COMPETITION ACT INVESTIGATION BY THE DIRECTOR GENERAL OF TELECOMMUNICATIONS INTO DISCONNECTION OF FLOE TELECOM LIMITED’S SERVICES BY VODAFONE LIMITED

3 November 2003
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Chapter 1

Introduction

1. The Director General of Telecommunications ("the Director") has conducted an investigation into whether Vodafone Limited ("Vodafone") has infringed Section 18(1) ("the Chapter II prohibition") of the Competition Act 1998 ("the Act") in relation to its disconnection of telecommunications services provided to Floe Limited ("Floe").

2. The Director has concluded that Vodafone has not infringed the Chapter II prohibition.

GSM gateways

3. A GSM Gateway is a bank of Subscriber Identity Module ("SIM") cards mounted in a device that provides connectivity between a fixed telephone line and a mobile network.

4. A GSM Gateway uses the SIMs of a mobile network operator ("MNO") on whose network the call is to be delivered to make the call appear to be an on-net mobile to mobile call\(^1\), and so be charged at the MNO’s retail rate for on-net calls. The operation of a GSM Gateway utilises the spectrum of the MNO on whose network the call is terminated.

5. A GSM Gateway can be utilised by companies to connect their Private Automatic Branch Exchange ("PABX") systems to the MNO’s network ("Private GSM Gateway"). As with a cellphone, the connection to a public network by a Private GSM Gateway is self-provided, and does not involve the provision of commercial telecommunications services to third parties.

6. Where a GSM Gateway is operated by companies to offer mobile call termination to third parties ("Public GSM Gateway"), the connection to a public network involves the provision of commercial telecommunications services to third parties ie services that are not self-provided by the end user.

The Government announcement of 18 July 2003

7. The Radiocommunications Agency ("RA") has responsibility for managing the non-military radio spectrum in the UK. On 18 July 2003, the day that Floe submitted its complaint to the Director, the Government published the results of its consultation entitled “Public Wireless Networks – Exemption of User Stations” ("the RA consultation")\(^2\). The RA consultation sought views on proposals to amend the Wireless Telegraphy (Exemption) Regulations 1999 (SI 1999/930) ("the Regulations") to clarify the status of end-user equipment connecting to telecommunications networks.

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\(^1\) A call from a mobile phone to another mobile phone on the same network is known as an “on-net” call.

8. In summary, the conclusions reached by the RA were that:

- fixed as well as mobile user devices are considered to meet the exemption set out in the Regulations, and do not require individual licensing under Section 1 of the Wireless Telegraphy Act 1949 (“WTA”); and

- the restriction on the provision of third party traffic telecommunications services over exempted devices or spectrum will be retained.

9. The effect of the Government’s conclusions is that companies operating Private GSM Gateways may be accepted as customers by MNOs if they comply with the MNO’s terms and conditions. Public GSM Gateways do not qualify for exemption from WTA licensing.

10. However, the Government announcement indicated that it may be possible for Public GSM Gateway services to be authorised under the auspices of an MNO’s WTA licence, subject to meeting any other legal and regulatory requirements.

11. In addition, the RA has confirmed to the Director that MNOs’ WTA licences do contain terms which could, subject to suitable agreements being in place, enable third parties to legally provide Public GSM Gateways under the relevant MNO’s WTA licence.
Chapter 2

The complaint

12. Floe submitted a complaint to the Director on 18 July 2003, in which it alleged that Vodafone had breached Chapter II of the Competition Act and/or Condition 8 (sic) (‘prohibition on undue preference and undue discrimination’) of its licence under Section 7 of the Telecommunications Act 1984, by periodically suspending Floe’s GSM Gateway services on the grounds of unlawful activity yet still permitting GSM Gateway services by others, including its own service providers.

13. Floe considered that it had been the victim of a selective policy of service suspension and attack by Vodafone. Floe stated that Vodafone suspended Floe’s GSM Gateway service on the grounds of unlawful activity. Floe alleged that Vodafone had not suspended the services of other named Public GSM Gateway operators, and referred to company A, company B and company C.

14. Floe stated that the total damage that it had suffered as a result of Vodafone’s action was £[…].

15. Further to questions put to Floe by the Director, Floe confirmed that the date of the disconnection of services to Floe was 11 April 2003. Floe requested interim measures “in order to ensure that Vodafone will stop breaching its contract with Floe by unilaterally taking any form of action at all that would or might further undermine Floe’s service and result in any form of disruption or disconnection of service to the end consumer”.

16. Floe subsequently submitted correspondence to the Director in which it referred to the cessation of additional SIMs by Vodafone and the barring of IMEI numbers by Vodafone. Floe stated that such conduct was unreasonable in the context of the Director’s investigation.

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3 For reasons of confidentiality the identities of these companies have not been disclosed.
4 For reasons of confidentiality this figure has been excised.
5 The Director’s Section 26 Notice of 20 August 2003.
6 Floe’s letter to the Director of 2 September in response to the Director’s Section 26 Notice of 20 August 2003.
7 Floe’s letter to the Director of 2 September 2003.
8 Floe’s letter to the Director of 17 October 2003. An IMEI number is a unique number given to a cellphone. In this letter Floe stated that the blocking of IMEI numbers renders GSM Gateway equipment inoperable.
9 Floe’s letter to the Director of 17 October 2003.
Chapter 3

The Director’s investigation

17. The Director considered that the most appropriate way of addressing Floe’s complaint was under the Act, rather than under Condition 8 [sic] of Vodafone’s Telecommunications Act licence. This is in line with Oftel’s Competition Act strategy\(^\text{10}\). The Director had reasonable grounds to suspect that the Chapter II prohibition had been infringed by Vodafone. The Director suspected that Vodafone may be dominant in the market for termination of wholesale voice calls on its own network and that Vodafone may have abused this dominant position by refusing to supply Floe. On this basis, the Director decided that he had sufficient grounds to open an investigation into Floe’s complaint under section 25 of the Act.

The services to which this decision relates

18. Floe’s allegations referred to the disconnection of its ‘GSM Gateway services’. In its complaint, Floe did not explicitly characterise itself as a Public GSM Gateway operator, nor did it specify whether the services disconnected by Vodafone were being provided via Public GSM Gateways or Private GSM Gateways. However, on the basis of the information available, the Director is satisfied that Floe was providing Public GSM Gateway services and that it was those services that were disconnected by Vodafone.

19. Floe provided no evidence to suggest that it was providing Private GSM Gateway services, nor that Vodafone has disconnected services provided via Private GSM Gateways. Vodafone has maintained\(^\text{11}\) that it has not sought to disconnect individual corporate customers who use GSM Gateways (ie Private GSM Gateways). Vodafone has also stated\(^\text{12}\) that it has in place arrangements for the provision of Private GSM Gateways with other customers.

20. Floe stated that “It is totally within the gift of Vodafone to make the running of the Floe Gateways legal\(^\text{13}\)”. Such a statement by Floe appears to demonstrate that Floe considers itself to be providing Public GSM Gateway services. If Floe were referring to Private GSM Gateway Services, there would be no issue as to the legality of its services.

21. Furthermore, Vodafone’s letter to Floe about the SIMs that were disconnected on 11 April 2003\(^\text{14}\) states that Vodafone suspected these SIMs were being used “in GSM Gateways to supply services to third parties” (ie. Public GSM Gateways). Floe has not provided any evidence to the Director to demonstrate that this was not the case.

\(^{11}\) Vodafone’s letter to the Director of 8 August 2003.
\(^{12}\) Vodafone’s letter to the Director of 16 September 2003 in response to the Director’s Section 26 Notice of 16 September 2003.
\(^{13}\) Floe’s letter to the Director dated 14 July 2003.
\(^{14}\) Vodafone’s letter to Floe of 10 March 2003.
22. Therefore, the scope of the Director’s decision relates to disconnection of Vodafone SIMs suspected by Vodafone of being used in the provision of Public GSM Gateway Services.

Characterisation of the abuse

23. For the purposes of this investigation, the Director characterised the alleged abuse as a refusal to supply by Vodafone. In investigating Vodafone’s stated grounds for refusing to supply Floe, the Director also considered Floe’s allegation that Vodafone had continued to supply some GSM Gateway operators, whilst refusing to supply Floe, ie whether Vodafone has discriminated between Floe and Vodafone’s other customers.

24. The Director informed Floe of this approach in a letter to Floe of 24 July 2003, and Floe was given the opportunity to comment on this approach. Floe did not comment on this approach.

25. The Director opened an investigation into Floe’s complaint on 8 August 2003, and the scope of the investigation was confirmed on OfTEL’s website.

Information requested during the course of the investigation

26. The Director requested information from the RA on the arrangements between an MNO and Floe that would be necessary in order to ‘legalise’ Floe’s operation of Public GSM Gateway services (ie that would enable the services to be provided lawfully under the auspices of an MNO’s WTA licence).

27. The Director asked Floe to demonstrate that it has or had contractual arrangements in place with Vodafone for the supply of Floe’s Public GSM Gateway Service. Floe submitted information to the Director which, Floe argued, provided overwhelming evidence that it did have the necessary contractual arrangements in place with Vodafone.

28. The Director asked Vodafone to provide details of any contractual arrangements that it had in place with any Public GSM Gateway operator that Vodafone considered sufficient to enable those operators to legally operate Public GSM Gateways. The Director also required Vodafone to provide internal Vodafone correspondence detailing the view of Vodafone account managers responsible for the supply of SIMs to Floe and evidence of Vodafone’s treatment of other named Public GSM Gateway operators.

29. In addition, the Director required Vodafone to provide documentary evidence concerning the provision of services to Floe or referring to contracts between Vodafone and Floe.

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15 http://www.oftel.gov.uk/publications/comp_bull/cases/cw_662.htm
16 The Director’s Section 26 Notice of 20 August 2003.
17 The Director’s Section 26 Notice of 9 September 2003.
18 The Director’s Section 26 Notice of 19 September 2003.
19 The Director’s Section 26 Notice of 9 October 2003.
Chapter 4

Suspected Breach of the Chapter II prohibition – abuse of a dominant position

30. The Chapter II prohibition of the Act prohibits conduct by one or more undertakings which amounts to an abuse of a dominant position in a market where this may affect trade within the United Kingdom.

Market definition and dominance

31. The Director has not reached any final conclusion on which markets are relevant in this case or whether Vodafone is dominant in those markets. However, in order to put the investigation in context, the Director’s preliminary view is that the relevant market in this case is the market for wholesale voice calls terminated on Vodafone’s network. Another plausible relevant market definition is the market for wholesale access and call origination on Vodafone’s network.

The market for wholesale voice calls terminated on Vodafone’s network

32. As part of the implementation of the new EC regulatory framework for electronic communications, the Director has published his current view of market definitions for mobile telephony. During this exercise, the Director has set out his provisional findings that there is a market for wholesale voice calls terminated on individual mobile networks. From previous investigations and the current market review consultation document, the Director has evidence to suggest that Vodafone holds a position of dominance in the termination of wholesale voice calls on its own network.

33. GSM Gateways take advantage of an arbitrage opportunity that can exist between the charges for retail calls to mobile networks from either fixed networks or other mobile networks and the (often much lower) charges for on-net mobile calls. Under some retail packages, the retail price per minute for an on-net call can be much lower than the standard wholesale termination rate charged by mobile operators for terminating calls on their network from other operators.

34. Public GSM Gateways seek to provide cheap rates for making calls to mobile phones. An essential input into GSM Gateway services is call termination on mobile networks. Floe’s complaint concerned incoming calls to mobiles on Vodafone’s network. The relevant market for the purposes of this case could therefore be the market for the termination of voice calls on Vodafone’s network.

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23 See footnote 1 for a description of an on-net call.
The market for wholesale access and call origination on Vodafone's network

35. As part of the implementation of the new EC regulatory framework for electronic communications, the Director has set out his findings that there is a market for the provision of mobile access and call origination on public telephone networks in the UK\(^{24}\). In the same document, the Director has also set out his view that Vodafone does not hold a position of dominance in the origination of voice calls on its own network.

36. Although the service which Floe is seeking to provide is reduced rates for calling Vodafone mobiles, Floe is trying to provide this service not by purchasing termination at Vodafone’s standard interconnect rates but by purchasing SIM cards typically sold (or resold) to customers purchasing retail mobile services. It is plausible that the product Floe is attempting to purchase falls within the market for wholesale access and call origination on Vodafone’s network.

37. As has already been set out, no firm conclusion has been reached on the relevant market and whether or not Vodafone may be dominant within it. The reason for this is that the Director is satisfied that, even if Vodafone were found to be dominant in a relevant market, its conduct would not in any case amount to an abuse within the meaning of the Chapter II prohibition.

The alleged abuse - refusal to supply

38. The European Court of Justice has established that a refusal by a dominant undertaking to supply an existing customer can be an abuse if such a refusal to supply is not objectively justified\(^{25}\). The Director considers that a dominant undertaking would be objectively justified in refusing to supply a customer where the products or services to be provided were to be used in an unlawful manner.

Are the Public GSM Gateway services provided by Floe illegal?

39. The Director considers that the evidence submitted during the course of the investigation shows that the services provided by Floe were Public GSM Gateway services.

40. Under Section 1 of the WTA, it is an offence to establish or use any station for wireless telegraphy unless authorised to do so by a licence or unless specifically exempted from the requirement to hold a licence. The use of GSM Gateways falls within this provision. Floe is not licensed to use GSM Gateway equipment under the WTA.

41. Regulation 4(1) of The Wireless Telegraphy (Exemption) Regulations 2003\(^{26}\) provides that the requirement to obtain a licence under Section 1 of the WTA does not apply to certain types of apparatus and use. However, regulation 4(2) provides that this exemption does not apply where such apparatus is being used

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\(^{26}\) SI 2003/74.
to provide a telecommunication service “by way of business to another person”. The use of Public GSM Gateway services, as carried out by Floe, falls within the scope of regulation 4(2) and therefore Floe does not benefit from exemption under regulation 4(1). Such use is therefore illegal.

42. However, The RA has confirmed\(^\text{27}\) that MNOs’ WTA licences contain terms which could enable third parties to legally provide Public GSM Gateways under the relevant MNO’s licence. Condition 8 is the key term of Vodafone’s licence in this respect, and states the following:

“The Licensee must ensure that the Radio Equipment is operated in compliance with the terms of this Licence and is used only by persons who have been authorised in writing by the Licensee to do so and that such persons are made aware of, and of the requirement to comply with, the terms of this Licence”.

43. In addition, the Government announcement of 18 July 2003\(^\text{28}\) stated that:

“in some circumstances, MNOs may be able to consider purchasing products or services from gateway operators under the auspices of their licences. Although a commercial matter for the companies concerned, the Government encourages the MNOs and Gateway Operators to consider ways to address pragmatically existing uses of equipment that continue not to meet the requirement for exemption”.

This announcement indicates that in such circumstances it is possible for Public GSM Gateway services to be authorised, subject to meeting any other legal and regulatory requirements.

44. At the very least, the Director considers that for Floe’s Public GSM Gateway services to be operated lawfully, it would be necessary for an arrangement to be in place between Vodafone and Floe whereby Vodafone expressly authorises in writing the use of Floe’s Public GSM Gateway equipment. Such a requirement would be in line with Condition 8 of Vodafone’s WTA Licence. The Director notes that the Government’s announcement of 18 July 2003 uses slightly different wording to Condition 8 and appears to suggest that, for a Public GSM Gateway to be authorised under the auspices of a MNO’s WTA licence, the arrangements which need to be in place between the MNO and the Public GSM Gateway Operator must involve the MNO in purchasing products or services from the Public GSM Gateway Operator. As mentioned at paragraph 48 below, Vodafone has interpreted this requirement to mean that the GSM Gateway equipment would need to be owned and controlled by the MNO.

45. In establishing whether an arrangement exists/existed between Vodafone and Floe, which would be sufficient to authorise the provision of Public GSM Gateway services by Floe under Vodafone’s WTA licence, the Director has assessed the available evidence in the light of both Condition 8 of the WTA licence and the

\(^{27}\) RA email to the Director of 8 September 2003.

\(^{28}\) See footnote two.
Government’s announcement of 18 July 2003. However, it should be noted that in making this decision the Director has not sought to specify the exact form that the possible arrangements should take.

Arguments submitted by the parties

46. The Director has considered the evidence submitted by Floe in support of its argument that it had an agreement with Vodafone authorising Floe’s operation of a Public GSM Gateway. Evidence submitted by Floe included, inter alia, a contract between Floe and Vodafone for the provision of mobile voice and data services, details of a meeting that took place between Vodafone and Floe, emails from Floe to Vodafone requesting information on rates and SIM card rentals, and Floe’s business plan.29

47. Floe argued that the information submitted “provides overwhelming evidence that Vodafone did indeed have contractual arrangements in place with Floe relating to Floe’s GSM Gateway Services”30 ie Floe argued that Vodafone had authorised Floe to provide Public GSM Gateway services under the terms of Vodafone’s WTA licence. In response, Vodafone stated that, as far as it was aware, Floe intended to use SIMs supplied by Vodafone for the provision of Private GSM Gateways services to end-users, not in the supply of Public GSM Gateway services.31

48. Vodafone did not consider that it could “simply authorise the use of Public GSM Gateways, as is seen from the majority of statements from the RA”. Vodafone considered that “in any event, no such authorisation has ever been given to Floe, nor has Floe ever asked for their illegal public GSM gateway operation to be authorised”. Vodafone argued that it could have enabled Floe to operate legally if it put arrangements in place that gave Vodafone ownership of Floe’s Public GSM Gateway equipment, and referred to the Government announcement of 18 July 2003 in support of its argument.32 However Vodafone stated that no such arrangement had ever been agreed with Floe.

Has Floe been authorised by Vodafone to provide Public GSM Gateway services under the terms of Vodafone’s WTA licence?

49. The Director has considered the provisions of the contract between Floe and Vodafone. The contract allows Floe to purchase certain mobile products and services from Vodafone, such as SIM cards, and re-sell them to end-users. The Director has also considered written documentary evidence concerning the

29 Letters to the Director dated 14 July 2003 and 2 September 2003, the letter of 2 September being in response to the Director’s Section 26 Notice of 20 August 2003.
30 Floe’s letter to the Director of 2 September 2003 in response to the Director’s Section 26 Notice of 20 August 2003.
31 Vodafone’s letter to the Director of 16 September in response to the Director’s letter of 9 September 2003.
32 Vodafone’s letter of 23 October 2003 in response to the Director’s Section 26 Notice of 9 October 2003.
33 Vodafone’s letter of 23 October 2003 in response to the Director’s Section 26 Notice of 9 October 2003.
34 See footnote 2.
provision of services from Vodafone to Floe or referring to contracts between Vodafone and Floe\textsuperscript{35}.

50. The Director considers that the contract between Vodafone and Floe is not sufficient to constitute an agreement between the parties about the provision of Public GSM Gateway services by Floe, as envisaged by Condition 8 of Vodafone’s WTA Licence. There is nothing in the contract between Vodafone and Floe to indicate that Vodafone has given written authorisation to Floe to provide Public GSM Gateway services.

51. The contract between Floe and Vodafone states that Floe is to act independently and on its own account. Again, the Director does not consider that this is the type of agreement that would, effectively, allow Floe to operate under Vodafone’s WTA licence. The Director has not been provided with the required written agreement indicating that Vodafone has/had authorised Floe to provide Public GSM gateway services. The written contract between Floe and Vodafone is silent on the use to be made of the SIMs supplied under the contract.

52. Furthermore, the Director has not seen any other evidence which demonstrates that Vodafone gave written authorisation that Floe could operate Public GSM Gateways under the terms of Vodafone’s WTA Licence.

**Have arrangements been put in place whereby Vodafone has purchased products and services from Floe in line with the Government announcement of 18 July 2003?**

53. During the course of the Director’s investigation, Vodafone provided the Director with evidence of a ‘potential legal structure’ between Vodafone and Floe whereby Vodafone would have owned Floe’s Public GSM Gateway equipment\textsuperscript{36}. Vodafone considered that such an arrangement would have enabled a public GSM Gateway to operate legally within the Wireless Telegraphy (Exemption) Regulations\textsuperscript{37}.

54. It does not appear to the Director that any such arrangement was ever agreed between Vodafone and Floe. Therefore, the Director does not consider that Floe’s Public GSM Gateway services was legalised in accordance with any requirement of this type.

**Conclusion on refusal to supply**

55. The Director does not consider that the evidence submitted by Floe meets the requirement set out in Condition 8 of Vodafone’s WTA licence. Furthermore, no evidence has been provided regarding the conclusion of an agreement whereby Vodafone purchased Floe’s GSM Gateway equipment, thus meeting the requirement set out in the Government announcement of 18 July 2003.

\textsuperscript{35} Vodafone’s letter of 23 October 2003 in response to the Director’s Section 26 Notice of 9 October 2003.
\textsuperscript{36} Vodafone’s letter of 16 September 2003 in response to the Director’s letter of 9 September 2003.
\textsuperscript{37} Vodafone’s letter of 23 October 2003 in response to the Director’s Section 26 Notice of 9 October 2003.
56. Irrespective of the parties' arguments regarding the use to which the SIMs supplied to Floe were going to be put, the Director has not been provided with any written evidence indicating that Vodafone has at any time authorised Floe in writing to provide Public GSM Gateway services. Although it is possible that at the time of service provision to Floe certain Vodafone personnel may have been aware that Floe was using SIMs supplied by Vodafone in GSM Gateway equipment, this does not constitute a formal written arrangement between the parties sufficient to ‘legalise’ the operation of a Public GSM Gateway.

57. Therefore, as the services that Floe was providing were illegal, Vodafone had an objective reason to refuse to supply Floe.

Vodafone's offer to enter into a standard interconnect arrangement with Floe

58. Floe has not complained to the Director that Vodafone has infringed the Act by refusing to enter into an arrangement with Floe that would legalise Floe’s Public GSM Gateway Services. However, the Director notes that although Vodafone disconnected SIMs provided to Floe, Vodafone subsequently offered to enter into interconnect arrangements with Floe that would have enabled Floe to continue providing telecommunications services to end-users. Further to Floe’s SIMs being disconnected (as notified in a letter from Vodafone to Floe of 3 April 2003) Vodafone offered to enter into an interconnection arrangement with Floe under Vodafone’s standard terms. Such an arrangement would have enabled Floe to purchase mobile call termination at Vodafone’s wholesale rates.

59. The Director required Floe to provide any correspondence which it submitted to Vodafone following Vodafone’s offer to enter into a standard interconnect arrangement with Floe. In response, Floe stated that two days after Vodafone’s offer to enter into interconnection arrangements, Vodafone demanded payment of outstanding amounts which Vodafone considered were owed to it by Floe. As a result, Floe was not in a position to enter into an interconnection arrangement with Vodafone. Floe also stated that it would not have sought to enter into such a contract, as it considered it already had a valid contract with Vodafone which amounted to a superior deal.

60. Irrespective of Floe’s argument regarding why it did not enter into interconnect arrangements with Vodafone, it is clear that this offer to interconnect was not taken up. It appears to the Director that a direct interconnection link would have constituted a viable legal alternative to Floe. Such a conclusion is backed up by correspondence between Floe’s legal advisers and Vodafone that took place following the disconnection of Floe’s services. In this correspondence, it was stated that

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39 The Director’s Section 26 Notice of 19 September 2003.
40 Floe’s letter dated 25 September 2003 in response to the Director’s Section 26 Notice of 19 September 2003.
“Floe has sought to engage with Vodafone with a view to reaching mutually acceptable solutions for the resumption of services. This includes proposals whereby alternatively a direct connection be put in place from Vodafone to Floe”.

61. Vodafone’s offer of a direct interconnection link would have allowed Floe to terminate traffic on Vodafone’s networks at a wholesale rate set by the Director following a reference to the Competition Commission42. The Director is currently investigating43 whether Vodafone, O2, Orange & T-Mobile are engaging in a margin squeeze in the provision of fixed to mobile calls for retail business customers. This investigation is considering whether these mobile operators are distorting competition by offering business customers lower prices for non-PSTN44 calls to mobile than the wholesale price that fixed operators are charged for mobile call termination. Floe has not alleged that the standard interconnection rates offered by Vodafone are anti-competitive but the Director notes that Floe is free to raise any concerns that Floe may have regarding Vodafone’s interconnection terms in the context of the margin squeeze investigation.

Has Vodafone discriminated between Floe and other GSM Gateway Operators?

62. Floe’s complaint to the Director also alleged that Vodafone’s actions were discriminatory, in that Vodafone had suspended service provision for certain GSM Gateway operators, but not others. Floe named three other companies allegedly providing Public GSM Gateway services.

63. Vodafone stated that it does not have any contractual arrangements in place with Public GSM Gateway operators which would authorise these operators to provide Public GSM Gateway services under the terms of Vodafone’s WTA licence45.

64. Vodafone has confirmed to the Director46 that it does currently allow some of its customers to operate Private GSM Gateway services. However, the Director does not consider that Vodafone’s actions in differentiating between Public and Private GSM Gateways are sufficient to infringe the Act. The fact that Public GSM Gateway services are unlawful unless expressly authorised by Vodafone constitutes an objective justification for such differential treatment.

65. The Director has also considered whether Vodafone has been acting in a discriminatory fashion in its treatment of Public GSM Gateway operators, irrespective of the fact that these operators have not been authorised by Vodafone. On the basis of the information provided to the Director47, the Director is satisfied that this is not the case.

42 http://www.ofTEL.gov.uk/publications/mobile/2003/ctm_index_0103.htm
43 http://www.ofTEL.gov.uk/publications/comp_bull/cases/cw_615.htm
44 Non-PSTN calls refers to the delivery of calls via the integration of a company’s fixed line and mobile infrastructures, by directly connecting the company’s PBX to the mobile network.
45 Vodafone’s letter of 16 September 2003 in response to the Director’s Section 26 Notice of 9 September 2003.
46 Vodafone’s letter of 16 September 2003 in response to the Director’s Section 26 Notice of 9 September 2003.
66. Vodafone has told the Director that it establishes whether Vodafone SIMs are being used for Public GSM Gateway services by monitoring network usage. Vodafone has stated that if there is network congestion, which might give rise to a suspicion that Public GSM Gateways are being used, the use of particular SIMs will be analysed more closely. However, in the absence of such network congestion, it is feasible that the use of Public GSM Gateways may go undetected.

67. In addition, Vodafone has confirmed to the Director that in all cases where it has identified that a company is providing Public GSM Gateway services, it has taken action against that company. Vodafone has stated\(^48\) that:

“There may be third parties who have contracts with Vodafone and then under the auspices of those contracts are operating public GSM Gateways; however, this is not with Vodafone’s consent. Indeed, once Vodafone has been able to identify possible public GSM gateways operators, Vodafone has contacted the relevant Vodafone Service Provider or directly connected customer and asked them to explain the call pattern figures (or congestion) that Vodafone has detected which indicate that a public GSM Gateway may be in operation. If it transpires that a public GSM Gateway is or is likely to be, in operation, Vodafone has taken steps to disconnect and/or suspend the SIM cards which are being used.”

68. During the course of the investigation the Director required Vodafone to provide details of any action it had taken any action against the companies named by Floe (companies A, B and C). In response\(^49\), Vodafone stated that it had no dealings with Companies B and C and that that SIMs used by company A had been disconnected. The Director also required Vodafone to provide details of its actions towards other companies that Vodafone suspected of providing Public GSM Gateway services. In response, Vodafone submitted details of correspondence between Vodafone and 15 other companies in which Vodafone stated that unless the company in question demonstrated to Vodafone that SIMs were being used for legal purposes only, Vodafone would suspend the service of that company\(^50\).

69. This evidence does not indicate that Vodafone has knowingly permitted Public GSM Gateway services to be provided by some Public GSM Gateway operators and not others. Therefore, on the basis of the information available, the Director is satisfied that Vodafone has not been acting in a discriminatory fashion.

\(^48\) Vodafone’s letter of 16 September 2003 in response to the Director’s Section 26 Notice of 9 September.

\(^49\) Vodafone’s letter to the Director of 29 September 2003 in response to the Director’s Section 26 Notice of 19 September 2003.

\(^50\) Vodafone’s letter to the Director of 29 September 2003 in response to the Director’s Section 26 Notice of 19 September 2003.
Chapter 5

Conclusion: Non-Infringement

70. On 17 October 2003 the Director advised Floe that he had exercised his discretion not to grant interim measures. This was because he had yet to uncover any evidence which suggested that there had been a breach of the Act.

71. The Director has now completed his investigation. On the basis of the information available to him, the Director has concluded that:

- evidence submitted demonstrates that Floe has not been authorised by Vodafone, in accordance with either the terms set out in Condition 8 of Vodafone’s WTA licence, or the Government announcement of 18 July 2003, to provide Public GSM Gateways;

- Vodafone had an objective reason to refuse to supply Floe’s Public GSM Gateway services; and

- the Director does not consider that Vodafone is acting in a discriminatory manner in its treatment of Public GSM Gateway operators.

72. For these reasons, the Director does not consider that Vodafone’s disconnection of Floe’s services constitutes an infringement of the Act.