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**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case Nos 1024/2/3/04  
1027/2/3/04

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

20 September 2005

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

Sitting as a Tribunal in England and Wales

**BETWEEN:**

**FLOE TELECOM LIMITED**  
**(in administration)**

Appellant

and

**OFFICE OF COMMUNICATIONS**

Respondent

supported by

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

Interveners

And

**VIP COMMUNICATIONS LIMITED**

Appellant

and

**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 Appellants and for the proposed intervener.

Mr. Rupert Anderson Q.C. (instructed by the Director of Telecommunications and Competition Law, Office of Communications) appeared for the Respondent

Mr. Stephen Wisking (of 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

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1 THE CHAIRMAN: Good morning. May I begin by thanking you all for the very helpful written  
2 submissions which you have made available in advance of today's hearing? It may be of  
3 assistance if I began by indicating the Tribunal's provisional views subject to any oral  
4 submissions today, of course, on the written submissions which have been provided.

5           Going to the end first, we consider it premature to indicate the relief which might be  
6 appropriate in this case. We also consider that it would not be appropriate, at this stage, to  
7 determine market definition, dominance, and effect on trade. Those matters only become  
8 relevant if ultimately Floe is successful in appealing the Second Decision. So it seems to us  
9 that the appropriate way forward is first to hear the appeal on the Second Decision and, having  
10 heard the appeal, to then decide the appropriate relief. Accordingly, the written submissions  
11 which have been made concerning whether this Tribunal should on this occasion substitute its  
12 decision for Ofcom's decision are premature.

13           Having mentioned the end first, I now return to whether Floe's statement of case or  
14 amended Notice of Appeal is now sufficient. Subject to one point, which I am going to raise in  
15 a moment, Floe have provided answers to the request for the further and better particulars from  
16 Vodafone and Ofcom. It seems to us important to balance conciseness and sufficiency. We  
17 need to ensure, so far as practicable, that the parties are on an equal footing having regard to  
18 Floe being in administration, Vodafone being a significant public company and Ofcom being  
19 a public authority for this purpose. We hope it is helpful to indicate that any suggestion that the  
20 amended Notice of Appeal is still insufficient should be considered by us against that  
21 background.

22           I mentioned there was one point which concerned us as to sufficiency, that is as to  
23 what representation the RA made as to the ambit of Vodafone's licence, and as to the  
24 regulation of GSM gateways before the agreement was entered into.

25           The first full hearing proceeded on the basis that the representations were made after  
26 the agreement was entered into. The statement of case, together with the further and better  
27 particulars that have now been provided, refers to evidence, not disclosed, of a meeting in  
28 February 2002 with the Department of Trade and Industry. In the further and better particulars  
29 Floe offered to produce the evidence of this meeting and discussion if they are not admitted. It  
30 seems to us that this evidence is of significance and there is no explanation of why it has only  
31 now been mentioned. It may be that it is not contentious, but if it is contentious then our  
32 preliminary view, subject to any submissions today by Floe, would be that the evidence should  
33 be disclosed forthwith, with an explanation of why it was not disclosed earlier either at the first  
34 full hearing stage or to Ofcom when they were re-investigating the remitted complaint. We  
35 say that because it seems to us and, of course, subject to any submission to the contrary, that

1 when a complaint is remitted under the umbrella of an appeal the appellant has a role in  
2 assisting Ofcom to arrive at a decision on the evidence available to the appellant.

3 We note from the Second Decision that Vodafone now accepts that it always knew  
4 that Floe were going to provide commercial services over GSM gateways, albeit restricted to  
5 single use. This appears to us to be contrary to what the Tribunal was told on the last full  
6 hearing. We refer to the transcript of the second day of the hearing, an exchange between Mr.  
7 Ivory and me at p.53 line 27, p.54, lines 35-39, p.67 lines 1-10. We note that there is no  
8 explanation for that change in the Second Decision, nor have we found on our reading of the  
9 Second Decision Vodafone's explanation for its conduct in entering into and performing the  
10 agreement in the context of this knowledge. It will be appreciated that this Tribunal is  
11 concerned that the facts stated in the Second Decision differ from what Vodafone told it at the  
12 first full hearing. In due course, it may be appropriate for this matter to be addressed by  
13 Vodafone and by Ofcom.

14 For the purposes of the Second Decision Ofcom researched how GSM gateways are  
15 regulated by other European administrations. It appears from Floe's statement of case that  
16 there is a dispute as to the results of that research. The regulation of GSM gateways in Europe  
17 may be relevant to the outcome of these proceedings. We are unclear from the terms of the  
18 Second Decision as to the position of the legality of GSM gateways in other Member States.  
19 We highlight this now so that consideration might be given to what further evidence is required  
20 in that area and whether this is a matter on which we should consider whether the Commission  
21 should be invited to provide the Tribunal with its observations as *amicus curiae* under the  
22 procedure envisaged in Regulation 1. This arises because it appears that there are different  
23 positions in Member States. It may possibly go to the question of whether the exemption  
24 regulation and in particular para. 4(2) is compliant with the RTTE and the Authorisation  
25 Directives.

26 We raise this now so that consideration can be given to whether any such invitation  
27 would be appropriate in all the circumstances. Those are my general observations; I now turn  
28 to the agenda.

29 First, VIP's Appeal. We would like to hear oral submissions on the advantages and  
30 disadvantages of hearing both Appeals at the same time. Our present view is that  
31 consolidation would be inappropriate. The question seems to us, subject to submissions today,  
32 is whether the factual evidence in both cases should be heard by the Tribunal before the  
33 Tribunal comes to a decision, or whether VIP's case should be stayed until after the Tribunal's  
34 decision in Floe. This appears to the Tribunal to depend upon whether the decision in Floe

1 may narrow the issues in the VIP Appeal so that waiting for the Floe decision would reduce the  
2 costs of the VIP Appeal.

3 The second issue on the agenda was the application for intervention by Worldwide.  
4 As far as we can see the application does not explain the instances in which Worldwide would  
5 like to make submissions which differ from those of Floe and VIP. Also, it is not clear to us  
6 whether Worldwide has (or has had) any relationship with Vodafone concerning GSM  
7 gateways. I say Vodafone because T-Mobile have said they have no relationship and we have  
8 just assumed that that is correct. At this stage of this Appeal, we consider (subject to any  
9 further submissions by the parties to us) that it would be appropriate for us to have that  
10 information before considering whether we should extend time for the application of  
11 Worldwide and whether we should grant it and, if so, on what conditions, e.g. written  
12 submissions, oral submissions or both? So subject to any further submissions today we would  
13 suggest this application is adjourned for that information to be provided.

14 The list of main issues. The Tribunal prepared a very provisional list for discussion,  
15 and we would encourage the parties to co-operate to provide a definitive and agreed document.  
16 Perhaps this is a matter which again should be adjourned today, although it requires  
17 expeditious consideration by the parties.

18 Further documents and disclosure. We note that Ofcom have offered to disclose  
19 equivalent to access to the file both in relation to themselves and to the RA. We note that  
20 Ofcom have indicated that the selection of documents from these files, both in relation to  
21 relevance, privilege and confidentiality may take some time. We have not been given any  
22 indication by Ofcom of the timescale proposed, save that Ofcom have indicated that the case  
23 can be heard in full in December. We invite Ofcom to propose a timetable. In relation to the  
24 relevant but confidential and privileged documents we would like submissions on whether it is  
25 proposed to list those documents either individually or under headings, and it may be helpful to  
26 indicate our present view, which is that there should be some list of the relevant documents not  
27 disclosed on grounds of privilege or confidentiality.

28 We also note in connection with disclosure that the offer is for a period beginning  
29 November 2002. We do not understand why that date has been chosen when the agreement  
30 was entered into in August 2002 and there is an RA statement also in August 2002 albeit, on  
31 the evidence previously before us, shortly after the agreement was entered into.

32 In that connection, February 2002 may also be relevant having regard to Floe's new  
33 evidence of the meeting with the DTI. We also wonder whether disclosure should be up to  
34 August rather than July 2003 having regard to the RA's statement referred to in paras.70-72 of

1 the Second Decision. We invite Ofcom to consider whether their disclosure therefore should  
2 be for a more extended period than presently being offered.

3 The sixth item on the agenda was written statements and oral evidence. Ofcom have  
4 indicated that it is premature to consider this and our provisional view is that that should be left  
5 to the next CMC.

6 Expert evidence. We note what has been written to us on the issue of expert evidence.  
7 Floe have indicated that they wish to call Mr. Stonehouse, who was a director of Floe. Ofcom,  
8 on the previous occasion, relied on Mr. Unger, who is internal to Ofcom. Neither  
9 Mr. Stonehouse or Mr. Unger are independent. Mr. Unger's evidence was challenged and we  
10 assume Ofcom will challenge Mr. Stonehouse's evidence. In those circumstances we consider  
11 there may be merit in an independent expert and we think that consideration needs to be given  
12 to whether a single joint expert would be the appropriate way forward. The Tribunal also  
13 appreciates that in this case there may be two different types of expert evidence. The first is  
14 technical evidence from an expert, for example, on the question of splitting of frequencies and  
15 on what constitutes harmful interference.

16 The second may be opinion evidence of an expert, although we have difficulty seeing  
17 the requirement of any expert evidence in that category but we are open to submissions on that.  
18 It seems to us that urgent consideration needs to be given as to what issues require expert  
19 evidence, whether that expert evidence is of a technical or opinion nature in the way that I have  
20 described, and who should provide that evidence to the Tribunal. Certainly, insofar as it is  
21 technical evidence – and subject of course to submissions – the Tribunal's present view is that  
22 it should be a joint independent single expert.

23 Lastly we get to the timetable. We will hear, of course, submissions from the parties  
24 on an appropriate timetable from now. We have been looking at the Tribunal's diary and we  
25 suggest a CMC on 2nd November at 2 p.m., and that the hearing takes place over two days on  
26 1<sup>st</sup> and 2<sup>nd</sup> December. In relation to dealing with the position on experts, we suggest that I am  
27 delegated by the Tribunal to deal with that issue. We hope that it will be dealt with by  
28 agreement and if not totally by agreement then at least on paper with the Tribunal. But if that  
29 cannot happen then I will make myself available at short notice either to deal with it on  
30 a telephone CMC or at an oral hearing because it probably is quite urgent, if there is going to  
31 be any expert evidence, to organise that.

32 I hope that those observations assist the parties. I am not sure who is going to start, or  
33 would you like us to rise for a moment?

1 MR. WISKING: Perhaps I should volunteer. I wonder whether it might be possible to deal with each  
2 of the issues identified by the Tribunal with each party commenting on each, as it were, and  
3 work through the agenda in that way – if the Tribunal find that convenient?  
4

5 THE CHAIRMAN: Yes.

6 MR. WISKING: The first issue that we need to address the Tribunal on is the question of the  
7 particulars of the Appeal, or the adequacy of the Appeal. We note what the Tribunal says  
8 about the respective position of the parties. However, our concern about the Notice of Appeal  
9 as it stands, coupled with the correspondence that we have had from Floe’s solicitors is that in  
10 a number of aspects we are not in a position to prepare our Statement of Intervention or  
11 evidence in response. The focus has been, in writing to Floe, that we have sought to identify  
12 what are the material facts in issue, and what is the evidence that Floe is relying upon, so that  
13 Floe’s case is on the table and we can respond to that and do so in as efficient a way as  
14 possible.

15 We appreciate that there are differences in the relative positions of the parties, but  
16 there is certain information we simply need in order to prepare a Statement of Intervention and  
17 those documents. As we indicated in our observations to the Tribunal the position is different  
18 now in these proceedings because of the relief sought by Floe. We have to prepare this case on  
19 the basis that the Tribunal might, as the Tribunal has indicated, make final findings adverse to  
20 Vodafone. The position would have been, had Ofcom sought to make an infringement finding  
21 against Vodafone, that we would have had a fully reasoned Statement of Objections, we would  
22 have had access to the file (which we have not yet had), we would have had an opportunity to  
23 see that case in its totality; to respond to it both in writing and orally, and we are seeking to get  
24 as close to that position as possible, having regard to the respective position of the parties.

25 I do not propose to go through the extensive correspondence in detail, but I just  
26 wanted to highlight some of the key issues that we have, and I submit that it is a very simple  
27 matter for Floe to address some of these issues so that it ought not to occupy much time and  
28 resources. The first general point is that we have sought to identify what are the facts in issue.  
29 There is a general statement in the Floe Notice of Appeal which makes reference to the  
30 previous appeals as setting out the relevant facts, and we have said that on that basis we  
31 assume the facts in issue are those that you put in issue in the Notice of Appeal. However, the  
32 response has been “No, no, that is wrong. Actually, the facts in issue are every finding which  
33 Ofcom makes which is inconsistent with the submissions we have made to Ofcom.” That is  
34 not very helpful to us because we have not seen those submissions and it is very difficult and  
35 time consuming for us then to engage in a process of comparing documents and guessing what

1 are the facts in issue, and we should not have to do that. It should be possible for Floe quite  
2 readily to set out what are the facts in issue. It is not helpful to refer to or rely upon documents  
3 we have not seen.

4 The issue arises again in respect of the discrimination allegations made against  
5 Vodafone. You will recall in para.2(e) of the Notice of Appeal that Floe alleges that Vodafone  
6 has knowingly supplied operators of commercial multi-use gateways in a period of time when  
7 that is not clear either. For us to respond to that we need to know who they are, who it is that  
8 supplied them, and we can get the evidence. We are told “No,” we are not allowed to know  
9 who they are, that is confidential. We are not allowed to know who the Vodafone executives  
10 are. Now how it can be confidential when the allegation is we have knowingly supplied them  
11 I do not know, but it is very difficult for us to respond to these kinds of allegations. It gets  
12 worse because the correspondence then starts changing the allegations so in the Notice of  
13 Appeal the time period that is referred to is from mid-2003 onwards. In the correspondence  
14 the time period is from the disconnection of Floe, so early 2003 onwards. So already the  
15 goalposts are changing. All we ask is that the case be put fairly and squarely so we can  
16 respond to it. But at present, with the exception of one operator which Floe has revealed, we  
17 cannot actually respond to these allegations because we do not know who it is we are alleged  
18 to have knowingly supplied.

19 There is a similar issue with the evidence which the Tribunal has identified, and the  
20 example I was going to refer to was the one the Tribunal has referred to, this meeting where we  
21 are told there was a meeting. There is a very vague allegation as to what has happened at that  
22 meeting, no evidence is advanced and then we are told “Well, you might get some  
23 information ----”

24 THE CHAIRMAN: You heard what I said about it?

25 MR. WISKING: Indeed. But there are other examples in relation to the discrimination allegation in  
26 which we are told “We have some documents, if you dispute it we will produce the  
27 documents”, or “If you dispute these allegations we will put some more evidence in.” Now  
28 again we should have the case on the table so that we can respond to it, it is just not  
29 satisfactory to be in a position where we respond, there are then witness statements in response  
30 to our response and we respond to those. That is not an efficient way to proceed.

31 It similarly arises in relation to the legal question of the scope of Vodafone’s licence.  
32 The argument of Floe in relation to that is that the licence should not be interpreted by  
33 reference to GSM standards because there is no express importation of GSM standards or  
34 express statement that they should be interpreted in that way. Floe refers to other licences  
35 where there is express importation of technical standards which is relevant to the interpretation

1 of those licences as a contrast. So we ask “Well what are those licences?” and we are told we  
2 cannot know that because that is confidential. It similarly arises in relation to the legitimate  
3 expectations case where we ask what are the statements which Floe relied upon? The response  
4 is “It is in correspondence”. That is not very helpful because we are not told what the  
5 correspondence is. It is not very helpful because it is probably correspondence between Floe  
6 and Ofcom which will be on their file which we have not seen. So it is this failure to identify  
7 stuff which is obviously out there but we just have not seen, and it should not be that hard for  
8 Floe to sit down and just set out what their case is, put the evidence forward and we can  
9 respond to it.

10 There are a number of other instances. For example, in relation to the allegation of  
11 abuse there is this question as to whether or not Vodafone, in supplying Floe, would have  
12 aiding and abetting a criminal offence. Floe assert that it was not aiding and abetting. We ask  
13 why and we are told that “The elements of the offence were not made out but we will not tell  
14 you which ones.” So again, how do we respond to that? Floe makes vague allegations about  
15 what is Vodafone’s duty as a dominant company – an allegation which we do not necessarily  
16 accept.

17 THE CHAIRMAN: That is going over, probably.

18 MR. WISKING: Sorry?

19 THE CHAIRMAN: I indicated that we were not going to decide the “dominant” point.

20 MR. WISKING: No, no, but they make assertions about what duty a dominant company has in these  
21 circumstances in the vaguest of terms and we ask “Well particularise what the duty is”, and we  
22 are told “Oh no, you are not allowed to have that either”. So there is just this array of matters  
23 which do not require a lot of effort to respond to but are essential for the preparation of our  
24 Statement of Intervention and witness statements, and it should not be too much to ask for Floe  
25 to set out its case, set out what the facts are in dispute and put forward its evidence so we can  
26 respond to it, rather than having this sort of staggered, rolling exercise which is what we are  
27 likely to end up with, because otherwise we are going to have to proceed on the basis of certain  
28 assumptions about their case. We are then going to be told that those assumptions are wrong.  
29 We are then going to have to deal with the changes, and it will go on and it makes a hearing in  
30 December very ambitious in those circumstances.

31 So those are my submissions on ----

32 THE CHAIRMAN: Shall we hear what Mr. Mercer says on those? Would that be a good way to  
33 proceed?

34 MR. WISKING: Thank you.

1 MR. ANDERSON: Ma'am, it might be sensible if I went next to save Mr. Mercer having to respond  
2 twice to what are very similar observations.

3 THE CHAIRMAN: Yes.

4 MR. ANDERSON: We, Ofcom, would agree with what is being said by Vodafone and indeed our  
5 views are not confined to what is said by Vodafone. We have sought in a request for further  
6 and better particulars, clarification of this case. The difficulty that we find ourselves in is  
7 understanding which parts of our Decision are challenged, and the basis upon which they are  
8 challenged. If I might, just by way of example, invite the Tribunal to look at the Notice of  
9 Appeal in the Floe case (the appendix to it) at section 2.

10 THE CHAIRMAN: Appendix?

11 MR. ANDERSON: The meat of the Notice of Appeal in each case is included in what is called an  
12 "Appendix", and in section 2 of the appendix – p.4 of the appendix to the Notice of Appeal.

13 THE CHAIRMAN: Yes.

14 MR. ANDERSON: You will see a section headed "Breach of the Chapter II Prohibition or Article  
15 82 should be a matter of reality rather than theory." Now that, of course, is not a section that  
16 relates to any particular section of the Decision, it is entirely a section of this appendix. One  
17 then looks at the first sentence of what we find under that case. "Floe will contend that  
18 Ofcom's analysis bears no resemblance to reality." Now, we are not told which parts of the  
19 analysis, what analysis is at issue; in what respects it does not bear any resemblance to reality.  
20 What is meant by "any resemblance to reality"?

21 THE CHAIRMAN: Do you not have to read on?

22 MR. ANDERSON: We do then perhaps read on, it might shed some light on to it. We read on to the  
23 next sentence, and what appears to be put in issue is the question of harmful interference. Now  
24 that, so far as we can tell, from the rest of the Notice of Appeal is addressed to the question of  
25 whether or not the regulations comply with, or are compatible with, the Directives. We move  
26 on to the next sentence and we are in to this whole question of whether the industry thought the  
27 regulations were about to be amended which, so far as we can understand, is a legitimate  
28 expectation argument. I take you to this, ma'am, simply as an example of how difficult it is for  
29 us to understand precisely which parts of our Decision are challenged and why. In an ideal  
30 world, of course, we would have identified parts of the Decision, issue taken with them, and  
31 then arguments set out. But so far as I can tell throughout this appendix there are only three  
32 references to specific aspects of the Decision. Paragraph 1(a)(iii) of the appendix refers to  
33 paras. 90-94, 1(a)(vii) refers to 126, and 2(b)(i) refers to para.2.11. Beyond that no specific  
34 paragraphs are identified. Of course, in an ideal world I would be submitting Floe should go

1 back to square one and serve a Notice of Appeal that properly addresses and identifies the  
2 issues. But we are where we are.

3 THE CHAIRMAN: The provisional list of issues which the Tribunal prepared was prepared from  
4 **this** document. If the paragraph numbers in the Notice of Appeal, statement of case, were  
5 linked to that issues' document then that would explain to you which paragraphs and that  
6 would not be a very big job to do for Mr. Mercer.

7 MR. ANDERSON: Well that would certainly be a help, of course. There are many issues raised in  
8 the Notices of Appeal and the appendices when one wades through it that do not find  
9 themselves on the Tribunal's list of issues, but they may or may not become relevant.

10 THE CHAIRMAN: That is why the starting point is to see whether the list of issues needs to be  
11 revised, or expanded. That would become obvious if that exercise is done by Mr. Mercer.

12 MR. ANDERSON: Of course, under para.3(1) Schedule 8 to the Competition Act this Tribunal  
13 should be deciding the case by reference to the Notice of Appeal not to a list of issues that the  
14 Tribunal has been able to glean from the Notice of Appeal. The problem that I am identifying  
15 is the problem of pleading to the Notice of Appeal rather than addressing the Tribunal's list of  
16 issues, which is why I believe it may be necessary for me to go through in a little more detail  
17 some of the requests that we have made and where we stand on them, and leave it to the  
18 Tribunal as to whether the Tribunal makes an order. But I think it is important that it is on the  
19 record as to where we stand on some of these issues.

20 If I could start with para.7 of the Notice of Appeal which is where Vodafone sought  
21 identification of which issues are not accepted by Floe – they are issues of fact raised in the  
22 Decision. The position that we will adopt therefore is that we will assume Floe is only  
23 disputing matters expressly identified in the Notice of Appeal or the witness statements as in  
24 dispute. It is not practical for us to approach it in any other way.

25 It may be helpful just to move through the Notice of Appeal as we go. In relation to  
26 1(a)(i) and this rather cryptic reference to gateways being treated as relevant apparatus, we are  
27 going to assume that Floe's accepting of the GSM gateways it employed are relevant apparatus  
28 for the purposes of the exemption regulation. Paragraphs 1(a)(ii) and (iii) we rather thought  
29 raised a new argument which was seeking to draw a distinction between who uses the  
30 equipment and who provides the service and it is alleged that only the former was determined  
31 by the Tribunal against Floe at para.190(a). Insofar as Floe are revisiting this point we assume  
32 that they are simply trying to re-argue a point that the Tribunal has already decided and on that  
33 basis our case will be that this is issue estoppel.

1 Paragraph 1(a)(iv) is implied authority under the agreement, and again we will have to  
2 approach this matter on the basis that Floe rely on nothing other than that set out in their  
3 response to Vodafone.

4 Paragraph 1(a)(v) we will assume that Floe are contending that gateways are base  
5 transmitter stations and that it relies simply on what it calls “the ordinary natural meaning” of  
6 the words and the use of stations in the WTA 1949, because that is all that they have identified.  
7 In relation to all the other licences they simply will not give particulars and there are over  
8 200,000 of them, we cannot be expected to go through them all – it is up to them to identify  
9 what they rely on and they have not.

10 We have now had an answer on the legitimate expectation argument and the relevant  
11 reliance appears to be making the complaint and launching the Appeal. Well so be it. If that is  
12 the basis upon which they are advancing their legitimate expectation then the case is now  
13 clearer and that is the case then that we will answer.

14 Paragraph 1(a)(vii) – we concluded in para.126 of the Second Decision that the  
15 statements relied on, which were from the RA, post-dated the agreement, and were not capable  
16 therefore of giving rise to a legitimate expectation. It is now pleaded that there was this  
17 meeting between Floe and the DTI in 2002.

18 THE CHAIRMAN: Yes, this is what I referred to before.

19 MR. ANDERSON: Yes, and I think I perhaps ought to make it clear that in the course of the  
20 re-investigation Floe did mention that meeting, but it was mentioned not in as precise a way  
21 that it is now alleged that it gives rise to any legitimate expectation. So we do ask that Floe  
22 provide a more detailed case in relation ----

23 THE CHAIRMAN: What did they provide you during the investigation?

24 MR. ANDERSON: I think they mentioned that they had had a meeting at which no objections were  
25 raised by the DTI.

26 THE CHAIRMAN: Did they say who was at the meeting?

27 MR. ANDERSON: I think they did. We will provide details of precisely what they did provide.  
28 I cannot give those details now, this morning.

29 THE CHAIRMAN: And is the meeting referred to in your Decision?

30 MR. ANDERSON: It is not, no. But it would not be right for this tribunal to be under the  
31 impression that it had not been raised at all during the investigation.

32 THE CHAIRMAN: No, no.

33 MR. ANDERSON: Turning to section 1(b), this is an argument that we simply do not understand.  
34 There is reference to “logically discrete systems” and that we approved that concept, but we

1 simply cannot see what the case is that we are meant to be answering here. That is an example  
2 of where we say Floe really need to identify what their case is.

3 1(b)(ii), again we simply assume that the answers they have given assume all the  
4 material on which Floe intended to rely.

5 1(b)(iv) is the next material one, where we have asked for particulars of why they say  
6 4.2 is not a condition attached, and they say “look at our previous skeleton argument”. Well,  
7 so be it, we will look at the previous skeleton argument but it is not a very satisfactory way of  
8 pleading a case.

9 Turning to para.2, and 2(iii), again the point that my friend was making for Vodafone,  
10 Vodafone were not aiding and abetting – we have asked for particulars and in fact they say  
11 “Await our skeleton argument”. So we will simply have to assume that Floe’s position is  
12 simply that Ofcom is put to proof of its argument and not raising any positive case in rebuttal.

13 THE CHAIRMAN: Well it depends whether or not it is law or fact, does it not?

14 MR. ANDERSON: Well we do not know what their answer is, they simply say “We do not accept  
15 it”. They do not say why. So all we can assume is that their case is simply that we are put to  
16 proof of our case, but they are not going to advance anything positive in reply. The same is  
17 true under 2.4.

18 THE CHAIRMAN: Are you suggesting that they need to plead the law as well as the facts?

19 MR. ANDERSON: Well they need to plead their case, and insofar as they say we have got it wrong  
20 as a matter of law they should say that. If they say we have got it wrong as a matter of fact  
21 they should say that, but we simply do not know which it is. The same in relation to 2.4,  
22 a criminal offence. Market definition does not arise because we would respectfully agree with  
23 your suggested approach about dealing with market definition of dominance.

24 2(b)(ii) Ofcom’s Decision was that it was not an abuse to rely on domestic law even if  
25 the law was incompatible. Floe here argue that they were not entitled to rely on that but give  
26 no basis for their bald assertion, so again we will simply have to assume that Floe’s case is that  
27 Ofcom are put to proof of their case without any positive case in rebuttal being advanced.

28 The bullet point in 2(c) is really the next section. Taking each bullet point in turn  
29 – we have sought particulars of these – the third bullet point: they strongly object to our  
30 conclusions on the legal status of RA’s statements. We contend at para.274 that they had no  
31 legal effect and nowhere is it set out what they contend in the alternative is the legal effect. So  
32 it just leaves the issue in the air. We will therefore have to assume that their case there is  
33 simply that set out in para.1(a)(vi), namely, the legitimate expectation argument.

34 Bullet point 4, asserting what Vodafone said to Ofcom is insupportable, incorrect and  
35 not borne out by subsequent events. They identify para. 275 of the Second Decision in their

1 particulars which records that Vodafone was aware of the RA statements but did not consider it  
2 covered their licence. If those are the only details they rely on again we have to assume that  
3 Floe advanced no positive case.

4           Bullet point 7 is the next material one, again we have to assume no positive case is  
5 being advanced. Bullet point 8, again the simple fact that Vodafone addressed only multi-user  
6 gateways appears to be the only point of fact relied on, nothing specific arising out of it.  
7 Really those are the main ones, I mean they do have others but you get the tenor. The only  
8 way we can approach this case is on the basis of making certain assumptions about what is in  
9 issue and what is not in issue and that is what will take a little time in formulating the defence,  
10 and why we are asking until 14<sup>th</sup> October. Thank you.

11 MR. MERCER: I am sure Mr. Pickford has something to say, as the other have, ma'am.

12 MR. PICKFORD: Madam, I have very little to say. The submissions of Mr. Wisking and  
13 Mr. Anderson deal adequately with the inadequacies in the Statement of Claim. The only thing  
14 we would say is that obviously to the extent that the VIP case is not stayed we would need to  
15 make the same applications in relation to that.

16 THE CHAIRMAN: Mr. Mercer?

17 MR. MERCER: That was mercifully short, ma'am, for which I thank Mr. Pickford. But he makes  
18 a Freudian slip you see which I think the other advocates here this morning all make, which is  
19 he referred to it as a "Statement of Claim" and it is not. It is a Notice of Appeal before the  
20 CAT, and the CAT, as ma'am the Tribunal has constantly reminded us in this matter, looks at  
21 these Appeals on the merits, and though it looks at the Appeal on the terms of the Notice of  
22 Appeal it looks at them on the merits. This is not a High Court action and I have not prepared  
23 a Statement of Claim. In fact, I started, and I will admit authorship of the document that has  
24 been so gone over this morning, by doing exactly what Mr. Wisking and Mr. Anderson would  
25 have wanted, cross-referencing everything. But I soon discovered that I had been totally  
26 strait-jacketed into an argument prepared by Ofcom with which I totally disagree as to the  
27 analysis. It is not that I wish to be difficult or I wish to make it difficult to analyse matters but  
28 we fundamentally and totally disagree as to the analysis as to how the matter should be looked  
29 at and that makes it very difficult to shoe horn things – and I use the words advisedly, "shoe  
30 horn" things – into Ofcom's analysis, and I do not think that I should be strait-jacketed in that  
31 way. I am quite happy to help anybody try and cross-reference matters as much as they can if  
32 that gives them any assistance and satisfaction. But as somebody said,  
33 I am not about to plead the law and some of the questions frankly, ma'am, would have been  
34 answered if others who had looked at the papers had been around through the totality of the  
35 case. One also has to remember the document that we drafted was in the context of being

1 a further amended Notice of Appeal. We have already done one, and the case already has  
2 a significant history. Some of it, ma'am, such as that related to the doctrine of logically  
3 discrete systems, well it is just a matter of how much you know about telecoms and how much  
4 you do not. I think the point would be a lot more obvious to those who had some experience.

5 I want to deal with one point on a general level which relates to confidentiality. The  
6 trouble is, the problem we are going to have is balancing the question of confidence, because  
7 – to use the vernacular – if we hand all we know about the use of SIM cards over to  
8 Mr. Wisking, we will be “grassing up our mates”. We will be handing Vodafone all the  
9 information it needs to take commercial action against these people. So if Mr. Wisking would  
10 like to give me an undertaking that no action will be taken against anybody I will be very  
11 happy to accept that, and will deliver him anything.

12 THE CHAIRMAN: When you say Mr. Wisking, which is Vodafone, what about Ofcom?

13 MR. MERCER: I do not think Ofcom are fortunately in a position to switch off any operators' SIM  
14 cards but Vodafone are.

15 THE CHAIRMAN: So are you prepared to provide the information to Ofcom?

16 MR. MERCER: Yes, I am, ma'am. One also has to remember that, on the information before us at  
17 the moment, Vodafone is very probably the largest commercial operator of gateways in the  
18 country since it took over a number of accounts of one of its service providers called “Genesis”  
19 which is an extremely large provider of such services. So one would also be providing such  
20 information to a trade competitor.

21 We were provided with a long list of issues which I think in the circumstances I rather  
22 rely on my general submissions I have just made about the terms, and we will help people with  
23 information but we have problems with confidentiality, etc. We are not trying to hide things,  
24 and we are not trying to not be helpful.

25 THE CHAIRMAN: We have not seen what you provided to Ofcom in the course of the  
26 investigation and Ofcom have told us today that you did provide about the February 2002  
27 meeting.

28 MR. MERCER: Yes, we did.

29 THE CHAIRMAN: Quite appropriately. Now, did you provide this information up to Ofcom during  
30 the re-investigation?

31 MR. MERCER: We made it very plain in the course of meetings and elsewhere that we believed  
32 that Vodafone SIM cards were still in commercial multi-use gateways in this country.

33 THE CHAIRMAN: You know who those people are?

34 MR. MERCER: Yes.

35 THE CHAIRMAN: Ofcom do not.

1 MR. MERCER: We did I think mention some names in the course of the meeting.

2 MR. ANDERSON: My instructions are that although Floe were invited to provide everything that  
3 they considered relevant to us they provided no particulars, no names and no specific instances  
4 at all.

5 MR. MERCER: Well a point where we disagree, ma'am.

6 THE CHAIRMAN: You say you did?

7 MR. MERCER: We gave an indication of what we thought was going on in the industry.

8 THE CHAIRMAN: With names?

9 MR. MERCER: I will take instructions. (After a pause) We need to go back and look at our  
10 records. My belief this morning is that there were names mentioned.

11 THE CHAIRMAN: But you have no objection to telling Ofcom on a confidential basis.

12 MR. MERCER: All about that, no objection whatsoever.

13 THE CHAIRMAN: That would deal with the discrimination point.

14 MR. MERCER: Yes, ma'am.

15 THE CHAIRMAN: What about the other matters that have been referred to?

16 MR. MERCER: I think we need to do an analysis of how just how much and whether we have  
17 answered those points already, because we did write to Ofcom on Friday afternoon answering,  
18 we thought, all of their points, and I am not entirely sure listening to Mr. Anderson whether  
19 those have been taken into account.

20 As far as Mr. Wisking is concerned, we set out – we thought hopefully helpfully  
21 – a list of factual areas in a letter to him on Friday afternoon where we thought there would be  
22 some disagreement with Vodafone of a factual nature.

23 THE CHAIRMAN: But he is still maintaining that he has not got enough information. Now, he is  
24 an intervener and not the other party, so possibly we should start with Ofcom.

25 MR. MERCER: Yes, I was going to say it begs the question of what information an intervener  
26 should have, because Mr. Wisking is an intervener supposedly in this matter and not a  
27 principal party, as I understood it, but I get the feeling, ma'am, and you may have got the  
28 feeling too, that things are becoming juxtaposed between Vodafone and Ofcom. I also read,  
29 I think in Mr. Wisking's submissions, that he regards this as being a matter that should be  
30 considered as being a matter that should be considered as being a criminal proceeding which  
31 would rather indicate that he therefore does not accept that evidence and the standard of proof  
32 should be on the balance of probabilities. I wondered if that submission was coming next.  
33 Well it certainly is what he wrote, ma'am.

34 THE CHAIRMAN: I do not think that is for this CMC.

1 MR. ANDERSON: Could I just say, ma'am, on this question of this information on discrimination  
2 that it is not entirely clear to us what we are intended to do with this information once it is  
3 received. We took a decision on a complaint of discrimination based on the material provided  
4 to us. Now after we have taken the decision Floe wishes to advance new material to make an  
5 allegation of discrimination. We have already taken our decision, there is nothing we can do  
6 with it. It is to be confined to us; those against whom the actual allegation of discrimination is  
7 made apparently are not to see this information. It is not at all clear to us what the purpose of  
8 that particular exercise will be if its supply is confined to us. It is effectively a new allegation  
9 of discrimination that is not subject to the Decision and we can supply to the Tribunal our  
10 detailed notes of the meetings and our file on what was provided to us in relation to  
11 discrimination from which it will be quite clear that the specifics of what is now alleged were  
12 not raised, despite express invitation to do so. I simply raise that with the Tribunal because it  
13 is still leaving this issue of discrimination rather up in the air.

14 THE CHAIRMAN: That is the reason why I was asking the question.

15 MR. WISKING: Can I make one small point which is that this whole question of confidentiality is  
16 a red herring. The allegation is that we knowingly supplied these operators, so it cannot be  
17 confidential for us.

18 THE CHAIRMAN: That you are still supplying ----

19 MR. WISKING: We are not allowed to know for some reason, but the allegation is we do know, so  
20 if we know, telling us is not a problem. We have heard from Bar table another operator has  
21 now dropped out, well we did not know that before. The final point I would like to make is  
22 this, this notion of us behaving in some way improperly, the tribunal has made it clear in the  
23 *Burgess* case that in a case where the potential remedy is an infringement finding that the  
24 requirements of procedural fairness have to be respected and I would submit it is a minimum  
25 that we actually see the evidence against us.

26 MR. MERCER: Well I can reverse that, which is that he should be able to tell me where it is,  
27 because his organisation should know, and the fact (and what I am going to allege) is that they  
28 do not know. There are parts of their organisation going off, seemingly with some form of  
29 authority and doing things that my learned friend does not seem to know about at all, and that  
30 is going to be something that we are definitely alleging, ma'am. That is the difficulty, they  
31 have a situation where their left hand does not know what their right hand is doing, and that is  
32 causing a significant problem.

33 Ma'am, do you think it is a useful exercise for me to take on Mr. Wisking's and  
34 Mr. Anderson's points point by point?

35 THE CHAIRMAN: Well I am not sure how we are going to resolve them if you do not.

1 (The Tribunal confer)

2 THE CHAIRMAN: It seems to us that if there is no agreement between the parties as to what further  
3 information will be supplied then we are going to have to decide it and we are going to have to  
4 hear submissions. Whether we have time this morning to do that is another matter, because we  
5 do have to finish by 1 o'clock. We could also indicate that insofar as there are (if there are)  
6 any allegations which were not subject to the complaint then we can see difficulties in it  
7 becoming part of the Appeal. We would need to look at the matters closely to see, but that is  
8 our preliminary observation.

9 What we are wondering is if we rose for five minutes and there was a list of materials  
10 that were required by Ofcom and by Vodafone that the issues could be narrowed a little so that  
11 you would know what you were responding to and what you were prepared to give and  
12 therefore it was not a problem, and either we can decide whatever is left today or we are going  
13 to have to reserve it.

14 MR. ANDERSON: Ma'am, may I suggest in response to that both Ofcom and Vodafone have set  
15 out quite detailed requests. Answers have been supplied by Floe to some of those but not to all.  
16 Another way forward might be for the outstanding requests to be consolidated in writing  
17 ASAP and submitted to Mr. Mercer to respond in writing rather than attempting to go through  
18 what I rather clumsily tried to go through, speaking notes, this morning.

19 THE CHAIRMAN: Well I would have hoped that you would have come prepared today to do that,  
20 the answers were given on Friday.

21 MR. ANDERSON: Yes, and that is what I did by going through the answers that were given  
22 paragraph by paragraph and indicating that the inadequacy of the answers meant that we have  
23 to make the following assumptions. I am perfectly happy to proceed and prepare our case on  
24 the basis of the assumptions I have identified and which will be apparent to Mr. Mercer when  
25 he gets the transcript, and to the Tribunal, and it was not expecting them to be written down in  
26 detail. I can provide a written copy – tidied up a little – of the notes to which I was referring.  
27 But because we only got them on Friday we have not had an opportunity to submit a written  
28 response to those further and better particulars, which is why I had to do it orally. But it may  
29 be easier, if it is in fact done, in writing – it may be quicker in fact in the long run.

30 THE CHAIRMAN: Do you not have a list with you of the material which you think has not yet been  
31 provided that ought to be provided?

32 MR. ANDERSON: Not in that specific form, no, because it is not just material it is clarification of  
33 arguments, it is trying to understand the point – it is not just a question of material that we are  
34 missing, it is understanding the case that we are missing. Indeed, in that respect we are  
35 perfectly happy to proceed on the basis that we have all the material that they are proposing to

1 rely on. There are a few instances and the allegations of discrimination are perhaps the most  
2 striking example where Mr. Mercer is in fact saying “We have material but we are not going to  
3 let anybody see it.” Those are actually very few in number, and of course if you rose for five  
4 minutes those could be identified, but that will not address our principal concerns which are  
5 that the case that is put against us, not just on evidence and material, but on argument, is  
6 unclear and we have to proceed on the basis of certain assumptions. If it would assist  
7 Mr. Mercer he can see the transcript, or we can provide in writing the basis of those  
8 assumptions, and if he wants to respond, and can respond quickly in such a way that does not  
9 affect the timetable to any material degree then that may be a sensible way forward, but we are  
10 very happy for that to be rather than for Mr. Mercer to go through each point today and try and  
11 respond and say why that assumption is not a reasonable assumption. That is an alternative  
12 way forward. But in terms of a list of the actual information that has been identified in the  
13 Notice of Appeal which is either new or which Mr. Mercer is not today prepared to provide,  
14 then that list can certainly be prepared I would have thought relatively quickly, yes.

15 THE CHAIRMAN: In relation to the discrimination point you heard what we preliminarily  
16 indicated?

17 MR. ANDERSON: Yes, yes.

18 THE CHAIRMAN: Mr. Wisking, did you want to say something?

19 MR. WISKING: I am content to proceed however the Tribunal wishes, I can rapidly prepare a list if  
20 necessary; I am happy to write, and as the Tribunal indicated there is the availability of  
21 a telephone CMC facility which would rapidly resolve any ---

22 THE CHAIRMAN: That is only if that is delegated to me alone.

23 MR. WISKING: I understand that, yes. I am concerned that we address the other issues on the  
24 agenda as well.

25 THE CHAIRMAN: Yes, so am I. If you had the list – you have a list, have you?

26 MR. WISKING: Not in a form I could hand to Mr. Mercer, but I could create one.

27 THE CHAIRMAN: You could create one so it is going to take a quarter of an hour or half an hour?

28 MR. WISKING: Yes.

29 (The Tribunal confer)

30 THE CHAIRMAN: Our view is that it would not be a useful use of the time this morning to try to  
31 hear Mr. Mercer’s submissions when he has just been given the submissions of Mr. Wisking  
32 and Mr. Anderson, and that there is not available what I would call a “shopping list” at the  
33 moment from either of you. Therefore, the suggestion of Ofcom and Vodafone that they  
34 provide a list which is then answered appears to us to be the most expeditious way of dealing

1 with the matter. It is unfortunate that a shopping list is not here this morning so that we could  
2 deal with it, but we have to deal with it as it stands this morning.

3 Mr. Mercer, you say that you question the approach that was taken in the Second  
4 Decision and that there is a fundamental conception in the approach. I think if you are going to  
5 say that you have to say why you are saying it, that they failed to take into account X, Y and Z.  
6 I am not asking you to do it now.

7 MR. MERCER: Yes, it is in fact a case, as the old joke goes, "If I was going to Dublin I wouldn't  
8 start from here".

9 THE CHAIRMAN: We understand that, but if you are going to say that you have to say "I would  
10 have started from Southampton", and ----

11 MR. MERCER: I believe there is a direct flight to Dublin! I take the point, ma'am.

12 THE CHAIRMAN: The other thing which might be helpful is that we do not expect the detailed  
13 argument, rather than the nature of the case at this stage because that will come with argument,  
14 that is what the skeleton argument and the written submissions and the oral submissions deal  
15 with. But what is important is that the nature of the point is understood and sometimes  
16 conciseness is important in order to do that.

17 MR. MERCER: Yes, ma'am.

18 THE CHAIRMAN: Because otherwise, if one starts putting in one's argument and elaborates it is  
19 sometimes not clear what actually the nature of the point is.

20 MR. MERCER: Yes, ma'am.

21 THE CHAIRMAN: If that is helpful?

22 MR. MERCER: It is. Should I then continue back to the other points that you raised in your  
23 opening – list of provisional points, ma'am? Timetable – I wonder if I might get a nominal  
24 seven days to answer their shopping list when it arrives?

25 THE CHAIRMAN: If we are going to do the timetable, the first thing is how long a shopping list  
26 will take, and I suspect that will only take overnight now?

27 MR. WISKING: If we finish at lunch time I undertake to send it out tonight.

28 MR. ANDERSON: Similarly, we can provide that shopping list overnight.

29 THE CHAIRMAN: By tomorrow?

30 MR. ANDERSON: Yes.

31 THE CHAIRMAN: On that basis you could probably provide the answers by close of play on  
32 Friday, could you not?

33 MR. MERCER: Close of play on Monday would be preferable, ma'am.

34 THE CHAIRMAN: That is 26<sup>th</sup>?

35 MR. MERCER: Yes, ma'am.

1 THE CHAIRMAN: You could not do it by Friday? I am concerned about the slippage down the  
2 line.

3 MR. MERCER: So am I, ma'am, but I have the next two days already completely knocked out  
4 during the day time, so I only have the evenings ----

5 THE CHAIRMAN: This is an evening and weekend job, is it?

6 MR. MERCER: Yes, it is – a cottage industry by itself, indeed.

7 THE CHAIRMAN: So assuming that we decided close of play on Monday, what else were you  
8 going to address us on?

9 MR. MERCER: Because, interestingly, it may impact on what we have just been talking about,  
10 I would like to go back to Worldwide, ma'am.

11 THE CHAIRMAN: Yes.

12 MR. MERCER: As we indicated ----

13 THE CHAIRMAN: For this purpose you are representing Worldwide, are you?

14 MR. MERCER: I am, actually, yes, ma'am. For once schizophrenia comes in useful. As we put in  
15 our original application ma'am, we would expect Worldwide actually to be separately  
16 represented by a separate advocate before the Tribunal.

17 Now as you once said yourself, ma'am, words to the effect, "Mr. Mercer, you may be  
18 a specialist in telecoms. and competition but perhaps in not other general areas of the law" so  
19 I think you might have assumed that one of the people that you met before on the procedural  
20 side of this case would be re-appearing for Worldwide, somebody from public law chambers,  
21 because, as you will have noted yourself, ma'am, the legal points in this matter range wide and  
22 high, and we thought it might be of assistance to the Tribunal to have Worldwide. Worldwide  
23 has always taken a particular view of the legal side of things, and it has kept its head down,  
24 because all of those who have been running gateways would find it in their interest to have  
25 kept their heads down before things get switched off. As for its interest in the subject  
26 Worldwide at one time, I am instructed, had a turnover of something like £1.5 million a month  
27 from gateway business and it would really like to get back into it again. So I think it has  
28 a sufficient interest, and it has because of the particular nature of its principal, I am particularly  
29 interested in the legal side of this. It wishes, if for no other reason, to demonstrate that there are  
30 other people apart from VIP and Floe who are involved here, and it has (and has had) different  
31 relationships in respect of gaining its SIM cards in the market place, not being directly  
32 sometimes from the mobile operators but through service providers.

33 In that regard we think that Worldwide's intervention would be helpful to all.

34 THE CHAIRMAN: Do they have a relationship with Vodafone or not?

1 MR. MERCER: I do not think directly, ma'am, but if you were to ask me the question had they been  
2 using Vodafone SIMs in their machines then I would have to answer "yes".

3 THE CHAIRMAN: I see, but through service providers.

4 MR. WISKING: We are not aware of any.

5 MR. MERCER: If Mr. Wisking can be so sure as to be answering on behalf of all Vodafone.

6 MR. WISKING: On behalf of those instructing me.

7 MR. MERCER: You see, ma'am, I think we are going to have to start drawing that distinction and  
8 getting used to doing so. I think it really would be very useful to have that intervention and  
9 you cannot but argue that Worldwide has a very significant interest in the way this case goes.  
10 If there is anything else on that point I can help you with, ma'am?

11 THE CHAIRMAN: The real issue is whether Worldwide has a particular approach because of their  
12 position which is no available to you as Floe or VIP.

13 MR. MERCER: I think the difference in stances is that they are coming from people who have taken  
14 SIM cards in good faith from service providers which is something which, on occasions Floe  
15 did, but it was not its main practice.

16 THE CHAIRMAN: Was that evidence provided to Ofcom during the re-investigation?

17 MR. MERCER: No, it was not. I understand though, ma'am, Vodafone know full well who  
18 Worldwide are. People from Vodafone have been to Worldwide's offices it is not as though  
19 they are unknown in the industry.

20 THE CHAIRMAN: But you say that they are going to be represented by counsel from public law  
21 chambers, what are the issues which they wish to address us on which are different from the  
22 issues which you are going to address us on?

23 MR. MERCER: I doubt they will be different issues, but then they would not be different issues,  
24 because they will be an intervener and therefore taking a view on what is being led by the  
25 appellant. But I think the owner of Worldwide has a particular view of the public law aspects  
26 of this, and it is very much on the lawfulness of gateways on which they will concentrate.

27 THE CHAIRMAN: If he has a particular view is that a different view from the view that your  
28 clients under the other hat, Floe and VIP, take?

29 MR. MERCER: It is a more trenchant view, ma'am. Worldwide simply do not understand how they  
30 think they can enter into a contract to get something and now cannot get it in the  
31 circumstances, which is a point which comes out in Floe but with particular reference to  
32 Worldwide.

33 THE CHAIRMAN: Whose contract would they ----

34 MR. MERCER: With a service provider.

1 THE CHAIRMAN: (After a pause) Do you have anything else we ought to know about the  
2 interveners?

3 MR. MERCER: No, well I am just going to link that to VIP for a moment and point out that, of  
4 course, since we all last met VIP has gone into administration. It is the total level of support,  
5 as it were, from VIP, I should think it is going to be considerably reduced.

6 THE CHAIRMAN: So would VIP prefer that their case was stayed?

7 MR. MERCER: No, ma'am, in fact, they would not. The reason for that is what the administrator,  
8 who is again Mr. Frost, is fearful of is that let us just suppose for the moment, and I know this  
9 will not be accepted by anybody over **there**, that Floe is successful, what he is fearful of is that  
10 T-Mobile would then throw their hands up and say "Oh but the facts are different, we are  
11 going to have another hearing now to go through all of this." As a matter of what the  
12 administrator would like, ma'am, he would like to come out of this with some form of  
13 Decision rather than being left up in the air again and having to wonder what then happens,  
14 because it will always be an argument that there was a different set of facts, and you need to  
15 have a different hearing to go it through from the T-Mobile side.

16 THE CHAIRMAN: Using the expressions that are relevant to this case, this Tribunal gives no  
17 legitimate expectation that it will come to a decision in substitution for the Decision of Ofcom.  
18 It is completely open.

19 MR. MERCER: That is completely open, ma'am, but the administrator feels that he would be in  
20 a better position if he takes part than if he is not, and it is quite a relevant consideration at this  
21 particular moment in time because the administrator is considering and discussing with various  
22 parties the question of funding of the company going forward.

23 THE CHAIRMAN: So he would like us to consider his evidence in any event so that they have  
24 a view of what our conclusions are on the evidence, without it being stayed.

25 MR. MERCER: Yes. Now, having tried three or four difficult things before coffee time I would like  
26 to try something which I fear may be impossible, but I would like to have a go, and that is the  
27 economic argument and dominance.

28 I do not think I need to remind anybody in this Tribunal room how long this matter  
29 has been going, and the thought of a split hearing in this matter just fills me with dread. Here  
30 we go again! I put the matter rhetorically, I would not regard myself as being amongst the  
31 upper echelons of economists but I do not have a great deal of trouble with the economic  
32 evidence in this case. I will tell you why because it is extremely simple. We have a lot of  
33 words from Ofcom and Mr. Wisking about how difficult this is, and how complex and  
34 amazingly difficult to get through all of this. My reaction to that is "Are we reading the same  
35 papers?" Bizarrely

1 I have to say, with the exception of the section about not wanting to take a decision, I could not  
2 have sat down and written something very different myself from the analysis provided by  
3 Ofcom, and there is a reason – I say “bizarrely” it was about the only time we have ever agreed  
4 to that level before, frankly. The reason for that is there is really only one answer. We are  
5 dealing with a market about access to Vodafone customers. It is not that difficult, it really is  
6 not Ma’am. I do not see why Ofcom and Mr. Wisking want to make such a meal of it. There is  
7 only one subsidiary question relating to substitutability which as Ofcom carefully said, really  
8 when you examine it is not relevant.

9 I understand the difficulty, ma’am, I do not think it needs a split trial. I do not see  
10 why the whole matter cannot be dealt with because we could at least at that stage get to  
11 a decision about where we actually are in this matter, without there always being another  
12 hurdle put ahead of us. Let us get to that point, ma’am, and I do earnestly ask you to look  
13 again at the economic sections and see how difficult the analysis is, because it is not. I am not  
14 a betting man, fortunately, but I would bet it will be rare that the Tribunal will see such  
15 a comparatively easy to understand matter in the next few years.

16 It may well be that for reasons unassociated with this case, Mr. Wisking’s client and  
17 Ofcom do not particularly want to have to go down that route, and given that we may be  
18 having – who knows – a European Commission Sector Inquiry into this area next year, I do not  
19 know, but I really do not see why this is so difficult to deal with.

20 I do not suppose you have any questions on what I have just said, it is fairly...

21 THE CHAIRMAN: What about disclosure?

22 MR. MERCER: You said, Ma’am, “Why November 2002?” I will take the rap for that one, it was  
23 me who suggested that date to Ofcom, because the point I was trying to establish and why I  
24 wanted to look at the RA files in the period from November 2002 to July 2003 was to establish  
25 why, despite all the RA said in the consultation document, by the time they got to the  
26 following July Ministers had taken a contrary view, because you may remember, ma’am, in the  
27 consultation document the RA said really they were thinking that they were going to do away  
28 with the exception to the exemption and that they were unconvinced there was a reason to  
29 prevent, in effect, the GSM gateways of any description not being exempted from the need for  
30 a licence.

31 THE CHAIRMAN: But if you are relying on this evidence in February 2002, do you not want to see  
32 the RA file for February 2002? Were they at the meeting?

33 MR. MERCER: No, ma’am.

34 THE CHAIRMAN: They were not at the meeting?

1 MR. MERCER: No, the meeting in 2002 was with the DTI, and present at the meeting with the DTI  
2 was a member of staff of the DTI who was the liaison with the RA, an inspector of these  
3 relevant matters. The meeting was with the head of the then mobile desk at the DTI.

4 THE CHAIRMAN: So are you content that the disclosure is confined from November 2002 to July  
5 2003 notwithstanding what I said before?

6 MR. MERCER: I am quite content, actually, ma'am, yes.

7 THE CHAIRMAN: (After a pause) Expert evidence?

8 MR. MERCER: I have a suggestion for a suitable expert, and I will hold my hand up at once and say  
9 that he is a client of my firm, and also a member of an Ofcom Committee. He has not been  
10 approached by us, but ----

11 THE CHAIRMAN: Is the answer to the expert that we have not heard what Ofcom and Vodafone  
12 say, but if the approach is going to be that there should be an independent expert first we need  
13 to know what the issues are so that we know what sort of expert, and secondly it may well be  
14 that there is somebody whom all three would be happy to approach as an independent person  
15 who would give independent evidence of a technical nature to this Tribunal and that could be  
16 done outside here in the next few days.

17 MR. MERCER: That is what I was going to suggest, ma'am, that we got together over this. I think  
18 what we need is a jointly agreed brief.

19 THE CHAIRMAN: Yes, and what I was going to suggest is that perhaps it should be done by  
20 agreeing it, and also by putting before the Tribunal just in case there are areas which we could  
21 have been thinking about which do not come out in that brief.

22 MR. MERCER: I quite agree with that, and I would also say the brief needs actually to be prepared  
23 and agreed before we approach anybody.

24 THE CHAIRMAN: Absolutely.

25 MR. MERCER: Because my experience is that just phoning up 'George' and saying "This is a good  
26 idea" or whatever, and suddenly they see the brief and say "Oh, I can't do that."

27 THE CHAIRMAN: The first thing to do is to set out the issues and what sort of expert one needs to  
28 answer those issues – hopefully it will be the same expert for all the issues – and whether they  
29 are technical issues or, as I call them, opinion issues. But, subject to what you will say,  
30 I suspect they are all technical issues.

31 MR. MERCER: I think the opinion part of it, ma'am, may well be in relation to whether, if you took  
32 certain steps, any harm could be alleviated, mitigated, or made possible to live with, and there  
33 might be some questions in that area which are going to be opinion rather than pure, technical  
34 fact.

1 THE CHAIRMAN: Well let us see where we get to because it may be that a single joint expert  
2 could deal with that subject to any evidence from the other side, it may be that it will be agreed  
3 as to what the solution is. So the expert evidence you would say that my suggestion should be  
4 followed up?

5 MR. MERCER: Yes, ma'am.

6 THE CHAIRMAN: Are there any other headings – “the issues”?

7 MR. MERCER: I think logically when we have dealt with next Monday's exchange, the next thing  
8 I think that needs to be dealt with is the issues, so we can start to refine things down somewhat.  
9 It may be possible, using what the Tribunal has prepared already as the starting place ----

10 THE CHAIRMAN: It is only a starting place.

11 MR. MERCER: We could actually agree that, following that exchange, relatively quickly I would  
12 have thought.

13 THE CHAIRMAN: Would it be helpful do you think if on Monday when you provide the answers  
14 to the shopping list that you also had a go at providing a draft issues, working from the  
15 document that the Tribunal has prepared?

16 MR. MERCER: Yes, ma'am.

17 THE CHAIRMAN: Because you will be thinking of that while you are doing the shopping list.

18 MR. MERCER: Yes.

19 THE CHAIRMAN: That leaves the timetable, and I think possibly we need to hear what the other  
20 parties say about the points that you have raised, and then discuss what timetable is relevant,  
21 having regard to ----

22 MR. MERCER: The only thing I was going to say about timetable is what you may expect me to say  
23 obviously which is the sooner the better, but I have always imagined that that meant  
24 a substantive hearing in December.

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

26 MR. ANDERSON: Let me deal with the points as I think they arose in your opening and the agenda.  
27 The first was the question of what the scope of this hearing at this stage of the proceedings  
28 should be. We would fully endorse the approach that you are suggesting. We did not take  
29 a decision on market definition and the rest and it is very difficult really to see what role we  
30 would be playing in those parts of the proceedings in any event; I will perhaps leave my  
31 learned friends to deal in a little more detail with that point – if you want that point dealt with.

32 THE CHAIRMAN: Well you say that you did not take a decision so there may be nothing to  
33 challenge?

1 MR. ANDERSON: There is nothing to challenge. The role the Tribunal would then take would that  
2 be that of an investigative undertaking which would be a much bigger exercise than the  
3 exercise ----

4 THE CHAIRMAN: Where is the Appeal?

5 MR. ANDERSON: Well, yes, in a case like *Burgess* of course it was much simpler because all the  
6 material was there and all the points were in issue, it is very different here. We would suggest  
7 that the course that you are suggesting is much the most sensible because we may never get  
8 there.

9 On the question of Worldwide's intervention again, we would fully agree with the  
10 point that you, ma'am, made at the outset and nothing that Mr. Mercer said really shed a great  
11 deal more light on what it is that Worldwide really wants to come to this Tribunal for, what  
12 role it would play, why it would assist the Tribunal? So if what Mr. Mercer has said is all that  
13 will be provided effectively in writing were you to adjourn the application to intervene then,  
14 though we do not feel strongly about it, we would suggest that a case for intervention by  
15 Worldwide has not really been made out.

16 As to whether the VIP case should be stayed, again, we do not feel strongly. Clearly  
17 there are two stages, there are all the legal issues and arguments about whether the regulations  
18 are compatible with the ----

19 THE CHAIRMAN: We assume that all of that would be effectively jointly done as it was done last  
20 time, which is why you say it because they will adopt the arguments. So it is only a question  
21 of the factual evidence.

22 MR. ANDERSON: There is only the question of the factual evidence which then moves on to who  
23 said what, those sorts of things. Of course, at the moment we do not have any VIP evidence,  
24 we have only got the witness statements that have been put in on behalf of Floe so we do not  
25 know what that evidence is. So at the moment it seems to us the sensible course is to adopt the  
26 same sort of approach that was adopted first time round which is to stay the VIP case, clearly  
27 their counsel is fully able to participate in all the matters, and they may resolve the case  
28 without the need to go on and consider specific factual evidence relevant to VIP as distinct  
29 from Floe.

30 THE CHAIRMAN: What one could do is to hear the Floe case and then to hear the VIP case in  
31 relation to facts before one comes to reaching our conclusions so that the whole thing is done  
32 within a timescale. What the administrator of VIP is concerned about is that the VIP case goes  
33 on for an inordinate time length which means that he is in difficulties as an administrator in  
34 knowing how to proceed with the administration, but there is some pressure now on getting to  
35 a final point.

1 MR. ANDERSON: There is inevitably going to be delay between the Tribunal considering the Floe  
2 case, including the Floe and Vodafone specific facts, and the VIP, T-Mobile case, that is  
3 inevitable. One way forward may be the way forward suggested by Vodafone which is in fact  
4 to have the first hearing confined – I say “confined”, it is the bulk of the case – to the legal  
5 arguments and those very fact specific matters could then be heard at a later date if one ever  
6 gets there, because you see the attraction of that approach is that if Floe, and Mr. Mercer even  
7 with his VIP hat on at the same time – if necessary even his Worldwide hat on – fails at that  
8 stage we do not get on even to the fact specific issues in relation to T-Mobile and Vodafone as  
9 distinct from ever getting on to the dominance/market share abuse issues. So that is the  
10 attraction of the way forward proposed by Vodafone. It makes it much more limited in terms  
11 of the amount of evidence and material the Tribunal needs to consider. It is self-contained, it  
12 may determine the issues for all parties without the need for the Tribunal then to get into fact  
13 specific hearings. That approach certainly is not going to cause any delay from VIP’s point of  
14 view, because VIP is inevitably some way behind the Floe/Vodafone case, but we leave that to  
15 the Tribunal to determine the best way forward. However, if that approach is adopted then  
16 there is no difference between the Floe/VIP Appeal. They run exactly the same Notices of  
17 Appeal on those arguments.

18 THE CHAIRMAN: Is Vodafone going to suggest that we deal with law and then facts separately?

19 MR. WISKING: The position which my friend is supporting and adopting is that we suggested in  
20 our observations that there be a trial, if you like, of preliminary issues. Those are the issues  
21 which, as my friend has said, are in effect the substance of this case and, using the Tribunal’s  
22 provisional list of issues, I think are points 2,3 and 4 which is whether the exemption  
23 regulations comply with the Directives, and the scope of the licence. As my friend said, it  
24 seems to me that those issues do not require very much evidence.

25 THE CHAIRMAN: There are some, are there not, as to the scope of the licence?

26 MR. WISKING: On the scope of the licence, the case that is put by Floe is simply an interpretive  
27 one based on obviously these documents we have not seen. It is just a matter of legal  
28 construction.

29 On the question of the Directives, I do not know what Ofcom is proposing to put on  
30 those, but I imagine if any evidence is put forward it would be the very limited expert  
31 evidence, maybe of the kind that that Tribunal has indicated could be dealt with by a joint  
32 expert. It seems to us that it has considerable advantages because to some extent it is either  
33 determinative of the rest of the proceedings, or even if it is not determinative of the rest of the  
34 proceedings it clarifies and limits the scope of the issues that have to be dealt with. It also has  
35 the advantage that it could be dealt with fairly quickly and it provides a vehicle, as my friend

1 has indicated, for dealing with the overlap with VIP proceedings, because that seems to be the  
2 common issue. Whilst I would adopt my friend's submissions in relation to Worldwide and if  
3 the Tribunal is minded to allow Worldwide to intervene in these proceedings again it is the  
4 place, if anywhere, where Worldwide should be intervening because it has no interest in the  
5 factual aspects of the dispute between Vodafone and Floe or VIP and T-Mobile. So it seems to  
6 be a very convenient way of getting those legal issues dealt with, clarifying the rest of the  
7 proceedings, maybe determining the proceedings altogether. Also for Vodafone and the other  
8 mobile operators it provides some immediate commercial certainty as to what the legal  
9 landscape is for dealing with gateways operators, and part of Floe's case now is making  
10 allegations about particular instances of dealing with people. Now if that is a concern then as  
11 soon as the legal position is clear the better.

12 THE CHAIRMAN: The only problem is that you mentioned 2, 3, and 4 of the issues, whatever one  
13 decides on 2, 3, and 4 that does not resolve the case because then you come to 5. So it leaves  
14 both Floe and VIP – I can see that if we proceed on the basis we proceeded last time at least at  
15 the end VIP knows what on the facts of Floe we decide, and then if they have different facts  
16 they can put those to us so at least we determine something at the end of our hearing in  
17 December. But if we leave all the factual issues aside then we are completely at large because  
18 the factual issues still need to be determined, it does not bring it to an end.

19 MR. WISKING: It is possible to identify legal questions in relation to item 5, which would be  
20 potentially determinative of that issue as well.

21 THE CHAIRMAN: We have all had experience like that. If you start doing that it becomes very  
22 difficult because it always turns out that you need the facts; and then you do it on assumed  
23 facts and then eventually it turns out many years later that the assumed facts are not the facts  
24 anyway. So, in my experience, and probably in yours, apart from somebody who wishes to  
25 delay that is not an appropriate way forward.

26 MR. WISKING: As I understand Ofcom's Decision the fundamental objection to Floe' case on item  
27 5 is that whatever was said, and whatever the nature of the reliance, it does not give rise to  
28 rights vis-à-vis Vodafone. That is determined in the way that Ofcom has found, and that  
29 would be the end of the matter.

30 THE CHAIRMAN: But it is not. One has to look at it both ways ----

31 MR. WISKING: Of course, of course.

32 THE CHAIRMAN: -- and have completely open minds, it could go 50:50 one way or the other, and  
33 if it is not then it is not determined.

34 MR. WISKING: The additional concern from our perspective is that there a lot of outstanding issues  
35 (and I can come back to these) in terms of the factual part of the case, and this is something

1 that is perfectly feasible to get heard rapidly and it has then all the advantages that I have  
2 described in terms of clarifying, at best it is determinative, but at worst it narrows the scope of  
3 the subsequent proceedings and the issues are clear and clean. I understand the difficult with  
4 that, but these issues seem to me to require little or no facts to determine.

5 THE CHAIRMAN: So you are suggesting that we try 2, 3 and 4, and leave everything else open?

6 MR. WISKING: Indeed, and possibly aspects of 5.

7 THE CHAIRMAN: On some sort of assumed facts.

8 MR. WISKING: Well it may not be necessary because you could just identify that particular legal  
9 point as to whether a representation made by a regulatory authority can give rise to rights as  
10 regards third parties pursuant to the doctrine of legitimate expectation but that would be  
11 a discrete legal point.

12 THE CHAIRMAN: The question is whether you have to rely or not because I think there is some  
13 jurisprudence and administrative law on which you are going to need to rely.

14 MR. WISKING: To give rise to a legitimate expectation.

15 THE CHAIRMAN: To be able to rely on the legitimate expectation you do not actually have to rely  
16 upon legitimate expectation!

17 MR. WISKING: I understand it might be a question of detriment rather than reliance. But you do  
18 not even need to get to that because whether or not there is a legitimate expectation as between  
19 Floe and Ofcom, there is still the question of does that give rise to rights as against Vodafone,  
20 and that is a discrete legal question.

21 THE CHAIRMAN: Shall we see what Mr. Mercer has to say about this, as a discrete point?

22 MR. WISKING: Indeed, I have other comments ----

23 THE CHAIRMAN: On other points, yes, but not on the question of the VIP stay point?

24 MR. WISKING: Well in relation to the stay ----

25 THE CHAIRMAN: Everybody has interrupted everybody else, and I think you interrupted  
26 Mr. Anderson.

27 MR. ANDERSON: I had not quite finished on that point.

28 THE CHAIRMAN: Absolutely, no.

29 MR. WISKING: I am in your hands in terms of how you want to proceed.

30 THE CHAIRMAN: Mr. Anderson, have you finished on the stay point?

31 MR. ANDERSON: I have not finished on the stay point, but it is probably my fault that I provoked  
32 my learned friend into interrupting me.

33 THE CHAIRMAN: Well I think it might have been me, actually.

34 MR. ANDERSON: I have started making his application for the split hearing. Just finishing that  
35 point off, as far as the legitimate expectation and the Radio Communication Agency's point is

1 made, they are, of course, facts, but they are not facts that are really going to be in dispute as  
2 between the parties, it is just a question of what did the RA say? We then argue about the legal  
3 effect of that, so that could perfectly easily be included in a joint VIP/Floe appeal.

4 THE CHAIRMAN: Yes.

5 MR. ANDERSON: Is it a criminal offence to supply SIMs? Is it aiding and abetting, those are all  
6 matters which are not really fact specific. One of the problems tying at this stage the shape of  
7 the case to the Tribunal's very helpful list of issues, which as I said earlier is not a complete  
8 list of issues, there are others ----

9 THE CHAIRMAN: No, it was not intended to be.

10 MR. ANDERSON: -- there are others, and we will need to work on that, of course. We would  
11 prefer to spend more time working on our defence than seeking to agree a list of issues, but we  
12 are in your hands on that.

13 So it will certainly be possible to separate out some very fact specific aspects of the  
14 case such as real motive for terminating or discriminatorily continuing to supply, those sorts of  
15 factual issues, which may never arise if Floe have lost on the earlier issues. That is what  
16 I meant by split trial – perhaps not quite as narrow as my learned friend was suggesting, but  
17 still not necessarily embracing everything that is put in issue in the Notice of Appeal. On that  
18 basis one would effectively be staying that end/tailpiece part of both the Floe and the VIP  
19 Notices of Appeal. If the Tribunal is against us on that and thinks that at least one of the cases  
20 should be heard in its entirety then we would suggest that the VIP Appeal be heard  
21 subsequently to the Floe Appeal because it may never arise.

22 THE CHAIRMAN: And after the Decision?

23 MR. ANDERSON: Well, again, I was going to come back on that point. If the Tribunal had  
24 determined the certain legal issues in such a way that it did not matter what the facts were in  
25 the subsequent matters then you would not need to delay issuing that Decision until you had  
26 a further hearing on facts that may be utterly obsolete or unnecessary for you to consider. So  
27 whether one waits until after your Decision rather depends on what your Decision is.

28 (Laughter)

29 THE CHAIRMAN: Then you will have to wait until after the Decision.

30 MR. ANDERSON: If one is intending to save costs it is really for the Tribunal to decide – “We  
31 know what our Decision is going to be, we will issue it at this stage”, but then merely by listing  
32 the fact that you are going to give the Decision ----

33 THE CHAIRMAN: As a matter of practicality it does not work like that.

34 MR. ANDERSON: No, no.

35 THE CHAIRMAN: Shall we deal with this stay point since it has become a discrete point?

1 Mr. Pickford?

2 MR. PICKFORD: Madam, thank you. Ofcom and Vodafone have obviously made submissions  
3 relating to the advantages of a split trial, whether it be factual only or quasi factual/legal, and  
4 we would endorse those. But if the Tribunal is not minded to go down that route we would say  
5 that a stay of the VIP proceedings is the most sensible way forward. It is highly likely to save  
6 costs if we go down the route of a stay. First, it is the process that we adopted last time round,  
7 and that appeared to work quite satisfactorily, in particular one of the advantages of that  
8 particular method of proceeding, if it allows T-Mobile to intervene, very much as second  
9 intervener, it does not need to duplicate everything that Vodafone says or does, whereas if we  
10 have some form of joint trial or both trials move together at the same pace, T-Mobile  
11 effectively has to take the same role that Vodafone took, which inevitably increases costs and  
12 inevitably increases the amount of time that the Tribunal has to consider the matters.

13 Secondly, as has been pointed out, the question of what were the relevant facts in  
14 VIP's case may well be completely moot, obviously the Tribunal has an open mind at the  
15 moment but it is quite possible that the matters will be determined purely on the basis of the  
16 law and therefore any factual investigation into VIP would be wholly wasted. It should also be  
17 pointed out that in relation to the Floe case the facts have already been canvassed and analysed  
18 in some detail once before. In relation to VIP we are effectively at a standing start – indeed,  
19 the situation is even worse than that in these particular proceedings because we do not have  
20 any witness statements that have been positively advanced as specific to VIP. We simply have  
21 an assertion by VIP that they rely on the same witness statements that Floe put in in relation to  
22 their Appeal, so we would have to go through all of that in order to bring VIP up to the same  
23 speed. We say that would inevitably slow down the timetable and make it really quite  
24 unrealistic to try and adhere to a hearing by the end of this year.

25 Moreover, we have not touched on these issues as yet, because obviously we have  
26 been trying to save costs and save Tribunal time, but we would have to go into all those similar  
27 issues on the particularisation of VIP's claim that we have been canvassing in relation to Floe  
28 and again that is further cost, further time, further delay which we say may very well be  
29 wasted. So for all of those reasons we say that it would be far preferable to stay the  
30 proceedings if the Tribunal is not minded to go down the discrete approach of looking at issues  
31 – probably 2 – 6.

32 One further comment to make is that it should also be borne in mind that obviously  
33 VIP is in administration and that has implications for the chances of anyone recovering costs  
34 against them and again that should be a consideration when considering how to administrate  
35 these proceedings and how to save costs.

1 THE CHAIRMAN: Thank you.

2 MR. WISKING: If I can just add that I adopt those submissions and if the Tribunal is not minded to  
3 go down the preliminary issue route then we would submit that the VIP ----

4 THE CHAIRMAN: The Floe case and then the VIP case?

5 MR. WISKING: Indeed. The only qualification to that is that I think it would be appropriate that  
6 any VIP hearing at least was not commenced until after the determination of the Floe  
7 proceedings. Otherwise, there would be concern on our part that, given the representation of  
8 VIP, that it would be effectively using the hearing as a re-run of the Floe proceedings, and we  
9 would feel the need to intervene in that, which we obviously would not want to do.

10 THE CHAIRMAN: Mr. Mercer? Can I just mention a point that I think Mr. Pickford was alluding  
11 to? He was saying that the had not done a request for particulars on the VIP case in the same  
12 way as they have done in the Floe case, and that that would need to be done. Now, you are  
13 representing both Floe and VIP, and there is a limited number of hours in the day which you  
14 have told us about, for example, you are busy Thursday and Friday and would have to do what  
15 we have asked you to do over the weekend. So there is a concern that perhaps you might not  
16 have time available, that if we put them together VIP might cause Floe's case to be delayed  
17 rather than be heard on the timetable we are all envisaging, which is the beginning of  
18 December. I just thought I had better mention that because it is a point which I think  
19 Mr. Pickford alluded to.

20 MR. MERCER: Yes, that is not a point which concerns us at the moment. I do not think Floe  
21 contends that really to get a fair hearing in this matter we need to look at the facts and the law  
22 together, because there are some issues which are inextricably linked. Let us just look at what  
23 you described as the "discrimination argument" so far, ma'am. Discrimination is one thing by  
24 itself, but when you have discrimination of the degree that has occurred, a genuine situation of  
25 one rule for one set of people and one rule for another then that in my opinion impacts on the  
26 way in which a Tribunal would look at some of the legal argument. Therefore, I think it is  
27 important actually to consider the matter – I hate to use this word – "holistically" in the round  
28 or you do not get a proper picture. You can take out some legal arguments possibly, but if you  
29 look, for example, at an argument as to whether or not regulation 4.2 is proportionate, etc., you  
30 have to look at the expert evidence because there may be nothing behind it, and the evidence of  
31 the parties as to what is harmful interference in this case and what is not. You may have to  
32 look at that after you have decided what is the meaning of interference, what is the meaning of  
33 harmful, but the things are inextricably linked together that it is just impossible to pull it apart  
34 as my learned friend suggests. I have to say I think the view we would take is that we would be  
35 significantly disadvantaged by that.

1 It is all very well for those representing the other parties to make theoretical  
2 discussions about whether it is best to do this or best to do that, but VIP may just not be here if  
3 we take too long about this and that would be wrong in my submission – just to let its position  
4 go by the board. I will explain the view of the administrator who has looked at this from all  
5 ways round. One of the things we discussed was whether or not we should just go for the kind  
6 of stay which in fact I applied for last time, I think and very specifically came to the conclusion  
7 that we should not because we just could not face the uncertainty. There is a chance of funding  
8 this company through while there is the chance of a definite timetable for something occurring.  
9 Out of that I doubt that opportunity exists and I think that has to be borne in mind really.

10 THE CHAIRMAN: Right, thank you.

11 (The Tribunal confer)

12 THE CHAIRMAN: Mr. Pickford?

13 MR. PICKFORD: Madam, I do not know to what extent this is relevant to the deliberations you  
14 have just been having but my instructing solicitor has pointed out to me something that we feel  
15 would be relevant for the Tribunal to bear in mind, which is that Floe has for the last 18  
16 months I believe, or potentially even longer, itself been in administration, has the same  
17 administrator and has survived on the same basis which is that there is an expectation that at  
18 the end of all of this they will be able to sue for damages.

19 THE CHAIRMAN: Yes, but we are told that VIP's financial position and those who are supporting  
20 the litigation may be different.

21 MR. PICKFORD: It may or may not but we certainly have not seen any evidence in relation to that,  
22 madam.

23 THE CHAIRMAN: Thank you. Right, we will come to the end and then we will deal with what we  
24 order.

25 MR. ANDERSON: Can I turn to disclosure next, if that helps? You asked at the outset – you had  
26 not had an indication of a timetable for disclosure from Ofcom. If I can just indicate that it is  
27 our intention to provide disclosure of Ofcom documents within the next two weeks and that  
28 that disclosure will identify confidential documents that are on the file.

29 THE CHAIRMAN: What about privilege?

30 MR. ANDERSON: They are not privileged. That will be disclosure of documents to Floe and to the  
31 two Interveners save where there may be an issue of confidentiality as between those two  
32 Interveners, it is that exercise that takes a little bit of time.

33 THE CHAIRMAN: Yes, but you can do it within two weeks?

1 MR. ANDERSON: Within two weeks. So far as RA documents are concerned, and that of course is  
2 confined to RA documents passing between the RA and the DTI because that is all we have  
3 been asked for, we can do that within three weeks.

4 (The Tribunal confer)

5 THE CHAIRMAN: That is on the basis of the date that you have agreed with Mr. Mercer?

6 MR. ANDERSON: It is. My instructions we can go back to whenever the Tribunal wishes to go  
7 back, it may take a little longer, it should not take very much longer.

8 (The Tribunal confer)

9 THE CHAIRMAN: What concerns us is, and of course we are a little bit in the dark because we  
10 have just been told about this meeting in February 2002 with DTI ----

11 MR. ANDERSON: Yes.

12 THE CHAIRMAN: -- at which the RA was not present but at which we are told there was  
13 somebody who would liaise with the RA present. Now you also very openly told us that  
14 Ofcom knew that that information had been given on re-investigation.

15 MR. ANDERSON: I am not sure that information in that detail was given, I think what we had been  
16 told was a meeting with the DTI had taken place and they raised no objection. Whether there  
17 were liaison officers ----

18 THE CHAIRMAN: Right, now what we do not know is whether there is anything relevant on the  
19 RA file. Would it be appropriate, so we can forestall another application, that that is included?

20 MR. ANDERSON: Yes, we are perfectly happy to disclose that material.

21 THE CHAIRMAN: So that one takes it back to that February meeting?

22 MR. ANDERSON: Yes. We are only talking about communications between the RA and the DTI  
23 on that point.

24 THE CHAIRMAN: That would be the only thing that was relevant, would it not?

25 MR. ANDERSON: Yes.

26 THE CHAIRMAN: Mr. Mercer, do you think that might be helpful, or do you think we are going  
27 too far.

28 MR. MERCER: I think you almost assume that there is going to be some kind of disagreement  
29 about this. I do not think that there is going to be disagreement about the meeting or what was  
30 said.

31 THE CHAIRMAN: It is not the DTI meeting, it is whether the RA, who are the people who would  
32 have needed to make the representation, had told the DTI something which you were then told  
33 at that meeting.

34 MR. MERCER: I do not believe that the RA told the DTI something that we were told at that  
35 meeting. I will just take instructions, if I may.

1 THE CHAIRMAN: (After a pause) I do not know what your instructions are, or if you have had  
2 time. We think that in order that everything is open if one had whatever there was that would  
3 forestall any problem that we might come across later in not having that information.

4 MR. ANDERSON: We can make available what the RA have in relation to that.

5 THE CHAIRMAN: Absolutely.

6 MR. ANDERSON: We cannot of course make available evidence that the DTI may have in relation  
7 to that meeting. We will do that, though of course as I indicated earlier in the day, we know  
8 what the Appellant's case is in relation to legitimate expectation.

9 THE CHAIRMAN: So it is only information that the RA have on the DTI for the purpose of that  
10 meeting?

11 MR. ANDERSON: Whatever is on the file arising out of that meeting with it in the RA's  
12 possession, whether it came from the DTI ----

13 THE CHAIRMAN: Arising out of.

14 MR. ANDERSON: Leading up to, arising out of, yes.

15 THE CHAIRMAN: "Leading up to", yes.

16 MR. ANDERSON: That is disclosure. Witnesses: as we have indicated it is not currently our  
17 intention to call any witnesses of fact.

18 THE CHAIRMAN: But you want to cross-examine?

19 MR. ANDERSON: We want to cross-examine and we want to reserve our position in the light of  
20 what might arise out of the further information that has been provided.

21 THE CHAIRMAN: So the suggestion we made, which is leave it to the next CMC, would be  
22 appropriate?

23 MR. ANDERSON: Yes. So far as expert evidence is concerned, certainly we agree with and would  
24 support this suggestion of the Tribunal that we liaise in order to identify the issues on which  
25 expert evidence may be relevant. We are not prepared at this stage to agree to the notion that  
26 there be a single joint expert. Some of the expert evidence that we would be minded to call  
27 would be to rebut evidence that has been adduced by witnesses on behalf of Floe which,  
28 however they may be characterised, is in fact expert evidence. We think that point, whether  
29 the appropriate way is a joint expert, and if joint experts one or two, ought best be resolved  
30 once the issues on which expert evidence is to be called have been defined.

31 THE CHAIRMAN: I think that is what we were suggesting were we not? We said the first thing to  
32 do is to define the issues, and then to see whether one can resolve it by a single joint expert.

33 MR. ANDERSON: Yes.

34 THE CHAIRMAN: And we have intimated that we hope that that will be possible, both in order to  
35 narrow the issues and also to save costs.

1 MR. ANDERSON: Yes, we fully appreciate that.

2 THE CHAIRMAN: What we are intimating is that the parties should work towards that. If it  
3 becomes impossible the matter has been delegated to me and I will make myself available to  
4 deal with it – but we hope that will not be necessary.

5 MR. ANDERSON: We are perfectly content with that way forward. I think our immediate reaction  
6 was we were not wildly enthusiastic about the sound of the expert that my learned friend was  
7 suggesting, but we will cross that bridge when we get to it.

8 THE CHAIRMAN: Well there are not that many experts in this field necessarily.

9 MR. ANDERSON: I am sure that is right, yes. I am sure they will be known to at least those behind  
10 me, or next to me and behind me.

11 THE CHAIRMAN: Yes.

12 MR. ANDERSON: Does that leave only timetable? We are asking for Friday, 14<sup>th</sup> October to put in  
13 our defence. We do not believe that that will have an impact on any overall timetable, but in  
14 view of the difficulties that we spent most of the morning discussing on identifying the issues,  
15 considering the Notice of Appeal, we will be getting particulars not until next Monday, we do  
16 not believe in the circumstances the 14<sup>th</sup> October is an unreasonable period of time. We are  
17 obviously working on other things at the same time – disclosure, for example, that we are  
18 proposing to give within that timetable and looking at things like the list of issues.

19 THE CHAIRMAN: Well next Monday is 26<sup>th</sup> so that would give you three weeks?

20 MR. ANDERSON: Three weeks, yes. We would find it very difficult, I think, to put in a properly  
21 considered defence, given the late stage at which we would be getting issues identified in less  
22 than that time frame.

23 THE CHAIRMAN: And you are going to be able to give disclosure in two weeks?

24 MR. ANDERSON: Yes, we have been working on it, it is not as if we are starting from today to  
25 produce the list for disclosure, we have been working on the Defence.

26 THE CHAIRMAN: And after you putting in the Defence, we have Vodafone and T-Mobile  
27 documents that will go in, and we are working towards a CMC on 2<sup>nd</sup> November. That does  
28 not give very much time ----

29 MR. ANDERSON: Well I am instructed that we could probably bring the 14<sup>th</sup> back by a couple of  
30 days to the middle of that week, if that would assist. The CMC on 2<sup>nd</sup> ----

31 THE CHAIRMAN: If we brought it back to the 11<sup>th</sup>?

32 MR. ANDERSON: If you could bear with me just a moment. (After a pause) Of course, asking until  
33 the 14<sup>th</sup> is in fact only asking for what would otherwise be an extension of seven days. We got  
34 the witness statements a week after the Notice of Appeal, six weeks from that date takes us to  
35 7<sup>th</sup> October anyway, so it is only an extra week so to speak.

1 THE CHAIRMAN: We have to fit it in pragmatically for you, but we also have to fit it in  
2 pragmatically for the Tribunal because when we get it it has to be processed and sent out to the  
3 members and they have to have time to read it.

4 MR. ANDERSON: Yes, of course.

5 THE CHAIRMAN: Because of our diaries the 2<sup>nd</sup> November is a convenient date, and one wants  
6 that CMC in sufficient time for the main hearing. You were saying 14<sup>th</sup> October, if we  
7 brought that back to 11<sup>th</sup> October that would give T-Mobile and Vodafone until – what would  
8 you want, two weeks?

9 MR. WISKING: Again, we would certainly need at least two weeks, and the difficulty comes back  
10 to this problem of the case.

11 THE CHAIRMAN: Assuming that is all going to be resolved, otherwise ----

12 MR. WISKING: No, I understand that, but we will not know until Monday, that is assuming that is  
13 resolved, what those particulars are. As things at present much seems to turn on access to the  
14 Ofcom file, there appears to be issues as to whether Floe is now raising matters which were not  
15 before Ofcom. As things stand Floe says it is all in the file, you have to read the file. Well, we  
16 do not have access to the file and we are not going to get that for two weeks. It may be  
17 relevant for us to see the Radio Communication Authority documents.

18 THE CHAIRMAN: Then it will be three weeks, you are going to get those by ----

19 MR. WISKING: By mid-October.

20 THE CHAIRMAN: -- three weeks from now.

21 MR. WISKING: There weeks from now is about the 10<sup>th</sup>.

22 THE CHAIRMAN: Yes, so you will have two weeks. Is it possible to get the Radio  
23 Communication file earlier than that? Could they not come at the same time?

24 MR. ANDERSON: I will just take instructions on that. (After a pause) I can give no firm assurance  
25 on that. We can do our best and we may be able to provide it on a piecemeal basis, but I could  
26 not undertake to provide that file because it involves liaising with other Government  
27 Departments on questions of confidentiality, and so on and so forth. We can endeavour to do it  
28 sooner, and we can provide it may be in tranches, but I could not assure the Tribunal that we  
29 could get the entire file in less than three weeks.

30 THE CHAIRMAN: Well we have all got to do the best we can, so I think what I am going to  
31 suggest is that the Defence is by Tuesday, 11<sup>th</sup> October.

32 MR. ANDERSON: I wonder, madam, if I could come back to you on that because we really do  
33 believe that that will be extremely tight. That is effectively 11 working days from the 26<sup>th</sup>  
34 when we get the final particulars of the Notice of Appeal. It is a complex case raising many  
35 issues to produce that, given that it will require signing-off within Ofcom, within the entire

1 space of 11 days is really very tight. We understand the need for expedition. We perfectly  
2 endorse the intention to aim for the beginning of December as the hearing date, but it is far  
3 more important that the case is decided properly and fully, with full argument and  
4 consideration than it is decided in the first week, or heard in the first week of December. We  
5 do not believe that giving us until later in that week will have a serious overall impact on that  
6 timetable, but it is very important, we would urge on the Tribunal, that we be given a proper  
7 opportunity to provide a fully reasoned Defence.

8 THE CHAIRMAN: Even the submissions you made today were on the basis that there were certain  
9 assumptions that you could make.

10 MR. ANDERSON: Yes.

11 THE CHAIRMAN: The Tribunal managed to set out in draft, and very provisionally, what the  
12 issues are in the Notice of Appeal, so a lot of work can be done, it is not that you start work at  
13 that point. There is a lot of work – it is not when you are going to start, it is when you are  
14 going to finalise it.

15 MR. ANDERSON: That is perfectly true. Well I have made my points, I am in your hands,  
16 obviously, as to the timetable.

17 (The Tribunal confer)

18 THE CHAIRMAN: 11<sup>th</sup> October. So it is Tuesday, 11<sup>th</sup> October for the Defence. It is Tuesday,  
19 25<sup>th</sup> October for the Interveners. Mr. Wisking, do you have problems?

20 MR. WISKING: Can I take instructions?

21 MR. PICKFORD: Madam, can I just clarify that that is intervention in relation to the Floe case  
22 only?

23 THE CHAIRMAN: Yes.

24 MR. WISKING: (After a pause): Again it is difficult for me to say how long we need because of the  
25 contingencies, and obviously we can take ----

26 THE CHAIRMAN: Let us forget about the contingencies because if the whole thing breaks down  
27 you are going to have to come back and think about it again. Hopefully it is not going to break  
28 down.

29 MR. WISKING: No, I understand that.

30 THE CHAIRMAN: And the question is whether you are actually treating this as – I am not saying  
31 whether you are or not – but whether you are treating this as a high powered commercial action  
32 or whether you really do need it, and I have not considered that ----

33 MR. WISKING: If we are, it is just a matter of having the case in front of us so that we can respond  
34 to it. As it stands it comes back to the question of witnesses. We will, I think, be putting in

1 further witness statements, so it is not simply an exercise of putting in a Statement of  
2 Intervention which deals with the legal issues, if you like.

3 THE CHAIRMAN: I know you are supposed to, but would you need to have the witness statements  
4 before you finish the Statement of Intervention.

5 MR. WISKING: That may be one way through.

6 THE CHAIRMAN: That may be a way that you would come back.

7 MR. WISKING: Again, I am talking without instructions, but it may be we can reach the position  
8 where we can put in a Statement of Intervention subject to witness statements.

9 THE CHAIRMAN: Let us see where we get to on that sort of timetable.

10 MR. WISKING: I appreciate there is not much in it, but I was going to submit that we would use  
11 our best endeavours to get something to the Tribunal before the case management conference  
12 ----

13 THE CHAIRMAN: That does not help us because the Tribunal members have to receive the  
14 information for an effective Tribunal and be able to read it. Therefore, the Registry needs time  
15 to be able to send it out and they need to have a timetable within their other diary commitments  
16 to be able to read it before. So it is not like sending it to the court the night before, or sending  
17 it to me the night before, there are other issues within the Tribunal and they have to be  
18 pragmatically dealt with.

19 MR. WISKING: Can I just have a moment? (After a pause) On the basis that we will do our best,  
20 and we will get the Statement of Intervention in by 25<sup>th</sup> October, we may need flexibility on  
21 the witness statements, much as Floe has already had.

22 THE CHAIRMAN: You will do your best on the witness statements, and otherwise you will ----

23 MR. WISKING: Indeed, and we may be able to produce some, but it is just that the rest may have to  
24 follow.

25 THE CHAIRMAN: So that is the Statement of Intervention and Defence. You are going to have  
26 your shopping list by this evening, so it will be tomorrow.

27 MR. WISKING: Tomorrow, yes.

28 THE CHAIRMAN: That is 21<sup>st</sup> September for Ofcom and Vodafone shopping list, and that is going  
29 to be responded to by 26<sup>th</sup>.

30 MR. ANDERSON: In relation to the question of my learned friend's case that he would have started  
31 from Plymouth and not somewhere else to get to Dublin, you sensibly suggested to him that it  
32 might assist if he were to identify, even in outline, where he says that we went so  
33 fundamentally wrong. That was not going to be part of my shopping list, but very helpful if he  
34 were able to provide that indication, at the same time ----

35 THE CHAIRMAN: I do not think it ought to be part of your shopping list.

1 MR. ANDERSON: No, but it is nonetheless of critical importance to us if we are to formulate  
2 a sensible Defence within the very, very tight timetable we have now been given.

3 THE CHAIRMAN: I think Mr. Mercer appreciates what I was saying before.

4 MR. MERCER: Yes, ma'am.

5 MR. ANDERSON: The issue is when is he going to provide that statement, within this timetable?

6 THE CHAIRMAN: I hope by Monday.

7 MR. MERCER: I had not envisaged taking longer than that.

8 THE CHAIRMAN: By Monday.

9 MR. ANDERSON: I am obliged.

10 THE CHAIRMAN: That leaves the question of VIP and the stay. Having heard all the submissions  
11 we are of the view that it would be very difficult to get the VIP case ready on this timetable,  
12 and that the experience of last time was that it was not necessary to do the VIP case at the end,  
13 because it all falls into place, and therefore our view is that it should be stayed.

14 That leaves the Intervener ----

15 MR. WISKING: Well we had not made submissions.

16 THE CHAIRMAN: -- you had not made submissions – did you want to make submissions on  
17 intervening?

18 MR. WISKING: Briefly, just to add, and it is perhaps something that has been missed by Mr.  
19 Mercer in his submissions, is the scope of the intervention proposed by Worldwide is in all the  
20 issues, there are letters from Taylor Wessing saying it is not just the legal issues it is all issues.  
21 I adopt the submissions of my friend that it is not evident why they are intervening, they have  
22 not put forward any reason why their position is different. In fact, we were told today the  
23 position is identical to that of Floe, which is even more concerning that they want to be  
24 involved in all the issues. I can see no basis for that and so I would adopt my friend's  
25 submissions that at the present time there is no basis for that intervention, it would just add to  
26 the cost and the complexity of these proceedings which are unfortunately already complex  
27 enough.

28 MR. PICKFORD: We would support that for the same reasons.

29 THE CHAIRMAN: I have a concern that we do not actually know sufficiently at the moment about  
30 what they are intending to intervene in, and also from what Mr. Mercer was saying I wonder  
31 whether they are going outside this Appeal. So I think he ought to adjourn on the basis of what  
32 I said at the outset and if the application wants to be renewed at the next CMC, when all the  
33 material is in, it could be renewed, with the information as to exactly why they wanted to  
34 intervene, and what they are going to add in relation to the issues as they will have (hopefully  
35 by then) been ascertained and agreed.

1 I said we had to finish by 1 o'clock, that is why it is very important that we get on.  
2 I think the issue that we have not now dealt with is the issue of whether we hear everything or  
3 we only hear the legal or some of the issues in December, and whether dominance and those  
4 issues are split off?

5 MR. WISKING: Can I just say that our submissions on timetable were premised on the basis that  
6 the economic issues are split off, but there was not a preliminary issue on ----

7 THE CHAIRMAN: Yes, well Mr. Wisking has, I think, read the crystal ball, so all the issues, but  
8 not the dominance etc. issues, will be heard in December, and therefore all the preliminary  
9 preparatory documents are on all the issues, but not the issues on dominance, etc.

10 MR. WISKING: And just for clarity, it is not just the evidence but it is the pleadings on those  
11 economic issues that is stood down for the moment?

12 THE CHAIRMAN: Yes, that is right, yes. Is there anything else? Costs are reserved.

13 MR. ANDERSON: We hope you will also include liberty to apply?

14 THE CHAIRMAN: Yes. To make it clear, the issues on the expert evidence will come back to me,  
15 and the issues on the further and better particulars will also come back to me, and I will say  
16 that I have a very, very full diary until the end of October, but I will have to make myself  
17 available to deal with them, but it will not be easy. So if you are going to be in a position  
18 where you need me we are going to have to work out when I am available. Hopefully you will  
19 not need me, but if everything could come through the Tribunal in the usual way so we can see  
20 where we are getting to.

21 MR. ANDERSON: I am grateful for that.

22 THE CHAIRMAN: Is that all right, Mr. Mercer?

23 MR. MERCER: Yes, that is fine.

24 (The hearing concluded at 1.10 p.m.)