Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title: Notice of Ofcom's proposal to make regulations amending the Wireless Telegraphy (Exemption) Regulations 2003

To (Ofcom contact): Cliff Mason

Name of respondent: Jury O'Shea LLP

Representing (self or organisation/s): Client

Address (if not received by email):

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Nothing	☑	Name/contact details/job title	☐
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RESPONSE TO OFCOM CONSULTATION
NOTICE OF OFCOM'S PROPOSAL TO MAKE REGULATIONS AMENDING THE WIRELESS TELEGRAPHY (EXEMPTION) REGULATIONS 2003

This is a representation in response to the Ofcom consultation concerning amendments to the Wireless Telegraphy (Exemption) Regulations 2003 and specifically to the wording by which Commercial Single-Use Gateways ("COSUGs") could be exempted from the need for a specific licence.

These representations are made on behalf of a client of Jury O'Shea LLP who was involved in the Gateway industry in respect of the legal aspects of the proposed change.

The Statutory Framework

As the proposal document of 6 November 2015 states the primary piece of legislation here is Section 8 of the Wireless Telegraphy Act 2006 which effectively was first enacted in Section 1AA of the Wireless Telegraphy Act 1949 by the Communications Act 2003.

That section was then amended pursuant to the amendments to the Framework Directives implementing regulations in the United Kingdom as from November 2011. In particular, Section 8(4) is of importance together with Section 8(5).

The section states that if Ofcom are satisfied that the conditions in sub-section 5 are satisfied as respects the use of stations or apparatus they must [emphasis added] make regulations under sub-section (3) exempting the establishment and use of the relevant apparatus. There is no choice for Ofcom if, subject to a reasonableness test, they should be satisfied that what is set out in sub-section 5 is met. Ofcom must make regulations so no specific licence is required.

The principle condition for not making such an order is that the apparatus involves undue interference with Wireless Telegraphy. A series of legal decisions going back to that in the *Floe* litigation in the CAT in 2006 and following through the *Recall* litigation both at first instance and in the Court of Appeal means that it is now impossible for anybody to argue that whatever it is that gateways do involves undue interference.

Looking through the list of other matters that have, at various times, been considered, there is whether or not what happens leads to an inefficient use of the spectrum but *Recall (*at first instance) decided it does not so the only matter in sub-section (5) that has not had any judicial consideration is whether gateways cause an adverse effect on technical quality of service. Our client has been advised that, from a technical perspective, whatever it is that gateways do in causing potential congestion does not constitute something which has an adverse effect on technical quality of service and, in any event, whatever it does not warrant proportionally a ban to achieve any desired result. In other words, it is difficult to see the adverse effect on technical quality provision would cause any gateway not to be permitted.

The restrictions on Ofcom's actions set out in sub-sections 4 and 5 relate both to Commercial Multi-Use Gateways ("COMUGs") and COSUGs. There is no differentiation made.

Representations

Our client wishes very much that COSUGs should be permitted to operate without the need for a specific licence and believes that Ofcom is under a duty to ensure that. That is to say, it is under a positive duty to ensure it not a permissive power that allows it to do so.

It also seems to our client that under English law (in fact under UK law) COMUGs must also be permitted to operate without an individual licence. That appears to be a right given to people pursuant to EU law as enacted in UK law. We can establish this because the explanatory notes relating to the Communications Act 2003 make it clear that the original provisions to which this related were the embodiment of a part of Article 5 of the Authorisation Directive.

It is, of course, the case that the UK Courts in the *Recall* action at first instance decided that it was lawful as a matter of EU law for security reasons to effectively ban COMUGs. That is to say the Court was persuaded that under European law security considerations could be invoked to restrict the way in which Article 5 worked. As the Government has told successive Courts, however, the way in which that is done (as they made very clear to the European Commission) is through the mechanism of a direction under Section 5 of the Communications Act 2003.

In fact, in the United Kingdom, no such direction in respect of any gateways has ever been made.

It seems to my client the correct procedure in the circumstances would be for Ofcom also to formally do its duty and consult on liberalising COMUGs. There is no reason in law why they should be treated differently from COSUGs except and until the Government serve a Section 5 direction, although there may then be questions as to what that direction can be justified in requiring.

Generally Ofcom is to be applauded in finally getting to grips with doing its duty under Section 8 of the Wireless Telegraphy Act 2006 even though that duty is not acknowledged in the consultation document. It has to get on and do what it suggests for the purposes of compliance with European law though as we say above that might not be the whole story.

What is not so clear, however, is why the wording in the crucial section of the proposed new order is as it is. The crucial wording is set out on page 13 of the consultation document and the wording is:

> "*...by way of business to more than one person within a single body.*"

We also consider that that is not sufficiently wide when you take into the account the definitions that have been used when looking as far back as 2004 and the first decision in the *Floe* case when the distinction between COMUGs and COSUGs was first raised.

In 2004 the late Marion Simmons QC was, in paragraph 222 of the first *Floe* Judgment looking at a "*GSM Gateway [is] dedicated to the use of a single customer...*" . This is rather different from more than one person within a single body. In 2013 the High Court in *Recall* looked at calls from one user although from many individuals comprising the customer's workforce. It seems to be that the preferable concept here is that of a single customer where the relevant Electronic Communications Service is provided by means of a business to a single entity by the person providing it. Otherwise there would seem to be the danger of narrowing the concept at a risk of litigation over the meaning of "within a single body". For example, although a shareholder might be said to be part of the body of a company it is more difficult to say that an employee is. A telephone call emanating from a contract doctor in an NHS Trust might not be said to be emanating from the Trust but it is coming via services being provided to a single customer.

In terms of drafting we strongly feel that going back to basics in this would be useful and those basics have always required a reference to a single customer and multiple end-users. The concept of customers and end-users is not unfamiliar in the General Conditions and is a pertinent test here.

Conclusion

In short:

- Our client applauds Ofcom for entering into the process, if however late, given the duty has existed on it since 2003, to liberalise COSUGs; but
- it is not enough and the attempt by Ofcom should have been to do its duty under the law to liberalise both COMUGs and COSUGs leaving it to the Government to serve a Section 5 direction.