IN THE COMPETITION APPEAL TRIBUNAL

Case No 1024/2/3/04

Victoria House,
Bloomsbury Place,
London WC1A 2EB

1st February 2006

Before:
MARION SIMMONS QC
(Chairman)

MICHAEL DAVEY
SHEILA HEWITT

Sitting as a Tribunal in England and Wales

BETWEEN:

FLOE TELECOM LIMITED
(**In administration**) — Appellant

supported by

WORLDWIDE CONNECT (UK) LIMITED — Intervener

and

OFFICE OF COMMUNICATIONS — Respondent

supported by

VODAFONE LIMITED
T-MOBILE (UK) LIMTED — Interveners

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H E A R I N G
DAY THREE

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APPEARANCES

Mr. Edward Mercer (of Taylor Wessing) appeared for the Appellant.

Mr. Brian Kennelly (instructed by Taylor Wessing) appeared for the Intervener Worldwide Connect Limited.

Mr. Rupert Anderson QC and Miss Anneli Howard (instructed by the Director of Telecommunications and Competition Law, Office of Communications) appeared for the Respondent.

Mr. Charles Flint (instructed by Herbert Smith) appeared for the first Intervener, Vodafone Limited.

Mr. Meredith Pickford (instructed by Miss Robyn Durie, Regulatory Counsel, T-Mobile) appeared on behalf of the Second Intervener, T-Mobile (UK) Limited.

THE CHAIRMAN: Good morning, Mr. Mercer.

MR. MERCER: Good morning. Ma'am, I will answer the points you raised in the message yesterday evening, and I use as my agenda for the first half of that Ofcom skeleton argument paras. 14 – 29, and then I will go on to Mr. Mason's evidence. What you may in fact find, ma'am is that you have heard this all before because, in essence, it is just a re-ordering of what I said yesterday afternoon, to fit it to this particular point. Therefore I will start with something I said yesterday afternoon which is the difficulties we have in this area are because we have legislation that does not match up to the framework expected by the Framework Directives, and in particular the Authorisations Directive. The essence of that, as I said yesterday afternoon, is that the Wireless Telegraphy Act 1949 seeks to govern the use of equipment and through that the right of use of frequencies and that is very difficult to operate in a framework when, in fact, the equipment, the network and the services should be governed by general authorisation.

The first point that Ofcom made in para.14 refers back to annex 2 of their Defence, and their Defence reference is vol.5 tab 21 and annex 2 is what we are referring, and their point as I would understand is their licence, their Vodafone GSM licence licences certain types of equipment as specified in the schedule – those being referred to are base transceiver stations and repeater stations, and those are licensed for user frequencies only one way each – one way in and one way out. Of course they say that is because it is coming in and out on the contrasting frequencies, so that you match up within the network. What we would say about that, and I will call it the "first argument" is that Mr. Mason and others thought it was possible, and we would say that that view is too restrictive because it would mean that all of the equipment referred to could only transmit on one set of frequencies and receive on another, and that is going to give you a bit of a problem when you come to repeater stations. When you think about that logically, ma'am, a repeater station will be putting in at one frequency and pushing out at another, instead of pushing out at the same frequency as I understand it, without a frequency other than what the base of the station is doing. So it is broadcasting, as it were, when it is going back along the line, on the same frequencies as a Gateway would be using, and yet it seems to be licensed under the licence.

I am not trying to argue for a moment that Gateways are repeater stations, before anybody jumps up and makes that point. What I am doing is using that to illustrate that Ofcom's argument does not work in every circumstance because the intention is to licence a network that basically uses the frequency allocation prescribed, and uses equipment to a general description. If you want to see how many people believe that – lots of people believed that was the case right until the Spring of 2004. Not just anybody believed it was so, the RA

believed it was so. I will come later on to the difference between "could", "would" and "possibly", but for the time being that is my contention.

The second argument I advanced yesterday afternoon, required us I think to look at the Authorisation Directive annex B. I did not have my bundles at home with me last night, ma'am, so I used my own copies of things. Bundle 3, tab 11. "B" is helpfully headed "Conditions which may be attached to rights of use for radio frequencies". The purpose of the section is to prevent Member States from including certain types of conditions, and principally we are only concerned with para.1. It says: "Designation of service" – in this case the service is mobile, or that which is text and mobile now. "… or type of network or technology…" is GSM. It goes on to say:

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

That is relating to TV. The words on which I am relying are "Designation of service or the type of network or technology." There is other condition that deals with that area, except perhaps for Condition 3, which is "Technical and operational conditions necessary for the avoidance of harmful interference." That does not deal with equipment either. My submission is that you cannot have a restriction on apparatus that Mr. Anderson says, or you could read in the licence, because it is incompatible with the Directive. There simply is not authority for saying "You can only have bits of this and bits of that, and it is what we tell you". A base station is not a service, it is not a network, it is part of a network, and it is certainly not a type of network or a type of technology. The reference to the equipment just should not be in the licence. Now we come to the third argument.

THE CHAIRMAN: Just so that I understand your second argument correctly, are you saying that you have to read the licence without the reference to equipment in order to make it compatible with the Authorisation Directive?

MR. MERCER: Correct, madam. The second and third arguments are reasonably close because the third argument with which Ofcom and Vodafone have had so much difficulty in comprehending, which must be my fault, is much the same in that what it says is we do not know what we have got here. We know what we should have which is the right to use frequencies. What we have in fact got is a right to use certain types of apparatus which is not how any draftsman in Brussels would have understood what was going to happen because the physical characteristics of the network in terms of exact apparatus etc should be something that you put into general authorisation. So it is very difficult to look at the words of the Vodafone licence and get much help. But there would appear to be a clear intention on the part of the

government which granted the licences to licence frequencies for use for the provision of GSM services, and that is what the licence does; it is all it can do and be compatible with the Directive. No, it can also contain conditions as set out in annexe section B.

I take that together with another concept which is that a licensee of a licence for the use of frequencies may – and I use Ofcom's language – hire out those frequencies. Having those two elements in place, I then look for what authority Vodafone gave to use those frequencies. In my contention, that is the agreement and I would, suppose, madam from the message that I had that you do not want me to go through that part of the argument again.

One general point I would like to touch on for a moment is actually Article 5(1). It says that where there is a risk of harmful interference the member states shall not make the use of frequencies subject to the grant of individual rights which could include conditions for usage of such radio frequencies in the general authorisation. Leading on from that is why there are only four GSM licences which is why it is not a free-for-all; because it could be, and indeed some parts of the market are. For example, that relation to Wi-fi where the restriction in 4(2) does not apply. The answer can only that, as permitted by the Directive, you can for good reasons limit the number of licences for the overall provision of the network. The procedure is set out in Article 7. I think Mr. Mason mentioned yesterday it is really difficult to imagine further licences for those frequencies being granted for the provision of whole scale systems. But if one is to recognise what has become the orthodoxy in mobile telephony, it is that the operator of the network is not the person using the handset for the purposes of wireless telegraphy; somebody else has a right to use those frequencies. The way to do that is to put something into the general authorisation and you can use the conditions in the general authorisation to prevent equipment being used which causes harmful interference. But gateways do not cause harmful interference, is my submission, and so they should not be restricted, but there is now a vacuum and nature and lawyers abhor a vacuum. What you have then got to say is what control is there in respect of the network to prevent congestion, and you arrive back at something (I think I said at the first hearing) which is the answer is to use contract.

I have gone on for a bit from the question you asked because I wanted to bring everything round to what looked like some form of a coherent argument, subject to anything which Mr. Flint, Mr. Anderson and Mr. Pickford may say. Forgive me going on for that little extra bit to try and bring some of those threads together.

The next issue is Mr. Mason and what he says about the scope of the licence.

THE CHAIRMAN: Before you move on to that, can I just make sure that I understand your first argument?

MR. MERCER: Yes, certainly, madam.

THE CHAIRMAN: There was no general authorisation. You are not saying there was a general authorisation in relation to gateways?

MR. MERCER: No.

THE CHAIRMAN: So Floe knows there is no general authorisation?

MR. MERCER: Floe's state of mind is that it is wondering what on earth it needs.

THE CHAIRMAN: Vodafone's licence is not a public document.

MR. MERCER: Correct.

THE CHAIRMAN: So Floe would not know what was in that licence.

MR. MERCER: Correct.

THE CHAIRMAN: But it would know that Vodafone does have a licence.

MR. MERCER: Correct.

THE CHAIRMAN: And that that licence should be in accordance with the Authorisation Directive.

MR. MERCER: It had a right to believe that, yes.

THE CHAIRMAN: So I think what you are saying is that Floe had a right to believe, using your language, that Vodafone had one of the four licences for the right to use the frequencies.

MR. MERCER: Correct, madam.

THE CHAIRMAN: And I think your submission is that what its belief would be, would be a right to use the frequencies and there was no restriction on equipment, because under the Authorisation Directive there would be no entitlement to put an equipment restriction on the licence.

MR. MERCER: Correct, madam. To put it in the simple language which has been expressed by Floe all along, it had a contract with Vodafone. Vodafone was the licensee. What more did it need? I think Floe would accept that it did not have carte blanche because the equipment into which it put the SIMs would have to comply with the RTTE. I think we have always accepted that.

THE CHAIRMAN: That would be its responsibility?

MR. MERCER: Yes. Shall I move on, madam?

THE CHAIRMAN: Yes, please.

MR. MERCER: If we look at yesterday's transcript (which has not yet got a tab number as far as I know), p.17, lines 33 and 34 and going over the page to 18, lines 1 and 2. Now just so that I manage to hit the point on one or two things, I will express my and therefore Floe's belief of what the scope and ambit of a licence are. I look at a number of elements. One is the frequencies which have just submitted to you is the really the right to use those is the only thing the licence can deal with, but it also has a technical ambit – the type of system, the type of technology, services to be provided; and it has geographical application that can only be the

UK, but some times it can be smaller than that, and it has an element outside of the licence which is to do with policy, which is how many of them are granted, because we know under Article 7 of the Authorisation Directive that can be limited.

When we are looking for those elements and what Mr. Mason said the first place I come to is the reference I would have given you, and the sentence which starts: "I intended to convey that Vodafone was entitled to use equipment within the spectrum licence to them and that in doing so we would not …" I take "we" to be the RA "… would not have licensed anyone else to use equipment that we thought would interfere with that service." That goes along, ma'am to the 2002 consultation document that we looked at yesterday, and the sentence in the correspondence that is referred to in the question on p.17 immediately above where I have just read from: "The GSM spectrum has been licensed to them on a nationally exclusive basis and cannot therefore be licensed for commercial purposes to anyone else." So there was not going to be another specific licence.

On p.18, line 19: "I believe that Vodafone have the authority under its licence to delegate part of its network operation." I am aware of the rule, ma'am, that says that advocates should never try to give evidence, but I submit that if, for example, you were doing a turn key contract for provision of part of a GSM network, so that the equipment manufacturer had to hand over a specific part of the network in working order, that could only be achieved if a part of the running of the system could be delegated to that contractor, and I assure the Tribunal that happens with some frequency and has done in the past.

THE CHAIRMAN: That is where you are giving evidence.

MR. MERCER: The evidence I would have given if I could. The system just would not work otherwise, and he is quite right to say that, I quite agree with that, and I think that supports Floe's position.

Where Floe's position differs in respect of the scope of the licence arguments from Mr. Mason is in the point relating to "could", "would" and "possibly". Could it be used to authorise? Would it be used? Could it possibly be used? Mr. Mason makes that distinction in his evidence.

As to the impression Mr. Mason gave on that point, I would draw to your attention the note of the meeting on 8th July with the Minister. You may remember it because it is the section where Mr. Mason said "no, if I had been writing a note of the meeting I would have put 'could' rather than 'would'," but you will note that the Civil Servants who wrote the note said "would". I think that is indicative of the impression that was being given. If we look at p.23 of the transcript, line 10, it starts:

"If they had come looking for a licence, I believe we would have had to consider – if it was an application to use GSM equipment generally – whether alternative spectrum was available, but spectrum for running a GSM service within the channels licensed to Vodafone was effectively already allocated."

Again, we look at the exclusivity point. Line 16:

"Because the rights to use equipment within that defined spectrum was already licensed to another party, Vodafone."

Line 30:

"I knew that it was possible for Vodafone to sub-contract some of the running of its network. I was unaware at the time whether or not gateway equipment would or would not qualify as such equipment under the licence."

Clearly he thought the scope of the licence included delegation. Indeed, if he read the plain black letter words of condition 8 you would think that was the case. What I think we can divine from Mr. Mason's evidence is that there may be a theoretical possibility that a further licence of the same frequencies could have been granted but it was not going to occur, it was theoretical only in so much as it was possible for somebody to have signed one, and there was no legislative bar to them doing so. I would be interested to know what T-Mobile's or Vodafone's reaction would be if they ever did, and I think we have a flavour of that from what Mr. Pickford said in terms of them not quite seeing it perhaps the first time they read it exactly the same way as Ofcom. Mr. Pickford can answer that point, but you can see why if I were in T-Mobile or Vodafone's shoes I would expect that I had a licence that in terms of what I have been told by the Government was not going to be added to by another one in the same frequency pack.

The second thing Mr. Mason tells us is that he confirms that – I will take some of his words out of context and just put it together – as a facilitator trying to make things work in a difficult situation he used language which could have been misinterpreted, indeed was, by one of his Civil Service colleagues in a meeting with the Minister in that he was giving the impression that a solution was possible – a definite impression, a deliberate impression that it was possible. When you have that opinion expressed in the way it has been expressed in writing – you may remember I put it to Mr. Mason "Where are the caveats in your letter that you are now expressing?" W hen things are expressed like that by somebody who has for a notable period been working for the people who had drafted the licence, I believe you have an expectation.

Was there anything else about the scope of the licence and Mr. Mason?

THE CHAIRMAN: No. I think that has been very helpful. I think what you are saying in your first set of submissions this morning and the submissions in relation to Mr. Mason are somewhat connected. I think you are saying – confirm whether you are – that if Vodafone had gone to the RA and asked for an extension to their licence to cover gateways, you are either saying that was not necessary because, under your first submission the licence should not have been restricted to equipment -----

MR. MERCER: Yes, madam.

THE CHAIRMAN: Alternatively, the RA would not have been able to refuse to provide that licence (the extension to the licence) because the only basis on which they could refuse is if the equipment did not comply with the RTTE Directive.

MR. MERCER: Yes, madam. I do go a little further than that. I think what I am also saying is that notwithstanding the words in that document -----

THE CHAIRMAN: In the licence?

MR. MERCER: In the licence – it can only really be taken to be a right to use those frequencies.

THE CHAIRMAN: Yes, I understand that is your first point, and therefore they would not have had to have gone back because that part of it is pencil-lined (blue pencil through it).

MR. MERCER: It is as if it is not there.

THE CHAIRMAN: Yes. Thank you very much. That was very helpful.

MR. MERCER: Will you please excuse us while we do a shuffle again. (Pause)

THE CHAIRMAN: I notice Mr. Mercer has disappeared. Do we want to wait for him to come back?

MR. KENNELLY: No. I do not think that will be necessary, madam. He did tell me he would be leaving. If any point arises that requires his involvement, I expect he will come later. He will not come in the initial stages. What I propose, madam, subject to your indication is to address first the case which has been circulated this morning, the case of *Lynch v. General Dental Council*. Is it the Tribunal's wish to deal with that first. It seems to go to the issue we dealt with yesterday.

THE CHAIRMAN: It is up to you.

MR. KENNELLY: Perhaps it is better to start with that. I shall not take very long because in the short time which I have had to consider the decision, it seems to state uncontroversial principles applicable to the consideration of evidence and, in particular, expert evidence in the Administrative Court on a claim for judicial review.

THE CHAIRMAN: Yes.

MR. KENNELLY: I do not propose, subject to research I may do this evening, to deviate from those statements Collins J sets out in that decision.

THE CHAIRMAN: We thought that you had possibly deviated from that in a concession you made yesterday.

MR. KENNELLY: In relation to?

THE CHAIRMAN: In relation to whether Mr. Burns' evidence could have been before a court dealing with judicial review.

MR. KENNELLY: If there were any difference – because, of course, the extent to which Mr. Burns' evidence could be considered buy the Administrative Court is an issue before the Tribunal because it goes to whether an effective remedy can be secured there. If there were a difference between what is said in *Lynch* when I said yesterday that I must adopt *Lynch,* of what evidence may be considered. I must state that squarely because if this Tribunal chooses to couch these questions on strict judicial review grounds, it must approach Mr. Burns' evidence with the principles in *Lynch* in mind and consider it on the basis of only providing technical information. It would be very rare for the Tribunal to use it to re-assess the discretionary assessment made by Ofcom.

THE CHAIRMAN: I think it may be that we took your submission too narrowly and thought you might be saying we could not look at it at all even if we decided against you it was judicial review grounds.

MR. KENNELLY: Madam, if I made that submission -----

THE CHAIRMAN: You did not intend to.

MR. KENNELLY: I did not intend to, no. Mr. Burns' evidence could, in very rare circumstances, be considered by a JR court to assist it on technical matters, but it would not surprise the Tribunal to know that my submission, of course, is that it could be considered in a much more substantial way on the basis of my submissions yesterday. That is really why I place so much importance on this issue because if the Tribunal approaches these issues on strict judicial review grounds, it is the scope of the review which may apply which will be very limited. In circumstances where Mr. Burns' report shows that Ofcom may have erred in its assessment of harmful interference – because Ofcom did conduct an analysis based on evidence – if it erred in that respect , then it would be, in my submission, unfair (it would certainly indicate an injustice) if that evidence could not be considered on its substance and you were bound by Ofcom's assessment which may have been incorrect as we have seen from Mr. Burns' evidence. That is the link that I make between this issue.

The second point I made yesterday in relation to evidence is that it may be, in my submission, that if the Tribunal approaches this from strict JR principles, it does not provide effective relief as required by Community law, because in order to deal with these issues properly, it requires an analysis of the evidence on its substance. My first point, the Tribunal

will recall, is that the Tribunal is free under the Competition Act, in particular, paragraph 3(1) of schedule 8, to analyse the matter on its merits, on its substance, and it is not precluded from doing it by any rule of Community law or by the case of *Upjohn*. My second separate point is that on JR grounds effective relief may not be provided to Floe because a detailed analysis of the evidence is necessary in order to indicate the rights created by the Community law instruments. That is a separate point to the first point, and my first point is by far the most important, which is that the Tribunal on domestic grounds is entitled – and ought to in this case – analyse the evidence on its substance.

THE CHAIRMAN: Sending it back on JR for it to be reconsidered, that does not provide effective relief?

MR. KENNELLY: It may do, madam, in the circumstances because it would flow. From the strict legal point of view it may provide effective relief to remit to the Regulator. Whether it does so on the facts of this case is a matter which I would have to discuss with Mr. Mercer. It would depend on the circumstances. Those are my submissions on *Lynch*.

In the time remaining to me, madam, I propose to deal with five issues arising from Worldwide's skeleton. The first is whether Regulation 4(2) of the Exemption Regulations in so far as it applies to COMUG, is compatible with Article 7 of the RTTE Directive (that is issue 4.3). Secondly, do Articles 7(3) and 7(4) of the RTTE Directive apply in these circumstances, whether there was compliance with those Articles and the consequences of any failure to comply with those requirements. That is issue 4.3.3. Thirdly, is Regulation 4(2) of the Exemption Regulations, in so far as it applies to COMUG, compatible with Article 6 of the Authorisation Directive? That is issue 4.4. Fourthly, if regulation 4.2 is incompatible with Community law, what is the effect on Ofcom's position? That is issue 5.4. Finally, my fifth point would be in relation to the *Hilti* issues.

Beginning with whether Regulation 4(2), in so far as it applies to COMUG is compatible with Article 7 of the RTTE Directive, because time is limited, I do not propose to go through every part of my skeleton argument. In so far as I do not deal with points in the skeleton, I do not resile from them, but I will be focusing on what I submit are the more controversial parts. First of all, it may be useful at this stage to take up the RTTE Directive. It is in the legislation bundle 3 behind tab 6. If I could direct the Tribunal, first of all, to Article 8 of the Directive, this is useful because it is important to see from the outset that the principle behind the Directive is the free movement of the apparatus. You can see from the text of Article 8(1) that member states shall not prohibit, restrict or impede the placing on the market or putting into service in their territory apparatus bearing the relevant marking which indicates conformity with all provisions of the Directive including the conformity assessment procedures

set out in Chapter II. Of course, it is stated to be without prejudice to Articles 647(2) and 9(5). That is the general principle. In my submission, any derogation from that general principle should, consistently with Community law principles, be restrictively construed. That, in my submission, is born out by the terms of Article 7(2) itself, because in Article 7(2) the Community legislature has stated that notwithstanding para.1 and without prejudice to conditions attached to authorisation for the provision of the service concerned, in conformity with Community law member states may restrict the putting into service of radio equipment only for the reasons which are set out and which follow. So the legislation is concerned to remove restrictions on the free movement and to make it clear that restrictions could only be imposed in these limited circumstances. As delegations therefore, they should be restrictively construed; not broadly construed as Vodafone submit at para.96 of their skeleton argument.

Harmful interference itself is Article 2 of that Directive. I shall not read the words. I am sure you have looked at it already just to make a note. As the Tribunal is well aware, Ofcom at the paragraphs to which I have already directed the Tribunal's attention, made an assessment (a regulatory assessment) based on certain materials and evidence that COMUG caused harmful interference within the meaning of Article 2(i) of the Directive and 7(2) of the Directive. In our submission, on the face of the Decision the basis for that Decision was insufficient for the reasons set out in my skeleton. I shall come to that after examining the issue of Mr. Burns because under issue 4.3.1 the Tribunal is asked to determine the correct interpretation and application of the concept of harmful interference. For that purpose Mr. Burns was instructed because, as I submit, we can see from Ofcom's decision it is not a purely legal question. What the COMUG operators seek to do is to challenge Ofcom's own assessment; something which would normally be impermissible in judicial review, a technical assessment, but in my submission is permissible in this Tribunal. Mr. Burns is a single joint expert and was asked broad questions, not questions limited to the provision of technical assistance. He was asked the questions which Ofcom itself considered, that is are GSM and Gateways capable of giving rise to interference which seriously degrades or obstructs, or repeatedly interrupts a radio communications service and, if so, under what conditions? In the context of GSM Gateways is congestion capable of giving rise to interference that seriously degrades and/or obstructs and/or repeatedly interrupts a radio communication service provided by GSM operators to their customers? That was the agreed remit for Mr. Burns, and his evidence is set out in his report in bundle 1, tab 34 – if I could direct the Tribunal's attention to that now and in particular paras. 2.3 and 2.4 of his report. At p.6 of his report his conclusion in 2.3 is given: "Are GSM Gateways capable of giving rise to interference?" He states in terms in the second sentence in the first paragraph:

> "In principle, an individual call originating or terminating on a GSM gateway is no more likely to cause interference within a GSM network than a call originating or terminating on any other mobile terminal."

The Tribunal can there read for yourselves his conclusions. At the end of that paragraph 2.3, even bearing in mind the arguments made to the effect that GSM Gateways are capable of giving rise to harmful interference he concludes that in practice the likelihood of such interference is small, given the relative low power emitted by GSM terminals.

Similarly, at 2.4 on the broad issue of whether congestion within a GSM network arising from the presence of one or more GSM Gateways constitutes interference he adopts the construction based on the ITU regulations and concludes that, because it is not unwanted, it cannot amount to interference, still less harmful interference. In my submission the Tribunal should give a close regard to this conclusion in examining the sufficiency and the accuracy of Ofcom's assessment as to whether a COMUG causes harmful interference, or a risk of harmful interference, as it concludes at para.158 of the second Decision.

When one examines the reasons that are given in those paragraphs for the conclusion that harmful interference is caused by GSM Gateways one sees, in my submission, an insufficiency of reasoning. Turning up that Decision in the core bundle at tab 4, I would direct the Tribunal to p.32, and the analysis from para.150 onwards. Again, the Tribunal will have read these paragraphs already and I directed the Tribunal to them yesterday so I do not propose to read them out again. From those paragraphs in my submission it is possible to see that Ofcom's analysis is reached without the involvement of the COMUG operators. It is said against that point that the COMUG operators themselves ought to have got involved in the consultations. On the face of this Decision itself it appears that OFCOM has relied entirely on information provided by non-COMUG operators and, in particular, on unidentified submissions from undertakings – the MNOs – whose interests might have been inimical to those of the COMUG operators themselves. In my submission, this insufficiency of reasoning is seen again in annex 5 of the Defence where, at para.31, Ofcom say that GSM Gateway services' customers are willing to put up with a higher call blocking. In non-technical language the customers are prepared to put up with a worse service. That seems to have been based on an analysis that did not involve the COMUG operators themselves or their customers.

Finally, Mr. Anderson is quite right when he says Ofcom have not resiled from their point of relying on in appropriate use of the spectrum. My submission is simply that in Ofcom's skeleton argument it appears at para.100 that the basis that is given for relying on inappropriate use of the spectrum is essentially harmful interference – that point has been relied on for both purposes, harmful interference.

THE CHAIRMAN: Or congestion?

MR. KENNELLY: Quite, but congestion as harmful interference. I am going to move on to the next issue now. Maybe if the Tribunal has questions, the Tribunal will ask them depending on the issue, or we can leave any questions to the end, but that is all I have to say about the first point that I identified, and I am going to move on now to 7.3 and 7.4 of that Directive.

THE CHAIRMAN: Of the RTTE Directive?

MR. KENNELLY: Yes.

THE CHAIRMAN: Then I will wait.

MR. KENNELLY: Very good. Turning then to the second issue – do Articles 7.3 and 7.4 even apply in these circumstances, and where there has been compliance with them and the consequences of any failure? It is again clear from the RTTE Directive that it recognised the need to disconnect apparatus such as GSM Gateways which otherwise complied with the technical requirements of Article 3. The Commission was aware that this right to disconnect could be misused, and it was Article 36 of the RTTE Directive – if we go back to it. The Tribunal will see that Article 36 of the Directive provides that:

> "Those measures which are appropriate to be taken by a Member State of the Commission or apparatus declared to be compliant with the provisions of this Directive cause serious damage to a network or a harmful radio interference, shall be determined in accordance with general principles of Community law, in particular the principles of objectivity, proportionality and non-discrimination."

It was, in my submission, circumscribing this right to disconnect; it had to be applied in this limited way consistent with the rules outlined in the last sentence of recital 36.

Turning to Article 7.3 of the Directive, there the Tribunal can see the Member States ensure that the Operators of telecommunications' services do not refuse to connect telecommunications' terminal equipment to appropriate interfaces on technical grounds where the equipment complies with the applicable requirements of Article 3. Whether or not Vodafone disconnected for technical grounds in this case, of course, appears to be a matter of dispute. Vodafone say they did not disconnect on technical grounds, it was because it was illegal. Floe make a different submission, but that is a matter of fact for the Tribunal. If the Tribunal find there was a disconnection on technical grounds then 7.3 applies. It is submitted by Ofcom and the other parties that this relates only to equipment itself and not to the use of its equipment, and this is what Ofcom decided at para.165 of the second Decision. But, in my submission, this gloss on the plain words of Article 7.3 undermine the purposes of the provision. It is not permissible in my submission, because Article 7.3 is designed, among other things – as I said – to promote the free movement of radio equipment and telecommunications

terminal equipment, and this necessarily involves permitting the use of such equipment subject to the harmonised requirements, and the guarantees of free movement which this Directive is designed to promote would be meaningless in my submission if the Member States were permitted to disconnect without restraint on grounds relating to the use. In my submission it is artificial to divide equipment from the use of the equipment.

As I say in the skeleton 7.3's reference to where the equipment complies with the applicable requirements of Article 3 implicitly refers to the use of "that equipment" because the applicable requirements in Article 3 include requirements relating to the use of the equipment. I do not suggest that they all relate to the use of the equipment, some relate to the construction of the equipment, but some of those requirements relate to use.

THE CHAIRMAN: Can I just make sure what is going through my head? The RTTE Directive is to do with the licensing of equipment.

MR. KENNELLY: Yes.

THE CHAIRMAN: The Gateways were licensed?

MR. KENNELLY: Yes.

THE CHAIRMAN: The relevance of the RTTE Directive to this case is as to whether Vodafone could in some way prevent their use ----

MR. KENNELLY: Yes.

THE CHAIRMAN: -- under this Directive?

MR. KENNELLY: Yes, indeed.

THE CHAIRMAN: It is not to do with the licensing of the equipment to start with, it is having licensed it there is something in addition that Vodafone would be able to do?

MR. KENNELLY: Yes, and the analysis, the duty lies on Ofcom to make sure that the provisions of the Directive are properly applied, because 7.4 is the critical Article for our purposes, from Worldwide's point of view because it sets out, in our submission, a procedure which should be followed when harmful interference serious dangers are identified.

THE CHAIRMAN: Yes, but what I am trying to do is to get the levels. First, the equipment is licensed?

MR. KENNELLY: Yes.

THE CHAIRMAN: So that means it can be used?

MR. KENNELLY: Yes.

THE CHAIRMAN: The piece of equipment not being used is useless it is just standing there?

MR. KENNELLY: Yes.

THE CHAIRMAN: So you say "This piece of equipment is all right." You then put it into use, and then f or whatever reason there is a question about how that piece of equipment is being used?

MR. KENNELLY: Correct.
THE CHAIRMAN: And this Directive goes on to cover what you can do if the way the piece of equipment is being used is subject to question.
MR. KENNELLY: Yes.
THE CHAIRMAN: So what we are now looking at is what the provisions of this Directive contain in relation to that?
MR. KENNELLY: Indeed, forgive me if I have not clarified our submissions.
THE CHAIRMAN: I just wanted to make sure that I was understanding it.
MR. KENNELLY: Moving on then to 7.4, and there is a separate point, because even if 7.3 does not apply there is a separate issue under 7.4 relating to the procedure which should be follow and the procedure is set out where a member state considers that apparatus declared to be compliant with the provisions of the Directive causes serious damage to a network or harmful radio interference, or harmful to the network's function – in other words, serious risks – clearly in those circumstances there has got to be a procedure to disconnect that kind of equipment used in that way, or its use causes that risk. The procedure is as follows. The member state must consider the apparatus declared to be compliant causes the damage set out there. That means not the operator but the member state. The member state may authorise the operator to disconnect once it has taken that view: that is, authorise the operator to refuse connection or to disconnect the apparatus, or withdraw it from service, and the member state must then subsequently notify each such authorisation to the Commission and then the Commission is required to convene a meeting of the relevant committee to consider what has happened and potentially initiate procedures to change the requirements at Articles 5(2) and (3) of the Directive itself.
THE CHAIRMAN: Going on from where I was, just to make sure that I have the picture that you want me to have, you have a piece of apparatus that has been authorised. But then what happens is that it is being used and in a particular situation – it may be all right everywhere else – it is said to be causing harmful interference, serious damage, to a network or harmful radio interference or harm to the network or its functioning.
MR. KENNELLY: Yes.
THE CHAIRMAN: So at that stage you get into 4.
MR. KENNELLY: Yes.
THE CHAIRMAN: And you say the member state can authorise the operator to disconnect.
MR. KENNELLY: Yes.
THE CHAIRMAN: Or to refuse the connection or disconnect the apparatus. The operator there is who?

MR. KENNELLY: It would be the operator -----

THE CHAIRMAN: Of the equipment.

MR. KENNELLY: It would be the operator who is able to disconnect the equipment. In our submission, that would apply to a company such as Vodafone.

THE CHAIRMAN: That goes back to the question we were asking about the IMEI number.

MR. KENNELLY: Yes.

THE CHAIRMAN: You might like to deal with that.

MR. KENNELLY: I am afraid I am not in a position to deal with that. The issue relating to that number ----

THE CHAIRMAN: That is the only way that Vodafone can disconnect.

MR. KENNELLY: But I am afraid, madam, I am not in a position to make submissions in relation to that issue. I have this. You might like a comment from Mr. Mercer.

THE CHAIRMAN: Not at the moment.

MR. KENNELLY: We will park that issue and may be Mr. Mercer can come back to it.

THE CHAIRMAN: He can deal with it in reply. Thank you. You say the operator here would be both ends.

MR. KENNELLY: Yes. The reason for this procedure is, in my submission, clear. The member state must take a view in order to ensure that there is no potential abuse by the operator and the Commission should be notified as a further safeguard. It is admitted that the operation of a procedure such as that which I have outlined would be unworkable in practice. That is a submission that is made against us but, in my submission, this procedure could operate very quickly and very effectively because no time limits are prescribed. In an emergency situation, Article 7(5) applies where the operator may disconnect without reference but in the Article 7(4) situation which is not an emergency, a swift application may be made to the member state which would be the regulatory authority, Ofcom in this state, and Ofcom could make a decision very quickly on an interim basis to authorise disconnection and then to inform, as a matter of course, the Commission. That is simply a relatively minor procedural requirement to keep the Commission abreast of such authorisations. It is not an unworkable administrative burden that would preclude the safe operation of the network.

THE CHAIRMAN: Are you going on to 5?

MR. KENNELLY: Article 7(5)?

THE CHAIRMAN: Yes.

MR. KENNELLY: There is no suggestion that there was an emergency in this case, and I said in my skeleton that Article 7(5) did not apply. It was not contested. Article 7(5) shows that the

Directive is designed to deal with an emergency situation so that no lengthy administrative process is required, but in a true emergency an operator may disconnect straightaway..

THE CHAIRMAN: Then you get back into 4 anyway.

MR. KENNELLY: Yes. Those are my submissions in relation to 7(3) and 7(4). Turning then to whether Regulation 4, in so far as it applies to COMUG, is compatible with Article 6 of the Authorisation Directive. Firstly, the vexed question of whether Regulation 4(2) is a condition within the meaning of Articles 5(1) and 6(1) of the Authorisation Directive. My primary submission is that it is, but a provision which excludes the supply of telecommunications services provided by way of a business. That is what it is most likely to be. That is what it looks like. On the balance of convenience, it is not a condition within the meaning of Articles 5(1) and 6(1) of the Authorisation Directive. Regulation 4(2) in those circumstances cannot be used by Ofcom to require individual licensing of COMUG because the risk of harmful interference is negligible if not non-existent based upon Mr. Burns' report. I understand I have to rely on that for this purpose.

My alternative submission is that if the application of Regulation 4(2) to COMUG is properly characterised as a condition, then it fails to satisfy the requirements of the Directive because the condition has not been objectively justified by Ofcom and is, in my submission, discriminatory.

Turning to the Authorisation Directive itself behind tab 11 of that same bundle 3 of legislation, recitals 3, 7 and 15 are relevant for setting out the purpose of the Authorisation Directive. Again, it is useful as an aid to interpretation to look at the intention of the Community legislature and the purpose behind the legislation itself. The Authorisation Directive is intended to preclude individual licensing subject to the derogations, individual licensing, that require the creation of a general authorisation. T-Mobile make the point fairly against me that it is not an absolute ban on individual licensing, but that the intention is to favour a general authorisation and have individual licensing only in limited circumstances. My primary submission is it is not a condition. It is necessary to turn to Article 5(1) of the Directive. Article 5(1) provides that member states shall, where possible, in particular where the risk of harmful interference is negligible, not make the use of radio frequencies subject to the grant of individual rights abuse but shall include the conditions for usage of such radio frequencies in the general authorisation. Ofcom, in its decision, relies here on the risk of harmful interference being more than negligible and that is a finding made in para.161 of the Second Decision itself. To oppose that on the submissions I made earlier in relation to whether there was genuinely a risk of harmful interference, I rely on the report of Mr. Burns.

If the application of Regulation 4(2) to COMUG were properly characterised as a condition, it has not been objectively justified, in my submission, because Ofcom has failed in the Second Decision to explain why this particular restriction on COMUG is strictly necessary. I rely for those words "strictly necessary" on recital 15 to the Authorisation Directive which provide that the conditions which may be attached to the general authorisation as to specific rights or use should be limited to what is strictly necessary to ensure compliance with the requirements and obligations of Community law. In my submission, in order to show objective justification to the restriction, Ofcom ought to have looked more closely at the difference between interference and harmful interference. No distinction is made between the two. As the Tribunal discussed at the previous CMC and as Mr. Burns made clear not all interference is harmful interference, and a more detailed analysis of that issue ought to have been conducted.

Finally, on the issue of discrimination, Mr. Happy gave evidence in his first witness statement at para.2. The single use of GSM gateways which, as we know, escaped the application of Regulation 4(2) and benefited from the general authorisation, potentially carry the same – if not greater – volume of traffic as COMUG and create as much – if not more – risk of congestion.

THE CHAIRMAN: Was there not something in the agreed statement about that – the agreed statement of facts.

MR. KENNELLY: Yes.

MR. PICKFORD: I believe it is para.11.

MR. KENNELLY: There was, madam. I have seen this discussed in the skeletons.

THE CHAIRMAN: There was an agreement as to this point which I suppose stands now as well.

MR. PICKFORD: The agreement was COMUGs cause more congestion than single user gateways.

THE CHAIRMAN: Possibly a gloss. May be you ought to -----

MR. KENNELLY: Yes, I will sum it up.

THE CHAIRMAN: Rather than what Mr. Happy said.

MR. KENNELLY: Yes. What I may do is come back to that because I will need to understand the circumstances in which that was agreed. If I am to say that we deviate from the agreed facts, I will need to have good reason to do so, and I will need to discuss that. My submission based on what Mr. Happy says in his statement – and Mr. Happy's statement is still before the Tribunal and was not challenged -----

MR. PICKFORD: Madam, on this point, we dealt with on Monday whether I needed to put anything to Mr. Happy and it was decided by the Tribunal that Mr. Happy's evidence was not relevant in relation to issue 4 of the issues before the Tribunal.

MR. KENNELLY: I understand that.

THE CHAIRMAN: I think this is partly because this was all in the agreed statement.

MR. KENNELLY: It would certainly be an injustice if that was the position before and now I made the point so, subject to what I say after lunch -----

THE CHAIRMAN: Come back to it.

MR. KENNELLY: But I may have to just leave that completely.

THE CHAIRMAN: Yes.

MR. KENNELLY: In any event, the analysis that I suggest ought to have been conducted by Ofcom was not, and this clear difference in treatment imposed by Ofcom to the detriment of COMUG operators, according to whether the GSM gateways are for single multi-use, has not been justified. That is the own use gateways and the gateways offered by COMUG operators has not been justified in the Decision by Ofcom. Moreover, Ofcom failed to take adequate account of the commercial interest of the COMUG operators in cooperating with the MNOs in order to avoid congestion. There is obviously a strong commercial rationale in avoiding harmful interference and congestion with the GSM gateway operators themselves. No consideration has been made of that fact in Ofcom's conclusion. Ofcom stated that they were not sure they had *vires* to monitor this kind of cooperation. They say in the Decision that it is far from clear whether the *vires* exists. In my submission, that was insufficient to be able to identify. The analysis ought to have been performed to explain why it was not because this was a proportionality exercise; Ofcom had to establish that the restriction went no further than was reasonably necessary to secure the legitimate objective. Those are my submissions on the Authorisation Directive.

Turning to the penultimate point, which is perhaps the most important, which is even if the submissions are correct, what is the actual legal effect on Ofcom's position? I shall leave to one side the issue of the effect on Vodafone of any of this incompatibility. The Tribunal has seen the submissions on that. I am focusing only on the effects on Ofcom, and this is the issue at 5.4. In my submission Ofcom, as an emanation of the State, was bound at all times to act compatibly with Community law and, in particular in making the second decision, and I shall be turning now – if the Tribunal permits – to the *CIF* Decision, which is in the authorities' bundle 4(b)(i) tab 35. To begin, the question is at para.39, this is the question that was referred by the Italian Court to the ECJ for a preliminary ruling. It begins:

> "Where an agreement between undertakings adversely affects Community trade, and where that agreement is required or facilitated by national legislation which legitimises or reinforces those effects, specifically with regard to the determination of prices …" etc "… does Article 81EC require or permit the national competition

Authority to disapply that measure and to penalise the anti-competitive conduct of the undertakings or, in any event, to prohibit …" and so forth. Then:

"2. For the purposes of applying Article 81(1) [EC] is it possible to regard national legislation under which competence to fix the retail prices of a product is delegated to a ministry and power to allocate production between undertakings is entrusted to a consortium to which the relevant producers are obliged to belong, as precluding undertakings from engaging in autonomous conduct .."

That relates to the issue which we will not be addressing in my submission. Turning then to the following page, para.43. It is useful to see here the submission made by CIF because in some respects it resembles the submissions made by Vodafone.

"43. In CIF's submission, although Law No 52/1996 confers on the Authority power to apply Article 81EC for the purpose of ruling on, and imposing penalties in respect of, anti-competitive agreements between the undertakings, it does not confer on it power to check the validity of national legislative measures for the purposes of combined provisions of Articles 3 EC, 10 EC and 81 EC."

"44. Consequently, the conduct of undertakings such as those in the CIF is covered by Article 81 EC only if the Authority first – and as a preliminary issue – looks into and establishes how autonomous those undertakings are …"

Paragraph 45, an important finding by the ECJ, it recalls that Article 81 EC and 82 are in themselves, although they are concerned solely with the conduct of undertakings and not with laws or regulations emanating from Member States, those articles, read in conjunction with Article 10EC, which of course is the duty of loyalty to the Community:

"… which lays down a duty to cooperate, none the less require the Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature which may render ineffective the competition rules applicable to undertakings."

Then if I could turn to para.49:

"The duty to disapply national legislation which contravenes Community law applies not only to national courts but also to all organs of the State, including administrative authorities …"

and various references are given. Ofcom falls squarely within the meaning of that dicta.

A submission is made by T-Mobile that a distinction should be drawn between sectoral regulators and competition authorities. That distinction is not made by the court in this judgment. The ECJ is speaking of administrative authorities, emanations of the State, and their duty under Article 10 to disapply national legislation which contravenes Community law.

The distinction between sectoral regulators and competition Authorities made by T-Mobile goes back to the scope of the review which the Tribunal ought to undertake, which is a point that we addressed yesterday – whether it should approach this as a s.192 of the Communications Act approach ----

THE CHAIRMAN: Which hat it is wearing.

MR. KENNELLY: Indeed. But CIF is crystal clear. If you are faced with a provision that is incompatible with Community law – competition law in particular – the Tribunal ought to disapply it. At para.51 the ECJ says:

> "In that regard, it is of little significance that, where undertakings are required by national legislation to engage in anti-competitive conduct, they cannot also be held accountable for infringement of Articles 81 EC and 82 EC."

I do not speak to the finding the Tribunal will make in relation to how this relates to Vodafone, but Ofcom's duty clearly is to disapply if it is faced with incompatibility. Vodafone, in fairness, acknowledges in its skeleton at para.108, the possibility that Ofcom might disapply national measures for the future, and T-Mobile makes the point in its skeleton that because Ofcom now makes regulations under the Wireless Telegraphy Act, s.1(1) that because it makes those regulations clearly it must be under a duty to disapply national provisions that are incompatible with Community law.

In the light of the *CIF* case, in my submission, a procedural bar which prevented this Tribunal, or prevented Ofcom from disapplying the rules, the procedure requiring Ofcom not to disapply in those circumstances would be contrary to Community law and would, itself, have to be disapplied because the *CIF* judgment is unequivocal about what the national authority must do when faced with incompatible legislation or measures.

Turning finally then to the *Hilti* issue and the principle, in my submission, that is set out in full in the skeleton, that dominant undertakings – according to the *Hilti* case – cannot act unilaterally to exclude a competitor from the market. *Hilti*, in my submission, requires a level of co-operation between such an undertaking and the national authority before taking action which has the effect of excluding a competitor, or a potential competitor from the market. It may be useful then to look at the *Hilti* case itself, which is in authorities bundle 4 – this is the one that got me into trouble yesterday ----

THE CHAIRMAN: It has been sorted.

MR. KENNELLY: -- behind tab 4. Again, this case, I am sure, has been seen by the Tribunal, but if I could just bring the Tribunal back to the relevant paragraphs, 115 is where the legal appraisal begins on the relevant issues. This is the legal appraisal conducted by the court:

"It is common ground that at no time during the period in question did Hilti approach the competent United Kingdom authorities for a ruling that the use of the interveners' nails in Hilti tools was dangerous.

"The only explanation put forward by Hilti for its failure to do so is that recourse to judicial or administrative channels would have caused greater harm to the interests of Bauco and Eurofix than the conduct which it in fact pursued."

"The argument cannot be accepted. If Hilti had made use of the possibilities available to it under the relevant United Kingdom legislation, the legitimate rights of the interveners would in no way have been impaired had the United Kingdom authorities acceded to Hilti's request for a ban on the use of its tools of nails produced by the interveners and, where appropriate, on all misleading advertisements issued by them. If on the other hand the authorities had dismissed those requests, Hilti would have had great difficulty in persisting in its allegations against Profix and Bauco."

Importantly at para.118:

"As the Commission has established, there are laws in the United Kingdom attaching penalties to the sale of dangerous products and to the use of misleading claims as to the characteristics of any product. There are also authorities vested with powers to enforce those laws. In those circumstances it is clearly not the task of an undertaking in a dominant position to take steps on its own initiative to eliminate products which, rightly or wrongly, it regards as dangerous or at least as inferior in quality to its own products."

Then finally in 119:

"It must further be held in this connection that the effectiveness of the Community rules on competition would be jeopardised if the interpretation by an undertaking of the laws of the various Member States regarding product liability were to take precedence over those rules."

The question then is what principles may be drawn from this Judgment? In my submission the first principle is this, that an undertaking in a dominant position cannot act unilaterally to take action which has the effect of excluding a potential competitor for reasons based on its view of the public interest. (Para.116 of the Judgment) or its view of its legal duties (para.119 of the Judgment)

The second principle is the reference at para.119 of the Judgment, it makes no distinction between whether the dominant undertaking believes that a failure to eliminate the

product would incur a tortuous or criminal liability, and the principle outlined by the ECJ in this case is not confined to product liability.

Worldwide is concerned with this principle, because it obviously has very great significance for the future conduct of undertakings upon which companies like Worldwide rely and it is their duty as dominant undertakings to inform and seek guidance from Ofcom.

The Ofcom and interveners seek to distinguish *Hilti* on its facts. In my submission whatever fine factual distinctions may be made between *Hilti* and the present case are beside the point. The principle outlined in *Hilti* which I have submitted to the Tribunal is what is critical, and the factual differences such as they are do not alter that. The attempts to distinguish *Hilti* rest on a number of points. One is that it is clear in this case that the product excluded by Vodafone was illegal, but that of course is a matter for the Tribunal. It cannot just be pre-supposed; and secondly, that Vodafone – unlike *Hilti* – was an intended beneficiary of the legislation it sought to enforce, that is a point made by T-Mobile. T-Mobile also say, at para.56.2 that the tenor of the CFI's judgment, because it was a Court of First Instance, was that *Hilti* had acted in a way that was less than genuine. The Tribunal ought to put to one side such impressionistic careless construction. None of these points go to changing the fundamental principles which the CFI outlined in the Judgment itself. All of the parties, including Ofcom say that, in any event, the criteria set out in *Hilti* was satisfied in the present case because they said Vodafone did seek guidance and did obtain a ruling and, if the Tribunal find that Vodafone did approach Ofcom and did obtain a ruling using the language in the *Hilti* Judgment, and did not take unilateral action until that had been done. All well and good. The Tribunal will make its finding according. What Worldwide is concerned to establish is the principle in the *Hilti* judgment itself because Ofcom do deny the existence of this principle in its skeleton at para.169 and they submit that there is no need to inform Ofcom where Vodafone or any operator is in a circumstance where it believes its supplies are used unlawfully and there is a risk of committing a criminal offence. That I believe facing its own assessment of the facts without reference to the Regulator itself. T-Mobile – I submit it would be intolerable to institute a scheme such as this. A company in a situation such as Vodafone, taking their case at its highest, would believe its products were being used unlawfully and believed it may become involved in a criminal offence (I say nothing about the merits of those arguments) it would be intolerable to prohibit it from acting immediately and requiring it to consult and obtain guidance from Ofcom. In my submission, it would not be intolerable to do that. Ofcom is in a position to provide that guidance and it is not set out *Hilti* how an undertaking would obtain a decision or ruling from Ofcom that it could take action in an emergency. So it is open to the Regulator, it is open to Ofcom to develop a system which could operate very quickly on

an interim basis to comply with the Decision of the CFI in *Hilti*. It could be constructed in a way that would be consistent with *Hilti* and not place an intolerable burden on an undertaking such as Vodafone. It is simply our submission that it is inconsistent with *Hilti* for it to act entirely unilaterally and obtain no guidance from the Regulation when the effect of its action is to exclude entirely the potentially competing undertakings' products from the market.

THE CHAIRMAN: If one goes back to the Article RTTE Directive and the procedure there for emergencies, there is a procedure in that the Directive envisages an emergency situation where the operator can take action on his own accord, and then you go through the procedure.

MR. KENNELLY: Correct, and it may well be consistent with the *Hilti* judgment that in a particular emergency swifter action could be instituted but it is not suggested that this is such a case and, of course, emergency – because, again, it is a derogation from the general principle outlined in the RTTE Directive – the term "emergency" must be construed restrictively, it cannot be a broad meaning.

THE CHAIRMAN: I was just using it as an analogy that if you are going to commit a criminal act – you suddenly discover that you are going to commit a criminal act – then is that the same as the emergency? We are looking at this hypothetically on your part. Is that the same as the emergency in the RTTE Directive so that in fact if that was put to the CFI they would be saying there should be a similar procedure. In other words, the operator can take emergency action but do not have to go through a procedure.

MR. KENNELLY: Madam, precisely. Again, it is difficult dealing with a hypothetical situation, but if one is faced with a genuine emergency where, if action was not taken immediately, as in a couple of hours, something terrible would happen, Community law cannot require that undertaking then to go through even the very short procedure of contacting the regulatory authority. There may be very limited circumstances where, with a genuine emergency, an immediate emergency, it would be appropriate to act unilaterally and then go through the 7(4) procedure or something analogous afterwards. *Hilti* establishes as a matter of general principle that one must not do that; one must, I would say – if I were to be pressed by the Tribunal – subject to that nuance, that in a genuine emergency, something that was interpreted restrictively where perhaps there was an immediate risk of serious harm, the dominant undertaking would have to act immediately otherwise it would always have to go to the Regulator.

THE CHAIRMAN: Criminal acts. If you then commit a criminal offence, is that an emergency?

MR. KENNELLY: It would depend on the circumstances, because if the meaning of the criminal act was not clear – it was ambiguous as to whether a criminal act was itself being committed because of an ambiguity in the legislation or conflicting advice – I cannot say definitively

whether in every circumstance the risk of potentially committing a criminal offence would count to evade fixed guidance given by the CFI in *Hili*; it would depend on the circumstances. Those circumstances which the Regulator is best placed to judge – so in almost all circumstances – the Regulator would have to decide whether or not the action by the dominant undertaking should take place. It is independent. It is unbiased and impartial and it is in the best position to authorise or deny the actions of the dominant undertaking which it is to undertake. Those are my submissions on *Hilti* subject to Mr. Mercer's comments on the technical questions which I was not able to assist the Tribunal upon.

MR. MERCER: Madam, you were interest in IMEIs. In fact, a pithy little description of how IMEIs, in a sense, work is actually found in a document we have been referring to this morning which is vol.5(2). It is a statement of facts from the first time out at para.28. It is paras.28 and 29 -----

THE CHAIRMAN: My question was not quite directed as to how they do it, because we realised how they do it. My question is directed to their authority to do it.

MR. MERCER: Well, madam, you can get a flavour of that from 28 and 29 which is the operator decides. If I had my mobile phone stolen and I ring up 0_2 and tell them, then they will upload the IMEI number of my device into the central register so nobody can use it. They cannot take a SIM out of it and put another SIM in it. It just cannot be used at all. As I understand it, that is not something which is subject to any form of statutory or review by legislation or whatever: if you simulate something which the operators run between themselves. As I understand it, others do not have a part in the decision-making process.

THE CHAIRMAN: The reason that this question has come up in our minds is that if the position is that the mobile operator of the mobile equipment that end is entitled to a separate licence, and obtained a separate licence, then they have the licence to use that equipment on that frequency. Why should the person who does not have a licence to use that equipment on that frequency be able to cut off that equipment?

MR. MERCER: I hesitate before saying this -----

THE CHAIRMAN: May be we are totally confused.

MR. MERCER: I hesitate before saying this because we are going to hit issue estoppel again. The answer I would give, madam, is that somebody else has control over it because they are using the apparatus to provide a service. When they no longer want to provide a service by mean of a particular piece of apparatus, they can cease to do so. But it does not work both ways, probably fortuitously. The user of a mobile handset cannot turn off a part of the Vodafone network. So the power that can be exerted is not too wide. Only the network operator has this

ability and this level of control, and can exert it (if you read paras.28 and 29) even accidentally with effect.

THE CHAIRMAN: I understand your issue estoppel point. If the licence from the mobile network operator's licence covered the frequency and the use of that frequency both ways, they could not stop anybody using that frequency. Is that not another way of looking at it without getting into issue estoppel?

MR. MERCER: That is another way, but my analysis of that would be that the level of control exerted over the apparatus by means of the SIMs and the IMEI numbers was such a level of control that the handset actually formed part of the network. Therefore -----

THE CHAIRMAN: They had control over the handset is what you are saying?

MR. MERCER: Yes.

THE CHAIRMAN: You may not have to go that far or do you think you do have to go that far?

MR. MERCER: I would like to think about that one, madam. Just to finish off, you can see that even accidentally, but unilaterally, they can act because there is no doubt from what Vodafone is saying, they never intended to switch off the IMEIs when they switched off the Floe SIMs, but they did it by accident because they uploaded it to CEIR, the Central Register, and blocked the use on any network whatsoever. That, I think, is a small example of just how powerful this is, and the degree of control which is exerted before I have to get into other things like control of the frequencies, control of the frequencies used by the handset, control of power. Unless there is anything else you think I can help you with at this moment, madam, I will give some thought to that before I come to my responses.

THE CHAIRMAN: The only other matter that was raised was the question of Mr. Happy's evidence and the agreed statement, and I see there is to be some discussion between you and Mr. Kennelly. You may want to leave that over as well.

MR. KENNELLY: I must find the relevant paragraph. It is para.11. I have no doubt that it is more likely than not that a GSM Gateway is likely to generate more ----

THE CHAIRMAN: I think para. 20.

MR. MERCER: Paragraph 20. I will not say anything about that paragraph under that number, but the first paragraph certainly we would agree with.

THE CHAIRMAN: Well this is what was set out in the statement, and that rather overtook Mr. Happy's evidence.

MR. MERCER: It does, yes. But I think that is point generally one which I was taking yesterday which is that it is very difficult to tell from looking at the ones and noughts coming through the system, even by the volume, because theoretically each type can create the same volume.

THE CHAIRMAN: You are happy with that, are you?

MR. KENNELLY: Madam, yes, except that Worldwide were not involved in the preparation of the Statement of Facts. We are bound to what was said specifically in relation to this case and therefore for present purposes I cannot rely on what Mr. Happy says in relation to this particular issue, so yes I must be bound by that.

THE CHAIRMAN: So that clears up your point?

MR. PICKFORD: Yes, it does.

MR. ANDERSON: Good afternoon. Just dealing very quickly with the penultimate point on IMEIs. IMEIs are the mechanism through which Vodafone, or indeed any other mobile network operator, controls access to its own network, and that is really the justification for its ability to place them on a register and block calls into its network. That is its mechanism. It is true that by accident they uplifted to a central register which blocked through all networks, but they corrected that. In essence then a Gateway is no different to a mobile phone that you or I might have. If there is a particular justification for disconnecting that particular use then the IMEI is the mechanism through which it does that; and of course it has to be able to do that in order to comply with its licence conditions.

If I could just make a few very general observations before I start and go through the issues. The first point is, of course – and I will come in a little more detail later to the nature of the Tribunal's jurisdiction in particular in relation to the question of compatibility – by virtue of para.3 of schedule 8 to the Competition Act, the function of this Tribunal is to determine the Appeal on the merits by reference to the grounds of appeal set out in the Notice of Appeal. That, in essence, is the parameter of your function.

Issues 1, 2, and 3 broadly reflect the issues that Ofcom identified in para.22 of its Defence as being three sub-issues under the general heading legality of Floe's activities under domestic law, and they are the position under the exemption regulations, the scope of Vodafone's licence and legitimate expectation – issues 1, 2, and 3. Those issues are dealt with respectively at paras. 24 to 34 of our Defence, that is issue 1. Paragraphs 34 – 44 on issue 2, and paras. 45 – 62 on legitimate expectation. We would say that nothing that has been said in the skeleton argument or orally today has undermined anything said in those paragraphs of the Defence. Without taking you to them I invite the Tribunal to re-read them.

We have summarised our case at the outset of our skeleton argument and it is really quite simple. Commercial Multi-User Gateway Services fell within regulation 4(2) of the Exemption Regulations and hence, at least as a matter of domestic law, were illegal. Vodafone's licence was not capable of enabling it to authorise the use of Commercial Multi-User Gateways, and that is the case whatever views may or may not have been held or expressed by people over the course of this period. That being the case Vodafone's conduct in

terminating the supply to Floe is simply not capable of constituting an abuse. That really is an end to the case. Issues, such as legitimate expectation, which I will come to and which we say Floe has not even begun to get off the ground, compatibility we say because of the issues of legal certainty does not arise, and discrimination does not add anything to the debate one way or the other. So when one gets to the position of establishing that the COMUGs fall within 4(2) and they are outside the scope of the licence that is really effectively an end to this Appeal.

Turning first to issue 1 – the scope of regulation 4(2). The Tribunal will be very familiar with 4(2), I do not need to take you to it, but the arguments that are essentially being run are first: Floe was not the user. That was the argument run last time round – Floe did not use the equipment. Secondly, Floe does not provide the service; and thirdly, Mr. Mercer can see no light between what Floe does and MVNOs.

The first point to make, of course, is that this has all been decided by you. Mr. Mercer recognises the principle of issue estoppel but he refused – or failed – even to address it. The problem is there, there is no reason why the principle should not apply in this case. I did not appear first time round but it is quite clear when one looks at the statement of facts, and the full reasons the Tribunal went through, that you reached the conclusion not only that Floe was using the apparatus but you also reached the conclusion that it was using them to provide a service by way of business to other parties. That is para.190 of your Judgment. Floe, indeed, have confirmed in their letter of 16th September 2005 (which just for the benefit of cross-referencing later is to be found in core bundle 5, tab 10, p.4) that they are not seeking to challenge para.190(b) of the first Decision. Perhaps it might just help if the Tribunal were to turn up the Judgment in this case and look at 190(b) and you will see that the issues are dealt with squarely and decisively (Tab 3, p.86, para.190):

> "As regards the primary argument of Floe, Floe and not Vodafone, used the GSM Gateways for the purposes of s.1. Floe's use of the GSM Gateways was not exempt on the exemption regulations from the requirement that such use be under the authority of a licence, as the GSM Gateways were being used to provide a link between the apparatus of Floe's customers and the apparatus or system of Vodafone by means of which Floe provided a telecommunications service by way of business to another person, its customers, and so were excluded from the exemption from licence".

It could not be clearer. That is really an end to this issue. But let us just dwell for a moment on the MVNO argument. The first point to make of course is that the MVNO argument is not actually a new argument. It is based on this premise that Floe is re-selling Vodafone service,

and therefore it is Vodafone that is providing the service to the end customer, so it is a re-hash of the same argument, but just with an additional frill attached to it, the MVNO. But of course the fundamental problem with the analogy is "Who is using the equipment?" An MVNO is not using any equipment, it is supplying the equipment, because the equipment in that instance is the mobile handset, and the mobile handset is being used by the end user. That is the distinction. One only has to spend a moment looking at the analogy to see that it breaks down. But, of course in any event the Tribunal is not concerned with MVNO's in this case, it is concerned with Floe's Commercial Multi-user Gateway Services and it has already found that it falls within regulation 4(2). So unless there is anything further I can help you with on issue 1 that is all I was proposing to say.

Moving to issue 2 and the scope of the WTA licence granted to Vodafone. Our case is, and has been at least since the Defence in the first proceedings, that Vodafone's licence is not capable of including GSM Gateways. But that argument has been set out in annex 2 of the Defence, and is referred to in both the witness statement of Dr. Ungar in the first proceedings. It is also to be found in Mr. Weiner's evidence, and Mr. Pike's evidence, but the important point is that on this issue of reverse receipt and transmission of frequencies there is no difference between the parties on it. It is set out, in fact, in the agreed Statement of Facts at paras. 13, 16 and 17, if the Tribunal would like to turn that up for a moment. It is core bundle 5, tab 2, para.13 "Floe's GSM Gateways were connected to Vodafone's network in the same manner as a mobile handset is connected to a mobile operator's network." In other words, a GSM Gateway is equivalent to a mobile phone. The manner in which the GSM system operates is specified in a series of reference documents published by the ETSI Institute. The references to the ETSI Institute interfaces appears as early as the Statement of Facts. It should not have been controversial. These documents describe the different elements of the GSM system.

> "A feature of the GSM system is that the role of the mobile stations, such as GSM Gateways, are base transceiver stations and frequencies on which they operate are distinct. GSM Gateways transmit on one set of frequencies, which is the same set of frequencies on which the mobile operator's base transceiver stations receive, and they receive on another related set of frequencies, which is the same set of frequencies on which the mobile operator transceiver stations receive and they receive on another related set of frequencies which is the same set of frequencies on which the mobile operators base transceiver stations transfers."

So it is quite clear from that statement of fact that GSM gateways base transceiver stations are different. We would say that Floe has really raised no counter-argument to meet that

point. At one stage they were making the point that the ETSI standard is not actually incorporated into the terms of the Vodafone licence. In fact, it is, and this is a point that we made in the defence at para.41. Para.3 of schedule 1 to the licence refers to the interface requirements. That is IR20.14 which, in turn, of course, refers to the ETSI standards. But, of course, the other key point to make is that unless base transceiver stations has the meaning ascribed in the ETSI standards, the system is not going to work. Those are the standards recognised in the industry and applied, cross-referred to in the interface requirements and anything outside that is simply not going to operate. We say that that question of the scope of the Vodafone licence is a question of construction. We spelt it out in annexe 2. It is not seriously challenged. I do not propose to elaborate on it particularly today. The nature of the challenges are that Mr. Mason and the RA seem to have held the view over a long period of time that it might not have been quite as clear as I am now suggesting today it is. That may well be so, but that in our submission is utterly irrelevant to the question of construction.

One can go through the evidence with a fine toothcomb and one will see various caveats, some more specific than others. One can see various generalities. One can see that certainly the Minister in July 2003 was urging the MNOs and gateway operators to seek a pragmatic solution, but again that is all irrelevant to what the scope of the licence in fact is, and of course ambiguous. What they meant by seeking a pragmatic solution could mean any number of things. It does not mean necessarily authorising under the terms of the licence. But even if that is what the Minister had in mind, that does not alter what the actual scope of the licence. All that will come down to at the end of the day would be an argument on legitimate expectation which I will come to.

Recognising the steer from the bench and possibly from the weakness of his own argument, Mr. Mercer has advanced now what is called an alternative argument. It is an argument that has sort of evolved, if I can put it that way, over time since the skeleton argument. As I understood what he was saying yesterday afternoon, which was about spectrum trading, it amounted to nothing other than Vodafone can hire out what it has been licensed to provide. We would not disagree with that. That does not help Mr. Mercer, because what Vodafone has been licensed to provide does not include GSM gateways, does not include the use of GSM gateway equipment on the relevant frequencies. Equally, the debate about whether Vodafone's licence is exclusive or not is neither here nor there because a second licence to Floe in the terms that it was granted to Vodafone or T-Mobile would not enable Floe to offer a GSM gateway service in just the same way that it does not allow Vodafone to offer a GSM service. So, of course, the question that then became of interest was well, could Ofcom licence Floe direct? It is an interesting question. It is utterly irrelevant to this case because

they did not ask for one and were not given one. Whether they would or would not have been given one, I cannot say. The fact of the matter is they do not have a licence, they have not applied for one, and whether or not they would be granted one is a matter of pure speculation. It is perfectly possible that they would not have been; it is perfectly possible as a matter of policy they would not have been. As a matter of strict interpretation of the WTA, of course, theoretically they could have been. That we fully accept. But whether or not licences will be granted, should be granted, for GSM gateways is outside the scope of this appeal but it is a matter that I am sure Ofcom are no doubt considering amongst a range of other considerations in the current consultation it is undertaking in relation to the future regulation of GSM gateways.

We deal with the alternative argument in para.17. We identify what we understood to be the alternative argument in 17 and we have made a number of points in response to that. Perhaps this is where we got into this whole debate on exclusivity. We say that Vodafone's licence is not an exclusive licence. Subsequently we clarify what is meant by that, but as I hope we made clear on day one, it is not an issue that the Tribunal need trouble itself with. It does not affect Floe's position one way or the other.

The next point that Floe made was, well, mobile handsets have had to be exempted because of the exclusivity granted to Vodafone, T-Mobile and the other MNOs. That is wrong for the same reason that it is irrelevant to the question of GSM gateways. Mobile phones are equivalent to GSM gateways. They are outside the scope of the definition of a base transceiver station or repeater station. So that is not the reason why they are exempted; the reason why they are exempted is that it would be impractical to issue an individual licence to every handset that was used. That, as Mr. Mason confirmed in his evidence, was the real reason for the Exemption Regulations, 4(2) making it clear that the exemption was effectively only for self-use for handsets, and that if one was engaged in commercial telecommunications services by virtue of 4(2) you would be excepted from (taken out of) the scope of the exemption.

An argument that was flagged last night and elaborated upon this morning was, well, as it turns out condition 8 of the licence which confines Vodafone and the other MNOs from operating equipment on specific frequencies is not a condition of the kind permitted by annexe B of the Authorisation Directive and therefore you, the Tribunal, should be reading the licence as if the reference to the equipment was not there. Just a couple of points to make on that. The first point is that this is an argument that has never been raised before. It is outside the scope of the Notice of Appeal. It is outside the scope of the List of Issues and we would therefore submit it is not an argument that is open to Floe to make today.

Secondly – and can I ask you to take up the bundle of legislation and turn to the Authorisation Directive which is at tab 11 (annexe B) – there may be any number of conditions here which will be sufficient to meet this, but conditions which may be attached to the rights of use for radio frequencies, (i) designation of service or type of network or technology. In our submission -----

THE CHAIRMAN: Where are you?

MR. ANDERSON: Tab 11, annexe B, the conditions. It is the very last page of that divider. Annexe B are the conditions. Description of service or type of network or technology for which the rights of use for the frequency has been granted. Our position is that base transceiver stations are technology with designating that technology for which the rights of use have been granted. There may be additional arguments to justify that particular condition. It may also be a condition - identifying that particular equipment on those frequencies may also be effective and efficient use of frequencies; I do not know; the argument has only just been, as I say, raised. Our primary position is that it is a designation of technology, and I do not for my part immediately see a distinction between the word "technology" and the word "equipment" in this context.

I will be addressing you in due course on why we say that Regulation 4(2) is a condition attached to the authorisation which is the final point that Mr. Mercer made. We do not believe, for the reasons we have set out in paras.28 and 29, that the fact that the WTA (which licences equipment within certain frequencies and the authorisation Directive which permits the use of certain frequencies by certain specified technology) we do not see a tension between those two at all for the reasons we have identified there. You can licence the equipment at certain frequencies or licence the frequencies in respect of certain equipment. We say it comes to the same thing.

THE CHAIRMAN: What Mr. Mercer said about technology was it was the GSM.

MR. ANDERSON: I know that is what he said but we do not agree with that. The GSM is the network. Equipment is the technology. Ignore the term "technology"; it is simply GSM. Certainly, we would submit it includes the specification of the equipment. It would be a very bold move if, on the basis of an argument raised for the first time on day 3 of the hearing, the Tribunal were to rule that the licence conditions were such that mobile network operators have not been licensed in the way that everybody has assumed that they were licensed.

THE CHAIRMAN: We may have to look back into what was argued last time. We did go to these conditions last time.

MR. ANDERSON: I do not recall, having re-read your judgment quite recently, it appearing in any great detail in the context of your judgment.

THE CHAIRMAN: No, but it may be in what was submitted to us.

MR. ANDERSON: We can look at that. Our answer is that the condition on the type of equipment on these frequencies is a perfectly permissible condition within the meaning of annex B, and we have not to date had any articulated argument against that. The one that was articulated by Mr. Mercer today is met by the term "technology" which, on any ordinary meaning of the word "technology" must include equipment but also, as I say, there could be other justifications on efficient use of the spectrum, efficient and appropriate use of the spectrum, or indeed also I think it is 5, technical and operational conditions necessary for the avoidance of harmful interference and the limitation of exposure to the general public of electromagnetic fields.

THE CHAIRMAN: What are you reading from?

MR. ANDERSON: I am reading back from annexe B of the Authorisation Directive.

THE CHAIRMAN: Transfer of Rights.

MR. ANDERSON: No, I am sorry; I meant 3.

THE CHAIRMAN: That is why I asked you.

MR. ANDERSON: Yes, I did mean 3.

THE CHAIRMAN: My recollection is (and we need to look at the transcript from last time) that there was discussion about 2 and 3. There was not a discussion that fell within 1.

MR. ANDERSON: As I say, I have dealt with this, if you like, off the cuff, but I will look at it.

THE CHAIRMAN: We can look at it over lunch.

MR. ANDERSON: Yes. The Tribunal has heard a fair bit of evidence about what Vodafone's understanding and the scope of its licence was, Vodafone's understanding of the scope of the business plan and so on and so forth. I was not proposing myself to go into that. It is really a matter for Mr. Flint in so far as it is relevant because what we would concentrate on is Mr. Mason and his understanding which I dealt with by saying essentially it is irrelevant unless it gives rise to a legitimate expectation to which I will be returning. That is all I was proposing to say on the scope of Vodafone's licence; it does not cover GSM gateways; therefore, it could not enable Vodafone to authorise Floe whatever the agreement purported to cover, whatever the parties understood the position to be; it is simply not capable of authorising the use of GSM gateways and therefore the use of GSM gateways by Floe was at all times - commercial multi-user gateways because that is all we are concerned now – illegal, criminal.

THE CHAIRMAN: But it would not have allowed any gateways so it would not have allowed single user either?

MR. ANDERSON: That is our position, yes. As a matter of construction, that is correct. I think there was more uncertainty in relation to single user at that time because of the use of the distinction, the words public/private -----

THE CHAIRMAN: Why does that make any difference? If it is illegal it is illegal.

MR. ANDERSON: I agree. It does not make any difference so far as the activities of Floe were concerned, but I think there is -----

THE CHAIRMAN: For anybody else.

MR. ANDERSON: Well, in one sense, yes, but what we are concerned in this case are commercial multi-user gateways and we say there was never any ambiguity in relation to the scope of 4(2) in what was being said in relation to those because this goes back to the debate on whether a Gateway was a user station, whether it was fixed or mobile?

THE CHAIRMAN: But it is not and that is the end of that question.

MR. ANDERSON: Yes.

THE CHAIRMAN: And if you are saying that we must only look at the licence and what the licence says, and we are not to look at the evidence then we are not to look and see whether there is any ambiguity because the licence is clear.

MR. ANDERSON: Yes, that is our position. That brings me to the subject of legitimate expectation. We have dealt with this in our skeleton argument at para.33, through to 47. We have, I think, done more justice to it than it deserves in terms of its articulation because there has been no serious attempt to analyse the relevant principles that apply to legitimate expectation. There has been no attempt whatsoever to identify why this legitimate expectation can in any way relate to the conduct of Vodafone, which is the relevant party whose conduct is being impugned. There has been a failure throughout the formulation of this case to identify precisely what it is that gave rise to an expectation and precisely what that expectation was. Yesterday Mr. Mercer said that it was an entire course of dealings commencing with a meeting with the DTI in February 2002 and existing right through until the Defence in the first set of proceedings.

One then looks at what that course of dealings is and, apart from the DTI meeting in 2002, which I will come to, everything else post dates not only the agreement that was concluded with Vodafone but the termination, yet Floe has failed to explain how that is capable of giving rise to any meaningful legitimate expectation within the meaning of the jurisprudence. It is not even sought to take the principles that exist from the case law and apply them to the facts of this case so that the Tribunal is really rather at sea, I would submit, just as we have been throughout, in understanding precisely what this legitimate expectation case is. It seems to be nothing more than a general feeling of unfairness because the RA,

possibly the DTI, maybe even the Minister in July 2003, seems to have thought that there might be a way to sort out these problems other than the course of events that in fact took place. In my submission that does not begin to get close to formulating a legitimate expectation case. Even against us, or our predecessors, it is still less one that is material to whether or not Vodafone has abused a dominant position, legitimate expectation is a concept of public law relevant to public authorities. Of course, that is all that has ever been advanced by Floe in relation to its so-called course of dealings with February 2002 through to the first set of proceedings.

You will recall that throughout the preliminary stages of this case, by that I mean the second round. We have sought clarification from Floe of the particulars of its legitimate expectation case. What they identified in the further and better particulars were three things: the DTI meeting of February 2002, a Cliff Mason email of 10th February 2003; and the Ministerial statement of the 18th July 2003. That is all that was actually identified when we sought further and better particulars. Before dealing with those three documents, it is perhaps worth reiterating what the relevant principles are – I was not actually proposing to take you into the cases because we have identified the principles in our skeleton and nobody has sought to challenge that analysis. I am sure the Tribunal will be familiar with cases such as *MFK*. If you want some kind of definitive ruling on which you can rely, you place all your cards on the table, you make it clear to the public authority that you want a considered response. You indicate why you want that considered response and then you get one.

What did the evidence actually come down to in relation to the meeting with the DTI? What it came down to was that they never got back to us. If in the circumstances that would give rise to any relevant legitimate expectation, then Floe in this case will have extended the bounds of that principle way beyond anything that has previously been accepted by the courts as giving rise to any kind of a meaningful legitimate expectation. Of course, the story changed. Originally it was said that the DTI did not raise any regulatory issues at that meeting. Well, of course, we now know that it did, we have seen the notes of the meeting. In terms of supplying those meeting notes to the DTI, you were taken to the letter in which there was no reference to their being supplied. We have been asking throughout these proceedings for a copy of an email which Floe say was the email under which they forwarded the notes of the meeting to the DTI. We have never seen that email. We were told that we could not see it because Floe did not have access to its server any more. But we heard from Mr. Stonehouse on Monday that they did now have access to their server, but there is no email. So we do not even know whether the notes were sent to the DTI.

We say that in the light of that meeting Floe cannot be said to have reasonably entertained an expectation that the services it provided were lawful or capable of being authorised. It is not reasonable to rely on the silence of a public Body, in fact, one can think of an analogy. If one sought confidential guidance from the OFT, and did not get any reply could it seriously be contended that the competition Authorities could not then investigate or take any action. Of course not. No relevant reliance, we would submit – and no doubt this is a matter that others might get into in more detail – Floe did not bother to take any legal advice. They did not seek specific guidance on specific proposals ----

THE CHAIRMAN: But that would not matter, would it, in relation to legitimate expectation?

MR. ANDERSON: Well, there is authority for the proposition, for example, the case of *Henry Boot*, I am not sure if that is in the bundle, where it is a fact that you can take into account, because as has been emphasised legitimate expectation is about fairness, and in circumstances like this where the Floe witnesses were emphasising at length that this was a grey area, did not understand the difference between public and private GSMs, they did not have a clue. To launch straight into this whole exercise without seeking any form of clarification is certainly a relevant consideration for the Tribunal to take into account. I do not know if that is a convenient moment.

THE CHAIRMAN: Shall we say five past two?

(Adjourned for a short time)

**MR. ANDERSON: I have handed up a copy of the ----

THE CHAIRMAN: Communications Act.

MR. ANDERSON: The Communications Act, and if I can take you to it very briefly, you will see s.192 of the Communications Act, "this section applies to the following Decisions", and then "(a) a Decision by Ofcom under this part of the Wireless Telegraphy Act, or the Wireless Telegraphy Act 1998 that is not a Decision specified in schedule 8."

THE CHAIRMAN: This goes to your first point about jurisdiction.

MR. ANDERSON: It will go to my point about jurisdiction. I was just explaining to you that I will come to it, yes. Then schedule 8, para.27 a Decision given effect to by regulations under the proviso to s.1 of the Wireless Telegraphy Act. So s.1 does not apply to decisions given effect to by regulations, that is in effect the regulations. As you will see from s.192(ii) "A person affected by a Decision to which this section applies may appeal against it to the Tribunal", so a decision given effect to by regulations is not. The other document I handed up was the *Henry Boot* case, which was simply para.58, a reference in that case to the planning authority could have sought legal advice. It may be that I was in fact answering the wrong question as to what

was a requirement. When you said "That is not relevant" it has been pointed out to me that you were probably referring to the need for reliance, as opposed to seeking legal advice.

THE CHAIRMAN: We were at cross purposes but it does not matter.

MR. ANDERSON: Well if I can just take you very briefly to the case on reliance. That is in bundle 4(b) tab 27, just to see what the Court of Appeal said on the issue of reliance. I do not think we need to get into the facts. It is a case about refugees and providing accommodation and whether refugees had been promised, and they had a legitimate expectation that they could claim secure accommodation for a longer period. But Lord Justice Schiemann, who gave the leading Judgment, deals with the question of reliance at paras. 29 and 30, effectively by adopting what a Professor Craig has proposed in this regard in his administrative law:

> "Detrimental reliance will normally be required in order for the claimant to show that it would be unlawful to go back on a representation. This is in accord with policy, since if the individual has suffered no hardship there is no reason based on legal certainty to hold the agency to its representation. It should not, however, be necessary to show any monetary loss …
>
> "But he gives the following instance of a case where reliance is not essential.
>
> "Where an agency seeks to depart from an established policy in relation to a particular person detrimental reliance should not be required. Consistency of treatment and equality are at stake in such cases and these values should be protected…"

So the rule is that one would normally expect reliance in a case, and this is the kind of case where we would submit it would clearly require reliance because what is being alleged is some representation made by the DTI and unless there was material reliance there is no reason why – and of course the point becomes all the more relevant in relation to the RA's statements that have been advanced to you as ambivalent, or is giving the impression that Vodafone's licence enabled it to authorise these Gateways. Since they were all after the event we would say they are simply not capable of giving rise to any expectation, largely because there could not have been any reliance, in addition to the points about them being too vague to give rise to any expectation.

The next item relied on is an email of 10th February 2003, which the Tribunal will find in bundle 2(b) at 20. I am only dealing with it specifically because these are what were identified in our request for further and better particulars. This was a response – I accept this one was before the termination – from Cliff Mason to John Stonehouse to an email of John Stonehouse to him. To put in context, what Mr. Stonehouse is asking is

> "When you were discussing enforcement Cliff stated that the RA had decided not to take precipitous action against Gateway users during the consultation period, could you tell me whether or not this advice was by default, also directed at the mobile operators, and under what grounds the RA would take action and what action would the RA take against mobile operators who did or have taken precipitous action."

The reply:

> "The RA can only speak for itself in its decision to forebear the enforcement of the exemption regulations pending the outcome of the consultation. From the outset we have said that we will only act if we receive complaints of interference due to unlicensed use. That said, individuals, including companies, are perfectly entitled to act on the law as it stands. If they do act that is a contractual matter between them and their customer."

In my submission that cannot give rise to any expectation that the RA were of the view that Vodafone could not take the action that it took. The only other document actually identified in the further and better particulars was the DTI announcement of 18th July 2003, which was the announcement that came at the end of the consultation process. The Minister decided that he was not going to amend the regulations, and I think what is being relied on there is the quote that Mr. Davey put to Mr. Mason yesterday about the government encourages MNOs and gateway operators to consider ways to address pragmatic existing uses of equipment that continue to meet the requirements of exemption. What we say to that is firstly it is after the event and secondly far too vague to found any expectations as to the strength of the licence. Certainly, Mr. Mason accepted that the RA wanted MNOs and GSM operators to talk to one another. I mean, that is not surprising, but one cannot jump from that to something quite as specific as Floe is contending in this case.

The following documents were raised in cross-examination. One was a letter of 20th March from Cliff Mason. That is 2(b) at 44. Without picking it up, you will recall that Mr. Mason's evidence in relation to that was he was talking about equipment generally, not GSM gateways in particular, and at that time he did not know about gateway technology and did not offer an opinion about whether they qualified as equipment under these licences or not. That is the transcript at p.18, lines 19-21. Then there was a letter of 27th May 2003, again after the event. Mr. Mason deals with that on the transcript at p.20, line 34, and 21 lines 1-2 and then further on. He emphasised that he considered only MNO authorised authorisation as a possibility. Again, the point is not sufficiently specific and after the event. Finally, Mr. Mason was taken to an email of 8th September from Cliff Mason to another government body, Oftel.

Clearly, there is nothing that is capable of giving rise to any legitimate expectation in relation to any third party. That is really all I am proposing to say on legitimate expectation.

THE CHAIRMAN: Can I just take you back. I think it arises out of your submissions in relation to annexe B. I am not taking you back to annexe B, but in relation to those submissions have you considered s.166 of the Communication Act?

MR. ANDERSON: On the question of annexe B, we have not had a chance to go through just yet what was said last time. What we were proposing was to look at it overnight -----

THE CHAIRMAN: I appreciate that and that is why I am not taking you back now to annexe B. In your considerations overnight, I think there may be an additional matter that we would like some submissions on which is section 166 of the Communications Act. That, I do not think, was discussed last time but it does seem to us to be possibly relevant.

MR. ANDERSON: Is there a specific concern the Tribunal has which you wish to direct us to, or just generally?

THE CHAIRMAN: Do you want to look at it now?

MR. ANDERSON: No.

THE CHAIRMAN: I think if you look at it, you will see the point.

MR. ANDERSON: We will certainly do that. If necessary, we can do a note.

THE CHAIRMAN: It is an amendment to the Wireless Telegraphy Act; It is section 1(1)(a)A of the Wireless Telegraphy Act.

MR. ANDERSON: We will look at that. Could I now turn to compatibility and, rather cheekily, we reversed the orders of issues four and five because we say you do not actually need in this case to consider the question of compatibility.

THE CHAIRMAN: I am not sure we found it very useful that you reversed it, but anyway.

MR. ANDERSON: Well, could I start by taking you to my skeleton argument as to why we say the relevant and effective compatibility – why we say the compatibility issue is irrelevant. We say it is irrelevant from all perspectives: from the position of Vodafone, the position of Ofcom and the position of the Tribunal. As far as Vodafone is concerned, we say the question of whether or not regulation 4(2) is incompatible can have no bearing on the core issue in this case, which is whether or not Vodafone abused a dominant position. Therefore, whatever the position may be on compatibility, Vodafone was entitled – indeed, obliged – to rely on, or apply the national legal framework that was in place until such time as it may be disapplied. It has not been disapplied and they are therefore obliged to give effect to the national regime. This is dealt with in my skeleton at paras.48-56 and there are a number of authorities that we cite there. Some of them raise general principles underlying the rationale, which I was not going to take you specifically to. Firstly, legal certainty (referred to in para.51), *Defrenne v. Sabina;* Non-

retroactivity, *Kolpinguis*; presumptive validity, *Hoffman La Roche*. The first case that I actually want to take you to is the case of *Ladbroke Racing* which is to be found at tab 4(b), vol. 1. In this case Ladbroke Racing had lodged a complaint with the Commission that 10 racing companies in France and the PMU, a group created by those companies to manage their rights to organise off course totaliser betting on race courses, so it had effectively been granted under domestic rules a monopoly, and Ladbroke Racing were contending that the PMU was abusing its dominant position by effectively denying it access to that. The Commission rejected the complaint against the PMU company on the grounds that Articles 81 and 82 did not apply. Part of the complaint was also against the member state itself. The CFI then annulled the Commission's Decision on the basis that it had failed to examine the compatibility of the French National Rules with competition law and France and the Commission appealed against that and the CFI's Decision was overturned. The central proposition is that the Chapter II prohibitions, Article 82 by virtue of section 60, parity of reasoning, do not apply where, as in the present case, an undertaking as to conduct is required by national law or where the latter creates a legal framework which eliminates any possibility of competitive activity by the undertaking. It is simply not necessary to assess the compatibility of national legislation with EC law. One looks only at the national law to decide whether undertakings were acting independently or on the domestic law. If the latter, then conduct cannot infringe the rules of competition. The relevant extracts from the Decision of the ECJ can be found essentially at para.29. May I invite the Tribunal to read those paragraphs rather than reading them out. (Pause) So the essence of what the court is saying, in our submission, in that case is that the CFI was wrong to look at the national legislation and decide whether it was compatible or not as a starting point. The only significance of the court looking at the domestic legislation was to see what obligations did it, as a matter of domestic law, impose upon the parties and if that is what regulated their affairs then they are not within the scope of Article 81 and 82. That, we would say, is precisely the position here. It does not matter, we would submit that the relevant incompatibility in that case is with the rules and competition. It is a question of compatibility with EC law. That is the same position that we have in this case.

THE CHAIRMAN: Do you need to look at EC law when you are looking to construe English law? In other words, do you need to look at EC law when you are construing national law because you should construe it so it is compatible. So you cannot close your eyes to it?

MR. ANDERSON: You cannot close your eyes to it, no, but we say in this particular case the question of the scope of Regulation 4(2) is perfectly clear, and as far as Vodafone is concerned, one cannot expect Vodafone to engage on the exercise of viewing the compatibility of

Regulation 4(2) of the Directive. They are entitled to assume Regulation 4(2) means what it says, and they do not need to look any further than that. The question of looking at Community law does not arise for the purposes of this case for the purposes of this point. The rationale of the case is essentially a question of legal certainty.

The question of the position of France, of course is not addressed. The position of Ofcom is neither here nor there as far as the conduct of -----

THE CHAIRMAN: It does not assist you.

MR. ANDERSON: It does not assist; it does not take one anywhere. The next case, *Promedia* which is I think at the next tab. The issue in this case was whether Belgacom, the national telecoms company in Belgium was abusing its dominant position by bringing proceedings against publishers of telephone directories. The Commission rejected the complaint on the basis that bringing an action could not be an abuse unless designed to harass an opponent and eliminate competition. The applicant brought an action against the Commission before the CFI. Effectively what was held was that the ability to access one's rights through the court was a fundamental right and a general principle of law, and only in exceptional circumstances would the bringing of legal proceedings constitute an abuse. The Commission had correctly held that Belgacom could legitimately rely on national provisions granting it a right of action so long as they had not been invalidated. That is to be found at para.98 of the Decision, effectively relying on the principles in *Ladbroke Racing*. So again it was not necessary for the Commission to examine the compatibility of the Belgian provisions with Community law. Again, if you take the Judgment at para.95: "In that context the court …" and read down to the bottom of para.98". (After a pause) So we say that is to the same effect as far as the undertaking is concerned, and that is what is in issue in this case, you do not need to look at the question of compatibility. It is entitled to rely on domestic law, whether or not it is compatible.

The next case is *CIF*, which is a case that concerned a consortium, and that is at tab 35 – you were taken to it this morning by my learned friend, Mr. Kennelly on a slightly different point, but we would say it is again to the same effect as the previous two cases. Effectively this was a case where there was a monopoly conferred on a domestic Italian match manufacturers and a German importer, I think, was complaining that he could not get access, and he wanted declaration that the arrangements were contrary to Articles 10 and 81, and that CIF and its members had infringed Article 81 through the allocation of production quotas.

The Italian court referred questions – and you were shown the questions this morning, they are to be found at para.39, and where I would invite you to take up the Judgment is at para.48.

THE CHAIRMAN: You really want para.51, do you?

MR. ANDERSON: Paragraph 51 emphasises the distinction between the position of the Member States and the undertakings. 52:

> ".. the penalties which may be imposed on the undertakings concerned, it is appropriate to draw a two-fold distinction by reference to whether or not the national legislation precludes the undertakings from engaging in autonomous conduct …"

So 53 and 54 are really the crucial paragraphs.

> "First, if a national law precludes undertakings from engaging in autonomous conduct which prevents, restricts or distorts competition, it must be found that, if the general Community law principle of legal certainty is not to be violated, the duty of national competition authorities to disapply such an anti-competitive law cannot expose the undertakings concerned to any penalties either criminal or administrative, in respect of past conduct where the conduct was required by the law concerned.
>
> "The decision to disapply the law does not alter the fact that the law set the framework for the undertakings' past conduct. The law thus continues to constitute, for the period prior to the decision to disapply a justification which shields the undertakings concerned from the consequences of an infringement of Articles 81 EC and 82 EC and does so vis-à-vis both public authorities and other economic operators."

In our submission the position could not be clearer. The regulation 4(2) has not been disapplied as at today's date and that therefore provides, however one wishes to put it, a complete defence. Article 82 does not apply, or there is an objective justification. The position then is that, as a matter of national law, the provision of these Gateway services was illegal, exposing Vodafone if continuing to supply, having finally acquired knowledge of what was going on, to the potential risk of aiding and abetting a criminal offence – the proceeds of crime point, and I will deal with those later – and that, in our submission, is also a legal requirement then on Vodafone to desist from supplying SIMs to be employed in Commercial Multi-User Gateway Services operated by Floe.

Just for the sake of completeness, the Advocate General, just at the very back of that page, describes really the underlying reasoning for this, which are paras. 48 through to 51. The essential reasoning is that one cannot expect undertakings themselves to engage in the process of considering compatibility of domestic rules with Community law.

The next case is the case of *Altair*, which is at tab 51. Perhaps whilst *CIF* is open, I could show you the relevant paragraph on which my learned friend, Mr. Kennelly relies, and I will be coming back to this at its appropriate point in my submissions. But you will see in para.49 the duty to disapply which he relies on. As I say, whatever the scope of that duty we

say it cannot affect the outcome in this case because this case is concerned with Vodafone's conduct, and whatever our duties we did not disapply, but we would say that that is an answer to this particular case. But of course, the duty to disapply at 49 is a duty to apply if the circumstances so require. We say that since the disapplication or otherwise of the regulation could not have affected the legitimacy or otherwise of Vodafone's conduct, there was no need to disapply – no need even to consider the question of compatibility because it would not have affected the outcome of the Decision, and we say the Tribunal finds itself in the same position. To use the parlance of Article 239 on References – it is not necessary to take a view to determine the case.

There were two other cases which I could take you to very quickly. One is the case of *Altair*, which is to be found at tab 51.

THE CHAIRMAN: (After a pause) The point you have just made, what about the continuing effect of the turning off, because it is not only a complaint about turning off, but it is not turning on?

MR. ANDERSON: So far as Vodafone's position is concerned, we have not disapplied the provision.

THE CHAIRMAN: But you may have had a duty to disapply?

MR. ANDERSON: Well we say we did not have a duty to disapply because it could not have affected the outcome of their case ----

THE CHAIRMAN: But it could, because they take the action and they turn off.

MR. ANDERSON: Yes.

THE CHAIRMAN: And just assume you are right, and they are entitled to do that?

MR. ANDERSON: Yes.

THE CHAIRMAN: Floe come to you and say to you that they have turned us off, relying on national law, but in fact national law is incompatible with European law and that you ought to disapply so that they get turned back on.

MR. ANDERSON: I do not think, with respect, it is quite as simple as that. They may have come and said "Look, it is incompatible", and our first point is we do not need to decide that. Supposing you are against me on that and we ought to have looked at it, it then raises a hypothetical question of what position we would have taken in relation to the question of compatibility. We are not at all satisfied that in the context of a complaint under the Competition Act we have the jurisdiction to disapply those regulations as competition authority. It is perfectly true that in the context of consultation now being responsible for regulations of this kind, we will of course have regard to questions of compatibility and many other issues. Were we to take a decision in relation to those regulations, by virtue of s.192 it would not be appealable to this Tribunal.

THE CHAIRMAN: But you are responsible through inheriting it ----

MR. ANDERSON: Yes.

THE CHAIRMAN: -- to the original condition?

MR. ANDERSON: Yes.

THE CHAIRMAN: And to the original regulation?

MR. ANDERSON: Yes.

THE CHAIRMAN: So it is your responsibility, that?

MR. ANDERSON: Yes.

THE CHAIRMAN: You cannot say "It is nothing to do with me ----

MR. ANDERSON: No.

THE CHAIRMAN: "-- it was the Secretary of State at the time" – you accept that?

MR. ANDERSON: Yes.

THE CHAIRMAN: If that regulation is incompatible – I say "if" – with the European Regulation, then I think you would accept that you would have to disapply?

MR. ANDERSON: Yes.

THE CHAIRMAN: No – you do not accept?

MR. ANDERSON: Well, it is the consequences that would come from what is actually meant by disapplying in this context. It does not necessarily follow from that either that Vodafone's conduct is an abuse of a dominant position; nor does it follow necessarily that Floe has any right to offer GSM services by virtue of the disapplication of 4(2).

THE CHAIRMAN: Let us just go back. Are you saying that until you have completed the consultation process, you do not know whether to disapply or not and therefore you did not need to disaapply.

MR. ANDERSON: Well, that is a slightly different point. The question of compatibility is a much bigger question than has been, I would respectfully say, submitted to you so far because it all turns on what Mr. Burns says. The question of compatibility in a case such as this where there is a discretion and there are a number of factors which need to be taken into account, there is a Regulator now and the Secretary of State back when he was responsible involving wide consultation and how best to address the question of the regulation of GSM gateways. That is a process that we engage in as sectoral regulator with our radio spectrum management powers, and if we get that wrong Parliament has decreed by virtue of section 192 that the challenge is not to this Tribunal but by way of judicial review.

THE CHAIRMAN: I understand that, but there is an exception to that when it is related to the Article 81/82 point.

MR. ANDERSON: You say "when it is related to".

THE CHAIRMAN: I have not got the words in front of me.
MR. ANDERSON: It is necessary to resolve.
THE CHAIRMAN: To resolve for the purposes of.
MR. ANDERSON: For the purposes of.
THE CHAIRMAN: So there is an exception. It is not an absolute thing that it has got to go off to judicial review. We do not stop the case and say we had better send that off to judicial review, and then they all come back and tell us. We are allowed to do it in those circumstances.
MR. ANDERSON: If it is necessary for the resolution of the case.
THE CHAIRMAN: We have to decide that point.
MR. ANDERSON: Yes.
THE CHAIRMAN: Forgetting about the jurisdiction of this Tribunal and looking at what Ofcom's position is as an administrative authority, the sectoral regulator, if the position is that a national law is clearly unambiguously incompatible with the EU Regulations so that when the complainant comes to you and you look at it, you say this is clearly incompatible, are you saying you do not have to disapply at that point.
MR. ANDERSON: The highest that can be put is at that stage we would have said to Vodafone you can no longer rely on Regulation 4(2). What might have happened thereafter we do not know, because you are not, with respect, concerned about that hypothesis. The reality is that we did not.
THE CHAIRMAN: In that hypothesis, you ought to have.
MR. ANDERSON: Well -----
THE CHAIRMAN: You would have had to.
MR. ANDERSON: That may be right. Whether we ought to or ought not to have, that cannot affect the outcome of this appeal. That is a complaint, if anything, against us, but it does not alter Vodafone's conduct and whether it was objectively justified. That is the issue that is before the Tribunal.
THE CHAIRMAN: I think I understand what you are saying. I think what you are saying is that you did not disapply, and while you did not disapply, the national law protected Vodafone.
MR. ANDERSON: Yes.
THE CHAIRMAN: So if you are wrong about that, that is not something which can be complained of against Vodafone. The fact that you did not do properly – if that is what happened – is not something which the complainant can bring at Vodafone's door.
MR. ANDERSON: Yes, it is, with great respect.
THE CHAIRMAN: So that it does not matter about the continuing obligation.
MR. ANDERSON: It does not matter.

THE CHAIRMAN: It did not do it and therefore Vodafone are protected.

MR. ANDERSON: Yes, and it is for that same reason that you need not be troubled by the question of compatibility because it cannot affect the outcome. On the question, the point that you put to me, about if it arises in the context with Article 81/82, you have jurisdiction to consider it. The only point I am making is that does not necessarily apply also to us in the same way as the Competition Authority in that context. We are not exercising, if you like, a judicial function in the way that you are.

THE CHAIRMAN: I think what you are saying is that if the complaint is against you rather than against Vodafone, then that is not an Article 81/82 problem, therefore, it must be judicial review because it is a matter relating only to how you have exercised your powers.

MR. ANDERSON: Yes. That is when s.192 and schedule comes into play. Parliament has said in those circumstances that is why -----

THE CHAIRMAN: Can I just go on with this a little. You have two hats as Ofcom.

MR. ANDERSON: Yes.

THE CHAIRMAN: You have a competition hat and a regulator hat.

MR. ANDERSON: Yes.

THE CHAIRMAN: And you have been given the competition hat because your regulation hat has an effect on competition (I think that is the right way round) – can have an effect on competition. That is why it somehow comes together.

MR. ANDERSON: Can I just take instructions for a moment.

THE CHAIRMAN: It is all right; I am watching behind you as well as you! (Pause)

MR. ANDERSON: We have that dual role, and we have that dual role partly because of our expertise in the field of telecommunications because, as you rightly say, it can impact on competition and the promotion of competition is clearly one of the factors that we take into account and promote in the exercise of our sectoral functions as well as our Competition Authority functions.

THE CHAIRMAN: Can we just look at where the provision is that allows us to do it, just the wording in schedule 8.

MR. ANDERSON: Schedule 8 of the Competition Act.

THE CHAIRMAN: The wording that allows us to do it when it is necessary. I do not want to use words which is not the appropriate wording.

MR. ANDERSON: Are you referring to s.192 of the Communications Act?

THE CHAIRMAN: I think so.

MR. ANDERSON: This is the section which applies to the decision by Ofcom under this part of the Communications Act, the Wireless Telegraphy Act or the Wireless Act 1998 that is not the Decision specified in schedule A.

THE CHAIRMAN: Yes, that is it. Then schedule 8.

MR. ANDERSON: Then you go to para.27 of schedule 8. You will see that schedule 8 is entitled -----

THE CHAIRMAN: A decision given effect to by regulations under the provisions -----

MR. ANDERSON: Given effect to by regulations, so it is the regulations themselves. You will see that schedule 8 is headed "Decisions not subject to appeal." To the extent that now instead of the Secretary of State it is Ofcom that is entrusted with decisions given effect to by regulations which clearly means revoking, amending or enacting the regulations, are not matters that are subject to review. So if Ofcom in the course of its consultation comes to the view that the regulations are incompatible, what it would do in its duties under Article 10 would be to amend the regulations. If we amended the regulations and Floe thought we had still got it wrong, it would not be to this Tribunal that Floe would complain; it would be to the Administrative Court.

THE CHAIRMAN: I understand what you are saying. I just want to make sure that we have closed all the doors. Floe here complains to you that Vodafone's conduct is inappropriate.

MR. ANDERSON: Yes.

THE CHAIRMAN: They say it is inappropriate for two reasons: (1) Vodafone should not have cut them off; and (2) Vodafone, having cut them off, should have turned them on because you should have disapplied the regulations.

MR. ANDERSON: Yes, I know that is what they say.

THE CHAIRMAN: That is what they say. Why is not the question of whether you should have disapplied the regulation part of the question before us in relation to the complaint by Floe and the appeal of the Decision you have made?

MR. ANDERSON: That is a complete answer otherwise you would be applying this application retrospectively.

THE CHAIRMAN: But in your Decision you deal with these points.

MR. ANDERSON: We do, and we deal with them, with respect, because you invited us to.

THE CHAIRMAN: We asked you to, but this point was not taken on the earlier occasion when these points were dealt with on the earlier occasion.

MR. ANDERSON: Again, we would need to go back to the transcript. I cannot say. I did not appear and I do not know to what extent questions of compatibility and so on were addressed. I do not know the circumstances in which they arose.

THE CHAIRMAN: We will have to look at the original Decision.

MR. ANDERSON: Certainly, you did not express a view on compatibility. You certainly asked us to look at it and we looked at it. Indeed, I believe you even asked us to consult on it before we reached a view on it, and that is what we did.

THE CHAIRMAN: I think we have got your point. I think we understand what your submission is. I think that has been quite useful.

MR. ANDERSON: Yes, certainly, as far as the first Appeal is concerned I have rather approached this as if, although I can see technically an extension of the previous Appeal I had rather taken that Mr. Mercer was effectively starting with a blank sheet of paper for his Notice of Appeal against our second Decision and addressed the argument.

THE CHAIRMAN: I am not sure that we quite see it that way because it was a continuum.

MR. ANDERSON: It is certainly a continuum in the sense that certain issues you have decided ----

THE CHAIRMAN: And certain issues we have not but ask you to ----

MR. ANDERSON: Yes.

THE CHAIRMAN: And therefore these issues came out of the consideration on the first occasion, and therefore what was asked in the first Decision, and what we left over were matters which were aired in the first hearing, otherwise they would not have been in the first Decision. Do you see ----

MR. ANDERSON: I am sure that is right, ma'am, and it may well be that this particular issue was not gone into sufficiently by those appearing in front of you for these points to come out.

THE CHAIRMAN: It may be that you thought up a point that had not been thought up before, and it may be right and it may be wrong, but I suppose we ought to look to see how this was dealt with in Ofcom's – or actually Oftel's – first Decision.

MR. ANDERSON: As you know the CIF Decision was raised by us in the second Decision for the point I was making on legal certainty, and I suspect a lot of our thinking was brought into focus by you, ma'am, very sensibly raising with us at a case management conference, have you considered the implications of the CIF Decision on your obligations as an organ of the Member State to disapply.

THE CHAIRMAN: Yes.

MR. ANDERSON: So in a sense that may be the origin of our thoughts on this, but as I say the main reason for considering compatibility was not because we considered it was necessary in order to reach a decision. It arose out of the first hearing and the Decision, the Judgment.

THE CHAIRMAN: I think we will have to look and see where it did arise out of.

MR. ANDERSON: We can do that again.

THE CHAIRMAN: Not that it may make a difference because it may be a point that you are entitled to take now in any event.

MR. ANDERSON: Well it is a point of principle, a point of law, I certainly suggest that whatever happened at the previous hearing it is not a point that we cannot take in that sense, but we will look at it.

The last Decision on this whole area, the *Belgacom* case – I am not sure I need to take you to it, other than to point out – it is at tab 52 – it is just an example of a domestic court in Belgium applying the principles that I have identified as arising out of *Ladbroke* and *Promedia* to the facts of that particular case, so it is a national court there saying ----

THE CHAIRMAN: We have a translation of that, do we?

MR. ANDERSON: It is in tab 52, translated for the benefit of ECC, Sweet & Maxwell. It is essentially the point that is made at para.5.14. Again we do not need to go into the facts. It is a case about again the Belgacom monopoly in Belgium refusing to grant reduced rates for telephone services that apply to daily and weekly newspapers, I think. On page 514 at para.2,

> "Articles 81 and 82 of the EC Treaty apply only to anti-competitive conduct engaged in by undertakings on their own initiative. If anti-competitive conduct is required of undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, those provisions do not apply. In such a situation the restriction of competition is not attributable, as those provisions implicitly require, to the autonomous conduct of the undertakings."

THE CHAIRMAN: Now that I have opened it where were you reading from?

MR. ANDERSON: I was reading from para.22 on p.514. Tab 52 in bundle 4(b).

THE CHAIRMAN: I am not sure about the paragraphs.

MR. ANDERSON: They are strange paragraph numbers, it is 22 (in the left hand margin) down to 25.

THE CHAIRMAN: I am concerned before we leave it that we have all the pages of the Judgment so that when we do read it – yes we do.

MR. ANDERSON: I think I have covered in that exchange what I was then going to say about the effect on Ofcom. The question of Article 6 of the European Convention on Human Rights has not been advanced so I have nothing more to say on it. The question then arises on the extent to which you, the Tribunal, should be considering the question of compatibility, and as you will appreciate from our skeleton argument we say for much the same reasons that we have been debating why Ofcom does not need to, that you do not need to because it is not necessary for your decision on the outcome of this case, because if I am right on that line of authorities –

Ladbroke Racing, Promedia, and *CIF* – that Vodafone's conduct cannot have been abusive, whatever the position is on compatibility.

THE CHAIRMAN: On that point, you say that our jurisdiction is only an Appeal on the merits in relation to the matters set out in the Notice of Application, etc. If, in considering those matters, it comes to our attention – take my first point, that it is absolutely obvious – it comes to our attention that it is absolutely obvious should we not address it?

MR. ANDERSON: It depends, if I may say so with respect, what you mean by "absolutely obvious"?

THE CHAIRMAN: Just say that the European legislation tells you that you must do X and you go off and do Y; it is absolutely clear.

MR. ANDERSON: I hesitate to commit myself on something that you describe as "absolutely clear" because if it is absolutely clear it is absolutely clear. This is not a case where it is absolutely clear. The second point is that what it comes down to is it is an appeal on the merits in relation to the grounds of Appeal – that does not mean every point that is raised needs to be addressed. If it is a point that does not need to be addressed because the views of the Tribunal, the views of anyone will not affect the outcome of the Appeal, in my submission it is not necessary for the Tribunal to address that point and, in this particular case, not appropriate given that it is a question of Community law and the compatibility of regulations in circumstances where Parliament has identified the appropriate jurisdiction as being another jurisdiction. So unless there is some compelling reason for the Tribunal to address the question in our respectful submission the Tribunal should not; and we say there is no such compelling reason. It is not a case where it is a clear answer by any means, we would suggest. I do not know if that helps you, ma'am.

THE CHAIRMAN: I think I hear your submission, we will have to think about it.

MR. ANDERSON: The *Cilfit* case to which you were taken, and I am sure my learned friend, Mr. Pickford will be taking you back, the test is there. I accept that this is not a case where you are a court of final resort and must therefore refer unless it is *acte clair* but one does get guidance from that case on the circumstances in which it is appropriate to make a reference. You were taken to para.10 of the Judgment, and the phraseology that is used there is that a court is not obliged to refer a question concerning the interpretation of Community Law raised before them if that question is not relevant, that is to say if the answer to that question – regardless of what it may be – can in no way affect the outcome of the case. That is what we say is the position here.

By parity of reasoning if there is no obligation to refer in circumstances where the answer to the question, regardless of what it may be, can in no way affect the outcome, we

would submit it would fall outside the scope of the Article that entitled reference to be made, namely, a test of necessity. It comes to the same thing. There is no obligation to refer unless it is necessary. Equally there is no power to refer unless it is necessary.

THE CHAIRMAN: Therefore you say, by parity of reasoning, if it cannot affect the outcome of the case, if there is no possibility that it can affect the outcome of the case on the principles that have now been set out about judicial reasoning you do not need to deal with it?

MR. ANDERSON: Yes.

THE CHAIRMAN: You cannot be criticised for not dealing with it?

MR. ANDERSON: That is what we say, certainly, yes.

THE CHAIRMAN: Even though it is a point taken.

MR. ANDERSON: The test, in *CIF* as I pointed out to you, was the duties on the court and, indeed, on us is to consider compatibility and disapply if the circumstances so require. It is a requirement, so if the circumstances do not require, i.e circumstances where it cannot affect the outcome of the case, or cannot affect how to categorise Vodafone's conduct, then there is no obligation on the *CIF* to disapply. One has to look at the context in which it is being considered and if it is necessary to disapply it has reached the right conclusion then, of course, look at compatibility to disapply, and if it is not necessary then do not. That was the reason for citing various authorities to support the proposition that the Court of Justice will not entertain references on hypothetical questions, or questions where the relevant national rules have not been engaged between the parties – I do not need to take you to the cases because I can rely simply on the test of necessity and the relevant Treaty Article.

THE CHAIRMAN: My concern is slightly different. I see your point, but I think there is an additional point which is the duty of the courts in this country to provide full reasons.

MR. ANDERSON: I see that, yes.

THE CHAIRMAN: And you are saying that there is no such duty where it could not affect the outcome of the case. So if a point is taken, which could not affect the outcome of the case, then we do not need to provide our reasons in relation to it?

MR. ANDERSON: Well you would need to explain why it was that you accepted my proposition that it was not necessary, but I - and I am sure everybody else on the front bench – have appeared in many cases where our wonderful arguments have not found their way into a Decision by a court because they have not been considered necessary by the Judge to reach a conclusion.

THE CHAIRMAN: But that is happening less today because the courts have firmed up on the content of reasons. It used to be because there were lots of extemporary Judgments, etc., and the reasons were not as full. Now, they have told us that they have to be full.

MR. ANDERSON: That cannot, with respect, extend to having to deal with every argument that has been addressed in front of you if you are satisfied that argument cannot affect the outcome of the case one way or the other.

Moving on, hypothetically, to if we get into the question of compatibility, what is the nature of the jurisdiction and what actual decision is it that you are being asked to consider? This really rather depends on what is meant by, in this context, "an appeal on the merits". An appeal on the merits, according to Mr. Kennelly, involves you digging down into the actual evidence on the problems associated with GSM gateways. Mr. Mercer categorises this as the prop which, if it is kicked away, the entire justification for the discipline action falls with it. That, in the context of a full merits enquiry, can only mean looking at the regulations themselves: that is to say, the lawfulness when they were introduced or when they were reviewed in 2003. Because, to look at Ofcom's analysis, and say we do not think you did a very good job, will not affect necessarily the regulations themselves.

THE CHAIRMAN: You mean analysis in the Decision.

MR. ANDERSON: The analysis in the Decision. They may say you attach too much weight to this, that and the other, but that would not lead necessarily to a conclusion that the regulations were incompatible; merely, that Ofcom had not done a good enough job of analysing compatibility. So unless they can persuade you that you have jurisdiction to consider and should consider and are able and armed with the evidence to consider compatibility of the regulations themselves, in other words, what the Minister did in 2003, it does not help them to challenge our Decision. So we would submit that what in reality Mr. Kennelly is urging upon this court is a review of the Decision to implement the regulations themselves, and we would submit that is not appropriate for a number of reasons. Firstly, it is effectively using the Competition Act to bypass s.192 and schedule 8 of the Competition Act. Secondly, we would submit that the appropriate level of review in a case like this is the *Upjohn* level of review. That is largely because we are talking about the exercise of ministerial discretion weighing up considerations and reaching a view, more than that *Upjohn* sets, if you like, the benchmark for all cases. In other words, when Mr. Kennelly says "an appeal on the merits" it turns on what the circumstances are, what the issue is. This particular issue, compatibility, if you get that far, given the level of discretion concerned, the kind of issue where this court ought to be applying an *Upjohn* style review. The importance of that is underscored by the fact that if this issue were being considered under 192, as it ordinarily would, then that is the level of review that would be exercised in the Administrative Court in relation to this kind of question of compatibility. That, of course, is also the level of review that the European Court would apply pursuant to Article 230, and of course what was as issue in *Upjohn* was not the level of review

of the Court of Justice; it was the domestic regime, and the court refers to Article 230 as, if you like, indicative of what the minimum level of review (to adopt Mr. Kennelly's phrase) should apply in this case. That is not the opinion in all cases. That is the minimum. The question of whether there is an obligation on you to adopt a higher level of detailed enquiry based on the distinction he has identified in the Competition Act between appeals on the merits and appeals to which you apply the JR, in our submission does not answer all the other reasons of applying the level of review set out in para.34 of *Upjohn*.

The third reason is that, of course, it would be a huge task for the tribunal to review the actual question of compatibility. It took many months in 2002-2003 to consider the question. There were an awful lot of people with an awful lot of views. It has been some months now again in 2005. It is a very big issue and there are a number of facts to be taken into account. Ofcom looked at two and were satisfied that on the basis of those two, harmful interference and inappropriate use of the spectrum, these regulations were appropriate.

THE CHAIRMAN: Having on the first occasion said that harmful interference was not being relied on.

MR. ANDERSON: When you say "on the first occasion"?

THE CHAIRMAN: After their first Decision. In the first hearing you were not relying on harmful interference.

MR. ANDERSON: Well, it is nonetheless a question before the Tribunal gets into the question of compatibility. Those are the items that are relied on in the Second Decision as justifying Regulation 4(2). They may be right, they may be wrong. There may be others which the Minister relied on but which we do not rely on. That is why, as they say, a full merits review of the compatibility of the regulations involves a much bigger task than the Tribunal has currently been taken through and would involve consideration of a great deal more material than has either been put before the Tribunal or that the Tribunal has been taken through. It simply will not be sufficient to wave Mr. Burns and say that is enough, that shows they are incompatible The most that that could show is that there is a question over how broad the definition of harmful interference is. We certainly, in our Decision, in addition to harmful interference identified inappropriate use of the spectrum. That simply has not been addressed properly, with respect.

THE CHAIRMAN: There is a footnote in the Decision, is there not?

MR. ANDERSON: There is footnote 46 in the Decision in which Ofcom states that it does not rely solely on inefficient uses.

THE CHAIRMAN: It says it is not relying, I think on inefficiencies.

MR. ANDERSON: No, this is inappropriate use of the spectrum which is different.

THE CHAIRMAN: Right.

MR. ANDERSON: It is inefficient or inappropriate use of the spectrum, harmful interference or public -----

THE CHAIRMAN: I see..

MR. ANDERSON: That is not to say the question of ineffective use of the spectrum does not arise. That, no doubt, will be part of what we are considering in the context of our current consultation, but the inappropriate use of the spectrum – yes, that is congestion – but Mr. Kennelly is wrong when he says it is congestion as harmful interference that is giving rise to inappropriate use of the spectrum. It is congestion which we say is both harmful interference and is inappropriate use of the spectrum. Whatever the merits of the debate on harmful interference, it is not going to get Floe and Worldwide home in this case because it is still inappropriate use of the spectrum and we have set out in our defence and in our skeleton argument – indeed, in our Decision – what we mean by inappropriate use of the spectrum. So we say the relevant test to apply is the *Upjohn* test which is verifying that the action taken by the Authority – and this would apply whether you were looking at it from the point of view of analysing the Decision of the Minister or analysing it from the position of Ofcom – vitiated by a manifest error or misuse of powers and it had not clearly exceeded the boundaries of its discretion. We say if you apply that test both to the Minister's Decision to implement the Regulations or revoke them, or to our analysis, the challenge fails. What the Tribunal should not be doing is substituting its assessment of the facts for the assessment of the Authority concerned.

THE CHAIRMAN: But if what we decided was that an appeal on the merits in this connection is effectively the judicial review test, and in so far as one is relying on congestion, if we concluded that the technical meaning of harmful interference – and let us leave aside inappropriate use of the spectrum for the time being – just assume we concluded that in relation actually to both, there is no evidence before us that the Secretary of State took into account that technical information, we do not know what else he took into account.

MR. ANDERSON: We know some of what else he took into account.

THE CHAIRMAN: But we do not know everything he took into account.

MR. ANDERSON: We do not.

THE CHAIRMAN: Therefore, we get to this part of the case. If we concluded that that was not taken account of and ought to be taken account of -----

MR. ANDERSON: It could only have been taken into account as an additional reason because we know he took account of congestion. We know that he took account of inefficient and inappropriate use of the spectrum arising out of congestion.

THE CHAIRMAN: You say that the inappropriate use of the spectrum must include congestion?

MR. ANDERSON: Yes. It is very difficult for me to stand here today and defend the Secretary of State's Decision as I am not the Secretary of State and he is not represented.

THE CHAIRMAN: Except that you have inherited it.

MR. ANDERSON: Well, we have not inherited that Decision as such, but as I say, what we have inherited are the obligations.

THE CHAIRMAN: In 2003 when you took over under the Communications Act. You were required to make sure that it was in accordance with the European Directives and therefore some sort of imprimatur of seal of approval was put on it by you.

MR. ANDERSON: Yes, of course, we took over on 25th July and the statement was 18th July, but in a sense it is a question of fact as to what he did or did not take into account. The only point I am making is that he is not here to explain what he did or did not take into account, and we cannot explain what he did or did not take into account.

THE CHAIRMAN: But you have inherited him. Did you not inherit the documents that he has got?

MR. ANDERSON: No.

THE CHAIRMAN: You did not.

MR. ANDERSON: We did not inherit the DTI; we inherited RA and Oftel; not the DTI. The RA functions, yes. We do now have the statutory functions that the DTI was exercising on 18th July 2002, yes.

THE CHAIRMAN: But you -----

MR. ANDERSON: And we are now conducting, as I say, our own consultation.

THE CHAIRMAN: Your own consultation. But you say in relation to that Decision of the Secretary of State you did not actually step into his shoes afterwards in relation to that Decision?

MR. ANDERSON: That Decision was simply a decision not to amend the Regulations so there is not, if you like, a Decision into whose shoes we step. It is just we inherit responsibility for the Regulations. There are statutory powers to amend them.

THE CHAIRMAN: Yes.

MR. ANDERSON: I am not seeking to disassociate myself from the Decision. The only point I am making is -----

THE CHAIRMAN: No, it is a technical point.

MR. ANDERSON: ---- that the Secretary of State is not here to explain, if necessary – and in a sense it is not surprising he is not here because we would say the Tribunal should not be engaged in a judicial review of the Minister's Decision which is effectively, we would submit, what Worldwide is asking you to do. It is not appropriate. The very fact that we are having this debate simply illustrates why it is inappropriate.

THE CHAIRMAN: But if you had made the Decision – if it had happened five days later or ten days later, or however long it was, and it was you who made the Decision, then you would not be able to stand here and say it is in the Secretary of State's hands.

MR. ANDERSON: One would look at what the statutory regime is for challenging a Decision such as that.

THE CHAIRMAN: We go back to that, but this conversation is on the assumption that you have lost on that, and that we can review it. If we can review it, you are saying we do not know what is in the Secretary of State's file. We do not know what he took account of.

MR. ANDERSON: You still need to embark upon a review of all the material that was then before the decision maker, consider whether the material was relevant or irrelevant, whether he took into account relevant or irrelevant considerations, all those questions, and the Tribunal simply is not, we would submit, able to do that on the basis of the material that is before it.

THE CHAIRMAN: No, but if it happened ten days later, then you would have made the Decision and the material would have been available.

MR. ANDERSON: Yes.

THE CHAIRMAN: But you are saying that because it happened when the Secretary of State was there you do not have the material?

MR. ANDERSON: I am saying that simply as a matter of fact, yes.

THE CHAIRMAN: Therefore, if it had been done by you we would have had material to review it, if it is done by the Secretary of State we do not have the material to review it?

MR. ANDERSON: You may or may not have had the material. It would have depended on what, during the preparation of the case, you considered relevant and material. Our position has always been that it is not relevant to get into this.

THE CHAIRMAN: That is a different point. I understand that is your position, but that does not mean that is what we are going to have to decide. So one has to look at it both ways. I have no idea what we are going to decide.

MR. ANDERSON: It is more than ten days. I understand that it was 29th December when we assumed powers. Let us look at it from the point of view of our Decision then in the second Decision, because a number of criticisms were raised. That would involve what weight do you attach to Mr. Burns and whether the criticism that Mr. Kennelly raised that we looked at evidence of congestion from the MNOs and he says not from the Gateway operators, but that factor vitiates our Decision.

As far as Mr. Burns is concerned, we would submit that the contents of his report are entirely irrelevant for two principal reasons: firstly, he was engaged to provide technical assistance on the circumstances in which interference could arise. He has advanced an opinion

which, given what the opinion is I am not surprised that Floe and Worldwide have adopted, but he was not engaged to provide an opinion on the meaning of the word "interference" or "harmful interference". So to the extent that he has expressed an opinion, and his report consists of an opinion on the interpretation of "harmful interference" it is inadmissible. In our submission, were the Tribunal to base their conclusion on the interpretation of the phrase "harmful interference", which we say is a matter of law, were the Tribunal to base their conclusion on the views of Mr. Burns, you would be committing an error of law, because it is a question of law, it is not a question of expert opinion.

THE CHAIRMAN: The basis upon which he was instructed was in order to give us technical assistance on technical matters.

MR. ANDERSON: Yes, not an opinion on the meaning of the word "interference". The second reason why you can disregard his report on this question is because, in fact, when you look at his opinion it is an opinion based on the ITU radio regulations which had nothing to do with Community law. He is perfectly open, and he repeats it not only in his report but several times in the course of his evidence, "I have taken the phrase 'unwanted energy' from the ITU radio regulations". The ITU radio regulations are an international Treaty designed to address an entirely different situation. There is nothing in the Authorisation Directive or the RTTE Directive which incorporates the ITU Regulation definitions. In other words, this Tribunal should be approaching the phrase "harmful interference" by reference to its ordinary meaning.

THE CHAIRMAN: What was the purpose of the ITU Regulations then?

MR. ANDERSON: The purpose of the ITU Regulations, as I understand it – they relate solely to relations between Members – that is to say between countries. They do not impose any constraint on the way in which a country administers the use of the radio spectrum within its own country. As I understand it, the primary focus is therefore to control the level and type of radio emission that is permitted across international borders. So, in a sense, it is not surprising that it adopts a narrow view, or narrow interpretation of what it means by "interference" because it is designed to address a much more specific problem, cross-border emissions. That is why it talks about interference in terms of emissions at radio equipment level.

By contrast, the authorisation and RTTE Directive, being directions under the Framework Communications Directives, are intended to harmonise, administer, regulate the use of radio frequencies within the Union, within individual Member States, and are therefore much more concerned, if you like, with not just technical but also economic competition and promotion and regularisation of the use of the radio spectrums within the Community. It is to provide a harmonised framework for the regulation of electronic communication services, electronic communications networks, associated facilities and associated services.

THE CHAIRMAN: Is it radio frequencies between countries or only within the country? Is it between France and Germany and Italy as well as?

MR. ANDERSON: No, the Authorisation Directives impose obligations on Member States. So each Member State is to implement the terms of the Directives with a view to creating a common harmonised set of Rules across the whole Community. The ITU Regulations, on the other hand, are designed to govern cross-border emissions.

THE CHAIRMAN: In regularising the national positions, does that affect cross-border emissions between countries who are Member States?

MR. ANDERSON: Forgive me, I am being very stupid, I do not fully understand what you mean by that.

THE CHAIRMAN: There are a number of borders within the EC, or EU.

MR. ANDERSON: Yes.

THE CHAIRMAN: Therefore, in dealing with each national country dealing with its own, does it also deal with what is going between countries – between France and England and Germany and France?

MR. ANDERSON: I would need to take instructions on that. I am told it may indirectly, but that is not what it is designed to achieve. It is designed to introduce a common set of rules on the efficient and appropriate use of the equipment, regularising and harmonising the rules on equipment, throughout the Community as a whole by, as in every case of harmonisation, imposing obligations on individual Member States. I do not believe it is designed specifically to address any interference problems that might occur across borders by regimes licensing neighbouring frequencies along borders. There may be provisions that deal with that, but not the provisions that we have been considering in this case. They are not designed to meet any problems of that kind. I do not know if that answers ----

THE CHAIRMAN: That is your answer?

MR. ANDERSON: It is the best I can give. I can ask those around me who have been listening to you if there is anything more and come back to you tomorrow morning on it.

THE CHAIRMAN: It may well be that they would like to think about it just to make sure that we do not go down a misconceived area on that.

MR. ANDERSON: Certainly I think I am saying something that all those behind me will agree with when I say that the ITU Regulations which are designed specifically to deal with cross-border emissions, whereas it is quite clear that the Authorisation and RTTE Directives are not aimed at specifically emissions and interference of that kind. So, on any view, the Authorisation Directive and the RTTE Directive are designed to achieve a larger purpose, a great purpose, a more diverse purpose than the ITU Regulations. So it is not merely that the ITU Regulations

are not a Community instrument, it is that they are designed to achieve something different, and there is no basis – Mr. Burns could not identify any particular basis for using the ITU Regulations other than it used the phrase "interference" and it had used the phrase "unwanted energy in relation to interference", but it is a very large step to then import that into Community legislation which has specifically not used the term "unwanted energy" or "unwanted emissions". Had they meant that the Community legislature could no doubt have included that, but it did not. Having done nothing more than define it as they have done by virtue of Article 2 of the Directive, that is where you look to find out what it means and Mr. Burns accepted, in answer to one of Mr. Pickford's questions, "If you use the term colloquially, would you accept that it obstructs services", he accepted that it did.

In answer to some of our questions he has accepted that congestion causes problems. It is just that, in his view, it is not interference. Why is it not interference? Because it is not unwanted energy. Why is it not unwanted energy? Because it uses Vodafone SIM cards. It is an entirely circular argument that does not help his definition of "wanted" and "unwanted" in the context of what we are considering here.

THE CHAIRMAN: Are you saying that Mr. Burns' evidence is to the effect that there is no technical assistance that can be given because you say the ITU is something different and that is what he has relied on and therefore there is no technical meaning of "interference" ----

MR. ANDERSON: We do.

THE CHAIRMAN: ---- but in the business they do not have any technical meaning?

MR. ANDERSON: We do. We have got a definition of "harmful interference", and it is whether it repeatedly obstructs – I forget the actual phrase – but if you look at the evidence it is quite clear that calls on mobile phones within the Vodafone network are blocked by the use of Gateways and they are blocked more by the use of commercial multi-user Gateways than anything else. That falls within the ordinary meaning of the words of the definition. That falls within the concept of "harmful interference", and that is the basis upon which the Regulations were there and the basis upon which we looked at it in our Decision and came to the view we did as set out in Annex 5. Mr. Burns actually sheds no light on that. He has adopted, as perhaps one might have expected from a technical engineer, a technical concept of "interference". It is just that he has adopted it from an instrument that is utterly irrelevant for the purposes of construing Community legislation. We do not think at the end of the day that Mr. Burns actually adds anything to the debate, other than to recognise that Gateways do cause problems. He accepted in answer to a point of clarification I put to him that, yes, they can cause problems with the police tetra network, and if that were not regulated there would be problems there. There were a number of other points that one could make.

I will let Mr. Pickford make the point about his skeleton argument. He accepts that GSM Gateways cause congestion.

THE CHAIRMAN: Can cause congestion.

MR. ANDERSON: Can cause congestion, and we know from the statement of facts that although, theoretically, single user Gateways could cause of the same level of congestion as multi-user, we also know from the Statement of Facts that multi-user Gateways are likely to cause more congestion.

THE CHAIRMAN: We also know that mobile phones can cause congestion.

MR. ANDERSON: Yes.

THE CHAIRMAN: So if you have SIMs in individual phones, as we know about the Heathrow experience, they have to put more cells in.

MR. ANDERSON: It is a question of degree of course. That is where the exercise of discretion comes into play. We know from Annex 6 to our Defence, which I do not think anyone has put in anything to challenge, is a different approach is adopted throughout the Community to the best way to deal with GSM Gateways. That reflects the margin of discretion that is conferred on the Member States in this field. Some have adopted a more rigorous approach. I would suggest that in this country the GSM market is more sophisticated than in perhaps some others in Europe where it has been less necessary to have as interventionist an approach as we do at the moment, although, as I say, we are reviewing it and constantly are reviewing it.

Of course, the nature of a Gateway is that it will always take precedence over people on their mobile phones because it effectively hogs the spectrum by constantly redialling until it gets through. They tend to displace the mobile handsets when they are in competition with one another. It is more likely that Gateway will obstruct use by mobile handset than vice versa. Obviously, the more calls that are forced through a Gateway the more likely it is to cause congestion and it is just a matter of commonsense that a multi-user Gateway is more likely to have more calls going through it than a single user Gateway.

THE CHAIRMAN: I think the evidence was that the Gateways were effectively 70 per cent single user. They had 30 per cent space for multi-user.

MR. ANDERSON: The evidence from Mr. Stonehouse. I think, on a number of Gateways, it was a 60:40 split.

THE CHAIRMAN: No, no, no, he said – I thought he said, and you can correct me, but I understood him to say that they were specific to a particular customer as to 70 per cent. of the space – I am not sure that is the right term – but the space in the Gateway.

MR. ANDERSON: I understood him to be saying that they were operating when he was questioned about continuously in use, he was saying just up to 70 per cent. of their capacity ----

THE CHAIRMAN: Was single user.

MR. ANDERSON: No, I think it was just 70 per cent. was use.

THE CHAIRMAN: We will need to look at it, but I thought that what he was saying was that there was ----

MR. ANDERSON: I understood ----

THE CHAIRMAN: Well let us see what he said.

MR. ANDERSON: I understood that at the time of disconnection Floe were only operating Multi-User Gateways, but certainly it was the use of the Multi-User Gateways that was the cause of the disconnection and that is the basis upon which ----

THE CHAIRMAN: Because 30 per cent. of the space in the Gateway was used for Multi-User. I may have misunderstood that, but we need to look at it.

MR. ANDERSON: That is not my understanding but we will obviously look back at it and we can revisit it in the morning. I understood it was substantially more than 30 per cent. I understood it was just 30 per cent. was spare capacity on continual use, because they were being used up to a maximum of around 70 per cent. capacity.

THE CHAIRMAN: You may be right. We will look at his evidence and see actually what he did say.

MR. ANDERSON: Yes, of course there is also the evidence that Ofcom took into account as decision maker in relation to this issue in the Second Decision. I have identified and set out in our skeleton material that we relied on and those were submissions to the RA during the 2002/2003 consultation, and also material submitted in the 2005 consultation. Now, what criticism that was levelled at us this morning was, well, you have looked at the evidence from the MNOs but not from the Gateway Operators. When one is looking at the question of congestion Gateway Operators would not have any evidence relevant but it is congestion on the MNOs Network that is the problem, so of course that is where we looked t o for evidence of congestion and, of course, that is where we identify what we relied on as evidence of congestion, and that, in our respectful submission cannot be criticised because that would be the only source of evidence of congestion on their networks. The Floes and the Worldwides of this world could not give evidence on the level of congestion caused in Vodafone's, Orange's networks. But, of course, these consultations both in 2002 and again in 2005 were consultations with the industry as a whole. We know that Floe made representations, made submissions, attended meetings in the context of the 2002/2003 consultation and certainly it was open to both Floe and Worldwide to submit evidence and to submit material in the context of the 2005 consultation and, of course, Floe did provide evidence, submissions and materials as part of the re-investigation into this complaint. So it is not right to say that we only had

regard to what the mobile operators had to say to us when reaching a decision, but it is, of course, right to say that the principal source of evidence on congestion will have been that supplied by the MNOs.

(After a pause) Two brief additional points. Of course, I understand – I have the references – the material was submitted by Floe to the Minister. The other point is that Floe had previously submitted – I think this is a point we make in the Defence that COMUGS do cause harmful interference if unregulated. The reference for that is volume 2(d) at tab 15E. The briefing paper to the Minister, back in 2003, which can be found in volume 2(c) tab 13 ----

THE CHAIRMAN: Shall we look at that?

MR. ANDERSON: Yes, it is a very short point, but it is tab 13 of volume 2(c). Page 10 of that is an annex B, this is material that went to the Minister. It is an analysis of Floe's telecom Gateway business, and on p.11 on the question of traffic analysis, interference, you will see in the second paragraph down under Traffic analysis there is a reference in the last sentence to the fact that as a result of Floe's Gateway business the blocking probability of a cell rises from 2 per cent. to 13 per cent. It goes on in the next sentence to point out that the implementation of 15 SIMs per operators is conservative. So that may be the bottom end of the estimate.

So of course there was material before the Minister relating to specifically the impact of Floe's GSM Gateways on traffic and hence congestion.

THE CHAIRMAN: The last paragraph of that is something which Mr. Stonehouse was addressing in his evidence, was it not, which is why ----

MR. ANDERSON: The last paragraph ?

THE CHAIRMAN: "The addition of a Gateway …."

MR. ANDERSON: Well, absolutely. Mr. Stonehouse dealt with that in the section of his evidence that I did not ask him questions on for much the same reason as Mr. Pickford did not, because it was not considered a material aspect of his witness statement.

THE CHAIRMAN: He did give some evidence orally on how, using the Gateways, you avoid congestion.

MR. ANDERSON: He gave oral evidence on how using Gateways could avoid congestion?

THE CHAIRMAN: The way that you use the Gateways can overcome the problem?

MR. ANDERSON: I think he gave some evidence, which I did not challenge because of your ruling, in relation to the fact it may be possible to mitigate some of the effects of congestion through planning and co-operation with the MNOs, but you will see from annex 5 to our Defence we do not accept that that is a solution for two main reasons. First, it all depends on co-operation between the Gateway Operator and the MNO ----

THE CHAIRMAN: No, I am not talking about that, that is a different point. We will look at his evidence.

MR. PICKFORD: Madam, that is evidence on issues that we would have sought to cross-examine Mr. Stonehouse on had the Tribunal ruled that they were admissible.

THE CHAIRMAN: We are talking about different evidence.

MR. ANDERSON: We will look again at his evidence on the extent to which Gateways can themselves be used to modulate or regulate congestion. I cannot recall him giving oral evidence on that subject, but I we will look at his evidence and we will address it tomorrow morning.

Inappropriate use of the spectrum I think I have dealt with. We know that the Ministerial submission of 7th July ----

THE CHAIRMAN: Just a moment.

MR. DAVEY: Mr. Anderson, as we are in this briefing to the Minister, I notice that immediately following the traffic analysis there is a section dealing with interference separately. The traffic analysis seems to be talking about, if you like, congestion, blockage, but interference, according to this document, seems to be related to significant amounts of radiated energy and transmitting significant amounts of energy into surrounding base stations and so on, which seems to create a distinction between interference and congestion. Can you comment on that?

MR. ANDERSON: There is no doubt that interference of the kind that Mr. Burns is talking about, and is being addressed here is interference. The question is whether the fact that one can have that specific kind of interference means that congestion does not comprise harmful interference for the purposes of the Authorisation Directive. This document is not seeking to categorise specifically for legal purposes, so I do not think with respect you can attach a great deal of weight to the fact that that distinction is being made.

MR. DAVEY: I wondered if it was a distinction being made for colloquial purposes, Mr. Anderson?

MR. ANDERSON: Well I am not the author of the Paper, but I would invite you to not to draw the inference that you are suggesting might be drawn from that fact because it is not seeking to apply its mind to the particular issue. There clearly is a subset of harmful interference that consists of interference of the kind that Mr. Burns was talking about, but that, with respect, does not answer the question which is "Look at Article 2 of the Directive to see what the definition is". Ask yourself do these Multi-User Gateways seriously degrade or obstruct repeatedly and there you get your answer. So actually, coming back to that Ministerial statement, you will see from p.7 that the Ministerial submission advocated maintaining Regulation 4(2) on the grounds of spectrum management generally, identifying GSM Gateways monopolising cells causing congestion and capacity problems. Inefficient use of the

spectrum is a separate issue identified by the Minister as a matter, not specifically addressed by us in our second Decision beyond the footnote that we have previously discussed, though, as I say, it is an issue that has arisen again the context of the recent Consultation.

That brings me to Articles 7(3) and 7(4) of the RTT Directive. This is dealt with in my skeleton. It is dealt with in more detail in our Defence in bundle 5. The Decision at paras.164 to 167 is dealt with in our skeleton at 106 to 108.

There are several short points. It is clear from the terms of 7(3), if we look that up, which is in the Legislation bundle, tab 6, the reference there to "technical grounds", it is clear, in our submission, that the refusal to connect on the disconnection in this case was not related to "technical grounds", and that, we would submit, supports our proposition that what Article 7(3) and (4) is really directed to is problems associated with equipment *qua* equipment, rather than use. That is the point we make in the skeleton at 107.

So far as Article 7(4) is concerned, there are a number of points. What 7(4) introduces is a regime of authorisation for the Member State in circumstances where there is serious damage to a network or harmful radio interference or harm to the network or its functionary. In those circumstances, the Member State may authorise disconnection. What it does not say is that in no other circumstances can an operator disconnect. In circumstances such as we have here where the continued supply by Vodafone to Floe may have involved Vodafone in itself committing a criminal act, it cannot have been the intention of 7(4) to, even by implication, restrict Vodafone's ability to cease criminal activity or activity that assisted another to engage in unlawful conduct.

In any event, even if 7(4) were engaged, what are the consequences? It imposes an obligation on us, Ofcom, to notify the Commission. We say, of course, that since 7(3) and 7(4) is not concerned with the reasoning that led Vodafone to terminate it is not engaged, but even if it were engaged what should Vodafone have done? How does it affect Vodafone's conduct? The most it could do would be to suggest that it should raise the matter with the Regulator before taking action. That is what it did, it raised the matter with the RA and said, "Have you any objections to the course of action that we are proposing?" and the Regulator did not say, "Desist". Indeed, if one turns to bundle 2(a) tab 38, you will see that in August 2002 the Regulator is already identifying – this is a letter that I believe went out to all MNOs, bottom paragraph on p.264:

> "Under the Wireless Telegraphy Act 1949 wireless telegraphy apparatus that is not specifically exempted from licensing is required to be licensed, otherwise use of such apparatus is illegal. Anyone installing or operating GSM Gateway equipment without an individual licence will be in contravention of the Wireless Telegraphy Act

1949 and enforcement action may be taken. This can involve seizure of the equipment and prosecution."

So it is indicating there that such use of apparatus is illegal.

We know from the evidence of the Vodafone witnesses that the matter was raised by the RA. The RA did not object, so what could be engaged in 7(4) is nothing more than an obligation on Ofcom to have notified the Commission were 7(4) to apply. No power is conferred upon the Commission to veto any conduct that Vodafone may have undertaken.

THE CHAIRMAN: Can you just look at 7(4).

MR. ANDERSON: Yes, I was addressing 7(4).

THE CHAIRMAN: Am I reading it wrongly – does that not require that the operator may be authorised to refuse connection, so it requires the Member State, i.e. Ofcom in this situation, to authorise the operator. The operator cannot go off and do it by himself.

MR. ANDERSON: That is the point I was just making, they did not. They raised it with the RA.

THE CHAIRMAN: But raising is not sufficient, should they need authorisation?

MR. ANDERSON: Well to raise it with the Regulator, and say we propose to cut off, can we, and the Regulator says "Fine" is an authorisation. There is no formal format in that for the granting of specific authorisations, it simply says "authorise".

THE CHAIRMAN: So you say the document at 2(a) tab 38 is an authorisation?

MR. ANDERSON: Not that document specifically, I am talking about the f act that they raised before they disconnected – that is back in August 2002. My understanding of the evidence, and I will find the exact references overnight, is that they raised the matter with the RA before they disconnected. I think it is mentioned in the Decision but I will have to find the actual references. But of course there is nothing, as I say, to suggest that authorisation on 7(4) is required in circumstances where Vodafone is terminating for illegal use by Floe in relation to its licence, in relation to its connection to its network, for the reasons we have already given. I have been handed a number of cross-references, but I would like to check them overnight before I take you to them.

THE CHAIRMAN: Tomorrow, yes.

MR. ANDERSON: I do not know if that is a convenient moment, I was going to move on to the Authorisation Directive? There are a number of points you have asked me to check on.

THE CHAIRMAN: (After a pause) We will rise now.

MR. ANDERSON: We will address the various points that have arisen in the course of my submissions and, if necessary, put things down in writing and maybe I can start tomorrow morning by going through those matters. I suspect that I do not have a great deal more to say, so I do not think I shall be more than about half an hour to forty-five minutes.

THE CHAIRMAN: We are still troubled by the point that we have raised on more than one occasion now on the IMEI – ability to turn off – on the basis that Vodafone's licence does not cover the frequency from the mobile installation.

MR. ANDERSON: I understand that, but ----

THE CHAIRMAN: What we would like some submissions on is: on the basis that Vodafone does not have a licence over that frequency, on what authority can it turn off a mobile station which does have a licence where the operator of that mobile station has a licence over the frequency?

MR. ANDERSON: Of course it is hypothetical because there is no such thing as a mobile operator in the sense that you are speaking having a licence, there are no such licences. So effectively, with respect, the question is "Under what authority can Vodafone turn off the IMEI's handsets connecting or using them to the Vodafone network?" I will take instructions but I think the answer is "because it is their network".

THE CHAIRMAN: Well it is not their network, because on your case they do not have a licence over that particular frequency going in that particular direction.

MR. ANDERSON: They do in the sense that all that device is doing is speaking to Vodafone's base transceiver stations. It is because the base transceiver stations are Vodafone's that they can stop equipment using its network if the equipment that is connecting into its network is causing it problems, congestion, or if it is a stolen phone.

THE CHAIRMAN: Well that may be your answer, but can it be considered overnight as to what the submission is by everybody?

MR. ANDERSON: Yes.

THE CHAIRMAN: It may be very simple, but it is troubling us so it needs to be dealt with.

MR. ANDERSON: Certainly tomorrow, yes.

THE CHAIRMAN: Thank you. 10 o'clock tomorrow morning.

(Adjourned until 2nd February, 2006 at 10.am)