

Daniel Mahony

Do you have any comments on the proposed statutory instrument set out in this notice?

I welcome the belated acknowledgement from Ofcom that the Exemption Regulations 2003 are in breach of EU law. I cannot understand, however, why a consultation exercise was thought to be necessary to remedy what is a very clear defect in the transposition of the Authorisation Directive into domestic law. The process for requiring a licence to use wireless telegraphy equipment is already set out in existing legislation. Regrettably that process has not been followed, and this consultation exercise makes no attempt to remedy that.

Section 4.2 of the Exemption Regulations 2003 ought to have been revoked following the introduction of section 1AA to the Wireless Telegraphy Act 1949. That section required Ofcom to exempt from the need for a licence any relevant equipment that did not cause undue interference. No other restrictions of use were indicated in the Act. From the moment of the introduction of section 1AA into the WTA, Ofcom has been in breach of its statutory duty to enact appropriate legislation under the Wireless Telegraphy Act 1949, later carried into the WTA 2006. The additions made in 2011 to the list of restrictions that required a licence under the WTA still do not permit Ofcom to prohibit commercial services using GSM Gateways.

I note that the historical fluidity of the definitions of GSM Gateway use is continued in this consultation exercise. The Ofcom consultation in March 2005 defined three types of GSM Gateway use for the first time. That was followed shortly afterwards in June 2005 where the definitions were further refined. However, the responses to that consultation, while published, were not considered as the consultation exercise was placed in a permanent state of suspense and effectively shut down.

The proposed changes make yet further amendments to the definition of use as 'body' is now being used in place of Ofcom's earlier definitions of 'user' and the definitions agreed in the various hearings of Recall of a 'customer'. Such changes, while subtle, are a matter of concern as they will undoubtedly create legal argument. Any legal argument will merely confirm publicly that the issues regarding the use of GSM Gateways are far from settled, and that Ofcom will have lost, yet again, the opportunity to settle the matter properly.

On 12th March 2010, Ofcom commenced a consultation exercise on the subject of licence exemption under the WTA 2006. In its consultation document, it specifies that it is "required to exempt [from the need for a licence] the establishment, installation and use of a station or apparatus if it is not likely to involve undue interference." (para. 1.2). It further notes that "Under section 8(4) of the WT Act, we must make regulations to exempt equipment if its installation or use is unlikely to involve undue interference to other users." (para. 2.2).

Significantly, since 2006, domestic courts have consistently found that no GSM Gateways cause harmful, or undue, interference. As a result of these findings, there can be no justification in law to restrict the use of GSM Gateways according to commercial definitions.

On 18th March 2010, the UK Government was notified by the European Commission that the Exemption Regulations 2003 were not compatible with Article 5 of the Authorisation Directive, and that it proposed to commence infringement proceedings against the UK for misapplication of EU law. These proposed changes to the Exemption Regulations 2003 still do not comply with the findings of the European Commission in 2010. Any commercial restriction on the use of relevant equipment cannot, therefore, stand.

If the justification used by DCMS for banning gateways used by multiple ends users is for reasons of public security, Ofcom must firstly exempt all relevant apparatus and the Secretary of State should then issue a section 5 direction under the Communications Act 2003 to require a licence on the grounds of public security. That would then resolve any ambiguity in this matter and would be the right and proper process as prescribed in law. It is simply not good enough to argue that one can 'read into the WTA' the terms of section 5 of the CA 2003 when no direction has been given. English law is based on clear and precise legislation, and not on inference or implication. The fact that the issue of GSM Gateways has been the subject of legal challenge since 2003 is proof that the current regulations are arcane and unintelligible. Ofcom has a duty to resolve this matter properly, and this consultation exercise falls far short of its obligations.