IN THE COMPETITION APPEAL TRIBUNAL

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

Victoria House,
Bloomsbury Place,
London WC1A 2EB

3rd February, 2006

Before:
MARION SIMMONS QC
(Chairman)

MICHAEL DAVEY
SHEILA HEWITT

Sitting as a Tribunal in England and Wales

BETWEEN:

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

supported by

WORLDWIDE CONNECT (UK) LIMITED — Intervener

and

OFFICE OF COMMUNICATIONS — Respondent

supported by

VODAFONE LIMITED
T-MOBILE (UK) LIMTED — Interveners

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H E A R I N G
DAY FIVE

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APPEARANCES

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

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

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

Mr. Charles Flint QC (instructed by Herbert Smith) appeared for the first Intervener, Vodafone Limited.

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

MR. KENNELLY: Good afternoon, ma'am, Members of the Tribunal. Again, I shall be dealing with the five points I dealt with in my submissions, starting with the jurisdiction and duty of Ofcom and the Tribunal, secondly, the issue of harmful interference, thirdly, I will be focusing in particular on Article 7(4) of the RTTE Directive, fourthly, the issue raised by Mr. Pickford in relation to the Authorisation Directive and Recital 5 of that directive; and finally, the *Hilti* point. Subject to any contrary directions from the Tribunal that is the structure I propose to adopt.

Beginning with the jurisdiction issue, it is important in my submission to step back a moment and reflect on what is actually challenged before this Tribunal, and that is the second Decision of Ofcom of 28th June 2005 and, in my submission there are areas of law and regulatory judgment in that Decision which are challenged properly before this Tribunal.

We are not challenging any regulations made by Ofcom. My simple submission is that Ofcom, in applying domestic legislation, expressly found it to be compatible with Community law and in my respectful submission committed thereby an error of law which it must be possible to challenge before this Tribunal under an Appeal within the meaning of the Competition Act.

Turning to the *Upjohn* case. I repeat my submission that it sets out minimum requirements in order to comply with Community law, but it is still submitted before this Tribunal that *Upjohn* whether in terms or in effect precludes more intensive review by this Tribunal. But, in my submission, it is clear from the text of the *Upjohn* Judgment, in particular paras. 32 and 36, that the issue of intensity of review is regarded by the court as a procedural issue, and in the absence of Community rules it is for the Member States to determine this procedural issue, to determine at what level of review the decisions of national regulatory authorities are to be subject. Because it is a procedural issue, this question of intensity of review, which is left to the Member States – the Member States have procedural autonomy and the Community respects that provided that the basic requirements of EC law are respected. In allowing this Tribunal a more intensive review than applies in the Administrative Court is not only permitted by Community law but it is not the same as permitting a different approach as to the substance of Community law. If this Tribunal examines in detail factual issues determined by Ofcom, it does so consistently with Community law. It acts in accordance with Community law principles laid out in the legislation and case law of the court and there was no reason why that should give rise to any deviation in the substance of how EC law is treated in each Member State. As it is, different Member States apply different levels of intensity of review to Decisions which engage Community law rights and that does not lead to any inconsistency in the application of EC law throughout the Union.

What my learned friend suggests is that somehow *Upjohn* has dictated mandatory requirements in this procedural issue which bind the Tribunal. In my submission it does no such thing. With that background, my primary submission of course is that the Tribunal should examine the issue on the merits, which means the substance of the Decision, but even if, in accordance with the guidance in *Freeserve* the Tribunal decided to apply a more limited review, either along the lines of Judicial Review principles or something analogous to them. It is still open to this Tribunal, even on that limited basis, to resolve the areas of law committed in the second Decision. Those areas of law, of course, include areas of Community law, and the question then turns to what does Community law require of Ofcom? It is not my submission that certain duties are imposed on the undertakings. We have had a limited lead to intervene, and our concern has been the duties on Ofcom. I have not engaged any question of horizontal direct effect. I am concerned in my submission solely with the duties on Ofcom, as one would expect from the position of Worldwide. In my submission those duties are set out in the *CIF* decision. I think Mr. Pickford said it was looked at three times, but if this could be the fourth and final time to turn up the *CIF* decision because it is critical for my submissions and therefore perhaps, hopefully for the last time, it is at bundle 4(b), tab 35. I would invite the Tribunal to look again not only at the issue of the duty on the Tribunal but also to address a point made by Mr. Flint when he said in rather dramatic language "the broad constitutional issues" before the Tribunal, which I shall come to in a moment because characterised as he characterised them they really are broad constitutional questions. But dealing first with the more limited point under *CIF*, we are all familiar with the critical passages, but at para.49 the general principle is set out that it is the duty to disapply national legislation which contravenes Community law applying not only to national courts but to all organs of the State including administrative authorities. It is not limited to the application of competition law.

The point is made by Mr. Flint that this Decision in some way is specific to the competition law context, and he referred to para.50 to the fact, and Mr. Pickford made the same submission, but the reference to competition authorities and Articles 81 and 82 showed that this was specific to the competition law context. But it is clear, in my submission, from the terms of the judgment that it is not Articles 81 and 82 that impose this duty on the national authorities, but it is Article 10 EC that is the key to the imposition of this duty, and Article 10 is not specific to competition law. On the contrary it is the broad over arching Article which requires Member States to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty. That is such a fundamental statement of Community law that I hesitate to offer up copies of Article 10 of the Treaty, but I have copies for the Tribunal but I shall not waste your time by handing them up, but they are there if anyone needs them. But it

is Article 10 that is key, not Articles 81 and 82. Article 10 is what requires Ofcom to determine these issues of compatibility where they arise in this Appeal.

Turning at that point to Mr. Flint's submission that Ofcom had no power to consider this issue of compatibility because it was only the Administrative Court which could determine the issue of the compatibility of the regulations with Community law. He relied in that instance on the *Hoffmann* case. At p.366 of the *Hoffmann* case it is stated in effect that only a competent court can disapply – that is not the language used – but declare invalid legislation, secondary legislation in this context. To the extent that Mr. Flint submits, and I hesitate to say that he submits something as extreme as this, but if it is his submission – and certainly from the terms of the transcript that is what it appears to be – that faced with a manifestly incompatible provision of domestic law, demonstrated to be incompatible with Community law – and we will say for this purpose competition law – Ofcom could in no circumstances disapply that domestic provision but would have to wait for a claim to be made to the Administrative Court and for it to quash the legislation. That is plainly contrary to the dicta in *CIF*, and to the extent that *Hoffmann* is authority for that – and I submit that it is not, but if it is – it is contrary in that respect to Community law.

If Ofcom is dealing with the question of, we shall say, competition law as *CIF* dealt and it is incompatible, and it is relevant to the issue to be determined it must disapply, it has a duty to disapply. It cannot be that the Administrative Court has sole jurisdiction to disapply in measures of Community law. Mr. Flint, in his submissions, and again I can take the Tribunal to the passages in the transcript if that is necessary, but we recall them clearly because they were staged in such stark, bare terms, stated that this Tribunal – he went further, not only Ofcom but this Tribunal – had no power under its limited statutory jurisdiction to disapply measures of Community law, sorry, measures of domestic law incompatible with Community law. It was under no circumstances able to consider this issue of compatibility but must wait for the Administrative Court to determine it under a claim for judicial review. That submission disregards at least 30 years of jurisprudence before the domestic and Community law courts. It is interesting that Ofcom quite properly made no submission, and Mr. Anderson at para.70 of his skeleton (a reference I will check) submits that if the issue of compatibility is determinative of this appeal, it should be considered by the Tribunal quite properly. Mr. Anderson's submission, of course, is that it is irrelevant and so the Tribunal should not consider it, but if it were determinative then, in accordance with the *Simmenthal* jurisprudence the Tribunal should resolve the issue. It is para.70 of Offcom's skeleton. That statement by Mr. Flint in relation to the jurisdiction of this Tribunal is plainly wrong and it should be disregarded.

The point is made by Mr. Flint in relation to abuse that really raised the question of what is Floe to do. It is out of time for the administrative courts. Even if it had thought of bringing proceedings in January, it might have been said that they were premature because there was still the ongoing consultation. In July 2003 it could have been said that there was an alternative remedy because there was that suggestion in July 2003 that it was still possible to authorise under the auspices of the MNO licence. As I said at the very beginning, we are now faced with the Decision of 28th June 2005 which, in my submission, contains errors of law, errors of Community law. What is Floe to do? It cannot go to the administrative courts. Mr. Flint says it cannot even raise the issues for this Tribunal's consideration. T-Mobile made a suggestion that if there were such an error of Community law we could write to Ofcom and say please rectify it. Ofcom said no, we could not review that Decision. If we wrote to Ofcom and said there is an error of Community law they would say what they have said to this Tribunal. They would say what you are trying to challenge are the regulations. It is too late. We are not the Secretary of State. We have not got the materials. Sorry. That would be the response. I do not want to put words in their mouths, but certainly based on the submissions made before this Tribunal that would be the response we would be likely to expect.

So, in my submission, the Tribunal has the jurisdiction. The question then is should it exercise that jurisdiction? Again, as a preliminary point, the cases cited before this Tribunal under Article 234 EC are, in my submission, irrelevant. The jurisdiction to make preliminary references to the Court in Luxembourg is so different to the jurisdiction before this Tribunal. This relationship of cooperation which underlies the case law under Article 234 is very different from the relationship between Ofcom and the Tribunal and, in my submission, the differences are so great that the case law is of no assistance. It is better, in my submission, to turn simply to the schedule to the Act which sets out what this Tribunal may or may not do. In that it is set out in broad terms the Tribunal will determine the grounds of appeal on the merits. The Tribunal will determine what issues need to be resolved and, in that respect, the Tribunal has again a broad discretion. Mr. Flint sought a very restrictive interpretation of the issues. He said in threatening terms if the Tribunal strayed one iota from the issues it would be exceeding your jurisdiction. Mr. Flint warned the Tribunal – I use that word advisedly – not to stray one inch from the issues which it has determined but, of course, the Tribunal has its own rules of procedure and we are all familiar with Rule 51 which says the Tribunal must approach the proceedings without excessive formality. It will not surprise the Tribunal, of course, to know that the objective of doing justice between the parties and producing a correct decision in law is the pre-eminent objective rather than sticking strictly to issues which are themselves sufficiently broad to allow the Tribunal to make the determinations which I seek..

I turn now to the question that if, as has happened here, Floe has complained to the Tribunal on two bases, one, that Vodafone should not have cut it off (I am using the colloquial terms) and, two, that Ofcom should have corrected the error in law which may have led Vodafone to do that. That is the basis for the challenge, and on that basis the question of compatibility must be part of the question before this Tribunal. The absence of the Secretary of State, in my submission, is not determinative as to whether or not the Tribunal should address this issue of compatibility. Mr. Anderson again said quite fairly at para.95 of his skeleton that the issue of compatibility is an objective question to be determined in all the relevant circumstances. A piece of domestic legislation can be compatible when it is enacted but can become incompatible if the circumstances change. We submit the Tribunal should address this issue of compatibility now on the basis of all the relevant circumstances.

Before I turn to the issue of incompatibility, the submission was made before you as to the need for direct effect; the fact that only when there is direct effect must domestic instruments be disapplied. It is true that the Competition Articles in the CIF case had direct effect. I shall not repeat the submissions made in the skeleton; they are set out in full. In any event, if Ofcom committed an error of Community law in its Decision, this Tribunal must have jurisdiction to examine that error and resolve the question according to the proper principles of EC law. They cannot ignore an error of law in the Ofcom Decision. This, of course, is all possible to resolve under a strict judicial review approach to these issues. It is not necessary to go any further than that.

Turning then to the question of incompatibility and this issue of harmful interference, as Mr. Mercer said, it is confusing – and it is, because we have not got a definite answer from any of the parties as to exactly what is meant, but the Tribunal does have a route to a solution and it is. The definition of harmful interference in both the RTTE Directive and the Authorisation Directive appears now at this late stage to have been plainly based on the definition in the RTTE Regulations which were handed up yesterday by Floe to the Tribunal. Mr. Pickford made the point that those Regulations (the version handed up) appeared to be very recent. Overnight Floe have examined the position and, of course, the definition was the same in 1998. I cannot speak of the mind of the Community legislature, but it seems plain that when the RTTE Directive was enacted it used the definitions from the RTTE Regulations. They are word for word the same. That is the definition of harmful interference. But what the EC legislature did not do was move the definition of interference and so the reference to unwanted emissions was not carried. As Mr. Burns clear – whether or not he had jurisdiction to do so – that was so obvious to him that it was not necessary. In any event, since the definition has been carried in exactly the same terms from one instrument to the other, it must

be permissible for this Tribunal to use the RTTE Regulations as an aid to construction of the true meaning of harmful interference. It is perfectly permissible for the Tribunal to have record to an international law instrument when construing these directives. Community law respects the principles of international law and there is a great deal of authority to that effect. I do not expect any of my friends to contradict that proposition. It is not a question of supremacy; it is a question of having due regard to international law and the principles of international law.

In the absence of any Community instrument setting out a different definition of harmful interference, the preceding international definition in exactly the same terms, must be of relevance before this Tribunal in construing the true meaning of harmful interference in the RTTE and Authorisation Directives. That is consistent with what Mr. Burns said, and it is permissible for this Tribunal wearing its judicial review hat to rely on Mr. Burns for that limited purpose. The case of *Lynch* which was very helpfully handed to us by the Tribunal demonstrates that. It is not necessary to look at the substance of what Mr. Burns says. Even the technical assistance which he provides supports I make that the RTTE Regulations should be an aid to construction and should be used by the Tribunal to determine that inference means unwanted emissions. That must inform the Tribunal's definition of harmful interference.

There are copies of the 1998 RTTE Regulations for the Tribunal and for my learned friends. In order to save time, I do not propose to hand those out, but they are available and I understand this is a document which no-one has seen so obviously if Mr. Pickford and Mr. Anderson wish to make submissions, I cannot object. It is simply the same definition. It is simply the same definition from a preceding document.

That definition of harmful interference is relevant in two respects. The first is, of course, the section 1(a)(a) points where Mr. Anderson said where there is no harmful interference there shall be regulations enacted and it is set out in mandatory terms in section 1(a)(a) of the Wireless Telegraphy Act, but secondly it goes to the 7(2) issue of the RTTE Directive and, in my submission, is determinative of that issue.

Subject to the issue of ineffective and inappropriate use of the spectrum – and I have made my submissions about that – and the inadequacy of the analysis at paras.151-158 of the Decision, I repeat my submission that it is unreal to make a distinction between equipment and use of equipment in the RTTE Directive. The Directive is designed to facilitate the free movement of the equipment which must include use of the equipment. My submission is not limited to a strict question of authorisation. As is set out in the skeleton, it simply goes to the use of the equipment. Article 7(3) does refer to disconnection for technical reasons. The Tribunal has my submissions on that. 7(4) is not limited restricted or refers to technical

reasons only. Article 7(4) of the RTTE Directive refers to disconnection on quite different grounds, where there is particular danger. I could turn up that legislation now but, again, the Tribunal has the points. It is not restricted to technical grounds; it is a very different reason. When that reason is given, as it has been in this case, and it is set out in the Ofcom Decision which we challenge, the procedure in 7(4) must apply. Mr. Anderson says that the reason why 7(4) refers to notifying the Commission is because if a particular type of equipment is dangerous (in its different way it has not been considered) it is important to tell the Commission because that may have Community wide implications. That is quite right, but if the use of equipment which otherwise complies with Article turns out in some manner to be dangerous or harmful set out in Article 4, equally it may have Community-wide implications, and it will be important in those circumstances to inform the Commission.

Listening to my learned friends on this issue of the 7(4) procedure, because this is of particular concern to Worldwide, it begs the question how has Article 7(4) of the RTTE Directive been implemented in this Country? Where is the measure which purports to implement it? It appears from the public record that there has been no request for authorisation to disconnect under Article 7(4). If I am wrong my learned friends will correct me, but there has been no authorisation provided under Article 7(4) that I am aware of and no notification made to the Commission critically under Article 7(4) of the RTTE Directive.

Turning to the Authorisation Directive, and here it will be necessary to look at the document because it relates to quite a narrow point of construction. The Authorisation Directive is in the legislation bundle behind tab 11, and recital 5 of the Directive is what I wish to address. It is the point made by Mr. Pickford that in fact regulation 4(2) of the exemption regulations limits the scope of the regulations t o self-use of certain telecommunications apparatus within the meaning of recital 5. But in my submission that is incorrect because regulation 4(2) precludes the provision of the electronic communication service by way of a business to another person. The meaning of self-use in recital 5 refers to use not related to an economic activity. It is not the same thing at all – as Mr. Mercer said recital 5 and the reference to use not related to an economic activity refers to quite a limited category of people, for example, a citizens band by radio amateurs. It is possible to use a GSM Gateway for reasons related to economic activity, but not by way of business provided to another person, and so it simply does not apply – the definition of "unrelated to" and "economic activity" makes that clear.

Turning to the issue of *Hilti* ----

THE CHAIRMAN: Before you turn to the issue of *Hilti*, if you look at the Wireless Telegraphy Exemption Regulations which is divider 16 of that bundle, and you look at para.6, is that of any relevance?

MR. KENNELLY: It certainly appears on its face to be of relevance, but as I do not understand it I do not want to give an answer off the top of my head. I would definitely consider it.

THE CHAIRMAN: Because you were dealing with that point I thought I would highlight it. I think if you remember yesterday – I think it was when Mr. Flint was on his feet – I was referring to various regulations in this bundle, and trying to follow through the history, and perhaps this is what I was trying to get at that that point, but it may be that that needs to be considered.

MR. KENNELLY: Yes, I do not see immediately, ma'am, that it contradicts the submissions ----

THE CHAIRMAN: No, no, no, I do not think it does, but it appears to be the national law in relation to submissions that you are making.

MR. KENNELLY: This is in relation to disconnection provisions under the RTTE Directive, yes, it may be. I will have to check on it. I am addressing, as is proper in reply, only the submissions made by my learned friends, but I will have to consider that. I apologise not to be able to give an answer straight away. But I should note while we are in this document that the Wireless Telegraphy Exemption Regulations 2003 refer to definitions - this is in the interpretation section, regulation 3, for example ERP – this is on p.2 of 24 – as defined in the Radio Regulations, and the Radio Regulations mean the ITU Regulations. That is simply to indicate to the Tribunal what has already been submitted, that domestic telecoms' regulation regularly refers to the ITU Regulations for the purposes of definition. There is no inconsistency, on the contrary it indicates that harmful interference within the Directives is likely also to be implementing this international standard, as one would expect, where the questions are the same wherever they arise.

THE CHAIRMAN: I am sorry, I put you off your stride. I thought it was the opportune moment to refer to that.

MR. KENNELLY: Quite.

THE CHAIRMAN: I will give you some time at the end.

MR. KENNELLY: In order to be fair I will have to check that and come back, and I imagine my learned friends will want to say something about that too, and I will need to discuss it with Mr. Mercer in order that our positions are consistent.

THE CHAIRMAN: That is fine.

MR. KENNELLY: This, of course, has been raised before the Tribunal by all the parties and I shall not turn up the copy of this Judgment, but I will repeat the point made about the difference between criminal and tortuous liability. Mr. Anderson said criminal liability is far worse. The

point I was making was if one looks at the principle that the court is trying to outline it did not make a distinction between the two because different Member States would treat an issue like product liability differently, some will deal with it in the criminal law, some will deal with it through civil law. It is not correct, in my submission, to limit *Hilti* in that way, that it is just a product liability case, or just applies to a situation where civil liability is in issue. Perhaps there is not very much between Worldwide and Ofcom on the *Hilti* point, and really we are concerned only with what Ofcom say, because it is Ofcom's attitude to *Hilti* that concerns us not, with respect, Vodafone and T-Mobile. The issue for us is not that they should have a pleading or a detailed legal understanding of the position before disconnecting, but that they cannot act according to their own view of what the law is, that they must – even to the limited extent required by *Hilti* consult the national regulatory authority. Because of the special duties incumbent on a dominant undertaking that is entirely appropriate, and that is all that Worldwide seeks, that there is guidance from the Tribunal, if the Tribunal thinks it is appropriate to do so, setting out the duties incumbent on Ofcom in a situation where a dominant undertaking in this market, such as Vodafone, wishes to disconnect for whatever reason, but in particular when it wished to disconnect because of its own view because of potential civil or criminal liability. I appreciate the point made by the Tribunal about the potential exception, where there is a genuine emergency as is outlined in Article 7(5) of the RTT Directive.

THE CHAIRMAN: That is just another step that goes in.

MR. KENNELLY: Indeed.

THE CHAIRMAN: It does not seem to be, I think, in this regulation that I pointed out to you.

MR. KENNELLY: I was going to look actually for that point, but before I finish I will just turn to my instructing solicitor and check if there is anything more. (After a pause) Mr. Mercer wishes to deal with three matters, whether he deals with them now or after my learned friends have spoken I am in the hands of the Tribunal, but he does wish to say a few brief words, and I am in the Tribunal's hands whether the Tribunal wants to hear Mr. Mercer now or he wishes to hear my learned friends on this point, but I certainly will need to come back on the issue that the Tribunal has raised under the 2003 regulations.

THE CHAIRMAN: We will certainly give everyone an opportunity to come back on that.

MR. KENNELLY: I am very grateful.

THE CHAIRMAN: Mr. Mercer wants to raise there issues on matters that you have raised, or three different issues.

MR. MERCER: I have three housekeeping matters, madam, which can wait right until the end.

THE CHAIRMAN: They are not matters on which ----

MR. MERCER: They are not matters on which others will want to comment, I hope.

MR. KENNELLY: Well unless I can assist the Tribunal further, those are my submissions in reply.

MR. ANDERSON: Could I just point out the implementation of Article 7(4) and 7(5), it may be of assistance to the Tribunal, are to be found in the Regulations set out in tab 7 to the bundle – it has been amended over time and all the amendments are also in the bundle. In terms of tab 7 , look at regulation 7 of those regulations under "The Right to Connect.":

> "(1) Operators of public telecommunications networks shall not refuse to connect telecommunications terminal equipment to appropriate interfaces on technical grounds, where that equipment complies with the requirements of regulation 4.
>
> (2) Where they consider that apparatus declared to be compliant with the provisions of the Directive causes serious damage to a network or harmful interference or harm to the network or its functioning the Secretary of State and the Director shall, in exercising their functions under Part II and sections 47 to 49 of the Act, ensure that public telecommunications operators may refuse connection, disconnect such apparatus or withdraw it from service."

Then (3) deals with emergencies. Of course our submission is that those provisions are not engaged in this particular case and, in any event, they are without prejudice to any independent right and operator such as Vodafone may have to disconnect.

THE CHAIRMAN: Contractually.

MR. ANDERSON: Contractually or in this case because of illegality. We have no additional observations we wish to add.

MR. KENNELLY: Madam, if I may say one brief thing about that, since I am grateful to my learned friend for pointing that out, it does explain where my potential confusion arose because the Commission has no record of any notification of disconnection authorisation and that may be because it appears from this, and again I am in the hands of my learned friend, there is no duty to notify the Commission in compliance with Article 7(4). This may go some of the way in implementing it, but it certainly does not implement fully the obligation incumbent on the Member State under Article 7(4) of the RTTE Directive, but there may be another provision which I have missed. It certainly does not appear there.

THE CHAIRMAN: You say that is another area of law, do you?

MR. KENNELLY: I do, ma'am, yes. My learned friend made his point in skeleton that this is only a small thing, the fact that there is no duty to inform the Commission, what does that add? That is quite beside the point, the Community legislature believed it was important in inserting this requirement, and if it has not been implemented, if that requirement does not exist that is an incomplete implementation and is itself an error of Community law.

MR. ANDERSON: I do not want to get drawn into this particular debate. These regulations, of course, are regulations that are implanted in order to make it clear to undertakings what their rights and obligations are. The duty to notify the Commission is a duty on the member states and it is not necessary for that obligation to find its way into Regulations. With respect to my learned friend, it is a non-point, certainly an irrelevant point, for the purposes of these proceedings.

MR. KENNELLY: I shall let Mr. Anderson have the last word. Unless I can be of any further assistance to the Tribunal -----

THE CHAIRMAN: No, thank you, except you may want to come back, or has that really answered it.

MR. KENNELLY: Madam, I will have to look at the Regulation you directed me to because while I have been through it once, I have not seen it in that way so I will have to consider whether I have to change my submissions.

THE CHAIRMAN: Mr. Flint, did you have some matters that you wanted to raise from yesterday?

MR. FLINT: Yes, I have two points.

THE CHAIRMAN: Were you sitting down because -----

MR. FLINT: Well, I was sitting down because I had not got up! But I hope I was courteously waiting to be invited, but I am happy to go before or after Mr. Mercer. I just have two points arising out of yesterday. Shall I deal with those?

THE CHAIRMAN: Yes.

MR. FLINT: The first point is an answer I gave to Mr. Davey at day 4, p.53, line 29, which was on the subject of were there some commercial single user gateways. I thought I ought to draw to the attention of the Tribunal the Ofcom finding which is not challenged in this appeal at its Decision, if you could turn that up at pp.330 to 332. That is in the core bundle 5 at tab 4.

THE CHAIRMAN: 330?

MR. FLINT: Yes, para.330, madam. This is on the subject Mr. Davey was asking me about, Vodafone's supply of gateways; not multi-use gateways but supply to corporate customers. This is the finding of Ofcom which, as I say, is not challenged in this appeal. It appeared to Ofcom that Vodafone was supplying gateway equipment to its customer for their own use. It did not appear to Ofcom that Vodafone was using the equipment to provide an electronic communications service contrary to Regulation 4(2). The use of the GSM gateway equipment via Vodafone's customers was therefore exempt from the requirement of licence and was lawful.

The second point I wanted to raise again arises out of the questions put to me by Mr. Davey. If you have the core bundle still open, could I ask you to turn to tab 29. I was going to

refer you to the List of Issues. If I can do so in a manner which does not cause Mr. Kennelly to feel threatened, at para.6.3 in the List of Issues I just wanted to draw attention to the issue with which you are dealing under 6.3 on illegality. It is if the Chapter II prohibition Article 8(2) applies, was Vodafone objectively justified in refusing to supply because of the unlawfulness, if established, of Floe's activities under domestic law. That, in my submission, is a threshold issue; it is an issue reflecting what Ofcom decided: does illegality in itself provide the objective justification? If your finding is that it did not, for whatever reason, it would not follow that there was no objective justification. That would need to be decided later. It is therefore – and this arises out of the questions I was answering – not relevant to that issue whether Vodafone after disconnection should then have undertaken other measures to reconnect. Therefore if the point were that Vodafone should post-termination, because we say there was no option but to cease to continue to supply for unlawful purposes, if the point were that Vodafone should then have sought to amend its licence or there was some other similar point, in our submission, those are events after disconnection and are not relevant at this stage on these issues. I am not going to go into all the permutations of the Decision that the Tribunal might reach; I was just drawing attention to the limit of the issue at the moment to the threshold issue of illegality. That is all I wanted to say.

MR. KENNELLY: Madam, all I can say on this is that clearly these provisions are intended to implement the Articles that I was discussing in the RTTE Directive, but in any event it is my submission that Ofcom has still erred in law in failing to apply these to this particular case because of its overly inappropriate restrictive interpretation of the scope which limits it only to equipment and not to the use of equipment, and that Ofcom's Decision, in its Second Decision, in this respect does contain an error of law, and even on a limited basis which is proposed to the Tribunal by my friends. The Tribunal ought still to determine that issue as we suggest.

THE CHAIRMAN: Mr. Mercer.

MR. MERCER: Three very short points, madam. Firstly, on Tuesday when I was talking, I was talking about legitimate expectations and some points involved in that, and the timing of when Ofcom changed its view concerning the meaning of the scope of the licence. I just want to be clear on the record that nothing I said should be taken as an express or implied criticism of the lawyers at Ofcom or any other person at Ofcom in respect of that matter, madam.

The second thing is at the beginning of March I shall be facing another Tribunal in respect of instructions I have to extend Floe's administration. Anything you might say regarding the timetable for delivery of judgment would be extremely welcome to us, because I am sure that the person judging on that occasion may well ask me, although I realise how difficult that must be.

The last point, madam, is simply on behalf of Floe and Worldwide, and I am sure this is shared by everybody else, to ask you madam to thank the Registrar and their staff for their unfailing cheerfulness and helpfulness over the course of this week. I wish I was greeted every morning by such a big smile as I am greeted when I picked up my badge in the morning - Mr. Green is going to have to learn a lot - and also the unfailing kindness when she smiles on me as I leave at night telling her yet again that during the course of the day I appeared to have mixed it up with somebody else in the front row and lost it. I think they have been particularly helpful in finding extra rooms for people and giving up their lunch hours to sit in front of desks to watch things, and it has been extremely helpful to all the parties, madam. I just thought that should go on the record.

THE CHAIRMAN: That is very much appreciated. They have heard it and it will be passed on. Can we rise a moment and we will come back in about five minutes. I just want to make sure that we do not have any further questions. It is easier if we go out and come back rather than we try to talk here.

(Adjourned for a short time)

THE CHAIRMAN: I am sorry you had to wait, but we do have one point. Mr. Flint submitted yesterday, I think you said – and I have not gone back to the transcript so this is rather general than quoting exactly what you said, Mr. Flint – that prior to the Authorisation Directive in 2002 there were no European Directives which governed this area and the provisions of the Vodafone licence was therefore purely a matter of national law. Mr. Flint, do not worry about it for the moment but just let me continue. We refer the parties to Directive 97/13, the Licensing Directive and we just wonder whether that is relevant. We assume that because no-one raised it today, no-one has yet considered it. But in order that we do not decide this case and misrepresent the law, we feel we ought to raise it with you and perhaps that can be dealt with in written submissions because I suspect I have rather taken everybody by surprise.

MR. ANDERSON: We had considered it. We do not think that it raises any matter that is material to this case, but we will supply a note on it, certainly the Licensing Directive, which was the first stage of liberalisation before one got to harmonisation under the Authorisation Directive was in place at the time and was displaced by the Authorisation Directive, but each party can put in a note on its relevance or irrelevance, as the case may be, to these proceedings.

MR. MERCER: I have actually got a copy in front of me. We did consider. We, too, put in a written submission but we did not refer to it because we regarded it as dealing only with networks rather than frequencies.

THE CHAIRMAN: It may be totally irrelevant then, but we thought we had better raise it because we do not want to misrepresent what the law is. (Pause) Mr. Mercer, you asked us about the

timing and, of course, that is a very difficult question. There is a lot to consider. The submissions have been very extensive and although very clearly put require quite a lot of consideration by the Tribunal. I do not know what date in March you were thinking of, but I gather it is the beginning of March.

MR. MERCER: It is, I think, around mid-March for a hearing, madam.

THE CHAIRMAN: I think it is very unlikely that there will be a Decision by then from my experience of writing these things.

MR. MERCER: Just you saying that, madam, is helpful in itself when I have to go before the other place.

THE CHAIRMAN: I think it is very unlikely. That does not stop you enquiring just before to see where we are.

MR. MERCER: Yes, we will try not to do that every day.

THE CHAIRMAN: The Registry may stop smiling at you. Can I thank everyone for all the work that has been done in the submissions, both written and oral in this case, and in providing the materials. We will go away and consider our Decision. Thank you very much.