



Decision by Ofcom to make
regulations amending the Wireless
Telegraphy (Exemption) Regulations
2003

Statement

Publication date:

8 April 2016

About this document

This document states that after consultation Ofcom has amended the Wireless Telegraphy (Exemption) Regulations 2003 (S.I. 2003/74) by making the Wireless Telegraphy (Exemption) (Amendment) Regulations 2016.

The amendment is 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 may be reduced significantly.

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Section 1

Executive summary

- 1.1 Following the notice published by Ofcom on 6 November 2015¹, this document confirms that we have decided to make the Wireless Telegraphy (Exemption) (Amendment) Regulations 2016 (the “Amendment Regulations”)².
- 1.2 The Amendment Regulations amend the Wireless Telegraphy (Exemption) Regulations 2003 (as amended) (the “Principal Regulations”) in respect of the establishment, installation and use of prescribed apparatus.
- 1.3 Before making regulations under section 12 of the Wireless Telegraphy Act 2006 (the “WT Act”), Ofcom is required by section 122(4) of the WT Act to give notice of our proposal to do so. Under section 122(5), the notice must: a) state that Ofcom proposes to make the regulations in question; b) set out the general effect of those regulations; c) specify an address from which a copy of the proposed regulations may be obtained; and d) specify a time before which any representations with respect to the proposal must be made to Ofcom. That time must be at least one month beginning with the day after that on which the notice is given or published.
- 1.4 We received ten non-confidential and one confidential response to the Notice. In accordance with section 122(4)(c) of the WT Act, we have considered the comments raised. After doing so, and for the reasons set out in this document, we have decided to adopt the Amendment Regulations as proposed but amending the definition of ‘body’ in paragraph 3. Copies of the Regulations can be obtained using the link below.³
- 1.5 The Amendment Regulations will enter into force on 28 April 2016. A copy in draft form is annexed to this Statement for indicative purposes. The government’s *legislation.gov.uk* website is the only authorised source for published statutory instruments.

¹ <http://stakeholders.ofcom.org.uk/consultations/gsm-gateway-2015/>

² In the Notice these regulations were referenced as “the Wireless Telegraphy (Exemption) (Amendment) Regulations 2015”.

³ Online version of the Amendment Regulations can be found at <http://www.legislation.gov.uk/>

Section 2

Background and responses

Background

Legal Framework

- 2.1 Under section 8 (1) of the WT 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 WT 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 WT 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")⁴ 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 may be 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').

⁴ 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.⁵ 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 Appeal⁶, 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 Court⁷ 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 Directive⁸....;

⁵ 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*)

⁶ *Recall Support Services Limited and Others v Secretary of State for Culture Media and Sport 2014 EWCA Civ 1370*.

⁷ *Recall Support Services Ltd and Others v Secretary of State for Culture Media and Sport [2013] EWHC 3091 (Ch)*

⁸ The Court concluded that the RTTE Directive was not relevant to the question of legality

- 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 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.

Responses to the Notice

2.13 Ofcom received 11 responses to the consultation; 1 of these was confidential.

2.14 A number of the responses discussed matters beyond the remit of the consultation such as the authorisation of multi-user gateways COMUGs. Accordingly, it is not appropriate to discuss those in this statement, which relates only to the consultation question concerning COSUGs. The purpose of the Amendment Regulations is to amend the legislation to give effect to the Court's decision that single use gateways that are commercially provided should be authorised on a licence exempt basis (in line with self- use gateways).

2.15 None of the responses argued against amending the regulations for this purpose, although a number of responses commented on the wording proposed in regulation 4 (5). Some respondents felt that the text proposed needed to be expanded to more closely define or limit the types of use permitted; others felt that the proposed wording was already limiting while others felt the word 'body' was not an appropriate term to use or if used, that it should be more explicitly defined; and that a definition should be given for a COSUG.

2.16 Having considered all the responses, we have decided that since the existing regulations do not describe 'gateways' (nor any device) but instead refer to 'relevant apparatus', it would not be appropriate to introduce a separate definition for a COSUG into the Amendment Regulations or seek to define more closely the type of use permitted. We also consider that 'body' is an appropriate term to use in the Amendment Regulations since it is a recognised legal term commonly used in legislation. However, in light of the comments received, we have slightly amended the definition of 'body' so it is now defined as 'a body corporate or an unincorporated association' (see para 3 of the Amendment Regulations).

Section 3

General effect of the Amendment Regulations

- 3.1 The purpose of the Amendment Regulations is to amend the legislation to give effect to the Court's decision.
- 3.2 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 Amendment Regulations introduced, 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'.
- 3.3 Since the sole purpose of this 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.

Extent of application of the Amendment Regulations

- 3.4 The Amendment 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 Amendment Regulations

- 3.5 The Amendment Regulations will come into force on 28 April 2016.

Annex 1

Responses

Chief Fire Officers Association

GCI

Mr Hakeem

Mr Lloyd-Weston

Mr Mahoney

Name withheld 1

Name withheld 2

Norlink

O'shea J LLP

Obsidian Wireless

Annex 2

Amendment Regulations

A2.1 A copy of this statutory instrument is annexed to this Statement for indicative purposes. The statutory instrument will be formally published on the government's legislation.gov.uk website in due course.

STATUTORY INSTRUMENTS

2016 No. 0000

ELECTRONIC COMMUNICATIONS

The Wireless Telegraphy (Exemption) (Amendment) Regulations 2016

Made - - - - *6th April 2016*

Coming into force - - *28th April 2016*

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^(a) (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 2016 and shall come into force on 28th April 2016.

Amendment of the Wireless Telegraphy (Exemption) Regulations 2003

2. The Wireless Telegraphy (Exemption) Regulations 2003^(b) (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 corporate or an unincorporated association;”.

^(a) 2006 c. 36.

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

Amendment of regulation 4

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

“(2) With the exception of—

- (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) 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.”.

6th April 2016

Philip Marnick
Group Director, Spectrum Group
For and by the authority of the Office of Communications

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend the Wireless Telegraphy (Exemption) Regulations (S.I. 2003/74, amended by S.I. 2003/2155, 2005/3481, 2006/2994, 2008/236, 2008/2426, 2010/2512, 2011/2950, 2013/1254) (the “principal Regulations”).

Regulation 3 of these Regulations amends regulation 3(1) of the principal Regulations by inserting the definition of “body”.

Regulation 4 of these Regulations amends regulation 4 of the principal Regulations by introducing additional circumstances in which the exemption in regulation 4(1) of the principal Regulations shall apply.

A full regulatory impact assessment of the effect that these Regulations will have on cost to business is available to the public from OFCOM’s website at <http://www.ofcom.org.uk> or from the OFCOM library at Riverside House, 2a Southwark Bridge Road, London SE1 9HA. Copies of this assessment have also been placed in the library of the House of Commons.