



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

	Consultation
Publication date:	6 November 2015
Closing date for response	7 December 2015



## About this document

This document invites comments on Ofcom's proposal to amend the Wireless Telegraphy (Exemption) Regulations 2003 (S.I. 2003/74). Ofcom is proposing to make regulations, the Wireless Telegraphy (Exemption) (Amendment) Regulation 2015.

The proposed amendments are to give legislative effect to the decision of the Court in *Recall Support Services and Others v Secretary of State for Culture Media and Sport* (2013, EWHC 3091 (Ch)), confirmed by the Court of Appeal (2014 EWCA Civ 1370) in regards to commercial single user gateways.

A gateway is a device incorporating one or more SIM cards created and issued by a mobile network operator (MNO), which allows the device on which the SIM card is installed, to originate calls on that MNO's network. As a result, calls from fixed lines to mobile networks are treated by the recipient's network as if they were made by a mobile phone using that SIM card in the gateway, rather than made from the fixed line phone. This means the cost of the call is reduced significantly.

The closing date for responses is 7 December 2015.

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## Section 1

# Notice

### Notice of proposals

- 1.1 This notice is given in accordance with section 122(4) and (5) of the Wireless Telegraphy Act 2006 (the “2006 Act”) and covers a proposal to make a statutory instrument.
- 1.2 This proposed statutory instrument sets out how we intend to amend the Wireless Telegraphy (Exemption) Regulations 2003 (as amended) (“the Principal Regulations”) in respect of the establishment, installation and use of prescribed apparatus.

### Proposed regulations

- 1.3 Ofcom has the power under sections 8(3) and 122(7) of the 2006 Act to make regulations to provide for such exemptions and exceptions as it thinks fit in respect of wireless telegraphy licences and to make different provision for different cases.
- 1.4 Ofcom proposes to make regulations amending the exception to the exemption provided for in the Principal Regulations.
- 1.5 A draft of the proposed regulations ((‘the Wireless Telegraphy (Exemption) (Amendment) Regulations 2015’) is set out at Annex 5 and their general effect is set out at Section 2 of this document.

### Comments or representations

- 1.6 Comments or representations with respect to the proposed regulations are invited by **7 December 2015**.<sup>1</sup> Comments should be sent to:

Cliff Mason  
Ofcom  
Riverside House  
2a Southwark Bridge Road  
London SE1 9HA

email:[cliff.mason@ofcom.org.uk](mailto:cliff.mason@ofcom.org.uk)

Tel: 020 7783 4353

Following completion of the consultation process, Ofcom intends to make the final regulations as soon as practicable.

- 1.7 Hard copies of this notice and the proposed regulations can be obtained from the address above. Electronic copies are also available and this notice has been placed on Ofcom’s website <http://www.ofcom.org.uk>.

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<sup>1</sup> Under s122(6) of the Wireless Telegraphy Act 2006, the time specified must be at least one month from publication of the notice.

## Section 2

# General effect of the proposed Wireless Telegraphy (Exemption) (Amendment) Regulations 2015

### The legislative framework

- 2.1 Under section 8 (1) of the Wireless Telegraphy Act 2006 (the “**2006 Act**”), it is unlawful to establish or use a wireless telegraphy station or install or use wireless telegraphy apparatus except under and in accordance with a wireless telegraphy licence granted under the 2006 Act.
- 2.2 Under section 8 (3) of that Act, Ofcom may make regulations exempting from the licensing requirements under section 8 (1) the establishment, installation or use of wireless telegraphy stations or wireless telegraphy apparatus of such classes or description as may be specified in the regulations, either absolutely or subject to such terms, provisions and limitations as may be specified.
- 2.3 When making such regulations, section 122 (7) of the 2006 Act enables Ofcom to make such exemptions and exceptions as it thinks fit and to make incidental, supplemental, consequential and transitional provisions.
- 2.4 Regulation 4 (1) of the Principal Regulations provides for an exemption in relation to the establishment, installation and use of ‘relevant apparatus’, being the prescribed apparatus defined in Schedules 3 to 10 of those Regulations. This includes at paragraph 3 of Part III of Schedule 3: cellular radiotelephone systems for use in certain specified services on relevant frequency bands.
- 2.5 A mobile Gateway (“**Gateway**”)<sup>2</sup> is a device incorporating one or more SIM cards created and issued by a mobile network operator (MNO), which allows the device on which the SIM card is installed, to originate calls on that MNO’s network. As a result, calls from fixed lines to mobile networks are treated by the recipient’s network as if they were made by a mobile phone using that SIM card in the gateway, rather than made from the fixed line phone. This means the cost of the call is reduced significantly.
- 2.6 Gateways may be used in different ways:
  - a) by a single customer to use in its own business (‘a self-use gateway’); or
  - b) where electronic communications services are provided by way of a business to:
    - (i) a single end user so that all the calls diverted through the gateway come from one user - a commercial single user gateway (a ‘COSUG’); or
    - (ii) multiple end users so that the calls diverted through the Gateway come from more than one end user - a Commercial Multi-User Gateway (a ‘COMUG’).

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<sup>2</sup> Mobile Gateways, also known as SIM Gateways or GSM Gateways. Since the first use of these with GSM networks, additional spectrum and technologies have come into use that might be accessed via a Gateway.

- 2.7 Regulation 4 (2) of the Principal Regulations provides an exception to the exemption set out in Regulation 4 (1): namely, that the exemption shall not apply to relevant apparatus which is established, installed or used to provide or to be capable of providing a wireless telegraphy link between electronic communications apparatus or an electronic communications network and other such apparatus or system, by means of which an electronic communications service is provided by way of business to another person.
- 2.8 The effect of this exception, as provided for in the Principal Regulations, is that Gateways are exempted from the obligation to obtain a licence but only to the extent set out in regulation 4: so there is a restriction in those Regulations on the use of Gateways by way of business to another person.<sup>3</sup> As such this restriction applies to both COSUGs and COMUGs.

## Recent Developments

- 2.9 Since the Principal Regulations came into force, the grounds, in particular, the public security grounds on which Gateways fall within the exception in regulation 4 (2) of those Regulations (above) has been the subject of legal challenge.
- 2.10 In *Recall Support Services Limited and Others v Secretary of State for Culture Media and Sport*, the Court of Appeal<sup>4</sup>, cited as a 'major issue' which had been before the Court at first instance: "...whether the restriction could be justified on the grounds of public security". It explained:

"Since the time when the existence of GSM (Global System for Mobile Communications) Gateways first came to light in 2002, the Home Office has maintained that the exemption of commercial operators of such gateways from the licensing regime would be seriously detrimental to public security. When a call is routed through a GSM Gateway, the caller line identification of the party originating the call is replaced by that of the SIM card in the GSM Gateway, so that the identity of the originating caller is masked. This is said to give rise to serious public security concerns for law enforcement agencies in relation to the investigation and prevention of terrorism and serious crime".

- 2.11 However, as regards the legality of the restriction (described as the 'Commercial Use Restriction'), the Lower Court<sup>5</sup> concluded that:
- the legality of the decision to maintain in force the Commercial Use Restriction for GSM Gateways must be assessed against the provisions of the Authorisation Directive<sup>6</sup>...;
  - in seeking to justify the Commercial Use Restriction the United Kingdom may, as a matter of EU law, rely on arguments relating to public security, the need to avoid

<sup>3</sup>This use refers to a person providing a Gateway to another person as part of a service provided under a commercial arrangement to that other person; (*Recall Support case Court of Appeal decision [2014] EWCA Civ 1370*)

<sup>4</sup>*Recall Support Services Limited and Others v Secretary of State for Culture Media and Sport 2014 EWCA Civ 1370*).

<sup>5</sup>*Recall Support Services Ltd and Others v Secretary of State for Culture Media and Sport [2013] EWHC 3091 (Ch)*

<sup>6</sup>The Court concluded that the RTTE Directive was not relevant to the question of legality



harmful interference and the need to ensure the efficient use of spectrum (the Court did not decide whether, as a matter of domestic law, DCMS could rely on arguments relating to the efficient use of spectrum as a justification for the Commercial Use Restriction);

- on the facts, DCMS can rely on public security concerns to justify imposing the Commercial Use Restriction for COMUGs.
- the restriction is however not justified in so far as it applies to COSUGs but not to Self Use GSM Gateways. DCMS has not shown that the Commercial Use Restriction is justified either on the basis of the need to avoid harmful interference or of the need to ensure the efficient use of spectrum;
- the Commercial Use Restriction therefore constitutes an infringement of EU law only in so far as to apply to COSUGs.

2.12 Accordingly, the restriction in the Principal Regulations, insofar as it applied to COSUGs (only) was found to be in breach of the Authorisation Directive and constituted an infringement of EU law. This was confirmed on appeal.

### **The general effect of the proposed regulations**

2.13 The purpose of the 2015 Regulations is to amend the legislation to give effect to the Court's decision (above).

2.14 In order to maintain the restriction on the use of COMUGs, but lift the restriction on the use of COSUGs and do so, in a way which makes clear that the restriction does not apply to the commercial use of a gateway by individual users ('more than one person') within a *single* business entity the proposed Regulations introduce, in Regulation 4 (2) (b), an additional exception to the exemption. This is set out in full in paragraph 5 of that Regulation as '...the situation where relevant apparatus is established, installed or used to provide an electronic communications service by way of business to more than one person within a single body'.

2.15 Since the sole purpose of this proposed amendment is to give effect to the Court's decision and this change is not the result of a change in policy by Ofcom, there has been no previous policy consultation in this case.

2.16 Therefore we now give notice of our proposal to make new regulations amending the Wireless Telegraphy (Exemption) Regulations 2003 (as amended) to give effect to the Court's decision.

2.17 We seek comments on the proposed regulations, a draft of which is set out in Annex 5 to this Notice.

### **Extent of application of the proposed regulations (reg. 1)**

2.18 The Proposed Regulations will apply in the United Kingdom and will extend to the Channel Islands and to the Isle of Man.

### **Entry into force of the proposed regulations (reg. 1)**

2.19 The Proposed Regulations will come into force as soon as practical after making the final regulations. The final regulations will be made after Ofcom has concluded its

consultation process on its proposal to give effect to the Court's decision and made a final decision as to the nature of the amendment to be made to the 2003 Regulations.

## Annex 1

# How to respond

- A1.1 Ofcom invites written views and comments on the issues raised in this document, to be made **by 5pm on Monday 7 December 2015**.
- A1.2 Ofcom strongly prefers to receive responses using the online web form at <https://stakeholders.ofcom.org.uk/consultations/gsm-gateway-2015/howtorespond/form> as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 3), to indicate whether or not there are confidentiality issues. This response coversheet is incorporated into the online web form questionnaire.
- A1.3 For larger consultation responses - particularly those with supporting charts, tables or other data - please email: [cliff.mason@ofcom.org.uk](mailto:cliff.mason@ofcom.org.uk) attaching your response in Microsoft Word format, together with a consultation response coversheet.
- A1.4 Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.
- Cliff Mason  
Ofcom  
Riverside House  
2A Southwark Bridge Road  
London SE1 9HA
- A1.5 Note that we do not need a hard copy in addition to an electronic version. Ofcom will acknowledge receipt of responses if they are submitted using the online web form but not otherwise.
- A1.6 It would be helpful if your response could include a direct answer to the question asked in this document, which is highlighted at Annex 4. It would also help if you can explain why you hold your views and how Ofcom's proposals would impact on you.

## Further information

- A1.7 If you want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact Cliff Mason on 020 7783 4353.

## Confidentiality

- A1.8 We believe it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, [www.ofcom.org.uk](http://www.ofcom.org.uk), ideally on receipt. If you think your response should be kept confidential, can you please specify what part or whether all of your response should be kept confidential, and specify why. Please also place such parts in a separate annex.
- A1.9 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and will try to respect this. But sometimes we will need to publish

all responses, including those that are marked as confidential, in order to meet legal obligations.

- A1.10 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's approach on intellectual property rights is explained further on its website at <http://www.ofcom.org.uk/about/accoun/disclaimer/>

## **Ofcom's consultation processes**

- A1.11 Ofcom seeks to ensure that responding to a consultation is easy as possible. For more information please see our consultation principles in Annex 2
- A1.12 If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at [consult@ofcom.org.uk](mailto:consult@ofcom.org.uk). We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, who are less likely to give their opinions through a formal consultation.
- A1.13 If you would like to discuss these issues or Ofcom's consultation processes more generally you can alternatively contact Graham Howell, Secretary to the Corporation, who is Ofcom's consultation champion:

Graham Howell  
Ofcom  
Riverside House  
2A Southwark Bridge Road  
London SE1 9HA

Tel: 020 79823601

Email [Graham.Howell@ofcom.org.uk](mailto:Graham.Howell@ofcom.org.uk)

## Annex 2

# Ofcom's consultation principles

- A2.1 Ofcom has published the following seven principles that it will follow for each public written consultation:

### Before the consultation

- A2.2 Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

### During the consultation

- A2.3 We will be clear about who we are consulting, why, on what questions and for how long.
- A2.4 We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened version for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.
- A2.5 We will normally allow ten weeks for responses to consultations on issues of general interest.
- A2.6 There will be a person within Ofcom who will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organizations interested in the outcome of our decisions. This individual (who we call the consultation champion) will also be the main person to contact with views on the way we run our consultations.
- A2.7 If we are not able to follow one of these principles, we will explain why. This may be because a particular issue is urgent. If we need to reduce the amount of time we have set aside for a consultation, we will let those concerned know beforehand that this is a 'red flag consultation' which needs their urgent attention.

### After the consultation

- A2.8 We will look at each response carefully and with an open mind. We will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

## Annex 3

# Consultation response cover sheet

- A3.1 In the interests of transparency and good regulatory practice, we will publish all consultation responses in full on our website, [www.ofcom.org.uk](http://www.ofcom.org.uk).
- A3.2 We have produced a coversheet for responses (see below) and would be very grateful if you could send one with your response (this is incorporated into the online web form if you respond in this way). This will speed up our processing of responses, and help to maintain confidentiality where appropriate.
- A3.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their coversheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A3.4 We strongly prefer to receive responses via the online web form which incorporates the coversheet. If you are responding via email, post or fax you can download an electronic copy of this coversheet in Word or RTF format from the 'Consultations' section of our website at [www.ofcom.org.uk/consult/](http://www.ofcom.org.uk/consult/).
- A3.5 Please put any parts of your response you consider should be kept confidential in a separate annex to your response and include your reasons why this part of your response should not be published. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only, so that we don't have to edit your response.

## Cover sheet for response to an Ofcom consultation

### BASIC DETAILS

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

### CONFIDENTIALITY

Please tick below what part of your response you consider is confidential, giving your reasons why

Nothing

Name/contact details/job title

Whole response

Organisation

Part of the response

If there is no separate annex, which parts?

If you want part of your response, your name or your organisation not to be published, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

### DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response that Ofcom can publish. However, in supplying this response, I understand that Ofcom may need to publish all responses, including those which are marked as confidential, in order to meet legal obligations. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

Name

Signed (if hard copy)

## Annex 4

# Consultation question

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



## Annex 5

# Draft regulations

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### STATUTORY INSTRUMENTS

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**2015 No. 0000**

## **ELECTRONIC COMMUNICATIONS**

### The Wireless Telegraphy Exemption (Amendment) Regulations 2015

*Made* - - - - - \*\*\*

*Coming into force* - - - - - \*\*\*

The Office of Communications (“OFCOM”) make the following Regulations in exercise of the powers conferred by sections 8(3) and 122(7) of the Wireless Telegraphy Act 2006<sup>(1)</sup> (the “Act”).

Before making these Regulations, OFCOM have given notice of their proposal to do so in accordance with section 122(4)(a) of the Act, published notice of their proposal in accordance with section 122(4)(b) of the Act, and have considered the representations made to them before the time specified in the notice in accordance with section 122(4)(c) of the Act.

#### **Citation and commencement**

1. These Regulations may be cited as the Wireless Telegraphy (Exemption) (Amendment) Regulations 2015 and shall come into force on [0000].

#### **Amendment of the Wireless Telegraphy (Exemption) Regulations 2003**

2. The Wireless Telegraphy (Exemption) Regulations 2003<sup>(2)</sup> (the “principal Regulations”) shall be amended in accordance with the following Regulations.

#### **Amendment of regulation 3**

3. In regulation 3(1) of the principal Regulations, insert the following definition between the definitions of ‘apparatus’ and ‘eirp’—

“‘body’ means a body of persons whether incorporated or not and includes a partnership;”.

#### **Amendment of regulation 4**

4.—(1) For regulation 4(2) of the principal Regulations substitute—

“(2) With the exception of—

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<sup>(1)</sup> 2006 c. 36.

<sup>(2)</sup> S.I. 2003/74 amended by S.I. 2003/2155, 2005/3481, 2006/2994, 2008/236, 2008/2426, 2010/2512, 2011/2950, 2013/1254.

- (a) relevant apparatus operating in the frequency bands specified in paragraph (3); and
- (b) the situation set out in paragraph (5),

the exemption in paragraph (1) shall not apply to relevant apparatus which is established, installed or used to provide or to be capable of providing a wireless telegraphy link between electronic communications apparatus or an electronic communications network and other such apparatus or system by means of which an electronic communications service is provided by way of business to another person.”

(2) After regulation 4(4) of the principal Regulations, insert the following paragraph—

“(5) The situation mentioned in paragraph (2)(b) is a situation where relevant apparatus is established, installed or used to provide an electronic communications service by way of business to more than one person within a single body.”.

*Name*