply a rule of reason to the provisions of Article 81(1) EC, in contradiction to the case-law.
- 66 In order to assess whether an agreement is compatible with the common market in the light of the prohibition laid down in Article 81(1) EC, it is necessary to examine the economic and legal context in which the agreement was concluded (Case 22/71 *Béguelin Import* [1971] ECR 949, paragraph 13), its object, its effects, and whether it affects intra-Community trade taking into account in particular the economic context in which the undertakings operate, the products or services covered by the agreement, and the structure of the market concerned and the actual conditions in which it functions (Case C-399/93 *Oude Luttikhuis and Others* [1995] ECR I-4515, paragraph 10).

- 67 That method of analysis is of general application and is not confined to a category of agreements (see, as regards different types of agreements, Case 56/65 *Société minière et technique* [1966] ECR 235, at 249-250; Case C-250/92 *DLG* [1994] ECR I-5641, paragraph 31; Case T-35/92 *John Deere v Commission* [1994] ECR II-957, paragraphs 51 and 52; and Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services and Others v Commission* [1998] ECR II-3141, paragraphs 136 and 137).
- 68 Moreover, in a case such as this, where it is accepted that the agreement does not have as its object a restriction of competition, the effects of the agreement should be considered and for it to be caught by the prohibition it is necessary to find that those factors are present which show that competition has in fact been prevented or restricted or distorted to an appreciable extent. The competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute; the interference with competition may in particular be doubted if the agreement seems really necessary for the penetration of a new area by an undertaking (*Société minière et technique* at 249-250).
- 69 Such a method of analysis, as regards in particular the taking into account of the competition situation that would exist in the absence of the agreement, does not amount to carrying out an assessment of the pro- and anti-competitive effects of the agreement and thus to applying a rule of reason, which the Community judicature has not deemed to have its place under Article 81(1) EC (Case C-235/92 P *Montecatini v Commission* [1999] ECR I-4539, paragraph 133; *M6 and Others v Commission*, paragraphs 72 to 77; and Case T-65/98 *Van den Bergh Foods v Commission* [2002] ECR II-4653, paragraphs 106 and 107).
- 70 In this respect, to submit, as the applicant does, that the Commission failed to carry out a full analysis by not examining what the competitive situation would have been in the absence of the agreement does not mean that an assessment of the positive and negative effects of the agreement from the point of view of competition must be carried out at the stage of Article 81(1) EC. Contrary to the defendant's interpretation of the applicant's arguments, the applicant relies only on the method of analysis required by settled case-law.

71 The examination required in the light of Article 81(1) EC consists essentially in taking account of the impact of the agreement on existing and potential competition (see, to that effect, Case C-234/89 *Delimitis* [1991] ECR I-935, paragraph 21) and the competition situation in the absence of the agreement (*Société minière et technique* at 249-250), those two factors being intrinsically linked.

72 The examination of competition in the absence of an agreement appears to be particularly necessary as regards markets undergoing liberalisation or emerging markets, as in the case of the 3G mobile communications market here at issue, where effective competition may be problematic owing, for example, to the presence of a dominant operator, the concentrated nature of the market structure or the existence of significant barriers to entry — factors referred to, in the present case, in the Decision.

73 In order to take account of the two parts which this plea actually contains, it is therefore necessary to examine, first, whether the Commission did in fact consider what the competition situation would have been in the absence of the agreement and, second, whether the conclusions which it drew from its examination of the impact of the agreement on competition are sufficiently substantiated.

— Concerning the examination of the competition situation in the absence of the agreement

74 The Decision cannot be criticised for not having carried out, in order to analyse the effects of the agreement, any comparison between the competitive structure introduced by the agreement and that which would prevail in the absence thereof. By contrast, as regards the terms of the comparison performed, it must be observed that the entire examination of the effects of the agreement is based on the idea that, whether there had or had not been an agreement, both the O2 and T-Mobile

operators would have been present and competing on the relevant market. The hypothesis that, in the absence of the agreement, O2 might have been entirely or partially absent from the 3G mobile telephony market in Germany was at no time envisaged.

- 75 It follows implicitly but necessarily from the Decision that the Commission considered, first, that O2 would in any event be present on the market, which is apparent, for example, at recital 97 of the Decision from the projections concerning the 3G site infrastructure market on the basis of the data relating to the 2G site infrastructure market and, second, that there would be no restriction of competition whereas the disputed agreement specifically brings about such restriction by reason of the national roaming for which it provides, which the Decision states in particular at recital 107.
- 76 The Commission confirmed at the hearing that that was indeed its approach in the present case. The defendant stated in this respect that none of the information provided by the parties could have suggested to it that the conclusion of the agreement was an indispensable condition for O2's entry into the 3G market when it was already present on the 2G market, that the applicant had mentioned to it its intention to penetrate the 3G market and that, moreover, the Commission had found that licensed operators present on the 2G market remained in the market.
- 77 Working on the assumption that O2 was present on the mobile communications market, the Commission did not therefore deem it necessary to consider in more detail whether, in the absence of the agreement, O2 would have been present on the 3G market. It must be held that that assumption is not supported in the Decision by any analysis or justification showing that it is correct, a finding that, moreover, the defendant could only confirm at the hearing. Given that there was no such objective examination of the competition situation in the absence of the agreement, the Commission could not have properly assessed the extent to which the agreement was necessary for O2 to penetrate the 3G mobile communications market. The Commission therefore failed to fulfil its obligation to carry out an objective analysis of the impact of the agreement on the competitive situation.

78 That lacuna cannot be deemed to be without consequences. It is apparent from the considerations set out in the Decision in the analysis of the agreement in the light of the conditions laid down in Article 81(3) EC as regards whether it was possible to grant an exemption that, even in the Commission's view, it was unlikely that O2 would have been able, individually, without the agreement, to ensure from the outset better coverage, quality and transmission rates for 3G services, to roll out a network and launch 3G services rapidly, to penetrate the relevant wholesale and retail markets and therefore be an effective competitor (recitals 122 to 124, 126 and 135). It was because of those factors that the Commission considered that the agreement was eligible for exemption.

79 Such considerations, which imply some uncertainty concerning the competitive situation and, in particular, as regards O2's position in the absence of the agreement, show that the presence of O2 on the 3G communications market could not be taken for granted, as the Commission had assumed, and that an examination in this respect was necessary not only for the purposes of granting an exemption but, prior to that, for the purposes of the economic analysis of the effects of the agreement on the competitive situation determining the applicability of Article 81 EC.

— Concerning the impact of the agreement on competition

80 The applicant complains that the Commission confined itself to the premiss that roaming is of itself restrictive of competition and made broad and general statements which are unsupported in order to conclude that the agreement was not compatible with the common market, pursuant to Article 81(1) EC and Article 53(1) of the EEA Agreement.

- 81 It is apparent from the Decision that, as regards the effects of national roaming on competition on wholesale markets, the Commission states that '[n]ational roaming between network operators ... by definition restricts competition between these operators in all related network markets on key parameters such as coverage, quality and transmission rates' (recital 107).
- 82 Next, the Commission states that national roaming 'restricts competition on scope and on speed of coverage because instead of rolling out its own network to obtain the maximum degree of coverage of territory and population within the shortest period of time, a roaming operator will rely for its roamed traffic on the degree of coverage achieved by the network of the visited operator'. It adds that '[n]ational roaming also restricts competition on network quality and on transmission rates, because the roaming operator will be restricted by the network quality and the transmission rates available to it on the visited network that are a function of the technical and commercial choices made by the operator of the visited network' and that 'the wholesale rates that [O2] will be able to charge to purchasers of its own wholesale network and access services will be constrained by the wholesale rates it has to pay to T-Mobile' (recital 107).
- 83 The Commission states that '[g]iven the resulting constraints on the ability of O2 ... and T-Mobile to compete on coverage, on quality, on transmission rates, and on wholesale prices, 3G national roaming between O2 ... and T-Mobile has an impact on competition in all 3G network markets in Germany' (recital 109) and that '[n]ational roaming at wholesale level will lead to a greater uniformity of conditions at retail level, given the fact that the underlying network coverage, quality and transmission speeds are likely to be similar' (recital 111).
- 84 The Commission also takes the view that 'the prior approval of the other Party [to the Agreement] for any resale of roaming capacity to MVNOs that would offer voice

telephony services to end-users' is '[a limitation on] the type of customers' and that it 'limits output and therefore constitutes a restriction of competition' (recitals 115 and 116).

85 It is apparent from those assessments that, for the Commission, the very nature of a roaming agreement, such as that concluded by the parties, brings about a restriction of competition by reason of the dependence on the visited operator which national roaming creates for the roaming operator. The restriction manifests itself in three ways: first, from the point of view of network coverage, because roaming constitutes an obstacle to the network roll-out of the operator which uses the network of its partner; second, as regards network and transmission quality, because the using operator depends on the technical and commercial choices of the visited operator and, third, as regards prices, because the wholesale rates of the roaming operator are a function of the wholesale price paid to the visited operator, which is the case in this instance.

86 Such general considerations, which could be formulated in respect of any national roaming agreement, are not based on any specific evidence showing that they are correct in the case of the agreement concluded between O2 and T-Mobile.

87 It is true that in various recitals the Decision contains information describing the context of the agreement. It describes the economic, legal and technical context surrounding the agreement (recitals 6 to 22) and explains the scheme of the agreement in its various provisions, relating to extended site sharing, RAN sharing and national roaming (recitals 23 to 43). It also examines the relevant markets, namely the wholesale and retail markets, the product and service markets, and the geographical markets (recitals 44 to 72), and provides information about the structure of the market by considering, in particular, who the actual and potential competitors on the various markets were (recitals 73 to 77 and 96 to 99).

88 However, that information, provided by way of presentation of the sector of activity in which the undertakings in question operate, in no way clarifies the assessment of the impact of the agreement.

89 When questioned at the hearing as to what concrete evidence, beyond the general assessment of the restrictive nature on competition of national roaming, which is specific to the agreement and contained in the Decision, justifies that assessment in this specific case, the Commission, after drawing attention to the highly concentrated nature of the relevant market, which is composed of four operators, highlighted two elements which are not found in all roaming agreements. First, roaming represents a substantial part of the agreement. It creates a situation in which O2 is not obliged to roll out a network in most of Germany and has a particularly negative impact in core urban areas which are the most economically viable. Second, the mechanism for determining wholesale prices, which includes a fixed part, makes the rates charged by O2 dependent on those paid to T-Mobile. By limiting O2's freedom to set its prices on the market, that mechanism therefore restricts competition. The defendant also stated that the assessment in recital 107 of the Decision is borne out by the Decision as a whole.

90 It is therefore necessary to examine, in the light of the two factors referred to by the defendant, whether the contested Decision establishes the restrictions of competition alleged against the agreement.

91 First, as regards the importance of roaming in the agreement and its alleged restrictive effects in core urban areas, it is apparent from the Decision, in particular from recitals 107 and 108, that in order to claim that national roaming and, in the present case, the agreement, by definition restrict competition, the Commission took the view that its impact was more negative in areas where competition was possible under economically viable conditions, notably in core urban areas, thus considering that national roaming was not justified in such areas.

- 92 The case-file indicates that in order to adapt the contractual framework to market developments, in particular as regards national roaming, the parties amended the original agreement dated 20 September 2001 and notified on 6 February 2002, on three occasions, on 20 September 2002, 22 January 2003 and 21 May 2003. Thus the amended agreement specifically draws a distinction between three types of areas, namely urban areas, areas of so-called secondary commercial importance, and areas of so-called lesser commercial importance, and provides that roaming will last for a shorter period in urban areas. It is apparent from the scheme of the agreement, as presented in the Decision, that roaming access rights are defined according to population coverage areas and that a timetable for phasing out those rights has been established.
- 93 The Decision, although taken in the light of the amended agreement, does not however include, in the examination of the agreement in the light of Article 81(1) EC and Article 53(1) of the EEA Agreement here at issue, any concrete assessment of those factors on competition, although those factors adjust the national roaming provided for in the agreement both in space and time. In particular, it appears that the general assessment of the restrictive nature of roaming is not substantiated in the light of the key parameter consisting in the duration of the agreement, that is to say taking account of the timetable for phasing out roaming envisaged for each area.
- 94 However, the onus was clearly on the Commission, when analysing whether the agreement was compatible with the common market, to take account of those new factors resulting from the amendments to the agreement during the administrative procedure and relating, in particular, to roaming in urban areas, and to reconsider, where appropriate, some of its assessments.
- 95 Had the Commission actually taken into account the amendments to the agreement concerning roaming in urban areas in the examination of whether the agreement is compatible with the common market, it is possible that it would have made findings

which differ from those which it reached in the Decision, in particular as regards the need for those new elements for O2 to gain access to the 3G market in urban areas.

- 96 Such consideration of the detailed rules according to which national roaming is envisaged in the amended agreement occurs, in the contested Decision, only in the examination of whether it is possible to grant an exemption under the provisions of Article 81(3) EC and Article 53(3) of the EEA Agreement, which cannot remedy the lacunae previously noted. The analysis of whether an agreement is compatible with the common market, then, if the agreement is declared incompatible, the analysis of whether it is possible to grant the agreement an exemption, are carried out in separate stages, the second presupposing in particular that it has been duly demonstrated during the first that the agreement is incompatible.
- 97 The explanations given by the Commission at the hearing confirm the finding that the analysis of the agreement under the provisions of Article 81(1) EC and Article 53(1) of the EEA Agreement did not take into account the amendments in question. The defendant stated that it could not be criticised for not analysing whether national roaming in urban areas was necessary for O2 to enter the market, as the agreement initially notified made no provision for roaming in urban areas.
- 98 Consequently, it must be found on that first point that, by not adapting its analysis to take account of the new elements in the file relating to roaming in urban areas, the Commission also vitiated its assessment by a failure to analyse the facts submitted to it by the notifying parties.
- 99 Next, as regards the second factor restricting competition which, according to the Commission, is specific to the agreement, namely the mechanism for determining prices referred to in paragraph 89 above, the alleged restrictive effect is not established.

100 As regards, first, the impact of wholesale prices paid to T-Mobile on the wholesale and retail prices charged by O2, the applicant is, from that point of view, in a situation analogous to that of any undertaking vis-à-vis its suppliers. O2 and moreover T-Mobile both depend upstream on the prices charged to them by suppliers of goods and services which they use and may be led to pass on those costs to their customers. In addition, the price dependence alleged has not been demonstrated. It is even belied by the statement in the Decision that the parties to the agreement have different pricing principles (recital 140). Moreover, in response to the questions put by the Court of First Instance, referred to in paragraph 36 above, concerning O2's price structure, the applicant has supplied information from which it is apparent that, by means of different types of products and services, a variety of subscription packages and pricing formulae combining many variables, it attempts to differentiate itself from T-Mobile.

101 As regards, second, the fixed rate paid by O2 to T-Mobile, it must be held that the Decision contains no analysis concerning that fixed payment obligation. Moreover, the defendant conceded at the hearing that that point had not been discussed during the administrative procedure.

102 It results from the foregoing that the general assessment in recital 107 of the Decision that national roaming restricts competition because it enables a roaming operator to slow down the roll-out of its network and places it in a situation of technical and commercial dependence on the network of the visited operator is not based on any concrete evidence specific to the agreement and contained in the Decision; moreover, that assessment betrays a failure to evaluate the amendments made to the agreement as regards roaming in urban areas.

103 Nor, furthermore, does that general assessment stem from the provisions of Community law governing the telecommunications sector. As is apparent from the defendant's replies to the questions put by the Court of First Instance, referred to in

paragraph 36 above, none of the directives concerning the telecommunications sector deals with national roaming agreements and their compatibility with Community competition law, although such agreements must be subject to competition law, and in particular to the provisions of Article 81(1) EC.

104 In addition, as the applicant asserts, the Commission's general assessment on national roaming is not borne out in the light of the relevant facts relating to the market as they are described in the Decision itself.

105 According to the Decision, which relies on extrapolation of the data then available concerning the situation of the 2G mobile telecommunications market, T-Mobile, which is ultimately linked to the incumbent operator Deutsche Telekom, probably has a market share in the order of 100% on the national wholesale roaming market for the 3G telecommunication services in question here. The Decision also states that opportunities for entry into that market at network operator level are restricted on account of the limited number of licences, their cost and the significant investments necessary for 3G network infrastructure (recitals 74 and 75).

106 As regards the retail market for 3G services, the Decision states that six operators have obtained licences, namely, in addition to T-Mobile and O2, D2 Vodafone, E-Plus, Mobilcom and Group 3G, O2 being the last entrant on the market, and that there are four main competitors in the retail markets. It states that their respective market shares for 2G communications, which were the only data available at the time when the Decision was adopted, in terms of customers of service providers, were 41.7% for T-Mobile, 38.3% for D2 Vodafone, 12.2% for E-Plus and 7.8% for O2 (recitals 76 and 77).

107 It is apparent from that presentation that T-Mobile is a major operator on the German mobile telecommunications market, both as regards wholesale and retail markets and that O2, which was the last operator to enter the German market, appears to be in the weakest competitive position. Even if O2 does have some infrastructure, as the Decision indicates, its modest market share and its situation as the last entrant place it objectively in a less favourable position.

108 The dependence criticised by the Commission thus stems from de facto inequality that the agreement specifically seeks to rebalance by placing O2 in a more favourable competitive position while its actual situation appears to be the least competitive compared with the other operators, which are actual or potential competitors, identified by the Decision. O2's dependence on T-Mobile's network is moreover designed to be temporary since it is intended to diminish over the duration of the agreement at the pace of the timetable for phasing out roaming access rights provided for in the amended provisions of the notified agreement, which were submitted to the Commission for examination as part of the administrative procedure. On that point, the Decision, which, as previously stated, contains no concrete evidence, fails to establish the restrictive effects of the agreement on the roll-out of O2's networks. A fortiori, the Commission has failed to show that the agreement seeks to slow down, if not to limit, the roll-out of the applicant's network, as it submits in its pleadings. The letters submitted during the proceedings by the defendant, notably those of 4 March 2003 and 9 April 2003, show on the contrary that the agreement seeks to enable the applicant to roll out its 3G network in a profitable way in accordance with the requirements imposed by its licence in terms of the timetable and coverage.

109 In the present case, it cannot therefore be ruled out that a roaming agreement of the type concluded between T-Mobile and O2, instead of restricting competition between network operators, is, on the contrary, capable of enabling, in certain circumstances, the smallest operator to compete with the major players, such as in this case T-Mobile but also D2 Vodafone on the retail market, or even dominant operators, as T-Mobile is on the wholesale market.

- 110 That particular context, resulting from the specific characteristics of the relevant emerging market, was not taken into account in the assessment of whether the agreement was compatible with the common market under Article 81(1) EC and Article 53(1) of the EEA Agreement.
- 111 By contrast, when, under the provisions of Article 81(3) EC and Article 53(3) of the EEA Agreement, the Commission, considering that the agreement was necessary and that, without it, O2 would not have been able to gain access to the market efficiently, decided to grant an exemption, it took account of that particular context.
- 112 Thus, the Decision finds that as a result of the agreement O2 will be in a better competitive position in the area subject to an obligation of providing 50% population coverage by 31 December 2005 (recital 123) and that, outside that area, it is unlikely that it would have been able to fulfil its obligations under its licence (recital 126). It is also stated that since O2 is 'the smallest operator in the German mobile market with a small share of the 2G market (about 8%) it is unlikely to be in a position to quickly build out a high-quality network covering a sufficient area to enable the company to compete effectively from the outset against other established licensed operators of 3G networks and services in Germany' (recital 124).
- 113 In a more general and conclusive assessment, the Decision adds that 'O2 ... [s] roaming on T-Mobile's 3G network even in the main urban areas for a limited period of time is considered proportionate and indispensable, where this might not necessarily be the case for operators with more established market positions' (recital 133). It states in conclusion that '[w]ithout access to national roaming for 3G services on T-Mobile's network, O2 ... would be a less effective competitor during its roll-out phase and would be unlikely to enter 3G wholesale and retail markets as a nationwide competitor (or in any event as a competitor offering the broadest geographical scope that is likely to be available at that time)' (recital 135).

- 114 It is therefore apparent from the examination carried out under Article 81(3) EC and Article 53(3) of the EEA Agreement that, in the light of the specific characteristics of the relevant emerging market, O2's competitive situation on the 3G market would probably not have been secure without the agreement, and it might even have been jeopardised. Those assessments confirm that the Commission's presuppositions in its examination under Article 81(1) EC and Article 53(1) of the EEA Agreement have not been established.
- 115 The argument relied on by the defendant at the hearing that there is a significant difference between not being able to penetrate a market and being able to do so with difficulty cannot, in any event, invalidate the above considerations since, in the Decision, the Commission specifically failed to analyse objectively the competition situation in the absence of the agreement under Article 81(1) EC and Article 53(1) of the EEA Agreement.
- 116 It follows from the foregoing that the Decision, in so far as it concerns the application of Article 81(1) EC and Article 53(1) of the EEA Agreement, suffers from insufficient analysis, first, in that it contains no objective discussion of what the competition situation would have been in the absence of the agreement, which distorts the assessment of the actual and potential effects of the agreement on competition and, second, in that it does not demonstrate, in concrete terms, in the context of the relevant emerging market, that the provisions of the agreement on roaming have restrictive effects on competition, but is confined, in this respect, to a *petitio principii* and to broad and general statements.
- 117 On that ground, the form of order seeking the partial annulment of Articles 2 and 3(a) of the Decision should therefore be granted and there is no need to adjudicate on the second plea of the application.

## Costs

- 118 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must be ordered to pay the costs, as claimed by the applicant.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

- 1. Annuls Articles 2 and 3(a) of Commission Decision 2004/207/EC of 16 July 2003 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/38.369: T-Mobile Deutschland/O2 Germany: Network Sharing Rahmenvertrag) in so far as they imply that the clauses referred to in those articles fall within the scope of Article 81 EC and Article 53 of the EEA Agreement;**
- 2. Orders the Commission to pay the costs.**

Legal

Mengozzi

Wiszniewska-Białecka

Delivered in open court in Luxembourg on 2 May 2006.

E. Coulon

H. Legal

Registrar

President