Neutral citation [2004] CAT 18

IN THE COMPETITION APPEAL TRIBUNAL Case No: 1024/2/3/04

Victoria House
Bloomsbury Place
London WC1A 2EB

19 November 2004

Before:

Marion Simmons QC (Chairman)
Mr Michael Davey
Mrs Sheila Hewitt

BETWEEN:

FLOE TELECOM LIMITED
(in administration)

Appellant

-v-

OFFICE OF COMMUNICATIONS
(formerly the Director General of Telecommunications)

Respondent

supported by

VODAFONE LIMITED

and

T-MOBILE (UK) LIMITED

Interveners

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

Mr Mark Hoskins (instructed by the Director of Telecommunications and Competition Law, Office of Communications) appeared for the Respondent.

Mr Thomas Ivory QC (instructed by Herbert Smith) appeared for the First Intervener, Vodafone Limited

Mr Meredith Pickford (instructed by Robyn Durie, Regulatory Counsel, T-Mobile) appeared for the Second Intervener, T-Mobile (UK) Limited

Heard at Victoria House on 19 and 20 July 2004

JUDGMENT

I INTRODUCTION

(a) General

1. In this appeal the appellant Floe Telecom Limited (in administration) ("Floe"), acting by its joint administrators, appeals against a decision of the Director General of Telecommunications (the "Director")[1] dated 3 November 2003 (the "Decision") that Vodafone Limited ("Vodafone") did not infringe section 18 of the Competition Act 1998 (the "Chapter II prohibition") by disconnecting the telecommunications services it was providing to Floe on or about 18 March 2003.

2. In the Decision the Director decided that the telecommunications services supplied by Floe were "Public GSM Gateway services". According to the Director, Floe was not itself licensed to use GSM Gateway equipment pursuant to section 1 of the Wireless Telegraphy Act 1949 (the "WTA 1949") and was not expressly authorised in writing to do so under the terms of Condition 8 of Vodafone's licence under the WTA 1949. Hence, according to the Director, the services provided by Floe were illegal. Accordingly, Vodafone's refusal to supply Floe was objectively justified and hence not a breach of the Chapter II prohibition (see paragraphs 49 to 52, and 55 to 57 of the Decision).

3. For the reasons given in this judgment we have decided to set aside the Decision and remit the matter to OFCOM for reconsideration pursuant to Schedule 8, paragraph 3(2)(a) of the Competition Act 1998. Our principal reasons are:

    (a) The Director's reasoning at paragraphs 49 to 57 of the Decision to the effect that Floe had not been authorised by Vodafone to provide Public GSM Gateway services under the terms of Vodafone's WTA licence is in our view incorrect and/or flawed. In those circumstances in our view the existing Decision cannot stand.

---

[1] Since the date of the Decision the functions of the Director have been transferred to OFCOM, see paragraphs 5 to 7 below.

(b) During the course of the appeal OFCOM in effect abandoned paragraphs 49 to 57 of the Decision and advanced a wholly new argument to the effect that, on the true construction of Vodafone's WTA licence, Vodafone could never have authorised Floe to provide Public GSM Gateway Services. That new argument does not feature in the Decision, and is contrary to the position taken in the Decision by the Director and the views of the former Radiocommunications Agency ("RA"), the body responsible for spectrum licensing at the time. On the materials before it, the Tribunal is not able to find that OFCOM's new argument as to the scope of Vodafone's WTA licence is correct. Since the new argument advanced by OFCOM has potentially wide ramifications for Mobile Network Operators (MNOs) generally, for intermediaries such as Floe, for competition in this sector, and for the management of the spectrum, the Tribunal considers that the proper course in the circumstances is to remit the matter to OFCOM with a view to a new fully reasoned decision being taken on Floe's original complaint.

(c) Given the uncertainty and complexity of the legal position at the time of Floe's disconnection by Vodafone, the Tribunal considers that a serious issue arises as to whether Vodafone, in the context of the Chapter II prohibition of the Competition Act, was objectively justified in disconnecting Floe without first referring the matter to the RA or leaving it to the RA to take enforcement action under the WTA. That issue was not investigated by the Director. Remitting the matter will enable OFCOM to take a reasoned decision on that issue.

(b) The Parties

Floe

4. When carrying on business Floe was a provider of telecommunications equipment and services, in particular "least cost routing" services to business customers and "GSM gateways". Its Chief Executive was Simon Taylor. Floe entered into a contract with

Vodafone on 12 August 2002 discussed further below (the "Agreement"). Andrew William Thompson and Jeremy Charles Frost were appointed as administrators of Floe on 1 October 2003 and notice of that appointment was lodged with the High Court on the same date.

OFCOM

5. The Telecommunications Act 1984 (the "1984 Act") established the Director as the regulator of the telecommunications industry in the United Kingdom. The office of the Director became known as "Oftel". The Director and Oftel were abolished by the Communications Act 2003 (the "2003 Act") and his functions were transferred to the Office of Communications ("OFCOM").

6. By virtue of section 371(1) of the 2003 Act OFCOM was empowered with effect from 25 July 2003 to exercise the relevant functions of the Office of Fair Trading ("OFT") under the provisions of Part 1 of the Competition Act 1998 (see Communications Act 2003 (Commencement No. 1) Order 2003, SI 2003/1900, paragraph 2(1) and Schedule 1). During a transitional period between 25 July 2003 and 29 December 2003, the Director was empowered to carry out certain of OFCOM's functions, including those in relation to the application of the Competition Act 1998: see section 408 and paragraph 57 of Schedule 18 of the 2003 Act. The transitional period ended on 29 December 2003: see article 3(2) of the Office of Communications Act 2002 (Commencement No. 3) and Communications Act 2003 (Commencement No. 2) Order 2003, SI 2003/3142.

7. Under section 408(5) of the 2003 Act anything which was done by the Director during the transitional period is to have effect after that time as if it had been done by OFCOM. This judgment is concerned with a Decision made by the Director during the transitional period. We make no distinction for the purposes of our judgment between the Director and OFCOM since the Director was carrying out OFCOM's functions under the Competition Act 1998 during the transitional period.

The Radiocommunications Agency

8. The Radiocommunications Agency ("RA") was established as an executive agency of the Department of Trade and Industry ("DTI") and was at the material time responsible for most non-military radio spectrum matters in the United Kingdom. Pursuant to section 2 and Schedule 1 of the 2003 Act the functions of the Secretary of State and the Radiocommunications Agency under the WTA 1949 have now also been transferred to OFCOM. However, at the time of the Decision and during the Director's investigation leading to the Decision, the RA was responsible for matters under the WTA 1949. From the Annual Report and Accounts of the RA for 2002-2003 it appears that its third "Business Objective" in the area of competition was "to ensure compliance with spectrum management requirements imposed for the benefit of all radio users in order to keep the spectrum clear of undue interference".

9. Thus, at the relevant time, the RA was responsible for the enforcement of the WTA 1949 and the licences issued under it and the Director was concurrently responsible (with the OFT) for the application of the Competition Act 1998 in the telecommunications sector. Both of these functions are now carried out by OFCOM.

Vodafone and T-Mobile

10. Vodafone and T-Mobile, the interveners in these proceedings, are Mobile Network Operators ("MNOs"). Both are holders of a licence in similar terms under section 1 of the WTA 1949 to establish install and use equipment comprising a mobile telecommunications network using the GSM radio spectrum. "GSM" stands for Global System for Mobile communications. Specifications for the "architecture" of GSM mobile communications systems have been published by the European Telecommunications Standards Institute.

II THE WIRELESS TELEGRAPHY ACT, THE EXEMPTION REGULATIONS AND VODAFONE'S LICENCE

(a) The Wireless Telegraphy Act 1949

11. Section 1 of the WTA 1949 provides for the licensing of stations and apparatus for wireless telegraphy. Before 25 July 2003 that section provided so far as relevant:

> "**1.** (1) No person shall establish or use any station for wireless telegraphy or install or use any apparatus for wireless telegraphy except under the authority of a licence in that behalf granted under this section by the Secretary of State...and any person who establishes or uses any station for wireless telegraphy or installs or uses any apparatus for wireless telegraphy except under and in accordance with such a licence shall be guilty of an offence under this Act.
>
> Provided that the Secretary of State may by regulations exempt from the provisions of this subsection the establishment, installation or use of stations for wireless telegraphy or wireless telegraphy apparatus of such classes or descriptions as may be specified in the regulations, either absolutely or subject to such terms, provisions and limitations as may be so specified."
>
> …
>
> (2) A licence granted under this section (hereafter in this Act referred to as a wireless telegraphy licence) may be issued subject to such terms, provisions and limitations…
> as the Secretary of State may think fit (…) including in particular in the case of a licence to establish a station, limitations as to the position and nature of the station, the purpose for which, the circumstances in which, and the persons by whom the station may be used and the apparatus which may be installed or used and the places where the purposes for which the circumstances in which, and the persons by whom the apparatus may be used."

12. With effect from 25 July 2003, in section 1 of the WTA "OFCOM" was substituted for "the Secretary of State", pursuant to the 2003 Act.

13. Section 19 of the WTA 1949 contains the interpretation section and states:

> "(1) In this Act, except where the context otherwise requires, the expression "wireless telegraphy" means the emitting or receiving, over paths which are not provided by any material substance constructed or arranged for that purpose, of electro-magnetic energy of a frequency not exceeding three million megacycles a second, being energy which either:
> serves for the conveying of messages, sound or visual images (whether the messages, sound or images are actually received by any person or not) or for the actuation or control of machinery or apparatus;

…

and references to stations for wireless telegraphy and apparatus for wireless telegraphy or wireless telegraphy apparatus shall be construed as references to stations and apparatus for the emitting or receiving as aforesaid of such electro-magnetic energy as aforesaid.

(b) The Exemption Regulations

14. On 20 January 2003 The Wireless Telegraphy (Exemption) Regulations 2003, SI 2003/74 (the "2003 Regulations") were passed. The 2003 Regulations entered into force on 12 February 2003. The 2003 Regulations replaced The Wireless Telegraphy (Exemption) Regulations 1999, SI 1999/930, which entered into force on 19 April 1999. In all material respects for the purposes of this appeal, the 2003 Regulations are in the same terms as the 1999 Regulations, and we refer below to these as the "Exemption Regulations". The Exemption Regulations were made pursuant to section 1 of the WTA 1949.

15. Regulation 4 of the Exemption Regulations provides:

"**4. –** (1) Subject to regulation 5, the establishment, installation and use of the relevant apparatus are hereby exempted from the provisions of section 1(1) of the 1949 Act.

(2) With the exception of relevant apparatus operating in the frequency bands specified in paragraph (3), the exemption shall not apply to relevant apparatus which is established, installed or used to provide or to be capable of providing a wireless telegraphy link between telecommunications apparatus or a telecommunication system and other such apparatus or system, by means of which a telecommunication service is provided by way of business to another person."

16. "Relevant apparatus" for the purposes of regulation 4 of the Exemption Regulations is defined as the "prescribed apparatus" as defined in Schedules 3 to 9 of those Regulations. Schedule 3, Part I, of the Exemption Regulations (none of the parties submitted that any other schedule of the Exemption Regulations was relevant) provides that "prescribed apparatus" means a "user station" as "defined below …". It is common ground that what is relevant for present purposes is the definition of "user station".

17. "User Station" is defined in Schedule 3, Part I, of the Exemption Regulations as "a mobile station for wireless telegraphy designed or adapted (a) to be connected by wireless telegraphy to one or more relevant networks; and (b) to be used solely for the purpose of sending and receiving messages conveyed by a relevant network by means of wireless telegraphy".

18. "Relevant network" is defined in Schedule 3, Part I as "a telecommunications system consisting exclusively of stations established and used under and in accordance with a licence which has been granted under section 1(1) of the 1949 Act by the Secretary of State and is of a type specified in Part III of this Schedule".

19. Schedule 3, Part I also contained the following definitions:

> "BTx" means a Base Transmit, the frequency on which a base station transmits and a user station receives.
>
> MTx" means Mobile Transmit, the frequency on which a user station transmits and a base station receives."

(c) Vodafone's Licence under the WTA 1949

20. Vodafone was issued by the RA, on behalf of the Secretary of State, with a licence under section 1(1) WTA 1949. We have not been provided with a copy of Vodafone's licence but instead were given a copy of T-Mobile's licence the terms of which we were told by the parties, as far as material to the matters before us, are identical to those of Vodafone's licence. On that basis Vodafone's licence provided, inter alia, as follows:

> "1. This Licence authorises [Vodafone Limited] ("the Licensee") of [The Courtyard, 2-4 London Road, Newbury, Berkshire, RG13 1 JI] to establish, install and use radio transmitting and receiving stations and/or radio apparatus as described in Schedule 1 of this Licence (hereinafter together called "the Radio Equipment") subject to the terms set out below." (…)
>
> 8. The Licensee shall ensure that the Radio Equipment is operated in compliance with the terms of this Licence and is used only by persons who have been authorised in writing by the Licensee to do so and that such persons are made aware of, and of the requirement to comply with, the terms of this Licence.

13. In this Licence:

(a) the establishment, installation and use of the Radio Equipment shall be interpreted as establishment and use of stations and installation and use of apparatus for Wireless Telegraphy as specified in section 1 of the 1949 Act

Schedule 1 of the licence provides:

"1. Description of Radio Equipment Licensed

In this Licence, the Radio Equipment means the base transceiver stations or repeater stations forming part of the Network (as defined in paragraph 2 below).

2. Purpose of the Radio Equipment

The Radio Equipment shall form part of a radio telecommunications network (the "Network") in which approved user stations communicate by radio with the Radio Equipment to provide a telecommunications service for customers."

(…)

7. Frequency Band(s) of operation

The Radio Equipment is required to operate in the following frequency ranges:

xxxx - xxxx[2] MHz: Base transmits

xxxx –xxxx MHz: Base receives

(…)

11. Conformity Assessment Requirements

The Radio Equipment is required to be subject to and comply with:

IR 2014 – First and Second Generation Public Cellular Radiotelephone Service

12. Interpretation

(…)

(b) "IR" means the United Kingdom Radio Interface Requirement published by the Radiocommunications Agency of the Department of Trade and Industry (RA) in accordance with Article 4.1 of Directive 1999/5/EC of the European Parliament and of the Council on radio equipment and telecommunications terminal (RTTE) and the mutual recognition of their conformity.

(…)

(e) "User Station" means any vehicle mounted or hands portable mobile station designed for mobile use and/or any static fixed station designed or adapted to be established and used from static locations which meet the appropriate technical performance requirements as set out in the relevant Wireless

[2] This sets out the frequencies which Vodafone is authorised to use. The precise frequency numbers are not needed to determine the issue before us.

Telegraphy (Exemption) Regulations and either complies with the appropriate Interface Regulation listed in paragraph 11, of for equipment placed on the market before 8 April 2000, is type approved in accordance with a recognised technical standard relating to the service licensed.

III GSM GATEWAYS

21. This case concerns equipment known as "GSM gateways" employed by Floe in its business. On 6 July 2004, in response to a request from the Tribunal on 10 June 2004, the parties submitted a "Statement of Facts" that had been agreed between them save to the extent expressly indicated in that statement. As to the characteristics of GSM gateway devices the following was agreed in the Statement of Facts:

> "3. GSM gateways are devices containing one or more SIMs for one or more mobile networks and which enable calls from fixed phones to mobile networks to be routed directly via a GSM link into the relevant mobile network.
>
> 4. A call made via a GSM gateway appears to the mobile network to have originated from a mobile registered to that network and so attracts a cheaper call rate.
>
> 5. A purpose of a GSM gateway is to take advantage of the lower "on-net" tariff for calls on a mobile network compared with the rate for fixed-to-mobile calls."

22. The Statement of Facts also explained the following:

> *"The function of a SIM card*
>
> 6. A Subscriber Identity Module ("SIM") card is a 'smart card' which contains subscriber specific information. The main purpose of a SIM is to identify the subscriber to the mobile network (e.g. for tariff identification and billing purposes). Each SIM card has an International Mobile Subscriber Identity ("IMSI") number that is uniquely associated with it.
>
> *The function of the IMEI number*
>
> 7. The International Mobile Equipment Identity ("IMEI") is a 15-digit code. Each mobile handset or GSM gateway has an IMEI number that is uniquely associated with it and which enables the equipment to be identified by the mobile network. The first six digits of the IMEI number disclose the type of equipment being used.

23. An important feature of this case is the distinction between "public" GSM gateways and "private" GSM gateways, in particular because the Director found that Vodafone was justified in taking steps to disconnect Floe's GSM gateways on the basis that they were being used by Floe illegally as "public" gateways without a licence under section 1 of the WTA.

24. In the decision GSM Gateways are described as follows at paragraphs 3 to 6:

> "**GSM gateways**
>
> 3. A GSM Gateway is a bank of Subscriber Identity Module ("SIM") cards mounted in a device that provides connectivity between a fixed telephone line and a mobile network.
>
> 4. A GSM Gateway uses the SIMs of a mobile network operator ("MNO") on whose network the call is to be delivered to make the call appear to be an on-net mobile to mobile call[1], and so be charged at the MNO's retail rate for on-net calls. The operation of a GSM Gateway utilises the spectrum of the MNO on whose network the call is terminated.
>
> 5. A GSM Gateway call can be utilised by companies to connect their Private Automatic Branch Exchange ("PABX") systems to the MNO's network ("Private GSM Gateway"). As with a cellphone, the connection to a public network by a Private GSM Gateway is self-provided, and does not involve the provision of commercial telecommunications services to third parties.
>
> 6. Where a GSM Gateway is operated by companies to offer mobile call termination to third parties ("Public GSM Gateway"), the connection to a public network involves the provision of commercial telecommunications services to third parties ie services that are not self-provided by the end user."
>
> [1] a call from a mobile phone to another mobile phone on the same network is known as an "on-net" call.

25. Before us the parties agreed the following in the Statement of Facts:

> *"The distinction between "Public" and "Private" GSM Gateways*
>
> 8. The distinction between "public" and "private" GSM gateways arises from the wording of Regulation 4(2) of the Wireless Telegraphy (Exemption) Regulations 2003. This refers to relevant apparatus "by means of which a telecommunications service is provided by way of business to another person." The term "public GSM gateway" is used to describe a GSM gateway falling within this description. The term "private GSM gateway" on the other hand, is used to describe a GSM gateway falling outwith this description".

26. This agreed definition is not materially different from the distinction made in paragraphs 5 and 6 of the Decision between "private" and "public gateways", cited above.

27. Although it was agreed before us that the distinction between "public" and "private" GSM gateways arises from the wording of regulation 4(2) of the Exemption Regulations, the Statement of Facts does not assist as to the extent to which this distinction between a "private" and a "public" gateway was understood at the time in the industry, by the parties to the Agreement, or the persons who negotiated the Agreement on behalf of the parties to it. Similarly, although the Decision distinguishes between "public" and "private" GSM gateways in terms which reflect regulation 4(2), it does not necessarily follow that those terms were used in that sense in the industry at the time.

28. In this judgment we use the term "public GSM gateway" to mean GSM gateway apparatus by means of which a telecommunications service is provided by way of business to another person.

29. The following was also agreed between the parties:

> "9. Typically, a private GSM gateway is connected to the Private Automatic Branch Exchange ("PABX") of the company using its services and is used by that company alone.
>
> 10. By contrast, the operator of a public GSM gateway typically:
>
> (a) is the owner of that GSM gateway;
>
> (b) has the GSM gateway installed at its own premises or at premises which it otherwise has the right to control and, if it has switching equipment, has the GSM gateway connected to its own switching equipment;
>
> (c) subscribes for the SIMs to be placed into the GSM gateway and places them into the GSM gateway;
>
> (d) enters into contracts with corporate and/or individual customers to supply them with fixed-to-mobile calls at on-net prices below those charged by mobile operators for fixed-to-mobile calls; and …

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

30. OFCOM and Vodafone also inserted a further statement as 10(e) in the passage quoted above to the effect that the operator of a public GSM gateway typically installs or procures the installation of connectivity and operates the GSM gateway so that it can supply those customers. Floe did not agree that statement.

31. The agreed Statement of Facts continued:

"11. A public GSM gateway is likely to generate more traffic than a private GSM gateway and can cause congestion by concentrating significant volumes of traffic in a particular cell site and at particular times of day. Public GSM gateways will usually prevent the mobile operator from providing subscribers with calling line identification."

IV THE AGREEMENT BETWEEN FLOE AND VODAFONE

(a) The Agreement

32. On 12 August 2002 Floe entered into an "agreement for the distribution of mobile voice and data services" with Vodafone (the "Agreement"). As is apparent from documents before the Tribunal, discussions leading to the conclusion of the Agreement had taken place between Simon Taylor, the Chief Executive of Floe and Johnathan Young, on behalf of Vodafone since at least January 2002. Relevant extracts from the Agreement are:

"RECITALS

(A) Vodafone supplies mobile voice and data services to its customers.
(B) FLOE supplies a range of telecommunications services to its customers.
(C) Vodafone wishes to supply the Services to FLOE and FLOE wishes to provide the same to End Users, in accordance with the provisions of this Agreement.

IT IS AGREED as follows:

1. **Definitions**

In this Agreement

"ARPU" means average revenue per user

"**End User**" means FLOE's corporate or business customers to whom FLOE resells the Services to [*sic*] under this Agreement.

"**Services**" means the services described in Schedule 2.

2. **Appointment**

Vodafone appoints FLOE as an authorised distributor of the Services and hereby grants to FLOE pursuant to such appointment, a non-exclusive licence to market and resell the Services to End Users in the Territory, in accordance with and subject to the provisions of this Agreement.

4. **Charges Discounts and Payments**

4.1 The charges at which Vodafone shall sell the Services shall be as specified in Schedule 5 ("**Charges**"). All Charges may be modified by Vodafone giving FLOE 30 days prior notice, unless fixed term Charges have been agreed by the parties for any End User.

4.2 FLOE shall receive the discounts specified in Schedule 5, subject to the conditions set out in Schedule 5 and compliance with Clause 5 and Schedule 3.

4.3 The provisions of the Order Form shall apply to all Services ordered by FLOE under this Agreement.

4.4 Where the ARPU falls below the minimum amount stated in Schedule 5, during any monthly period of this Agreement then Vodafone shall have the right to review the Charges and discounts specified in Schedule 5 and to vary them to a more appropriate level.

4.5 If FLOE defaults in the payment when due of any sum payable under this Clause 4 (whether determined by agreement, determination, judgment or pursuant to an order of court or otherwise) the liability of FLOE shall be increased to include interest on such sum from the date when such payment is due until the date of actual payment (as well as after as before judgment) at a rate per annum of 3 per cent. above the base rate from time to time of Barclays Bank PLC. Such interest shall accrue from day to day. However, Vodafone shall not be entitled to charge such interest on late payments disputed and withheld by FLOE unless the amount not paid is subsequently determined to be validly due to Vodafone.

5. **FLOE's obligations**

5.1 FLOE shall pay for all Services ordered in accordance with this Agreement irrespective of any payment terms it may agree with any End User.

5.2 FLOE shall be solely responsible for all risks and expenses incurred in connection with its activities under this Agreement and shall independently contract for itself with End Users for the purpose of reselling the Services and act in all respects on its own account.

5.3 FLOE shall obtain at its own expense and thereafter comply with all necessary permissions, consents and licences to enable FLOE to purchase, use, distribute, market and sell the Services and to ensure the full and legal operation of this Agreement.

5.4 FLOE shall also:(…)

5.4.4 keep proper and up-to-date records of its activities carried out under this Agreement and to supply Vodafone upon request with any information which it may reasonably request in this respect, including without limitation, such revenue and traffic projections in relation to the Services as are necessary for Vodafone to comply with its obligations under this Agreement;
(…)
5.4.9 maintain a minimum ARPU of no less than Vodafone has achieved at the time of each quarterly review, a minimum of 3000 End Users by the first anniversary of the Commencement Date and a minimum annual spend of £1,000,000 from the first 3000 connections made during the first year following the Commencement Date. The minimum number of connections shall increase by 2000 and the minimum annual spend shall increase by £750,000 for each year this Agreement remains in effect.

5.5 FLOE shall use its best endeavours to ensure that (save where the End User states to the contrary in writing) all negotiations with an End User regarding the provision of Services shall include such representative of Vodafone as Vodafone may from time to time appoint.

6. **Vodafone's Obligations**

6.1 Vodafone shall:

6.1.1 supply Services ordered by FLOE, subject to clause 7 and the capabilities and/or limitations of the Vodafone network from time to time;

7. Sale and Purchase of the Service

This Agreement is not a contract for the sale or purchase of services and any supply of the Services by Vodafone to FLOE shall be subject to execution of an Order Form by FLOE or the relevant FLOE Affiliate and acceptance by Vodafone and shall be governed by the terms and conditions set out in the Order Form, provided that in the event of any conflict or inconsistency arising between any Order Form and this Agreement, this Agreement shall prevail.

9 **Termination**

Notwithstanding anything else contained herein, this Agreement may be terminated:

By either party immediately on giving notice to the other party:

9.2.1 on the 14th day after either party gives the other party notice of a material breach of this Agreement and the other party has failed to remedy the breach by such time.

Schedule 2 – Services

VODAFONE TO PROVIDE

A) Mobile voice services on the GSM system and mobile phone equipment and accessories on the terms of the Order Form and those set out in Schedule 6.
B) 'WAP' Services, the terms to be agreed by the parties at the time of order.
C) Business Solutions, as required and the terms to be agreed by the parties at the time of order subject to a maximum charge of £450 per working day.

Schedule 4 – Bid Qualification and Sales and Marketing Procedures

The parties shall comply with the following bid qualification and sales and marketing procedures:

1. FLOE shall establish a single sales point of contact with Vodafone, such contact to have the necessary authority to agree to all decisions affecting any of the matters dealt with in this Schedule 4.

2. FLOE shall send Vodafone a pre-qualification Services requirement note covering:

   (a) overview of Services (location and design)
   (b) overview of application and protocols, and
   (c) general volume estimates and number of users and locations

(…)

5. There shall be quarterly management review meetings attended by senior sales management from both parties. Such meetings shall be held alternatively at each party's offices…the following subjects will be discussed at the regular review meetings and minuted:

   - FLOE service performance of any services – e.g. Call Centre, Billing….
   - Prospect List
   - Existing Customer List
   - Tenders in progress
   - Tenders completed
   - Win/Loss analysis

…

Schedule 6 – Terms for the Supply of Telecommunications Equipment and Services

1 Definitions

(…)

p) "Mobile Phone" means a Mobile Phone and any other terminal equipment that is capable of transmitting and/or receiving communications via the Network

(…)

w) "Services" means the supply of Equipment, access to the Network and ancillary services to FLOE by Vodafone as detailed in this Agreement or such other services as may be subsequently agreed by Vodafone and FLOE in writing.

2 Scope of the Agreement

2.1 This document sets out the agreement between FLOE and Vodafone under which FLOE may order the Services...

2.2 This Agreement is a Framework Agreement under which each item of Equipment that is a Mobile Phone is taken out under its own separate "Mobile Phone Sub-Contract".

4 Connection of Equipment

4.1 FLOE must arrange connection of the Equipment with Vodafone (unless the Equipment is already connected when received). If Vodafone have not received a request from FLOE to connect the Equipment within 15 days of dispatch Vodafone will automatically connect the Equipment to the Network and the Mobile Sub-Contract shall be effective from that date.

8 Use of the Services

8.1 FLOE undertakes that its End Users shall use the Services in accordance with such conditions as may be notified in writing to FLOE by Vodafone from time to time. Without limiting the generality of the foregoing FLOE undertakes:

(a) not to use or allow others to use the Services and/or the Equipment for any improper, immoral or unlawful purpose including the transmission of defamatory material;

(b) to comply with reasonable instructions issued by Vodafone which concern FLOE's or its End Users use of the Services, the Equipment or connected matters including the use by FLOE and its End Users of Vodafone's customer care services; and

(c) not do or allow anything to be done which in Vodafone's opinion will or is likely to impair or damage the Network or the provision of the Services.

11 Digital Networks

11.1 A SIM card is provided for FLOE's use in order to gain access to digital networks. The SIM card remains the property of Vodafone and is on loan to FLOE only for use of the Services. If requested, the SIM card must be returned to Vodafone if the phone is disconnected from the Network. It is FLOE's responsibility to keep the SIM cards secure as Vodafone is not liable for any loss or liability incurred by FLOE (or any End User) resulting from their unauthorised use. If a SIM card is lost or stolen or damaged it is FLOE's responsibility to inform Vodafone of this. FLOE shall be responsible for the replacement costs of any SIM cards that are lost, stolen, or require replacement (other than warranty replacements that shall be the responsibility of Vodafone) during the term of the Agreement.

16 Termination

16.2 "Vodafone shall have the right to terminate this Agreement immediately on written notice to FLOE if:

a) Vodafone reasonably believes that the Services are or the Equipment is being used in an unauthorised way or for criminal activities; or
b) Floe does anything (or allows anything to be done) which Vodafone reasonably believe may damage or affect the operation of the network.

(b) The Business Plan

33. Prior to entering into the Agreement Floe provided Vodafone with a copy of a business plan (the "Business Plan"). The copy of the Business Plan produced by Floe to Oftel, and on which the Director based his Decision was different to the version on Vodafone's files. The version on Vodafone's files was produced to the Tribunal on 5 July 2004 in response to a request from the Tribunal that Vodafone examine its files following Vodafone's denial in its Statement of Intervention that it had received the version of the Business Plan which Floe had provided to Oftel. Floe has no accurate record of which version of the Business Plan was in fact provided to Vodafone. The version produced on 5 July 2004 was, on its face, specially written for submission to Vodafone. We therefore find that the Business Plan in Vodafone's files and produced to the Tribunal on 5 July 2004 was the Business Plan which Floe provided Vodafone during the negotiations leading to the Agreement. Unlike the version of the Business Plan before the Director at the time he made the Decision, the Vodafone version did not have pictures of GSM gateway devices which Floe intended to use attached to it, but it referred to Floe's intended use of GSM devices with multiple SIM card capability. We have carefully considered the Vodafone version of the Business Plan and in particular the statements in that plan in the following paragraphs:

34. In the Executive Summary it is stated:

"All of Floe's efforts are concentrated on incrementally growing the number of "On-Net" minutes carried over the Vodafone mobile infrastructure. To achieve this Floe will "attack" the switch rooms of small to medium businesses and use its unique product portfolio to directly connect the PABX to the Vodafone mobile network via the air interface. This strategy will provide major benefits to Vodafone Corporate such as:

- Exceptionally high ARPU in excess of eight times current handset figures
- High market penetration
- Low churn
- Lock in
- Value pricing
- Structured channel management"

35. The Business Plan further stated:

"Floe will use its extensive expertise within the existing mobile regulatory environment and its extensive knowledge of least cost routing within the fixed network environment, to build and manage an indirect infrastructure to deliver its value added services and solutions. Floe will sell its own enhanced mobile routing solutions in a carefully planned manner for Vodafone Corporate, its resellers, dealers and business end-users, employing a strategy of both direct and indirect sales channels.

To gain market advantage, Floe has a clearly defined competitive strategy in support of its sales channels, ensuring that it will not become trapped in the mire of the mass mobile handset consumer market. Floe will differentiate by means of packaged service solutions to business that provide customers with significant savings on their current fixed line costs.

(…)

The senior management team will use an extensive network of contacts to set up supply and distribution agreements and work closely with leading manufacturers of customer premise equipment.

Description of Business Activity
Floe Telecom will focus on targeted propositions to business. It will be distinct from other companies seeking to capture new markets in the mobile telecommunications arena, in that it has the ability to achieve high market penetration with value pricing, structured channel management and subsequently, low churn and lock-in, with the delivery of value added services to its chosen customer base.

The company will use its expertise in the existing mobile regulatory environment to build and manage indirect infrastructure to deliver its value added services and solutions. Floe will sell its own enhanced mobile routing solutions in a carefully planned manner for Vodafone Corporate; its resellers, dealers and businesses end-users, employing a strategy of both direct and indirect sales channels.

(…)

Level of Stockholding or Ordering Procedure

Floe will hold an initial stock of SIM's equal to one and half months of forecast and will order on an ongoing two weekly basis SIM's equal to 50% of the next months forecast.

Other Assumptions

- Each SIM generates a minimum of 750 minutes per month.
- Customers are charged at circa 12p per minute and costs are as per the Cellnet Accredited Service Provider Agreement
- The costs of acquiring and installing CPE is capitalised and depreciated over 2 years
- The CPE for disconnected customers is recovered and reused in 80% of cases

Indirect
Pabx Distributors

Some of the largest PABX distributors and dealers in the United Kingdom will sell through Floe's solutions to their existing customer base where there is trust and loyalty between the customer and the supplier and intimate knowledge of the PABX installation to be connected to.

Systems Integrators
Floe has had constructive and detailed negotiations with 2 major Systems Integrators both of whom have expressed a desire to offer telecommunications solutions to their vast existing IT customer bases. Both organisations have stated that a fully managed solution from an external partner would be of great interest. Armed with a Major Business Partner Agreement from Vodafone Corporate, Floe will be in an ideal position to win this business.

Vertical Markets
Floe will design products and packages aimed directly at certain 'high spending' vertical market sectors. Floe believes that with the right products and pricing, there are a number of exiting opportunities to sell fixed to mobile solutions through non-traditional mediums.

Direct
Floe 'Own' Packages
Floe will employ a small but highly specialised direct sales team that will focus on Floe 'Own Branded' business that will, to ensure differentiation and competitor lock-out, concentrate on providing fixed-to-mobile solutions on a single bill.

White Label
Floe Telecom's organisation and structure allows the company to offer "White Label" products and services to major UK brands, two of which are programmed to go to trial in April 2002. White Label is an area where the Floe management team have a particular experience and expertise and would like to discuss further with Vodafone Corporate Affinity Programme makers.

(…)

Hardware Details

Floe will use a range of unique customer premise direct mobile access equipment as a cost-effective solution for Small to Medium Enterprise customers with between five and eighty employees. The solutions employed are compatible with all major types of analogue PABX's and Digital Key Systems and approved for use on fixed and mobile

networks in the United Kingdom. The equipment contains all the technology required for the enhanced routing of fixed line and mobile calls and are suitable for Virtual Private Network (VPN) type environments. The equipment is either connected across the PABX exchange lines in such a manner that it is able to "sense" the dialled information carried on the lines or in the case of the smaller single line solutions, terminate the line to a GSM interface.

Analogue Single Line Solution
Technical Specification

Dual band 900/1800 GSM
Connects to PBX or standard analogue phone set
Routes incoming and outgoing calls from landline telephones to the mobile network
GSM Services: SMS, call hold, call waiting, call forward, multiparty, call transfer, call barring, fixed number and alternate line
Connects to PBX trunk line or analogue extensions
Supports HSCSD data transfer (up to 43.2kbps)
Supports PC fax on Windows 98/98/NT4/2000
Supports SMS on Windows 95/98/NT4/2000
RS232 connector, integrated antenna, external antenna adaptor

Analogue Multi Line Solution
Technical specification

Dual band 900/1800 interfaces
Multi SIM capability up to a maximum of 6
Connects to PBX trunk lines and is scaleable between 2 & 18 lines
Compatible with all major PBX systems
Does not require re-programming of the PABX
Fully parallel connection therefore no loss of fixed-line capability
Transparently Routes incoming and outgoing calls from landline telephones to the mobile network
Power 240VAC 50Hz…

ISDN Basic Rate Solution
Technical specification

Dual band GSM 900/1800
Single or Multi SIM
…

ISDN Primary Rate Solution
Technical specification

Modular Architecture from 2-30 GSM channels per system
Hot Swappable GSM units
Multi SIM Capabilty
…

Product Support

Length of Contracts To Be Offered to Subscribers

Floe is currently looking at, and modelling a number of innovative ways in which to package the fixed-to-mobile solution; these include but are not limited to, fully subsidised hardware, full and partial hardware payments, leasing etc. It is Floe's

intention to offer service contracts ranging from a minimum of 12 months up to a fully leased 3-year package.

V THE AGREED STATEMENT OF FACTS

36. The parties further agreed in the Statement of Facts (except where indicated as not agreed) the following concerning the material facts relevant to this appeal:

"**The manner in which the GSM gateways operated by Floe were connected to and/or disconnected from Vodafone's network**

How were Floe's GSM gateways connected to Vodafone's network?

13. Floe's GSM gateways were connected to Vodafone's network in the same manner as a mobile handset is connected to a mobile operator's network.

14. When a customer connected to one of Floe's GSM gateways made a call from a fixed phone to a mobile phone on Vodafone's network, the GSM gateway would select a SIM registered to Vodafone's network and transmit the call via radio to a base transceiver station forming part of Vodafone's mobile network. From the base transceiver station the call would then be onward routed via Vodafone's mobile network to the mobile phone being called.

15. When Floe's GSM gateway equipment was first activated, it would emit a signal containing data as to the identifying number of the Vodafone SIM card(s) contained within the GSM gateway and the IMEI number of the GSM gateway equipment itself. This would be received by a Vodafone base transceiver station and relayed to another part of Vodafone's network on which a central register of subscriber data was maintained (the "home location register"). This would 'authenticate' the GSM gateway as a new subscriber i.e. it would recognise that the SIM card was a Vodafone SIM card and record the IMEI number of the GSM gateway. Subsequently, whenever Floe's GSM gateway equipment was turned on, the information stored in the home location register would enable the Vodafone network to 'recognise' the GSM gateway.

16. The manner in which the GSM system operates is specified in a series of reference documents published by the European Telecommunications Standards Institute ("ETSI"). These documents describe the different elements of the GSM system and the interfaces between them.

17. A feature of the GSM system is that the role of "mobile stations" (such as GSM gateways) and "base transceiver stations" and the frequencies on which each type of station operates are distinct. GSM gateways transmit signals on one set of frequencies – which is the same set of frequencies on which the mobile operator's base transceiver stations receive signals – and GSM gateways receive signals on another related set of frequencies – which is the

same set of frequencies on which the mobile operator's base transceiver stations transmit.

18. The network of a mobile operator sends information to a mobile handset or gateway device which indicates the precise radio frequency to be used for transmission and also information which is needed by the device or handset to synchronise with the network. On the basis of information sent by the handset or device to a base station, instructions are sent by the base station to the handset or device informing it of the power level it must use. Where a base station uses frequency hopping a handset or gateway device communicating with it must also adopt frequency hopping. This procedure grants permission for the mobile handset or gateway device to start sending or receiving user information (e.g. speech or data) to or from the base station. The customer may terminate the call at any time.

How were Floe's GSM gateways disconnected from Vodafone's network?

19. During the latter half of 2002, Vodafone identified the use of SIMs in public GSM gateways by reference to its call traffic data, from which it is able to pinpoint SIMs generating unusually large volumes of on-net call traffic from the same cell-site.

20. Traffic volumes do not themselves provide conclusive evidence of whether or not a device is providing public or private gateways. Public and private gateways may theoretically produce the same traffic volumes and profiles. Floe says that this allegation is only relevant to and will only rely on it to the extent that it wishes to make submissions as regards Vodafone's dealings with respect to third parties and will not rely on it with respect to any submissions that it wishes to make with respect to Vodafone's dealings with Floe.

    It is also agreed that:

    - call traffic data can be indicative of whether a gateway is public or private;

    - it is unlikely that public and private gateways will produce the same traffic volumes and profile;

    - where Vodafone has identified (based on traffic data) a SIM being used in what it believes to be a public Gateway, it has given notice as described as paragraphs 21-22, 24 and 30 below, so as to avoid any theoretical risk that it might suspend a SIM being used in a private GSM gateway;

    - Vodafone has never sought to suspend SIMs used in private Gateways; and

    - Vodafone has never knowingly suspended SIMs used in private Gateways.

21. In January 2003 Vodafone decided to contact the largest operators which it suspected of using public GSM gateways on its network and ask them to explain what they were doing. Failing an explanation satisfactory to Vodafone, Vodafone would then take action to 'bar' the GSM gateways from the Vodafone network. One of these operators was Floe.

22. On 6 February 2003, Vodafone had a meeting with Floe at which Vodafone's concerns were outlined to Floe. At this meeting, Floe denied that it was providing public GSM gateway services. Vodafone intends to prove this by reference to the witness statements of David James Rodman and Johnathon Young. Floe considers this statement to be incorrect by omission: Floe did not distinguish between public and private GSM gateways at that time.

23. Floe now admits that it was operating public GSM gateways from at least August 2002.

24. On 10 March 2003, after having reviewed the levels and patterns of usage of its SIM cards registered to Floe, Vodafone wrote to Floe asking it formally within 14 days to demonstrate "*to Vodafone's satisfaction that these SIMs are being used for legal purposes only*." Vodafone further stated that: "*Failure to comply will result in the suspension of the service to Floe Telecom without further notice and Vodafone reserves the right to take such further measures as it deems appropriate*".

25. On 13 March 2003, Floe responded to Vodafone and did not deny that it was providing public GSM gateway services nor did it dispute that the use of such services was illegal unless authorized by a licence exemption.

26. On 13 March 2003 Vodafone issued an instruction to its bank to call for payment pursuant to a direct debit arrangement put in place by Floe of approximately £135,000 due from Floe to Vodafone. On 18 March 2003 Vodafone's bank informed Vodafone that the payment had been refused. Vodafone contacted Floe and Floe informed Vodafone that it had cancelled the direct debit.

27. On 18 March 2003 Vodafone suspended the SIMs it had identified as being used in public GSM gateways. It did this by amending its home location register and 'flagging' Floe's SIMs as being suspended. This had the effect that Floe's SIMs were no longer recognised by Vodafone's network, i.e. the SIM card could no longer be used to make or receive calls. These SIMs were not subsequently re-activated.

28. After Vodafone suspended Floe's SIMs on 18 March 2003, Vodafone recorded the IMEI numbers of the GSM gateway equipment in which the SIMs had been used on its Equipment Identity Register ("EIR"). This is a register which is used by Vodafone to record the IMEIs of lost and stolen equipment. The effect of this was that these IMEI numbers were also 'flagged' as suspended on Vodafone's home location register and could not be used to make or receive calls on Vodafone's network. This prevented Floe

from obtaining new Vodafone SIMs and inserting them into the GSM gateway equipment. As a general matter, flagging an IMEI number as suspended on Vodafone's network does not of itself prevent the relevant equipment being used on another network; each operator needs to flag the IMEI on its own network in order to prevent the relevant equipment from being used to communicate via its network. In the case of Floe's equipment the IMEIs were mistakenly uploaded from Vodafone's EIR onto the Central Equipment Information Register ("CEIR"), a centrally maintained database used by all mobile network operators in the UK, to enable them to identify stolen equipment and prevent it being used. Once this mistake came to Vodafone's attention, Vodafone corrected that data on the CEIR.

29. It is agreed between the parties that by the entry of the relevant IMEI number into the CEIR on, say theft, the apparatus to which it related may be permanently or temporarily prevented from using any network. The manner in which this works is as follows. The CEIR acts as a central storage and forwarding mechanism and entries are only effective once entered into the network operator's EIR. Information on the CEIR is downloaded by network operators and stored in each operator's EIR. When a handset or gateway tries to access a network its IMEI number is transmitted to the network and may be checked. If the IMEI is blacklisted or suspended in the relevant EIR, the network may refuse access and a voice call cannot be made. If the IMEI is removed from the EIR it will once again be possible to make calls on the network. The apparatus to which the IMEI number relates is prevented from operating on a UK network only for so long as the entry of its IMEI number in the CEIR is maintained.

30. Floe asserts that Vodafone periodically disconnected further GSM gateways operated by Floe after 18 March 2003. According to Vodafone it did not directly supply Floe with any further SIMs after 18 March 2003. Vodafone therefore maintains that such SIMs must have been obtained from service providers, without Vodafone's knowledge. In situations such as these, Vodafone asserts that, where it found evidence to indicate that public GSM gateways were being used, it would have contacted the service provider to whom the SIMs were registered to ascertain the nature of the usage of the SIMs. Vodafone then allowed a service provider 14 days within which to provide an explanation, failing which it would suspend the SIMs. Where the SIM card was connected to a "Pay as You Talk Tariff", Vodafone would follow its standard practice of sending a text message to the handset of the user, explaining that it intended to suspend the SIM card for illegal use and would then wait 24 hours before effecting the suspension, so as to allow an innocent user to contact Vodafone to explain its usage. This is Vodafone's standard practice where it has no contractual relationship with the PAYT customer and did not hold any other contact details for that customer.

Vodafone's dealings with Floe

The basis of the relationship between Vodafone and Floe

31. Floe's relationship with Vodafone was governed by an agreement dated 12 August 2002 (the "Agreement").

The services being provided by Vodafone to Floe

32. Pursuant to the Agreement, Vodafone appointed Floe as an authorised distributor of certain telecommunications services set out in the Agreement. In essence, Vodafone agreed to sell airtime to Floe, to allow Floe to sell to its customers services comprising the conveyance of voice calls over the Vodafone network. Vodafone also agreed to provide SIMs to Floe, to allow Floe's customers to obtain access to the Vodafone network. Floe agreed to order at least 3,000 SIMs in the first year of the Agreement. Floe disagrees that it obtained the SIMs from Vodafone "to allow Floe's customers to obtain access to the Vodafone network". Floe contends that the SIMs allowed Vodafone to provide services to customers.

33. Floe purchased 250 SIMs from Vodafone in the first month of the Agreement. Vodafone did not receive any further orders from Floe. Floe subsequently purchased further Vodafone SIMs from service providers without Vodafone's knowledge.

34. Floe has made no payments under the Agreement to Vodafone since 13 March 2003 and amounts owing under the Agreement amount to approximately £450,000.

Whether the Agreement authorised Floe to operate public GSM gateway services

35. The Agreement confers no express authorisation on Floe to use public GSM gateways.

Whether Vodafone knew that Floe intended to operate public GSM gateway services

36. Prior to entering into the Agreement, Floe met with Vodafone. Floe indicated to Vodafone that it intended to conclude an agreement with Vodafone, for Vodafone to supply services to Floe to form part of Floe's "least cost routing service" for business users. Floe provided Vodafone with a copy of a business plan."

VI THE RA's STATEMENTS ON THE LEGALITY OF GSM GATEWAYS UNDER THE EXEMPTION REGULATIONS AND ITS CONSULTATION

37. Various statements were made during 2002 and 2003 by the RA concerning the legality of GSM gateway devices. In particular, all parties referred to a consultation on inter alia, the use of GSM gateways commenced by the RA in November 2002. These documents are relevant to a number of the submissions made to us.

(a) The August 2002 Announcement and the website notice of 4 October 2002

38. On 23 August 2002 the RA issued an announcement (the "August 2002 Announcement") concerning devices which enable fixed telephone networks to connect via a mobile phone radio link directly to mobile networks. The letter, as later published on the website was as follows:

> "**23 August 2002**
> **GSM GATEWAYS - RA POSITION ON LEGALITY**
>
> The Radiocommunications Agency (RA) is aware of devices being marketed in the UK which enable fixed telephone networks to connect via a mobile phone radio link directly to mobile networks; these devices are commonly referred to as 'GSM Gateways'. This letter sets out the regulatory position for these devices, and outlines the future plans in relation to GSM Gateways.
>
> The GSM spectrum has already been awarded in the UK to the cellular operators by licence on a nationally exclusive basis. This spectrum can not therefore be licensed to other users. Under the current Wireless Telegraphy (Exemption) Regulations 1999 (1999/930) hereafter referred to as "the Regulations", mobile GSM User Stations are exempt from the need for individual licensing under the Wireless Telegraphy Act 1949. The Regulations do not extend to User Stations that are fixed.
>
> Companies installing and/or using this type of equipment should be aware that GSM Gateway equipment is therefore not covered by the Regulations as the equipment is fixed and does not comply with the definition of a mobile station. In addition, regulation 4(2) of the Regulations provides that the exemption from licensing with respect to "relevant apparatus" does not apply to equipment where a telecommunications service is provided by way of business to another person. GSM Gateway equipment used to provide a public telecommunications service via a connection to a public network will be captured by regulation 4(2) and is therefore again not covered by the Regulations.
>
> Under the Wireless Telegraphy Act 1949 wireless telegraphy apparatus that is not specifically exempted from licensing is required to be licensed, otherwise use of such apparatus is illegal. Anyone installing or operating GSM Gateway equipment without an individual licence will be in contravention of the Wireless Telegraphy Act 1949

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

Due to the wide range of views that have been expressed and the number of representations made to the RA regarding the legality of GSM Gateways the RA plans to hold a consultation that would address the regulatory issues, identify possible options and seek views on any proposals to amend the Regulations. Any initial views and comments on this subject can be sent to:

Richard Young
Public Wireless Networks Unit
Radiocommunications Agency
189 Marsh Wall
London, E14 9SX

I hope the above information is helpful.

Yours sincerely,

Cliff Mason
Hd Licensing Policy Team
Public Wireless Networks Unit"

39. On 4 October 2002 the RA issued a press statement (attaching the above letter) in the following terms:

"The Radiocommunications Agency (RA) has been made aware of devices being marketed in the UK which enable fixed telephone networks to connect via a mobile phone radio link directly to mobile networks. These devices are commonly referred to as 'GSM Gateways'. At present GSM Gateway equipment is not covered by the existing Wireless Telegraphy (Exemption) Regulations as the equipment is fixed and does not comply with the definition of a mobile station. As a result of this the attached letter was sent out by the RA.

Under the Wireless Telegraphy Act 1949 wireless telegraphy apparatus is required to be either licensed or specifically exempted from licensing, otherwise use of such apparatus is illegal. As GSM Gateway equipment and fixed "mobile" applications are not covered by the existing Exemption regulations, anyone installing or operating GSM Gateway equipment / fixed "mobile" applications without an individual licence will technically be in contravention of the Wireless Telegraphy Act 1949.

The Exemption Regulations (current version: "The Wireless Telegraphy (Exemption) Regulations 1999, SI 1999/930") were introduced originally to authorise network customers to use mobile handsets without the need for individual licensing. The sort of equipment developed since, not being 'mobile', is not covered by the Regulations and, depending on the type of use, may also fail Regulation 4(2) which prevents exempted equipment from providing a telecommunication service.

The RA therefore considers there to be a need to seek the views and requirements of operators, manufacturers and other interested parties in order to find a sensible and

proportionate way forward as soon as possible. One reason for this is that the intensive 'public' use of Gateways and fixed "mobile" applications could affect the engineering stability of licensed networks in a particular area. It is not therefore a foregone conclusion that we can simply legitimise them, hence the need for a measured, pragmatic approach.

RA is therefore drafting a consultation on GSM Gateways which will be published on the RA's internet site and will address the regulatory issues, identify possible options and seek views on any proposals to amend the Regulations.

In the meantime should you have any enquiries regarding the RA's enforcement policy on GSM Gateways please contact Derek German (020 7211 0455), derek.german@ra.gsi.gov.uk"

(b) The November 2002 Consultation

40. A consultation paper entitled *Public Wireless Networks – Exemption of User Stations* was published by the RA in November 2002 (the "November 2002 Consultation"). Relevant extracts from that document are as follows:

> "**1 EXECUTIVE SUMMARY**
>
> 1.2 Under the Wireless Telegraphy Act 1949, wireless telegraphy apparatus that is not specifically exempted from licensing must be licensed, otherwise its use is illegal. The current Wireless Telegraphy (Exemption) Regulations 1999 (SI 1999/930), hereafter referred to as 'the Exemption Regulations', incorporate earlier legislation introduced to exempt mobile user stations – such as Global System for Mobile communications (GSM) handsets – from the need for individual licensing. However, the Exemption Regulations do not extend to fixed user stations (i.e. those that do not comply with the definition of a mobile station).
>
> 1.3 RA is aware of devices, being marketed in the UK, that enable fixed telephone networks to connect directly to mobile networks via a mobile phone radio link; these devices are commonly called 'GSM gateways'. Recent years have also seen the development of various fixed 'mobile' telematic applications such as vending machines and automatic transfer machines (ATMs), which use licensed public networks spectrum to deliver a service. Other fixed devices connecting to data, paging or Public Access Mobile Radio (PAMR) networks may also be inadequately covered; their status under the Exemption Regulations needs to be clarified.
>
> 1.4 Leaving aside the question of whether they are fixed or mobile, user stations may – depending on the type of use – also fail Regulation 4(2), which precludes the provision of a telecommunications service via exempted equipment. GSM gateways appear to be used mainly for private commercial

use (i.e. gateways installed as extensions to PABX[1] systems, where companies are self-providing services for their staff). However, some service providers wish to use a gateway as a link from their own network to a cellular network to carry third-party traffic and thus provide a telecommunications service. This is a grey area at present, as these service providers cannot be licensed under the Wireless Telegraphy Act 1949 – the cellular radio frequencies are already licensed to UK cellular network operators on a nationally exclusive basis, so cannot be licensed to other commercial users.

1.5 RA has discussed these issues with representatives from the licensed network operators, manufacturers of telephony equipment and individuals. Because of the wide range of views expressed regarding the legality of GSM gateways, RA issued a statement on 23 August 2002 and a website notice on 4 October 2002. This consultation document seeks to address the regulatory issues, identify the options and seek views on proposals to amend the existing Exemption Regulations. The views and requirements of operators, manufacturers and other interested parties are therefore sought, to find a sensible and proportionate way forward.

(…)

3 INTRODUCTION

3.3 Introducing new technologies and services is likely to affect competition in a range of product and service markets. This will have an impact on the various public organizations, individuals and companies that use radio to provide or receive a service. For example, introducing a new technology like GSM Gateways may have the benefit of increasing choice and lowering prices to consumers, but the impact on the integrity and grade of the service delivered by the spectrum provider must also be considered.

(…)

4 USER STATIONS

4.3 GSM Gateway technology enables a call from a fixed office phone system to be routed directly via a GSM link to a GSM mobile phone. The gateway is effectively a fixed mobile containing the subscriber identity module (SIM) for a number of networks. The gateway recognizes a mobile endpoint, selects a SIM to correspond and sets up the call. The call appears to the network to have originated from another mobile of the same network, so it enjoys a cheaper call rate. The purpose of the gateway is, therefore, to avoid the higher charges of fixed-line-to-mobile calls and exploit the lower tariff of mobile-to-mobile calls within the same network.

(…)

5. REGULATORY ISSUES

5.1 There are two issues concerning the installation and operation of fixed stations, GSM gateways and other fixed mobile applications under the Exemption Regulations:

---

[1] Private Automatic Branch Exchange – an automatic telephone switching system for providing access to the public telephone system. A PABX usually serves a single commercial entity and is located on its premises.

(i) fixed stations, fixed mobile terminals and GSM gateways are not covered by the definition of 'user station' in the existing Exemption Regulations; and

(ii) under Regulation 4(2) of the existing Exemption Regulations, user stations may not be used to provide a telecommunications service 'by way of business', i.e. commercially.

Fixed Use

5.2 A 'user station' is defined in Part I of Schedule 3 of the Exemption Regulations, as amended by SI 2000/1012, SI 2001/730 and SI 2002/1590, as a mobile station for wireless telegraphy designed or adapted to be:

(a) connected by wireless telegraphy to one or more relevant networks; and

(b) used solely for the purpose of sending and receiving messages conveyed by a relevant network by means of wireless telegraphy.

5.3 Ordinarily, the term 'mobile station' applies only to equipment that is movable and not fixed. It is therefore difficult to support an interpretation of the term that includes a fixed mobile terminal or GSM gateway equipment (where such equipment is effectively a fixed mobile phone).

5.4 It may be argued that if such equipment is manufactured to the same standards as 'true' mobile user terminals, it will probably cause little or no interference to the networks it uses. There are engineering implications for network operators, as a fixed station within a cell can affect traffic flow and capacity, and therefore has the potential to degrade service to mobile users. However, operators are currently accepting and connecting customers with such equipment, and they might reasonably be expected to provide additional capacity to accommodate the extra traffic. Ultimately, the decision to accept a customer rests with the operator, who may decline connection if the stability of the network is threatened.

5.5 Since there are several instances where network customers will employ fixed data, GSM or other equipment:

Proposal 1: It is proposed that the definition of 'user station' be amended to cover any customer of the network, irrespective of its fixed or mobile status.

Public/Private Use

5.6 Regulation 4(2) of the Exemption Regulations provides that (with the exception of equipment operating in the 2.4 GHz band) the exemption from licensing of 'relevant apparatus' does not apply to apparatus that provides a commercial telecommunications service to another person via a wireless telegraphy link. This prevents commercial users from usurping spectrum designated for deregulated uses such as low-power devices, cordless telephony and telecommand, as this would be detrimental to the permitted applications in those bands.

5.7 It would therefore appear that equipment such as GSM gateways is permitted (i.e. does not fall within Regulation 4(2)) if it is used to provide a private connection to a public network, as it is not providing a telecommunications service to third parties. However, the use of GSM gateway equipment to provide a public connection to a public network is not permitted (i.e. does fall within Regulation 4(2)) as the link does provide a third-party telecommunications service.

5.8 However, if operators choose to connect customers to the network, does it matter if the traffic carried is a private or a public service? Where large-volume gateway systems might impact on network planning, operators could require users to declare such use before installation to allow for network configuration. In any case, RA believes that relaxing the Exemption Regulations to permit public connections would give the operators a choice, and would also bring potential benefits for consumers in terms of increased competition and reduction of call costs.

Proposal 2: It is proposed that the restriction on the type of service that may be provided via network user stations shall be withdrawn.

(…)

7 REGULATORY IMPACT ASSESMENT

7.2 The deregulation of fixed user stations should encourage greater use of the radio spectrum and assist the free circulation of radio-based equipment within Europe and beyond. It will benefit UK manufacturers, small businesses, service providers, retailers and consumers by facilitating the use of a new generation of sophisticated telephony terminals. Deregulation – which will affect only user stations, not the provision of the networks to which they are configured – will remove the need for regulatory licensing and fee-paying requirements for UK consumers. Exempting this range of equipment from licensing should provide significant financial benefits to small businesses and the UK economy in general."

41. Pausing there, it would appear that, as at November 2002 the RA considered that "GSM Gateways" in general (without making any distinction between "public" and "private") were not covered by the Exemption Regulations since the apparatus in question was "fixed" rather than "mobile" and thus fell outside the definition of "user station" for the purposes of those Regulations. The RA proposed, however, that the Exemption Regulations should be amended so that such apparatus would be exempted. Secondly, however, the RA considered that, by virtue of Regulation 4(2) of the Exemption Regulations, the supply of GSM gateway services to third parties (i.e. "public GSM gateways" as defined for the purposes of this case) was required to be licensed. However, the RA's proposal was that such a licensing requirement should be withdrawn, in order notably to enhance consumer choice, reduce costs and increase competition.

(c) The licensed MNOs' response to the Consultation paper

42. On 21 February 2003 the MNOs, including Vodafone, submitted a joint response to the November 2002 Consultation Paper. In that paper the MNOs stated the following:

(a) they supported a change to the definition of "User Station" to cover any customer of the network irrespective of fixed or mobile status;

(b) they supported the "self-use of private GSM gateways by corporate customers for routing their own traffic";

(c) The MNOs were concerned about "public GSM gateways" – referred to as "3rd party public commercial gateways" – which enabled third parties to connect directly to mobile networks by way of a mobile phone radio link and provide commercial services to others; and

(d) A change to regulation 4(2) would reduce spectrum efficiency and give rise to network planning problems.

43. Vodafone's disconnection of Floe occurred shortly after this joint response was submitted.

(d) The 18 July 2003 Statement

44. On 18 July 2003 the Government announced its conclusion following the Consultation. It issued the following statement:

> "**Government announces results of the consultation "Public Wireless Networks – Exemption of User Stations**
>
> …The Government confirms:
>
> that the definition of "User Station" will be extended to cover any customer of the network, irrespective of its fixed or mobile status; and that the general restriction of

provision of services to third parties over exempt devices, except where otherwise specifically provided for in the Regulations, will be retained.

User devices connecting to networks may be mobile, fixed or portable depending on the type of application. The Government concludes that the current definition of "User Station" in schedule 3 of the Regulations may be ambiguous and when next revised, the Regulations will be clarified to cover both fixed and mobile user devices. This supports the majority of responses to the first proposal and enables the use of Gateway devices by private users.

Many responses from small businesses also supported the second proposal, to remove the restriction in Regulation 4(2) on the carriage of third party traffic over exempt devices. However, the benefits of this are mitigated by the fact that the operators' ability to comply with their Regulatory requirements with regard to emergency calls and security concerns are impaired and that the resulting use of spectrum is very inefficient. After considerable discussion with manufacturers and users of Gateway equipment and considering technical and other information supplied by them, the Government concludes that the restriction must be retained.

Mobile Network Operators ("MNO's") licensed under the Wireless Telegraphy Act 1949 can use their own (or third party) equipment in accordance with their licences in order to provide a telecommunications service. In some circumstances MNO's may be able to consider purchasing products or services from Gateway Operators for use under the auspices of MNO licences. Although a commercial matter for the companies concerned, the Government encourages the MNOs and Gateway Operators to consider ways to address pragmatically existing uses of equipment that continue not to meet the requirement for exemption."

45. The last paragraph of this statement of 18 July 2003 suggests that, even though public GSM gateways were not to be exempted under the Exemption Regulations, in certain circumstances Gateway Operators could operate under the auspices of the relevant MNO's licence, MNO's and Gateway Operators being encouraged "to address pragmatically existing uses of equipment that continue not to meet the requirements for exemption."

VII THE COMPLAINT AND THE DECISION

(a) The Complaint

46. On 18 July 2003 Floe made a complaint to the Director in which it alleged that Vodafone had inter alia breached the Chapter II prohibition by periodically suspending Floe's GSM gateway services on the grounds of unlawful activity yet still permitting GSM gateway services by others, including its own service providers.

47. In response to the complaint, Vodafone told the Director that it considered that Floe was operating an unlawful service and that it therefore had an objective justification for refusing to continue to supply Floe.

(b) The Decision

48. The Director published his Decision on 3 November 2003.

49. The Decision was that the Director did not consider that Vodafone's disconnection of Floe's services constituted an infringement of the Chapter II prohibition. According to the summary of the Decision at paragraph 71 (under the heading "Conclusion: Non-Infringement") this was because:

"• evidence submitted demonstrates that Floe has not been authorised by Vodafone, in accordance with either the terms set out in Condition 8 of Vodafone's WTA licence or the Government announcement of 18 July 2003, to provide Public GSM Gateways as defined;

• Vodafone had an objective reason to refuse to supply Floe's Public GSM Gateway services; and

• the Director does not consider that Vodafone is acting in a discriminatory manner in its treatment of Public GSM Gateway operators."

50. The reasons for the Director's Decision can be summarised as follows:

(a) The Director was satisfied that Floe was providing public GSM gateway services (paragraphs 18 to 25) ;

(b) the Director considered that Vodafone's disconnection of Floe was to be characterised as a refusal to supply and that a dominant undertaking would be objectively justified in refusing to supply a customer where the products or services to be provided were to be used in an unlawful manner (paragraphs 23 and 38);

(c) The Director considered section 1 of the WTA 1949 and Regulation 4 of the Exemption Regulations and found that Floe was using GSM gateways to provide a telecommunication service "by way of business to another person" and that such use did not benefit from exemption from licensing (paragraphs 39 to 41);

(d) The Director referred to the confirmation he had received from the RA that the licences issued to Mobile Network Operators ("MNOs"), including Vodafone, under the WTA 1949, contain terms which could enable third parties legally to provide public GSM Gateways under the relevant MNO's WTA licence and that the key term in the Vodafone licence is Condition 8 (paragraphs 42 to 43);

(e) The Director considered that for Floe's public GSM Gateway to be operated lawfully it would be necessary for an arrangement to be in place between Vodafone and Floe whereby Vodafone expressly authorised in writing the use of Floe's public GSM gateway equipment in line with Condition 8 (paragraphs 44 to 45);

(f) The Director considered that the contract between Vodafone and Floe was not sufficient to constitute an agreement between the parties about the provision of public GSM gateway services by Floe, as envisaged by Condition 8 of Vodafone's WTA Licence. The Director did not find anything in the contract between Vodafone and Floe to indicate that Vodafone had given written authorisation to Floe to provide public GSM gateway services and had not seen any other evidence which demonstrated that Vodafone had given written authorisation that Floe could operate public GSM gateways under the terms of Vodafone's licence. Therefore Vodafone had not given Floe written authorisation to provide public GSM gateway services pursuant to Condition 8 of its licence (paragraphs 49 to 52);

(g) The Director also referred to the Government announcement of 18 July 2003 which he said also indicated that it is possible for public GSM Gateway services to be authorised by MNOs, subject to meeting any other legal and regulatory requirements (paragraphs 44 to 45);

(h) In order to meet the requirements set out in the Government announcement of 18 July 2003 the Director adopted Vodafone's interpretation that the GSM Gateway equipment would need to be owned and controlled by the MNO. No evidence was provided to the Director regarding the conclusion of an agreement whereby Vodafone purchased Floe's GSM Gateway equipment. The Director noted that in making his decision he had not sought to specify the exact form that the possible arrangements should take under the Government announcement (paragraphs 53 to 54);

(i) Under the heading "conclusion on refusal to supply" at paragraphs 55 to 57 of the Decision the Director stated:

> "55. The Director does not consider that the evidence submitted by Floe meets the requirement set out in Condition 8 of Vodafone's WTA licence. Furthermore, no evidence has been provided regarding the conclusion of an agreement whereby Vodafone purchased Floe's GSM Gateway equipment, thus meeting the requirement set out in the Government announcement of 18 July 2003.
>
> 56. Irrespective of the parties' arguments regarding the use to which the SIMs supplied to Floe were going to be put, the Director has not been provided with any written evidence indicating that Vodafone has at any time authorised Floe in writing to provide Public GSM Gateway services. Although it is possible that at the time of service provision to Floe certain Vodafone personnel may have been aware that Floe was using SIMs supplied by Vodafone in GSM Gateway equipment, this does not constitute a formal written arrangement between the parties sufficient to 'legalise' the operation of a Public GSM Gateway.
>
> 57. Therefore, as the services which Floe was providing were illegal, Vodafone had an objective reason to refuse to supply Floe."

51. In this appeal OFCOM has abandoned the Director's reasons set out in (d) to (h) above and has submitted that neither condition 8 of Vodafone's licence nor the possible way forward envisaged in the Government announcement of 18 July 2003

are now or were ever capable of providing a method pursuant to which Vodafone could authorise the use of public GSM gateways by Floe.

52. Condition 8 of Vodafone's WTA licence and the Government announcement of 18 July 2003, mentioned above, are considered in further detail below.

53. Oftel had commenced its investigation in this matter because it held a "reasonable suspicion" for the purposes of section 25 of the Competition Act 1998 that Vodafone was abusing a dominant position. However, no firm conclusions were reached by the Director on the definition of the relevant market in this case, nor as to whether or not Vodafone occupied a dominant position in a relevant market. According to the Decision, the reason for that was that the Director was satisfied that, even if Vodafone were found to be dominant in a relevant market, Vodafone's conduct would not in any case amount to an abuse within the meaning of the Chapter II prohibition and it was therefore not necessary to reach any firm conclusions on those matters (paragraphs 17, and 30 to 37 of the Decision).

54. In the Decision and before us, it was accepted by all parties that a refusal to supply by a dominant undertaking can be an abuse for the purposes of the Chapter II prohibition unless it is objectively justified.

VIII FLOE'S APPEAL TO THE TRIBUNAL

55. The administrators of Floe submitted a Notice of Appeal to the Tribunal on 2 January 2004. The reasons stated by the administrators in their notice of appeal that the Decision should be overturned were:

> "1 A failure by OFTEL to investigate "Private" GSM Gateways when they formed part of the complaint
>
> 2 A failure by OFTEL to base its investigation on the legislation prevailing at the time
>
> 3 The use by OFTEL of an incorrect assumption in coming to one of their conclusions. OFTEL thought that Floe had been made an interconnection offer. This was not so."

56. A case management conference was held on 6 February 2004. At that case management conference Vodafone was granted permission to intervene in the proceedings. Floe was represented at that hearing by Mr Mercer of Taylor Wessing who indicated that he had recently been instructed. Mr Mercer applied at that case management conference to be permitted to file and serve an application to amend Floe's notice of appeal pursuant to rule 11 of the Competition Appeal Tribunal Rules 2003 (SI 2003/1372) by substituting an entirely new Notice of Appeal. Floe's proposed amended Notice of Appeal was submitted to the Tribunal on 20 February 2004 and written observations from OFCOM on Floe's application were received by the Tribunal on 5 March 2004. Floe's application to amend its Notice of Appeal, which was contested by OFCOM and Vodafone, was heard at a further case management conference on 2 April 2004. At that hearing the Tribunal granted Floe's application to amend its Notice of Appeal, save that Floe was not permitted to introduce an amendment seeking to challenge the Decision on the basis of an argument based on discrimination. The Tribunal gave its written reasons in a judgment handed down on 30 April 2004 (see [2004] CAT 7).

57. The hearing of Floe's application for permission to amend its notice of appeal was heard on the same day as a case management conference in another case concerning the disconnection of GSM gateway services, Case 1027/2/3/04 *VIP Communications Limited v Office of Communications*. The appellant in that case, VIP Communications, was also represented, for the purpose of that case management conference, by Mr Mercer. That case concerned a decision taken by the Director following a complaint made to him by VIP Communications following the disconnection of its GSM gateway services by T-Mobile. That decision is similar to the Decision taken in the present case.

58. Following the case management conference on 2 April 2004 and correspondence between all parties and, in particular, an undertaking given by VIP Communications through their solicitors Taylor Wessing to be bound by the Tribunal's final judgment in the Floe appeal, the Tribunal made an Order on 20 April 2004 that T-Mobile be granted permission to intervene in Floe's appeal, that VIP Communications' appeal be stayed pending determination of Floe's appeal, and that the Tribunal will give such

consequential directions in the VIP Communications appeal as may be appropriate in the light of this judgment after considering any observations of the parties.

59. Following the Tribunal's decision granting Floe permission to amend its notice of appeal, the original notice of appeal was abandoned. Floe's new notice of appeal challenges the Decision under three "headings" which it called the "Primary Argument", the "First Alternative Argument" and the "Second Alternative Argument", respectively.

60. The Primary Argument is that Floe did not need authorisation under section 1 of the WTA 1949 to provide gateways, whether public or private:

    (a) because on a true construction of section 1 of the WTA 1949, as applied to the facts of the case, it was Vodafone that "used" the GSM gateways under the auspices of its WTA licence and the GSM gateways were not "used" by Floe; and

    (b) if, contrary to (a) above Floe did "use" the GSM gateways, then the prohibition of public GSM gateways by section 1 WTA 1949 and the Exemption Regulations issued under that section is contrary to Directive 1999/5/EC ("the RTTE Directive") and Directive 2002/20/EC (the "Authorisation Directive").

61. The First Alternative Argument is that Floe had been authorised in any event to use the GSM gateways under Vodafone's licence by entering into the Agreement (which Agreement is to be construed against Floe's Business Plan submitted to Vodafone in advance).

62. The Second Alternative Argument is that even if Floe "used" the GSM gateways in contravention of section 1 of the WTA 1949:

    (a) Vodafone was not entitled to disconnect Floe since the enforcement of section 1 of the WTA is to be carried out by the regulator and not Vodafone. Accordingly Vodafone's unilateral disconnection of Floe could not be objectively justified; and

(b) The criteria which Vodafone applied when deciding to disconnect were arbitrary in that they were not capable of distinguishing between lawful and unlawful use of gateways and accordingly the disconnection cannot be objectively justified.

Floe made no submissions on element (b) of the Second Alternative Argument, either in its skeleton argument or at the hearing.

63. T-Mobile did not make submissions concerning each point in this appeal but adopted the submissions of OFCOM and Vodafone, except where indicated otherwise.

64. The Primary Argument requires consideration of the construction of section 1 WTA 1949, the Exemption Regulations made under that section, and certain relevant European Directives (the RTTE Directive of 1998 and the Authorisation Directive of 2002). The First Alternative Argument requires consideration of the terms of Vodafone's licence under the WTA 1949, the Agreement, the Business Plan submitted by Floe to Vodafone prior to the conclusion of the Agreement, the 23 August 2002 Announcement by the RA, the November 2002 Consultation paper issued by the RA and the 18 July 2003 Announcement. The first part of the Second Alternative Argument requires consideration of whether Vodafone were "objectively justified" for the purpose of the Chapter II prohibition in disconnecting Floe.

IX BACKGROUND TO THE APPEAL

The contacts and correspondence between Floe and Vodafone relating to the disconnection

65. In addition to the agreed facts, the Tribunal has been provided with evidence as to the background to, and the contacts between Floe and Vodafone concerning, the disconnection of Floe's services. These include the following.

66. In a witness statement dated 26 May 2004, Mr Rodman, Head of Regulatory Policy at Vodafone UK, states as follows:

"5. Indeed, with the liberalisation of the telecommunications market in the UK, and with the multiplicity of network operators and service providers, there are numerous opportunities for users to reduce their overall telephone bills by choosing the cheapest ways of making calls. There are active in the UK market various companies providing so-called least cost routing services. They tend to market their services to corporate customers, who incur relatively high telephone bills, and offer them cheaper charges by routing their calls across transit networks and through other devices which offer cheaper prices than conventional carriers' charges. A least cost routing company will generally connect is own equipment to the customer's switchboard equipment (PABX) and carry the traffic itself, up to a point of handover to third party network operators for on-delivery to its destination. The carrier will arrange for the traffic to be carried, in each case, by the lowest cost route. The company will charge for its services, at a price which effectively allows the end user to achieve an overall reduction in its telephone bills, whilst remunerating the routing company for its services. This activity is generally perfectly legal, provided that all the carriers involved operate within the terms of applicable authorisations and licences.

6. In 2002, I learned that some such companies also establish and use public GSM gateways. These are devices which may hold a substantial number of SIM cards (e.g. Vodafone SIM cards, 02 SIM cards, Orange SIM cards, T Mobile SIM cards). A telecommunications operator carries relevant call traffic to the gateway. At the gateway, the call is routed through a SIM card associated with the network to which the call is destined to be delivered (so, a call to a Vodafone subscriber is routed via a Vodafone SIM card). (The gateway operator can select the correct network SIM card by finding out the number ranges allocated to particular networks.) The call routed through the SIM card is treated, by the Vodafone network, like any outgoing call originated on a Vodafone handset and is delivered to the called party, in all respects as if it were an on-net call from one Vodafone subscriber to another. If the gateway operator has acquired the SIM card as part of a package offering cheaply-priced on-net calls, he will pay only that cheap on-net call price for the delivery of the call from the gateway to the called party. Where a gateway operator provides services to numerous customers, it will be able to pass large volumes of traffic through the gateway. Vodafone's subsequent investigations revealed that public GSM gateway operators were contracting to carry a variety of kinds of call traffic through their gateways, including internationally-originating calls, calls originating on fixed UK networks (which the fixed network operator hands over to the gateway operator for routing through the gateway) and calls originating from a corporate customer's switchboard, and routed to the gateway by the use by the corporate customer of a special 4 digit dialling prefix (1xxx). Vodafone believed that the use of such public GSM gateways for all these purposes was illegal.

67. After drawing attention to various technical problems which such GSM gateways allegedly cause, Mr Rodman continued at paragraphs 11 to 12:

"11. For completeness, I should also mention the use of so-called private GSM gateways. A private GSM gateway is a device containing a single SIM card, which may be attached directly to a corporate customer's switchboard (PABX) and used to route outgoing calls from the switchboard through the gateway, and through a particular SIM card for on-delivery of the call to a subscriber to the network with which the SIM card is associated. It serves the same purpose as a public GSM gateway – namely to convert a fixed-to-mobile call, for charging purposes, to an on-net call.

12. I had been familiar with private gateway devices when I worked in the mobile telecoms sector in South Africa, before joining Vodafone. In the UK, Orange had been the first mobile network operator to offer private gateways, using Premicell devices. Vodafone's own in-house service provider business, Vodafone Corporate, found that it also had to offer private gateway devices to its corporate customers, in order to compete effectively with Orange."

68. We pause at this stage to observe that, in our view, a great deal of the confusion that has arisen in this case is due to the fact that the expression "public GSM gateway" has not always been used by all parties in the same sense. For example, it is clear to us that in the above passages Mr Rodman is using the expressions "public GSM gateways " and "private GSM gateways" in a sense different to that used in the agreed Statement of Facts and in the Decision. In the agreed Statement of Facts, the distinction between a "public" and a "private" gateway is that in the former case the apparatus in question is supplied so as to enable "a telecommunications service to be provided by way of business to another person", within the meaning of regulation 4(2) of the Exemption Regulations. According to this definition, it is immaterial whether the apparatus in question is used by a single user (such as where a least cost routing company connects equipment to a single customer's PABX as set out in paragraphs 5 and 11 of Mr Rodman's statement) or is "multi-user," where the apparatus is used to convey calls from numerous customers, as set out in paragraph 6 of Mr Rodman's statement. Similarly, the definition of "public GSM gateway" in paragraph 6 of the Decision, cited above, does not depend on whether the public GSM gateway is "single user" or "multi-user". According to the definition in regulation 4(2) it is likewise immaterial whether the GSM gateway uses one SIM card or more than one SIM card (as set out in paragraphs 6 and 11 of Mr Rodman's statement).

69. It appears to us from Mr. Rodman's witness statement, that it is far from clear that either he or Floe understood at the material time that the supply by Floe to another

person of a telecommunications service using GSM gateways would constitute the supply of a "public GSM Gateway" as that expression was later defined in the Decision and in the agreed Statement of Facts.

70. Thus, at paragraphs 19 and 20 of his witness statement Mr Rodman describes a meeting he had with Floe on 6 February 2003 in these terms:

> "19. John Overton, Johnathan Young and I were in attendance at the meeting on 6 February, from the Vodafone side. Simon Taylor and Graham Ward, a former executive of Vodafone, attended on behalf of Floe. At the meeting I explained our concerns with respect to the illegal operation of public GSM gateways and the associated problems with congestion, CLI and interception. I stressed that the use of public gateways was illegal. Simon Taylor did not take issue with this. Instead, he assured us on more than one occasion that Floe was only engaged in providing private GSM gateways. He explained that Floe's business was focused on serving small and medium sized enterprises with private gateway solutions. He expressed sympathy with any network congestion problems which Vodafone was encountering, and offered to help to find ways of solving them.
>
> 20. Absent any precise data as to Floe's usage, I did not question Simon Taylor any further on this at the meeting. I was aware that, having worked with Telecom FM, Simon Taylor would be fully familiar with private gateway devices, and there was no question of his having misunderstood what I was saying."

71. In this passage of his evidence, assuming it to be accurate, it seems to us that Mr Rodman may not be using the phrases "public GSM gateways" and "private GSM gateways" in the sense set out in the agreed Statement of Facts and the Decision. Mr Taylor's reported statement that "Floe's business was focused on serving small and medium sized enterprises with private gateway solutions" suggests to us that, according to Mr Taylor, Floe was supplying each such customer individually with separate GSM gateways, without appreciating that such supply would involve Floe in supplying "public" GSM gateways in the sense of the Agreed Statement of Facts and the Decision.

72. On 10 March 2003 Jeff Wearing, Director of Security, Fraud and Risk Management at Vodafone wrote to Simon Taylor of Floe referring to the meeting that had taken place between Mr Taylor and his colleagues from Vodafone in early February 2003 at which Mr Wearing believed Mr Taylor indicated that Floe supplied GSM gateway

devices to individual ME and SME customers for their own use and billed them for calls but did not supply a GSM gateway service on a wholesale basis to third parties. That letter referred to an analysis of 29 SIMs on a Vodafone cell near Heathrow Airport, registered to Floe, which made an average of 163 calls each, which suggested to Mr Wearing that the SIMs were used in GSM gateway devices to supply services to third parties. Mr Wearing required Floe to demonstrate that the GSM gateways were being used "for legal purposes only" within 14 days failing which service to Floe would be suspended without further notice.

73. On 13 March 2003 Mr Taylor of Floe wrote to Sir Christopher Gent, then Chief Executive of Vodafone Group plc, referring to the letter from Mr Wearing of 10 March 2003. Mr Taylor referred to the consultation being undertaken by the RA to review the legality of GSM gateways and that the RA had stated publicly that whilst the consultation period is underway taking "precipitous" (sic) action would be inappropriate. Mr Taylor stated that prior to entering into the Agreement Floe had approached Vodafone and shared its strategy and detailed business plan with Vodafone and explained that the "fixed to mobile element of the plan" was a very important feature for attaining new customers.

74. Mr Taylor of Floe also responded to Mr Wearing on 13 March 2003. He stated:

> "Floe Telecom supplies a whole range of telecommunications services to UK based businesses. Included in the service portfolio is a fixed to mobile service solution, all of which was covered with Vodafone in great detail during the six months or so it took to agree and sign the contract. The only thing that has changed since that time is the type of customer we have been able to attract. Initially as you rightly state, we were targeting the ME and SME type business. However, it has turned out that the customer that has been most attracted to our services has been major corporates and blue-chip organisations, which enabled us to build an impressive customer list. This has meant that we have had to reassess our service delivery mechanisms in order to meet with the additional needs of this type of customer.
>
> I am surprised that Vodafone needed to go through the activity of analysing traffic data associated with our SIM's in order, to come to the conclusion that the activity patterns of 14th November were indicative of the use of Gateways. You were eminently aware of this during our contract negotiations…
>
> Our corporate customers being mainly City-based organisations, presented us with a problem with connection, as we knew that (especially) the City of London was an area of extremely high mobile activity. Our solution to this problem was to invest heavily in switching and network infrastructure in order to move the activity to areas

where the impact on the viability of the Vodafone network would be less apparent. (You will be aware of this from your network activity records that Floe does not operate a single gateway in the centre of a city). The result of all this is that in order to reduce the pain for your network planners, Floe "extends" the corporate customers premises by the use of leased lines and indirect access switching, to terminate traffic in areas of lower mobile activity. Hence the conclusions you reached (incorrectly) in your analysis of our traffic in November…

We are all aware of the current activities being undertaken by the Radiocommunications Agency (RA) with regard to the use of 'fixed user stations' and Floe has held a number of meetings with the DTI, RA and OFTEL on the subject. You will also be aware that, until a judgment is forthcoming from the Secretary of State, the RA have stated publicly that 'it would be inappropriate to take precipitous action against their use during the consultation period'."

75. On 7 April 2003 Gavin Darby, UK Chief Executive Officer of Vodafone responded to the letter from Floe dated 13 March 2003 to Sir Christopher Gent and to the letter of the same date to Jeff Wearing. That letter stated the following:

> "Vodafone did not state that Floe's business with Vodafone "*is going to be suspended due to the use of 'illegal gateways' which are causing Vodafone network problems.*…Instead, Vodafone asked Floe Telecom to demonstrate, to our satisfaction, that the 29 SIMs registered to your company showing unusually high traffic patterns were not being used for illegal purposes, namely the supply of GSM gateway services to third parties…Your two letters do not address this point. The clear inference from your letters is that you acknowledge that you are operating a wholesale supply of gateway services, and you do not claim to have a licence to do so (which is hardly surprising as the stated view of the Radiocommunications Agency (RA) is that such activities cannot be licensed under the current regime). In the light of this failure to satisfy us that you were not using the SIMs for illegal purposes, we were fully entitled to terminate the contract without further notice and with immediate effect under clause 16.2 of Schedule 6. We are therefore within our rights to suspend service to you…
>
> Vodafone is well aware that GSM Gateways are the subject of an RA consultation. Vodafone is also aware that the RA has stated on its website that the use of such devices is currently illegal. Vodafone has no reason to believe that the outcome of the RA's review will be that the provision of wholesale gateway services will be legalised."

76. Also contained in the bundle of documents before us is a letter dated 19 May 2003 from Mr Darby of Vodafone to Baroness Billingham. That letter states *inter alia*:

> "My understanding is that, for the moment, the RA has not sought to enforce the breach of the law by GSM Gateway operators while the consultation is continuing. However I believe that the RA is well aware that this illegal activity is causing damage to customers using the network legitimately."

The letter continues:

> "Our policy is to engage in a constructive dialogue and where possible [ensure][3] that these operators are able to route their calls legally. I can confirm that this has been done [in an] even handed manner".

77. We observe at this stage that, according to Floe's letter to Vodafone of 13 March 2003, Floe's position was that it had not moved outside the type of activity envisaged by its Agreement with Vodafone of 12 August 2002. The only difference, according to Floe, was that instead of selling its services to small and medium sized enterprises, as originally envisaged, it had found a demand for its services from larger corporate customers in the City of London. To serve such customers it had arranged to terminate the traffic in operation "in areas of lower mobile activity", with the result that, according to Floe, Vodafone had jumped to the wrong conclusion. Floe's statement, that it was targeting larger corporate customers could, if true, place Floe in more direct competition with Vodafone itself for the business of larger customers, than would have been the case had Floe been acting as an "authorised distributor" under the Agreement of the Services in question to small and medium sized enterprises.

78. However, the Director in the Decision made no finding as to the precise scope of Floe's activities at the time of disconnection beyond finding that Floe was operating "public GSM gateways" as defined in the Decision (and now in the agreed Statement of Facts). Neither did the Director address the question whether Floe's public GSM Gateways as so defined were "single user" or "multi-user", nor whether anything turns on that distinction.

The contacts between Floe and the RA

79. Evidence of the contacts between Floe and the RA has also been provided to us. This includes the following. On 10 February 2003 Mr Cliff Mason, head of the Licensing Policy Team in the Public Networks Unit of the RA emailed John Stonehouse of Floe following a meeting between Mr Mason and Mr Stonehouse that appears to have taken place on 7 February 2003. In that email Mr Mason said:

> "John

[3] Not legible on the copy before the Tribunal

RA can only speak for itself in its decision to forbear enforcement of the Exemption Regulations pending the outcome of the consultation. From the outset we have said we will only act if we received complaints of interference due to unlicensed use.

That said, individuals, (including companies) are perfectly entitled to act on the law as its stands. If they do act, that is a contractual matter between them and their customer."

80. On 20 March 2003 Mr Mason of the RA wrote to Mr Stonehouse of Floe. He explained how the RA understood the distinction between "public" and "private" GSM gateways:

"For WT purposes:

(i) A **PRIVATE** mobile radio system is a self provided and self used mobile radio system. A private radio system is one where the purpose and the exclusive benefit of the use of the radio system is solely in the interests of the individual/business. Such systems may interconnect with telecommunications systems such as the Public Switched Telephone Networks, provided that the only traffic which is carried over the radio element of the communications path is concerned solely with the individual/business and will receive no payment, consideration or other benefit from any third party in respect of the provision of radio telecommunications facilities;

(ii) A **PUBLIC** mobile radio system is a mobile radio system provided commercially for use by others. A public radio system is one where the beneficiary of use of the system might not be anyone concerned with the business of the provider. The provider may receive a payment, consideration or other benefit, either directly through a contractually managed fee or indirectly through standing charges levied at point of sale of any equipment to be connected to the system or by any other means, in payment of the service of providing and maintaining the radio facility for use by third parties.

To answer your last point, under the Wireless Telegraphy Act 1949 all use of the radio equipment must be either licensed or specifically exempted from licensing. The mobile operators are not operating illegally as the GSM spectrum has been licensed to them on a nationally exclusive basis and cannot therefore be licensed for commercial purposes to anyone else."

X THE PRIMARY ARGUMENT

81. Consideration of the Primary Argument (whether the operation of public GSM gateways was unlawful on the true construction of Section 1(1) of the WTA 1949) involves dealing with the following sub-issues:

(a) Were the relevant GSM gateways "used" by Floe for the purposes of section 1(1) of the WTA 1949 or were such GSM gateways used by Vodafone?

(b) If the relevant GSM gateway devices were "used" by Floe for the purposes of section 1(1) of the WTA 1949 was such use authorised without the need for individual licensing by any relevant exemption regulations issued under the WTA 1949?

(c) Is the restriction on commercial use of gateways imposed by virtue of section 1(1) WTA 1949 and of the relevant Exemption Regulations compatible with the requirements of the RTTE Directive and/or the Authorisation Directive?

(d) Did Floe install apparatus for wireless telegraphy within the meaning of section 1(1) of the 1949 Act?

We consider the parties' submissions on each of these sub-issues below.

(a) Were the relevant GSM gateways "used" by Floe for the purposes of section 1(1) of the WTA 1949 or were such GSM gateways "used" by Vodafone?

82. In its Amended Notice of Appeal Floe set out a new argument, not presented to or considered by the Director prior to the Decision, which it has called the "Primary Argument". By the Primary Argument Floe submits that the analysis of the Director in paragraphs 39 to 45 of the Decision (entitled "Are the public GSM gateway services provided by Floe illegal?") is incorrect. In particular, Floe submits that the Director failed to look directly or at all at who was "using" (in accordance with the true construction of that word) the relevant GSM gateway device and erroneously assumed that GSM gateways have the same technical and other characteristics as all other forms of "user station". According to Floe, this is not the case and the particular technical and operational characteristics of GSM gateway devices mean that they are, for the purposes of wireless telegraphy, being used by Vodafone and therefore do not require any further authorisation.

83. All the parties were agreed that as the word "use" is not defined in the WTA 1949 nor in the Interpretation Act 1978, it should be interpreted in accordance with its ordinary and natural meaning in the context. There was, however, considerable disagreement as to what is the ordinary and natural meaning of the word "use" in section 1(1) of the WTA.

Floe's submissions

84. Floe submitted that in identifying who is using the GSM gateway equipment there are three possibilities. The first is the originator of the voice telephone call who is, according to Floe, in a sense, using the apparatus to make the call. He may be unaware, according to Floe, that he is "using" the apparatus as he does not own it or have any control over it. It is therefore difficult to say that he is using the device for the purposes of wireless telegraphy as he may be entirely unaware that the GSM gateway forms part of the apparatus involved in conveying his call. The second possibility is Floe. Floe owns the relevant equipment and has commissioned it and attached it to a switch or PABX. According to Floe's amended notice of appeal "it is in one sense using the apparatus to provide services to the end user except that it is not itself providing services, it is merely reselling a service provided by Vodafone." Although "in general or common parlance" it may be said that Floe is using the GSM gateway device, Floe submits that because of the role of the "SIM card" and the ability of Vodafone to switch off the "IMEI", Floe has no ultimate or general control over use of the device and so was not using it.

85. According to Floe no GSM user station works if either there is no SIM card or the IMEI number is disabled. Floe had no control over the relevant GSM gateways which Floe says is demonstrated by the fact that Vodafone disabled the IMEI numbers of its equipment so that they could not be used in any way whatsoever.

86. Floe submitted that the WTA 1949 and the exemption regulations made under it suppose that mobile telephone "handsets" and GSM gateways have the same characteristics as all wireless telegraphy apparatus. That is, that a person in whose charge the apparatus is switches it on and controls the use. That person directs the frequency, the types of services and the power which the apparatus utilises. He has

control of the unit and provides himself with conveyance services to others who may pick up his signals. According to Floe, that analysis may have worked well in the days of Marconi, and even today in the case of "radio hams", but it is a far cry from the sophistication of modern networks and the reality of who now uses apparatus to provide mobile telephony services to an end-user by means of a network where all signals are not between users' handsets but are between the GSM gateway and a "base station".

87. Floe further submitted, essentially, that the person who "uses" the equipment for the purposes of section 1(1) of the WTA is the person who "controls" it. Floe summarised its argument on control thus: "put an authorised SIM card into the GSM gateway and it works. Take it out and the device can only be used to call the emergency services. The SIM card belongs to Vodafone and the main purpose of it is to identify and authorise the subscriber. Without the authorisation of Vodafone the GSM gateway will not know the frequency to use for its return path or the level of power to use." Floe also relied on the IMEI putting further control into the hands of Vodafone. For so long as the IMEI number is uploaded on the CEIR it cannot be connected to any network. It is for all intents and purposes, "useless". In that regard, Floe referred to the "immobilisation campaign" in relation to the reporting of stolen mobile phones so that mobile operators can ensure that such stolen phones cannot be used. This, said Floe, demonstrated the extent of control of the mobile operator. Furthermore, the mobile handset or GSM gateway, primed by the SIM card can communicate with Vodafone's network of its own volition, without the involvement of the subscriber.

88. Floe further submitted that in interpreting section 1(1) WTA 1949 it was relevant to consider the meaning of "run" a telecommunications system in section 5 of the Telecommunications Act 1984 which provided:

"**5.** - (1) …a person who runs a telecommunications system within the United Kingdom shall be guilty of an offence unless he is authorised to run the system by a licence granted under section 7 below."

89. Although Floe did not point to any authority, there being little case law considering section 5 of the 1984 Act, according to Floe the "custom and practice" which had grown up in the period since the 1984 Act came into force until its repeal on 25 July 2003, especially as articulated by the DTi and Oftel, pointed to the crucial factor, for the purposes of section 5 of the 1984 Act, being that a person who had "high level" control over the system was held to "run" the system, and so required a licence under the 1984 Act. It was further clear, said Floe, that for the purposes of the 1984 Act day-to-day operational management did not equate to control and neither did ownership equate to control. Rather it was control over whether the system was usable and the type of service provided that were the determining factors for the purposes of that Act.

90. Floe submitted that the interpretation of section 5 of the 1984 Act was relevant because the underlying framework relating to the authorisation of the provision of electronic communications networks and services and the rights to use radio frequencies is set out in the Authorisation Directive. That Directive has been incorporated into the law of the United Kingdom by the Communications Act 2003 (which repealed the 1984 Act). The 2003 Act applies, inter alia, to the provision of "electronic communications networks and services". Although Floe stated that it had not been able to establish any official pronouncements by the DTI or the Department of Culture, Media and Sport correlating the provisions of the 2003 Act to the requirements of the 1984 Act, and in particular section 5, Floe "understood from informal meetings relating to specific drafting points concerning the Act when the [Communications] Bill was before Parliament" that it was indicated that provision of an electronic communications network did generally amount to the running of a telecommunications system, in the opinion of the DTI.

91. Floe submitted that there is only one party that meets the relevant criteria of "control", so that, for the purposes of the Authorisation Directive, and the question as to who is "running" the relevant GSM Gateway apparatus, Vodafone was the only possible candidate.

92. Floe submitted that its analysis would not lead, as suggested by Vodafone, to a "ludicrous" result in terms of regulation. However, Floe agreed that if its submissions

were correct then there would be no need for the Exemption Regulations and the regulatory structure of the wireless telegraphy legislation in the United Kingdom would need to be overhauled.

93. Furthermore, Floe submitted that the ordinary and natural meaning of the word "use" had to be considered in the context of section 1 of the WTA 1949 which sought to regulate "use for wireless telegraphy". Regardless of day-to-day control of the subscriber over the handset, the subscriber or Floe has no "top level control". As section 1(1) of the WTA 1949 is concerned with a licensing requirement, Floe submitted that it is who can control the frequency used by the device, or its power, that is relevant to the interpretation of "use".

OFCOM's submissions

94. OFCOM submitted that Floe's argument on the construction of section 1 WTA 1949 is flawed. The relevant GSM gateways were used for the purposes of that section by Floe and not Vodafone.

95. OFCOM noted that it was common ground that the GSM gateways were connected to Vodafone's network in the same manner as a mobile handset is connected. It would be ridiculous to suggest that whenever a person makes a telephone call over the Vodafone network using a mobile phone that it is Vodafone that is "using" the phone and not the caller. It is therefore equally ridiculous to suggest that whenever a call is routed through one of Floe's GSM gateways that it was Vodafone that was using the gateway.

96. According to OFCOM the following facts show the use by Floe of the GSM gateway: Vodafone did not provide the GSM gateway devices to Floe, the devices were sourced independently; Floe itself placed the SIM cards into the GSM gateway devices which it used to provide telecommunications services to third parties; Floe contracted with third parties independently and on its own account; Floe owned the GSM gateways and connected them to its own switching equipment; the GSM gateways were situated on Floe's premises or on premises which it otherwise has the right to control; and Vodafone had no control over where or when the GSM gateway devices were

switched on or put into use, or of the level of call traffic carried over the GSM gateway; these were matters that were within the control of Floe.

97. OFCOM did not contest that Vodafone has the power to block access to its network or to disable SIM cards and IMEI numbers. However the fact that a mobile network operator can control the use of apparatus in that way does not mean that the mobile operator is the user of the apparatus. There is a clear distinction between control of use on the one hand and use on the other. Therefore Floe's argument is unsustainable. The fact that Vodafone has the ability to take action at some point to prevent access to its network cannot change the identity of the person who is using the device.

98. There is no analogy between the interpretation of "use" in section 1(1) WTA 1949 and the interpretation of "run" in section 5 of the 1984 Act. The manner in which "run" was interpreted by the relevant authorities was that authority over the system, in particular control over how the system is made up and how and for what purposes it was used, was important. OFCOM referred us to an extract from an explanatory guide issued by Oftel in October 1992 entitled "Explanatory Guide to the Self-Provision Licence (SPL) and the Telecommunications Services Licence (TSL)" (although we have noted that the preface to that guide states that is has no legal standing of its own). Paragraph 14 of that explanatory guide, to which OFCOM referred us stated:

> "14 The term "to run a telecommunications system" is used, though not defined, in the Act and is therefore used in all licences granted under it. At the time of writing the Act's meaning of "run" had not been tested by the courts and so only informal guidance can be given. "Run" does not refer to the day-to-day operation of a system. It refers rather to authority over the system, in particular to control over how the system is made up and how, and for what purposes, it is to be used. The person or body who runs a system need not own it (it could be leased or hired); and while the person or body who pays for any public telecommunications services used in conjunction with a system will often be the person running the system, it is not necessarily so."

99. In OFCOM's view it is clear from that statement, in any case, that it would have been Floe and not Vodafone that was "running" a telecommunications system comprising

the relevant public GSM gateway devices since it was Floe and not Vodafone that set up the gateways and determined the use to which the gateways were put.

100. OFCOM also submitted that even if, contrary to that submission, Vodafone was the user of Floe's public GSM gateways their use would, in any event, still be unlawful as GSM gateways do not come within the scope of Vodafone's licence under the WTA 1949. This, submitted OFCOM, should be considered as part of the "Primary Argument". As consideration of this issue is also central to Floe's First Alternative Argument, we consider this latter submission under that heading.

Vodafone's submissions

101. Vodafone submitted that the Tribunal was bound to follow the interpretation of the word "use" in section 1(1) WTA 1949 by reference to its ordinary and natural meaning and it referred the Tribunal to *Rudd v Secretary of State for Trade and Industry* [1987] 1 WLR 786. According to the ordinary meaning of the word "use" it is Floe that uses the public GSM gateway devices in the same way that a person who makes or receives a telephone call on a mobile phone handset also uses the handset. Likewise, when a person switches on a television set to receive and watch television programmes that person uses the television set.

102. The Telecommunications Act 1984 is a different statute which contains different words. The meaning of words in the 1984 Act has no bearing on the ordinary and natural meaning of the word "use" in the WTA 1949. Rather, the word "use" in the WTA 1949 should be interpreted in a manner which is apt to render the WTA 1949 effective to achieve its objectives. According to Vodafone the objectives of the 1984 Act were different from those of the WTA 1949.

103. The 1984 Act sought to regulate persons who ran telecommunications systems with a view to securing a range of public policy objectives such as the interoperability of systems, the promotion of competition and the protection of consumers. According to Vodafone, the WTA 1949 is designed to regulate the use of radio spectrum by regulating the use of individual pieces of apparatus and individual stations. The radio spectrum is a scarce resource and the right to use it is of economic value. There is a

public interest in protecting the economic interests of persons who have been licensed to use spectrum and have invested in providing particular services by prohibiting others, who were not duly licensed, from causing interference with such services.

104. Vodafone submitted that the objectives of the WTA 1949 include:

(a) to ensure the orderly use of the finite radio spectrum, by allocating different frequency bands for different uses;

(b) to protect the interests of those authorised to use spectrum, by preventing interference by unauthorised users; and

(c) to protect privacy, where applicable.

105. According to Vodafone, the WTA 1949 expressly recognises that communication by wireless telegraphy entails the use of different kinds of apparatus and regulates the use of each type of equipment. Thus, it is clear that even relatively passive use (use of a receiver) amounts to "use". It is not necessary that a person should control the overall system or control the making or content of emissions to be a user of wireless telegraphy apparatus. This, said Vodafone, is clear from the definition of "wireless telegraphy" in section 19(1) (set out above) which refers to "emitting or receiving" and the exception in section 1(1A) for television receivers which provides:

"Subsection (1) of this section shall not apply to the installation or use of any television receiver by a person who is a dealer in such receivers where the installation or use is solely for the purpose of doing any one or more of the following in the course of his business as such a dealer, namely, demonstrating, testing or repairing such receivers".

106. Further, Vodafone submitted that its interpretation accords with the common understanding and application of the WTA 1949. For example, if a person watches a television set without a licence under the WTA 1949 he risks prosecution under section 1(1) (Vodafone referred to *Marmont v Secretary of State for Culture, Media and Sport and others* [2003] EWHC 2300 (QB) and *Congreve v Home Office* [1976] QB 629).

107. Even if it were correct to equate control with use, which Vodafone denied, barring the SIM cards and the equipment in which they were placed did not, in normal usage, mean that Vodafone "used" the gateways. Vodafone was simply preventing Floe and/or Floe's customers from continuing to use them to access Vodafone's network.

108. Moreover, if the features of control relied on by Floe were relevant to the interpretation of "use" it would follow that where an individual uses a mobile phone to make or receive a telephone call it is Vodafone and not that individual that uses the phone. That would mean that the Exemption Regulations, a chief purpose of which is to enable individuals to use mobile phones without a licence, are otiose and completely misconceived.

T-Mobile's submissions

109. In relation to whether Floe or Vodafone used the GSM gateways for the purposes of section 1 WTA 1949 T-Mobile adopted the submissions of OFCOM and of Vodafone. In addition, T-Mobile submitted that even if (which T-Mobile strongly contested) Vodafone did "use" the GSM gateway this fact would not mean that Floe itself did not also "use" the GSM gateway in providing telecommunications services by way of a business to third parties. T-Mobile also emphasised that if Floe was right the Exemption Regulations were otiose and that Floe's submissions failed to make sense of the relevant legislation including the Exemption Regulations.

The Tribunal's analysis

110. We say at the outset that we are not persuaded by Floe's Primary Argument.

111. Section 1(1) of the WTA 1949 prohibits the installation or use for wireless telegraphy of any apparatus except under the authority of a licence and provides that any person who installs or uses any apparatus for wireless telegraphy except under and in accordance with such a licence shall be guilty of an offence. The definition of apparatus for wireless telegraphy is contained in section 19 of the Act and GSM gateways fall within that definition. As Vodafone submitted, correctly, we are bound

by the House of Lords judgment in *Rudd v Secretary of State for Trade and Industry* (cited above) to interpret section 1(1) WTA giving the word "use" its ordinary and natural meaning.

112. Under the Agreement between Floe and Vodafone Floe contracted with third parties on its own account and employed the gateway devices to earn revenue by billing its customers for calls made over the devices. Floe connected the GSM gateways to its own switching equipment. The amended notice of appeal (paragraph 4) stated that "in general or common parlance" it may be said that Floe was using the GSM gateway devices. It was common ground before us that Floe's GSM gateways were connected to Vodafone's network in the same manner as a mobile phone handset would be connected to the network. The Tribunal considers that in ordinary and natural usage a person "uses" a mobile phone handset to make calls. It therefore seems to the Tribunal also to be the ordinary and natural interpretation that Floe used the GSM gateway devices. Giving the word "use" its ordinary and natural meaning, and not a technical or strained meaning, it is clear to us that Floe were using the GSM gateways for the purposes of section 1(1) WTA 1949.

113. Furthermore, Floe's Primary Argument was to a large degree based on submissions concerning the manner in which the GSM gateways were connected and disconnected to Vodafone's network, the role of the SIM card and the IMEI number. We accept Floe's submissions that Vodafone could prevent the SIM cards being used on its own network and could "disable" the IMEI number of the gateway for use on its network. Floe submitted that Vodafone "controlled" the GSM Gateway and its submissions were to the effect that "use" and "control" are interchangeable in the context of section 1(1) of the WTA 1949. The Tribunal does not consider that the words "use" and "control" are interchangeable. In our view, there is a clear difference between "use" and "control". We are reinforced in that view in the context of the WTA 1949, having regard to the provisions of section 1A of the WTA 1949:

"Any person who has any station for wireless telegraphy or apparatus for wireless telegraphy in his possession or under his control and either: -

a. intends to use it in contravention of section 1 of this Act; or

b. knows or has reasonable cause to believe that another person intends to use it in contravention of that section,

shall be guilty of an offence."

114. The above section, it seems to us, makes a clear distinction between a person who is in "control" of a station or apparatus for wireless telegraphy and a person who "uses" it in contravention of section 1. Therefore we do not accept Floe's submissions that any control that Vodafone is or was capable of exercising, in particular with regard to blocking the SIM card or the IMEI number, is pertinent to the question of who "uses" apparatus for the purposes of section 1(1) WTA 1949.

115. The Tribunal does not consider that, in interpreting the word "use" in section 1 WTA 1949 any guidance can be drawn from the interpretation of the word "run" in the 1984 Act. The meaning of the word "run" is not synonymous with the word "use". In any event, the Tribunal considers that there is force in Vodafone's submission that the 1984 Act had different regulatory objectives to the 1949 Act. In particular the compass of section 1(1) of the 1949 Act is a wide one, as is made clear in cases such as *Rudd,* cited above, and *R v Blake* [1997] 1 All ER 963.

116. For these reasons we do not consider Floe's Primary Argument, that it was Vodafone and not Floe that used the GSM gateways for the purposes of section 1 of the WTA to be well founded.

(b) What is the effect of the Exemption Regulations made under section 1 WTA 1949?

117. The next question before the Tribunal is whether, if Floe used the GSM gateway devices for the purposes of section 1(1) WTA 1949 (as we have decided) was such use authorised without the need for individual licensing by virtue of any relevant exemption regulations issued by the Secretary of State under the WTA 1949? The parties' submissions concentrated on (i) the meaning of "relevant apparatus" in regulation 4(1) and Schedule 3 of the Exemption Regulations and (ii) the true construction of regulation 4(2) in the Exemption Regulations. If the GSM gateways

devices are "relevant apparatus" for the purposes of the Exemption Regulations then they are exempt from the licensing requirement in section 1(1) WTA 1949 unless regulation 4(2) applies. We consider each of these issues in turn below.

(i) The meaning of "relevant apparatus"

118. For the GSM gateway to come within the Exemption Regulations, and so potentially benefit from an exemption from the requirement that its establishment, installation or use must be licensed under section 1 WTA 1949, it must be classified as a "mobile station for wireless telegraphy". This is because "relevant apparatus" is exempted under Regulation 4(1). As already set out above, "relevant apparatus" is defined as "prescribed apparatus" as set out in Schedule 3 to the Exemption Regulations. "Prescribed apparatus" in turn is further defined in Schedule 3 to the Exemption Regulations as meaning a "User Station". So far as here relevant, the term "User Station" is defined to mean "mobile station for wireless telegraphy".

Floe's submissions

119. Floe submitted that although OFCOM now state that GSM gateways are "mobile" devices, and accordingly would fall within the scope of the Exemption Regulations, the term "mobile station" is not defined in the Exemption Regulations and the interpretation that OFCOM now put forward is not made clear in any provision of the Exemption Regulations. Floe drew our attention to the Government announcement of 18 July 2003 that the Exemption Regulations should be amended so as to apply expressly to GSM gateways (and other such "fixed" devices) and that the Government's intention was to make such an amendment. Floe said that OFCOM's submissions before us and in its witness statements, which refer to standards published by the European Telecommunications Standards Institute, were not supported by the text of the Exemption Regulations. Floe's submission was that the position was so confused that the Exemption Regulations were "a bit of nonsense".

OFCOM's submissions

120. OFCOM submitted that it was clear from the definitions in all relevant versions of Schedule 3 of the Exemption Regulations that GSM gateways fell within the definition of "relevant apparatus" that benefited from the exemption under Regulation 4(2) since they were "User Stations". This was because GSM gateways were "mobile stations" and not "fixed stations". OFCOM acknowledged that the RA, the body previously responsible for the enforcement of the WTA 1949 and the Exemption Regulations, had considered, and stated publicly, that GSM gateways were "fixed stations" and not "mobile stations" and so did not benefit from the exemption from the licensing requirement. But, in OFCOM's submission, the RA had been wrong as to this.

121. OFCOM referred us to witness statements submitted by Dr Stephen William Unger, Director of Telecoms Technology at OFCOM (and formerly Head of Network Analysis at Oftel). Dr Unger's second witness statement stated as follows:

> "3. A GSM gateway is a Mobile Station (in the same way that a mobile phone is a Mobile Station for these purposes), which communicates via radio with the mobile operator's network. A Mobile Station is defined in terms of the radio frequencies at which it transmits and receives, and the signalling interface used to control those transmissions. In both those respects a GSM gateway complies with the definition of a Mobile Station. If it did not, it would not function. A Mobile Station is not required to be mobile at the time it transmits or receives a call, though the specification is designed so as to support mobility.
>
> 4. Floe Telecom seeks to argue that there is a looser definition of such terms as "Base Transceiver Station" and "Mobile Station" than that used in the GSM technical specification, and that these looser definitions are the definitions that were used in Vodafone's licence. This is unsustainable. The definitions I have referred to are clearly and unambiguously set out in the GSM technical specification documents. They are universally accepted, and it is precisely because of this universal acceptance that it is possible for mobile subscribers to roam onto other GSM networks. If different operators used different definitions of network elements, then roaming would not have been possible, and GSM would not have been the global success that it has been."

122. OFCOM submitted that in the light of Dr Unger's evidence the meaning of "mobile station" was clear, notwithstanding the RA's views to the contrary. Accordingly GSM gateway devices are (and always were) potentially exempt from licensing under the WTA 1949, but only if they are used by one company for the "self-provision" of services (i.e. "private GSM gateways" as defined in the agreed Statement of Facts) in

accordance with regulation 4. OFCOM submitted that although the text of the relevant definitions has not changed in any version of the Exemption Regulations, the RA's interpretation of the Exemption Regulations in that regard had been wrong and that GSM gateways are clearly "mobile stations". Counsel for OFCOM told us that, "like much of this case, it depends on where you slice through time" to determine what the regulatory position was believed to be by the relevant regulatory authority.

Vodafone's submissions

123. Vodafone submitted that devices known as "Premicells", which in Vodafone's submission are "private GSM gateways", had been around for some years and that no-one, so far as one can tell, had questioned their legality. Vodafone referred us to the RA's August 2002 Announcement (which we consider in greater detail below under the First Alternative Argument) which in Vodafone's submission appeared to be the first time the unlicensed use of those GSM gateways was questioned on the basis that they were "fixed stations" and not "mobile stations", whatever was the meaning of those terms. The August 2002 Announcement set out the RA's view only and not Vodafone's view and it was wrong as OFCOM now accept.

124. Vodafone submitted that the question of whether or not GSM gateway devices were "fixed" or "mobile" stations for the purposes of the Exemption Regulations was no more than a mere "technical point" because if it were right that GSM gateways were fixed stations and not mobile stations that would render illegal all sorts of things that "could not possibly be regarded as illegal" such as GSM gateways connected to ATM machines, traffic lights and vending machines. So if there was anything in the point, which there was not, it was an obvious anomaly and to consider GSM gateway devices as "fixed" and not "mobile" (and so outside the scope of the exemption regime entirely) would be "ridiculous".

The Tribunal's analysis

125. We have noted the views expressed by the RA, first during the consultation commenced in August 2002 and subsequently in the Government Statement of 18 July 2003 which followed the November 2002 consultation, when it pronounced that

the definition of "User Station" in the Exemption Regulations "may be ambiguous" and "when next revised" the Exemption Regulations would be amended to cover both fixed *and* mobile user devices. In the "Notes for Editors" to the Government Statement of 18 July 2003 it was stated that this would legitimise a number of applications that had already been developed outside the then current regulatory framework, such as ATM banking machines, vending machines and credit card authorisation terminals and would also allow companies to connect their own fixed user station equipment (i.e. GSM gateways) to PABX systems for their own private use. The Government concluded that an amendment to the Wireless Telegraphy (Exemption) Regulation 2003 would be prepared and published in due course, and that meanwhile the Government would "continue to" forbear any enforcement action against qualifying user devices. As far as the Tribunal is aware, the amendment to the Exemption Regulations foreseen by the Government Statement of 18 July 2003 has not yet been made.

126. Despite Dr Unger's view that a "mobile station" is to be defined in terms of the frequencies that it uses rather than in terms of whether it transmits from a point which is physically fixed, we have reservations as to whether it would be appropriate for us to interpret the meaning of a Statutory Instrument dating from 1999 solely by reference to a witness statement from a single expert witness, as we were invited to do by OFCOM. This is especially so in circumstances where, so far as the Tribunal can tell from the documents before it, the interpretation now contended for by OFCOM's witness is directly contrary to what appears to have been a settled view of both the RA and the DTI at least until July 2003, as to the correct interpretation of those provisions. Indeed whether the definition of "User Station" should be *changed* to cover GSM gateways and other "fixed" devices was one of the very matters included in the RA's November 2002 Consultation. The Government represented, in the Notes for Editors referred to above, that pending amendment to the Exemption Regulations "the Government will continue to forbear enforcement against qualifying user devices". We were not told when the Government's forbearance of the enforcement of this aspect of the Exemption Regulations commenced.

127. Moreover, it seems clear that at all material times for the purposes of the matters under consideration in this case, that the RA was aware of use of GSM gateway

devices and other "fixed" devices, but did not take enforcement action pending an amendment to the Exemption Regulations.

128. At paragraph 17 of the Statement of Facts it was agreed that a GSM gateway is a "mobile station" for these purposes but on the materials before us we prefer to leave open whether this is correct on the true construction of the Exemption Regulations.

129. Since Vodafone did not rely on the distinction between "mobile" and "fixed" devices for its disconnection of Floes services in our view it is not necessary for the Tribunal to decide whether a GSM gateway device is "fixed" or "mobile" for the purposes of the Exemption Regulations.

130. However, if we assume, without deciding, that for the purposes of Regulation 4(1) of the Exemption Regulations a GSM gateway is capable of being treated as being "relevant apparatus" and so exempted from the licensing provisions of section 1 WTA 1949, the next question is whether the exemption is rendered inapplicable by the provisions of regulation 4(2).

(ii) The meaning of regulation 4(2) of the Exemption Regulations

131. It was agreed in paragraph 8 of the Statement of Facts that the distinction between "public" and "private" GSM gateways, upon which the Director and Vodafone relied as objective justification for Vodafone's disconnection of Floe, arises from the wording of regulation 4(2) of the Exemption Regulations. For convenience we set out again the text of regulation 4(2) below:

"(2) With the exception of relevant apparatus operating in the frequency bands specified in paragraph (3), the exemption shall not apply to relevant apparatus which is established, installed or used to provide or to be capable of providing a wireless telegraphy link between telecommunications apparatus or a telecommunication system and other such apparatus or system, by means of which a telecommunication service is provided by way of business to another person."

Floe's submissions

132. Floe submitted that the scope of the Exemption Regulations was unclear and that any reasonable person would have real difficulty interpreting regulation 4(2). In Floe's submission regulation 4(2) was "nonsense" and it is a "fig leaf of legislation designed for a different age".

133. Floe had had a great deal of difficulty in working out what the difference between "public" and "private" GSM gateways was. Floe referred to the fact that it was agreed between the parties that "public" and "private" gateways may have exactly the same level of call traffic and that one cannot tell from call traffic alone whether or not a gateway is being used as a "public" gateway or a "private" gateway.

134. The object of the Exemption Regulations, submitted Floe, was to differentiate between GSM gateways owned and run by and serving one legal person and gateways other than that. However the Exemption Regulations had not managed to make that distinction in any way, shape or form, in terms of the wording that they use.

135. Every GSM gateway was, submitted Floe, at the very least "capable of" providing a telecommunications service by way of business to a third party. The wording of regulation 4(2) therefore excludes from the exemption all gateway devices since they are all "capable of" providing "public" gateway services. In addition, Floe submitted that the Exemption Regulations assume a very particular form of business relationship between the person providing the services and the end-user. The end-user envisaged by regulation 4(2) is the person who is provided with a service by way of business by another. The regulation assumes that the end-user is using the gateway device for the purpose of wireless telegraphy.

136. If the GSM gateway was not on a customer's premises but on the premises of a person who has resold access to the MNO's network and the reseller owned the GSM gateway and billed the customer, such use of GSM gateways was use of "public" gateways for the purposes of regulation 4(2). Floe submitted that was the use envisaged by the contractual matrix between Floe and Vodafone.

137. Floe submitted that because regulation 4(2) restricted the use of a wireless telegraphy link by means of which a telecommunication service is provided by way of business to another person, regulation 4(2) covered each end-user subscriber of Vodafone using mobile phone handsets because Vodafone provided a telecommunications service by way of business to another person, (each subscriber) by means of mobile telephone handsets. Therefore the effect of regulation 4(2) was actually that each customer of Vodafone's who used a mobile phone handset was in contravention of the Exemption Regulations and this demonstrated that the Exemption Regulations were an unsuccessful "edifice".

138. Counsel for Floe submitted that he had therefore come to the conclusion that the entire regulation was nonsense. The draughtsman of the regulation was hammering around trying desperately to find a characteristic of radio equipment rather than a straightforward usage restriction (because, in Floe's submission a usage restriction is impermissible under the RTTE Directive), but had failed.

OFCOM's submissions

139. OFCOM submitted that regulation 4(2) does not identify GSM gateway devices in terms. Its scope covers a wide range of devices, including GSM gateways. However, OFCOM submitted that it was clear, both from the 1999 and the 2003 versions of the Exemption Regulations, that all "apparatus" used to provide a telecommunications service by way of business to third parties was not exempt from the requirements of section 1(1) WTA. The distinction between lawful "private" gateways and unlawful "public" gateways is thus between "self-provision" and "commercial services". OFCOM submitted that if a person is using a GSM gateway device to provide a commercial service to another person it does not matter whether the service is provided via that GSM gateway to one person or to two or more persons, it will not benefit from an exemption from licensing.

140. OFCOM did not consider that Floe's submission that regulation 4(2) is nonsense was well founded. Floe's argument that any device "capable of" providing a public GSM gateway service would fall within regulation 4(2) of the Exemption Regulations overlooks the wording of the regulation. The test is not simply whether apparatus is

"capable of" providing a commercial service but whether the device has been "established, installed or used to be capable of providing" such a service. OFCOM submitted that where a person has himself established or installed a GSM gateway device which links only to his own fixed telephone lines that device will not fall outwith the exemption. That was a perfectly sensible provision and not nonsensical.

141. Further, it was not the case that the use of mobile handsets by Vodafone subscribers would fall outside the exemption because of the requirement in the wording of regulation 4(2) that the telecommunications service be provided "to another person". OFCOM submitted that the words "to another person" must refer to a third party and not to either the provider of the telecommunications system (Vodafone) or Vodafone's customer where the customer is the end-user of the apparatus linking with the system.

Vodafone's submissions

142. Vodafone submitted that if regulation 4(2) is read carefully it is clear that it carves out from the exemption the situation where the relevant apparatus is apparatus by means of which a telecommunications service is provided by way of business to another person. In the case of a lawful "private" GSM gateway that did not apply because the private GSM gateway is the customer's own (owned or rented) gateway used solely for its own purposes. Floe's arguments, if correct, would render the 1999 Regulations and the 2003 Regulations otiose and defeat their very purpose, the prime object of which, according to Vodafone, was to exempt mobile phone users from section 1(1) of the WTA 1949. As an approach to statutory construction Floe's submissions were therefore hopeless.

The Tribunal's analysis

143. Regulation 4(2) excludes from the exemption provided for in regulation 4(1) any apparatus that is "established, installed or used to provide or be capable of providing a wireless telegraphy link between telecommunications apparatus or a telecommunications system and other such apparatus by means of which a telecommunications service was provided by way of business to a third party".

144. We accept OFCOM's submission that, with respect to the exclusion of devices "capable of" providing commercial services, such devices are excluded from the exemption only to the extent that the device has been "established installed or used to be capable of providing" a service by way of business. We also accept the submission of Vodafone and OFCOM that mobile handset users do not fall within the scope of Regulation 4(2) because the requirement that the commercial service be provided "to another person" properly construed means that the service is provided to a person other than the subscriber. In the case of a mobile handset, the mobile handset subscriber does not, at least ordinarily, use the handset to provide a link between two pieces of apparatus or systems by means of which a telecommunications service is provided by way of business to another person. Floe's submission that regulation 4(2) is "nonsense" on the basis that it excludes from the exemption in regulation 4(1) all users of mobile phone handsets is, in our view, accordingly misconceived.

145. Floe has not denied that it was providing commercial services by means of the relevant GSM gateway devices which were used to provide a wireless telegraphy link between the telecommunications system or apparatus of Floe's customers and the apparatus or system comprising Vodafone's GSM network. We have found above that it was Floe and not Vodafone that used them. Mr Happy on behalf of Floe states in his witness statement that Floe was providing "what are now called "public" gateway services", and it was agreed in the Statement of Facts that Floe provided "public gateways".

146. Accordingly the Tribunal concludes that regulation 4(2) is not "nonsense". In our view, the exemption provided for by regulation 4 did not cover the relevant GSM gateways provided by Floe which were therefore required to be established installed and used under authority of a licence issued under section 1(1) WTA.

147. However, Floe submitted that if we upheld OFCOM's submissions on the meaning of the Exemption Regulations then the Exemption Regulations were not compliant with the RTTE Directive or the Authorisation Directive and therefore were ultra vires. We consider those submissions next.

(c) Is the restriction on the commercial use of GSM gateways imposed by virtue of section 1 WTA 1949 and the Exemption Regulations compatible with the requirements of the RTTE Directive and/or the Authorisation Directive?

The Directives

148. Floe referred us to the provisions of Directive 1999/5/EC on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity (the "RTTE Directive") and Directive 2002/20/EC on the authorisation of electronic communications networks and services (the "Authorisation Directive").

149. The RTTE Directive sets out a harmonised regulatory framework regulating, inter alia, the putting into service of radio equipment and telecommunications terminal equipment in the European Community. The RTTE Directive was required to be implemented by Member States by 7 April 2000 (Article 19).

150. The Authorisation Directive forms part of a package of Directives which together provides for a reformed regulatory framework applicable to electronic communications networks and services and which repealed existing Directives applicable to telecommunications, but not the RTTE Directive. The Authorisation Directive was adopted on 7 March 2002. Article 18 required Member States to comply with the Authorisation Directive by 24 July 2003 and to apply the measures contained in the Directive from 25 July 2003. The Authorisation Directive was incorporated in United Kingdom law by the Communications Act 2003, the relevant provisions of which entered into force on 25 July 2003.

The RTTE Directive

151. Relevant provisions of the RTTE Directive include:

The recitals:

> "(8) Whereas, given the increasing importance of telecommunications terminal equipment and networks using radio transmission besides equipment connected through wired links, any rules governing the manufacturing, marketing, and use of

radio equipment and telecommunications terminal equipment should cover both classes of equipment.

(12) Whereas Community law provides that obstacles to the free movement of goods within the Community, resulting from disparities in national legislation relating to the marketing of products, can only be justified where any national requirements are necessary and proportionate; whereas, therefore, the harmonisation of laws must be limited to those requirements necessary to satisfy the essential requirements relating to radio equipment and telecommunications terminal equipment;

(13) Whereas the essential requirements relevant to a class of radio equipment and telecommunications terminal equipment should depend on the nature and the needs of that class of equipment; whereas these requirements must be applied with discernment in order not to inhibit technological innovation or the meeting of the needs of a free-market economy;

(21) Whereas unacceptable degradation of service to persons other than the user of radio equipment and telecommunications terminal equipment should be prevented; whereas manufacturers of terminals should construct equipment in a way which prevents networks from suffering harm which results in such degradation when used under normal operating conditions; whereas network operators should construct their networks in a way that does not oblige manufacturers of terminal equipment to take disproportionate measures to prevent networks from being harmed; whereas the European Telecommunications Standards Institute (ETSI) should take due account of this objective when developing standards concerning access to public networks;

(22) Whereas effective use of the radio spectrum should be ensured so as to avoid harmful interference; whereas the most efficient possible use, according to the state of the art, of limited resources such as the radio frequency spectrum should be encouraged;

(23) Whereas harmonised interfaces between terminal equipment and telecommunications networks contribute to promoting competitive markets both for terminal equipment and network services;

(24) Whereas, however, operators of public telecommunications networks should be able to define the technical characteristics of their interfaces, subject to the competition rules of the Treaty; whereas, accordingly, they should publish accurate and adequate technical specifications of such interfaces so as to enable manufacturers to design telecommunications terminal equipment which satisfies the requirements of this Directive;

(27) Whereas it is in the public interest to have harmonised standards at European level in connection with the design and manufacture of radio equipment and telecommunications terminal equipment; whereas compliance with such harmonised standards gives rise to a presumption of conformity to the essential requirements; whereas other means of demonstrating conformity to the essential requirements are permitted;

(32) Whereas radio equipment and telecommunications terminal equipment which complies with the relevant essential requirements should be permitted to circulate freely; whereas such equipment should be permitted to be put into service for its intended purpose; whereas the putting into service may be subject to authorisations on the use of the radio spectrum and the provision of the service concerned;

(36) Whereas the measures which are appropriate to be taken by the Member States or the Commission where apparatus declared to be compliant with the provisions of this Directive causes serious damage to a network or harmful radio interference shall be determined in accordance with the general principles of Community law, in particular, the principles of objectivity, proportionality and non-discrimination;

The operative provisions:

"*Article 1*

Scope and aim

1. This Directive establishes a regulatory framework for the placing on the market, free movement and putting into service in the Community of radio equipment and telecommunications terminal equipment.

Article 2

Definitions

For the purpose of this Directive the following definitions shall apply:

(a) 'apparatus' means any equipment that is either radio equipment or telecommunications terminal equipment or both;

(b) 'telecommunications terminal equipment' means a product enabling communication or a relevant component thereof which is intended to be connected directly or indirectly by any means whatsoever to interfaces of public telecommunications networks (that is to say, telecommunications networks used wholly or partly for the provision of publicly available telecommunications services);

(c) 'radio equipment' means a product, or relevant component thereof, capable of communication by means of the emission and/or reception of radio waves utilising the spectrum allocated to terrestrial/space radiocommunication; …

(i) 'harmful interference' means interference which endangers the functioning of a radionavigation service or of other safety services or which otherwise seriously degrades, obstructs or repeatedly interrupts a radio-communications service operating in accordance with the applicable Community or national regulations.

Article 7

Putting into service and right to connect

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

2. Notwithstanding paragraph 1, and without prejudice to conditions attached to authorisations for the provision of the service concerned in conformity with Community law, Member States may restrict the putting into service of radio

equipment only for reasons related to the effective and appropriate use of the radio spectrum, avoidance of harmful interference or matters relating to public health.

- *The Authorisation Directive*

152. Relevant provisions of the Authorisation Directive include:

The Recitals:

(2) Convergence between different electronic communications networks and services and their technologies requires the establishment of an authorisation system covering all comparable services in a similar way regardless of the technologies used.

(4) This Directive covers authorisation of all electronic communications networks and services whether they are provided to the public or not. This is important to ensure that both categories of providers may benefit from objective, transparent, non-discriminatory and proportionate rights conditions and procedures.

(5) This Directive only applies to the granting of rights to use radio frequencies where such use involves the provision of an electronic communications network or service, normally for remuneration. The self-use of radio terminal equipment, based on the non-exclusive use of specific radio frequencies by a user and not related to an economic activity…does not consist of the provision of an electronic communications network or service and is therefore not covered by this Directive. Such use is covered by the Directive 1999/5/EC…on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity.

(7) The least onerous authorisation system possible should be used to allow the provision of electronic communications networks and services in order to stimulate the development of new electronic communications services and pan-European communications networks and services and to allow service providers and consumers to benefit from the economies of scale of the single market.

(8) Those aims can be best achieved by general authorisation of all electronic communications networks and services without requiring any explicit decision or administrative act by the national regulatory authority and by limiting any procedural requirements to notification only…

(11) The granting of specific rights may continue to be necessary for the use of radio frequencies and numbers, including short codes, from the national numbering plan…Those rights of use should not be restricted except where this is unavoidable in view of the scarcity of radio frequencies and the need to ensure the efficient use thereof.

(12) This Directive does not prejudice whether radio frequencies are assigned directly to providers of electronic communications networks or services or to entities that use these networks or services…The responsibility for

compliance with the conditions attached to the right to use a radio frequency and the relevant conditions attached to the general authorisation should in any case lie with the undertaking to whom the right of use for the radio frequency has been granted.

(13) The conditions which may be attached to the general authorisation and to the specific rights of use, should be limited to what is strictly necessary to ensure compliance with requirements and obligations under Community law and national law in accordance with Community law.

(27) The penalties for non-compliance with conditions under the general authorisation should be commensurate with the infringement. Save in exceptional circumstances, it would not be proportionate to suspend or withdraw the right to provide electronic communications services or the right to use radio frequencies or numbers where an undertaking did not comply with one or more of the conditions under the general authorisation. This is without prejudice to urgent measures which the relevant authorities of the Member States may need to take in case of serious threats to public safety, security or health or to economic and operational interests of other undertakings. This Directive should also be without prejudice to any claims between undertakings for compensation for damages under national law.

The operative provisions:

Article 1

Objective and scope

1. The aim of this Directive is to implement an internal market in electronic communications networks and services through the harmonisation and simplification of authorisation rules and conditions in order to facilitate their provision throughout the Community.

2. This Directive shall apply to authorisations for the provision of electronic communications networks and services.

Article 2

Definitions

1. For the purposes of this Directive, the definitions set out in Article 2 of Directive 2002/21/EC (Framework Directive) shall apply.

2. The following definitions shall also apply:
(a) 'general authorisation' means a legal framework established by the Member State ensuring rights for the provision of electronic communications networks or services and laying down sector specific obligations that may apply to all or to specific types of electronic communications networks and services, in accordance with this Directive; …

Article 3

General authorisation of electronic communications networks and services

1. Member States shall ensure the freedom to provide electronic communications networks and services, subject to the conditions set out in this Directive. To this end, Member States shall not prevent an undertaking from providing electronic communications networks or services, except where this is necessary for the reasons set out in Article 46(1) of the Treaty.

2. The provision of electronic communications networks or the provision of electronic communications services may, without prejudice to the specific obligations referred to in Article 6(2) or rights of use referred to in Article 5, only be subject to a general authorisation. The undertaking concerned may be required to submit a notification but may not be required to obtain an explicit decision or any other administrative act by the national regulatory authority before exercising the rights stemming from the authorisation. Upon notification, when required, an undertaking may begin activity, where necessary subject to the provisions on rights of use in Articles 5, 6 and 7…

Article 5

Rights of use for radio frequencies

1. Member States shall, where possible, in particular where the risk of harmful interference is negligible, not make the use of radio frequencies subject to the grant of individual rights of use but shall include the conditions of usage of such radio frequencies in the general authorisation.

2. Where it is necessary to grant individual rights of use for radio frequencies and numbers, Member States shall grant such rights, upon request, to any undertaking providing or using networks or services under the general authorisation, subject to the provisions of Articles 6, 7 and 11(1)(c) of this Directive and any other rules ensuring the efficient use of those resources in accordance with Directive 2002/21/EC (Framework Directive).

(…)

5. Member States shall not limit the number of rights of use to be granted except where this is necessary to ensure the efficient use of radio frequencies in accordance with Article 7.

Article 6

Conditions attached to the general authorisation and to the rights of use for radio frequencies and for numbers, and specific obligations

1. The general authorisation for the provision of electronic communications networks or services and the rights of use for radio frequencies and rights of use for numbers may be subject only to the conditions listed in parts A, B and C of the Annex. Such conditions shall be

objectively justified in relation to the network or service concerned, non-discriminatory, proportionate and transparent.

Article 7

Procedure for limiting the number of rights of use to be granted for radio frequencies

1. Where a Member State is considering whether to limit the number of rights of use to be granted for radio frequencies, it shall *inter alia*:

(a) give due weight to the need to maximise benefits for users and to facilitate the development of competition;

(b) give all interested parties, including users and consumers, the opportunity to express their views on any limitation in accordance with Article 6 of Directive 2002/21/EC (Framework Directive);

(c) publish any decision to limit the granting of rights of use, stating the reasons therefore;

(d) after having determined the procedure, invite applications for rights of use; and

(e) review the limitations at reasonable intervals or at the reasonable request of affected undertakings.

2. Where a Member State concludes that further rights of use for radio frequencies can be granted, it shall publish that conclusion and invite applications for such rights.

3. Where the granting of rights of use for radio frequencies needs to be limited, Member States shall grant such rights on the basis of selection criteria which must be objective, transparent, non-discriminatory and proportionate. Any such selection criteria must give due weight to the achievement of the objectives of Article 8 of Directive 2002/21/EC (Framework Directive).

4. Where competitive or comparative selection procedures are to be used, Member States may extend the maximum period of six weeks referred to in Article 5(3) for as long as necessary to ensure that such procedures are fair, reasonable, open and transparent to all interested parties, but by no longer than eight months.

These time limits shall be without prejudice to any applicable international agreements relating to the use of radio frequencies and satellite coordination.

5. This Article is without prejudice to the transfer of rights of use for radio frequencies in accordance with Article 9 of Directive 2002/21/EC (Framework Directive)."

Article 17

Existing authorisations

1. Member States shall bring authorisations already in existence on the date of entry into force of this Directive into line with the provisions of this Directive by at the latest the date of application referred to in Article 18(1), second subparagraph.

Article 18

Transposition

1 Member States shall adopt and publish the laws, regulations and administrative provisions necessary to comply with this Directive by 24 July 2003 at the latest. They shall forthwith inform the Commission thereof.

They shall apply those measures from 25 July 2003.

(…)

2. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field governed by this Directive and of any subsequent amendments to those provisions.

Article 19

Entry into force

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Communities*.

ANNEX

The conditions listed in this Annex provide the maximum list of conditions which may be attached to general authorisations (Part A), rights to use radio frequencies (Part B) and rights to use numbers (Part C) as referred to in Article 6(1) and Article 11(1)(a).

A. **Conditions which may be attached to a general authorisation**

(…)

17. Conditions for the use of radio frequencies, in conformity with Article 7(2) of Directive 1999/5/EC where such use is not made subject to the granting of individual rights of use in accordance with Article 5(1) of this Directive.

B. **Conditions which may be attached to rights of use for radio frequencies**

(…)

1. Designation of service or type of network or technology for which the rights of use of the frequency has been granted, including, where

applicable, the exclusive use of a frequency for the transmission of specific content or specific audiovisual services.

2. Effective and efficient use of frequencies in conformity with Directive 2002/21/EC (Framework Directive) including, where appropriate, coverage requirements.

Floe's Submissions

153. Floe submitted that the RTTE Directive sets out a framework for the placing on the market, free movement and putting into service of radio equipment and other telecommunications terminal equipment within the European Community. Floe submitted that the RTTE Directive is concerned solely with "technical characteristics, interface standards and conformity expectations of radio equipment".

154. The issues in the appeal arise not because of any problems inherent in the equipment itself. The alleged problem was concerned with overloading of the MNOs' networks. Overloading is a function of volume of usage of the services and the manner in which the use is provided, and not of an essential characteristic of the GSM gateway as a piece of radio equipment. There is nothing "wrong" with the GSM gateway: it is rather the network that allegedly cannot cope with the use.

155. Floe submitted that it followed as a matter of logic that if there is nothing inherently wrong with a GSM gateway "as equipment", then it is not and was not open to the United Kingdom Government to impose restrictions on use of GSM gateways by means of provisions falling within the scope of the RTTE Directive. It therefore also followed that Regulation 4(2) of the Exemption Regulations could not be justified under point 17 of Annex A to the Authorisation Directive. Pursuant to Article 6(1) of the Authorisation Directive, Member States are only entitled to impose conditions listed in the Annex to the Directive. Point 17 of the Annex to the Authorisation Directive refers to conditions imposed in accordance with Article 7(2) of the RTTE Directive. Since the restriction in regulation 4(2) could not possibly be justified under Article 7(2) of the RTTE Directive, it was also not compliant with the Authorisation Directive.

156. Floe submitted that the United Kingdom had chosen not to renew its wireless telegraphy legislation in the light of the enactment of the Authorisation Directive but had super-imposed obligations from the Authorisation Directive on an existing raft of legislation beginning with the WTA 1949. The Authorisation Directive permits Member States to grant individual rights of use for "radio frequencies" but does not permit Member States to impose a requirement for individual licensing in relation to the establishment of "stations" or use of apparatus. The Authorisation Directive envisaged a regime where if a network requires the use of radio spectrum a separate right is granted in respect of that network. The apparatus comprised in the network must therefore, in terms of both the authorisation and the right to use the radio spectrum, logically be the same. This, submitted Floe, meant that the words "using apparatus" for the purposes of the WTA 1949 must mean the same as "providing a network" under the Authorisation Directive. It would be bizarre to have apparatus which formed part of an operator's network for the purposes of the Authorisation Directive but not for the purposes of the WTA 1949.

157. Floe also referred to Article 5 of the Authorisation Directive and submitted that if it had been intended that the use of radio frequencies by individual users should not be subject to individual licences, then this should have been achieved by means of exempting the user stations connected to Vodafone's network from the need for a licence, and should have been included in a general authorisation. Floe submitted that any such conditions could have been imposed only in accordance with section 45 of the Communications Act 2003. The Exemption Regulations had not been imposed in accordance with that section.

OFCOM's submissions

158. OFCOM submitted that Floe's submissions were unfounded. OFCOM referred to the definition of "general authorisation" in Article 2(2)(a) of the Authorisation Directive which provides:

"a legal framework established by the Member State ensuring rights for the provision of electronic communications networks or services and laying down sector-specific obligations

that may apply to all or to specific types of electronic communications networks and services, in accordance with this Directive".

159. OFCOM submitted that the WTA 1949 and the Exemption Regulations form part of the "legal framework" by which the United Kingdom has implemented the Authorisation Directive. A Member State is entitled to rely on existing laws in order to meet its obligations to implement a Directive (see Case C-190/90 *Commission v Netherlands* [1992] ECR I-3265). The conditions derived from the Exemption Regulations are therefore included in the "general authorisation" as defined by the Directive. Section 45 of the Communications Act 2003 establishes a power for OFCOM to set conditions to a general authorisation, but does not set out an exhaustive mechanism for establishing such conditions.

160. OFCOM has chosen not to exempt the establishment, installation and use of "the Radio Equipment", as defined in Vodafone's licence, from the individual licensing regime as this would be likely to give rise to undue interference with wireless telegraphy for the purposes of Article 5(1) of the Authorisation Directive. As regards "User Stations" within the scope of the Exemption Regulations, such as GSM gateways, OFCOM currently takes the view that the installation, establishment and use of such stations or apparatus is not likely to lead to undue interference with wireless telegraphy.

161. In accordance with Article 6(1) and Part A of the Annex to the Authorisation Directive, it is permissible to make the exemption of such stations or apparatus from the individual licensing regime (or general authorisation) subject to certain conditions. OFCOM considers that the restriction in Article 4(2) of the Exemption Regulations corresponds to the type of condition referred to at point 17 of Annex A to the Annex to the Authorisation Directive, namely "conditions for the use of radio frequencies, in conformity with Article 7(2) of [the RTTE Directive]". Article 7(2) permits a restriction on the putting into service of radio equipment for reasons related to the effective and appropriate use of the radio spectrum, avoidance of harmful interference or matters related to public health.

162. OFCOM submitted that the conclusions of the RA consultation on the exemption of user stations published in July 2003 were that the benefits of removing the restriction in regulation 4(2) of the Exemption Regulations were "mitigated" (sic) by the fact that the resulting use of spectrum was very inefficient. OFCOM had therefore imposed a condition on usage related to the effective and appropriate use of the radio spectrum which was clearly permitted under Article 7(2) of the RTTE Directive and point 17 of Annex A to the Authorisation Directive.

Vodafone's submissions

163. Vodafone submitted that the events which Floe complained to Oftel about and which form the subject of Oftel's decision all occurred prior to 24 July 2003. Vodafone barred all the SIMs supplied to Floe under the Agreement on 18 March 2003 and provided no further services thereafter.

164. Although Floe alleged that Vodafone barred further SIMs after 24 July 2003 the complaint and the Decision dealt only with SIMs supplied by Vodafone to Floe under the Agreement. Vodafone assumed that any other SIM cards were SIMs obtained by Floe from independent service providers and which Vodafone did not know were being used by Floe.

165. Vodafone submitted that whilst a Directive produces legal effects from the time at which it is notified to Member States, the effects are limited to imposing an obligation on the Member State to adopt implementing measures by the date for implementation and to refrain, during the implementation period, from taking any measures which could seriously compromise the attainment of the Directive's objectives (Case C-129/96 *Inter-Environnement Wallonie ASBL v Region Wallonie* [1997] ECR I-7411).

166. The Authorisation Directive according to Vodafone does not require that the United Kingdom should have brought its implementing rules into force by a certain date but require that they should be brought into force on 25 July 2003. Accordingly the Directives are not relevant to the issues before the Tribunal.

167. In any event, section 1(1) WTA 1949 and the Exemption Regulations are in accordance with the Directives and Vodafone adopted OFCOM's submissions on this point.

T-Mobile's submissions

168. T-Mobile submitted that the RTTE Directive is concerned exclusively with equipment. T-Mobile's primary submission was that the RTTE Directive had no application to the present case. There is no suggestion by any party that the GSM gateways used by Floe were *of themselves* unlawful or problematic *as equipment*. It was the *use* that arose through the commercial use to which Floe's GSM gateways were put that was the mischief in the present case and which was prohibited by Regulation 4(2) of the Exemption Regulations. The Authorisation Directive on the other hand is concerned with the use of "radio frequencies".

169. The prohibition against the commercial use of GSM gateways is permissible under Article 6(1) of the Authorisation Directive and Annex B (points 1 and 2). The Exemption Regulations generally provide a right to use radio frequencies but regulation 4(2) limits that right by designating the service for which the right to use a frequency is granted (i.e. not providing a service by way of a business to another person). The purpose of that condition is to ensure the effective and efficient use of radio frequencies.

The Tribunal's analysis

(i) *The RTTE Directive*

170. The RTTE Directive establishes a framework for, amongst other things, putting into service of radio equipment and telecommunications terminal equipment.

171. Floe submitted that the RTTE Directive only applied where the equipment was problematic as equipment, and did not permit restrictions on the putting into service of equipment where the problem to which the restriction is directed does not relate to the particular piece of equipment. It submitted that since the GSM Gateway was

compliant with the RTTE Directive no restriction could be justified under Article 7(2) of the RTTE. Floe therefore submitted that Regulation 4(2) could not be justified under the Annex to the Authorisation Directive since that would require the condition to be in conformity with Article 7(2) of the RTTE Directive and on Floe's submission the RTTE Directive is inapplicable.

172. We consider that the submissions of Floe in this respect ignore the express wording of Article 7(2) of the RTTE Directive:

"Member States may restrict the putting into service of radio equipment only for reasons related to the effective and appropriate use of the radio spectrum…"

We consider that it is clear from this wording that the "mischief" of a restriction on the putting into service of GSM gateways imposed by the United Kingdom may relate to the use of the radio spectrum and may not necessarily be directed solely to a matter concerned with the radio equipment itself.

173. A GSM Gateway is telecommunications equipment within the definition in Article 2(b) and radio equipment within the definition in Article 2(c) and "apparatus" within the definition in Article 2(a) of the RTTE Directive. Article 7(1) requires Member States to allow the putting into service of apparatus for its intended purpose where it otherwise complies with the RTTE Directive. Article 7(2) permits Member States to restrict the putting into service of radio equipment only for reasons related to the effective and appropriate use of the radio spectrum, avoidance of harmful interference or matters relating to public health.

174. Regulation 4(1) of the Exemption Regulations exempts "relevant apparatus" from the provisions of section 1(1) of the 1949 Act. However, as discussed above, regulation 4(2) provides that this exemption does not apply to "relevant apparatus" which is established, installed or used to provide or to be capable of providing a wireless telephony link between telecommunications apparatus or a telecommunications system and other such apparatus or system, by means of which a telecommunication service is provided by way of business to another person.

175. OFCOM submitted that the restriction on the putting into service of GSM gateways (and other equipment) contained in regulation 4(2) was justified under Article 7(2) of the RTTE Directive as it has been imposed for reasons related to the effective and appropriate use of the radio spectrum. Although Regulation 4(2) first appeared (so far as is evident from the material before us) in the Exemption Regulations made on 22 March 1999, no evidence was provided by OFCOM as to the reasons for the restriction having been included in the 1999 Exemption Regulations.

176. There is no evidence before us that any evaluation had been made as to whether use of public GSM gateway devices provided by way of business to another person in fact gave rise to problems for the effective or appropriate use of the radio spectrum prior to 18 July 2003. OFCOM relied on the Government Statement of 18 July 2003 in which the RA stated publicly that it considered that the use of spectrum by public GSM gateways was "very inefficient". During the consultation period it seems that the RA had been persuaded by the MNOs of the inefficiency as this was emphasised by the MNOs in their joint written response to the November 2002 Consultation (see above). OFCOM submitted that the efficiency or otherwise of the commercial use of GSM gateways was obviously something that had been considered as a technical aspect by those responsible for implementing the legislation and that the United Kingdom had been entitled to "take a view, presumably on the basis of the expertise of technical advisers" as to whether or not to impose a restriction for reasons of the effective and appropriate use of the spectrum.

177. OFCOM's submission requires us to assume that the inefficiency referred to in the 18 July 2003 Statement ("the resulting use of spectrum is very inefficient") was not a new phenomena and must have existed also in 1999, that it was known to the technical advisers, and that that was the reason for the exclusion from the exception of public GSM gateway devices provided by way of business to another person. However, in the intervening period, the RA had in fact been expressing the opposite conclusion, as is evidenced by its proposal in the November 2002 Consultation that the restriction should be lifted: "if operators choose to connect customers to the network, does it matter if the traffic carried is a public or a private service?" (see paragraph 58 of the November 2002 Consultation).

178. As we understand it from the agreed Statement of Facts, a self-provided private GSM gateway, as defined for the purposes of this case, may in some circumstances involve the same quantitative use of the radio spectrum as a public GSM gateway. It seems to us therefore that in the circumstances the distinction drawn in Article 4(2) of the Exemption Regulations between "self-provision" and "supply by way of business" may be a somewhat arbitrary method of ensuring "effective and appropriate" use of the spectrum under Article 7(2) of the RTTE.

179. However, it seems to us that whether the Exemption Regulations are in conformity with the RTTE Directive depends in part on the matters raised under the First Alternative Argument discussed below. In view of the conclusion we have reached in relation to the First Alternative Argument set out below, including the view we take as to the new position adopted by OFCOM as to what is or is not authorised under the MNO's WTA licence, it is not necessary for us to decide, in this appeal, whether the Exemption Regulations are, on their true construction, in conformity with the RTTE Directive.

(ii) *The Authorisation Directive*

180. The Authorisation Directive, which had to be applied by 25 July 2003, applies to the granting of rights of use of radio spectrum where such use involves the provision of an electronic communications network or service, normally for remuneration. The Authorisation Directive provides for either general authorisation for the use of radio frequencies or for individual rights of use of radio frequencies. Wherever possible Member States are required to make the use of radio frequencies subject only to conditions in a general authorisation and not to make them subject to individual rights of use. Article 5(5) provides that Member States shall not limit the number of rights of use to be granted except where this is necessary to ensure the efficient use of radio frequencies in accordance with Article 7 of the Authorisation Directive. Article 7 sets out the criteria to be applied by Member States wishing to restrict the number of rights of use granted.

181. The conditions which can be imposed in a general authorisation are set out under heading "A" in the Annex to the Authorisation Directive. Such conditions are

required by Article 6 of the Authorisation Directive to be objectively justified in relation to the service concerned, non-discriminatory, proportionate and transparent. Condition 17 under A in the Annex permits "Conditions for the use of radio frequencies, in conformity with Article 7(2) of [the RTTE Directive] where such use is not made subject to the granting of individual rights of use in accordance with Article 5(1) of this Directive."

182. It is submitted by OFCOM that regulation 4(1) of the Exemption Regulation is a "general authorisation" for the purposes of the Authorisation Directive. OFCOM submits that this general authorisation includes the condition contained in Regulation 4(2) and that that condition is compliant with Condition 17 of "A" in the Annex since it does not make the use of the radio frequency subject to the granting of individual rights of use.

183. T-Mobile submitted that Regulation 4(2) was in accordance with condition 2 under "B" in the Annex to the Authorisation Directive. The Conditions permitted under "B" are conditions permitted to be attached to "rights of use for radio frequencies".

184. At first sight, we find it hard to accept that regulation 4(2) is to be understood as a "condition" attached to the "general authorisation" supposedly granted under regulation 4(1). Even assuming that regulation 4(1) would amount to a "general authorisation" within the meaning of Article 2 (2) of the Authorisation Directive, it seems to us arguable that regulation 4(2) is not a "condition of usage of such radio frequencies" within the meaning of Article 5 of the Directive, but rather a provision which excludes the supply of telecommunications services provided by way of business to another person from the scope of the general authorisation. In other words, it seems to us that the "conditions" to which Articles 5 and 6, paragraph 17 of Annex A and paragraphs 1 and 2 of Annex B, refer are conditions which regulate the use of the authorised frequencies. Regulation 4(2) on the other hand excludes certain activities from the authorisation in the first place. At first sight, the effect of Regulation 4(2) is to require individual licensing of the activities to which that provision applies.

185. Even if Regulation 4(2) could be construed as a condition of a general authorisation, the question would still arise as to whether that provision was non-discriminatory, proportionate, and transparent, in accordance with Article 6(1) of the Authorisation Directive.

186. At the time of Floe's disconnection, the Authorisation Directive had been made but was not yet in force. Member States were required to apply the measures necessary to comply with that Directive from 25 July 2003. As we understand it, prior to that date, the obligation of the United Kingdom was to refrain from adopting measures liable seriously to compromise the result prescribed: Case C-129/96 *Inter-environment Wallonie* [1997] ECR I-7411, at paragraph 43.

187. However, for the reasons which appear below in relation to the First Alternative Argument, in our view the Tribunal does not need to decide at this stage whether at the material time the United Kingdom was in breach of any requirement of Community law arising as a result of the Authorisation Directive.

(d) Did Floe install the GSM gateways?

188. OFCOM further submitted that Floe's Primary Argument overlooked the fact that a WTA licence is necessary not just to authorise the "use" of apparatus but also to "install" apparatus. Floe has not contested the fact that it installed public GSM gateways. This is a further reason why Floe was required to be licensed under the WTA 1949 in respect of its public GSM gateways.

189. We have already decided that Floe did "use" the GSM gateways for the purposes of section 1 WTA 1949. We also find that Floe "installed" GSM gateways for the purposes of section 1 WTA 1949. Section 1 WTA 1949 required that both such actions were under authority of a licence in that behalf issued by the Secretary of State or exempted from that licence requirement. However, whether Floe was acting lawfully, whether as regards "use" or "installation", seems to us to depend on the First Alternative Argument discussed below.

(e) Conclusion on the Primary Argument

190. The Tribunal therefore finds as regards the Primary Argument of Floe:

(a) Floe and not Vodafone "used" the GSM gateways for the purposes of section 1 WTA 1949.

(b) Floe's use of the GSM gateways was not exempt under the Exemption Regulations from the requirement that such use be "under the authority of a licence in that behalf" as the GSM gateways were being used to provide a link between the apparatus of Floe's customers and the apparatus or system of Vodafone, by means of which Floe provided a telecommunications service by way of business to another person (its customers) and so were excluded from the exemption from licensing by Regulation 4(2).

(c) Whether regulation 4(2) is compliant with the RTTE Directive, and/or the United Kingdom's obligations under the Authorisation Directive is a matter which the Tribunal does not need to decide in view of our conclusions under the First Alternative Argument discussed below.

XI THE FIRST ALTERNATIVE ARGUMENT

191. The First Alternative Argument is that Floe, by entering into the Agreement, had been authorised in any event by Vodafone to use the GSM gateways under provisions in Vodafone's WTA licence (which Agreement is to be construed against Floe's Business Plan received by Vodafone before Vodafone entered into the Agreement with Floe).

192. There are two main elements that require consideration under the First Alternative Argument. First, what is the true construction of the Agreement and in particular did Vodafone under the Agreement purport to authorise Floe to use "public" GSM gateways? Secondly, did Vodafone's licence under the WTA 1949 give Vodafone the authority to authorise the use of GSM Gateways by Floe? In the Decision the

Director, on the basis of advice given to him by the RA, the body that issued the licence on behalf of the Secretary of State, took the view that condition 8 of Vodafone's licence did indeed give Vodafone the ability to authorise the use of GSM gateways by Floe. The Director, however, decided that no such authorisation had been given under Condition 8. However, OFCOM has now resiled from that part of the Decision which decided that Vodafone was entitled to authorise Floe to use public GSM gateways. OFCOM submits that that part of the Decision was wrong.

193. According to OFCOM, the provisions of Vodafone's WTA licence relating to authorisation can only be relevant if the scope of the licence extends to "user stations" and is not restricted to "base transceiver stations" only. The RA had considered that Vodafone's licence was sufficient in scope to permit Vodafone to authorise Floe to provide a public GSM gateway service pursuant to Condition 8 of the licence and this was accepted by the Director in the Decision. OFCOM told us that OFCOM now took a different view as to the scope of the licence from that of the RA and the Director, on the grounds that Vodafone's WTA licence did not extend to "user stations". However, OFCOM told us that the RA could have granted Vodafone a licence that covered user stations; it would have been intra vires the RA to have done so, but OFCOM now took the view, in opposition to the view of the RA itself, that the RA had not done so.

194. In the Decision, at paragraphs 49 and 50, the Director stated that he had considered the provisions of the Agreement which he found allowed Floe to purchase certain mobile products and services from Vodafone, including SIM cards, and re-sell them to end-users. The Director stated that he had considered written documentary evidence concerning the provision of services from Vodafone to Floe and referring to contracts between Vodafone and Floe. The Director considered that the Agreement between Floe and Vodafone was not sufficient to constitute an agreement between the parties concerning the provision of public GSM gateway services by Floe as envisaged by condition 8 of Vodafone's WTA licence. The Director found that there was nothing in the contract between Vodafone and Floe to indicate that Vodafone had given *written* authorisation to Floe to provide public GSM gateway services. The Director further found that the contract between Floe and Vodafone stated that Floe was to act independently and on its own account and that it was silent as to the use to

be made of SIM cards supplied under the contract. The Director did not consider that the Agreement was the type of agreement that would, effectively, allow Floe to operate public GSM gateways under Vodafone's WTA licence. The Director further stated that he had not seen any other evidence that demonstrated that Vodafone had given written authorisation to Floe to operate public GSM gateways under the terms of Vodafone's WTA licence.

195. In his "conclusions on refusal to supply" in paragraph 56 of the Decision the Director stated:

> "Irrespective of the parties' arguments regarding the use to which the SIMs supplied to Floe were going to be put, the Director has not been provided with any written evidence indicating that Vodafone has at any time authorised Floe in writing to provide Public GSM Gateway services. Although it is possible that at the time of service provision to Floe certain Vodafone personnel may have been aware that Floe was using SIMs supplied by Vodafone in GSM Gateway equipment this does not constitute a formal written arrangement between the parties sufficient to 'legalise' the operation of a Public GSM Gateway."

(a) The true construction of the Agreement

196. In making submissions on the true construction of the Agreement all parties referred us to the Business Plan and Vodafone referred us to witness statements provided by certain of its employees who were involved at the time of negotiation of the Agreement and at the time of the decision to disconnect Floe's SIM cards and IMEIs. We have also been provided with documentary evidence, including the documentary evidence before the Director when the Decision was made. We have carefully considered the material before us in particular the Agreement, the Business Plan and Vodafone's witness statements.

197. It is agreed between the parties as set out in paragraph 35 of the Statement of Facts that the Agreement did not expressly authorise Floe to use public GSM gateways. Floe relies on it having been "tacitly agreed" between the parties that Floe were to provide its service using GSM gateways, in particular having regard to the Business Plan.

The relevant facts

198. Witness statements were provided by:

(a) Mr Johnathan Young who in 2002 was employed by Vodafone Limited as the Relationship Manager in the Facilities Managed Service Providers channel. In that position he dealt with relationships with smaller-sized organisations that could not or did not wish to enter into standard service provider contracts with Vodafone. Mr Young negotiated the Agreement on behalf of Vodafone and became the Relationship Manager for Floe. The Agreement was signed on behalf of Vodafone by Mr Young's manager, Mr Overton.

(b) Mr Rodman, Head of Regulatory Affairs in Vodafone's UK business. He has been employed by Vodafone for just over 4 years and has been involved in telecommunications for almost 18 years and in mobile communications for 14 years.

(c) David Morrow, employed as an Intelligence Manager in Vodafone's Security and Fraud Department.

199. Mr Rodman in his witness statement gave evidence as to what he understood was meant by a private gateway device, a public gateway device and least cost routing services. We have already referred to some of this evidence. Mr Rodman's evidence on least cost routing services and public gateway devices is as follows:

> "5. Indeed, with the liberalisation of the telecommunications market in the UK, and with the multiplicity of network operators and service providers, there are numerous such opportunities for users to reduce their overall telephone bills by choosing the cheapest ways of making calls. There are active in the UK market various companies providing so-called least cost routing services. They tend to market their services to corporate customers, who incur relatively high telephone bills, and offer them cheaper charges by routing their calls across transit networks and through other devices which offer cheaper prices than conventional carriers' charges. A least cost routing company will generally connect its own equipment to the customer's switchboard equipment (PABX) and carry the traffic itself, up to a point of handover to third party network operators for on-delivery to its destination. The carrier will arrange for the traffic to be carried, in each case, by the lowest cost route.

> The company will charge for its services, at a price which effectively allows the end user to achieve an overall reduction in its telephone bills, whilst remunerating the routing company for its services. This activity is generally perfectly legal, provided that all the carriers involved operate within the terms of applicable authorisations and licences.
>
> 6. In 2002, I learned that some such companies also establish and use public GSM gateways. These are devices which may hold a substantial number of SIM cards (e.g. Vodafone SIM cards, O2 SIM cards, Orange SIM cards, T Mobile SIM cards). A telecommunications operator carries relevant call traffic to the gateway. At the gateway, the call is routed through a SIM card associated with the network to which the call is destined to be delivered (so a call to a Vodafone subscriber is routed via a Vodafone SIM card). (…) The call route through the SIM card is treated, by the Vodafone network, like any outgoing call originated on a Vodafone handset and is delivered to the called party, in all respects as if it were an on-net call from one Vodafone subscriber to another. If the Gateway operator has acquired the SIM card as part of a package offering cheaply-priced on-net calls he will pay only that cheap on-net call price for the delivery of the call from the gateway to the called party. Where a gateway operator provides services to numerous customers, it will be able to pass large volumes of traffic through the gateway…."

200. Mr Rodman in his witness statement said that he was familiar with what he described as private gateway devices from when he worked in South Africa, before joining Vodafone. He referred to Orange in the UK having been the first mobile network operator to offer private gateways, using Premicell devices. He explained that:

> "11. A private GSM Gateway is a device containing a single SIM card, which may be attached directly to a corporate customer's switchboard (PABX) and used to route outgoing calls form the switch board through the gateway, and through a particular SIM card for on-delivery of the call to a subscriber to the network with which the SIM card is associated. It serves the same purpose as a public GSM Gateway – namely to convert a fixed-to-mobile call, for charging purposes, to an on-net call."
>
> 12. I had been familiar with private gateway devices when I worked in the mobile telecoms sector in South Africa, before joining Vodafone. In the UK, Orange had been the first mobile network operator to offer private gateways, using Premicell devices. Vodafone's own in-house service provider business, Vodafone Corporate, found that it also had to offer private gateway devices to its corporate customers, in order to compete effectively with Orange."

201. In addition the Tribunal was provided with the agreed Statement of Facts (referred to above). Many of the matters in Mr Morrow's witness statement were subsequently agreed between the parties in the Statement of Facts. The relevant facts as appear from the agreed Statement of Facts and the witness statements are:

(a) Mr Young first met Mr Simon Taylor in around 2000 when Mr Taylor was Marketing Director of a small telecoms service provider known as Telecom FM. Mr Taylor subsequently became Chief Executive of Floe.

(b) As set out in paragraph 36 of the Agreed Statement of Facts, "prior to entering into the Agreement, Floe met Vodafone. Floe indicated to Vodafone that it intended to conclude an agreement with Vodafone, for Vodafone to supply services to Floe to form part of Floe's 'least cost routing service' for business users. Floe provided Vodafone with a copy of a business plan".

(c) Mr Young, in his witness statement, sets out his understanding of Floe's Business Plan which he saw prior to concluding the Agreement. He understood from the Business Plan and from the discussions with Mr Taylor that Floe intended to provide a range of "least cost routing services" to its customers, including what Mr Young knew to be "Premicell-type products". Mr Young's understanding of a Premicell-type product was that it was a device which a corporate customer can use to route its outgoing fixed-originated call traffic to, say, a Vodafone mobile subscriber via a SIM card, so that it can secure on-net call charges. Mr Young's understanding was that the SIM card is accessed via the Premicell, which is connected directly to the customer's switchboard equipment. He further explained in his witness statement that this is what he now understands is termed "private gateways".

(d) Floe stated to Vodafone during the negotiations that the average revenue per user or "ARPU" it would be likely to achieve would be 8 times higher than the normal ARPU for mobile handsets. Floe would be sourcing equipment for its business itself and would not be buying mobile handsets from Vodafone.

(e) Floe informed Mr Young during the contract negotiations or shortly thereafter, that each customer would be likely to take three or four new SIM cards. Mr Young does not record who in Floe so informed him.

(f) Mr Young was responsible for negotiating the Agreement between Vodafone and Floe which was approved and signed on behalf of Vodafone by Mr John Overton, Mr Young's manager. No witness statement was submitted by Mr Overton.

Floe's submissions

202. Floe submitted that Vodafone always knew or ought to have known that Floe intended to operate public GSM gateway services and that Vodafone had intended to authorise such use under its WTA licence by the Agreement. Floe submitted that one of the most important aspects of the Agreement was that it was a contract for the provision of services. It was not a contract for the connection of particular equipment to a network. It was not a contract for anything else other than the distribution or resale of telecommunications services. Floe was not characterised as a service provider under the Agreement and it was specifically not Vodafone's agent. The service provider under the Agreement, submitted Floe, was Vodafone and Floe was merely reselling a service to end-user customers.

203. By the Agreement Floe was obliged to comply with licences necessary for Floe to use the services. That provision implied, said Floe, that Vodafone recognised that Floe itself intended to use the services under the Agreement. Very little is said in the Agreement about SIM cards except as to who is responsible for ensuring connection to the network and the expectations of quantities to be supplied. The quantities to be supplied and the average revenue per user envisaged by the Agreement were larger than usual and the contract was at risk if certain minimum requirements as to that were not met.

204. Under the Agreement Floe were entitled to place SIM cards obtained by Floe from Vodafone into any equipment lawfully marketed in the EU under the RTTE Directive and compliant with relevant standards under the RTTE, including GSM gateways.

There was no prohibition in the contract as to the type of equipment to be used by Floe and therefore no express authority was needed for Floe to put the SIM cards into GSM gateway equipment which was otherwise lawfully sold in the United Kingdom, whether "public" or "private".

205. As a result of the pre-contractual discussions between the parties, Floe submitted that Vodafone knew that the Agreement was not one for the ordinary distribution of services to the public using ordinary mobile telephone handsets. However, at the time of the Agreement no one in the industry, said Floe, was able to understand or differentiate between "public" and "private" GSM gateways. Nobody had yet made that distinction.

206. Floe submitted that it was not possible merely from looking at a GSM gateway device to know whether the GSM gateway was for use as a "public" or a "private" gateway. All GSM gateway devices were at the very least capable of use as a public GSM gateway.

207. Floe said that prominent among a list of bullet points in the version of the Business Plan provided by Vodafone was the fact that Floe intended to provide a service that involved eight times the average ARPU. The Business Plan was not in respect of a small affair and Vodafone should have been aware of the implications of that. The relationship between Floe and Vodafone was not a "walk in off the street" relationship. Floe had been required to produce, and did produce, a Business Plan before Vodafone would enter into the Agreement. The Agreement was therefore intended to cover a relationship of a kind that was clearly in respect of an entirely new type of business opportunity.

208. Floe further submitted that if the Vodafone licence imposed a duty on Vodafone to authorise use of GSM gateways expressly that did not mean that any authorisation given by Vodafone to use GSM gateways was void or unenforceable. It may mean that Vodafone was in breach of its licence, for which the RA had a remedy, but it was not a requirement that could be held against Floe.

OFCOM's submissions

209. OFCOM submitted that Floe had not alleged that it had any express written authorisation to use public GSM gateways under the Agreement. OFCOM submitted that the Agreement itself makes no express reference to GSM gateway services whatsoever. That had been agreed by Floe in the Statement of Facts at paragraph 35. The highest that Floe put its case was that it was "tacitly" authorised to use public GSM gateways by Vodafone pursuant to the Agreement.

210. OFCOM submitted that although it was possible that certain Vodafone personnel were aware that Floe were using the SIMs supplied by Vodafone in public GSM gateways, such knowledge by those Vodafone employees would not amount to express written authorisation. It may be, said OFCOM, that the Vodafone employees dealing with the Agreement did not know at the time that public GSM gateways were unlawful or it may be that they did. In either case, if Floe had ever sought to enforce the Agreement in order to allow Floe to provide public GSM gateway services the Agreement would have been found to be unenforceable on grounds of public policy.

211. The Agreement contained an "entire agreement" clause so if there was to be any written authorisation to use public GSM gateways by the Agreement one would expect it to be set out in the Agreement. However counsel for OFCOM accepted that that was not his best point and that it was possible to have an entire agreement clause and still have an authorisation outside the Agreement.

212. OFCOM referred to clause 5.3 of the Agreement which provided that Floe was to obtain at its own expense all necessary permissions, consents and licences to enable Floe to purchase, use, distribute, market and sell the Services. If it had been possible to operate the Agreement legally it was for Floe to ensure that it obtained any necessary licences. It cannot be held against Vodafone or OFCOM if Floe did not get a necessary licence.

213. OFCOM drew our attention to clause 8.1 of Schedule 6 to the Agreement which stated: "Floe undertakes that its End-Users shall use the Services in accordance with such conditions as may be notified in writing to Floe by Vodafone from time to time.

Without limiting the generality of the foregoing, Floe undertakes: (a) not to use the services and/or the equipment for any improper, immoral or unlawful purpose including the transmission of defamatory material". OFCOM's submission was that the use of public GSM gateways was unlawful and accordingly the Agreement in fact expressly prohibited the use of public GSM gateways. Floe's submission that the Agreement did not prohibit the use of public GSM gateways, and that Floe were entitled under the Agreement to put SIM cards in any equipment compliant with the RTTE Directive, was therefore misconceived.

214. The Business Plan provided to Vodafone did not take Floe anywhere because the Agreement could not be enforced on grounds of public policy. OFCOM submitted that the Tribunal was not dealing with a contractual dispute but a Competition Act complaint. The fact that Vodafone employees in the commercial department entered into a contract which contemplated GSM gateways, and those employees may have known that Floe was to provide public GSM gateways, and whether or not such employees may also have known that such a service was illegal, was not relevant to the position under competition law.

Vodafone's submissions

215. Vodafone disputed Floe's submissions. It contended that it believed, in the light of Floe's Business Plan, that the SIMs provided to Floe were to be used in mobile phone handsets and/or in "private" GSM gateways.

216. Vodafone submitted, based on the witness statements and the Business Plan, which Vodafone submitted are the only relevant evidence before us, that Vodafone had considered that Floe's business would be to sell GSM gateway *equipment* to corporate customers for such customers' self-use as "private" gateways. In support of that submission Vodafone referred us to the witness statement of Mr Young and to references in the Business Plan to "customer premise equipment" (CPE), to attacking the switch rooms of small to medium businesses, to using its unique product portfolio to directly connect the PABX to the Vodafone mobile network via the air interface, and to Floe's stocking of SIM's.

217. Vodafone submitted that Vodafone did know that Floe intended to put SIMs into "private" GSM gateways, but did not know that Vodafone intended to use SIMs to provide "public" GSM gateways. Counsel for Vodafone said: "that is the evidence of Vodafone's witnesses and there is no evidence to the contrary. It makes a big difference, because the Business Plan on the face of it, where they are proposing to sell private gateways, is a perfectly legal business. That is what Vodafone thought they were doing. Vodafone understood that Floe would be using SIMs supplied under the agreement in mobile phones and private gateways. That is the evidence of Mr Morrow. That is obviously on the basis that private gateways were legal, as they are. You will see that Mr Morrow and others refer to Premicell devices – that is what private gateways used to be called, Premicell devices – and they have been around for some years."

218. The Business Plan was, in Vodafone's submission, entirely consistent with Floe selling GSM gateways for use as private GSM gateways by customers. Vodafone referred to the references in the Business Plan to "customer premise equipment" and to Floe's intention to "directly connect the PABX to the Vodafone mobile network". The Business Plan referred to minimum use of each SIM of 750 minutes per month. Vodafone submitted that that sort of usage did not indicate public GSM gateways. Vodafone referred to the witness statement of Mr Rodman which referred to usage of public GSM gateway equipment for up to four hours per day.

219. Counsel for Vodafone further submitted that it can be seen from Mr Young's witness statement "that it was not just the Business Plan, there were actually discussions – because of course the negotiations went on for a long time – between Mr Young and Mr Taylor, in the course of which, he says Mr Taylor explained to him what they were proposing to use was private gateways. Floe has produced no evidence to contradict that, still less any witnesses to say that in those discussions we told Vodafone that we were going to use them in public gateways." Vodafone also said that Floe lied about what they were doing. Vodafone understood that they were going to sell private gateways which are and at all times have been legal. It turns out, said Vodafone, that Floe were not doing that at all but were using GSM gateways as public GSM gateways. When Vodafone confronted them with the evidence of that they lied about it.

220. Vodafone also referred us to the witness statement of Mr Young which refers to his understanding that Floe were to provide a "least cost routing" service and Vodafone referred the Tribunal to the explanation of the phrase "least cost routing" in Mr Rodman's witness statement.

221. Vodafone also submitted at the hearing that "public" GSM gateways are a completely different type of equipment from "private" GSM gateways. Counsel for Vodafone relied for this submission on the witness statements of Mr Young and Mr Rodman which he submitted were evidence that Premicell–type devices were private and not public gateways.

The Tribunal's analysis

222. We repeat at this stage our finding when considering the Primary Argument that we have upheld the submissions of OFCOM and Vodafone that all use of GSM gateways to provide a telecommunications service by way of business to another person falls within the scope of regulation 4(2) of the Exemption Regulations, and that use of such "public" GSM gateways is not exempted from the requirement to be licensed under section 1 WTA 1949. In this context "public" use of GSM Gateways embraces both GSM gateways used by an intermediary to provide a telecommunications service where each GSM gateway is dedicated to the use of a single customer of the intermediary, and GSM gateways used by an intermediary to provide a telecommunications service to two or more customers of the intermediary.

223. We also note that Floe now accepts in the Statement of Facts that it was operating "public" gateways, as defined in the Statement of Facts, from at least August 2002.

224. The Tribunal must construe the Agreement having regard to the wording of the Agreement in the light of the Business Plan. Vodafone also provided evidence of its background knowledge against which the Agreement is to be construed in its witness statements which we have considered together with the facts which were agreed in the Statement of Facts. We do not accept the conclusions reached by the Director set out

in the Decision as to the construction of the Agreement, or as to whether the Agreement amounted to a written authorisation to use public GSM gateways.

225. Under the Agreement Vodafone appointed Floe as an "authorised distributor" of the Services described in Schedule 2 to the Agreement (set out above) and granted Floe a non-exclusive licence to market and resell the Services to Floe's corporate and business customers to whom Floe resold the Services under the Agreement. The description of the Services in Schedule 2 included "mobile voice services on the GSM system and mobile phone equipment and accessories". Clause 5.2 of the Agreement provided that Floe was to contract for itself independently with End-Users for the purposes of reselling the Services and act in all respects on its own account. Clause 5.3 of the Agreement provided that Floe was to obtain at its own expense and thereafter comply with all necessary permissions, consents and licences to enable Floe to purchase, use, distribute, market and sell the Services and to ensure the full and legal operation of the Agreement. Clause 5.4.9 provided that Floe would maintain a minimum ARPU (average revenue per user) of no less than Vodafone had achieved at the time of each quarterly review, would achieve a minimum of 3000 customers to whom Floe resells the Services under the Agreement (End Users) by the first anniversary of the Commencement Date, and a minimum annual spend of £1m from the first 3000 connections made during the first year following the Commencement Date. Clause 5.4.9 of the Agreement further provided that the minimum number of connections shall increase by 2000 and the minimum annual spend shall increase by £750,000 for each year this agreement remains in effect. Schedule 6 to the Agreement contained a pro-forma agreement between Vodafone and Floe in relation to the supply of Equipment and Services. Schedule 6 defined "Mobile Phone" as "a Mobile Phone and any other terminal equipment that is capable of transmitting and/or receiving communications via the Network". "Services" in Schedule 6 were defined as "the supply of Equipment, access to the Network and ancillary services to Floe by Vodafone as detailed in this Agreement or such other services as may be subsequently agreed by Floe and Vodafone in writing".

226. Mr Young's understanding was, and it was agreed in paragraph 32 of the Statement of Facts, that under the Agreement Floe agreed to order at least 3000 SIM cards during the first year. Mr Young records that he deduced from this that Floe would make on

average 250 new connections per month and that Vodafone estimated from this that this would generate aggregate outgoing call revenues of £1 million per year, which would equate to roughly £27 per month per SIM card.

227. In paragraph 32 of the Statement of Facts there is set out a dispute between Vodafone and Floe as to whether Floe obtained SIM's from Vodafone "to allow Floe's customers to obtain access to the Vodafone network" as is maintained by Vodafone, or whether, as Floe contends, that the SIM's allowed Vodafone to provide services to customers. The Tribunal find that on a true construction of the Agreement the Services provided by Vodafone were sold to Floe who were entitled to resell them to Floe's customers. Under the Agreement there was no legal relationship between Floe's customers and Vodafone.

228. We have noted the references in the Business Plan referred to by Vodafone and also note that as to the relationship between Floe and its customers the Business Plan refers to Floe modelling a number of innovative ways in which to package "the fixed-to-mobile solution" including "fully subsidised hardware, full and partial hardware payments and leasing". There is reference to Floe using its expertise in the existing mobile regulatory environment to build and manage an indirect infrastructure to deliver its value added services and solutions.

229. Further, the Tribunal notes that Floe's Business Plan makes it abundantly clear that Floe intended to provide a "least cost routing" telecommunications service to Floe's corporate customers using devices connected to the PABX of its corporate customers. Mr Young stated in his witness statement that he understood Floe was to provide a "least cost routing" service. The Business Plan made clear that Floe intended itself to build and manage an indirect infrastructure to deliver its services. It also made clear that Floe intended to be distinct from other companies and would concentrate all of its efforts to growing the number of "on-net" minutes carried over Vodafone's network. Far from merely selling equipment, as Vodafone contends, in our view the Business Plan makes clear that Floe intended to provide "fully subsidised" hardware to at least some of its customers, i.e. that Floe would not be paid "up front" for the equipment and Floe would recover and re-use equipment when its customers were disconnected in 80% of cases.

230. We have carefully considered the witness statements of Mr Morrow, Mr Young and Mr Rodman. Mr Morrow was not himself involved in the negotiations leading up to the Agreement with Floe and his evidence does not seem to us to be directly relevant to what Vodafone knew at the time the Agreement was entered into. Similarly Mr Rodman was not involved at that time. That leaves the Tribunal with the witness statement of Mr Young. As referred to above, Mr Young's statement is to the effect that he understood Floe to be a provider of "least cost routing" services using "Premicell-type" devices.

231. "Premicell" devices are GSM Gateways. Vodafone submitted that the apparatus used for "public" gateways was different from that used for "private" gateways and referred to the witness statement of Mr Young and Mr Rodman for the proposition that "Premicell" devices were exclusively private gateway devices. However all parties agreed in the Statement of Facts that the distinction between a "public" gateway and a "private" gateway arises from regulation 4(2) of the Exemption Regulations. The distinction made in the Exemption Regulations does not depend on any particular technical or other characteristic of the device, far less on which brand of device is used.

232. Mr Young does not refer to regulation 4(2) of the Exemption Regulations but explains his understanding is that Premicell-devices are now known as "private" gateways. It appears to us from Mr Young's witness statement that at the time the Agreement was entered into, Mr Young did not know the true distinction between "public" and "private" GSM gateways, which depends on whether the gateways are used within the scope of regulation 4(2) of the Exemption Regulations, rather than on the type of device being used.

233. Further, Mr Young's evidence was that he knew that the agreement which Floe wished to conclude with Vodafone, was for Vodafone to supply services to Floe to be used in order that Floe could provide a least cost routing service for business users. Mr Rodman's witness statement explained that least cost routing companies offer corporate customers cheaper charges by routing their calls across transit networks and through other devices which offer cheaper prices than conventional carriers' charges.

He explained that a least cost routing company will generally connect *its own equipment* to the customer's switchboard equipment (PABX) and *carry the traffic itself*, up to a point of handover to third party network operators for on-delivery to its destination. At the hearing, having referred us to that passage in Mr Rodman's statement, counsel for Vodafone submitted that Mr Rodman was there explaining telecommunications systems generally but in the context of fixed-line telecommunications only, and that the remarks were not directed to the issues in this case. However Mr Rodman's witness statement was made by him to be used before this Tribunal to decide the issues in this case, and it would therefore be surprising if the evidence contained in his witness statement was not directly relevant to the issues and that there was another explanation, more directly relevant, which Mr Rodman had not set out in his witness statement. This is particularly so since Mr Rodman has been employed as Head of Regulatory Policy at Vodafone UK for the past four years, has been involved in telecommunications for almost 18 years and in mobile communications for 14 years. It appears therefore to the Tribunal that the reference to "least cost routing" is indicative of the provision of "public" gateways in the sense that that term is used and defined in the agreed Statement of Facts and the Decision.

234. The supply by Floe, as envisaged under the Agreement, of services involving routing calls from Floe's customer's PABX onto the Vodafone GSM system would be the supply of a "public" gateway, in the sense of the Exemption Regulations and the agreed Statement of Facts since it would be supply by Floe of "a telecommunications service by way of business to another person." The Tribunal considers that Vodafone's submission that Floe intended to put SIMs into GSM gateways and then to sell the GSM gateways to corporate customers who could use them to "self-provide" a "private" GSM gateway, and that Vodafone did not know that Floe intended to put SIMs into "public" gateways as defined in the agreed Statement of Facts is not made out. Vodafone's submission that the Agreement was merely for the sale of GSM Gateway equipment is not in our view consistent with the terms of the Agreement and is not consistent with the Business Plan which Vodafone provided from its files. Both the terms of the Agreement and the Business Plan point to the use by Floe of equipment itself to provide a link between the apparatus of Floe's customers and the Vodafone network by means of which Floe would provide a telecommunications service by way of business to Floe's corporate customers. In

particular, the Agreement provides for Floe to "resell" inter alia mobile voice services on Vodafone's network on its own account and makes clear that Vodafone has no direct relationship with any of Floe's End Users. It was clear that Floe would charge its corporate customers for the telecommunications service so provided.

235. Accordingly, the Tribunal considers that it is clear from the Agreement properly construed on the material before us that Floe's use of the GSM gateway devices involved use of GSM gateways to provide a link between the apparatus of Floe's customers and Vodafone's apparatus, by means of which a telecommunications service was to be provided by way of business to Floe's customers. Furthermore, the Tribunal have concluded that the evidence of Vodafone's witness statements as to its background knowledge, as referred to above, is further evidence that indicates that Vodafone did know or ought to have known that Floe intended to use the SIMs in what are now known in the terminology used in the agreed Statement of Facts and the Decision as "public" GSM gateways by means of which Floe were providing a telecommunications service by way of business to Floe's customers.

236. Whether Floe's business concerned the provision of a telecommunications service by means of GSM gateways each of which were dedicated to the exclusive use of a single corporate customer of Floe at that customer's premises or whether the GSM gateways were to be used by multiple customers, Floe's use of GSM gateways in either case involved the provision of a telecommunications service by way of business to another person. In either case Floe's use of GSM gateways would be within regulation 4(2) of the Exemption Regulations and so would not be exempt from licensing under section 1(1) of the WTA 1949.

237. The conclusion reached by the Tribunal on the evidence before us is that the Agreement contemplated Floe providing a least cost routing service on a commercial basis using GSM gateways and therefore covered Floe's use of public GSM gateways as defined in the agreed Statement of Facts and the Decision.

238. We therefore consider that the Director was wrong to conclude at paragraphs 49 to 56 of the Decision that the Agreement did not constitute an agreement between Floe and Vodafone about the provision of public GSM gateways by Floe. In our view

therefore, the Agreement, which is in writing, necessarily involved a written authorisation to Floe by Vodafone for the supply of telecommunications services to third parties using public GSM Gateways as defined in this case.

239. The next question for consideration is whether the Agreement purported to authorise Floe to use public GSM Gateways pursuant to Condition 8 of Vodafone's licence. This depends upon whether Vodafone believed at the time when it entered into the Agreement that its licence was an exclusive licence for the use of the GSM spectrum frequencies awarded to it. If so, then Vodafone could only provide the "Service" it had agreed to provide in respect of public GSM Gateways if it so authorised Floe to use those gateways. In that event the submission of Vodafone and OFCOM that under the Agreement Floe and not Vodafone were responsible to ensure the lawful performance of the Agreement, would be misconceived. OFCOM's submission that it was for Floe to obtain any necessary licence (relying on clause 5.3 of the Agreement) is only tenable if Vodafone's licence is limited in scope and the relevant frequencies mentioned in Vodafone's licence had not already been exclusively licensed to Vodafone. We next consider the arguments concerning the scope of Vodafone's licence.

(b) Did Vodafone's licence give Vodafone the ability to authorise the use of GSM gateways by Floe?

240. The terms of Vodafone's licence under section 1 WTA 1949 are set out above. The Director found that under Condition 8 of Vodafone's licence Vodafone had the ability to authorise the use of GSM gateways by Floe. Condition 8 of Vodafone's licence provides as follows:

> "8. The Licensee shall ensure that the Radio Equipment is operated in compliance with the terms of this Licence and is used only by persons who have been authorised in writing by the Licensee to do so and that such persons are made aware of, and of the requirement to comply with, the terms of this Licence."

Emails of 23 and 27 May 2003 between the RA and Floe

241. In an email dated 27 May 2003, Cliff Mason, Head of the Licensing Policy Team in the Public Wireless Networks Unit of the RA wrote to John Stonehouse of Floe:

> "The mobile operators' licences allow them to use their assigned spectrum with any equipment that meets the technical specifications in the schedule to the licence. I believe therefore that the network operators have the authority under the W T Act (but not the obligation) to accept by agreement customer equipment that is not covered by the Exemption Regulations. However, the Licensee would remain responsible for compliance with the licence conditions of all equipment used."

That email replied to a message from John Stonehouse to Cliff Mason on 23 May 2003:

> "Cliff,
>
> You may remember that during our last conversation you mentioned that the mobile operators had the authority to extend their licences for the use of other parties. Is this how the MVNOs work and can you point me to the clause(s) that authorises this?"

The Government Announcement of 18 July 2003

242. The Government Announcement of 18 July 2003 stated the following with regard to Vodafone (and other operators' licences):

> "Mobile Network Operators ("MNOs") licensed under the Wireless Telegraphy Act 1949 can use their own (or third party) equipment in accordance with their licences in order to provide a telecommunications service. In some circumstances, MNOs may be able to consider purchasing products or services from Gateway Operators for use under the auspices of MNO licences. Although a commercial matter for the companies concerned, the Government encourages the MNOs and the Gateway Operators to consider ways to address pragmatically existing uses of equipment that continue not to meet the requirement for exemption.
> (…)
>
> 4. Rejecting Proposal 2 confirms that the use of terminal equipment to provide commercial third-party telecommunications services is not authorised by the Exemption and hence remains illegal. The commercial use of licensed spectrum is authorised only by the licences of network operators who may purchase equipment or services from other companies subject to fulfilling legal and regulatory requirements placed on them."

Correspondence between the RA and Oftel

243. As is clear from the documents before us, the relevant case officers investigating Floe's complaint on behalf of the Director arranged a meeting on 11 September 2003

with officials at the RA to discuss the requirements of the WTA 1949. In advance of that meeting Robert MacDougall of Oftel sent an email on 8 September 2003 to Cliff Mason of the RA in these terms:

> "The RA has confirmed with Oftel that by having such contractual arrangements in place with MNOs, public gateway operators may, in certain circumstances, legally be able to provide telecommunications services to third parties via GSM gateways, as this would be authorised under Vodafone's Wireless Telegraphy Act licence.
>
> Can the RA please respond to the following points:
>
> 1. What are the circumstances that the RA has in mind where MNOs may be able to purchase products & services from GSM gateway operators in this respect?
> 2. What are the products and services the MNOs would purchase from GSM gateway operators in order to make these gateway services legal?
> 3. Under what MNO licence conditions would MNOs purchase these products and services from GSM gateway operators?
> 4. If different to the answer to question 3, what MNO licence conditions would authorise GSM gateway operators' provision of telecommunications services to third parties via GSM gateways?
> 5. What sort of contractual arrangements do you envisage being in place between MNOs and GSM gateway operators?"

Cliff Mason responded by email on 8 September 2003 as follows:

> "Robert
>
> Apologies if this seems long-winded but it may help to build up a picture of what goes on before arriving at answers to your 5 questions.
>
> The WT licences convey authority to "…establish, install and use radio transmitting and receiving stations…" on the specific radio spectrum channels. They neither prevent nor compel the running of a telecommunications service on the spectrum…the economics of building infrastructure is the driver for getting a return on the huge investment costs.
> All use of spectrum must be in accordance with a licence under the 1949 Act, unless covered by a specific exemption. For some services, these may be on shared channels where the sharing and coordination criteria will be defined. For most public operators, spectrum is awarded by competitive means and is licensed exclusively to that operator. This is the case with the cellphone networks. They have the exclusive rights to employ the spectrum licensed to them.
> (…)
>
> User Stations
>
> I own a personal cellphone handset that transmits on frequencies in the 1800MHz range. I do not have a WT Act licence, neither am I part of nor employed by Orange. However, I am not committing a criminal offence because I am a single private user that is exempted and I do not supply a commercial telecoms service via my handset. A gateway is a type of user station that may use a multiple of subscriber lines (radio

channels) and connects a fixed telephone to the mobile network via a radio link i.e. it 'pretends' to be a [batch of] mobile[s]…

Where a gateway is used commercially to provide third party services without coordination with or the agreement of the MNO it is not covered by the exemption neither are we able to issue a WT Act licence for the spectrum that is licensed exclusively to the MNO.
(…)

Legitimate Commercial Gateways

in answer to your 5 questions, as the RA understands the position:

1. Floe, MGOA and other gateway operators (GOs) say that congestion and calling line identity problems are capable of solution. If so, the RA has no objection to a MNO authorising a partner company to access its spectrum as authorised by the WT licence to the extent that the MNO must accept responsibility for the transmissions made and remains liable for any infringement of the licence conditions. The MNO bears too the responsibility for complying with other law and regulations.

2. The GOs collect telecommunications traffic by wire, cable and fibre relay it to their gateway and shoot it into a base station of the mobile network. Basically they are providing interconnection between telecommunications networks. RA has no objection to this service being provided as long as where spectrum is used, the licensee (MNO) is happy to take responsibility for compliance with the WT licence terms. RA notes though that this is an inefficient use of spectrum and suggests that interconnection may be better achieved through fixed backhaul means.

3. WT licence conditions neither allow nor prevent the purchase of interconnection services via gateways. The licensee (MNO) remains responsible in law for the correct operation of the Radio Equipment used in accordance with the technical parameters contained in Schedule 1 to the licence.

4. The WT licences contain the following terms:

"Radio Equipment Use

7. The Licensee must ensure that the Radio Equipment is constructed and used only in accordance with the provisions specified in the schedule(s). Any proposal to amend any detail specified in the schedule(s) must be agreed with the Secretary of State in advance and implemented only after this Licence has been varied or reissued accordingly.

8. The Licensee must ensure that the Radio Equipment is operated in compliance with the terms of this Licence and is used only by persons who have been authorised in writing by the Licensee to do so and that such persons are made aware of, and of the requirement to comply with, the terms of this licence."

There is no requirement for the Licensee to own the Radio Equipment in question so we conclude that the Licensee has the ability to authorise partners to operate as part of their network but not to delegate their responsibility for licence compliance.

5. Pursuant to clauses 7 & 8 shown above, any contract would have to state explicitly that permission to utilise the spectrum must be in accordance with the WT Act licence terms. Any other commercial matters such as tariffs, continuity and

> security of tenure are not matters for the RA. However, the MNOs would presumably have to include other regulatory and legal duties such as those under RIPA in any contract."

[emphasis added by the Tribunal]

Note of a meeting between Oftel and Floe on 26 September 2003

244. In a note of a meeting between representatives of Oftel, including Robert MacDougall, and Floe Telecom (John Stonehouse and David Happy) held on 26 September 2003 which was placed before us it is stated:

> "RM stated that Oftel's investigation could be broken down into three stages. First the RA announcement on the 18 July formed the basis for the investigation. Broadly speaking, this announcement stated that Private GSM Gateways were legal and Public GSM Gateways were not. However, Public GSM Gateways could be legal if the companies running these Gateways were expressly authorised by the MNOs to do so and therefore utilise the MNO's spectrum.
>
> Second, Oftel's investigation had sought to establish whether Floe had been authorised by Vodafone to operate its Public GSM Gateway Services. RM stated that Oftel had considered the evidence that Floe had provided in this regard including the contract for the supply of SIMs. It was not clear that Floe had an express written authorisation to utilise its GSM Gateways in providing telecommunications services to third parties…
>
> JS and DH stated that Vodafone was supplying Floe with SIMs to access network services and that the supply of SIMs under contract was a de facto agreement to use Vodafone's Wireless Telegraphy Act licence. JS and DH also stated that the Private/Public GSM Gateway distinction was irrelevant as it was not a consideration prior to the publication of the Government announcement on the 18 July 2003. Vodafone had disconnected Floe SIMs in April 2003."

Floe's letter of 27 September 2003

245. There is no contemporaneous material before us which sheds light on what Floe believed Vodafone's licence to cover or the basis on which it entered into the Agreement. Floe wrote to Oftel on 27 September 2003 following the meeting referred to above stating, inter alia:

> "The question of public or private Gateways only arose *after* services had already been offered and Gateways were in wide use by many people across the UK. To automatically decide Floe was operating illegally and there is no case to answer makes the presumption that Floe was not operating under Vodafone's Licence. However, Vodafone obviously thought that they could block Floe's IMEI numbers

lawfully, since they did so unilaterally. If they regarded the Gateway equipment to be part of *their* network then this course of action would be logical. However, since they felt able to block IMEI numbers lawfully then they *must* also believed (*sic*) that the equipment was part of *their* network and therefore that the point of interconnection must have been before the GSM Gateway. Therefore there is no doubt that Floe was operating under Vodafone's licence. No other explanation of which I am aware fits the facts."

Vodafone's letter of 23 October 2003

246. Although there are contemporaneous statements made by the RA as to the extent of Vodafone's licence there is no contemporaneous evidence before the Tribunal of Vodafone's understanding of the scope of its WTA licence. In response to a question from the Tribunal at the hearing Vodafone drew our attention to a letter dated 23 October 2003 from Mr Rodman of Vodafone to Heather Clayton of Oftel. This letter was in response to a "section 26 notice" served on Vodafone on 9 October 2003 at a late stage in the Director's investigation. That letter stated the following:

"Could Vodafone have simply given its written consent to allow Floe to operate what would otherwise have been an illegal public GSM Gateway service?

Oftel's position

3.1 During the conference call on 13 October, Oftel said that it had always been an option for Vodafone to simply consent to any public GSM Gateway operator operating a public GSM gateway. We have already supplied information to Oftel to the effect that Vodafone has not given its express consent to Floe (or indeed anyone else) to operate a public GSM Gateway. In addition, we would make the following points in respect of this line of argument.

View of the RA

(…)

3.3 On 24 July 2003 the RA issued a statement entitled "Consultation on Exemption of User Stations" which sought to clarify its position on public GSM Gateways.

3.3.1 In the Statement, the RA states: "*Commercial use of the GSM spectrum is authorised only by the Wireless Telegraphy Act licences of the Mobile Network Operators (MNOs). Subject to the MNOs being able to fulfil all the legal and regulatory requirements of their licences and authorisations, it is conceivable that MNOs may be able to agree commercial ventures with other companies where traffic and connection to a relevant network would be authorised under the auspices of their WT Act licences. As the planning and control of the equipment, spectrum and network needs to be tightly controlled, GSM Gateway companies offering third party commercial services must approach the MNOs to discuss whether their operation can*

be regularised and accommodated. Operation without the authority and permission of a licensee is unlicensed use and will be illegal."

3.3.2 As is set out below it is difficult to see how an MNO could give its consent and yet still be able "*to fulfil all the legal and regulatory requirements of their licences and authorisation*". We are not aware that the RA has given any guidance as to how these legal and regulatory issues, for example, the masking of CLI or the effect on unregulated spectrum trading, could be overcome. In addition, the RA has not explained how the practical problems upon which its decision of 18 July 2003 was based (and which it subsequently reiterated on 27 August – see below) in respect of congestion etc. could also be overcome.

3.3.3 In any event, no MNO is under any legal obligation to give its consent to any public GSM Gateway operator.

(…)

3.5 Both the 18 July and August 2003 announcements talk of only licensed operators using spectrum and those MNOs "purchasing equipment or services from other companies", not sub-licensing spectrum to them to use on their own equipment.

3.6 It seems to us that the RA has concluded, publicly, on more than one occasion, that the issue of whether public GSM Gateways can operate legally is not simply a case of the MNO giving its consent to a public GSM Gateway operator, as Oftel suggested on 13 October 2003.

Use of Spectrum

3.7 Section 1 of the Wireless Telegraphy Act 1949 (as amended) forbids the installation or use or wireless telegraphy equipment unless two criteria are met. The first is that you are licensed (as Vodafone is) or secondly, that an exemption applies. The RA announcement of 18 July 2003 made it clear that public GSM Gateways continue to be illegal. The exemption therefore cannot apply to Floe.

3.8 For a public GSM Gateway to operate legally, one legal solution (which we have already outlined to Oftel) would be for Vodafone Limited to own the public GSM Gateway equipment. However, as we have already pointed out to Oftel, this would involve Vodafone having an airtime contract with the end customer direct and it would not solve "*mobile customers being unable to use including: returning a missed call; sending an SMS; screening unwanted or malicious calls (call rejection); and using CLI to manage costs when roaming/receiving calls from overseas (deciding whether to accept the call)"*.

3.9 Both Vodafone's 2G licences and 3G licence state "This licence may not be transferred". The licences are personal to the licence holder, in this case Vodafone Limited. To interpret "transferred" as meaning Vodafone can sub-contract spectrum to someone else (i.e. a public GSM Gateway operator) to use the frequencies for third party services, means there would be no need to have a consultation on spectrum trading. As spectrum trading is one of the initiatives being looked into by OFCOM, Oftel cannot be correct in their apparent interpretation of the transferability of spectrum licences or general use of spectrum by those other than the licence holder…

3.10 Section 8 of Vodafone's 2G licence refers to "Radio Equipment" only being used in compliance with the terms of the Licence and only by persons who have been authorised by the Licensee, in this case Vodafone Limited. One of the conditions of

the Licence is that the use of Radio Equipment can be ordered to be permanently closed down immediately if the "use is causing or contributing to undue interference to the use of other authorised radio equipment". If Oftel's line of argument is correct then all public GSM Gateways could be authorised by all MNOs not just by Vodafone. This universal ability to use spectrum would lead to network congestion (and the other consequences set out by the RA on 18 July 2003) and prevent the use of airtime services by other users. As public GSM Gateways cause or contribute to undue interference of other authorised radio equipment, if any MNO gave its consent to a public GSM Gateway operating, that MNO would potentially be in breach of its own 2G licence (and indeed, as relevant, its 3G licence).

3.11 In Vodafone's 2G licences, Radio Equipment, is defined as equipment which forms part of the network, "in which User Stations which meet the appropriate technical performance standards set out in the Wireless Telegraphy (Exemption) Regulations…communicate by radio with the Radio Equipment to provide a telecommunications service". A User Station is defined as a vehicle mounted or hands portable mobile station designed for mobile use, or other static fixed station which meets the requirements of the Wireless Telegraphy (Exemption) Regulations.

3.12 So, if the public GSM Gateway is not part of the MNO network (which in Floe's case it is not and never was) then in order to connect to the network, that gateway equipment would have to be a User Station as defined. However, Floe's public GSM Gateways cannot be User Stations as defined, because they fall outside the Wireless Telegraphy (Exemption) Regulations and always did so and were always illegal, as confirmed by the RA on 18 July 2003. In addition, public GSM Gateways cannot be Radio Equipment because they do not communicate with a User Station; they can only communicate with a network.

(…)

3.14 Even if, despite all of the above, Vodafone could have authorised the operation of public GSM Gateway equipment, Vodafone would still have to be responsible for it under the Wireless Telegraphy Act 1949 and the Telecommunications Act 1984. As Floe has steadfastly refused to tell Vodafone where their equipment is (because they knew it was illegal) Vodafone could not authorise it without being in breach of its licences."

Floe's submissions

247. Floe submitted that OFCOM should not be permitted to disown the analysis contained in eleven paragraphs of its own Decision to the effect that Floe's activities were capable of being authorised by Vodafone, "in order to make a quantum leap that Vodafone had an objectively justifiable reason to disconnect Floe's gateways".

248. In reply to OFCOM's argument, advanced for the first time before the Tribunal, that Vodafone's WTA licence extended only to "base stations" and not to the "mobile stations" envisaged by GSM Gateways, Floe submitted that the WTA licence given to Vodafone covered Radio Equipment as defined, which included base transceiver

stations. A "base transceiver station", according to Floe, is essentially a transceiver which is not a mobile station in the sense of a handset and which carries traffic from a number of sources. Floe submitted that a GSM gateway may be a less sophisticated base station but it has the characteristics of such and is fixed when in use. Floe submitted that OFCOM's new interpretation of Vodafone's licence, in its Defence and witness statements, sought to import meanings from detailed "GSM specifications" into the more loosely worded WTA licence. Those detailed specifications are not mentioned in the body of the licence and are not relevant to its interpretation. In so doing Floe submitted that OFCOM sought to ignore the emphasis placed in the Decision by the Director and in the 18 July 2003 Statement on the acknowledged possibility of Vodafone being capable of authorising Floe under its licence.

OFCOM's submissions

249. OFCOM submitted to the Tribunal a wholly new argument, not contained in the Decision, to the effect that Vodafone's WTA licence did not authorise Vodafone to supply public GSM Gateways, and hence did not permit Vodafone to authorise Floe to do so. The basis of this submission is that the 'Radio Equipment' authorised by Vodafone's licence permits only the operation of "base transceiver stations" and not "mobile" or "user" stations.

250. OFCOM submitted two witness statements from Dr Unger (to which we have previously referred). According to Dr Unger's witness statements a "Base Station System" (comprising transceivers, controllers etc.) is responsible for communicating with "Mobile Stations" in a certain area. The "Mobile Station" consists of the physical equipment used by a subscriber to access the mobile operator's network, i.e. mobile equipment and the SIM card. According to Dr Unger, the role of the Mobile Station and the Base Station are quite distinct. He explained that the architecture of a "GSM system" is specified in detail in a series of reference documents published by the European Telecommunications Standards Institute. According to Dr Unger, the respective roles of the "Mobile Station" and the "Base Transceiver Station" are defined by the "Um interface" which is described in detail in the "04- and 05-series of GSM Technical Specifications, the 05-series focusing on the physical layer radio interface". He continued:

"In order to allow two-way communication, it is necessary to distinguish between the transmission path from the Mobile Station to the Base Transceiver Station (known as the uplink) and the transmission path from the base Transceiver Station to the Mobile Station (known as the downlink). The means by which this is achieved is that the Mobile Station and the Base Transceiver Station are required to transmit and receive at different frequencies, a mechanism known as Frequency Division Duplex."

251. Dr Unger's statement continued:

"The detailed way this operates is specified in GSM technical specifications GSM 5.01 and 5.05.
In the case of the standard or primary GSM900 band, the system is required to operate in the following bands:

- 890-915 MHz: mobile transmit, base receive
- 935-960 MHz: base transmit, mobile receive

In the case of the extended GSM 900 band, the system is required to operate in the following bands:

- 880-915 MHz: mobile transmit, base receive
- 925-960 MHz: base transmit, mobile receive

In the case of the GSM 1800 band, the system is required to operate in the following bands:

- 1710-1785 MHz: mobile transmit, base receive
- 1805-1880 MHz: base transmit, mobile receive"

252. OFCOM submitted that, in the light of Dr Unger's witness statement, a GSM gateway was clearly a "Mobile Station" and not a "Base Transceiver Station". A GSM gateway device is, like a mobile phone, a device which is a means of accessing the mobile operator's network but does not form part of that network itself. It transmits on the "mobile transmit, base receive" frequency and receives on the "base transmit, mobile receive" frequency. Although it might be true that the standards referred to by Dr Unger in his witness statement were not referred to in Vodafone's WTA licence, that is irrelevant as the expression "Radio Equipment" and the expression "base transceiver station" have to be given a meaning. The obvious meaning of those expressions, at least to those with technical knowledge in the industry, is that a GSM gateway device is not a base transceiver station because it does not comply with the detailed GSM standards set down for base transceiver stations.

253. OFCOM also submitted that it had been agreed in the Statement of Facts that GSM gateways were mobile stations. On that basis Floe's argument that its use of public GSM gateways was authorised under Vodafone's licence was hopeless.

254. A GSM gateway accordingly does not fall within the scope of Vodafone's WTA licence, as the definition of "Radio Equipment" which Vodafone is licensed to establish install and use covers only "base transceiver stations": see the definition contained in the licence. A GSM gateway is rather a "user station" which falls entirely outside the scope of the licence.

255. Therefore, even if Floe's Primary Argument had been correct, and Vodafone had been the "user" of the GSM gateways then Vodafone's use of public GSM gateways would also be unlawful as the use of public GSM gateways by Vodafone was not authorised by Vodafone's WTA licence either.

256. OFCOM submitted that although the Decision proceeded on the basis that it could be possible under certain conditions for Floe to operate public GSM gateways under the authority of Vodafone's licence, OFCOM had now reconsidered the matter and concluded that in fact the Director had been wrong as to this. It had therefore never been possible for Vodafone to have authorised Floe under the provisions of Vodafone's licence. OFCOM submitted that it was appropriate for us to deal with this case according to OFCOM's new interpretation because:

(a) it arises out of Floe's Primary Argument; and

(b) is a pure point of law that does not require any further evidence.

Vodafone and T-Mobile's submissions

257. Vodafone and T-Mobile both adopted the submissions of OFCOM.

258. Vodafone submitted that even if Floe were right that Condition 8 of Vodafone's licence conferred authority on Vodafone to authorise Floe's use of public GSM gateways, it had been conceded that there was no express authority to do so in

writing. Floe's submission that any breach of the requirements of Condition 8 was Vodafone's problem and not Floe's problem was wrong. In order for Floe to be protected under section 1(1) of the WTA 1949 it is not sufficient that Vodafone had authorised Floe but Floe must be properly authorised under and in accordance with a licence issued by the Secretary of State. If the authorisation did not comply with the requirements of Condition 8 then any authorisation that may have been given did not help Floe for the purposes of section 1(1) WTA 1949. That was a conclusive answer, said Vodafone, to Floe's First Alternative Argument and therefore it did not matter whether Vodafone knew or ought to have known that Floe were to use public GSM gateways under the Agreement.

259. T-Mobile further submitted that Floe's submission that it was possible for Vodafone to have authorised the use of public GSM gateways under its licence ignores the fact that the frequency bands on which MNOs base transceiver stations are permitted respectively to send and receive radio signals are the exact opposite of the frequency bands on which GSM gateways connecting to the MNOs networks respectively send and receive signals. Floe's submission that the reference to "base transceiver stations" in Vodafone's licence was wide enough to embrace GSM gateways was misconceived as it relied on factual assertions as to the characteristics of GSM gateways for which there was no evidential support and was contrary to paragraph 17 of the agreed Statement of Facts which recorded that it is a feature of the GSM system that the role of mobile stations (such as GSM gateways) and base transceiver stations and the frequencies on which they operate are distinct.

260. T-Mobile further submitted that even if GSM gateways were in fact base transceiver stations falling within the definition of "Radio Equipment" that would still not make their use lawful under Vodafone's licence since mobile operators are only authorised to operate base transceiver stations on specified frequency bands. These differ from the bands required by GSM gateways. T-Mobile submitted a witness statement by Anthony Wiener, Head of Technology Strategy at T-Mobile who has been employed by T-Mobile for 14 years in various engineering roles mainly involved with the development of GSM and 3G technology. Mr Wiener agreed with the witness statement of Dr Unger. He further referred to paragraph 7 of Schedule 1 to Vodafone's licence which states that the Radio Equipment is required to operate in

specific frequency ranges, xxxx – xxxx MHz Base Transmits and xxxx-xxxx MHz Base Receives. In T-Mobile's licence T-Mobile is required to operate in the following ranges:

"1816.7-1846.7 MHz: Base transmits
1721.7-1751.7 MHz Base receives".

261. However, GSM gateways communicating with T-Mobile's network *transmit* in the frequency range 1721.7-1751.7 MHz and *receive* in the frequency range 1816.7-1846.7 MHz. GSM gateways therefore use the same radio frequencies but send and receive signals in the *opposite* band to base transceiver stations.

The Tribunal's analysis

262. OFCOM's argument is that Vodafone's WTA licence is limited to the base transceiver stations, as defined, but that Vodafone's customer (e.g. the owner of the mobile handset) does not need a licence because of regulation 4(1) of the Exemption Regulations. Similarly if Vodafone or another MNO supplies a GSM gateway to one of its customers, who uses the GSM gateway solely for its own purposes, OFCOM submits that is still a lawful operation because again the customer does not need a licence because of regulation 4(1) (a "private" GSM gateway). On the other hand, if the same operation is carried out by an intermediary such as Floe OFCOM submits that the operation is illegal because Floe then supply a telecommunications service by way of business to another person, within the meaning of regulation 4(2). Hence, the effect of OFCOM's submission is that what would be a lawful "private" gateway when supplied by Vodafone, is in effect an unlawful "public" gateway when supplied by Floe.

263. As we see it, the question is whether Vodafone was able to authorise Floe's activities under Condition 8 of its WTA licence. That, in turn, raises the question whether Vodafone's WTA licence, properly understood, was a licence which covered "the GSM spectrum" frequencies allocated to Vodafone under the licence or whether, as now contended for by OFCOM, the licence was limited to use of that radio spectrum by apparatus transmitting signals on those frequencies using the "base transmit,

mobile receive" frequency and receiving signals on the "base receive, mobile transmit" frequency.

264. We recall that in the Decision the Director found, on the basis of advice that had been given to him by the RA, the body that had issued the licence to Vodafone on behalf of the Secretary of State, that Condition 8 of Vodafone's licence entitled Vodafone to authorise the use by others of public GSM gateways in writing. We have also referred to public statements by the RA above to the effect that "the GSM spectrum" had been exclusively licensed under the WTA to the mobile network operators, including Vodafone.

265. Vodafone's WTA licence states that it provides authorisation to Vodafone to establish, install and use radio transmitting and receiving stations and/or radio apparatus as described in Schedule 1 of this Licence (hereinafter together called "the Radio Equipment") subject to the terms set out below." (…). Schedule 1 provides:

> "1. Description of Radio Equipment Licensed
>
> In this Licence, the Radio Equipment means the base transceiver stations or repeater stations forming part of the Network (as defined in paragraph 2 below).
>
> 3. Purpose of the Radio Equipment
>
> The Radio Equipment shall form part of a radio telecommunications network (the "Network") in which approved user stations communicate by radio with the Radio Equipment to provide a telecommunications service for customers."
>
> (…)

266. Dr Unger in his witness statement distinguishes base transceiver stations from "mobile stations". The only evidence before us on the characteristics of base transceiver stations and mobile stations respectively is the evidence of Dr Unger and Mr Wiener. Dr Unger's statement (supported by Mr Wiener) is to the effect that GSM gateways are "mobile stations" and not base transceiver stations; that if the GSM gateways are mobile stations then accordingly they are not "Radio Equipment" authorised by Schedule 1 of Vodafone's licence; and the use by Floe of GSM gateways could never be authorised under Vodafone's WTA 1949 licence as that

licence covers only "base transceiver stations" and "repeater stations". No party submitted that GSM gateways were repeater stations.

267. In the context of this appeal, in particular having regard to the change of position of OFCOM as to this aspect, we have significant reservations in making a finding that the scope of Vodafone's licence was limited as now contended for by OFCOM on the basis of the information and submissions before us.

268. OFCOM's new interpretation relies on a distinction arising from the use of radio wavelengths by equipment for "base transmit" and "mobile receive" (or a distinction between "base receive" and "mobile transmit"). However, as the Tribunal understands the position from Dr Unger's statement, the base transceiver station transmits signals on the very same frequencies that the mobile or user station receives signals and the base station receives signals on the same frequencies that the mobile or user station transmits signals. Dr Unger appears to be dividing use of the same wavelength so that a licence can be given separately in respect of the same GSM radio frequencies to different undertakings depending upon whether the apparatus used by the undertaking is transmitting or receiving.

269. However, it is clear that the RA repeatedly stated publicly that licences for the commercial use of the "GSM spectrum" had been awarded exclusively to the MNOs (including Vodafone). That was expressly stated by the RA to be the reason why a licence for commercial use of GSM gateways by anyone other than the MNOs themselves was not possible. No distinction, so far as we can ascertain from the documents and submissions before us, seems ever to have been drawn by the RA between the direction in which the signal is sent and received. In the November 2002 Consultation entitled "Public Wireless Networks – Exemption of User Stations", the RA stated that the cellular radio frequencies were already licensed to the cellular network operators on a nationally exclusive basis and so could not be licensed to other commercial users. It therefore appears to the Tribunal that at that time the RA were concentrating on the cellular radio frequency covered by the licence and were not making a distinction between base transceiver stations and user stations.

270. Secondly, Dr Unger places great reliance in his witness statement on "the 04- and 05-series of the GSM Technical Specifications" and on the "Um Interface". These documents or specifications are not referred to in T-Mobile's licence (and we therefore assume are not referred to in Vodafone's licence). Documents which are referred to in the licence such as "IR 2014 – First and Second Generation Public Cellular Radiotelephone Service" are not referred to by Dr Unger and were not placed before us. OFCOM submitted that the meaning of the terms of the licence was entirely obvious to those with sufficient knowledge in the industry. However, the RA and the Director both took a different view to that now expressed in Dr Unger's witness statement: see in particular the various Consultation Documents referred to above, and the emails of Mr Mason of 20 March 2003 to Floe and of 8 September 2003 to OFCOM already referred to. Further we note from Dr Unger's witness statement that Dr Unger was one of the Director's senior officials at the time the Director made his Decision as to the scope of Vodafone's licence.

271. Thirdly, it is clear to the Tribunal that the Government's eventual conclusion following the consultation on user stations that it would not remove the restriction on commercial use of GSM gateways provided for in regulation 4(2) of the Exemption Regulations (as it had originally proposed) was influenced by the fact that the Government considered that the existing users of GSM gateways could be accommodated on a "pragmatic" basis by the MNOs under the terms of the MNOs' licences. OFCOM has not explained before us how the Government's intention that existing GSM gateway operators be dealt with on a "pragmatic" basis was to be achieved if the MNOs' licences cannot possibly extend to user stations. If the consultation had proceeded on a false basis then the question arises whether it may be necessary for a new consultation exercise to be commenced in the light of the new understanding. This question was not addressed before us.

272. Fourthly, the scope of Vodafone's licence (and the licences of the other MNOs) is an issue of wide importance, given in particular that OFCOM has been consulting extensively on the future use of "radio spectrum" and the possibility of introducing a regime of "spectrum trading" in the United Kingdom. Although the parties placed certain documents relating to that consultation before us and a further statement was issued by OFCOM on 6 August 2004 shortly after the hearing in this case, no party

made submissions concerning the relevance of that new consultation to the issues before us.

273. We have not been made aware of the reasons why the RA came to its public view as to the scope of Vodafone's licence. We have not been referred to any of the background documentation that we imagine may well be relevant, such as any earlier European legislation preceding the Authorisation Directive that may be relevant, consultation or policy documents of the RA or the DTi that were or may have been issued prior to the licence being awarded and any radio spectrum licensing policy documents or other representations made since that date that may shed light on why the RA stated publicly that the licence was wider than now contended for by OFCOM.

274. In those circumstances, the Tribunal does not consider that it is in a position to determine on the basis of a close textual analysis of the terms of Vodafone's licence (a copy of which has not actually been put before us) and in reliance on Dr Unger's statement, that the clear advice of Mr Mason (whose function was "head of licensing policy" at the body that issued the licence) and the conclusion of the Director in the Decision as to the scope of the licence were both clearly wrong.

275. The Tribunal considers that, when an appeal is made to this Tribunal against a decision under the Competition Act, should OFCOM, in consultation with its advisers, form the view that a decision it has taken was taken on a clearly erroneous understanding of the law or of the relevant facts, it will normally be appropriate for OFCOM to seek permission to withdraw that decision and for appropriate directions to be made, possibly with a view to OFCOM's new understanding being put to the parties in accordance with the procedure set out in the OFT's Rules (SI 2004/2751) and, if so advised, a new decision to be taken on what OFCOM understands to be a correct legal and factual basis. A similar procedure was adopted recently before a differently constituted tribunal in case 1036/1/1/04 *Association of British Insurers v Office of Fair Trading*. This is likely generally to assist in the efficient and expeditious review of the decision and allow all interested parties to direct their submissions appropriately. Where the matter which is alleged to have been erroneously understood by the Director is a matter of law or a material matter to the

reasoning adopted in the decision, it is generally likely to be unhelpful to seek to argue the appeal before us on an entirely new basis which is without any foundation in the decision.

276. OFCOM submitted that the true construction of the licence was a matter introduced by OFCOM in response to Floe's Primary Argument. However, the Director considered the true construction of Vodafone's licence in the Decision from which OFCOM now resiles. OFCOM submitted that the true construction of the licence was a pure point of law which required no evidence. However, OFCOM relied on the evidence of Dr Unger and evidence as to the various matters we have outlined above also appears to the Tribunal essential to the true construction of the licence.

277. Moreover, the Director did not investigate what the understanding of Vodafone was as to the scope of its licence, nor the extent to which there was a common understanding in the industry regarding the licensing of GSM spectrum. Vodafone submitted that the letter dated 23 October 2003, which we have referred to above, was clear evidence that Vodafone did not agree with the RA's interpretation of Vodafone's licence. The Tribunal finds that that letter, taken by itself, is ambiguous. It was a letter written at a late stage in the Director's investigation long after the first disconnections had taken place. It gives a number of reasons why Vodafone then argued that it could not "simply authorise" the use of "public" GSM gateways. It talks of the definition of Radio Equipment which is consistent with a narrow interpretation of the licence but that discussion is preceded by discussion of a purported authorisation of public GSM gateways involving "spectrum trading" and use of "spectrum" by those other than the "licence holder" which is not consistent with an understanding that Vodafone's licence covered use of spectrum only by base stations.

278. The Tribunal considers that the true scope of Vodafone's licence is of crucial importance in this case as it is relevant to whether or not Floe and Vodafone could have entered into an Agreement that was ever capable of being performed within the existing licensing regime. Whether, and in what circumstances, the Agreement is or was capable of being performed within the licensing regime established under the WTA 1949 is relevant background to the understanding of the parties as to the

Agreement, as well as relevant to whether Vodafone's subsequent conduct was objectively justified.

279. If Vodafone really believed that it had no authority to authorise Floe to do what the Agreement envisaged, we find it hard to see on what basis Vodafone entered into the Agreement in the first place. We understand that other MNOs may have entered into similar agreements.

280. Moreover, OFCOM's interpretation apparently means that the United Kingdom spectrum licensing scheme under the WTA excludes entirely all activity by intermediaries such as Floe. Whether such a result is necessary for the "effective and appropriate" use of the radio spectrum within the meaning of Article 7(2) of the RTTE Directive does not appear to have been considered by OFCOM (or the RA). Similarly whether such a system is "the least onerous system possible" or a restriction that is "unavoidable in view of the scarcity of radio frequencies and the need to ensure the efficient use thereof" within the meaning of recitals (7) and (11) of the Authorisation Directive does not appear to have been considered either. Nor has the question whether the system involves conditions which are "objectively justified", "non-discriminatory, proportionate and transparent" within the meaning of Article 6(1) of that Directive.

281. In any event, on any view, the true scope of the WTA licence issued to the existing MNOs is an issue of major public importance. The implication of OFCOM's new position seems to be that, in theory at least, the relevant GSM radio frequencies in Vodafone's WTA licence could be also be licensed to other operators such as Floe (at least as regards use of those frequencies for devices using the "mobile transmit/mobile receive" part of the GSM spectrum) especially given the provisions of the 2003 Act aimed at encouraging competition, and the effect of the Authorisation Directive. That, however, would represent a radical change in the position as previously understood.

282. In those circumstances, the situation in which the Tribunal finds itself may be summarised as follows. In the course of this appeal, OFCOM has abandoned important parts of the Decision taken by the Director, and advanced a new argument

that is contrary to the views expressed by the Director in the Decision. The Tribunal itself has found that an important part of the Director's reasoning – to the effect that Vodafone had not authorised Floe to operate public GSM gateways – is flawed.

283. In those circumstances in our view the correct course for the Tribunal to take is to set aside the Decision and remit the matter to OFCOM for reconsideration. We express no view on whether OFCOM's new argument – to the effect that Vodafone's WTA licence did not permit Vodafone to authorise Floe – is correct. Even if that argument were correct, it does not seem to us that it would be appropriate in this case to uphold the Decision on the basis of a new argument that does not figure at all in the existing Decision and is contrary to it. Given the importance of the argument, and its potentially wide ramifications for the management of the spectrum, it seems to us far preferable that OFCOM's considered position should now be fully set out in a new Decision. Any such new Decision should be adopted by OFCOM taking account of the representations it receives. Given the substantial change in the legal position now adopted by OFCOM, as compared with the position of the RA, OFCOM in our view may well feel that it should invite comments more widely than usual before adopting a new Decision. If that new Decision is then appealed to the Tribunal, the intervention procedure under the Tribunal's Rules will permit all parties in the industry with a sufficient interest to be fully heard, including Floe, VIP Communications and any other relevant persons.

(c) Conclusions on the First Alternative Argument

284. On the evidence before us we conclude, first, that the Agreement, properly construed, was one pursuant to which Floe would provide "public GSM gateways" within the meaning of regulation 4(2) of the Exemption Regulations. Accordingly, we are not satisfied that the Director's investigation of, or understanding of, the Agreement as set out in the Decision was satisfactory. On the evidence before us the Agreement was an agreement which contemplated the provision by Floe of a least cost routing service to its customers using GSM gateways. That service involved the use of "public" GSM gateways within the meaning of regulation 4(2).

285. Secondly, the Decision found that it was open to Vodafone to have authorised Floe's use of public GSM gateways pursuant to Vodafone's licence under the WTA 1949 but that no written authorisation had in fact been given. If Vodafone's licence was wide enough to permit it to authorise the use of GSM gateways, as was believed to be the case by the RA and the Director, then, on the evidence before us the Tribunal finds that the Agreement amounted to a written authorisation to Floe to do so. It was not necessary for GSM gateways to be mentioned in the Agreement expressly and to the extent that Vodafone overlooked any other requirements of its licence those are not requirements that can be held against Floe, particularly in circumstances where Vodafone has not been prepared to disclose the precise terms of its licence to Floe.

286. Before us OFCOM resiled from the Director's analysis of the licence in the Decision and, indeed, relied on that part of the Decision being wrong. However, OFCOM's new reasoning is not set out in the Decision and we are unable to find, on the materials before us, that OFCOM's new approach is correct.

287. In our view the Decision must therefore be remitted to OFCOM so that OFCOM can reconsider the matter in the light of OFCOM's new understanding of the licence, as well as the understanding of Vodafone, Floe and the Government as to the scope of the licence at the time of the Agreement and at the time of disconnection. In reconsidering the matter OFCOM will need to consider whether its new understanding of the scope of Vodafone's licence, as submitted to us, is the correct construction having regard to the relevant materials, including those to which we have referred above, having made its position clear to the parties in writing and taking into account any submissions that it may receive. OFCOM will also need to consider whether its new interpretation is compatible with the RTTE Directive and the Authorisation Directive.

XII THE SECOND ALTERNATIVE ARGUMENT – OBJECTIVE JUSTIFICATION

Introductory remarks on objective justification

288. The Second Alternative Argument is that Vodafone was not entitled to disconnect Floe unilaterally since the enforcement of section 1 of the WTA and the Exemption

Regulations is to be carried out by the relevant regulatory body and not Vodafone. Accordingly Vodafone's unilateral disconnection of Floe and refusal to supply Floe without reference to the relevant regulator cannot be objectively justified for the purposes of the Chapter II prohibition in the 1998 Act.

289. We wish to state at the outset that we accept, as a general proposition, OFCOM's submission to us that competition law does not and cannot require an undertaking, even a dominant undertaking, to commit a criminal offence itself or to supply goods or services to another undertaking in circumstances where the dominant undertaking, being otherwise blameless, knows that the buyer will use those goods or services to commit a criminal offence. Our decision in this case does not detract from that general proposition.

290. Floe raised a number of arguments to challenge any justification by Vodafone for its refusal to supply:

(a) that the legal status of GSM Gateways was a "grey area" and subject to an ongoing consultation exercise and so Vodafone acted precipitately and pre-empted the decision of the regulator;

(b) that if Vodafone believed Floe was using GSM gateways illegally, it should not itself have acted as "judge, jury and executioner" but ought to have approached the RA as the relevant regulator; and

(c) that Vodafone always knew, or should have known, that Floe intended to provide public GSM gateways under the Agreement and on its proper construction the Agreement did not prohibit the use of public GSM gateways.

291. We have already found in Floe's favour on point (c) above.

292. Vodafone submits that in any event it was objectively justified in disconnecting Floe on three grounds:

(a) that Floe was operating GSM gateways illegally. Vodafone submits that even a dominant undertaking is entitled to refuse to participate in or to assist in illegal activity.

(b) Floe's use of public GSM gateways was causing network congestion thereby damaging the quality of service which Vodafone was able to provide to other customers.

(c) Floe was competing unlawfully in the market: the Chapter II prohibition is not intended to foster unlawful competition.

293. A number of points were canvassed in argument, including the law as to aiding and abetting; paragraph 5(2) of Schedule 3 of the Competition Act 1998; whether the legal status of GSM gateways was a "grey area" at the time of disconnection; the Agreement against the background of the legal position as understood at the time of disconnection; the case of *Hilti v Commission*; and the legal position as understood at the time of the Decision.

294. In our view, the issue of "objective justification" for Vodafone's disconnection of Floe turns in part on what the legal position actually was at the time of disconnection, and also on what the legal position was understood by the parties to be, and the basis on which the parties entered into the Agreement. In particular, it seems to us relevant to consider whether Vodafone's disconnection of Floe was, in the circumstances, a reasonable response, or whether, before acting, Vodafone should have invited the RA to take appropriate regulatory action.

295. In this general connection we note recital (27) of the Authorisation Directive – adopted but not at the time yet in force – which provides:

> "(27) The penalties for non-compliance with conditions under the general authorisation should be commensurate with the infringement. Save in exceptional circumstances, it would not be proportionate to suspend or withdraw the right to provide electronic communications services or the right to use radio frequencies or number where an undertaking did not comply with one or more of the

> conditions under the general authorisation. This is without prejudice to urgent measures which the relevant authorities of the Member States may need to take in case of serious threats to public safety, security or health or to economic and operational interests of other undertakings. This Directive should also be without prejudice to any claims between undertakings for compensation for damages under national law."

296. We also note that the 2003 Act now provides, in sections 172 et seq, that a prosecution for non-compliance with section 1 of the WTA may not be brought by OFCOM without giving the proposed defendant an opportunity to make representations, and to comply with the provision which he is alleged to contravene, within one month or such longer period as OFCOM may allow: see section 172 (2), (3), (4) and (5). No proceedings may be brought unless OFCOM has first considered those representations, or if the person concerned has complied with the provisions in question within the time allowed: section 174 (2) and (3).

297. Against that background, the Tribunal considers that there are several aspects which require consideration when deciding whether Vodafone's conduct was objectively justified for the purposes of the Chapter II prohibition. The first is what the legal position was, and was understood to be, at the time of disconnection. Moreover "objective justification" must also be considered against the jurisprudence of the Court of Justice and the Court of First Instance.

The understanding of the RA

298. The legality of GSM Gateways as understood by the RA at the time of Floe's disconnection in March 2003 can be discerned from the August 2002 Announcement, from the documents which were published on the RA website in October 2002, and from the November 2002 Consultation.

299. The August 2002 Announcement sets out the RA's view as to the regulatory position of GSM gateway devices. The RA's view was the following from the contents of that announcement:

(a) "The GSM spectrum" had already been awarded to the cellular operators by licence on a nationally exclusive basis and it is therefore impossible to licence use of "the GSM spectrum" to anyone else.

(b) All GSM gateway devices are fixed devices and not "mobile" for the purposes of the definition of "User Station" in the Exemption Regulations;

(c) All GSM gateway devices are not therefore within the scope of the Exemption Regulations;

(d) Anyone installing or operating any GSM gateway except under authority of a licence to do so will be in breach of section 1 WTA 1949;

(e) In addition, depending on the use to which the GSM gateway is put, any use of a GSM gateway to provide a telecommunications service by way of business to another person will "be captured" by regulation 4(2) and again not be covered by the Exemption Regulations;

(f) Enforcement action may be taken, including seizure of the equipment and prosecution, against anyone installing or operating a GSM gateway without authority under an individual licence.

300. The above points were reinforced by the rubric added by the RA when publishing the letter on its website, in October 2002. The RA noted that it was aware of GSM gateway devices being marketed in the United Kingdom, that all such devices were "fixed" and did not comply with the definition of a mobile station, that anyone installing or operating a GSM gateway device without an individual licence would "technically" be in contravention of the WTA, that the use to which the device is put may present an additional reason that such devices are not within the Exemption Regulations, that intensive use of GSM gateways may affect the stability of licensed networks and that it was not a foregone conclusion that the RA could simply legitimise them. The RA concluded that it was drafting a consultation on GSM

gateways seeking views on amending the Exemption Regulations and there was a "need for a measured, pragmatic approach".

301. The RA then published the November 2002 Consultation. That document noted the following:

(a) that the Exemption Regulations did not cover fixed User Stations including GSM gateways (the term 'mobile station' in the definition of 'User Station" was said to refer to equipment that is moveable and not fixed, and it was therefore difficult to support any interpretation of the Exemption Regulations that covered a fixed terminal or GSM gateway);

(b) that the GSM radio frequencies had already been licensed to UK cellular network operators and so could not be licensed to other commercial users;

(c) GSM gateways were "fixed mobile" applications which involved a static device transmitting and receiving information through a wireless connection via a licensed radio network. GSM gateways communicated via the 'mobile' leg of a duplex channel even if they did not themselves move.

(d) The RA was aware that the MNOs were then currently accepting and connecting customers with fixed equipment, including GSM gateways, and considered that therefore the MNOs might reasonably be expected to provide additional capacity to accommodate any extra traffic. The decision to accept a 'fixed' customer rested with the MNO which was free to decline connection if the stability of its network was threatened;

(e) Under regulation 4(2) of the Exemption Regulations the exemption from licensing did not apply to apparatus providing a commercial telecommunications service to another person via a wireless telegraphy

link. This prevented commercial users from "usurping spectrum" designated for other uses;

(f) Use of GSM Gateways would not fall within regulation 4(2) if used to provide a "private connection to a public network", but use to provide a "public connection to a public network" would fall within regulation 4(2) as the link would provide a third-party telecommunications service;

(g) The RA proposed to amend the definition of "User Station" so that it covered any customer of the network irrespective of its status as fixed or mobile; and

(h) The RA further proposed to amend the restriction on the type of service that may be provided via network user stations and proposed to give the operators a choice as, if operators themselves chose to connect customers to their network, what did it matter if the traffic carried was a private or a public service?

302. However, it appears from Mr Mason's email of 10 February 2003 to Floe, cited above, that, notwithstanding the legal position, the RA was forbearing enforcement of the Exemption Regulations pending the outcome of the Consultation.

The understanding of Vodafone

303. As discussed above, Vodafone's understanding with respect to GSM Gateways can be discerned from the fact that it had entered into the Agreement with Floe and also from the mobile operator's response to the Consultation Paper dated 21 February 2003 to which it was a party and to the contemporaneous documents including the exchange of correspondence between Vodafone and Floe in March 2003 immediately before disconnection took place.

304. We have found above that, on the true construction of the Agreement, Vodafone must have envisaged that Floe would be providing telecommunications services to its

customers using GSM gateways, and not merely selling equipment. That necessarily involved Floe in supplying "public GSM gateways" as defined in this case.

305. The MNOs' joint response to the November 2002 Consultation Paper, which included Vodafone (discussed above), was to the effect that the Exemption Regulations should not differentiate between fixed and mobile apparatus and that "self-use" of private GSM Gateways by corporate customers for routing their own traffic should be exempted from any licensing requirement. However that Response states that no exemption from licensing should apply to "3rd party public commercial gateways" since these contained large quantities of SIM cards making large volumes of calls and reduce spectrum efficiency and network efficiency and cause service disruption to the prejudice of private mobile phone users.

306. The MNOs' Response did not expressly consider GSM Gateways which are provided commercially by a "reseller" for dedicated individual use by one customer at that customer's premises. The MNOs' Response was also on the basis that they supported a change to the definition of User Station so that the definition be extended to cover GSM gateway devices and other "fixed" User Stations.

307. At the quarterly review meeting attended by Floe and Vodafone on 6 February 2003 David Rodman of Vodafone explained to Simon Taylor and Graham Ward of Floe, that Vodafone had concerns regarding the illegal operation of public GSM Gateways and the associated problems with congestion, CLI and interception. Mr Rodman stressed that the use of public gateways was illegal. Mr Taylor apparently assured David Rodman that Floe did not provide public gateways and was only engaged in providing private GSM gateways. Mr Taylor explained to Mr Rodman that Floe's business was focused on serving small and medium sized enterprises with GSM gateway solutions. Mr Taylor expressed sympathy with any network congestion problems which Vodafone was encountering and offered to help to find ways of solving them.

308. At the meeting in February 2003 Floe apparently indicated to Vodafone that it supplied GSM gateway devices to individual ME and SME customers for their own use and that it billed its customers for the calls and that it did not supply GSM

gateway services on a wholesale basis to third parties. That indication was rehearsed by Vodafone in its letter to Floe of 10 March 2003. In its letter to Vodafone of 13 March 2003 Floe stated that it had invested in switching and network infrastructure (as it stated it intended to do in the Business Plan) in order to move the activity to areas where the impact on the viability of network would be less apparent and that this resulted in Floe "extending the corporate customers' premises" by the use of leased lines and indirect access switching to terminate traffic in areas of lower mobile activity. Vodafone asserted to us that it was not commercially realistic to provide GSM gateways commercially for dedicated use by one customer and that therefore it could be inferred that the gateways provided by Floe were all "multi-use". However, Vodafone did not provide any evidence to support this assertion which was not accepted by Floe.

309. The Statement of Facts and Mr Young's witness statement is to the effect that Vodafone considered that Floe would, pursuant to the Agreement, use SIM cards in mobile phone handsets and "Premicell devices" (which are GSM gateways). Vodafone did not submit that it did not know that GSM gateway devices were to be used by Floe at all. As regards the RA's view that GSM gateways were "fixed" devices and so entirely outside the Exemption Regulations, Vodafone submitted that this was a mere "technical point" and the view of the RA was wrong, as OFCOM now acknowledges, and has always been wrong.

310. However, we have noted that the MNOs' Response to the November 2002 Consultation was on the basis that the definition of User Station in the Exemption Regulations should be *changed* so that it covered "fixed" stations. We also note that correspondence from Vodafone to Oftel during Oftel's investigation sets out Vodafone's then view that GSM gateways were fixed devices and so outside the scope of the Exemption Regulations. In that regard the Tribunal notes a letter dated 16 September 2003 from Mr Rodman to Mr Trevor Wood of Oftel in which Mr Rodman stated:

> "For private GSM Gateways, SIM cards are put in 'boxes' (sometimes called Premicells) which are located at the customer's premises. The boxes might be described as 'fixed'. The customer self-provisions the service.

> For public GSM gateways, SIM cards are put in 'boxes' which are not located at a customer's premises. The boxes are (1) fixed; and (2) used to provide a telecommunications service "by way of business to another person" (these words are taken from Regulation 4(2) of the Wireless Telegraphy (Exemption) Regulations 1999, as amended)."

311. In these confused circumstances it appears to the Tribunal that Vodafone must have entered into the Agreement in either of four possible circumstances which we refer to below:

(a) Vodafone might have believed Floe's use of the GSM Gateways was as dedicated customer premise equipment only and was exempt from licensing. This required Vodafone to have believed that the RA was wrong in concluding that a GSM Gateway was a fixed station and outside the Exemption Regulations. It would also have required Vodafone to be prepared to take the risk of potentially committing an offence itself and/or being an accessory to an offence by Floe if the RA proved to be correct as to its interpretation. It further requires Vodafone to have believed (wrongly) that a business concerned with the provision of a least cost routing telecommunications service using dedicated customer premise equipment did not amount to the provision of a telecommunications service by way of business to another person and that it therefore fell within the exemption in Regulation 4(1);or

(b) Vodafone might have known or believed that Floe's business was not exempt from licensing under section 1 WTA 1949 but was prepared to rely, possibly *pro tem*, on the forbearance from enforcement of section 1 WTA which Mr Darby of Vodafone later told Baroness Billingham in his letter of 19 May 2003, cited above, that he understood to be in operation. This requires the forbearance policy to have been in operation at the time the Agreement was signed and for Vodafone to have been aware of it; or

(c) Vodafone knowingly or recklessly operated the Agreement with Floe outside the views expressed by the RA and the scheme of the Exemption Regulations and section 1 of the WTA 1949 and was prepared to risk exposure for itself and/or Floe to criminal prosecution; or

(d) Vodafone considered that notwithstanding that Floe intended to use equipment that was defined by the enforcement authority as "fixed" and so outside the scheme of the Exemption Regulations and to provide a public GSM gateway service, Vodafone was content to perform its obligations under the Agreement as Vodafone believed it could do so under the terms of Vodafone's own WTA licence (but may have overlooked the requirements to which it was subject in respect of making Floe aware of the terms of the licence etc.).

312. Each of those possibilities is also, of course, relevant to Floe. No findings were made by the Director as to the understanding of the parties when they entered into the Agreement. OFCOM's submission was that this did not matter. OFCOM accepted that if those who signed the contract on behalf of Vodafone knew that Floe intended to provide a telecommunications service by way of business to others then the Agreement contemplated the provision of a public GSM gateway service by Floe. Counsel for OFCOM expressly made no submissions to us as to the understanding of Vodafone. However, he submitted that assuming it to be the case, which we have found, that the Agreement was for a public GSM gateway service then the Agreement could not in any event have provided the requisite "authorisation in writing" and as soon as persons "higher up the food chain" within Vodafone became aware of the matter (for these purposes Mr Rodman was submitted to be sufficiently high in the chain) then at that point Vodafone were entitled to take steps to disconnect Floe.

313. The Agreement was concluded after several months of negotiation between the parties, including review of a Business Plan, and was signed on behalf of Vodafone by Mr Overton who was Mr Young's superior. It was not suggested either by Vodafone or OFCOM that Mr Young had no authority to negotiate on behalf of Vodafone or that Mr Overton had no authority to enter into the Agreement. We are given to understand that the Agreement with Floe was not an isolated contract but that there were several such agreements with other so-called "gateway operators" each of whom has now had its services disconnected in what we understand to be similar circumstances. MNOs other than Vodafone, we were told, also had arrangements with operators of GSM gateways.

314. There is some evidence before us, in particular Mr Young's witness statement, which suggests to us the possibility that Vodafone's understanding of Floe's business was that Floe's use of public GSM gateways was to be limited to the use of "customer premise equipment" dedicated in each case to a single Floe customer. It may therefore be that Vodafone were content and did agree that Floe would use public GSM gateways under the Agreement where each public GSM gateway would be dedicated to and connected to the PABX of a single corporate customer and were not content and did not intend to agree that Floe would use "multi-user" public GSM gateways. No investigation was conducted by the Director of the precise scope of Floe's business at the time of the disconnections. However, it was the call traffic from 29 SIMs suggesting the possible use of "multi-user" gateways that apparently caused Vodafone to write to Floe and it appears from the evidence of Vodafone's witnesses that although "public" and "private" gateways may have the same call patterns, "multi-user" public gateways are more likely to give rise to the kind of network congestion problems which Vodafone has identified. The Tribunal considers it possible that Vodafone's true concern was summarised in Mr Rodman's letter of 16 September 2003 to Mr Robert MacDougall of Oftel when he said:

> "There is a distinction to be made between private GSM Gateways and public GSM Gateways. Vodafone believed that Floe would be offering a service relating to private GSM gateways, that is that the "box" in which the SIM card(s) would be housed would be at the customer's premises (and used for their own 'office' to Vodafone mobile calls). Vodafone did not supply the SIM cards believing that the SIM cards would be put in "boxes" which were not on individual customer's premises but were in fact located separately to be used for the carriage of third party traffic. Vodafone did not intend that SIM cards would be put in "boxes" to service the needs of many customers, that is "boxes" being used to provide a telecommunications business to third parties i.e. a public GSM Gateway."

315. This possibility was not considered by the Director in his Decision and has not been explored before us and it would therefore be inappropriate for us to make a finding as to this in the absence of a proper investigation by OFCOM.

Summary of the position at the time of disconnection

316. It appears to us that at the time of disconnection in March 2003:

(a) Vodafone had entered into an Agreement pursuant to which it would provide services to Floe where the GSM gateway was a means by which Floe was to provide a telecommunication service to Floe's corporate customers.

(b) It may be that Vodafone had not intended to agree to Floe using SIMs provided by Vodafone to Floe under the Agreement in multi-user GSM Gateways. In response to the RA consultation in February 2003 Vodafone had made representations to the RA that such use should not be legitimised.

(c) the RA's stated position was that provision of a GSM gateway service required to be licensed under the WTA 1949 but no further licences could be issued because the relevant GSM spectrum used by GSM gateways had been exclusively licensed to Vodafone and the other MNOs.

(d) The RA in its Consultation Paper had proposed the legitimisation of all GSM gateways whether multi-use, single use or self provided.

(e) The RA had stated that it was forbearing enforcement and so there was no risk of criminal prosecution arising from the Agreement (at least pending the conclusion of the Consultation) but Floe may possibly have been in breach of the parties' understanding of the Agreement if it was providing multi-user GSM gateways.

(f) At the time of the disconnection the Government had not decided whether to adopt the proposal in the Consultation Document or to accept the Response made by the mobile operators to continue the restriction on commercial use of GSM gateways.

(g) There was no clear indication that the supply of a public GSM Gateway (as defined in this case) by an intermediary such as Floe

could not be authorised by the MNO concerned under its own WTA licence.

Developments subsequent to disconnection

317. Subsequent to Floe's disconnection, if not before, the RA made it clear that MNOs could authorise public gateway suppliers under the terms of their relevant WTA licences.

318. In the course of this appeal OFCOM has submitted that (a) GSM gateway devices are, after all, "mobile" not fixed and (b) that the MNO's WTA licences do not permit them to authorise use of public GSM gateways, in both cases contrary to the RA's previous views.

Hilti v Commission

319. The Tribunal drew the parties' attention to the decision in *Case T-30/89 Hilti AG v Commission* [1991] ECR II-1439, considering that case to be relevant to the question of whether Vodafone was objectively justified in disconnecting Floe. In that case Hilti had concerns about the quality of nails which were being supplied by a third party as compatible with its nail guns and the representations being made by a third party concerning such compatibility. Hilti refused to supply distributors who supplied such nails. It was held that Hilti's conduct could not be objectively justified. In that case whether or not the nails met the requisite quality standards had not been considered by the authorities invested with the powers to investigate and enforce relevant offences concerning the sale of dangerous products and misleading trade description claims.

320. The Court of First Instance stated that:

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

products which, rightly or wrongly, it regards as dangerous or at least as inferior in quality to its own products.

119. It must further be held in this connection that the effectiveness of the Community rules on competition would be jeopardized if the interpretation by an undertaking of the laws of the various Member States regarding product liability were to take precedence over those rules. Hilti's argument based on its alleged duty of care cannot therefore be upheld."

321. Floe submitted that in the circumstances it was up to the RA, and not Vodafone to take the necessary regulatory action. Floe also referred us to the Court of First Instance judgment in Cases T-213/95 and T-18/96 *Stichting Certificatie Kraanverhuurbedrijf* [1997] ECR II-1739. Floe submitted that the Court of First Instance there reiterated that it is the task of public authorities and not of private bodies to ensure that statutory requirements are complied with. An exception to the rule may be allowed where the public authorities have, of their own will, decided to entrust the monitoring of compliance with statutory requirements to a private body. In the SCK case however, SCK had set up a "monitoring system" parallel to the monitoring carried out by the public authorities without there being any transfer to the SCK of the monitoring powers exercised by the public authorities. That case was relevant, said Floe, because in the present case there has been no delegation of the RA's or OFCOM's powers. In those circumstances there is a clear principle in European competition law that it is for the public authorities and not private bodies to ensure that statutory requirements are complied with.

322. Floe also referred to the opinion of Advocate General Jacobs in Cases C-67/96 etc. *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751. Floe quoted from paragraph 289 of that opinion which states:

> "…In those circumstances the infringing undertakings have often claimed that they were engaged in the prevention of unfair competition, dumping or more generally, acting in pursuit of the public interest. The Court and the Commission have consistently held that it is for the public authorities or the courts and not for private undertakings to protect the interests of the public in matters such as product safety or the prevention of unfair competition".

323. Floe submitted that in the United Kingdom, except in very limited circumstances, no delegation of matters of regulation of wireless telegraphy had been made to the MNOs. The very limited circumstances were the emergency situations foreseen by Articles 7(3) and 7(4) of the RTTE Directive and all parties were in agreement that those Articles had no application to the present case. Therefore it was not for Vodafone to take it upon itself to enforce the WTA 1949 and the Exemption Regulations and act as judge, jury and executioner. That could only be done by the relevant authority.

324. OFCOM submitted to us that *Hilti* should be distinguished from the case we are now deciding since in *Hilti* the authorities had not pronounced on the lawfulness of competitors' nails and the representations being made about them. *Hilti* should be distinguished from the circumstances of this case as Vodafone had a genuine and reasonable belief that public gateways were unlawful (as opposed to dangerous or inferior) and Vodafone was itself at risk of being found in breach of the criminal law. OFCOM submitted that Vodafone's actions were designed to protect itself from possible criminal liability.

325. OFCOM submitted that the fact that the RA was, during the period of its consultation, forbearing enforcement against operators of public GSM gateways does not alter the position. If Vodafone had continued to supply to Floe and a third party had complained then the RA could have taken action against Vodafone. Competition law did not require Vodafone to run that risk.

326. OFCOM submitted that the situation in this case was very different to that in *Hilti.* In *Hilti* action was taken by the dominant company long after the event and after a complaint had been made Hilti turned up and raised issues concerned with reliability and legal obligations. In this case Vodafone were proactive. Vodafone had taken their own steps to investigate the position and had raised the matter expressly with Floe and then refused to supply. Vodafone behaved entirely properly having investigated thoroughly. It was also clear that the European Commission had warned Hilti that its practices were unacceptable if proved but Hilti nonetheless carried on. Hilti never wrote to or communicated with complainants to express its concerns whereas Vodafone did write to Floe and asked Floe to explain itself. Furthermore it is

apparent from the Hilti Decision that there were standards which existed but Hilti took the law into its own hands and applied its own interpretation of the law. Vodafone did not ignore any relevant legal provisions but had reference to them. It was because of the existence of the relevant legal provisions that Vodafone took the action that it did.

327. OFCOM submitted that the additional authorities cited by Floe did not take the matter any further. In order to decide whether conduct is objectively justified it was necessary to consider each case on its merits having regard to all relevant circumstances and it is not helpful to pick out sentences from voluminous authorities. The authorities referred to by Floe were dealing with an analysis under Article 81 and not Article 82 (the equivalent of the chapter II prohibition). OFCOM submitted that the crucial difference between *SCK* and *Hilti* and the present case was that Vodafone did not at all seek to ensure that statutory requirements were complied with and did not set itself up as judge, jury and executioner. Rather, Vodafone took steps to ensure that it did not commit a criminal offence itself. That was the crucial and important difference.

328. Vodafone submitted that *Hilti* is very much a judgment confined to its own facts. It was concerned with safety concerns and not illegality. The judgment in *Hilti* does not, submitted Vodafone, contain any proposition of law and certainly not any proposition of law that involves a dominant undertaking being required to continue supplies to a customer engaged in illegal activities. Vodafone adopted the detailed submissions of OFCOM in respect of the relevance of *Hilti*.

329. T-Mobile submitted that *Hilti* is plainly distinguishable on its own particular facts. Hilti did not concern potential criminal liability as this case does. That Floe's behaviour was unlawful was the stated position of the RA in contradistinction with the position in *Hilti* where the core factual circumstance relied upon by the Court of First Instance in support of its ultimate conclusion was that *Hilti* had not approached the competent UK authorities for a ruling, thereby undermining the genuineness of Hilti's claim to have at the core of its behaviour a concern for safety. T-Mobile submitted that even if the RA had not made a public pronouncement concerning the legality of GSM gateways Vodafone was as well placed as any other party to form a

legal assessment of the legality of GSM gateways. Vodafone's legal assessment conformed with that of the RA, Oftel, the police and the DTi and was plainly reasonable.

330. The nature of the rules to which Vodafone sought to give effect were very different from those at issue in *Hilti* as the WTA 1949 has among its objectives ensuring the efficient use of finite radio spectrum and the protection of valuable interests of those authorised to use GSM radio spectrum by preventing use by unauthorised users. As the holder of a licence under the WTA 1949 Vodafone's legitimate commercial use of particular spectrum is one of the very activities section 1(1) WTA is designed to protect. T-Mobile submitted that as an intended beneficiary of the legislation Vodafone was therefore entitled to take its own action to enforce its rights and to protect its commercial position. In *Hilti* the legislation was not designed to protect Hilti's interests but to protect consumers. Vodafone was taking reasonable steps to protect its commercial interest in the light of its genuine and reasonable belief that Floe was acting illegally.

The Tribunal's analysis

331. *Hilti* is a judgment of the Court of First Instance. Pursuant to section 60(2) of the Competition Act 1998 this Tribunal is required to act with a view to securing that there is no inconsistency between the principles applied and the decision reached by the Tribunal in this case and the principles laid down by the Treaty and the European Court (including the Court of First Instance) in any relevant decision of that Court. In *Hilti* the Court of First Instance noted that the effectiveness of the rules on competition would be jeopardised if the interpretation of the law by an undertaking could take precedence over those rules.

332. The Director did not give consideration in the Decision to any of the matters referred to above but instead concluded that the services that Floe was providing were illegal and therefore Vodafone had an objective justification for refusing to supply Floe.

333. As discussed above we accept that where the relevant authorities have pronounced that an activity is illegal, competition law cannot and does not require the dominant

undertaking to participate in the furtherance of an illegal act. However where there may be doubt as to the legality of an activity or where the relevant authority has announced that it is not for the time being taking enforcement action in respect of the activity of which it is aware, we do not consider that the dominant undertaking can necessarily rely, without more, on its own interpretation of the illegality of the activity objectively to justify conduct that would otherwise be an abuse of a dominant position.

334. In this case, as we explain above, we have not been able to discern the circumstances in which Vodafone entered into the Agreement, in particular what its understanding of the legal position was. Had Vodafone's understanding been identical to that set out in the public statements of the RA, it seems to us that Vodafone would not have entered into the Agreement at all unless it did so under its own WTA licence or in one of the other circumstances we have mentioned above. Therefore, the evidence presently before us does not support Vodafone's submission that the conduct of Vodafone in disconnecting Floe was objectively justified because it was in accordance with the public statements of the RA.

335. Moreover, the RA considered that MNOs could authorise others to use public GSM Gateways under their own WTA licence, albeit that OFCOM has now resiled from that position. Also, OFCOM (supported by Vodafone) has disavowed the RA's earlier public statements on the basis that they were wrong on the "fixed/mobile" point.

336. In all the circumstances we are driven to the conclusion that the relevant law was and is far from clear. Nor is it clear what Vodafone considered the position to be at the time.

337. In those circumstances, bearing in mind the *Hilti* decision, and the uncertainties in the legal position, the Tribunal considers that there was a serious issue in the present case as to whether Vodafone was objectively justified in disconnecting Floe without first raising the matter with the RA, or leaving it to the RA to take enforcement action under the WTA. Accordingly, it is inappropriate for this Tribunal now, and only on the basis of the material presently available, to express any view as to the issues raised

in argument as to aiding and abetting and the true construction of paragraph 5(2) of Schedule 3 to the Competition Act 1998.

Matters relevant to objective justification

338. In particular, when considering the question of objective justification in the circumstances of this case, the Tribunal considers that the Director ought to have taken into account the following matters, all of which matters he failed to consider:

(a) The legal status of GSM gateways and the common understanding in the industry at the time as to the legality or otherwise of GSM gateways and the licensing requirements under the WTA 1949;

(b) the true construction of Vodafone's licence (if the true construction is not the construction relied upon in the Decision);

(c) the legal status of the representations made by the RA as to the scope of MNOs' licences under the WTA 1949;

(d) Vodafone's understanding of the scope of its licence at the time of the Agreement;

(e) that the Agreement properly construed related to the provision by Vodafone of SIM cards to be used in GSM gateway devices which on the then understanding of the RA were not exempt under the Exemption Regulations from the licensing requirement in section 1 WTA 1949, irrespective of whether the device was a "public" or "private" GSM gateways and if "public", whether for single-party or multi-party use;

(f) the RA's statements on forbearance of enforcement including the extent to which either party was aware of such statements and, if aware when they became so aware and the effect of those statements, if any, on the conduct of Vodafone and Floe in entering into the Agreement

and during the period August 2002 to February 2003 in performing the Agreement;

(g) that at the time of first disconnection a proposal had been made by the RA in the Consultation Document to legitimise GSM gateways, including for "public" use;

(h) the response by the mobile operators to the RA that private use of GSM gateways should be legitimised but that multi-user gateways should not be legitimised;

(i) the omission in the response of the mobile operators to the November 2002 Consultation Paper of any consideration of single user gateways used to provide telecommunication services by way of business;

(j) whether the criteria established by Vodafone on which it based its decision to disconnect Floe were capable of distinguishing between "public" and "private" use (and/or single-use and multi-party use, if relevant);

(k) the obligations of the United Kingdom not to take action prior to 25 July 2003 capable of seriously undermining the objectives of the Authorisation Directive.

339. The Tribunal considers that it was also incumbent on the Director to have considered whether there had been any change in circumstances between the date of first disconnection and the date of the Decision that was relevant to the objective justification or otherwise of the then ongoing refusal to supply by Vodafone. In our view the Director ought also to have considered the following matters (none of which were considered in the Decision) when deciding whether Vodafone was objectively justified in its continued refusal to supply SIM cards and Services to Floe under the Agreement and its continued disconnection of Floe:

(a) the result of the Consultation announced by the Government on 18 July 2003 including in particular:

(i) that the definition of "user station" was found to be ambiguous and it was decided that it should be amended to make clear that it covers any customer on the network irrespective of fixed or mobile status;

(ii) that the restriction on provision of services to third parties over exempt devices should be retained;

(iii) that the Government encouraged MNOs and Gateway Operators to consider ways of addressing pragmatically the existing uses of GSM gateway equipment that continued not to meet the requirement of exemption;

(b) that the Government issued a statement to the effect, even after it had been decided to retain the restriction on exemption in regulation 4(2), that it was "eager" for the possibility of a pragmatic approach to commercial ventures where traffic and connection to MNOs networks via GSM gateways would be agreed under the auspices of the MNOs' licences.

(c) the effect, if any, of the provisions of the Communications Act 2003 and the Authorisation Directive which came into force on 25 July 2003 (including sections 45 *et seq*, 164 and 172 *et seq* to which reference was made at the hearing).

XIII CONCLUSION OF THE TRIBUNAL

340. The Tribunal unanimously considers for the reasons stated above that the proper course to take in this Appeal is to set aside the Decision of the Director on grounds of incorrect and/or inadequate reasoning and to remit "the matter" to OFCOM under paragraph 3(2)(a) of Schedule 8 to the 1998 Act.

Marion Simmons QC | Michael Davey | Sheila Hewitt

Charles Dhanowa
Registrar

19 November 2004