Neutral citation [2006] CAT 17

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1024/2/3/04

Victoria House
Bloomsbury Place
London WC1A 2EB

31 August 2006

Before:

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

Sitting as a Tribunal in England and Wales

BETWEEN:

FLOE TELECOM LIMITED
(in administration)

Appellant

supported by

WORLDWIDE COMMUNICATIONS UK LIMITED

Intervener

-v-

OFFICE OF COMMUNICATIONS
(formerly the Director General of Telecommunications)

Respondent

supported by

VODAFONE LIMITED

and

T-MOBILE (UK) LIMITED

Interveners

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

Rupert Anderson QC, Anneli Howard and Benjamin Lask (instructed by the General Counsel, Office of Communications) appeared for the Respondent.

Brian Kennelly (instructed by Taylor Wessing) appeared for Worldwide Communications UK Limited

Charles Flint QC (instructed by Herbert Smith) appeared for Vodafone Limited

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

Heard at Victoria House on 30 and 31 January and 2, 3 and 4 February 2006

JUDGMENT

TABLE OF CONTENTS

Note: For simplicity, this judgment will refer throughout to Articles 81 and 82 of the EC Treaty, whether in citations from judgments or otherwise, notwithstanding that the original citation referred to Articles 85 and 86 of the EC Treaty, which were renumbered as Articles 81 and 82 by the Treaty of Amsterdam with effect from 1 May 1999.

I INTRODUCTION

1. This is an appeal by Floe Telecom Limited (in administration) ("Floe") against a decision of the Office of Communications ("OFCOM") dated 28 June 2005 that Vodafone Limited ("Vodafone") had not infringed section 18 (the "Chapter II prohibition") of the Competition Act 1998 (the "1998 Act") or Article 82 of the EC Treaty ("Article 82") by disconnecting the services it was providing to Floe for use in telecommunications equipment known as "GSM gateways".

2. This is the second occasion on which this Tribunal has considered a decision of a competition authority concerning the subject matter of Floe's complaint. Floe first submitted a complaint to the Director General of Telecommunications (the "Director") on 18 July 2003. The Director took a decision under the 1998 Act on 3 November 2003 (the "First Decision") and concluded that Vodafone had not infringed the Chapter II prohibition. The First Decision was appealed by Floe's administrators to this Tribunal on 2 January 2004. We gave judgment on 19 November 2004 ([2004] CAT 18) (the "First Judgment"). The detail of Floe's complaint to the Director, the Director's First Decision, and the submissions made to us by the parties at the first hearing are set out in detail in our First Judgment, to which we make reference, and we do not repeat that background here.

3. In the First Judgment we concluded that the Director's First Decision must be set aside. We concluded that the Director was wrong to have decided in the First Decision that an agreement between Floe and Vodafone dated 12 August 2002 (the "Agreement") did not constitute an agreement between Floe and Vodafone about the provision of "Public" GSM gateways. Furthermore, during the appeal OFCOM (which by that time had inherited the functions of the Director and so was the respondent to Floe's appeal in place of the Director) submitted to us that the Director had made a significant error in the First Decision in deciding that it was possible for Vodafone to authorise Floe to use GSM gateway equipment under the auspices of Vodafone's licence under the Wireless Telegraphy Act 1949 (the "1949 Act"). OFCOM submitted to us that, contrary to the view expressed by the Director in the First Decision, Vodafone's licence under the 1949 Act did not permit the commercial

use of GSM gateway equipment, whether by Vodafone or any other person and that consequently Floe could not have been authorised by Vodafone to use GSM gateway equipment.

4. In view of the submissions before us at the first hearing, when setting aside the First Decision we remitted the matter to OFCOM under paragraph 3(2) of Schedule 8 to the 1998 Act. As we considered that OFCOM's new argument as to the true construction of Vodafone's licence under the 1949 Act had potentially wide ramifications for Mobile Network Operators ("MNOs") such as Vodafone and for intermediaries such as Floe and for competition in the mobile telephony sector generally, we considered that the proper course was for OFCOM to reinvestigate the matter with a view to a fresh, fully reasoned decision being taken on all the points raised by Floe's complaint. In view of the detailed submissions which had been made to us, and the lack of any reasoning in the First Decision concerning a number of important issues, we also directed OFCOM to consider specifically various aspects of the complaint in its fresh decision (see paragraphs [287], [338] and [339] of our judgment).

5. OFCOM took a subsequent decision under the 1998 Act on the matter we remitted to it on 28 June 2005 and we refer to that decision in this judgment as the "Second Decision". The steps taken by OFCOM during its re-investigation of the complaint were fully described by OFCOM at paragraphs 16 to 21 of the Second Decision.

6. We also made a consequential order as to the time period within which OFCOM should take a further decision. OFCOM appealed to the Court of Appeal against that order. The Court of Appeal gave judgment on 15 June 2006 (see [2006] EWCA Civ 768) clarifying the scope of this Tribunal's powers under Schedule 8 of the 1998 following the setting aside by the Tribunal of a decision of a competition authority under the 1998 Act. As OFCOM had, by that time, already issued the Second Decision and the appeal was, in the words of Lloyd LJ "academic" as between the parties, the Court of Appeal made no order on OFCOM's appeal.

7. The appeal before us on the first occasion proceeded in the context of a material distinction which the Director had relied upon in reaching his conclusions between so-called "Public" GSM gateway devices and "Private" GSM gateway devices. It was

explained to us during the hearing of the first appeal, and accepted by all parties, that this distinction was a shorthand nomenclature for describing GSM gateway devices that respectively fell within and outwith the exception in regulation 4(2) of the Wireless Telegraphy (Exemption) Regulations 2003 (the "Exemption Regulations") (SI 2003/74). As OFCOM noted at paragraph 37 of the Second Decision:

> "Various terms have been applied in the past to describe different types of use of GSM gateway equipment (for example the terms 'private' GSM gateway use and 'public' GSM gateway use have been used in the past to distinguish between 'lawful' and 'unlawful' use). These terms have not always been applied consistently and this inconsistent application may have created a certain amount of confusion as to the legal status of each type of use."

8. OFCOM further noted, at footnote 19 of the Second Decision that, in particular, there had been, in its view, "confusion" as to whether the use of a GSM gateway to provide an electronic communications service by way of business to one single end-user and located at an end-user's premises was 'private' (and therefore lawful) use or 'public' (and therefore unlawful) use. OFCOM makes similar remarks as to confusion caused by the use of the terms 'public' and 'private' GSM gateways at paragraph 86 of the Second Decision.

9. In its re-investigation of Floe's complaint, and in the Second Decision, OFCOM has refrained from use of the terms 'Public' and 'Private' GSM gateways which, we agree, appears to have caused considerable confusion in the past, at least as far as all of the parties to this appeal are concerned. Instead, OFCOM now distinguishes, at paragraph 37 of the Second Decision, between three types of use of GSM gateways:

> "a) A "Self-Use GSM Gateway". This refers to the situation where a single end user 'uses' GSM gateway equipment for its own purposes;
>
> b) A "Commercial Single-User GSM Gateway". This refers to the situation where a person other than the ultimate end-user 'uses' GSM gateway equipment to provide an electronic communications service by way of business to one single end-user, whether the GSM gateway equipment is located at the single end-user's premises or elsewhere; and
>
> c) A "Commercial Multi-User GSM Gateway". This refers to the situation where a person 'uses' GSM gateway equipment to provide an electronic communications service by way of business to multiple end-users."

10. Before us, counsel for all of the parties adopted a shorthand convention to describe different types of commercial use of GSM Gateway: using the term "COSUG" to refer to a Commercial Single-User GSM Gateway described at (b) above; and "COMUG" to refer to a Commercial Multi-User GSM Gateway, described at (c) above. For convenience, in this judgment we have on occasion adopted this shorthand.

II SUMMARY OF OUR JUDGMENT

11. For the reasons given in this judgment we unanimously confirm OFCOM's decision that Vodafone had not abused a dominant position when disconnecting Floe's SIM cards and accordingly dismiss Floe's appeal.

12. In reaching our judgment we have made findings on the list of issues before us at the hearing. We summarise these below:

Did Vodafone's Licence permit it to authorise Floe to use COMUGs?

(1) Vodafone's licence forms part of the statutory and regulatory scheme for the authorisation of the use of GSM radio frequencies and apparatus for commercial purposes. In our judgment, the true construction of Vodafone's Licence permits the provision, by Vodafone, of a telecommunications service by way of business, including using GSM gateways which comply with the requirements of the RTTE Directive. OFCOM's reasoning at paragraphs 95 to 126 of the Second Decision for concluding, at paragraph 127 that Vodafone's Licence does not cover the use of GSM gateways is misconceived (see paragraphs 117-124 and 146-149 below).

Did Vodafone authorise Floe to use SIMs in COMUGs under Vodafone's Licence?

(2) On the facts as found by us, Vodafone did not agree to provide Floe with SIM cards for use in COMUGs. Floe did not request Vodafone to supply it with SIMs for use in COMUGs and Vodafone did not know that Floe intended so

to use the SIMs provided to it by Vodafone. In those circumstances, Vodafone could not have authorised, pursuant to the agreement between Floe and Vodafone, an activity by Floe of which it had no knowledge and in respect of which Floe had never made any request to Vodafone for such authorisation (see paragraphs 150-158 below).

Were OFCOM's reasons adequate with regard to its conclusion in the Second Decision that its construction of Vodafone's Licence and the Exemption Regulations is compatible with Community law?

(3) OFCOM's conclusions in its Second Decision, at paragraphs 148 to 158 and 170 that the restriction in regulation 4(2) of the Exemption Regulations is compatible with the RTTE Directive and the Authorisation Directive are inadequately reasoned. OFCOM misdirected itself as to the true construction of the term "harmful interference" in Article 7(2) of the RTTE Directive and incorrectly relied on evidence in respect of congestion as amounting to "harmful interference" in the circumstances of this case. Furthermore, we are not satisfied that a restriction on all use of GSM gateways to provide a telecommunications service by way of business, is justified as being required for the "effective and appropriate" use of the radio spectrum under Article 7(2) of the RTTE Directive on the basis of OFCOM's reasoning in the Second Decision. In particular, we cannot be satisfied that the evidence on which OFCOM relies in the Second Decision, which relates primarily to the amount of call traffic potentially arising from use of COMUGs, supports a restriction that is not related to the amount of call traffic but rather to the provision of services by way of business, regardless of the volume of call traffic (see paragraphs 210-231 and 236-248 below).

(4) Furthermore, OFCOM's conclusion, at paragraph 161 of the Second Decision is inadequately reasoned. OFCOM's conclusion was that "even if regulation 4(2) of the Exemption Regulations is not a condition attached to a general authorisation, but rather a limit on the scope of the exemption, such that commercial GSM gateway use required individual licensing, such a result is compatible with the [RTTE and Authorisation] Directives". That conclusion

was on the basis that no such individual right of use had ever been granted and cannot stand in the light of our judgment at paragraphs 137 to 143 below.

Are the issues of compatibility with Community law relevant to Floe's appeal against the Second Decision?

(5) On the true construction of the Licence as part of the statutory scheme for the authorisation of the use of GSM radio frequencies and apparatus national law is compatible with Community law. Had relevant national law been incompatible with Community law then the *CIF* judgment of the European Court of Justice establishes that OFCOM would have been under a duty to disapply such incompatible national law when exercising its powers under the 1998 Act or Article 82. OFCOM's duty would have arisen notwithstanding that, for the period prior to a decision to disapply it, national law may, to the extent it precluded undertakings from engaging in autonomous conduct, have provided a justification which would have shielded Vodafone from the consequences of an infringement of the competition rules (paragraphs 317-348 below).

(6) Accordingly, OFCOM's conclusion at paragraph 171 of the Second Decision concerning the irrelevance of the compatibility or otherwise of the legal position in the UK with Community law, is misconceived (paragraph 317-319 below).

Was Vodafone subject to a legal requirement to disconnect Floe's SIMs?

(7) On the true construction of Vodafone's Licence, Vodafone would not have been exposed to criminal liability for entering into an agreement with Floe for the provision by Floe of least cost routing services by way of business using GSM gateway equipment which complied with the essential requirements of the RTTE Directive. Therefore, OFCOM's analysis in the Second Decision, at paragraphs 197 to 207, relating to issues concerning Vodafone aiding and abetting criminal conduct and the application of the Proceeds of Crime Act 2002, which was on the basis that Floe could not in any circumstances have

been authorised to use SIM cards by way of business in GSM gateways, does not arise in the circumstances of this case (paragraph 355). Had Vodafone's Licence not covered the provision of services to third parties by way of business using GSM gateways then, in our judgment, Vodafone would have been subject to a legal requirement not to enter into any agreement concerning the provision of services by Floe using GSM gateways of any description. In those circumstances, neither the 1998 Act nor Article 82 could require Vodafone to provide SIM cards for that service to Floe (paragraph 366).

Could Floe rely on a legitimate expectation as to the construction of Vodafone's Licence or as to the legality of its COMUG services?

(8) Floe has failed to establish any evidential basis for any legitimate expectation, there being no evidence before us that any relevant representation was made to Floe on which it was entitled to rely (paragraphs 168-170 below).

Did Vodafone unlawfully discriminate against Floe in disconnecting Floe's SIM cards?

(9) Likewise, Floe has failed to establish any evidential basis for any allegation of discrimination (paragraphs 373-375 below).

13. The consequence of the Tribunal's findings of fact in this case is that the inadequate reasoning in OFCOM's Second Decision does not vitiate OFCOM's conclusion that Vodafone had not abused a dominant position when disconnecting Floe's SIM cards. It is therefore not necessary in this appeal for us to remit any matter in this appeal to OFCOM for re-investigation. We set aside those parts of OFCOM's Second Decision which are inconsistent with our judgment.

14. At paragraphs 172 to 175 of the Second Decision OFCOM refers to a separate consultation on the future regulation of GSM gateways which it is currently conducting. So far as relevant to that exercise, the Tribunal's analysis of the issues as set out in this judgment can be taken into account.

III PROCEDURE BEFORE THE TRIBUNAL

15. Following the taking of the Second Decision on 28 June 2005 Floe lodged its amended Notice of Appeal on 19 August 2005. Floe's grounds of appeal were:

    (a) that OFCOM erred in law in concluding that Floe's use of GSM Gateways was unlawful;

    (b) OFCOM erred in concluding that Vodafone's refusal to supply Floe was in compliance with a legal requirement;

    (c) alternatively, even if Floe's operation of GSM Gateways was arguably unlawful, in the particular circumstances of the case Vodafone should not have refused to supply;

    (d) Vodafone's conduct was not objectively justified and was in breach of its legal obligations to Floe, particularly with reference to the state of knowledge of the parties at the relevant time; and

    (e) Vodafone acted in a discriminatory manner in its treatment of Floe and continues to do so.

16. A case management conference took place on 20 September 2005. Following a hearing on 12 October 2005 before the Chairman sitting alone to hear an application by Vodafone to strike out certain evidence that Floe wished to adduce, the Chairman made a ruling on 13 October 2005 rejecting Vodafone's application ([2005] CAT 35).

17. On 31 October 2005 Worldwide Connect UK Limited ("Worldwide") applied to the Tribunal to intervene in the proceedings out of time. Worldwide relied, inter alia, on its interest in the outcome of certain legal issues raised by Floe's appeal. By an order dated 2 November 2005 the Tribunal granted Worldwide permission to intervene, subject to certain conditions limiting the scope of the intervention. Further case management conferences took place on 2 November 2005 and 1 December 2005. At

the case management conferences the Tribunal directed, inter alia, that the parties agree a list of issues for consideration at the main hearing. That list of issues was finally agreed and signed on behalf of all parties on 23 December 2005. The issues of market definition, dominance and effect on trade between Member States were, by paragraph 8 of an order dated 20 September 2005 held over until after this judgment. The main hearing took place between 30 January 2006 and 3 February 2006.

18. The list of issues for consideration at the main hearing was a heavily negotiated document which extends to over four pages. We note at the outset that the way in which the parties have sub-divided the issues in their submissions to us has not necessarily been of assistance in our consideration of the matters in dispute. In outline, the issues in the agreed list of issues can be summarised as follows:

    (1) the application of the exemption in regulation 4(2);

    (2) the scope of Vodafone's licence under the 1949 Act;

    (3) legitimate expectation;

    (4) compatibility of the Exemption Regulations with Community law;

    (5) the relevance and effect of the compatibility issue;

    (6) the applicablility of the Chapter II prohibition and Article 82; in particular whether Vodafone was precluded by a "legal requirement" from continuing to supply Floe or whether Vodafone was objectively justified in disconnecting Floe?

    (7) Did Vodafone unlawfully discriminate against Floe?

19. Before considering each of these issues in detail we set out relevant terms of Vodafone's licence under the 1949 Act, the statements made by the Radiocommunications Agency ("RA") as to the legal position concerning the use of

GSM gateways and the licences issued to Mobile Network Operators ("MNOs") such as Vodafone and our findings of fact relevant to the issues.

IV THE LICENCE

20. Vodafone's Public Mobile Operator Licence (the "Licence") was issued on 28 January 2002 (this licence replaced a licence first issued to Vodafone by the Secretary of State on 23 July 1992). We considered extensive submissions by all parties as to the true construction of the Licence in the appeal against the First Decision. We did not reach a concluded view as to the true construction of the Licence in our First Judgment but remitted that matter to OFCOM in view, in particular, of the difference in approach that had arisen before us as to the true construction of the Licence between the Director, who had taken the First Decision, and OFCOM, who was the respondent to the appeal against the First Decision.

21. The Second Decision considers the true construction of the Licence in detail at paragraphs 95 to 131. OFCOM's analysis of the Licence was further developed in the submissions before us. We consider the construction of the Licence at paragraphs 57 to 158 below.

22. Paragraph 1 of the Licence authorises Vodafone Limited to establish, install and use radio transmitting and receiving stations and/or radio apparatus as described in the Schedules to the Licence (the "Radio Equipment"). Pursuant to paragraph 3 the Secretary of State may not revoke or vary the Licence without Vodafone's consent, save in the circumstances set out in that paragraph, which are not relevant to this appeal.

23. Pursuant to paragraph 7 of the Licence Vodafone must ensure that the Radio Equipment is constructed and used only in accordance with the provisions specified in the Schedules. Any proposal to amend any detail specified in the Schedules must be agreed with the Secretary of State in advance and implemented only after the Licence has been varied or re-issued accordingly.

24. Pursuant to paragraph 8, the Licensee must ensure that the Radio Equipment is operated in compliance with the terms of the 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 the Licence.

25. Schedule 1 to the Licence, entitled "Licence Category: Cellular Radiotelephones" describes the Radio Equipment and is set out below:

> "This schedule forms part of licence no **249664**, issued to **Vodafone Limited,** the Licensee on **28 January 2002** and describes the Radio Equipment covered by the Licence and the purpose for which the Radio Equipment may be used.
>
> 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 User Stations which meet the appropriate technical performance requirements as set out in the relevant Wireless Telegraphy (Exemption) Regulations made by the Secretary of State communicate by radio with the Radio Equipment to provide a telecommunications service.
>
> 3. **Approved Standards for Radio Equipment**
>
> The Radio Equipment covered by this Licence shall be subject to and comply with the appropriate Interface Requirement (IR 2014 – First and Second Generation Public Cellular Radiotelephone Services), listed below in paragraph 11 of for equipment placed on the market before 8 April 2000, is required to be type approved in accordance with a recognised performance standard relating to the service licensed.
>
> (…)
>
> **TECHNICAL PERFORMANCE REQUIREMENTS**
>
> 6. The Radio Equipment shall be operated in compliance with such co-ordination and sharing procedures as may be considered necessary and notified to the Licensee by the Radiocommunications Agency on behalf of the Secretary of State.
>
> The Licensee must ensure that the Radio Equipment performs in accordance with the following technical performance requirements.
>
> **PART A: DIGITAL – Global System for Mobile Communications (GSM) and Extended Global for Mobile Communications (EGSM)**
>
> 7. **Frequencies of Operation**
>
> The Radio Equipment is required to operate on an of the following frequency ranges:

GSM:

Base Transmits/ Mobile Receives	Base Receives/ Mobile Transmits
935.1-939.5 MHz 947.3-955.1 MHz	890.1-894.5 MHz 902.3-909.9 MHz

(...)

9. **ITU Emission Designation**

271KG7W

(…)

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;

17. **Interpretation**

In this Schedule:

(b) "IR" means the United Kingdom Radio Interface Requirement 2013 published by the Radiocommunications Agency of the Department of Trade and Industry (RA) in accordance with Article 4.1 of Directive 1995/5/EC of the European Parliament and of the Council on radio equipment and telecommunications terminal equipment ("RTTE") and the mutual recognition of the conformity. If needed the OJ reference for the Directive is O.J. No. l91, P.10; the Directive was implemented in the UK by the Radio Equipment and Telecommunications Terminal Equipment Regulations, 2000/7/730.

(c) "ITU" means the International Telecommunications Union and "Emission Designation" shall have the meaning as defined in the ITU Radio Regulations RR 4-2 and Appendix 6 Parts A & B

(d) "RF" means Radio Frequency

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

Issued by the Radiocommunications Agency on behalf of the Secretary of State for Trade and Industry."

V THE VARIOUS STATEMENTS MADE BY THE RA

26. In the period during and leading up to Floe's conclusion of the Agreement with Vodafone and its conduct of business as a provider of GSM gateway services the Government and the former Radiocommunications Agency ("RA") made certain public announcements as to the legal position concerning GSM gateways, and the licences issued to MNOs, including Vodafone. It is, in our view, important to set out the various statements made by the former RA (the functions of which have also now been transferred to OFCOM). According to paragraph 56 of the Second Decision OFCOM's view is that these statements may have created a certain degree of ambiguity as to the proper legal status of GSM gateways.

27. On 23 August 2002 the RA published a statement on its website "GSM Gateways – RA position on legality" (the "August 2002 Statement"). This statement 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"

28. On 4 October 2002 the RA published a statement on its website, attaching the above letter, as follows:

"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"

29. In November 2002 the RA published a consultation document (the "November 2002 Consultation") entitled "*Public Wireless Networks – Exemption of User Stations*". Relevant extracts from this 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:

(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."

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.

30. On 18 July 2003 the Government made the following announcement:

"**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."

31. Finally, in August 2003 the RA made a further statement, published on its website, as follows:

"A Consultation (Public Wireless Networks – Exemption of User Stations) was launched on 4 November 2002. The consultation closed on 21 February 2003 and the responses and correspondence received raised many issues that required careful consideration. Following an extensive investigation and analysis of the responses the Government announced its decision in a press notice on 18 July 2003. This notice is available on: http://www.radio.gov.uk/publication/press/2003/18july03.htm

The consultation, non-confidential responses and RA statements are also available on the RA web site

Use of GSM Gateways:

(a) Following the consultation the current definition of "User Station" in schedule 3 of the Wireless Telegraphy (Exemption) Regulations 2003/74 (the Regulations) has been extended to cover any customer of the network, irrespective of its fixed or mobile status. The Regulations will be amended when they are next revised. This will legitimise a number of private use applications that developed outside the existing regulatory framework.

(b) 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, authorisations and related legislation (i.e. Regulatory Investigatory Powers Act 2000), 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 by the relevant licensee, 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.

However, whilst the general restriction of provision of commercial services to third parties over exempt devices (except where otherwise specifically provided for in the Regulations) is maintained, the Government is eager for the MNO's and GSM Gateway Operators to consider ways to address this issue pragmatically between themselves."

The statement then set out contact details for a specific person at each of Vodafone, T-Mobile, Orange, O2 (UK), and Hutchison 3G who were responsible within the MNOs for dealing with specific enquiries concerning GSM Gateways.

VI FINDINGS OF FACT

32. The following witnesses provided witness statements (the evidence in witness statements provided for the purposes of the hearing of the appeal against the First Decision was also before us at this hearing):

For Floe:

(a) Mr David Happy, consultant to Floe (first witness statement dated 19 February 2004 and second witness statement dated 26 August 2005);

(b) Mr John Mittens, former Chairman of Floe;

(c) Mr John Stonehouse, former director of Floe (witness statement dated 26 August 2005, as amended on 30 January 2006); and

(d) Mr Simon Taylor, former Chief Executive of Floe.

For OFCOM:

(e) Dr Stephen Unger, Director of Telecoms Technology, OFCOM (first witness statement dated 13 May 2004, second witness statement dated 12 July 2004); and

(f) Mr Cliff Mason, manager of the mobile and broadband wireless policy team, OFCOM and formerly head of Public Networks Licensing at the Radiocommunications Agency.

For Vodafone:

(g) Mr Martin Bell, technical architect in the Technical Services Group of Vodafone Limited;

(h) Mr Ian Greenstreet, independent consultant and former Product Manager, Vodafone (first witness statement dated 25 May 2004, and second witness statement (incorrectly described as a "third witness statement") dated 21 October 2005);

(i) Mr Timothy Harrabin, former Strategy Director, Vodafone Limited;

(j) Mr Charles Morrow, Intelligence Manager, Vodafone Security and Fraud Department (first witness statement dated 26 May 2004, second witness statement dated 28 June 2004, third witness statement dated 25 October 2005 and fourth witness statement dated 28 October 2005);

(k) Mr Gerard O'Neill, technical manager for special projects, Vodafone;

(l) Mr John Overton, Business Development Executive, Vodafone;

(m) Mr Simon Pike, Chief Engineer – Regulatory and Spectrum, Vodafone;

(n) Mr Jason Rigby, Head of Service Provision, Vodafone (first witness statement dated 25 October 2005 and second witness statement dated 28 October 2005);

(o) Mr David Rodman, Head of Regulatory Policy, Vodafone UK (first witness statement dated 26 May 2004, second witness statement dated 26 October 2005 and third witness statement dated 20 January 2006);

(p) Mr Martin Woodford, Strategy Executive, Vodafone UK; and

(q) Mr Johnathan Young, Relationship Manager in Mobile IT Solutions, Commercial Partnerships, Vodafone UK (first witness statement dated 21 May 2004, second witness statement dated 21 October 2005)

For T-Mobile:

(r) Mr Anthony Wiener, Head of Technology Strategy, T-Mobile (first witness statement dated 28 May 2004, second witness statement dated 24 October 2005).

33. The following witnesses of fact were cross-examined at the hearing:

Floe's witnesses:

(a) Mr Taylor; and

(b) Mr Stonehouse

Vodafone's witnesses:

(c) Mr Greenstreet;

(d) Mr Overton;

(e) Mr Rodman; and

(f) Mr Young

OFCOM's witnesses

(g) Mr Mason.

Before being cross-examined and then re-examined, each witness confirmed on oath (or affirmation) the truth of their witness statements which then stood as their evidence-in-chief.

34. Also before the Tribunal was an agreed Statement of Facts which had been prepared for the purposes of the appeal against the First Decision (see, in particular paragraphs [21], [22], [25], [29], [31] and [36] of our first judgment).

35. Five bundles of relevant documents and correspondence were also placed before us. As regards contemporaneous documents, we consider that evidence in a document prepared at a time when the author did not necessarily anticipate that it might be referred to in later court proceedings, is likely to have more weight than explanations or glosses given later. The evidence of all the witnesses of fact who gave oral evidence at the hearing is open, to some extent, to having been influenced, at least sub-consciously, by the fact that they are employed (or were employed) by the parties to this litigation.

36. For example, Floe's witnesses must be taken to be conscious of the fact that, if an infringement of the 1998 Act is established, the company may possibly have a substantial damages claim against Vodafone pursuant to section 47A of the 1998. Vodafone's witnesses are likewise conscious of that background matter. The second hearing at which we heard oral evidence took place almost four years after the relevant events in question and we take into account that recollections may be incomplete. In all the circumstances we have approached the oral evidence cautiously and looked, wherever possible, for corroboration in the documentary record.

37. Our consideration of Floe's appeal against the First Decision was hindered because the investigation conducted by the Director, in particular as regards the underlying factual issues, was seriously deficient. In particular, as we held, taking account of the evidence adduced in the appeal against the First Decision, at paragraphs [3(a)] and [237] – [238] of the First Judgment, the Director's conclusions as to the true construction of the Agreement between Floe and Vodafone were wrong. Because of his incorrect conclusions as to the Agreement the Director did not, as part of his investigation leading to the First Decision, obtain any information as to Floe's business at the time of disconnection or Vodafone's understanding of Floe's business. As noted at paragraph [314] of the First Judgment there was some, albeit limited, evidence before us at the hearing in witness statements provided by Vodafone witnesses, though no party sought to cross-examine any witness at the first hearing. In those circumstances we made no finding as to the scope of Floe's business at the time of the disconnection by Vodafone or the parties' intentions in entering into the Agreement. Those matters were remitted by us to OFCOM for further investigation.

38. Furthermore, because OFCOM abandoned important parts of the First Decision taken by the Director and had advanced an entirely new argument that was contrary to the views expressed in the First Decision by the Director (which had been based on advice given to the Director by the RA), we found in the First Judgment that a further important part of the First Decision, as to whether or not Vodafone had authorised Floe to operate "Public" GSM gateways, was flawed (paragraph [282]).

39. The evidence now before us, both as a result of OFCOM's further investigation and as a result of further evidence adduced by the parties before the Tribunal, provides a much fuller picture than was available to us at the first hearing.

40. Having heard the evidence and read the witness statements and the documents in the bundles, we make the following findings of fact relevant to this judgment (for the assistance of the parties only we include references to the bundles of documents and the transcripts of the oral evidence):

    (1) Vodafone was granted a licence under the Wireless Telegraphy Act 1949 on 23 July 1992, which licence was re-issued on 28 January 2002. No party has

suggested to us that the terms of the licence re-issued on 28 January 2002 were materially different, for the purposes of the issues in this appeal, to the terms of the licence in 1992 (2(a)(8)).

(2) On Tuesday 8 January 2002, a meeting took place between Mr Taylor of Floe and Mr Young of Vodafone. On 11 January 2002 Mr Taylor sent an email to Mr Young thanking him for seeing him "on Tuesday" at short notice (2(a)(7)).

(3) On 9 January 2002, Vodafone and Floe entered into a confidentiality agreement concerning the negotiation of the Agreement. Each party agreed to keep confidential the Confidential Information (as defined in that confidentiality agreement) of the other which it was anticipated would be disclosed "for the purpose of future wireless and service provision business opportunities" (recital (A) to the confidentiality agreement) (2(a)(6)).

(4) At the beginning of 2002 Mr Taylor was a director of a company called Telecom FM Limited which made equipment for the telecommunications industry. In early 2002 Mr Taylor, on behalf of Telecom FM Limited, met Mr Bell of Vodafone to discuss the possibility of the development of multi-SIM GSM gateway devices. Mr Bell's understanding from his discussions with Mr Taylor was that Telecom FM would manufacture a multi-SIM device (approximately 3-4 SIMs) which would operate in a slightly different way to a "Premicell[1]" in that it made the intelligent decision on how to route the call. Mr Bell's understanding was that the Telecom FM devices, which Vodafone ultimately offered to its customers, would operate with all of the networks, would be cheaper for the customer, were specifically designed for ease of installation on a user's PABX[2] because of the intelligent call routing and took up less space than multiple Premicells. Mr Bell's understanding was that Vodafone was interested in Telecom FM's multi-SIM product, at

[1] A "Premicell" is a type of GSM gateway device.
[2] "Private Automatic Branch eXchange" – an automatic telephone switching system for providing access to the public telephone system.

that time, in order to supply it to corporate customers who would install it on their own premises.

(5) On 1 February 2002 John Stonehouse of Floe met Mr Jim Davies and Mr Gordon Tarrant of the Department of Trade and Industry ("DTI"). Mr Stonehouse subsequently prepared a note of the meeting, including details of a presentation of Floe's business plans which he had given at the meeting. Mr Stonehouse's evidence was that he sent that document to Mr Davies shortly after the meeting. Matters arising from that document (2(a)(9)) are that:

(i) at the meeting John Stonehouse discussed Floe's proposal to offer a service via GSM Gateways and Mr Stonehouse expressed the view that as a result of such a service cost savings would be available to end-users;

(ii) Gordon Tarrant voiced concerns that, if Floe used GSM Gateways, Floe would be broadcasting from a Base Station without a licence and agreed to look into those issues further;

(iii) John Stonehouse did not contact OFTEL at that time;

(iv) Mr Stonehouse told the DTI that Floe would use "Customer Premise Direct Mobile Access as a cost-effective solution for small to medium enterprise customers with between five and eighty employees" and that such a "solution" was "compatible with all major types of analogue PABX's and Digital Key Systems and was approved for use on networks in both the United Kingdom and Europe" (page 3 of Mr Stonehouse's note).

(v) Mr Stonehouse told the DTI that Floe intended to use a system "connected across the PABX exchange lines in such a manner that it

[the system] is able to "sense" the information carried on lines to look for specific dialled digit information."

(vi) Mr Stonehouse also told the DTI that Floe had "under development", "a number of solutions, complementary to the products already defined in Phases 1 & 2 of the plan to allow enhanced mobile routing solutions on mobile-to-mobile and fixed-to-mobile calls via intelligent switching platforms". These would involve, inter alia "customer account routing via Floe's enhanced networks platforms" and "all routing, switching and billing will be handled by Floe and thus a true indirect mobile service would be launched using all the major mobile network operators" (page 4 of Mr Stonehouse's note).

(vii) Mr Stonehouse also discussed Floe's plans with regard to "wholesale aggregation of mobile call traffic" as a "natural progression of its planned business phases" (Mr Stonehouse's note, page 5).

(6) We find as a fact, having heard the evidence of Mr Stonehouse as to what transpired at this meeting, that Mr Stonehouse did not receive any express advice or assurance to the effect that a commercial service using GSM gateways could lawfully be provided in the United Kingdom without a licence under the 1949 Act. Mr Stonehouse's evidence was that, having raised possible concerns at the meeting Mr Tarrant of the DTI said that he would look into the issues further. Mr Tarrant did not subsequently contact Mr Stonehouse in respect of those issues. Mr Stonehouse took comfort from this. Mr Stonehouse was not told by the representatives of the DTI at the meeting that Floe would be able to operate under the terms of Vodafone's licence or that it was certainly legal to operate multi-user GSM gateways commercially [Day 1, pg 19; pg 39, line 1 – 34; pg 40, line 1-35; pg 41 line 1 – 21; day 1 pg 48, line 20].

(7) Floe provided Vodafone with a Business Plan during the negotiations leading up to the Agreement (2(a)(24). The Business Plan provided to Vodafone was considered in the First Judgment (paragraphs [33]-[35], [224],

[228], [229] and [234]). It made clear that Floe intended to provide a least cost routing service using GSM Gateways. There is reference in the Business Plan provided to Vodafone to Floe's intended use of multi-SIM GMS Gateway devices of up to 30 GSM channels. The Business Plan referred repeatedly to Floe's intended use of "customer premise equipment". As we make clear below, we find that Vodafone had seen this Business Plan by at least 14 March 2002.

(8) On 12 March 2002 Mr Young of Vodafone sent an email to Mr Stonehouse of Floe stating that the "process" regarding the negotiations between them would involve: (a) receipt/review of a current Business Plan and Financial Plan; (b) preparation of a "Specification Document" (10-12 page document detailing route to market, typical proposition and overview of customer profile etc). This document was to be prepared by the "Channel Manager" in accordance/alongside the "potential partner"; (c) audit of the potential partner's sales team (1/2 day workshop/review); (d) "acceptance of prospect partner" by Vodafone senior management/commercial review board; (e) draft agreements would be prepared; (f) a "roadmap for launch" would be prepared; (g) the agreement would be signed; (h) the service would be launched. It was indicated that the process would take a minimum of 6-8 weeks and much longer if the agreement was in dispute. Typically such negotiations would take 2 months (2(a)(11)).

(9) On 14 March 2002 Mr Stonehouse sent an email to Mr Young indicating that Floe's average revenue per user ("ARPU"), as had previously been discussed, would be significantly higher than the current ARPU for handsets, probably by up to 8 times and that Floe was a "special case" as it would have additional costs such as equipment, installation and commissioning. Mr Stonehouse thought that Floe should therefore be considered as a "special case" in respect of connection bonuses. Mr Young rejected Mr Stonehouse's request for a higher bonus payment by email dated 14 March 2002 (2(a)(13) & (2(a)(14)).

(10) During the negotiations, Floe had made clear to Vodafone that their business was "not typical i.e. connection-based" (see email from Stonehouse to Young of 15 March 2002) (2(a)(16)).

(11) On 10 April 2002 Mr Stonehouse sent an email to Mr Young saying that he was disappointed that Mr Young had not responded to his earlier email dated 14 March 2002 and asking to be made aware by return email as to the progress of the agreement and the reasons for the delays. Mr Stonehouse also asked whether there was anything that Floe could provide that would help move the process forward (2(a)(17)).

(12) On 10 April 2002 Mr Young responded to Mr Stonehouse saying that he had spoken to Simon [Taylor] and had asked him to update Mr Stonehouse as to progress. There was nothing else that Floe could provide to assist Vodafone at that time. Mr Young indicated that Vodafone was unlikely to and should not enter into any "partnering agreement" with Floe hastily (2(a)(18)).

(13) Mr Stonehouse responded to Mr Young by email dated 11 April 2002. Mr Stonehouse attached the text of an email sent by Mr Young on 12 March 2002 in which Mr Young had indicated that a draft "Spec Doc" was being prepared and that Floe would be involved once the draft was ready, as there would be points requiring further information (2(a)(19)).

(14) On 25 April 2002, Mr Young sent various documents to Mr Taylor under cover of an email headed "Price Lists, Billing Specification Document and sample data etc". The text of those documents has not been disclosed in the proceedings (2(a)(21)).

(15) Mr Young knew that Floe intended to use GSM gateway devices with more than one SIM (day 2, pg 11, line 1-16).

(16) A further, fuller, business plan (the "Fuller Business Plan") was prepared by Floe. The copy disclosed in the proceedings is dated 29 September 2002 with an indication on the second page that it is a "second draft after internal

review" on 9 May 2002 (2(a)(23)). It appears from these dates that the Fuller Business Plan may have been prepared, or at any rate, finalised after the Business Plan that was provided to Vodafone, but there is no direct evidence before us as to precisely when the Vodafone version of the Business Plan was provided to Vodafone. We note that the email sent by Mr Young on 12 March 2002 (referred to at point 8 above) stated that the Floe Business Plan would be reviewed by Vodafone before the Specification Document was prepared. On 10 April 2002 Mr Stonehouse emailed Mr Young expressing his disappointment that he had not received any response from Vodafone since 14 March 2002 and as to lack of progress. In his email of 10 April 2002 Mr Young indicated that there was nothing further Floe could provide to Vodafone at that point (2(a)(18) having previously indicated in an email dated 12 March 2002 that the Specification Document was being prepared (2(a)(19). This indicates to us that Vodafone had seen the Business Plan prepared by Floe for Vodafone by at least 14 March 2002.

(17) The Fuller Business Plan is considerably more detailed than the Business Plan which was provided to Vodafone. We find that the earliest date on which the Fuller Business Plan was available incorporating the text shown to us was 9 May 2002, although a version of the draft had been in preparation before then. That document makes clear Floe's plan during "Phase 1" (from March 2002) to use Customer Premise Direct Mobile Access as a cost-effective solution for small to medium enterprise customers. During Phase 1 Floe would employ, inter alia, "Product 1" which was "GSM Gateways and hybrid PABX solutions <u>for customer premises</u>". During Phase 3, from January 2003 onwards, Floe would develop "enhanced mobile routing solutions", including Indirect Access and Pre-Paid Card Services by making use of the "very latest switching environment that functions as both the network interconnect point and as an application rich Intelligent Node". The Fuller Business Plan also refers to Floe's plans with regard to "wholesale aggregation of Mobile Call Traffic". Page 35 of the Fuller Business Plan notes that Floe was developing applications that "will in some areas test OFTEL and the mobile regulatory regimes in the United Kingdom because the company is not a licensed Mobile Network Operator". It was

there stated: “To ensure that the business is not adversely affected by loose or ineffective legislation or by the slow turning of the government wheels Floe is working closely with and currying the sponsorship of the regulatory department of the Department of Trade and Industry.” We find as a fact that Vodafone was never shown the Fuller Business Plan by Floe.

(18) Simon Taylor, Chief Executive of Floe knew or thought that Floe’s business would test the regulatory regime for GSM Gateways [Day 1, pg 18, line 5 *et seq*]. He did not himself understand the detail of the regulatory regime. However, both Mr Taylor and Mr Stonehouse knew that there was a regulatory regime applicable to the provision of mobile telephony services but approached their negotiations with Vodafone on the basis that they thought that Floe could offer services using GSM gateways in that Floe could be authorised under the auspices of Vodafone’s licence (Day 1, pg 18 line 29, pg 20 line 1, day 1 page 44 line 11 to page 46 line 29).

(19) On 10 June 2002, Rob Borthwick of Vodafone Regulatory reported to Mr Rodman of Vodafone that an ex-colleague of Mr Borthwick’s had told him that a South African company was offering to terminate all UK mobile traffic at wholesale and deliver “on-net” calls. At that time Mr Borthwick stated that “it has always been theoretically possible” to do this and the only issue was a “commercial one.” Mr Borthwick considered that the company may wish to have “a commercial response” if such services were to develop but there is no evidence before us to suggest that Mr Borthwick considered such a service to be illegal (2(a)(25)).

(20) On 27 June 2002, Graham Markwick, an Investigations Officer of the RA, emailed various representatives of the MNOs including Jeff Wearing of Vodafone concerning reports that a small number of fixed network operators were using GSM Gateways as a means of undercutting their rivals in the industry. Mr Marwick’s email attached a “position paper” which noted that a GSM Gateway is a station for wireless telegraphy, that a mobile handset and SIM card are normally exempted from the provisions of s1(1) of the 1949 Act but that any use by way of business would not be exempt. Such

use without a licence would therefore be an offence. The RA paper refers to a "practice" by certain "operators" using GSM gateways. The RA posed various questions including whether it would be in the public interest to prosecute anyone operating a GSM Gateway without a licence as there appeared to be no interference concerns and whether anyone passing traffic to a GSM gateway would be "aiding, abetting, counselling or procuring" a breach of the 1949 Act (2(a)(28)).

(21) On 27 June 2002, Mr Mittens and Mr Taylor of Floe gave guarantees to Vodafone of the obligations of Floe in respect of all goods and services provided by Vodafone to Floe from time to time (2(a)(29)).

(22) On the next day, 28 June 2002, Cliff Mason, head of the Public Wireless Networks at the RA circulated a paper to various representatives of the MNOs including Rob Borthwick of Vodafone concerning GSM Gateways. His covering email stated that he had told enquirers that use of GSM Gateways appeared to fall outside the Exemption Regulations and that he could not advise that it would be legal for anyone other than the licensed mobile operators to use such devices. The paper attached to the email noted that if an MNO owned and operated the GSM Gateway Mr Mason considered that such use by the mobile operator would be covered by its licence (para 2). Mr Mason's view, as set out in that paper, was that commercial use of GSM Gateways appeared beyond the scope of the Exemption Regulations as GSM Gateways are "fixed" and not "mobile" devices (although he also considered that the exemption might "possibly stretch" to a system installed on companies' PABX). Mr Mason's view was that the Exemption Regulations excluded any use by way of business and that the provision of a commercial service via a GSM Gateway was not "licensable" other than by the mobile operators themselves to use under their existing licences (2(a)(30)).

(23) On 22 July 2002, Mr Greenstreet of Vodafone informed Mr Rodman of Vodafone of the telephone numbers associated with a Vodafone customer

using Premicell (i.e. GSM Gateway) devices which should give a "typical genuine user profile" (2(a)(33)).

(24) On 30 July 2002, Vodafone were alerted to a project, involving call traffic of over 2.5 million minutes per month (60% off peak). The project involved "yagi antennae" with distribution of calls to the recommended cell sites in the area which would require significant capacity in the Milton Keynes area. Mr Rodman was alerted to this project on 7 August 2002. On 9 August 2002 Mr Rodman emailed his colleagues to say that he would write two letters to Vodafone service providers: the first, outlining the policy on usage which might harm network integrity; and the second to those service providers supporting "on-net arbitrage", detailing the relevant SIMs, the traffic congestion and giving notice that service would be disconnected under the Service Provider Agreement within x days unless the matter was resolved (2(a)(40)).

(25) On 7 August 2002, Mr Rodman gave a presentation at which he noted the RA's view was that use of GSM Gateways was "unlicensable" except by Mobile Operators (2(a)(34)).

(26) The Agreement between Floe and Vodafone was executed on 12 August 2002 (2(a)(36)). The Agreement was signed by Mr Overton on behalf of Vodafone. Mr Young had previously had assistance from Vodafone's legal department in the drawing up of the terms of the Agreement.

(27) Mr Overton was aware that the contract was for GSM Gateway devices and for least cost routing [Day 1, page 65, line 29-34]. He did not recall seeing the Floe Business Plan. His practice was to leave the reading of business plans to his team and to their judgment [Day 1, page 66, line 20-29].

(28) Mr Young's understanding was that the Agreement covered the provision of least cost routing by Floe and knew that Floe intended to provide "one bill" for their customers [Day 2, page 11, lines 1-6 & page 12, lines 21-22].

(29) Mr Young did not understand that the wholesale multi-SIM part of Floe's proposition was "ready yet" at the time of signature of the Agreement [Day 2, pg 14, line 33 – 35]. Any extension of Floe's activities during the currency of the Agreement was intended to be covered during quarterly review meetings with Floe [Day 2, page 15, line 9-12].

(30) On 21 August 2002, Vodafone received an opinion from expert competition law counsel at Brick Court Chambers (James Flynn QC and Maya Lester) which highlighted a possible infringement of competition law were Vodafone to disconnect SIM cards being used by GSM Gateway operators (2(a)(37)). Counsel advised, in particular, that although Vodafone would argue that any abuse was objectively justified, if it did so Vodafone would face "powerful counter-arguments" from a complainant, in particular that a refusal to supply would not be a justified response to network overload where Vodafone could reduce the price differential in termination charges and/or increase its network capacity. Counsel's conclusion was that if Vodafone were to disconnect SIM cards in GSM gateways it might be open to legal challenge on the basis of competition law. While counsel understood the basis upon which Vodafone would seek to justify such action counsel's conclusion was: "we cannot advise with confidence that Vodafone would succeed." Vodafone subsequently circulated this legal advice to third parties thereby waiving any privilege in it and relevant parts of the advice were accordingly disclosed by Vodafone to Floe in these proceedings.

(31) Mr Rodman did not attend any conferences with counsel. Counsel was not provided with the Agreement with Floe before they gave their advice [Day 2, page 3, line 20; day 2, page 8, line 18-19]. There is no evidence of any communication within Vodafone between those giving instructions to counsel and those (including those in the legal department) who were considering the Agreement with Floe. In particular, within the Vodafone legal department there is no evidence that those advising Mr Young as to the terms of the Agreement had been made aware of the issues upon which counsel's advice was being sought nor did those advising on the Agreement

make their regulatory colleagues aware of the proposed Agreement with Floe.

(32) On 23 August 2002, the RA published a statement on its website concerning GSM Gateways which noted that the GSM spectrum had already been awarded in the UK to "the cellular operators on a nationally exclusive basis" and could not be licensed to other users. In that statement it was recorded that companies installing and or using GSM Gateways should be aware that the equipment is not covered by the Exemption Regulations as it is fixed and, in addition, cannot be used "by way of business" (2(a)(38)).

(33) On 11 September 2002, a submission from the RA was sent to the Minister concerning GSM Gateways seeking approval for a proposal to hold a public consultation on amending the Exemption Regulations to allow the use and legitimisation of GSM Gateway Fixed Stations that communicate with Licensed Networks. That submission noted:

(i) that GSM Gateways do not fall within the Exemption Regulations because the equipment is fixed and does not comply with the definition of a Mobile Station; (para 4) and

(ii) the GSM spectrum is licensed to the cellular operators on a nationally exclusive basis and user stations are exempt from licensing (para 6) (2(a)(42)).

(34) On 13 September 2002, the Minister approved the submission from the RA (2(a)(43).

(35) Also on 13 September 2002, Vodafone wrote to the relevant service provider in respect of the Milton Keynes project stating that serious network integrity problems had arisen and the advice of the RA was that the relevant activities would appear to amount to an offence under the 1949 Act. Vodafone therefore required disconnection of the relevant connections (2(a)(44)).

(36) On 27 September 2002, Mr Morrow of Vodafone sent an internal email to Mr Wearing of Vodafone saying that he had spoken to Colin Richards at the RA. He had been told by Colin Richards "that 'given appropriate time' if we supply details of gateway operators the RA would catch them in the act". Mr Morrow put it to Mr Richards that Vodafone would disconnect the GSM Gateways in order to mitigate their losses and Mr Richards "confirmed my suggestion that they would take no further action in the circumstances" (2(a)(47)).

(37) On 16 October 2002, there was a meeting between Floe and Vodafone. In a subsequent email from Ms Healy of Floe to Mr Young of Vodafone it is recorded that Floe "brought Vodafone up to date with its projected growth plans" and that Floe would have a quarterly review on 29 November 2002. Vodafone asked Floe to "bring them up to date with any Floe business developments at this meeting" (2(b)(1)).

(38) There were at least one, and maybe two, account review meetings between Floe and Vodafone after the signing of the Agreement and before the discussion in February 2003 at which issues of the potential illegality of GSM gateways were raised with Floe directly for the first time [Day 1, pg 58, line 6-14].

(39) Vodafone billed Floe for call charges in respect of the SIMs it provided to Floe under the Agreement. The amounts invoiced to Floe were £53,861.02 (October 2002); £82,393.59 (November 2002); £129,702.14 (December 2002); £65,882.40 (January 2003); £135,746.12 (February 2003); £186.986.03 (March 2003); and £126.723.09 (April 2003) (2(a)(51)).

(40) In November 2002 the RA issued a consultation paper "Public Wireless Networks – Exemption of User Stations". The consultation paper was considered in the First Judgment (2(b)(5)).

(41) On 13 November 2002, a representative of T-Mobile sent an email to representatives of the other MNOs regarding the RA consultation document

noting that "the thrust of the consultation was somewhat different from our expectations" but that Cliff Mason had told her colleague that a "plausible outcome" of the consultation would be that "third party use of GSM gateways remained illegal" but that "other uses of gateways" along with items such as SIM boxes in vending machines etc became legal. Cliff Mason also said that the RA was keen to receive a common view from the mobile operators (2(b)(4)).

(42) On 28 November 2002, Floe sent a direct debit mandate to Vodafone. Mr Taylor expressed the hope that this meant that "the relationship" between Floe and Vodafone would be on a "stronger footing" (2(b)(8))

(43) On 9 January 2003, Mr Rodman met Mr Overton regarding GSM gateways. Mr Rodman prepared a document for the Vodafone corporate sales team regarding GSM gateways noting that GSM gateways caused particular problems for Vodafone including loss of revenue, congestion, no Calling Line Identity and disruption of the ability to track calls for the police (2(b)(11).

(44) On 14 January 2003, T-Mobile gave Floe notice of disconnection in respect of SIM cards in GSM gateways (2(b)(11A)).

(45) On 29 January 2003, Mr Young emailed Mr Taylor concerning the agenda for a forthcoming meeting and noting that a Director would attend and would require a "heads up" on Floe prior to the meeting. Mr Young also noted that no connections had been placed by Floe for January 2003 and suggested that an outlook for connections could be highlighted as part of the meeting (2(b)(13)).

(46) Mr Taylor responded by email on 30 January 2003 suggesting that the issues for the meeting should include Floe increasing its portfolio of Vodafone offerings, Floe selling 50 handset connections per week, working closely as a partner to Vodafone on fixed/mobile convergence and Floe strategy moving into 2003 (2(b)(15)).

(47) At a meeting between Vodafone and Floe on 6 February 2003, when asked by Mr Rodman, Simon Taylor denied that Floe at that time operated "public" gateways on a "wholesale basis". Mr Taylor did not tell Vodafone that Floe's business had developed beyond dedicated customer premise equipment. We find that this omission was not deliberately misleading, particularly having regard to the confused use of terminology (see paragraph 8 above) including Mr Rodman's own confusion as to the terms "public gateway" and "private gateway" and to the fact that Mr Rodman's evidence was that he had not himself considered the terms of Vodafone's Licence in his capacity as an employee in Vodafone's regulatory policy department (see (54) below) [Day 1, pg 25 line 25 to pg 26 line 6; day 1 pg 34, line 1] [See also day 2, pg 6 line 34 to day 2 pg 7, line 26].

(48) On 7 February 2003, Floe had a meeting with the RA. Mr Stonehouse's subsequent email to Mr Mason of the RA records that Mr Mason told Mr Stonehouse "that the RA had decided not to take any "precipative" action against gateway users during the consultation period."(2(b)(19).

(49) On 10 February 2003 Mr Mason replied to Mr Stonehouse stating "RA can speak only for itself in its decision to forbear the 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 it stands. If they do act, that is a contractual matter between them and their customer." (i.e. Mr Mason of the RA considered that whether or not MNOs were in a position to take action to disconnect GSM gateways depended on the terms of the contracts between MNOs and customers such as Floe) (2(b)(20).

(50) On 19 February 2003, Floe responded to the consultation paper agreeing with the RA's proposal to amend regulation 4(2) to withdraw the restriction on the type of service that may be provided via network user stations so that

"Public" GSM gateways could be used commercially without any licensing requirement (2(b)(5)(cc)).

(51) Mr Rodman noted on 24 February 2003, by way of internal email to his colleagues including Mr Young, that he had received information from Mr Morrow concerning one site with 30 Floe SIMs generating 160 calls per day. Mr Rodman considered that this cast doubt on what he understood to be "Floe's story" that they were providing customer premise GSM gateways only (2(b)(28)).

(52) Mr Rodman knew that the RA's view was that commercial use of all types of GSM gateway – both "private" and "public" were "illegal" i.e. not covered by the Exemption Regulation [Day 2, page 3, line 30-31]. Mr Rodman disagreed with the RA in this regard and Mr Rodman considered that "private" GSM gateways were "arguably" legal under the Exemption Regulations (Day 2, page 3, line 32-34).

(53) During meetings between Vodafone and the RA concerning the November 2002 consultation the RA never indicated to Mr Rodman that they would prosecute or take enforcement action against anyone operating a GSM gateway and Vodafone did not ask the RA to prosecute any operator of GSM gateways [Day 2, page 5, line 20 – 23]. Mr Rodman's understanding at that time was that the RA had said that they were not taking action against GSM gateways and therefore his view was that "the option of referring it to the RA did not exist" [Day 2, page 5 line 26 – 32].

(54) During the internal Vodafone investigations concerning GSM gateways, and at the time of disconnection, Mr Rodman who worked in Vodafone's regulatory policy department, and was in charge of the investigations, and later became Head of Regulatory Policy, had not familiarised himself with Vodafone's Licence [Day 2, pg 8, line 5].

(55) During the Vodafone internal investigations Mr Rodman believed that GSM gateways were being used by persons who had received SIMs from

independent service providers and not from Vodafone itself. Mr Rodman's initial investigations were with Mr Rigby of Vodafone, who was in charge of Vodafone's relationships with independent service providers, rather than negotiating contracts for Vodafone [Day 2, pg 8, line 6 – 10].

(56) On 10 March 2003, Jeff Wearing of Vodafone wrote to Floe stating that he understood that Floe had indicated that it did not supply GSM Gateway services on a wholesale basis to third parties; that Vodafone had analysed the traffic data associated with SIM cards registered to Floe which suggested that the SIMs were being used in GSM Gateways to supply services to third parties; that Vodafone considered that such use was illegal; and therefore unless Floe demonstrated within 14 days that the SIM cards were being used legally Vodafone would disconnect Floe's SIM cards (2(b)(35)).

(57) On 13 March 2003 a submission from officials to the Minister noted that GSM Gateways are "parasitic to the licensed networks…usurping the spectrum while paying no licence fees" (para 9) (2(b)(39)).

(58) The RA did not receive any specific complaints about the operation of GSM gateways at any time relevant to this appeal (day 2, pg 19, line 4-5).

(59) Floe met the Minister (Mr Stephen Timms MP) on 26 March 2003 (2(b)(45)). A note of that meeting states that the proposal to retain the restriction in regulation 4(2) was necessary "to keep licensed operators' spectrum free from sources of interference and congestion". At the end of the meeting the RA agreed to investigate whether the wording in regulation 4(2) could be amended to allow third party use via a contractual agreement with a licensed operator.

(60) Mr Mason of the RA emailed John Stonehouse on 27 May 2003 stating that he believed that MNOs had authority under the 1949 Act (but not the obligation) to accept, by agreement, customer equipment that is not covered by the Exemption Regulations (2(b)(66)).

(61) Mr Stonehouse had constructed Floe's systems in such a way that it "optimised the routing" of calls at around 70% so that if more than 70% of capacity on a directly-connected gateway was used, the calls above that amount were transferred to other gateways. Mr Taylor knew that Floe was providing services using "distributed equipment" (i.e. not dedicated customer premise equipment, at least in part). As at March 2003, when Vodafone disconnected Floe's SIMs none of Floe's GSM equipment was dedicated to a particular customer for use as "customer premise equipment" (Day 1 page 36).

(62) Neither Mr Stonehouse nor Mr Taylor ever told Vodafone that their business had developed beyond the use of dedicated customer premise equipment. [Day 1 pg 35; pg 36, line 1 – 9; day 1, pg 37, line 26 – 34].

(63) If Floe had approached Mr Mason at the RA seeking a licence to operate GSM gateways at any time before July 2003 Mr Mason would have considered that the relevant radio spectrum for running a GSM service using such devices had already been licensed to Vodafone and would have refused such a licence on that basis [Day 2, page 23, lines 9 – 17]. If Vodafone's licence did not cover GSM gateways the RA's view would have been that no one could provide a commercial service using GSM gateways [Day 2, page 23, lines 34 – 35].

(64) The RA considered that if an operator wished to sub-contract its spectrum for the commercial use of GSM gateways they could apply to the RA for an extension of their licence [Day 2, page 25, line 1 – 12].

(65) Mr Mason considered that the intention behind the government's reference to "pragmatic solutions" in its public statements was to encourage GSM gateway providers and the MNOs to talk to each other. His view was that there would then be the question of whether the service met or could be made to meet the MNO's licence. Mr Mason suggested in his oral evidence that the reference to "pragmatic solutions" might have referred to an MNO

making a request for an extension or variation of its licence [Day 2, page 26, line 1 – 9].

(66) Both the "sending channel" and the counterpart "receiving channel" of radio frequency are, in Mr Mason's view, equally important to a mobile operator for the provision of a commercial service [Day 2, page 26, line 31 -35].

(67) On the basis of the facts as set out above, we find that at no stage did Mr Taylor or Mr Stonehouse seek authorisation from Vodafone for the use of GSM Gateway equipment that was not dedicated customer premise equipment.

41. Vodafone invites the Tribunal to find, on the evidence adduced before us that Floe misled Vodafone as to the development of its business plan. We do not make that finding.

42. Vodafone invites the Tribunal to find as a fact that as from February 2003 Vodafone suspected that Floe was providing COMUGs. We make that finding.

43. Vodafone invites the Tribunal to find as a fact that as from 21 August 2002 Vodafone's senior management believed, having taken proper legal advice, that the provision of COMUGs was unlawful. We consider that there is no proper basis for us to make such a specific finding and we do not make any finding in that regard. In particular, this finding is undermined by the evidence: first, that counsel had not been shown the Agreement with Floe and had not considered it when giving their advice; secondly, that Mr Rodman's evidence was that he had not looked at or formed any view as to the scope of Vodafone's Licence; thirdly, that Mr Rodman gave evidence that he knew that the RA had suggested that GSM gateways could be operated commercially under the auspices of Vodafone's Licence; and fourthly, in the legal advice given to Vodafone, counsel's conclusion was circumspect.

44. Vodafone invites the Tribunal to find as a fact that before taking action to disconnect Floe's SIM cards Vodafone believed on reasonable grounds that the services being

provided by Floe were illegal in the view of the RA. We do not have a sufficient basis to make this finding, which is expressed too simplistically in our view, in particular having regard to the RA's view (which Mr Rodman knew) concerning Vodafone's ability to authorise such services under its own Licence. Our findings of fact relevant to this aspect are set out above.

45. We now turn to consider the agreed list of issues which were the subject matter of the hearing before us.

VII ISSUE 1 – APPLICATION OF THE EXEMPTION IN REGULATION 4(2)

46. This issue was agreed between the parties as follows:

"**Issue 1: Application of the exemption in Regulation 4(2)**

1.1 Was the establishment/use by Floe of GSM gateways to provide commercial multi-user GSM gateway services [without a licence] lawful as being exempt under Regulation 4(2) of the Wireless Telegraphy (Exemption) Regulations 2003 (SI 2003/74) [if the application was not authorised pursuant to Vodafone's licence]

1.2 Is it open to Floe to argue the points regarding its use of "relevant apparatus" and providing a service by way of business in the light of:

- Point 23 of the Statement of Facts agreed for the first hearing; and/or
- the judgment of the CAT of 19 November 2004 including the submissions of Floe recorded at paragraph 84 and the reasoning at paragraphs 112, 116, 145, 190, 223, 236?

47. The words in square brackets were words on which the parties had not reached agreement by the commencement of the hearing.

The parties' submissions

48. In the Appendix to its Notice of Appeal Floe submitted that the application of the Exemption Regulations to GSM gateways demonstrated that the regulation of GSM gateways is being "shoehorned" into an existing set of regulations not designed to

undertake the task. Floe submitted that the Exemption Regulations ignore the "reality of the industry" and that it was reselling a service of Vodafone. It was Vodafone and not Floe that provided a service by means of Floe's GSM gateways. Floe submitted that at paragraphs 90 to 94 of the Second Decision OFCOM had confused two concepts, the first is which party "uses" the GSM gateway and the second is which party "provides a service by means of the equipment". The service using GSM gateways and mobile phones is two-way telephony and it is impossible to characterise what was provided by Floe as the provision of national wireless two-way telephony.

49. Floe relies on paragraph 144 of our First Judgment where we accepted 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. Floe submits that in that light, OFCOM are not correct in considering that an "MVNO's" services are not also within the Exemption Regulations as there is no difference in the analysis of an MVNO situation to that of Floe. Floe submits that it can rely on the "concept of logically discrete systems" to say that the relevant apparatus is being used by any one party at a time for the provision of the resale of services and the apparatus may therefore be run by more than one person.

50. OFCOM submits that commercial use of GSM gateways is prohibited by regulation 4(2) of the Exemption Regulations, unless authorised under a licence granted under section 1(1) of the 1949 Act. That prohibition applies whenever GSM gateways are established installed or used for the purpose of providing an electronic communications service by way of business. The Tribunal has already concluded that Floe's use of commercial multi-user GSM gateways in this case was for the purpose of providing an electronic communications service by way of business (First Judgment, paragraphs [222] and [223]). Floe did not appeal against the First Judgment and it is not open to Floe to reargue that point now or seek to argue it in a different way. Floe's alleged analogy with the services of an MVNO could have been raised previously, but was not and it is not open to Floe to make this argument in this appeal in accordance with the principles of res judicata as well as issue estoppel. Even if the analogy is good, which OFCOM does not accept, it does not assist Floe as

it does not affect the issue in this case which is whether Floe was using relevant apparatus.

51. Vodafone and T-Mobile adopt the submissions of OFCOM on this issue.

The Tribunal's analysis

52. In our judgment Floe's submissions on this issue are an attempt to re-open a submission which it made to us at the hearing of the appeal against the First Decision. In that hearing Floe's "Primary Argument" was that Vodafone and not Floe "used" the relevant GSM gateway apparatus to provide a service to customers (see paragraphs [84]-[93] of the First Judgment). We rejected Floe's submission on this point at paragraph [110] of the First Judgment for the reasons we set out at paragraphs [111] to [116] of our First Judgment. Furthermore, it was accepted by Floe that it was operating "public" GSM gateways (i.e. GSM gateways used to provide a telecommunications service by way of business to another person) (see paragraph [223] of the First Judgment) and at paragraph [234] we found that the supply by Floe, as envisaged by the Agreement of the service of routing calls from Floe's customers' PABX to Vodafone would be the supply of a "public" gateway in the sense of the Exemption Regulations since it would be a supply by Floe of "a telecommunications service by way of business to another person". This issue was considered extensively in the submissions before us in the hearing of the appeal against the First Decision, and Floe had previously accepted that it was providing "public" GSM gateways. That was the basis upon which the matter was remitted to OFCOM for re-investigation by this Tribunal and the basis upon which the re-investigation leading to the Second Decision proceeded. Floe did not apply for permission to appeal against our judgment and we do not think it is open to Floe now to re-argue that point in its appeal against the Second Decision.

53. In any event, even if it were open to Floe to re-argue the point before us now, none of the submissions made by Floe convince us that our conclusion at paragraph [234] of our First Judgment, that the provision by Floe of the routing of calls from a customer's PABX to Vodafone was the supply of "a telecommunications service by way of business to another person", was wrong. Floe's purported distinction between

the "use" of the equipment and the provision of the service does not arise under regulation 4(2) of the Exemption Regulations as use of a GSM gateway device is exempt from licensing under regulation 4(1) unless it is use "to provide a telecommunications service by way of business to another person".

54. The effect of Floe's submission is that it is to be taken as having acted as agent for Vodafone. In order to have been Vodafone's agent Floe would have required actual or ostensible authority from its principal, Vodafone, to act in that capacity. Floe did not submit that it had authority to act as Vodafone's agent and we have found above that Vodafone did not know of Floe's plans regarding the provision of COMUG services.

55. Floe sought to rely on an analogy with the services provided by MVNOs but did not provide any evidence or submissions as to the services provided by MVNOs. In any event, whether or not there are other services which are outside the Exemption Regulations does not assist in considering whether the provision by Floe of telecommunications services using GSM gateways by way of business was exempt from licensing under the Exemption Regulations. Floe's use of GSM gateways was to provide a telecommunications service by way of business and was accordingly not exempt from licensing under section 1 of the 1949 Act.

56. Finally, we merely note, for clarity, that we endorse paragraphs 90 to 92 of OFCOM's Second Decision. Our analysis at paragraph 144 of the First Judgment arose in the specific context of Floe's submission at the first hearing that, if OFCOM's submissions were correct, then the use of mobile telephone handsets was also illegal unless each mobile phone user in the country held an individual licence. We rejected that submission.

VIII ISSUE 2 – THE SCOPE OF VODAFONE'S LICENCE

57. This issue was agreed between the parties as follows:

"**Issue 2: Scope of Vodafone's WTA Licence**

2. Did Vodafone's licence permit it to authorise Floe to establish/use GSM gateways so as to provide commercial multi-user GSM gateway services and was such authorisation given?

2.1 As a matter of interpretation of the Vodafone licence was the GSM gateway as operated by Floe a "base transceiver station"?

2.1.1 What is the relevance to this issue of:

(a) Vodafone's understanding of the ambit of its licence, and its understanding of the use to which Floe proposed to put the SIM cards?

(b) Any statements made by the RA or the DTI?

2.1.2 If relevant, what was Vodafone's understanding of the ambit of its licence and the use to which Floe proposed to put the SIM cards?

2.2 If Vodafone's licence permitted the authorisation of the establishment/use of GSM gateways so as to provide commercial multi-user gateway services, did Vodafone authorise such establishment/use and provision of services so as to make them lawful?

2.2.1 What representations were made by Floe to Vodafone prior to the agreement made on 12 August 2002?

2.2.2 Insofar as such knowledge is relevant, to what extent did Vodafone comprehend prior to 12 August 2002 that the provision of commercial multi-user GSM gateway services existed and could be developed?

2.2.3 As a matter of construction, did the agreement made on 12 August 2002 cover the provision of commercial multi-user GSM gateway services?

58. The first part of issue 2 (did Vodafone's licence permit it to authorise Floe to establish/use GSM gateways so as to provide commercial multi-user GSM gateway services?) requires consideration of the following:

(a) The Wireless Telegraphy Act 1949;

(b) Relevant European legislation, including the Licensing Directive, the RTTE Directive and the Authorisation Directive;

(c) The Exemption Regulations; and

(d) The terms of the Licence;

59. OFCOM considered this issue in the Second Decision (paragraphs 95-131). Its position as to this issue differed from that of the Director in the First Decision (see paragraph 3 above). In the First Decision (dated 3 November 2003) the Director decided that the Licence contained terms which could, subject to suitable agreements being in place, enable "third parties" (such as Floe) legally to provide what were then termed "Public GSM Gateways" (i.e. commercial services using GSM gateways, which, by the terms of regulation 4(2) of the Exemption Regulations, were not exempt from the requirement of a licence under section 1 of the WTA 1949 (see, First Decision, paragraphs 11 and 42 to 45)). The Director referred, in the First Decision, to confirmation which had been given to him by the RA, the body which had issued the Licence to Vodafone on behalf of the Secretary of State, that his understanding of Vodafone's Licence accorded with that of the RA (First Decision, paragraphs 11 and 42).

Background

60. In our view it is important to recall how this issue arose and was considered during the investigation of Floe's complaint by the Director in the First Decision and at the hearing of Floe's appeal against the First Decision. We therefore set out the relevant background to this issue briefly below.

61. In the First Decision the Director concluded that Floe's operation of GSM gateways had not been sufficiently "authorised in writing" pursuant to the terms of Vodafone's Licence as, effectively there had been no express reference to GSM gateway equipment in the Agreement between Floe and Vodafone and there was no other evidence to demonstrate that Vodafone intended to give Floe authorisation to operate "Public GSM Gateways" under the terms of Vodafone's Licence (First Decision, paragraphs 49 to 52).

62. In our First Judgment we considered the true construction of the Agreement between Floe and Vodafone (paragraphs [191] to [239]). The Business Plan that Floe had prepared for consideration by Vodafone during its negotiations leading to the Agreement had been disclosed during the preparation for the hearing of the appeal

against the First Decision. We also had evidence in the witness statements of Messrs Young and Rodman of Vodafone and there was before us the facts that had been agreed between the parties in the Statement of Facts.

63. We held that the Agreement had to be construed having regard to its wording in the light of the Floe Business Plan that had been provided to Vodafone and the evidence before us as to Vodafone's background knowledge of Floe's business. Its construction also had to be considered together with the facts agreed in the Statement of Facts (paragraph [224]). We held that the Business Plan which Floe had prepared for Vodafone made it abundantly clear that Floe would provide a "least cost routing" telecommunications service to corporate customers using devices connected to the PABX of such corporate customers. We noted that Mr Young had given evidence in his witness statement that he understood that Floe would be providing a "least cost routing service" using "Premicell-type" devices (paragraphs [229] and [230]). Premicell devices are GSM gateways.

64. We held that the supply by Floe of a least cost routing service for calls from a customer's PABX to the Vodafone GSM system was the supply of "Public" gateway services in the sense of the agreed Statement of Facts and the Exemption Regulations.

65. We rejected the submission of Vodafone's counsel that the Agreement provided only for the sale by Floe of equipment and not the provision of a service, which submission was inconsistent both with the terms of the Agreement, the Business Plan that Floe had provided to Vodafone and the evidence of Vodafone's witnesses (First Judgment, paragraph [234] – [237]). The conclusion we reached on the evidence then before us was that the Agreement contemplated Floe providing a least cost routing service on a commercial basis using GSM Gateways. We held that the First Decision was therefore wrong to conclude, at paragraphs 49 to 56, that the Agreement did not constitute an agreement between Floe and Vodafone for the provision of "Public GSM Gateways" by Floe. In our view, 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" (paragraph [238]).

66. No party applied for permission to appeal from the First Judgment.

67. Having considered the evidence then before us we recorded, at paragraph [311] of the First Judgment that the circumstances in which Vodafone entered into the Agreement with Floe were confused. At paragraph [311] we recorded that it appeared to us on the evidence then before us that Vodafone must have entered into the Agreement in one of four possible circumstances which we there set out. We noted that the Director had made no findings as to the understanding of the parties when they entered into the Agreement. In particular, we left open the possibility that Vodafone might have believed that Floe's use of GSM Gateways was as dedicated customer premise equipment only (paragraph [311(a)]). We noted that there was some evidence in Mr Young's witness statement that suggested the possibility that this was what Vodafone had believed and had purported to authorise under the Agreement (paragraph [314]). We further noted that the Director had conducted no investigation of the precise scope of Floe's business at the time of disconnection and had made no findings in that regard (paragraphs [314]-[315]). Since these matters had not been considered by the Director, or explored before us in the submissions made to us at the first hearing, we considered it would have been inappropriate for us to make any findings as to them in the absence of a proper investigation by OFCOM.

68. OFCOM did investigate, and decide, those points following the matter being remitted to it (Second Decision, paragraphs 185 to 189). OFCOM's Second Decision in those respects is challenged by Floe in this appeal. We have heard oral evidence on this aspect and our findings of fact in that regard are set out above.

69. More fundamentally, at the hearing of the first appeal before us OFCOM submitted that it did not matter whether the Director's conclusion as to the scope of the Agreement between Floe and Vodafone was correct or not. OFCOM submitted, in the light of witness statements that had been provided by one of its senior officials (Dr Unger) that whether or not the Agreement purported to authorise the use of GSM Gateways by Floe under the Licence did not matter, since on its true construction, the Vodafone Licence did not itself cover the use of GSM Gateways. Accordingly, OFCOM submitted that Vodafone could not itself lawfully provide a commercial service using GSM Gateways and therefore Vodafone could not lawfully authorise

any other person to do so under its own Licence. Vodafone and T-Mobile adopted these submissions of OFCOM. OFCOM submitted that in deciding that Vodafone could have authorised the commercial use by Floe of GSM gateways under its Licence, the Director had made a fundamental mistake in his understanding of the Vodafone Licence. OFCOM submitted that, to the extent that the Director's erroneous understanding of the Licence had been confirmed to him by the RA, the RA had also been mistaken as to its understanding of the Licence.

70. At paragraph [267] of the First Judgment we decided that, in the context of the appeal, in particular having regard to the change of position of OFCOM from that of the Director and the RA as to the scope of the Licence, we had significant reservations in making a finding that the Licence was limited in the way OFCOM had submitted to us, on the basis of Dr Unger's statements. We also noted at paragraph [278] that the true scope of the Licence is of crucial importance in this case. At paragraphs [282] to [283] of the First Judgment we therefore decided to set aside the First Decision and to remit the matter to OFCOM for reconsideration in the light of the matters we had referred to at paragraphs [269] to [281] of our Judgment.

The Second Decision and "Issue 2"

71. We have set out the relevant provisions of the Licence at paragraphs [22] to [25] above.

72. We set out below the relevant paragraphs of the Second Decision which contain OFCOM's conclusions on this issue:

> "***Whether or not the mobile operators' licences enable them to authorise the use of GSM gateways***
>
> 95. As noted at paragraph 7 above, when the Director made his decision in relation to the Floe complaint, he considered that it might be possible for Vodafone to authorise Floe's use of GSM gateways under the auspices of Vodafone's licence issued under section 1(1) of the WTA. The RA also made certain public statements that could be interpreted as being to this effect between 2002 and 2003.
>
> 96. If Floe's use of GSM gateways had been authorised under Vodafone's licence, it would have been lawful (Floe would not have required a separate licence in respect of

its use of GSM gateways, nor would it have mattered whether Floe's use of GSM gateways was exempted from the requirement for a licence under the Exemption Regulations).

97. Ofcom subsequently took the view that the Director's understanding and the view expressed in the RA's public statements was incorrect. Ofcom argued before the Tribunal that Vodafone's licence did not cover the use of GSM gateways, whether by Vodafone or any other person.

98. In its Judgment, the Tribunal did not reach a conclusion on the correct interpretation of Vodafone's licence. However, it stated that Ofcom should re-consider whether its interpretation was the correct one. The Tribunal stated that:

> "*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*."

99. As noted above, Ofcom published a statement for comment on 3 March 2005, which addressed, among other things, the scope of the mobile network operators' 2G cellular licences.

100. Insofar as relevant, the terms of Vodafone's second generation ("2G") cellular licence are identical to the licences issued to the other UK mobile network operators in respect of their 2G cellular networks.

101. Condition 1 of the mobile network operators' 2G cellular licences states that the licence authorises the relevant licensee "*to establish, install and use the radio transmitting and receiving stations and/or radio apparatus as described in the schedule to the licence (the "Radio Equipment")*".

102. Paragraphs 1 and 2 of Schedule 1 of those licences set out a description of what constitutes Radio Equipment and the purposes of such equipment:

> "1. *Description of Radio Equipment Licensed*
> *In this Licence, the Radio Equipment means the base transceiver station 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".*

103. GSM gateways do not constitute Radio Equipment as defined above. They are not "base transceiver stations" or "repeater stations" as set out in paragraph 1 of Schedule 1 to the 2G cellular licences. The reasons for this view were set out in detail in Ofcom's statement for comment and are repeated below.

The GSM system

104. A mobile operator's 2G radio telecommunications network is designed around the Global System for Mobile Communications ('GSM').

105. The European Conference of Postal and Telecommunications Administrations ("CEPT") originally began the GSM standardisation process. In 1988, CEPT created the ETSI, to which all its telecommunications standardisation activities were transferred. The first GSM standards (phase 1 GSM900 specifications) were published in 1990.

106. ETSI has specified the architecture of the GSM System in a series of reference documents, and the definitions used in this section are derived from these ETSI reference documents. An overview of the standards used in the GSM System can be found in the ETSI GSM technical specification 03.0235.

107. Standardisation by ETSI means that the key elements of the GSM System, and the interfaces between them, are well defined and commonly understood. This ensures interoperability between equipment manufactured by different vendors and ensures mobile network operators are able to mix and match equipment from different vendors within their network with minimal operational overhead.

108. Two key elements of the GSM System are the Base Station System ("BSS") and the Mobile Station ("MS"). These key elements, and the interfaces between them, are summarised in Figure 2 below:

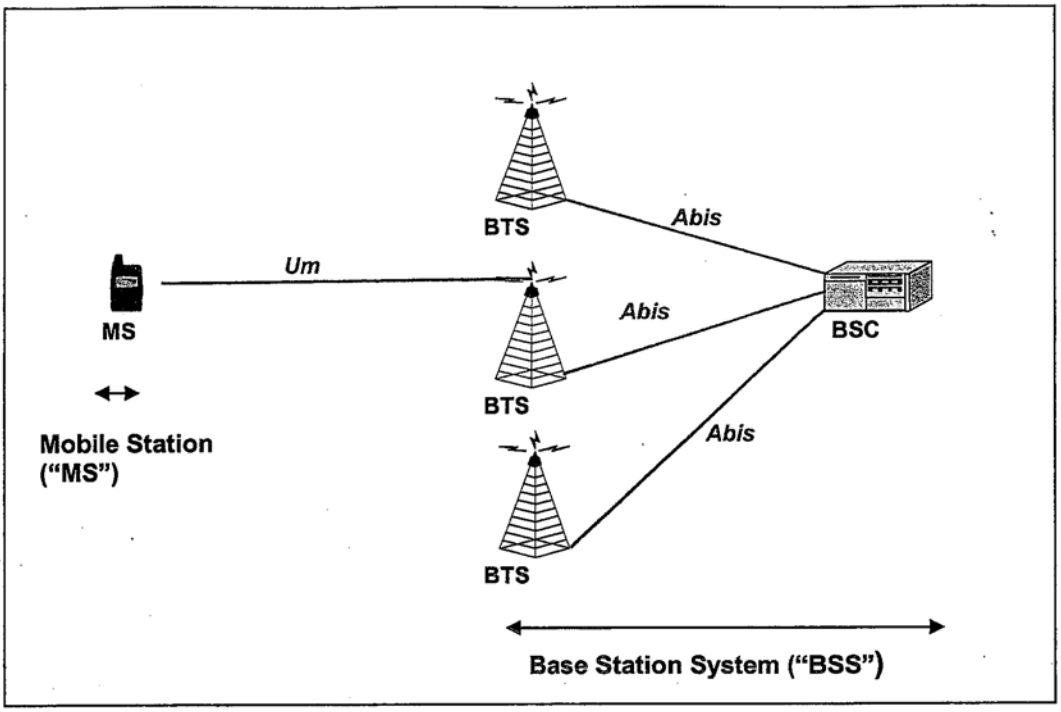

Figure 2: The Base Station System and the Mobile Station

The Base Station System

109. The Base Station System is the system of base station equipment responsible for communicating with Mobile Stations in a certain area. The Base Station System is sub-divided into one or more Base Transceiver Stations ("BTS") and one Base Station Controller ("BSC").

110. A Base Transceiver Station, which is referred to in the definition of Radio Equipment set out in paragraph 1 of Schedule 1 of the mobile operators' 2G cellular licences,

provides GSM radio coverage within a cell (i.e. a particular geographic area of the mobile network). It comprises radio transmitting and receiving equipment.

111. The role of the Base Station Controller is to manage the radio resources supported by a number of Base Transceiver Stations. Part of this role is to coordinate the handover of calls in progress between different Base Transceiver Stations as the mobile user moves between cells.

112. A repeater station, which is also referred to in the definition of Radio Equipment set out in paragraph 1 of Schedule 1 of the mobile operators' 2G cellular licences, is a device that receives a radio signal, amplifies it and retransmits it. Repeater stations are used in radio telecommunications networks to extend the range of Base Transceiver Station signals or to deal with areas that present certain difficulties (for example, they would be used where there is hilly terrain between Base Transceiver Stations). A repeater station receives the radio signal, amplifies it and re-transmits it without decoding or otherwise processing the information within it.

The Mobile Station

113. The Mobile Station ("MS") is the ETSI standardised term which is used to describe the physical equipment (normally a mobile phone) used by a subscriber to access the mobile operator's network. In practice, the Mobile Station is comprised of the Mobile Equipment ("ME") and a Subscriber Identity Module ("SIM").

The "Um" and "Abis" GSM interfaces

114. The radio transmitting and receiving equipment used by the Mobile Station and the Base Transceiver Station operate on different frequencies. As set out in Figure 2 above the Um interface ("Um") defines the respective roles of the Base Transceiver Station and the Mobile Station, and specifies the interfaces between them. The Um interface is described in detail in the 04- and 05- series of GSM Technical Specifications, the 05-series focussing on the physical layer radio interface.

115. Therefore the Mobile Station, the Base Transceiver Station and the Base Station Controller are distinct components of the GSM System. The Um interface is the standardised interface between the Mobile Station and the Base Transceiver Station, which enables the Mobile Station to communicate with the Base Transceiver Station. The Abis-interface ("Abis") is the standardised interface between the Base Station Controller and the Base Transceiver Station, which allows the Base Transceiver Station to communicate with the Base Station Controller.

A GSM gateway is a Mobile Station

116. As has been set out, GSM is a highly specified system in which the roles of the Mobile Station and Base Transceiver Stations, and the interfaces between them, are clearly distinct and have been standardised by ETSI.

117. A Mobile Station is defined in terms of the radio frequencies at which it transmits and receives, and the signalling interfaces used to control those transmissions. In both respects, a GSM gateway complies with the definition of a Mobile Station. If it did not, it would not function. In this context, a GSM gateway is a Mobile Station (in the same way that a mobile phone is a Mobile Station). A Mobile Station communicates via radio over the Um interface with Base Transceiver Stations and/or Repeater Stations.

118. A GSM gateway is not a Base Transceiver Station because it does not comply with the ETSI Base Transceiver Station standard, and therefore the universally accepted technical definition of a Base Transceiver Station. It does not comply with this definition in two key respects. Firstly, a Base Transceiver Station is required to transmit and receive at specific radio frequencies, and a GSM gateway does not do so. Secondly, a Base Transceiver Station is required to communicate with other parts of the network using specific signalling interfaces, and a GSM gateway does not do so.

119. Therefore, GSM gateways do not constitute Radio Equipment for the purposes of the 2G cellular licences because GSM gateways are not "Base Transceiver Stations" or "Repeater Stations" as set out at paragraph 1 of Schedule 1 of the 2G cellular licences. It follows, therefore, that the 2G cellular licences do not cover the use of GSM gateways, whether by the mobile network operators themselves or anyone else.

Responses to Ofcom's statement for comment

120. In its response to Ofcom's statement for comment, Floe submitted that Ofcom and the Courts are not constrained to have to interpret the scope of the mobile network operators' 2G cellular licences in accordance with the ETSI GSM standards. Floe noted that there was no cross-reference between the definitions used in the 2G cellular licences and the GSM standards. In Floe's view, base transceiver stations may be defined in a particular way by the GSM standards, but that definition must be expressly incorporated into the 2G cellular licences in order to have effect there.

121. Floe also submitted that Ofcom was bound to interpret the mobile operators' 2G cellular licences in accordance with the previous statements by the RA and Oftel to the effect that it was possible for the mobile network operators to authorise the use of GSM gateways under the auspices of their licences. According to Floe, by virtue of those statements, Floe had a legitimate expectation that the mobile operators' 2G cellular licences should be interpreted so as to permit the authorisation by the mobile network operators of the use of GSM gateways.

122. Gamma Telecom, in response to the statement for comment, also stated that the previous statements made by the RA about the scope of the 2G cellular licences had created a legitimate expectation that the mobile network operators could authorise the use of GSM gateways under their licences.

123. Ofcom notes that the paragraph 3 of Schedule 1 of the mobile network operators' 2G cellular licences states that "The Radio Equipment covered by this Licence shall be subject to and comply with the appropriate Interface Regulation (IR 2014 – First and Second Generation Public Cellular Radiotelephone Services)". This Interface Requirement sets out certain technical requirements relating to equipment used in providing 2G mobile networks and expressly cross-refers to the relevant ETSI standards. Therefore, Floe is incorrect to say that the mobile network operators' 2G cellular licences do not cross-refer to the ETSI standards.

124. In any event, Ofcom considers that, even if there were not a cross-reference in the licence with the relevant ETSI standards, it would still be necessary to interpret the terms of the licence so as to be consistent with the terminology used in the ETSI standards. The ETSI standards are precisely that – standards – which define how the GSM System operates. If the operation of mobile network operators' 2G cellular networks was not consistent with the ETSI standards, the networks would not function. Thus, it is difficult to see how GSM gateways could operate in the manner in which they do and yet still be considered to be base transceiver stations and/or repeater stations for the purposes of the mobile operators' licences. As explained above, within

the GSM System, GSM gateways fulfil the same role as mobile phones, not base transceiver stations and/or repeater stations.

125. So far as Floe's argument on legitimate expectation is concerned, Ofcom does not accept that previous statements made by the RA and Oftel have created a legitimate expectation that the mobile operators' licences should be construed in such a way as to confer an entitlement to authorise the use of GSM gateways. Those statements, which are considered to be incorrect, do not constitute clear, unequivocal representations devoid of any relevant qualification, as would be required to create any legitimate expectation. In any event, such statements are not capable of giving rise to any private law rights as between Floe and Vodafone, nor are they capable of altering the true construction of the mobile operators' licences.

126. Moreover, in the context of this case, it is clear that those statements were not relied upon in any material way so as to be otherwise capable of giving rise to any kind of estoppel. The statements post-dated the Agreement and therefore cannot have been relied upon by either party in entering into the Agreement. In addition, Vodafone has confirmed that at no point has it formed the view that it could legitimately authorise the use by Floe of GSM gateways, nor does it appear to Ofcom on the evidence provided that Vodafone has ever indicated to Floe that it could do so, even after the RA's statements had been made, and Vodafone became aware thereof.

Ofcom's conclusions

127. Having considered the responses to its statement for comment, Ofcom remains of the view that the mobile network operators' 2G cellular licences do not cover the use of GSM gateways, whether by the mobile network operators themselves or by anyone else. Accordingly, Vodafone was incapable of granting authorisation to Floe to use GSM gateways under its licence.

Whether Ofcom could licence the use of GSM gateways

128. As noted above, a key feature of the GSM system is that the role of "mobile stations" (such as GSM gateways) and "base transceiver station" 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 relevant mobile operator's base transceiver stations receive signals) and receive signals on another related set of frequencies (which is the same set of frequencies on which the relevant mobile operator's base transceiver stations transmit signals).

129. The Tribunal suggested in its Judgment that the logic of Ofcom's argument about the different frequencies on which base transceiver stations and mobile stations transmit and receive suggested that it might be possible to grant separate licences to different undertakings in respect of the same frequencies depending upon whether the apparatus used by the undertaking is transmitting or receiving on those frequencies. The Tribunal noted that such a view appeared to be contrary to previous statements made by the RA, which indicated that the commercial use of the 'GSM spectrum' had been awarded exclusively to the mobile network operators and so could not be licensed to other commercial users.

130. Ofcom does not consider that the mobile network operators have been granted exclusive 'commercial' use of the radio frequencies in question. Although it is not intended to issue any further 2G cellular licences of the type held by the mobile network operators, in Ofcom's view, it is feasible that Ofcom could in the future grant licences, which covered particular types of use of GSM gateways prohibited under the Exemption

Regulations. Such licences would authorise the licensee to use GSM gateways on specific frequencies, which would be the opposite frequencies to those on which the relevant mobile operator's base transceiver stations transmit and receive signals.

131. As explained further below, in parallel to the publication of this Decision, Ofcom has published a separate consultation document concerning the future regulation of the use of GSM gateways under the WTA. One of the options discussed in that consultation document is to issue individual licences authorising the use of Commercial Multi-User GSM Gateways on a case by case basis."

The parties' submissions

Floe's submissions

73. Floe makes two alternative submissions as to the scope of Vodafone's licence. Its first submission, described by Floe as the "traditional lines", is that GSM gateways are covered by the Licence as they are included in the definition of "base transceiver stations". Floe also refers to Condition 8 of the Licence as providing that Vodafone may ensure that radio equipment is operated and complies with the terms of the licence and is used only by persons who have been authorised in writing by the licensee. Floe submits that the Agreement between it and Vodafone was in writing and amounts to an authorisation to use GSM gateways pursuant to Vodafone's Licence.

74. Floe submits that Radio Equipment, as defined in the Licence, includes "base transceiver stations". There is no reason why the phrase "base transceiver station" should not be taken to include GSM gateway equipment. Floe submits that OFCOM had a "late change of heart" both as to the meaning of Vodafone's Licence and in deciding that when interpreting the Licence, one must have regard to definitions set out in "ETSI standards". Floe submits that there is no reference to ETSI standards anywhere in the Licence. Furthermore, the RA which was the relevant authority which issued the Licence and at the time of the investigation leading to the First Decision, was clearly of the view that Vodafone's Licence did cover the provision of services using GSM gateways.

75. Floe's alternative submission as to the true construction of the Licence is that Vodafone's Licence is an exclusive licence for the frequencies covered by the

Licence. Furthermore, the Exemption Regulations are, Floe submits, a "general authorisation" (or should be included in a general authorisation) pursuant to Article 5(1) of the Authorisation Directive. Floe submits because Vodafone's Licence is an exclusive licence the use of mobile telephone handsets cannot itself be licensed and therefore use of such devices had to be exempted from the requirement for a licence. Floe submits that if Vodafone was granted an exclusive licence of the radio frequencies then Vodafone had the power to authorise Floe's use of GSM gateway equipment under the Licence. Alternatively, Floe submits that it had a right, pursuant to Article 4(1)(a) of the Authorisation Directive, to run GSM gateways and it was not prevented from doing so by any lawful condition attached to a general authorisation.

76. Floe further submits, but without providing particulars, that if it were not possible for Vodafone to authorise use of certain frequencies in certain ways then "a good part of the edifice of spectrum trading falls apart."

OFCOM's submissions

77. OFCOM submits that, properly construed, and for the reasons set out in the Second Decision, the Licence is not capable of including GSM gateway equipment within the scope of "Radio Equipment" because GSM gateways cannot be characterised as "base transceiver stations". GSM gateways transmit and receive on opposite frequencies from base transceiver stations and use the "*Um* interface" to do so (and are not capable of using the specific ETSI "*Abis*" signalling interface through which base transceiver stations are required to communicate with other components of the network). As such, Vodafone is not authorised to establish, install or use GSM gateways itself under its Licence as such equipment is not "Radio Equipment" as defined in the Licence. OFCOM submits that this submission disposes of this issue and leads to the conclusion that Floe's activities were unlawful under the Exemption Regulations.

78. OFCOM submits that none of Floe's arguments lead to a conclusion that Floe could provide a service using COMUGs. In any event, Vodafone's Licence is not an exclusive licence in respect of the relevant radio frequencies. There is nothing in the licence itself which would suggest that. Whilst it may be true that OFCOM has not

granted any other licence to use the same frequencies as have been included in Vodafone's Licence there is nothing to prevent it from doing so and it is perfectly possible under section 1 of the 1949 Act to issue more than one licence covering the use of the same frequencies. OFCOM submits that Vodafone has a *sole* but not an *exclusive* licence in respect of its use of the relevant GSM radio frequencies.

79. OFCOM submits that mobile telephone handsets did not have to be exempted from the requirement for a licence because of the exclusivity of the mobile operators' licences but were exempted from the requirement for a licence because it would be impracticable to require each such handset to be individually licensed.

80. OFCOM agrees with Floe that the Exemption Regulations form part of the general authorisation for the purposes of Article 5(1) of the Authorisation Directive and that Floe is authorised to provide electronic communications networks and services subject to conditions attached to the general authorisation. However, this does not mean that Floe was authorised to provide an electronic communications service using specific radio frequencies without a licence when it was expressly prohibited from doing so by the Exemption Regulations. OFCOM also refutes Floe's argument that, unless Vodafone is able to grant authorisation to use certain frequencies, a central part of the spectrum trading regime will fall apart. OFCOM submits that the ability to carry out spectrum trading is pursuant to authorisation under separate regulations issued under section 168 of the Communications Act 2003.

81. OFCOM submits that the scope of Vodafone's Licence is a matter of legal construction and does not depend on Vodafone's understanding of the scope of its Licence or of Floe's understanding. The legal construction of the Licence cannot be altered by any statements made by the RA or by the Department of Trade and Industry as to the scope of the Licence and those statements are irrelevant to the construction of the Licence.

82. OFCOM submits that Article 5 of the Authorisation Directive contemplates the granting of licences in respect of the *use* of radio frequencies, not the licensing of radio frequencies. The fact that one person has been issued a licence to use the frequencies does not mean that such a person has exclusive use of the frequencies.

The Authorisation Directive permits Member States to designate the type of technology for which the rights of use of the radio frequency have been granted (see Part B to the Annex to the Authorisation Directive). The Licence granted to Vodafone is a licence to use certain specified radio frequencies by means of certain specified equipment (technology) and this is compatible with the Authorisation Directive.

83. OFCOM further submits that conduct on the part of Vodafone (whether by representation or agreement) cannot be interpreted as an authorisation under the Licence. In particular OFCOM submits that Vodafone thought that Floe was providing "single-user" gateways and not COMUGs and that the Business Plan provided by Floe to Vodafone referred to "customer premise equipment".

Vodafone's submissions

84. Vodafone submits that Floe's submissions are hopelessly unintelligible and illogical and that the Tribunal has no jurisdiction to consider them because they were not properly raised in the Notice of Appeal. Vodafone submits that the spectrum trading regulations, referred to by Floe, do not apply to GSM licences and are therefore irrelevant to the interpretation of the Licence.

85. Vodafone adopts OFCOM's submissions outlined above, save that Vodafone "does not necessarily agree" that OFCOM would be able to grant a further licence in respect of the same frequencies licensed to Vodafone. However, Vodafone submits that whether the Licence is exclusive or *de facto* sole is irrelevant as Vodafone agrees with OFCOM that the Licence does not cover the use of the radio frequencies referred to its Licence with GSM gateway equipment.

T-Mobile's submissions

86. T-Mobile adopts OFCOM's submissions. In the alternative, T-Mobile submits that the licences awarded to it and to Vodafone are individual rights of use for the purposes of the Authorisation Directive. A restriction has been included in such licences preventing the commercial use of GSM gateways. This restriction is

compatible with the RTTE Directive and Part B of the Annex to the Authorisation Directive.

The Tribunal's analysis

The Licence and the relevant legislation

87. In our view it is important, when construing the Licence, to consider the relevant background to the Licence and to place the Licence in the context of the statutory and regulatory scheme which was in place at the relevant time for the authorisation of the use of radio frequencies and apparatus for commercial activities applicable to GSM mobile telephony activity in the United Kingdom. The regulatory scheme, of which the Licence forms a part, includes the 1949 Act, relevant EU Directives and, importantly, the Exemption Regulations. Also relevant, in our view, would be any documents issued by the RA or the Secretary of State leading to the grant of the Licence to Vodafone and its renewal in 2002 such as a tender document. Neither OFCOM nor Vodafone referred us to any such document.

88. In our view, OFCOM misdirected itself in its analysis of the Licence in the Second Decision and in its submissions to us, to the extent that OFCOM's analysis of the Licence is focused exclusively on considering the direction in which radio signals are sent over the radio frequencies and on highly technical matters such as the *Um* and *Abis* interfaces and without any consideration of the Licence in the context of the Exemption Regulations and, after they came into force, relevant EU Directives and without any analysis of any relevant documents issued by the RA or the Secretary of State to which we have referred above.

89. We were not referred to any EU Directive in force at the time the Licence was issued and we were told that, in all material respects, the terms of the Licence and the Exemption Regulations have remained the same, notwithstanding the subsequent enactment and coming into force of various relevant EU Directives. In those circumstances the United Kingdom must be taken to have relied on the existing Licence and Exemption Regulations as being a scheme which is compatible or capable of being interpreted to be compatible with the relevant European legislation

as and when it entered into force: in 1997 (the Licensing Directive); 2000 (RTTE Directive); and July 2003 (Authorisation Directive). For example, in paragraph 140 of the Second Decision OFCOM relies on the "existing licensing regime" (i.e. the Licence and the Exemption Regulations taken together) as implementing the relevant provisions of Community law currently applicable. The Licence and the Exemption Regulations must be construed together against the relevant European legislative background and in conformity with Community law, if possible. In that regard, what is relevant is the *effect* of the provisions of the Licence when read *together* with the Exemption Regulations.

90. In this regard we have not been assisted by the submissions of the parties, in particular the submissions of OFCOM and Vodafone, both of whom sought to persuade us that the RTTE Directive and the Authorisation Directive were entirely irrelevant to the issues before us. We cannot accept that submission. When construing documents, such as the Exemption Regulations and the Licence, which, in part, give effect to European legislation or which have been issued under relevant European legislation our task is first to seek to construe those documents to give effect to the Directives. It is only if it is impossible to give effect to the Directives that we have to go on to consider whether the Exemption Regulations and/or the Licence are incompatible with Community law and, if so, what the consequences of such incompatibility may be for the purposes of this appeal. OFCOM and Vodafone have overlooked that essential first step of the analysis in their submissions to us. The submissions of OFCOM and Vodafone also inappropriately sought to keep entirely separate the provisions of the Licence and the Exemption Regulations.

91. We now therefore consider the correct construction of the Licence. In so doing there are two main questions to consider:

(1) Did the Licence give Vodafone the ability to authorise Floe to provide a commercial service using the GSM radio frequencies referred to in the Licence using GSM Gateways?

As we have mentioned above, the Director and the RA considered that Vodafone's Licence did confer the ability to authorise Floe's use of GSM Gateways, but that such

authorisation had not, in fact, been given. OFCOM, on the other hand, submitted that the Licence does not cover the commercial use of GSM Gateways at all and that, accordingly, no person is currently authorised to use GSM Gateways commercially in the United Kingdom.

(2) If the Licence did give Vodafone the ability to authorise Floe to provide a commercial service using GSM Gateways, did Vodafone give the requisite authorisation to Floe?

(1) Did the Licence give Vodafone the ability to authorise Floe to provide a commercial service using the GSM radio frequencies referred to in the Licence using GSM Gateways?

92. Notwithstanding that OFCOM did not refer us to any relevant background document, it is clear to us that one of the main purposes in issuing the Licence (and the similar licences granted to the other MNOs) must have been to enable the provision of a commercial GSM mobile telecommunications service to customers (see paragraph 2 of Schedule 1 to the Licence). In that context the Licence and the exemption from licensing for customers' use of User Stations (including mobile phones) are related.

93. Having regard to the surrounding context, there would have been little or no purpose, in our view, in issuing a licence to Vodafone and the other MNOs solely for the activity of using "Base Transceiver Stations" alone without permitting the use of mobile phones and other user stations communicating with the Base Transceiver Stations. Paragraph 2 of Schedule 1 to the Licence explicitly states that the purpose of the Radio Equipment (i.e. the Base Transceiver Stations) is to form <u>part of</u> a network in which User Stations communicate with the Base Transceiver Stations <u>to provide a telecommunications service</u>.

94. The Licence refers to a telecommunications service which uses the GSM spectrum in both the "MTx" and "BTx" directions. The Base Transceiver Station transmits radio signals to a mobile phone over the frequency in the "BTx" direction (described in Schedule 1 to the Licence as "Base Transmits/Mobile Receives") and the mobile phone receives such signals in that direction. The mobile phone itself transmits signals to the Base Transceiver Station over the frequency in the "MTx" direction

(described in Schedule 1 to the Licence as "Mobile Transmits/Base Receives") and the Base Transceiver Station receives such signals in that direction. Both Base Transceiver Stations and mobile phones (or other User Stations) are essential for the operation of a mobile telephony service and the one is of no practical or commercial purpose without the other. Whether the relevant equipment is transmitting or receiving in one direction or another both pieces of equipment use the same radio frequencies (in MHz).

95. It is clear to us from various RA documents referred to above that the RA's view at the time it issued those statements was that Vodafone and the other MNOs had been licensed on an "exclusive basis". Although those documents were all issued after the Agreement these all refer to the MNOs having been granted "exclusive" commercial use of the relevant parts of the GSM radio spectrum covered by their respective licences. Neither OFCOM nor Vodafone have produced any document or public statement issued at the relevant time containing any statement, or even inference, that the MNO licences were not granted on an "exclusive" basis. However, we do not need to decide for the purposes of this appeal whether Vodafone's Licence was an "exclusive" licence: it is accepted by all parties that Vodafone's Licence was *de facto* the sole licence which had been issued permitting the provision of commercial services using the relevant frequencies.

96. OFCOM and Vodafone place emphasis on the Licence covering "Radio Equipment" and not radio frequencies and submit that the definition of Radio Equipment in Schedule 1 to the Licence covers only "Base Transceiver Stations" (no party sought to suggest that "repeater stations" are relevant to the facts of this case).

97. As mentioned above, it is clear to us that a proper understanding of the background legislation is essential to an understanding of the Licence. We now consider the Licence in the context of the statutory and regulatory scheme as it applied from time to time.

1992 – 31 December 1998

98. We note that no party has referred us to any relevant EU Directive in force at the time the Licence was issued in 1992. We therefore assume for the purposes of deciding this appeal that the Licence was issued pursuant to relevant national law, i.e. section 1 of the 1949 Act and that no relevant European legislation was in force at that time. Section 1(1) of the 1949 Act provides that:

> "No person shall establish or use any station for wireless telegraphy or use any apparatus for wireless telegraphy except under the authority of a licence in that behalf […] and any person who establishes or uses any station for wireless telegraphy or instals 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."

99. Accordingly, a licence issued under the 1949 Act is limited to the use of particular "apparatus" or "stations". Section 1(2) of the 1949 Act provides that a licence granted under section 1 may be issued subject to such terms, provisions and limitations as the Secretary of State (now OFCOM) thinks fit.

100. In accordance with section 1 of the 1949 Act Vodafone was granted a licence on 23 July 1992 to establish, install and use radio transmitting and receiving stations and/or radio apparatus as described in the Schedules to the Licence on the radio frequencies specified in the Licence and subject to the other terms of the Licence.

101. We have not been referred to any exemption from the requirement of section 1 of the 1949 Act applicable at the time the Licence was issued in 1992. The first Exemption Regulations we have been referred to came into force in 1999. However, no party suggests that before 1999 Vodafone could not lawfully provide telecommunications services by way of business to its customers using mobile phones.

1 January 1999 to 4 April 2000

102. On 20 May 1997 the Licensing Directive (Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework of general authorizations and individual licences in the field of telecommunications services)

entered into force. No party made any submissions based on the terms of the Licensing Directive at the hearing before us. However, as a result of submissions made to us by Mr Flint QC for Vodafone to the effect that there was no relevant European legislation dealing with authorisation prior to the Authorisation Directive the parties made brief written submissions to us after the hearing on the scope and relevance of the Licensing Directive.

103. Relevant articles from that Directive are set out in the Annex to this judgment.

104. None of Floe's grounds of appeal against the Second Decision refer to the Licensing Directive. After 1 January 1999 Vodafone's Licence was required to have been "brought into line" with the provisions of the Directive (Article 22) and must therefore, if possible, be interpreted to conform with the provisions of the Directive. This appeal has proceeded on the basis that the continuing in effect of an individual licence to Vodafone (the Licence) and the limitation of the number of individual licences to one licence was not incompatible with the Licensing Directive. It appears to us (without deciding this) that on 1 January 1999 when the Licensing Directive came into force Vodafone's Licence was an "individual licence" for the purposes of Article 7 of the Licensing Directive which had been continued in effect for the purpose of "allowing the licensee access to radio frequencies…" (Article 7(1)(a)). It further appears to us that pursuant to Article 10 of the Licensing Directive the United Kingdom had limited the number of individual licences for the provision of telecommunications services using the spectrum allocated to Vodafone. There was only one licence in respect of the provision of telecommunications services using those frequencies and that licence had been issued to Vodafone. This would accord with the statements made by the RA referred to above. There was no relevant general authorisation in respect of the provision of telecommunications services using those frequencies for the purposes of Article 8 of the Licensing Directive at that time.

105. The Wireless Telegraphy (Exemption) Regulations 1999 (the "Principal Exemption Regulations") came into force on 19 April 1999. These regulations exempted certain wireless telegraphy stations and apparatus from the requirement to be licensed under section 1 of the 1949 Act. If exempted, it was unnecessary to hold a licence to

establish or use any station or install or use any apparatus specified in the Principal Exemption Regulations.

106. Regulation 4 of the Principal Exemption Regulations, at that time, provided:

> "**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) The exemption in paragraph (1) 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 a public switched telephone network, by means of which a telecommunication service is provided by way of business to another person."

107. At this time, it appears that users of mobile phones and other User Stations, such as GSM gateways, would not have been exempt from the licensing requirement in section 1 of the 1949 Act in respect of the use by way of business to another person of apparatus communicating with Vodafone Base Transceiver Stations because such apparatus would have been providing a link with a "public switched telephone network".

8 April 2000 – 24 July 2003

108. An important development took place with the enactment by the Community legislature of Directive 1999/5/EC on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity (the "RTTE Directive"). The RTTE Directive entered into force on 7 April 1999 and existing measures were required to be transposed by 8 April 2000 (Article 19(1) and Article 21). The provisions of the RTTE Directive to which we were referred by the parties are set out in the Annex to this judgment.

109. Article 9 of the RTTE Directive provides for "safeguard measures" to be taken in circumstances where there are found to be shortcomings in the relevant standards.

110. In our view, the following arises from the RTTE Directive, as far as relevant to the construction of the Licence:

(a) The RTTE Directive intended to harmonise rules governing the manufacturing, marketing *and use* of radio equipment in the EU (see recital 8, also recital 32 which mentions permitting the putting into service of equipment for its intended use and Article 1 which makes clear that the Directive is concerned with the regulatory framework for, inter alia, the putting into service of radio equipment and telecommunications terminal equipment).

(b) Any restrictions placed on radio equipment after the entry into force of the RTTE Directive were required to be related to the permitted reasons set out in the RTTE Directive and to be necessary and proportionate.

(c) The Community legislature was concerned about *both* harmful interference and unacceptable degradation in service to users (see recital 21). With regard to "unacceptable degradation in service" the Community legislature decided that radio equipment *must be manufactured in such a way* as to prevent any such degradation in service by equipment *when used under normal operating conditions* (recital 21). Likewise, operators such as the MNOs were expected to develop their networks in such a way that manufacturers did not have to take disproportionate measures to prevent harm to networks. Standards for manufacture to ensure that equipment did not cause degradation in service when used under normal conditions were to be developed by ETSI.

(d) It is clear that part of the rationale for the RTTE Directive in the view of the Community legislature was the promotion of competitive markets both for *equipment* and for *network services* (i.e. telephony services) (see in particular, recitals 2, 23 and 25).

(e) Operators, such as the MNOs should be able to design their technical interfaces, subject to the competition rules of the Treaty (recital 24).

i.e. Operators may thus reasonably construct their networks but must do so in line with the competition rules and not unreasonably restrict or deny access to their networks (recitals 24 and 25).

(f) Points (d) and (e) above make clear that, contrary to the submissions of counsel for Vodafone, the RTTE Directive is not "entirely unrelated to competition" but that one of the reasons for enacting the RTTE Directive was the promotion of competitive markets in this sector in the Community economy.

(g) Equipment which meets the technical standards must be permitted to be used (recital 32) – the putting into service of such equipment may be subject to authorisations on the use of the radio spectrum (recital 32):

(i) this recital makes clear that OFCOM and Vodafone's submission to us that the RTTE Directive is concerned only with standards for equipment *qua* equipment and is not concerned with the *use* of equipment cannot be maintained: approved radio equipment and telecommunications equipment must be capable of being put into service for its intended purpose; and

(ii) use of radio equipment, and the provision of the service concerned, can be made subject to authorisations for such use (see further our remarks on Article 7 below).

(h) Article 3 of the RTTE Directive sets out provisions on the "essential requirements" for radio equipment and a procedure for the European Commission to specify further essential requirements. Equipment *shall be so constructed* that it does not harm the network or its functioning or misuse network resources thereby causing degradation in service (Article 3(3)(b)). Therefore degradation in service is a matter that is to be considered primarily at the stage of pre-

authorisation of equipment and in the standards for construction of equipment;

(i) If the harmonised standards for the construction of the equipment nevertheless give rise to the authorisation of certain equipment which does not comply with the "essential requirements" then a Member State must bring the matter to the attention of the European Commission which may then publish further guidelines (Article 5(2) and (3)) or withdraw the standard;

(j) Only equipment which complies with the appropriate essential requirements when properly installed and maintained may be placed on the market in the EU. If a piece of radio equipment complies with the "appropriate essential requirements" then it shall not be subject to further national provisions in respect of placing it on the market (Article 6(1));

(k) As far as *use* of authorised equipment is concerned, Member States must allow the "putting into service" (i.e. use) of the equipment for its intended purpose where it complies with the appropriate essential requirements and the other relevant provisions of the Directive (Article 7(1));

(l) Member States may restrict the putting into service of radio equipment only for reasons related to the effective and appropriate use of the spectrum, harmful interference or matters related to public health (Article 7(2)). We conclude that, as a restriction on the free movement of goods within the Community, the provisions of Article 7(2) must be interpreted strictly. OFCOM relies on the references to "appropriate use" (but not on "effective use") and to "harmful interference" for the purposes of this case.

(m) Article 7(3) requires Member States to ensure that operators do not refuse to connect equipment where that equipment complies with the standards.

(n) Article 7(2) is "without prejudice to conditions attached to authorisations for the provision of the service concerned in conformity with Community law". There was a dispute between the parties as to the meaning of this proviso, which we consider further below.

(o) Recognising that there may be unforeseen circumstances in which compliant equipment nevertheless causes problems in practice, Articles 7(4) and 7(5) set out a procedure for the disconnection of such equipment, including disconnection in emergency situations. Because equipment which may be sold freely throughout the EU is being disconnected, and may equally cause the same problems in other Member States, the procedure requires the involvement of the national regulatory authority in a decision to disconnect (the operator "may be authorised to refuse connection, to disconnect such apparatus or to withdraw it from service"). The procedure also requires the national authority to make a notification of any such disconnection to the Commission which shall convene a meeting of the committee for the purpose of giving its opinion on the matter.

111. The RTTE Directive was implemented in the United Kingdom by:

(a) the Radio Equipment and Telecommunications Terminal Equipment Regulations 2000 (the "RETTE Regulations"), which entered into force on 8 April 2000; and

(b) Wireless Telegraphy (Exemption) (Amendment) Regulations 2000, which entered into force on 1 May 2000.

112. Regulation 4 of the RETTE Regulations provided that apparatus, when properly installed and maintained and used for its intended purpose shall satisfy the essential

requirements set out in the regulations. Essential requirements include the protection of health and safety of users and other persons and electromagnetic compatibility. Regulation 4(4) of the RETTE Regulations provides that in addition radio equipment shall be so constructed that it effectively uses the spectrum allocated to terrestrial/space radio communication and orbital resources so as to avoid harmful interference. Regulation 4(5) provides that apparatus shall meet the requirements of measures adopted by the European Commission pursuant to Articles 3(3), 6(2) and 15 of the RTTE Directive, including with regard to determinations that apparatus must be constructed so that it does not harm the network or its functioning or misuse network resources, thereby causing an unacceptable degradation of service (regulation 4(4)).

113. Regulation 5 of the RETTE Regulations provides that no person shall place on the market or put into service any apparatus unless, inter alia, the "essential requirements" set out in regulation 4 are satisfied. Regulation 6(2)(b) provides that the switching on of radio equipment may be restricted for reasons related to the effective and appropriate use of the radio spectrum, avoidance of harmful interference or public health.

114. Regulation 7 provides that operators of public telecommunications networks shall not refuse to connect telecommunications terminal equipment to appropriate interfaces on technical grounds where that equipment complies with the requirements of regulation 4. Where they consider that apparatus declared to be compliant with the provisions of the Directive causes serious damage to a network or harmful interference or harm to the network or its functioning the Secretary of State and the Director "shall…ensure that operators may refuse connection, disconnect such apparatus or withdraw it from service." In the case of emergency the Secretary of State and the Director shall ensure that public telecommunications operators may disconnect apparatus if protection of the network requires the apparatus to be disconnected without delay.

115. The effect of Floe's submissions as to the RTTE Directive are that to be compatible with the RTTE Directive the statutory scheme (the Licence and the Exemption Regulations) is to be construed so as to permit commercial use of the radio frequencies specified in Schedule 1 to the Licence to provide a commercial telecommunications service with any equipment which complies with the

requirements of the RTTE Directive. OFCOM, Vodafone and T-Mobile submit that the Licence is to be construed as a licence to use the frequencies receiving and transmitting via Base Transceiver Stations only and not otherwise.

116. No party suggested to us that the GSM gateway equipment used by Floe did not comply with the requisite standards for the construction of equipment for the purposes of the provisions of the RTTE Directive. Our analysis therefore proceeds on the basis that GSM Gateway equipment is compatible with the relevant standards.

117. Floe's submission would mean that, at least by the coming into force of the RTTE Directive, Vodafone was authorised to provide a telecommunication service to customers using the radio frequencies specified in its Licence with any apparatus that had been authorised under the RTTE Directive. This submission appears to us to be consistent with the RTTE Directive. The result of this construction is that Vodafone, but only Vodafone, would hold a licence to provide a telecommunications service to its customers using GSM Gateways, if such GSM Gateways had been approved under the RTTE Directive. On that construction, a restriction that has been imposed on the use of GSM gateways is that such devices can be used only under the auspices of a licence held by a Mobile Network Operator (in this case Vodafone). Such a restriction is in accordance with the proviso in Article 7(2). In the case of GSM Gateways specifically, this construction means that Vodafone's Licence would permit the provision of least cost routing services to customers which includes the use, as part of that service, of any GSM Gateway device which has been declared to be compliant with the essential requirements and the other parts of the RTTE Directive.

118. If, as submitted by OFCOM, Vodafone and T-Mobile, the Licence is restricted to use by Vodafone of the relevant radio frequencies via Base Transceiver Stations only then, at all material times there was no licence or authorisation in force allowing the provision of a service by way of business using GSM Gateways in the United Kingdom. Nor was there any relevant exemption from the licensing requirement in section 1 of the 1949 Act. The result of that construction is that no person could ever have lawfully used GSM Gateway equipment to provide a telecommunications service by way of business to another person (see paragraph 127 of the Second Decision). Furthermore, Mr Mason's evidence to the Tribunal was that if Floe or any

other undertaking had approached him, in his capacity as Head of Public Networks Licensing at the Radiocommunications Agency, at any time before July 2003 seeking a licence to operate GSM gateways, he would have considered that the relevant radio spectrum for running a GSM service using GSM gateways had already been licensed to Vodafone and the other MNOs and would have refused to grant any further licences on that basis.

119. The main use of GSM gateway equipment is the provision of "least cost routing". GSM gateway devices are used, in this context, to "route" calls made to a mobile phone from a fixed line telephone in the most cost effective way for a customer (see, in particular, paragraphs 30 to 36 of the Second Decision where OFCOM explains the use of GSM gateway equipment and concludes "the key point to note…is that when the call is delivered to the mobile operator via the GSM gateway, it is not transferred to the mobile operator's network via the fixed point of termination and therefore does not incur a wholesale termination charge"). No other use of GSM gateway equipment has been suggested to the Tribunal. We recall that at the hearing of Floe's appeal against the First Decision counsel for Vodafone, Mr Ivory QC, submitted that the provision of services using GSM gateways to single end-users would not be a practical proposition (first hearing, day 2, transcript page 61 line 39 to page 62 line 8) but we do not need to make any findings in that regard for the purposes of this appeal.

120. Article 7(1) of the RTTE requires Member States to allow the "putting into service", i.e. the use, of equipment for its "intended purpose" if it complies with the "essential requirements" and other standards provided for in the Directive. The European Court has held that Article 7(1) of the RTTE Directive has direct effect (Joined Cases C-388/00 and C-429/00 *Radiosistemi Srl v Prefetto di Genova*, [2002] ECR I-5845, paragraph 57). As explained above, the intended purpose of GSM Gateway equipment is the routing of calls from fixed lines to mobile phones. A complete restriction on the putting into service of such equipment commercially (which is the construction urged on us by OFCOM and Vodafone) cannot in our judgment be compatible with Article 7(1) unless justified by Article 7(2).

121. For the reasons we give below under issue 4, we are not satisfied on the material before us that OFCOM's reasons in the Second Decision establish that any of the

matters set out in Article 7(2) can justify a complete restriction on the provision of services using GSM gateways by way of business. Furthermore, it is accepted that the United Kingdom has not followed the procedure in Article 7(3) and 7(4) in respect of the disconnection of compliant apparatus. Therefore we cannot accept, on the material presently before us, OFCOM's construction, which results in the complete prohibition of commercial services involving devices which have been authorised under the RTTE Directive.

122. No party submits that the Exemption Regulations, or the Licence, permitted what is now described as "COSUG" services (i.e. the provision of commercial GSM gateways where each gateway is dedicated to a single customer at that customer's premises). In particular OFCOM and Vodafone do not submit that this would be the correct, or a possible, construction of the statutory scheme. Accordingly we have no material before us, and have not considered, whether a construction which limited the commercial use of GSM gateway equipment to "COSUG" services (but prohibited "COMUG" services) would be compatible with the RTTE Directive. We have dealt with this issue on the basis of OFCOM's submission that, at the relevant time, there was no authorisation permitting the use of GSM gateways to provide a telecommunications service by way of business to another person.

123. In our view the words "without prejudice to conditions attached to authorisations for the provision of the service in accordance with Community law" in Article 7(2) of the RTTE Directive cannot mean, as OFCOM suggests, that, by way of the authorisation regime, the United Kingdom might introduce a complete prohibition on the use of compliant equipment for its "intended purpose" so as to trump the approval of equipment under the RTTE Directive entirely. Such a construction would undermine the entire scheme of the RTTE Directive, which as Article 1 makes clear, is to provide for a regulatory framework for the putting into service of radio equipment. The "conditions attached to authorisations for the provision of the service in accordance with Community law", refers to the conditions which are permissible under the Licensing Directive, which had been enacted in 1997. Therefore this proviso, when read in the context of recital 32, Article 7(1) and Article 7(3) cannot mean that the "conditions attached to authorisations for the provision of the service" refers to a condition that makes it impossible to use compliant equipment at all. Although this

appeal proceeded on the basis that the statutory scheme is compatible with the Licensing Directive it is clear that the proviso to Article 7(2) envisages *ex hypothesi* that a service can be *provided* and not that the provision of services is restricted entirely by the condition.

124. We are fortified in our view that this construction of the statutory scheme is correct taking account of the fact that both the Director (in the First Decision) and the RA took the view, previously, that Vodafone was able to provide GSM Gateway services under the Licence (and indeed that Vodafone was able to authorise Floe to do so). We also note that this construction, in contrast to the new construction in OFCOM's Second Decision, avoids Vodafone from having entered into an illegal contract (having taken legal advice) and avoids the possibility of Vodafone itself having been in breach of the criminal law in performing the Agreement on and from 12 August 2002.

125. The next development in the statutory scheme was the enactment of the Wireless Telegraphy (Exemption) (Amendment) Regulations 2000, regulation 3 of which amended regulation 4(2) of the Principal Exemption Regulations as follows:

> "(2) The exemption in paragraph (1) 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 telecommunication 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."

126. The amendment thus made to the Principal Exemption Regulations substituted for "public switched telephone network" the words "any other apparatus or system" thus narrowing the scope of the exemption from licensing that had previously been provided for in regulation 4 of the Principal Exemption Regulations.

127. Vodafone's Licence was replaced on 28 January 2002. The relevant terms of the Licence have been set out above.

128. For the purposes of the present appeal no party submits that the Licence, when re-issued in 2002, was not in conformity with the relevant legislation then in force which, at European level, continued to be the Licensing Directive.

129. The Wireless Telegraphy (Exemption) (Amendment) Regulations 2002 came into force on 8 July 2002 and further amended regulation 4 of the Principal Exemption Regulations, which from that date read as follows:

> "With the exception of relevant apparatus operating in the frequency band 2400.0 to 2483.5 MHz the exemption in paragraph (1) 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 telecommunication 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."

130. Finally, on 12 February 2003 the Wireless Telegraphy (Exemption) Regulations 2003 (SI 2003 No. 74) entered into force. Those regulations further amended regulation 4(2) of the Principal Exemption Regulations. The relevant exemption, as from that date was as follows:

> "**Exemption**
> 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 in paragraph (1) 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 telecommunication apparatus or a telecommunication system and other such apparatus or system, by means of which a telecommunications service is provided by way of business to another person.
>
> (3) The frequency bands specified for the purposes of paragraph (2) are -
>
> (a) 2400.0 to 2483.5 MHz;
>
> (b) 5150 to 5350 MHz;
>
> (c) 5470 to 5725 MHz;
>
> (d) 57.1 to 58.9 GHz.
>
> (4) The exemption provided in the case of relevant apparatus operating in the frequency bands specified in paragraph (3) shall not apply unless such apparatus complies with the appropriate…Interface Requirement (…)

Terms, provisions and limitations
5. – (1) The exemption provided in regulation 4(1) shall be subject to the terms, provisions and limitations that -

(a) the relevant apparatus shall not cause or contribute to any undue interference to any wireless telegraphy; and

(b) the use of the relevant apparatus is terrestrial use only, unless otherwise stated in Schedule 6.

(2) Such exemption shall also be subject to such additional terms, provisions and limitations as are specified in the Schedules hereto in respect of the relevant apparatus.

Inspection and restrictions on use
6. – (1) Where an authorised person has reasonable cause to believe that any relevant apparatus is not complying with regulation 5 any person who is in possession or control of the relevant apparatus shall, on the demand of that authorised person -

(a) permit and facilitate its inspection by that authorised person; and

(b) cause its use to -

(i) cease; or

(ii) be restricted in the manner specified by that authorised person,

For a period of time ending either on a date or on the occurrence of an event specified in either case by that authorised person.

(2) Any authorised person exercising powers under paragraph (1) above shall produce evidence of his authority, if so required by the person in possession or control of the relevant apparatus."

131. The effect of these amendments to regulation 4(2) of the Principal Exemption Regulations is that, within the radio frequency bands specified (no party submits that those frequency bands are relevant to this case) the relevant apparatus can be established, installed or used to provide a service by way of business to another person without a licence, but not otherwise. These amendments are not relevant to any issue before us in this case.

25 July 2003 onwards

132. In 1999 a review took place of the European regulatory framework applicable to electronic communications which led to a package of new Directives being adopted by the European legislature.

133. The "Authorisation Directive" (Directive 2002/20/EC on the authorisation of electronic communications networks and services) was part of the European legislation establishing this new regulatory framework. The relevant provisions of the Authorisation Directive to which we were referred are set out in the Annex to this judgment.

134. In our view the following, so far as relevant to the issues before us, arises from the Authorisation Directive:

(a) The Authorisation Directive sets out a comprehensive scheme for the authorisation of all electronic communications services and networks, whether they are provided to the public or not (recital 4).

(b) The self-use of radio frequencies, 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 the Authorisation Directive (recitals 4 and 5). The Second Decision is concerned with the use of radio frequencies which involve the provision by Floe of electronic communications services for remuneration. The authorisation of that activity on and from 25 July 2003 is covered by the Authorisation Directive.

(c) The Authorisation Directive requires the *least onerous authorisation system possible* (recital 7). It states that this can be best achieved by "general authorisation" of all electronic communications networks and services without requiring any explicit decision or administrative act (recital 8). Any rights and obligations imposed on undertakings by national regulatory authorities such as OFCOM should be set out explicitly in the authorisation in order to ensure a level playing field throughout the Community and to facilitate cross-border negotiation of interconnection between public communications networks (recital 9).

(d) It may continue to be necessary to grant individual rights of use for radio frequencies. Any such rights of use should not be restricted except where this is unavoidable due to the scarcity of radio frequencies and the need to ensure the efficient use thereof (recital 11).

(e) The conditions which may be attached to general authorisations 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 (recital 15).

(f) Penalties for non-compliance with conditions under the general authorisation should be commensurate with the infringement. The recitals to the Authorisation Directive provide that, 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 (recital 27).

(g) The objective of transparency requires that service providers consumers and other interested parties have easy access to any information regarding rights, conditions, procedures, charges, fees and decisions concerning the provision of electronic communications services, rights of use of radio frequencies and numbers (recital 34).

(h) The Directive aims to implement an internal market in electronic communications networks and services through the harmonisation and simplification of authorisation rules and conditions (Article 1(1)).

(i) The scheme of the Directive is to provide for general authorisations and individual authorisations.

(j) Article 3 of the Directive concerns general authorisations. OFCOM's submission to us is that regulation 4 of the Principal Exemption Regulations (as amended) is "part of" a "general authorisation" for these purposes.

(k) Member States shall not prevent an undertaking from providing electronic communications services except where necessary for the reasons set out in Article 46(1) of the Treaty. (No party relies on any matter under Article 46(1) of the Treaty before the Tribunal and no reference has been made to that provision in submissions to us).

(l) An undertaking is entitled to a general authorisation to provide electronic communications or services without a prior decision from the authority (OFCOM) but may be required to make a notification to the authority. Article 4 sets out a minimum list of rights granted to those subject to a general authorisation. These include:

(i) the right to provide electronic communications or services; and

(ii) the right to negotiate interconnection.

(m) Article 5 concerns rights of use of radio frequencies. Member States shall where possible, in particular where harmful interference is negligible, not make the use (i.e. commercial use) of radio frequencies subject to individual rights of use but shall include the conditions for usage of such radio frequencies in the general authorisation. 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 the radio frequencies in accordance with Article 7.

(n) Article 6(1) provides that authorisations may be subject *only* to the conditions set out 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.

(o) The general authorisation shall only contain conditions in Part A of the Annex and shall not duplicate other conditions. An individual right of use shall only contain conditions in Part B of the Annex.

(p) Member States were required to bring authorisations already in existence into line with the Directive at the latest by 25 July 2003 (article 17(1)).

(q) To justify the complete restriction of the use of COMUG services OFCOM relies on Part A paragraph 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."

135. In our view, after the coming into force of the Authorisation Directive on 25 July 2003 if, as Floe submits and we have held above, at paragraphs [115] to [124], the Licence must be construed as a right to use the relevant radio frequencies referred to in the Licence commercially to provide a telecommunications service with equipment declared compliant with the RTTE Directive then the Licence must, on and from 25 July 2003, be an "individual right of use of the radio spectrum" for the purposes of Article 5(1) of the Authorisation Directive. In order to be compatible with the RTTE Directive, which remains in force, Vodafone must be authorised to provide electronic communications services using all equipment which is compatible with the RTTE Directive on the radio frequencies licensed to it, unless a restriction on putting into service such equipment can be made out under Article 7(2) of the RTTE Directive.

136. In that regard we note:

(a) after the Authorisation Directive came into force there is an express obligation on OFCOM to impose the least onerous conditions possible in any general authorisation or in individual authorisations to use radio spectrum;

(b) any conditions imposed by OFCOM must be objectively justified, proportionate and transparent; and

(c) there is an obligation to make radio frequencies subject to the general authorisation if possible, in particular if the risk of harmful interference is negligible.

137. As is clear from the provisions of the Authorisation Directive, the "general authorisation" bestows a right under Community law to provide electronic communications networks and services. It contemplates the provision of services by those subject to a general authorisation on a *commercial* basis. The Authorisation Directive itself makes clear, in recital 5, that it is concerned with authorisation for commercial activities. The terms on which undertakings are permitted to provide electronic communications networks and services commercially is a fundamental part of the general authorisation under the Authorisation Directive. As a minimum, an undertaking benefiting from the general authorisation has the right to provide services, to install facilities and a right to negotiate interconnection (Article 4).

138. OFCOM submits that regulation 4 of the Exemption Regulations is a "general authorisation" to provide electronic communications services using GSM gateways. As a condition of such general authorisation users must comply with regulation 4(2). However, the effect of regulation 4(2) of the Exemption Regulations is that only "self-use" is permitted. Any use to provide a telecommunications service "by way of business" to another person is not exempt from the licence requirement. On OFCOM's case such use has not been licensed to any undertaking in the United Kingdom. We cannot accept OFCOM's submissions in this regard. A statutory scheme which prohibits the provision of telecommunications services by way of business cannot be a "general authorisation" to provide electronic communications services for the purposes of Article 3 of the Authorisation Directive. In our view, from its coming into force in July 2003, the Authorisation Directive reinforces our construction of the Licence.

139. The only restrictions that can be imposed on an individual right of use of radio frequencies after the Authorisation Directive entered into force are those set out in part B of the Annex to the Directive. For the reasons which we set out under our consideration of "Issue 4", we are not satisfied on the material before us that a

restriction on the use of GSM Gateways by Vodafone can be justified on the basis of OFCOM's reasoning in the Second Decision, whether or not justified for other reasons.

140. For completeness, in the event that we are wrong that the Licence is to be undersood as we have set out above, we go on to consider OFCOM's analysis. If, as OFCOM and Vodafone submit, the right commercially to use the radio frequencies is limited to use of those frequencies by Vodafone using Base Transceiver Stations only then, following the coming into force of the Authorisation Directive, the right to provide electronic communications services using the "MTx" GSM radio spectrum commercially with "mobile stations" has not been made subject to individual rights of use and accordingly must be covered by a "general authorisation" (Second Decision, paragraph 140).

141. The only conditions which can be attached to a general authorisation applicable to the use of radio frequencies are those which fall under Part A of the Annex to the Authorisation Directive. OFCOM submits that the Exemption Regulations are "part of" such a "general authorisation" (what the other part(s) of the general authorisation were said to be was never explained). Its submission is that the condition attached to to the general authorisation is that the use of GSM gateways and other user stations is confined to "self-use" only. This restriction, in OFCOM's submission, is compatible with the Authorisation Directive and OFCOM relies on paragraph 17 of Part A of the Annex and the requirements of Article 7(2) of the RTTE Directive.

142. The result of OFCOM's construction of the statutory scheme would be that no person is authorised to provide an electronic communications service using GSM gateways on the relevant frequencies. The "self-use" of the radio spectrum by a GSM Gateway, unconnected to an economic activity, is entirely outside the scope of the Authorisation Directive (see recital 12). Accordingly, a "general authorisation" of the provision of electronic communications services under the Authorisation Directive cannot be restricted to self-use only; the general authorisation for the purposes of the Authorisation Directive can in those circumstances only relate to an authorisation for commercial use linked to an economic activity.

143. If OFCOM's and Vodafone's construction were correct then there would be no individual right of use permitting the provision of a telecommunications service using GSM gateways by way of business and the purported "general authorisation" would only permit "self-use" and not commercial use. Such an authorisation would be outside the ambit of the Authorisation Directive. In our view, the effect of that construction is that there is no "general authorisation" for the purposes of the Authorisation Directive at all. In particular an "authorisation" limited to "self-use" does not provide the minimum rights provided for in Article 4 of the Directive. It therefore seems to us that OFCOM's submissions in this regard must be misconceived.

144. The Communications Act 2003 implemented, inter alia, the provisions of the Authorisation Directive and entered into force on 23 July 2003. Neither the Licence nor the Exemption Regulations were amended after that date.

145. In our view the enactment and coming into force of the Authorisation Directive provide further reason, on and from 25 July 2003, for the Licence to be construed on and after that date so as to permit the provision by Vodafone of commercial services with GSM gateway equipment which is compliant with the RTTE Directive.

Conclusion on the construction of the Licence

146. For the reasons we have explained above, the construction of the Licence in the Second Decision, which was focussed on the *Um* and *Abis* interfaces and on the direction in which a radio signal travelled cannot, in our view, be correct. For the Licence and the Exemption Regulations, taken together, to be compatible with the RTTE Directive (and later, if relevant, the Authorisation Directive) the Licence must be interpreted in such a way that Vodafone is authorised to provide, for commercial purposes, telecommunications services (and later electronic communications services) using the radio frequencies set out at paragraph 7 of Schedule 1 of the Licence for the purpose set out in paragraph 2 of the Licence. Vodafone's commercial exploitation of those frequencies pursuant to the Licence may, in principle, involve the use of any User Station which has been authorised under the RTTE Directive, including GSM gateways.

147. Furthermore, in our view, if as counsel for OFCOM and Vodafone came close to suggesting, the commercial use of GSM gateways is abhorrent because it causes all kinds of degradation to the proper functioning of radio networks then such considerations ought to be raised, under the scheme of the European legislation, at the stage of the manufacturing requirements (see Article 3(3)(b)). Equipment which is capable when used for its intended purpose of causing serious degradation to networks ought not to be manufactured, placed on the market or put into service at all. Rather, the RTTE Directive sets out a regulatory framework so that relevant standards are established that should ensure that radio equipment does not, when used normally for its intended purpose, cause such degradation.

148. If, despite the relevant standards developed at a European level, problems are subsequently identified with manufactured equipment by a Member State it is clear from the RTTE Directive that the European legislature has considered it important that such matters are considered and dealt with first by national regulatory authorities who must notify the European Commission. OFCOM submitted that this procedure was unworkable. However it is the procedure required by the Directive and whether or not OFCOM now considers that procedure to be a workable or desirable procedure is irrelevant. We can well understand why the European legislature may have considered the procedure to be desirable as it ensures that problems that are identified with equipment that might cause degradation to networks are disseminated to national authorities throughout the EU in order: (a) to verify that the apparent problem that has arisen in one Member State is a real problem; (b) if it is a real problem, to avoid that problem subsequently arising in the other Member States; and (c) so that it can be taken account of in the relevant standards for the future. Thus the procedure envisaged in Article 7 for operators to notify the authorities in the Member State and the Member State to notify the European Commission is, in our view, a very important procedure for ensuring that problems of degradation of service and interference do not arise in practice or if they do arise, can be dealt with on a Europe-wide basis.

149. For the reasons set out above, after the coming into force of the RTTE Directive in 1999, Floe's construction of the Licence is to be preferred. After that date, it is only if

Vodafone is itself entitled to provide a telecommunications service to customers by way of business which includes the use of compliant equipment which has been approved for free circulation under the RTTE Directive (including GSM gateway equipment) that the statutory scheme (the Licence construed together with the Exemption Regulations) is compatible with the RTTE Directive.

(2) Did Vodafone authorise Floe's use of COMUG services pursuant to the Agreement?

150. Since Vodafone's Licence must, in our judgment, be construed, at least from the time the RTTE Directive entered into force, as permitting Vodafone to provide commercial services to customers using GSM Gateway equipment which was compliant with the RTTE Directive we must therefore go on to consider the next question. This is, did Vodafone "authorise" Floe's use of SIMs to provide COMUG services pursuant to paragraph 8 of its Licence (see paragraph [285] of our first judgment)? As noted above, we have already held, in our First Judgment, that if Vodafone's Licence was wide enough to cover the use of Public GSM gateways then the Agreement, which is in writing, was an authorisation to use GSM Gateways. The evidence before us was clear that Vodafone always knew, and Floe had made clear, that it would provide commercial services using "Premicell-type" devices, which are a type of GSM Gateway device. However, at paragraphs [311] to [315] of our First Judgment we expressly made no finding as to the extent of the purported authorisation of Floe's activities by Vodafone. In particular, in view of the fact that the Director had not investigated the matter at all, and the evidence before us as to that issue was limited at the first hearing, we remitted to OFCOM for further investigation the extent to which Floe's use of GSM gateways had been intended to be limited to "customer premise equipment" dedicated to specific customers and attached to their PABX (as suggested in Mr Young's first witness statement) and the extent of Floe's business.

151. Evidence has been adduced before us as to this matter and much of the cross-examination of Mr Taylor, Mr Stonehouse, Mr Young and Mr Overton concerned this issue.

152. In view of our findings of fact set out above, it is clear to us that the Business Plan Floe provided to Vodafone referred extensively to "customer premise equipment". We have found that both parties were, at that stage, using that term to describe GSM gateway equipment situate at an individual customer's premises and dedicated to that customer. It was always clear to Vodafone, and to Mr Young in particular, that Floe would be providing a telecommunications service to its customers, would bill its customers, would have the relationship with its customers and would provide customers with a least cost routing service and that Vodafone would not have any direct relationship with any customer in respect of Floe's proposed least cost routing service. Therefore it was clear that Floe was involved in an economic activity and that it was providing to its customers a least cost routing service by way of business. However, neither the Business Plan provided to Vodafone nor, as we find, any of the discussions between the parties made reference to the use by Floe of a network of GSM gateways for the aggregation of calls from a variety of different corporate customers (so-called "multi-user GSM gateways"). We find that at no time did Floe expressly tell Vodafone that its business would involve the use of a network of multi-user Gateways and we find that Vodafone did not know this at the time of entering into the Agreement. Vodafone only began to suspect that this was the case subsequently when Mr Rodman and his colleagues began investigating the matter.

153. Prior to concluding the Agreement with Vodafone in August 2002 Floe did have plans to use a "distributed network" of GSM gateways and to aggregate traffic from several customers on multi-user GSM gateways. The Fuller Business Plan makes Floe's plans in that regard clear. However, for whatever reason, neither Mr Taylor nor Mr Stonehouse ever provided a copy of the Fuller Business Plan to Vodafone and never made Vodafone aware of those plans.

154. At paragraphs 185 to 189 of the Second Decision OFCOM made findings as to the scope of Floe's business at the time Vodafone disconnected its SIM cards in March 2003. OFCOM found, in particular, that at that time Floe used GSM gateways to provide telecommunications services to end-users and other communications providers, that Floe's call traffic was routed into a distributed network rather than to "on-site customer premise GSM Gateways" and that no SIMs were dedicated to an individual customer. The evidence before us, in particular the oral evidence of Mr

Stonehouse, confirms those findings of fact by OFCOM. In particular, Mr Stonehouse explained that no SIMs were dedicated to individual customers using "customer premise equipment" and that Floe "optimised the routing" of calls at around 70% so that if more than 70% of capacity on a directly connected gateway was used, the calls above that amount were transferred to other gateways.

155. Mr Young knew that Floe intended to develop its business. However, at no stage did Floe inform Vodafone that it intended to develop its business to include COMUG activity and at no stage was authorisation for such development sought.

156. Therefore we find that Floe was authorised pursuant to the Agreement by Vodafone to provide a least cost routing service to customers using "customer premise equipment" dedicated to a single customer at his premises. However, none of Floe's SIMs were, in fact, at the relevant time being used in equipment dedicated to one customer at its premises. The SIMs were, rather, being used in COMUGs. Vodafone had not been told by Floe, and did not know, of the use by Floe of COMUGs in the provision of its services. Accordingly, Vodafone could not have authorised such use. Mr Stonehouse explained that the manner in which he had engineered the Floe network of GSM gateways was, in his view, a much more efficient and effective use of the equipment which was less likely to cause any congestion for Vodafone and the other Mobile Network Operators. We make no finding as to whether or not Mr Stonehouse was correct as to this. However, the important fact is that Floe did not seek authorisation from Vodafone to use SIMs in a network of multi-user GSM gateways. Nor did Floe consult Vodafone as to Floe's plans in that regard at all. In those circumstances, Floe was acting outside the scope of the authorisation that had been given to it, which was limited to using the SIMs in customer premise equipment dedicated to the sole use of a particular customer in each case.

157. Vodafone cannot have authorised, pursuant to the Agreement, an activity by Floe of which it had no knowledge and in respect of which Floe had never made any request to Vodafone for such authorisation.

158. When Floe was confronted by Vodafone concerning its activities and apparent congestion problems on the Vodafone network related to Floe, for whatever reason,

Mr Taylor and Mr Stonehouse did not, at that stage, take the opportunity to inform Vodafone that its activities had broadened from using the SIMs to provide a telecommunications service with customer premise equipment dedicated to single customers to using the SIMs to provide a multi-user service. Floe merely asserted that it was operating within the Agreement that it had with Vodafone. At no time did Floe either request that the scope of its new business be authorised or suggest that it would take steps to limit its activities solely to customer premise equipment, as previously described. The consequence of that was that Floe was not itself licensed to use the relevant SIMs and had not been given authorisation by Vodafone to do so under the Licence. Therefore Vodafone disconnected SIMs that were being used by Floe in a manner which had not been authorised by Vodafone under the Licence.

IX ISSUE 3 – LEGITIMATE EXPECTATION

159. Issue 3 was set out in the agreed list of issues as follows:

"**Issue 3: Legitimate expectation**

3.1 Is the issue of legitimate expectation relevant to and capable of determining the legality of establishing/using GSM gateways under the 1949 Act or the effect of Vodafone's licence? If not, there is no need to proceed with the following analysis in this section. What is the consequence of the Respondent's apparent change of position?

3.2 May Floe invoke any legitimate expectation concerning the Respondent's apparent change of position, so as to affect the legal analysis in this case?

3.3 Was there any representation made by the RA as to the ambit of Vodafone's licence or the legality of GSM gateways on which Floe relied which is capable of creating a legitimate expectation in public law?

3.4 Was there any representation made by the DTI at its meeting in February 2002 or in its July 2003 statement [or otherwise] regarding the legality of the establishment/use of GSM gateways on which Floe relied which is capable of creating a legitimate expectation in public law?

3.5 If there were representations made by the RA or the DTI on which Floe is entitled to rely, how does that in law affect the issue of whether Vodafone's conduct infringed the Chapter II prohibition?

3.6 What in the circumstances is the scope of relief that can be ordered by the Tribunal in these proceedings?

The parties' submissions

160. Floe's skeleton argument for the hearing proceeded on the basis that Floe could establish a legitimate expectation "in respect of what it could expect as to the regulation of all forms of gateway". It submitted that this expectation arose "from a course of dealing over this issue in what [Floe] describes as the Davies/Tarrant interview of February 2002." Floe submits that it had a meeting with officials of the DTI and did not receive any material warning or intimation of any legal problem with the provision of services using GSM gateways.

161. Floe submitted that as a result of that meeting it had a legitimate expectation that the licence given for GSM to Vodafone is structured such that, by contract, authorisation for the use of all manner of GSM gateway equipment can be given by Vodafone pursuant to its licence. Floe also relies on the email sent by Mr Mason of the RA to Floe on 10 February 2003 and the 18 July 2003 Statement.

162. OFCOM submits that Floe's case on legitimate expectation is unclear and misconceived. The burden rests on Floe to put its case in respect of legitimate expectation and to prove its case by demonstrating the existence of a clear and unconditional promise on which it was reasonably entitled to rely. OFCOM submits that Floe has failed to do either.

163. OFCOM referred to the Court of Appeal's judgment in *R (Bibi) v Newham London Borough Council* [2001] EWCA Civ 607 as establishing three elements necessary to establish a case for legitimate expectation, which OFCOM summarised as: (1) a public authority must by its words or conduct make a statement that amounts to a "promise" or "commitment" as to what will happen in the future; such statement must be "clear, unambiguous and devoid of relevant qualification"; (2) the commitment causes the promisee reasonably to entertain an expectation that the public authority will or will not act in a particular way; and (3) assuming the first two elements have been satisfied, the public authority in departing from such a promise must have acted so unfairly or unconscionably as to amount to an unlawful abuse of power.

164. OFCOM submits that Floe has failed to identify any document or statement that constitutes a clear, unambiguous and unconditional promise on which it could reasonably have relied.

165. Vodafone and T-Mobile adopted the submissions of OFCOM on this issue.

Tribunal's analysis

166. In our findings of fact, at paragraph 40(5), we found that Mr Stonehouse of Floe met Mr Jim Davies and Mr Gordon Tarrant of the Department of Trade and Industry on 1 February 2002 and discussed Floe's proposal to offer a service via GSM gateways. Mr Tarrant was concerned that by offering such a service Floe would be broadcasting from a Base Transceiver Station without a licence. Mr Stonehouse did not contact either the RA or Oftel at this time. We found at paragraph 40(6) that no express assurance was given to Mr Stonehouse by the officials of the Department of Trade and Industry to the effect that the provision of commercial services using GSM gateways could lawfully be provided in the United Kingdom. Floe has not established that any discussion took place between Floe and those officials concerning whether or not Vodafone could itself authorise such a service under Vodafone's Licence and we have found that no advice or assurance was given to Mr Stonehouse in that regard.

167. Mr Stonehouse relied on the fact that Mr Tarrant, having raised the possibility of regulatory issues applicable to the provision of a service using GSM gateways, did not contact Mr Stonehouse again.

168. In our judgment Floe has not established any evidential basis for any legitimate expectation. There is no evidence before us that any relevant representation was made to Floe. In relying on the subsequent silence of DTI officials who initially raised concerns Mr Stonehouse and Floe were assuming a risk. Floe's subsequent attempt in these proceedings to transform its own assumption of risk into a "legitimate expectation" is simply misconceived.

169. Mr Mason's email of 10 February 2003 did not represent that Floe's services were certainly lawful. The July 2003 Statement occurred after Floe had been disconnected. That statement noted the government's view that MNOs such as Vodafone may be able to consider purchasing services from GSM gateway operators for use under the auspices of their own licences. The government's statement encouraged MNOs and Gateway operators to consider ways to address pragmatically existing uses of GSM gateway equipment that continued not to meet the requirements for exemption. In our judgment that statement cannot amount to a representation to Floe that it would be operating a lawful service in entering into the Agreement in August 2002 and in conducting its multi-user GSM gateway business from August 2002 until March 2003 In any event, the statement was made after Vodafone had disconnected Floe's SIM cards.

170. OFCOM referred us to various authorities as to the legal principles relevant to establishing legitimate expectation in public law. However, in view of our findings of fact it is unnecessary for us to consider this issue further.

X ISSUE 4 - COMPATIBILITY OF THE EXEMPTION REGULATIONS WITH COMMUNITY LAW

171. Issue 4 was agreed between the parties as follows:

Issue 4: Compatibility of the Exemption Regulations with EC law

4 .1 Should Floe have applied to the High Court for judicial review of the Regulation at the material time? [Floe objects]

4 .2 Is it open to the Tribunal to review the lawfulness of the Exemption Regulations in these proceedings? If so, what is the scope of its power in this respect ?

4.3 Is Regulation 4(2), insofar as it applies to the use of GSM gateways for the provision of commercial multi-user GSM gateway services, compatible with Article 7 of the RTTE Directive ?

4.4 Is Regulation 4(2), insofar as it applies to the use of GSM gateways for the provision of commercial multi-user GSM gateway services, compatible with Article 7 of the RTTE Directive?

4.3.1 What is the correct interpretation of "harmful interference" in Article 2(i) the RTTE Directive?

4.3.2 Does the use of GSM gateways for the provision of commercial multi-user GSM gateway services give rise to "harmful interference"?

4.3.3 Does the use of GSM gateways for the provision of commercial multi-user GSM gateway services constitute an "appropriate use of the radio spectrum" within the meaning of Article 7(2) of the RTTE Directive?

4.3.4 Do Articles 7(3) and 7(4) apply in the particular circumstances of this case and, if so, whether there has been compliance with the requirements and, if not , what are the consequences of any failure ?

4.4 . Is Regulation 4(2), insofar as it applies to the use of GSM gateways for the provision of commercial multi-user GSM gateway services, compatible with Article 6 of the Authorisation Directive?

4.4.1 Did the Authorisation Directive have any effect at the material time when Vodafone disconnected Floe's GSM gateways in March 2003?

4.4.2 Is Regulation 4(2) a condition attached to a general authorisation for the purposes of Article 6(1) of the Authorisation Directive?

4.4.3 Is Regulation 4(2) objectively justified, non-discriminatory, proportionate and transparent?

(a) harmful interference

Mr Burns' expert evidence

172. On 9 December 2005 all of the parties jointly instructed Mr John Burns of Aegis Systems Limited as a single joint expert to assist the Tribunal as to relevant technical background to interference as understood by radiocommunications experts, the Tribunal having previously indicated that some assistance in that regard might be required. The parties agreed to appoint Mr Burns, who had initially been proposed by OFCOM.

173. Mr Burns holds a BSc (Hons) in Electrical and Electronic Engineering and is a Chartered Engineer and a Member of the Institution of Electrical Engineers. He is currently employed as Principal Consulting Engineer: Mobile and Fixed Access by Aegis Systems Limited and has experience as a consulting engineer working with

OFCOM, ComReg (the Irish telecommunications regulator), the RA and the European Commission. From 1996 to 1999 he was Head of Radio and Private Networks at the Office of Telecommunications (Oftel). In that role he was the Principal Technical Adviser responsible for advising the Director General of Telecommunications as to the introduction of third generation mobile services in the UK and represented Oftel on the Government's "Third generation policy working group". Prior to that, from 1991 to 1996, he was Head of Public Networks at the RA. In that role he was responsible for technical and licensing policy relating to public mobile radio networks under the 1949 Act.

174. The questions the parties instructed Mr Burns to report upon were as follows:

"(i) What is or is understood to be interference capable of seriously degrading and/or obstructing and/or repeatedly interrupting a radio communications service? In particular, what in technical terms, given the background above and the points raised below, is "interference"? Please explain your answer by reference to specific examples.

(ii) How can interference seriously degrade and/or obstruct and/or repeatedly interrupt a radio communications service? Please explain your answer by reference to specific examples.

(iii) Are GSM gateways capable of giving rise to interference which seriously degrades and/or obstructs and/or repeatedly interrupts a radio communications service? If so, under what conditions? Please explain your answer by reference to specific examples.

(iv) In the context of GSM Gateways, is congestion capable of giving rise to interference that seriously degrades and/or obstructs and/or repeatedly interrupts the radio communications service provided by GSM operators to their customers? Please explain your answer by reference to specific examples."

Mr Burns' instructions also stated:

"Please note that you are not instructed to give an opinion on any of the following:

- the legal meaning of the relevant provisions;
- the extent of the congestion problems caused by commercial multi-user GSM gateways;
- whether and, if so, how easily the potential congestion problems caused by commercial multi-user GSM gateways are capable of being overcome; or
- how the use of commercial multi-user GSM gateways should be regulated."

and:

"If any of the issues on which you have been asked to cover in your report involve matters of controversy, you should not express your opinion on the controversy, but point out what the controversy is and how it arises."

175. Mr Burns prepared a draft report which was circulated to the parties on 19 December 2005. OFCOM submitted observations to Mr Burns on his draft report on 22 December 2005. Floe submitted observations on the draft report on 3 January 2006. Vodafone and T-Mobile also submitted detailed observations and further questions to Mr Burns. Mr Burns' final report was submitted on 6 January 2006.

176. The evidence in Mr Burns' report, responding to the questions jointly posed by the parties, is as follows:

"**2.1 What is or is understood to be interference capable of seriously degrading and/or obstructing and/or repeatedly interrupting a radio communications service?**

In the context of a radiocommunication system, interference is considered to be the effect of *unwanted electromagnetic energy* (of whatever sort, including in-band and out-of-band emissions) on a *wanted radio signal*, manifested by any degradation in the performance of the system. It follows that for interference to exist there has to be an unwanted signal in the presence of a wanted signal. However, a signal may notionally be considered to be unwanted (i.e. have the potential to cause interference) in the case where one is trying to prevent or reduce the possibility of interference occurring with respect to a wanted signal that might be put into operation at some time in the future.

In technical terms the impact of interference is often associated by considering the ratio of the wanted signal level received (usually designated "C"…) to the unwanted signal level (usually designated I+N…). In order to achieve a certain quality of performance (e.g. a minimum level of audio quality or a better than a required rate of error in the information transfer) a given C/(N+I) ration has to be maintained, where the exact ration depends on the means (i.e. modulation and coding) by which the information to be transferred is carried by the radio signal.

Interference to a radiocommunications service can originate in four main ways:

(i) *Self-interference*, which occurs within a radio system (such as a GSM network) and is planned/managed by the operator of that system. Noting that the performance of a radio link depends on (N+I)…a system can be said to be *noise limited*, if the interference is significantly less than the noise, or *interference limited* if the interference is significantly greater than the noise.

(ii) *External interference* received from other systems operating lawfully nearby in frequency and/or location.

(iii) External interference received from other systems operating unlawfully. This can be unintentional (e.g. faulty equipment) or mischievous (e.g. unlicensed broadcasters).

(iv) External interference from non-radio systems, e.g. noise from electrical devices such as car ignitions or thermostats or from natural sources such as lightning.

The effect of interference in terms of performance degradation is a continuum ranging from extremely low levels of interference having a negligible impact to very high levels of interference preventing any information from being transferred.

Given that the performance of a radiocommunication service depends on the level of received information and that this dependency is a continuum as noted above, it is important to be able to define a number of benchmark levels of interference.

Formal definitions of three benchmark levels are contained in the ITU Radio Regulations, namely *permissible, accepted* and *harmful* interference…

Permissible interference – this level complies with quantitative interference sharing criteria contained in ITU-R Recommendations or as assumed by national regulatory authorities or regional bodies (CEPT)…

Accepted interference – a higher level than permissible interference and which has been agreed between two or more administrations without prejudice to other administrations….Specific limits have been agreed on the emissions from UK mobile systems to prevent interference to foreign television services.

Harmful interference – the level at which service is seriously degraded, obstructed or repeatedly interrupted. In addition, for the more specific case of radionavigation or other safety services, interference is defined to be harmful if it endangers the functioning of the service. Harmful interference might arise when a faulty radio system generates emissions at frequencies other than those authorised, which affects the operation of another service operating on those frequencies.

The regulatory interference terms above relate to the types of interference discussed earlier as follows:

• Self-interference – this is generally the responsibility of the radiocommunication system designer and is therefore not regulated, although guidelines are often included in ITU-R Recommendations and standards from other sources. Interference can also be generated internally within a receiver in the form of intermodulation products created when two or more signals (wanted or unwanted) are received simultaneously at the receiver. Receivers may be required to meet minimum technical standards in order to minimise the potential for such interference to arise.

• External interference (from other systems operating lawfully) – in the normal course of events the level of this interference would be expected to fall within permissible levels (or accepted levels where relevant). It is unlikely, but possible, that anomalous propagation conditions could give rise to harmful levels of interference being received, however this should typically only be for short periods of time. An example is the occasional interference to TV reception along the south and east coasts due to certain weather conditions which lead to anomalous propagation effects.

• External interference (from other systems operating unlawfully) – it is not necessarily the case that systems operating unlawfully will give rise to interference greater than permissible or acceptable levels. It is however more likely that unlawful transmissions rather than lawful transmissions will give rise to harmful interference simply because of the inherent lack of control over such transmissions.

• External interference (from sources other than radio systems) – little can be done about naturally occurring electrical noise. Man-made electrical noise however is controlled by other instruments relating to Electro-Magnetic Compatibility (EMC), for example CEN/CENELEC and CISPR standards. Equipment not compliant with such standards and associated regulations or equipment that is faulty can give rise to harmful interference."

2.3 Are GSM Gateways capable of giving rise to interference?

A GSM gateway, assuming it is compliant with the relevant Interface Standard, is treated by the GSM network to which it connects in exactly the same way as any other GSM terminal. In principle, an individual call originating or terminating on a GSM gateway is no more likely to cause interference within a GSM network than a call originating or terminating on any other mobile terminal. Where a number of calls are underway simultaneously at a GSM gateway, the probability of co-channel interference arising to other nearby cells will be greater than in the case of a single call from a single handset, but is unlikely to be significantly different from the interference generated by a similar number of conventional mobiles operating within the same cell. The peak level of co-channel interference between cells within the network is therefore unlikely to change as a result of the operation of GSM gateways in the network, although the average level may be higher if the average level of traffic in a particular cell is greater due to the presence of a GSM gateway.

Harmful interference could arise where a GSM gateway equipment is used in a manner that falls outside the interface standard, e.g. by the connection of a high gain antenna that would result in significantly higher levels of unwanted energy being received by distant co-channel base stations. Interference could also arise in a situation where a GSM gateway was to transmit in a manner that did not cooperate with the network, e.g. by attempting to initiate a call when all the available voice channels are already in use. However, such a situation should not arise if the equipment is in compliance with the Interface requirement.

We note that the GSM Association has cited the possibility that the operation of multi-channel GSM gateways could lead to intermodulation products, whereby simultaneous transmissions on two or more different frequencies combine to create unwanted emissions on other nearby frequencies. If this were the case then it is possible that under some circumstances interference could result to other nearby cells.

In practice the likelihood of such interference arising seems small given the relatively low power emitted by GSM terminals. Although no limits are defined in the GSM standards for emissions resulting from the co-location of multiple GSM terminals, the generation of excessive intermodulation products could be considered a breach of the R&TTE Directive requirement with regard to prevention of harmful interference. There could therefore be a case for testing such multi-channel equipment to verify whether or not there is in practice a significant generation of intermodulation products that could lead to potential interference.

2.4 Is congestion capable of giving rise to interference?

The question whether congestion within a GSM network, arising from the presence of one or more GSM gateways, constitutes interference hinges on whether the signals connecting the network to the GSM gateway(s) can be regarded as comprising wanted or unwanted radio energy and, if the energy is determined to be unwanted, whether there is a consequential degradation of a wanted radio signal.

The management of the radio frequencies used by individual base stations to communicate with terminals in a GSM network is a function of the Radio Resource management layer part of the network which oversees the establishment of a communications link between the mobile station and the mobile switching centre. Radio resource management relies on signalling between the terminal (gateway or mobile), base station and mobile switching centre (MSC). Before a radio channel can be assigned to a terminal to enable communication with the network, the terminal must be authenticated by checking the credentials of both the terminal equipment and the SIM card against databases maintained in the MSC.

Each SIM card has a unique International Mobile Subscriber Identity (IMSI) number which enables the network to identify whether the card is authorised to access the network. Each equipment (phone or gateway module) has a unique International Mobile Equipment Identity (IMEI) number which enables the equipment to be checked against a database of stolen or otherwise unauthorised equipment. If the SIM card is identified as an authorised subscriber and the equipment is not identified as blacklisted in the Equipment Identity Register, the terminal will be connected to the network and the call may proceed. Since the decision to connect the terminal is effectively made by the network, and the terminal is compliant with the relevant interface standards, in physical (radio frequency) terms the radio signal connecting the terminal to the base station is indistinguishable from any other radio signal connecting a GSM terminal to the network.

On this basis, the radio link connecting a properly functioning GSM gateway to the network must be considered to be a "wanted" signal and cannot therefore be considered to constitute interference in the context of the definitions presented in 2.1 above."

177. Vodafone provided comments on Mr Burns' draft report and asked him, inter alia: "Do you agree…that limitations on duty cycle for licence-exempt devices are intended to avoid congestion in narrow spectrum allocations? Please provide an

explanation of your answer". In an Annex to his report Mr Burns responded as follows: "Yes, but there seems to be a conflation of two effects. One is a network congestion effect and the other is an interference effect. A device transmitting continuously using network resources with authorisation from the network will cause congestion but this is not in my view an interference effect. In other circumstances (i.e. considering interference between different devices between which there is no network control) a higher or lower duty cycle will have the potential to cause more or less interference".

The parties' submissions

Floe and Worldwide's submissions

178. Floe and Worldwide submit that OFCOM's analysis of regulation 4(2) of the Exemption Regulations in the Second Decision is in breach of Article 7 of the RTTE Directive because COMUGs do not cause "interference" when used, far less "harmful interference". Therefore OFCOM cannot, as it seeks to do, rely on Article 7(2) of the RTTE Directive as a justification for the prohibition on the use of COMUGs.

179. Floe submits (and OFCOM does not contest) that COMUG apparatus bears the CE marking for the purposes of Annex VII of the RTTE Directive and complies with all the technical requirements for such equipment. Therefore, pursuant to Article 8(1) of the RTTE Directive the UK may not prevent, restrict or impede the putting into service of GSM gateway equipment.

180. Floe submits that the expert report of Mr Burns (referred to below):

(a) confirms the consistent position of Floe and Worldwide that "harmful interference" refers to "unwanted emissions";

(b) rejects OFCOM's analysis of "harmful interference" in the Decision and at Annex 5 to the Defence; and

(c) makes clear that, from the face of the Second Decision, OFCOM did not ask itself the right questions in its assessment of whether COMUGs cause harmful interference within the meaning of Article 7(2) RTTE.

181. Floe and Worldwide submit that even if GSM gateway equipment does cause "interference" (which is denied) it is not of a type which justified a restriction. It is only "harmful" interference that may justify a restriction on the putting into service of the equipment. This only arises where degradation of a radio-communications service is "serious" or the radio-communications service is "repeatedly" interrupted. OFCOM failed to make this necessary distinction in relying on "harmful interference". OFCOM has failed to explain why it has decided to treat certain "interference" (as defined by OFCOM) as harmful and certain interference as not harmful.

182. Floe and Worldwide submit that, for example, a single large office building in which each of several hundred employees have a mobile phone may cause a far greater risk of congestion than one standard COMUG device. Similarly, stadia, in which large groups of people regularly use mobile phones during football matches or concerts create a more substantial risk of congestion than COMUGs. OFCOM's analysis is based merely on estimates of COMUG activity and has been reached without any consultation with the COMUG operators. OFCOM cannot properly have reached its conclusion that COMUG activity would be "much more widespread than at present" without allowing COMUG operators an opportunity to make representations on that issue. Furthermore OFCOM's analysis ignores the powerful commercial interest of the COMUG operators themselves to avoid congestion arising to ensure the quality of their own services. OFCOM's assumption that customers of COMUG operators (para 31 to Annex 5 to the Defence) are willing to put up with higher call blocking in exchange for the savings made on calls that they do manage to make is not based on any reasoned analysis or evidence.

OFCOM's submissions

183. OFCOM submits that, insofar as regulation 4(2) of the Exemption Regulations applies to COMUGs, it is consistent with Article 7(2) of the RTTE Directive. OFCOM

submitted that only the application of the Exemption Regulations to COMUGs is relevant in the context of this case and submitted no positive case on whether the prohibition of all commercial services by GSM Gateways is compatible with the RTTE Directive.

184. OFCOM submits that the restriction on the use of COMUGs is justified under Article 7(2) RTTE: (a) to avoid "harmful interference" and (b) because use of the radio spectrum by COMUGs is inappropriate use of the spectrum.

185. OFCOM submits that the term "harmful interference", defined in Article 2(i) of the RTTE Directive is "interference which endangers the functioning of a radionavigation service or of other safety services or which otherwise seriously degrades, obstructs or repeatedly interrupts a radiocommuncations service operating in accordance with the applicable Community or national regulations."

186. OFCOM submits that unless prohibited the use of COMUGs would lead to a significant increase in congestion on the mobile network operators' networks with the result that the radiocommunications service provided by the mobile network operators would be seriously degraded and/or repeatedly interrupted within the definition in Article 2(i). OFCOM relies on evidence submitted to the RA during its consultation in 2002/2003 and to OFCOM during the course of its reinvestigation of this case.

187. In response to Floe's submission that "harmful interference" in the RTTE Directive should be interpreted in accordance with the ITU Radio Regulations OFCOM submits that it is not appropriate to interpret an autonomous concept of Community law by reference to a definition in a different agreement of an international organisation. OFCOM also submits that Floe had previously acknowledged in response to OFCOM's statement for comment in March 2005 that unregulated use of GSM Gateways could cause harmful interference.

188. OFCOM notes that Floe and Worldwide rely on the expert report of Mr John Burns. OFCOM submits that Mr Burns' evidence was not intended to cover the legal meaning of the term "harmful interference" and it is not appropriate to interpret a legal definition by reference to the evidence of a technical expert. The meaning of

"harmful interference" is, submits OFCOM, purely a legal question and the Tribunal cannot be assisted by Mr Burns' evidence in that regard.

189. In any event, OFCOM submits that the approach adopted by Mr Burns in his report is too narrow as it focuses entirely on how interference arises at the physical (radio link) level, rather than more broadly at its impact on the operational (systems) level. OFCOM submits that the TETRA network (Terrestrial Trunked Radio), used by the police, operates in a similar manner to a mobile network. In the same way that mobile networks are likely to become congested if a large number of users concentrated in the same area make or receive calls at the same time the TETRA network is likely to become congested if large numbers of TETRA handsets are operated at the same time in close proximity. If OFCOM were to follow the approach adopted by Mr Burns OFCOM submits that it could not regulate to prevent congestion arising in the operation of the TETRA network.

190. In OFCOM's view congestion caused by COMUGs would clearly be "harmful" in the sense intended by the RTTE Directive. Vodafone provided evidence to OFCOM of one example where the level of call blocking in a cell went from below 2% to in excess of 35% before the GSM gateway was disconnected by Vodafone. GSM gateways tend to operate constantly and for long periods of the day and this gives rise to "serious degradation" to the quality of service of ordinary mobile phone handset users and "repeated interruption" to such service.

191. Irrespective of whether the Secretary of State did or did not consider or rely on whether GSM gateways cause "harmful interference" at the time the Exemption Regulations were made, OFCOM is not precluded from relying on that justification now. The compatibility of domestic law with Community law is an objective question to be decided by reference to all relevant matters. In any event it is clear that the Secretary of State did consider that there was a risk of congestion arising from commercial use of GSM gateways and it is irrelevant whether or not the risk of such congestion was then characterised as "harmful interference" by the RA or the Minister.

192. OFCOM submits that the mobile network operators' networks are planned around certain assumptions about levels of demand. Where demand increases significantly, unless there is spare capacity available, the network becomes congested and this may result in end-users being unable to make or receive calls. Even if it is possible for the mobile network operators to expand their capacity to accommodate increases in demand or traffic, the network is likely to remain congested in the meantime.

Vodafone's submissions

193. Vodafone submits that Floe's arguments in its appeal depend on technical issues and possible future developments in the use of networks. These arguments raise regulatory questions of a specialist judgmental nature in respect of which the Secretary of State will have taken expert advice (from OFCOM and its predecessors). In such areas, the Secretary of State has a wide margin of appreciation and in deciding whether or not such conclusions were correct the Tribunal does not have a full mertis jurisdiction as identified in *Napp Pharmaceuticals v Director General of Fair Trading* [2002] CAT 1 but must approach these issues with the same limited review as would the Administrative Court hearing an application for judicial review (*Upjohn Limited v Licensing Authority* [1999] ECR 1-223, para 34 "*The Community judicature must restrict itself to examining the accuracy of the findings of fact and law made by the authority concerned and to verifying, in particular, that the action taken by that authority is not vitiated by a manifest error or a misuse of powers and that it did not clearly exceed the bounds of its discretion*)".

194. Vodafone notes that OFCOM provided, at Annex 6 to its Defence a table showing that different Member States in the EU have different approaches to the regulation of GSM Gateways (commercial use of GSM Gateways being permitted or not prohibited in Austria, Belgium, Czech Republic, Denmark, Estonia, Germany, Greece, Hungary, Slovakia, Slovenia and Sweden). Vodafone submits that, from that table, it appears that in some Member States use of GSM Gateways for "interconnection" is not considered proper use of mobile frequencies that have been assigned for the operation of mobile networks (Germany, France). In some Member States where the commercial use of multi-user GSM gateways is permitted the terms for the usage of

such equipment are dealt with in the contractual arrangements of the mobile operators (e.g. Austria, Belgium).

195. Vodafone submits that the information in the table at Annex 6 to OFCOM's defence indicates that there is a range of reasonable views which regulators in the EU may adopt as to the operation of GSM gateways and that it is an issue calling for the exercise of specialist judgment. It is also a potential function of the different factual matrices against which the different regulators will have made such decisions (as to matters such as population density, patterns of industry and urbanisation).

196. As to the substance of the issues Floe's arguments are flawed. Floe's reliance on "harmful interference" in the RTTE Directive overlooks the way in which such terms are applied in Directives. The assessment of risk of harmful interference is a paramount area of specialist regulatory judgment and the courts should be reluctant to interfere. No sufficient case to review the proportionality of the Secretary of State's adoption of, or OFCOM's continuation of, the Exemption Regulations has been made out by Floe.

197. Floe's reference to the ITU definitions is obviously misconceived because of the need for consistent, uniform EU meanings to be attached to such terms. The ITU Radio Regulations have a different purpose to the RTTE and Authorisation Directives.

198. Floe's own case, in the evidence of Mr Stonehouse, is that some form of licensing regime for COMUGs is required to set regulatory parameters. It is impossible to see how a national regime which required Floe to have an individual licence before providing services could be disproportionate.

199. As regards the reliance by Floe and Worldwide on the expert evidence of Mr Burns, that evidence does not begin to answer the proper question: did the Secretary of State when he made regulation 4(2) have proper reasons *related to* effective use of the spectrum or avoidance of harmful interference to support the restriction? If he did, then regulation 4(2) is lawful and neither Floe nor Worldwide have adduced any evidence to impugn his decision.

200. OFCOM was not applying "its restriction" of COMUGs in the Second Decision but took that Decision by reference to the law in force as at March 2003. Even if the focus is shifted to the assessment of this issue by OFCOM in its Second Decision then an error of law still must be demonstrated. There is no error of law in the reasoning of OFCOM at paragraphs 148-159 of the Second Decision.

201. Vodafone submits that the expert evidence of Mr Burns is both inadmissible and unnecessary. The meaning of words in the context of both the RTTE and Authorisation Directives is a matter of law based on the meaning of ordinary English words and is not a technical question on which the view of a technical expert can assist. In any event, there is no good reason to give the words "harmful interference" a restricted meaning as in this context the definition of harmful interference should be interpreted to mean "any effect, by any means, which is detrimental to the operation of a network in degrading the service or preventing or interrupting calls".

202. Vodafone submits that the definition of "harmful interference" should be interpreted in its context and by reference to Article 3(2) RTTE ("radio equipment shall be so constructed that it effectively uses the spectrum…so as to avoid harmful interference") and recital 22 RTTE ("whereas effective use of the radio spectrum should be ensured so as to avoid harmful interference; whereas the most efficient possible use…of the radio frequency spectrum should be encouraged."). Vodafone also refers to Article 5(1) of the Authorisation Directive. In that context, Vodafone submits it is clear that the words must be construed broadly, so as to include congestion effects impairing the efficiency of the network or causing inefficient use.

203. Furthermore, notwithstanding Mr Burns's evidence, Vodafone submits that as a matter of commonsense "interference" includes congestion effects. From the point of view of a customer the reason why any failure to connect a call occurs is irrelevant. Whether a signal is a "wanted" signal or an "unwanted" signal the use of the network is interfered with. Mr Burns was constrained by his instructions to answer the questions with reference to radio signals and spectrum engineering. However, the RTTE Directive takes account of the system operations level. Mr Burns' understanding of "interference" is therefore too narrow.

T-Mobile's submissions

204. T-Mobile submits that the RTTE Directive has no application to the present case as the Exemption Regulations are applicable national law which are clear and have not been disapplied. The RTTE Directive is concerned with equipment *as equipment* and not the right to use spectrum to provide services; it is the latter that is relevant to the present case. That is, submits T-Mobile, a complete answer to Floe's reliance on the RTTE Directive.

205. In any event OFCOM was entirely justified in rejecting the central premise of Floe's argument on incompatibility as GSM gateways cause substantial harmful interference to the operation of MNO's networks. OFCOM had more than adequate information before it to justify such a conclusion. In any event T-Mobile has submitted evidence from Mr Wiener as to the problems caused by GSM gateways and submits that, in fact, the Exemption Regulations do not currently go far enough. A complete ban on the use of GSM gateway equipment by anyone is required.

206. T-Mobile submits that use of GSM gateways does give rise to a more than negligible risk of harmful interference within the meaning of the RTTE Directive and Authorisation Directive.

207. Mr Burns agreed with T-Mobile that GSM networks have been designed on the basis of certain assumptions as to traffic levels and the manner in which equipment will be used and on assumptions as to the randomness of calls. There is a non-linear relationship between available numbers of channels in a cell and its capacity. These assumptions break down if used by equipment with very high volumes of traffic such as GSM Gateways. Equipment that functions in a manner which is outside the assumptions made in the design of the system should be understood to give rise to "unwanted" signals and therefore "harmful interference".

208. T-Mobile submits that there is plainly an element of judgment in assessing whether degradation is "serious" or "repeated" but discretion has been conferred on OFCOM in this case and unless it commits a manifest error of assessment in this regard OFCOM is the sole arbiter of when interference amounts to "harmful interference".

209. For the avoidance of doubt, in response to paragraph 19 of OFCOM's skeleton argument suggesting that OFCOM is in a position to grant individual licences to other operators to use COMUGs, T-Mobile contends that OFCOM would not be in such a position. In investing in all the infrastructure necessary to utilise its licence T-Mobile has relied, it submits, on clear and unequivocal representations made to it by the Secretary of State for Trade and Industry that no other MNOs or any third party would be granted similar licences in respect of the same frequencies. However this issue is, submits T-Mobile, strictly irrelevant to the current appeal.

Tribunal's analysis

210. At paragraph 51 of OFCOM's Defence to Floe's appeal against the First Decision OFCOM stated, "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." In that paragraph of the Defence the stations or apparatus being referred to were GSM gateways and "undue interference" was being used as a synonym for "harmful interference" (see paragraph 48 of that Defence).

211. In the First Decision, and in the appeal against the First Decision the Director (and subsequently OFCOM) did not rely on GSM gateways causing "harmful interference". Accordingly the true construction of the term "harmful interference" was not an issue at all in the appeal against the First Decision. In its Second Decision OFCOM did not refer to its previous position, as set out in its Defence above, or explain why, in the Second Decision, it had changed its position and was now relying on "harmful interference". It has now become an issue in the appeal against the Second Decision since, for the first time, in these proceedings OFCOM (and Vodafone and T-Mobile) now rely on the alleged "harmful interference" caused by use of GSM gateways as a justification for a restriction on the use of GSM gateways to provide a telecommunications service by way of business.

212. We have not been provided with any materials which demonstrate that the restriction of the commercial use of GSM gateways in the Exemption Regulations was imposed specifically to deal with "harmful interference", as distinct from congestion. The

Second Decision proceeds on the basis that a restriction on commercial use of Multi-User GSM gateways is compatible with the RTTE Directive. OFCOM relies on evidence in respect of congestion as amounting to "harmful interference" (see paragraphs 144 to 161 of the Second Decision). This raises the question whether, in so doing, OFCOM has, as a matter of law, given a true construction to the term "harmful interference" in Article 2(i) and Article 7(2) of the RTTE Directive.

213. In the Second Decision, OFCOM states that Article 7(2) of the RTTE Directive permits a Member State to impose restrictions on the putting into service of radio equipment which related to the effective and appropriate use of the radio spectrum, the avoidance of harmful interference or matters relating to public health. OFCOM concluded (paragraph 158 of the Second Decision) that the restriction in the Exemption Regulations was such a restriction and that it is objectively justified as a means of avoiding the risk of harmful interference and inappropriate use of the radio spectrum. The basis for that justification was evidence provided to OFCOM by the mobile network operators about "the impact of GSM gateway use on the operation of their networks and the quality of service they are able to provide to their subscribers" (paragraph 150 Second Decision). It was explained at paragraph 153 of the Second Decision and at Annex 5 to OFCOM's defence in these proceedings that the evidence that had been provided to OFCOM was in particular that GSM gateways can give rise to "congestion". This is stated to be because, if call traffic levels are higher than those "anticipated" by mobile operators as a result of GSM gateways being present in a cell, there may be insufficient capacity in a particular cell for all of the call traffic. The consequence may be that some users will experience an inability to make calls from time to time and some incoming calls will not be received. Floe (supported by Worldwide) appeals against both of those findings of OFCOM. No party submits that public health is relevant to this appeal.

214. At the hearing Vodafone submitted that the word "interference" should be given its ordinary dictionary meaning in English but did not itself provide the Tribunal with any extract from any dictionary in support of its submissions.

215. The submissions of OFCOM, Vodafone and T-Mobile at the hearing were primarily directed to submitting either that Mr Burns' evidence as to the technical meaning of

"interference" from the perspective of a radio engineer was irrelevant and/or that it was inadmissible. Mr Burns' report was also attacked on the basis that he had informed his report by reference to a definition of "harmful interference" and "interference" in the Radio Regulations of the International Telecommunications Union ("ITU Radio Regulations"). It was submitted that the ITU Radio Regulations are irrelevant to the construction of Community law in this area and to national law based on Community law.

216. Article 2(i) of the RTTE Directive defines "harmful interference" as follows:

> "interference which endangers the functioning of a radionavigation service or which otherwise interrupts a radiocommunications service operating in accordance with the applicable Community or national regulations".

The issue therefore is whether OFCOM is correct that congestion potentially caused by use of GSM gateways amounts to "harmful interference" within that definition. No party suggests that radionavigation services or other safety services are relevant to this case.

217. OFCOM, Vodafone and T-Mobile did not assist us as to the true construction of the term "interference" save to submit that that word, in the RTTE Directive, had to be understood according to its ordinary "colloquial" meaning in English, as something which interferes with a service.

218. The starting point for the construction of the term "harmful interference" is Article 7(2) RTTE and the definition of "harmful interference" in Article 2(i). It is clear from the words of the definition in Article 2(i) that to fall within that definition any serious degradation, obstruction or repeated interruption of a radiocommunications service must arise out of "interference".

219. The RTTE Directive makes clear that it establishes a regulatory framework for the placing in the market, free movement and putting into service of radio equipment (Article 1(1)). The definition of "radio equipment" is "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" and "radio waves" means "electromagnetic waves of frequencies from 9 kHz to 3000 GHz, propagated in space without artificial guide" (Article 2(c) and (d) of the RTTE Directive).

220. In our judgment, it is clear from the context of the Directive as a whole that the language used in the RTTE Directive must be read in the context of terminology applicable to radio equipment and telecommunications. We therefore reject the submission that the word "interference" must be given a colloquial meaning in the definition of "harmful interference".

221. During the hearing the Tribunal caused copies of an extract from the Oxford English Dictionary definition of "interference" to be provided to all the parties. The Oxford English Dictionary lists various senses of the word "interference" including sense 5 "Broadcasting and Telecommunications" for which the definition is "disturbance of the transmission or reception of signals by the intrusion of extraneous signals; hence, signals collectively or radiation by which it is perceived (e.g. unwanted sounds in radio reception)."

222. The dictionary definition of "interference" applicable in the broadcasting and telecommunications sense refers to a disturbance by the intrusion of "extraneous signals" and to "unwanted sounds". Accordingly we find that the term "interference" used in the definition of "harmful interference" in the RTTE Directive refers to extraneous or unwanted signals. Congestion, or increased call traffic, on the other hand, does not arise as a result of "extraneous" or "unwanted" signals but because too many "relevant" or "wanted" signals compete to use the radio waves at the same time, so that not all of them are able to use the relevant radio waves at the same time. Exceeding available capacity in this way is not "interference" in the sense used in the definition of "harmful interference" in Article 2(i) of the RTTE Directive.

223. At paragraphs 150 to 154 of the Second Decision OFCOM relies on congestion and concentration of traffic from many users in a single location as amounting to "harmful interference". OFCOM has focused its analysis of the term "harmful interference" on the words "seriously degrades, obstructs or repeatedly interrupts" (which words it has underlined at paragraph 151 of the Second Decision). This ignores the opening words

of the definition which begins "interference which…". It is therefore a prerequisite that "interference" exists and that any such serious degradation, obstruction or interruption must arise out of such "interference" before it can amount to "harmful interference". As explained above, congestion, of itself, cannot be "harmful interference" for these purposes because it is not "interference" in the relevant sense.

224. We note that Floe and Worldwide also rely, as textual support for their submissions, on the definition of "interference" in the ITU Radio Regulations. The ITU Radio Regulations define "interference" as "the effect of unwanted energy due to one or a combination of emissions, radiation or inductions upon reception in a radiocommunication system, manifested by any performance degradation, misinterpretation, or loss of information which could be extracted in the absence of such unwanted energy". The ITU Radio Regulations define "harmful interference" as "*Interference* which endangers the functioning of a radionavigation service or of other safety services or seriously degrades, obstructs, or repeatedly interrupts a *radiocommunication service* operating in accordance with these Regulations".

225. OFCOM and Vodafone submit that the ITU Radio Regulations have nothing to do with the RTTE Directive, Community law or the facts of this case and it would therefore, in their submission, be inappropriate for us to have regard to the reference to "unwanted energy" in that definition. However, we note that the ITU Radio Regulations are referred to in Vodafone's Licence which expressly adopts various definitions from the ITU Radio Regulations. In those circumstances we cannot accept the submission that the ITU definition is entirely irrelevant. We note that the definition of "harmful interference" in the ITU Radio Regulations is almost identical to the definition in the RTTE Directive and also has the opening words "interference which…". In those circumstances, although we do not need to rely on the ITU Radio Regulations, we note that the definition in those regulations provides further textual support for our construction.

226. OFCOM and Vodafone did not refer us to any textual support for their colloquial construction of the definition in Article 2(i) of the RTTE Directive.

227. Accordingly construing the language used in the definition of "harmful interference" in the context of the RTTE Directive as a whole and in the sense used in telecommunications and broadcasting, as evidenced by the Oxford English Dictionary and supported by the ITU Radio Regulations, we conclude that OFCOM in its Second Decision misconstrued the RTTE Directive and so committed an error of law in this regard. In that respect the reasoning in the Second Decision cannot be upheld.

228. We have also had the advantage of Mr Burns' evidence as to what is understood by "interference" in the radiocommunications context. Mr Burns' evidence accords with the definition in the Oxford English Dictionary and the ITU Radio Regulations. It was submitted to us by OFCOM, Vodafone and T-Mobile that this evidence was inadmissible and that we should take no account of it. It was adduced *de bene esse* (i.e. conditionally, and subject to a final ruling as to its admissibility). In reaching our conclusion above as to the construction of Article 7(2) and 2(i) of the RTTE Directive we have taken no account of Mr Burns' evidence. However, had we taken account of his evidence we would have reached the same conclusion. Since we have decided this issue without Mr Burns' evidence we do not, strictly, need to decide whether the evidence is admissible. However, since the evidence was adduced *de bene esse* we deal with its admissibility.

229. OFCOM, Vodafone and T-Mobile submitted that the construction of the term "harmful interference" is a question of law and the words of the Directive should be given an ordinary or colloquial meaning. They submitted that accordingly the Tribunal should not take account of the meaning of "interference" which is specific to telecommunications or radiocommunications, which we have referred to above, and consequently should not have regard to Mr Burns' evidence.

230. In our judgment, the meaning of "interference", in the context of telecommunications law and, in particular, the context of the RTTE Directive, should be considered by a court or tribunal having regard to an understanding of the technical meaning of these words. Having rejected the submission that the word "interference" in the definition of "harmful interference" is to be understood colloquially and not technically Mr Burns' evidence is relevant and admissible (and would be admissible even in judicial review proceedings in the administrative court: see the judgment of Collins J in *R (on*

the application of Lynch) v General Dental Council [2003] EWHC 2987 (Admin), paragraphs [22]-[25]).

231. We note that the submissions of OFCOM, Vodafone and T-Mobile were directed at whether the words of the definition in Article 2(i) of the RTTE Directive were to be understood in a technical sense or a colloquial sense. They were not disputing that if the words in question were to be given a technical meaning that meaning should be other than as set out in the Oxford English Dictionary, the ITU Radio Regulations and Mr Burns' evidence.

(b) inappropriate use of the radio spectrum

The parties' submissions

Floe's submissions

232. Floe submits that once it has been demonstrated that COMUG devices do not, of themselves, cause harmful interference it is not open to OFCOM to fall back on a general assertion that COMUG use is not "appropriate" within the meaning of Article 7(2) RTTE. OFCOM has failed to identify any material reason absent the alleged congestion and "harmful interference" which demonstrates that COMUG leads to inappropriate use of the radio spectrum.

233. Floe submits that the wording of Article 7(2) is "effective *and* appropriate" not "effective *or* appropriate". Floe submitted that these words must be read conjunctively and not disjunctively and that accordingly OFCOM's analysis in the Second Decision was misconceived.

OFCOM's submissions

234. OFCOM submits that the use of COMUGs is inappropriate use of the radio spectrum for the purposes of Article 7(2) of the RTTE Directive. OFCOM submits that its reasons for this submission are essentially the same as its reasons for considering that use of COMUGs gives rise to harmful interference. In response to Floe's submission

that OFCOM's submissions are tantamount to arguing that use by mobile phone users of GSM spectrum is inappropriate, OFCOM submits that use of a mobile network by COMUGs is to be distinguished from use of the network by mobile phone users. OFCOM submits that use of the radio spectrum by COMUGs involves one person using the spectrum in a manner that may significantly and repeatedly interrupt other parties' use of the radio spectrum. The fact that localised congestion may occur sporadically on a mobile telecommunications network from the use of ordinary mobile phones is not comparable to use by COMUGs.

Vodafone's and T-Mobile's submissions

235. Vodafone submits that OFCOM plainly had substantial evidence before it to support the proposition that use of COMUGs would give rise to an inappropriate use of the spectrum. No error of law has been established in OFCOM's analysis in the Second Decision (paragraphs 148-159). T-Mobile supports the submissions of OFCOM and also submits that use of GSM gateways gives rise to "inefficient" use of the spectrum.

Tribunal's analysis

236. Article 7(2) of the RTTE permits a Member State to restrict the putting into service of radio equipment for reasons related to the effective and appropriate use of the radio spectrum. The question is therefore whether the imposition of the restriction on commercial use of GSM gateways in Regulation 4(2) of the Exemption Regulations is justified as a restriction related to the appropriate and effective use of the radio spectrum.

237. In the Second Decision OFCOM said the following concerning the effective and appropriate use of the spectrum:

> "150. Ofcom has been provided with evidence from the mobile network operators about the impact of GSM gateway use on the operation of their networks and the quality of the service they are able to provide their subscribers. This evidence indicated that the use of Commercial Multi-user GSM Gateways, if such use were to be permitted, would be likely to give rise to problems of harmful intereference and would be an inappropriate use of the radio spectrum (…)"

238. In a footnote to that paragraph OFCOM stated:

> "The RA previously also considered that the restriction on the use of Commercial Multi-User GSM gateways was justified on the basis that it was an ineffective use of the radio spectrum. Ofcom does not dispute that the use of GSM gateways to make a call to a mobile phone involves the use of additional spectrum resources compared to a standard fixed-to-mobile call. Therefore, in that sense, it could be said that the use of a GSM gateway as an alternative to making a fixed-to-mobile call is an ineffective use of the radio spectrum. However, Ofcom considers that it would be inconsistent with its broader policies in relation to spectrum management if it were to rely on this argument alone as a justification for restricting GSM gateway use. As far as possible Ofcom aims to allow the market to determine the most economically efficient outcome for spectrum allocation. Therefore, although Ofcom does not consider that the RA's reasoning was incorrect or unwarranted, Ofcom no longer considers it appropriate to rely solely on such reasoning to justify a continued restriction on the use of Commercial Multi-User GSM gateways. Ofcom would only consider it appropriate to intervene in the market by imposing or maintaining restrictions on the use of GSM gateways if it were of the view that the market would be unable to determine whether such use was efficient, for example because of some market failure. As noted below in parallel to publishing this Decision Ofcom has published a consultation document which addresses broader questions about the future regulation of GSM gateways outside the scope of this Decision."

239. In the above passage of the Second Decision, OFCOM separated the "effective" use of the radio spectrum from "appropriate" use. OFCOM therefore relies only on "appropriate" use as justifying the restriction on commercial use of GSM gateways in regulation 4(2) and does not rely on reasons related to the "effective" use of the radio spectrum. OFCOM submits that the potential for commercial use of GSM gateways to give rise to congestion amounts to "inappropriate" use of the radio spectrum which justifies the imposition of the restriction on such use.

240. OFCOM and Vodafone did not specifically address us on Floe's submission that the words "effective and appropriate" must be read conjunctively and not disjunctively.

241. The restriction imposed in Regulation 4(2) is that "relevant apparatus" cannot be used to provide or to be capable of providing a wireless telegraphy link by means of which a telecommunications service is provided by way of business to another person. If the words "effective and appropriate" can be read disjunctively then the next question would be whether the evidence referred to in the Second Decision, supports OFCOM's conclusion that it is entitled to restrict the putting into service of GSM gateways by prohibiting the use of GSM gateways to provide or to be capable of

providing a wireless telegraphy link by means of which a telecommunications service is provided by way of business to another person

242. The evidence relied on by OFCOM in the Second Decision related to increased call traffic volumes which, it is said, can lead to congestion in particular as regards Commercial Multi-User GSM Gateways (paragraph 153). However, in the agreed Statement of Facts before us at the last hearing the following was agreed by all parties:

> "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" (paragraph 20).

243. "Public" and "private" were being used in that statement as synonyms for "commercial" and "non-commercial" gateways. The agreed Statement of Facts also records that call traffic data can be indicative of whether a gateway is public or private and that it is unlikely that public and private gateways will produce the same traffic volumes and profile.

244. The restriction in the Exemption Regulations prevents all use of GSM gateways to provide a telecommunications service to another person by way of business. OFCOM's treatment of this issue in the Second Decision, and OFCOM and Vodafone's submissions to us are to the effect that since this appeal is concerned only with the provision by Floe of "COMUG" services our consideration of the Exemption Regulations should also be so confined. However, the restriction in the Exemption Regulations is not confined to the use of COMUGs. The evidence referred to by OFCOM is also directed more generally.

245. It seems to us that the submissions of OFCOM and Vodafone on this aspect of the appeal are both confused and confusing. In particular we have some difficulty in reconciling OFCOM's position that it is appropriate for the market, and not OFCOM, to decide what is an "effective" use of the spectrum while deciding that it must restrict use of GSM Gateways on the spectrum because such use may not be "appropriate", even if the market considers it to be "effective". However, for the reasons given

below, it is not necessary for us to reach any final decision as to whether "effective and appropriate" are to be read conjunctively or disjunctively.

246. On the basis of the submissions and material before us we are not satisfied as to the correctness of OFCOM's conclusion in the Second Decision that the restriction on commercial use of GSM gateways in the Exemption Regulations is required for the effective and appropriate use of the radio spectrum under Article 7(2) of the RTTE Directive. In particular we cannot be satisfied that the evidence on which OFCOM relies, which relates primarily to the amount of call traffic potentially arising from commercial use of multi-user GSM gateways supports a restriction that is not related to call traffic but to the provision of services by way of business, regardless of the volume of call traffic. OFCOM's analysis of this issue in the Second Decision is in our judgment insufficiently reasoned.

247. It would not, on the basis of the material and submissions before us, be appropriate to form any final view as to whether the restriction in Regulation 4(2) could be justified on the basis of other material not before us or whether there may be other restrictions on the use of GSM gateways which could be justified on the basis of the evidence in respect of congestion upon which OFCOM relied in the Second Decision.

248. Submissions were also made to us as to our jurisdiction to consider the compatibility of the Exemption Regulations with the RTTE Directive and the Authorisation Directive. Insofar as there is an error of law in the Second Decision that undermines the reasoning in the Second Decision, it must, in our judgment, be within our jurisdiction to identify such error of law and to correct it. It is unnecessary for us, in this judgment, to make any observation as to the intensity of review which this Tribunal should apply in a case where the question is not purely an issue of law.

(c) Articles 7(3) and 7(4) of the RTTE Directive

The parties' submissions

Floe's submissions

249. Floe and Worldwide submit that the RTTE Directive recognises that there may be circumstances in which it would be necessary to disconnect apparatus which otherwise complied with the requirements of Article 3.

250. It is clear from recital 36 to the RTTE Directive that the Community legislature was aware of the risks of undermining the objectives of the Directive if national authorities were to be given a wide discretion to refuse access to or to allow disconnection of equipment which *prima facie* complies with the requirements of the RTTE Directive. Vodafone's actions in disconnecting Floe without first seeking permission to do so were not in accordance with Articles 7(3) and 7(4) of the RTTE Directive.

OFCOM's submissions

251. In response to Floe and Worldwide's submission that regulation 4(2) and Vodafone's actions in this case, are inconsistent with Articles 7(3) and 7(4) of the RTTE Directive OFCOM submits that those provisions are not applicable in the circumstances of this case (OFCOM notes that this was Floe's position during the earlier hearing before the Tribunal).

252. OFCOM submits that the reason Vodafone disconnected Floe was because Floe's use of commercial GSM gateways was unlawful as a matter of domestic law and not for technical grounds relating to the use of GSM gateway equipment. OFCOM relies on Vodafone's letter of 10 March 2003 in this regard.

253. OFCOM submits that it cannot have been the intention of Articles 7(3) and 7(4) of the RTTE Directive that a mobile operator should be precluded from disconnecting equipment in all circumstances without first obtaining the permission of the national authority, and without the national authority making a notification to the European Commission. If that were the case, OFCOM submits that mobile operators would be unable to disconnect customers who had not paid their bills without involving OFCOM and the European Commission.

254. In any event, OFCOM submits that Vodafone's actions were consistent with the procedure mandated by Article 7(4). OFCOM submits that it appears that Vodafone did speak to the RA prior to disconnecting GSM gateway operators and it appears that the RA raised no specific objection. OFCOM submits that the only possible failure would be a failure by the UK authorities to notify the European Commission. Even if the European Commission had been notified this could not have prevented Vodafone from disconnecting Floe. Article 7(4) does not give the European Commission any veto power over such disconnection. Therefore Floe has not been disadvantaged even if the correct procedure has not been followed.

Vodafone's submissions

255. Vodafone submits that Floe's attempted reliance on Articles 7(3) and 7(4) of the RTTE Directive is plainly misplaced as Article 7(2) clearly gives Member States the power to regulate the uses to which equipment can be put and that power must, of necessity, include a power to make any restricted use a criminal offence. Such illegality is obviously a reason upon which an MNO can rely to refuse to connect. The Article 7(2) process is quite separate from the process under Articles 7(3) to 7(5). The latter articles apply only to equipment that (a) meets the essential requirements and (b) has not been subject to a legitimate restriction under Article 7(2).

256. Vodafone submits that Articles 7(3) and 7(4) do not confer rights on Floe or Vodafone. The type of equipment being used is not in issue in this appeal, rather the issue is as to the use to which the equipment was being put.

Tribunal's analysis

257. In our view, Articles 7(3) and 7(4) of the RTTE Directive must be read in the context of Article 7 as a whole. The reference in Article 7(4) to "apparatus declared to be compliant with the provisions of [the RTTE Directive]" is to apparatus which complies with the appropriate essential requirements in Article 3 and which has not been restricted by a Member State for one of the reasons mentioned in Article 7(2).

258. If, notwithstanding its compliance with the essential requirements and that no lawful restriction has been imposed by the Member State under Article 7(2), such equipment causes serious damage to a network or harmful radio interference or harm to the network or its functioning, then the procedure set out in Article 7(4) must be followed if equipment is to be disconnected or if connection is to be refused.

259. The "failsafe" provision in Article 7(4) was not invoked by Vodafone when it disconnected Floe's equipment and SIM cards. What is relied upon by Vodafone (and by OFCOM) is a restriction imposed by the United Kingdom purportedly in reliance on one of the reasons set out in Article 7(2). In those circumstances Article 7(4) is irrelevant to the circumstances of this case.

260. As to Article 7(3) of the RTTE Directive, in our view that provision must be read together with Article 7(1). If there has been no restriction imposed by a Member State in accordance with one of the justifications under Article 7(2) then Member States must allow the putting into service of equipment that meets the appropriate essential requirements and shall ensure that operators of public telecommunications networks do not refuse to connect telecommunications terminal equipment to appropriate interfaces on technical grounds. Thus Article 7(3) applies if, but only if, there has been no lawful restriction imposed under Article 7(2). Article 7(3) does not confer any additional "self-standing" right irrespective of whether a restriction has been imposed under Article 7(2). We have already decided above that we are not satisfied on the basis of OFCOM's reasoning in the Second Decision that the restriction on commercial use of GSM gateways in the Exemption Regulations is, on the material before us, justified.

(d) The Authorisation Directive

The parties' submissions

OFCOM's submissions

261. OFCOM submits that the deadline for implementing the Authorisation Directive was 24 July 2003. Floe's GSM gateways were first disconnected on 18 March 2003, prior

to the date for implementing the Authorisation Directive. Accordingly, so far as Vodafone's actions in disconnecting Floe are concerned the Authorisation Directive can have had no legal effect. Whether or not the Authorisation Directive can at that time have had any effect on the UK authorities is irrelevant.

262. OFCOM submits that regulation 4(2) is a condition attached to a general authorisation for the purposes of Article 6(1) of the Authorisation Directive. Although there is no specific document in the United Kingdom that constitutes a "general authorisation" as such. Any person has a right to provide electronic communications networks or services within the United Kingdom subject to compliance with certain conditions adopted by OFCOM in accordance with Article 6(1) of the Authorisation Directive. These conditions include restrictions or limitations arising from the Exemption Regulations, since the Exemption Regulation form part of a "legal framework" for ensuring rights and obligations relating to the provision of electronic communications networks and services.

263. OFCOM submits that in considering whether the Exemption Regulations are a condition attached to a general authorisation what matters is their *effect* rather than their *form*. Insofar as regulation 4(2) limits a person's right to provide electronic communications by means of specified equipment and within certain specified frequencies it is clearly a "condition". It does not preclude anyone from providing electronic communications services *per se* but simply restricts the type of equipment and frequencies by which a person can do so.

264. OFCOM submits that the general authorisation applies irrespective of whether or not the use of the radio spectrum is made subject to individual rights of use. The right to provide an electronic communications network or service and the right to use the radio spectrum are mutually exclusive.

265. Even if regulation 4(2) is not a condition attached to a general authorisation, but simply a limit on the scope of the exemption this would still be in conformity with the Authorisation Directive as Article 5(1) of the Directive permits Member States to make the use of radio spectrum subject to individual rights of use where such use creates a more than negligible risk of harmful interference. For the reasons outlined

above, OFCOM submits that use of COMUGs does create a risk of harmful interference.

266. OFCOM submits that while it may be true to say that the self-use of GSM gateways can give rise to similar levels of traffic as the use of COMUGs that is not to say that they are likely to do so in practice. There are likely to be a number of reasons why this is not the case. OFCOM submits that it goes without saying that multiple end-users are likely to generate more traffic than a single end-user. Furthermore, there is an obvious incentive on a commercial GSM gateway operator to try to maximise the levels of traffic being passed through the GSM gateway, as there is a commercial benefit in doing so. The same incentive does not apply to entities using GSM gateways for self-use.

267. OFCOM notes that Vodafone's analysis, upon which it relied to identify COMUGs on its network, was that the average number of minutes used per SIM per day was 30 minutes in respect of a typical single-user gateway compared with 407.3 minutes for suspected COMUG use. Floe has not provided any evidence to suggest that Vodafone's figures are incorrect.

268. In response to Floe and Worldwide's suggestion that any congestion problems on a mobile operator's network could be overcome by cooperation with mobile network operators and that therefore regulation 4(2) is a disproportionate response, OFCOM accepts that, to some extent, it might be possible to limit the problems caused by the use of COMUGs if such use was coordinated with the mobile operators. However OFCOM submits that there would still be legal and practical problems to overcome. OFCOM submits that it could not rely on the goodwill of GSM gateway operators and the mobile network operators to ensure that such coordination took place in practice. It is far from clear that OFCOM could enforce any such obligations in practice.

Vodafone's submissions

269. Vodafone submits that the Authorisation Directive was not in force at the time Floe was disconnected and so is irrelevant to the appeal. Vodafone submits that Worldwide's submission, in its skeleton argument, to the effect that regulation 4(2) is

not a condition of a general authorisation but rather a requirement for individual licensing, contrary to Article 5 of the Authorisation Directive is not found in Floe's notice of appeal and so cannot be considered. Vodafone submits that Worldwide's submission is a startling submission, that calls into question the basis of the UK government's decision "to grant licences for specific frequencies to specific licensees".

270. Vodafone submits that upon proper analysis Worldwide's submission is misconceived. The issue concerns Vodafone's legal right to "control its own network and make use of the licensed frequencies". If Vodafone lawfully held a licence for the use of the designated frequencies, albeit restricted only to the equipment designated in the licence, then Floe had no legal right to participate in the rights granted by that licence. Regulation 4 therefore serves a proper purpose of permitting customers of the licensed network to use their own handsets without a licence but not to permit third parties to provide services by way of business to another person on that network. The restriction, on this analysis, does not amount to a bar on the provision of services but only requires that a person in the position of Floe had to apply for a licence.

271. Vodafone submits that Floe did not have the benefit of any general authorisation to provide services through the relevant frequencies: the use of those frequencies had been allocated to Vodafone (albeit only with the equipment designated in the Licence). The rights to use mobile phone network frequencies are subject to a specific "right of use" and not a general authorisation. There is therefore no question of any condition being attached to any authorisation or licence under the Directive for no other such authorisation or licence was ever granted in respect of the frequencies allocated to Vodafone under the Licence. Therefore no question can therefore arise as to the compatibility of any such "condition" with the requirements of the Authorisation Directive. Therefore the Authorisation Directive, in particular Article 6, is irrelevant.

T-Mobile's submissions

272. T-Mobile's submissions on the Authorisation Directive differ from the position taken by OFCOM. T-Mobile notes that recital 5 to the Authorisation Directive makes a clear distinction between *self-use* of radio equipment and frequencies (which lies outside the scope of the Directive) and the provision of electronic communications networks and services to others (which is within the scope of the Directive).

273. In relation to the frequency bands in issue in the present case (those licensed for use by the mobile network operators and the corresponding frequencies used by customers) Regulation 4(2) limits permitted use to *self-use* only and excludes the use of equipment to provide an electronic communications service by way of business to another person. This reflects the boundary of the Authorisation Directive (with which the Exemption Regulations must be consistently interpreted Case C-106/89 *Marleasing SA v La Commercial Internacional de Alimentacion SA* [1990] ECR I-4135). The Exemption Regulations therefore, contrary to OFCOM's submissions, do not, and cannot constitute a condition attached to a general authorisation under Article 3 of the Authorisation Directive.

274. T-Mobile submits that the result of its submissions is that the challenge based on the legality of the alleged condition attached to a general authorisation falls away: there is no such general authorisation and no such condition. This also, in T-Mobile's submission, answers the question raised by the Tribunal as to whether a restriction based on commercial use can be justified under Article 6 of the Authorisation Directive. Article 6 would only be relevant if GSM gateways could be used commercially and conditions were being imposed on such commercial use. In reality, the Exemption Regulations do not permit any commercial use of GSM gateways.

275. The result of this is that commercial use of GSM gateways (whether single or multi-user) falls to be dealt with under the provisions for individual licensing. Although the Authorisation Directive creates a presumption in favour of general authorisations rather than individual licensing it plainly contemplates that individual licensing may be necessary.

Tribunal's analysis

276. OFCOM's analysis at paragraphs 148 to paragraph 158 of the Second Decision conflates the issues arising under the RTTE Directive and the Authorisation Directive. On the coming into force of the Authorisation Directive OFCOM submits that Regulation 4(1) of the Exemption Regulations amounts to a "general authorisation" of the provision of electronic communications services using GSM gateways but a condition has been imposed on that "general authorisation" under the Directive which limits the use of GSM gateways to self-use.

277. For the reasons we have given above, we reject OFCOM's submission that the Exemption Regulations, read as whole, can be a "general authorisation" for the purposes of the Authorisation Directive. In particular an authorisation permitting "self-use" only is entirely outside the scope of that Directive and the effect of the Exemption Regulations is thus to impose a requirement for individual rights of use to provide any electronic communications network or service within the scope of the Directive.

278. However, if we are wrong as to this then it is permissible under Article 6 of the Authorisation Directive to impose conditions on a general authorisation which are listed in part A of the Annex to the Directive. OFCOM relies on paragraph 17 of part A which permits the imposition of "conditions for the use of the 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".

279. The Authorisation Directive thus permits the same conditions to be imposed in a general authorisation as are permitted by Article 7(2) of the RTTE Directive (i.e. harmful interference, effective and appropriate use of the spectrum and public health). For the same reasons that we have given above in considering harmful interference and effective and appropriate use of the spectrum, in our view, even if the Exemption Regulations are a general authorisation (which we have already held is not the case) we cannot be satisfied, on the material before us, that a restriction on the commercial use of GSM gateways can be justified for any of these reasons. The coming into force

of the Authorisation Directive does not change the analysis under the RTTE Directive. However from that time onwards Article 6(1) makes clear that any conditions imposed by OFCOM on a general authorisation must be "objectively justified in relation to the network or service concerned, non-discriminatory, proportionate and transparent". Having regard to our concerns referred to above we also cannot be satisfied that these requirements are fulfilled. At the hearing reference was also made, in particular by counsel for T-Mobile, to Part B of the Annex to the Authorisation Directive and the conditions that may be imposed upon individual rights of use. We have already held above that any restrictions on the use of equipment imposed in individual rights of use cannot "trump" the RTTE Directive and must be in accordance with Article 7(2) of the RTTE Directive. OFCOM's analysis in the Second Decision does not rely on any individual right of use that permits the provision of services with GSM gateways or on any provision of Part B of the Annex to the Authorisation Directive. Accordingly, there was no material before us as to whether a restriction on the provision of telecommunications services by way of business using GSM gateways can be justified in an individual licence in accordance with Part B of the Annex to the Authorisation Directive.

XI ISSUE 5 – RELEVANCE OF ISSUE OF COMPATIBILITY WITH COMMUNITY LAW

280. This issue was agreed between the parties as follows:

"Issue 5: Relevance and effect of the compatibility issue

5.1 Is the alleged incompatibility to Regulation 4(2) of the Exemption Regulations with Community law relevant to and capable of affecting the legality of Vodafone's conduct under the Chapter II prohibition and Article 82?

5.2 If Regulation 4(2) is incompatible with EC law, what is the effect as a matter of law on Vodafone's position?

5.2.1 Does such incompatibility affect the legality of Vodafone's conduct at the material time?

5.2.2 Is there a principle of law imposing an obligation on an allegedly dominant operator to ignore the domestic law in force so that Vodafone could not rely on domestic legislation which was "void or voidable or otherwise

incompatible with European law" even though that national provision had not been disapplied?

5.2.3 If there is such a principle, then what is the operative standard of fault to impose on a dominant undertaking for acting in accordance with a domestic law subsequently held not to be compatible with EC law?

5.3 If Regulation 4(2) is incompatible with EC law, what is the effect as a matter of law on OFCOM's position?

5.3.1 Is it open to the Tribunal to find that OFCOM should have interpreted or should interpret Regulation 4(2) in such a way as to make it compatible with EC law, or else have disapplied that provision ?

5.3.2 Can such an obligation on OFCOM result in the imposition of obligations on Vodafone or the conferral of rights on Floe? If so, do these obligations/rights take effect retrospectively or prospectively?

5.3.3 Does it follow that the licensing regime imposed by the Exemption Regulations is unlawful?

The parties' submissions

Floe & Worldwide's submissions

281. Floe and Worldwide made joint submissions on the issues related to the European Directives and the compatibility of the Exemption Regulations with European law. The submissions of counsel for Worldwide, Mr Kennelly, were adopted by Floe for these purposes. For brevity, references to "Floe" in this section of the judgment incorporate a reference to Worldwide.

282. Floe submits that OFCOM erred in law in its interpretation and application of the RTTE Directive and the Authorisation Directive. It submits that Regulation 4(2) of the Wireless Telegraphy (Exemption) Regulations 1999 as applied by OFCOM in the Second Decision to COMUGs is incompatible with the requirements of Article 7 of the RTTE Directive and Article 6(1) of the Authorisation Directive.

283. Floe submits that OFCOM was at all times required to interpret and apply relevant Community law rules correctly and to full effect, if necessary by disapplying regulation 4(2). In the circumstances of the present case Floe and Worldwide submit

that OFCOM ought to have construed regulation 4(2) so as to give the operation of COMUGs by Floe a "general authorisation". If such an interpretation of regulation 4(2) is impossible it should have been disapplied by OFCOM in the Second Decision and should now be disapplied by the Tribunal.

284. Floe submits that the appropriate standard of review by the Tribunal is of the greatest importance in this appeal as the clear words of the Competition Act 1998 *require* the Tribunal to examine each of the issues raised before it in an appeal under section 47(1) of the Act "on the merits" as distinct from judicial review. This is of particular importance in relation to the issue of whether COMUGs caused "harmful interference" within the meaning of Articles 2(i) and 7(2) of the RTTE Directive which, in the Decision, OFCOM has decided makes the restriction on the use of COMUGs necessary.

285. Floe submits that Vodafone's submission that in construing the Exemption Regulations and in examining the compatibility of the Exemption Regulations with Community law the Tribunal is bound by the same jurisdictional limits as the Administrative Court, is contrary to law and principle. Where Parliament intended the Tribunal to limit its review to judicial review grounds only it made express provision for this (ss 120(4) and 179(4) of the Enterprise Act 2002 and para 3A(2) of Schedule 8 to the Competition Act 1998). However, this is an appeal under section 47 of the 1998 Act and, by virtue of para 3(1) of Schedule 8 to the 1998 Act the Tribunal is obliged to hear the appeal "on the merits" and cannot limit itself to a review on judicial review grounds only. It would be contrary to the express provisions of the 1998 Act, and to principle, for the Tribunal to fetter its jurisdiction in the way suggested by Vodafone.

286. Floe and Worldwide submit that Vodafone's reliance on the judgment of the Court of Justice in Case C-120/97 *Upjohn Limited v The Licensing Authority* [1999] ECR I-223 ignores the significant differences in the jurisdiction of the Community judicature and the Tribunal. Unlike the Community courts the Tribunal's jurisdiction is not limited by Article 230 EC (see *Freeserve.com v Director General of Telecommunications* [2003] CAT 5, para 106) and, unlike the Community courts, the Tribunal has been empowered to substitute its own assessment of the facts and its own

decision under the 1998 Act in place of the assessment and decision of a competition authority (paragraph 3(2)(e) of Schedule 8 to the 1998 Act). The nature of the review described by the Court of Justice in *Upjohn* (cited above) therefore needs to be understood in context and cannot be "carried over" to limit the jurisdiction of the Tribunal.

287. Floe and Worldwide submit that Vodafone's approach would, if adopted, undermine the very purpose and operation of the Tribunal because it would prevent the effective review of decisions of the sectoral regulators which appear before it. The unfairness to Floe of such an approach in the particular context of this appeal would be manifest since the report of the Joint Expert is to the effect that, contrary to OFCOM's finding in the Second Decision, COMUGs do not, as a matter of technical fact, cause "interference", still less "harmful interference" within the meaning of the RTTE and Authorisation Directives.

288. Similarly, the issues under Article 6(1) of the Authorisation Directive must be decided by the Tribunal on the merits and not according to judicial review grounds. The issue of whether the restriction imposed on the operation of COMUGs is objectively justified, non-discriminatory, proportionate and transparent requires the Tribunal to assess the merits of the submissions and not to limit its examination to a *Wednesbury* review, as demanded by Vodafone.

289. Floe notes that Vodafone, in its Statement of Intervention, raised for the first time a submission that it is an abuse of process for Floe to argue before the Tribunal that OFCOM erred in finding that the Exemption Regulations were compatible with the RTTE Directive and the Authorisation Directive since, in Vodafone's submission, only the Administrative Court has jurisdiction to consider such matters. Floe submits that neither OFCOM nor Vodafone argued that the same submissions, when raised before the Tribunal on the appeal against the First Decision, were an abuse of process. On the contrary, all parties made submissions to the Tribunal at the hearing of the appeal against the First Decision and no party suggested at that time that the only route for Floe to make such a challenge would have been by way of judicial review in March 2003. The Tribunal quashed OFCOM's First Decision for other reasons and did not consider it necessary to decide those issues at that stage.

290. Floe submits that there is no bar in the 1998 Act or in the Tribunal's Rules of Procedure to the effect that the Tribunal is precluded from reviewing the legality of a domestic legal provision on the ground that it infringes Community law. In the circumstances of the present appeal if such a bar were to exist it would, itself, be a provision that is contrary to Community law.

291. Floe submits that the Tribunal is obliged, pursuant to Article 10 EC, to ensure the fulfilment of the United Kingdom's obligations under Community law. In the circumstances of the present case it is necessary to examine the compatibility of the Exemption Regulations with Community law and the Tribunal is best placed to do so. If the Tribunal does not have jurisdiction to examine the compatibility of the Exemption Regulations with Community law, as suggested by Vodafone, then there will be no effective review or relief available to Floe. According to well-established principles of Community law, it is incumbent upon courts and tribunals to ensure that, where possible, domestic rules and procedures are interpreted in order to give effective protection to Community law rights (Case C-312/93 *Peterbroeck, Van Campenhout & Cie v Belgian State* [1995] ECR I-4599; Case C-430 & 431/93 *Van Schijndel & Van Veen v Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-4705).

292. Floe submits that OFCOM clearly addressed Floe's arguments as to the proper application of the Directives in the Second Decision and concluded that the restriction on the use of COMUGs was compatible with Community law. Floe and Worldwide submit that they are entitled to challenge that finding as an error of law in the Second Decision and as a ground of appeal before the Tribunal. Floe and Worldwide submit that the European Court of Justice's decision in Case C-198/01 *Consorzio Industrie Fiammiferi v Autorità Garante della Concorrenza e del Mercato* [2003] ECR I-8055 (the "*CIF* case") makes clear that OFCOM and this Tribunal have a duty to disapply national legislation which contravenes Community law. It therefore cannot be the case, as Vodafone submits, that only the Administrative Court, and no other tribunal, has jurisdiction to disapply national provisions that are plainly incompatible with Community law. Vodafone's submissions, in that respect, disregard at least 30 years

of jurisprudence of the European Court. Floe submits that Vodafone's submissions are therefore plainly wrong and should be disregarded.

OFCOM's submissions

293. OFCOM submits that whether or not Regulation 4(2) is compatible with the RTTE Directive and the Authorisation Directive can have no material bearing on the resolution of the issue before the Tribunal, which is whether Vodafone's conduct infringed the Chapter II prohibition and/or Article 82 EC. Vodafone was entitled, and indeed obliged, to comply with provisions of national law unless and until the relevant national law has been disapplied by a competent authority or the court. The reality of the present case is that, whether or not OFCOM's conclusions as to compatibility of the Exemption Regulations with Community law in the Second Decision are correct, no competent authority has disapplied the Exemption Regulations.

294. OFCOM relies on the principle of legal certainty in Community law, citing Case 43/75 *Defrenne v Sabena (No. 2)* [1976] ECR 455, and submits that there is a presumption of validity in favour of the Exemption Regulations being compatible with Community law until conclusively shown otherwise (*Hoffmann La Roche v Secretary of State of Trade and Industry* [1975] AC 295, pp 366-7 per Lord Diplock).

295. OFCOM submits, in reliance on Joined Cases C-359/95P and C-379/95P *Ladbroke Racing v Commission* [1997] ECR I-6265, that if national law creates a legal framework that *requires* undertakings such as Vodafone to engage in anti-competitive conduct, the restriction of competition that results is not attributable to the autonomous conduct of the undertaking concerned and Article 82 does not apply in the circumstances. OFCOM further submits that the principle of legal certainty requires that undertakings cannot be held liable or penalised in respect of any competition law infringement that results from the national legal framework as the national law provides a justification which shields the undertaking concerned from all the consequences of an infringement of Article 82 and does so vis-à-vis both the public authorities and other economic operators (Case C-198/01 *CIF* cited above, paragraph [54]). OFCOM submits that in the context of an investigation under the 1998 Act and/or Article 82 EC it is unnecessary to consider the compatibility of the

relevant provisions of national law with EC law (Case T-111/96 *ITT Promedia NV* [1998] ECR II-2937, para 98).

296. OFCOM submits that there is no authority that suggests that an undertaking (whether dominant or otherwise) must ignore or disapply national provisions in force in favour of Community law provisions with which national law may or may not be comptabile. Any such obligation would not only place commercial undertakings in an invidious position of uncertainty but would be an obvious recipe for legal chaos. In the present case, even if the Exemption Regulations are incompatible with Community law that can have no bearing on the conduct of Vodafone. Vodafone's disconnection of Floe in the circumstances of this case was not as a result of its own autonomous conduct but as a result of the national legal framework.

297. OFCOM submits that, the Tribunal, like all national courts, has a duty deriving from Article 10 EC to interpret domestic legislation compatible with Community law or, in certain circumstances, to disapply domestic legislation that cannot be so interpreted (see Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629). OFCOM submits, however, that this duty is not engaged in the present case as the issue of compatibility is of no material relevance to the resolution of the dispute before the Tribunal. OFCOM relies on the case law of the European Court of Justice on the admissibility of preliminary references according to which the Court will not engage in an interpretation of Community law where such interpretation is not required for the resolution of the substantive dispute before the national court or where the national court has referred questions to the Court of Justice which are purely hypothetical (see Case 244/80 *Foglia v Novello* [1981] ECR 3045; Case C-83/91 *Wienand Meilicke v ADV/ORGA* [1992] ECR I-4871; and Case C-346/93 *Kleinwort Benson Limited v Glasgow City Council* [1995] ECR I-615).

298. OFCOM submits that in the present case whether the Exemption Regulations are compatible with Community law has no material bearing on whether Vodafone's conduct was an infringement of the Chapter II prohibition or Article 82 EC and it is unnecessary for the Tribunal to consider the compatibility issue at all.

299. Furthermore, OFCOM submits that section 192(2) of the Communications Act 2003 provides that a person affected by a decision of OFCOM to which that section applies may appeal against the decision to this Tribunal. Section 192(1) provides that the decisions to which that section applies include:

> "a decision by OFCOM under this Part, the Wireless Telegraphy Act 1949 or the Wireless Telegraphy Act 1998 that is not a decision specified in Schedule 8."

300. Paragraph 27 of Schedule 8 refers to:

> "a decision given effect to by regulations under the proviso to section 1(1) of the Wireless Telegraph Act 1949"

301. OFCOM submits that it was the clear intention of Parliament that a decision to adopt regulations under section 1(1) WTA should *not* be subject to an appeal before this Tribunal and that the correct forum for challenging an instrument such as the Exemption Regulations is not the Tribunal but the Administrative Court. Therefore any challenge to the compatibility of the Exemption Regulations with Community law should ordinarily be brought before the Administrative Court and not the Tribunal. OFCOM submits that the only circumstances in which the Tribunal should determine the question of compatibility is where that issue is determinative of the case before it such as to engage the Tribunal's duty under Article 10 EC. Furthermore, there are a number of practical reasons why it is undesirable for the Tribunal to consider the issue of compatibility in the context of the present case as, in order to understand the reasons behind the adoption of the Exemption Regulations in 1999 and the decision to maintain the Exemption Regulations in force in 2003, it would be necessary for the Tribunal to consider a large amount of technical and policy evidence that was before the Secretary of State for Trade and Industry at that time. The Secretary of State is not a defendant in the proceedings before the Tribunal. In any event, such an exercise would involve an unjustified call on the Tribunal's limited resources, particularly as OFCOM submits that the issue can have no bearing on the outcome of the appeal.

302. OFCOM submits that if the Tribunal does consider the compatibility issues then its review must be determined by reference to Community law which requires the Tribunal simply to assess whether as a matter of law the Exemption Regulations give proper effect to the Community provisions and are not inconsistent with the latter's

terms and objectives. It is neither necessary nor desirable for the Tribunal to undertake an assessment of the facts or technical evidence upon which the decision to adopt or maintain the Exemption Regulations in force was based.

303. OFCOM submits that pursuant to Article 249 EC Member States have a margin of discretion as to the manner and means by which they implement Directives in national law. In those circumstances it would be inappropriate for the Tribunal to substitute its own assessment of the relevant facts and evidence for that of a Minister. OFCOM submits, in reliance on Case C-120/97 *Upjohn v The Licensing Authority*, cited above, and Case C-211/03 *HLH Warenvertreibs v Bundesrepublik Deutschland* [2005] ECR I-5141 that Community law requires the Tribunal's review of the compatibility issues to be limited to deciding whether the decision was one which the authority could reasonably have reached rather than deciding whether the decision was correct.

304. OFCOM submits that there is no inconsistency between its submissions and section 47 of the 1998 Act. The decisions to adopt and maintain in force the Exemption Regulations are not decisions under the 1998 Act and there is therefore no need for the Tribunal to consider the issues of compatibility "on the merits" as suggested by Floe and Worldwide.

Vodafone's submissions

305. Vodafone submits that the Tribunal is required to determine the issues on the merits and is not, in general, limited in its powers to those analogous to a court hearing a judicial review application. However, acting as an appellate tribunal, not as a court of first instance, the first task of the Tribunal is to examine the reasons given in the Second Decision under appeal to see if they are vitiated by an error of fact or law. The scope of an "appeal on the merits" under the 1998 Act depends on the issue of which the Tribunal is seised. The issue of compatibility with European law is a question of law. It is not a question of fact nor a question of appraisal on which the Tribunal has expertise.

306. The jurisdiction of the Tribunal is limited by statute to an appeal against the Second Decision and there is no appeal in the Tribunal against the decision of the Secretary of

State to make the Exemption Regulations. The Tribunal is not engaged in any review of the Secretary of State's decision and does not have the power to decide, on the basis of factual or expert evidence, whether in its judgment it was necessary for the provision of COMUGs to be unlawful under the Exemption Regulations.

307. Vodafone submits that in the absence of the Secretary of State as a party to the proceedings and in the absence of all of the relevant material which was before the Secretary of State in 2003 when the Exemption Regulations were re-enacted there is no basis to contend that the Exemption Regulations were unlawful. Vodafone submits, relying on *Hoffmann La Roche v Secretary of State for Trade and Industry* [1975] AC 295, that the Tribunal must proceed on the basis that the Exemption Regulations are lawful and effective. Any issue as the compatibility of the Exemption Regulations with Community law is therefore irrelevant in these proceedings. Counsel for Vodafone further submitted that any issue as to the compatibility of the Exemption Regulations with Community law is for the Administrative Court and the Administrative Court alone. By a letter dated 17 February 2006, following the hearing, Vodafone's solicitors clarified that this submission of Vodafone's counsel should be treated by the Tribunal as being limited to the particular circumstances of this case which Vodafone submits are that: (i) neither Floe nor Worldwide argued that the Exemption Regulations were *ultra vires*; (ii) it is not alleged that the provisions of either the RTTE Directive or Authorisation Directive have direct effect, still less horizontal direct effect; and (iii) it is not alleged that the Exemption Regulations should be set aside, but rather that they should be disapplied in respect of the complaint made by Floe to OFCOM. Vodafone's solicitors clarified that Vodafone does not, in this appeal, submit that the Tribunal does not, in principle, in an appropriate case, have jurisdiction to disapply a provision of domestic law which is demonstrated to be incompatible with Community law. Vodafone's solicitors draw the attention of the Tribunal to the case of *Chief Adjudication Officer v Foster* [1993] 2 WLR 292 in that regard.

308. Vodafone submits that the issue before the Tribunal is not whether OFCOM can rely on "harmful interference" but whether there is any evidential basis in support of the contention that the Exemption Regulations are unlawful. The issue of compatibility is not to be determined as at the date of the Tribunal's judgment on the basis of any

factual or expert evidence now before the Tribunal, but is an issue of legality to be determined at the time when the Regulations were made or applied. The Secretary of State had a wide margin of appreciation in deciding to make the Exemption Regulations. The relevant Directives, so far as they apply, do not prescribe that restrictions may only be imposed if, as a matter of fact, use of COMUGs actually causes "harmful interference"; rather the Directives merely prescribe factors Member States are required to take into account in framing domestic regulations.

309. The issue of compatibility with EC law, which the Tribunal is required to determine "on the merits" is, in Vodafone's submission, an issue of law to be determined in accordance with the judgment of the Court of Justice in *Upjohn* (cited above) by respecting the wide margin of appreciation given to the Secretary of State and conducting a limited judicial review in the course of which the Community judicature may not substitute its own assessment of the facts for the assessment of the authority concerned. That principle applies as much to a domestic court or Tribunal considering an issue of EC law as it does to the Court of Justice.

310. The focus of the arguments on incompatibility cannot, in Vodafone's submission, be shifted from the decision of the Secretary of State to make the Regulations to the different question of whether the Regulations should properly have been applied by OFCOM when making the Second Decision on 28 June 2005. OFCOM was not exercising any discretionary function in deciding whether to apply the Exemption Regulations. As OFCOM was investigating Vodafone's conduct in March 2003 OFCOM could only disregard the Exemption Regulations if satisfied that the Exemption Regulations had not been lawfully made in the light of the Directives.

T-Mobile's submissions

311. T-Mobile submits that national law, so long as it has not been disapplied, sets the framework for the conduct of undertakings. If national law precludes competition, that shields the undertakings concerned from all the consequences of what would otherwise be an infringement of Article 81 or 82 (Case C-198/01 *CIF*, cited above, at paragraph [54]). Thus even if OFCOM's assessment of the compatibility of domestic law with Community law were wrong the Second Decision would not fall to be set

aside. Therefore, the issue of whether Vodafone's conduct was an infringement of the Chapter II prohibition or Article 82 requires no assessment by OFCOM or the Tribunal of the compatibility of domestic law with Community law.

312. T-Mobile further submits that the Tribunal should not seek to determine the issue of compatibility in this case. The subject of the appeal is OFCOM's Second Decision as to the applicability of the 1998 Act or Article 82 in respect of Vodafone's conduct. T-Mobile submits that OFCOM did not need to consider the legality of national law with Community law to determine this issue. T-Mobile accepts that, as the body now charged with making regulations under section 1(1) of the 1949 Act OFCOM has a role in assessing the compatibility of any regulations made under that section with Community law. T-Mobile accepts that OFCOM arguably has a duty to withdraw or amend any such regulations if, in the light of such assessment, it finds them to be incompatible with Community law. However, T-Mobile submits that it is crucial to appreciate that the finding in *CIF*, cited above, that the national competition authority should disapply provisions which are incompatible with Article 81 and 82, the ECJ relied on the fact that a national *competition authority* is responsible for ensuring that *competition law* is observed. The incompatibility issue considered in the *CIF* case was between domestic law and EC *competition law*. However, the compatibility issue in this case is between domestic law and EC *telecommunications law*. OFCOM wears an entirely different hat in that regard – not that of competition authority but of sectoral regulator.

313. This difference is crucial in T-Mobile's submission because of the different forums Parliament has established for scrutiny of the different types of decision by OFCOM. The making or withdrawal of the Exemption Regulations fall for consideration only by the Administrative Court and not by the Tribunal.

314. T-Mobile further submits that the issues of compatibility raised in this appeal have never previously been ruled upon by the European Court and are not *acte clair* (see Case 283/81 *CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3415 at [16]-[21]). The Tribunal cannot reasonably therefore rule upon them itself but is required to make a reference to the ECJ pursuant to Article 234 EC. However, in the circumstances of this case T-Mobile submits that the Tribunal cannot make a

reference to the ECJ either, because the issue of compatibility is not determinative of the matters in issue in the appeal. Therefore in T-Mobile's submission, the Tribunal cannot rule on these matters at all.

315. Even if it were correct for the Tribunal to consider the compatibility of the Exemption Regulations with Community law Floe/Worldwide's submission that the Tribunal is empowered to substitute its own assessment for the assessment of the Secretary of State and/or OFCOM in the making, amending or withdrawal of the Exemption Regulations is (a) misconceived as a matter of law and (b) contrary to fundamental principles of Community law.

316. The Tribunal's powers to determine appeals on the merits and to make any other decision OFCOM could itself have made are confined to the context of review of a decision under the 1998 Act. A decision to enact or maintain in force regulations under section 1(1) of the 1949 Act must be a matter exclusively for OFCOM, subject to judicial review by the Administrative Court. To the extent that the Tribunal considers the questions of compatibility at all then, in compliance with Article 10 EC it must apply Community law. Where the Community legislature has provided a Member State with a margin of discretion this must be respected and cannot be emasculated by applying inconsistent domestic legislation. The Authorisation Directive plainly leaves a considerable margin of discretion to Member States in its implementation. Member States have a discretion to choose when it is appropriate to control any particular activity pursuant to a system of individual licensing and when it is appropriate to use a general authorisation. This judgment will be dependent on factors that will vary from state to state. The regulatory authorities of each Member State are in a vastly superior position to assess such issues and the technical views of these authorities must be properly respected. There is certainly no role as a matter of Community law for the Tribunal to substitute its own assessment of the facts for those of OFCOM.

Tribunal's analysis

317. As we explain above, under Issues 2 and 4, in our view regulation 4(2) of the Exemption Regulations cannot properly be construed in isolation of Community law.

Regulation 4(2) was at all material times, and is now, a part of the scheme, in the United Kingdom, for the licensing of GSM radio spectrum over which GSM radiocommunications services are provided to customers. That scheme includes the individual licences issued to Mobile Network Operators, including Vodafone, pursuant to section 1(1) of the 1949 Act.

318. No party submitted to us that the Licence is not relevant in deciding this appeal. On the contrary, all parties made submissions to us based on their own construction of the Licence and it is agreed that the construction of the Licence is an issue that affects the outcome of this appeal and goes to the heart of Vodafone's conduct in this case. We have construed the Licence in the context of the statutory scheme above and, as is apparent from our reasons set out there, the construction of the Licence must be considered together with the Exemption Regulations (in particular Regulation 4(2)). This Tribunal, like all courts and tribunals, has a duty to interpret national provisions in conformity with European law as far as possible (Case C-106/89 *Marleasing*, cited above, Cases C-240-244/98 *Oceano Grupo Editorial SA v Roció Murciano Quintero* [2000] ECR I-4941). As it is agreed that it is essential for us to consider the scope of the Licence in this appeal it is therefore equally essential to consider the relevant European Directives and for us to interpret, if possible, the provisions of national legislation (the Exemption Regulations) and the Licence in conformity with Community law. The submissions of OFCOM and the interveners in support of OFCOM that we cannot and should not consider issues of compatibility with Community law at all in this appeal are therefore manifestly misconceived since it is fundamental to our consideration of the relevant national law also to give consideration to Community law.

319. OFCOM and Vodafone submitted that Issue 5 ought to be considered before Issue 4 because, if issues of compatibility with Community law are irrelevant to this appeal and/or outside our jurisdiction, then the Tribunal has no jurisdiction to consider the matters discussed under Issue 4 at all. In our judgment that submission was misconceived. For the reasons we have already set out at Issue 2 and Issue 4, the Exemption Regulations and the Licence cannot properly be considered without taking account of Community law.

320. If, however, we had concluded that the national scheme in the United Kingdom could not be interpreted to be compatible with Community law then we would have had to consider the consequences of this. That situation does not now arise in this appeal. However, in view of the extensive written and oral submissions of OFCOM and the interveners supporting it we now consider this issue.

321. In our view, it is important first to distinguish between the position of Vodafone and the position of OFCOM in this appeal. *Ladbroke Racing* and *ITT Promedia* establish that if an undertaking such as Vodafone is precluded by national law from any "autonomous conduct" when performing its activities it is entitled to rely on the relevant national law unless and until the national law is disapplied by a relevant authority. *Ladbroke Racing* nevertheless made clear that the European Commission must address itself to whether or not the national law in question does prevent undertakings from engaging in autonomous conduct which prevents restricts or distorts competition.

322. OFCOM, as a national competition authority and a national regulatory authority with powers *inter alia* over the regulation of electronic communications matters, is in a different position to an undertaking such as Vodafone.

323. All parties referred extensively in their submissions to the judgment of the Court of Justice in Case C-198/01 *Consorzio Industrie Fiammiferi v Autorità Garante della Concorrenza e del Mercato* (the "*CIF* case"). In that case there was a consortium of Italian match manufacturers (the "CIF") which was established by Italian law and which had been granted a commercial monopoly consisting of the exclusive right to manufacture and sell matches for consumption in Italy. A German match manufacturer made a complaint to the Italian competition authority (the "Authority") alleging that it was experiencing difficulties in distributing its products in Italy and the Authority opened an investigation into, *inter alia* the conduct of CIF and its member undertakings. In its final decision the Authority found that the conduct adopted by the consortium and its members on the Italian market was "more or less a direct consequence of the legislation which…governed the sector" (paragraph 19) but was nonetheless partly attributable to autonomous economic decisions. The Authority further found that insofar as national legislation required the members of the CIF to

participate in the consortium in order to produce and sell matches in Italy the legislative framework provided a "legal shield" to the conduct of the CIF and its members which would otherwise be prohibited by the Community competition rules. The Authority decided that the relevant Italian legislation had to be disapplied by any court or public administration since it was contrary to Article 3(1)(g) EC, Article 10 EC and Article 81(1) EC and such disapplication would remove the legal shield that would otherwise exist (paragraph 22).

324. The CIF appealed against the decision of the Authority before the national court in Italy. The national court found that the CIF's proposition that the Italian legislation precluded competition at the outset leaving no room for any significant competition between undertakings was not manifestly unfounded. The national court also doubted that the Authority had jurisdiction to disapply the Italian law in question (see paragraphs 32 and 38) and therefore made a reference to the Court of Justice.

325. The Court of Justice first considered whether Articles 81 and 82 applied only to conduct engaged in on an undertaking's own initiative and do not apply where such conduct is required by national legislation. The relevant passage from the Court's judgment considering this issue is as follows:

> "48. …in accordance with settled case-law the primacy of Community law requires any provision of national law which contravenes a Community rule to be disapplied, regardless of whether it was adopted before or after that rule.
>
> 49. The duty to disapply national legislation which contravenes Community law applies not only to national courts but also to all organs of the State, including administrative authorities (see, to that effect, Case 103/88 *Fratelli Constanzo* [1989] ECR 1839, paragraph 31), which entails, if the circumstances so require, the obligation to take all appropriate measures to enable Community law to be fully applied (see Case 48/71 *Commission v Italy* [1972] ECR 527, paragraph 7).
>
> 50. Since a national competition authority such as the Authority is responsible for ensuring, *inter alia*, that Article 81 EC is observed and that provision, in conjunction with Article 10 EC, imposes a duty on Member States to refrain from introducing measures contrary to the Community competition rules, those rules would be rendered less effective if, in the course of an investigation under Article 81 EC in to the conduct of undertakings, the authority were not able to declare a national measure contrary to the combined provisions of Articles 10 EC and 81 EC **and if, consequently, it failed to disapply it.** [emphasis added].
>
> 51. In that regard, it is of little significance that, where undertakings are required by national legislation to engage in anti-competitive conduct they cannot also be held accountable for infringement of Articles 81 and 82 EC (see, to that effect,

Commission and France v Ladbroke Racing, paragraph 33). Member States' obligations under Articles 3(1)(g) EC, 10 EC, 81 EC and 82 EC, which are distinct from those to which undertakings are subject under Articles 81 EC and 82 EC, none the less continue to exist and **therefore the national competition authority remains duty-bound to disapply the national measure at issue** [emphasis added].

52. As regards, by contrast, the penalties which may be imposed on the undertakings concerned, it is appropriate to draw a two-fold distinction by reference to whether or not the national legislation precludes undertakings from engaging in autonomous conduct which might prevent, restrict or distort competition and, it if does, by reference to whether the facts at issue pre-dated or post-dated the national competition authority's decision to disapply the relevant national legislation.

53. First, if a national law precludes undertakings from engaging in autonomous conduct which prevents, restricts or distorts competition, it must be found that, if the general Community law principle of legal certainty is not to be violated, the duty of national competition authorities to disapply such an anti-competitive law cannot expose the undertakings concerned to any penalties, either criminal or administrative, in respect of past conduct where the conduct was required by the law concerned.

54. The decision to disapply the law concerned does not alter the fact that the law set the framework for the undertakings' past conduct. The law thus continues to constitute, for the period prior to the decision to disapply it, a justification which shields the undertakings concerned from all the consequences of an infringement of Articles 81 and 82 EC and does so vis-à-vis both public authorities and other economic operators.

55. As regards penalising the future conduct of undertakings which, prior to that time, were required by a national law to engage in anti-competitive conduct, it should be pointed out that, once the national competition authority's decision finding an infringement of Article 81 EC and disapplying such an anti-competitive national law becomes definitive in their regard, the decision becomes binding on the undertakings concerned. From that time onwards the undertakings can no longer claim that they are obliged by that law to act in breach of the Community competition rules. Their future conduct is therefore liable to be penalised.

56. Second, if a national law merely encourages, or makes it easier for undertakings to engage in autonomous anti-competitive conduct, those undertakings remain subject to Articles 81 and 82 EC and may incur penalties, including in respect of conduct prior to the decision to disapply that national law.

57. It must none the less be made clear that, although such a situation cannot lead to acceptance of practices which are likely further to exacerbate the adverse effects on competition, it nevertheless means that when the level of penalty is set the conduct of the undertakings concerned may be assessed in the light of the national legal framework, which is a mitigating factor (see, to that effect, Joined Cases 40/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others v Commission* [1975] ECR 1663, paragraph 620)."

326. In our view the following arises from the judgment in *CIF*:

(a) the duty to disapply national legislation which clearly contravenes Community law applies not only to national courts (such as the Tribunal) but also to competition authorities such as OFCOM (*CIF*, paragraph [49] citing Case 103/88 *Fratelli Constanzo*);

(b) OFCOM's duty entails, if the circumstances so require, an obligation to take all appropriate measures to enable Community law to be fully applied (*CIF*, paragraph [49] citing Case 48/71 *Commission v Italy*);

(c) since OFCOM is responsible for ensuring *inter alia* that the Community competition rules are observed in the electronic communications sector in the United Kingdom, those rules would be rendered less effective if, in the course of an investigation into the conduct of undertakings, OFCOM were not able to declare a national law contrary to the combined provisions of Article 10 and Article 81 or 82 (*CIF*, paragraph [50]);

(d) accordingly, OFCOM may have a duty in the context of an investigation under Article 82 into the conduct of undertakings not only to declare a national measure contrary to Community law but itself to disapply the relevant national law (*CIF*, paragraph [50]);

(e) OFCOM's obligations as national competition authority are separate to and additional to the obligations of undertakings to comply with competition law and it is therefore of little significance for the purposes of a decision on a complaint to OFCOM that the undertakings subject to OFCOM's investigation might not themselves be penalised for *past* conduct that relied on the relevant national law (*CIF*, paragraph [51]);

(f) for the period prior to the decision to disapply it, the national law provides a justification which shields the undertakings concerned form all the consequences of an infringement of Articles 81 and 82 (*CIF*, paragraph [54]).

327. As explained above, in our judgment, the starting point is that a national authority such as OFCOM or a national court, such as this Tribunal, must, so far as possible, interpret national law in accordance with Community law (Case C-106/89 *Marleasing*, Cases C-240-244/98 *Oceano Grupo Editorial*). If national law can be interpreted in accordance with Community law no issue of the disapplication of national law arises. Since we have construed the statutory scheme to be compliant with the RTTE Directive no issue of disapplication of national law therefore arises in this case.

328. If no consistent interpretation can be given so that the only outcome is that national law is inconsistent with Community law, Vodafone cannot be penalised for acting in accordance with national law if the national law in question removes the possibility of autonomous conduct on its part, unless and until such national law is disapplied.

329. However, OFCOM cannot be a party to such incompatibility and has a duty to disapply incompatible national law for the future.

330. OFCOM's reasons for rejecting Floe's complaint relied on the Exemption Regulations as a legal requirement on Vodafone to disconnect the SIM cards (Second Decision, paragraphs 185 to 208). Floe submitted to OFCOM that its conclusions as to this could not be correct, in part because such conclusions were said to give rise to a breach of relevant Directives. OFCOM rejected those submissions of Floe at paragraphs 132 to 171 of the Second Decision. Since OFCOM's conclusions in the Second Decision have a potentially significant bearing on the future conduct of both Vodafone and Floe the issues are not, as counsel for OFCOM and Vodafone both sought to suggest, entirely hypothetical. In that respect, OFCOM was under a duty to ensure that Vodafone's continuing refusal to supply SIM cards to Floe was lawful. To the extent that such refusal to supply was based on applicable national provisions which Floe alleged to be incompatible with Community law OFCOM was under a duty to satisfy itself as to the compatibility of the relevant national provisions. Had OFCOM reached the view that the relevant national law was incompatible then OFCOM would have been under a duty to disapply the relevant national provisions.

Such a view could, of course, only be reached after due and proper consideration by OFCOM, on the basis of clear legal advice.

331. In the event, OFCOM concluded in the Second Decision that the relevant national provisions are compatible with Community law. OFCOM's conclusions in that regard are recorded in the Second Decision and form part of OFCOM's reasons for its decision and are accordingly within the Tribunal's jurisdiction in this appeal.

332. Accordingly we reject OFCOM's submission that this appeal is concerned solely with Vodafone's conduct in the past and that the issue of whether or not the national law in question was or is compatible with Community law is entirely irrelevant to the appeal before us. OFCOM submits that because neither it nor any of its predecessors have disapplied the Exemption Regulations Vodafone was entitled to rely on them at the time of disconnecting Floe. That submission however ignores OFCOM's duty, as set out in *CIF* to satisfy itself as to the compatibility of the relevant national law and to disapply it for the future if it is clearly incompatible with Community law.

333. OFCOM has overlooked a significant feature of the decisions which it takes pursuant to the Competition Act (and/or Articles 81 and 82 EC). Such decisions have a material bearing not only on undertakings' *past* conduct but also on undertakings' conduct in the *future* in the light of the decision (and may well have implications for the conduct, including the future conduct, of undertakings whose conduct is not directly in issue in the decision, as the intervention of T-Mobile in this appeal demonstrates). The scheme of the 1998 Act, which includes provision for the giving of directions under sections 32 and 33 of the Act, demonstrates the importance that Parliament has attached not only to penalising conduct that has infringed competition law in the past but also to ensuring the existence of fair and competitive markets in the future by requiring an infringer to cease or to modify his future conduct. This Tribunal has, in previous cases, emphasised the significance of that latter feature of decisions taken by competition authorities under the 1998 Act (see *Pernod Ricard SA and another v Office of Fair Trading* [2004] CAT 10 paras [173]-[175] and [185]-[187]).

334. The significance of a decision under the 1998 Act or Articles 81 and 82 for the future conduct of the undertakings affected by the decision is illustrated in the judgment of the Court of Justice in *CIF*. In that judgment the Court of Justice very clearly emphasised that although the CIF and its members were shielded from the consequences of an infringement of the competition rules in the period *prior to the decision* (see para [54]), once the competition authority had concluded that relevant national law was incompatible with Community law and taken a decision to that effect "the decision becomes binding on the undertakings concerned" (para [55]). Furthermore, the Court then emphasised: "*From that time onwards* the undertakings can no longer claim that they are obliged by the law to act in breach of the Community competition rules. Their *future* conduct is therefore liable to be penalised" (emphasis added).

335. Furthermore, as the *CIF* judgment makes clear, where issues of compatibility of national law with Community law arise in the context of a decision under the 1998 Act or Articles 81 and 82 EC, the effect of the decision is *primarily* concerned with the future and not with the past. Both OFCOM and the Tribunal are bound by the Court of Justice's judgment in *CIF* in this respect.

336. The submissions of Vodafone went further than those of OFCOM. Counsel for Vodafone submitted that, to the extent that OFCOM's Second Decision purported to reach conclusions or make findings on the compatibility of the Exemption Regulations with Community law, such conclusions or findings were *ultra vires* and should never have been made. He further submitted that it would similarly be *ultra vires* of this Tribunal to consider Floe's submissions challenging those purported findings. We reject those submissions.

337. In our view the Court of Justice in the *CIF* case has given clear guidance to competition authorities such as OFCOM on these important questions, which we have explained above. To the extent that a competition authority such as OFCOM construes and relies upon national law in a decision under the 1998 Act or Article 82 (as was the case in the Second Decision) it is not *ultra vires* for OFCOM to consider relevant Community legislation because of the obligation to interpret national law consistently with the requirements of Community law, if possible.

338. We do not see any inconsistency in the judgments of the Court in *CIF* on the one hand, and *Ladbroke Racing* and *ITT Promedia* on the other. We note that the Court expressly took its earlier judgment in *Ladbroke Racing* into account when giving its reasons in *CIF* (e.g. see paragraph [51]). The *CIF* judgment expressly considers, in considerable detail, the powers and duties of national competition authorities (as distinct from the European Commission) to disapply national laws that are incompatible with Community law. Furthermore, the *CIF* judgment was the most recent judgment of the Court of Justice cited to us to consider these matters.

339. OFCOM, Vodafone and T-Mobile also seek to persuade us that if a national competition authority has a power or duty to disapply national legislation that power or duty should be limited solely to "matters of competition law". It is submitted that in this case the national legislation in question in the present case comes within OFCOM's powers *qua* national regulator of electronic communications and not *qua* national competition authority. We reject that submission.

340. In our view, nowhere in the *CIF* judgment or any of the case law to which we were referred is the duty of a national authority expressly or impliedly limited in the manner submitted by OFCOM. The Court of Justice has held that the duty on a national competition authority such as OFCOM, or the OFT, to disapply inconsistent national legislation derives from Article 10 EC, in conjunction with Articles 81 and 82. Article 10 is of general application and applies to the entire subject matter of the Treaty. It would, in our view, be inconsistent with Article 10 EC to decide that OFCOM has a duty to disapply inconsistent national law if it acts *qua* competition authority but not otherwise. If OFCOM and the interveners were correct in this view it would mean that OFCOM could avoid its Article 10 duty depending on which powers it chose to exercise.

341. OFCOM has decision-making competence over, on the one hand, matters under Articles 81 and 82 EC and the 1998 Act in the field of electronic communications and, on the other hand, electronic communications matters under relevant European Directives and the Communications Act 2003. The power to make regulations such as the Exemption Regulations is now vested in OFCOM and OFCOM is the authority

which has primary responsibility for ensuring that the relevant Community provisions are transposed correctly and, once enacted, interpreted and enforced in conformity with Community law. In those circumstances, in our view, OFCOM's duties pursuant to Article 10 EC are clear.

342. OFCOM and Vodafone submit that the Tribunal has no power to consider any submissions made as to compatibility with EC law because any such challenge can only be brought in the Administrative Court. This is because, it is submitted, the compatibility issues concern the Exemption Regulations and pursuant to paragraph 27 of Schedule 8 to the Communications Act 2003 Parliament has provided that there is no appeal to this Tribunal under section 192 of the 2003 Act against any decision of OFCOM given effect to by regulations under the proviso to section 1(1) of the 1949 Act.

343. First, we are not, in this appeal, concerned with an appeal against a decision given effect to by regulations under the proviso to section 1(1) of the 1949 Act. Our jurisdiction in this appeal derives from the 1998 Act. The Director decided to take a decision on these matters under the 1998 Act and OFCOM has inherited the Director's functions in that regard. OFCOM has now taken its own decision under the 1998 Act and Article 82. Floe challenges OFCOM's conclusions in the Second Decision before the Tribunal in this appeal. We agree with Vodafone's submission that, acting as an appellate tribunal, the first task of the Tribunal is to examine the reasons given in the Second Decision to see whether they are vitiated by error of fact or law. The issues of compatibility with Community law are questions of law which arise in this appeal and we are satisfied that the correctness or otherwise of the legal reasoning employed in the Second Decision is well within our jurisdiction.

344. However, even if we conclude that OFCOM's legal analysis of these issues in the Second Decision is wrong, the judgment of the Tribunal does not of itself quash the Exemption Regulations. To that extent we agree with OFCOM's submission that this is not an appeal against the making of the Exemption Regulations. In the Second Decision OFCOM decided that Floe's services were illegal. Floe's submission to OFCOM was that its services were not illegal, *inter alia* because Floe submitted that OFCOM's interpretation of the relevant national legal provisions on which it relied to

establish Floe's illegality is not in accordance with Community law. OFCOM rejected Floe's submissions in the Second Decision in reaching its decision on illegality. OFCOM satisfied itself that, notwithstanding Floe's submissions concerning Community law, Floe's services were illegal according to OFCOM's construction of national law and that the provisions of national law upon which OFCOM relied to found Floe's illegality were compatible with Community law. On that basis, OFCOM decided that Vodafone had not and could have not abused any dominant position for the purposes of Chapter II of the 1998 Act or Article 82.

345. The issue for us, raised by Floe in its appeals against both the First Decision and the Second Decision, is whether OFCOM's interpretation of the relevant legal provisions in the Second Decision is correct. If OFCOM's interpretation is not correct that has a bearing on the correctness of OFCOM's analysis as to whether Floe's conduct was illegal and therefore whether Vodafone's conduct was justified under the 1998 Act and/or Article 82 because of such illegality.

346. OFCOM's submission in this regard is also inconsistent with its further submission to us that the Exemption Regulations are to be viewed as part of a "general authorisation" for the purposes of the Authorisation Directive. Appeals against the making of a "general condition" do lie to the Tribunal under the scheme of the 2003 Act (section 192 of the 2002 Act). In that regard we note that Article 10(7) of the Authorisation Directive requires Member States to ensure that undertakings have a right of appeal against a decision of OFCOM as to obligations in a "general authorisation" or in rights of use in accordance with Article 4(1) of the Framework Directive (Directive 2002/21/EC). Article 4(1) of the Framework Directive requires any such appeal to be an "appeal on the merits to a body with appropriate expertise".

347. OFCOM's submission would give rise to the question of whether Parliament did intend to exclude decisions of OFCOM relating to obligations in a general authorisation or an individual right of use under the Authorisation Directive from the right of appeal to the Tribunal, and if it did, whether an application to the Administrative Court for review of such a decision of OFCOM would provide the appellant with the "appeal on the merits" by a body with appropriate expertise as required by the Framework Directive. The Administrative Court would not normally

concern itself with the merits of a decision-maker's decision but with whether the decision was reasonable and reached according to a proper procedure. We do not, however, have to decide that issue now as we are not seised of any such appeal pursuant to the 2003 Act. It is, in our view, unfortunate in the 21st century that modern legislation may create complex issues as to which is the appropriate court or tribunal in which to commence proceedings in respect of matters such as these.

348. Accordingly we are satisfied that we have jurisdiction to consider the substance of Floe and Worldwide's submissions as to compatibility with Community law.

XII ISSUE 6 – OBJECTIVE JUSTIFICATION

349. Issue 6 was agreed between the parties as follows:

"**Issue 6: Applicability of the Chapter II prohibition and Article 82 EC**

6.1 If Floe's establishment/use of the GSM gateways at the time of disconnection was prohibited under domestic law and that domestic law was compatible with EC law, do the Chapter II prohibition and Article 82 apply ?

6.2 Was Vodafone precluded by a "legal requirement" from continuing to supply Floe within the meaning of paragraph 5(2) of Schedule 3 of the Competition Act 1998 and the equivalent principles under Community law ?

6.2.1 Would Vodafone have been aiding and abetting the commission of a criminal offence if it had continued to supply Floe?

6.2.2 Would Vodafone have been concerned in an arrangement that facilitated the acquisition of criminal property if it had continued to supply Floe?

6.2.3 Was Vodafone under a general "legal requirement" to avoid or cease the commission of a criminal offence?

6.3 If the Chapter II prohibition and/or Article 82 apply, was Vodafone objectively justified in refusing to supply because of the unlawfulness (if established) of Floe's activities under domestic law?

6.3.1 What is the relevance of Vodafone's motives for disconnecting GSM gateways or its understanding of the services that Floe intended to provide? To the extent that the Tribunal is able to decide this matter without considering whether Vodafone was objectively justified in its

conduct for reasons other than the illegality of Floe's behaviour, was Vodafone acting, as matter of fact, under improper motives?

350. In the Second Decision OFCOM considered, and some of the submissions of the parties addressed, whether or not the application of the 1998 Act and/or Article 82 were excluded entirely because Vodafone was subject to a legal requirement to disconnect Floe's SIM cards and, if Vodafone was not subject to a legal requirement, whether Vodafone was nevertheless objectively justified in disconnecting Floe (paragraphs 184 to 268 of the Second Decision).

351. Whether or not a dominant undertaking is able to rely on "objective justification" for conduct that would otherwise amount to an abuse of a dominant position depends on the facts and circumstances of the particular case. The issue of whether Vodafone was "objectively justified" in disconnecting Floe must be considered by us having regard to the evidence before us, including the oral evidence before us.

352. We have found above, on the evidence before us, that Floe did not disclose to Vodafone and never requested authorisation for, its plans in respect of Multi-User GSM gateway services. The discussions that took place with Vodafone, and the Business Plan provided to Vodafone, related to Single-User GSM gateways attached to a customer's PABX. On the evidence before us it is clear that at the time Vodafone disconnected the relevant SIMs Floe was not using those SIMs in any GSM gateways that were dedicated to a single user at that user's PABX.

353. The Director, and subsequently OFCOM, have analysed the facts of this case as potentially abusive conduct being "refusal to supply", contrary to the Chapter II prohibition and/or the 1998 Act. However, we note that Floe never requested a supply of SIMs from Vodafone for the purposes of supplying commercial multi-user GSM gateway services. In our view, a refusal to supply normally presupposes that a request to be supplied has first been made in good faith. If, as we find, Floe never made a relevant request for supply of SIMs for commercial multi-user GSM gateways we do not consider that there is any sufficient basis for a finding that Vodafone can have "refused" to have supplied this service. Accordingly, in our judgment a proper analysis of the specific facts and circumstances of this case demonstrates that this is

not a case of potentially abusive refusal to supply contrary to the Chapter II prohibition and/or Article 82.

354. We now turn to consider whether Vodafone would have been objectively justified in refusing to supply Floe if, contrary to our findings, Floe had at a material time made a proper request to Vodafone for a supply of SIMs for use in Commercial Multi-User GSM gateways. In our view, Vodafone would have been objectively justified in refusing to supply Floe in those circumstances having regard to:

    (a) Vodafone being the sole licensee authorised to provide the service; and

    (b) Article 10 of the Licensing Directive.

355. As set out above, we consider that the Director and the RA were correct in their view that Vodafone's own licence covered the provision by Vodafone of least cost routing services to third parties by way of business using GSM gateway equipment that complied with the essential requirements of the RTTE Directive. Therefore, if a proper request had been made to it Vodafone could have consented to an Agreement with Floe for the provision of such a service. On that analysis of Vodafone's Licence, and in particular construing the Licence in conformity with the RTTE Directive, Vodafone would not be exposed to criminal liability for having entered into the Agreement with Floe, since it was licensed to do so. Accordingly, in our view, OFCOM's analysis of the legal position, set out at paragraphs 185 to 268 of the Second Decision is therefore misconceived on the facts of this case. Issues concerning the potential application to Vodafone of the Proceeds of Crime Act 2002 and of the criminal law applicable to aiding and abetting (paragraphs 197 to 208 of the Second Decision) do not therefore arise. In those circumstances, Vodafone was not subject to a legal requirement to disconnect Floe's SIMs nor could Vodafone have been exposed to criminal liability for aiding and abetting.

356. In the Second Decision (paragraph 218) OFCOM referred to the case law of the European Court of Justice to the effect that in certain circumstances it might be an abuse for a dominant undertaking to refuse to supply a particular product or service to a customer, in particular where the product or service is an "essential facility" (Case

C-7/97 *Oscar Bronner GmbH v Mediaprint Zeitungs- und Zeitschrift GmbH* [1998] ECR I-7791). This would give rise to the question of whether, if Floe had made a request to Vodafone for a supply of SIMs for use in Commercial Multi-User GSM gateways, Vodafone could be obliged to consent to provide a supply for such use.

357. Assuming for these purposes that Vodafone SIM cards are to be regarded as an "essential facility" for the purposes of the Chapter II prohibition and/or Article 82 (as to which we have not heard any evidence or submissions) we do not consider, in all the particular circumstances of this case, that Vodafone would have had any such obligation at any relevant time.

358. We have held above that Vodafone's Licence must be read, at the relevant time, as an individual authorisation to it to provide *inter alia* least cost routing services over the frequencies specified in its Licence using radio equipment, including GSM Gateways, to the extent such equipment complies with the essential requirements of the RTTE Directive. However, Article 10 of the Licensing Directive permitted Member States to limit the number of individual licences for any category of telecommunications services and for the establishment and/or operation of telecommunications infrastructure, but only to the extent required to ensure the efficient use of radio frequencies and subject to the other provisions of that Directive. Our construction of Vodafone's licence means that, at the relevant time, the United Kingdom had restricted the number of persons able to provide least cost routing services via GSM gateways on the frequencies specified in Vodafone's licence to one. Floe does not submit that the Exemption Regulations or the Licence were incompatible with the Licensing Directive. We therefore proceed on the basis that the Licence, and in particular, the limitation of individual authorisations by way of the Licence to one authorisation, was compatible with the Licensing Directive.

359. On that basis, if at the relevant time the United Kingdom lawfully restricted the number of individual licences to one licence in order to ensure the efficient use of the radio spectrum pursuant to Article 10 (all of which is unchallenged by Floe) then we do not consider that Vodafone would, in those particular circumstances, have been under any obligation to supply Floe at any time before July 2003.

360. It seems likely to us that had Floe requested SIMs from Vodafone for use in Commercial Multi-User GSM gateways at any time before July 2003 Vodafone could have been objectively justified in declining to provide SIMs to Floe for that purpose. This is so because: (a) the national scheme (the Exemption Regulations and the Licence) did not, at that time, permit anyone other than Vodafone to use GSM gateways for the provision of telecommunications services to third parties by way of business; and (b) although Vodafone's licence permitted the provision of the relevant telecommunications service by way of business, the United Kingdom had restricted the number of licensees permitted to use the frequencies specified in Vodafone's licence to one and Floe did not challenge that restriction.

361. After July 2003 there was no relevant change to the Exemption Regulations and, as far as we are aware, no further licences were issued. Floe and Worldwide did not, in these proceedings, challenge the limitation of the number of licences after July 2003 but made submissions on the basis that a complete restriction of commercial services using GSM gateways in the Exemption Regulations is unlawful. Having regard to our construction of the Licence it is therefore not necessary for us to further consider this aspect. In any event, as Floe did not challenge a restriction on the number of licences after July 2003 there is no material before us on that issue.

362. However, OFCOM's Second Decision, and the submissions of OFCOM, Vodafone and T-Mobile at the hearing, proceeded on the basis that the use of Commercial Multi-User GSM gateways is prohibited unless authorised pursuant to a licence under section 1(1) of the 1949 Act, that Vodafone's licence did not permit Vodafone itself to provide commercial services using GSM Gateways and no licence had been issued to Floe. Accordingly, those parties submitted that Floe's use of GSM gateways was unlawful under section 1(1) of the 1949 Act. It is submitted that in those circumstances the 1998 Act and/or Article 82 cannot assist Floe as competition law does not protect or promote unlawful competition. Insofar as the prohibition on commercial use of GSM gateways is incompatible with Community law it is submitted that Vodafone is entitled to rely on clear and unambiguous national law unless and until disapplied by a relevant authority.

363. We have no hesitation in repeating our statement at paragraph [333] of our first judgment that if a regulatory authority has pronounced that an activity is illegal or if the relevant law is clear, then competition law does not require any undertaking to act in furtherance of an illegal act.

364. We therefore proceed below on the basis that, contrary to our findings, Floe had requested SIMs from Vodafone for use in Commercial Multi-User GSM gateways and Vodafone's licence restricted Vodafone's commercial use of the frequencies specified in its licence to use with Base Transceiver Stations only.

365. In our view it would be highly artificial to embark on a detailed consideration of the basis on which OFCOM has considered objective justification in the Second Decision (paragraphs 246 to 268). Such a consideration would, of necessity, have to be on the basis that we are wrong both as to our construction of the statutory scheme (in particular the Licence and the Exemption Regulations) and as to our findings of fact as to whether Floe made any proper request to Vodafone for the provision of SIM cards for use in Commercial Multi-User GSM Gateways. Because of the submissions made to us, we make some brief remarks in that regard although we emphasise this is a purely hypothetical exercise.

366. If Vodafone's Licence was restricted to the commercial use of the frequencies using Base Transceiver Stations only then Vodafone would not have infringed the 1998 Act and/or Article 82 if it had relied on the Exemption Regulations as a justification for refusing to supply SIM cards to Floe for use in GSM gateways for the purposes of providing a telecommunications service to third parties. Such use would not have been individually licensed to Vodafone or Floe and would not have been within the activities permitted by the Exemption Regulations. Therefore, such a service could not, under applicable national law, lawfully be provided in the United Kingdom at all (see section 1(1) of the 1949 Act). The provision of wireless telegraphy without a licence in that behalf under section 1 of the 1949 Act is a criminal offence. In those circumstances, in our view, Vodafone would have been subject to a legal requirement not to provide SIMs to Floe for use in providing a telecommunications service by way of business to another person. Neither the 1998 Act nor Article 82 would, in those circumstances, have applied as competition law does not require furtherance of a

criminal act. This is so even if the Exemption Regulations were not compatible with the RTTE Directive and so were not compatible with Community law as Vodafone cannot be required by the 1998 Act and/or Article 82 to expose itself to criminal prosecution.

367. Our difficulty with the analysis in OFCOM's Second Decision is that Vodafone, for reasons that even now have not been made clear to us, decided to enter into a negotiated agreement with Floe which would permit Floe to provide a telecommunications service to third parties by way of business using GSM gateways (albeit, as we have found, restricted to use of single user GSM gateways at customers' own premises). In so doing, Vodafone's actions were contrary to its own submissions to us as to the true construction of the relevant national law. If its own Licence did not cover the provision of such a service then, on its own submissions, Vodafone acted contrary to the provisions of national law because at no time did the Exemption Regulations ever exempt such a service from the licensing requirement in section 1 of the 1949 Act. The Exemption Regulations did not permit use of apparatus for provision of a telecommunications service by way of business to another person. The relevant national law did not distinguish between single-user and multi-user GSM gateways. Neither use was permitted under the Exemption Regulations. There is no statutory basis for the distinction between single-user and multi-user GSM gateways. This distinction only arises from the contractual negotiations which took place between Vodafone and Floe.

368. If Vodafone had entered into an agreement performance of which would have been contrary to the criminal law then such agreement would be unenforceable. Neither contract law nor competition law can be relied upon to enforce a contract which requires criminal conduct.

369. OFCOM recorded at paragraph 256 of the Second Decision, "The legal situation with regard to GSM gateway use was unclear in certain respects at the time Vodafone disconnected Floe. For example, Vodafone itself considered that the type of service it expected Floe to provide under the Agreement (i.e. a Commercial Single-User GSM gateway) would have been lawful. However, OFCOM has not been provided with any evidence to demonstrate that there was any uncertainty at the time that

Commercial Multi-User GSM Gateways were not exempted from the requirement for a licence."

370. It seems to us that the above quotation is founded on rather confused thinking, particularly because there is and was no legal distinction between Commercial Single-User GSM gateways and Commercial Multi-User GSM gateways, although immediately before the disconnection of Floe Vodafone was, in practice, drawing a similar distinction when seeking to identify the SIM cards which it considered it appropriate to disconnect. Nonetheless, it seems to us that in considering objective justification a dominant undertaking may be objectively justified if it ceases, in part, to provide services which are prohibited by law notwithstanding that it continues to supply other services which are also prohibited by the criminal law.

371. However, this begs the question as to whether or not the services which Vodafone were providing to Floe were precluded by law. Reliance by a dominant undertaking on an objective justification based on a legal requirement must require the dominant undertaking, at the very least, to have clear legal advice that it is so precluded. The issue which therefore arises in the present case is whether Vodafone can rely on an objective justification for disconnecting Floe on the basis of the evidence which has been adduced before us. We have found above that Mr Rodman, who was the responsible person in Vodafone's regulatory department for the disconnection, did not inform himself as to the provisions of Vodafone's Licence, although he knew that the RA considered at that time that Vodafone's Licence did cover the provision of services using GSM gateways. Mr Rodman did not inform himself as to the contractual position between Vodafone and Floe. Had he done so he would have identified Vodafone's Licence and the Agreement with Floe. At that stage, he would have been put on enquiry and ought to have made further investigations within Vodafone and with the RA and Oftel.

372. Enquiries of the RA and Oftel would, in our view, have been likely to have resulted in him receiving similar information to that adduced in the evidence of Mr Mason before us. Proper enquiries within Vodafone ought to have resulted in an analysis of Vodafone's Licence and the contractual relationship between Vodafone and Floe. At that stage it is likely that it would have been appropriate to seek specific legal advice.

We should not now speculate as to what legal advice would have been likely to have been given. However, had Vodafone, at that stage, acted on specific legal advice, following a proper investigation of the factual and legal position and based on full knowledge of the facts and circumstances relevant to Floe, then Vodafone would have been able to rely on that advice as an objective justification for any actions that it then took on the basis of that advice. Had Vodafone followed this course then the litigation which has ensued arising from the disconnection of Floe might well have been avoided.

XIII ISSUE 7 – DISCRIMINATION

373. Floe submits that Vodafone have discriminated against it in disconnecting Floe's services whilst continuing to permit services of other operators of GSM gateways. Floe referred to Recall Support Services Limited ("Recall") who, submits Floe, was using GSM gateways to provide services with the approval of Vodafone. The possibility of evidence being available in this regard was considered at a case management conference before the Chairman sitting alone on 12 October 2005. As the position of Recall was raised only in the notice of appeal it had not been considered by OFCOM in the Second Decision.

374. Vodafone and OFCOM submit that this issue is irrelevant but, in any event, fails on the evidence. Vodafone strongly disputes that it has discriminated against Floe and submits that it disconnects all use of SIMs which it suspects are being used in COMUGs.

375. Floe has adduced no, or no sufficient, evidence in respect of Recall or of any other provider of COMUGs to establish that Vodafone has discriminated against Floe in disconnecting its SIMs. In those circumstances it is unnecessary for us to consider this issue further.

XIV CONCLUSION

376. Floe's appeal must, accordingly, fail having regard to our findings of fact notwithstanding that, in the respects set out above, the Second Decision is inadequately reasoned.

377. Having regard to our findings of fact above, we unanimously confirm the decision of OFCOM that Vodafone did not abuse a dominant position, but we set aside the Second Decision insofar as OFCOM's reasons in its Second Decision differ from the reasons in this judgment. Since the appeal fails we do not, in this appeal, remit any part of the matter to OFCOM.

378. OFCOM is able to take account of this judgment as to the law in the context of its future conduct, including in its separate consultation on the future regulation of GSM Gateways.

Marion Simmons QC Michael Davey Sheila Hewitt

Charles Dhanowa 31 August 2006
Registrar

ANNEX

PROVISIONS OF RELEVANT EUROPEAN LEGISLATION TO WHICH WE WERE REFERRED

1. The Licensing Directive

Article 1

Scope

1. This Directive concerns the procedures associated with the granting of authorizations and the conditions attached to such authorizations, for the purpose of providing telecommunications services, including authorizations for the establishment and/or operation of telecommunications networks required for the provision of such services.

2. This Directive is without prejudice to the specific rules adopted by the Member States in accordance with Community law, governing the distribution of audiovisual programmes intended for the general public, and the content of such programmes. It is also without prejudice to measures taken by Member States concerning defence and to measures taken by Member States in accordance with public interest requirements recognized by the Treaty, in particular Articles 36 and 56, especially in relation to public morality, public security, including the investigation of criminal activity, and public policy.

Article 2

Definitions

1. For the purposes of this Directive,

(a) 'authorizations` means any permission setting out rights and obligations specific to the telecommunications sector and allowing undertakings to provide telecommunications services and, where applicable, to establish and/or operate telecommunications networks for the provision of such services, in the form of a 'general authorization` or 'individual licence`, as defined below:
- 'general authorization` means an authorization, regardless of whether it is regulated by a 'class licence` or under general law and whether such regulation requires registration, which does not require the undertaking concerned to obtain an explicit decision by the national regulatory authority before exercising the rights stemming from the authorization,
- 'individual licence` means an authorization which is granted by a national regulatory authority and which gives an undertaking specific rights or which subjects that undertaking's operations to specific obligations supplementing the general authorization where applicable, where the undertaking is not entitled to exercise the rights concerned until it has received the decision by the national regulatory authority;

(b) 'national regulatory authority` means the body or bodies, legally distinct and functionally independent of the telecommunications organizations, charged by a Member State with the elaboration of, and supervision of compliance with, authorizations;
(c) 'one-stop-shopping procedure` means a procedural arrangement facilitating the obtaining of individual licences from, or, in the case of general authorizations and if required, the notification to more than one national regulatory authority, in a coordinated procedure and at a single location;
(d) 'essential requirements` means the non-economic reasons in the public interest which may cause a Member State to impose conditions on the establishment and/or operation of telecommunications networks or the provision of telecommunications services. Those reasons shall be the security on network operations, the maintenance of network integrity and, where justified, the interoperability of services, data protection, the protection of the environment and town and country planning objectives, as well as the effective use of the frequency spectrum and the avoidance of harmful interference between radio-based telecommunications systems and other space-based or terrestrial technical systems. Data protection may include the protection of personal data, the confidentiality of information transmitted or stored, and the protection of privacy.

2. Other definitions given in Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision and the Interconnection Directive shall apply, where relevant, to this Directive.

Article 3

Principles governing authorizations

1. Where Member States make the provision of a telecommunications service subject to an authorization, the grant of such authorization and the conditions to be attached thereto shall comply with the principles set out in paragraphs 2, 3 and 4.

2. Authorizations may contain only the conditions listed in the Annex. Moreover, such conditions shall be objectively justified in relation to the service concerned, non-discriminatory, proportionate and transparent.

3. Member States shall ensure that telecommunications services and/or telecommunications networks can be provided either without authorization or on the basis of general authorizations, to be supplemented where necessary by rights and obligations requiring an individual assessment of applications and giving rise to one or more individual licences. Member States may issue an individual licence only where the beneficiary is given access to scarce physical and other resources or is subject to particular obligations or enjoys particular rights, in accordance with the provisions of Section III.

4. Member States shall, in the formulation and application of their authorization systems, facilitate the provision of telecommunications services between Member States. (…)

SECTION III

INDIVIDUAL LICENCES

Article 7

Scope

1. Member States may issue individual licences for the following purposes only:

(a) to allow the licensee access to radio frequencies or numbers;
(b) to give the licensee particular rights with regard to access to public or private land;
(c) to impose obligations and requirements on the licensee relating to the mandatory provision of publicly available telecommunications services and/or public telecommunications networks, including obligations which require the licensee to provide universal service and other obligations under ONP legislation;
(d) to impose specific obligations, in accordance with Community competition rules, where the licensee has significant market power, as defined in Article 4 (3) of the Interconnection Directive in relation to the provision of public telecommunications networks and publicly available telecommunications services.

2. Notwithstanding paragraph 1, the provision of publicly available voice telephony services, the establishment and provision of public telecommunications networks as well as other networks involving the use of radio frequencies may be subject to individual licences.

Article 8

Conditions attached to individual licences

1. The conditions which, in addition to those set out for general authorizations, may, where justified, be attached to individual licences are set out in points 2 and 4 of the Annex.
Such conditions shall relate only to the situations justifying the grant of such a licence, as defined in Article 7.

2. Member States may incorporate the terms of the applicable general authorizations in the individual licence by attaching to the individual licence conditions set out in the Annex.

The rights given under and the conditions attached to any general authorizations must not be restricted or complemented by the granting of an individual licence, except in objectively justified cases and in a proportionate manner, in particular to reflect obligations relating to the provision of universal service and/or the control of significant market power, or obligations corresponding to offers in the course of a comparative bidding process.

3. Without prejudice to Article 20, Member States shall ensure that information concerning the conditions which will be attached to any individual licence is published in an appropriate manner, so as to provide easy access to that information. Reference to the publication of this information shall be made in the national official gazette of the Member State concerned and in the Official Journal of the European Communities.

4. Member States may amend the conditions attached to an individual licence in objectively justified cases and in a proportionate manner. When doing so, Member States shall give appropriate notice of their intention to do so and enable interested parties to express their views on the proposed amendments.

Article 9

Procedures for the granting of individual licences

(…)

5. In the event of harmful interference between a telecommunications network using radio frequencies and other technical systems the national regulatory authority may take immediate action to remedy that problem. In such a case the undertaking concerned shall thereafter be given a reasonable opportunity to state its view and to propose any remedies to the harmful interference. (…)

Article 10

Limitation on the number of individual licences

1. Member States may limit the number of individual licences for any category of telecommunications services and for the establishment and/or operation of telecommunications infrastructure, only to the extent required to ensure the efficient use of radio frequencies or for the time necessary to make available sufficient numbers in accordance with Community law.

2. Where a Member State intends to limit the number of individual licences granted in accordance with paragraph 1, it shall:

- give due weight to the need to maximize benefits for users and to facilitate the development of competition,
- enable all interested parties to express their views on any limitation,
- publish its decision to limit the number of individual licences, stating the reasons therefore,
- review the limitation at reasonable intervals,
- invite applications for licences.

3. Member States shall grant such individual licences on the basis of selection criteria which must be objective, non-discriminatory, detailed, transparent and proportionate. Any such selection must give due weight to the need to facilitate the development of competition and to maximize benefits for users.
Member States shall ensure that information on such criteria is published in advance in an appropriate manner, so as to be readily accessible. Reference to the publication

of this information shall be made in the national official gazette of the Member State concerned.

4. Where, on its own initiative or following a request by an undertaking, a Member State finds, either at the time of entry into force of this Directive or thereafter, that the number of individual licences can be increased, it shall publish this fact and invite applications for additional licences.

Article 22

Authorizations existing at the date of entry into force of this Directive

1. Member States shall make all necessary efforts to bring authorizations in force at the date of entry of this Directive into line with its provisions before 1 January 1999.
2. Where application of the provisions of this Directive results in amendments to the terms of authorizations already in existence, Member States may extend the validity of terms, other than those giving special or exclusive rights which have been or are to be terminated under Community law, provided that this can be done without affecting the rights of other undertakings under Community law, including this Directive. In such cases, Member States shall notify the Commission of the action taken to that end and shall state the reasons therefor.
3. Without prejudice to the provisions of paragraph 2, obligations in authorizations existing at the date of entry into force of this Directive which have not been brought into line by 1 January 1999 with the provisions of this Directive shall be inoperative. Where justified, Member States may, upon request, be granted a deferment of that date by the Commission.

Article 25

Implementation

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive and publish the conditions and procedures attached to authorizations as soon as possible and, in any event, not later than 31 December 1997. They shall immediately inform the Commission thereof. When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

ANNEX

CONDITIONS WHICH MAY BE ATTACHED TO AUTHORIZATIONS

1. Any conditions which are attached to authorizations must be consistent with the competition rules of the Treaty.

2. Conditions which may be attached to all authorizations, where justified and subject to the principle of proportionality:
2.1. conditions intended to ensure compliance with relevant essential requirements;
2.2. conditions linked to the provision of information reasonably required for the verification of compliance with applicable conditions and for statistical purposes;
2.3. conditions intended to prevent anti-competitive behaviour in telecommunications

markets, including measures to ensure that tariffs are non-discriminatory and do not distort competition;
2.4. conditions relating to the effective and efficient use of the numbering capacity.

3. Specific conditions which may be attached to general authorizations for the provision of publicly available telecommunications services and of public telecommunications networks that are required for the provision of such services, where justified and subject to the principle of proportionality:
3.1. conditions relating to the protection of users and subscribers in relation particularly to:
- the prior approval by the national regulatory authority of the standard subscriber contract,
- the provision of detailed and accurate billing,
- the provision of a procedure for the settlement of disputes,
- publication and adequate notice of any change in access conditions, including tariffs, quality and the availability of services;
3.2. financial contributions to the provision of universal service, in accordance with Community law;
3.3. communication of customer database information necessary for the provision of universal directory information;
3.4. provision of emergency services;
3.5. special arrangements for disabled people;
3.6. conditions relating to the interconnection of networks and the interoperability of services, in accordance with the Interconnection Directive and obligations under Community law.

4. Specific conditions which may be attached to individual licenses, where justified and subject to the principle of proportionality:
4.1. specific conditions linked to the allocation of numbering rights (compliance with national numbering schemes);
4.2. specific conditions linked to the effective use and efficient management of radio frequencies;
4.3. specific environmental and specific town and country planning requirements, including conditions linked to the granting of access to public or private land and conditions linked to collocation and facility sharing;
4.4. maximum duration, which shall not be unreasonably short, in particular in order to ensure the efficient use of radio frequencies or numbers or to grant access to public or private land, without prejudice to other provisions concerning the withdrawal or the suspension of licences;
4.5. provision of universal service obligations in accordance with the Interconnection Directive and Directive 95/62/EC of the European Parliament and of the Council of 13 December 1995 on the application of open network provision (ONP) to voice telephony (1);
4.6. conditions applied to operators having significant market power, as notified by Member States under the Interconnection Directive, intended to guarantee interconnection or the control of significant market power;
4.7. conditions concerning ownership which comply with Community law and the Community's commitments vis-à-vis third countries;
4.8. requirements relating to the quality, availability and permanence of a service or network, including the financial, managerial and technical competence of the applicant and conditions setting a minimum period of operation and including, where appropriate and in accordance with Community law, the mandatory provision of publicly available telecommunications services and public telecommunications networks;

4.9. specific conditions relating to the provision of leased lines in accordance with Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines (2).

This list of conditions shall be without prejudice to:
- any other legal conditions which are not specific to the telecommunications sector,
- measures taken by Member States in accordance with public interest requirements recognized by the Treaty, in particular Articles 36 and 56, specifically in relation to public morality, public security, including the investigation of criminal activities, and public policy.

2. The RTTE Directive

(1) Whereas the radio equipment and telecommunications terminal equipment sector is an essential part of the telecommunications market, which is a key element of the economy in the Community; whereas the directives applicable to the telecommunications terminal equipment sector are no longer capable of accommodating the expected changes in the sector caused by new technology, market developments and network legislation;

(2) Whereas in accordance with the principles of subsidiarity and proportionality referred to in Article 3b of the Treaty, the objective of creating an open competitive single market for telecommunications equipment cannot be sufficiently achieved by Member States and can therefore be better achieved by the Community; whereas this Directive does not go beyond what is necessary to achieve this aim;

(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 such 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;

(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 public use, according to the state of the art, of limited resources such as the radio 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;

(25) Whereas, nevertheless, the competition rules of the Treaty and Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment establish the principle of equal, transparent and non-discriminatory treatment of all technical specifications having regulatory implications; whereas therefore it is the task of the Community and the Member States, in consultation with the economic players, to ensure that the regulatory framework created by this Directive is fair;

(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;

(34) Whereas radio frequencies are allocated nationally and, to the extent that they have not been harmonised, remain within the exclusive competence of the Member States; whereas it is necessary to include a safeguard provision permitting Member States, in conformity with Article 36 of the Treaty, to prohibit, restrict or require the withdrawal from its market of radio equipment which has caused, or which it reasonably considers will cause, harmful interference; whereas interference with nationally allocated radio frequencies constitutes a valid ground for Member States to take safeguard measures;

(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;

CHAPTER I

GENERAL ASPECTS

Article 1

Scope and aim

1. This Directive establishes a regulatory framework for the placing on the market, free movement and putting into service 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.

379. Article 3 of the Directive contains provisions setting out "essential requirements" to be observed in the construction of radio equipment and a procedure for the European Commission to specify further essential requirements within certain categories, including effective use of spectrum and avoidance of harmful interference (article 3(2) and Article 3(3)(b)).

Article 6

Placing on the market

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

(…)

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.

3. Without prejudice to paragraph 4, Member States shall ensure that operators of public telecommunications networks do not refuse to connect telecommunications terminal equipment to appropriate interfaces on technical grounds where that equipment complies with the applicable requirements of Article 3.

4. Where a Member State considers that apparatus declared to be compliant with the provisions of this Directive causes serious damage to a network or harmful radio interference or harm to the network or its functioning, the operator may be authorized to refuse connection, to disconnect such apparatus or to withdraw it from service. The Member States shall notify each such authorisation to the Commission, which shall convene a meeting of the committee for the purpose of giving its opinion on the matter. After the committee has been consulted, the Commission may initiate the procedures referred to in Article 5(2) and (3). The Commission and the Member States may also take other appropriate measures.

5. In case of emergency, an operator may disconnect apparatus if the protection of the network requires the equipment to be disconnected without delay and if the user can be offered, without delay and without costs for him, an alternative solution. The operator shall immediately inform the national authority responsible for the implementation of paragraph 4 and Article 9.

3. The Authorisation Directive

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.

(15) 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; …

(b) '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 radiocommunications service operating in accordance with the applicable Community or national regulations.

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 4

Minimum list of rights derived from the general authorisation

1. Undertakings authorised pursuant to Article 3 shall have the right to:

(a) provide electronic communications networks and services; and

(b) have their application for the necessary rights to install facilities considered in accordance with Article 11 of Directive 2002/21/EC (Framework Directive)

2. When such undertakings provide electronic communications networks or services to the public the general authorisation shall also give them the right to:

(a) negotiate interconnection with and where applicable obtain access or interconnection to or interconnection from other providers of publicly available communications networks and services covered by a general authorisation anywhere in the Community under the conditions of and in accordance with Directive 2002/19/EC (Access Directive)

(…)

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 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.