

1. I welcome the consultation on the matter of whether commercial multi-user gateways (“COMUGs”) meet the requirements for licence exemption as set out in section 8 of the Wireless Telegraphy Act 2006 (“WTA”). Ofcom has, however, failed in its statutory duty to exempt all types of GSM gateway usage and this failure goes back to 2003. Section 166 of the Communications Act 2003 imposed a duty on Ofcom to exempt from the need for a licence any equipment that did not cause undue interference with wireless telegraphy. It is a point of some regret that Ofcom has historically bowed to pressure from government departments to maintain the unsatisfactory status quo. It is equally regrettable that the government has exerted undue influence on Ofcom, rather than issuing directions as required by statute, which undoubtedly coloured the outcome of similar consultations in 2005 and 2010. Both consultations were simply dropped without reaching a conclusion.
2. Section 166 of the Communications Act 2003 created section 1AA of the Wireless Telegraphy Act 1949 (and thereby the duty to make exemptions from the need for a licence equipment that did not cause undue interference). Section 1AA of the 1949 Act later became section 8 of the 2006 Act. The duty to create legislation to exempt from the need for a licence has been unbroken since 2003. It is a matter of record that GSM gateways (however used) do not cause undue interference.
3. The current setup is based, therefore, on a mix of secondary and primary legislation: the Exemption Regulations (2003/74) that prohibit any use of equipment in a commercial capacity, the Wireless Telegraphy (Exemption) (Amendment) Regulations 2016 that allow the commercial use of equipment in certain circumstances and WTA 2006 that specifies equipment may be used without a licence provided it does not meet the conditions listed in section 8(5). In 2011, s. 8 WTA was modified to include additional conditions and these are listed in Ofcom’s consultation document at paragraph 1.6. Undue interference is still listed as a condition requiring consideration.
4. The Exemption Regulations (2003/74) pre-date section 1AA of the Wireless Telegraphy Act 1949. Ofcom had a duty to revoke or change the Exemption Regulations (2003/74) when section 1AA became law. The fact that Ofcom amended the Exemption Regulations last year to permit the operation of commercial single-user gateways (“COSUGs”) proves such a duty exists. This same duty exists for COMUGs.
5. The decision in Recall referred to grounds of national security argued by DCMS as justifying a ban on commercial GSM gateways (both single-user and multi-user). The court found that that justification was not made out in respect of COSUGs, but that it could be used in respect of COMUGs. However, Recall did not settle domestic legislation, something to which this consultation bears witness.
6. The judgment in Recall was delivered, in part, in a confidential annex meaning I am unable to comment here on its contents. I can say, however, that the data collection capabilities of the MNOs are far greater than that presented on behalf of DCMS during Recall. Evidence presented by Vodafone to Surrey Police in 2009 using call data from GSM gateways confirms that.
7. As Ofcom now makes clear, decisions concerning national security are a matter for the Secretary of State alone. Only by the Secretary of State issuing a direction made under section 5(3) of the Communications Act 2003 can Ofcom make regulations requiring equipment to be licensed before use. No such direction has ever been given. If such a direction were to be given, section 5(4) of the Communications Act 2003 would prevent a blanket ban on use being issued. Because no section 5 direction has ever been given, domestic law has not been properly challenged and a restriction that ought to have been removed in 2003 has been allowed to remain for 14 years.

Question 1 - Do you have any evidence that the installation or use of COMUGs does or does not have the potential to cause an adverse effect on technical quality of service and wireless telegraphy?

8. The consultation appears to concentrate on the possible collateral effects from the use of COMUGs, specifically technical quality of service. According to the consultation, this arises by congestion caused as a result of commercial GSM gateways being installed in a particular location. The question also requires an answer to a more general definition of 'wireless telegraphy'. For the purposes of this submission, I will comment on the means by which the service is delivered, and how that delivery might be frustrated or adversely affected by the use of a COMUG. The definition of 'quality of service' ("QoS") is closely-linked to 'technical quality of service' ("TQoS") as QoS will deteriorate if TQoS is adversely affected.
9. If a GSM gateway is installed in a location that has limited cell capacity, it will reduce the QoS it can offer a customer. Customers of my company included Virgin Media, BT, Sky and Spiritel and any degradation in service (such as the call connection rate) would not have been accepted by them. It is not in the interests of the gateway operator or MNO to provide a poor-quality service.
10. At paragraph 3.17 of the consultation document, it lists the response of an MNO to the 2005 consultation:

"This MNO told us that a typical corporate user, with a six-SIM card gateway, would generate around 30 minutes of traffic a day per SIM whereas the comparable figure for a multi-user gateway could be as high as 400 minutes per SIM (and that gateways capable of accommodating up to 60 SIMs were commercially available)."
11. Aside from the loose definition of a 'typical corporate user', the MNO is over-egging its case in respect of commercial gateways. It should be noted that in 2005, a commercial gateway was either a COSUG or COMUG; the importance of use only evolved over time. I do not know of any commercial GSM gateway operators who used gateways carrying 60 sims for the reasons of quality listed above.
12. It is not practical to use a sim card for 400 minutes a day. MNOs employ anti-gateway departments (or outsource them to specialist companies) and sim cards that the MNOs believe are being used in commercial GSM gateways are suspended before the figure of 400 minutes a day can be met. Sim cards in GSM gateways display certain behavioural characteristics that render them easy to identify and suspend.
13. In January 2014, evidence was given at court by Vodafone's former Radio Networks Executive about the configuration of GSM gateway equipment in 2010 at my company's offices. In his accompanying report dated 28th February 2012, he speculates on the volumes of traffic carried over those GSM gateways, having examined photographs of the equipment and cell-usage graphs provided to him by Vodafone. His evidence was that my company was completing almost 1.9 million minutes of mobile traffic each day.
14. The report and accompanying usage graphs show three things. Firstly, that Vodafone had plenty of capacity in place and that no congestion was caused by the use of GSM gateways, despite their complaints. Technical quality of service was not affected. Secondly that the installation of a GSM gateway did not cause call blocking (mentioned in paragraph 3.12 of the consultation). Technical quality of service was not affected. Thirdly, the call attempts and supposed minutes generated do not correspond with the actual minutes terminated. The estimates of the traffic carried by the GSM gateways presented to the court were exaggerated by a factor of ten.

15. While I support Ofcom's need to be alive to the issue of congestion, it should not base its decisions uniquely on figures provided to it by the mobile networks. It cannot not be forgotten that the MNOs have been hostile to GSM gateways since their introduction for commercial reasons. If traffic from a GSM gateway is being terminated successfully, it stands to reason that the network can cope with the volumes and that the quality of service remains high. This remains true of both COSUGs and COMUGs; they present a virtually similar network footprint meaning that the TQoS is providing for a good quality of service. There are no adverse effects to the normal function of the wireless telegraphy network.
16. If TQoS as a result of congestion is still the issue it was said to be in 2005, previous respondents could have made similar representations to the previous consultation affecting COSUGs. Significantly, none were made.

Q2. To the extent that you do have any concerns regarding the impact of the use of COMUGs on technical quality of service, do you think these concerns could be adequately addressed through a qualified exemption of COMUGs? If so, please explain what conditions you consider would need to be imposed on the use of COMUGs?

17. As noted previously, it is not in the commercial interests of a GSM gateway operator to offer a poor-quality service. MNOs have the power to suspend sim cards it believes are causing problems to its network at any time (including a breach of any fair usage conditions) so no qualified exemption is required.

Q3. If you do not consider that your concerns could be addressed through a qualified exemption, please explain why, giving reasons for your views.

18. The WTA specifies that Ofcom is to issue a full exemption, not a qualified one.

Q4. Do you have any evidence that the installation or use of COMUGs is likely to:

- involve undue interference with wireless telegraphy;
- lead to inefficient use of the part of the electromagnetic spectrum available for wireless telegraphy;
- endanger safety of life;
- prejudice the promotion of social, regional or territorial cohesion; or
- prejudice the promotion of cultural and linguistic diversity and media pluralism.

19. I noted in paragraph 3 that some conditions in section 8(5) WTA were added in 2011. This was as a result of the 'Better Regulation Directive (2009)'. Undue interference remained a condition after this amendment.
20. The 2013 case of Recall, a Francovich action, was heard some two years after the changes were made to section 8(5) WTA. During those proceedings, DCMS placed no reliance or presented evidence on any of those additions. Those conditions could not have had any merit then and it can be safely assumed that no reliance can be placed on them now.

Q5. To the extent that you do have any concerns in relation to any of the issues referred to in question 4, do you think it can these concerns could be adequately addressed through a qualified exemption of COMUGs? If so, please explain what conditions you consider would need to be imposed on the use of COMUGs?

21. Per question 4, I have no such concerns.

Q6. If you do not consider that your concerns could be addressed through a qualified exemption, please explain why, giving reasons for your views.

22. Per question 4, I have no such concerns.