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IN THE COMPETITION APPEAL TRIBUNAL

Case No 1024/2/3/04

Victoria House  
Bloomsbury Place  
London WC1A 25B

Monday 19th July 2004

Before:

**MARION SIMMONS QC**  
(Chairman)

**MR MICHAEL DAVEY**  
and  
**MRS SHEILA HEWITT**

---

B E T W E E N:

**FLOE TELECOM LIMITED**  
(in administration)

Appellant

- and -

**OFFICE OF COMMUNICATIONS**

Respondent

supported by

**VODAFONE LIMITED**

-and-

**T-MOBILE (UK) LIMITED**

Interveners

MR EDWARD MERCER (of Taylor Wessing) appeared on behalf of the Applicant.

MR MARK HOSKINS (instructed by OFCOM) appeared on behalf of the Respondent.

MR THOMAS IVORY QC (instructed by Herbert Smith) appeared on behalf of Vodafone.

MR MEREDITH PICKFORD appeared on behalf of T-Mobile UK Ltd.

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**PROCEEDINGS - DAY 1**

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1 THE CHAIRMAN: Good morning.

2 MR MERCER: Good morning, Ma'am.

3 THE CHAIRMAN: Before we start, can I thank everybody for the  
4 skeletons, which have been extremely useful and also the  
5 bundles, which I know you have had a lot of trouble with,  
6 but it has been very helpful to do it that way, so thank  
7 you very much.

8 Before we start, it may be helpful if I made some  
9 provisional comments on matters on which the Tribunal's  
10 understanding is presently unclear, so that everybody is  
11 aware of those matters which are troubling the Tribunal  
12 but which appear not to have been dealt with in the  
13 skeleton arguments.

14 The first question we have is what is the correct  
15 statutory distinction between public GSM gateways and  
16 private GSM gateways?

17 The Statement of Facts (at paragraph 8) refers to  
18 the 2003 Exemption Regulations which provide that if a  
19 GSM gateway provides a "telecommunications service" "by  
20 way of business" then it is a public GSM gateway. The  
21 Tribunal notes that the 2003 Regulations do not provide a  
22 definition of "public" or "private" gateways. It appears  
23 to us, from what we have read, that the parties accept  
24 that a public gateway is as identified in the 2003  
25 Regulations.

26 In the light of that, the Tribunal's tentative view  
27 is that the exemption provided by the 2003 Regulations  
28 depends upon whether there is an intermediary between the  
29 mobile operator and the end customer who is providing a  
30 "telecommunication service" "by way of business".

31 It seems to us at the moment that the Regulations  
32 make no distinction between the situation where an  
33 intermediary provides a separate GSM gateway to each of  
34 its customers and where an intermediary connects each of  
35 its customers to a central GSM gateway. Both seem to us  
36 at the moment to be within the scope of the wording in  
37 the 2003 Regulations, so using shorthand both seem to be  
38 public gateways. That view seems to be supported by

1 OFCOM's skeleton argument at paragraph 65.

2 That view also provisionally seems to us to be  
3 consistent with the manner in which the Exemption  
4 Regulations appear to have been understood, at least by  
5 OFCOM and Vodafone from the documents in the bundles.

6 It is probably not necessary to look at each one,  
7 but I will refer you to the tab numbers.

8 Tab 17 is the Consultation Document of November  
9 2002. Paragraph 1.4 distinguishes between self-provision  
10 of a gateway and "use of a gateway as a link to a  
11 cellular network to carry third party traffic". The  
12 self-provision would be exempted under paragraph 4(2) if  
13 the gateway could be classified as mobile. However, we  
14 note that in that document it is referred to as a "fixed  
15 mobile". That document refers use of a gateway to carry  
16 third party traffic as a "grey area". I think that is  
17 the only reference from primary documents, rather than  
18 repeating it, that refers to "grey area". That is the  
19 only reference that we have found anyway. There is no  
20 distinction being made between single and multi-party use  
21 of the gateway.

22 In paragraph 5.4 of the Consultation Paper it is  
23 recorded that "operators are currently accepting and  
24 connecting customers with" gateways and in paragraph 5.8  
25 it raises the question as to whether a distinction  
26 between private and public gateways can be justified.

27 It seems to us at the moment from paragraph 5.7 that  
28 in that document a public gateway was thought to be one  
29 which provides a third party telecommunications service.

30 At the moment we do not see that any distinction is  
31 being made in that document between single and multi-user  
32 gateways provided by way of business.

33 The position, as set out in that Consultation Paper,  
34 appears to us to be reiterated in the Radio Communication  
35 Agency's letter to Floe of 20 March 2003 at tab 22. That  
36 letter was in response to a letter by Floe to the Radio  
37 Communications Agency, but we do not have the original  
38 letter. My recollection is that it is dated 13 March.

1 It may be helpful to look at the letter that it was in  
2 response to.

3 At tab 18 there is the mobile operators' response to  
4 the Consultation. That was Vodafone and T-Mobile's  
5 response. It appears to us from that response that the  
6 operators were distinguishing between "self-use" and  
7 "commercial use" but they were not making any distinction  
8 *within* commercial use.

9 The next documents that I am going to refer to in  
10 this sequence are the letters from Vodafone's Chief  
11 Executive at tabs 23 and 24. They do not appear to us to  
12 make a distinction either. The first one, at tab 23,  
13 points to supply of service to third parties and to  
14 "wholesale supply" as being objectionable. The second,  
15 which is at tab 24, is the letter to Baroness Billingham  
16 and that distinguishes between use of "gateway devices by  
17 individual corporate customers for their own private use"  
18 on the one hand and "the use of GSM Gateways when used to  
19 provide a commercial telecommunications service to third  
20 parties".

21 In addition, at tab 30, there is a letter from  
22 Vodafone to Oftel setting out Vodafone's initial response  
23 to the complaint that had been made by Floe. That letter  
24 also refers at point (b) to "private" use as being use by  
25 individual corporate customers for their own private  
26 calls. It also states that Vodafone has not sought to  
27 disconnect individual corporate customers who use GSM  
28 gateways.

29 In this sequence of documentation we also note the  
30 letter at tab 37. That is currently stated to be  
31 confidential so I am not going to say anything more about  
32 it at this stage, save that the contents of that may be  
33 relevant.

34 Vodafone, in its skeleton argument, refers us to  
35 page 23 of the Business Plan which Floe relies on. The  
36 wording in the paragraph headed "Product 1" refers to  
37 "Floe's customers" and the intermediary service which  
38 Floe is to provide between its customers and the

1 operator.

2 It seems to us - and this is very provisional and  
3 subject to what we hear in this hearing - that that is  
4 describing a service "by way of business". The  
5 explanation in the last two sentences of paragraph 55 of  
6 Vodafone's skeleton also appears to us to support the  
7 understanding which we presently have. Whichever  
8 Business Plan, whether it is one that Vodafone has  
9 produced or the one that Floe has produced, we wonder how  
10 a document that is a "Business Plan" is not describing a  
11 service "by way of business". The Business Plan which  
12 has been produced by Vodafone appears to describe a  
13 telecommunications service to be provided by Floe "by way  
14 of business". In the same vein the Agreement between  
15 Floe and Vodafone seems to us necessarily to be "by way  
16 of business" and it clearly expressly envisages resale by  
17 Floe.

18 The distinction which Vodafone now appear to be  
19 making in paragraph 57 of its skeleton, if we have  
20 understood it correctly, is whether the GSM gateway  
21 service is or was provided by Floe to one customer or to  
22 multi-Floe customers. If we have understood it right -  
23 so this is a very provisional view - the submission seems  
24 to be that where the service is provided to one Floe  
25 customer then, notwithstanding that Floe is providing the  
26 service "by way of business", it is a "private" gateway.

27 If that is the submission, we do not understand the  
28 basis in law for that conclusion and we need some help.

29 You will now understand why I went through the whole  
30 sequence.

31 We do not see how factual evidence as to what  
32 individuals believed the position to be can be relevant  
33 to the true construction of the Regulation, but the  
34 Tribunal notes that the documentary evidence appears to  
35 be consistent with our view.

36 Of course, Mr Mercer, none of that would arise if  
37 your construction of section 1 is right and so it is all  
38 without prejudice to whether or not your construction is

1 right.

2 Can I turn to the second question that is in our  
3 minds. That concerns Vodafone's ability to authorise  
4 Floe's use of gateways.

5 We note from the skeletons that it is said that it  
6 was clear that public gateways were unlawful. We refer  
7 to OFCOM's skeleton at paragraphs 65 and 66 and  
8 Vodafone's skeleton at paragraph 39 where it says "it was  
9 plainly a reasonable belief". That way of putting it is  
10 supported in paragraph 24 of T-Mobile's skeleton.

11 The August 2002 document from the Radio  
12 Communications Agency, which is at tab 16, addressed  
13 three points.

14 First, that the GSM spectrum has already been  
15 awarded in the UK to the cellular operators by licence on  
16 a nationally exclusive basis and that spectrum therefore  
17 cannot be licensed to other users.

18 Second, that "gateways" are fixed and not mobile.  
19 That mobile devices only are within the Exemption  
20 Regulation so section 1 would require a licence but,  
21 because of the licences already granted, referred to on  
22 their first point, no further licences could be granted  
23 for gateways.

24 Thirdly, in addition, the exemption did not apply  
25 where a telecommunication service is provided by way of  
26 business to another person.

27 That published document stated that anyone  
28 installing or operating a gateway of any sort without an  
29 individual licence will be in contravention of the  
30 Wireless Telegraphy Act and enforcement action may be  
31 taken. It concluded that a consultation process was to  
32 be undertaken.

33 Notwithstanding that announcement, which was in  
34 August 2002, Floe and Vodafone entered into the contract  
35 in the same month. It is now said in Vodafone's skeleton  
36 that it was thought that Floe would provide "private"  
37 gateways. But private gateways at the time were believed  
38 to be fixed, as we understand it. The question in our

1 minds is, if Vodafone knew that Floe were to provide GSM  
2 gateways, whether private or public, at the time the  
3 contract was entered into, on what basis did Vodafone  
4 enter into the contract? Of course, it is a rule of  
5 construction of contracts to seek to avoid a result that  
6 would require the performance of an illegal activity.

7 At tab 22 page 29 there is a letter from Mr Cliff  
8 Mason of the Radio Communications Agency to John  
9 Stonehouse of Floe stating that "the GSM Spectrum has  
10 been licensed to [the mobile operators] on a nationally  
11 exclusive basis and cannot be licensed for commercial  
12 purposes to anyone else".

13 At tab 22 page 297 there is an e-mail from Mr Mason  
14 of the Radio Communications Agency to John Stonehouse of  
15 Floe which states that the mobile operators are permitted  
16 to use their "assigned spectrum" with any equipment that  
17 meets the technical specifications in the schedule to the  
18 licence and that the mobile operators have the authority  
19 under the Wireless Telegraphy Act, but not an obligation,  
20 to accept equipment that is not covered by the Exemption  
21 Regulations, but if they do so the mobile operators would  
22 be responsible for compliance with their licence  
23 conditions.

24 Mr Mason of the Radio Communications Agency is also  
25 the person from whom Oftel sought guidance on the  
26 interpretation of the Wireless Telegraphy Act and of  
27 Vodafone's licence. At tab 34 the views he gave to Oftel  
28 are set out and include the statement that "where a  
29 gateway is used commercially to provide third party  
30 services without coordination with or agreement of the  
31 mobile network operator it is not covered by the  
32 exemption neither are we able to issue a Wireless  
33 Telegraphy licence for the spectrum that is licensed  
34 exclusively to the mobile network operator".

35 At tab 30, which was Vodafone's initial response to  
36 the complaint at point (c), Mr Rodman of Vodafone drew  
37 attention to the Government's announcement of 18 July  
38 2003 and the statement that operation of a GSM gateway

1 "without the authority and permission of a licensee, ie  
2 Vodafone".

3 It seems, from the documents that we have seen, that  
4 at the relevant time both the authority and Vodafone  
5 considered that Vodafone *did* have the ability to  
6 authorise Floe's use of "public" gateways under its  
7 licence, because the relevant spectrum which was used by  
8 such gateways was licensed to the operators exclusively.

9 The question to be considered seems to us to be whether  
10 Vodafone had given *sufficient* written authorisation and  
11 on our reading of the Oftel decision that seems to be the  
12 basis on which that was written as well. However it is  
13 now said by OFCOM and Vodafone, if we understand the  
14 position correctly, that that understanding as to how  
15 Vodafone's licence operated was wrong, that Vodafone were  
16 not "exclusively licensed" in respect of the relevant GSM  
17 spectrum but only part of it, the part which is used by  
18 the base stations. GSM Gateways are "user stations" and  
19 not "base stations" and so fall outside the licence  
20 entirely and Vodafone can therefore have had no authority  
21 to authorise their use. I think that is the argument in  
22 the skeletons. I hope I have summarised it properly.

23 At the CMC on 25 June I averted to this point, which  
24 I am elucidating now, and suggested that the point be  
25 dealt with in the skeleton arguments, but I do not think  
26 that it has been - at least as I had it in mind. What I  
27 had in mind when I mentioned the point was whether, in  
28 the circumstances, if both the authority and the licensee  
29 understood the licence to operate in a particular way and  
30 proceeded to deal with third parties on that basis, can  
31 they now abandon that approach if that would prejudice  
32 the applicant Floe?

33 To be slightly more helpful, what was going through  
34 the Tribunal's mind in thinking about this were two cases  
35 on construction contracts. One is *Amalgamated Investment*  
36 *& Property Co Limited v. Texas Commerce International* and  
37 the other is *Hiscox v. Outhwaite (No 1)*. There are other  
38 cases in that line, but they are the two main ones. You

1 are all probably familiar with them.

2 I hope that outlines the concerns that are worrying  
3 us about that sort of approach.

4 The next issue is, of course, which Business Plan  
5 did Floe provide to Vodafone before entering into the  
6 contract in August 2002.

7 We note that the Business Plan which Floe relies on  
8 bears a footer "Revision 09.05.2002". But Appendix 4 of  
9 that document attaches the Government's announcement of  
10 18 July 2003. It is at tab 13 and that is the version  
11 that was annexed to the Amended Notice of Appeal.

12 We have checked the OFCOM Decision Bundle, which  
13 very kindly was provided, and that does not contain  
14 Appendix 4. We also note that the Business Plan produced  
15 by Vodafone was specifically designed for "Vodafone".  
16 That is at tab 54. Also the version at tab 13 is a very  
17 truncated version of the version in the Decision Bundle,  
18 but the version in the Decision Bundle is also not  
19 complete because it is missing pages 17 and 21. I leave  
20 that there. I do not know what has happened about  
21 sorting out which Business Plan it was, but I make those  
22 remarks about it.

23 I now come on to the RTTE Directive 1999.

24 Can I thank you all for the submissions which you  
25 made in response to the Tribunal's letter of 6 July.  
26 They were very helpful and hopefully put us on the right  
27 track. It seems clear (again provisionally and subject  
28 to T-Mobile's point and further submissions) that Article  
29 7(2) permitted member states to restrict the putting into  
30 service of apparatus for reasons related to the  
31 "effective and appropriate use of the radio spectrum" and  
32 it also seems at the moment that that is probably what  
33 the UK intended to do by making Article 4(2) of the  
34 Exemption Regulations as amended in 2000 and re-enacted  
35 in 2003.

36 What we are unclear about is whether before the 2003  
37 Exemption Regulations, or indeed any earlier version of  
38 the same restriction, there had been any evaluation into

1 whether commercial use of a GSM Gateway had implications  
2 for the effective and appropriate use of the radio  
3 spectrum. What we are wondering is whether such an  
4 evaluation might be necessary to provide the required  
5 reasons for the restriction.

6 The Government announcement of 18 July 2003 followed  
7 a Consultation Process which began in November 2002. The  
8 re-enactment of the Exemption Regulations was in February  
9 2003, before the Consultation Process had finished. We  
10 wonder whether that might be a reason why there are  
11 references to there being a "grey area" over the question  
12 of whether the restriction applied to GSM gateways  
13 supplying commercial services.

14 The next point is that we have noted sections 172 to  
15 174 of the Communications Act, which provide that after  
16 that Act came into force in July 2003, no proceedings can  
17 be brought under section 1 of the Wireless Telegraphy Act  
18 or any exemption regulations made under section 1 unless  
19 OFCOM have given a notification that there are reasonable  
20 grounds for believing that the person is contravening  
21 section 1 and has considered representations made by that  
22 person. There are certain exceptions to that about  
23 public safety and national security and the like.

24 We therefore are wondering whether, after July 2003,  
25 Floe could not have been guilty of an offence under  
26 section 1 unless and until that procedure had been  
27 followed.

28 Given that the "abuse" which the Director was  
29 considering in his Decision was that of "refusal to  
30 supply", which commenced on the date on which Vodafone  
31 initially disconnected Floe's SIM cards, which we  
32 understand was in March 2003, but which refusal to supply  
33 continued throughout the Director's investigation (and, I  
34 suppose, is still continuing) the Tribunal wonders what  
35 relevance those statutory provisions have on the proper  
36 analysis of the issues presently before us and, in  
37 particular, with regard to whether Vodafone's refusal to  
38 supply was, or remains, objectively justified.

1           We do not expect you to answer all those questions  
2 immediately, but they might be incorporated, if you know  
3 the answers, in what you are addressing us today. We  
4 note that the timetable envisages that all parties have  
5 the opportunity to address us during the course of  
6 tomorrow and that should provide ample opportunity to  
7 consider the matters and to address us upon them.

8           If I may come to one final matter, and that is  
9 Confidentiality.

10           We note the extent of the confidentiality which is  
11 being claimed for documents in the bundle, but we are  
12 unclear as to the basis upon which the claim is being  
13 made. This needs to be considered further and if the  
14 confidentiality claims are to be persisted in, then the  
15 requirements of rule 53 must be complied with and they  
16 require that the relevant words, figures or passages for  
17 each claim of confidentiality must be identified and the  
18 reasons must be given. That ought to have been done  
19 before this hearing. I expect it cannot be done now  
20 until after the hearing but I think it needs to be done  
21 by 5 pm on Thursday. It may be that a very broad  
22 approach has been taken by everybody and actually if you  
23 look at the documents there is a very small claim to  
24 confidentiality, but I do not know. But it does mean  
25 that we have got to be very careful in this hearing as to  
26 what we refer to, because the claim is very extensive at  
27 the moment.

28           I hope it has been helpful to elucidate where we  
29 have got to. Everything I have said is very provisional,  
30 but we need to be put right.

31 MR HOSKINS: Can I just pick up on the confidentiality  
32 point?

33 THE CHAIRMAN: Yes.

34 MR HOSKINS: Obviously that is going to bear on the hearing.

35           It may be my fault but I am not aware of which documents  
36 they claim to be confidential. While I am standing on my  
37 feet, how do I make sure?

38 THE CHAIRMAN: The bundle has an index and all the documents

1 on which confidentiality has been claimed have been  
2 underlined.

3 MR HOSKINS: So in relation to each of those. Probably the  
4 safest way, and we have done this in previous Tribunal  
5 hearings, is to say 'look at the third paragraph of the  
6 document at tab X', and we will all read it.

7 THE CHAIRMAN: Yes, that is how we are going to have to deal  
8 with it, which makes it much slower and one wonders  
9 whether in fact there should be a claim or not.

10 MR HOSKINS: Precisely.

11 THE CHAIRMAN: I do not know who is making the claim.

12 MR HOSKINS: I presume it must be the private companies.  
13 Perhaps the private companies can have a conversation.  
14 Obviously it is easier if we do not have to adopt that  
15 system, but if we do, then we do.

16 THE CHAIRMAN: Maybe it can be dealt with at lunch.

17 MR HOSKINS: That was my hope. Thank you.

18 THE CHAIRMAN: Would that be appropriate?

19 MR MERCER: Yes, Ma'am. That is not Floe.

20 THE CHAIRMAN: It is not Floe?

21 MR MERCER: No.

22 MR IVORY: Madam, we will try and sort it out over lunch.

23 THE CHAIRMAN: Thank you.

24 MR PICKFORD: Ma'am, there is a further housekeeping matter.  
25 I do not know whether the Tribunal has received copies  
26 of the correct version of the document that the Tribunal  
27 referred to at tab 16? We meant to include the version  
28 as published on the RA's website. The wording is the  
29 same in both documents, but this version makes clear that  
30 it was published on the website as opposed to the others  
31 which did not. I can hand that up. I have already  
32 handed those documents to my friends.

33 THE CHAIRMAN: Do you want us to put them into tab 16?

34 MR PICKFORD: That would be very helpful.

35 THE CHAIRMAN: Or should we do that over the luncheon  
36 adjournment?

37 MR PICKFORD: Yes.

38 THE CHAIRMAN: Then we will do it over lunch. Thank you very

1 much.

2 Mr Mercer?

3 MR MERCER: My firm has a promotional giveaway. It is a  
4 mouse mat that redefines various items in Telecoms, one  
5 of which is a Telecom's lawyer is one who speaks entirely  
6 in acronyms and that is something which this industry has  
7 an unfortunate habit for. If you hear one which you have  
8 not heard before, perhaps because in a moment of  
9 abstraction when writing the skeleton I developed one, do  
10 stop me and ask what it is, but you are going to hear  
11 some of them quite a few times, like ARPU (average  
12 revenue per unit) and the like. That same item defines  
13 GSM as "good source of money" and therein lies the heart  
14 of this matter, because GSM is and continues to be a good  
15 source of money, particularly in the business sector and  
16 particularly when people can, by using arbitrage between  
17 fixed to mobile rates and on-net rates, gain a  
18 considerable saving over what they might otherwise have  
19 paid.

20 I think, Ma'am, it might be useful if I started, as  
21 does my skeleton, with the meaning of the contract. I  
22 will deal with it straightaway, because it is a related  
23 point, where I can help just at the moment in relation to  
24 the Business Plans.

25 Unfortunately during the course of the complaint and  
26 the investigation, my client of course became insolvent  
27 and went into administration, something which has not  
28 occurred in respect of Messrs Vodafone or T-Mobile. That  
29 has an unfortunate effect on being able to find company  
30 records, etc. The staff, the people who dealt with the  
31 matter, if not spread to the four winds are at least  
32 dispersed. They are in different companies now because  
33 they are in different businesses and so is part of their  
34 equipment and their records, although I am sure the  
35 Administrator did his duty in being able to bring in as  
36 many records as he possibly could. That means that we  
37 are working from incomplete records. We have done the  
38 best we can. We were instructed at the time that the

1 Notice of Appeal was put in but what we submitted was  
2 part of a Business Plan structure which the people who  
3 had worked for Floe in the relevant period believed had  
4 been in every Business Plan. We worked on a lowest  
5 common denominator basis. That is what, by consensus  
6 amongst those responsible, we believe to have been shown.

7 We do not have a copy, or anything like it, of that  
8 produced by Vodafone. We feel sure that what we have  
9 provided in the bundle represents the things that will be  
10 discussed and which we believe to have been sent to them.

11 We have no evidence that their version was or was not  
12 sent.

13 You will see in my skeleton, Ma'am, that I make two  
14 submissions about the Business Plan, one about theirs and  
15 one about our versions. In the case of our version I  
16 make reference to the wording, which makes it clear that  
17 we are going to be aggregating services together and  
18 pushing it out through a switch. If that is not - I was  
19 going to say "a definition of public gateway services",  
20 but I think I will restrain myself from saying that just  
21 for the moment until we get on to that very subject - but  
22 if that is not a definition of the kind of thing that  
23 Vodafone seem to have objected to, I do not know what is.

24 The second thing is, in their version prominent  
25 amongst a list of bullet points is the fact that we are  
26 going to in this Business Plan, if it works, provide  
27 eight times the ARPU. This is not some penny-ante  
28 contract. This is not some small affair. This is a  
29 Business Plan where we are looking at eight times the  
30 average revenue. We assumed Vodafone to be the modern,  
31 switched-on company that we know it to be and that its  
32 executives would have known the implications of that as  
33 far as were known at the time in the industry.

34 One of the things I will mention here, though I am  
35 sure I will mention it again, is something you will have  
36 seen, first of all, in Mr Happy's statement and then  
37 elsewhere, and it goes through to some of the exchanges  
38 of letters between Mr Stonehouse and the RA and Mr

1 Stonehouse and others, and that is Floe singularly  
2 failing to understand what difference there was between  
3 public and private gateways.

4 Back in the summer of 2002 Vodafone and Floe are  
5 discussing a contract. It is not just any contract for  
6 the provision of wholesale services. This is one where  
7 Vodafone are saying "you have to show us a business plan  
8 before we are going to give you this contract". This is  
9 not a walk-in-off-the-street business relationship. This  
10 is something which is being carefully constructed, or so  
11 you would have thought, in terms of what is clearly a new  
12 business opportunity. If you read the version of the  
13 business plan provided by Vodafone, this is something  
14 that Floe is explaining in there. It is something new.  
15 It has higher ARPU level. It has a new means of making  
16 money. If you look at the contract you will see that  
17 there is actually a minimum revenue per unit provision.  
18 Vodafone and Floe agree not to have just any old  
19 customers. They want high-rolling, high-average revenue  
20 per unit customers.

21 In the industry at that time, as I think is clear  
22 from the initial letter from the RA, the one, if my  
23 memory serves me correctly, T-Mobile is seeking to  
24 provide a new copy of --

25 THE CHAIRMAN: Is this the 2002 copy?

26 MR MERCER: 2002 August. You will have seen, Ma'am, that  
27 the date of the contract is 12 August, shortly followed  
28 by the statement on the 23rd.

29 At that time we have an industry that is just going  
30 into this area for the first time in towards what the RA  
31 slightly later in the year described as a grey area in  
32 the executive summary to the November consultation  
33 document.

34 What can we ascertain about what this contract  
35 means?

36 One of the most important things about this  
37 contract, which I hope will have struck the Tribunal, is  
38 that it is a contract for the provision of services. It

1 is not a contract in relation to the connection of  
2 equipment to a network. It is not a contract for  
3 anything else other than the distribution or resale of  
4 telecommunications' services. Well it would have been at  
5 that time. We now have to call them electronic  
6 communications services. That kind of contract is not  
7 unusual in the industry, Floe contends. The contract, if  
8 you look at it, is in fact a non-standard front end  
9 attached on to a number of standard conditions, a number  
10 of which appear to relate to the provision of apparatus  
11 in motor vehicles, which is something which not even my  
12 client has ever quite understood. Floe is in that  
13 contract never characterised as the service provider -  
14 that is always Vodafone - and it is specifically not  
15 Vodafone's agent. It is merely reselling a service.

16 Because it is going to be a bit of a scene I will  
17 deal, if I may, for a moment with who receives a service  
18 from whom with what.

19 The service that is being resold by my client is  
20 that provided by Vodafone. Is my client providing a  
21 service? The answer as a matter of logic is "No".  
22 Vodafone is providing the service. We will come back to  
23 that, Ma'am, when I attempt at some point to deal with  
24 your questions concerning the Wireless Telegraphy  
25 Exemption Regulations 2003.

26 In that contract Floe is obliged to comply with  
27 licences etc necessary for Floe to use the services.  
28 This implies that Vodafone recognise that Floe itself  
29 intended to use the services, which would not have been  
30 necessary if they were nearly in every case to be resold  
31 on by another. The wording, in other words, is  
32 inappropriate, Ma'am.

33 Very little is said in the contracts about SIM  
34 cards, except as to who is responsible for ensuring  
35 connection to the network and the expectations of  
36 quantities to be supplied. I have already said that  
37 quantities to be supplied and the amount of revenue per  
38 unit are larger than is usual and the contract is at risk

1 if certain minimum requirements on that are not met.

2 I contend that what Floe had a right to believe goes  
3 like this.

4 'On buying services you give me SIM cards. We put  
5 SIM cards into devices.' 'What kind of devices?' 'Well,  
6 in the European Union we have the benefit of the RTTE  
7 (the Radio and Telecommunications Terminal Equipment  
8 Directive). That is a pretty powerful Directive which  
9 goes back to the earliest days of liberalisation of  
10 telecommunications in Europe and it says that Governments  
11 should not allow to be on the market that which is not  
12 compliant and also the equipment must not only conform to  
13 safety standards but also conform to general standards  
14 necessary for operation.

15 It is a bit like Cinderella. 'Whatsoever this SIM  
16 card shall fit, we, Vodafone, should be able to provide  
17 services by means of', because we know that something  
18 which is harmful will be prevented from access to the  
19 market and we know that what is on the market will work  
20 with that equipment. We have that general expectation as  
21 a populace and as commercial operations using GSM  
22 standard equipment. Whatever that SIM card fits into and  
23 operates with we should be able to use.

24 There is no prohibition in that contract on what are  
25 known as public gateways and we say that no express  
26 authority was needed to put the SIMs into equipment which  
27 was otherwise lawfully able to be sold in the United  
28 Kingdom.

29 One thing I would like to point out as we go through  
30 is the ability of Vodafone, pursuant to the contract, to  
31 give instructions about how it may be used, a standard  
32 clause in contracts for the provision of re-sale services  
33 or the sale of services, which is "we may give you from  
34 time to time instructions as to how this service may be  
35 used and if they are lawful you should follow them". I  
36 will come back to that, Ma'am. If you look in the  
37 contract and I think it is Appendix 6, which is the  
38 standard term contract terms, you will see a lot of the

1 standard boilerplate that goes with this kind of  
2 contract.

3 There is clearly a dispute about pre-contract  
4 discussions between Vodafone and my client as to what it  
5 can all have meant, but I think we would contend that  
6 Vodafone knew that this was not something in the ordinary  
7 means of distribution of services to the public using  
8 ordinary handsets and if you look, for example, at the  
9 version of the Business Plan provided by Vodafone, when I  
10 last looked it had some photographs at the back of  
11 gateways. This was at a time when the industry, we would  
12 contend, really was not able to differentiate between  
13 public and private. Nobody had made that distinction  
14 quite yet.

15 The contract is also silent as to who is responsible  
16 for installation and indeed establishment of the  
17 apparatus involved, though clearly when the contract is  
18 read together I would submit that you get the impression  
19 from that that there is sufficient authority, if not  
20 expressly then impliedly, given in respect of putting SIM  
21 cards into equipment installed in cars and I suggest that  
22 it is no different to move to an implied authority to  
23 instal equipment in which the SIM cards are to be placed.

24 Ma'am, I mention that because of the arguments  
25 relating to "even if we are wrong about who is using it,  
26 you installed it anyway", because the licence will act  
27 under section 1 of the Wireless Telegraphy Act 1949, to  
28 establish, instal and use. My contention is that the  
29 contract anticipated authority being given to instal and  
30 indeed did give authority.

31 Notwithstanding the protestations of Vodafone that  
32 they had no idea whatsoever that this was to be used in  
33 what are now known as public gateways, I am pretty sure  
34 that they would have been brave men at the time, and  
35 indeed women, to either identify at that time what public  
36 gateways were or were going to be and to know what not to  
37 put in them. But, my goodness, they had a really good  
38 idea of the size and capacity of the business that could

1 be created by what Floe intended.

2 Unless, Ma'am, you have any questions or any points  
3 that immediately occur to you on the contractual matrix I  
4 will move on to the primary argument.

5 There are two elements to Floe's arguments here.  
6 One, our own, and the second responses to the other  
7 parties arguments.

8 Floe's arguments are essentially set out in Schedule  
9 1 to the Amended Notice of Appeal and those points, as a  
10 primary argument, depend on looking at interaction  
11 between the Wireless Telegraphy Act and the Wireless  
12 Telegraphy Exemption Regulations. Might I suggest that  
13 we find the latter and have it in front of us? That is  
14 Volume 3.

15 The regime set up by the Exemption Regulations  
16 assume that GSM network services have the same kinds of  
17 characteristics, when you are looking at user apparatus  
18 and the rest, as apparatus which was envisaged and known  
19 about by the draftsman in 1949.

20 Let us look at a fairly simple situation. Some of  
21 us are old enough to remember Tony Hancock and the radio  
22 ham. He buys a piece of equipment in 1958, I think it  
23 was. He switches it on. He chooses the frequency and he  
24 chooses the power and he can speak to the poor gentleman  
25 on the yacht who is making the May Day signal. His  
26 control over that apparatus is complete and utter. There  
27 is no SIM card. There is no IMEI. I go out and I buy  
28 that equipment, I switch it on and I control every facet  
29 of it, whether it works, whether it interferes with next  
30 door, whether it interferes with a BBC broadcast, etc. I  
31 control that. I control the power over that.

32 Where you are dealing with a GSM mobile, because  
33 certainly my learned friends would classify a gateway as  
34 a mobile device - otherwise things start to fall apart  
35 under the Regulations - if you look at that device, you  
36 put a SIM card in it and it works. Take the SIM card out  
37 of it and all you can do is make an emergency services  
38 call.

1 I have tried lots of ways to think of explaining  
2 this simply, but I think the only real way is, first, to  
3 make this point that with the SIM card you can phone the  
4 world. Without the SIM card no authorisation, no  
5 nothing.

6 What does a SIM card do? The other parties in this  
7 matter would have you believe that it is just an  
8 identification device and that it did not link to  
9 anything else. In fact it is linked to getting services  
10 from a network, because that is what identifies the  
11 person who is given that SIM card. It identifies them to  
12 Vodafone - yes, for billing purposes. But once that  
13 relationship is set up, once the identification has been  
14 made, what does the network through the identification of  
15 the SIM card do? It tells that mobile phone what  
16 frequencies to use. It tells it what power to use,  
17 because the closer you are to a transmitter the less  
18 power you need to send signals back to it.

19 What other things can Vodafone and T-Mobile do?  
20 Well, they can make sure that you cannot use that handset  
21 at all. The other parties, at least in writing, get  
22 quite excited about this. They say, under the GSM case,  
23 "No, no, you do not understand IMEIs". (I begin to hear  
24 W S Gilbert and 'this is not ridiculous and this is not  
25 preposterous', coming from them. 'We just have access to  
26 these numbers. We can upload them and it is all for the  
27 public good'. Well, the answer is that what this is an  
28 example of is the ultimate degree of power and control  
29 that they have over an individual's handset. They can  
30 upload it if the CEIR [there is one of those acronyms  
31 again] and that will stop it being used in this country.

32 Look around at the advertisements on railway stations  
33 and the tube at the moment about the immobilisation  
34 campaign when things are stolen. Report your mobile  
35 phone is stolen. Make sure that it is stopped. That is  
36 not just stopped with one SIM card, that is with any.  
37 The answer from the other parties is, 'Well it only  
38 counts in this country unless we load it to the CEIR in

1 each country in which you might use it'. An interesting  
2 answer. But they have got that level of control and that  
3 is how they can exert it if they want to.

4 As far as the other parties are concerned, control  
5 and the ability to tell you whether you can or cannot  
6 make a call by means of a handset has nothing to do with  
7 who is using it. 'Irrelevant', they cry. (I precis).  
8 You cannot look at comparables like what constitutes  
9 providing an electronic communications service. You  
10 cannot look at how we used to look at what constitutes  
11 running a telecommunications system in the UK. It is all  
12 irrelevant. 'Well, that is plain old fashioned', and  
13 here they throw the case of *Rudd* at us Ma'am. 'It is a  
14 plain old fashioned use of English. "Use" must be given  
15 its ordinary and natural meaning in the context'. That  
16 means, they say, that it is you or I picking up the  
17 handset and we are using it.

18 That is a point, which you may remember at the last  
19 CMC Mr West alluded to when I used "use" in a particular  
20 way. "If you have to make that distinction", he said,  
21 "then what is your argument worth", or words to that  
22 effect.

23 Well, there is quite a lot of merit in it, I say,  
24 because "use" in the circumstances, has to be looked at  
25 in the context of "use" in the Wireless Telegraphy Act  
26 1949, section 1. Mr Ivory helpfully, in Vodafone's  
27 Statement of Intervention, set out the kinds of things  
28 that the Wireless Telegraphy Act was meant to provide  
29 control over in the public good. Radio spectrum is a  
30 funny thing. You cannot add to it and you cannot  
31 subtract from it. It just is, exists, and has always been  
32 a prerogative to dispense. If you are looking at what is  
33 important in Wireless Telegraphy Act terms it is to  
34 prevent interference, to prevent harm and that there  
35 should be an orderly use of the spectrum.

36 Ma'am, relate that back to the kinds of things that  
37 I was talking about a few minutes ago in terms of power,  
38 in terms of frequency, because it is the network telling

1 the phone what frequency to use for its reverse path,  
2 whether to frequency hop or not, or what power to use.  
3 You might say, Ma'am, that you have some degree of day to  
4 day control over your handset, because handsets and  
5 gateways you can class the same for the purposes of this  
6 argument, but you do not have any real top level control  
7 and, when you come down to licensing, when you are  
8 running something, who is controlling it, who is  
9 operating it and who is using it, it is those sorts of  
10 issues that you need to examine. Who has that ultimate  
11 control?

12 That, in essence, fits in with, for example,  
13 contractual matrix in terms of Vodafone and Floe, which  
14 is that Vodafone provide a service which is provided by  
15 means of the gateway.

16 Where Floe came from originally in its arguments was  
17 that it was not the person who used apparatus, a wireless  
18 telephony link by means of which telecommunications  
19 services were provided by way of business to another  
20 person, which made it committing some form of offence  
21 under Regulation 4(2) of the Wireless Telegraphy  
22 Exemption Regulations, as they now exist.

23 At this point, Ma'am, it might be useful if I make  
24 my first - though I do not guarantee that it will be my  
25 last - attempt to deal with the meaning of Regulation  
26 4(2).

27 I think anybody would have real difficulty with  
28 Regulation 4(2), because I am going to contend that it is  
29 a bit of nonsense really. It was not intended to be, but  
30 I think that is how it has ended up. To go off in what  
31 might seem a slight tangent but I do not think is, Ma'am,  
32 I am going to talk for a moment about the RTTE.

33 At last, I might say, the parties in this case have  
34 just about found something that they could agree about,  
35 which is that the RTTE is about radio equipment. There  
36 are indeed parts of what T-Mobile say about it which I  
37 could have written myself. There are parts, mind you,  
38 that I would not. But where they say that the RTTE is

1 about radio equipment and only radio equipment, then I  
2 wholeheartedly agree, and it should only be about radio  
3 equipment and it should never, in my submission, be used  
4 as authority for making exceptions to exemptions about  
5 usage - and that is what it has been used for. I really  
6 must stop using that word!

7 The draftsman kind of knew that what he was being  
8 told in respect of Regulation 4(2) should be about  
9 equipment. That was the rationale for making the  
10 exemption, so he tried to use words in the regulation  
11 that related to what in fact is a usage point to  
12 characteristics of equipment. Remember the only way in  
13 which Regulation 4(2) is lawful is if it relates to the  
14 RTTE so that it gives OFCOM the ability to say that this  
15 is a condition to the general authorisation. There are  
16 limited things for which you can have a condition under  
17 the general authorisation, one of them being the relevant  
18 regulation, which I think is 7(2) of the RTTE. By the  
19 way, I have to say as a matter of history that it is not  
20 unusual in wireless telegraphy terms to find matters  
21 dealt with as exceptions to exemptions and for a number  
22 of years the authority for BBC television licences was  
23 that they were an exception to an exemption. It is an  
24 established practice, for some reason, in this area.

25 What does it do? It does not apply to relevant  
26 apparatus which is established, installed or used to  
27 provide, or to be capable of providing a wireless  
28 telegraphy link between telecommunications apparatus or a  
29 telecommunications system and a public switch telephone  
30 network by means of which a telecommunications service is  
31 provided by way of business to another person. The bits  
32 that the data try and attach an exemption to wireless  
33 equipment is the "capable of", "used to provide or  
34 capable of providing".

35 The other parties, and Floe, had an interesting  
36 series of exchanges about what appeared in the agreed  
37 statement of facts relating to what was typical or  
38 untypical in relation to a gateway, a public or private

1 gateway and, as a matter of fact - it is probably true -  
2 on average gateways have higher usages than private  
3 gateways.

4 We will come on to what public and private are in a  
5 moment, but let us take that for a moment. Of course,  
6 they need not. They could have exactly the same kind of  
7 poor profile. Typically they may, but you cannot tell.  
8 In our submission there is no doubt that you could use  
9 the apparatus referred to in the Business Plan - I will  
10 take the one that has been supplied by Vodafone - and use  
11 that apparatus that is capable of providing public  
12 gateway services.

13 So what are public and private gateway services?  
14 What, when I started looking at this matter, Ma'am, I  
15 took them to be goes like this.

16 A public gateway service is where Floe owns the  
17 gateway device. Upstream of that one way is a PABX or  
18 switch which aggregates traffic from a number of users.  
19 In fact the number of users could have access through a  
20 multiplex plate straight into the gateway device and that  
21 gateway device then connects on net to the Vodafone  
22 network.

23 What I had believed OFCOM and Vodafone to be saying,  
24 and the RA before that, is that a private gateway is one  
25 where a single legal person purchases leases or otherwise  
26 becomes the user of a gateway device to which it attaches  
27 its ordinary fixed line system. That is, the only calls  
28 being made by means of that gateway device come from one  
29 source, so it is self-provision. There is no element of  
30 providing a service in relation to the wireless  
31 telegraphy link to any other person.

32 My client, it is true to say, has had a great deal  
33 of difficulty working out what public and private  
34 gateways are. That is something referred to in Mr Happy's  
35 statement and that goes back to the correspondence that  
36 you can read from Spring 2003 and before. What is this?

37 What distinction are you making?

38 Let me put it in a way in which they never quite

1 articulated because they are not quite so familiar with  
2 the ins and outs of the Wireless Telegraphy Exemption  
3 Regulations, as I unfortunately have become. It goes  
4 like this. If you start to analyse those words, I have  
5 already dealt with the "capable" point. This apparatus  
6 is used to provide, or is capable of providing a wireless  
7 telegraphy link by which a service is providing to  
8 another person. So it catches every device that could  
9 theoretically be used for what the other parties describe  
10 as "public gateway use", because all of that apparatus is  
11 capable of being used to provide those services. More  
12 than that it assumes a very particular form of business  
13 relationship between the person providing the services  
14 and, we will call them, the end user. The end user in  
15 this case is the person who is provided with a service by  
16 means of business by another. The business relationship  
17 it assumes is that the end user is using the gateway  
18 device. That is, using for the purpose of wireless  
19 telegraphy.

20 What happens, however, if the device is off your  
21 site and in the premises of the person who has resold you  
22 the Vodafone services, owned by the reseller of the  
23 Vodafone services by whom you are billed? That is  
24 entirely possible under, for example, the Floe/Vodafone  
25 contractual matrix. What happens then? Is that private  
26 or is that public? The answer, I contend, Ma'am, is that  
27 it is public, because the end user of the services is not  
28 using the gateway device. On the example that I have  
29 just given he does not even know where it is. He does  
30 not care where it is actually. That, too, seems to be  
31 caught by the regulations, whichever way you look at it.

32 I will go one stage further. Remember that 4(2)  
33 refers back to the relevant apparatus as described in  
34 Schedule 3 to 7, so it includes the handset in your  
35 pocket. Let us have a look. "Used to provide or capable  
36 of providing a wireless telephony link between  
37 telecommunication apparatus or telecommunication system  
38 and a public switch to telephoned network, by means of

1 which a telecommunication service is provided by way of  
2 business to another person.

3 It is an interesting use of the comma in the pre-  
4 penultimate line between "network and by", but  
5 notwithstanding that, what I think that means is that it  
6 is the wireless telephony link by means of which a  
7 telecommunication service is provided by way of business  
8 to another person. Well we really are getting out of  
9 kilter. We are not looking at gateways at all.

10 What are you sold by Vodafone, Ma'am? You are sold  
11 a service. How is that provided? By means of what is  
12 described as "a mobile user station". It does not say  
13 who has to be using it. It just says that that wireless  
14 telephony link has to be one "by means of which a  
15 telecommunication service is provided by way of business  
16 to another person." Well, if Vodafone are not providing  
17 you with a service by way of a business, using your  
18 mobile phone, I really do not know what they are doing,  
19 Ma'am. They are a public switch telephone network  
20 operator, as I understand it, and your apparatus you have  
21 actually got in your hand. So, Ma'am, I have come to the  
22 conclusion that the entire thing is nonsense.

23 I can tell you what it was supposed to do and I can  
24 tell you how it could have done it, or how the same  
25 effect could have been achieved by Messrs Vodafone and  
26 others. But I do not think this does it. I go back to  
27 the underlying problem with it, being that it is an  
28 equipment regulation which seeks to deal with a  
29 restriction on usage. It is hammering around trying  
30 desperately to find a characteristic of radio equipment  
31 that gives it the result that it wants. Hence, as I said  
32 before, the use of the strange word "capable" - the  
33 "provides or is capable of" provision. The draftsman is  
34 struggling around trying to attach something to  
35 "apparatus" rather than "usage", because he knows that if  
36 he puts in a straight-forward usage restriction by using  
37 this provision he has got a problem, because it has to  
38 relate to equipment.



1 future, Ma'am, but just at the moment there is - because  
2 you are receiving on an ordinary standard TV set *en clair*  
3 signals. The BBC does not tell you what frequency to  
4 use, you have to tune it in for yourself, and it does not  
5 tell your machine automatically, as a GSM phone does,  
6 what frequency to use at any particular time. It does  
7 not tell you what power. It is not relevant in that case  
8 because it is just a reception device. The BBC does not  
9 actually switch you off if you are using it unlawfully if  
10 you have not paid the licence fee. You get prosecuted.

11 A better example, and a closer comparison, might  
12 have been in respect of using something that does require  
13 a set-top card or enabling device to be put in it, like a  
14 satellite digital box or something, or a cable box. If  
15 you take the cable box, however, that box, when I last  
16 looked at the issue, Ma'am, is part of the cable  
17 operator's network, even though an individual has to pay  
18 or lease it, etc., because of the degree of functionality  
19 exerted by the network in the box because of the  
20 equivalent of a SIM card.

21 The next one is Vodafone never changes the SIM or  
22 alters it. It merely alters its databases on the network  
23 to de-authorise use. In this way it is like a credit  
24 card.

25 The SIM may not change, but it is the means by which  
26 the control is exerted on the handset by the person who  
27 is truly using it. Credit cards, like SIMs, remain the  
28 owner of the person providing the services. I used the  
29 standard Barclay Card one, and if you read that you will  
30 see that a Barclay Card, or whoever your card issuer is,  
31 retains ownership of the card, like Vodafone do. If you  
32 read the Floe/Vodafone contract you will find reference  
33 to that. The SIM card belongs to Vodafone. Credit  
34 cards, like SIMs, though they should provide a higher  
35 level of service if it is a content service, they permit  
36 between the terminal in the shop into which it is put and  
37 the network, their use is controlled by the issuer, just  
38 like SIM cards.

1 I think I have rather indicated that the regulated  
2 structure may need a slight overhaul.

3 The next point, Ma'am, you have already touched on  
4 yourself, which is the continuing offence nature of what  
5 has occurred. A failure to supply is a continuing  
6 failure to supply. It goes on as it happens and that  
7 affects some of the arguments that we have made. The  
8 argument here that Vodafone were referring to, I referred  
9 in the amended Notice of Appeal to the situation where  
10 the Authorisation Directive was a reason, or was part of  
11 a reasoning relating to why you should interpret use in a  
12 particular way, the primary argument. They said 'that  
13 only comes into force on 23 July'. Well there is a  
14 continuing offence. There was also the fact that the  
15 primary argument does not just depend on making  
16 references to the Authorisation Directive.

17 I then deal with an argument which you touched on  
18 this morning, Ma'am, in a way, which is that it could  
19 never be lawful, even if you are right on the Primary  
20 Argument, which depends on looking at the state of  
21 Vodafone's licence.

22 I will deal with your question later, Ma'am, when I  
23 have had a chance to look at it over a sandwich at  
24 lunchtime, but this is a slightly different point, which  
25 is that OFCOM blithely disregarded eleven paragraphs of  
26 their own decision letter. Is that right or is that  
27 wrong? I will deal with one context later.

28 What I want to deal with here is, really, could they  
29 have done what they thought they could in respect of  
30 authorising use of the apparatus under Vodafone's  
31 licence? The argument goes like this.

32 If public gateways could be authorised under  
33 Vodafone's licence, they would have to force in the  
34 relevant definition of Radio Equipment (RE) in the  
35 licence. We have not in fact got a copy of Vodafone's  
36 licence but we have got a copy of T-Mobile's licence  
37 fortunately provided, which is in the bundles, and I  
38 understand that nobody has questioned that it is exactly

1 the same. It appears, from comparing it and the  
2 decision, that it is the same.

3 The argument goes that if you can, however, show  
4 that it is radio equipment it can be authorised. But to  
5 be authorised as radio equipment there is a licence  
6 condition that says 'Vodafone must only do so in writing  
7 and expressly'.

8 Why is this raised, you may ask, by OFCOM in its  
9 Decision Letter? Because I think it was seeking to show  
10 how reasonable everybody thought they had been, certainly  
11 how reasonable the RA had tried to be, in finding a  
12 consensual solution to the problem, because it was the RA  
13 who came up with that idea in the first place and said it  
14 might be tried out. They did, with the best of motives,  
15 I think, to try and get the parties together. But they  
16 failed to think it would work because there was no  
17 express written authorisation. I say to that that you  
18 should not term a licence obligation placed on Vodafone  
19 into an obligation on Floe. In any event, given the  
20 state of play at the time at which the contract was  
21 entered into, it was authorised in effect because it was  
22 tacitly agreed that you could run this kind of kit in  
23 anything into which the SIM card will fit.

24 Now OFCOM changes its tune. It says 'it is awfully  
25 inconvenient but we were wrong, because the definition of  
26 a base station, as referred to in the definition of radio  
27 equipment, in the Vodafone licence can only be read by  
28 reference to GSM standards and in the GSM standards  
29 Vodafone's and user stations are entirely different and,  
30 frankly, we do not know what we were playing at in the  
31 first place'.

32 That depends, of course, on us all finding, Ma'am, a  
33 direct connection between the definition of base station  
34 and a GSM standard. I submit you will not. There are  
35 references to GSM standards in the licence, but not in  
36 the definition sections. It might not have been what was  
37 intended, but it is not written out anywhere.

38 What constitutes a base station? It is a matter for

1 what was intended. Of course, if I am right about the  
2 interpretation of the Wireless Telegraphy Exemption  
3 Regulations, it would be awfully useful to be able to  
4 include a GSM device as a base station on the part of  
5 Messrs Vodafone, because otherwise all of the handsets  
6 are unlawful.

7 What we get is a situation whereby essentially  
8 OFCOM, Vodafone and T-Mobile say to us 'your primary  
9 argument is wrong; even if we are wrong about that where  
10 is the authorisation for Floe to run this piece of  
11 equipment', or, 'where was the authorisation for Vodafone  
12 to run this piece of equipment?'

13 That brings us back to two things. One I have  
14 referred to already, which is that the Wireless  
15 Telegraphy Exemption Regulations have been made  
16 wrongfully, using the wrong authority. Secondly - let us  
17 take an example in around March 2003 - if somebody had  
18 been able to persuade OFCOM (perhaps they had gone to the  
19 courts and got the interpretation wrong) of section 1 or  
20 the regulations, what would have happened? If Vodafone  
21 had been seen to be running equipment without  
22 authorisation the Government at that time, I would  
23 suggest, the DTI to the RA and Oftel would have moved  
24 heaven and earth to sort that problem out overnight.  
25 That is the reality of the matter.

26 I want to deal with one point which has been raised  
27 by Vodafone and others. It partly touches on what you  
28 opened with this morning, Ma'am. That is that Vodafone  
29 have a defence because they reasonably or genuinely  
30 believed that the law was that Floe was acting  
31 unlawfully.

32 The first thing I want to point out on that is this.

33 As we agreed in the Agreed Statement of Facts I have  
34 little doubts that Vodafone and OFCOM believed that Floe  
35 was acting unlawfully at the time concerned. There is no  
36 evidence, however, Ma'am, as to the genuineness of that  
37 belief or indeed as to the motive for what actually  
38 happened. Indeed these are questions which Floe

1 considers are matters for another hearing, if necessary,  
2 on another date in relation to negligence, intention and  
3 damages. And I point out, as kindly T-Mobile did, that  
4 the first question relating to the legality of gateways  
5 appears to have been raised in the letter which was  
6 substituted this morning, dated 23 August 2002. So  
7 Vodafone, who hold themselves up as the holders of the  
8 law, let things continue for about nine months then.

9 As Mr Happy points out in his witness statement - I  
10 have mentioned it already - Vodafone and Floe were  
11 competitors in the relevant market and the consultation  
12 document, you may recall, issued in November 2002,  
13 actually proposed that public gateways be made lawful.  
14 It may be that Vodafone had advance knowledge of the  
15 results. It in fact went the other way but did not emerge  
16 until July, but I doubt that that is so, in which case  
17 they switched off the relevant public gateways operated  
18 by Floe knowing that they might, of course, be made  
19 lawful in the summer of that year. One might have read  
20 what OFCOM and Vodafone have said about genuine belief  
21 having an effect, etc, their mindset determining whether  
22 or not there was an abuse. I cannot begin to imagine how  
23 dangerous a view that might be. It all depended on what  
24 could be evidenced as the genuine belief of someone in  
25 respect of whether or not there was an abuse. That is a  
26 point which rightly goes to damages as to negligence and  
27 intention.

28 Vodafone's stance over switching off was pretty  
29 uncompromising. It set itself up as judge, jury and  
30 indeed executioner, because it, of course, had the power  
31 to switch off the phones. However, if you take some of  
32 the things I have mentioned before about the way in which  
33 the Wireless Telegraphy Exemption Regulations might be  
34 interpreted, or should be interpreted, it is likely that  
35 if they adopted that stance widely throughout the  
36 industry they could cut all sorts of things off,  
37 public/private whatever, because the basis on which they  
38 were deciding whether something was public or private was

1 usage.

2 Here we come to something that I have always found  
3 inexplicable, Ma'am. We have been dealing with Telecoms  
4 contracts for longer than I care to remember and the  
5 first thing I looked for in the Floe contract was the  
6 provision allowing Vodafone to set reasonable conditions  
7 relating to the service, conditions of usage. 'Thou  
8 shalt comply with all our reasonable instructions  
9 concerning the usage of the service'. The standard  
10 boilerplate provision. What it would have enabled  
11 Vodafone to do if it had actually used that clause,  
12 because it is part of the contractual matrix, would have  
13 been to have set a usage restriction based on hours of  
14 use, times of use, whatever. A better SIM card. What  
15 indeed, though it has not come out in the evidence, T-  
16 Mobile referred to sometimes as "a fair usage policy".  
17 That would have been a standard response and it is  
18 permissible. I mention it because it is permissible  
19 under the contractual matrix. Why didn't they do that?

20 The only submission that I can make in answer to  
21 that rhetorical question is (a) if they had done that, it  
22 would have led to the scrutiny of those failures of  
23 policy provisions by OFCOM and then by this Tribunal and  
24 it would not have sustained the uncompromising attitude  
25 that was adopted.

26 I am about to start hitting another topic, Ma'am. I  
27 see that it is 12.55. Do you want me to start and make  
28 the best use of five minutes or stop at this juncture,  
29 Ma'am?

30 THE CHAIRMAN: If that is a convenient time to stop probably  
31 it is better. What had been going through my mind and  
32 the other members of the Tribunal was whether it would be  
33 useful if we add another, say, 15 minutes on lunch to  
34 consider the points that we have raised. I do not know  
35 whether you would find that useful or not, because I do  
36 not want to waste time and I do not want to have a break  
37 if we do not need it. We could either resume at 2  
38 o'clock or we could resume at, say, ten past 2 or quarter

1 past 2.

2 MR HOSKINS: For myself, my intention over lunch was just to  
3 get my head around what the points were. If Mr Mercer  
4 needs the time it would be helpful if he could deal with  
5 the points today so that we can respond tomorrow.

6 THE CHAIRMAN: Would it be helpful for you to have an  
7 additional ten minutes over lunch so that you can  
8 consider the points that we dealt with earlier?

9 MR MERCER: Yes, it would be, Ma'am.

10 THE CHAIRMAN: Alright. If we break now. Shall we say  
11 quarter past 2?

12 MR HOSKINS: Can I make one cheeky request? I am not sure  
13 whether you are in a position to grant it, but over lunch  
14 I was going to go back to Chambers to try to consider the  
15 points.

16 THE CHAIRMAN: We can give you a copy. Is that alright.

17 MR HOSKINS: I was going to ask for the references so that I  
18 could get them more easily, but if you have copies that  
19 is better.

20 THE CHAIRMAN: We can get copies. There are library  
21 facilities here for us and so if you want a bit more we  
22 might be able provide it to you.

23 MR HOSKINS: It was simply those three cases.

24 THE CHAIRMAN: Very well.

25 (The short adjournment)

26 THE CHAIRMAN: I hope that was helpful?

27 MR MERCER: Well I am afraid that I went to a school where  
28 it was not permitted to do one's homework at lunchtime,  
29 Ma'am, but I have done the best that I can.

30 The place that I had got to was the first  
31 alternative argument and I will hopefully deal with as  
32 many of your questions as I can when I get towards the  
33 end.

34 I have really dealt with the first alternative  
35 argument and the points which I think are relevant in  
36 terms of dealing with the question about the licence and  
37 authorisation under the licence. I have dealt with both  
38 the points.

1           One is whether it could be authorised in any event  
2 and the second, which is a point that seems to be raised  
3 by the other parties (I have referred to this before as  
4 well) in relation to whether or not, if you have a  
5 licence condition, that imposes a duty on Vodafone to  
6 only expressly authorise in writing, can it nevertheless  
7 authorise without doing so expressly in writing? My  
8 submission is quite straight-forward, which is if  
9 Vodafone authorised use of public gateways, which we say  
10 they did under their contract, and that does not comply  
11 with their licence condition, that does not mean that the  
12 consent is void, or wrong, or unenforceable, it means  
13 that Vodafone are in breach of its licence condition, for  
14 which there is a remedy.

15           I have also dealt, really in the process of going  
16 through the points this morning, with the RTTE, but I  
17 just want to codify some of the points that I make about  
18 that. The most important is that it deals with equipment  
19 - radio equipment. But the problem in this matter, the  
20 difficulty that led Vodafone to do what they did, at  
21 least in part, so they say, is usage. I will come back  
22 again to volume of usage. That is what they say caused  
23 the problem. Not the way in which apparatus was used.

24           If you were to take, for example, one of the devices  
25 referred to, of which there is a photograph in the  
26 Business Plan, in the copy provided to you by Vodafone  
27 and you look at those devices, there is nothing  
28 inherently wrong with those devices. There is nothing  
29 that gives a problem. There is nothing inherent in those  
30 devices that actually gives you any inappropriate or  
31 ineffective use of the airwaves. There is nothing in the  
32 apparatus that causes a problem. It is the volume of  
33 service that goes through the apparatus that causes the  
34 difficulty. Stopping the apparatus being put into  
35 service does not (well in one sense it does) in a real  
36 sense does not cure Vodafone's problem that it perceives,  
37 or says that it perceives, which is associated with the  
38 volume of usage. In a sense the problem has nothing to

1 do with equipment. But for reasons that I cannot define  
2 - perhaps just making it administratively simple to do it  
3 this way, I do not know - they chose to baste the  
4 framework for what is essentially a condition to the  
5 general authorisation on the RTTE, and that just does not  
6 make sense.

7 I am sure that one of the serried ranks in  
8 opposition to my client will make the point that the  
9 exact wording of Article 7(2) of the RTTE simply gives a  
10 permissive power to member states to restrict the  
11 bringing into service of radio equipment only for reasons  
12 related to the effective and appropriate use of the radio  
13 spectrum, avoidance of harmful interference or matters  
14 relating to public health.

15 What is this getting at? The example I gave in the  
16 supplemental skeleton argument I believe is of the  
17 interesting, but still unfortunately compliant piece of  
18 apparatus which re-broadcast Radio 3 on its down-  
19 frequencies, so if it is not using something it chooses  
20 the last frequency it uses for the return path and it re-  
21 broadcast Radio 3. I understand Radio 3 is relatively  
22 unharmful and does not really bother public health, but  
23 that would have a significant effect on the appropriate  
24 use of the airwaves.

25 There the characteristic is the apparatus. It does  
26 something which causes an inappropriate and ineffective  
27 use of the airwaves.

28 Our apparatus does not do that. It is only the  
29 volume of usage that is allegedly the problem and  
30 therefore it is not possible to use Article 7(2) as  
31 justification for this weird and wonderful regulatory  
32 regime.

33 In the skeleton argument in the first place and in  
34 the supplemental, Ma'am, you may think that I have been a  
35 little prerogative about the Wireless Regulatory regime  
36 and that is partly because I find it difficult to  
37 understand why it is necessary to do what has been done.

38 Essentially OFCOM argue that the exception to the

1 exemption set out in Regulation 4(2) of the Wireless  
2 Telegraphy Exemption Regulations is in fact a condition  
3 of the general authorisation and a condition relating to  
4 the general authorisation giving a right to use certain  
5 frequencies. With the coming into force of the new  
6 telecommunications regime in the UK on 25 July last year  
7 what that legislation is supposed to do is to deal with  
8 general authorisations or specific authorisations  
9 relating to the provision of electronic communications  
10 networks or services, or the right to use spectrum.

11 At that point, Ma'am, I have some difficulty in  
12 understanding why the UK let stand on the statute book a  
13 statute that also talks about establishment and  
14 installation of apparatus as well as its use and I have  
15 some difficulty in understanding why it is necessary to  
16 deal with something as simple as a condition to the  
17 general authorisation by means of an exception to an  
18 exemption, apart from perhaps, as I alluded to earlier  
19 today, that this is the way we have always done it,  
20 because there is no doubt that that strikes some chord.

21 What they should have done was to put an exemption,  
22 if they could find justification for one, into the  
23 general authorisation. The answer is that it is actually  
24 very difficult to find something that would give them the  
25 same result in terms of what the general authorisation  
26 gives them the power to do in terms of putting conditions  
27 on general authorisation. But that does not really  
28 matter because, as I said before - and I do not mind  
29 belabouring the point on this occasion - the way to have  
30 dealt with this was for Vodafone to have imposed a  
31 reasonable restriction on usage, which it could have done  
32 pursuant to its contractual matrix. But something drove  
33 it not to do that.

34 Given the submissions made by the other parties,  
35 Ma'am, I do not intend to go on at length concerning  
36 Articles 7(3) and (4) and the Regulations relating to  
37 them of the RTTE, concerning disconnection for technical  
38 purposes. I think the parties are not too far apart

1 there.

2 I am beginning to draw towards a conclusion, apart  
3 from dealing with supplementary, but let me deal with an  
4 overview of how this all fits together, in our view.

5 Vodafone was using and arranging and permitting the  
6 installation and establishment of the Gateways (though,  
7 as I have just said, we have doubts about whether to  
8 establish and install should continue to be licensable  
9 acts).

10 Floe resold services provided by Vodafone by means  
11 of the gateways.

12 The contract of 12 August 2002 is one relating to  
13 the sale of services and at the time it was entered into,  
14 Vodafone had to have considered that anything into which  
15 its SIMs could be put lawfully, would be put to use.

16 We contend that Regulation 4(ii) of the Wireless  
17 Telegraphy Exemption Regulations is just a nonsense and  
18 there is no authority that it should be there.

19 Interestingly that leads to another conclusion,  
20 which is that if, of course, it was unlawful and void,  
21 then the exemption would still apply, if you take the  
22 other parties' reasoning together with mine, and it would  
23 therefore be lawful for them to be used by Vodafone  
24 because the exception to the exemption would have gone.

25 Alternatively, and assuming that the primary  
26 argument is correct, the "public" gateways are in fact  
27 base stations under Vodafone's licence.

28 Alternatively, if the primary argument is correct,  
29 the Government will see the ridiculousness of the  
30 position that they had accidentally created and would  
31 have made a licence change to Vodafone's licence, if it  
32 had been discovered, say, in March 2003.

33 Lastly, Ma'am, looking for a home for who is running  
34 this, I will deal with the estoppel argument which you  
35 asked us to consider. I will deal with that in a moment.

36 I want to move on now towards some of the other  
37 points that you asked us specifically to consider.

38 The first thing that I want to consider is the case

1 of *Hilti*. The first point on that relates to paragraph  
2 89 of the Commission decision which the Tribunal pointed  
3 us to at the end of last week, where was set out the  
4 points that made it look as if *Hilti* had made very little  
5 effort previously in respect of reporting matters to the  
6 authorities or taking little action previously in  
7 relation to making a proper and justifiable complaint  
8 about what others were doing in relation to health and  
9 safety.

10 I do not understand in this case why Vodafone were  
11 not jumping up and down and demanding that the RA took  
12 action. I do not understand, except that you will have  
13 noticed, Ma'am, that as far as we know, and I think this  
14 goes uncontested, we do not actually know of any  
15 prosecutions. Though the RA persecutes people like Mr  
16 Ridd in the case quoted by Vodafone in respect of the  
17 normal meaning of the word "use" (I think he was the poor  
18 gentleman who accidentally switched on his pirate radio  
19 station when he did not think it was switched on), in  
20 spite of the fact that they prosecute people like that,  
21 there have been no prosecutions in this area, as far as  
22 we know and I would doubt that any sane prosecutor would  
23 start a programme of prosecutions in respect of the  
24 guidelines that most prosecutors work to and in relation  
25 to the fact that at least until the summer of 2003 the  
26 policy position about what might have been the law, let  
27 alone was the law, was still to be decided by the  
28 government. Prosecutors, I submit, Ma'am, tend not to  
29 prosecute when the law is possibly going to be changed.  
30 It is interesting to note that even after last summer  
31 they had not prosecuted. If this was so important, and  
32 given that that was a way of dealing with it as far as  
33 Vodafone and the other parties are concerned, why didn't  
34 they? They are big enough and have resources enough to  
35 commence an action for mandamus. But instead, Ma'am,  
36 Vodafone chose the way, which by accident or design, had  
37 the maximum disruptive effect on Floe's business. There  
38 is no evidence for that, Ma'am, apart from the use of the

1 words "in administration" after the name of my client as  
2 it presently stands.

3 What is *Hilti* about? I have no wish to add to the  
4 amount of paper flowing around, but I have behind me  
5 another small forest relating to three cases where I  
6 provided, as is expected, the whole matter, though I am  
7 going to make reference to three very short paragraphs.  
8 I apologise for not having circulated these earlier, but  
9 this was my homework for the weekend in terms of sorting  
10 these out. (Transcripts handed to the Tribunal and the  
11 parties)

12 The first is the 1991 case of *Stichting Certificatie*  
13 *Kraanverhuurbedrijf*. It is the CFI talking. The case  
14 concerned certification systems for hiring cranes where  
15 one element of the system was a prohibition on hiring  
16 cranes from firms not affiliated to SCK. The Commission  
17 found that there was an infringement.

18 THE CHAIRMAN: I think we need to find which document you are  
19 referring to. The first one we have here is dated 30  
20 November 1994. I seem to have been given three cases.  
21 One is Cement and it seems to be 1994. One is *Stichting*.

22 I think that may be the one you are referring to. It  
23 appears to be 1997.

24 MR MERCER: Yes, it is.

25 THE CHAIRMAN: I thought you said 1991. The third one is  
26 *Albany*, which is 1999.

27 MR MERCER: That is correct. In fact, I was misreading 1991  
28 for 1997. We start with the 1997 one. I should say that  
29 I have not noted next to the quote that I am about to  
30 make exactly where it comes, but I will supply you with  
31 that.

32 THE CHAIRMAN: It is always a nuisance if you do not write it  
33 down at the time. It happens all the time!

34 MR MERCER: Yes. I am afraid the problem is technology,  
35 keeping your fingers open in three different places while  
36 you are typing on the PC at home. It is never easy I  
37 find.

38 Anyway the CFI stated in relation to the more

1 effective monitoring argument which it had already raised  
2 - and let me tell you what that was - the SCK (I will  
3 shorten it to those initials because it will be simpler  
4 for everybody) argued that the -

5 "certification system had sufficient added value to  
6 justify the alleged restriction upon competition",  
7 inter alia because -

8 "SCK pursues a more active monitoring policy in  
9 relation to statutory requirements than the ...  
10 public responsible for the inspection of cranes in  
11 the Netherlands", and its "system imposes  
12 requirements ... which go beyond the statutory  
13 requirements."

14 The CFI stated, in relation to the more effective  
15 monitoring argument, relying on *Hilti*, that is in  
16 principle the task of public authorities and not of  
17 private bodies to ensure that statutory requirements are  
18 complied with. It went on to say:

19 "An exception to that rule may be allowed where the  
20 public authorities have, of their own will, decided  
21 to entrust the monitoring of compliance with  
22 statutory requirements to a private body. In this  
23 case, however, SCK set up a monitoring system  
24 parallel to the monitoring carried out by the public  
25 authorities without there being any transfer to SCK  
26 of the monitoring powers exercised by the public  
27 authorities."

28 That is relevant here, because there is no  
29 delegation of RA's or OFCOM's powers. They enunciate  
30 this principle quite clearly. It is the task of public  
31 authorities and not private bodies to ensure that  
32 statutory requirements are complied with.

33 The second one that I am going to refer to is the  
34 *Albany* case and it is the Advocate-General's opinion to  
35 which I am referring. I hope that I have correctly taken  
36 down the reference this time. It is paragraph 289. (It  
37 is not quite what I have. We will check that, Ma'am).  
38 The Advocate-General says:

1 "In those circumstances the infringing undertakings  
2 have often claimed that they were engaged in the  
3 prevention of unfair competition, dumping, or more  
4 generally, acting in pursuit of the public interest.

5 The Court and the Commission have consistently held  
6 that it is for the public authorities or the courts  
7 and not for private undertakings to protect the  
8 interests of the public in matters such as product  
9 safety or the prevention of unfair competition."

10 The last reference is the Cement Cartel case and we  
11 are looking at paragraph 49(3) of the Decision.

12 "... it is not the task of an undertaking or  
13 association of undertakings to act on its own  
14 initiative in place of the public authorities  
15 responsible for implementing the laws of its country  
16 and to take 'steps to eliminate products which  
17 rightly or wrongly, it regards as dangerous or at  
18 least as inferior in quality to its own products.'"

19 I wanted to use those authorities, Ma'am, for the  
20 obvious purpose of saying that in this country, except in  
21 very limited circumstances, we do not delegate matters of  
22 control in wireless telegraphy, the very limited  
23 circumstances being in relation to the enactment of  
24 Articles 7(3) and 7(4) of the RTTE where people need to  
25 act pretty quickly because something nasty is going to  
26 happen. I think the parties are more or less in  
27 agreement that those are not really relevant here.

28 We come back to the point again. There was no need  
29 for Vodafone to act in the way that it did. There was a  
30 contractual remedy open to it but it decided to become  
31 judge, jury and indeed executioner, when it is accepted  
32 that that is not supposed to be what we do, unless you  
33 are given very specific instructions to do so.

34 It is a long time since I studied criminal law or  
35 was indeed a regular prosecutor, but I think I had better  
36 turn to the Accessories and Betters Act 1861.

37 I am not going to pretend that what I am about to  
38 say is original. I will happily provide copies of

1 Archbold in the circumstances.

2 THE CHAIRMAN: If you tell us what paragraphs of Archbold we  
3 can probably provide it.

4 MR MERCER: It is essentially sections 18/10 to 18/14. My  
5 starting place is the reference there to a case at the  
6 beginning, which is quoted in those sections:

7 "But even if a man is present whilst an offence is  
8 committed, if he takes no part in it and does not  
9 act in concert with those who commit it, he does not  
10 become an aider and abetter merely because he does  
11 not endeavour to prevent the offence or fails to  
12 apprehend the offender."

13 That goes along with my general belief that it is the law  
14 of this country that, even if I see a crime being  
15 perpetrated in front of me, I am under no duty, unless I  
16 am the police, to take any action whatsoever. There are  
17 exceptions to that, relating to money laundering and  
18 terrorism, but I do not think I need go into those.

19 Also quoted there is *National Coal Board v. Gamble*,  
20 a 1959 case, 1 QB where Archbold quotes Mr Justice  
21 Devlin, as he was at the time:

22 "A person who supplies the instrument for a crime or  
23 anything essential to its commission aids in the  
24 commission of it and if he does so knowingly and  
25 with intent to aid ...

26 - **and if he does so knowingly and with intent to aid** [I  
27 repeat those words] -

28 ... he abets it as well and is therefore guilty of  
29 aiding and abetting."

30 That brings me to the mental element which is necessary,  
31 which is an intention to knowingly aid.

32 Vodafone, we have submitted, had a contractual duty  
33 to supply services which Floe could resell. Vodafone,  
34 one might say partly because it took no interest in the  
35 matter, had no real idea of what those services were to  
36 be used for. We say that they probably had a pretty good  
37 idea, but they say they did not think they were going to  
38 be used for other than private gateway services.

1           Vodafone, it seems to us, Ma'am, simply does not  
2 have the *mens rea* to be able to commit an offence under  
3 the 1861 Act. It has no intention. Quite the opposite,  
4 it would seem. It certainly would not have known what it  
5 was doing in the sense of what to switch off, what I am  
6 going to come back to in a moment, because, as we pointed  
7 out, though it is indicative of what my learned friends  
8 describe as public and private gateways as to the volume  
9 of usage, it is not conclusive. You can have a private  
10 gateway serving just one person where that one person was  
11 a very large company, like Vodafone, where the usage  
12 would be quite phenomenal. They would not know exactly  
13 what it was. They do not have the *mens rea*. They are  
14 obliged to provide the services. I submit, Ma'am, that  
15 they do not have the intention to assist, they do not  
16 know if they are assisting, they are just providing a  
17 service and therefore they have no duty to stop it.

18           As Vodafone itself contends in paragraph 38 of the  
19 Agreed Statement of Facts, which is at Tab 92 of Volume  
20 5, it believes (reading to the words) SIMs provided Floe  
21 with use and mobile handsets are in private GSM  
22 gateways."

23           Well, if that is true then they could not possibly  
24 have had the *mens rea* necessary to believe that they had  
25 a duty and, even if they had had a reasonable suspicion  
26 that Floe was providing public gateways, they still would  
27 not have had the intention to help them break the law.

28           Unless you have any questions about the section I  
29 have just been through, Ma'am, I will continue on to the  
30 points you raised this morning, or as many as I can  
31 assist with at this time.

32 THE CHAIRMAN: Thank you.

33 MR MERCER: What is the distinction between public and  
34 private gateways?

35           It would be true to say that this is the problem  
36 that my client has been having for some time, or  
37 certainly had for a lot of the spring, summer and fall,  
38 to use an American expression, of 2003. What is it we

1 are talking about here?

2 I will tell you what I think they were trying to do  
3 and ask you, Ma'am, to match that with what I was  
4 discussing this morning in terms of what I think they  
5 did. I think the object was to differentiate between  
6 gateways owned, run and serving one legal person, and  
7 gateways other than that. I do not intend to repeat all  
8 that I said this morning, but as I think you will have  
9 appreciated I do not think they have managed that in any  
10 way, shape or form in terms of the wording that they  
11 used.

12 If I have got it right, the purpose of remaking the  
13 regulations in January 2003 was to avoid the fixed mobile  
14 problem. That is to say, it is my understanding that  
15 when we started the process in August 2002 and the letter  
16 of 23 August, what we were looking at in regulatory terms  
17 was everything that was fixed being banned. What we have  
18 at that time was the RA going 'Oh, dear, we need to have  
19 a look at this'. They had sorted that problem out by the  
20 January, when the new regulations came in in 2003 as  
21 amended. It amended the 1999 regulations. First of all,  
22 we deal with the fixed mobile point by means of changing  
23 the regulations.

24 You asked, Ma'am, whether there was any  
25 justification for the distinction. Well the  
26 justification for the distinction --

27 THE CHAIRMAN: I do not think I asked that actually. I think  
28 I was saying that that was what was being asked in the  
29 Consultation paper.

30 MR MERCER: What I was going on to say was you asked in  
31 general terms about the justification for the  
32 distinction. We would always say that the justification  
33 used by Vodafone is that public gateways produce  
34 typically larger volumes of usage and cause ineffective  
35 or inappropriate use of the radio waves, the spectrum.

36 THE CHAIRMAN: I said this morning that paragraph 5.8 of the  
37 Consultation document raises the question as to whether  
38 the distinction between private and public gateways was

1 justified. Then, of course, one has to answer in the  
2 summer when they said it could.

3 MR MERCER: Yes. Where I come on to with that is to deal  
4 with that area and another question of yours at the same  
5 time, which is that we are not actually aware of any  
6 study having taken place or any scientific objective  
7 study or report, even to the question of what constitutes  
8 inappropriate and ineffective use which in itself is  
9 alleged to be caused by public gateways.

10 THE CHAIRMAN: On that point I did raise a question about  
11 evaluation and probably we ought to listen to what is  
12 said by OFCOM.

13 MR MERCER: Generally when they are trying to make a  
14 distinction between self-use and communal use, Ma'am, it  
15 might be helpful to mention that the use of gateways is  
16 not just restricted to the making of voice calls. When  
17 you put your card into an ATM that may well be linked by  
18 a gateway back to the branch. It does not rely on land  
19 lines, which are too easy to interfere with. Similarly  
20 with sets of traffic lights in London, in particular.  
21 You may sometimes wonder why suddenly they change their  
22 phasing more quickly than other times. It is because  
23 they have been instructed to do so and that again can be  
24 by means of a gateway. That is a prime example of self-  
25 use. You could see that the authorities were trying to  
26 avoid catching inside the regulations.

27 I do not think I have very much to say about the  
28 question you asked, Ma'am, about Business Plans.

29 THE CHAIRMAN: I think you made that clear before.

30 MR MERCER: I think, Ma'am, that I have already laboured the  
31 point about interpretation, so that probably brings me to  
32 estoppel.

33 I have already alluded to the fact that if the  
34 primary argument is right and you look for what happens  
35 next in terms of an authority or what would have  
36 happened, and what is the answer to 'who would have been  
37 running it and how', there are four answers. I will not  
38 run through any of the other three because I have done so

1 already.

2 On to estoppel, really I think the extended form of  
3 the point is made in the *Hiscox v Outhwaite* case on page  
4 12. It is the paragraph at the top of the page, the last  
5 paragraph, which is the unconscionability of being able  
6 to abandon the defence, a position generally which has  
7 been relied upon by others, which appears to be the  
8 fourth answer that I might have found in that it seems to  
9 be on that basis unconscionable for OFCOM and Vodafone,  
10 OFCOM in particular, merely to rip up, in fairly  
11 breathtaking style, 11 paragraphs of their own Decision  
12 Letter.

13 Two last things. Firstly, we have a copy of what we  
14 think is the 13 March letter from John Stonehouse to  
15 Cliff Mason at the RA and we will have copies made of  
16 that.

17 Lastly, I refer back to the study point, which of  
18 course is what having a study and having this examined as  
19 to what should have been the technical parameters for the  
20 usage constraints to be applied is exactly what we would  
21 have liked to have happened in the case. That is what we  
22 would have liked. We would have liked to have examined  
23 what are the correct parameters that should have been  
24 employed, if there was a problem at all, by Vodafone and  
25 imposed pursuant to the contract.

26 As far as sections 172 to 175 of the Communications  
27 Act, Ma'am, unless you have any objection I will deal  
28 with those tomorrow when I have a chance to better  
29 consider them.

30 THE CHAIRMAN: Yes.

31 MR MERCER: Unless you have any questions from the Tribunal,  
32 Ma'am, I think that I have, for the time being at least,  
33 finished.

34 THE CHAIRMAN: That is very impressive. You have done it in  
35 the time, because we started with half an hour of  
36 opening, so that was very well done.

37 I have one question. It is on the Wireless  
38 Telegraphy Act 1949, which you will find at Tab 55 of

1 Volume 3 of your bundles. It is page 988. Halfway down  
2 there is a paragraph which is in brackets:

3 "Any person who has any station for wireless  
4 telegraphy or apparatus for wireless telegraphy in  
5 his possession or under his control and either (a)  
6 intends to use it in contravention of section 1 or  
7 (b) knows or has reasonable cause to believe that  
8 another person intends to use it in contravention of  
9 that section shall be guilty of the offence."

10 My question is that in that drafting it appears that the  
11 draftsman has made a distinction between use and control.

12 Maybe you would like to consider it overnight and come  
13 back tomorrow when you do your reply?

14 MR MERCER: Yes. Having taken 30 seconds to read it, Ma'am,  
15 you couldn't escape seeing that he uses three concepts,  
16 possession, control and use. "Use" very specifically in  
17 respect of its use in contravention of section 1 and then  
18 he uses the other concepts to control that, so that I do  
19 not think it is necessarily that you do 1, 2 or 3,  
20 "possess", "control" or "use". You could do all three.  
21 "Possession" and "under his control" must mean physical  
22 possession and physical control in the circumstances,  
23 which are very interestingly divided from use.

24 THE CHAIRMAN: Would you like to come back to it?

25 MR MERCER: I do not think it shows that it has to be in  
26 possession and control for you to be able to use it, or  
27 vice versa, Ma'am. I am not sure that it takes us to the  
28 separate point that he makes about use in contravention  
29 of section 1.

30 THE CHAIRMAN: Thank you.

31 Mr Hoskins?

32 MR HOSKINS: Can I, if only for my own benefit, set myself a  
33 road map?

34 THE CHAIRMAN: It would be of benefit to us, I am sure.

35 MR HOSKINS: It has already been flagged up in OFCOM's  
36 skeleton argument. It is paragraphs 12 to 13. You will  
37 see the way I have divided the cases. We say there are  
38 two main parts.

1           The first part is to ask whether the operation of  
2 public GSM gateways was unlawful as a matter of law, so  
3 if you like we will look at the black letter of law  
4 position at that stage.

5           The second main part of the case is then to say  
6 presumably there is nothing to say that it is unlawful.  
7 Whether there was either an exclusion from the  
8 Competition Act that Vodafone could rely on, or OFCOM  
9 could rely on, to justify its decision, or whether there  
10 was objective justification for Vodafone's acts.

11           Those are the two main parts of the case.

12           The first part of the case has a number of quite  
13 difficult and quite technical questions, which again I  
14 have tried to compartmentalise. I think it is useful to  
15 try to come at this case in compartments, because  
16 otherwise one tends to flow from one to the other (no pun  
17 intended) and it becomes quite difficult to follow.

18           The four parts of the illegality argument are at  
19 paragraph 13. The first one is intended to reflect  
20 Floe's primary argument.

21           "(a) Were Floe's Public GSM gateway devices 'used'  
22 by ... Floe", because if they were they fall into  
23 problems with Regulation 4(2). If Floe were to succeed  
24 they would have to show that the gateway devices were  
25 used by Vodafone and not Floe. Also that the use of  
26 public GSM gateway devices was authorised by Vodafone's  
27 Wireless Telegraphy Act licence. So there are two parts  
28 to that. I think the heading for that is Floe's Primary  
29 Arguments, although the second limb was actually raised  
30 by us. We say there are two limbs to it.

31           The second aspect of the illegality part of the case  
32 is, if Floe's public GSM's gateway devices were 'used' by  
33 Floe - ie they have lost the Primary argument - was the  
34 use of such devices nonetheless authorised pursuant to  
35 Condition 8 of Vodafone's 1949 Act licence? I think the  
36 best heading for that is that it is Floe's first  
37 alternative argument.

38           The third element is compatibility with community

1 | legislation, both the RTTE Directive and the  
2 | Authorisation Directive.

3 |         The fourth element raises very similar issues but it  
4 | makes the point that if Floe did not use their own public  
5 | GSM gateways, they have effectively accepted that they  
6 | installed the gateways and the Act and the Regulations  
7 | bite equally on a person who installs apparatus for  
8 | wireless telegraphy.

9 |         Those are the four parts to the illegality argument.

10 |         I intend to take the case like that, break them down and  
11 | deal with it in those compartments. I will also deal  
12 | with the questions that the Tribunal posed this morning  
13 | in the course of those submissions. However, I do not  
14 | intend to say anything about the third issue, which is  
15 | which Business Plan. It is more sensible to leave that  
16 | to Vodafone to deal with.

17 |         Before we plunge into the primary argument, I would  
18 | like to make some comments on the regulatory background.

19 |         I appreciate that the Tribunal is now very familiar with  
20 | that background, but there are certain points of detail  
21 | that I think I need to highlight at this stage.

22 |         At paragraph 8 of the OFCOM skeleton argument we  
23 | have set out a short summary of the position. It is  
24 | basically a regulatory system which has three tiers.

25 |         First of all, under section 1(1) of the Act itself,  
26 | a licence requirement is imposed.

27 |         The second tier is the general exemption that one  
28 | finds in Regulation 4(1) of the 2004 Exemption  
29 | Regulations.

30 |         The third tier is an exclusion from that Exemption,  
31 | which relates to the provision of commercial services to  
32 | third parties.

33 |         So three tiers, but the second tier is a general  
34 | exemption and the third tier is an exception or exclusion  
35 | from that exemption.

36 |         Dealing first with section 1(1) of the Wireless  
37 | Telegraphy Act, it may be useful to have the legislation  
38 | open as we do this. It is at Volume 3 tab 55 of the Act.

1           There are two elements to section 1(1). First of  
2 all, for the purposes of this case, no person shall  
3 establish or use any station for wireless telegraphy or  
4 install or use any apparatus for wireless telegraphy,  
5 except under the authority of a licence. So there is a  
6 licence requirement for installation or use of apparatus  
7 for wireless telegraphy. If such use or installation  
8 takes place without a licence, it is an offence - ie a  
9 criminal offence. There are two elements to it.

10           The relevant Regulations are the 2003 ones, because  
11 they came into force in February and the first  
12 disconnection was in March. They are to be found at tab  
13 69 at page 1224. Regulation 4(1) is what I have  
14 described as a general exemption for "relevant  
15 apparatus".

16           Just to follow through the definitions, because  
17 certainly the regulatory bodies' approach to the  
18 definitions has changed over time. That is clear from  
19 the evidence, but I want to make sure that everyone is  
20 aware of that. It was picked up in the questions this  
21 morning.

22           4(1) deals with "relevant apparatus". If one turns  
23 over to the previous page, 1223, Regulation 3(1) is an  
24 interpretation provision and it has a definition of  
25 "apparatus", meaning "wireless telegraphy apparatus or  
26 apparatus designed or adapted for use in connection with  
27 wireless telegraphy apparatus". Over the page, still in  
28 Regulation 3(1): "'relevant apparatus' means the  
29 prescribed apparatus is defined in Schedules 3 to 9  
30 hereto", so they have gone from 'apparatus' to 'relevant  
31 apparatus'. We then see the phrase 'prescribed  
32 apparatus'.

33           If we go through to Schedule 3, which is the  
34 relevant one for equipment in this case, it is at page  
35 1228. Part 1 is entitled 'interpretation' and  
36 'prescribed apparatus' is said to mean "A user station as  
37 defined below". If one goes to the definition of "user  
38 station", it is said to mean "a mobile station for

1 wireless telegraphy designed or adapted to be connected  
2 by wireless telegraphy to one or more relevant networks  
3 and to be used solely for the purpose of sending and  
4 receiving messages conveyed by a relevant network by  
5 means of wireless telegraphy".

6 The reason why I have taken us through the  
7 definition trail, if I can put it like that, is that one  
8 comes, in the end, to the definition of "user station".  
9 It means a mobile station. Previously we have seen the  
10 RA in certain documents saying that in its opinion at the  
11 time GSM gateway devices were fixed to mobile stations.  
12 It is not clear whether that means fixed or mobile.

13 THE CHAIRMAN: We started off by fixed.

14 MR HOSKINS: I think that is right.

15 The position now, in terms of the relevant  
16 regulatory body, which is obviously now OFCOM, is that a  
17 GSM gateway device is a mobile station within the  
18 definition in the Regulation. One sees the justification  
19 for that view in the second witness statement of Dr  
20 Unger. Again it may be helpful to look at the way he  
21 puts it. That is at Volume 1, tab 9. I think rather  
22 than have me read verbatim, as long as the Tribunal is  
23 happy, I suggest you simply read paragraphs 2 to 4. It  
24 is very short. But that is the explanation for which he  
25 says that GSM gateway devices are mobile stations and he  
26 explains why they are treated as mobile stations. Like  
27 much of this case, it depends on where you slice through  
28 time, what position you have. That is the current  
29 regulatory position and, insofar as I am dealing in this  
30 section with submissions with the black letter law  
31 position, that is what I say the position is. Obviously  
32 the use of the phrase "the definition of user station is  
33 a mobile station" was the same in the 1999 Regulations  
34 and through, so that has been the case since 1999 when  
35 the Consultation was muted. The definition has not  
36 actually changed.

37 If I can lay down a marker, and I will come back to  
38 it, in its Consultation document, at paragraphs 5.6 to

1 5.8 from memory, there are two reasons that the Radio  
2 Communications Agency gave for why public GSM gateways  
3 were unlawful. One was that they believed they were  
4 fixed mobile and not fixed and therefore could not  
5 benefit from the exemption, but the other was that they  
6 were to provide telecommunication services for commercial  
7 purposes. The fact that the Regulatory Body now takes a  
8 different view of what a mobile station is, it does not  
9 alter the fact that there were two reasons for illegality  
10 and the second one is still valid.

11 I am sorry if that is a bit of a side-step of the  
12 path that I have set myself. I think it is important,  
13 because obviously that dichotomy is there which everyone  
14 has referred to. I think it is important to understand  
15 where OFCOM is coming from in terms of that part of the  
16 case.

17 If I can turn back to Regulation 4(2), which is the  
18 exception to the exemption. It is at page 1224.

19 THE CHAIRMAN: It might be helpful, Mr Hoskins, if I explain  
20 that the reason we referred to it was because of what the  
21 parties understood at the time rather than what the  
22 position is now.

23 MR HOSKINS: I understand that, Madam.

24 THE CHAIRMAN: We will want to come on to that later.

25 MR HOSKINS: I will have to deal with it. I think the way I  
26 would like to deal with it is to say as a matter of black  
27 letter law was it unlawful, and that requires me to say  
28 what we think 'mobile station' covered. It is the same,  
29 as I say, in the Regulations one sees factors for 2003  
30 all the way through.

31 The next question will be, how does that go to the  
32 parties' belief, because the Radio Communications Agency  
33 thinks it is a grey area. What does that mean? What was  
34 Vodafone entitled to assume it meant, etc. I will come  
35 back to that.

36 Regulation 4(2) leads us into the first question  
37 asked by the Tribunal this morning, which is what is the  
38 proper definition of a public GSM gateway? What is the

1 distinction between private and public? What is a public  
2 GSM gateway device?

3 What is clear is that "relevant apparatus" which is  
4 used to provide or to be capable of providing a wireless  
5 telegraphy link etc, by means of which a  
6 telecommunication service is provided by way of business  
7 to another person does not benefit from the exemption.  
8 That is the point.

9 There is no definition of "public GSM gateway" as  
10 such. It is a phrase which is used by the Regulators and  
11 by the industry to refer to GSM gateway devices, but of  
12 course 4(2) covers lots of other different types of  
13 devices. It is not specific to GSM gateways. That  
14 terminology is used to cover GSM gateway devices by means  
15 of which a telecommunication service is provided by way  
16 of business to another person. OFCOM agrees with the  
17 Tribunal's assessment this morning, but if I could  
18 summarise it this way.

19 The distinction between public and private and  
20 between private and public is between self-provision and  
21 commercial service. If a person is using a GSM gateway  
22 device to provide a commercial service to another person,  
23 it does not matter whether the service is provided to one  
24 or more other person or persons. It will not benefit  
25 from an exemption.

26 That is all I wanted to say about the regulatory  
27 position at this stage, but obviously I will have to keep  
28 coming back to it.

29 If I can turn to the Primary Arguments now.

30 Floe's Primary Argument has two limbs and that is  
31 partly because of the point that we have raised. One of  
32 the limbs is ours. It must succeed on both limbs in  
33 order for its argument to succeed. Floe's argument runs  
34 like this.

35 On a proper construction of section 1(1) of the 1949  
36 Act, Floe says it did not use the GSM gateway devices  
37 that it operated. It says it was Vodafone who used them.

38 Secondly, even if that is correct, it would have to be

1 shown that the use of public GSM gateway devices by  
2 Vodafone was authorised by Vodafone's Wireless Telegraphy  
3 Act licence. Those are the two limbs. The first limb is  
4 did Floe use the GSM gateway device?

5 With all due respect, in our submission this  
6 argument is hopeless. If I can pick it up from our  
7 skeleton argument at paragraphs 17 to 20, the starting  
8 point is this - and I do not think there is any dispute  
9 between the parties - that the words should be given  
10 their ordinary linguistic meaning. That is the starting  
11 point for any statutory construction as a matter of  
12 English law. It is also common ground that Floe's GSM  
13 gateways were connected to Vodafone's network in the same  
14 manner as a mobile handset is connected to a mobile  
15 operator's network. I say that is common ground, because  
16 that is what is reflected at paragraph 13 of the  
17 Statement of Facts. It is Bundle 5, tab 92 at page 1759.

18 In our submission, it would be ridiculous to suggest  
19 that whenever a person made a telephone call using their  
20 mobile phone over the Vodafone network it was, in any  
21 ordinary sense of the word, Vodafone who was using the  
22 mobile phone. If that is accepted as being ridiculous,  
23 as we say it must be, then given that Floe's GSM gateways  
24 inter-react with Vodafone's network in precisely the  
25 same way as a mobile phone, it must equally be ridiculous  
26 to suggest that when Floe is operating its GSM gateways  
27 it is Vodafone who is using the GSM gateway device. The  
28 power of control over the SIMs, the control that can be  
29 exercised through the IMEI number is precisely the same  
30 if one has a gateway device as if one has a mobile phone.

31 We say on any normal meaning of the word "use" or  
32 "used", it has to be Floe who was using the GSM gateway  
33 device.

34 We say that is confirmed - looking at the normal  
35 meaning of the words, what does one appreciate by the  
36 word "use" - by paragraph 10 of the Statement of Facts.  
37 I think it is worth turning that up for this point. It  
38 is Volume 5, tab 92 at page 1758, paragraph 10. Here one

1 sees the extent of the agreed facts about public GSM  
2 gateways.

3 "(a) By contrast the operation of a public GSM  
4 gateway typically is the owner of that GSM  
5 gateway;

6 (b) has the GSM gateway installed at its own  
7 premises or at premises which it otherwise has  
8 the right to control and if it has switching  
9 equipment, has the GSM gateway connected to its  
10 own switching equipment;

11 (c) subscribes for the SIMs to be placed into the  
12 GSM gateway and places them into the GSM  
13 gateway;

14 (d) enters into contracts with corporate and/or  
15 individual customers to supply them with fixed  
16 to mobile calls at on-net prices [etc];

17 (e) installs or procures the installation of  
18 connectivity ..."

19 I will not read the next word because Floe does not agree  
20 with all of this sentence, but the only bit it does not  
21 agree with are the words "and operates the GSM gateway",  
22 so the agreed bit of (e) reads:

23 "... installs or procures the installation of  
24 connectivity ... so that it can supply those  
25 customers;

26 (f) operates the GSM gateway in order to provide  
27 services to a number of corporate customers."

28 Again, by any normal understanding of the word "use",  
29 even if one takes it to a more technical level than who  
30 was using the handset, still the pointers are clear. It  
31 is Floe who uses, who operates, its own GSM gateway  
32 devices. It owns them. It puts the SIMs in. It has  
33 them on its premises. It installs or procures the  
34 installation of connectivity. It enters into contracts  
35 with customers. It is overwhelming and there is no  
36 contrary argument.

37 Floe's only real point, certainly up until today,  
38 but I will deal with the new points later, was based on

1 the notion of control. Floe's point was that Vodafone  
2 was the user of Floe's GSM gateway devices because it  
3 could control the use of those devices through the SIMs  
4 and the IMEI number. I do not need to go into the  
5 details but there is a description of how that control is  
6 exercised at paragraphs 27 to 30 of the Statement of  
7 Facts.

8 It is not contested because it is obvious that  
9 Vodafone had power to block access to its network.  
10 However, we say the fact that a mobile operator can  
11 control the use of apparatus in this way by blocking  
12 access to the network does not mean that the mobile  
13 network operator is therefore the user of that apparatus.

14 The reason we say that is that there is a clear  
15 distinction between *use* and *control of use*.

16 Let me give you a silly example but I think it makes  
17 the point. Mr X is driving home from the pub. He has  
18 had too much to drink. Mr X is using his car. A  
19 policeman stops Mr X and says 'I am terribly sorry but I  
20 think you have been drinking. I am going to stop you  
21 driving any further.' Mr X is the user of the car. The  
22 policeman is controlling the use of the car by saying 'I  
23 am not letting you drive it any more'. You would never,  
24 in any normal use of language, say that the policeman was  
25 using the car. It is a silly example, but it gets to the  
26 heart of the problem. There is a fundamental distinction  
27 between 'use' and 'control of use'. Yes, the mobile  
28 network operators can control access to the network, but  
29 that does not therefore mean that they are using every  
30 piece of apparatus that happens to connect to their  
31 network.

32 Paragraph 20 of the skeleton is a more apposite and  
33 less silly example, but hopefully it is equally powerful.

34 Imagine the facts were as follows. Vodafone  
35 provides a SIM card to Floe. Floe places the SIM card  
36 into a public GSM gateway device. Vodafone at that  
37 stage, let us presume on this example, does not know that  
38 the SIM card is being used in that way. Vodafone does

1 not at any stage interfere with the operation of that  
2 particular SIM card.

3 If that were the end of the story and if that was  
4 the whole story it would be ridiculous to suggest that  
5 Vodafone was using a public GSM gateway device of which  
6 it had absolutely no knowledge.

7 Let us add to the example. Suppose Vodafone  
8 discovers that the SIM card is being used in a public GSM  
9 gateway device and takes steps to prevent access to the  
10 network, either by disabling the SIM or by flagging the  
11 IMEI number. It would be equally ridiculous to suggest  
12 that, by virtue of those acts, Vodafone had all along  
13 been "using" the GSM gateway device.

14 What that example proves is that control has nothing  
15 to do with use, because if you are using a public GSM  
16 gateway device you are using it from the start and the  
17 fact that Vodafone takes action somewhere down the line  
18 cannot change the identity of the person who is using the  
19 device.

20 The new point in relation to this which came up  
21 today was Mr Mercer's argument that Regulation 4(2) is  
22 nonsense. That is not the case - and I will show why in  
23 a minute - but even if it were nonsense that would not  
24 solve the problem that the Tribunal has with the issue it  
25 has before it, which is what does "use" mean in  
26 Regulation 4(2). We say the literal meaning is quite  
27 clear.

28 If I can deal with the arguments that Regulation  
29 4(2) is nonsense, I think again we probably need to have  
30 the Regulation in front of us. I am sorry to be chopping  
31 and changing. It is Volume 3, tab 69, page 1224.

32 Mr Mercer said that Regulation 4(2) is nonsense, for  
33 two principal reasons. First of all, he focused on the  
34 words "capable of providing", which are used in  
35 Regulation 4(2). He said that, because of the inclusion  
36 of those words, Regulation 4(2) captures every device  
37 which could be used for a public gateway use, as such  
38 equipment is capable of being used as a public gateway.

1 For example, if you have a piece of equipment that can be  
2 used either as a private gateway or a public gateway, it  
3 will automatically be excluded from the exemption because  
4 it is capable of being used as a public gateway device.

5 With respect, that actually overlooks the wording of  
6 Regulation 4(2) because it is not as simple as that.  
7 Regulation 4(2) says: "With the exception of 'relevant  
8 apparatus' operating the frequency band specified in  
9 paragraph (3), the exemption in paragraph (1) shall not  
10 apply to 'relevant apparatus' which is established,  
11 installed or used to provide, or to be capable of  
12 providing." The test is not simply whether apparatus is  
13 capable of providing a commercial service, the test is  
14 whether 'relevant apparatus' has been established or  
15 installed so as to be capable of providing the necessary  
16 service. Where a person has established or installed a  
17 private GSM gateway device, which links only to that  
18 company's own fixed lines, that device will not fall  
19 within the Regulation 4(2) exception. One cannot  
20 overlook the necessity for establishment or installation  
21 so as to be capable of providing that sort of service.

22 For example, I have been given a pirate radio  
23 station. Say the police, or the regulatory bodies know  
24 it is there. They rush in and nobody is there. It is  
25 turned off. You could still catch them, because you have  
26 equipment, apparatus, which has been established or  
27 installed as to be capable of being used as a pirate  
28 radio station. There is no nonsense in Regulation 4(2)  
29 on that aspect.

30 The other way in which Regulation 4(2) was said to  
31 be nonsensical (my note is a bit incomplete) but Mr  
32 Mercer said 'Vodafone provides you with a service. How  
33 is it provided? By means of a mobile user station'. The  
34 wireless telegraphy link has to be provided by means of  
35 the handset, I think is the way he put it. Therefore  
36 Vodafone is providing a service by use of use of your  
37 handset.

38 Again that ignores the wording of Regulation 4(2),

1 because what Regulation 4(2) actually deals with is  
2 apparatus which is established, installed or used to  
3 provide a wireless telegraphy link between  
4 telecommunication apparatus or a telecommunication  
5 system, or other such apparatus or system, by means of  
6 which a telecommunication service is provided by way of  
7 business to another person. "To another person" must  
8 mean a third party, ie not Vodafone or the handset user.

9 Of course, when one uses a handset to talk to someone,  
10 one is not providing a telecommunication service by way  
11 of business to another person, one is simply talking into  
12 one's phone. It is the words "to another person" at the  
13 end of Regulation 4(2) which pull the legs from that  
14 particular argument.

15 There is nothing in 'the Regulation 4(2) is  
16 nonsense' argument and even if it were difficult to apply  
17 in those particular ways, it would not make any  
18 difference because the definition of the person who uses  
19 the apparatus is clear, for the reasons that I have  
20 already set out.

21 THE CHAIRMAN: Are you saying that the "by way of business"  
22 refers to the other person?

23 MR HOSKINS: Precisely. You must be providing a  
24 telecommunication service by way of business to another  
25 person. I am afraid "another person" cannot be the  
26 person who is providing the telecommunications system,  
27 nor can it be the person who is using the apparatus which  
28 is linking with it.

29 THE CHAIRMAN: Whereas Mr Mercer's argument is that "by way  
30 of business" is the original provider.

31 MR HOSKINS: That is correct. It is Vodafone providing.

32 THE CHAIRMAN: So those words face **that** way or face **that** way?

33 MR HOSKINS: In my submission, the addition of the words "to  
34 another person" must mean something and if they do not  
35 mean what I have suggested, it is difficult to see what  
36 they do mean. Mr Mercer might have more of a go to his  
37 argument if there was a full stop after "business" and no  
38 other words. That is what we say. Those words have to

1 have a meaning and that is the meaning that they have.

2 That is all I want to say about the first limb of  
3 the argument. I will now move on to the second limb,  
4 which is, if, contrary to what I have just submitted, it  
5 was Vodafone who was using the GSM gateway device, was  
6 that use authorised by its own Wireless Telegraphy Act  
7 licence? As you know, we say it was not authorised by  
8 Vodafone's Wireless Telegraphy Act licence.

9 Can we have a look at the licence, or a licence  
10 which is in the same form. It is in fact T-Mobile's  
11 licence but they are in the same form. That is at Bundle  
12 1, tab 12.

13 You will see at the top, under the Radio  
14 Communications Agency logo, it says:

15 "Condition 1

16 This licence authorises T-Mobile to establish,  
17 instal and use radio transmitting and receiving  
18 stations and radio apparatus as described in the  
19 schedules hereinafter together called 'the radio  
20 equipment', subject to the terms set out below."

21 What is being authorised for the purposes of the 1949 Act  
22 is the establishment, installation and use of the radio  
23 equipment as later defined in the licence.

24 One finds the definition of 'radio equipment' at  
25 page 202. Under the heading the text says, "This  
26 Schedule forms part of licence ... and describes the  
27 radio equipment covered by the licence and the purpose  
28 for which the radio equipment may be used. This is the  
29 definition section, if you like. Paragraph (1):

30 "Description of radio equipment licence

31 In this licence the radio equipment means the  
32 base transceiver stations ... [I do not have to  
33 worry about repeater stations; nobody is suggesting  
34 that GSM gateway devices are repeater stations] ...  
35 forms part of the network as defined in paragraph  
36 (2) below.

37 "Purpose of the radio equipment

38 The radio equipment shall form part of the radio

1 telecommunications network in which mobile user  
2 stations, which meet the appropriate technical  
3 performance requirements, communicate by radio with  
4 the radio equipment to provide a telecommunications  
5 service."

6 There is a distinction drawn between, on the one hand,  
7 base transceiver stations and, on the other hand, mobile  
8 user stations and it is only base transceiver stations  
9 which form part of the radio equipment for the purposes  
10 of the licence.

11 Floe's point in this, as set out at paragraph 22 of  
12 its skeleton argument, is simply an assertion, because  
13 there is no evidence to back it up, but the assertion is  
14 that a GSM gateway device is "a less sophisticated base  
15 station". That is the way that Floe puts its case.

16 Without having to enter into any analysis of the  
17 technical issues, the hopelessness of that argument, we  
18 say, is underlined by paragraphs 17 to 18 of the  
19 Statement of Facts and that again is at Bundle 5, tab 92.

20 Paragraphs 17 to 18 are at page 1760. These are the  
21 facts that have been agreed by Floe and in our submission  
22 clearly show that Floe, certainly for the purposes of the  
23 Statement of Facts, accepted that there was a clear  
24 distinction between base transceiver stations and mobile  
25 stations and also accepted that GSM gateways were mobile  
26 stations.

27 "17 A feature of a GSM system is that the role of  
28 mobile stations such as GSM gateways and base  
29 transceiver stations and the frequencies under which  
30 they operate are distinct ..."

31 I do not need to go into the technicality.

32 "GSM gateways are expressly said to be mobile  
33 stations in contra-distinction to base transceiver  
34 stations."

35 The same distinction and acceptance applies throughout  
36 paragraph 18:

37 "18 The network of a mobile operator sends  
38 information to a mobile handset or a gateway device

1           which indicates the precise radio frequency to be  
2           used for transmission and also information which is  
3           needed by the device or handset to synchronize with  
4           the network. On the basis of information sent by  
5           the handset or device ...  
6           [and that is obviously a gateway device]  
7           "... to a base station ...  
8           [so the gateway device sends information to the base  
9           station]  
10           "... instructions are sent by the base station to  
11           the handset or gateway device informing it of the  
12           power level it must use. Base station users are  
13           frequency hopping" [etc]. " ... this procedure  
14           grants permission for the mobile handset or gateway  
15           device to start sending or receiving user  
16           information, for example, speech or data, to or from  
17           the base station."  
18           On the basis of the agreed Statement of Facts GSM  
19           gateways are mobile stations and mobile stations are  
20           distinct from base transceiver stations. On that agreed  
21           basis, Floe's argument is again, we submit, hopeless.  
22           One does not have to simply rely on that, what Mr  
23           Mercer might think is a forensic trick, because the  
24           technical position is set out in Dr Unger's second  
25           witness statement. Those are the paragraphs that I have  
26           already taken you to and asked you to read. Again the  
27           reference for your notes is Volume 1, tab 9, page 53. Dr  
28           Unger's expertise is explained in his first witness  
29           statement, which one finds at Bundle 1, tab 2, page 11.  
30           Floe has not produced any evidence whatsoever to counter  
31           that of Dr Unger.  
32           The only argument that has been put forward today on  
33           behalf of Floe in relation to this part is that, whilst  
34           we have seen that Dr Unger justifies his classification  
35           of GSM gateway devices as mobile user stations by  
36           reference to the GSM standards they apply, Mr Mercer says  
37           that there are no references to those GSM standards in  
38           the relevant definitions in the licence, which we have

1 just looked at, to which our response is that that is  
2 irrelevant, because the expression "radio equipment", the  
3 expression "base transceiver station" must be given a  
4 meaning. Dr Unger has explained why the obvious meaning,  
5 at least to those with sufficient technical knowledge, is  
6 that a GSM gateway device is not a base transceiver  
7 station because it does not comply with the GSM standards  
8 set down for base transceiver stations.

9 You have on one side the evidence of an expert with  
10 an explanation of why his approach is the correct one  
11 and, on the other hand, one has no evidence on behalf of  
12 Floe and indeed no suggested alternative criteria for  
13 deciding what is a base transceiver station and what is a  
14 mobile station. You are simply left with a void.

15 In our submission, faced with the evidence on one  
16 side and the absence of any evidence, or even  
17 explanation, on the other, Floe's argument has to fail on  
18 that part.

19 The punch line on this is that because a public GSM  
20 gateway device does not fall within the definition of  
21 "radio equipment" for the purposes of Vodafone Wireless  
22 Telegraphy Act licence, the licence does not authorise  
23 Vodafone to use public GSM gateway devices, even if  
24 Vodafone were the user of those devices.

25 At this stage can I pick up the second issue that  
26 the Tribunal identified this morning, which I suppose can  
27 probably be described as the estoppel issue. Let me put  
28 it this way.

29 Given that the decision proceeded on the basis that  
30 it might be possible for use of public GSM gateway  
31 devices to be authorised under Vodafone's licence, can  
32 OFCOM now go back on that? I appreciate the question is  
33 in relation to can OFCOM go back and Vodafone go back. I  
34 am dealing now with can OFCOM go back on that.

35 We say the answer is "yes", for three reasons.

36 The first point is this. The issue as to the scope  
37 of Vodafone's Wireless Telegraphy Act licence has arisen  
38 as a result of Floe's primary argument.

1           The second limb, as I have put it, is a pure point  
2 of law at its best. I appreciate that I have then gone  
3 on to rely on the evidence of Dr Unger but the point can  
4 be made without any further evidence because of the  
5 statement of facts. But even if that were a problem, the  
6 primary argument was only introduced as a result of an  
7 application by Floe to amend its notice of appeal. It  
8 was Sir Christopher Bellamy who heard that application.  
9 He said it should be allowed in because it was a pure  
10 point of law. Of course, we have now discovered that we  
11 have had to have evidence and an Agreed Statement of  
12 Facts, but so be it. That is what has happened. But he  
13 also recognised that it was important that if the  
14 Tribunal was to be dealing with these legal issues, it  
15 should be dealing with the issues without one's hands  
16 tied behind its back. It would make no sense for a  
17 Tribunal, with a function such as this, to approach a  
18 legal question whilst deliberately being forced to turn a  
19 blind eye to an important part of the legal equation, ie  
20 it would make no sense to decide that if Floe succeeded  
21 on the first limb of its primary argument, one was going  
22 to assume that what it did was necessarily lawful without  
23 inquiring into whether it was in fact lawful. That is  
24 the first point.

25           The second point is this. The decision itself  
26 proceeded on the basis that authorisation might be  
27 possible but found that the conditions for authorisation  
28 were not in fact fulfilled. This point about  
29 authorisation, I believe I am correct, was something that  
30 the Office raised rather than something that Floe put  
31 forward in the first instance. The Office spotted the  
32 point, dealt with it and found that even if authorisation  
33 was possible the conditions were not satisfied.  
34 Therefore what we have now is that, if we are allowed to  
35 raise the second limb of the primary argument, then there  
36 are no vested rights which Floe can claim which are  
37 affected by that change of position, because under the  
38 Decision it was not authorised because it did not fulfil

1 the conditions. What we are saying now is that it was  
2 not in fact possible for it to be authorised. But the  
3 effect on Floe's position in terms of vested rights is  
4 precisely the same. It cannot be authorised and it was  
5 not authorised, leading to the same result. Floe was  
6 acting unlawfully in operating public GSM gateways. One  
7 is not taking away anything which should have been vested  
8 in Floe as a result of the Decision.

9 The third point relates to the two authorities that  
10 the Tribunal very kindly provided copies of. The point  
11 in relation to those authorities is that cases on  
12 estoppel between private parties cannot bind a public  
13 body acting as a public body.

14 The doctrine of estoppel has a very limited role to  
15 play in public law. We are dealing with a regulatory  
16 authority performing its statutory function and one  
17 cannot take authorities which deal with estoppel by  
18 convention as between private parties and apply them to a  
19 public body.

20 I wish that I could give you references for those,  
21 but they are dealt with in leading textbooks.

22 THE CHAIRMAN: We can look at them tomorrow.

23 MR HOSKINS: It is certainly something that I can look at  
24 overnight and bring the references.

25 For those three reasons we say that it is not just  
26 appropriate but probably necessary, because of the first  
27 reason I put forward, for the Tribunal to listen to the  
28 arguments and deal with the arguments that we put forward  
29 in relation to the second limb of the Primary Argument.  
30 If it is correct that OFCOM is entitled to take that  
31 position, Vodafone's position becomes irrelevant. Again,  
32 we are dealing with a challenge to the decision of a  
33 public body and if the public body is entitled to raise  
34 those arguments, then it makes little sense to go into it  
35 any further and inquire whether Vodafone can raise the  
36 point or not, because the point is before the Tribunal.  
37 But even in relation to Vodafone we would say that  
38 estoppel cannot apply so as to require a party to perform

1 a contract in an unlawful way. That is another important  
2 distinction between the contractual position between  
3 Vodafone and Floe in the present case and the contractual  
4 position in the two authorities, to which the Tribunal  
5 has referred us. There is no sense that estoppel was  
6 being relied on in order to impose an obligation on a  
7 private party to act in an unlawful way or for an  
8 unlawful purpose.

9 That completes all I wanted to say on the Primary  
10 Argument.

11 The next compartment I wanted to move on to was  
12 Floe's first alternative argument. If I can deal with  
13 that by reference to our skeleton argument, it is  
14 paragraphs 31 to 34.

15 Just to position us along the route map which I have  
16 set out, the question here, which is set out at the top  
17 of page 12, is:

18 "If Floe's Public GSM gateway devices were 'used' by  
19 Floe ...

20 [so I am presuming that Floe has lost the Primary  
21 argument, because it is its use we are now looking at]

22 "was such use authorised pursuant to Condition 8 of  
23 Floe's 1949 Act licence."

24 This is the point. This is the way in which the point  
25 was raised in the Decision itself.

26 Condition 8 of the licence I have set out in the  
27 skeleton. I do not think we need to turn it up. I have  
28 given the reference.

29 "The Licensee shall ensure that the Radio Equipment  
30 is operated in compliance with the terms of this  
31 Licence and is used only by persons who have been  
32 **authorised in writing** ...

33 [those are the crucial words]

34 ...by the Licensee to do so and that such persons  
35 are made aware of, and of the requirements to comply  
36 with the terms of this Licence."

37 I say those are the crucial words, but, of course, there  
38 is no evidence at all to suggest that the requirement in

1 the latter part of Condition 8 was satisfied with either,  
2 ie that Vodafone made Floe aware of the licence and of  
3 the requirements to comply with the licence.

4 Let us focus on the "authorised in writing" part.

5 There are two points which we make in response to  
6 this first alternative argument. The first is the one we  
7 have just been looking at. Because GSM gateway devices  
8 are not radio equipment within the meaning of Vodafone's  
9 Wireless Telegraphy Act licence their use by third  
10 parties cannot be authorised in writing by Vodafone. If  
11 the licence itself does not allow Vodafone to operate  
12 public GSM gateway devices, then Vodafone cannot  
13 authorise a third party under its licence to operate such  
14 devices.

15 The second argument is that, even if public GSM  
16 gateway did fall within the scope of Floe's 1949 Act  
17 licence, Vodafone did not in fact authorise Floe to  
18 operate such devices in accordance with Condition 8.  
19 That is because such authorisation would have had to be  
20 in writing. There are a number of points in relation to  
21 this.

22 Firstly, Floe does not allege that it has any such  
23 written authorisation. The highest that it puts its case  
24 on authorisation is that Vodafone 'tacitly' authorised  
25 the use of GSM gateways by Floe. The reference is  
26 footnote 25. It is the Amended Notice of Appeal Schedule  
27 2 paragraph 1(b). That is the highest that Floe puts its  
28 case on authorisation. 'Tacit' authorisation is not  
29 express written authorisation.

30 Secondly - and I would like to change the reference  
31 here - rather than referring to paragraph 50 of the  
32 Decision. As indicated at paragraph 35 of the Statement  
33 of Facts - because obviously that is something that has  
34 been agreed by Floe - the actual agreement entered into  
35 between Vodafone and Floe makes no reference to GSM  
36 gateway services whatsoever. There is nothing in the  
37 written agreement between the parties referring to GSM  
38 gateway devices or GSM gateway services. That is agreed.

1           It is paragraph 35 of the statement of facts.

2           The third point is that, although it is possible -  
3           an issue before the Tribunal - that certain Vodafone  
4           personnel may have been aware that Floe was using SIMs  
5           supplied by Vodafone in public GSM gateway equipment,  
6           such knowledge by certain Vodafone employees would not  
7           amount to written authorisation. I will come back to  
8           Vodafone's knowledge when I deal with objective  
9           justification, but just on this point, the fact that  
10          certain Vodafone employees may have known what the  
11          intended use of the services and SIMs was is not written  
12          authorisation.

13          The next point is that the agreement is said to  
14          represent the entire agreement between the parties, so if  
15          one were looking for written authorisation one would have  
16          expect it to be in the agreement. That is not the best  
17          point, because one can have an entire agreement and still  
18          have authorisation outside the agreement. That is why  
19          that is very much the last of the points made in the  
20          skeleton.

21          Just to deal with the way in which the point was put  
22          today in oral submissions by Mr Mercer, he argued that  
23          the authorisation to use public GSM gateways was implied  
24          by virtue of the fact that the agreement between Floe and  
25          Vodafone did not expressly exclude Floe operating public  
26          GSM gateway devices. It was not that they were expressly  
27          authorised, it was that they were expressly not precluded  
28          from providing such services using such devices. But  
29          that is not a correct construction of the contract. It is  
30          probably worth having a look at the contract at this  
31          stage. It is in Bundle 1, Tab 15. It is paragraph 8.1 of  
32          Schedule 6, which is at page 255. 8.1 says:

33                 "Floe undertakes that its end users shall use the  
34                 services in accordance with such conditions as may  
35                 be notified in writing by Vodafone from time to  
36                 time. Without limiting the generality of the  
37                 foregoing, Floe undertakes not to use the services  
38                 and/or the equipment for any unlawful purpose. The

1 use of public GSM gateway devices was unlawful,  
2 therefore the contract expressly prohibits the use  
3 of Vodafone services and/or equipment in relation to  
4 public GSM gateway devices.

5 So there is an express prohibition in the contract of  
6 such use.

7 For those reasons we say that the first alternative  
8 argument that Floe has put forward cannot succeed either.

9 THE CHAIRMAN: The Business Plan did make clear that what was  
10 being or going to be used was the GSM gateway device. It  
11 also made clear it was for business. What do you think  
12 about the fact that the whole background to this  
13 agreement is the Business Plan - that is what we have got  
14 - and that that refers to the GSM gateway devices and  
15 therefore one must read this altogether. One cannot look  
16 at it in isolation with just the agreement.

17 MR HOSKINS: There are a number of points in relation to  
18 that.

19 First of all, the entire agreement clause does  
20 become relevant at that stage, because the purpose of the  
21 entire agreement clause is to preclude either of the  
22 parties from relying on the discussions that took place  
23 leading to the contract in order to insert provisions  
24 into the contract which are not there.

25 THE CHAIRMAN: Can that be right, because if everybody  
26 understands that what is going to be used is GSM gateways  
27 and the fact that there is an entire agreement clause  
28 cannot mean that this contract means you cannot use GSM  
29 gateways. That would make a nonsense. Lord Hopkins'  
30 analysis in the cases on construction of contracts I  
31 think indicates that that really is no longer a way that  
32 one can look at an entire agreement, or anything else.

33 MR HOSKINS: Let me put it this way. In a sense one chases  
34 one's tail, because one starts saying let us assume -  
35 because that is the assumption at the moment - that  
36 certain Vodafone employees were aware that Vodafone's  
37 SIMs and equipment would be used for public GSM gateway  
38 devices which were in fact unlawful. It may be that the

1 Vodafone employees dealing with it did not know at the  
2 time they were in fact unlawful. You then have a clause  
3 in the agreement saying that Floe must not do anything  
4 unlawful and indeed, if Floe ever came to try and enforce  
5 the contract in order to require Vodafone to provide  
6 services or equipment in order to allow Floe to provide  
7 public GSM gateway devices, the contract would be  
8 unenforceable on grounds of public policy. It could not  
9 be sued on.

10 It does not really take Floe anywhere at the  
11 contractual level to rely on the Business Plan, because  
12 the bottom line is always going to be, whenever it came  
13 to enforce the contract it would not be able to do so  
14 because of public policy.

15 But there is another level to this, because that is  
16 the contractual position. Obviously it is important for  
17 the Tribunal to get to the bottom of the contractual  
18 position in order to decide what it has to decide, but  
19 what we must not forget is that this is not a contractual  
20 dispute. Floe could have sued Vodafone on the contract  
21 and it is perhaps not surprising that it did not. For  
22 the reason that I have just described it would not have  
23 got very far. What it chose to do was to make a  
24 Competition Act complaint.

25 I will come on to deal with objective justification,  
26 but the fact that certain Vodafone employees may have  
27 entered into this contract in the knowledge that (and I  
28 am just presuming that it is going to be that) a public  
29 GSM gateway device was going to be provided, does not  
30 answer the Competition point because it may be - we do  
31 not know because, of course Vodafone says it had no such  
32 knowledge - that the particular employees involved in the  
33 Commercial Department had no idea of the legality of  
34 public GSM gateway devices. Or may be they did? But  
35 what has happened in this case is that subsequently  
36 someone higher up the food chain, if I can put it like  
37 that, in Vodafone has spotted a problem. We have seen  
38 that in the evidence from Vodafone. It is very detailed

1 as to how they became aware of this problem and how they  
2 dealt with it. Once a company realizes, if this is the  
3 correct factual basis, that employees with authority to  
4 contract on its behalf have entered into unlawful  
5 contracts, the question is then, as a matter of  
6 Competition law, are they objectively justified in  
7 refusing to continue to supply the services under that  
8 contract for unlawful purposes? That is where we get to.

9 I think it is important always to realize the split  
10 between the contractual position and the Competition  
11 position. We say, even if one looks at the contractual  
12 position, it does not get Floe anywhere. They will  
13 always come up against the barrier of public policy and  
14 in fact the more knowledge that Vodafone had of the  
15 intended use, probably the worse it is in terms of public  
16 policy.

17 That has finished the first alternative argument.  
18 My next matter is the community law arguments, but given  
19 the time I do not know if you want me to begin with that  
20 or not?

21 THE CHAIRMAN: Are you going to finish it?

22 MR HOSKINS: I can take it quite quickly, I think. It may  
23 take me 10 or 15 minutes, if you prefer to take the risk  
24 of a few more minutes.

25 THE CHAIRMAN: Yes.

26 MR HOSKINS: We have dealt in our defence and in our  
27 skeleton argument with compatibility with both the RTTE  
28 and the Authorisation Directive.

29 Given the nature of the submissions this morning, I  
30 do not intend to say anything specific about the  
31 Authorisation Directive, unless the Tribunal wants me to  
32 do so, but I will deal with the RTTE Directive first and  
33 tomorrow morning, if the Tribunal wants to hear how we  
34 say the Authorisation Directive fits, I will be happy to  
35 do that. I want to focus on the RTTE Directive, because  
36 that has been the focus of the attack.

37 The Directive is in Bundle 3 at Tab 59. The issue  
38 which has been raised before the Tribunal is that the

1 RTTE Directive is to do with equipment and nothing else.

2 Our submission is that, yes, it is primarily concerned  
3 as equipment, but certain aspects of the RTTE Directive  
4 also concern the use to which such equipment may be put.

5 If I can set the scene for the Directive by looking  
6 at some of the recitals in the preamble.

7 At page 1079, Recital 21, one sees the focus being  
8 on equipment.

9 "Whereas I accept the degradation of service to  
10 persons other than the user of radio equipment and  
11 telecommunications terminal equipment should be  
12 prevented, whereas manufacturers of terminal should  
13 construct equipment in a way which prevents networks  
14 from suffering harm which results in such  
15 degradation when used in normal working conditions"  
16 etc.

17 It is all about the construction of equipment, the  
18 construction of networks.

19 Then 22:

20 "Whereas effective use of the radio spectrum should  
21 be ensured so as to avoid harmful interference ...

22 [so it is use of the radio spectrum]

23 ... whereas the most efficient possible use,  
24 according to the state of the art and limited  
25 resources, such as the radio frequency spectrum,  
26 should be encouraged."

27 So it is also to do with use of available spectrum.

28 Recital 27, over the page, explains the role of  
29 essential requirements:

30 "Whereas it is in the public interest to have  
31 harmonised standards at European level in connection  
32 with the design and manufacture.

33 [So again very much focusing on that aspect of radio  
34 equipment and telecommunications terminal equipment]

35 "Whereas compliance with such harmonised standards  
36 gives rise to a presumption of conformity to the  
37 essential requirements, whereas other means of  
38 demonstrating conformity to the essential

1 requirements are permitted."

2 Then 32:

3 "Whereas radio equipment and telecommunications  
4 terminal equipment which complies with the relevant  
5 essential requirements should be permitted to  
6 circulate freely."

7 [so there is the Free Movement of Goods provision]

8 "Where such equipment should be permitted to be put  
9 into service for its intended purpose, whereas the  
10 putting into service may be subject to  
11 authorisations on the use of the radio spectrum and  
12 the provision of the service concerned."

13 That is very important, because obviously the Treaty has  
14 various fundamental freedoms. One is the free movement  
15 of goods, another is the freedom to provide services.  
16 The RTTE Directive is primarily concerned with free  
17 movement of goods. The Authorisation Directive is  
18 primarily concerned with freedom to provide services.  
19 But what Recital 32 shows us is that the RTTE Directive  
20 is also to a certain extent concerned with the provision  
21 of particular types of services. It is not purely about  
22 construction and manufacture of equipment. It is also  
23 about the use to which it is put. It is also about  
24 provisions of service using that equipment.

25 We can make that good by looking at the substantive  
26 Articles of the Directive. One can see it immediately in  
27 Article 1.

28 "This Directive establishes a regulatory framework  
29 for the placing on the market free movement and  
30 putting into service in the community of radio  
31 equipment."

32 So you already have the distinction between placing on  
33 the market of equipment and putting into service of  
34 equipment.

35 Article 2 has various definitions. I do not think I  
36 need to look at that in any detail.

37 Article 3 deals with the essential requirements.  
38 Equipment must comply with the essential requirements in

1 order to be able to be put on the market, etc.

2 Article 5 deals with harmonised standards, because  
3 the essential requirements are, for example, "radio  
4 equipment shall be so constructed that it effectively  
5 uses the spectrum", etc. What 5 does is to provide for  
6 harmonised standards to be created at community level.  
7 As we have seen from the Recitals, if equipment complies  
8 with the harmonised standards it is assumed to comply  
9 with the essential requirements. That is the way the  
10 mechanism works.

11 Then crucially Article 6 and Article 7. One can see  
12 the distinction immediately that I highlighted in  
13 relation to Article 1. Article 6 is entitled "Placing on  
14 the Market. Article 7, which must relate to something  
15 else, is entitled "Putting into service and right to  
16 connect".

17 Article 6 is when one has manufactured the  
18 equipment, one wants to sell it. One wants to place it  
19 on the market. What Article 6(1) tells us is:

20 "Member states shall ensure that apparatus is placed  
21 on the market only if it complies with the  
22 appropriate essential requirements identified in  
23 Article 3 and the other relevant provisions of this  
24 Directive when it is properly installed and  
25 maintained and used for its intended purpose. It  
26 shall not be subject to further national provisions  
27 in respect of placing on the market."

28 So that is when you sell your equipment. You have  
29 manufactured it and you sell it.

30 Article 7 is about what happens next, because what  
31 we say is the putting into service means the use to which  
32 the equipment is put.

33 "Member States shall allow the putting into service  
34 of apparatus for its intended purpose where it  
35 complies with the appropriate essential requirements  
36 identified in Article 3 and the other relevant  
37 provisions of this Directive."

38 That is a general obligation on the Member States to

1 allow them to put into service.

2 However, Article 7(2) is a derogation from that:

3 "Notwithstanding paragraph (1) and without prejudice  
4 to conditions attached to authorisations for the  
5 provision of the service concerned in community law,  
6 Member States may restrict ...

7 [so not necessarily prohibit but restrict]

8 ... the putting into service of radio equipment only  
9 for reasons related to the effect of inappropriate  
10 use of the radio spectrum, avoidance of harmful  
11 interference and matters relating to public health."

12 One has a situation where equipment has been placed on  
13 the market and what the Member State is entitled to do is  
14 to place restrictions on the putting into service, ie the  
15 use of that equipment.

16 That is precisely what the United Kingdom has done.

17 There is no prohibition on the placing on the market of  
18 GSM gateway devices. However, there is a restriction  
19 upon the putting into service of such devices and that  
20 restriction is contained in Regulation 4(2). So no  
21 restriction on placing on the market. You can sell GSM  
22 gateway devices. However, a restriction on putting them  
23 into service, ie the use to which they are put.

24 If I can deal very briefly with the fourth question,  
25 because that relates to the RTTE Directive and then I  
26 shall stop for the night.

27 The fourth question is whether there had been an  
28 evaluation at the time when the 2003 Exemption  
29 Regulations were adopted of the impact of public GSM  
30 gateway devices on use of the spectrum.

31 There was no formal evaluation. It was obviously  
32 something that was considered as a technical aspect by  
33 those responsible for implementing the legislation.  
34 There was no formal investigation. But there was no  
35 need, as a matter of community law, to conduct an  
36 investigation before a Member State exercised the powers  
37 under Article 7(2). It could have been possible for the  
38 Directive to be drafted so as to say there is a power of

1 derogation, but a Member State may not exercise it,  
2 unless it has first carried out an impact assessment or  
3 something of that sort. But the Directive does not say  
4 that. What a Member State is entitled to do is to take a  
5 view on the basis of presumably technical expertise from  
6 its technical advisers as to whether it is necessary to  
7 invoke the exception or not. That is what the United  
8 Kingdom chose to do.

9 The basis upon which it decided to exercise the 7(2)  
10 restriction is irrelevant for purposes of community law.

11 The only question is whether it was entitled to exercise  
12 the 7(2) exception - ie do public GSM gateways have a  
13 problem for efficient use of spectrum. In relation to  
14 that, there is no dispute before this Tribunal, because  
15 Floe has never contested the fact that public GSM gateway  
16 gateways cause harmful interference and are an  
17 inefficient use of the radio spectrum. In relation to  
18 the last point that comes out clearly from paragraph 11  
19 of the statement of facts, which is Bundle 5 tab 92, page  
20 1759. It is the first sentence of paragraph 11:

21 "A public GSM gateway is likely to generate more  
22 traffic than a private GSM gateway and can cause  
23 congestion by concentrating significant volumes of  
24 traffic in a particular cell site and at particular  
25 times of day".

26 There is no dispute before the Tribunal that the basis  
27 for the United Kingdom invoking or relying on Article  
28 7(2) is fulfilled, ie it was necessary to impose  
29 restrictions related to the effective and appropriate use  
30 of the radio spectrum.

31 THE CHAIRMAN: What you would say is, if you go back to 7(2)  
32 it is only for reasons related to, and you say that the  
33 reasons are admitted in the Statement of Facts and that  
34 is an end of it?

35 MR HOSKINS: Precisely. The fact that we have or have not  
36 carried out particular problems of investigation is  
37 irrelevant as a matter of community law to whether the  
38 United Kingdom was able to rely on Article 7(2). As a

1 matter of community law the only question is, are there  
2 reasons related to the question of appropriate use of the  
3 spectrum which justify the UK invoking Article 7(2) and,  
4 yes, my point, as you have just put it back to me, is  
5 there is no dispute before this Tribunal that the UK was  
6 so entitled.

7 That is all I wanted to say on the RTTE Directive.  
8 I am quite happy to stop there.

9 THE CHAIRMAN: That is probably a convenient place to stop.

10 Can I ask you, in relation to the estoppel argument,  
11 do you think that you could make good your submissions in  
12 relation to public authority, because what concerns me is  
13 the principles of legitimate expectation, proportionality  
14 and that sort of thing. I would like to hear your  
15 submissions as to why this case clearly falls within the  
16 public authority and no estoppel rather than a more  
17 general and flexible area.

18 MR HOSKINS: Certainly.

19 THE CHAIRMAN: 10.30 tomorrow morning.

20 MR IVORY: Madam, at the risk of detaining you for more than  
21 30 seconds, can I mention where we have got to on  
22 confidentiality?

23 THE CHAIRMAN: Yes.

24 MR IVORY: The position is, as I understand it, that it is  
25 simply to do with the number of documents referring to  
26 prices and rates, which may be commercially sensitive as  
27 between my client and the second intervener. That is  
28 what confidentiality is about.

29 Madam, what we propose to do is to overnight produce  
30 a list of the documents in question and we will seek to  
31 mask the references to the sensitive issues like prices.

32 It does not seem to have caused a problem so far. The  
33 relevant documents I understand T-Mobile have not got.

34 THE CHAIRMAN: But of course there may be things in the  
35 relevant documents that T-Mobile would like to see, which  
36 are not to do with that, because the documents are  
37 numbers of pages, some of them.

38 MR IVORY: Indeed. That is why we have produced redacted

1 documents and simply mask the sensitive areas. It does  
2 not seem to have caused a problem in practice so far, but  
3 that is what we propose to do.

4 THE CHAIRMAN: Is that convenient to T-Mobile? Do you want a  
5 time limit on that? I do not know whether these  
6 documents are relevant to your submissions? They  
7 probably are not.

8 MR PICKFORD: As I understood the matter, I thought we were  
9 going to get those tomorrow morning, but that is fine by  
10 us.

11 MR IVORY: Indeed, Madam. That is what we envisage.

12 THE CHAIRMAN: Excellent. I am pleased that got resolved.

13

14 (Adjourned until 10.30 am tomorrow morning)

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