

OFCOM  
Spectrum Policy Group – Floor 3  
Riverside House  
2a Southwark Bridge Road  
London SE1 9HA

20<sup>th</sup> May 2010

For the attention of Mr Paul Chapman

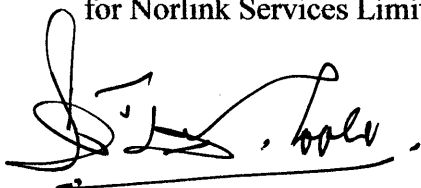
Dear Sirs

**LICENCE EXEMPTION OF WIRELESS TELEGRAPHY DEVICES**

We refer to your above mentioned consultation document of 12<sup>th</sup> March 2010 and to your letter of 29<sup>th</sup> April 2010 which extended the deadline to 27<sup>th</sup> May 2010 for this company to respond with its submission.

We are now pleased to attach our submission of even date for your consideration. Further, we confirm that there are no confidentiality issues associated with this submission and that you may publish this document on your website in full upon receipt in accordance with your usual procedure.

Yours faithfully  
for Norlink Services Limited



Daniel St A Moore  
Managing Director

## **SUBMISSION TO OFCOM**

### **REASONS FOR NOT HAVING THE EQUIVALENT OF REGULATION 4(2) IN ANY FURTHER MOBILE DEVICE EXEMPTION REGULATIONS**

We wish to make representations concerning Ofcom's Consultation of 12<sup>th</sup> March 2010 in relation to the need to remake or update the WTA (Exemption) Regulations in relation to mobile or fixed wireless devices. This document is submitted within the extended time period as agreed by Ofcom for this submission.

We have noted particularly that, because it is quite possible that Ofcom may need to extend mobile handset exemptions from licensing to devices operating in new bands, such as the 800 MHz band, they will need to amend, add to or include in the ambit of existing regulations a specific exemption relating to handsets and other terminal equipment operating at the relevant frequencies.

At the present time, there is a very significant exception to all exemptions relating to mobile user station handsets and fixed equipment as is set out in Regulation 4(2) of the Wireless Telegraphy (Exemption) Regulations 2003. It is this exception which relates to the use of apparatus for the provision of service by way of business to another person that prevents, for example, the use of Commercial Multi-Use Gateways or indeed Commercial Single-Use Gateways in the UK.

We wish to protest, if it is Ofcom's intention to extend the "anti-gateway" exception to the exemption, i.e. Regulation 4(2), to equipment operating in any further frequency ranges. Our objection is based on the fact that the present Regulations, and any future such Regulations should they be made, are and would be incompatible with EU law.

The general prohibition on the commercial use of GSM Gateways is incompatible with Directive 1999/5/EC (the "RTTE Directive") and specifically Recitals 2, 22, 32 and Articles 1, 6, 7 and 8 thereof. Under Article 19 of the RTTE Directive the UK was obliged to adopt and publish the laws necessary to comply with the RTTE Directive by 7 April 2000. UK domestic law has been incompatible with the RTTE Directive since that date.

The general prohibition on the commercial use of GSM Gateways is incompatible with Directive 2002/20/EC (the "Authorisation Directive") and specifically Recitals 3, 4, 8, 9, 10, 15, 25 and Articles 1, 2, 3, 4 and 6 thereof. Under Article 18 of the Authorisation Directive the UK was obliged to adopt and publish the laws necessary to comply with the Authorisation Directive by 24 July 2003. UK domestic law has been incompatible with the Authorisation Directive since that date.

#### **1. The RTTE Directive**

The UK domestic law prohibition on the commercial operation of GSM Gateways, except with a licence under Section 1 of the WTA 1949 and now Section 8 of the WTA 2006, is and was incompatible with the RTTE Directive because:

- 1.1 GSM Gateways are "apparatus" for the purpose of the RTTE Directive and, unless it does not have the "CE" mark, the relevant apparatus here will comply at all material times with the appropriate essential requirements of such apparatus under Article 3 of the RTTE Directive;
- 1.2 Article 6 of the RTTE Directive required the UK to allow gateways to be placed on the market without being "subject to further national provisions";

- 1.3 Article 7(1) of the RTTE Directive required the UK to allow the "putting into service" of a gateway for its "intended purpose";
- 1.4 Article 8 of the RTTE provided that the UK "shall not prohibit, restrict or impede the placing on the market and putting into service in their territory" of a GSM Gateway;
- 1.5 Furthermore Articles 7(2) and 8(1) of the RTTE Directive required the UK to ensure that domestic law placed restrictions on the "putting into service" of CE-certified equipment only where necessary to avoid "harmful interference". The GSM gateways in this matter are likely to be CE-certified and do not cause harmful interference. As regards the meaning of "harmful interference" this has been examined judicially in the *Floe Telecom case [2006] CAT 17* – see paragraphs 172 to 231.

## 2. The Authorisation Directive

The UK domestic law prohibition on commercial operation of GSM Gateways is incompatible with the Authorisation Directive because:

- 2.1 In broad terms the Authorisation Directive requires the UK to ensure that there is "general authorisation of all electronic communications networks and services without requiring any explicit decision or administrative act by the National Regulatory Authority and by limiting any procedural requirements and identification only" (Recital 8);
- 2.2 Commercial operators of GSM Gateways are undertakings seeking to provide "electronic communications services" for the purposes of the Authorisation Directive;
- 2.3 Article 3(2) of the Authorisation Directive required the UK to enact a "general authorisation" of such activities meaning "a legal framework established by the Member State ensuring rights for the provision of electronic communications networks or services and laying down sector-specific obligations that may apply to all or specific types of electronic communications networks and services, in accordance with [the] Directive";
- 2.4 Article 3(2) of the Authorisation Directive went on to prohibit the UK from operating a requirement for individual licensing, stating "the undertaking concerned may be required to submit a notification but may not be required to obtain an explicit decision or any other administrative act by the national Regulatory Authority before exercising the rights stemming from the authorisation";
- 2.5 Article 4 of the Authorisation Directive set out a "minimum list" of rights which must be granted to undertakings including "the right to ... provide electronic communications ... services";
- 2.6 Article 6(1) of the Authorisation Directive limited the conditions capable of being attached to an authorisation to "the conditions listed respectively in Parts A, B and C of the Annex". Parts A, B and C of the Annex did not include an entitlement to render unlawful an entire category of electronic communication services and/or to make such services subject to an individual licensing regime.

## 3. Wireless Telegraphy Act 2006

In having Regulation 4(2), as it applies to GSM gateways, Ofcom is not in compliance with Section 8 of the Wireless Telegraphy Act 2006.

The *Floe* case in the Competition Appeal Tribunal successful de-bunked the idea that any objection to GSM gateways was based on the principle of GSM gateways causing harmful interference and it is difficult to see how you could justify any ban on the use of GSM gateway

equipment by showing any condition in that respect was related to effective and appropriate use of the Spectrum. All of the objections that have so far been raised to gateway-type services of a commercial nature have been related to the type of usage rather than the technical aspects of the way in which the spectrum is used.

Neither is it possible to argue that there are any security or related issues in respect of the use of commercial gateways given that the same considerations would apply to a private use gateway, particularly one that aggregated traffic from a number of sites from the same legal person and of course in the light of the fact that it has already been shown in this country that even though a COMUG may not hand over the CLI of the underlying originating terminal equipment, that information will be available to the gateway operator who can without much ado pass this on to the relevant authorities if requested. A broadly similar situation has always obtained with domestic and international wholesale traffic where CLI frequently is not passed but that originating information will be available to the operator who can pass it on to the relevant authorities where requested.

In summary, we repeat that we object in the strongest possible terms to any Exemption Order which repeats provisions incompatible with European law.

for Norlink Services Limited

Daniel St A Moore  
Managing Director

20<sup>th</sup> May 2010

cc: European Commission - Brussels