



EUROPEAN COMMISSION

SECRETARIAT-GENERAL

Brussels, 22 III 2010

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SG-Greffe(2010)D/ 3756

PERMANENT REPRESENTATION
OF THE UNITED KINGDOM TO
THE EUROPEAN UNION
10 Avenue d'Auderghem
1040 Brussels

Subject: Letter of formal notice
- Infringement No 2009/4392

The Secretariat-General would be obliged if you would forward to the Minister for Foreign Affairs a letter from the Commission on the above subject.

Received in Reception

22 -03- 2010

1340

UK Representation to the EU

For the Secretary-General,

p.o.
Karl VON KEMPIS

Annex: C(2010) 1536

UK



EUROPEAN COMMISSION

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For the Secretary-General,

f.o. 
Karl VON KEMPIS

Annex: C(2010) 1536

UK



EUROPEAN COMMISSION

Brussels, 18.3.2010

2009/4392

C(2010) 1536

Dear Minister,

I would draw your attention to the matter of incorrect transposition in the United Kingdom of Directive 2002/20/EC on the authorisation of electronic communications networks and services (Authorisation Directive)¹ as regards the operation of GSM gateways – telecommunications equipment used for routing calls from fixed lines directly onto the relevant mobile network.

Article 5 of the Authorisation Directive on “Rights of use for radio frequencies and numbers” provides that:

“1. Member States shall, where possible, in particular where the risk of harmful interference is negligible, not make the use of radio frequencies subject to the grant of individual rights of use but shall include the conditions for usage of such radio frequencies in the general authorisation”.

Article 6 of the Authorisation Directive on “Conditions attached to the general authorisation and to the rights of use for radio frequencies and for numbers, and specific obligations” provides that:

“1. The general authorisation for the provision of electronic communications networks or services and the rights of use for radio frequencies and rights of use for numbers may be subject only to the conditions listed respectively in parts A, B and C of the Annex. Such conditions shall be objectively justified in relation to the network or service concerned, non-discriminatory, proportionate and transparent.”

The relevant paragraphs of regulation 4 ‘Exemption’ of the UK Wireless Telegraphy (Exemption) Regulations 2003 provide as follows:

“4. - (1) Subject to regulation 5, the establishment, installation and use of the relevant apparatus are hereby exempted from the provisions of section 1(1) of the 1949 Act.

¹ OJ L 108, 24.4.2002, p. 21

The Rt Hon David MILIBAND
Secretary of State for Foreign Affairs
Foreign and Commonwealth Office
King Charles Street
London SW1A 2AH
United Kingdom

(2) With the exception of relevant apparatus operating in the frequency bands specified in paragraph (3), 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 telecommunication apparatus or a telecommunication system and other such apparatus or system, by means of which a telecommunication service is provided by way of business to another person.”

The GSM frequency bands are not included in the following paragraph (3) of regulation 4. In consequence, GSM gateways ‘*by means of which a telecommunication service is provided by way of business to another person*’, commonly referred to as ‘commercial’ GSM gateways, are subject to a licensing requirement under the 1949 Act while other types of GSM gateways, i.e. self-use gateways by which services are not provided by way of business to another person, are exempted from this requirement.

This legal situation is confirmed, *inter alia*, in Ofcom’s decision of 28 June 2005 under the Competition Act 1998 on ‘Re-investigation of a complaint from Floe Telecom Limited against Vodafone Limited’. Paragraph 54 of the decision explains that: “*In summary, Ofcom has concluded that the current legal position is as follows:*

- *the use of Self-Use GSM Gateways is exempted from the requirement for a licence and is therefore lawful; and*
- *the use of Commercial Single-User GSM Gateways and Commercial Multi-User GSM Gateways is prohibited unless authorised by a licence and, on the basis that no licence has been granted covering the use of GSM gateways, is unlawful”.*

Following an appeal against this decision, the Competition Appeal Tribunal (CAT) in its judgment of 31 August 2006 decided (summary of judgment, paragraph 12(1)) that the “*true construction of Vodafone’s Licence permits the provision, by Vodafone, of a telecommunications service by way of business, including using GSM gateways which comply with the requirements of the RTTE Directive. Ofcom’s reasoning at paragraphs 95 to 126 of the Second Decision [i.e. decision of 28 June 2005] for concluding, at paragraph 127 that Vodafone’s licence does not cover the use of GSM gateways is misconceived.*” Subsequently, by Order of 18 January 2007 (paragraph 3), the CAT set aside the Ofcom decision of 28 June 2005 in so far as its reasoning and conclusions differed from the reasons set out in the Judgment.

Following a further appeal by Ofcom against this CAT judgment and order, the Court of Appeal decided, by judgment on 10 February 2009, to set aside paragraph 3 of the CAT Order of 18 January 2007. The Court of Appeal also declared that:

“1. On its proper construction, the Public Mobile Operator Licence issued to Vodafone on 28 January 2002 under section 1(1) of the Wireless Telegraphy Act 1949 does not authorise the use of GSM Gateways (including commercial multi-use GSM Gateways (“COMUGs”)) for providing a telecommunications service by way of business to another person.

2. In the absence of a licence or exemption granted or made under section 8 of the Wireless Telegraphy Act 2006, the use of GSM gateways (including COMUGs) for the purpose of providing a telecommunications service by way of business to another person is unlawful.”

Further to a complaint by a UK company, on 13 August 2009 the Commission services sent a letter through the EU pilot system to the UK authorities requesting information about the legal status of commercial GSM gateways following the Court of Appeal judgment of 10 February 2009. In their reply (i.e. Ofcom letter dated 19 November 2009), the UK authorities confirmed that the use of commercial GSM gateways requires a licence from Ofcom and that the existing mobile network operators’ (MNOs) licences

do not authorise commercial GSM gateway use. The reply also announced that, following the Court of Appeal judgment, Ofcom is preparing a new consultation document on the authorisation of GSM gateways and expects to publish this document by end 2009. According to the information at the Commission's disposal, no such consultation has been issued so far.

The individual rights of use for GSM radio frequencies, utilised in the operation of GSM gateways, have been granted to the UK mobile network operators. The Wireless Telegraphy (Exemption) Regulations 2003 exempt from licensing radio equipment operating in certain radio frequency bands. In the case of GSM gateways, these Regulations create a distinction between 'private' GSM gateways, which do not require a licence, and 'commercial' GSM gateways, which require a specific licence. By virtue of these Regulations, the very same GSM gateway serving the needs of the same organisation would be exempted from licensing when it is installed by the organisation concerned but it would require a licence if it was installed by the relevant mobile network operator or an authorised third party (GSM gateway operator), with which this mobile operator has concluded arrangements to offer commercial gateway services to end-users. These Regulations accordingly impose additional conditions on the rights of use of frequencies assigned to MNOs and, for this reason, should be considered as conditions attached to the rights of use in the meaning of Article 6 of the Authorisation Directive.

The above-mentioned letter of the Commission services inquired about the reasons for the application of the licensing regime to 'commercial' GSM gateways while gateways for self-use ('private' gateways) are exempt from such a requirement. The UK authorities in their reply explained that the reasons for this position are the *"operators' ability to comply with their regulatory requirements with regard to emergency calls and security concerns are impaired and that the resulting use of spectrum is very inefficient"*.

However, the usage pattern of a GSM gateway may well be the same, regardless of whether it is installed by the end-user or by the MNO or a GSM gateway operator. In both situations the GSM gateway will have the same effect in terms of mobile network operators' ability to comply with their regulatory requirements with regard to emergency calls, security concerns and efficient spectrum use. The distinction made on the basis of the Wireless Telegraphy (Exemption) Regulations 2003 between these two types of GSM gateways is, accordingly, based on the commercial arrangements for their operation rather than on any objective difference in relation to the network or service concerned, as required by Article 6 of the Authorisation Directive as justification for attaching conditions to the rights of use for radio frequencies.

Furthermore, the conditions which may be attached to rights of use for radio frequencies listed in part B of the Annex and referred to in Article 6 of the Authorisation Directive do not include any references to commercial conditions for the provision of services. Point 1 of Part B refers to designation of *'service or type of network or technology'* as a condition that can be attached to the rights of use for frequencies. Since both the 'commercial' and 'private' GSM gateways provide the same service and operate on the same network using the same GSM technology, this point does not cover the possibility to restrict the rights of use to frequencies in the case of commercial gateways.

Points 2 and 3 of Part B refer to effective and efficient use of frequencies in conformity with Directive 2002/21/EC and *'technical and operational'* conditions necessary for the avoidance of harmful interference and for the limitation of exposure to electromagnetic fields. As mentioned earlier, the two types of gateways may be used as alternatives by any end-user and they will accordingly produce the same impact in terms of the use of frequencies, harmful interference and exposure to electromagnetic fields. It should be noted that Point 3 explicitly refers to the possibility to impose 'technical and operational'

conditions whereas no similar reference is made to 'commercial' conditions. These two points of Part B cannot therefore be relied upon for distinguishing between 'commercial' and 'private' gateways and restricting one type of GSM gateways, i.e. 'commercial' gateways.

The UK authorities might also consider the provisions of the Wireless Telegraphy (Exemption) Regulations 2003 as creating specific individual rights of use for radio frequencies to provide services over the 'commercial' GSM gateways while the 'private' gateways are subject to general authorisation.

Article 5 of the Authorisation Directive requires the Member States not to make the use of radio frequencies subject to the grant of individual rights of use where possible, in particular where the risk of harmful interference is negligible. As explained above, there is no technical or other objective distinction between the 'commercial' and 'private' gateways and the classification of any given GSM gateway into one of these two categories depends solely on the commercial arrangements for their operation, i.e. on whether the gateway is installed by the end-user himself or by the MNO or an authorised GSM gateway provider. It can be even argued that in the case of 'commercial' gateways installed by the MNO or a GSM gateway provider, the MNO is likely to be better placed to control the usage of the gateway than in the case of 'private' gateways installed by end-users. Accordingly, the MNO can better manage the use of the mobile network and reduce the risk of its overload.

The Commission therefore considers that the UK provisions in question are not compatible with Article 5 of the Authorisation Directive.

The European Commission consequently takes the view that, by imposing additional licensing requirement on 'commercial' GSM gateways pursuant to the Wireless Telegraphy (Exemption) Regulations 2003, the United Kingdom has failed to fulfil its obligations under Article 5 (1) and 6(1) and Part B of the Annex to the Authorisation Directive.

The Commission invites your Government, in accordance with Article 258 of the Treaty on the Functioning of the European Union, to submit its observations on the foregoing within two months of receipt of this letter.

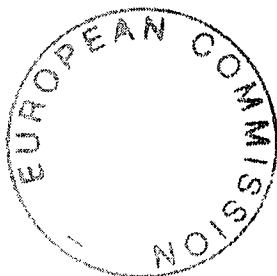
After examining these observations, or if no observations have been submitted within the prescribed time-limit, the Commission may, if appropriate, issue a Reasoned Opinion as provided for in the same Article.

Yours faithfully,

For the Commission

Neelie KROES

Vice-president



CERTIFIED COPY

For the Secretary - General,

p.o. 

Jordi AYET PUIGARNAU
Director for the Registry