**IN THE COMPETITION APPEAL TRIBUNAL**

Case No 1024/2/3/04

Victoria House,
Bloomsbury Place,
London WC1A 2EB

2nd November 2005

Before:
MARION SIMMONS QC
(Chairman)
MICHAEL DAVEY
SHEILA HEWITT

Sitting as a Tribunal in England and Wales

BETWEEN:

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

and

**OFFICE OF COMMUNICATIONS** Respondent

supported by

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

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# CASE MANAGEMENT CONFERENCE

# APPEARANCES

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

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

Mr. Charles Flint QC (instructed by Herbert Smith) and Mr. Stephen Wisking of that firm appeared for the first Intervener, Vodafone Limited.

Mr. Meredith Pickford (instructed by Miss Robyn Durie, Regulatory Counsel, T-Mobile) appeared on behalf of the Second Intervener, T-Mobile (UK) Limited.

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

THE CHAIRMAN: Good afternoon. I suggest we take the agenda and go down the items of the agenda, would that be convenient? The first item is in relation to the proposed Intervener. Mr. Kennelly?

MR. KENNELLY: Madam, I understand the Tribunal has received my written submissions?

THE CHAIRMAN: Yes.

MR. KENNELLY: I put in a short document. I also have some authorities which it may or may not be necessary to examine. They relate to the principles that the Tribunal applies when considering applications to intervene. I proceed on the basis that those are understood and if necessary I will hand those up and distribute them to my learned friends.

Madam, Worldwide has until recently been a provider of Commercial Multi-use GSM Gateways, but of course as a result of Ofcom's Decision it has ceased to provide those services, but it is fair to say that its entire business depends on the legal issues which this Tribunal will resolve. The application of the exemption regulations and whether or not the restrictions placed on Commercial Multi-use GSM Gateways, whether or not those restrictions are compatible with the authorisation Directive and the RTTE Directive goes right to the heart of whether or not Worldwide can continue its business. It has been questioned by Ofcom and by Vodafone whether or not Worldwide has a genuine interest in the outcome of these proceedings but, of course, the Tribunal may well have to consider these very legal issues, quite apart from the separate issues of abuse which relate to Floe, but the legal issues may well be resolved and those are quite fundamental to Worldwide's business, in relation to which Worldwide ought to be able to make representations. Those legal issues are very important, and that has been confirmed by Ofcom's own skeleton submissions in relation to this hearing. They have suggested that it may be necessary to make a reference to the European Court of Justice under Article 234/EC.

There is no suggestion that the issues are unimportant or so straightforward that they do not admit of detailed legal analysis and therefore Worldwide ought to be able to make representations in relation to those narrow issues.

Of course, the Tribunal will recall that when Vodafone sought permission to intervene in these proceedings in 2004, when Miss McKnight appeared for Vodafone, its submission was that it ought to be able to intervene because the hearing threw up issues in relation to the wireless telegraphy legislation. That was the basis for Vodafone's application. It was the President of the Tribunal who said that of course Vodafone may also be prejudiced by things decided by the Tribunal. But Vodafone's own application was based on this same issue of important legal issues which are relevant to its business, and the same applies completely to

Worldwide – even more so, in fact, because Worldwide's entire business depends on Commercial Multi-use GSM Gateways.

It has been suggested that Worldwide add nothing to what Floe will say. Worldwide's position is not exactly the same as Floe's. It received its SIM cards from third parties. It has no direct relationship with Vodafone or T-Mobile, but its interests are separate in the sense that its business is separate to Floe's and, of course, T-Mobile has permission to intervene, quite properly it must be said, because its commercial interests are intimately affected, although it may also be said that Vodafone could make the same submissions that T-Mobile are also making.

THE CHAIRMAN: Well is that not because of VIP?

MR. KENNELLY: It is, but the legal arguments could be made. As far as I can see – and I realise I have come to this fairly recently – the vast majority of the legal arguments could be made just as well by Vodafone in coordination with T-Mobile, or separately by T-Mobile. I am not suggesting, Madam, that T-Mobile should not have been given permission to intervene, I am simply saying that Worldwide ought to be given the same permission.

In terms of the legal issues to which our attention would be directed, I hope that my written submission has given some comfort to the parties because I understand there was some confusion – perhaps justifiable – in relation to what Worldwide were actually going to do in these proceedings and I accept completely that Worldwide have no role in discussing the factual issues that are specific to Floe, there are discrimination issues and so forth that relate to Floe, and those throw up evidential questions which will occupy a great deal of the Tribunal's time. Worldwide's concern is in relation to the legal issues, as I have said, and we would accept that any intervention by us would be limited to those issues. Those issues, of course, may throw up evidential questions as I have said in my submission this Tribunal is not the Administrative Court and in a merits' appeal (which is what this is) the Tribunal is empowered and ought properly to examine the substance of the question, and in relation to that Worldwide would hope to make submissions, but the broad factual issues that Floe has raised we have no role in that. So when I describe the legal issues we will address, clearly those fall into two parts, the domestic question, the exemption regs. in Regulation 4.2 and the correct application of the authorisation Directive, and the RTTE Directive, and in particular Article 7 of the RTTE Directive.

Secondly, if the question of abuse comes to be addressed, the circumstances in which the mobile operators may properly disconnect a GSM Gateway, the legal test that ought to be applied in that circumstance is a matter also in which Worldwide would wish to make representations in relation to the legal test.

THE CHAIRMAN: The *Hilti* point?

MR. KENNELLY: Indeed, madam, yes. Those are my submissions.

THE CHAIRMAN: Thank you very much.

MR. ANDERSON: Ofcom's position is the same as the position it took at the last CMC in which the question of intervention was raised, namely, we oppose it. Having received this written elaboration – I have to say rather late in the day for an Intervener who is applying to intervene out of time – but it is clear from looking at that document that Worldwide wishes to make submissions in relation to issues of law which we say are issues essentially directed to the question of whether or not the domestic regulations are compatible with EC law. For reasons that I hope we get on to later today we say that those are issues which cannot sensibly be dealt with on 1st December, there is plenty more for the Tribunal to be considering at that stage and one may never get to the question of compatibility with EC law.

The second point is that it is quite clear that the issues on which Worldwide wishes to make representations are issues that if they arise in due course are issues on which Floe will be making representations and it is simply a question of repetition, which the Tribunal's own guidance makes at 10.5 – if the interests of the proposed Intervener are adequately protected by the position taken by another party then there is no need to grant intervention just for the sake of expanding the scope of the representation and the parties. So our position is that the intervention should be declined. It is likely to cause simply more complexity and extra expense without any discernible benefit to anybody, particularly the Tribunal. I ought to add that if the Tribunal is against us and is minded to grant intervention we would propose that it is granted only in very limited form with appropriate safeguards and precisely what Worldwide will be permitted to address the Tribunal on.

THE CHAIRMAN: What sort of limited form would you suggest if that is the way we decided?

MR. ANDERSON: Well they are confined to the three issues they have identified, that they do not call evidence, that they limit the scope of their intervention to one written skeleton argument served before Ofcom and the Interveners have to serve theirs, and leave open the question of whether it is necessary for them to make oral submissions; and obviously, no participation in factual issues and questions of cross-examination. But our principal position is that they bring nothing and they should not be allowed to intervene.

THE CHAIRMAN: Do you think you have anything particularly to say for Vodafone?

MR. FLINT: I do have an interest in terms of the costs and delay that will be caused by a further Intervener and, if you will permit me, I have three short points to make. First, that Worldwide has no sufficient interest under Rule 16, secondly, that no proper grounds are shown for this intervention; and thirdly, as a matter of discretion the Tribunal ought to refuse it.

On the question of sufficient interest it is remarkable that this is an Intervener who does not claim to have any competition law complaint at all. It did not participate in the complaint to Ofcom, it could not participate because it has no complaint – it does not even say it has a potential complaint against another supplier of SIM cards – its grievance is quite different, namely, that Ofcom takes a certain view of the law. As you have seen from the Notices of Application it actually considered and took legal advice as whether it should Judicially Review Ofcom at an earlier stage and decided not to challenge. So if one asked the question "is Worldwide concerned in Floe's complaint and its outcome?" the answer has to be in our submission: "not at all", they are not even concerned in a potential complaint made against another mobile operator. It is a remarkable fact arising out of this application that we were told by Floe that part of their case on discrimination was that Vodafone had supplied SIM cards knowingly to Worldwide and allowed them to operate COMUG services. That allegation has been shown to be false by this application by Worldwide who have made clear they were not supplied by Vodafone.

The second point is that in our submission there are simply no proper grounds for this application. If one asks the question: "What is the separate interest that Worldwide has?" – again it is noticeable there is not even a statement from a director explaining why the company has an interest in intervening in this case – they have no different separate interest. On the legal issues, their case is identical to Floe's and there is not a single point that Mr. Kennelly could argue – no doubt very eloquently – that could not equally well be argued by Floe.

The third point goes to discretion. We invite the Tribunal to take note of the fact that this is a company that has had the benefit of legal advice, decided whether to bring a challenge against Ofcom's view of the law by the proper means, Judicial Review, and decided not to do so. They should not now be permitted to piggy back on a competition complaint in which they have, in our respectful submission, no interest at all.

The interest of Vodafone in making these submissions is simply that this Appeal should be confined within reasonable bounds and not allowed to grow by adding an Intervener who has nothing to add, which will simply add further time cost and expense to the proceedings. Mr. Kennelly invites you to conclude that his position is similar in some way to Vodafone and T-Mobile. The position of Vodafone is completely different. It is Vodafone's conduct that is impugned in this complaint, and it is Vodafone's conduct that has to be defended on Appeal before this Tribunal. It is also in a completely different position from T-Mobile, which equally has a complaint impugning its conduct from VIP. We invite the Tribunal to note that, despite being given a further opportunity to explain its interest in these

proceedings, all one really has is a desire to fortify the arguments that Floe wishes to make by repetition, and we invite you to refuse the application.

THE CHAIRMAN: Well since Vodafone have had their say, do you want to say anything?

MR. PICKFORD: Madam, I have nothing further to add to the submissions of Ofcom and Vodafone, which we support.

THE CHAIRMAN: Thank you.

MR. MERCER: I have little to say, ma'am, except to point out some obvious points. I do not recall in this matter there being a statement from the directors of Vodafone concerning the matter in why they should intervene, and so I do not know why Mr. Flint should expect Worldwide to do something along those lines.

I think I am one of the few original survivors from the first hearing and I remember what Miss McKnight said, quite vividly, namely, that their first point was that they were interested in the legal position because that had a knock-on effect in their total business and dealings, and that was their grounds for originally asking to be an Intervener. Mr. Flint says that all Worldwide is doing is piggy-backing, but this may be its one chance to have its say in respect of the particular legal issues that will come up about the legality of commercial gateways and if it does not take that opportunity it loses it, perhaps.

THE CHAIRMAN: There you are representing Floe, I was looking at you as Floe, not as Worldwide.

MR. MERCER: Well yes, I was actually answering as Floe for once. I looked carefully above my head to see which cap I was wearing at the time.

THE CHAIRMAN: You may be sitting next to Mr. Kennelly as the solicitor instructing him, but you are there also for Floe.

MR. MERCER: Actually I could not cope with instructing Mr. Kennelly, ma'am, so I got one of my assistants to do it. But those are the points I think obviously come out, listening to the other speakers, as being the ones that are an immediate answer to Mr. Flint, and apart from that I will not detain the Tribunal further.

MR. KENNELLY: Madam, simply to say that dealing with the legal issue, it may be that we have no interest in the result of the specific complaint against Vodafone but the legal issues are relevant to us and this is our only chance, I would say, to deal with them now.

(The Tribunal confer)

THE CHAIRMAN: We are going to deal with the issues one by one today, so we will just adjourn for few moments to discuss this and then tell you result, and then go to the next item.

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

THE CHAIRMAN: We are satisfied that the resolution of the legal issue affects Worldwide's future business and on that ground we consider that they do have a sufficient interest in the outcome of the proceedings for permission to intervene under Rule 16. Accordingly, we exercise our discretion to permit this application out of time and to grant it.

Turning to the conditions for intervention, the submissions are contained in the Grounds of Intervention dated 31st October 2005, and we direct that those stand as the Statement of Intervention and that the intervention be limited to the three grounds identified. We stand over the question of oral submissions by Worldwide until after the skeleton arguments have been provided by the parties. If oral submissions are to be permitted then these will need to be prepared in cooperation with Floe so that there is no duplication.

MR. KENNELLY: Madam, very briefly on that, so there is no confusion, in the Statement of Grounds which now stands as the Grounds of Intervention I refer to the issues to which Worldwide's intervention will be directed, and I refer to the broad legal issues under the Authorisation Directive, the RTTE Directive. Then there were three sub-headings: Scope of Review, Standard of Review and *Hilti*. Those are not the three to which the Tribunal refers, but the legal issues to which I have referred to in para.7 of the Statement. So can we clarify that Worldwide will be permitted to make legal submissions in relation to the Directives?

THE CHAIRMAN: Yes.

MR. KENNELLY: I am very grateful.

MR. FLINT: Could I ask for clarification? Is the Tribunal intending that Worldwide should then go on to make submissions as to the circumstances in which a dominant mobile operator may unilaterally refuse to supply its services to COMUG? In my respectful submission that falls way outside the proper interest of Worldwide. Their interest is only on the legal issues as to the legality of the services, and nothing to do with the competition law issues.

MR. KENNELLY: I limited my intervention in that respect to the *Hilti* point.

THE CHAIRMAN: That is what I understood, it is limited to the *Hilti* point.

MR. FLINT: I am very grateful.

THE CHAIRMAN: So it is purely on the law.

MR. KENNELLY: Indeed, madam, yes.

THE CHAIRMAN: The next point on the agenda is disclosure of documents. Disclosure of documents as they affect the parties in the front row today – all right? Now, there is an application by Mr. Mercer in relation to disclosure of documents from Ofcom and Vodafone – that is right, is it not?

MR. MERCER: Yes. We pursue an application which I will not repeat, looking firstly at the Vodafone issue.

THE CHAIRMAN: Those documents are the responses to the consultation to which apparently there is some claim to confidentiality?

MR. MERCER: I was actually going to deal with the application we made in respect of the documents held by Vodafone which relate to dealings with other MNOs.

THE CHAIRMAN: Yes, all right.

MR. MERCER: In which case, ma'am, the Tribunal has my application and it has the comments and observations of Mr. Flint, so I will not repeat those, ma'am, but just try and pick up a few points. Mr. Flint believes that I am a keen fisherman, and this is merely an expedition on my part to try and pick something up that I might not otherwise be interested in. He says that we did not make the real reason for our application obvious soon enough. I can only apologise for that, but I thought it would have been blindingly obvious why we would want to know what conversations Vodafone have had with the MNOs about gateways. We now begin to know – I do not have the records in front of me – when going through in detail the materials provided by Vodafone there is at one point a reference to the MNOs getting together. Mr. Flint, Vodafone, argued that it could not really be of any great interest to know what was the motive of Vodafone because the question of *mens rea* does not really come into the argument. Well, it may not come into Ofcom's argument but it may well come into mine, and knowing why they did something may become quite important. It may become very important, for example, when we are looking at an analysis of *Hilti* or we are trying to work out the real reason as to whether Vodafone are the saviours of the wireless telegraphy network, or merely protecting commercial interests.

Mr. Flint generally, both in respect of this issue and elsewhere, says that our amended revised Notice of Appeal is confused and disorganised, and it may be that somebody coming late to the matter may find it so, ma'am, but one of the points I referred to last time we were here was the fact that this is such a complex, interwoven series of issues that we must look at everything in the round and to do that we must, I think, understand better what were Vodafone's motives.

It is clear that if there was nothing to provide to us that Vodafone could have just said there is nothing to provide to you, but clearly there is something and indeed their own materials refer to it. There were discussions between the MNOs about this area. In short, Vodafone's objections are just the classic objections of somebody who does not quite want these documents to come out and I think prima facie there has to be a degree of relevance that is high to the matter and these documents very likely contain matters that will be of great interest to the Tribunal. That is all I have to say, ma'am, at this moment.

MR. FLINT: We are facing an application, so far as I understand it, made in the application of

25th October for information (para.5) about any meetings between GSM operators around the time of the disconnection of Floe, that is March 2003. Reference is made to the letter of 13th September, which I hope the Tribunal has seen, in which Taylor Wessing asked for disclosure of documents based on, as it is candidly put in the first paragraph: "persistent rumour and hearsay evidence" relating to meetings of GSM operators perhaps together with Ofcom, at which action as GSM Gateway Operators was to co-ordinate it. In a second paragraph it is said:

> "It is our understanding that the aim of the meeting was to co-ordinate action against specified or targeted GSM Gateway Operators with the object of making example for them".

The reply from Herbert Smith (for Vodafone) was to ask what the foundation was for those serious allegations, perhaps a fairly remarkable suggestion to make against Ofcom, and to say that as far as it is aware there was no discussion between operators to take action against specified or targeted Gateway Operators with the objective of making example of them. The reply from Taylor Wessing – and in our submission it was a remarkable letter for a solicitor to write – was:

> "With respect to the allegations it would I think be wrong to assume we have disclosed all that we know."

So what appears to be being said there is that there is further material to support the application but the Appellant is not prepared to adduce it. We have three points to make to the Tribunal as to why you should dismiss this application. First, this material is irrelevant to the issues, secondly, the application is not founded on any proper evidence; and thirdly, the question of the Tribunal's discretion, even if there were some relevance which could be made out, in our submission as a matter of discretion the disclosure is quite unnecessary.

The first point on relevance is that the issue is that there is no issue as to whether Vodafone had the necessary *mens rea* to be convicted of a criminal offence if it continued to supply. That sort of topic could only become relevant if and when we get to the issues – if they arise in the case – relating to the motives of Vodafone. On any prior issue what Vodafone thought is immaterial. The Ofcom Decision, which is under Appeal at para. 198 and following is to the effect that there was a potential criminal offence if Vodafone continued to supply with knowledge. It is irrelevant to that reasoning, and clearly equally irrelevant to this Appeal whether in fact Vodafone had the requisite knowledge so as to be liable to penalisation for a criminal offence at any time with which we are concerned in particular March 2003. If one can just test the Appellant's assertions as to relevance against their list of issues, if we look at the list of issues which Mr. Mercer has put forward as standing as the issues which this

Tribunal should determine and one asks the question where, under those issues, is it relevant to investigate whether Vodafone could in theory have been liable to a criminal offence, if you have those, madam, one sees that it cannot apply to any of the first six issues – it certainly does not apply to "7 – legitimate expectation". At 8 one gets into the area where Vodafone motives may, to a certain extent, become relevant if we get there, and it would have to be under "8(b) was Vodafone's conduct in disconnecting Floe discriminatory in all the circumstances?" It is not part of the discrimination case that Vodafone committed a criminal offence, indeed, whether Vodafone was or was not liable to criminal penalty is simply not part of the issues at all. So in our submission this Application is for irrelevant material.

The second point is that this Application is not founded on any proper evidence at all, there is simply no basis for the assertion made by Mr. Mercer that there may have been such meetings and in some way Vodafone is seeking to withhold them. The letter of 13th September was avowedly based on rumour and hearsay, it has not been substantiated by anything more and the allegation that there was some such co-ordinated meeting was denied, not only in the correspondence but also in the evidence that has been put before the Tribunal. If you have Vodafone's Statement of Intervention, there is attached to it Mr. Morrow's third witness statement, at divider D, the annexure to the Statement of Intervention, and it is at para.9. The witness here is speaking about September 2002 and the Application for disclosure relates in any event to a later period, March 2003. But speaking in September 2002, at para.9 he says that

> "… although my email suggests it might be worthwhile co-ordinating legal action with the other networks Vodafone did not contact the other UK mobile networks and was never involved in any co-ordinated action against illegal gateways."

So there is, in my submission, on the evidence before the Tribunal simply no basis at all for suggesting that there were meetings and, if there were meetings, that they might hold relevant material that requires to be disclosed.

My third point is on discretion. For the reasons I have given it is simply not helpful on any of the issues, and certainly none of the issues with which this Tribunal is likely to deal at the December hearing. The question for the Tribunal is whether Ofcom made an error of law or fact in its Decision in the respects in which it is impugned in the Notice of Appeal. There is no requirement for Ofcom to have conducted a general inquiry into the entirety of Vodafone's knowledge or of its alleged dealings with other mobile network operators, and in my submission this is indeed a wholly speculative application in the hope that something may turn up which will allow another issue to be developed. It certainly does not go to any of the issues of which this Tribunal is seized and so we invite you to dismiss this application.

THE CHAIRMAN: Mr. Mercer? I think this is just between Vodafone and you, I do not think it has any bearing on anybody else?

MR. MERCER: I would not want to stop anybody, ma'am. Have you noticed, ma'am the visual similarity between Mr. Flint and the actor, Charles Dance? Yes, when you take your glasses off, particularly, Mr. Flint! (Laughter) Now they are both, you see, playing Tulkinghorn. Mr. Dance is playing Tulkinghorn in the BBC production of Jarndyce v Jarndyce, and Mr. Flint I suspect, as a recurring theme this afternoon will be playing Tulkinghorn in trying to drag us all into our own version of Jarndyce v Jarndyce. The fact is that it is, I accept, Mr. Flint's job to try and narrow the issues with his client by examining this matter as much as he can. But I will submit, and will keep submitting, that that is not what this Tribunal should do. Now, I will be quite happy to say this. If Mr. Flint, on behalf of his client, stands up and says "There were no such meetings as you referred to in your letters", then I will withdraw my Application, but I think there were and I do not think he can make that statement. If those meetings did take place then we should know about them. I will not trouble you further, ma'am.

MR. FLINT: Well if that is an invitation, I thought my submissions had made clear that the unsubstantiated assertion, founded on rumour and hearsay, that there were co-ordinating meetings between GSM operators to co-ordinate action against specified or targeted GSM Gateway Operators, there were no such meetings.

MR. MERCER: Well I have to accept that because, in that case, there would be no notes of any meetings to produce, ma'am. If that is a straightforward statement that the MNOs have never discussed Gateways between them, then I have to accept that.

MR. FLINT: That is, of course, not what I said. As Mr. Mercer perfectly well knows the mobile operators did, at the request of the Radio Communications Agency co-ordinate a response to the consultation exercise. So of course the suggestion that there were no discussions at all is not the one I was making. I was responding to the point as to whether or not there had been meetings of the type in March or April 2003 described in the letter, and I hope I have given a clear response to that. It is a great pity that that response, when given by Herbert Smith in its letter of 16th September, was not accepted at that stage.

THE CHAIRMAN: Does that satisfy you, Mr. Mercer?

MR. MERCER: Well, no, actually. If we examine the letter from Herbert Smith we can see that it deserved the answer that it got.

THE CHAIRMAN: What do you want to refer us to?

MR. MERCER: The letter of 16th September from Herbert Smith.

THE CHAIRMAN: I think we have it.

MR. MERCER: The last version that I have seen is attached to Vodafone's observations.

THE CHAIRMAN: Yes, we have the copy.

MR. MERCER: If we look at the third paragraph:

> "… there has been no discussion between GSM operators as to the action against specified or targeted gateway operators with the objective of 'making an example' of them. Moreover, it is not aware of any legal action taken by it or other operators (in particular T-Mobile) against gateway operators."

If we just look at the wording to that ----

THE CHAIRMAN: What are you directing us to on ----

MR. MERCER: It is a very specific sentence, ma'am.

THE CHAIRMAN: Are you talking about the words "with the objective of making an example of them"?

MR. MERCER: Yes.

THE CHAIRMAN: Mr. Flint better correct me, but I do not think he put those words in just now. That is right, Mr. Flint, is it not?

MR. FLINT: I reflected that letter in my observations I trust, which was entirely responsive to the way in which it had been put by Mr. Mercer. But it is right, there were no meetings between the operators with a view to co-ordinate action against specified or targeted GSM Gateway Operators. Madam, you may well be right, I did not add the words "… making an example …" and that is not a material point. I was answering the substance.

THE CHAIRMAN: Yes, absolutely. So you go wider than is in this letter effectively, because in this letter there were no meetings in relation to "making an example", you are saying there were no meetings with a view to co-ordinating ----

MR. FLINT: Well as there were no relevant meetings as are referred to in the request of 13th September I do not go wider or narrower than there were no such meetings. I should have drawn the Tribunal's attention to the point that not only did Mr. Morrow deal with it, but you have a very detailed statement from Mr. Rodman, which you probably have not had a chance to read, where he does explain, of course, there was a joint response to the Radio Authority's ----

THE CHAIRMAN: We appreciate that, we know all about that from last time. (To Mr. Mercer) I think you have to accept that.

MR. MERCER: Categorical.

THE CHAIRMAN: So that has been dealt with. Right, we can now move on to your next application, which is against Ofcom.

MR. ANDERSON: Madam, we have received no application for disclosure. What I was proposing to do was to update the Tribunal on where we stand on the confidentiality exercise as I have outlined in our written submissions. We have one minor application for disclosure referred to in para.22, but in our submission it would be quite premature to deal with the substance of any application for disclosure against Ofcom when no application has been received by us. In particular, since we are advancing confidentiality on behalf of third parties, it would, in our submission, be necessary for those third parties to be afforded an opportunity to make whatever representations they wish to make before any confidentiality should be overruled or lifted by an order from you, ma'am.

What we have been doing, and we reiterate the point we make, that the bulk of this information we cannot see as relevant to any issue before this Tribunal, we have been seeking the consent of those on behalf of whom we have claimed confidentiality to see if they will consent to that documentation being disclosed. That is an on going process, it is taking time, we have had some responses. In relation to those companies that have consented, we will disclose that information. In relation to those who maintain confidentiality, what we were proposing to do, and this will assist, I think, my friend Mr. Mercer, to formulate whether or not he wishes to make a formal application, we will set out a confidential version of a confidential table that we are creating which we hope will identify the nature of the documents at issue. So the Tribunal and Mr. Mercer – and indeed any other party – can see whether there is any potential relevance in that category of document, and then we will identify the nature of the reasons for confidentiality that are being advanced to the extent that we can, we have not had responses from all and we may not get responses from all because we went through this exercise at the outset as well asking these companies whether they wished to maintain confidentiality. Once that exercise is done, and we can do it in two stages, as and when the responses come in, everybody will then be in a much better position to see whether, applying the *Claymore* tests to this information it is necessary or appropriate for the Tribunal to make an order. But it is premature, in our submission, to do that at this stage when we are in the process of finding out the basis of and whether the companies concerned wish to maintain confidentiality. But it cannot, in our submission, be dealt with today. There is no application.

THE CHAIRMAN: Mr. Anderson, there is a bit of a chicken and egg situation here, because although the file, and access to the file, is normally appropriate in these sort of cases, there is the question here as to whether the particular documents in the file are relevant at all because there could be documents in the file that are not relevant.

MR. ANDERSON: Well there certainly are.

THE CHAIRMAN: Absolutely. You said the bulk of documents – I am not sure which documents you meant – are not relevant. Now, what concerns me is whether a lot of work is being done in relation to documents which are not relevant, that is why I have raised it.

MR. ANDERSON: The answer to that question is certainly an awful lot of work is being done in relation to documents that are not relevant in an endeavour to pre-empt, if you like, the Tribunal being troubled by them. So what we are seeking to do is identify in this schedule the categories of documents and what they cover, so the Tribunal can see, and Mr. Mercer can see, that they are not relevant and then identifying also why the confidentiality is being sought so that if Mr. Mercer were to make an application – I stress he has not made an application – if he were to, then the Tribunal would be better placed to take a view on whether it is appropriate but, yes, we are going through all the documents that were submitted by third parties to the RA in 2002 in relation to that consultation. The reason we say that is irrelevant is because it is not in our submission the function of this Tribunal to be considering whether or not the Secretary of State was right or wrong to have decided not to repeal the regulations.

The other tranche of documentation is the submissions made in the context of Ofcom's consultation of this year, again not an issue with which this Tribunal is concerned, but you will have seen from the correspondence that we attached to our written submissions that Mr. Mercer is nonetheless pressing for us to be more specific in relation to why it is that we have taken the line that we have taken, that is the purpose of the schedule, but we do not believe that the Tribunal needs to be troubled today by the detail of that exercise.

THE CHAIRMAN: What crosses my mind is whether the Tribunal ought to get involved at this stage with whether the category of document is relevant, because if the category of document is not relevant then a lot of work is being done for nothing and delay is being caused for no reason.

MR. ANDERSON: Again, in part that will depend upon identification of what are the issues in this case and the order in which the Tribunal should take them. I do not think I can categorise the documents in DB1 and 2, which are the re-investigation because there there are various emails and documents from parties that have confidentiality claimed in respect of them. We will endeavour to categorise them in this schedule. The other broad categories are the submissions underlying the consultation in 2002, which we say is not relevant on any basis, and the same for the 2005 consultation. There is also some debate about whether disclosure should be granted of internal minutes and communications between various officials leading up to the formulation of the submission put to the Minister, of which I understand there are a large number of documents running into tens of lever arch files, as I understand it, which is not an exercise we are undertaking. We have simply said in relation to that, you have got what was

provided to the Minister for his decision, although the Minister's decision is not actually an issue in this case, but everything underlying all that would just be disproportionate and on no view is relevant. So that is the position. There is the first category which are documents on the file in DB1 and 2 and there are then those three other categories – submissions in the 2002 consultations, submissions in the 2005 consultation, and internal DTI RA communications.

THE CHAIRMAN: How long is all this going to take you?

MR. ANDERSON: If it is an exercise that is necessary to be done, and considered, it cannot be done, we do not believe sensibly in time for it to be of use at a hearing on 1st December.

THE CHAIRMAN: That is not the question I asked you. I asked you how long do you think it is going to take you?

MR. ANDERSON: To some extent it is not in our hands because it depends on ----

THE CHAIRMAN: Does this relate to other issues?

MR. ANDERSON: No, it relates to the fact that we are at the moment dependent upon responses from third parties as to whether they wish to maintain confidentiality and why they wish to maintain confidentiality. We do have some responses already. We have written to everybody I understand and we are awaiting their responses. We could certainly give an update, for example at the end of the week, to provide all the documents that we have already got, but it is difficult to give an actual deadline on how long the exercise will take.

THE CHAIRMAN: Well you are suggesting it is as long as a piece of string.

MR. ANDERSON: Well if I could just take instructions on that one point. (After a pause) Of course, if the Tribunal were to indicate now that they agree with us that those categories of document are not relevant we can stop the exercise. As I understand it, the deadline for responding from those to whom we sent letters has already expired, it is out of our hands. So we could now prepare a schedule of where we stand and serve that by the end of the week.

THE CHAIRMAN: Right, that is very helpful. Shall we hear what Mr. Mercer says about this?

MR. ANDERSON: Certainly.

MR. MERCER: For once I think there is going to be a measure of agreement in what we say, in the sense of no, I have not actually made a formal application because I was waiting – lo and behold we were one of the people who were asked for consent – for the outcome of the exercise that Ofcom were clearly undertaking, and I had also assumed that I would not deal with the internal correspondence point until also I knew the totality of the position on confidentiality. I would not want the Tribunal, ma'am to get the impression that we asked for this just for the sake of it, you know, a bit of an annoyance factor, or something. We asked the question because when you look at that schedule, it is a schedule of documents from Ofcom,

and you look at the highlighted items, it just says "Letter to ….[blank] dated ….[whatever]" with no indication of who it is about or what it is about very often.

THE CHAIRMAN: Well it now turns out that these documents, as I understand it, are letters or some sort of document which is a communication from a third party in answer to a consultation. Now, do you say those documents are relevant?

MR. MERCER: I do not think they probably would be, ma'am, no. What we said was "Well, are they?" We just do not know, and we cannot determine whether they are useful or not useful, we should be making an application about them until we have some idea what they are about, who they are from, what it is about? There was no description given, ma'am.

THE CHAIRMAN: We now understand what those documents are about. Possibly we should just park this for today, but there needs to be some discussion between Ofcom and you in order to identify the category of document and to decide whether or not you want to make an application in relation to it. If you do not want to make an application a lot of work is being done by Ofcom for no purpose. I am very concerned – I think we are all very concerned – it is all very well that there is a huge file, but not all the documents in that file are going to be relevant, and therefore to cause Ofcom to have to obtain documents which are clearly – I am not saying these are clearly or not clearly – but if they are clearly not relevant to our consideration that is inappropriate.

MR. MERCER: Well what we said was we have just got no idea what these are about.

THE CHAIRMAN: Well now we know, the answer is that either after this hearing today, while everybody is here, or tomorrow there needs to be some discussion between Ofcom and you so that the categories are identified and it is clear whether or not you consider that they are relevant.

MR. MERCER: I think that is a very sensible way forward, ma'am. But that means one category is left, which is what Ofcom categorises as the internal Radio Communications' Agency correspondence. At the time at which the relevant events took place the Radio Communications Agency was an executive agency of the Department of Trade and Industry, and was in effect its principal adviser on wireless telegraphy matters. Though we have seen some of the papers (although they are redacted in places) that Ministers were shown in respect of the Decision they took concerning whether or not proposal 2 in the November 2002 consultation should go forward, i.e. should they scrap Regulation 4(2), though we have seen some of the end results of that, there must be a degree of correspondence – Mr. Anderson, I think, just said "10 lever arch files" – about leading to the result, which is the Paper to the Minister. In there there may be some very relevant documentation, madam, I suggest.

I had held off making a formal application about this, I was going to deal with the totality of information in one go, but I think that is far more likely to produce information which we would think would be very relevant to matters before the Tribunal, because it is some of the base working papers about congestion, there must be material in there about clogging the airways, about sufficient use of the spectrum, and the other issues that were précised and put together in the Civil Service Paper that went to the Minister.

THE CHAIRMAN: Do you have the paper that went to the Minister?

MR. MERCER: Yes.

THE CHAIRMAN: Do you need to go behind that Paper? Is there something in the Paper that you need to go behind it?

MR. MERCER: There are some matters which are taken almost as read. One very important issue relating to efficient use of the spectrum is more or less dealt with as if it is a given, and without any argument or background relating to it. That Paper makes it clear that the issues as to whether or not proposition two in the November 2002 consultation was adopted were very finely balanced. So the background papers, the discussions between the RA and the DTI leading up to those papers will probably set out background working and thinking and information in relation to the arguments that were eventually distilled for the Minister.

THE CHAIRMAN: Mr. Anderson, I think we should park this whole area and go on to the next issue.

MR. ANDERSON: Well I fully appreciate the desire to get through the agenda this afternoon. From what you have just heard from Mr. Mercer, parking this issue and having discussions with Mr. Mercer will achieve nothing, because we have been in communication with Mr. Mercer on these topics. There are certain categories of document, they are set out in my written submissions. Submissions or third party responses to the 2005 consultation, the 2002 consultation and the internal work communications giving rise to the Minister's decision. We gave the submissions and all the material on which the Minister made his decision we have disclosed, subject to one or two minor redactions. That was directed at a point raised in the Notice of Appeal, namely, the Minister did not have the evidence on which he could reasonably have based his decision. I can say, of course, that is not an issue for the Tribunal, but since it is a point raised we volunteered that material. To now go down a second level and start trawling around in reams of material as to how that submission was put together will bog us down, it will bog the Tribunal down, it will waste time and resources, and to simply park the issue is going to leave us in the position of continuing with this very time consuming exercise in circumstances where we have much better things to do.

(The Tribunal confer)

THE CHAIRMAN: I am going to move on to the next issue, all right?

MR. ANDERSON: Just before you do, ma'am, there is one ----

THE CHAIRMAN: I think let us move on to the next issue in relation to that, let us not deal with disclosure at the moment.

MR. ANDERSON: There was one very small application I had formally made for disclosure of some documents from Floe, which is set out at para.22 of my written submissions, and this arises out of a letter – you will recall the meeting between Floe and the DTI in February 2002.

THE CHAIRMAN: Yes.

MR. ANDERSON: We found a letter passing from Mr. Stonehouse of Floe to the DTI following that meeting, and that letter clearly refers to another email and clearly calls for a response from the DTI. We have had disclosed no documents in relation to that meeting from Floe so we formally request an order for disclosure from Floe in relation to those three items in paras.21 and 22. We have requested and we have had no response.

THE CHAIRMAN: Mr. Mercer? They are letters that Mr. Stonehouse was a party to.

MR. MERCER: We know exactly what is requested ma'am, I am just taking instructions for a moment. (After a pause) We have, in fact, been trying to co-ordinate a response. There is no difficulty in giving this material such as it exists to Ofcom, they may in fact have some of the items already. We are just trying to check up on that.

THE CHAIRMAN: They want your copies of them, that is the point.

MR. MERCER: Yes.

THE CHAIRMAN: They want your copies of them if you have them, and if you do not have them I suppose in the normal way you explain what happened to them.

MR. MERCER: Exactly, and there is one email which is still present only on the Floe server which will take some few days to get hold of, because Floe's ----

THE CHAIRMAN: Do you know which email that is?

MR. MERCER: I will just take instructions. (After a pause) It is an email to Mr. Davies following the meeting – Mr. Davies of DTI – to which the document which has already been filed and submitted, the long document, was attached. So it is an email which merely says "Thank you, Jim, for seeing us and here is what we drafted as a response", and you have the attachment to that email already, ma'am.

THE CHAIRMAN: Is that the email you are trying to find, or is that a different email?

MR. ANDERSON: I do not know because we have not seen the email.

THE CHAIRMAN: Have you got that email?

MR. ANDERSON: No, we do not.

THE CHAIRMAN: Well, as I understand it, you are undertaking to provide the document?

MR. MERCER: Yes.

THE CHAIRMAN: So we do not need to make an order, we have Mr. Mercer saying that ----

MR. ANDERSON: I am content with Mr. Mercer's undertaking to provide the documents.

THE CHAIRMAN: The next item on the agenda I think is oral evidence. Ofcom have prepared a schedule, which is very useful.

MR. ANDERSON: I think that is Vodafone, we are not calling any witnesses of fact.

THE CHAIRMAN: Vodafone prepared a schedule, which is very useful. It does seem to us, however, that it may be premature at the moment to consider whether there should be any oral evidence. That is our preliminary view, having looked at the materials previously. It seems to us that we need to know the actual precise areas for cross-examination before we consider an application for oral evidence, and that perhaps that could be more appropriately dealt with in correspondence which we could then consider if there is any dispute about it and then we can decide whether there should be oral evidence. So unless I have any submissions that that would not be appropriate I would move on to the next item.

MR. FLINT: I am sure the Tribunal has seen our observation that it is extremely difficult to debate this without having the Tribunal's direction as to what list of issues we are going to work to, and the order, and if you are indicating that it is premature to make any ruling on oral evidence before reaching that stage then we would respectfully agree with that. Perhaps I can return to oral evidence if I need to at the end.

THE CHAIRMAN: But it may be premature today to deal with it.

MR. FLINT: Even then it may be premature, that I follow.

THE CHAIRMAN: Yes. Expert evidence. This was raised at the last hearing and we are rather disappointed that there has been no progress on the matter. It does seem to us, subject to any submissions but we did discuss it on the last occasion, that in relation to harmful interference we need some assistance which is uncontroversial hopefully as to what that means as a matter of technicalities in a way that we can understand it as lay people. We would encourage the parties to provide us with that evidence which we think can be dealt with by what has now been termed "a single joint expert". Now, if the parties cannot come to that conclusion themselves then, subject to what we hear from everybody, our preliminary view is that we will ask for a list of relevant people and we will make an order identifying a single joint expert, not somebody who is an expert for the Tribunal, but we will order the parties to provide a single joint expert, because we do not see that there is any other way of being able to provide that informed information about what harmful interference means.

MR. ANDERSON: If it is purely a question of what harmful interference means, then that is essentially a question of law and, no doubt, one could put forward brief technical description of

what is or is not interference. What troubles us much more on the scope of the debate about the level of harmful interference and how that could be dealt with, was dealt with in 2002/03, the level of congestion, whether the regulations were the most appropriate way of dealing with it. That issue, on which there are a number of preliminary points as to whether the Tribunal should go into that, is a much bigger issue which could not be resolved simply by the Tribunal identifying some expert to come along and give it some assistance, but I see no reason why we cannot attempt to make some progress, and progress has been made it is just that agreement has not been reached identifying somebody who could explain in simple terms what is meant by harmful interference on that limited area certainly I am sure that some progress could be made on identifying an appropriate person. Indeed, we have undertaken some investigations and we do have some names and CVs already.

But on the broader question of on what issues does the Tribunal need expert evidence, then there is clearly a large degree of disagreement between us and Floe and also Vodafone and T-Mobile as to how far can the Tribunal sensibly hope to get into that whole topic of congestion on 1st December – that is a very big topic, it involves the entire industry, not just the parties before you.

MR. MERCER: There are two sides to harmful interference, one is the legal definition – and there will be a lot said about that – and the second is what that definition means when it is turned into reality. What constitutes harmful interference in the correct context and that is a matter of practicality about which we should all have access to expert help, ma'am.

If I just take up a couple of points – one was alluded to by Mr. Anderson, and others by Vodafone in their observations – about this whole thing being too difficult and too expensive. The fact is that a lot of information about this area must have been collected by the Radio Communications Agency, by Ofcom in the course of examination of these matters. They must have quite a lot of information already sitting on the files. One of the reasons we would like to look at the RA to DTI discussion document – documents going backwards and forwards – they must have some information about this, because if they have not actually accumulated quite a degree of evidence about this kind of area from a practical point of view, then how on earth do they come to decisions that they did about perpetuating regulation 4(2). So saying that there is lots to be done, and there are no studies must be wrong, there must be information on the files of Ofcom, or the RA that deals with some of these areas and would give an independent expert in knowing what the industry, Vodafone and others, thought constituted harmful interference, what constitutes the problem. There must be some base material for the expert already there, ma'am.

THE CHAIRMAN: Well if there is some base material there do we need the expert as long as we understand what harmful interference means.

MR. MERCER: If we are given access to it, ma'am, but in any event I think it would be helpful for all of us to have some assistance as to what, in the circumstances constitutes the practicalities of harmful interference, because you may well have the positions put forward by the MNOs in their submissions about this matter – I am sure they must have been made – and you have the information provided by Floe, and you must adjudicate between the two, and that I think is where an expert would be beneficial, ma'am.

THE CHAIRMAN: A single joint expert can say that this is the area of harmful interference, some people say that it extends here, some people say it extends there, and he can give both views, you do not need two experts to deal with that.

MR. MERCER: No, you do not, ma'am.

THE CHAIRMAN: So what is the problem with having an expert.

MR. MERCER: One expert I think would be fine, ma'am.

MR. FLINT: May I make submissions on this for Vodafone, because I fear I, for Vodafone, take a rather more rigorous and, I am afraid, more difficult position on this issue which is that expert evidence is wholly inadmissible, apart from being a complete waste of cost and time. The first point is this, I have already been accused by my learned friend of trying to narrow the issues, and I am happy to stand guilty of that accusation. I understand it is the duty of all advocates, (and of course the Tribunal's as well) to narrow the issues, so one starts with the position of saying to what issue is this expert evidence suggested to be relevant? The list of issues, it comes in, as I understand it, under the question of incompatibility of the regulations with the Directives. If I could ask you to look at the Notice of Appeal, which serves as a menu from which one can pluck out all sorts of points that may arise in this case, but if it is not on the menu we assume it does not arise. If you would look at the appendix to this lengthy document, at pages 3 and 4 we have the question posed at (b): "Are the exemption regulations lawful?" An interesting question but is it relevant? If one goes to the end of p.4, the summary of this section, the last four lines: "On the black letter of the law …" I think that means reading the words, "Article 7(3) of the RTTE Directive applies …" so does Article 7(4) "… it appears on common ground the relevant notification has not been given. UK courts are obliged to interpret UK law as far as feasible to give effect to the Directives." That is clearly right as a matter of principle, so the first issue arising here is whether or not the regulations can be read so as to be compatible with the true meaning of the Directives. That, of course, is a pure question of law which does not require expert evidence. It requires one to take harmful interference, which is expressly defined in both Directives and applied to the Regulation. I do

not think anybody is in fact suggesting that if Floe's case were correct it is possible to read the Regulations as being consistent with the Directive.

The next question that arises is, is it being said that in some way the Regulations are invalid or void so they should have been disregarded by Ofcom when it came to take its Decision, and it is in this area that we enter a fog of 'unclarity' at p.B3. Moreover, it seems quite probable that on a black letter interpretation of the authorisation directive and/or the RTT Directive, the Regulation should never have been made in the first place. I am quite unclear as to whether that is intended to be an allegation that as a result the Regulations were legally invalid. If that is said to be what is being contended for I am quite unclear on what basis it is being put. But on any basis again expert evidence as to what harmful interference could consist of on the facts of this case, or in relation to mobile networks generally, is in our respectful submission completely irrelevant.

THE CHAIRMAN: Mr. Flint, can I just make sure that we are both talking about the same thing when we talk about expert evidence. What I am addressing is harmful interference has a technical meaning.

MR. FLINT: Well it has a legal meaning.

THE CHAIRMAN: It may have a legal meaning but you have to understand the technicalities of it in order to understand the legal meaning. When we are talking about an expert, and expert evidence, all that we are talking about is acquiring the technical information which will allow us to understand the legal meaning. It is not suggesting that it is opinion evidence, if we were technical people we would understand it, but because we are not technical people we need some help from a technical person in order to understand it. So it is effectively opening up the text book if I can put it that way. Now, is there a difference between us on that?

MR. FLINT: There is – well there is certainly a difference between the Tribunal and Mr. Mercer.

THE CHAIRMAN: That may well be but ----

MR. FLINT: Mr. Mercer takes the view that you should have expert evidence not only on the meaning of harmful interference and a technical background to understand the meaning, but in order to decide the question as to whether there was cell overloading, whether it is an efficient use of a spectrum ----

THE CHAIRMAN: What I would like to do is to do it in stages. What I was addressing was what I have just explained. Now is there a problem with having what is termed an "expert" – somebody who knows about the technicalities of radio communications – to provide a paper, and I am using my language carefully, which will explain the technicalities so that we can look at what harmful interference means as a matter of law.

MR. FLINT: I have to submit that it would be inadmissible on the question of the legal meaning and, in my submission, completely unnecessary because we have the Ofcom Decision. If you would look at para.150 of the Decision under appeal at p.32:

> "Ofcom has been provided with evidence from the mobile network operators about the impact of GSM gateway use on the operation of their networks ... This evidence indicates 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 interference and would be an inappropriate use of the radio spectrum."

So you already have a judgment of the Regulator based on evidence (technical evidence) not that there is or is not harmful interference in particular cases, but it is a general judgment would it be likely to give rise to problems of harmful interference if unregulated use were to be permitted. Now, in our respectful submission the area of inquiry for the Tribunal can only be "Was there an error of law in that approach?" The Tribunal is not, in our respectful submission, concerned to analyse the evidence submitted to Ofcom to decide whether or not this risk existed, the question is, as a matter of law was Ofcom correctly directing itself as to the risk. What I am concerned about is that first of all there will no doubt be dispute between the parties as to how far the experts should go. The expert will need to see the material which, in any event, is going to be made available in this case and the question I ask – and I apologise it is a rhetorical question because I do not know the answer and I have not seen the evidence – but the question I raise is why does one need another person to look at the evidence in the case, which is dealing with the technical risk to the networks of unregulated use of gateways. It is a fairly limited finding, and I would suggest not a finding that requires great technical understanding in order to grasp whether or not it was a proper judgment open to Ofcom, or whether, as Floe wishes to allege, in some way it is flawed in law or indeed flawed in fact.

So I hope I have answered the Tribunal's question. In my respectful submission you do not need it and it is inadmissible, even on the very limited basis of the meaning of harmful interference, but I am concerned that once you open the door to expert evidence then of course lots of other technical issues are going to be sought to be deployed by Floe and on the list of issues produced by Floe at the moment they are asking the Tribunal to determine, for example at 2(b): What amounts to interference and harmful interference? Can it be relied upon to justify the application of Regulation 4(2)? Was Floe admitting harmful interference? Well that cannot conceivably be the issue arising on an Appeal from this Decision of Ofcom. The Decision of Ofcom is a principle decision as to whether, in principle, it was right as a matter of Community law to regulate networks in this way and to have the exemption regulations in this form. As you observed to Mr. Mercer, if one has these documents – we would say if you have

the documents that were submitted to Ofcom and on which Ofcom relied, they will in all probability provide all the technical understanding one needs in order simply to interpret the words, which are not very difficult words in the Directive, as to harmful interference. I emphasise we are not concerned with the degree or technicality of interference, we are only concerned with the question of whether that was a legitimate matter for the Secretary of State to take into account when making the Regulations. This is all very much, of course, at third hand, in our submission we do not even get near that issue in any event.

THE CHAIRMAN: We will come on to that.

MR. FLINT: Those are my submissions.

(The Tribunal confer)

THE CHAIRMAN: Mr. Mercer, we are wondering whether we should move on to the issues and then come back to this point because it may depend how one looks at the issues and what expert evidence is required.

MR. MERCER: Very well, ma'am.

THE CHAIRMAN: Shall we move onto the issues because that, I think, is where Mr. Flint has taken us? Can we thank Ofcom – I think I am thanking the right person this time – for having prepared the list of issues for consideration. We find that the detail in the list is helpful, and we are somewhat disappointed that Floe have declined to join in in preparing it in that way. We have looked at Floe's list of issues, and they appear to us to have been incorporated for the most part in the Ofcom list, but of course we will hear from Mr. Mercer if he wants to make submissions that they have not.

We appreciate the analysis that has gone into preparing the list of issues, but we wonder, and I think this goes really partly to what Mr. Flint has been addressing us on, whether in fact issues 4 and 5 do require some further reconsideration – all the sub-issues within 4 and 5. It seems to us that logically we need first to decide whether the exemption regulations are compatible with the Directive. If they are compatible then clearly they can be relied on. If they are not compatible then we need to consider what the consequences are.

It may be that in drawing up the issues you have considered the case of *Fiammiferi*, a Decision of the European Court of Justice on 9th September 2003, which seems to us, on our brief reading of it, to have some relevance to how one deals with issues 4 and 5. Subject to any submissions that we hear today our preliminary view is that possibly the right way forward is for the parties to reconsider issues 4 and 5 in the light of what we have just said and to reconsider particularly the order in which the separate matters under 4 and 5 have been included.

There is one further point which it seems to us may require some further consideration, and that is the first two lines under "List of Issues". That sentence, or that question that is set out there, seems to address a Judicial Review hearing and not an appeal on the merits which is the jurisdiction in which we are deciding this case. Having said that, we do appreciate that there may be some matters within the list of issues which one or more of the parties may submit should be decided by this Tribunal using a Judicial Review test to decide those particular issues. If that is the submission of any of the parties, what we would suggest is that those items be highlighted on the issues' document and then for the parties either to agree the relevant test or otherwise, that we can then consider it. But the opening words which are there as an umbrella for the whole of the issues does seem to us at the moment to be inappropriate.

MR. ANDERSON: On the very first point we have prepared a version of this now that cross-refers to Floe's list of issues, from which it can then be seen that every issue on Floe's list of issues is addressed somewhere in our list of issues.

THE CHAIRMAN: We will have to hear Mr. Mercer on that, yes.

MR. ANDERSON: I can let Mr. Mercer see that at the end, or I can supply copies now because I have brought along plenty of copies, it just adds in an extra cross-reference.

We proposed this list of issues as a logical order through the case, and of course, we will review in the light of the observations of the Tribunal, but it remains our position that if issues 1 to 4 – possibly issue 5.1 – are decided first, it may never be necessary to get on to the question of compatibility with the EC Regulations. But that is our position ----

THE CHAIRMAN: Did you consider *Fiammiferi*?

MR. ANDERSON: I cannot say off the top of my head.

MR. FLINT: It is referred to in my learned friend's Decision in para.296. Indeed, it is a foundation of one of Ofcom's important and central conclusions where, in our respectful submission, Ofcom directed itself entirely correctly in holding, at para.171, which refers then to paras.294 to 297, that the principle of legal certainty – to put it in short common law ----

THE CHAIRMAN: I am sure it is very kind of you, Mr. Flint, to help Mr. Anderson, to show it was in his Decision ----

MR. FLINT: I hoped I was helping the Tribunal.

THE CHAIRMAN: -- but I was asking Mr. Anderson the question.

MR. FLINT: Very well.

MR. ANDERSON: I am very grateful to my learned friend. So the answer is "yes", indeed we considered all the relevant case law ----

THE CHAIRMAN: I am not saying in the Decision, which is the point Mr. Flint was going on, but when one was preparing this list?

MR. ANDERSON: Oh yes, yes. The way we proposed this list, we took the order in the Decision and the Defence and went through them issue by issue in what we say is the most logical way to approach the issues. On our submission in relation to the law, one need never get – and one does never get – to the question of compatibility unless Floe has succeeded on the whole of issues 1-5.1, and if Floe has not succeeded there then the Appeal has failed and the Tribunal need not address the question of compatibility with EC Regulations, which is a much bigger topic. That is why we proposed it in the way we proposed it and why we say in our written submissions the sensible approach for the Tribunal on 1st December, given that we only have two days, is to deal with issues 1-4, because if we are right in what we say in relation to those issues, then the Appeal has failed, and it is only if Floe is right throughout those issues does one get on to the question of compatibility of the domestic regulations with the EC Directives. The advantage of that course is that it then puts to one side all these problems about harmful interference and the consultation and the disclosure and all those kinds of issues, meaning that we can retain the current timetable and the estimate of the hearing. Two days will just about be adequate to deal with issues 1-4. We do not believe two days – indeed we do not believe two days in a month's time would be sufficient to deal with the much broader issues that Floe would wish to argue on the question of compatibility. So that is why we have adopted the structure that we have adopted in this list of issues. It provides, I think the term we have used in our written submissions is a 'road map' through the issues, but we have identified at the various points in the route through the list of issues the points at which it would then not be necessary to consider subsequent issues. We certainly take the view, having got through issues 1-4, and possibly 5.1 but not any more of 5, that this case may well end at that point and it not be necessary for the Tribunal to embark on that segment. We do not think it is sensible, in any sense, to have as a starting point the compatibility of the Regulations with EC law, because if there was a point of principle, a matter of law, an undertaking is entitled to rely on the domestic legislation that is in place; if it has not been 'disadvised' it is entitled to rely on that and that is a complete answer to Floe's complaints.

THE CHAIRMAN: The difficulty with that is that the question is the Decision here and the question is the position of Ofcom, and as I understand it the *Fiammiferi* Decision indicates that it may not be appropriate for a body in the position of Ofcom to be relying on a piece of domestic legislation which is inconsistent with a European Directive. If that is right, then since we are looking at the position of Ofcom and one starts at that position and then goes down, it seems to me that it is not just the position of the undertaking in this case. The judgment in *Fiammiferi* is

dealing with whether there should be a penalty imposed on the undertaking, not what action an undertaking may take when the government body may not be able to rely on the legislation.

MR. ANDERSON: With respect, ma'am, the relevant reliance and compatibility under national law, it is the reliance of Vodafone, not Ofcom that is at issue. The question is whether Vodafone's conduct infringes Article 82, or the Chapter II prohibition, and the question is whether it is legitimate for an undertaking to rely on domestic legislation as a justification or as a basis for the prohibition not applying, so it is the position of Vodafone under the national legislation, not Ofcom's position in relation to that that is the material point that is being made by Ofcom in the Decision and addressed at issue 4 in our list of issues. If that is right, as a matter of law, then that in our submission terminates the Appeal. That is why we put it the way round that we put it in our list of issues and that is why we say you may never need to get to the issues on issue 5 on compatibility.

THE CHAIRMAN: Well, we will have to see what Mr. Mercer says about that.

MR. ANDERSON: Well that is our position. If we are wrong on that then yes, you do have to go on and consider – or you may have to go on and consider – the compatibility of domestic legislation with the EC Regulations, but our decision is that one does not, and that would be our submission at this hearing. We will deal, of course, with all the cases – and there is more than that case – but the implied principles that apply in these kinds of cases. That is why we have adopted that order.

MR. FLINT: Would it be helpful if I made my short submissions in support?

THE CHAIRMAN: I think actually – just wait a minute, Mr. Flint.

(The Tribunal confer)

THE CHAIRMAN: Mr. Mercer, can we hear you first, please?

MR. MERCER: Yes. I am not sure that Mr. Kennelly has not got something to say on this subject, ma'am, and I might like to go last, if that is the case.

MR. KENNELLY: I was happy to wait my turn, but if that is an invitation to speak now, I am happy to do so.

(The Tribunal confer)

THE CHAIRMAN: I stopped Mr. Flint, I think I ought to hear Mr. Mercer.

MR. MERCER: I told you you were heading for Jarndyce v Jarndyce, he is mentioning "fog" already now, ma'am, which, as you know is the word which starts that particular book of Dickens.

I hate to use, I said this before, the word "holistic", but you need to look at all of these issues in the round. It would be very convenient for my learned – sorry, they are not "my learned friends because they are from the Bar – for Mr. Flint and Mr. Anderson – that is the

convention, actually, ma'am, sorry – it would be very convenient for them to cut off at 5, but that is not the answer. We have to look at all of the issues and how they inter-react, and I did not know I was going to have to argue on the particular case this afternoon, I must admit my reading of the CFI case is very much as yours, ma'am, and I must admit some surprise when I read it in the Decision letter as to why it was there, used in the context which it was in the Decision letter. What that tells me is that we have to go beyond issues 4 and 5 to actually get towards a full understanding of what everything is in its proper context and, as I say, it is just convenient for the other parties to finish at that point without going on. I do not think that anybody in this room is going to get a full understanding unless we deal with the full range of issues. I hope that the Tribunal does not think that I am playing dog in the manger because somebody else produced another list of points. I do have some concerns about the way in which some of these points are expressed, and the way in which they are angled towards a particular point of view which is not that of Floe Telecom., and if we are going to have to accept ----

THE CHAIRMAN: Mr. Mercer, the way to deal with that would be to put your amendments to that list rather than saying "I am not going to look at it", and I am not sure it is appropriate to be trying to deal with that at a hearing where one has not had the opportunity to see whether that could have been agreed beforehand.

MR. MERCER: Well in my own defence I will say we did actually send a list some time ago.

THE CHAIRMAN: That is your list but they provided **this** one, and it may be now that the Tribunal have said that we prefer **this** format, and the detail that is in it ----

MR. MERCER: Then we will work with it, ma'am, and we will submit the changes we think are right and proper.

THE CHAIRMAN: As I understand your submission on the point of whether we should stop at the end of 4, or whether we should go on you are saying we need to look at everything at the same time?

MR. MERCER: Yes, ma'am.

THE CHAIRMAN: And that we should not have two bites of the cherry?

MR. MERCER: Correct, ma'am.

THE CHAIRMAN: And on the question of whether issues 4 and 5 need to be reconsidered in the light of the way that I was expressing the *Fiammiferi* case, what do you say about that?

MR. MERCER: I say they need to be reworked, ma'am, and that would be my first priority in sending comments to the other side.

THE CHAIRMAN: I am not sure we can take that very much further today.

MR. ANDERSON: Certainly, we have indicated in our written submissions that were Mr. Mercer to make representations on this list of issues we will of course consider and hope to accommodate them. The idea is to achieve an agreed list of issues, and now that we see that Mr. Mercer is not simply going to persist in advancing two alternative lists of issues then we will certainly look forward to his comments.

(The Tribunal confer)

THE CHAIRMAN: Mr. Anderson, we are very pleased that there is now going to be a proper look at the issues and that hopefully they will be put in a way that accommodates Mr. Mercer's concerns, as well as puts them in a way that accommodates the points that you want to take and, of course, that Vodafone and T-Mobile want to take. We are not minded to have two bites at the cherry, I think that would be inappropriate and would make the case much more complicated because it is all very well if you are right and you can stop, but if you cannot stop we have all to come back and start again, and I think it would be much more appropriate to have one hearing where everything was looked at.

MR. ANDERSON: Well we do not believe that that is going to feasible ----

THE CHAIRMAN: By December 1st, we appreciate that, but to have two bites at the cherry – the fact that if one had to go on after December 1st, if you are not right and it did not end the case, then of course there would be delay anyway. So it seems, I think, more appropriate, to have a hearing at which all the issues are looked at, and we would encourage you to look at the way that Issues 4 and 5 have been put having regard to what I was saying.

MR. ANDERSON: Certainly, ma'am.

THE CHAIRMAN: I think you understood what I was saying.

MR. ANDERSON: Oh yes, yes.

THE CHAIRMAN: It seems it may be that one has to look a bit broader about what Ofcom's position is in the context.

MR. ANDERSON: I understand that, it is an issue of Ofcom's duties under Article 10 as a distinct issue from the question of Vodafone.

THE CHAIRMAN: And the position of Vodafone may be different – I am not saying which way it goes, but there are possibly arguments where what they can do is not cut off at the point that you are suggesting it is cut off. I do not know what the answer is but it needs to be explored and the issues need to take that into account.

MR. ANDERSON: Certainly, ma'am. We would not have characterised what we were proposing as "two bites at the cherry", it is a logical order which the Tribunal may well not have to consider, so it was proposed as a way of assisting the Tribunal in maintaining its current timetable and not having to investigate issues that may ultimately not be necessary for the Tribunal to decide.

THE CHAIRMAN: But it did mean that if you are wrong, and we did have to investigate those issues that we would then have to come back and do it again, and ----

MR. ANDERSON: Well it may or may not, whatever happens at the end of this hearing there is going to have to be a consideration of where we go from next if Floe is successful. This proposal was simply if Floe has not succeeded then that is an end of the matter. If Floe succeeds, there is in any event going to have to be some further airing or further consideration either by yourselves or by Ofcom so it does not, in our submission, introduce any delay to the ultimate resolution of the issues before the Tribunal. That is why we thought we could suggest it without in fact causing any additional delay.

THE CHAIRMAN: I am grateful to you for suggesting it, but I am not sure that this Tribunal wishes to take up the suggestion. So that I think has dealt with the issues as far as we can go today, and we are effectively going to have to come back on them if there is not agreement. That leaves us with, I think the timetable. Mr. Anderson has indicated that 1st December may not be appropriate.

MR. ANDERSON: In the light of the Tribunal's desire to hear all the issues, and given that there there are broad issues and matters of disclosure that have not been resolved, we do believe 1st December is no longer realistic, indeed, nor is two days. So we would invite the Tribunal to vacate that hearing and arrange something in the New Year.

THE CHAIRMAN: Mr. Mercer?

MR. MERCER: The only point that concerns me on timetable, ma'am is actually the independent expert, and their ability to get something done in the relevant time.

THE CHAIRMAN: If there was going to be any expert evidence then it is unlikely now that 1st December would be an appropriate date.

MR. MERCER: That is what I was thinking, ma'am.

THE CHAIRMAN: In relation to the disclosure there is a similar problem, is there not?

MR. MERCER: There is in terms, if it is the Tribunal's wish that I actually served a skeleton argument by or around 14th December, then yes, there might, ma'am, because there are only so many hours in the day and we probably would not get anything for at least a week, say, and we would be working against the clock rather desperately.

THE CHAIRMAN: So it may not be in your best interest to hold the date?

MR. MERCER: That would be a sadness for us because, as you know, we are in ----

THE CHAIRMAN: Yes, I know, that is why I am asking you ----

MR. MERCER: But I think we would rather do the job properly than stick to 1st December. Those would be my instructions, ma'am.

THE CHAIRMAN: So the question is how long does one need after that in order to do the job properly, would you say?

MR. MERCER: Well solicitors interfacing directly with clients are always more enthusiastic about speed, but I would have thought around 1st February.

THE CHAIRMAN: We did look at the diary before and the 30th January, which is Monday, is an appropriate date for us in our diaries, and that should give everybody ample time to prepare this case and take into account the Christmas break.

MR. MERCER: Yes, it is a matter of the time estimate for the hearing – and I have not discussed this with anybody else – my own feeling is really that we are looking at three days now.

MR. ANDERSON: Well again it is going to be difficult to give a precise timing until the question of the issues have been determined and the question of whether an expert is going to be called, and quite what his remit is going to be. I think 30th January is certainly more realistic than 1st December. It may be too soon if the question of going into all issues relating to the previous consultation on all that material, and the positions of everyone in the industry need to be investigated.

THE CHAIRMAN: Well I think we have to try and work to 30th January, I do not think we would be very supportive of it being delayed further. If that requires a bit more hands-on dealing by this Tribunal then I think we will have to have a bit more hands-on dealing.

MR. ANDERSON: We would, of course, have wished the whole matter to have been resolved before Christmas. We have not come along seeking a vacation on that basis.

MR. FLINT: Before the Tribunal makes a ruling on when you are to hold the hearing and what it should cover, would you permit me to make some short submissions? I had hoped to make a contribution on issues.

THE CHAIRMAN: It was not that I was not hearing you on the issues, it is just that as everybody is going away to reconsider then you would be part of that reconsideration, and there is no point in having more submissions which are not actually going to be dealt with today.

MR. FLINT: No, of course, but one cannot form any sensible view on how long it is going to take and what it covers, unless one knows roughly the shape of the issues.

THE CHAIRMAN: What is the maximum it can take?

MR. FLINT: Well it is almost limitless at this rate! (Laughter) That, I am afraid, is first of all a question for the Appellant and, if I may respectfully say so, also a question for the Tribunal. Ofcom has set out, and we have supported seven issues which are defined here. The Tribunal has expressed a view to deal with everything. If everything is not going beyond the outer parameters of issues 1 to 7, that is the basis on which I am working, that there are no further issues ----

THE CHAIRMAN: It is on the basis of the issues as described on the last occasion? What we did not want to do was to divide up issues 4 and issues 5.

MR. FLINT: But as I understand the indication you have just given, you do want to deal with the entirety of issues 1 to 7 in one go, and I just wanted to make clear that our submission to the Tribunal was to be that it would have made sense to deal with what are primarily issues of law, up to issue 4, on December 1st and 2nd – we were quite content to go along with that – and of course one cannot pre-judge the issues that might or might not have resolved the entire Appeal – it might not have done.

But if one goes into issue 7 on discrimination (if it arises at all) then one is into there, an area of greater factual inquiry on any basis, documents, and probably oral evidence. So if the wish of the Tribunal is to deal with issues 1 to 7 how long could it take? In our submission it could certainly take five days, it could certainly take a week, and is likely to do so, particularly if we then add in expert evidence. That is a much more costly exercise for all parties, but I just make clear our submission was to be that two days in December should at least have stood a fair chance of resolving the Appeal.

If you are minded to fix on 30th January, and certainly so far as preparation is concerned that is fine, that should be adequate time as far as we are concerned to prepare, the main burden will clearly fall on Ofcom, then we would allocate the Tribunal to allocate five days because it would be most unfortunate if we allocate two or three and then find it cannot be done in that time. Five days is not an invitation to everybody to take five days, but in my respectful submission that is the minimum realistic view one could express on the shape of the case so far. But that is on the assumption that there are no substantial areas of inquiry to be added to issues 1 to 7.

THE CHAIRMAN: Mr. Flint, you are not used to being in this Tribunal, and we hope that quite a lot of it can be dealt with in writing, and that the submissions are timed and short.

MR. FLINT: Of course, and no doubt that will be very sensible, but if one is to get into evidence being called and cross-examination then of course ----

THE CHAIRMAN: We would try in the meanwhile to give some directions so that the evidence, if it needs to be called, will be to the point and limited to the relevant areas, we do not expect cross-examination in the way that it is done in the Commercial Court or the Chancery Division, going over a lot of irrelevant matters.

MR. FLINT: Well I am not aware of any court at the moment – or for the last 10 years – that has tolerated cross-examination on irrelevant matters and, in any event, I am sure that is a practice that would not be translated into this Tribunal. But even making allowance for that the compatibility argument under issue 5 is going to be a quite deep and complex argument, and

we have spent two and half hours – or just over two hours – on interlocutory matters. If we are going to have four or five parties, one is just being realistic, all I am submitting is that one should allow five days. If it turns out to be much shorter, no doubt everybody would be pleased, but if we allocate two days and it turns out to be longer then the parties will waste a great deal of costs.

(The Tribunal confers)

THE CHAIRMAN: Mr. Flint, we had already formed a view that we might need – although we would hope that we do not need – five days, and so when we were considering the date we had provisionally looked at keeping the whole week free, although we would hope that when the issues are properly narrowed, and when the skeleton arguments are prepared, it will become apparent that the issues can be dealt with in oral submissions in a shorter time.

MR. ANDERSON: Could I just make one point on the date, and it is not so much the date of 30th it is the period leading up to it. As a result of various commitments that is going to be a very difficult time for preparation for that particular date. I wonder if it would be possible, before you formally rule on it for there to be some liaison with your listing people possibly with a view to moving that date a week or so later.

THE CHAIRMAN: There is a problem moving later, I am afraid. We have been through the various dates and there is a difficulty if we move it.

MR. ANDERSON: There is a difficulty for us on that date in terms of preparation, although as I say we are physically available on that day.

THE CHAIRMAN: Well you have from now until ----

MR. ANDERSON: I understand that and we have been working very hard to meet the timetables and deadlines and deal with all the issues, but nonetheless, when one considers questions like skeleton arguments that will be a very difficult date from our point of view.

(The Tribunal confer)

THE CHAIRMAN: Mr. Anderson, when do you want to move it to?

MR. ANDERSON: One week or two weeks later.

THE CHAIRMAN: You see it is going to cause a serious problem on our part.

MR. ANDERSON: Is there any date after that that would not cause you this problem, can I ask?

(The Tribunal confer)

THE CHAIRMAN: We hear what you say, but at the moment we are going to fix it for 30th January. We will look at our commitments here again and if it can be moved to the following Monday and still provide you with five days then we will let you know.

MR. ANDERSON: I am grateful to you, madam.

MR. KENNELLY: Very briefly, I do not think the Tribunal is going to rule on any aspect of

Mr. Flint's submission in relation to the issues. He spoke the language of Judicial Review in relation to the areas of law. I would have addressed those submissions in my own slot, but if the Tribunal is not minded to rule on any of those points in its discussion or in its final ruling then I shall not address you further.

(The Tribunal confer)

THE CHAIRMAN: On the matter of list of issues that is going to have some discussion between everybody, which we may have some input into, and we hope that that will all get resolved without a problem.

MR. KENNELLY: I am very grateful.

THE CHAIRMAN: If it is not resolved then of course one can come back, and I will address that in a moment. On experts, again there seems to be a large variance of views as to what the expert evidence is directed to: (a) whether it is necessary; and (b) whether it is only the technical information or whether there is expert evidence required which is opinion evidence, and that there are differences of opinion. We do not think that that is something we can resolve today. It seems to us that the right thing to do is for everybody to try to discuss it sensibly. If the position is that on any of the matters that have been raised today there is not a satisfactory conclusion we have the 1st and 2nd December in our diaries, so we can have a CMC on 1st December which can deal with any outstanding issues. If there are problems with those matters I think we would need proper written submissions so we do not spend too much time trying to understand the point, because on experts it looks as if it is quite a complicated problem, but it may resolve itself when one has dealt with what the issues are and then what sort of evidence is required in order to deal with those issues.

MR. ANDERSON: I should remind the Tribunal on the question of the technical knowledge the Tribunal needs to obtain in order to reach a conclusion on the legal definition of harmful interference we did annex to our Defence (annex 5) a Paper which we hoped explained that, certainly in sufficient detail for the Tribunal to reach an understanding.

THE CHAIRMAN: Well that depends on whether that is an agreed Paper or not.

MR. ANDERSON: Right, yes.

THE CHAIRMAN: Which Mr. Mercer can deal with in the meanwhile, is that all right?

MR. ANDERSON: Yes, madam.

THE CHAIRMAN: And if we could have an agreed paper then there is no problem, because that is really all we are asking for, that is very helpful. Are there any other matters to be dealt with now?

MR. PICKFORD: Madam, I am conscious of the time but I am afraid there is one, hopefully very small residual matter which is outstanding. We wrote to Floe on 28th October a letter which we

copied to the Tribunal concerning the evidence about the discrimination allegation in respect of Recall that was provided to Vodafone and ourselves by letter of 18th October. In that letter, Floe described the information in the following terms. It said that it is the same as the CAT and Ofcom originally received, except that at Recall's request some of the information has been amended or deleted. We are left in a somewhat difficult position that we do not know whether we have the same information as has been provided to Ofcom and the Tribunal and as they have, as yet, failed to respond to our letter to clarify precisely what information it is proposing to rely upon – whether it is information that we have been given and in what respect that differs from the information that was previously given to the Tribunal.

THE CHAIRMAN: Mr. Mercer?

MR. MERCER: I will apologise, I know exactly where T-Mobile's letter is.

THE CHAIRMAN: Can this be dealt with ----

MR. MERCER: Yes, and we will answer their question. It is very simple: he has got what the others have got and I will formally confirm that in writing tomorrow.

THE CHAIRMAN: Is that all right?

MR. PICKFORD: I am grateful.

MR. FLINT: Can I just raise one point arising out of the expert evidence point? What, in my submission, would be useful and would accelerate matters is if Mr. Mercer on behalf of Floe were to agree within a certain time to state what aspects of the Annex 5, i.e the Ofcom technical document on harmful interference are in contention, and that will then isolate what we might need expert evidence on – at least one will then have a grip on where the areas of dispute are. If he could indicate that it would be done within a reasonable time – and I am not pressing for any particular time – then we can look at that and see ----

THE CHAIRMAN: Mr. Mercer, I think that was really what I was suggesting just now, was it not?

MR. MERCER: It was indeed, ma'am.

THE CHAIRMAN: Can you do that?

MR. MERCER: Yes, we can. I would say it is also something which Worldwide ought to turn its attention to as well. For myself, ma'am, we could get that out in seven days.

THE CHAIRMAN: Well we do not want repetition between you and Worldwide.

MR. MERCER: We will make sure it is co-ordinated, a co-ordinated response from Floe and Worldwide within 7 days.

THE CHAIRMAN: Assuming there is not going to be a difference between the two of you, hopefully there will only be one response.

MR. KENNELLY: Indeed, our issue is more in relation to the standard of review. The Tribunal has my submission and I would disagree with Mr. Flint on that. Our submission on the evidence itself obviously is a different matter.

THE CHAIRMAN: You know which document ----

MR. MERCER: Yes, we do.

THE CHAIRMAN: So if that could be done – how long do you think it would take you to do it?

MR. MERCER: I said seven days, ma'am.

THE CHAIRMAN: Is that all right, Mr. Flint?

MR. FLINT: Indeed.

THE CHAIRMAN: I do not think there are any other issues on the matters we have been dealing with on the agenda, is that right? All right, then we will rise.

(The hearing adjourned at 4.25 p.m.)