**IN THE COMPETITION APPEAL TRIBUNAL**

Case No 1024/2/3/04
1027/2/3/04

Victoria House,
Bloomsbury Place,
London WC1A 2EB

2nd February 2006

Before:
MARION SIMMONS QC
(Chairman)

MICHAEL DAVEY
SHEILA HEWITT

Sitting as a Tribunal in England and Wales

BETWEEN:

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

supported by

**WORLDWIDE CONNECT (UK) LIMITED** Intervener

and

**OFFICE OF COMMUNICATIONS** Respondent

supported by

**VODAFONE LIMITED**
**T-MOBILE (UK) LIMTED** Interveners

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# H E A R I N G
# DAY FOUR

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# APPEARANCES

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

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

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

Mr. Charles Flint 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. ANDERSON: Good morning. There were a number of points arising from yesterday which we said we would come back to you on. If I can take you through those first before resuming the end of my submissions. The first was the relative areas dealt with by the IT regulations and the Directives, and what I was proposing to hand up was the first section of the ITU regulations dealing with definitions. These can just be inserted at the back of the legislation bundles where the IT regulations are to be found (bundle 3, tab 19). It is simply the introductory statements, making it clear that "the following terms shall have the meanings defined below. These terms and definitions do not, however, necessarily apply for other purposes."

The primary purpose of the European Directives with which we are concerned in this case is to create a harmonised framework for the regulation of electronic communications services and networks, and therefore that their principal aim is to implement an internal market. So far as we can find there are no specific measures directed in any of those Directives towards controlling managing cross-border emissions which was, I think, essentially the question you asked me yesterday.

THE CHAIRMAN: In the Authorisation Directive, under B in the Annex, not I think under A, but we can check that, 8 is obligations under relevant international agreements relating to the use of frequencies, so there is a reference to international agreements.

MR. ANDERSON: Yes, but one could certainly impose conditions to meet international obligations but that does not mean that you cannot impose conditions for other purposes, nor does it assist in construing the phrase "harmful interference" in the context – it is true that if there was nothing in the Authorisation Directive akin to implementing the scope of conditions embraced by Article 7.2 of the RTTE Directive, they might nonetheless wish, since all Member States are signatories to the ITU Treaty and hence the regulations, wish to enable themselves to introduce conditions to meet those obligations. That, with respect, does not help dealing with the main point. Indeed, it could relate also to ETSI standards.

The purpose, of course, of the ITU Regulations we say are to facilitate equitable access and rational use of the natural resources of the radius frequency spectrum and the geostationary satellite orbit, and that is simply reading from the objectives of the regulations. So it is dealing with a far more specific matter.

The second issue relates to this question that has been troubling the Tribunal from day one, which is Vodafone's blocking of IMEIs, and particularly how it might arise in the context of a licence to a GSM Gateway operator to use a GSM Gateway.

THE CHAIRMAN: And that frequency.

MR. ANDERSON: The first point to make is, of course, that the licensing of the frequency in that direction to a Gateway would not in itself require Vodafone to permit access to its Gateway.

All an IMEI does is identify the piece of equipment so that if Vodafone for some legitimate reason does not wish to have that equipment connected to its network or, if it is connected, has some legitimate reason to wish to disconnect it. All the IMEI does is enable Vodafone to list that piece of equipment as one that is network does not wish to speak to. It is explained, and I have used it in very colloquial terms, it is explained in the Statement of Facts and in the witness statement of Ian Greenstreet. Of course, blocking the IMEI has no impact on the scope of the licence and has no impact on the equipment. The equipment is still licensed – or the service is still licensed – it is merely Vodafone in the exercise effectively of its own property rights does not wish that piece of equipment to speak to its network.

THE CHAIRMAN: It interferes with a piece of equipment and therefore a radio frequency that is not "its". I can see if it blocked it from its end, but it is blocking it from the other end. It is stopping the piece of equipment emitting signals.

MR. ANDERSON: No, no, it is not. It is simply registering that that piece of equipment will not be authorised to gain access to Vodafone's network. It would not affect the position of that piece of equipment to transmit and receive on those frequencies, it just would not be of any help to it, because those are the only frequencies on which Vodafone would accept its signal. So if you like it is like an access code to get into a building. It is Vodafone's building and they are entitled ----

THE CHAIRMAN: They are doing it to the piece of equipment.

MR. ANDERSON: They are not doing it to the piece of equipment; they are recognising that that piece of equipment will not be permitted access into their network. It does not affect the equipment.

MRS. HEWITT: May I just ask, does it affect the hardware's access to another MNOs network?

MR. ANDERSON: No.

MRS. HEWITT: So if, say, the Gateway had four SIMs for Vodafone for T-Mobile and Orange, the only ones which would be block the Vodafone's and it would still be effective for everything else?

MR. ANDERSON: Yes. There is of course a central register at a higher level, which we know accidentally it was registered on that which temporarily affected access to all networks but that was corrected, and I think in essence we are talking about Vodafone blocking access to Vodafone's network.

MRS. HEWITT: And if it was, say, a stolen piece of hardware then all of the MNOs would agree to block?

MR. ANDERSON: Yes, that would then go on the central register.

MRS. HEWITT: Completely disable that?

MR. ANDERSON: Yes.

THE CHAIRMAN: It could not access another network because Vodafone have the corresponding frequency?

MR. ANDERSON: In relation to the Vodafone SIMs, yes.

THE CHAIRMAN: So it actually stops. It means that although the RA, or whoever it is, Ofcom now, have given a licence for a frequency to the Gateway Operator to allow the Gateway Operator to use its equipment which is RTTE equipment authorised down that frequency, Vodafone in this case can interfere with that from that piece of RTTE equipment – it puts something on to that piece of RTTE equipment, does it not? It does not put something on to its own equipment to stop it at its end. It puts something on to the RTTE equipment to stop the signal coming that way, and it is a signal that has been licensed?

MR. ANDERSON: I do not believe it puts anything on to the Gateway equipment at all. It was simply that the base receiver station will not accept an incoming call made by that device.

THE CHAIRMAN: That is what I am trying to discover.

MR. ANDERSON: But that is the position.

THE CHAIRMAN: It is at the Vodafone end, at the base transceiver station end?

MR. ANDERSON: At the Vodafone end ----

THE CHAIRMAN: That is all I was asking.

MR. ANDERSON: Yes. The equipment is unaffected and, of course, the other point is the fact that the RA has licensed that equipment, even licensed that service does not, in itself, impose an obligation on Vodafone to accept.

THE CHAIRMAN: No, that I understand, but what was concerning us was that as we understood it – apparently wrongly – what Vodafone did was to put something on the piece of equipment that does not belong to them, and stops that piece of equipment emitting up, which it has a licence for according to you. I can see at the Vodafone end it can stop it and say I am not going to receive anything from up there.

MR. ANDERSON: The answer is “no”. One point of clarification, we do not say the GSM Gateways have been licensed – you say according to us “licensed” – they are not licensed.

THE CHAIRMAN: No, but they could be, they could be according to you. You could have given a licence.

MR. ANDERSON: Theoretically, yes.

THE CHAIRMAN: Mr. Mason says the whole thing is licensed, but you say that only three quarters of it is licensed.

MR. ANDERSON: If you look at Mr. Mason's evidence closely, he says that it could be licensed if it was the equivalent equipment, but under the Vodafone licence, in terms of their authorisations – is that the point that you are making to me?

THE CHAIRMAN: I think he says that the whole of the frequency is licensed to Vodafone, that the licence covers both the four directions ----

MR. ANDERSON: No, I think what he is saying is licensed on that frequency in respect of the equipment set out in the schedule it is licensed.

THE CHAIRMAN: The equipment is not licensed. The Gateway equipment is not licensed to be used on those frequencies, but the frequency is licensed.

MR. ANDERSON: But the frequency is licensed in respect of the equipment and the equipment is only receiving and transmitting in one direction.

THE CHAIRMAN: What is licensed is both directions in two pairs, but not to use the mobile equipment – only to use the base transceiver equipment.

MR. ANDERSON: Yes. That does not preclude ---- I do not believe, if one looked closely at what Mr. Mason was actually saying, that he was arguing that that act itself had precluded Ofcom from, in theory, licensing a GSM Gateway in the reverse direction of the transceiver.

THE CHAIRMAN: We may need to look at it because it may be that what he was saying was that the frequency was licensed to Vodafone; the equipment was not within the licence; and that Vodafone's licence needed to be extended to cover that equipment, and then contractually Vodafone can allow someone to use the frequency.

MR. ANDERSON: That would be an alternative. Either way, the Vodafone licence does not cover GSM Gateways. Nobody's licence does at the moment. There would be two possible ways forward. One would be to extend the definition of equipment in the Vodafone licence, and it could then sub-licence or hire ----

THE CHAIRMAN: No. On your argument, as I understand it, that would not be sufficient because you would also have to extend the licence to cover that frequency.

MR. ANDERSON: In respect of Gateway equipment, yes.

THE CHAIRMAN: So, there are two things ---- No. First of all, you would have to extend the frequency going in the direction from the mobile to the base transceiver station, and then it would have to say "—and you can use that equipment", but I thought Mr. Mason may have been saying, "You don't have to extend the frequency because the frequency is already within the licence. All you need to do is to extend the equipment".

MR. ANDERSON: I do not think there is actually a difference between us. One would need to extend the Vodafone licence to cover the equipment and the use of the frequencies in respect of that equipment.

THE CHAIRMAN: No. It is not between us, but there is a significant distinction between whether the licence covers the frequency but not the equipment, or the licence does not cover the frequency and also does not cover the equipment.

MR. ANDERSON: I think Ofcom's position, whatever Mr. Mason may, or may not, have said in his witness statement is that Vodafone is licensed in respect of the equipment on those frequencies in the directions in which they are specified for the purposes of that equipment and that as a result, in theory, Ofcom could licence GSM Gateway equipment on those frequencies in the reverse direction. Whether they would or not is entirely another matter.

THE CHAIRMAN: I think this might become quite crucial, because it is what the licence covers.

MR. ANDERSON: Well, what it does not cover is the use of GSM Gateways for the reasons that we have spelt out.

THE CHAIRMAN: It does not cover GSM Gateways. Therefore you could not use them.

MR. ANDERSON: Yes, and could not authorise their use. That is the critical point. I mean, when you say it could be crucial, with respect, whether Floe could, or could not, have been licensed is neither here nor there because they were not.

THE CHAIRMAN: It is very important to know exactly what the licence covers – what frequencies the licence covers, and in what directions.

MR. ANDERSON: Well, I thought we had spelt it out as to what we say the position is.

THE CHAIRMAN: I know what you say. I thought what Mr. Mason said may have been different, and what the documents say may be different.

MR. ANDERSON: We can go to the licence and see precisely what it is that they do cover. We can do that now, or we can do it at the end, but ----

THE CHAIRMAN: I do not want to take you out of order. You are saying it is something Vodafone blocks at their end ----

MR. ANDERSON: Yes. I do not think that point re-opens the debate that we are just having.

THE CHAIRMAN: No.

MR. MERCER: Would you prefer me not to interrupt Mr. Anderson's flow for longer than thirty seconds, or would you like me to tell you what my story on IMEs is?

THE CHAIRMAN: You tell me your story at the end.

MR. ANDERSON: There is one final point. Of course, when you are construing the terms of the licence, as I said yesterday, you construe it by reference to its express terms – not what Mr. Mason may, or may not, have understood about its scope. The relevance is, "What does the licence say?" If you look at the licence, and you look at the schedule, it is quite clear that it covers base transceiver stations which transmit and receive in the opposite frequencies to GSM Gateways. Therefore, it does not, in its terms, cover ----

THE CHAIRMAN: We will have to construe the licence.

MR. ANDERSON: Yes. The next question was Mr. Stonehouse's evidence relating to the 70 percent point. If one takes up the transcript of Day One, that is to be found at p.35 towards the bottom of the page. "We optimised our routing as was discussed at the Ofcom meeting at around 70 percent optimisation. We did this for two reasons: not to overload cells and, secondly, to be in a position where we could offer quality of service to our customers. Being big institutional banks, quality was of an issue. So, we had a call coming from one of those pieces of connecting equipment. That meant it took over the optimum parameters on that, i.e. over the 70 percent. We effectively moved that on and looked for another somewhere in the network, no matter where it was in the network, that carried the least amount of minutes for that day, and we sent that call there". The answer to the question? "Yes, to the fact that they were not dedicated. In fact, the majority of the optimisation of that piece of equipment into the GSM Gateway connected to the switch was effectively dedicated to the customer. We protected our quality and hopefully felt Vodafone would protect any congestion that may have happened to the overloading of the cell site by routing over and above the 70 percent".

Now, our understanding of that evidence was directed to the question of not wishing to overload the capacity of that particular cell at 70 percent. The Tribunal, as I understand it, have construed that ----

THE CHAIRMAN: Well, I have not construed it at all. I just remembered that there was something about 70 percent.

MR. ANDERSON: But it may have been suggested ----

THE CHAIRMAN: I said we needed to look at it again.

MR. ANDERSON: It may have been suggested 70 percent was dedicated to a single customer. Well, that may, or may not, have been what he said, but if 70 percent is dedicated to a single customer and 30 percent is not – in other words, that Gateway is split between more than one customer – it is necessarily therefore a multi-user Gateway.

THE CHAIRMAN: My reading of this overnight was that where it went over 70 percent in relation to a single customer, it was re-routed to another Gateway which was a multi-use Gateway. So, that is how he had single use and multi-use.

MR. ANDERSON: If I could just take you in the context of that to document 2(d)46, which were the responses in the re-investigation of Floe, which is Item 28 ---

THE CHAIRMAN: This is the document you put to Mr. Stonehouse?

MR. ANDERSON: I did not put anything to Mr. Stonehouse.

THE CHAIRMAN: Yes. But, it was put to Mr. Stonehouse.

MR. ANDERSON: Yes. It is merely reiterating that in the Section 26 notices they were ---- No SIMS were dedicated to individual customers. That was then repeated effectively, or clarified in Document 2(e), Tab 7 where we sought clarification, such as it was needed of that answer. Response to the following question asked in the above reference document: "At the meeting on 15 April you outlined the scope of Floe's business at the time of disconnection by Vodafone. Ofcom's note of this meeting records you as stating that at the time of the service disconnection by Vodafone, no SIMS were dedicated to an individual customer". Mr. Stonehouse says, "My simple answer is 'Yes'".

Annex B was the next question. The point you raised, ma'am, yesterday was that your recollection of the previous proceedings there was discussion of Items 2 and 3 of Annex B, but not Item 1. We have been back through the transcripts and the pleadings and we can find no reference of any discussion of Annex B in relation to the scope of Vodafone's licence.

THE CHAIRMAN: Are you saying that Annex B was not discussed.

MR. ANDERSON: Well I think Annex B was raised, I think by T-Mobile ----

THE CHAIRMAN: That is right.

MR. ANDERSON: And reference to the transcript on day 2, pages 80-82, but in the context of justification of Regulation 4(2) not on the question of the scope of the licence. The point I was making yesterday was answering Mr. Mercer's point that the restriction in their licence to certain equipment was incompatible with Part B of the Annex to the Authorisation Directive, and I identified yesterday that "technology" and "equipment" for these purposes were the same thing. That issue was never discussed or even raised so far as we can see in the last proceedings.

There was also a question raised yesterday as to how the question of compatibility came into play last time. The references are, yes, it was raised in the Notice of Appeal, that is in the old bundle tab 88, p.14.

THE CHAIRMAN: Which volume, do you know?

MR. ANDERSON: It looks like it is volume 5.

THE CHAIRMAN: It is the Notice of Appeal to the first ----

MR. ANDERSON: Yes.

THE CHAIRMAN: Do not worry, we will find it.

MR. ANDERSON: We deal with it in our Defence at paragraphs 45 to 55, and at 55 we make the point that we have made in this case that even if there were an issue of compatibility that would not affect the legality of the Decision since Vodafone would, in any event, be objectively justified on the basis of the existence of 4(2), and that is effectively the same argument that we make in the second Decision and I have been articulating again today.

There was then some debate on the applications of 7(3), 7(4) and 7(5) of the RTT Directive. We said then that they were of no application to this case. I believe that was also at that stage the position adopted by Floe, that they were of no application. The matter has now been raised effectively by Worldwide and that is largely where I ended in my submissions yesterday.

Section 166 of the Communications Act you raised, ma'am. Effectively what s.166 of the Communications Act does, it is the provision through which we implemented the Authorisation Directive.

THE CHAIRMAN: Yes, it amended the Wireless Telegraphy Act and inserted s.1(A)(a).

MR. ANDERSON: Yes, which has the effect of saying that if equipment is not likely to give rise to undue interference ----

THE CHAIRMAN: Which means harmful interference.

MR. ANDERSON: -- which means harmful interference, we are required to exempt that use from the need for an individual licence. It is therefore covered by the general authorisation and any conditions attached to the general authorisation. Now, I am sure Mr. Pickford will be developing his debate that we have taken too narrow a view of the circumstances in which we can introduce individual licensing as opposed to the General Authorisation, because you will recall there is a section in his skeleton argument when he says he adopts a slightly different line. Our position is that the conditions we have introduced in 4(2) are conditions attached to a General Authorisation. Those conditions are permitted by virtue of para.17 of the Annex, which incorporates effectively Article 7(2) of the RTTE.

Whether or not we could submit GSM Gateways to individual licences of course then turns on the question of harmful interference, and our case is that we could by virtue of the fact they cause harmful interference. If we could not then the only regulation of them is the conditions attached to the General Authorisation which are not confined, of course, to harmful interference, but would include inappropriate and inefficient use of the spectrum and public safety, which is what we say we have, in fact, done.

THE CHAIRMAN: And how does that relate to the amendment to 1(A)(a)?

MR. ANDERSON: The amendment in 1(A)(a) is simply that we have stated in 1(A)(a) as we are required, we say, under the Authorisation Directive, to limit the circumstances where one can introduce a specific licence requirement rather than the General Authorisation to situations where there is undue interference.

THE CHAIRMAN: Which is defined as "harmful interference".

MR. ANDERSON: So we have interpreted under that regulation that where the Authorisation Directive refers to in particular where the risk of harmful interference is more than negligible,

we have construed that as meaning the only circumstances in which we can introduce individual licences is where there is harmful interference. That is our construction. T-mobile take the view that that is too narrow a construction, but that is nonetheless the position that we have adopted.

THE CHAIRMAN: That is the statutory position under national law?

MR. ANDERSON: Yes.

THE CHAIRMAN: So you cannot go further than that under national law?

MR. ANDERSON: We cannot, no. It is a matter for Mr. Pickford, but he thinks we have probably implemented the Directive too narrowly.

THE CHAIRMAN: But you are allowed to implement it more narrowly. What you cannot do is implement it more widely.

MR. ANDERSON: Well, yes. But that is what we have done and that is the significance of 166. The question of whether or not we could grant an individual licence to a GSM Gateway turns on, as a matter of our implementation of the Directive, whether or not ----

THE CHAIRMAN: It is harmful interference.

MR. ANDERSON: -- it is harmful interference. There was one other point on Mr. Stonehouse's evidence I should return to which was a question of whether Gateways were a mechanism for controlling congestion, although, as I say, this is not a matter that we pursued in cross-examination because we took the view that what he had been suggesting in the course of the consultation as to how Gateways could be used, and it was mentioned I think at one point in his evidence at p.37, 1-5, which was talking about distributing capacity throughout the South of England to negate overloading cell sites. As both Mr. Pickford and I made the point yesterday, this was not an issue which we went into in cross-examination.

THE CHAIRMAN: Also, I think at the bottom of the page, is it not?

MR. ANDERSON: Yes.

THE CHAIRMAN: Line 26 to over the page?

MR. ANDERSON: Yes. The critical point here is that in the course of the consultation in 2002/2003 Mr. Stonehouse, on behalf of Floe, did make a number of submissions about how the problems could be overcome. Those were considered by the Minister – one can find them in even an Annex to a Paper to the Minister, and the view taken by the relevant authority at the time on how best to deal with GSM Gateway was to reject them.

THE CHAIRMAN: A similar point, in other words, was made to the Minister?

MR. ANDERSON: Yes, That brings me back to my skeleton argument. Article 7(3) and 7(4) – if I can just finish off on 7(4). It sets out a mandatory termination procedure. This is dealing with, we say, a situation where there is a technical problem with equipment, and one can

understand why there ought to be in those circumstances a regime that involves notifying the Community because it will have pre-supposed that equipment has been certified that is causing a problem of the kind that is identified in that provision, and therefore it is likely to be a problem that could have Community-wide implications. That is not the sort of case that we are dealing with today.

The second point is that Article 7(4) cannot displace any independent entitlement a Mobile Network Operator may have for disconnecting, for example, breach of contract; we would add illegal use by the subscriber, which is the situation here. The third point, which I was fumbling around trying to identify the documents for you yesterday in terms of whether or not authorisation had been granted – I took you to the letter that was sent out to all MNOs, that is document 2(a)38. The other document I was to take you to was bundle 2(a) tab 47, which records the conversation with the RA.

> "I've spoken to Colin Richards, the man responsible at the RA. He says that the letter confirming that GSM Gateways are illegal has gone out to those operators of which the RA is aware. A copy went to the networks …"

That is, I think, the letter that I took you to that is not addressed to anyone in particular at tab 2(a)38.

> "The RA is referring to this as "consultation", but the bottom line is that they're hoping the letter will stop third party operators using GSM gateways. Colin Richards has said that, "given appropriate time", if we supply details of gateway operators the RA will go out and catch them in act. When I pointed out that we must disconnect them in order to fulfil our responsibility to mitigate our losses he agreed and confirmed my suggestion that they would take no further action in these circumstances."

That is dealt with in a little more detail by Mr. Morrow in his third witness statement at paras. 7 and 8. (tab 14 witness statement bundle).

Moving on now to the Authorisation Directive, the first point, of course, to make is the obligation on the Member State to implement the Authorisation Directive did not arise until after termination, which is the point we make at para.111 in our skeleton argument. That post dates the disconnection.

The next point is that we say in any event Regulation 4(2) of the exemption regulation is a condition attached to General Authorisation. If one takes up the Authorisation Directive in vol.3 at tab 11. The definition of a General Authorisation "means a legal framework established by the Member State ensuring rights for the provision of electronic

communications networks …", so it is effectively the entire regime consists of the General Authorisation.

THE CHAIRMAN: Sorry, where were you reading from?

MR. ANDERSON: I am reading from Article 2(2)(a), the definition of "general authorisation".

THE CHAIRMAN: Yes.

MR. ANDERSON: It means the legal framework. So the Authorisation is the entire framework. What we say the effect of Regulation 4(2) is that you are generally authorised to provide the service subject to a limitation, and that limitation is you are not authorised to provide user stations in order to provide a communications' service commercially to third parties ---- or, by way of business to third parties. So, it is a limitation on the general authorisation. We say that that is quite clearly a condition on the general authorisation. It limits the scope of the general authorisation. It attaches a condition: "You shall not do this" – namely, that which is set out in Regulation 4(2) without an individual licence. That is why we say it is a condition attached to a general authorisation.

Is it a permitted condition? Well, permitted conditions are set out in the annex. One of the conditions, Item 17, refers back to 7(2) of the RTTE directive with which I am sure we are all now familiar. That is that one can introduce conditions attached to the general authorisation for reasons related to the effective and appropriate use of the radio spectrum, avoidance of harmful interference, or matters relating to public health. We also submit that it is justified non-discriminatory, proportionate and transparent. We have dealt with, in the context of the RTTE directive, all the issues as to whether Ofcom were justified in reaching that conclusion. Reaching that conclusion against the background of the very same issue effectively having been looked at by the relevant minister at the time reaching much the same view and having regard to the material that was both available to the minister back then, and, in our second decision, in relation to also material that has been supplied in the context of our parallel consultation on the future regulation of GSM Gateways. Effectively, I really repeat the submissions I make in relation to compatibility with 7(2) that I made to you yesterdays in relation to this authorisation.

Inappropriate use of the spectrum and/or harmful interference. It is of course material, by way of background for the Tribunal, that we are looking at this in parallel in the context of our sector regulator functions, which is, we respectfully submit, the forum in which these issues should be addressed. Again, by virtue of Section 192 of the Communications Act, if we amend the regulations, revoke them, do not revoke them, then the appropriate course of action is the course of action specified by Section 192 which would not be an appeal to this Tribunal, but it would be a challenge to the Administrative Court. We say that is a fully effective mechanism

for giving effect to the principles of equivalents and effectiveness. That is effectively what Upjohn says. Upjohn recognised that that level of review does not infringe ----

THE CHAIRMAN: That was your submission yesterday.

MR. ANDERSON: Yes. That is why I say, effectively I am covering the same ground that I am covering in relation to the RTTE directive.

THE CHAIRMAN: My concern is how 1(A)(a), Section 166 fits in with the submission in relation to the general authorisation and the condition, and limitation.

MR. ANDERSON: Section 1(A)(a) does not require us to approach the matter by way of individual licence. We have in fact dealt with GSM Gateways by way of the conditions attached to a general authorisation. So, the problem has been addressed. The question then is: could we issue licences? Could we adopt a different approach and regulate them by way of individual licences?

THE CHAIRMAN: Well, is Section 1(A)(a) dealing with issuing a licence, or is it also saying that you cannot make a condition?

MR. ANDERSON: No. It is simply dealing with the obligation in Article 7 of the Authorisation Directive which limits the circumstances in which we can regulate by way of invites of individual use rather than general authorisation.

THE CHAIRMAN: But it says 'exempt'. It is to do with exempting – not issuing licences.

MR. ANDERSON: That comes to the same thing. If you have not exempted it from the requirement for a licence, then you require a licence.

THE CHAIRMAN: So, if you have exempted it, is that not something attached to a general condition?

MR. ANDERSON: Yes. If you have exempted it, then you are subjecting it to the general authorisation regime. You come back to the question of: what conditions are you entitled to attach to the general authorisation? So, if you have not adopted the individual licence approach, then the general authorisation enables anybody to provide a service.

THE CHAIRMAN: And you can only attach a condition which means that you have to get an individual licence if it is harmful interference.

MR. ANDERSON: No. The conditions attached to a general authorisation are distinct from ---- Let me take it in stages. You have a general authorisation. In certain circumstances you can dis-apply that general authorisation and require individuals to have individual licences. You can only do that where the risk of harmful interference is less ---- It is slightly more complicated. Of course, the general authorisation is to provide the service. There are then certain circumstances in which you can licence the frequency and in those circumstances you can only make the licence of the frequency distinct from the general authorisation where the risk of

harmful interference is more than negligible. The position that we have adopted in relation to the GSM Gateways is that it is simply subject to the general authorisation and the conditions that are attached to that general authorisation include a condition relating to the use of those frequencies on this particular equipment. It is not exempted. Therefore, if you wish to operate a GSM service you would require the licence, and that is permitted because the risk of interference is more than negligible.

THE CHAIRMAN: When you say 'more than negligible' that is a reverse of 'it is not likely to involve', is it?

MR. ANDERSON: Yes. Effectively, yes.

THE CHAIRMAN: That is how you use the language.

MR. ANDERSON: Yes. That brings me to Issue 6 – the question of objective justification. I can take this relatively quickly because very little has been said on the other side against what we have set out in our skeleton at paras. 129 – 182 and in our second decision at paras. 184 – 208. There were two ways that we put this case: firstly, that the Chapter 2 prohibition, Article 82, do not apply either to protect Floe's unlawful or criminal conduct, or to compel Vodafone to do something it was prohibited from doing. We say unless Floe's operation of Commercial Multi-User Gateways was lawful, its appeal must fail, and both Vodafone and T-Mobile agree with this. If that premise is right, nothing either Floe or Worldwide have said, we respectfully submit, answers that basic premise. We say, so far as Vodafone's conduct is concerned, that the Chapter 2 prohibition – this is para. 5(2) of Schedule 3 to the 1998 Act – does not apply to conduct to the extent to which it is engaged in, and in order to comply with, the legal requirement. We say it is quite clearly desisting from criminal conduct, desisting from aiding and abetting criminal conduct, desisting from engaging in conduct prohibited by the Proceeds of Crime Act 2002 must be a legal requirement. That provision merely mirrors the provisions in *Ladbroke Racing* and that line of cases that I took you to yesterday. If that is right, it would not appear that either Floe or Worldwide deny that the Chapter 2 and Article 82 cannot apply – merely, Floe questions whether Vodafone would have been committing an offence. He relies on the case of *Borthwick* – that is, the bystander in the pub not intervening to stop somebody clubbing somebody else over the head. That really does not get us very far. I have set out in my skeleton argument at some length the ingredients of aiding and abetting. The *Borthwick* analogy really does not help because the critical points here are that Vodafone is quite clearly facilitating, in the sense that it has provided the SIM cards with which Floe is then engaging in prohibited conduct.

By the time Vodafone had investigated and established that Floe were operating Commercial Multi-User Gateways, they then had the necessary knowledge.

THE CHAIRMAN: If I go into Robert Dyas and I buy a knife, and I then use the knife for some criminal activity, Robert Dyas is not liable.

MR. ANDERSON: No, but if you went into Robert Dyas and said, "I wish to go out into the street and stab this person. Could I have a knife?" then they might well be. That is the situation here. It was clear to Vodafone that Floe were using these SIMs for the purposes of engaging in a criminal activity, and from the time at which they had that knowledge they would clearly be at risk, at the very least, of aiding an abetting that offence if they continued to enable those SIMs to be so used.

THE CHAIRMAN: So, taking my analogy, I go into Robert Dyas and I buy a knife, and Robert Dyas does not know the purpose to which I wish to put it ---- Mr. Robert Dyas then overhears some conversation which means that they then hear that I am going to commit an offence with that knife. Do they have a responsibility at that point?

MR. ANDERSON: If I can take you to my skeleton argument at paras. 144 – 146 ---- I suspect that in particular example that you have identified, they may not.

THE CHAIRMAN: It may not be quite the same.

MR. ANDERSON: I think it needs to be a more active participation. What we have here is an ongoing act by Vodafone, it is not a one-off act having sold a piece of equipment. It is enabling the SIMs to continue to be used to provide Commercial-Multi-user Gateway Services. So your analogy would be if, after over hearing the conversation, Robert Dyas continued to supply equipment to be used, the knives, then t hey would be guilty of aiding and abetting in relation to those subsequent offences.

THE CHAIRMAN: They are not continuing to supply SIMs, the SIMs have already been supplied, they do not have to sup ply any more SIMs.

MR. ANDERSON: But there are SIMs to be used, each time a call is made, they are then activated

THE CHAIRMAN: It is the frequency that is being used.

MR. ANDERSON: Yes, but it is on Vodafone's network.

THE CHAIRMAN: It is not their frequency.

MR. ANDERSON: You say "it is not their frequency …"

THE CHAIRMAN: Because you say they do not have a licence over that bit of the frequency.

MR. ANDERSON: As I understand the way it contractually works, each time a call is connected into the Vodafone network they are effectively selling that air time, and therefore each time they do that act it is a new act fro the purposes of aiding and abetting the criminal, or the unlawful activities of providing the Gateway service.

THE CHAIRMAN: What you are saying, as I understand it, is what is unlawful is the Gateway sending out a signal to Vodafone, to the base station, and you are saying that is not Vodafone's frequency. So if that is not Vodafone's frequency they are not committing a criminal offence.

MR. ANDERSON: I do not say that the criminal conduct is simply the signal coming from the Gateway Service, the base station, it is the provision of a communications' service to third parties by way of business and every time a call is made Vodafone must necessarily be participating in that by enabling the connection to be made into the Vodafone network. They have the ability to prevent that by terminating the supplies and if they do not in knowledge that that is what their air time or network is being used for they run the risk of being guilty of aiding and abetting the unlawful activity prohibited by Regulation 4(2).

THE CHAIRMAN: Well I can see that if they own the whole of the frequency, if they are licensed for the whole of the frequency. But if they are not licensed for the bit of frequency from the mobile station to the base receiver station and that is really what is causing the illegal act because that is the Gateway bit, then I am just wondering whether they are committing or aiding and abetting.

MR. ANDERSON: It is both in the sense that one is receiving and one is transmitting on both sides of the same coin, so it requires both for a call to be made from the original fixed line caller through to the end mobile phone, through that Gateway. It requires the communication between the base transceiver station and the GSM Gateway, and that is, if you like, a two-way conversation. One is transmitting, the other is receiving.

THE CHAIRMAN: It is the mobile station that is sending a signal to the base transceiver station.

MR. ANDERSON: Yes.

THE CHAIRMAN: And you say that that signal is not within the Vodafone licence, and if that signal is not within the Vodafone licence then how are they aiding and abetting?

MR. ANDERSON: Because they are enabling the receipt of that signal to be converted into a telephone call, so the connection can be made. They are enabling the GSM Gateway to operate by accepting the message coming from the Gateway. It is only by that Act that they are enabling or facilitating the GSM Gateway to operate.

The next question is under the Proceeds of Crime Act, and this is dealt with at paras. 150 through to 156 of my skeleton argument. The only point that is really made is that Vodafone could have raised the matter with the relevant authority. It would not in fact provide a defence in these circumstances because Ofcom is not relevant authority for the purposes of s.328(2)(a) of the Proceeds of Crime Act, and it is by no means clear that if an appropriate authority had been approached that consent would have been given, and we know from the documents that, in fact, it was the National High-Tech Crime Unit that first contacted

Vodafone in relation to this issue. So there is not, in fact, that defence available to Vodafone in the circumstances. Of course, in fact, Vodafone did, from the documents I have shown to you, raise this question with Ofcom and Ofcom did not indicate that they should not take the action that they took.

THE CHAIRMAN: Did Vodafone inform the relevant authority under the Proceeds of Crime Act?

MR. ANDERSON: I have no idea. I think there was communication with the ----

THE CHAIRMAN: I do not know if we are allowed to ask that, actually. It may be that we are not allowed to ask it.

MR. ANDERSON: It is certainly not something I can answer.

THE CHAIRMAN: I do not think we will ask it.

MR. ANDERSON: On the question of objective justification as opposed to the non-applicability of Chapter II Prohibition and Article 82, and this brings me to paras.157, 158, I have set out the general proposition that a dominant undertaking may refuse to supply where it is objectively justified. If you are against me and you say notwithstanding that this is unlawful criminal conduct and, as a matter of policy, competition law is not engaged. If it is not engaged then, of course, the principles in *Hilti* and objective justification we do not need to get into, as a matter of public policy competition law is not designed to protect unlawful activity. But it is well established on cases such as *United Brands*, *GlaxoSmithKline*, and so on, that objective justification is sufficient to take refusal to supply outside the scope of the prohibition.

It is an objective concept, we get that from *Burgess* in front of this Tribunal – the cross-references are in para.159. Really the only point that has been made against the analysis that Vodafone were objectively justified by reason of the unlawful activity is the *Hilti* case. Now, I deal with the *Hilti* case at para.169 of my skeleton argument. If I can ask you just to take up bundle 4(a), the bundle in which *Hilti* is to be found – you were taken to it by my learned friend, Mr. Kennelly. Let me say at the outset that we do not deny the principle in *Hilti* which Mr. Kennelly suggested – and you will find this at p.22 of the transcript from yesterday – we do not deny the principle suggested in *Hilti*, and we make that quite clear at para.169 of our skeleton. We accept the premise underlying the CFI's Judgment. Our point simply is that this case is nowhere near the principle in *Hilti* for various reasons. If I can ask you in the Judgment first to turn to para.108, the facts, what it is exactly that caused the Commission to take the view that *Hilti* was engaged in unilateral behaviour that was not justified under Article 82. According to the Commission Hilti's behaviour

> "… justifies the conclusion that its primary concern was the protection of commercial position rather than a disinterest wish to protect users of its products. The Commission based its view on the following considerations.

1. At no stage during the many years during which Eurofix and Bauco Nails have been sold in the United Kingdom market has Hilti made any complaint to the responsible authorities concerning their safety and reliability."

Here, of course, Vodafone did raise their concerns with the authority, indeed they even notified the authority that the course of action they were proposing was disconnection to check whether there was any objection, so a significant difference.

"… at no stage had Hilti made any complaint to the responsible authorities concerning statements."

Vodafone and MNOs have throughout expressed their concerns about particularly Multi-User-Gateway Services.

"Hilti instructed its salesmen not to record any criticism they might make of the safety or reliability of competitor's nails".

That again is not a consideration of any relevance in the case of Vodafone.

"Hilti never wrote to the Interveners or otherwise entered into contact with them to express concern about the reliability, fitness or safety of their nails."

Again, we know in this case that Vodafone wrote to Floe and said "We have these concerns, are you engaged in Commercial Multi-User Services? Come and see is." They came and saw Vodafone, were unable to give Vodafone the clarification and the assurances that Vodafone sought, and it was only after that that they terminated.

"Hilti failed to take even the basic precautionary measures to warn users of its systems which, according to Hilti's own evidence and particularly the opinion of a Profess or Spencer …."

That is not a consideration that can really apply here.

"Even viewed in the most favourable light the evidence on which Hilti now relies to show the inferiority Bauco Nails cannot justify on grounds of safety or reliability, no exclusion from use in Hilti nail guns."

So there is a dispute about even the factual premise underlying Hilti's conduct. No such dispute here. It is a simple question of law. Are the activities of GSM Gateways prohibited or not here it is quite clear first, that Floe were operating Multi-User Gateway Services in time; and secondly, that they are not only unlawful, but it is a criminal offence.

"Even in its application Hilti acknowledges that it recognised that its criticism of the complainants' nails might not withstand impartial scrutiny".

So the Commission takes the view that there is not even much in Hilti's purported basis for their refusal to supply, and even Hilti itself appears to have recognised that.

For those reasons, it is quite clear that we in this case are a million miles from the sort of situation with which *Hilti* was concerned. What we are effectively saying is, as I say in para.169 of the skeleton, it is that *Hilti* is clearly distinguishable on the facts, and to extrapolate from *Hilti* a principle that would apply in this case to compel Vodafone to continue to supply or not to terminate supplies in circumstances where the supply is for criminal activity in circumstances where Vodafone itself may find itself at risk of committing an offence of aiding and abetting under the Proceeds of Crime Act would be to extend the bounds of *Hilti* far beyond anything that it can reasonably bear.

Mr. Kennelly makes the point that the CFI drew no distinction between tortuous and criminal liability. Of course, it is true it did not because it did not have to, it was not dealing with criminal activity, but we would submit that there is a significant difference. There are quite clearly greater consequences flowing from criminal conduct than in the case of tortuous conduct. That is really all I propose to say on issue 6.

In relation to issue 7, discrimination, the instances of discrimination that were identified by Floe in the course of the re-investigation were addressed by Ofcom and have not been challenged by Floe. What is now relied on – and these are matters that my learned friend Mr. Flint will be dealing with – are matters that were not raised until after the second decision had been taken. They are, in my respectful submission, therefore simply incapable of founding any basis for setting aside the second decision.

So far as the underlying allegations are concerned, as I say, they cannot affect the outcome of this appeal, and really Ofcom has very little to say other than it would appear, from our review of the evidence and the material before you, that a very different situation in relation to recall and the whole saga and the position with Floe which was much clearer cut. That is really a matter – if the Tribunal even wants to get into it – for Vodafone to deal with.

Unless I can help you further, ma'am.

THE CHAIRMAN: Thank you very much.

MR. FLINT: What I would like to do is, first of all, to deal with the facts and then go to the agreed list of issues. What I propose to do is deal with those issues in turn, which will include the jurisdiction issue relating to Issue 4. Can I deal first of all with the findings of fact? Can I hand up to the Tribunal a document which we have prepared analysing and setting out the eight findings of fact which we invite you to make, and the evidence in support of them. What I would like to do is take you through these findings of fact which set out, I hope helpfully, the transcript references ---- In fact, they do more than set out the references – they set it out in full. Before dealing with each of those eight findings of fact, can I make one general point, which is this: that you have heard four witnesses from Vodafone. In our submission, there is no

basis at all other than to accept their evidence as being honest and reliable. You have heard two witnesses from Floe – Mr. Taylor and Mr. Stonehouse. There is every reason – which I will develop in a moment – to find their evidence thoroughly unreliable where it matters.

Dealing with the findings of fact we invite you to make, the first relates to this meeting on 1 February, 2002. It is to the effect that Mr. Stonehouse did not receive any advice or assurance from the DTI to the effect that COMUGs provided by Floe would be lawful without a licence.

You have Mr. Stonehouse's own notes of the meeting at Bundle 2(a)9 which show that issues were raised. Then you have Mr. Stonehouse's own evidence at 1.2. Mr. Tarrant suggested some issues they were going to look at, but they did not come back to him. Then, in the next section he raised an issue during that meeting – and I have sought to underline the critical points Then, at the bottom of the page, he accepted, "They [the DTI] did not give us an answer either way". Then, at the bottom of the page, "At the end of the meeting, we see from your last line the agreement was they would consider the matter absolutely". So, Mr. Stonehouse clearly accepted that he did not get a definitive answer at that meeting.

Then, over the page, we have the follow-up letter which expressly refers to the reservation of regulatory issues. So, it is clearly consistent with the evidence that there were regulatory issues raised. Then, I put to him – and, of course, this goes to the legitimate expectation point – that really it was just a failure to object that raised the reliance because he had not suggested that there was an approval. He uses the simile of the policeman – quite an accurate analogy actually because we say clearly Floe were taking a risk; they knew they were running a regulatory risk. Look at their business plan – it says so. They were indeed exceeding the speed limit and hoping not to be prosecuted. At a later stage, they were even hoping that the speed limit might be changed. But, what they cannot possibly say is that they were advised they were not breaking the law.

That, of course, explains why, when this issue came to a head in early 2003, they did not suggest to anyone – T-Mobile, Vodafone, or the minister – that they had been told that it was lawful to do what they were doing.

So, that is the first finding of fact on the DTI meeting.

The second finding of fact relates to Vodafone's knowledge at the time of entering into the contract as to Floe's intended use of the SIMs which were being supplied. The finding of fact which we say is made out clearly on the evidence is essentially that Vodafone were not told that Floe proposed to provide SIMs other than in Gateways located at customer premises connected to the private exchange – that is set out in (2) – which use Vodafone believed to be lawful. Mr. Young was not informed and he was the only person who had substantive face-to-face dealings with Floe that they proposed to provide Gateways not at customer premises,

connected and indirectly connected customers through a network and wholesale allocation of calls.

Now, I can take this quite shortly because Vodafone's witness statement is not challenged by any counter-evidence at all. Witnesses were called and we have set out the references in the cross-examination and questioning from the Tribunal. But, they do not actually take matters any further because the written witness statements were so clear and consistent form all three people concerned – that is, Overton, Young and Greenstreet.

If you could go to p.5 of the document, it is, however, we say, clear that Mr. Taylor accepted that he had not given a complete and full picture to Vodafone. At p.5 you will see in the first section of the transcript, six lines down, "The acceptance of the point that the whole document is based, is it not, on the proposal to place Gateways at customer premises?" The answer is, "Yes". Then, lower down I ask him if he had a plan to put Gateways not at customer premises, but at Floe sites – "Most definitely." "You did not tell Vodafone that in this business plan?" "Okay. In the business plan, maybe".

Then, in re-examination of Mr. Taylor, he accepted that Mr. Young could have got the wrong end of the stick. Well, we would say that is not surprising if he was being misled. The fact is that Floe have never produced a coherent explanation as to why the full business plan was not disclosed to Vodafone. It was clearly a deliberate decision to write up a shorter, more restricted business plan and give only that to Vodafone. That was the point raised by Mr Davey with Mr. Taylor at the bottom of that page, and Mr. Taylor cannot give any persuasive response. He is effectively saying that he cannot explain it.

So, that is Vodafone's knowledge at the time of the contract.

The third finding of fact at p.6 is the belief, having taken proper legal advice on the part of Vodafone that the provision of COMUGs would be unlawful, and on this the evidence of Vodafone is principally that of Mr. Rodman and is unchallenged. There is no evidence to set against it – no substantial cross-examination on the point, and certainly not to call his evidence into doubt in any way. We have essentially Mr. Rodman saying that he took legal advice. From August 2002 onwards that was the basis on which Vodafone were acting – that COMUGs would be, as they then called them, public gateways, unlawful.

Then, Finding 4 at p.7. This is that in February 2003 Vodafone suspected that Floe was providing SIMs for COMUGs. I will take this very shortly because there can really be no dispute at all, and there is certainly no evidence to challenge Vodafone's evidence that they did have that genuine suspicion at February 2003.

Then, Finding 5 at p.8. We come to a more contentious matter, which is that we submit that Mr. Taylor of Floe misled Vodafone at a meeting on 6 February by pretending Floe was only

using SIMs to provide Gateways at customer premises, and denying that Floe was using SIMs to provide wholesale services or multi-use services. We have three witnesses who speak on the Vodafone side to that meeting, all of whom, in slightly different words, give a consistent picture – that is, Rodman, Young and Overton. We set their witness statements out which were not challenged in cross-examination. Certainly no explanation ---- it is remarkable that no explanation was put to them as to how they could have come away from the meeting misunderstanding what Mr. Taylor had said. The reason they were not cross-examined on those lines is that Mr. Taylor himself was unable to give any good answer to the point. If you look at p.9, at the end of the cross-examination I put the point, I hope fairly clearly, to him and I said he was thoroughly tricky and evasive, and the opposite of open and honest, and his response was quite revealing. Rather than just denying it in a forthright fashion and giving an explanation he says that Vodafone were equally as tricky, which is not the most persuasive answer. Then he says "I do not remember where we went with it, frankly", a word that is often a give away.

The next section earlier in the cross-examination at 5.2.2 of this note, I asked him about the conversation: "Mr. Rodman asked if you were using SIMs as public Gateways?" "Yes". "You denied it and said they were located at customer premises, is that true or not true?" "I don't remember." So he remembers part of the conversation but not his answer. Then he says at the end "I don't remember exactly what was said".

Then I put to him the letter at 5.2.3, the letter that was written by Vodafone which said:

> "I believe you indicated you supply Gateway devices to individual ME and SME customers for their own use and bill them for calls, but did not supply a GSM Gateway Service on a wholesale basis for third parties" Taylor: "Yes". "Is that a true record of what you said on 6th February?" "Unsure".

Then he says at the bottom of the page "I can't remember what we'd discussed." Then over the page again he is asked about it and he says: "I'm actually unsure as I stand here as to whether there was any element of wholesale in our business in February of that year". I will come back to that later, but that plainly is nonsense. We have a letter written by the Chairman of the company, Mr. Mittens, admittedly in June 2003, laying out its categories of business which included wholesale. There is no evidence at all that Floe's business changed in substance between March and June 2003, if anything of course it diminished because they were being cut off.

So on that issue we submit that the Tribunal has three witnesses for Vodafone who recall the misrepresentation and give persuasive reliable evidence and one witness for Floe

who says that he does not remember, and on the balance of the evidence we say therefore the Tribunal should clearly conclude that there was a misrepresentation made at that meeting.

The sixth finding of fact, which we invite the Tribunal to make, at p.11, is as to Vodafone's belief at the time of termination that Floe was using SIMs to provide COMUGS, that Floe had misled Vodafone and the provision of COMUGS by Floe was unlawful without a licence under the Wireless Telegraphy Act. Those two latter points, of course, follow from previous findings but there cannot be any challenge at all to the state of Vodafone's belief at the time they wrote the letter, and there is nothing at all to suggest – and it has not been suggested – that the letter of 10th March 2003 which is the critical letter, was in any way written as a pretext or as a sham letter covering up the true reason or setting out a false reason. The clear evidence is that Vodafone genuinely and, as it turns out, correctly, believed that Floe was engaged in illegal activities.

The seventh finding of fact which is related to that is really the other side of the same coin but it is directed, of course, to the *Hilti* point, which is that before taking action to terminate services Vodafone believed on reasonable grounds that the services being provided by Floe were not only illegal, but they were illegal in the view of the Regulator. For that we set out the documents which are in the bundle, and the Tribunal has already seen, the consultation document at para. 5.7 clearly saying that public connections were not permitted. Then the email of January 2003 and this comes after the event but I put it in because it is confirmatory, the view of the Minister expressly saying to Floe that their activities were illegal.

Then Vodafone's evidence about consultation. There is the unchallenged evidence of Mr. Morrow, and over the page we have the documentary reference at 2(a)47, the email from Mr. Morrow to Wearing recording the conversation referred to in his witness statement, so it is not just Vodafone saying this, we actually have documents to support it. Again, we submit that is the clear finding the Tribunal should reach on point 7.

Finally, on the findings of fact point 8. This is not really a contentious point of fact, that when terminated Floe's services consisted entirely of COMUGS, because that was a finding of fact of Ofcom in its Decision, and we set out the reference, not challenged in the Notice of Appeal. The document we have, the letter from the chairman, Mr. Mittens, and the note which Mr. Anderson referred to this morning, where Mr. Stonehouse confirmed that at the time of disconnection all customers were being routed into distributed network rather than having onsite customer premises equipment. No SIMs were dedicated to an individual customer.

There was a lot of convoluted evidence given by Mr. Stonehouse to get away from that simple statement but he accepted in cross-examination that the statements he had made to

Ofcom were true. He asserted they were true and we must work on that assumption. So as a matter of fact Ofcom was correct to conclude that at the time of termination the business of Floe was the provision of COMUGS which, subject to the issues I will come to, were clearly illegal and were not the business in respect of which Vodafone thought they had been asked to provide services. What Vodafone thought was that it was being asked to provide SIMS for the purpose of customer premise equipment, single-user – private as they then thought and legal. In fact, these services were used by March 2003 entirely to supply on a multi-use basis, not at the customer premises, but remotely from the customer premises, therefore clearly commercial and clearly not sanctioned by the regulations. That is all I wanted to say on the facts. We invite the Tribunal to make those findings.

I then just want to say a word or two on the issues. We have an agreed and signed list of issues, that was a document drawn up at the requirement of the Tribunal, and those issues defined the only relevant points which this Tribunal needs to determine or, indeed, has power to determine under your jurisdiction, because your power under schedule 8 of the Competition Act is to determine the points raised in the Notice of Appeal and those points have now been crystallised into the list of issues. I propose to focus my submissions quite narrowly on the issues that are raised. I will have to pursue some of the other red herrings that have been raised, but I propose to focus primarily on the points that are raised in the list of issues which, in our submission, are the only points which this Tribunal needs to decide and the only points that you have power to decide.

I will not be referring at length to my skeleton argument, but we have set out, I hope reasonably fully, our points on the issues raised so far as they remain live as we see it from the skeleton argument submitted by Floe and, of course, also the argument from Worldwide. What I will try and do is when I deal with each issue to pick up the new points, and to pick up the salient points that we raise.

If I can turn to the issues, and I am going to take the first three issues quite quickly because, in our submission, really there is nothing left in the case on issues 1, 2, and 3. The first issue is whether Floe was providing a Gateway service to a third party by way of business, and in our respectful submission there really cannot be any remaining issue left in that. There has been an attempt to suggest that Floe in some way was not the user, but Floe it was that was providing the services to its customers, it was not doing so as agent for Vodafone, it was doing so as principal. It must follow, therefore, that there was a provision of services. There was a use for reward and that falls outside Regulation 4(2). That is issue 1.

Issue 2 is the question of base transceiver stations. On that, if I could take you back to the Ofcom Decision, which you have in the core bundle, at para.103 – the second Decision of

Ofcom at tab 4 of the core bundle, 5. The finding Ofcom, which is subject to Appeal to this Tribunal is at para.103:

> "GSM Gateways do not constitute Radio Equipment as defined above. They are not 'base transceiver stations' or 'repeater stations'."

So that is the finding and that is explained and expanded at 118. "A GSM Gateway is not a Base Transceiver Station" because it does not comply with the ETSI station and therefore the universally accepted technical definition. It does not comply in two key respects. First, it is required to transmit and receive at specified radio frequencies, and a GSM Gateway does not do so; secondly, the base transceiver is required to communicate with other parts of the network using specific signalling interfaces. So if one goes back to the previous page with the helpful diagram, one sees that the base transceiver station is designed to receive from the mobile on one frequency and then communicate back to a base station controller, and a Gateway first of all is transmitting on the opposite frequency to the base transceiver station and vice-versa; and secondly, the mobile station (the SIM card) however it is used, as a Gateway or not, it does not have the capability of transmitting back on the Abis leg back to the base station controller.

So those two technical points dictate, as a matter of const ruction of the licence, if one could go to bundle 2(a) tab 8, that this is not radio equipment as defined in the licence, the reference to radio equipment is at para.1:

> "To establish, install and use radio transmitting and receiving stations and/or radio apparatus set out in the schedule(s) (herein after together called 'the Radio Equipment') subject to the terms .."

If one goes to the terms, the description is in schedule 1 at p.5, and it is clause 1 - "the Radio Equipment means the base transceiver stations or repeater stations forming part of the network as defined in para.2 below." The two important elements of this licence are that you licence not particular equipment but a type of equipment, a "sort" of equipment, i.e. a base transceiver station or a repeater station. It is not licensed by reference to particular items of equipment or particular manufacturers, it is simply a general description. Secondly, it is required to operate on certain frequencies, and those are at para.7 of the schedule, p.7, base transmits, mobile receives, and vice versa, base receives, mobile transmits.

So we have the two elements of the licence, a type of equipment and a frequency on which it can transmit. In my submission, Mr. Mercer in his skeleton argument and in his oral argument has not put forward any substantial point to indicate why Ofcom erred in law in its construction of this licence. This is a matter of interpretation of a licence. It cannot conceivably be affected by what Vodafone thought, Floe thought, or what Mr. Mason thinks,

that is completely irrelevant. This has to be construed on its terms against the statutory background.

There is, however, one breathtaking point I ought to deal with that in some way at page 1 a licence issued originally on 23rd July 1992, I think, and then continued by an issue on 28th January 2002 is, in some way affected by the terms of the authorisation directive which did not come into force until 25 July, 2003. I am afraid I am unable to make the logical leaps necessary to answer that argument. It is completely unsustainable. The licence was issued under the Wireless Telegraphy Act. It must be construed, of course, consistently with that Act. But the authorisation directive is completely irrelevant to its terms.

So, we say, on Issue 2 there is simply no argument left to counter the Ofcom decisions, still less to show that the Ofcom decision was wrong in law, which is what Floe would have to establish for the appeal to succeed.

Issue 3 is the issue of legitimate expectation. This is a case which was always tenuous and now is completely hopeless on the facts. The position is that on the evidence Floe can no longer maintain, even if they were originally seeking to maintain, that they had any advice or assurance from the DTI before they launched their product, before they got into a contract with Vodafone, before they started selling services to customers, that they had any expectation or representation that their services would be lawful. There was no such representation.

There is one point on the facts which I do not think we dealt with in the document I handed up to you. It was the evidence of Mr. Stonehouse, just before he was dealing with the analogy with the policeman, when I put to him that he had received approval from the DTI. It is at Day One, p.48. You need not turn it up at lines 17 to 21. I am sure you will remember. I put to him, "Was it not until after July 2003 you came up with a story that you had received approval form the DTI for your proposed services?" and he says, "Those are your words, Mr. Flint. I don't recall ever saying both here or anywhere else that we had approval from the DTI. What I said to you all along was we had no negative or adverse response from the DTI".

Well, that is a hopeless basis on which to advance a claim of legitimate expectation. It is clear that even if the doctrine was in any way to apply – and we have explained in our skeleton argument (and we adopt the points made by Ofcom) – in any event, legitimate expectation cannot be relevant here, but it just simply cannot arise because there was no representation and no reasonable reliance. That is the end of that issue.

In our respectful submission, Issues 1, 2, and 3 pose no remaining difficulty for the Tribunal, and those should clearly be decided on the basis that Ofcom made no relevant error of law. Everything therefore turns on the question of whether or not – and this is really the thrust of

Mr. Mercer's skeleton argument – that it can be said that the position is different because of the impact of the directives.

So, I turn to the important question of Issue 4, which is the question of compatibility. I should make quite clear (for reasons I will explain) that our submission is that the list of issues has been illogically reversed here – Issues 4 and 5. The first question for the Tribunal is the legal certainty question; the second (because if that is decided against the Appellant) issues of compatibility simply do not arise under Issue 4.

I will deal with Issue 4 first. There are three preliminary points on the compatibility argument of some importance. The three points are: jurisdiction, margin of appreciation, and abuse of process. It is very important to understand that those are three related, but distinct, points. Now, they are raised also by Ofcom and by T-Mobile, but they are raised by Vodafone because it appears to be suggested that this Tribunal has power to declare that the regulations in force at the material time – that is, March 2003 – which had been made by the minister were unlawful and invalid as being incompatible with EC law. That therefore raises these three questions of the jurisdiction of this Tribunal; the respect for margin of appreciation enjoyed by the maker of the regulations; and the question of abuse of process. Is this a point that can be raised at all?

Now, the points are live because nobody in this Tribunal has yet explained how this Tribunal has power to determine that the minister acted unlawfully when, first of all under its limited powers, this Tribunal has no power to quash any decision of the minister; the Tribunal has no evidence of the material taken into account by the minister when he originally made the regulations or continued them on 20 January, 2003 (nor, I should add, any statement from the department supporting the decision); and the Tribunal has no evidence as to those factors and no power to take into account the other factors affecting the minister's decision to make, or continue, the regulations – in particular, the national security considerations which are alluded to at 2(c) Tab 13. You have already looked at this document, but if I can take you back to Bundle 2(c), at Tab 13 we have the submission to the minister of 7 July, 2003, and that, of course, is what resulted in the decision not to amend the regulations in the relevant respect, which decision was made on 18 July – in other words, not to broaden the exemption by removing Regulation 4(2), the by way of business test.

Now, what I wanted to draw your attention to – and I am not going to read the part in detail because there has been a specific request from the relevant department that this issue should not be ventilated more than is necessary in open court – is that you will have seen, of course, that the minister (at p.2) was invited to take into account various factors. It was not all just about harmful interference - there were lots of other factors. The background refers to the Home Office concerns (at para. 7) and there is a reference to an Annex A ----

THE CHAIRMAN: Be careful how you do that.

MR. FLINT: Quite properly, we have not been given Annex A, and nor has the Tribunal. So, it is perfectly plain that the issue before the minister was not simply the issue with which Mr. Burns was dealing, or the issue about which this Tribunal has heard evidence – namely, harmful interference and technical arguments as to what that means – they were much wider and broader issues than that. Yet, it appears to be that it is those regulations, made or continued for reasons such as those, which this Tribunal, it is suggested, has power to set aside or declare to be invalid.

Mr. Mercer, for Floe, has addressed no argument to you on these important constitutional questions at all. Mr. Kennelly, for Worldwide has addressed to you a much more limited argument. He does not contend that this Tribunal should review the minister's decision. His contention is a limited, but simple, point that as Ofcom considered compatibility – and there is a full appeal on the merits against the Ofcom decision, therefore this Tribunal has power to decide compatibility. I will deal with that point later, but, of course, it begs the question of what jurisdiction or power Ofcom was exercising in considering compatibility in the first place.

So, it appears, if I may say so with respect, that on this aspect I am really dealing with arguments that the Tribunal is raising of its own motion rather than responding to points put by Floe. Now, I have eight points on jurisdiction. The first is this: this is not an appeal from the minister's decision to make the regulations. The Tribunal, as a statutory Tribunal under the Competition Act, has no power at all to review or quash the minister's decision to make regulations under the Wireless Telegraphy Act. The only jurisdiction of this Tribunal is to determine an appeal against Ofcom's decision.

The second point is that the only issue of which you are seized is whether there is an error of law in the Ofcom decision in dealing with the issue of compatibility. Now, on that issue it is true that you have a full merit's jurisdiction, but it is only in respect of the Ofcom decision, and not in respect of the minister's decision.

Thirdly, Ofcom decided that the regulations were compatible. But, Ofcom – and, indeed, this Tribunal – did not have any power itself to review, or set aside, or quash, or dis-apply (however it is put) the regulations as a matter of domestic English law. The duty of Ofcom as a statutory body is to apply the law – not to make it up. It is the duty of the statutory body to apply the regulations which, by statute, are entrusted to the decision of the minister at the material time and not to the decision of Ofcom. If the regulations were alleged by any party to have been unlawful, then the proper way in which they might be challenged is by order of the High Court, the Administrative Court on an application for judicial review. I will deal later

with the question of whether community law makes any difference to that picture, but as a matter of domestic law, that is absolutely plain.

If I could just take you to one case – the case of *Hoffmann* in Volume 4(b)1, tab 4. This is a decision of the House of Lords. It is not necessary to go into the facts at all, or the issues. I want to take you to the two passages in the Judgment of Lord Diplock, starting at p.365. In a trademark, magisterial passage, he laid out the constitutional principle affecting the alleged invalidity of secondary legislation, which is what we are concerned with. It is the middle of p.365 where he says:

> "Under our legal system, however, the courts as the judicial arm of government do not act on their own initiative. Their jurisdiction is to determine that a statutory instrument is ultra vires does not arise until its validity is challenged in proceedings inter partes either brought by one party to enforce the law declared by the instrument against another or brought by a party whose interests are affected by the law so declared sufficiently directly to give him locus standi to initiate proceedings to challenge the validity of the instrument. Unless there is such challenge and until it has been upheld by a judgment of the court the validity of the statutory instrument and the legality of acts done pursuant to the law declared by it are presumed."

Then at the bottom of the page, the last four lines, after a decision:

> "Although such a decision is directly binding only as between the parties to the proceedings [a declaration of ultra vires] in which it was made, the application of doctrine of precedent has the consequence of enabling the benefit of it to accrue to all other persons whose legal rights have been interfered with in reliance on the law which the statutory instrument purported to declare."

Then over the page, at the end of the first paragraph, when he is dealing with the question of void or voidable, the last four lines:

> "All that can be usefully said is that the presumption that subordinate legislation is intra vires [valid] prevails in the absence of rebuttal and it cannot be rebutted except by a party to legal proceedings who has locus standi to challenge the validity of the subordinate legislation in question."

Then at the bottom of the page the reference to Lord Radclffe's statement in *Smith v East Elloe*, the legal status of the Regulation in *Smith v East Elloe*, and he said:

> "An order, …, is still an act capable of legal conseqeuences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders."

So those passages reflect the well accepted principle that regulations must be presumed to be valid until they are set aside by a court of competent jurisdiction.

The fourth point is that there is no principle of Community law which requires or gives jurisdiction to Ofcom or this Tribunal to quash the Minister's decision or to substitute its own view as to what the regulation should be. We say the position in *Upjohn* is clear, that is to say the general principle of English law, which requires challenges to the compatibility of legislation with Community law be brought in the Administrative Court and decided by Judicial Review principles is fully compliant with EC law, indeed, that was the approach actually adopted in *Upjohn.* If I could just take you back to one paragraph in *Upjohn*, para.32, that is at tab 4(b)(i) tab 23. If one goes to *Upjohn* at para.32 this is the general principle that it is for the domestic procedural law of Member States to decide how and where issues of Community law are dealt with. It is settled case law that in the absence of Community Rules governing the matter it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights.

THE CHAIRMAN: These are the passages that Mr. Kennelly drew our attention to.

MR. FLINT: Indeed, subject of course, and I will come back to this, to the principle of effectiveness and equivalent, but I just wanted to draw your attention to the courts and tribunals having jurisdiction. There was nothing in the *Upjohn* decision, indeed it was the contrary, to suggest that the English law principle under which issues of compatibility with European law in the English courts are dealt with by the Administrative Court on Judicial Review principles, was in any way invalid. I will come back to the *CIF* case later, but can I just make the point at this stage that *CIF*, in our submission, is in no sense inconsistent with that principle. It does not dictate that in England a competition authority is required to have jurisdiction to disapply because *CIF* was only referring to provisions which restricted competition, which is not the case here. This is a really coincidental point of invalidity not relating to competition. It is alleged to be an invalid application of a telecommunications Directive. So *CIF* does not, in any event, apply, but we say the general principle is clear, that is for English procedural law to decide, subject to the principle of effectiveness, as to where and how English legislation may be set aside for non-compliance.

My fifth point is this, it is that these points are reinforced by the factor that Parliament has expressly provided that with effect from the Communications Act 2003, which came into force between 25th July and, I think, 29th December 2003, any decision of Ofcom to continue, amend or revoke these regulations is not a matter which can be challenged at all in this Tribunal. That is the clear effect of s.192, and schedule 8 to the Communications Act.

With respect, ma'am, yesterday you suggested that that provision might be subject to an exception ----

THE CHAIRMAN: I do not think I suggested it, I think I was picking up something somebody had said, but anyway it does not really matter.

MR. FLINT: Well it certainly does matter if the Tribunal ----

THE CHAIRMAN: It does not matter who suggested it.

MR. FLINT: No, indeed.

THE CHAIRMAN: The principle matters, that is why I had picked it up, I was trying to find out the source of it.

MR. FLINT: Yes, indeed. It was clearly a misconceived point because the statute is perfectly clear, there is no appeal against a decision which is reflected in the making or continuing or revoking of regulations. So it must follow that if there were to be any appeal at all as to matters post-July 2003, the Tribunal would not be empowered to consider the validity of such regulations made by Ofcom. What would have t o happen is that the Notice of Appeal, or those parts of it which raised that issue would have to be struck out and it would be a matter for Floe, or whoever, to go by way of Judicial Review, to challenge the continuance of the regulations. This also reveals the fallacy in Mr. Kennelly's argument at – I give you the reference, I need not ask you to turn it up, Day 2, p.32, lines 8 -15, when he was arguing that Parliament clearly must have intended this Tribunal to have the widest jurisdiction, because he said it would be inevitable that challenges to Ofcom's Decisions would raise issues as to the compatibility of legal instruments applied by Ofcom and the underlying Community legislation, but Parliament remained of the view that the Tribunal should consider those issues on the merits. Parliament did not state expressly, as it could have done, in the Enterprise Act that where issues such as this were to be considered the Tribunal should apply Judicial Review principles. That is, with great respect, just completely wrong in this are. Parliament has actually gone further. It has not applied Judicial Review principles, it has said there should be no appeal at all.

My next point, the sixth point, is that that leads to this conclusion. First, if this appeal is suggested to enable the impugning of the decision of the Minister to make the regulations in January 2003, it is beyond the powers of the Tribunal. Again, with great respect, it cannot be suggested that in some way Ofcom stands in the shoes of the Minister, or has inherited the order. The order was made by the Minister, and it is the Minster's decision that would have to be set aside. So if that is the target of the alleged invalidity, Ofcom was obliged to have no power to set aside the Minster's decision, was bound to apply the law contained in the legislation and this Tribunal is in no different position.

Secondly, if it is suggested in some way that we are concerned with the position after July 2003, and so the issue is whether Ofcom has exercised its own powers properly in making, or adopting or continuing the regulations, then the Communications Act, 2003, s.192 precludes the Tribunal even considering this point. So whichever way one jumps on this issue, forward or backwards, there is no jurisdiction in this Tribunal to consider the validity of the regulations.

My seventh point is designed to illustrate why that must be right. If this Tribunal were to assert a power to declare that regulations made by t he Minister were unlawful this would lead to a bizarre conclusion. This Tribunal, as I pointed out, unlike the High Court, has no power to quash. The High Court, through the Administrative Court, is a court of unlimited jurisdiction, in contrast to this Tribunal, with powers to quash the legislation, declare it void and of no effect for all the world, that is what the High Court does when it quashes. But this Tribunal is a statutory Tribunal of limited jurisdiction with no power to quash. Your declaration in the course of a Judgment would only bind the parties to the Appeal, it has no effect at all on other parties, and could not affect the continuing operation of the law, see Lord Diplock in the *Hoffmann* case to which I referred you.

So the peculiar position that would result would be that this Tribunal would have declared that the legislation was unlawful, but it continues to bind everybody else, so any other telecoms operator would then have to continue to comply with the regulations unless and until they were quashed by the High Court.

If Ofcom, at the direction of the Tribunal, then chose to amend the regulations pursuant to any Judgment in this Tribunal, that amendment could be challenged by other persons by way of Judicial Review, and that could not be appealed to this Tribunal because of s.192. So we submit that it must follow that Ofcom had no jurisdiction to question the compatibility of the regulations made by the Minister with EC law, and this Tribunal had no power in its first Judgment to direct it to do so. This, of course, then answers Mr. Kennelly's argument, because Ofcom had no power to diapply the regulations, it follows that this Tribunal on appeal – even on a full merits' appeal – has no power to make a decision on compatibility. Compatibilty can be challenged but only by way of Judicial Review, and it could be Judicial Review either of the regulations or of Ofcom's Decision, but not by way of appeal.

That is the first point on jurisdiction but it is closely linked to the two subsequent points which are margin of appreciation and abuse of process. Now, margin of appreciation is a different point. Margin of appreciation is to the effect that this Tribunal has jurisdiction, but it should apply a limited review – just look at whether the minister's decision was reasonable, rational and so forth, and not obviously or manifestly incompatible with the directives.

Mr. Kennelly's entirely proper argument is so limited that he is able to side-step completely the question of margin of appreciation because he simply says, "This is a full merits appeal from Ofcom's decision. So no question of margin of appreciation applies because this Tribunal can substitute its own views for that of Ofcom". So far as it goes, that is right. But, once it is appreciated that the relevant decision under attack is not Ofcom's, but the regulations made by the minister then the margin of appreciation clearly comes into play. You have seen the *Upjohn* case at paras. 34 and 37. It is absolutely plain that it is not incompatible with English law to respect a proper margin of appreciation on the part of the decision-maker. So, I ask this rhetorical question: how is this Tribunal in any position at all to say that it can override the minister's decision and disagree with his implementation of the regulations, particularly when we do not even know all the factors that he took into account? That is the margin of appreciation argument.

The third, and related, and reinforcing, point is abuse of process. It is a well-established principle that a party who wishes to challenge administrative action – and that will include the making of regulations, whether they are made by the minister or made by Ofcom – should do so by judicial review, and within the appropriate time limits, in general. It is not an absolute principle. If I could show you the leading case of *O'Reilly –v- Mackman* in Bundle 4(b)1, Tab 7. Again, it is not necessary to look at the facts or the issues. This was a claim brought by prisoners claiming breach of prison rules. They were complaining about alleged breaches of prison rules, but they brought their action not by way of judicial review, but by way of ordinary action. I wanted to show you just three short paragraphs in the judgment of Lord Diplock starting with p.283 F. This is referring again to the question which he referred to in *Hoffmann* of whether administrative acts or legislation are invalid.

> "—provided that its validity was challenged timeously in the High Court by an appropriate procedure. Failing such challenge within the applicable time limit, public policy, expressed in the maxim [and that is the presumption of regularity] requires that after the expiry of the time limit it should be given all the effects in law of a valid decision".

In other words, if you have legislation and it is not challenged within three months by way of judicial review, it has effect in law, and it is the same as if it was valid from the word 'Go'. Of course, it is central to that principle that parties should go by way of judicial review because there is a strict time limit.

At p.284E-F Lord Diplock refers to the public policy consideration of having a time limit on attacking administrative acts where he says:

> "So to delay the Judge's decision as to how to exercise his discretion would defeat the public policy that underlies the grant of those protections: the need, in the interests of good administration and of third parties who may be indirectly affected by the decision, for speedy certainty as to whether it has the effect of a decision that is valid in public law".

I just pick up the point of third parties. One should not lose sight of the enormous implications of the decision that you are being invited to take. To hold that these regulations were invalid – if you had any power to do so – would, of course, affect not just the parties to this appeal, but everybody in the market. Then, at p.285D he sets out the principle of abuse of process, which is:

> "Now that those disadvantages [that is, the reform to public law by having Order 53] to applicants have been removed and all remedies for infringements of rights protected by public law can be obtained upon an application for judicial review . . . it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authority".

So, that is the general principle – if you are going to attack administrative action, you do so within the three month time limit prescribed for judicial review proceedings and if you do not, that decision, that legislation has to be treated as valid – unless, of course, it is properly called into question in subsequent proceedings. But, in our submission, the general principle must apply here. It is interesting to just see how it actually impacts on these particular appellants.

Floe did not challenge the regulations, and the decision of the Secretary of State to maintain the restriction under Regulation 4(2), either in January or on 18 July, 2003. They could easily have done so. It could have brought judicial review proceedings and put up all the points it puts up now. But, it did not.

Worldwide is in an even more invidious position because it accepts that it actually considered applying for judicial review at the time, and no doubt on the best advice very wisely decided not to challenge the regulations, no doubt recognising that it was hopeless.

So, what the argument is on the other side is, "Never mind. We can run all these points again. We did not raise them at the proper time, but we can raise them now". If one goes one step further and says, "Well, supposing Ofcom were to continue the regulations by a further decision, would that be a matter that could be brought to this Tribunal?" The answer is

clearly, "No". Because of Section 192 that would have to be brought to the Administrative Court by way of judicial review, and could not be appealed.

So, that is the principle of abuse of process. In my submission, those three points – margin of appreciation, jurisdiction and abuse of process – all lead to the same conclusion.

Can I deal briefly though with the principle of effectiveness which Mr. Kennelly raised? That is a very stringent principle. I referred you to the passage in *Upjohn*. It is that the procedure must not render it impossible or excessively difficult to enforce Community rights. It is a slightly strange submission from Worldwide, given that they actually considered applying for judicial review themselves, but leaving that cheap point on one side, the *Upjohn* case effectively decides that judicial review is okay. Any person in this jurisdiction who is affected by administrative action in violation of community right does have a right to go to the Administrative Court by way of judicial review and it does not make the right impossible of effective protection. Interestingly, if it was said it did, then presumably the logical effect of this argument is to say that not only does this Tribunal have jurisdiction in this case, but logically it would lead to the conclusion that Section 192 of the new Act is invalid because Section 192 compels persons who wish to challenge the decisions of Ofcom to make regulations to go by way of judicial review, and not by way of appeal.

So, if I can summarise on the preliminary points before we get to compatibility, in my respectful submission the Tribunal here is in danger of trespassing on an important constitutional principle. The courts do not make the laws – they apply them. It is not for this Tribunal to decide on the basis of the evidence of Mr. Burns alone that the regulations should have been made in a different form by the minister. It is a duty of this court to respect and apply the regulations as they were made. Any issue as to their compatibility with community law is for the Administrative Court and the Administrative Court alone.

So, with that rather depressing background, I then turn to the question of compatibility. I do not want to give the impression that I am not as interested as everybody else is in these arcane but wholly irrelevant and immaterial legal points.

The first point that I have made – but it has been rather lost sight of in Mr. Mercer's submissions, and Mr. Kennelly does not need to deal with it because, very properly, he confines himself to Worldwide's interests – is how on earth we are interested in the authorisation directive which only came into force on 25 July, 2003. That cannot conceivably affect the terms of the licence granted to Vodafone, nor the conduct of Vodafone, nor the rights of Floe prior to July 2003. That, on the list of issues, is all one is concerned about on the points before the Tribunal. But, can I deal with the point which was raised yesterday – that in some way the Tribunal is being invited to deal not just with the past, but whether in the future

the Gateways should be turned back on? In our submission it follows from the jurisdictional point I made that this Tribunal is not concerned as to what regulations should apply in the future – that is beyond your jurisdiction. Your only power is to determine an appeal against a decision on a complaint alleging abuse of dominant position. That complaint either succeeds or it fails. It may be incidentally in the course of its judgment points are made which have an impact on the future, but this Tribunal is not empowered, and not required, to design a regulatory system for the future, or say what would, or would not, be a good idea. That is entirely for Ofcom under its different statutory jurisdiction. You are concerned with the competition appeal. You have no power to determine what Ofcom does as a maker of regulations under the Communications Act. As I pointed out, if Ofcom went one way or the other post-July 2003, that is not appealable anyway.

So, we submit the only issue here is the historic question – namely, when Vodafone disconnected Floe in March 2003 was that, or was that not, an abuse of dominant position?

Now, can I turn to the RTTE directive? I have a similar, but I hope shorter, point to make than Mr. Anderson, which is that it just does not apply at all. If we could pick up the directive in the legislation, it is at Tab 6, Bundle 3. This directive at least has the benefit of being made and coming into force before 2003, but that is about as far as it goes because if we look at Recital 32, one sees in my submission the point that has been overlooked by Mr. Mercer and glossed over by Mr. Kennelly, which is the recital which says, "Whereas radio equipment which complies should be permitted to circulate freely ----" This is a directive about quality of equipment. "Whereas such equipment should be permitted to put into service for its intended purpose ----" in other words, all your handsets should be of a certain type and have certain frequencies and have good stamps on them, and then you can sell them, and then you can connect them, and plug them into your socket ----- But, then it goes on to say, "Whereas the putting into service may be subject to authorisation on the use of the radio spectrum and the provision of the service concerned". In other words, it is carving out from the directive the question of authorisation of the service.

Just to leap ahead, we are not concerned in this case with whether Floe's Nokia Gateways were good ones or bad ones, or caused interference. We are concerned with whether they were entitled to provide a service pursuant to an authorisation. Were they permitted to broadcast, or not? So, Recital 32 sets the scene. Recital 34 is a secondary point - the allocation of frequencies for the member states. Then, over the page, "Whereas it should be to member states to restrict or require the withdrawal from its market [so this again is the marketing of this equipment] a radio equipment which has caused or which it [and I draw attention to this] reasonably considers will cause harmful interference". So, this is not a hard-edged point as to

whether it is, or is not, harmful interference. It is a matter for reasonable consideration by the regulator.

Then, if one goes to the critical point in the substantive directive, it is found at Article 7(2). Mr. Kennelly very fairly read this, but he glossed over quite swiftly the first three lines, and one can understand why: "Notwithstanding para. 1 and without prejudice to conditions attached to authorisations for the provision of the service concerned in conformity with Community law, member states may restrict ----" This has nothing to do with authorisation of services. This whole directive is concerned with the manufacture and circulation, and selling, and then the right to connect certain types of handsets and so on, and apparatus. But, it is nothing to do with the issues in this case. There is no issue here as to whether Floe's Gateways complied with the directive, or had the right stamps on them. The only issue in this case is whether they could lawfully provide the service over the frequencies they did. On that basis, we say that the RTTE directive, as a whole, has no application at all to the issues in this case.

The authorisation directive. Can I just refer to the references to harmful interference in case they become relevant on the authorisation directive? Recital 22 of the RTTE directive shows that we are not dealing with precise hard-edged definitions of interference standing differently and separately from questions of effective or inappropriate use. Recital 22 makes clear that this is a general composite test whereas effective use of the radio spectrum should be ensured so as to avoid harmful interference, whereas the most efficient possible use should be encouraged. In other words, the concepts of interference and efficiency, and appropriateness come together there. Then, Article 3(2) of the directive ----

THE CHAIRMAN: Do you want us to look at Recital 21 as well?

MR. FLINT: You have obviously picked that up. There was no point on that that I was going to make, but I am happy to respond if there is one that I ought to be dealing with.

THE CHAIRMAN: It was referred to last time. It is marked here.

MR. FLINT: Anyway, Recital 22 I have invited you to look at. Then, Article 3(2) says that in addition, radio equipment shall be so constructed that it effectively uses the spectrum allocated to terrestrial communication so as to avoid harmful interference. Again, the concept of interference and effective use coming together.

If one then goes to the authorisation directive ----

THE CHAIRMAN: Do you want us to look at the definition of harmful interference?

MR. FLINT: It is the same, I think, in both. I am happy to look at it in the RTTE directive. It makes no difference. The point I make on that – and we have made it in our skeleton argument – is that there is no reason at all to give that anything other than its normal dictionary English meaning – in other words, something that interferes with the service. The evidence of Mr.

Burns – entirely proper evidence – all hangs on the starting point. His starting point is interference cannot be constituted by wanted signals. So, in effect, he is applying his own interpretation to interference and it is not necessary to understand his technical points. It is not helpful to understand his technical points because the question comes simply back to, "What do the words mean – 'harmful interference'?" I have drawn attention to the point that in these directives the concepts of interference and efficiency, or effective use, go hand-in-hand, and any reliance on Mr. Burns' evidence for the purpose of interpreting what harmful interference means would, in our respectful submission, be wrong in law. It is a matter of interpretation of harmful interference, and no reason at all to say that that cannot, in the view of a reasonable minister, include congestion factors. But, in any event, the authorisation directive was not in force at the material time.

MR. DAVEY: Mr. Flint, before we leave this particular point, you said as you were going along that there was no reason to give the phrase 'harmful interference' anything other than its ordinary – and I think the phrase you used was – dictionary English meaning. Have you had an opportunity of seeing the extract from the dictionary which was circulated earlier this morning?

MR. FLINT: I wondered where that came from.

MR. DAVEY: Wonder no longer!

MR. FLINT: The correct, but misleading answer to your question is: yes, I have had the opportunity. But, I have not, I am afraid, availed myself of that opportunity yet.

MR. DAVEY: If you want to come back to it at a later stage ----

MR. FLINT: I will do so.

MR. DAVEY: Later will do fine, Mr. Flint,.

THE CHAIRMAN: You may want to look at it over lunch.

MR. FLINT: I am glad it goes back to 1523 anyway!

MR. DAVEY: So, it was in force at the time! (Laughter)

MR. FLINT: Touché! Subject to that point – and you have the point in the written skeleton argument – I will pass on then from compatibility to Issue 5, which is legal certainty.

THE CHAIRMAN: Can I just raise another point which is going through my mind, which you might not be able to deal with now, but you may wish to come back to after lunch? You are saying that the authorisation directive came into force after the events.

MR. FLINT: Yes.

THE CHAIRMAN: Now, the RTTE directive was in force at the time.

MR. FLINT: Yes.

THE CHAIRMAN: It refers to authorisation.

MR. FLINT: Yes.

THE CHAIRMAN: Was there something equivalent to the authorisation directive in force at the time?

MR. FLINT: I am told my transmission should be switched off at that point and I should come back after lunch on that point.

THE CHAIRMAN: I think you may have to make submissions on whatever the law was at the time.,

MR. FLINT: I will come back after lunch, but I am bound to say I could not accept that premise. The only case put by Mr. Mercer is the authorisation directive. If the authorisation directive was not in force, what other provisions may have been in force is completely irrelevant. The Tribunal is dealing only with the issues raised by the parties in the list of issues. So, certainly I will investigate the background to that and see what other directives there were, but we are only concerned with the question of whether the authorisation directive can have any effect, and in my submission it cannot conceivably have any effect before 25 July, and after 25 July it is legally irrelevant to this complaint.

THE CHAIRMAN: Yes, but I would not like our Decision to be written on a misleading view of the law as it then stood.

MR. FLINT: No, of course. By way of background it may be useful for you to know what prior directive applied or what prior set of rules – but not, in our submission, relevant to the issues to be decided.

So, the fifth issue, Issue 5, is legal certainty. In our submission there was no error of approach in the Ofcom decision, and no realistic attempt in Mr. Mercer's written or oral arguments to challenge the principles expressed in *Ladbroke Racing* and *CIF*. Can I go back, I know you have looked at it before, to *Ladbroke Racing*, which is at tab 17 of 4(b)(i). You have been shown this already but I just wanted to draw specific attention to the clarity and firmness of the court's judgment at paras. 32 and 35.

> "Although an assessment of the conduct of the racing companies and the PMU in the light of Articles 85 and 86 of the Treat requires a prior evaluation of the French legislation, the sole purpose of that evaluation is to determine what effect that legislation may have on such conduct."

That is the sole purpose. One is not concerned with deciding what the position might be if different regulations were made, or what the position might be in the future. The only purpose of looking at legislation is to see if it makes any difference to the conduct in issue. That is reinforced at para.35.

"… a prior evaluation of national legislation affecting such conduct should therefore be directed solely to ascertaining whether that legislation prevents undertakings from engaging in autonomous conduct which prevents, restricts or distorts competition."

It is a strange coincidence that in this case on a competition law decision made by Ofcom it now is the case that Ofcom also wears a different hat giving it power to make regulations. But that does not change the nature of this Tribunal's jurisdiction which is solely to look at the legislation to determine what effect it had on conduct at the time. The same point is made in the *CIF* case, which is tab 35. I wanted just to take you back to that both on this point and on the jurisdiction point.

Dealing first with the jurisdiction point, it is important to bear in mind that what was in issue in *CIF* was a classic Italian monopoly by statute, created I think at the beginning of the fascist area in 1923 under which every single match in Italy had to be sold only through a State monopoly. In those circumstances it was quite an extreme case. That legal provision under Italian law was directly inconsistent with the competition provisions of the Treaty, whereas the legislation we are concerned with is not inconsistent with the Competition provisions. It is said not to be compatible with the Telecoms' Directives. At para .45 the court refers to Articles 81 and 82, and Article 10, it says that the Member States are required

"… not to introduce or maintain in force measures of a legislative or regulatory nature which may render ineffective the competition rules applicable."

So you are dealing there with the competition aspects, and that is made clear, if one goes through paras. 50, which imposes a duty on Member States to refrain from introducing measures contrary to the Community Competition Rules. Then at para.58 the holding of the court is:

"In the light of the foregoing considerations, the answer to be given to the first question is that where undertakings engage in conduct contrary to Article 81(1) and where that conduct is required or facilitated by national legislation which legitimises or reinforces the effects of the conduct specifically with regard to price fixing or market sharing arrangements a national competition authority, one of whose responsibilities is to ensure that Article 81 is observed:

- has a duty to disapply the national legislation."

So that was referring to competition provisions. In any event our point on jurisdiction is that even if that is to be taken to refer to this sort of case, which in our submission it does not, it does not dictate how the Member State ensures that a competition authority may disapply. Of course in this jurisdiction that can be done simply by an application for Judicial Review setting aside the regulations.

On the legal certainty point, that is dealt with, as you have seen, at para. 53 and then importantly at 54, this is the critical sentence:

> "The decision to disapply the law concerned does not alter the fact that the law set the framework for the undertakings' past conduct."

That is the test you have to apply here, and the law set the framework for Vodafone's conduct. Vodafone did not have a choice as to what the regulations said. Vodafone did not have a choice as to whether to comply with the regulations, the law set the framework. The law dictated that they could not continue to supply services once they knew they were illegal, and that is the answer, in our submission on the legal certainty point. That is the basis upon which Ofcom properly decided the case. If one just tests it in this very simple way that if Floe had come to Vodafone and said "We would like to provide Gateways, we know they are in breach of the law, but never mind, the DTI probably will not enforce, and the law may be changed in the future", would Vodafone have been obliged, even in a dominant position, to supply? In our submission the answer is plainly not. It would have said "The law sets the framework with what we can do, and we do not choose to break the law. We do not choose to facilitate your breaking the law". The position is exactly the same if Vodafone terminated once it discovered, and thus had knowledge that Floe was breaking the law.

You raised earlier the question of what constitutes aiding and abetting, and I may come back to that, but this is not a technical question of whose frequency it was. The question of aiding and abetting is a substantial question of fact. Was Vodafone providing services to Floe? Answer: yes. It was providing SIM cards, it was providing calls over those SIM cards, and it was billing Floe. It was therefore enabling, facilitating Floe to do what it did. That is fine, until Vodafone knew that it was illegal. Then plainly it was aiding and abetting if it continued. It would be no defence at all in the Crown Court – indeed, the defence would be laughed out of court and struck out – for the company to say "Well actually, although we were providing services technically we were not permitted to do so because it was not our frequency or something like that. That would not prevent a criminal prosecution being brought, it is rather like the manager of Robert Dyas saying "I knew you intended to go out and stab your mother-in-law, but actually we were not licensed to open on Sundays." It would make absolutely no difference. So that is the issue of legal certainty.

Can I deal briefly with *Hilti*? I adopt the submissions made by Mr. Anderson, particularly on the basis of the findings of fact we have invited you to make, the *Hilti* principle does not apply here. Mr. Kennelly, in his written skeleton argument at para.72 put his finger on the point *Hilti*, where he says:

"Contrary to the general principles of Community competition law, for a dominant undertaking to exclude a potential competitor from the market by unilaterally disconnecting its apparatus ostensibly for public interest or legal reasons."

"Ostensibly". That principle is right, a dominant undertaking cannot use the pretext – a pretended reason of public interest – to disconnect, but that is not this case. First of all, it was a genuine reason, and secondly, it was justified. We now know what Floe was doing was indeed actually illegal without a licence and Floe did not have a licence. For good measure, we know Floe knew they did not have a licence and were taking a risk, but that is not essential to the point. The critical point here is the genuineness and reasonableness of Vodafone's belief. As I have submitted on the facts that cannot realistically be challenged.

Madam, I have – I think – very little left to deal with. I was going to go on to issues six and seven, so we are very nearly there, but it would be very helpful to me if I could just check that I have covered everything up to now, and I am conscious that I have gone quite fast.

THE CHAIRMAN: We did start at 10 o'clock.

MR. FLINT: So would now be a convenient time.

THE CHAIRMAN: Now, would be a convenient time. Shall we say 5 past 2, because we have been saying "5 past 2"?

MR. FLINT: Yes.

(Adjourned for a short time)

MR. FLINT: (Recording begins) … meaning of harmful interference. We have made a submission on this at para. 94 of our skeleton argument – you need not look it up – which says that there is no good reason to give the words 'harmful interference' a restrictive meaning and in this context 'harmful interference' means any effect by any means which is detrimental to the operation of a network – in degrading a service or preventing or interrupting calls. We say that that is well capable of covering congestion, particularly bearing in mind the margin of appreciation reflected in the recital to the RTTE and, as a matter of general law, that it is for the maker of the regulations to take a reasonable view as to what harmful interference covers.

As to the large number of definitions in the Oxford English dictionary there is the general reference to interference, and then, of course, the broadcasting and telecommunications senses. One sees that the citations under that go back to the days of Mr. Marconi, when one was dealing with Morse code over, no doubt, copper wires. The last definition is in the BBC handbook in 1966, well before, I think, cellular radio would have been invented. So, in our submission it is of limited assistance. But, it is fair to say that it refers to extraneous signals. The point is this: extraneous to what? If one is going to draw a distinction between wanted and unwanted signals, or extraneous signals, from the point of view of the runner of the

service, the provider of the service, or, indeed, the user of the service, anything that stops you making or receiving calls is naturally and colloquially interference. It is a restricted meaning to say, "Well, no, the reason you can't make a call now, or it's interfered with, is due to congestion". That is not interference. From the point of view of the provider of the service or the consumer, each type of interference is equally detrimental. What we say is that the sense of it is simply wherever the signal comes from, and whatever the cause, does the maker of the legislation have a reasonable apprehension that the use of whatever facilities, or apparatus, or frequencies are envisaged will interfere with the smooth running of radio communications. Of course, I have made the point in any event that that is all a matter for the minister and not for Ofcom, nor this Tribunal.

The second point I want to deal with was the point I made on the RTTE directive – that it is irrelevant to what we are concerned with here because it does not purport to cover authorisation, to provide services. I was asked whether there were previous directives, and I am told that, yes, there were previous directives. They were not with a view to harmonisation in the relevant area we are dealing with. This area was left to member states to deal with, and Regulation 4 did not purport to be made in implementation of any directive or Community obligation. So, when the RTTE directive says 'without prejudice to authorisation', clearly there would have been either Community provisions or a Community acceptance that authorisation was for member states at that stage. Of course, that all changed once one got the authorisation directive coming in.

So, that is Issue 4. I have dealt with Issue 5 – legal certainty. Issue 6 – I adopt Mr. Anderson's submissions. I have responded to the point of the criminal offence of aiding and abetting. It is very important though to deal with this point and with the IMEI point – that one understands what Vodafone is supplying, and what Floe is providing to its customers. Can I ask you to look at a useful diagram in the witness bundle at Bundle 1, Tab 1? It is in the witness statement of Dr. Unger at p.3. This usefully illustrates where the SIM card and where the equipment identity – the IMEI – number comes in. If we start on the left-hand side of the page, we have a SIM card in a mobile station. Your average user, not engaged in Gateways, does not need a licence for that SIM card, but he needs a contract from Vodafone. He needs a handset from someone which will be an equipment. So, Vodafone, or a service provider, will be providing the consumer with (a) a SIM card, which remains the property of the mobile 'phone company, and (b) a handset which may, or may not, remain the property of the company, but, in any event, has an equipment number.

The SIM card transmits without a licence, because your average user is exempt under Regulation 4, to the base transceiver station. The SIM card does, indeed, transmit on

Vodafone's network in the sense that the Vodafone base transceiver station is licensed specifically to receive messages from that, and other, SIM cards on that frequency. So, the SIM card is connected over a licensed frequency to the Vodafone network. We then have the base transceiver stations which, as we have seen from earlier, are required both to receive from the mobile station and then to transmit back on the Abis network to the base station controller – the BSC. That then sends a message back to the mobile switching centre, and you will see that has links to two other areas: Link C goes to the HLR (the Home Location Register). That is the database where the SIM will be checked. So, your average user needs two things to make a mobile call which he has from Vodafone or another provider: he needs a SIM card to be in date and paid for (so, that will be checked on the Home Location Register), and then he needs to be using a legitimate non-stolen handset. That will be checked at Link F on the Equipment Identity Register.

So, if you have a Vodafone customer who does not pay his bill, Vodafone can do one obvious thing, which is to switch off a SIM card, which is an act not undertaken pursuant to its licence – you do not need any licence to switch someone off. It is simply a contractual right which it exercises against the user to say, "Well, you can't use that SIM card on our network, and we'll have the SIM card back please". If Vodafone have also sold him the handset, or hired him the handset, they may also say, "Well, give us the handset back, and we're blacklisting that handset by putting it on the Equipment Identity Register". The reason for having two controls is obvious – what you do not want is someone to steal the handset and then stick another SIM card in it, and carry on.

Now, the analysis is exactly the same with Floe. Floe, instead of a mobile station, has any number of SIM cards which are the same as mobile stations. Those SIM cards will be provided by Vodafone. They will remain Vodafone's property. Once Floe starts misbehaving, those SIM cards are switched off. That will mean that they cannot transmit on Vodafone's network. Of course, Vodafone does not switch it off by going out to Floe's sites and smashing the Gateways. It simply puts a note on the computer at the McMaster switch centre, or at the Home Location Register, to say, "If that SIM card comes on, it won't get through". Exactly the same technological wizardry is accomplished in relation to the equipment. So, if you are concerned that Floe is mis-using your SIM cards, you switch off the SIM card, but you also switch off the equipment because you are worried that otherwise they will just simply pick up some SIM cards by some untraceable means from other places and stick them back in the same equipment.

THE CHAIRMAN: How do you switch it off?

MR. FLINT: In the note ----

THE CHAIRMAN: In the Register?

MR. FLINT: In the Register, yes. Then the master switching centre sends an interrogation to the Register, saying, "Is this okay?" and it will come back, "No". So, the call will not be made.

THE CHAIRMAN: I am just curious really. It may not be a Vodafone mobile 'phone. I may have bought it in Selfridges, and put a Vodafone SIM card into some 'phone that I bought in Selfridges ----

MR. FLINT: Well, that is fine.

THE CHAIRMAN: Now, what happens? Do you switch it off?

MR. FLINT: We would switch off the Vodafone SIM card if you do not pay your bill.

THE CHAIRMAN: But you do not switch off the ----

MR. FLINT: Not necessarily, no. Suppose you have a pay-as-you-go SIM card and it runs out, your SIM card is no longer working but you still have your handset, you can go and buy another card, or get a SIM card off another user, another mobile operator and use that.

If I could ask you to keep that diagram open, could I ask you to pick up the transcript yesterday at 65 at lines 12 to 14. This is the IMEI point. This is the point put yesterday by the Tribunal:

> "What we would like some submissions on is: on the basis that Vodafone does not have a licence over that frequency, on what authority can it turn off a mobile station which does have a licence …"

Vodafone does have a licence over the frequency. It has a licence to receive a message from that SIM card, transmit it to the base transmitter station. So Vodafone does have a licence over that frequency but of course it does not need a licence to switch someone off. It needs a licence to operate a telecommunications service over the ----

THE CHAIRMAN: Well the reason for the question was that it was under the misapprehension that something happens to the mobile station rather than something happening at the other end.

MR. FLINT: Quite. What happens on the mobile station will be a matter of contract or property. As I have said the SIM card will normally be the property of the mobile operator anyway, but in practice he cannot get it back, it has gone, so he will simply make sure the calls are not accepted.

The other leg of the question was a mobile station which does have a licence, but again that is not right, the mobile station does not have a licence, it does not normally need one because it is exempt under Regulation 4, so your average private user who has his Vodafone handset and decides to misbehave or not pay his bill does not have any licence at all, he does not need one, but he needs a valid contract with a mobile operator to make and receive his calls.

THE CHAIRMAN: Yes, but just assume that a mobile operator had an arrangement with a Gateway operator, and as I understand the submissions that are being made that would require the Gateway operator to have a licence for the frequency from the Gateway to the base station.

MR. FLINT: That is a hypothetical, what we are dealing with here is ----

THE CHAIRMAN: But in order to understand what the licence covers, as I understand it that is what the submission is, that in this case Floe would have needed that licence.

MR. FLINT: The submission is that Floe did not have a licence.

THE CHAIRMAN: No, I know, but it would have needed that licence is your submission.

MR. FLINT: No, with respect, my submission is much simpler than that. Floe was acting illegally using a SIM card for purposes not permitted by Vodafone's licence, that is the base transceiver station point, it does not have any licence at all because it never applied for one. It does not have the benefit of an exemption because it is providing a service by way of business under 4.2, and in any event the authority to switch it off is not an authority you need under your licence, it is simply the exercise of a contractual right, or property right.

THE CHAIRMAN: Yes, if you would bear with me, we have to construe the licence.

MR. FLINT: Yes.

THE CHAIRMAN: You say, as I understand it, that in construing that licence – your licence, Vodafone's licence – the licence does not cover the frequency from the mobile station not the base station. It covers the frequency from the base station to the mobile station but not the other way around.

MR. FLINT: The licence covers the receipt of signals. Vodafone is licensed to receive that signal from the mobile station.

THE CHAIRMAN: What about the signal that comes from the base station to the mobile station?

MR. FLINT: Yes, Vodafone is licensed to transmit from the base station to the SIM card, and whether it is a one-user SIM card, or a Gateway operator SIM card, Vodafone is licensed to transmit to that. But, of course, Gateways are used to make calls to get into the network.

THE CHAIRMAN: Yes, and you say that the frequency making the call is not within your licence, but the other way is within your licence?

MR. FLINT: The ability to receive from a SIM card is within the licence.

THE CHAIRMAN: But not the other way?

MR. FLINT: Not the other way. As I say, that argument, that construction of the licence by Ofcom, I do not understand from Mr. Mercer's argument, can sensibly be challenged. You have the licence, you have the equipment, the Gateway does not qualify as a base transceiver station.

THE CHAIRMAN: On Mr. Mason's evidence may be that that is not the position.

MR. FLINT: Mr. Mason's evidence is ----

THE CHAIRMAN: I know you cannot construe the licence ----

MR. FLINT: It is completely irrelevant.

THE CHAIRMAN: No, but what is relevant is the question of what is the true construction of the licence. We are going to have to decide that. We cannot, for the moment, just assume that what you are saying is right, so I am trying to test it.

MR. FLINT: Well the testing, with respect, needs to be done by reference to the reasoning of Ofcom, which I adopt in its Decision, which I showed you earlier, and in particular it is at para.118. It has the helpful diagram at p.25 and then you have at 118 the reasoning which is essentially this, that Vodafone does not need a licence to make calls on mobile phones, because it is the mobile user who makes the calls. What Vodafone is licensed to do is to make and receive calls through its base transceiver station. The SIM cards provided to Floe cannot conceivably constitute base transceiver stations.

THE CHAIRMAN: No, I am not saying that they do. The frequencies are licensed to it under its licence – we may have to go back and look at the licence, but the frequencies are licensed, and the use of those frequencies is from the base transceiver station. The question is whether the pair is completely licensed, or only half of one plus the other of the pair is licensed?

MR. FLINT: In my submissions, those slightly arcane questions are not the central point. The central point is you have a SIM card, Vodafone is not itself licensed to use SIM cards to transmit. It is licensed to have base transceiver stations submitting and receiving from SIM cards. Therefore if Floe were to have any argument at all that it had a sub-licence from Vodafone or any right under Vodafone's licence it needs the SIM cards to be treated as base transceiver stations. They cannot be base transceiver stations for the technical reasons given in the Ofcom report – end of issue.

THE CHAIRMAN: I think what you are saying is that it may make no difference whether that part of the frequency is licensed to Vodafone or not?

MR. FLINT: I have some difficulty in drawing these ethereal distinctions between how a frequency is licensed. Vodafone, under its licence, is licensed to transmit and receive from its base stations on certain frequencies. It is very difficult to answer the question, indeed, I am not sure my electronics are up to it - "Is a signal coming one way to be treated as licensed by the receiver or the transmitter?" Vodafone has a licence to operate a base transceiver station to send calls out to SIM cards, to receive calls in from SIM cards. The point I was making on the point put by the Tribunal yesterday when you were asking the question "On what authority can it turn off a mobile station which does have a licence?" was to say Floe does not have a licence. It does not, with respect, help to hypothesise what would have been the position if it did have a licence. It did not have a licence and in any event the equipment register turn off

and the SIM turn off are not matters governed by the licence. Those are matters governed by property rights or contract as the case may be. Of course, you do have evidence on the SIM cards and equipment register point in the Statement of Facts from the last hearing and, indeed, Mr. Greenstreet's evidence. That is all I wanted to say on the physical working of the network.

The relevant supply here we are concerned with is not the supply of the equipment because Floe got that for themselves, it is the supply of the SIM cards, and it is turning the SIM cards off that is the relevant abuse of dominant position that is complained of. That is relevant to the aiding and abetting argument, because what Vodafone provides to its customers like Floe consists of at least three things. It physically provides the SIM card which you need to operate your mobile phone or operate the Gateway. It provides the facility to make and receive transmissions from that SIM card by keeping you switched on, and that is not a matter of licensing, it factually does provide that facility. Thirdly, you have the benefit of a contract under which you can make your calls over Vodafone's network and pay for them at the stipulated charge rate.

So if you asked the question "What is Vodafone doing so as to constitute an illegal activity?" The answer is it is providing those three facilities, the SIM card, the ability to access the network and the charging to Floe and once it knows that Floe is operating in an unlicensed, non-exempt capacity then it follows that Vodafone, if it continued with knowledge to supply would be aiding and abetting that breach of the WTA. So in our submission once the Tribunal has determined that the activities of Floe were illegal under domestic law and once the Tribunal has determined that it has no jurisdiction to decide issues of compatibility and the regulations are valid until set aside then it must follow that there can be no question here, as Ofcom decided, of abuse of dominant position.

The last issue I want to deal with, but very shortly, is issue seven on discrimination. The only remaining allegation was the recall issue; we have not dealt with that on the factual points we put in. That is just the evidence of Mr. Stonehouse, and the important point there is that we have the Vodafone evidence which in details answers on the Recall point. In reply to that Mr. Stonehouse has no documents to produce, no direct evidence at all and he stated in the course of his cross-examination that he had not even seen any documents relating to a Vodafone supply to Recall. So, in our respectful submission, there really is no evidence left at all to support any remaining allegation of discrimination irrespective of the fact as to whether it could be taken into account not having been a point raised under the complaint. We have set out the references in detail in our skeleton argument.

I have dealt with issues 1 to 7. I am just checking to make sure I have dealt with the issues that have been raised, or the main points that have been raised outside the issues in the

course of the hearing and I hope I have dealt with all the significant points. There is just one point as a matter of law and approach I ought to deal with and that is the point as to whether this hearing or this decision is in some way a continuation of what went before. In my respectful submission as a matter of law Ofcom took a new decision and this is a new and further Appeal in respect of that new decision and the Appeal stands or falls on a self-contained basis, subject to any argument about issue estoppel going either way and that may be important on jurisdiction because it matters not, in my submission, what Ofcom or any other party may have said about compatibility on the previous proceedings, the question is whether, in this case, Ofcom actually had jurisdiction, and you cannot confer jurisdiction by agreement or waiver, it matters not what they said, or may have said at a previous hearing, the issue is whether they actually had jurisdiction as directed by the Tribunal to consider issues of compatibility and for the reasons I have given they did not.

In conclusion on my submissions could I then say that in my submission the list of issues represent the agreed position between the parties on the parameters of the relevant points in this case, which the Tribunal has to decide. It is not permissible to go outside those issues. We say if you look at those issues one by one, most of them are inarguable and the compatibility question does not arise. I do, with respect, stress the point, that this Tribunal cannot have jurisdiction to set aside the Secretary of State's Decision to make or continue the exemption regulations and it is not the function of this hearing to decide what would be the best form of regulation now or historically or in the future. That is a matter for Ofcom under the statute, not a matter for this Tribunal.

So, ma'am those are the submissions for Vodafone.

MR. DAVEY: Mr. Flint, you invited us to consider a number of hypothetical scenarios in the course of your presentation, I wonder if you could consider one for me. Let us suppose that I come to you as a network operator with a plan to put SIM cards into devices which I describe to provide least cost routing services, and I ask you to supply the SIM cards for that purpose. So you go away to your manager and to your legal department and you produce a contract for me in which you agree to do that. Now I know that this activity has to be licensed under the Wireless Telegraphy Act, and I know that it will not be exempted. I do not have a licence but I know that you have. What I do not know, and cannot know is what your licence says, because that is confidential. I do know what the RTTE Directive says that approved equipment cannot be prohibited, and I know my equipment is approved. Let us suppose that those are the facts. Am I not entitled in that situation to assume that you are up to speed on your own licence and that you know what you can, or what you are and are not authorised to do?

MR. FLINT: Yes.

MR. DAVEY: Am I not entitled to assume that you are authorised to do what you have just agreed to do?

MR. FLINT: Clearly that is the assuming person who approaches me in good faith, that is the common understanding. Clearly Vodafone understood and assumed that the devices were to be used for lawful purposes. That was a fair and reasonable understanding. It may now be shown to be legally incorrect, but it was a fair and reasonable understanding at the time, but that does not, with respect, answer the question in the case. Whatever Vodafone assumed, the question is as a matter of law, did they, or could they lawfully authorise Floe to do what they did? The Ofcom Decision, which is correct, that they could not have done so because they had no ability to authorise SIM cards in that way, authorise the use of SIM cards in that way.

MR. DAVEY: So you said that if the assumption was correct that would be fine, and it subsequently transpired in this case that the assumption was incorrect, and that it was not legal. What bothers me, Mr. Flint, is here is something that you have agreed to do; you then find that although you thought it was legal when you agreed to do it, you now find it is illegal.

MR. FLINT: You find actually that the devices – at this stage I have not changed my mind as to what is legal or illegal, what has changed is the discovery that they are being used in a different way to that which you believed.

MR. DAVEY: Well let us assume that they are not being used in a different way to what you believed, but that you discover at that stage – later, a bit down the line – that what you originally believed was legal is not legal. Are you entitled just to pull the plug or are you under some sort of obligation to try and fix it?

MR. FLINT: First, if the services you are providing are being used for an illegal purpose what you cannot do is continue, so you have to "pull the plug" as you put it. The second point is that is not actually what Vodafone did. It made inquiries of Floe, received a false answer, consulted the Regulator, understood what the position was and then terminated. One must be very careful in this case to distinguish between matters arising as a matter of contract, which would lead to estoppel or a common understanding that they could carry on as per the contract, and the hard edge legal question here which is, that as a matter of law, Floe were not entitled to do what they were doing. What we are concerned with is not the contractual rights between Vodafone and Floe, and whose fault it was and whether there was a misrepresentation and so on. What we are concerned with is the much narrower question which is the law setting the framework for its conduct, could Vodafone continue to make a supply? And the answer is "no".

MR. DAVEY: If we go back to my hypothetical scenario, Mr. Flint, you have discovered what you agreed to do is illegal, what I am concerned about ----

MR. FLINT: To be more accurate, you have discovered the use being made of what you are providing is illegal. What we agreed to do was not in itself illegal, to provide SIMS.

MR. DAVEY: It is the service which is being provided through the SIMS.

MR. FLINT: It is how the SIMS are then used.

MR. DAVEY: Yes. In my scenario you have agreed to provide the SIMS which enable the service to be provided and you believe at the outset that the service is legal. You then discover that your original belief was mistaken and that it is illegal. It is in those circumstances that I am concerned, Mr. Flint. I am wondering how you can go to the person, with whom you have contracted, and say "I discover that I am in breach of the law and, incidentally, so are you, but it is my licence which it is a breach of and because I am in breach of the law I am going to stop supplying you". Are you not under some sort of duty to – you are relying on your own breach to get out of your own obligations?

MR. FLINT: I can see that point arising as a matter of contract or expectation as between the parties, but actually, even as you put it to me, with respect , it is not accurate. It is not a breach of the law because of Vodafone's licence or its failure to understand its own licence, it is a breach of the law because Floe is doing something that it simply is not permitted to do. So the fault or the responsibility does not lie on the Vodafone side, it lies on the Floe side. It is Floe that is committing the offence by transmitting or using the SIM cards in this way. Vodafone had a secondary criminal liability in facilitating that.

MR. DAVEY: You agreed, Mr. Flint, that I as the deliverer of this service was entitled to believe that you were authorised to do what I had said we were doing. In this particular situation, and coming away from you, Vodafone knew that Floe was going to use the SIM cards.

MR. FLINT: My acceptance was, of course, entirely hypothetical, but in the facts of this case it is Floe, and Floe alone, that knew what it intended to do. It is Floe that knew it was running a regulatory risk, as its internal business shows. Vodafone did not know that, and can only rely on what it is told.

MR. DAVEY: Vodafone did know a certain amount of what was going to be done. It had information before it. I am not saying how far that information went, but they did know ---- There was a business plan before them which disclosed a fair amount of what was going to happen, and even on that analysis things were going to be done which, as you point out, Vodafone thought were legal, but subsequently they discovered were not. Let us suppose the situation had stopped there. Are Vodafone under no obligation to try and put the thing right? These services would have been allowable. They have suddenly discovered that they are not. Are they not under some sort of obligation ---- For instance, should they have been making

inquiries as to whether their license could be extended or amended so as to enable the service which they originally contracted for to be supplied legally?

MR. FLINT: The difficulty I have – and I hope you sympathise and recognise the difficulty – is the complete unreality of that hypothesis. It is not what was originally supplied for the purposes originally adverted to that was of any use to Floe. Floe was doing something different. Floe, by March 2003, was exclusively using Multi-Use Gateways – not a customer premises. If it was the case that everything had stayed the same and then there was a change in the view of the law, then it might be, as a matter of private relations or contract between the parties, that one would have expected Vodafone to see what it could do to assist. But, that is not the position. The position is that the services were being used for a totally different purpose than had been represnted to Vodafone.

The second point is that as a matter of abuse of dominant position, the law sets the framework. However the parties got them into the position, by March 2003 Vodafone was not legally allowed to supply. The suggestion that Vodafone should have in some way done more, with respect, sets aside the point that Vodafone did not just act of its own initiative. It did consult the regulator. It did understand that the regulator took the view that the services provided by Floe were unlawful, and in those circumstances it is for Floe to make its activities lawful rather than for Vodafone to condone or assist in illegal activities. In any event the licence had been granted, and there was, as the law then stood and as it still stands, no provision to allow Vodafone to do what Floe was doing. So, no question can arise of granting a sub-licence or in some way improving the position because legally it just could not be done. What it would have required was a change in the law – which never arose.

MR. DAVEY: You are saying that there was nothing that could be done by way of licence. There would have had to have been a change in the regulations.

MR. FLINT: Yes, there would have had to have been a change in the regulations.

MR. DAVEY: There was nothing to say that this activity could not be licensed. I mean, the exemption regulations exempt you from getting a licence. The activity is licensable.

MR. FLINT: Well, it would require a different licence, and it would have been a wholly novel licence to a Gateway operator. The decision of the minister is that by whatever means the Gateways were not to be permitted in that form. Vodafone could not provide them ----

MR. DAVEY: Well, it certainly said unlicensed Gateways were not to be permitted in that form. Is that not the effect of the regulations?

MR. FLINT: Yes. But, as things stand at the moment there is no way that Vodafone could have itself conducted these activities or licensed someone else to do so. Vodafone cannot be

required to procure a change in the law, or a change in the legal status. It is required to do what it needs to do to comply with the law and respect the conditions on its license.

MR. DAVEY: They had some of these Gateways themselves, did they not?

MR. FLINT: They had supplied some equipment for Gateways, but those were self-use Gateways, and certainly were considered – and may still be considered to be – lawful. It is a Commercial Single User Gateway that is now accepted not to be lawful – hence the refusal to connect any further Gateways from December 2004.

MR. DAVEY: So, they did have Commercial Single User Gateways ----

MR. FLINT: There were some Commercial Single User Gateways, that is correct.

MR. DAVEY: Which would not have been lawful without a licence.

MR. FLINT: No, that is not necessarily correct. If they were self-use in the sense if they were the customer's property and were not providing a service to a third party. In that instance, they would not necessarily have been unlawful.

MR. DAVEY: No, I thought you said that Vodafone supplied the equipment

MR. FLINT: Yes, but the Premicell devices, for example, which were supplied, if they were supplied to the customer but the customer then used them and were a self-use Gateway, then they would not be unlawful. But, what was clearly unlawful, as understood by Vodafone, form August 2002 was the use that Floe was making of them.

MR. DAVEY: Yes, it was not illegal for Vodafone to supply the Gateways for commercial use under their own licence.

MR. FLINT: It would be. If the Gateway is supplied to be used as a Commercial Single User Gateway, then under the Decision of this Tribunal that is unlawful.

MR. DAVEY: Without a licence.

MR. FLINT: Without a licence, not being licensable under Vodafone's licence because it only has licence for base transceiver stations.

MR. DAVEY: Unless Vodafone's licence was changed.

MR. FLINT: Unless Vodafone's licence was changed, or a new licence was granted to someone else.

THE CHAIRMAN: Can I ask you three things? The first is in relation to objective justification. Does the justification have to be the justification that is given at the time of disconnection to be the objective justification?

MR. FLINT: In my submission, no. There has to be a good reason. But, in this case the reason given in the letter was the genuine and true reason.

THE CHAIRMAN: The reason I think given in the letter was illegality, but not your own illegality.

MR. FLINT: No, it was ----

THE CHAIRMAN: In other words, not the aiding and abetting. Now, the aiding and abetting was raised, I think, during the last hearing.

MR. FLINT: The objective justification is illegality, as such. How one analyses it, and how it works is a secondary question. The critical question is: were the Gateway services being used illegally? That was the central point in the letter. What follows from that as an inevitable inference is that if Vodafone continued to supply, then it would be aiding an abetting that illegality.

THE CHAIRMAN: But they may, or may not, have been aiding and abetting the illegality.

MR. FLINT: Of course, they were not at that stage.

THE CHAIRMAN: The reason that was given was Floe's illegality ---- Floe's unlawfulness.

MR. FLINT: Yes.

THE CHAIRMAN: So, are you effectively relying on the aiding and abetting, or are you relying on Floe's unlawfulness?

MR. FLINT: I am relying on both. The fundamental underlying point is that illegal use is being made by Floe. What a person in a dominant position does not have to do is serve a pleading with his termination letter setting out all the provisions of which they may be in breach, and how that implicates Vodafone. The only relevance of this is to make sure that there is evidence that this was a genuine reason, and the genuine reason was illegality.

THE CHAIRMAN: My second question is: this morning you referred to the service of billing which Vodafone provided.

MR. FLINT: Yes.

THE CHAIRMAN: Now, can you enlighten me as to what the billing covered – in other words, which frequency it was covering.

MR. FLINT: Well, you do not charge for frequencies. You charge for telephone calls.

THE CHAIRMAN: It is the telephone call which is from, effectively, the mobile station to the base transceiver station, etc. and then on ----

MR. FLINT: Yes. That is right. You pay on termination of the call.

THE CHAIRMAN: So you are paying effectively for the frequency between the mobile station and the base transceiver station.

MR. FLINT: You are paying for the facility to use the mobile network as a whole, which includes the wireless link to the base transceiver station, and then from wherever to wherever, and you are connected into some other Vodafone user somewhere else in the country or even abroad.

THE CHAIRMAN: So, you are paying for the use of the frequency ---- Floe would be paying for the use of the frequency from the mobile station to the base transceiver station.

MR. FLINT: Well, that is a somewhat, if I may say so ----

THE CHAIRMAN: That is what they would be paying for.

MR. FLINT: -- unreal way of looking at it. It is certainly right that the facility they get, and for which they are charged, includes the right to transmit from any of their SIM cards into any base station anywhere in the country, and then on to where the call terminates, where it is received.

THE CHAIRMAN: But, if your licence does not cover the frequency from the mobile station to the base transceiver station ----

MR. FLINT: But it does. Our licence covers the receipt of that message from the mobile station.

THE CHAIRMAN: It does.

MR. FLINT: The base station is licensed to receive calls from mobiles. It is licensed to make calls out to SIM cards. Could I go back to the previous question and just supplement it – objective justification? I am reminded that in Mr. Morrow's witness statement (Tab 14, para. 33), not challenged, he says, after I reviewed the relevant legislation, "It did strike me that if Vodafone were aware of Multi-Use Gateway activities and allowed them to continue, it could be complicit in the offence. That was certainly of concern to me".

THE CHAIRMAN: That is very helpful.

MR. FLINT: So, the concept that Vodafone might be exposed ---- Indeed, I will find the reference later, but I am sure that in the papers there is also a note that goes round on Gateways to mobile operators saying, "Beware. Your directors may actually have criminal liability for this sort of activity".

THE CHAIRMAN: If you find it, then perhaps you will let us know the reference.

MR. FLINT: The reference I had in mind was Tab 39 of Bundle 2(a).

THE CHAIRMAN: Who is that between?

MR. FLINT: That is from mobile operator-type people [Laughter] ---- That was intended to be a polite excuse for me not understanding who OG Secretariat could possibly be. It is from OG Secretariat, which looks like Logica, who I thought were a computer company – but I am obviously behind the times. It goes to various people, including Mr. Borthwick, I think, at Vodafone. So, that is Vodafone regulatory. A letter on GSM Gateways. "I have met the RA to discuss this. They told me they are taking it seriously". Then, at the end, "If your companies are doing this stuff, you might like to know that the penalties include prison terms for directors".

THE CHAIRMAN: That seems to be something that is going from somebody whom we cannot identify ---- We do not know from the bottom – because it is blacked out on my copy -----

MR. FLINT: I am told it is the operators' group – that is, fixed and mobile operators.

THE CHAIRMAN: The operators' group.

MR. FLINT: So, it is telecoms operators.

THE CHAIRMAN: So, it is not the directors of Vodafone. It is something that is going round the operators' group.

MR. FLINT: It is 'all directors'. It is, "If your companies are doing this stuff, you might like to know ----"

THE CHAIRMAN: Yes. But, it is information from the operators. I am just trying to work out what it is. It is information from the operators' group to various operators, including Mr. Borthwick, who is one of your ----

MR. FLINT: Absolutely.

THE CHAIRMAN: So, it went to Vodafone.

MR. FLINT: Yes, it went to Vodafone. It is just a general realisation that, "Just be careful if you are doing something that is illegal".

THE CHAIRMAN: Right. The operators' group is effectively a group of the people that are mentioned in the 'To'.

MR. FLINT: A trade group, yes, of mobile and fixed telecoms operators.

THE CHAIRMAN: My third question is: the predecessor to the authorisation directive ---- You said that it was not purported to be in compliance with the Community provisions. Now, we have a number of those regulations in our bundle. There is one at Divider 5, Volume 3. There is another at Divider 7. I think we have another one at Divider 8.

MR. FLINT: It goes through to the relevant one which is at Divider 16. Those are the relevant regulations in issue in this case.

THE CHAIRMAN: At Divider 16?

MR. FLINT: Yes.

THE CHAIRMAN: But, I asked about the predecessor. Divider 16 is the one in force. 2003.

MR. FLINT: Yes. It is the one which was made on 20 January, and came into force on 12 February. So, it is in force at the material time in March. But, it is in the same terms as the previous one.

THE CHAIRMAN: You say that those regulations were not made in compliance with European ----

MR. FLINT: No. I mean, they are made under the WTA. You are quite right – they go back a long way.

MR. PICKFORD: Thank you, madam, members of the Tribunal. I was proposing in my submissions to focus on Issues 4 and 5. Those are the compatibility issues. Before I do so though it may just be worth my while wading in and adding to the confusion on some of the points that have just been raised. The first of those concerns Vodafone's licence. The Tribunal were addressing various questions to Mr. Flint about how the frequencies are divided

up under that licence. I do not know whether it would assist the Tribunal if I just spent a couple of minutes explaining our understanding of the construction of the licence.

THE CHAIRMAN: This comes from what you were saying two days ago, does it?

MR. PICKFORD: It does indeed. I will be very brief on it. It may help if we turn to Volume 2(a), Tab 8 of the bundle. If we turn to p.7 of Vodafone's licence, we see Item 7, which is in Schedule 1 to the licence, and it deals with frequencies of operation. It says, "GSM base transmits ----" and then underneath that, "935.1 – 939.5 megahertz". Now, what we say is that in relation to that particular range of frequencies Vodafone has the right to use them – all of those frequencies. But, it has the right to use them purely for the purpose of transmitting from its base stations. Then we have a symmetrical proposition for its receiving on related, but different, frequencies.

So, to answer the Tribunal's question, it has a right in respect of the entirety of those frequencies, but for a limited purpose.

THE CHAIRMAN: That was what I was trying to put to Mr. Flint, but he was not accepting it. I thought there was a difference between everybody on this – which was why I was putting it.

MR. FLINT: I am not aware that I dissent from anything my learned friend just said so far.

THE CHAIRMAN: That may have cleared it up. It may well be that we had misunderstood – which is why I thought it was important to try and ---- So, it is very helpful that that is what you are saying.

MR. ANDERSON: We do not dissent from that either.

MR. FLINT: It was the Tribunal that was putting the point to me that Vodafone does not have a licence over the frequency between the mobile and the base station. I said, "Yes, Vodafone does have a licence in respect of that frequency, but it is to receive only – or vice versa".

THE CHAIRMAN: To use its base station only.

MR. FLINT: Yes. Yes. It does not need a licence for the mobile, because that is used by the user under exemption.

THE CHAIRMAN: I think that may have been very helpful.

MR. PICKFORD: There is one other point that has just been brought to my attention in connection with the licence. That also goes to a point which the Tribunal mentioned to Mr. Flint a little while ago. Whilst the precise details in terms of frequencies that were allocated to Vodafone was a private matter for Vodafone, the nature of the mobile 'phone companies' licences was public knowledge because they are all based on a standard template. So, it is not the case that Floe was unable to work out the type of activities which Vodafone could engage in.

THE CHAIRMAN: Would they know what the radio equipment was?

MR. PICKFORD: Yes – I am universally instructed.

THE CHAIRMAN: How do they do that? Where is the template?
MR. PICKFORD: It is on the website – on Ofcom's website ---- or, at the time, Oftel's website.
THE CHAIRMAN: That would have had a template which would have -----
MR. PICKFORD: Sorry. It is the RA's website. I am sorry. I have just been corrected.
THE CHAIRMAN: That would have said that the radio equipment is base receivers.
MR. PICKFORD: Yes. As I understand it, the only thing that would really be confidential would be the specific frequencies.
THE CHAIRMAN: Mr. Mercer agrees with that?
MR. MERCER: I think that is so, ma'am. I think that what was excluded was the entire reference to frequencies.
THE CHAIRMAN: But not base stations.
MR. MERCER: Not base stations. But, you see, you would not know about the base mobile splits.
THE CHAIRMAN: But you would know that they were only licensed for their base stations.
MR. MERCER: And repeaters.
THE CHAIRMAN: And repeaters.
MR. PICKFORD: That is my second point. I have two other points before getting on to the substance of my main submissions. The third one concerns the points that the Tribunal was putting to Mr. Flint about: was it not really incumbent on Vodafone to do something more when it discovered about the illegality. It must be emphasised, of course, that the breach in this case was not of Vodafone's licence. The primary breach was by Floe of the Wireless Telegraphy Act. Vodafone did not breach its licence at all. Why, as is quite clear, Vodafone may have been liable is in secondary liability for aiding and abetting a criminal offence.
THE CHAIRMAN: Can I just explain? I think actually it possibly does not arise any more because if it was not public knowledge that it was only base transceiver stations and repeater stations, then Floe, or whoever it was, would not know what equipment was licensed, but once they know what equipment is licensed then, of course, the position becomes less foggy.
MR. PICKFORD: Indeed, madam.
THE CHAIRMAN: The questions were based, I think, on the presumption – which was wrong – that the equipment would not have been known to the public.
MR. PICKFORD: I am grateful, madam, if that deals with that point.
THE CHAIRMAN: It is very fortunate that the question was asked. Thank you.
MR. PICKFORD: The final point I would like to address before going on to my main submissions is the Tribunal also asked Mr. Flint a question about what do you get for your payment? It was suggested, I think, by the Tribunal that you got some sort of specific right to use frequencies.

THE CHAIRMAN: No, I do not think that is what I was suggesting, and I was not suggesting anything I was making an inquiry to try and find out what the position is. What I was wondering – and I think the word is "wondering" – is it possibly does not now arise when you are saying you have the whole of the frequencies. I was under the misapprehension that it was being submitted that part of the frequency, i.e. from the mobile station to the base transceiver station was not licensed to you – not that the use of that was not licensed to you for the equipment, but the actual bit was not licensed which had been confusing me for a long time. On that basis I wondered how you could be charging for the use.

MR. PICKFORD: Again, if that has dealt with the point.

THE CHAIRMAN: So if you are saying that you do have the frequency, and it is only the use of the frequency that is in issue ----

MR. PICKFORD: Yes.

THE CHAIRMAN: -- then I do not think the point arises, because if you have the frequency you can charge for its use.

MR. PICKFORD: Indeed, although I should say that what one charges for as a mobile phone operator is a matter of contract and it is the whole service that is being provided.

THE CHAIRMAN: Yes, part of that service would be that bit of the frequency?

MR. PICKFORD: Yes, but it may well never be that specific, depending on the terms of the contract you may simply agree to terminate calls on to people's networks, and so if, for instance you decided to do it by some other method, by your backbone transmission system rather than by over frequencies in respect of which you were licensed, then it will be a matter for you as a mobile phone operator.

So turning to issues 4 and 5 – issue 5, of course is how the Tribunal should approach, deal with the compatibility issue, and issue four is the Tribunal's assessment of compatibility. In relation to issue 5, which we say should be logically taken first, and the reason we say that is because the Tribunal needs to decide ----

THE CHAIRMAN: I know you say that.

MR. PICKFORD: -- whether it needs to decide the issue and, indeed, whether it should decide the issue and how it should decide the issue before, in fact, deciding the issue. But in relation to that we have three points to make.

THE CHAIRMAN: Is this issue 5 or issue 4?

MR. PICKFORD: This is issue 5.

THE CHAIRMAN: It is just because they are set out that way it is much easier if we follow them that way, otherwise it is rather confusing. Anyway, you want to do issue 5 first?

MR. PICKFORD: If I may. There are three points to be made in respect of that. The first concerns the need for the Tribunal to address the issue of compatibility. The second concerns whether it should address it, which we say is highly related but it is nevertheless a slightly distinct question; and the third is assuming the Tribunal should address the issue at all, which we obviously say it should not, what approach the Tribunal should take?

Dealing with the first of those points, the need for the Tribunal to make an assessment, the point has already been dealt with comprehensively by Ofcom. I would just like very briefly to make the following points really of emphasis. The principle is that domestic law, which has not been disapplied provides a complete defence to an allegation of infringement of Article – in this case – 82, Chapter II of the Competition Act. That is the case both where the allegedly dominant undertakings conduct is not autonomous. So in this case that is the point that Vodafone would have been committing an offence itself had it continued to supply. It applies equally where the domestic legal framework eliminates the possibility for competition on the part of the undertaking which is seeking supply and, in this case, that is the point that Competition law cannot come to the aid of Floe because it was committing a criminal offence. In each case the logic is exactly the same, and it is one of legal certainty. As long as that national law has not been set aside, it sets the framework for the conduct of the relevant undertakings.

The Tribunal has been taken a number of times to the authorities, I do not intend to go to them yet again, save for one particular authority at the moment. In terms of the passages which I would like the Tribunal to consider, in particular it is para.54 of the *CIF* case, and the words used by the court there, that the decision to disapply the law concerned does not alter the fact that the "law set the framework for the undertaking's past conduct", it is a very clear statement. The passage in *Ladbroke* which I particularly emphasise is at para.33, and that is the passage which says that if national legislation creates a framework which eliminates any possibility of competitive activity on the undertaking's part, Articles 81 and 82 do not apply. That, I say, strongly supports my second proposition that it does not apply to assist where the activity being carried out by Floe is unlawful and competition law cannot assist it, that is a complete defence.

The third case is the *Promedia* case, and it may be of some assistance if we just very briefly revisit that case. It is at tab 18 of 4(b)(i). At para.96, when the court is considering the question it said:

"… the prior evaluation of national legislation which has an effect on the conduct of undertakings concerns only the question of whether the national legislation leaves

open the possibility of competition which might be prevented, restricted or distorted by autonomous conduct on their part …"

- that is the dominant undertaking's part. In this case national legislation left no room whatsoever for the possibility of competition by Floe, and so we say that what the court says there applies directly to the situation which we are currently in.

THE CHAIRMAN: Are you moving away from that point? I will tell you what is going through my mind, and I may be completely talking out of turn, but what about *Factortame* I know it does not apply to you or Vodafone?

MR. PICKFORD: Can the Tribunal elaborate on that point?

THE CHAIRMAN: If the national authority has put in a law which is in contravention of EU law, and a national is affected by that, is there not some relief that can be obtained?

MR. PICKFORD: It is possible that there may be some relief but nothing, as the Tribunal rightly pointed out, that affects the matters in this case, because the primary concern is what is the position of Vodafone? That is the question which Ofcom was addressing in its Decision.

THE CHAIRMAN: Is the question not what was it addressing in its Decision? In its Decision it is addressing Vodafone, but it was also addressing whether the national law was compliant, because if it was not compliant then you have – or may have – the consequences which one leads to through the *Factortame* decision?

MR. PICKFORD: You may have had other consequences if Ofcom's assessment was that it was not compliant, but in particular any decisions of that sort which would have been taken by Ofcom would have been taken by Ofcom wearing its hat as a sectoral regulator, not as a national competition authority.

THE CHAIRMAN: Well let us just leave that for the moment as to on what basis it takes its decision, but is it right just to confine one's consideration of this, or the Tribunal's consideration of this to the position of Vodafone, because otherwise if the situation is that it is non-compliant with European law, there is no way that that can be put right, except by this Tribunal looking at whether it is compatible, because the door is closed, and everybody is out of time, which is what Mr. Flint is telling us?

MR. PICKFORD: With respect I would submit that that is not the case. If it really is the case that there is a manifest incompatibility it would be open to Worldwide or Floe to write to Ofcom pointing out what their error was and asking Ofcom to reconsider its Decision. If Ofcom decided in this hypothetical case wrongly to do that, then it could seek Judicial Review of that Decision, and that is the proper course.

THE CHAIRMAN: I will have to think about that.

MR. PICKFORD: Whilst I have the *Promedia* case open, it may also be worth emphasising para.98, where the court said:

> "The Commission therefore currently held in points 17 and 21 of the contested decision, without having previously considered the question whether the relevant Belgian provisions were compatible with Community law, that Belgamcom could legitimately refer to those provisions … so long as they had not been invalidated …"

Again, we say that is very clear authority for the proposition that is being advanced before you. But even if I am wrong in relation to those points, that does not mean that Floe and Worldwide get home on whether the Directives are relevant, because there are two issues which neither Floe nor Worldwide have considered. The first is that of course in the *Promedia, CIF* and *Ladbroke* cases, the provisions with which the court was concerned were those contained in Articles 81 and 82 of the EC Treaty. Those provisions are directly applicable, so they impose obligations on individuals without there being any need for transposition by the Member State into domestic law, but that is not the case in relation to the Directives upon which Worldwide and Floe seek to rely. It is trite law that for Directives to have the type of effect which Worldwide and Floe seek from them, they need to satisfy the test for being directly effective because Worldwide is not merely relying on them as an interpretive guide, it relies on them to disapply national law; and neither Worldwide nor Floe have made any attempt to explain to the Tribunal that the Directives upon which they rely satisfy the criteria for direct effects, that is they are clear, precise and unconditional. Unless the Tribunal wishes me to I do not propose to take the Tribunal to authority on that point. That is clearly a well established proposition.

If we first consider the Authorisation Directive it is quite clear that prior to its date for implementation on 25th July 2003, the Authorisation Directive could not possibly have had direct effect because it was not unconditional, so that deals a fatal blow to any reliance on the Authorisation Directive in respect of the events in March 2003, when Vodafone terminated the provision of services to Floe.

There is also a second point which is that even if the Directives are directly effective, Floe and Worldwide cannot rely on a Directive to impose an obligation on Vodafone. To put that in the EC jargon, there is no principle of horizontal direct effect in Community law. The authority for that proposition that I rely upon is the *Faccini Dori* case – again I do not propose to take the Tribunal to that case unless it wishes me to. I believe that Mr. Kennelly accepts that as a general proposition. It is true that there have been a limited number of cases where reliance has been placed by one individual on a Directive which may have a legal consequence for a third party, but nothing has occurred in my submission since the *Faccini Dori* case to displace the central principle that you cannot impose an obligation on another individual in

reliance purely on a Directive. But, of course, that is precisely what Worldwide and Floe seek to do here in respect of the RTTE Directive. I have just been corrected – my learned friend is not saying that it imposes duties on individuals, but in my submission that is what their case requires in order for the RTTE Directive to have any effect. If I could just deal with that very briefly?

The RTTE Directive we have been referred to on a number of occasions and I do not intend to take the tribunal to it now. Very briefly, Article 7(3) to 7(5) need to be taken together, and their effect is to require a Member State to bring into place a system which first imposes an obligation on MNOs, and others, not to disconnect compliant equipment at 7(3) unless the Member State has authorised the MNO to do so, that is7(4), or unless it is an emergency, that is 7(5). What in effect Worldwide are seeking to do is to argue that because Vodafone did not comply with those particular provisions, because Vodafone, they say, did not seek the authorisation that they should have done, then Vodafone cannot rely on its domestic law defence. We say that that is to try to give effect to a Directive as against another individual.

So in conclusion in relation to that last point we say that Directives simply cannot change the outcome of this case, and if I could just turn to the Decision itself, which is at core bundle 5, tab 4. It is completely clear that that is the approach that Ofcom took. At para.22, section 3 of their Decision, they had a long section which is entitled "Background". In that background section they deal with all of the regulatory issues and compatibility issues that we have been considering at some length in this hearing. At para.171, p.36, they conclude:

> "In any event, whether or not the current UK legal position is compatible within the Authorisation Directive and the RTTE Directive, this is not relevant in assessing whether Vodafone has infringed the Chapter II Prohibition or Article 82 in relation to its past conduct."

And it explains that point further at paras. 294 to 297 of the Judgment. It is only after that introductory section, that in section 4 it goes on to its legal and economic assessment, which is not based on the issue of compatibility at all. We say the approach we are urging the Tribunal to take here is entirely consistent with the approach that Ofcom took in its Decision.

The second point concerns whether the Tribunal should consider the compatibility issue – we have dealt with whether it needs to. I have two points to make in relation to this, one based on domestic law, and one based on Community law. The first point on domestic law can be taken extremely briefly, because again in essence it is the same point that Mr. Anderson makes. Ofcom's indications on the compatibility issue, as one can see from the sections I have just taken the Tribunal to were, strictly speaking *obiter*.

To the extent that Ofcom were to take any decision about compatibility it would be wearing its Regulator hat, not its competition authority hat and, as such, any such decision would not be appealable to this Tribunal, it would go by way of Judicial Review to the Administrative Court.

Now, in relation to that point, Mr. Kennelly argues that the principle in *CIF* is an extremely broad one, which somehow displaces that point, but if we just very briefly turn up the *CIF* case, which is at tab 35 of 4(b)(i). I can deal with this very briefly because Mr. Flint also took us there earlier on. If one considers para.50 in particular it is quite clear that the court placed considerable emphasis on the fact that the provisions with which it was concerned were provisions of competition law, and the relevant authority was a national competition authority, and that can be seen from para.50. I do not propose to read it again because it has probably been read about three times already.

Turning to the point of Community law, I am very grateful to Mr. Kennelly for drawing my attention to the fact that there is a missing word in my skeleton. Mr. Kennelly is entirely correct, of course, that the Tribunal has a discretion whether to refer to the ECJ. I did not mean to suggest otherwise, but my skeleton may well appear to say that I did. If one were to insert the word "reasonably" before "cannot", where I say "The Tribunal cannot decide the issues itself," in my submission in the present case the Tribunal cannot reasonably decide the issues itself. The reason why I say that is that if Floe were right and if Worldwide are right, it throws into complete chaos, not simply the regulatory regime in this country, but the regulatory regime by my count – according to annex 6 of Ofcom's Defence – seven other Member States, all of which, in one way or another, impose controls on the operation of Commercial Multi-User Gateways. In that type of case it is inherent that other Member States would wish to intervene and make their views known, were it to be decided by a national court that that system was not permitted under the Authorisation Directive. So we say that this is a classic case, where if there really is anything in Worldwide's case and Floe's case, the Tribunal ought to refer. Of course, if a Tribunal takes the view that there is nothing in it at all, that it does not remotely think that really there is any substance to those propositions that have been advanced by Floe and Worldwide, then it can just deal with the matter on its own. But, clearly, if it thinks the reverse the consequences are quite profound, and so we say that since a reference is only permissible where it is necessary in order to determine the matter before the Tribunal and, as I have already explained, we say it is not necessary in this case, that indicates that the Tribunal should not really be considering the issue of compatibility at all.

Turning to the third point, which is if we are wrong on everything that has been said so far, and in fact we still should be considering the compatibility issue, what approach should the Tribunal adopt. Worldwide argue that *Upjohn* merely lays down minimum requirements,

but Member States are entirely free to have a more intensive review of a national regulatory decision in relation to an issue of Community law. I say that that is wrong, both as a matter of Community law and as a matter of domestic law. Why it is wrong as a matter of Community law is that the Tribunal could apply one standard and come to a conclusion on an issue of compatibility in which it substitutes its judgment for the judgment of the Regulator. It could clearly come to a different Decision to one which the European Court of Justice would arrive at if the ECJ took the approach which is available to it, which is not to conduct an intensive review and, indeed, one can see that we might have an intensive review in this country, we might have a non-intensive review in France. Indeed, we would have a non-intensive review in this country if the matter were being decided in the Administrative Court. So, it would be a nonsense if the question of compatibility with the authorisation directive were to be decided by this Tribunal on a different principle from the one which would be applied by the European Court of Justice. We say that the approach which this Tribunal should take exactly mirrors the approach that the European Court of Justice should take.

My authority for that proposition is the case of *Costa –v- ENEL*. I do not intend to take the Tribunal to it. But, in that case it is emphasised at p.593 that if domestic law were to alter the substantive principles to be applied in considering a question of Community law, then that would completely undermine the executive force of Community law because it would vary from one state to another, and that simply cannot be right. So, we say that the relevant test is that in *Upjohn*. In common with Mr. Anderson we do not say that *Upjohn* is the only test that could ever apply, but it is certainly the test that applies where there is a clear margin of discretion afforded to the original decision-maker.

In relation to domestic law, we say that Worldwide's argument, again, simply cannot get off the ground. In particular, it is worth noting that in Worldwide's skeleton they place reliance not simply on the power of the Tribunal to determine the appeal on the merits, which is contained in para. 3(1) of Schedule 8, but also on its power to make any other decision which Ofcom could itself have made (and that is at para. 3(2)(e). They put a slightly different spin on those words. They talk in terms of the Tribunal substituting its view on the facts. But, the words actually contained in the legislative provisions are the ones I have just used.

If Worldwide's case is correct, that means that the Tribunal can bring into force new regulations under the Wireless Telegraphy Act, because that is something Ofcom could do. That has clearly got to be wrong. We say the only sensible way, and the only correct way, in which one can construe Schedule 8 is that the power to determine matters on the merits is the power to determine anything that Ofcom could determine under the Competition Act. If Ofcom's decision were taken under a different statutory provision, then the Tribunal does not

have power to determine that matter on the merits. So, we say that dispenses with Worldwide's argument as a matter of domestic law as well.

So, if I can move on to the issue of substantive compatibility, on the RTTE directive nothing, we say, differs from what has been said to the Tribunal by Mr. Flint or Mr. Anderson. We adopt, in effect, Mr. Flint's submissions as a primary case, but if you are not persuaded that the RTTE directive had nothing to do with the matters in this case, then we adopt Mr. Anderson's approach which is that the only relevant provision is 7(2). He has explained why, in fact, that has no legal effect in this case.

The only points I would just like to emphasise in relation to the RTTE directive – and, again, I do not propose to take the Tribunal there, but simply for the record – the distinction between the purpose of the RTTE directive (which is equipment) and the authorisation directive (which is the provision of services) is clear not only from the various provisions to which you have already been referred by my learned friends, but also from Recital 5 to the authorisation directive which expressly distinguishes its scope from that of the RTTE directive. It is also clear from the objective and scope of each directive contained at Article 1(1) of each directive. It is also apparent from countless recitals to the directives themselves. If one is to read the recitals of the RTTE directive, you can see that its concerns are equipment, and equipment, and equipment. It is nothing but equipment, and it is equipment qua equipment. That really is the end of the matter.

As to the issue of compatibility with the authorisation directive, I can in some way assist the Tribunal by saying that it does not need to consider a dispute between myself and Mr. Anderson in relation to this case because we are happy to adopt their view of how it all fits together. But, we say that even if you are not convinced by that view, there is an alternative view pursuant to which exemption regulations are still entirely compatible with the authorisation directive. In respect of this submission, if I could draw the Tribunal's attention to Recital 5 of the authorisation directive (which is to be found behind Tab 11 of Bundle 3), it says, "This directive only applies to the granting of rights to use radio frequencies where such use involves the provision of an electronic communications network or service". It goes on to say ----- I should end that sentence: "—provision of an electronic communications network or service normally for remuneration". It goes on to say,

> "The self-use of radio terminal equipment based on the non-exclusive use of specific radio frequencies by a user and not related to an economic activity [and then it gives an example] such as the use of citizen's band radio by radio amateurs, does not consist of the provision of an electronic communication network or service and is therefore not covered by this directive".

Now, we say that that boundary mirrors exactly the boundary which Regulation 4(2) of the exemption regulations establishes. What Regulation 4(2) does is that it effectively implements, as it were, Recital 5 into domestic law and it makes clear that the authority granted under the exemption only applies to self-use. That is something which falls entirely outside the authorisation directive. So, if that is right, the exemption regulations do not need to constitute a condition attached to a general authorisation at all. They are effectively simply de-marking the boundary of authorisation directives. That answers a point that was raised by the Tribunal on 1 December of last year when it said, "Well, can a condition which discriminates between self-use and commercial use be justified under Article 6?" We say, "Well, yes, it can, because Article 6 is not even engaged in respect of self-use, which is always in fact permitted under the exemption regulations".

Worldwide accepts that you can have individual licensing and you can have it where it is necessary "in view of the scarcity of radio frequencies and the need to ensure efficient use thereof". That is to be found at Recital 11 in the final sentence. The first sentence reads, "The granting of specific rights may continue to be necessary for the use of radio frequencies and numbers", and then in the final sentence, "Those rights of use should not be restricted except where this is unavoidable in the view of the scarcity of radio frequencies and the need to ensure the efficient use thereof". In the light of that, we say that it really does not matter whether one is only allowed to license where there is harmful interference or one can license where there is harmful interference or if there is an issue relating to the efficient or appropriate use of spectrum.

THE CHAIRMAN: Can I just pick you up there? It is not 'efficient or appropriate'. It is 'efficient and appropriate', is it not?

MR. PICKFORD: I believe that may be the case, madam. In any event, the point that I am making remains the same, which is that it does not matter which view one takes because even if it is correct that it always has to come down to something called harmful interference, we say it is clear from Recital 11 that harmful interference would have to be given a very broad interpretation, and sufficiently broad to enable licensing to be imposed in view of the scarcity of radio frequencies and the need to ensure efficient use thereof. So, we say that the difference really does not amount to anything. One can always take account of efficiency. It would be very odd if it were otherwise.

On that point, whilst it is our primary case that the evidence of Mr. Burns is irrelevant to the matters which the Tribunal needs to decide, it is relevant to note that Mr. Burns does indeed support the fact that GSM Gateway use is liable to lead to the inefficient operation of

the network. That, the Tribunal will remember, is dealt with at para. 40 of my skeleton argument which Mr. Burns was referred to during his cross-examination.

THE CHAIRMAN: But, of course, you are not relying on him.

MR. PICKFORD: My primary case is that I do not need to rely on it, but my secondary case is that if I am wrong, then I do.

THE CHAIRMAN: Your alternative case?

MR. PICKFORD: Yes.

THE CHAIRMAN: Then we can rely on him for harmful interference as well, can we?

MR. PICKFORD: You can if it is correct to rely on him for that, but obviously our primary case in relation to that is that it is not. The Tribunal has in fact anticipated my next point, which is that exactly the same considerations apply in relation to harmful interference.

The only other point I wish to make in relation to evidence in respect of the issues of harmful interference and efficient use of spectrum is that Mr. Stonehouse's evidence is completely irrelevant in relation to that issue – not simply in relation to harmful interference, but also in relation to anything to do with Issue 4 because that is what the Tribunal decided at the outset. So, for example, just because Mr. Stonehouse says, "Oh, it would be really easy to deal with all these problems. I don't know what the fuss is all about" ---- That evidence is going to be irrelevant.

Finally, in relation to Issue 6 and the consequences of unlawfulness, the first point we make is that Worldwide's submissions on *Hilti* just do not get it anywhere because neither Worldwide, nor Floe, have dealt with the prior question of whether criminal activity can actually benefit from competition law protection. Neither has advanced a case on that point. So, if we are right about the legality issue, we simply do not get as far as *Hilti* because you do not need to consider objective justification unless competition law is engaged, and it is not. But, even if one does get into *Hilti*, Worldwide mentioned, but never actually addressed T-Mobile's case in my skeleton argument (at para. 56) which is that Vodafone was one of the intended beneficiaries of the legislation on which it was relying. We say that in those circumstances Vodafone must be entitled to take lawful action to enforce its rights, because, of course, what the legislation is intending to avoid, amongst other things, is harmful interference or inefficient use of spectrum, which adversely affects inter alia the operation by MNOs of their businesses. That is an important point of distinction as compared with *Hilti* because the legislation invoked by *Hilti* was not to protect it at all, it was to protect consumers. Another relevant point in relation to the legislation is that in the present case the assessment is essentially simply a question of statutory construction. It might be a relatively complex one because we have certainly had a lot of argument about it in these proceedings but it is,

nonetheless, pretty well a pure question of law. Again, that contrasts from the situation in *Hilti* which required a detailed factual assessment to be made about whether relevant products were safe, and the only Body that was competent to do that was the relevant regulatory authority. But in my submission, Vodafone and T-Mobile, and any other company is perfectly well equipped to come to a view on the law and, as happens in this case, they came to the correct view on the law. The other point to note, of course, is that Vodafone was acting pursuant to the stated position of the relevant regulator, the RA. I believe the Tribunal has already been taken to these documents, but again simply for the record it is the RA's position on legality of 23rd August 2002, which is at tab 38 of bundle 2(a). There is also the November 2002 Consultation, para.5.7 (bundle 2(b) tab 5). There is also the unchallenged evidence of Mr. Morrow, which he provided in his first witness statement (para.2) in relation to the first proceedings, where he says that he was contacted by the Police and told of the unlawful activity of GSM Gateway Operators.

Ma'am, I have no points on discrimination, save for those which are in my skeleton, which I would obviously invite the Tribunal to read but I do not propose to deal with them now. Of course, I should say, for the avoidance of doubt, anything that I have not dealt with but was is my skeleton I still obviously rely upon it.

Unless I can be of any further assistance?

THE CHAIRMAN: Thank you very much. Mr. Mercer? How have you decided to divide this?

MR. MERCER: Well I think I am going first. Between the two of us, however, if you were thinking that your object was to finish today then it is going to be a full hour and a half if not maybe a minute or two – the minute or two I did not take when I opened – longer. I just mention that, ma'am in case you would want to come back tomorrow or you would like to press through, because otherwise we might end up either staying quite a long time this evening or coming back tomorrow for just three quarters of an hour.

(The Tribunal confer)

THE CHAIRMAN: The position of the Tribunal is that although we would be delighted to sit here and listen to you this afternoon and would probably prefer to do that, but there is the question of all the staff that have to be here in order for that to happen, and I cannot now make inquiries if people can stay but we think that the staff can stay until 5.30 – in other words for this to finish at 5.30 – but not a moment longer because of course they cannot leave immediately they can only leave when everybody else has left, so that puts another half hour on to the equation.

MR. MERCER: Then we would be assembling for 45 minutes in the late morning tomorrow. I am just wondering if it would be a better use ----

THE CHAIRMAN: You would prefer to think about it overnight and come back ----

MR. MERCER: Well there are a few things I do not need to think about very hard, I can assure you, but it may be better to organise it and bring it in the morning.

(The Tribunal confer)

THE CHAIRMAN: Mr. Mercer, what we are going to do is we are going to start and we will see where we get to.

MR. MERCER: Very good ma'am. I hope the Tribunal will forgive me, this is not going to be the most logically ordered set of sequence but we will try and just relate it to the points we have heard. I would like to start with the template licence point that came out a few minutes ago. You see, ma'am, Mr. Davey might have been on to an interesting line of questioning and I would not want to think that simply because a template appears possibly now, or did for a time on the RA website, that that entirely blocks off that line of thinking because actually you have no evidence before you as to how long the template was on the website.

THE CHAIRMAN: It was a public document is what we understood – it could be obtained.

MR. MERCER: At the relevant times I have no idea, ma'am, and you have not heard any evidence about that. Moreover, as we know from what has been said to us, and from the evidence of Mr. Mason and others, the likely result would have been if you had rung up the DTI or the RA – of course the RA was an elective agency of the DTI at the time – we have a fair idea what answer you would have got if you had asked was it a matter that could be dealt with and they would have said it is a matter of contract between you and Vodafone, because that is the answer they gave to that kind of question later.

THE CHAIRMAN: Well it cannot be a matter of contract solely – can it – because Vodafone were not licensed for Gateways, so the licence would have to be extended?

MR. MERCER: At the time, let us make an assumption that the template is on the website.

THE CHAIRMAN: Well whether or not the template is on the website, the licence would have to be extended.

MR. MERCER: But if you were Floe you would not necessarily know that.

THE CHAIRMAN: You would only know that if the template licence is a public document.

MR. MERCER: Yes, and you would only know it, I submit, if you realised the base transceiver station had to be read according to the ETSI regulations, it could only be read as an ETSI base transceiver station. A big clue to that being the case, you might say, would have been in reading the frequencies, which you cannot do. As was helpfully pointed out the other day, I think by Mr. Anderson, the only references to ETSI are a couple of oblique references in the licence. You would be pretty clever – not to say prescient – to be able to work out that the base transceiver station was limited to the very technical definition. If you put yourself in the position of Floe, ma'am, you would be hard pressed to work all of that out.

Continuing on with scope of licence points for a moment, I just point out again the difficulty that everybody is going to have with putting repeater stations into this matrix. Repeater stations receive on the mobile transmission and transmit on the base station frequency, just like a base station, but they pump them out again using the mobile held transmission frequency and receiving on the base station transmit. So we know there is some equipment that is licensed and operates on the exactly opposite frequency system, otherwise it would not be a repeater station.

I would like next to deal with the annex to the Authorisation Directive, para.B1. I think you probably have this etched on your brain, ma'am, but I just want to look at what I think Mr. Anderson said. He said, "Oh, well, don't you worry, designation of service or type of network or technology – and technology, of course, that means 'kit' does it not? " No, it does not mean apparatus. My contention, ma'am, if you look through the Directives, when they talk about what you and I might colloquially call "kit" they call it "apparatus" or "equipment", they do not call it "technology". When they are talking about technology they are talking about a generic type of technology, and that is all they can mean. What they mean is GSM, Tetra, 3G, whatever. They are not talking about individual pieces of apparatus.

I made a number of submissions – was it only yesterday – on the other ways in which you can examine, identify and analyse the licence. I do not propose to go over those again, unless the Tribunal has any questions.

I will now turn to s.166, which is s.1AA of the Wireless Telegraphy Act. I think it is clear that 1AA is an attempt by Parliament to encapsulate the requirements in Article 5(1) of the Authorisation Directive, and I merely draw your attention, ma'am, to a couple of words, and those are "… they shall…" If Ofcom are satisfied the condition in subsection (2) is satisfied as respect the use of the stations or apparatus of any particular description they shall make regulations" – "…. they shall make regulations", they are under a duty. Subsection (2) says the condition is that they are "not likely" to involve any undue interference. Then you have to go to s.19, and interference is not to be regarded as undue for the purposes of the Act unless it is also "harmful", and it is "harmful if …". But note what it is, it is "interference", and that is "defined above" – "means of prejudicing by any emission or reflection …" etc. So it is clear that 1AA is not quite the same as what is required by the Directive, because we do not quite know what "undue" interference is, it looks as if it can be broader than just "harmful interference", but we know that it must include "harmful interference". So I had better move on to tackle exactly what we think is harmful interference, and I would like to pass something up, if I may.

THE CHAIRMAN: While you are doing that, we have ascertained that we can sit until 6 o'clock with the indulgence of the Registry.

MR. MERCER: This is the Radio Regulations of the ITU, a slightly longer section than was passed around by somebody either today or yesterday. If you turn to the penultimate page, which contains 1.166, which has been referred to before, and 1.169. I want to turn for a moment to 1.169, and to the definition of "harmful interference" in Article 2(B)(a) of the Authorisation Directive, and to point out the similarity in the wording. It is, apart from adjustment to circumstance, identical. I raise this point, ma'am, because t here is some indication that the ITU Radio Regulations have nothing to do with all of this, it is all to do with cross border systems and interference – of course, it is not. It is the natural reference point, and these regulations were last substantially updated in 1992, as is mentioned right in the first paragraph. These are the reference point for radio communications throughout the world. Indeed, I believe it is a principle of Community law that we should all address our international obligations and all the countries of the EU, as I understand it, are members of the ITU. One thing I will mention in passing which, of course, though GSM systems are organised on a national basis they were of course intended as a pan-European standard and, indeed, that is why it is so comparatively easy for you to take your phone from the UK and roam across Europe.

What 1.166 says, of course, is that interference is the effect of unwanted energy. That is the internationally accepted definition – you might say not quite as elegant as the OED, which refers to "extraneous" – "unwanted" is a bit more of a basic thing, but I think we all get the message. Certainly, of course, as we all know, Mr. Burns got the message. Mr. Burns, in my submission, found it quite difficult to know what we were all on about, because the point is so obvious. In fact, ma'am, the point is so obvious that it would be irrational to consider anything else. I just wanted to make sure I was using some of the words that the others have used. It is irrational to consider it that way. Nobody in their right Wednesbury mind would consider it so, in my submission. It is as obvious as that.

MR. PICKFORD: I apologise for interrupting. It is probably helpful to draw to the Tribunal's attention that these terms and definitions are dated 1st September 2005.

THE CHAIRMAN: Is there an earlier one?

MR. PICKFORD: By implication I believe there was.

THE CHAIRMAN: Were they materially different?

MR. PICKFORD: I do not know if they were materially different, but they may have been.

THE CHAIRMAN: They are public documents, are they not? So we can find out.

MR. MERCER: Yes, they are and, unlike template licences, not quite so hidden away, and they are very clear and the last major update was in 1992, in my submission.

THE CHAIRMAN: It says "Updated 1st September 2005" at the end.

MR. MERCER: The last major update was in 1992.

THE CHAIRMAN: We will assume, for the time being, that they are the same as the 1992 ones, and if it turns out that they are not, somebody will tell us.

MR. MERCER: What we have is an argument against us that congestion constitutes interference, technically that is not so. As a matter of definition that is not so, because congestion is a network matter. It is a network matter. It is something to do with the inherent running of the network, and it is nothing to do with the effective use of the spectrum, because that is a matter related to the type of technology used. I will just explain that further. If you think about it, ma'am, if you are talking about the effective use of the spectrum, that would mean that we are making the most of the use of the spectrum, and congestion problems can be overcome simply by accreting to the network. The spectrum is a very strange thing. You cannot take away from it and you cannot add to it. It just is there, it just exists. An effective use of the spectrum in this kind of situation would mean using a technology that used less. It is like moving from analogue to digital broadcasts. That is to do with the effective use of the spectrum, because with digital broadcasts you use less. You are not going to use less spectrum by getting rid of Gateways, because the GSM system uses those allocated frequencies and they are, in essence, protected.

While I am just dealing with effective and appropriate – in fact, you beat me to it, ma'am ----

THE CHAIRMAN: Sorry!

MR. MERCER: -- I have been waiting for two days to say it is the conjunctive between "appropriate" and "ineffective", and I was only 10 minutes short of getting there. That normally would not really be important, but you may recall – it may be the reason, ma'am, why you indeed raised it yourself – Mr. Anderson made a distinction because he kept saying "or", or "and/or", and he had to do that because he really only thinks he has a case on one and not the other.

THE CHAIRMAN: Well he is not relying on one, he is only relying on the other.

MR. MERCER: Yes, and he has to rely, in my submission, on both, because it is the conjunctive, unless of course there is a rule of interpretation of the Directives I am not quite aware of yet. So, we have a situation whereby certainly from the July of 2003 a Regulator with a duty to do something in respect of where there is no harmful interference, and nothing has happened, and we now know why, because it takes a view of harmful interference which is irrational.

Now does that mean that Vodafone would be left with no means of dealing with this situation; that it would have to sit there and watch congestion take place as Floe benefited? It does not. Fortunately, good old British contract comes to its aid. It could have done what Floe always said it should have done, which is to deal with the matter through a fair use policy, but it did not. It did not have to sit there simply taking it. It did not, of course, have to take it, at the end of the day because Vodafone had the ability and used their ability to switch off the SIM cards. In fact, in respect of the network Vodafone have the network including handsets and Premicells, Gateway and what have you. It has a much bigger power. It has a power of life and death over the handsets. As we know, we are not saying that Vodafone did other than accidentally upload our entire set of SIMs to the C&EIR, we accept it was an accident, but that accident demonstrates the power that it exerts. It can switch you off and it can prevent that apparatus from being used on any network on any frequency.

I do not want to complicate matters over IMEI's and the working of GSM Gateway systems because there are some agreed facts about that which are set out in the first judgment which we still think are correct, but there are a couple of points I would just like to emphasise from the first time around, and I am just saying what I said then. First, the way in which the system works is that phones are paged by the system – I look around me, that is right, is it not? Yes, they are paged by the system, and the phone sends a message back. In fact, when the IMEI is switched off the paging still goes on, the system is saying "Do you want to talk to me?" It is interrogated with the handset, and this happens all the time. It is saying "Do you want to contact me?" If the IMEI is switched off you get no message back saying "Yes, it is me, I would like to make a call now." I just want to be absolutely clear that our submission is that when you switch off the IMEI that blocks the phone from sending a response back to the network.

The two other matters I would like to remind the Tribunal of are the power ratio and the frequency. I mention the frequency because there has been quite a lot of chat about who controls frequencies, when were and how? I would like to remind the Tribunal that what was uncontested last time was that the network determines the frequency on which the mobile handset or Premicell or Gateway responds. You, ma'am, have no control over the frequency used by your mobile phone, except that you know that it is a GSM standard so it will work in the GSM general band of frequencies, the actual control over it is exerted by the network. I think that I quite important when you are looking at who does what in this system, and the provision of service. I would like to move on to what service is provided, that is another question that came up reasonably recently. He said, ma'am "Do you buy frequencies?" Well no, you do not – I wish you could actually – you cannot go out and buy some frequencies in

the spot market. I would like 20 minutes of 958 mobile transmit today. You go out and you buy an end to end service – end of one network to the end of another. In fact, what the person connected, let us say, to a Gateway buys is he has a handset next to the Premicell whatever, it phones into the system, he is not interested in frequencies, he is buying a telephone service – telephony and data service in this case. I could only think there is one person providing that, one person who is actually providing it and taking the call from the terminal apparatus, Premicell, or whatever, and taking it to the base station and delivering it, and that is the MNO. I am thinking hard of an example to deal with what I tried to say yesterday in respect of resale. In fact, I am not the only person who has used "resale" as a word, in fact, I am pretty sure Mr. Flint did, actually – he said "It is a resale of our service". The example is at your local newsagent in which, probably if that is in London, there are endless adverts for calling cards. You rub the strip off the back, it has a PIN number and you dial it. That may well be the XYZ Charity calling card or the XYZ promotion company card, but all it simply is is a resale of services. In that case there is no apparatus involved for the person who is doing the reselling. You simply dial in on the PIN number, it gives you access to a particular platform, and you dial out to the world through that at a cheaper rate.

In essence, with one difference I will come to in a moment, that is what somebody does with a Floe system. That is what Floe is doing, it is just reselling a service provided by somebody else. The difference in two cases out of three in relation to Gateways is who owns the kit, though that is not necessarily true. In respect of commercial use Gateways it is said that the kit is being used by Floe but, as I keep saying, it is being used to resell the service. Who is it being used by in respect of the service? It is not Floe. The service is the provision of an end to end telephony service, and that is not being provided by Floe it is being resold by Floe, and that is not the same thing. It is entirely different.

I do not want to further cloud the issue on SIM cards, but the analysis is more complicated even than that, because the SIM card is in the handset of Premicell or Gateway, and it is apparatus – there is no getting away from the fact it is apparatus – and it is apparatus for the purposes of wireless telegraphy; and, as people have been so pleased to inform us all, it belongs to, in this case, Vodafone. As we have also established Vodafone is not licensed to provide that either, because it is wireless telegraphy apparatus being used for the provision of wireless telegraphy on the frequencies which are the converse to those which it is licensed to provide.

So having created this Gordian knot of my own making how do I suggest that it can be cut? The intention of the points I have just made are to show that it is an absolute mess; it is a complete muddle, and when you have that kind of situation, really you are looking for a

knife. I know there are one or two along here who have been looking for a knife for me for some time (Laughter) and probably they will use it later as well. The only way you can take a knife to it is to say after the 2002 Authorisation Directive was made, so we all knew it had to be implemented by July 2003, after it was made it is the *Wallonie* principle, which we have been through before with the first case. People should have considered how on earth it should have been dealt with pursuant to the Directives; they should have considered the correct definition of "harmful interference", and it should have been licensed in the sense of being either exempt or licensed. By the way, though the European regulators and legislators see only general authorisations and individual licences you can have class licences which licence a number of individuals in one instrument. The only way you can cut through it really is to look at, for example, Vodafone licence in terms of being the instrument that licences to it the use of certain frequencies, and all of the stuff about equipment and base stations falls away. It just should not be there, because base stations are not technology, they are a description of equipment.

I ought at some point, and now is as good as any so I can give myself enough time, to deal with a few facts. A few of the facts I think are pertinent, and Mr. Flint has given us his views on what he thinks. I think it is pertinent that Mr. Stonehouse never received any indication from the DTI that COMUGS were unlawful, and yet he made it clear to them they were going to launch a business and it was important. He arranged a meeting with not just the head of the mobile desk at the DTI, we are talking about the man who would be advising the Minister at that time; the head of the mobile desk, and relied on his decision, who was liaison with the RA.

These are by order of them having occurred rather than any particular order. As we all know, the agreement is dated 12th August. Vodafone had advice on 21st August and, I hope, will not be objected to by the others. That advice predates the first delivery of SIMs to Floe. So they were supplied after the advice.

Mr. Flint made a lot of what Mr. Taylor said or did not say. I do not think there is any evidence at all that Vodafone were actually misled, what they actually call to their detriment in respect of that statement because they went on and shut everything off.. There is no evidence before the Tribunal that Vodafone made any disclosures under the Proceeds of Crime Act to indicate that they were very concerned about the problem.

THE CHAIRMAN: We have to be a bit careful about that because you are not supposed to tell anybody, are you? That is why when I said it I then withdrew the question.

MR. MERCER: I will consider that point, madam. One thing we do know is that the Decision to switch off was, according to Mr. Rodman, at least in part dictated by commercial

considerations. We kind of knew that already from footnote 149 in the Ofcom Decision. I do not want to trespass into Mr. Kennelly's domain, but I just want to get a couple of things over to Mr. Flint. Certainly, the age of steam is dead and, secondly, we joined the European Union and therefore I think we cannot just ignore its jurisprudence when we are looking at these issues. Certainly one of the cases he cited., I am conscious, was actually (*Hoffman*, I think, in fact) in respect of a decision reached prior to our accession, not post our accession. We really do have to consider these things now, and we have to consider them to give Floe its rights. There has been quite a lot of "Floe could not possibly have that or do that, say that and certainly has not got any and has not demonstrated any". One of the areas where that has been quite prevalent is in respect of legitimate expectation, and I have dealt with one of the facts relating to what we know about that meeting in February 2002, and then everybody says you cannot rely on it because some of these representations post-date the switching off. I am going to deal with that kind of thing.

What we have alleged is, in my opinion, a continuing matter. We did not and have not suffered damage, we would allege, simply because of one set of SIMs being switched off. If we had those SIMs continuing – just those SIMs in operation – since they were switched off, there would have been a lot of money to be made potentially, and we would still be making it today. The arbitrage opportunities – and I am sure that is what the other parties would describe it as – may be less, but they are still apparent. It is a continuing matter and we have been continuing to try to get these things back on and continue our business ever since. That is why, looking at what was said in the spring, summer and autumn of 2003 is quite important to us.

The other recurring theme has been, "Well, it is not a definite statement". Leaving aside February 2002 where we think there is a definite indication and a definite pronouncement made because we asked what we asked and we raised the question of being told afterwards if there was a problem that occurred to people, if you look at what Mr. Mason was saying to us, for example, in emails to Mr. Stonehouse, the ones referred to in his witness statement, he is not adding the caveat that he now adds in his evidence. I have to tell you that as a lawyer with some experience of public service including dealing with the RA, the DTI and similar sorts of matters, I would have had some difficulty in implying into what he was saying the kind of caveats that he now implies. Mr. Stonehouse and Mr. Taylor are not lawyers. Those statements were reasonably clear to anybody; in fact, clear beyond doubt. He was saying, "Go away, do a deal; it is possible." This is the man, Mr. Mason, coming from the Department who drafted the licence. What are we expected to do: say, "I am terribly sorry; you are quite wrong actually, Cliff, there cannot be a solution here." Are we not able in any way to rely upon that in respect of a body that has the ability to put it right and make it right because

Ofcom could have done so. They could have conducted the necessary consultation and varied, even on its plain terms (I will not go into that again), even on its plain black letter terms of Vodafone's licence.

One small matter, madam, before I forget. I totally assure Mr. Flint any Crown Court would burst into laughter over an offence relating to the Wireless & Telegraph Act in this way because it is a summary offence so it should not be there.

Recall, as far as the others go and what they say, misses the point. The point is that whichever way you look at it, we have got Vodafone SIM cards going into gateways, very probably COMUG gateways, two years plus after Floe was stopped. I do not categorise that as the flagrant acts of a company bent on discrimination. I categorise that in terms of a structure that the industry has never even got to grips with so that what is handed out by the service providers and dealt with is actually uniformly policed. I would like it to be uniformly policed, and the fact that it is not immediately creates a greater injustice and indicates the arbitrary nature in which Vodafone's control over SIM cards and IMEIs could be exerted without rhyme, reason or rationality.

Mr. Flint talked about Vodafone and what choices it had. I put words into his mouth: it had no choice. Here it was committing a grave offence for which it knew the RA would never prosecute so it had no choice. It had a choice. It could have made a formal complaint to the RA and it could have said, "Change our licence so we can make this whole or prosecute them" and if its motive was genuinely that it thought the effect on its network was so bad something should have been done, and thought that was his only remedy, that is what he would have done. It would have said, "RA, go in there, use your powers, stop it now. You can take that equipment away." Well, it did not. Mr. Flint says that you must look at the law as being the framework in which Vodafone made its choices and took its action, and I say to that – it makes me sound like the Godfather – that that ignores *Hilti* because *Hilti* is also part of the law. That is a duty not to blunder about in the undergrowth when it comes to competition if you are in the kind of position that Vodafone is and was.

I used the phrase at the last hearing, "judge, jury and executioner" and I kind of repeat that in terms of what I think *Hilti* is meant to stop, and what I would categorise the matter as is not as Mr. Flint which is them having to do because they were in danger of criminal liability; I look at it this way. The motive we know, from Mr. Rodman (he did not hide it) was in part commercial; it is to do with our serious losses; losses which, of course, in part have been put back into the consumer's pocket. Your choice is this. The RA seems a bit weak and they may try to prosecute, but nobody has brought a prosecution for this kind of thing in years and it is a grey area. We know it is a grey area and who knows what DTI lawyers legal branch will do.

So it might not actually stop people. We have got a consultation paper from November 2002 with proposal two in it that says we are more likely than not to change the law and make this all lawful. You have got is believed to be a black letter law situation, namely, to switch off straightaway. So what do you do? The problem that Vodafone have is that we now know because of the evidence that has come out in Floe 2 that they were warned. Counsel warned them and they still went ahead and did it. You can try, as Mr. Pickford did, to differentiate this case from *Hilti* on duties or whatever, but you know there were more people involved in this matter than just Vodafone; there were also consumers.

Coming to the Framework Directive, I would like to mention an Article that has not been mentioned before, and I have not been able to copy it. We can have that done for the morning. It is actually the Competition Directive which is [2002] 77 EC. That is the telecoms competition directive. This is the base framework. We have been looking at almost one layer down from this the whole time and looking at the nitty gritty. This is the base right that is granted. It is Article 2(3):

> "Member states shall ensure that no restrictions are imposed or maintained on the provision of electronic communications services over electronic communications networks established by the providers of electronic communications services over infrastructures provided by third parties or by means of sharing networks, other facilities or sites."

That is without prejudice to the other provisions of the Directive. That is your base right: that you should be able to provide services over other people's infrastructures.

There is one other place I am going to try to find there. You will forgive me; I just cannot find the right flag because I now have so many. What I am in fact looking for is none of the Directives I have managed to find so far; it is in fact the framework of electronics communications network services directive. Here we are. I want to mention this in respect of s.192. I will preface it by saying that there was a bit of a squabble, in my opinion, between the UK government and the Commission in years past over rights of appeal because we only ever had JR. I cannot remember the statistic but it is something like a researcher once worked out that of more than 300 Decisions taken by Oftel only 7 were actually ever appealed, and that have just had something to do with the way in which it had to be done; in other words, through judicial review. So that is probably, in part, why you have Article 4 of the Framework Directive. That is [2002] 21 EC, Article 4:

> "Member states shall ensure that effective mechanisms exist at national level under which any user or undertaking providing electronic communications networks and/or services" –

there is an and/or; it does not appear in the other Directive does it –

> "who is affected by a Decision of a national regulatory authority has the right of appeal against the Decision to an appeal body that is independent of the parties involved."

It says that the body may be a court and shall have the appropriate expertise available to it to enable it to carry out its functions.

> "Member states shall ensure that the merits of the case are duly taken into account and that there is an effective appeal mechanism. Pending the outcome of any such appeal the Decision of the national regulatory authority shall stand unless the appeal body decides otherwise."

It is not for me to explain s.192 and the derogation from 192 in respect of appeals under s.1 of the Wireless & Telegraphy Act embodied in Regulations; I can only assume that in those cases the parliamentary draftsmen and Parliament assumed there was some difference in respect of those kinds of decisions from those otherwise taken by Ofcom. I find it difficult to categorise it. It may well be that there is a very good reason, or some exception to that that I am not aware of, but that I believe is the base position in respect of rights of appeal against a national regulatory body.

If we go back to our old friend the Authorisation Directive, I wanted to emphasise only two things: conditions there being transparent, proportionate and non-discriminatory, and to pose the question to the tribunal how 4(2) matches up to those because, in my submission, it does not. I would also like to mention something Mr. Pickford referred to, which is Recital 5. It is an interesting point which had me fooled for a moment. In fact, my submission is if you read Recital 5 and what it is meant to be getting at, it is radio hams and people using Citizens Band Radio. The fact is that it is not meant to apply at all to what effectively is the terminal equipment for very large commercial networks. It is, by accident, of the way in which the UK regulatory regime works in respect of the handsets of GSM systems that self-use has any relevance. In any proper analysis of what a handset or premicell is, it is the terminal part of the GSM network terminating part of the GSM network and that is a million miles by the self-use of radio terminal equipment on the non-exclusive use of specific radio frequencies from a user and not related to an economic activity. The economic activity to which the service relates is the making of moneys by the MNMOs who are paid for their services. That is a million miles from Citizens Band. I just want to cover that point.

Lastly – you will be pleased to know – I just want to go back to Article 7 of the RTTE. On 20th July 2004 if I heard what has been said today about this Directive in terms of you have to look at it in terms of equipment *qua* equipment, I would have quietly, silently

without you noticing, punched the air with joy, madam, because that is the point I was trying to make: that the RTTE is about equipment *qua* equipment and not about its usage. The only reason that we are bothering to have this discussion is because in the UK we seem to have got our knickers in a twist over the concept of congestion which, you know, Mr. Burns was bemused by the concept, I almost thought, in terms of it forming into harmful interference. Why and how we got here I can only guess at, but clearly we have got here and it is irrationally wrong. At the least we should have had the benefit of 7(4). 7(4) is there for a reason: because the Commission and the European Parliament recognised it was difficult to get people to operate the same kinds of restrictions, and they said you had better tell us about it before you start switching people off. We also have a number of points about authority and whether you have to bother with 7(4) at all. My view is if you are going to give any effect to it, you have to pre-authorise by telling them the circumstances or provide a method by which they will come to you. You will see that has been pointed out before. In fact, an emergency procedure exists.

My last comment – the point I want everybody to take home – is what I said a little while ago. We have an immensely complex situation that should not be simply because for years the way in which the regulation of handsets in the UK has been dealt with has not reflected the certain realities. We have also a lack of properly bringing the legislation that existed prior to 2003 into line with the Directives. That has got to be done to give my client its rights. We have heard a lot about Vodafone's rights. I say it again for the third time – I have said it since Monday – complainants have rights as well, and they need to be given those rights and those rights need to be balanced. My submission is quite plain which is with any rights that Vodafone have to legal certainty are weighed in the balance against my client's rights, the law being interpreted properly – which I am sure, without having to go into it in too much detail – is a right we might accept under Article 6 because it is part of the right a fair trial. Remember my client, in effect, is accused of a criminal offence. What balances above that is *Hilti*. Thank you, ma'am.

THE CHAIRMAN: Mr. Kennelly, are you going to manage to do this in 20 minutes?

MR. KENNELLY: I was about to address you on that very point. We are all obviously very grateful to the Tribunal staff for agreeing to wait until 6 o'clock, but if the reason that we are sitting so late is in order for everything to finish today I am afraid that will not be possible. I will require at least an hour and I was going to make submissions to you on why I do need that time, and why 20 minutes will not be sufficient . I can assure you there are four main points: first, I need an hour. Secondly, there will be no overlap between myself and submissions made by Mr. Mercer in contra-distinction to those which we have heard today where there was a degree of overlap which has also contributed to the delay. There will be no overlap from me. Thirdly,

Worldwide has a separate interest, we are not simply an adjunct to Floe, we have leave to be here because of our separate interest; and finally, as Mr. Flint said, quite fairly, this is a very important case. That is why we sought leave to intervene and that is why Worldwide is here. The principles determined by the Tribunal will have implications for the market as a whole and, in those circumstances, I would ask for the full hour and not 20 minutes.

(The Tribunal confer)

THE CHAIRMAN: You are going to be an hour – I am not suggesting we are going to go on tonight. You are going to be an hour?

MR. KENNELLY: Yes, overnight I am sure I can shorten it to an hour.

THE CHAIRMAN: I just want to work out exactly how much time we are going to need. Mr. Mercer did refer to one Directive that was not here and one Directive that was in the bundle that had not been referred to. Is there anything else that Mr. Mercer might have referred to that may possibly be something that others want to respond to? I suspect that those two matters will not take up very much time, if they take any time at all? Mr. Flint?

MR. FLINT: Absolutely, if I have anything to say – and I do not think I will – I cannot see it will be more than five minutes.

MR. ANDERSON: I would have thought the same for us. We will review the transcript and see if there is anything we want to come back on, any new materials that Mr. Mercer has referred to, but I do not expect it will take very long.

THE CHAIRMAN: I think those were the only two things.

MR. ANDERSON: Yes.

THE CHAIRMAN: So we are not going to be very much longer than an hour, on that basis I suggest we come back at 2 o'clock.

MR. FLINT: Can I ask – I understood the Tribunal was proposing to sit at 11.15.

THE CHAIRMAN: It was not 11.15 it was between 11.30 and 11.45.

MR. FLINT: Then I must have completely misheard it. If we were to start then at 11.45 it would give us an hour and a quarter.

THE CHAIRMAN: I know, unfortunately, for various reasons we cannot do that. The earliest we could sit is 1.30. If you prefer to come back for 1.30 rather than 2 o'clock? If it is 1.30 it affects everybody's lunch, and as they have all stayed here today, it is probably better that we just do the usual thing of 2 o'clock.

MR. ANDERSON: We have no views as between 1.30 or 2.

THE CHAIRMAN: That is what I thought, so shall we say 2 o'clock?

MR. PICKFORD: Equally, we are happy to come at 2 as well.

THE CHAIRMAN: That should give us ample time, because even if you refer to things that have not been referred to – and I am not saying you will or you will not ---

MR. KENNELLY: I can tell the Tribunal that is not going to happen.

THE CHAIRMAN: -- that will give time for reply. 2 o'clock.

(Adjourned until Friday, 3 February 2006 at 2.00 p.m.)