IN THE COMPETITION APPEAL TRIBUNAL

Case No 1027/2/3/04

Victoria House,
Bloomsbury Place,
London WC1A 2EB

Friday, 17th July 2009

Before:

VIVIEN ROSE
(Chairman)
MICHAEL DAVEY
SHEILA HEWITT

Sitting as a Tribunal in England and Wales

BETWEEN:

VIP COMMUNICATIONS LIMITED Applicant
(in administration)

- v -

OFFICE OF COMMUNICATIONS Respondent

Supported by

T-MOBILE (UK) LIMITED Intervener

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

THE CHAIRMAN: Good morning ladies and gentlemen. I hope everyone has received the agenda for today's CMC. As we made clear in the correspondence, we are not expecting to hear any substantive argument today as to the various issues that have been raised in the correspondence but it would perhaps be useful, as we have said, to have some preliminary idea about how the parties see the situation following the Court of Appeal's judgment in the *Floe* case and how that affects the current proceedings, and then we need to set a timetable for handling the applications that the parties have indicated that they intend to make. Yes, Mr. Mercer?

MR. MERCER: Madam, here I am again, dust off the suit and dust off the papers, and some five years later than when I started. I sent to the Tribunal a short note by the prescribed time on the 15th, which sets out essentially what I seek, the short comments that I wanted to make, and an even shorter summary.

VIP's view is that there were two paths discussed by the Tribunal in the *Floe* case, one relating to the licence and one relating to incompatibility. The Tribunal felt that in *Floe* it was not necessary to pursue the compatibility matter to the end, it pursued the licensing matter to the end. The licensing matter has now been cut off by the Court of Appeal judgment. That leaves the compatibility issue still to be considered. That, simply, madam, is our position on this. Do you want to deal with this issue by issue, or hear me on all of the matters on the agenda?

THE CHAIRMAN: I think let us hear you on the matters on the agenda, but it would be useful – I do not know if you were planning to do this – as far as the "compatibility issue" as you describe it, not wishing to push you as to what you will be including in your amended notice should you go down that route, but just to explain a little what the thought process is as to how the incompatibility issue now fits in with the challenge to the original decision?

MR. MERCER: VIP is still in administration, so a possible route for it going forward is to return to the business that it has always wanted to. The problem that we have perceived with the compatibility route is that it deals with today and going forward, it does not help us going backwards.

However, the administrator has made inquiries and there is still an arbitrage business to be made, so there is still a business going forward. We say that the Court of Appeal successfully cut off the licensing route but it did not cut off the compatibility route, in fact Lord Justice Mummery specifically said that he made no comment in that regard.

The way the compatibility route works is also partly covered by what the Tribunal decided in the *Floe* case in terms of whether or not it could look at that issue and what the effects of looking at that issue would be; and we say that we start from that point. So we have to look at whether or not Ofcom in its report and in relation to applying the law properly, whether it did apply the law properly in terms of looking at whether or not the regulation was in fact incompatible with European Law.

If it was incompatible, which we say it is, then they should have taken a different route in looking at their investigation and what happened subsequently, because they should have said in fact going forward that regulation should not be there and it is the regulation on which Vodafone in *Floe* and T-Mobile in this case rely for saying: "We did not do anything which was anti-competitive" because, as was reiterated I think again by the Court of Appeal, if you are complying with the law as it stands at the moment then you should not be found to have committed an anti-competitive act.

However, as the reasoning in the *Floe* case in this Tribunal shows what Ofcom should have done was to have considered the question of whether or not that regulation was compatible.

Now, the issue in part is also, we say, already dealt with in the *Floe* judgment, to the extent that it touches on harmful interference, because the issue that is going to arise, we think, in the final analysis, is whether or not what we were doing in terms of providing commercial multi-use gateway services was something that was properly cut off by that regulation – by regulation 4(2), the regulation at the centre of all of this.

THE CHAIRMAN: Yes, I can see that that is what the incompatibility argument turns on in part at least, I think what I am saying to you, Mr. Mercer, is that in any application to amend the notice of appeal or in any proposed amendments we need to be very clear not only what you say as to why the domestic legislation was incompatible at the time with the relevant European Instruments but also how you tie that incompatibility in with the thought process that Ofcom either did go through, or you say should have gone through, which would have led to a different result and hence entitles or requires the Tribunal to take that into account when considering the appeal from the decision that was actually taken. That is the point I would like to get across.

MR. MERCER: In that regard, madam, we say that Ofcom was obliged to apply European law as it should have been applied, and if it had done that on the facts then that regulation was not compatible, and then the rest flows.

THE CHAIRMAN: Yes, it is that what "the rest that flows" is. I am not asking you to say it now, but I am just saying that when you come to produce the pleading that is what we need to see set out.

MR. MERCER: And I am aware, because actually right at the beginning of both the *Floe* and VIP cases there was significant amendment to the then notice of appeal that had been served around Christmas 2003, and we went through. What I am posing in my submission does not fall outside the four corners of what is already in the notice of appeal. What we are doing, the exercise we are proposing is to strip out the licence, the interpretation arguments from the notice of appeal. We are not relying on new facts as regards what happened vis-à-vis us and T-Mobile. What we may need to revisit is the question of half-interference, functioning of systems, etc and what actually we say Ofcom should have taken into account in that regard, and whether or not, in fact, the procedures and other matters related to the imposition of the regulation were complied with.

So what we are planning is an exercise of stripping. We are not relying on any new core facts except those related to the actual legal argument, related to the way in which one should analyse the matter before the Tribunal. In fact, I think it probably was one of the first *Floe* CMCs that considered that very question. I remember the then President saying to me: "Are you asking for a new ground of appeal, or are you just actually putting your legal argument a different way?" which in fact is what we were doing at that time, and I say that that is all we are doing again, we are not looking to add any new matter. We have always argued about the legality of the core underlying regulation. We are not seeking to do anything other than that.

THE CHAIRMAN: Well we have to see what the draft amendments and then I am sure we will have the usual arguments over whether it fits in rule 11(1) and rule 11(3), but we cannot really anticipate that now without having seen the amendments.

MR. MERCER: I would say that is exactly so, madam, but what I could do to help the Tribunal and help the other parties is when we provide a revised amended notice of appeal – stripped out notice of appeal – to provide just a commentary to show what has gone where and where it is all coming from.

THE CHAIRMAN: I think let us come perhaps a little bit later to how the Tribunal wants to proceed with this in terms of the documentation, but is there anything else that you would like to say on the agenda, except as regards the nitty-gritty of the timetabling which we will come to later, I think.

MR. MERCER: No, I think the ten, eleven points are wrapped up with the amended notice of appeal.

In respect of costs, we thought that the issue was dealt with by a clear judgment at the time, and I am not aware that the other parties are actually alleging that there has been some change in circumstance, and having looked back through the transcripts I cannot see that we promised to come back and give further information or revisions. So as far as I am concerned on the costs' issue it has been closed, unless something has changed in the meantime.

THE CHAIRMAN: What has been closed? There was, as I understand it, an order in relation to the application for interim relief. Has there been any other order in relation to the allocation of costs as regards the substantive hearing, other than the interim relief?

MR. MERCER: As I understand it, the point made by the respondent and intervener concerning costs goes to the funding arrangements which have not changed since the interim; they were considered as part of the interim relief application, and if they had changed then we would have told the Tribunal and the other parties.

THE CHAIRMAN: Well what your firm has said in the letter that we have seen of 1st July I think it was, was that:

> "Mr. Frost, in the position of administrator, would be personally liable in the circumstances for any costs awarded against him and unfulfilled. The administrator considers that he has access to sufficient funds to be able to fulfil any likely award of costs against him or VIP."

Now, presumably if you have said that in the letter, that is the situation and remains for the other parties, perhaps, to make their submissions if they are unhappy with that.

MR. MERCER: That is what I am saying, madam. The last point, which I put into the "any other business" – I will start by saying, as we have said, VIP does not resile from its original April 2004 undertaking, but we are left wondering whether points that we thought were decided by the Tribunal, and were not cut across by the Court of Appeal, are actually going to be reopened by the respondent and the intervener. If that is the case we would like to know what it is that they think they want to do in that regard, because we were going to take the judgment in *Floe*, except as it has been altered by the judgment in the Court of Appeal, as our base position.

THE CHAIRMAN: Well I do not think that we can consider that question about what remains of the Tribunal's *Floe* judgment in the abstract without knowing on the basis of your proposed

amended notice of appeal what issues are still extant. How I saw this moving forward is that you would put forward your proposed draft amended notice of appeal, we would then see what the other side say about that and about the parts of that document which are brought forward from the existing notice of appeal and, depending on what issues were then joined, there may or may not be a question as to whether some of those issues had in fact already been decided in favour of, or against, one of the parties; or whether those are issues which properly can be investigated anew by the Tribunal. So I suspect that if there are issues between the parties as to what has been definitively decided by the earlier judgments that will become apparent once we know what your case now is, and what parts of that case are disputed by the other parties, but I do not think we can go those judgments and say: "Well this is now finished with, and that is not finished with", I do not see that that would be a useful exercise at this moment. We will see what the other parties have to say.

MR. MERCER: I am happy to deal with it that way, but I just wanted to flag up the point.

THE CHAIRMAN: Yes.

MR. MERCER: That is all I would say at this time, madam.

THE CHAIRMAN: Thank you very much. Mr. Anderson?

MR. ANDERSON: Madam Chairman, listening in particular to that last exchange between yourself and Mr. Mercer concerns us, because in our view there is nothing left in this appeal whatsoever, that is the result of the Court of Appeal's decision.

I understand the Tribunal's reluctance to hear substantive submissions, but if I can just explain our position – you can take them as submissions or an explanation as you wish – because we are very concerned about further time and money being spent on a case if we are right that the case is now effectively spent. In our view the question that was decided by the Court of Appeal has determined it, and however one approaches the question of compatibility, and let us assume that VIP are right, the United Kingdom has not implemented the regulations, the Directives properly, and its regulations are incompatible with the Directive, that can get them nowhere in this case, because this is a case about whether T-Mobile infringed. They have had the benefit of over four months since the Court of Appeal to formulate, even in outline, why they say what Mr. Mercer calls the "compatibility route" – as if it were some free-standing route to infringement – how that applies in the context of this appeal. We know that they have had the benefit of leading counsel advising them over this four months, and all that has come out of it is a *Francovich* damages' claim against the Government. Not a damages' claim against T-Mobile for

abusing a dominant position, but a *Francovich* damages' claim, and that we would say is the only context in which these compatibility issues can arise? This is made perfectly clear by what the Court of Appeal said. What the Court of Appeal said, setting aside the question of it is academic, because Floe lost on the facts, we got over that hurdle, the question is: let us look at the licence. They determined the licence as not covering GSM gateways and they then concluded that is the end of the case. We do not need to look at compatibility, that is irrelevant. The Tribunal should not have looked at issues of compatibility in *Floe* and similarly we submit the Tribunal here should not look at issues of compatibility, and we are very concerned that the Tribunal may be persuaded by VIP, Mr. Mercer, to embark down a route raising all these issues again when they are utterly irrelevant to the question of compatibility, because what the Court of Appeal has concluded is the licences do not cover GSM gateways, the domestic regulations therefore render the use of GSM gateways unlawful unless licensed; they have not been licensed by Ofcom, and therefore the T-Mobiles and Vodafones of this world were obliged to terminate supplies, and that is *Ladbroke* and *CIF*; there can be no basis for contending an abuse on the part of T-Mobile. This is clear from the particulars of claim of VIP itself.

THE CHAIRMAN: Mr. Anderson, I understand that that is your case, the question is, if you are right – and of course there is dispute about that – what is the process that we need to go through from now on to arrive at a disposal of these proceedings? Now, VIP have said that they intend to amend their notice of appeal in order to reflect what they see as the outcome of the Court of Appeal's judgment in *Floe*. As far as I am aware we cannot stop them from doing that, even if we wanted to ----

MR. ANDERSON: Well, with respect, madam, you can under rule 10, which does not require anybody to make an application, the Tribunal itself could say: "It is quite clear now from the Court of Appeal" and we had rather hoped that we might be able today to spend a little time to persuade you to adopt that course.

THE CHAIRMAN: But that relates to the existing notice of appeal, but once it is clear that they wish to amend their notice of appeal I do not see what the point would be of hearing or deciding a rule 10 application in relation to the existing pleading.

MR. ANDERSON: For this reason: it is clear from the correspondence that what they want to amend is to introduce questions of compatibility. They have recognised, as Mr. Mercer has this forward looking and backward looking case, the backward looking case effectively means that we accept that we cannot revisit that. His forward looking is effectively inviting

the Tribunal to go down the very path the Court of Appeal suggested was not an appropriate path, which is to seek an advisory opinion for the purposes of the future regulation of these gateways – the consultation is now revived and back up and running.

The short point is there is no amendment raising the question of compatibility that can salvage this appeal, so we are wasting time and public money in going down the course of allowing them to apply to serve an amended notice of appeal (when we know roughly what it is going to contain) responding, coming back for further CMCs, it is a complete waste of public money and time of all the parties; that is our concern. We had hoped in the space of the last four and a half months that we would have had some formulation of why they say the compatibility issue helps them in the context of T-Mobile's potential abuse of a dominant position. We have had nothing, we have had nothing today, so we really do believe that the matter is so plain that it is an indulgence to the appellant that should not be provided, that is why we feel the Tribunal is in a position to end this case now and not embark upon further debates about amending notices of appeal, responding, and having hearings to decide whether or not permission should be granted, it is all going to be a complete waste of money because it is quite clear from what the Court of Appeal decided that once you construe the licence properly as not including GSM gateways there is no possibility of an infringement. There is an avenue to debate these compatibility issues, and that is the actual *Francovich* damages action. That is our position on that question, that is why we are a little concerned to hear Mr. Mercer raising issues of which parts of the old *Floe* judgment are alive and which are not. The answer is it is all dead; it has all been set aside, and it has all been set aside because the Court of Appeal recognised that issues such as harmful interference should never have been considered by the Tribunal.

THE CHAIRMAN: Yes, is there anything that you want to say on the costs point?

MR. ANDERSON: It is a debate that need not trouble the Tribunal today. What effectively happened was that there was all this information that came out in the context of an interim relief application about an assignment of the cause of action and whether that meant that this company still had sufficient interest in the case and so forth. As it happened the Tribunal refused interim relief and the case was stayed so the matter was not explored any further, but since we are likely in due course to be making an application for our costs – at least to date – and if the case were against what we think would be against the better judgment of the Tribunal to proceed, then those are matters that should be revisited because

the Tribunal made perfectly plain that it was not clear on the information that had been provided by VIP what the position was. But today it does not need to be decided.

THE CHAIRMAN: And this statement in the Taylor Wessing letter that the administrator accepts that he would be personally liable for any costs awarded against him and unfulfilled, presumably you have had an opportunity to investigate whether or not that is legally or factually correct?

MR. ANDERSON: We understood that to mean that Taylor Wessing had undertaken to meet his costs, but whatever the position is we will be making an application for costs in due course and if it is allowed and not met these may be issues that need to be revisited, but that was the basis upon which we understood that being the position; not that as a matter of law an administrator is personally liable, because I do not think that is right.

THE CHAIRMAN: Yes, thank you, Mr. Anderson. Can I assume that if we decide that there ought to be, albeit a short iteration following the Court of Appeal's judgment finally to resolve what the implications of that are for these proceedings, that you agree that any rule 10 application and any rule 11 application should be combined as they are likely to raise the same ----

MR. ANDERSON: Absolutely, yes. But I think the Tribunal need look no further than para. 114 in the Court of Appeal for this whole matter to be quite clear.

THE CHAIRMAN: Yes. Thank you. Mr. Pickford, do you want to say anything.

MR. PICKFORD: Thank you, madam. Dealing with the costs point first, if I may, whilst it is fresh in my mind. Our position is we do intend to make an application for costs in due course. The Tribunal is entirely correct that there is already an order in relation to the costs of the interim relief application and that was in favour of T-Mobile and also Ofcom, but the enforcement of that has been stayed pending the ultimate determination of the appeal.

Our position in relation to costs is that when we make that application, and when we seek to enforce the order that has ultimately been made against VIP, we would seek liberty to apply in the event that VIP is not able to pay so we do not think there is any point in dealing with all these complicated issue now about whether or not VIP has a continuing interest, whether or not the administrator will be personally liable. The sensible thing to do is to test whether VIP pay for the order, and if that is the case the we do not need to any further down that particular road.

Coming back to the main issue, namely the determination of these proceedings, we entirely endorse what Ofcom has said. We are concerned that these proceedings began life with

Ofcom, in fact, over six years ago, and they began life in this Tribunal over five years ago and in that course of time VIP has produced six different versions of its notice of appeal. So we would strictly be looking at the re-re-re-re-re-amended notice of appeal were we to allow a further amendment at this stage. In our submission there does come a time when enough is enough, and we say we have reached that time now.

We also wholeheartedly endorse what Mr. Anderson has said about the ability of the Tribunal really to deal with the situation now. I hear what the Tribunal said. The indication is that you do not wish to go down that route, and you wish to at least allow VIP an opportunity to put in their amendment. One immediately has to consider what would the jurisdiction of the Tribunal be to hear the amended claim that Mr. Mercer is posing because as I understand it, it is a claim that is shorn of anything to do with the original Competition Act article 82 decision. He concedes that as far as the behaviour of T-Mobile is concerned, and the subject matter of that decision – he is quite clear about this – there is no case against T-Mobile. His hope is all to the future.

The first point to make in relation to that is that that is entirely hypothetical if there were a situation in the future where Article 4(2) of the exemption regulations had been set aside, T-Mobile would obviously need to consider again what its position was in relation to the supply of companies such as VIP; that does not mean that it would necessarily supply them, but it would certainly have to consider the position once more because the domestic law would have materially changed. Currently, as you can see, there is a complete prohibition on it even assisting VIP if they wanted to.

THE CHAIRMAN: Well you say he concedes that, we have had correspondence in which we have been given an indication of what is going to be in the proposed amended notice of appeal, but what I am struggling with is whether procedurally it would be possible, fair, right, for the Tribunal to rely on what has been said in correspondence somehow to preclude them from applying to amend the notice of appeal now that they have indicated that they want to do that. We do not know what is going to be in the notice of appeal, we have been given some indication of what it is, but that is not binding on them what they said in their correspondence, is it?

MR. PICKFORD: I think what is clear, as Mr. Anderson has articulated as well, is that there is nothing that could be done to the notice of appeal to resurrect the attack on the decision which is the subject matter of what is before the Tribunal. If one looks at the decision – it

may be helpful to open the first paragraph of the decision – I do not know whether the Tribunal would like to do that now.

THE CHAIRMAN: We will just have a quick look, shall we? This is the Ofcom decision?

MR. PICKFORD: It is Ofcom's second decision of 28th June 2005. If the Tribunal turns to the very first page, section 1, paras. 1 and 2 of that decision one sees the following, that:

> "The Office of Communications has concluded that T-Mobile (UK) Limited has not infringed Section 18 of the Competition Act 1998, or Article 82 of the EC Treaty by suspending/disconnecting the services it was providing to VIP Communications Ltd for the use in VIPs GSM gateways while allegedly continuing to supply the same services to other companies for use in GSM gateways. There are therefore no grounds for action against T-Mobile.
>
> Ofcom has concluded that the Chapter II prohibition and Article 82 do not apply in respect of the particular facts of this case. This is because:
>
> * VIP's use of GSM Gateways was unlawful …"

Just pausing there, that matter has now been definitively decided by the Court of Appeal so there is nothing further to say in relation to that. Secondly:

> "… and the competition rules do not and cannot apply to protect or promote activities which are prohibited by law; and
>
> * by ceasing to supply VIP, T-Mobile was complying with a 'legal requirement'."

Those second matters are not disputed, as I hear it, by Mr. Mercer, and indeed they could not be because they were canvassed in front of this Tribunal in relation to the *Floe* judgment previously, and it is quite clear that the Tribunal did not demur from what is the clear line of authority in, as Mr. Anderson said, *Ladbroke*, *CIF*, etc.

THE CHAIRMAN: Well there was a discussion that I have seen in the Tribunal's judgment about *ITT Promedia* and *CIF*, but in the context of some jurisdictional debate about whether the Tribunal could look at those issues, or whether those would have to go to the High Court by way of judicial review, but I do not recall that the Tribunal actually decided in the *Floe II* judgment that the effect of *Ladbroke*, *ITT Promedia*, or *CIF* was entirely to preclude the possibility of an abuse on the part of the dominant undertaking in circumstances where the regulator is under a duty to disapply incompatible legislation. I do not want to get into the debate now, what I am trying to explore is whether things are quite as clear cut as you and Mr. Anderson are putting forward.

MR. PICKFORD: In my submission, albeit they dealt with that as an *obiter* point, because it was not relevant and it was not necessary for them to decide it in order to decide the appeal, as we now well know, they did deal with that at paras. 321 and following of their judgment. It is quite clear, I would submit, what their views were but obviously if you do not want to get drawn into that now I will not take the Tribunal to it. In any event I do not hear that Mr. Mercer is saying that he believes his point in relation to compatibility gives him any answer to the question of whether: first, T-Mobile did infringe the Competition Act or Article 82 – that matter appears now to be entirely resolved, and I do not hear him say anything otherwise. Secondly, there is the issue of whether T-Mobile is infringing today. Clearly the law today is the same as the law as it was at the time T-Mobile ceased to supply VIP, so it is not infringing today.

The question of tomorrow: should he be successful in persuading some court or Tribunal, or Ofcom that in fact Article 4(2) of the exemption regulations is incompatible with Community law is a question for another day. T-Mobile has not taken a view yet as to what it might or might not do in those circumstances, so it is an entirely hypothetical, potential abuse – even if he is right – and there would be no jurisdiction to deal with that on the basis of an appeal against what was said to be a concrete abuse under the Competition Act. There would not even be any jurisdiction, I would submit, for Ofcom to open an investigation in relation to it, it would not even cross the s.25 threshold, but we do not even need to consider that.

What we are then left with is a pure point about incompatibility of domestic law with Community law, and so one says if we are shorn at that point of all the other previous Competition law trappings, does the Tribunal have jurisdiction to hear that point, irrespective of whether it would be permissible as an amendment under Rule 11. In relation to that point the answer is quite clear that it does not. It would not fall under sections 46 and 47, because we are not talking about a Competition Act decision any more, we are talking about a decision of Ofcom in relation to whether it will or will not disapply regulation 4(2). That would fall to be appealed if at all, under s.192 of the Communications Act 2003 but as we are well familiar with there are exceptions to s.192 and they are set out in Schedule 8, and the particular decision falls squarely within the scope of the exceptions. We do slightly differ from Ofcom in relation to which exception applies. It is, in fact, para.40(a) of Schedule 8 which applies. The mistake, if I might respectfully put it that way, on the part of Ofcom, is that they look to the position in relation to the Wireless Telegraphy

Act 1949,which has now been repealed and replaced by the Wireless Telegraphy Act 2006, so any future decision that they would need to take would be under the local provisions of the 2006 Act; that is the only reason for the difference in relation to the paragraph numbers. That is why we say ultimately this appeal can go nowhere. If the Tribunal wishes to permit Mr. Mercer an opportunity to put his case down in writing obviously we cannot stand in the way of that but we say ultimately we now have hit the end of the road for this appeal.

THE CHAIRMAN: Yes, thank you very much, Mr. Pickford.

MR. ANDERSON: Before Mr. Mercer replies, could I just add one further point which is about a concern of yours about procedural fairness? Rule 10 is formulated in such a way as to enable the Tribunal to take a proactive role. It is perfectly legitimate and consistent with the way in which Rule 10 is drafted, which is not contingent upon an application being made for the Tribunal to say: "We have reached a provisional view that we have reached the end of the road, is there anything you wish to say, Mr. Mercer, to persuade us otherwise?" It does not have to sit there passively and say they have indicated they want to issue yet another version of amended notice of appeal, "We must let them and then see what they say." The Tribunal can be proactive, it does not need to be passive in this.

THE CHAIRMAN: Just looking at Rule 10, the relevant limb of it is presumably 10(1)(a) – "Considers that the notice of appeal discloses no valid ground of appeal", neither of the other two seems to be relevant.

MR. ANDERSON: Yes, but, as Mr. Pickford says, there must come a point where one reaches the end of the road as to how many times you can change a notice of appeal.

THE CHAIRMAN: Yes, So the question is whether we have reached that time or not. I see the point, Mr. Anderson about being proactive and generally we are a very proactive Tribunal as you know.

MR. ANDERSON: I know, but just to add to the point, of course, Mr. Mercer is only entitled to amend with your permission, so one can combine ----

THE CHAIRMAN: Yes, but he does not have to have our permission to apply to amend, that is the point.

MR. ANDERSON: Yes, it may come to much the same thing. You can take an pro-active role in this, you do not simply need to sit back because they have said in writing: "We want to raise the compatibility issues" and wait four and a half months without formulating anything.

THE CHAIRMAN: The question seems to me to be whether on the basis of the correspondence that has been exchanged between the parties there is something we can or should do to prevent there from being a step in these proceedings.

MR. ANDERSON: That is our only concern; if we are right we do not want to be going through series of rounds of submissions and further oral hearings when we say it is as plain as it is.

THE CHAIRMAN: Yes. Mr. Mercer?

MR. MERCER: I am beginning to feel like Banquo at somebody's feast; the ghost that nobody wishes to see, but I think the reports of my death have been somewhat exaggerated. Your attention is drawn, madam, to s.114 of Lord Justice Mummery's judgment. In my written submission I actually set out the last sentence of that which is as clear as I think it could be. There are two compatibility issues – one relating to the licence, and one was more general. As with Mr. Anderson and Mr. Pickford, I sat here for a long time listening to the very detailed arguments about jurisdiction, judicial review, and interpretation put forward by Mr. Anderson, Mr. Pickford, and by Mr. Flint for Vodafone in the *Floe* case. My view is that the Tribunal came to conclusions about that and that Tribunal always considered that it was dealing with two sides to the compatibility issue. One of these has been dealt with by the Court of Appeal, namely that in relation to the licence; there is one which still remains outstanding and which has never been pursued to a conclusion. I think that is absolutely clear. It may well be that we now need to reach a stage where we put all of this down and we actually set everything out. The respondent and intervener say: "You have had four and a half months". In what I am about to say I am not being trite, but it took the Court of Appeal 10 months to reach its decision in the *Floe* case. These are difficult and complex issues and they have been raised in a particular way, whereby, for example, at prima facie level the Court of Appeal case in *Floe* is of no help or assistance to VIP at all, but in some ways it is, because it prevents any answer relating to incompatibility. It works both ways in respect of what it said about *Marleasing* for example, so that nobody can now say that the respondent cannot argue that the licence can be used as a way of combating the incompatibility. These are complex issues, I say the Tribunal needs to look at the amended notice of appeal and then take the whole matter together in a structured way.

THE CHAIRMAN: Thank you. I think we will now adjourn for 20 minutes, after which we will let you now how we propose to deal with this matter that has arisen today. Thank you.

(Short break)

(For Ruling see separate transcript)

THE CHAIRMAN: We have given some preliminary thought therefore as to what further steps should be taken, and we will hear any arguments that counsel wish to make on the following suggested route. The first step, of course, is for VIP to produce a draft amended notice of appeal. As has been noted by the parties that pleading has already been much amended in the past and we would therefore like to see what I could describe as a "clean copy" of the pleading produced, i.e. showing without underlining what remains of the existing appeal as at today's date, and then showing what it is proposed to include by way of amendment into the notice of appeal but stripping out all the parts of the notice of appeal that have been struck out or withdrawn in the past.

We would propose setting a deadline of 28 days from today (i.e. 14th August) for VIP to produce that draft amended pleading. That draft should be attached to an application to amend. I note that Mr. Mercer referred to producing a commentary; I am not quite sure what he means by that, but what we want to see is an application to amend, setting out whether or not the amendments are new grounds, i.e. whether they fall within Rule 11(1) or 11(3) of the Tribunal's Rules and what reasons are being put forward to the Tribunal to allow the amendments. We then envisage that Ofcom and T-Mobile would then each serve a combined document which sets out their opposition to the application to amend, and puts forward their application under Rule 10 to strike out any of the existing notice of appeal which it appears from the draft is intended to remain extant.

If Ofcom and T-Mobile are able to provide us with a joint document then that would be welcomed, but we do not require that at the moment, but the document that they each serve should combine the opposition to the application to amend and the arguments on the Rule 10 point. We consider that such documents should be served by 11th September. VIP should then have 14 days (i.e. 25th September) to serve a combined document replying to the opposition to the application to amend and setting out their defence to the strike-out. We would expect those documents then to be the only documents necessary for the Tribunal to consider, and if any party wants at that stage to produce a further document they should write into the Tribunal explaining why. It may well be possible and desirable to deal with this matter on paper. If the Tribunal decides that it is necessary to have a hearing, we would expect the documents that I have just described to stand as skeletons for any hearing, and we would liaise with the parties in the usual way as regards the dates; the Tribunal, having

considered their own availability, has very provisionally pencilled in 14th October as a day on which a hearing could take place if such a hearing were necessary.

There was another issue raised on the agenda concerning the costs but, as we understand it, no party is proposing to make an application in relation to the costs having regard to what VIP's solicitors have said in their correspondence as to the access to sufficient funds as to be able to fulfil any likely award of costs should that happen in the future.

Mr. Mercer, the timetable that we have outlined, is that satisfactory as far as you are concerned?

MR. MERCER: It is, madam, yes. I make no comment.

MR. ANDERSON: We are certainly content with that.

MR. PICKFORD: Madam, we are also content, thank you.

THE CHAIRMAN: Is there anything else then that we need to deal with this morning.

MR. MERCER: Not from me, madam.

THE CHAIRMAN: Thank you very much.

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