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IN THE COMPETITION
APPEAL TRIBUNAL

Case No 1024/2/3/04

Victoria House,
Bloomsbury Place,
London WC1A 2EB

1st December 2005

Before:
MARION SIMMONS QC
(Chairman)

MICHAEL DAVEY
SHEILA HEWITT

Sitting as a Tribunal in England and Wales

BETWEEN:

FLOE TELECOM LIMITED
(in administration)

Applicant

supported by

WORLDWIDE CONNECT (UK) LIMITED

Intervener

and

OFFICE OF COMMUNICATIONS

Respondent

supported by

VODAFONE LIMITED
T-MOBILE (UK) LIMITED

Transcribed from the Shorthand notes of
Beverley F. Nunnery & Co.
Official Shorthand Writers and Tape Transcribers
Quality House, Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737

CASE MANAGEMENT CONFERENCE

APPEARANCES

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

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 QC (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.

Mr. David Allen Green (of Taylor Wessing) appeared for the Intervener Worldwide Connect Limited.

1 THE CHAIRMAN: Can I start by thanking everyone for the written submissions in advance of
2 today's hearing which have been extremely useful. We note that there has been agreement -
3 or at least advancement – on some of the matters that were being discussed on the last
4 occasion. If we take the agenda for today, we have a few preliminary remarks arising from our
5 pre-reading.

6 First, on the list of issues we agree with Ofcom's submission that a composite list of
7 issues should now be prepared. Where differences between the parties as to the precise
8 wording of the sub-issues remain then these can be highlighted. We think that is probably as
9 far as everybody can take the list of issues - there seems to be a measure of agreement.

10 MR. ANDERSON: I think that measure of agreement has even advanced since the written
11 submissions were put in, so there may be relatively few areas.

12 THE CHAIRMAN: So possibly we do not need to bother about it, there will be a document shortly?

13 MR. ANDERSON: I do not think you need to be troubled today with it.

14 THE CHAIRMAN: No, good. Disclosure – we note that Floe is not making any further application
15 for disclosure, and that Floe has located the document which was sought by Ofcom. We
16 understand that all parties have that document – I am not sure that we have it but there does not
17 seem to be any outstanding issue on disclosure.

18 MR. FLINT: Madam, we certainly do not have it, we are now told – quite contrary to what is in this
19 submission – that it will be coming tomorrow. We shall believe it when it arrives.

20 THE CHAIRMAN: Thank you. I am sure Mr. Mercer will answer that in a moment. Expert
21 evidence – we note what has been said in the written submissions on the subject of expert
22 evidence. We remain of the view that we would be likely to be assisted by some independent
23 expert evidence of a technical nature in relation to interference, or harmful interference, as
24 a background to the legal construction of harmful interference, as that phrase is defined in
25 Article 2 of the Authorisation Directive. We note that Ofcom have proposed three individuals
26 as potential single joint experts, and have provided a brief overview of the CVs of those
27 individuals. Floe has not presently proposed an individual but has identified a company,
28 “KTL”, and I think in the letter there was a mistake and it said it was “KPL” there was a typing
29 error, but it is “KTL” I understand?

30 MR. MERCER: It is, ma'am, yes.

31 THE CHAIRMAN: We do not have an individual from that company so we cannot really take that
32 much further, but we will deal with it in a moment. Vodafone has expressed a preference for
33 Mr. Hansell, but we understand that Mr. Hansell is no longer available and, in any event, Mr.
34 Hansell and/or the alternative come from Aegis Systems, and apparently – according to the

1 website – Vodafone is listed as a former client of that firm. I do not know if they are present
2 clients, but perhaps that can be updated.

3 Dr. Tuttlebee and Sir David Brown are also proposed by Ofcom. We note that both of
4 those individuals are members of Ofcom Spectrum Advisory Board, and I think that Sir David
5 Brown is Chairman of the Board. That affiliation was not drawn to our attention in the
6 material that was provided to us. We note that the terms of reference of the Advisory Board
7 includes the provision of independent strategic advice on spectrum policy to Ofcom.

8 The issue of harmful interference relates to the lawfulness of the prohibition of the use
9 of commercial multi-user GSM Gateways, and so before we can consider whether they are
10 appropriate experts we would need to be satisfied whether someone who is sitting on that
11 Board, or Chairman of that Board, can be regarded as truly independent of Ofcom.

12 We also wondered whether any relevant work has been done (or is being done) in the
13 framework of the ITU on harmful interference in the context of GSM Gateways? I think
14 Ofcom have referred to the ITU Radio Regulations and the definitions in them, and the
15 relationship between them and the Authorisation Directive in Annex 5 of the Directive.
16 Hopefully we can take the identification of an expert a little bit further this afternoon.

17 The next item on the agenda, I think, is oral evidence. The first question that has been
18 raised in submissions is about the oral evidence from Mr. Cliff Mason. At present, no party
19 has provided a witness statement from Mr. Mason. Now, as we all know there is no property
20 in a witness. Ofcom, as I understand it, does not rely on any evidence of Mr. Mason, although
21 they do provide various emails, the author of which or between whom was Mr. Mason, but
22 there is no witness statement from Mr. Mason. So there is no evidence-in-chief on which Floe
23 could cross-examine Mr. Mason. If Ofcom are not producing Mr. Mason then at the moment,
24 and subject to any submissions today, we do not see that there could be cross-examination of
25 Mr. Mason. However, Floe are entitled to seek a witness statement from Mr. Mason
26 themselves. If Mr. Mason is embarrassed by that procedure, then of course the normal course
27 would seem to be for Floe to apply to the Tribunal for a witness summons requiring
28 Mr. Mason's attendance at the hearing. Usually, that procedure results in the witness
29 providing a witness statement.

30 So subject to hearing submissions from Floe and Ofcom the procedure would not
31 appear to be for Ofcom to be required to produce a statement from Mr. Mason themselves, but
32 for Floe to take some action to obtain the evidence of Mr. Mason. However, Mr. Mason is
33 employed by Ofcom as I understand it, and therefore some co-operation of Ofcom may be
34 required to allow the employee to be interviewed. Subject to hearing any submissions our

1 initial reaction is that it is rather surprising if Ofcom were to require Floe to make an
2 application for a witness summons rather than co-operating or allowing Mr. Mason to be
3 interviewed, but we can take that further in a moment.

4 Vodafone witnesses – we note at present that there is a substantial disagreement
5 between Floe and Vodafone as to the extent that cross-examination should be permitted and as
6 to which issues. We have noted what has been written about that in the correspondence and in
7 the submissions. We agree with Vodafone that cross-examination should be limited to the
8 particular issues on which there is a conflict of primary fact arising from the present witness
9 statements. We do not propose to say anything further about this at this stage and we will hear
10 submissions as to the requirement for cross-examination for each witness in turn.

11 Further directions requested by Ofcom. Ofcom have sought guidance from the
12 Tribunal on the procedure to be followed where Worldwide is using the same solicitor as Floe.
13 Ofcom refer to concerns about documents disclosed on a confidential basis to Floe. At present
14 there is no order for a confidentiality ring or anything of that sort in these proceedings. We
15 would like to understand a little better the nature of Ofcom’s specific concerns and the
16 documents that are being referred to, and we may need to hear Mr. Mercer as to the
17 arrangements within his firm for dealing with confidentiality between the two clients, and so
18 we will need to discuss that further today.

19 Timetable and trial bundles – at the moment we agree that there should be sequential
20 skeleton arguments. There appears to be substantial agreement as to the dates for filing the
21 skeletons subject to whether Floe and Worldwide should submit skeletons on 22nd December
22 (as submitted by Vodafone) or 6th January (as submitted by Floe). We are just wondering
23 whether Vodafone are working over Christmas and therefore it is important for them to get the
24 material by 22nd December. In any event, we are going to have to timetable the expert
25 evidence into that and the expert evidence is probably going to be required before the skeleton
26 arguments, so we would need to discuss that a little bit further.

27 We are of the view that there needs to be some updating to the bundles for the use at
28 the hearing. We are conscious of the desirability of reducing costs, or keeping them in check,
29 but what is important is that all the relevant documentation and correspondence is clearly
30 contained in a chronological bundle. For my part I find it very difficult to read correspondence
31 attached to witness statements which have no chronology and one has to jump around.

32 The correspondence and documents in the previous hearings started at tab 10 in
33 bundle 1, and continued to tab 50 of volume 2. It seems to us that the further relevant material
34 now has to be integrated with that correspondence so that it is all set out and can be read in

1 | chronological order earliest date first, so one can read the whole history of this matter. So we
2 | are not persuaded by the idea of having separate files. Subject to that, it seems to us at the
3 | moment that there is no need to provide further copies of other bundles. The relevant
4 | legislation was contained in bundle 3 from the last hearing, and we can refer to that bundle for
5 | the legislation and, in fact, we would prefer to refer to it because it has our annotations on it.

6 | Bundle 4 at the last hearing contained authorities, and that bundle can also stand for
7 | this hearing insofar as those authorities are going to be referred to, but we clearly need
8 | additional bundles of the new authorities which are now going to be relied on and cited to us
9 | on this occasion. Volume 5 on the last occasion contained the statements of case, and so a core
10 | bundle will need to be prepared containing the statements of case for this hearing.

11 | In relation to the chronological bundle, perhaps the best way of forwarding that is that
12 | the parties liaise and possibly liaise with the Referendaire to discuss the mechanics of how our
13 | bundles are going to be updated. It may be that if you are going to have to incorporate new
14 | material into old bundles it is actually cheaper just to run the thing through the photocopier
15 | again, which is unfortunate but that may be the cheapest way, I do not know.

16 | Would you like us to rise for a moment because I can see that there is a lot of
17 | discussion going on, or shall we continue? You would like us to rise?

18 | MR. FLINT: No, I think we are quite happy.

19 | MR. ANDERSON: We might like a couple of minutes once you have finished the opening
20 | comments to see where we stand.

21 | THE CHAIRMAN: Yes, those are all the comments that I was going to make for the time being.

22 | I think that has covered all the directions, has it not?

23 | MR. ANDERSON: We would welcome a few moments.

24 | THE CHAIRMAN: Yes.

25 | (The hearing adjourned at 2.20 p.m. and resumed at 2.30 p.m)

26 | THE CHAIRMAN: Mr. Mercer?

27 | MR. MERCER: I will leave a couple of issues to be dealt with by my colleague, Mr. Green, on
28 | behalf of Worldwide. Dealing with Floe, on the list of issues, ma'am, my present reading in
29 | the half hour before this hearing started was that we are down to about between six and eight
30 | differences in wording – down, I think, to the point where you could manageably have
31 | alternatives and just say “That’s it”, and we know where we are, and I think that can be put
32 | behind us.

33 | THE CHAIRMAN: Good.

1 MR. MERCER: The case of missing documents, the 2003 Stonehouse document we have got, my
2 apologies they have not got it already, they will have it. They have had it already, as far as we
3 know last year. We think it is a document which actually has been there before.

4 THE CHAIRMAN: This is the email, or is that a different document?

5 MR. MERCER: That is a different document.

6 THE CHAIRMAN: Right. What has happened to the document that Mr. Flint said he has not yet got
7 – or is that the one?

8 MR. MERCER: That is the one.

9 THE CHAIRMAN: Right.

10 MR. MERCER: We did in fact discuss that with his instructing solicitor before we started today,
11 ma'am. Coming now to statements and experts, I will leave Worldwide to say what they
12 would like to about the statements, but my view on the totality of the area comes down like
13 this: there are three areas. One is basic description which you may have read in the various
14 submissions – paras. 1 to 13 of Worldwide's description document.

15 There are two other sections that need to be dealt with. One is interference and
16 harmful interference, what constitutes it and how you measure it, etc., on which ----

17 THE CHAIRMAN: We are going to have some assistance from a technical expert?

18 MR. MERCER: From a technical expert.

19 THE CHAIRMAN: We do not need anything else, do we? Otherwise, it is going to get too
20 confusing.

21 MR. MERCER: No, and the third area is congestion, whether it should be overcome, which we
22 believe is a matter for competing evidence between the parties.

23 THE CHAIRMAN: Well the first question is whether "harmful interference" as an industry
24 technicality jargon, whether we can get any assistance as to whether congestion is part of that
25 or not?

26 MR. MERCER: Yes.

27 THE CHAIRMAN: And then the question will be for us.

28 MR. MERCER: Exactly, ma'am. Names suggested by Ofcom we would share the Tribunal's view
29 and some of the concerns expressed about some of the things that were said, and that is why
30 we set off on the task of finding an independent place to look for assistance. In fact, we
31 emailed Mr. Aitken this morning, but very late on because we did not receive it until gone
32 11 o'clock this morning, a CV from KTL of their head of the interference branch. I notice,
33 ma'am, that my secretary did not email it to the other parties.

34 THE CHAIRMAN: Have they got it now?

1 MR. MERCER: It is probably sitting on their desk at the present time, which is not a good deal of
2 use.

3 THE CHAIRMAN: Well we are looking at something they do not have.

4 MR. FLINT: If this is the CV of the person who works in missiles at British Aerospace I have that
5 one.

6 MR. MERCER: The one you should have is of Kenneth John Anderson. I do not know whether that
7 is the one Mr. Flint has.

8 THE CHAIRMAN: Kenneth John Anderson.

9 MR. MERCER: KTL, used to be until seven or eight years ago, part of Kingston
10 Telecommunications Ltd. They are, I am instructed, the leading independent testing house in
11 the United Kingdom in respect of a radio interference with emissions, and specifically they are
12 a body approved by the Department of Trade and Industry for the purposes of testing pursuant
13 to the RTTE Directive.

14 I do not think, subject to what you say, that we need to make a decision on this today,
15 but I just wanted to point out the progress we were making in this particular area and, indeed,
16 as to the speciality of this company and the individual concerned in respect of testing and
17 interference.

18 THE CHAIRMAN: We will have to see what Ofcom and Vodafone say about the CV.

19 MR. MERCER: Yes.

20 MR. ANDERSON: Do you want us to deal with each point as we go through or to wait until
21 Mr. Mercer has finished the entire agenda?

22 MR. MERCER: I am in your hands, ma'am.

23 THE CHAIRMAN: Do you think we should deal with it one by one?

24 MR. MERCER: It might be useful.

25 THE CHAIRMAN: We are going to start with experts. So you are suggesting Mr. Anderson ----

26 MR. MERCER: -- would be suitable for the task, ma'am.

27 THE CHAIRMAN: What about the question of whether or not the particular Board of Ofcom which
28 the other two gentlemen sit on, whether that makes the person who sits on the Board not
29 independent? I do not know what that Board does. It is supposed to be giving independent
30 advice to Ofcom.

31 MR. MERCER: Our feeling is that that is too close in the prohibited degrees.

32 THE CHAIRMAN: Why?

33 MR. MERCER: Because members of that Board might be privy to information which, for example,
34 Floe is not, or have discussed this matter previously, we have no idea. In the case of the

1 gentleman from Motorola, we have no idea, ma'am, what commercial relationship there may
2 be between Motorola and Vodafone.

3 THE CHAIRMAN: Assuming whoever it is does not have any connection with Vodafone, and
4 assuming whoever it is has not advised Ofcom in relation to this particular matter, but does
5 advise Ofcom otherwise, always sits on this Board; and assuming whoever it is undertakes it
6 for a relevant period, they are not going to have anything to do with any of the parties in this
7 case, do you then have an objection? I am not familiar enough with the industry or the Board
8 to know whether ----

9 MR. MERCER: If I understand the nature of the closeness of the relationship between the Advisory
10 Board and Ofcom, I would have some disquiet and so would my clients.

11 THE CHAIRMAN: I am teasing it out so that Ofcom and Vodafone know what to address.

12 MR. MERCER: Yes, ma'am. If we go back to the commercial relationship with Vodafone, the
13 difficulty is this, there may have been in the past particular transactions, there may in the future
14 be particular transactions; and from my knowledge of the way the industry works, there is
15 likely to be existing arrangements relating to global framework arrangements for procurement,
16 because most of the very large manufacturers have such arrangements in place with Vodafone
17 which give such a degree of commercial closeness that it is a real concern.

18 THE CHAIRMAN: Are those your submissions on the expert?

19 MR. MERCER: Yes, there is one more nebulous concern, ma'am, forgive me for a moment if I try
20 and explain it. It is that all of the gentlemen, including the reserve who is now presented to us
21 called Mr. Hansell, who is busy, are born and bred in the GSM industry, so that will give them
22 a particular view of life. In the office we have come to describe it as "the GSM-ite view of
23 life", and that is because of the nature of their backgrounds. The other parties may well say
24 "Well they have to have that to understand the issues", to which my response is "the issue is
25 interference" and not GSM networks. It is where it constitutes harmful interference pursuant
26 to the RTTE, that is what we are looking at.

27 THE CHAIRMAN: No, not pursuant to the RTTE, pursuant to the Authorisation Directive.

28 MR. MERCER: Pursuant to the Authorisation Directive, sorry, ma'am, yes.

29 THE CHAIRMAN: That is a very important distinction.

30 MR. MERCER: But it is interference they are looking at, not just looking at everything from a GSM
31 point of view. So that, for example, we might have considerably less objection to a member of
32 the Advisory Board who came from a complementary branch of wireless telegraphy, or was

1 a generalist, or maybe did broadcasting, transmission work, would have the appropriate skills,
2 and the appropriate contacts, but was not dependent so much for his past and future on GSM,
3 or GSM based operator clients.

4 THE CHAIRMAN: You have suggested an academic and you have not produced an academic. Are
5 there none around?

6 MR. MERCER: We have not been able to find one, ma'am. I have to say that it is one of the
7 burdens of my particular job in life that I am always looking for peculiar experts in peculiar
8 areas of technology either for patents, wireless or something, and I do actually have quite
9 a reasonable contact list out there. I managed to find something for transmission technology in
10 TV in two hours earlier this week. It is not that we do not have the contacts, it is just that we
11 just could not find anybody out there.

12 THE CHAIRMAN: So the fact that you have not found one there probably is not anyone out there?

13 MR. MERCER: We think that is quite possible, ma'am.

14 THE CHAIRMAN: Are there any universities, such as Loughborough, that specialise in this sort of
15 area? I do not know if Loughborough does, but it just came to my mind as a possibility.

16 MR. MERCER: When dealing with physical sciences, ma'am, one's first thought actually is
17 Cambridge for wireless, in which indeed my own firm has an office, and I am indeed the
18 Company Secretary of an organisation called "Cambridge Wireless", so you may guess what
19 that does, ma'am, which is promote wireless interests from the Cambridge area. I have asked
20 a number of my contacts and there is one potential area from which I have not heard back,
21 which is that we have contacts with a group that co-ordinates academic experts from a number
22 of countries, in a number of disciplines, particularly providing evidence in patent actions and
23 I have not heard back from that source. It is just possible that they could produce somebody,
24 possibly not from this country.

25 THE CHAIRMAN: It is going to be very expensive if it is not produced in this country – I am not
26 sure it is ---

27 MR. MERCER: Yes, ma'am.

28 THE CHAIRMAN: So what you are really saying now is the likelihood is that it may have to be
29 somebody who advises Ofcom, but it should not be somebody who advises Ofcom in this area.

30 MR. MERCER: And whose speciality is in this area.

31 THE CHAIRMAN: Or whose speciality is in GSM Gateways.

32 MR. MERCER: Yes, or in GSM. In particular because a lot of people who provide consultants in
33 this area are not employed other than by the operators, or those providing services, which is
34 why we think that KTL with their particular bent would be very useful, ma'am.

1 THE CHAIRMAN: Well shall we hear what Ofcom say about this?

2 MR. MERCER: Yes.

3 MR. ANDERSON: We are a little surprised to hear that Mr. Mercer's objection to our three experts
4 is that they have some experience of the market in which they might be asked to provide an
5 opinion. What we put forward were three experts in the context of giving to the Tribunal
6 technical assistance which should not be controversial. They are not being asked to provide an
7 opinion. We have searched throughout the industry for relevant experts to put forward. We
8 have not been able to identify anyone who has not at some stage provided some form of
9 consultancy services to either Ofcom or one of our predecessors. That is not surprising, Ofcom
10 is responsible for the entire radio spectrum and that involves a lot of consultancy work.

11 So far as the Supervisory Board is concerned, that Board is an entirely independent
12 Board drawn from the great and the good of the industry who provide independent advice to
13 Ofcom on various high level policy issues, they do not get involved in individual transactions.
14 We are at the moment exploring the extent to which that Supervisory Board may have
15 provided opinions on this specific area, we are not aware at the moment, but it is an
16 independent Board and we do not believe membership of that Board would, in any sense,
17 impugn the impartiality of an expert properly instructed to give the technical assistance.

18 So far as Mr. Hansell and Mr. Burns – Mr. Burns was suggested by Mr. Hansell
19 because he was not available he recommended this gentleman within his own firm as
20 somebody who is perhaps even more expert on this particular area than he might be, but so far
21 as we can tell Mr. Burns has never provided consultancy work to Ofcom in this field. So far as
22 we are aware, the only involvement with Vodafone was with Vodafone (Belgium) on an
23 entirely separate point. We believe he would be well placed to provide the technical assistance
24 the Tribunal seeks, and I reiterate it is not opinion that is being sought, it is ---

25 THE CHAIRMAN: No, it is technical.

26 MR. ANDERSON: -- technical information. KTL on the other hand we would regard as wholly
27 unsatisfactory because essentially they test equipment, so instructing an expert of that kind sort
28 of pre-judges the issue. It assumes that unlawful interference is nothing more than unwanted
29 radiation which is my learned friend's case. So we would not regard him as having the
30 relevant expertise to provide the Tribunal with the technical assistance the Tribunal requires
31 which is in a slightly wider area than his particular technical expertise would provide.

32 THE CHAIRMAN: Is this Advisory Board a voluntary board or do you pay them?

33 MR. ANDERSON: They are not paid, they are more like a "think tank" that provide ideas to Ofcom.
34 They do not determine policy or anything, so we would not regard that as in any sense a bar to

1 impartiality, and we believe also that Mr. Hansell and Mr. Burns have a sufficient degree of
2 impartiality, they would be well suited.

3 THE CHAIRMAN: Mr. Burns has not advised or dealt with Vodafone, but Aegis have? Are they
4 still involved with Vodafone? Did they undertake not to be involved with Vodafone for this
5 period?

6 MR. ANDERSON: That I cannot say, but could you bear with me just a moment? (After a pause)
7 I should point out that when we, Ofcom, put work out to consultancy we put it out to tender
8 amongst the defined group of about 20 firms of which Aegis is one, but they have not to date,
9 and are not currently providing any consultancy work in this particular area. But, to be frank,
10 it is going to be extremely difficult to find anyone with the relevant expertise who has not done
11 some consultancy work for Ofcom.

12 THE CHAIRMAN: We can see that. What about Dr. Walter Tuttlebee, because Sir David Brown is
13 Motorola so we can see there may be a problem there, but Walter Tuttlebee?

14 MR. ANDERSON: I think he is one of the three names that we have put forward. We have given as
15 much as we know on his CV. I am not sure there is much I can add to that.

16 THE CHAIRMAN: Has he done paid work for Ofcom? Does he accept paid work from Ofcom?

17 MR. ANDERSON: We would need to check that, I am not aware.

18 THE CHAIRMAN: One of the ways that this Tribunal has dealt with experts before is that they
19 undertake not to act, contract, for a period.

20 MR. ANDERSON: That is a matter on which I could not take any further in the sense that we have
21 not approached these individuals yet. We have approached Mr. Hansell because he appeared
22 to be the more favoured candidate only to learn that he would not be available which is why he
23 suggested Mr. Burns. But I do emphasise that if this expert is to provide valuable assistance
24 he really needs to be instructed this week probably, if he is to produce a report by Christmas,
25 so we really do need to make some progress. We believe the sensitivities of Floe are
26 overstated given the nature of what this expert will be doing , and we are quite sure that any of
27 these individuals would recognise their duties of impartiality if the terms of reference are
28 defined. It is essentially, as my understanding of it, giving technical assistance to the Tribunal,
29 he is not giving ----

30 THE CHAIRMAN: But it is very difficult for an expert who has a relationship with one of the
31 parties, and who has or may have a financial relationship with one of the parties, to be able to
32 say to himself "I am going to be independent". The perception is that there may be a question.
33 So if one can find the most independent person that is the most appropriate person to have.

1 MR. ANDERSON: Well, with the proviso that it would need to be an independent person with the
2 relevant expertise.

3 THE CHAIRMAN: Oh absolutely.

4 MR. ANDERSON: The difficulty is everybody with the relevant expertise appears at some point to
5 have had some form of a relationship with Ofcom and I am sure would be very reluctant not to
6 have anyone in the future.

7 THE CHAIRMAN: Yes, but I am only thinking from the top of my head. If there is someone on
8 your list that is not on the list of tenderers, so that that might be more appropriate than
9 somebody who is on the list of tenderers, but I do not know if Walter Tuttlebee is on the list of
10 tenderers.

11 MR. ANDERSON: He is not, we will double check but we believe he is not. We would, I think,
12 repeat that we do not believe being on that list would in fact impugn the impartiality in the
13 context of what this expert is being asked to provide, because we seek to include within that
14 list the most expert consultants.

15 THE CHAIRMAN: For their own part it would be easier, I think, for them if they did not have that
16 sort of relationship.

17 MR. ANDERSON: The whole radio spectrum is a very broad area, and it is a very narrow issue
18 here, but I hear what the Tribunal says.

19 THE CHAIRMAN: Shall we hear what Mr. Flint says?

20 MR. FLINT: May it please you, madam, if I can make Vodafone's position plain, I have already
21 submitted to the Tribunal and we have submitted again in writing that this opinion, this expert
22 evidence is irrelevant and inadmissible; and as I understand it the Tribunal wishes to have it.

23 THE CHAIRMAN: I do not think you can say it is inadmissible, because under our rules we do not
24 have the rules of evidence such as in the courts.

25 MR. FLINT: Yes, well I have made the point.

26 THE CHAIRMAN: You may say it is irrelevant.

27 MR. FLINT: The matter of a meaning in a Directive of the phrase "harmful interference" is a matter
28 of law.

29 THE CHAIRMAN: But one has to understand that against the background, and we do not have the
30 background.

31 MR. FLINT: No, it is in the papers.

32 THE CHAIRMAN: Well that is very confusing because everybody says something different.

33 MR. FLINT: Well that may be ----

34 THE CHAIRMAN: Anyway, we are not discussing that now.

1 MR. FLINT: No, I am just making plain that Vodafone has opposed this evidence, the Tribunal
2 proposes that it should be obtained.

3 On the experts, the position on Mr. Kenneth Anderson is that he is no doubt a very
4 competent engineer, experienced in interference, but he does not purport to have any GSM or
5 mobile experience; and, indeed, the schedule to his approval form – at least I think it is, the last
6 page of the document – appears to indicate that his expertise lies principally other than in
7 telecommunications and the entry for telecommunications equipment says “Non-RTTE”.

8 THE CHAIRMAN: What are you reading from?

9 MR. FLINT: The last page of the document “Competent Body – Categories of Competence”. I do
10 not want to take an unfair point, I have only seen this document shortly before we started this
11 afternoon, but as I read it he does not purport to have any mobile telephone or GSM experience
12 and, as I point out on the last page, “Telecommunications equipment” appears to be in the non-
13 RTTE – whatever that means. But the main point is that he is no doubt an expert on
14 interference, but the question for the Tribunal so far as relevant and material is how one
15 construes the term “harmful interference” in the context of the Directive and GSM Networks,
16 and that is not a matter on which Mr. Anderson appears to have primary experience.

17 As to the other three names proposed, that is with the substitute of Mr. Burns for
18 Mr. Hansell, the position is – so I am instructed – that Aegis did do some work on a project of
19 Vodafone two years’ ago and does not currently do any work for Vodafone.

20 THE CHAIRMAN: Is that project completely different from the matters we are discussing here, or
21 is it along a similar line?

22 MR. FLINT: It is not related to the issues under discussion in the Tribunal. There is, of course, no
23 rule of law that an expert is disqualified from giving his opinion to a court because he has
24 a connection with the party, or has had, and generally, provided it is disclosed and understood
25 and the expert conscientiously applies his mind that provides no barrier at all. Of course, it is
26 primarily and firstly a matter for the expert himself. Some experts may feel very embarrassed
27 by being asked to act, but providing none of these names do in my submission they should not
28 be ruled out, particularly bearing in mind the points made by Mr. Rupert Anderson that in this
29 area most experts of repute will have worked either for the regulator, or for one of the networks
30 at some point or other.

31 Going on beyond the identity of the experts, I am bound to raise with the Tribunal
32 what power it is that is being exercised now to appoint a joint expert? As I understand your
33 rules, under Rule 19.2 there is a power to give directions as to experts. “Appointment and

1 Instruction of Experts whether by the Tribunal or by the parties”. I am not sure whether it is
2 envisaged that it is the Tribunal here ----

3 THE CHAIRMAN: No, it is the parties.

4 MR. FLINT: -- that are going to instruct the expert.

5 THE CHAIRMAN: It will be the parties.

6 MR. FLINT: Well, then the next question is who is to give instructions to the expert, and by whom
7 are those going to be settled? I am very concerned about the time and confusion that will be
8 caused by this, particularly given the track record and the difficulty of agreeing the issues, and
9 if there is a dispute on the instructions to be given to experts is the position to apply as applies
10 under specific rules in the High Court that each party is to give instructions to the expert?
11 When the expert produces a report or a draft report is there going to be an opportunity to ask
12 questions, or is it envisaged the expert will attend the hearing so that he can answer questions?
13 Now, all of those are points that need to be covered this afternoon if this is not going to
14 seriously jeopardise the hearing at the end of January. I raise those for the Tribunal because,
15 with great respect, even given the indicated path one can see room for considerable dispute as
16 to how wide this report should go and what actually it should cover, and I can see that even
17 giving instructions to the expert is going to cause some dispute.

18 So our position would be there should be no expert but if there is to be an expert it
19 should be from one of the three or four names that have been put forward by Ofcom.

20 MR. PICKFORD: Madam, similarly, T-Mobile’s position is that there is not a need for an expert but
21 obviously we do not need to go into that any further. In relation to the overriding principle
22 which the Tribunal should apply in selecting an expert it has to be that they have expertise in
23 the relevant area, otherwise the whole enterprise is entirely defunct. Mr. Flint and
24 Mr. Anderson have highlighted the clear inadequacies in the expertise of Mr. Anderson. In
25 T-Mobile’s submission, albeit that there are some minor concerns in that Mr. Burns used to
26 have a relationship in some form with Ofcom and Vodafone, Mr. Burns fits the bill better than
27 anyone else that we have seen today.

28 THE CHAIRMAN: You think Mr. Burns does?

29 MR. PICKFORD: Mr. Burns does in that he does not have any current relationship with Ofcom or
30 with Vodafone. He clearly does have ----

31 THE CHAIRMAN: Or with you?

32 MR. PICKFORD: Or with T-Mobile. He clearly does have relevant expertise and given that there
33 appears to be no perfect candidate, and we do need to select a candidate sooner rather than
34 later, in our submission he is the current front runner.

1 THE CHAIRMAN: And why is he better than Dr. Tuttlebee?

2 MR. PICKFORD: Well as I understand it there were concerns raised about Dr. Tuttlebee that he is
3 on the Ofcom Advisory Board.

4 THE CHAIRMAN: And Mr. Burns is not?

5 MR. PICKFORD: Mr. Burns is not, and Mr. Mercer has taken objection to someone who is on the
6 Ofcom Advisory Board, but that objection cannot stand in relation to Mr. Burns. Those are our
7 submissions on the matter of an expert.

8 THE CHAIRMAN: Thank you. Yes.

9 MR. GREEN: Good afternoon, ma'am, I am on behalf of Worldwide. This goes to the first round of
10 our intervention, which is the correct construction or application of the exemption regulations.
11 Our views can be put quite succinctly but are those of other companies that would like the
12 Multi-user Gateway thrust within the telecoms industry to thrive and to be part of the next
13 generation of telecommunications.

14 Insofar as any, shall we say, actual bias of the expert witnesses that they had
15 Vodafone amongst their clients, or that they are too closely connected to Ofcom, you would
16 think that by itself would be enough to disqualify them from being an expert in these
17 proceedings, but in a more general way Worldwide's view is that yes, there is an establishment
18 view on GSM and in a way the greater you are absorbed in the current ideology of GSM the
19 more partial you will be. The GSM Gateway providers such as Worldwide and Floe would
20 like to push the industry in a different direction. At the moment the current ideology shared by
21 Ofcom and the MNOs fits both of them. We actually feel at Worldwide that an expert on
22 interference is a far more appropriate expert than one who is too closely connected to the
23 current generation of GSM Gateways and outlook of GSM.

24 THE CHAIRMAN: You have not produced anybody though?

25 MR. GREEN: We completely support Floe in their ----

26 THE CHAIRMAN: But it does not appear that Mr. Anderson is an expert on interference. There is
27 nothing here to suggest that he is.

28 MR. GREEN: The company which Mr. Anderson works for have expertise in interference.

29 THE CHAIRMAN: But Mr. Anderson would have to be an expert in interference and there is
30 nothing here to suggest – I have only looked at it very quickly because it has just been
31 produced – there is nothing here to suggest that he is an expert on interference. He is an expert
32 on equipment and testing of equipment.

33 MR. GREEN: Ma'am, I accept the full force of your points. Worldwide's point of view as an
34 intervener is that if there is to be an expert it should be from the firm (or a similar firm) to the

1 one put forward by Floe. I only had notice of Mr. Anderson a few moments before the
2 hearing too, but we do strongly feel at Worldwide that a technical expert in interference is far
3 more appropriate than somebody closely connected to the current GSM ideology of Ofcom and
4 the mobile network operators.

5 THE CHAIRMAN: Mr. Mercer?

6 MR. MERCER: I suppose I should have asked in the first place whether Mr. Anderson K, from Hull
7 was any relation to Mr. Anderson QC, but I assume they are not. What Mr. Anderson K has,
8 however, is clearly as I read his CV and have read the website of the company, is a wealth of
9 experience in testing equipment to see whether it interferes.

10 THE CHAIRMAN: But that is not the problem here, Mr. Mercer. It is not whether the equipment
11 interferes, it is the other way around, it depends which way you look at it, I know, but when
12 you are looking at the Authorisation Directive you are looking at harmful interference in
13 accordance with the Authorisation Directive.

14 MR. MERCER: Yes, ma'am.

15 THE CHAIRMAN: And somebody who knows how to test equipment is not somebody who
16 necessarily will give us the assistance that we require. It might do but it does not appear to
17 have an academic background in the field and it does not appear that he has specialised in this
18 field. So without more I find it very difficult to believe for myself – I am not sure what
19 everybody else feels – that he is the right expert.

20 MR. MERCER: I think there is something I am not quite understanding here. I cannot see how you
21 can have interference without it emanating from a piece of equipment, or am I wrong in this?
22 I just cannot see ----

23 THE CHAIRMAN: I am sorry, I think you have misunderstood me. What I am saying is that this
24 gentleman, Mr. Anderson, is an expert in testing equipment, and how you test equipment, there
25 is nothing here to suggest that he is an expert in harmful interference of itself. If somebody
26 tells him to make sure that equipment does not do it he may know how to set up the procedures
27 to do that. He may not be an expert in radio frequencies and all of that. He may be but there is
28 nothing here to suggest he is. There may be somebody else who does that bit in KTL, that is
29 your difficulty. I think Worldwide is nodding their head and saying there may be something
30 what I am saying.

31 MR. MERCER: I just have this confusion.

32 THE CHAIRMAN: Well let me just see what everybody else thinks.

33 (The Tribunal confer)

1 THE CHAIRMAN: Mr. Mercer, what I have been expressing are the views of the other Members
2 of the Tribunal. It is not the machinery in itself which is causing the harmful interference, it is
3 a much more complicated issue to do with use, so there is nothing in Mr. Anderson's CV or
4 other material you have provided which shows that he is an expert in the field that is going to
5 help us. That leaves us with Dr. Tuttlebee and Mr. Burns, because nobody else has come up
6 with any other names. Now, this is a single joint expert and the idea is that both parties, or all
7 parties, are able to instruct and accept the evidence of the single joint expert. We are not
8 asking for opinion evidence, and I think that is where possibly Mr. Green's submissions do not
9 quite address the point on the expert evidence. All we are asking for is we have a number of
10 papers here which are contradictory and have been accepted to be contradictory in relation to
11 the interference problem, and the harmful interference problem. What we need is some
12 technical background so that we can bring ourselves up to speed so that we can decide what
13 harmful interference is. It would be, with all respect to Mr. Flint, inappropriate for this
14 Tribunal, who does not have that particular expertise in wireless frequencies to decide what it
15 means without having someone who is going to give us that expertise, but it is text book
16 expertise. It does not go further than textbook expertise.

17 MR. MERCER: Well, I hear what you say, ma'am, and therefore the only point I come back on is
18 – are we excluding people who are on their advisory board?

19 THE CHAIRMAN: Well if we are then that excludes Dr. Tuttlebee, and you have only Mr. Burns.

20 MR. MERCER: Referring to what I said before, I am not averse to having somebody from Ofcom's
21 Advisory Board, just not people who are quite so attached to the orthodoxy of GSM as it is
22 presently practised in the United Kingdom.

23 THE CHAIRMAN: I think whoever is assisting this Tribunal is going to have to understand that.

24 MR. MERCER: I think that is absolutely true, ma'am, but I do not think they have to be imbued
25 with a particular view.

26 THE CHAIRMAN: The difficulty is that you have not produced somebody whom you say is not
27 imbued with that view. We do not know whether these gentlemen are imbued with that view
28 – they may well not be. It is very unsatisfactory that this has not managed to be resolved.

29 MR. MERCER: Well I do not think there is very much more I can say, ma'am. Would the sensible
30 thing be for inquiries to be made of Mr. Burns and Dr. Tuttlebee and see which (if either) of
31 them is available to do it?

32 MR. ANDERSON: We can certainly do that as a matter of urgency. We can also inquire further
33 about the functions of Dr. Tuttlebee's supervisory board in this context, although I understand
34 that there is not now an objection being taken by Floe to his involvement.

1 THE CHAIRMAN: I think what Mr. Mercer is saying is that he would prefer somebody on the
2 Advisory Board who was not specifically in this part of the industry.

3 MR. ANDERSON: Well I have made my point, that simply means he has some experience of the
4 industry which I would have thought was a plus rather than a minus. It is the notion of being
5 imbued with the orthodoxy of the industry that we have difficulty in identifying quite what is
6 meant by that, but we can certainly make inquiries of both Dr. Tuttlebee and Mr. Burns as to
7 their availability, how quickly they could produce a report, but I think we are at the stage
8 where a decision has to be made today as to who we are going to approach – we are happy to
9 approach both of them.

10 (The Tribunal confer)

11 MR. ANDERSON: I should say that we do know that Mr. Burns is available because that is why he
12 was suggested by Mr. Hansell.

13 THE CHAIRMAN: Maybe we should see if Dr. Tuttlebee is available and where he falls within the
14 realm of independence so that Mr. Mercer can ----

15 MR. ANDERSON: Well we will do that and get the information to the parties as soon as possible.

16 THE CHAIRMAN: Yes. (After a pause) One would assume that either Dr. Tuttlebee or Mr. Burns
17 has not written any papers or given any advice which might be said to compromise their view
18 in this case.

19 MR. ANDERSON: Of course we will check that, but indeed as experts they would reveal that and if
20 they felt embarrassed by it would admit to it.

21 THE CHAIRMAN: Of course, and even if as it is they are only giving expert evidence on the
22 technical side, the fact that they may have gone down a different opinion route might be
23 relevant to their independence in giving their technical expertise.

24 MR. ANDERSON: Well possibly.

25 THE CHAIRMAN: That ought to be explored.

26 MR. ANDERSON: We will certainly explore that. The other matter is, of course, the terms of
27 reference and that is a matter which we need to move on to quickly.

28 THE CHAIRMAN: One moment, Mr. Mercer, none of us can see how this can be resolved unless
29 Mr. Burns and/or Dr. Tuttlebee are approached. This Tribunal does not think from the material
30 that we have before us that Mr. Anderson is expert in the field that we require, and therefore
31 we are left with these two other people.

32 MR. MERCER: Well then we will have to give them further consideration, ma'am, and we have no
33 choice in that. I do not like to use specific names of other people, but let me use an example of
34 the kind of person from the Ofcom Board I would have thought might have been more

1 independent. There is a gentleman called “Cleavelly” who sits on that Board, who used to be
2 the chairman of a consulting company, who has a wide experience. I will admit, for example,
3 I know him because we sit on the same Body – that is how I have met him. But that kind of
4 expertise – I am not saying Mr. Cleavelly would be suitable – that kind of general expertise in
5 wireless would be quite acceptable to us.

6 THE CHAIRMAN: But, Mr. Mercer, you have had weeks to propose names and this is becoming
7 extremely urgent now, that is the difficulty, and to suggest that we are going to have experts on
8 either side at the cost of doing so and then it turns out that in fact they both say the same thing
9 because this only technical evidence seems disproportionate.

10 MR. MERCER: I would agree with you there, ma’am.

11 THE CHAIRMAN: So the only answer is a single joint expert.

12 MR. MERCER: I do not think that my clients have any choice in the matter but to consider the two
13 names.

14 THE CHAIRMAN: Well then I suggest ----

15 MR. MERCER: But I would like to come back to a point of Mr. Flint’s which is that we are going to
16 need to instruct very quickly.

17 THE CHAIRMAN: I am going to turn to that, all right?

18 MR. MERCER: Yes.

19 THE CHAIRMAN: I suggest that what we do, therefore, is that the two names are approached with
20 co-operation from you, and that there is agreement between the parties as to which name is
21 instructed. You do not mind which name it is.

22 MR. ANDERSON: I think we have a marginal preference, on the basis of his expertise, for
23 Mr. Burns.

24 THE CHAIRMAN: Right, well it may turn out on the CVs that that becomes obvious.

25 MR. ANDERSON: Yes.

26 THE CHAIRMAN: At the moment I do not think that that is obvious to us.

27 MR. ANDERSON: We will certainly approach them both and provide the material to Floe,
28 Vodafone and T-Mobile.

29 THE CHAIRMAN: There is the Vodafone connection with Aegis, and the tendering list – we do not
30 know if Dr. Tuttlebee is on the tendering list.

31 MR. ANDERSON: We believe he is not.

32 THE CHAIRMAN: We think not.

1 MR. ANDERSON: We do know that Mr. Cleavelly who was considered and rejected as not having
2 the relevant expertise does also do quite a bit of work for Ofcom, so I am not sure that
3 producing yet further names is going to take the matter further.

4 THE CHAIRMAN: I hope that the matter is now going to be resolved ----

5 MR. ANDERSON: Between Tuttlebee and Burns.

6 THE CHAIRMAN: -- between the parties without a further direction from us as to who it has to
7 be ----

8 MR. ANDERSON: We hope so.

9 THE CHAIRMAN: -- having aired all the problems.

10 MR. MERCER: I wonder does Ofcom have any objection to me contacting both gentlemen and
11 talking to them?

12 MR. ANDERSON: I think we probably do. I would have thought all we are seeking to do at the
13 moment is to find out their availability and then the terms of reference will be a matter that is
14 dealt with separately. We do not think it would be appropriate for parties to be off
15 approaching these gentlemen independently.

16 THE CHAIRMAN: Well that depends on how Ofcom are going to deal with this as well. Are they
17 purely going to ask them for their availability ----

18 MR. ANDERSON: Yes.

19 THE CHAIRMAN: -- and not discuss with them anything else?

20 MR. ANDERSON: Yes.

21 THE CHAIRMAN: And they have not yet discussed anything else?

22 MR. ANDERSON: No, we have not contacted ----

23 THE CHAIRMAN: Well you have contacted Mr. Burns.

24 MR. ANDERSON: We have contacted Mr. Hansell to say "Would you be available to act as an
25 expert?" and he said "No, but my colleague might" or "would be".

26 THE CHAIRMAN: I think we have to keep a level playing field here.

27 MR. ANDERSON: Yes.

28 MR. MERCER: Very well, ma'am.

29 THE CHAIRMAN: Now the terms of reference?

30 MR. ANDERSON: What I was going to propose was that Ofcom in the first instance – and my
31 learned junior has been beavering away at it already – produces some draft terms of reference
32 for circulation before the end of the week – and this is where the difficult bit will be –
33 identifying precisely what it is that we want the expert to produce a report on so that he does
34 not go off on a frolic of his own into contentious areas, but the particular technical assistance

1 that the Tribunal wishes could be properly identified. Though, of course, we have all been
2 talking about the technical assistance to inform the debate on harmful interference, when
3 simply to identify that is not going to provide much guidance.

4 THE CHAIRMAN: We have the various statements that have been attached to various documents,
5 and one of the things that was going through my mind was that the expert could see those and
6 (a) insofar as they are very technical explain them; and (b) to say what is contentious and what
7 is non-contentious.

8 MR. ANDERSON: I think, with respect, it is more than just what is contentious and what is not
9 contentious, because particularly the second half of the Worldwide paper - and to some extent
10 so does Annex 5 – embarks on a debate on how one could otherwise regulate GSM Gateways.

11 THE CHAIRMAN: Is that relevant?

12 MR. ANDERSON: Well it is not relevant but it is contained in those papers, and if those papers are
13 sent in that form to the expert he may feel entitled to embark on that debate.

14 THE CHAIRMAN: Well no because he could be asked to ignore that.

15 MR. ANDERSON: Or we could cut it out. I think it is paras.1-13 of the Worldwide paper, because
16 beyond that they get into contentious debate on legal submissions and there is similarly an
17 obvious cut-off point in Annex 5. The problem with just providing that material is that it
18 addresses solely the question of congestion rather than other forms of harmful interference, and
19 the Tribunal may wish the expert to provide some guidance on other forms of harmful
20 interference so you can see where congestion fits in.

21 THE CHAIRMAN: Well one of the questions is whether congestion is harmful interference?

22 MR. ANDERSON: Exactly, the trouble with those technical papers is they are confined to
23 congestion.

24 THE CHAIRMAN: Which is why we cannot just use those technical papers.

25 MR. ANDERSON: Yes, I see that.

26 THE CHAIRMAN: Is the starting point not the Authorisation Directive, and the provision in the
27 Authorisation Directive – is it Article 2 – and the words that are used in there? What we are
28 really interested in I think is whether those words are jargon in the industry and therefore have
29 some meaning in the industry against which they need to be considered?

30 MR. ANDERSON: I think if one adopts that approach one is rather inviting the expert to start
31 opining on the definition of harmful interference.

32 THE CHAIRMAN: Well we have to be very careful not to do that.

33 MR. ANDERSON: My understanding is that what the Tribunal wants is some understanding of the
34 technical background from which it will then form an independent view of the meaning of

1 harmful interference, and to direct specifically to the Article 2 of the Authorisation Directive
2 may encourage the expert to go straight in to opining on the meaning of harmful interference.

3 THE CHAIRMAN: Well I think he needs to know the context in which we are doing this and
4 therefore he needs to know it is Article 2 of the Authorisation Directive.

5 MR. ANDERSON: Of course, by way of background, it is defining the terms of precisely what we
6 want in his report that is going to be the difficult part.

7 MR. FLINT: I have a suggestion which is, I hope, helpful, which is that the expert should be
8 directed to Article 2. He should specifically not be asked to express a meaning on any of the
9 words, but he ought to be asked to produce a technical report on all the factors which endanger
10 the functioning of a radio navigation service, or which otherwise seriously degrade, obstruct or
11 repeatedly interrupts a radio communication service. In other words, one follows the wording
12 in the brief of the definition. One directs the expert not to express a view on the meaning but
13 to give the Tribunal the technical background to the technical factors which could be said to
14 have those effects.

15 Then if he can be shown the rival papers that at least means one starts with him
16 pointing in the right direction. Of course, there is no guarantee that he stays there, but it is
17 a start.

18 THE CHAIRMAN: Very useful.

19 MR. ANDERSON: That is very helpful and we will draft something with that in mind and circulate
20 it hopefully by tomorrow.

21 THE CHAIRMAN: Is that the way your mind is working, Miss Howard?

22 MISS HOWARD: Well I am not quite sure of the technical implication, but yes

23 MR. PICKFORD: Madam, we would add that the extent to which the expert is to be shown the
24 technical papers it would probably be helpful if they saw the technical evidence that has been
25 provided by the witnesses, in particular Mr. Wiener has provided technical evidence in this
26 area, and that is T-Mobile's contribution to this particular debate.

27 THE CHAIRMAN: Is there any objection to him seeing Mr. Wiener?

28 MR. ANDERSON: No, I think it may be sensible if he sees everything that is in dispute between the
29 parties on the technical issues, and that includes some of the witness evidence.

30 THE CHAIRMAN: Now assuming that one went down that line, will the first step be to produce
31 a report or do you think he will need some discussion with the parties?

32 MR. ANDERSON: My initial reaction is that we should ask him to produce a draft report first, and
33 then we will take it from there because obviously no party here can necessarily commit now to

1 agreeing with everything he says, but at least if he produces a draft report we have a starting
2 point and then take it from there.

3 THE CHAIRMAN: Right. Now, Mr. Mercer, I thought we would explore exactly how it was going
4 to be put to see what you think about that sort of approach?

5 MR. MERCER: I do not have any comment on that sort of approach, that seems to be the sensible
6 way of approaching things. What I am concerned about is we will have to agree between
7 ourselves what evidence is shown to him, because I think Mr. Anderson is indicating it is more
8 than just Mr. Wiener, he was thinking of other parts of the evidence being shown as well.

9 THE CHAIRMAN: There is Mr. Weiner, there is the Worldwide document, there is a document
10 attached to the defence. I do not think Vodafone put anything is.

11 MR. FLINT: There is Mr. O'Neil, I think, on our side.

12 THE CHAIRMAN: Is that it?

13 MR. MERCER: That is what we had hoped would be it.

14 THE CHAIRMAN: And what we are hoping for is that this expert evidence is going to produce
15 a document so that we can have one document rather than trying to work with all these five
16 documents which are inconsistent.

17 MR. MERCER: Yes, ma'am.

18 THE CHAIRMAN: You have heard a little about the approach to the instructions and the wording
19 of the instructions. Are you happy with that sort of approach, because we do not want to go
20 through the manifestations that the issues document has gone through?

21 MR. MERCER: I sincerely hope not, and my view is that left between the two principal parties we
22 actually usually come out with a result, but somehow along the line there always seems to be
23 a bit of an intervention along the way which seems to create more difficulty, and I have no
24 hesitation in saying that Floe and Ofcom, and Worldwide and Ofcom can do something, I just
25 hope that all of the interveners join in with the same spirit, ma'am, as I am sure they will.

26 THE CHAIRMAN: I am sure they will. So the idea is to have something drafted by tomorrow
27 evening and exchanged, so that maybe on Monday it can be finalised.

28 MR. MERCER: Yes, I am quite happy to say for ourselves, ma'am, if it would help to have
29 a meeting on Monday to finalise things we would be quite happy to take a brisk walk along to
30 Southwark Bridge House, and we will do everything we can along those lines.

31 THE CHAIRMAN: The document should not be contentious because the contentious part is in the
32 Annexes which are going to be given, so it should not be necessary to put in anything that is
33 contentious. The wording that Mr. Flint suggested seemed to be an uncontentious wording

1 that was quite useful. For my part I would endorse the idea that we start from the wording of
2 the Authorisation Directive and Article 2.

3 MR. FLINT: In order to accelerate things could I invite the Tribunal then to rule that Ofcom should
4 on behalf of all five parties proceed to retain whoever is the selected expert and agree
5 remuneration with the expert. We do not want sordid disputes as to pay to slow things up, but
6 of course it must be clearly understood that all five parties – that includes Worldwide and Floe
7 – will be jointly liable for the expert’s fees.

8 THE CHAIRMAN: And you are the initial party, are you happy with that?

9 MR. ANDERSON: We are happy with that given the condition.

10 THE CHAIRMAN: You would be the party primarily responsible?

11 MR. ANDERSON: Yes.

12 THE CHAIRMAN: Mr. Mercer?

13 MR. MERCER: I have no objection to that, ma’am.

14 (The Tribunal confer)

15 MR. ANDERSON: I am just asked by those behind me if we could ensure in the order that, given
16 that it is public funds, the Tribunal makes it clear that all the parties are to contribute equally to
17 the costs albeit ----

18 THE CHAIRMAN: When are they going to contribute though, because we have the problem that
19 Floe is in administration?

20 MR. ANDERSON: I see that, but at least there should be no reason why the other four should not
21 pay their contributions towards the costs as soon as the costs are incurred.

22 THE CHAIRMAN: You are happy with that?

23 MR. GREEN: Yes, ma’am?

24 THE CHAIRMAN: Are you happy with that, Vodafone?

25 MR. FLINT: Yes.

26 THE CHAIRMAN: Are you happy with that, T-Mobile?

27 MR. PICKFORD: We are, madam, although ----

28 THE CHAIRMAN: Is Ofcom going to bear Floe’s costs for the time being?

29 MR. ANDERSON: We do not see why we should, Taylor Wessing should perhaps bear the costs of
30 Worldwide at the moment.

31 THE CHAIRMAN: That is not appropriate, because then they would be funding the litigation.

32 MR. ANDERSON: I can see that it is a litigation cost, but ----

33 THE CHAIRMAN: It is not that much money, is it?

1 MR. ANDERSON: Can we sort that out between the parties? I am sorry I am not attracted to that.
2 (After a pause) I am asked to invite the other parties at this stage to agree to split the costs four
3 ways in those circumstances, rather than having the public purse bear the costs of Floe which is
4 what it would amount to because the expert will have to be paid before the costs of the
5 litigation are paid by the parties.

6 MR. FLINT: If I could just make a suggestion. Should not the order simply be that each party is
7 liable, subject to any application made by the administrator of Floe to postpone that payment.
8 It is impossible to see how the administrator, who is bringing an appeal, can possibly object to
9 paying either his solicitors or the other costs of the litigation. But if such an objection is put
10 forward on paper then it can be considered, but for the time being the principle must clearly be
11 that each party pays its own share.

12 THE CHAIRMAN: Let us see what Mr. Mercer says.

13 MR. MERCER: You know the difficulty my client has, ma'am, you had already picked up on it.

14 THE CHAIRMAN: If there were going to be independent experts here you would have had to have
15 funded that. The single joint expert is resolving that problem, because you do not have to fund
16 the whole of an expert and you are only going to have to fund one-fifth of it. Are you saying
17 you cannot fund one-fifth of it?

18 MR. MERCER: No, I am not saying that, ma'am, and only half in fun and wholly in earnest I would
19 remind Ofcom we have not actually finalised the costs from last year yet, and we still have an
20 argument to make in that regard.

21 MR. ANDERSON: Mr. Mercer, that is quite an improper point to have made in the circumstances of
22 what has happened over those costs, but we do not need to go into that today.

23 THE CHAIRMAN: I do not know anything about this.

24 MR. MERCER: The only reason I raise that, ma'am, is so that you do not think necessarily the
25 balance might be all one way.

26 THE CHAIRMAN: The question is: are you going to make an application that you should not fund
27 your one-fifth share, and that Ofcom should?

28 MR. MERCER: No, ma'am.

29 THE CHAIRMAN: Right, that is the end of that point. So we have dealt with the expert, what is the
30 next item, Mr. Mercer? Oral evidence?

31 MR. MERCER: Mr. Mason, I thought, actually. Ma'am, I think you actually identified yourself my
32 thinking process concerning the question of Mr. Mason, which is that really we should give
33 Ofcom the chance to proof him ----

34 THE CHAIRMAN: That is not what I said, actually.

1 MR. MERCER: Perhaps not, ma'am, forgive me. But the eventual application we would have to
2 make would be for him to be witness summonsed. We did not want to do that straight off, or
3 to threaten it, we thought that the correct way, having done our analysis of the evidence so far
4 and, together with the client, identified the points that Mr. Mason had not actually been
5 proofed at all and yet Mr. Mason's name is one that goes through this matter like the wording
6 in a stick of Blackpool rock. If you look, as I am looking at the moment, at an analysis of the
7 contacts between Mr. Mason and Floe and what we know he was involved in, which we set out
8 in a letter which was copied to the Tribunal I think of yesterday or today – probably this
9 morning, actually – relating to his involvement in the original consultation of November 2002,
10 his involvement with Floe all through the Spring and Summer of 2003, his heavy involvement
11 in this matter altogether, and the fact that he could help us to establish better, I think, the string
12 of events and put everything into its correct time slot in respect of what was being said to
13 whom at what time in terms of the consultation, in terms of what action was going to be taken
14 in respect of gateways, in respect of those various matters, swinging all the way through to the
15 Autumn of 2003, when it is Mr. Mason whom you may recall from the first bundle, writes an
16 email to Ofcom in respect of the first investigation setting out what he thought the RA's league
17 position was in respect of the various matters. It is that continuous theme. Having this matter
18 without Mr. Mason is a bit like having Harry Potter of the GSM Gateways without Harry
19 Potter to some extent, because there is one person who goes all the way through, with both
20 sides of the fence in his knowledge, both what was said and happened to Floe and what was
21 said and happened to the other Interveners, because he was the principal person involved in
22 that. Neither he, nor Mr. Young, whom we believe was in the same section as Mr. Mason, and
23 for example whose name appears actually at the contact point of the consultation, etc., and was
24 present at meetings with Floe, neither of them have been proofed. We think that it would be
25 helpful for everybody to have that because it will add a better grid, as it were, in which to put
26 all of the various pieces.

27 MR. ANDERSON: We have asked Floe twice to identify the issues on which Mr. Mason's evidence
28 might be material and again today we hear that there is absolutely nothing that has been
29 identified. We have not proofed, and do not intend to call Mr. Mason because he can shed no
30 light on any of the issues relevant to this Tribunal.

31 THE CHAIRMAN: Are we looking at the various emails of Mr. Mason?

32 MR. ANDERSON: The various emails are before the Tribunal because the Tribunal required us to
33 disclose that area. We are not relying on them, there has been nothing identified in any of

1 those emails which gives rise to any allegation or any fact alleged against Mr. Mason that is
2 either relevant or disputed that this Tribunal needs to resolve.

3 THE CHAIRMAN: Well, Mr. Anderson, as I understand it the position that Ofcom are taking is that
4 you are not going to proffer Mr. Mason, by putting in a witness statement, for cross-
5 examination?

6 MR. ANDERSON: We are saying that Mr. Mason's role in the RA at the time, which was the
7 consultation process ultimately resulting in the decision of the Secretary of State cannot
8 conceivably be material to any issue in this case. So far as the legitimate expectation is
9 concerned, they have either got their reliance on this February 2002 meeting, and they have the
10 public statements of the RA which they have contend amounted to a change in position. The
11 background, Mr. Mason's role in all of that, is utterly immaterial because it is not relevant why
12 they changed their mind to the argument on legitimate expectation, it is just whether it did.
13 That is all material which is before the Tribunal and to simply state that having Mr. Mason
14 along because he was around at the time and can generally inform the debate and help on the
15 factual grid against which the debate takes place is simply a waste of time.

16 THE CHAIRMAN: Mr. Anderson, we have before us – whether you want to rely on them, certainly
17 Mr. Mercer is going to rely on them – various documents, the author of which is Mr. Mason.

18 MR. ANDERSON: Yes.

19 THE CHAIRMAN: One can see that if one is looking at documents out of context that is not always
20 very satisfactory, and so one can see that normally one would have the witness who prepared
21 those documents.

22 MR. ANDERSON: Well, ma'am, I do not accept that as a general proposition. If Mr. Mercer had
23 identified an email and said "This email gives rise to this point, which is relevant to this issue
24 in this case, we therefore need to ask him about that email, so be it. But that is not what Mr.
25 Mercer has done. Mr. Mercer has simply said that Mr. Mason was around at the time. He runs
26 through the case like the wording through Blackpool rock, that is enough of a reason to require
27 Ofcom to either produce a witness statement or produce Mr. Mason. What Mr. Mercer needs
28 to do if he wants to progress this matter is to set out precisely what it is he wishes to inquire
29 about from Mr. Mason and what issue it goes to in the case, and why Mr. Mason's
30 involvement is required. If that is done we will, of course, look at it, but it has not been done.
31 We have asked twice for details of what it is that Mr. Mason is needed for in these proceedings
32 and they have simply failed to identify them. Their latest letter simply says:

33 "Mr. Mason could assist on a host of topics including:

1 “(i) why the RA changed its mind over areas on which it consulted in
2 November 2002.”

3 that cannot possibly be relevant –

4 “(ii) what, apart from the general comments said to Floe about what
5 Vodafone could authorise under its licence...”

6 whatever that means, but it is irrelevant whatever it means.

7 “(iii) why the RA did not prosecute Floe?”

8 Utterly irrelevant to any issue. So they have simply failed to identify anything on which
9 Mr. Mason could assist the Tribunal, and to simply say his name appears on emails is not a
10 sufficient basis to require Mr. Mason to appear before the Tribunal, particularly since they are
11 not emails we rely on and he has not indicated that there was any particular email that gives
12 rise to an issue on which he needs to ask Mr. Mason any questions. So it is simply premature
13 to be having this debate about whether we should be proofing Mr. Mason, or whether we
14 should be co-operating with making Mr. Mason available. Mr. Mercer needs to make out
15 a case as to why Mr. Mason is a material witness and then we will consider it.

16 THE CHAIRMAN: If Floe applied for a witness summons, or let us just start at the first stage, Floe
17 goes to Mr. Mason and says “I would like to take a witness statement. That is something
18 which Floe is entitled to do. Are you suggesting that you are going to stop Mr. Mason giving
19 that witness statement?”

20 MR. ANDERSON: On the basis of the current material we see no reason for changing our view that
21 Mr. Mason has nothing of relevance to say ----

22 THE CHAIRMAN: That is not the question I was asking you. There is no property in a witness.
23 If an opposing party in a case wishes to take a witness statement from somebody they are quite
24 entitled to do it if that person will co-operate. Now, I do not know whether Mr. Mason will
25 co-operate, but Mr. Mason is your employee ----

26 MR. ANDERSON: Yes.

27 THE CHAIRMAN: -- and usually between an employer and an employee there needs to be some
28 co-operation before he consents. That seems to me to be the first stage.

29 MR. ANDERSON: I think we certainly do have a reluctance to simply allow Mr. Mercer to come in
30 and interview Mr. Mason without giving any indication of why it is that he needs to interview
31 Mr. Mason, and we do not consider that is us being uncooperative. We would regard that as
32 Mr. Mercer failing to make out a case that persuades us that our co-operation is necessary or
33 that Mr. Mason’s role is ----

1 THE CHAIRMAN: So you say that if Mr. Mercer wishes to interview Mr. Mason that the only
2 basis upon which he is going to be able to do that is by applying to us for a witness summons.

3 MR. ANDERSON: Bear with me a moment (After a pause) My instructing solicitor is absolutely
4 right, we think the first question in fact is, is Mr. Mason's evidence relevant? That is the point
5 that needs to be identified first. If the Tribunal takes the view that there is some issue of
6 relevance on which Mr. Mason can give evidence then we will take a witness statement from
7 him and produce it. But at the moment there is simply no basis for contending that there is
8 anything Mr. Mason can say that is relevant. What Mr. Mercer should do is, as I indicated,
9 identify precisely the issues on which Mr. Mason's evidence is material and then we can
10 consider the position. That is the appropriate way forward.

11 THE CHAIRMAN: Your Junior wants to tell you something.

12 MR. ANDERSON: (After a pause) Of course, if they were to go down the route of a witness
13 summons they would need to set out why it is that this person's evidence is material, and we
14 think that is the approach that should be adopted by Mr. Mercer, informally to begin with and
15 then, if he has made out a case for the relevance of Mr. Mason's evidence, we can take it from
16 there, but it is simply premature at this stage for Mr. Mercer to go along with a roving brief and
17 start interviewing Mr. Mason. We think Mr. Mercer should set out why Mr. Mason's evidence
18 is material and on what issues and then we can take it from there, because that he would need
19 to do to obtain a witness summons. So all we are asking for is the material that the Tribunal
20 would have before it could take a decision on whether or not to issue a summons.

21 THE CHAIRMAN: Mr. Mercer?

22 MR. MERCER: I am not sure how much more I can add, ma'am.

23 THE CHAIRMAN: Can we suggest something then?

24 MR. MERCER: Yes, ma'am.

25 THE CHAIRMAN: Why do you not set out in a letter effectively what the questions are that you
26 would ask Mr. Mason, because if you apply to us for a witness summons you have to set out
27 what the relevant evidence is, so if you do that ----

28 MR. MERCER: We will do that and communicate it to Ofcom, ma'am.

29 THE CHAIRMAN: Then if those letters are relevant, or they consider they are relevant, it looks as if
30 they will provide a statement.

31 MR. ANDERSON: We would ask that Mr. Mercer goes further. What is required under the Rules is
32 that they identify the matters, the facts upon which the witness is to be questioned and the
33 reasons for the questions for the examination. So he needs to set out not merely what his
34 questions are, but why they are material. That is what is important.

1 THE CHAIRMAN: Mr. Mercer, are you happy with that?

2 MR. MERCER: Yes, ma'am, on the grounds that we will merely have done the work in advance of
3 making the application if we need to, because we would need to produce that if we came here
4 anyway.

5 THE CHAIRMAN: Absolutely, so if you look at Rule 23, if you produce what you need for Rule 23
6 then either it will be volunteered or alternatively you will have to come back and apply to us
7 and we will have to decide.

8 MR. MERCER: Yes, ma'am.

9 THE CHAIRMAN: The next thing is Vodafone's witnesses.

10 MR. FLINT: The next is really Floe's witnesses, madam. Maybe I can help on that because I do not
11 know if the Tribunal has Mr. Mercer's very helpful schedule which was produced today.

12 THE CHAIRMAN: Yes.

13 MR. FLINT: What I was proposing to do to try and cut this short, if I may try, we have the
14 principles which we have put forward that there should be cross-examination on relevant
15 matters of primary fact only. The only two issues that raise matters of fact are issue 2, which
16 go to the representations made to Vodafone and its knowledge as to the use to which Floe
17 intended to put the gateways and issue 7 relating to discrimination. But the principle must be
18 that if either party wishes to challenge evidence of fact it must do by cross-examination and put
19 the point to the witness, or not make any submissions to the effect that the evidence should be
20 disbelieved or discounted subsequently.

21 Now we have the peculiar position on Floe's witnesses, whereas on our side we are
22 saying the issues are narrowed, or should be narrowed and we do not want to cross-examine
23 everybody on everything and Mr. Mercer is saying "no", all his witnesses raise relevant issues
24 and by implication they must all be cross-examined.

25 THE CHAIRMAN: Well no, if they are his witnesses, if you choose not to cross-examine them that
26 is fine.

27 MR. FLINT: Indeed, but it is I who need to make out the case for cross-examination. We have
28 attempted to narrow what the relevant areas are on which cross-examination could be
29 admissible, and we fail to persuade Mr. Mercer of that narrowing of the issues. So what I am
30 going to suggest is this, that with the exception of Mr. Mittens, the other three witnesses all
31 raise at some point, and to a limited extent, questions of fact on which there is dispute, or
32 which are capable of dispute, on which I would wish to have liberty to cross-examine.

33 Even in respect of Mr. Mittens we contend the factual evidence is not relevant to the
34 issues before the Tribunal but unless the Tribunal is prepared to rule this afternoon that those

1 facts are irrelevant to the issues, if they are to be left as potentially relevant then I must ask for
2 liberty to cross-examine if so advised, unless and until the Tribunal rules that a particular area
3 of factual inquiry is irrelevant.

4 THE CHAIRMAN: Well are you not really saying that we are not quite there to decide whether or
5 not there needs to be cross-examination of these witnesses and you want to reserve your
6 position?

7 MR. FLINT: There will need to be cross-examination to a limited extent for some of them.

8 THE CHAIRMAN: But we do not quite know where we are at the moment so it is premature to
9 decide that today, that ought to go off and we can decide it probably when the skeleton is
10 done?

11 MR. FLINT: If we are not to have cross-examination of particular witnesses on particular factual
12 issues where there is a conflict then the Tribunal will need to rule clearly that that is an
13 immaterial conflict and neither party needs to cross-examine.

14 THE CHAIRMAN: That can be resolved ----

15 MR. FLINT: That can be resolved maybe at the beginning of the hearing.

16 THE CHAIRMAN: I would have thought so.

17 MR. FLINT: So I simply want to make our position clear that on the four Floe witnesses we reserve
18 our right to cross-examine, if so advised, and if permitted by the Tribunal but, of course, we do
19 hope that by the beginning of the hearing the Tribunal would be in a position to make clear that
20 on certain aspects the conflict of evidence is immaterial and therefore does not require cross-
21 examination.

22 On the Vodafone witnesses similar considerations apply, but there we ask the
23 Tribunal to note that there is no application to cross-examine our witnesses dealing with the
24 discrimination case, that is the recall account, and we point out in our observations that
25 Mr. Mercer is quite entitled not to cross-examine, but it must follow that he has to accept that
26 evidence and cannot make submissions to the contrary at the hearing.

27 On the other witnesses we say most of the areas of intended cross-examination are not
28 questions of fact, or are immaterial but again the same problem arises. Unless the Tribunal is
29 prepared to rule it out today, we may have a rather empty debate if we go through the
30 witnesses one by one. I think both parties are clear that the Tribunal would like to see cross-
31 examination confined. We entirely share that view. We think there should be cross-
32 examination only on directly relevant issues of primary fact which, on our side, are simply
33 Vodafone's knowledge at the time of the agreement, and discrimination. Discrimination it
34 appears the other side does not want to cross-examine our witnesses, so that cuts that right

1 down, and so we are left with knowledge at the time of the agreement and on that basis one
2 would hope that if those submissions are accepted by the Tribunal at the beginning of the
3 hearing we may be down to cross-examination of two or three witnesses on each side. In any
4 event it will not be very lengthy and I would not dissent from the indication that we will need
5 perhaps a day, a day and a half on evidence, not much more.

6 I am happy to take them witness by witness and persuade you that certain areas are
7 irrelevant so that we know that those witnesses need not come to the Tribunal. I suspect we on
8 our side would need to know whether we are to line these witnesses up or not, but I am in the
9 hands of the Tribunal.

10 THE CHAIRMAN: It might be better, you are saying, just to leave it for the time being?

11 MR. FLINT: Well no, that is true on the Floe witnesses because there is some potential cross-
12 examination for three out of the four, so that does not matter, but on the Vodafone witnesses
13 we could go through and I would seek to persuade you quite quickly that most of the areas of
14 cross-examination are completely irrelevant, they go to issues of law or technical issues, not to
15 issues of primary fact. If the Tribunal was prepared to give an indication this afternoon on
16 those points then at least we would know we would not have to produce the witness, and
17 I would also be prepared to say that if there was a subsequent change in the scope of the issues
18 and Mr. Mercer wanted to reargue a point on a particular witness I would not seek to shut that
19 out, but it would be helpful this afternoon if we were to know from the Tribunal what your
20 views are as to the Vodafone cross-examination.

21 (The Tribunal confer)

22 THE CHAIRMAN: Yes, Mr. Pickford?

23 MR. PICKFORD: Thank you, madam. We are in a parallel position to that of Vodafone. Whilst
24 our interest in cross-examination is not as extensive as Vodafone's there are three witnesses,
25 Mr. Happy, Mr. Mittens and Mr. Stonehouse ----

26 THE CHAIRMAN: Who you want to reserve your rights in relation to.

27 MR. PICKFORD: Who we would need to reserve our rights in relation to.

28 THE CHAIRMAN: Mr. Mercer, what is going through the mind of this Tribunal is that at the
29 present time, when we do not know the scope of what is going on, it may be not appropriate to
30 decide this issue today and that it might be better as Mr. Flint was suggesting to leave it over,
31 and to deal with it when we have seen the skeletons. Now, the only difficulty with that is that
32 Mr. Flint says that of course, he has to reserve certain witnesses which might not be
33 appropriate.

1 If you are going to cross-examine his witnesses you have to have evidence which
2 you are relying on, on which you can cross-examine. It may be that in relation to certain of the
3 points that you have referred to in your letter there is no such evidence. So I suggest that you
4 re-look at that and see whether or not you still wish to cross-examine, for example, Mr. O'Neil,
5 and that this matter is put back to a later date, and nearer the hearing. But in the meantime you
6 could look at it and if you decided they did not have anything in their statements which you
7 were challenging because you did not have any evidence to submit to us ----

8 MR. MERCER: Yes, ma'am.

9 THE CHAIRMAN: -- then you could inform the parties that that was the case.

10 MR. MERCER: Yes, ma'am.

11 THE CHAIRMAN: Would that be helpful?

12 MR. MERCER: That would be helpful, ma'am. From our part all four have been warned to be here.

13 THE CHAIRMAN: I appreciated that, so I did not think that that was a problem. But if it turns out
14 that there are certain witnesses on the Vodafone side which do not need to be warned, then it is
15 inappropriate to keep them with the date in the diary.

16 MR. MERCER: Yes, ma'am.

17 THE CHAIRMAN: You were not involved in this, were you?

18 MR. ANDERSON: No, you will see from Annex 3 to our submissions, we have reserved our
19 position in relation to a very few areas.

20 THE CHAIRMAN: Mr. Flint, is that all right? I think that is the most sensible way to deal with it
21 for the time being?

22 MR. FLINT: Yes. I suppose it depends when you are thinking of having, I assume, another case
23 management conference before the hearing.

24 THE CHAIRMAN: Unless it can be resolved.

25 MR. FLINT: Unless it can be resolved.

26 THE CHAIRMAN: Hopefully it might be able to be resolved.

27 MR. FLINT: Absolutely. Certainly, at the moment we have potentially seven witnesses whom they
28 have given notice to cross-examine. I can certainly see that one is likely to be required, so that
29 is an advance.

30 THE CHAIRMAN: I think there is more than one that is likely to be required.

31 MR. FLINT: I think we will ask in correspondence to try and focus it down to a shortlist of three or
32 four who are potentially really required.

33 THE CHAIRMAN: I suspect it can be dealt with in correspondence.

34 MR. FLINT: Well I hope so.

1 THE CHAIRMAN: Mr. Mercer, if you are saying that you need to cross-examine somebody on
2 a particular thing then you have to show your evidence which is contrary to what is being said
3 and then it becomes clear, and if that is not the case then there is no basis upon which you can
4 cross-examine, and so I would have thought it would be worth isolating those matters.

5 MR. MERCER: Yes, ma'am. Timetable?

6 THE CHAIRMAN: Further directions, can we just deal with that before timetable?

7 MR. MERCER: Yes.

8 THE CHAIRMAN: This is the Worldwide point.

9 MR. MERCER: I will leave Worldwide to deal with that, if I may.

10 THE CHAIRMAN: Yes, shall we hear what the point is?

11 MR. ANDERSON: Well the point is simply that there has been some confusion over the previous
12 weeks of just what Taylor Wessing's role is in relation to Worldwide and Floe, because for
13 example Mr. Green has written on behalf of Floe and then today says he is instructed only on
14 behalf of Worldwide, but we do understand now that Mr. Green is prepared to give an
15 undertaking, the precise terms of which I do not know, but he is yet to reveal them to us, so we
16 are not troubling the Tribunal for anything this afternoon.

17 THE CHAIRMAN: Good.

18 MR. GREEN: Ma'am, Mr. Anderson is being perhaps a little mischievous. I have agreed with
19 lawyers at Ofcom the terms of an undertaking that I have not seen confidential information,
20 should I do so I will report it immediately to the Tribunal and to Ofcom and I undertake further
21 not to ever share any such information with my client.

22 THE CHAIRMAN: "Share" – what do you mean by "share"?

23 MR. GREEN: Disclose any confidential information which I come into possession of.

24 THE CHAIRMAN: Well I think this is a matter which needs to be sorted out internally. It would be
25 very unfortunate if another solicitor had to be instructed ----

26 MR. ANDERSON: Absolutely, it was simply that the position was unclear to us but it may now be
27 sorted out by Mr. Green's undertaking.

28 THE CHAIRMAN: I think it needs to be sorted out internally and if there is a problem you can
29 come back.

30 MR. GREEN: Furthermore, ma'am, I am acting on behalf of Floe in the Court of Appeal case, not in
31 this case, as is counsel.

32 THE CHAIRMAN: Which is completely separate really.

33 MR. ANDERSON: We were aware of that, yes. That is not an issue.

34 THE CHAIRMAN: If that is the ----

1 MR. ANDERSON: No, that is not the issue, but that is not a matter that concerns us, it was only in
2 the context of these proceedings that we were troubled about what the position was.

3 THE CHAIRMAN: Well let us hope it can be sorted out between the parties and the matter can be
4 resolved for the future.

5 MR. MERCER: Timetable, ma'am?

6 THE CHAIRMAN: Yes.

7 MR. MERCER: I think you identified the difference which is whether I clear the Christmas period
8 for festivities, or whether there will be the Mercer family gravy stains on the skeleton argument
9 before it is delivered.

10 THE CHAIRMAN: Or whether Mr. Flint is intending to work over Christmas?

11 MR. MERCER: Well I am afraid I cannot speak for Mr. Flint on that, you know how hard working
12 the Bar are, ma'am, I would not put it past him really. But we would, I think, very much
13 appreciate being able to complete the exercise by 6th January. We do not think that that should
14 massively inconvenience the other parties.

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

16 MR. FLINT: Indeed.

17 THE CHAIRMAN: In fact, one has to slot in the expert evidence, and if that could be done before
18 Christmas – it is quite a tall order.

19 MR. ANDERSON: We will certainly do our best.

20 MR. PICKFORD: Madam, if that concludes the matters that were listed in the Tribunal's directions
21 for the case management conference, it is ----

22 THE CHAIRMAN: You have another application?

23 MR. PICKFORD: Yes. It is somewhat regrettable that I need to be making this application again,
24 and I get a certain amount of déjà vu in doing so. You may recall that at the end of the last
25 CMC I drew the Tribunal's attention to the fact that we were still struggling with a letter that
26 had been written to us on 18th October saying words to the effect of "Here is the evidence in
27 respect of Recall, but note that some of it has been amended and some of it has been deleted."
28 We asked for clarification of that in the CMC and in three subsequent letters, and we are still
29 waiting for a response.

30 MR. MERCER: I thought I had explained it actually. We will write by close of business on
31 Monday, ma'am, and set down what I thought I had said. I must be hallucinating again.

32 THE CHAIRMAN: Well, did you say it in this Tribunal?

33 MR. MERCER: I think I did.

34 THE CHAIRMAN: Well if you said it in this Tribunal we can check on the website.

1 MR. PICKFORD: What Mr. Mercer said in this Tribunal is that he would be “explaining the matter
2 tomorrow in writing”, and that letter never came.

3 THE CHAIRMAN: Well can we leave it that it will now be resolved in writing.

4 MR. MERCER: We will sort it out. There is the question that Ofcom raised of the actual timetable
5 for the hearing itself, and I do not know whether you are going to deal with that today, ma’am?

6 THE CHAIRMAN: I would not have thought that that needs to be dealt with today.

7 MR. MERCER: I merely point out, to save Worldwide’s embarrassment, that their name does not
8 actually feature in the list at all.

9 MR. ANDERSON: That is simply because it was reserved last time as to whether they would be
10 making any oral submissions or not, so there is not as yet any order from the Tribunal that they
11 should. Certainly, we would submit that if they are to be making oral submissions they should
12 be brief.

13 THE CHAIRMAN: I think the idea was that if they did make oral submissions they would make the
14 submissions rather than Floe making those, because they are legal submissions, and that Floe
15 would therefore follow only insofar as they wanted to add anything, or otherwise they would
16 adopt the submissions so that it would effectively embrace the time that Floe would have had
17 to produce ----

18 MR. ANDERSON: Yes, they might carve out some of the points Floe would otherwise have made
19 but they will not be making the same points.

20 THE CHAIRMAN: Yes.

21 MR. FLINT: Can I raise the matter of the length of the hearing, madam? Your order on the last
22 occasion said it should be listed on 30th January, time estimate to be considered further at the
23 next case management conference which is today. The parties need to know whether we are to
24 reserve five days. I am looking with some trepidation at the timetable, it looks as if that would
25 be prudent or could no be dismissed as wholly unreasonable.

26 THE CHAIRMAN: It is prudent at the moment, unfortunately.

27 MR. FLINT: I do have a suggestion though to shorten the time of the hearing, apart from sticking to
28 the issues and cross-examining only on questions of fact, which is to dispense with any
29 opening submissions and to take evidence first. If I can explain the reason for that it is to avoid
30 repetition, so we have one set of submissions from each party, subject to any reply, and to
31 avoid hypothetical questions as to evidence – so if the evidence comes out like this, then that.
32 Whereas if we just take the evidence first we go straight into my cross-examination, so far as it
33 is needed, of the Floe witnesses, and then the Floe cross-examination of Vodafone witnesses,
34 and any other cross-examination, and that is dealt with in the first day and a half, or certainly in

1 the first two days. That then leaves us three and a half days for submission and, speaking for
2 myself, I would far rather have three or four hours in one go and get all my submissions done
3 rather than two hours at the beginning and two hours towards the end.

4 THE CHAIRMAN: It is an interesting suggestion and I suggest that everybody thinks about that and
5 that can be resolved at a later time, but it is an interesting suggestion.

6 MR. FLINT: We just do need to resolve it before we start though.

7 THE CHAIRMAN: Absolutely. (Laughter) But it depends on which witnesses we are having and
8 how long, and the other question is about the expert of course because we might need him first
9 before we can understand anything else.

10 MR. FLINT: Indeed, and that would, I suggest, add some force to my suggestion, so if one took the
11 expert evidence first and everybody asked their questions, he could then leave and then we
12 could move to argument on a reasonably secure basis.

13 THE CHAIRMAN: Yes. So, as I said, it is an interesting suggestion which needs to be considered
14 properly.

15 MR. MERCER: I heartily concur, ma'am, I think that would save quite a lot of time.

16 THE CHAIRMAN: Well we will leave it over and resolve that nearer the time of the hearing but
17 unfortunately it looks as if we are going to have to reserve five days for the time being. If we
18 can do it in a shorter time, that would be preferable.

19 Going back to the expert, hopefully you will reach agreement and hopefully you will
20 reach agreement by Monday morning, or Friday night. If you do not, then you are going to
21 have to come back to us, are you?

22 MR. ANDERSON: By "agreement" do you mean agreement on the identity of the expert or the
23 terms of reference?

24 THE CHAIRMAN: Both.

25 MR. ANDERSON: Well I am not sure we will get agreement on the terms of reference as early as
26 Friday night.

27 THE CHAIRMAN: No, that would be Monday, but agreement as to the identity of the expert?

28 MR. ANDERSON: Identity of the expert and terms of reference – if we cannot reach agreement on
29 either one or both then of course we will need to come back to you.

30 THE CHAIRMAN: Should we not have a deadline for that?

31 MR. ANDERSON: I think we certainly should, yes. Tuesday, 10 o'clock I hear, and certainly we
32 would not want to push it much later than that.

33 (The Tribunal confer)

1 THE CHAIRMAN: We suggest 4 or 5 o'clock on Monday, and that what is being suggested is that
2 if there is not agreement it is delegated to me, so that we can have a hearing quickly.

3 MR. ANDERSON: As before, yes, certainly. That would be a hearing on Tuesday, would it?

4 THE CHAIRMAN: I cannot remember what I am doing on Tuesday.

5 MR. ANDERSON: Well if necessary it could be done by telephone.

6 THE CHAIRMAN: If it is just a name I can deal with it. If we have to resolve the terms of
7 reference we might be able to do it on the telephone, or we might have to have a hearing.

8 MR. ANDERSON: What we would do is clearly provide to you a copy of the document with the
9 alternative forms of words that people can explain why it is that they prefer their particular
10 version if they are not agreed. But if we get that to you then perhaps you, ma'am, can decide
11 whether you need to see us in person or can deal with it on the telephone, or indeed even in
12 writing.

13 THE CHAIRMAN: Yes, thinking about it I think I can deal with it on Tuesday.

14 MR. ANDERSON: Excellent. We shall endeavour to let you know by 5 p.m. on Monday.

15 THE CHAIRMAN: I am not sure what time on Tuesday but I think I can deal with it on Tuesday.

16 MR. ANDERSON: I am sure we will be flexible.

17 THE CHAIRMAN: Are there any other matters that need to go into the order? No, good. As you
18 may have realised the Tribunal has been re-reading the papers in this case in preparation for the
19 CMC today and there are certain matters which have occurred to us during our reading which
20 we think it might be helpful to mention now. We do not expect anyone to address them today
21 but we feel that it might be helpful to raise them so that you can bear them in mind when you
22 are writing your skeleton arguments in particular to disabuse us of any thoughts we have had
23 which might be misconceived.

24 25 **HARMFUL INTERFERENCE**

26
27 It may be helpful if I indicate what is worrying us from our preliminary look at Article 2 of the
28 Authorisation Directive – I think some of this may have come out in our considerations over
29 this afternoon but I will repeat it. It may be that the key question will turn out not to be what is
30 interference and how interference arises, but what interference is actually “harmful
31 interference”? To what extent do GSM Gateways “seriously” degrade, obstruct or
32 “repeatedly” interrupt a GSM mobile telephony service – really what we were discussing in
33 relation to how the expert is to be instructed.
34

1 To us, as lay people, it appears that interference may be a common occurrence, and the
2 example that comes to our mind is when travelling in a taxi one may experience interference
3 with a mobile telephone conversation from a taxi radio or from another mobile user. We
4 assume for the moment that that sort of interference is not classified as “harmful”. When one
5 travels on an aeroplane, on the other hand, the use of a mobile phone is prohibited because of
6 the interference that can be caused to the frequencies used by the safety and navigation
7 systems, so that interference may be classified as harmful. In that regard, we would also like
8 some assistance on whether capacity is relevant to harmful interference under the
9 Authorisation Directive.

10
11 In addition, network capacity may vary depending on discrete circumstances. Is the
12 Authorisation Directive concerned with, for example, continuous or repeated interference
13 generally rather than – and I do not mean to be contentious there although it may sound to be –
14 intermittent and discrete interference? I think that raises the question of what “repeatedly”
15 means in Article 2.

16 17 **SELF USE AND COMMERCIAL USE**

18
19 We understand the submission to be that regulation 4(2) of the exemption regulation is a
20 condition to the general authorisation under Article 6 of the Authorisation Directive. That
21 requires the condition to be objectively justified in relation to the network or service
22 concerned, non-discriminatory, proportionate and transparent. The condition differentiates
23 between self-use and commercial use. However, we presently understand that the underlying
24 reason for imposing the condition is concerned with the volume of traffic usage on the
25 frequency.

26
27 The evidence before us on the last occasion was that similar levels of traffic can exist in either
28 circumstance. We would therefore like assistance on whether a condition discriminating
29 between self and commercial use can be justified under Article 6.

30 31 **OBJECTIVE JUSTIFICATION, UNLAWFULNESS AND NATIONAL LAW**

32
33 The starting point is that the commercial use of GSM Gateways must be licensed. This applies
34 both to single and to multi-use. Vodafone entered into the Agreement which concerned the

1 commercial use of GSM Gateways. Vodafone's case is that the Agreement related to single
2 use and, since Floe now admit to multi-use, that Floe were acting outside the Agreement.
3 Vodafone submit to us that this case is concerned only with multi-use and that the Tribunal
4 need not concern itself with single use. However, since both types of use were unlawful
5 without a licence it seems to us that there may be some inconsistency between the submission
6 that Vodafone were entitled to cut off Floe because of multi-use when they entered into an
7 agreement for single use and when they have not cut off commercial single users.

8
9 So what is troubling us in this context is Vodafone's submission that they relied on the law to
10 cut off Floe. Also, we are troubled by the fact that Vodafone entered into the Agreement with
11 Floe on 12th August 2002 because it would seem to us, on Vodafone's case that at inception
12 Vodafone were potentially committing a criminal offence or, at least, had advice from Mr.
13 Flynn on 21st August 2002 which highlighted a competition law problem. In this regard we
14 have not been given the instructions to Mr. Flynn or the complete advice so we do not have a
15 complete picture of the surrounding circumstances in relation to the acquisition of that opinion.
16 We note that the advice concerns the "GSM Scheme", and we do not know what that relates to.

17 18 **THE TRIBUNAL'S JURISDICTION**

19
20 We note that submissions are being made that the lawfulness of the exemption regulations is to
21 be determined on strict judicial review principles. We are at present not convinced that this
22 submission is correct since the exemption regulations must be compliant with the
23 Authorisation Directive and that question may ultimately be one for the European Court. It
24 seems to us, therefore, subject to everybody's submissions, that our jurisdiction in this regard
25 must mirror the approach of the European Court. We note that Worldwide have raised this
26 and that is really the main part of their intervention, but because of the emphasis on judicial
27 review in certain of the submissions that have been made to us at this CMC we thought we
28 should just mention again that this question will need to be fully dealt with in the skeleton
29 arguments.

30
31 At the moment it seems to us that when hearing an appeal against the actions of Ofcom under
32 the 1998 Act, we ourselves may have a duty to ensure that Ofcom's decision is consistent with
33 applicable European law. It may not be open to us to ignore the possibility that the regulation
34 is non-compliant, even if Vodafone's action at the time may not be subject to a penalty because

1 it was thought by Vodafone to be consistent with applicable national law. When making
2 submissions on how we should approach the issue of the compatibility of the exemption
3 regulations with European law we would therefore be assisted by submissions as to our
4 jurisdiction in this matter.

5
6 A further question in that regard is whether or not the case that is now being made by Ofcom in
7 reliance on harmful interference was specifically considered or properly considered by the
8 Secretary of State at the time the regulations were made. If that justification was not
9 specifically considered we wonder whether Ofcom can now rely on it. We should say that we
10 have looked very briefly at the paper to the Minister, which I think you referred us to the last
11 occasion, which is dated 7th July 2003, and it is unclear to us whether at that time reliance was
12 being placed on harmful interference itself. We recollect that we were told at an earlier
13 hearing that unfortunately the contemporaneous material supporting the exemption regulations
14 initially is unavailable and so there is no evidence as to whether harmful interference was
15 relied on at the initial stage. We also recollect that the exemption regulations were made under
16 a predecessor Directive to the Authorisation Directive. We mention all those points now to
17 give Ofcom further opportunity to consider the overall position on that.

18 19 **THE SCOPE OF THE LICENCE**

20
21 Having regard to the submissions and documentation that has been provided on this occasion,
22 we wonder first, whether Floe's submission that the ETSI Standards have nothing to do with
23 the licence is really a realistic submission and we would invite Mr. Mercer to consider whether
24 he wants to pursue that submission.

25
26 We would also invite Mr. Mercer to consider whether his submission that GSM Gateways are
27 in reality "Base Transceiver Stations" is also realistic. I do not want Mr. Mercer, or anybody
28 else, to take it that I am indicating whether either of those arguments is correct. All I am
29 saying is that could you just look at it again to see whether it is an appropriate argument to
30 make.

31
32 It seems to us that the submissions which are addressed to these issues may not address the key
33 question concerning the licence. What is troubling us regarding Ofcom and Vodafone's
34 submissions on the scope of the licence is whether the licence is properly to be regarded as a

1 licence authorising the use of GSM radio frequencies by Vodafone rather than as a licence of
2 specific equipment. We note that Article 5 of the Authorisation Directive contemplates the
3 licensing of radio frequencies. It makes no reference to the licensing of specific equipment
4 which uses such frequencies. We are wondering what significance this has for Ofcom's new
5 interpretation of the Vodafone licence.

6
7 Mr. Mason's correspondence referred to in our earlier judgment, and which we have referred to
8 earlier today as well, would appear on a first reading to indicate that his view was that the
9 frequencies had been licensed to Vodafone and the other mobile operators, and we also note
10 that the advice to the Minister, which I have just referred to, also reflects that understanding.

11
12 We hope that our present thoughts are of some assistance to the parties in preparing the
13 skeleton arguments and so that concludes my commentary on our reading so far.

14
15 The final matter is whether or not we have another CMC? At the moment I would suggest that
16 we wait to see what happens and, depending what it is, it will be either me or the three of us
17 who will sit if we cannot resolve matters in writing and another hearing is necessary. Does
18 that accord with everybody's view?

19
20 MR. FLINT: Yes.

21 MR. ANDERSON: Yes.

22 THE CHAIRMAN: Because I think if we fix a CMC then the likelihood is that it will take place
23 whether or not we need it. If we do not fix it, it may be that we can resolve the matter without
24 having to have a hearing. Anything else? Thank you very much.

25
26 (The hearing concluded at 4.35pm)
27