Neutral Citation Number: [2014] EWCA Civ 1370

Case No: A3/2014/0070

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**CHANCERY DIVISION**
**Mrs Justice Rose**
**[2013] EWHC 3091 (Ch)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/10/2014

**Before :**

**LORD JUSTICE RICHARDS**
**LADY JUSTICE BLACK**
and
**LADY JUSTICE RAFFERTY**

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**Between :**

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| **(1) Recall Support Services Limited**<br>**(2) Floe Telecom Limited (in liquidation)**<br>**(3) Easyair Limited (in liquidation)**<br>**(4) Packet Media Limited**<br>**(5) VIP Communications Limited (in liquidation)**<br>**(6) Edge Telecommunications Limited** | **Claimants/ Appellants** |
| **- and -** | |
| **Secretary of State for Culture, Media and Sport** | **Defendant/ Respondent** |

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**Monica Carss-Frisk QC and James Segan** (instructed by **Matthew, Arnold & Baldwin LLP**) for the **Appellants**
**Daniel Beard QC, Philip Moser QC, Brendan McGurk and Sarah Ford** (instructed by **The Treasury Solicitor**) for the **Respondent**

Hearing dates : 7-8 October 2014

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# Judgment

**Lord Justice Richards :**

***Introduction***

1. The appellants claim damages for loss alleged to have been suffered as a result of the United Kingdom's maintenance in force of a restriction on the commercial use of a piece of telecommunications equipment known as a "GSM gateway". They contend that the restriction, referred to in these proceedings as "the commercial use restriction", was in breach of European Union law and that the breach was sufficiently serious to give rise to liability to damages under the principles in Cases C-6 & 9/90, *Francovich v Italian Republic* [1991] ECR I-5357 as developed in subsequent case-law. Their claim was dismissed by Rose J after a trial lasting almost four weeks. The judge herself granted permission to appeal.

2. Rose J's judgment extends to 75 pages plus a confidential annex and provides a masterly account of the background and analysis of the factual and legal issues with which she had to deal (including several that do not arise on this appeal). I will cross-refer heavily to it, repeating only those matters that are central to the issues in this court.

3. As explained more fully at paragraphs 4-9 of her judgment, a GSM gateway contains one or more mobile SIM cards which are used to route telephone calls originating from a fixed line network so as to terminate on a mobile network. Calls routed in that way appear to originate on the same mobile network as that of the party called and thereby benefit from the reduced rates available for "on-net" mobile-to-mobile calls on the same network. The use of GSM gateways can be divided into three kinds:

   (1) a "self-use GSM gateway", where a single customer buys and installs the GSM gateway for use in its own business;

   (2) a "commercial single-user GSM gateway" (or "COSUG"), where a commercial operator uses a GSM gateway to provide services to a single end-user, so that all the calls diverted through the gateway come from one user (though from multiple fixed lines used by that one user's workforce);

   (3) a "commercial multi-user GSM gateway" (or "COMUG"), where a commercial operator uses a GSM gateway to provide services to multiple end users, so that the calls diverted through the gateway come from more than one user.

4. The appellants were GSM gateway operators (or were all so treated by the judge) who provided commercial services to business users, mainly in the form of COMUGs but also in the form of COSUGs. Their position is described at paragraphs 31-36 of Rose J's judgment. It appears that their businesses collapsed in 2003 as a result of action taken by mobile network operators. What matters for present purposes, however, is the impact on them of the regulatory regime in place from mid-2003.

5. The use of telecommunications equipment in the United Kingdom is regulated by a number of EU directives comprised within the Common Regulatory Framework adopted in 2002, replacing an earlier framework. The Common Regulatory Framework comprises the Framework Directive (Directive 2002/21/EC of 7 March

2002) and four specific directives. Member States were required to implement the directives by 24 July 2003 and to apply the implementing measures from 25 July 2003.

6. The specific directive of particular relevance to this case is the Authorisation Directive (Directive 2002/20/EC of 7 March 2002). That directive refers to two kinds of authorisation for the use of radio spectrum: a general authorisation (of which a user can take advantage without needing to make a specific application to the regulator) and an individual licence (which must be applied for, and the grant or refusal of which is subject to a decision by the regulator). Article 5 of the directive provides that "where possible, in particular where the risk of harmful interference is negligible", Member States shall make the use of radio frequencies subject to a general authorisation rather than to the grant of individual rights of use. The use of GSM gateways comes within the scope of the provision.

7. The commercial use of GSM gateways in the United Kingdom was not made subject to a general authorisation. The relevant provisions of domestic law are considered more fully later in this judgment but of particular importance are the Wireless Telegraphy (Exemption) Regulations 2003 ("the 2003 Exemption Regulations"). Those regulations provide an exemption from the provisions of the Wireless Telegraphy Acts that otherwise operate to prohibit the use of wireless telegraphy apparatus without a licence. The commercial use of GSM gateways, however, falls within a carve-out from the exemption and has continued to be restricted. The judge found that it was possible in principle to apply for a licence for the use of GSM gateways but that in practice at all material times there was no prospect of such a licence being granted to a GSM gateway operator. The appellants contend that this situation amounted to a *prohibition* on the commercial use of GSM gateways. Without prejudice to that argument, I shall follow the judge's approach of referring to it as a commercial use *restriction.*

8. The judge rejected the Secretary of State's contention that the commercial use restriction was justified on the ground of avoidance of "harmful interference", so as to fall within the express exception in Article 5 of the Authorisation Directive.

9. A major issue before her was whether the restriction could be justified on the ground of public security. Since the time when the existence of GSM 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. The judge found that public security was available in principle under the Authorisation Directive as a justification for applying an individual licensing regime rather than granting a general authorisation. For reasons given in the confidential annex to her judgment, based on her assessment of evidence heard in private, she went on to find that the restriction on COMUGs was justified by the specific public security concerns raised by the Home Office but that those concerns did not justify the restriction on COSUGs.

10. Accordingly, she found that the commercial use restriction was in breach of the Authorisation Directive and constituted an infringement of EU law only to a limited extent, i.e. in so far as it applied to COSUGs but not in its application to COMUGs.

11. The judge went on to consider whether that limited infringement of EU law satisfied the *Francovich* criteria for state liability. She referred to the three conditions set out by the Court of Justice in Cases C-46/93 & 48/93, *Brasserie du Pêcheur* and *Factortame* [1996] ECR I-1131, namely that (1) the rule of law infringed must be intended to confer rights on individuals, (2) the breach must be sufficiently serious, and (3) there must be a direct causal link between the breach of the obligation resting on the state and the damage sustained by the injured parties. She found that conditions (1) and (3) were satisfied but that condition (2) was not satisfied because the infringement did not constitute a manifest and grave disregard of the United Kingdom's obligations under EU law.

12. The appellants advance the following grounds of appeal:

    (1) By ground 1A they contend that the judge erred in her interpretation of Article 5 of the Authorisation Directive. They submit that public security was not available under Article 5 in its original form as a ground for withholding a general authorisation; and that even if it was available, a Member State could not avail itself of that ground without first notifying the matter to the European Commission under Article 114(4) TFEU and obtaining the Commission's approval, which the United Kingdom did not do.

    (2) By ground 1B they contend that even if Article 5 of the Authorisation did permit reliance on public security as a ground for withholding a general authorisation, the United Kingdom chose to implement the directive in a way that provided no basis for reliance on the ground; on the contrary, the implementing legislation required the regulator to lift the commercial use restriction. It is submitted that in those circumstances the maintenance of the restriction was in breach of EU law in relation to COMUGs as well as to COSUGs.

    (3) By ground 2 they contend that the breach of EU law was sufficiently serious to satisfy the second condition for liability under *Francovich* principles. They submit that there was demonstrable disregard for the United Kingdom's EU obligations and that the infringement was manifest and grave.

13. The Secretary of State supports the decision of the judge for the reasons she gave in her judgment but contends further or alternatively that the judge's order should be upheld on additional grounds:

    (1) It is submitted that the judge should have found the commercial use restriction to be justified under Article 5 of the Authorisation Directive by reference to "harmful interference". The essential question here concerns the meaning of "interference" in the directive.

    (2) It is submitted that the judge erred in rejecting the justification based on grounds of public security in relation to COSUGs, in particular that she was wrong to draw the line she did between COSUGs and COMUGs.

14. In advancing those grounds, the parties do not purport to challenge any of the judge's findings of fact.

15. The oral submissions for the appellants were presented by Ms Monica Carss-Frisk QC. The task of opposing her was divided between Mr Daniel Beard QC and Mr Philip Moser QC. Mr Beard represented the interests of the Secretary of State for the Home Department, who is not a party to the proceedings; Mr Moser those of the Secretary of State for Culture, Media and Sport, who is a party. Both counsel were formally instructed, however, on behalf of the Secretary of State for Culture, Media and Sport. This slightly curious arrangement was adopted in the court below and was maintained before us without objection from the appellants.

16. Some of the submissions at the hearing touched on matters contained in the confidential annex to Rose J's judgment or in confidential documents. The court is grateful to counsel for their co-operation in dealing with those matters in such a way as to enable the entire hearing of the appeal to proceed in open court. In similar vein, I have endeavoured to cover the issues in the appeal in an open judgment without the need for a confidential annex.

17. I propose to consider the appellants' grounds 1A and 1B and then the respondent's additional grounds before turning to consider, in the light of my conclusions on those matters, the appellants' ground 2 and whether there was a sufficiently serious breach of EU law to satisfy the second condition for liability under *Francovich* principles.

***The appellants' ground 1A: the availability of public security as a ground of justification***

*The Authorisation Directive*

18. The legal basis for the Common Regulatory Framework, including the Authorisation Directive, is what is now Article 114 TFEU (formerly Article 100a and Article 95 EC). The article provides for the adoption of measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

19. The only provision of the Framework Directive I need note is recital (7), which states that the provisions of the Framework Directive and of the specific directives, including the Authorisation Directive, "are without prejudice to the possibility for each Member State to take the necessary measures to ensure the protection of its essential security interests, to safeguard public policy and public security and to permit the investigation, detection and prosecution of criminal offences ....".

20. The right of Member States to take the necessary measures to safeguard public security and to achieve other objectives of general interest is also reflected in the recitals to the Authorisation Directive:

> "(3) The objective of this Directive is to create a legal framework to ensure the freedom to provide electronic communications networks and services, subject only to the conditions laid down in this Directive and to any restrictions in conformity with Article 46(1) of the Treaty [now Article 52

> TFEU], in particular measures regarding public policy, public security and public health.
>
> …
>
> (12) … In accordance with case law of the Court of Justice, any national restrictions on the rights guaranteed by Article 49 of the Treaty [now Article 56 TFEU] should be objectively justified, proportionate and not exceed what is necessary to achieve general interest objectives as defined by Member States in conformity with Community law."

21. The reference to Article 46(1) EC (now Article 52 TFEU) is at first sight puzzling, since that article appears in the context of freedom of establishment and concerns the treatment of foreign nationals. It sets out that the provisions of the relevant chapter of the Treaty and measures taken in pursuance of it "shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health." But Article 55 EC (now Article 62 TFEU) provides that the provisions of Article 46 are also to apply in the context of free movement of services.

22. Article 3 of the Authorisation Directive reads:

> **"Article 3**
>
> **General authorisation of electronic communications networks and services**
>
> 1. Member States shall ensure the freedom to provide electronic communications networks and services, subject to the conditions set out in this Directive. To this end, Member States shall not prevent an undertaking from providing electronic communications networks or services, except where this is necessary for the reasons set out in Article 46(1) of the Treaty [now Article 52 TFEU].
>
> 2. The provision of electronic communications networks or the provision of electronic communications services may, without prejudice to the specific obligations referred to in Article 6(2) or rights of use referred to in Article 5, only be subject to a general authorisation. 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. Upon notification, when required, an undertaking may begin activity, where necessary subject to the provisions of rights of use in Articles 5, 6 and 7.
>
> …."

23. Article 5, in the form in which the Authorisation Directive was originally adopted, read:

> **Article 5**
>
> **Rights of use for radio frequencies and numbers**
>
> 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.
>
> ..."

24. The directive was subsequently amended by the Better Regulation Directive (Directive 2009/140/EC), adopted on 25 November 2009 for implementation by 25 May 2011. Recital (12) of that directive states that "[c]ertain definitions should be clarified or changed to take account of market and technological developments and to eliminate ambiguities identified in implementing the regulatory framework". Recital (25) provides that radio spectrum policy activities in the Community "should be without prejudice to measures taken at Community or national level, in accordance with Community law, to pursue general interest objectives, in particular with regard to content regulation and audiovisual and media policies, and the right of Member States to organise and use their radio spectrum for the purposes of public order, public security and defence." Recital (67) states that conditions for the use of radio spectrum to provide electronic communication services should normally be laid down in general authorisations "unless individual rights are necessary ... to protect against harmful interference, to ensure technical quality of service, to safeguard efficient use of the spectrum or to meet a specific general interest objective". In line with those policy statements, the directive amended Article 5(1) of the Authorisation Directive so as to read in material part as follows:

> "1. Member States shall facilitate the use of radio frequencies under general authorisations. Where necessary, Member States may grant individual rights of use in order to:
>
> - avoid harmful interference,
> - ensure technical quality of service,
> - safeguard efficient use of spectrum, or
> - fulfil other objectives of general interest as defined by Member States in conformity with Community law."

25. Article 6 of the Authorisation Directive provides that the general authorisation for the provision of electronic communications networks and services and the rights of use for radio frequencies may be subject only to the conditions listed in the Annex to the directive. Those conditions include matters of a public security character, such as the enabling of legal interception by competent national authorities.

*The judge's findings*

26. The judge held (at paragraphs 69-74 of her judgment) that a public security justification was available under both the original and amended versions of Article 5 of the Authorisation Directive. She said that the drafting of the original Article 5, incorporating the words "in particular", made clear that harmful interference was not intended to be the only relevant factor. As to what other factors a Member State could take into account, one had to look to the other provisions of the directive and to EU law more generally. There were references in the directive to public security grounds and to Article 52 TFEU. The judge also found the amended Article 5 to be of assistance. One intention of the amendment was to spell out the content of the previously vague "in particular" in the original Article 5. That clarification, omitting "in particular" and listing so far as possible the reasons why a Member State could adopt an individual licensing regime, was "better regulation" as promised by the Better Regulation Directive. The judge also referred to the terms of recital (25) of that directive.

27. Having found that Article 5 contemplated from the outset that a Member State could rely on public security, the judge held that the notification procedure under Article 114 TFEU, on which the appellants relied, was not triggered. Article 114(4) provides:

> "If, after the adoption of a harmonisation measure by the European Parliament and the Council, by the Council or by the Commission, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 36, it shall notify the Commission of these provisions as well as the grounds for maintaining them."

The judge said that the notification procedure is designed to forestall infraction proceedings where the national legislation is *prima facie* inconsistent with a harmonisation measure adopted by the European Union, whereas in this case the relevant harmonisation measure contemplated in Article 5 that the Member State could base its decision on its own assessment of public security factors.

*The appellants' challenge to the judge's findings*

28. The appellants submit first that the judge was wrong to interpret Article 5 as she did. On the original wording of Article 5, properly interpreted, the only permitted ground for making the use of radio frequencies subject to the grant of individual rights of use rather than a general authorisation was that of harmful interference. The general rule of the Authorisation Directive, which was designed to further a fundamental objective of the European Union, namely the completion of the internal market, was that no individual licensing regimes should be retained for electronic communications services. Article 5(1) restated that general rule and provided for a limited exception. In accordance with general principles of EU law, the words giving rise to an exception must be construed strictly or narrowly: see, for example, Case C-239/06, *Commission v Italy* [2009] ECR 1-000, paragraphs 46-47, and *White v White* [2001] UKHL 9, [2001] 1 WLR 481, paragraph 14. On a strict or narrow interpretation, the words "in particular where the risk of harmful interference is negligible" in Article 5 gave specific content to the words "where possible". There was no mention of any ground other than harmful interference and there was no warrant for reading in

exceptions based on public security or other objectives of general interest. General interest objectives were taken into account within the directive in the conditions that could be attached to a general authorisation or individual rights of use. The amendments made to Article 5(1) by the Better Regulation Directive in 2009, allowing reliance to be placed on "other objectives of general interest as defined by Member States in conformity with Community law", did not spell out what was previously implicit in the article but introduced new exceptions.

29. In my judgment, that line of argument is plainly mistaken and was rightly rejected by the judge. The recitals to the Framework Directive and to the Authorisation Directive evidence a clear intention that Member States are to be permitted to derogate from the provisions of the directives on grounds of public security and other objectives of public interest. Article 3(1) of the Authorisation Directive permits Member States to prevent an undertaking from providing electronic communications or networks or services at all on such grounds. Against that background it would be very surprising if public security could not be relied on under Article 5(1) as a ground for making the use of radio frequencies the subject of a licensing regime rather than a general authorisation: the article must be read together with the other provisions of the directive and of the Framework of which it forms a part. Moreover, the very words "where possible, in particular" indicate that the risk of harmful interference is not the only permitted ground of exception. Having regard to all those considerations, I do not think that the principle that exceptions are to be construed strictly calls for the narrow reading of the article contended for by the appellants. The amendment made by the Better Regulation Directive, providing in terms that Member States may grant individual rights of use in order to fulfil objectives of general interest as defined by them in conformity with Community law, also makes good sense as a clarification of what was implicit previously rather than as effecting a substantial change: it has not been suggested that market or technological developments had led to the need for any substantive change. Finally, I refer later in this judgment to the infraction proceedings threatened by the European Commission in respect of the United Kingdom's regulatory treatment of GSM gateway operators. A central issue concerned the United Kingdom's reliance on a public security justification, in the context of Article 5 in its original wording. At no stage did the Commission dispute the availability in principle of such a justification under the article. On the contrary, in deciding not to pursue the threatened proceedings it must have accepted the public security arguments. The Commission's decision provides support for my view that such a justification was available at all material times. I shall proceed on the basis that it does not have any deeper legal significance: it is unnecessary to decide the issue left open by the Court of Appeal in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2014] EWCA Civ 708, [2014] 1 WLR 2921, paragraphs 149-157, as to the legal effect of a decision by the Commission to close the file on a complaint requesting that it bring infraction proceedings against a Member State.

30. The appellants' next submission is that if public security was available in principle under the original version of Article 5 as a ground for withholding a general authorisation, a Member State wishing to rely on such a ground was required to notify the relevant national provisions to the European Commission under Article 114(4) TFEU, with a view to the Commission taking a decision to approve or reject those provisions pursuant to Article 114(6). Reliance is placed on Case C-41/93, *France v Commission* [1994] ECR I-1841, Case C-319/97, *Kortas* [1999] ECR I-3160 and

Joined Cases T-366/03 and T-235/04, *Land Oberösterreich and Austria v Commission* [2005] ECR II-4009. It is submitted that the Authorisation Directive is not to be taken to have ousted the Article 114(4) procedure and that the present situation falls within the scope of that provision: the United Kingdom is seeking to rely on public security (one of the "major needs" referred to in Article 36 TFEU) as a ground for maintaining a national provision that derogates from the requirement in the directive to grant a general authorisation.

31. In my view that argument, too, was correctly rejected by the judge. The notification requirement under Article 114(4) applies where a Member State wishes to maintain, on grounds of major needs, national provisions that *derogate from* a harmonising directive, i.e. that *conflict with* it, not where a Member State wishes to maintain or adopt a national measure *permitted by* the directive. All the cases cited by the appellants on this issue concerned national measures in direct conflict with a harmonising directive. In *France v Commission*, Germany had maintained in force national legislation far more restrictive than the relevant directive: it had decided "to continue to apply national provisions ... *instead of* Directive 91/173" (paragraph 12 of the judgment, emphasis added). In *Kortas*, Sweden had maintained in force national legislation banning a colorant approved by the relevant directive. *Land Oberösterreich and Austria v Commission* was a case under what is now Article 114(5) TFEU, which imposes a notification requirement where, after the adoption of a harmonising measure, a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment. Austria had notified a draft law under that provision, seeking a derogation from the relevant directive so as to permit the banning of genetically modified organisms. None of those cases involved an exception permitted by the harmonising directive itself. In none of them is there any suggestion that the notification procedure under Article 114(4) applies in the case of such an exception. Nor did the Commission suggest, in the context of the threatened infraction proceedings, that there had been any requirement to notify. It follows from all this that if public security was available in principle under Article 5 of the Authorisation Directive as a ground for applying an individual licensing regime rather than granting a general authorisation, it was not necessary for a Member State to go through the Article 114(4) notification procedure in respect of national provisions properly based on that ground.

32. The appellants' final contention in the context of this issue, though it does not fit comfortably here, is that even if public security can be relied on under Article 5 as a ground for withholding a general authorisation, the only alternative allowed by the article was to make the use of radio frequencies "subject to the grant of individual rights of use"; it did not permit a complete ban on any area of electronic communications activity. It is submitted that the United Kingdom, however, did apply a ban on the commercial use of GSM gateways. Reliance is placed on the judge's finding, at paragraph 218 of her judgment, that there was no realistic possibility of GSM gateway operators being granted licences to deploy GSM gateways commercially at any time relevant to the dispute. It is contended that Article 5 does not permit a situation in which there is no realistic prospect of any individual rights ever being granted. Reliance is also placed on the terms of the July 2003 announcement (as to which, see below) that the Government had decided to retain the commercial use restriction. The announcement stated that the commercial

use of GSM gateways was not authorised by the 2003 Exemption Regulations "and hence remains illegal".

33. I do not accept that line of argument. It is common ground that under Article 5 of the Authorisation Directive the alternative to a general authorisation was an individual licensing regime, not a complete ban. In this case there was a genuine licensing regime, not a ban. As described more fully in the next section of this judgment, there was a statutory prohibition on the commercial use of GSM gateways except under the authority of a licence. The July 2003 announcement, in stating that such use remained illegal, plainly meant that it remained illegal in the absence of a licence. An application for a licence could have been made to the regulator and, if made, would have had to be determined on its merits. A decision to refuse the application would have been amenable to judicial review and would therefore have had to be based on proper grounds. In those circumstances the fact that, on the judge's finding, there was no realistic possibility of a licence being granted does not equate to a ban.

***The appellants' ground 1B: the manner of transposition of the Authorisation Directive into national law***

34. The next issue that the judge had to consider was whether, if Article 5 of the Authorisation Directive did in principle permit the rights referred to in the Directive to be restricted on public security grounds, the way in which the Directive was transposed into national law provided a basis for reliance on a public security justification.

*The relevant domestic legislation*

35. The relevant domestic legislation both before and after implementation of the Common Regulatory Framework is described in detail by the judge: see in particular paragraphs 12-30 and 75-82 of her judgment. I shall pick out what appear to me to be the most important features for present purposes.

36. Section 1(1) of the Wireless Telegraph Act 1949 ("the 1949 Act") prohibited the use of any apparatus for wireless telegraphy except under the authority of a licence granted by the Secretary of State. This was subject to a power in the Secretary of State to make regulations providing for exemptions.

37. Regulation 4(1) of the Wireless Telegraphy (Exemption) Regulations 1999 ("the 1999 Exemption Regulations"), bringing together earlier provisions, exempted a broad range of apparatus from the licensing requirement in section 1(1) of the 1949 Act. The effect of regulation 4(2), however, was that the exemption did not apply to the commercial use of GSM gateways which therefore remained subject to the licensing requirement. That regime was carried over into regulation 4 of the 2003 Exemption Regulations. Those regulations were made in January 2003 under the 1949 Act and came into force in February 2003. They were amended in immaterial respects in the course of that year. Regulation 4 in its amended wording read as follows:

> "(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.

(2) With the exception of relevant apparatus operating in the frequency bands specified in paragraph (3) [which is not material], 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."

38. At paragraphs 180-195 of her judgment, Rose J sets out the background to and details of a consultation exercise that took place in the latter part of 2002 and the early part of 2003 as to whether the commercial use of GSM gateways should be brought within the scope of the exemption in regulation 4(1), thus removing the commercial use restriction. The exercise led ultimately to a Government decision, announced on 18 July 2003, that the restriction should be retained. It is evident that the arguments were finely balanced but that security considerations, together with perceived spectrum efficiency problems, were a prime reason for the decision.

39. From 25 July 2003 the 2003 Exemption Regulations were continued in force (though having effect as if made by Ofcom rather than by the Secretary of State) by the transitional provisions in paragraph 1 of Schedule 18 to the Communications Act 2003 ("the 2003 Act") – the statute is considered more fully below. GSM gateways thereby continued to be subject to the commercial use restriction. There has been no material change since then.

40. The 2003 Act was the primary means by which the Common Regulatory Framework was implemented in the United Kingdom. It amended the 1949 Act in relevant respects and conferred relevant functions on Ofcom, including the transfer to Ofcom of the powers conferred on the Secretary of State by section 1 of the 1949 Act to grant licences and to make regulations exempting use from the need for a licence. There was, however, an interim period between July and December 2003 when the functions conferred by the legislation on Ofcom fell to be discharged by the Secretary of State.

41. Section 5 of the 2003 Act conferred a power on the Secretary of State to give directions to Ofcom. It is not clear to me how the power was intended to operate during the interim period when the functions of Ofcom fell to be discharged by the Secretary of State but I need not dwell on that issue. The section read:

"**5. Directions in respect of networks and spectrum functions**

(1) This section applies to the following functions of OFCOM:-

(a) their functions under Part 2; and
(b) their functions under the enactments relating to the management of the radio spectrum that are not contained in that Part.

(2) It shall be the duty of OFCOM to carry out those functions in accordance with such general or specific directions as may be given to them by the Secretary of State.

(3) The Secretary of State's power to give directions under this section shall be confined to a power to give directions for one or more of the following purposes –

(a) in the interests of national security;

...

(4) The Secretary of State is not entitled by virtue of any provision of this section to direct OFCOM to suspend or restrict –

(a) a person's entitlement to provide an electronic communications network or electronic communications service; or
(b) a person's entitlement to make available associated facilities."

42. As mentioned above, the 2003 Exemption Regulations were continued in force by virtue of the transitional provisions in the 2003 Act. At the same time section 166 of the 2003 Act inserted a new section 1AA into the 1949 Act, imposing a duty on Ofcom to make exempting regulations in the circumstances there set out:

**"1AA. Exemption from need for wireless telegraphy licence**

(1) If OFCOM are satisfied that the condition in subsection (2) is satisfied as respects the use of stations or apparatus of any particular description, they shall make regulations under section 1 of this Act exempting the establishment, installation and use of any station or apparatus of that description from the prohibition in that section.

(2) That condition is that the use of stations or apparatus of that description is not likely to involve any undue interference with wireless telegraphy."

The explanatory notes to the 2003 Act state that section 166 "implements Article 5(1) of the Authorisation Directive".

43. The 1949 Act as amended was subsequently replaced by the Wireless Telegraphy Act 2006 ("the 2006 Act"). Section 8 of the 2006 Act contained provisions relating to licences and exemptions corresponding to those previously contained in sections 1 and 1AA of the 1949 Act. In particular, section 8(4) and (5) of the 2006 Act were in the same terms as section 1AA(1) and (2) of the 1949 Act, quoted above.

44. Section 8 of the 2006 Act was amended in turn by the Electronic Communications and Wireless Telegraphy Regulations 2011 to take account of the amendment to

Article 5 of the Authorisation Directive introduced by the Better Regulation Directive. As so amended, section 8 read in material part:

> "(4) If OFCOM are satisfied that the conditions in subsection (5) are satisfied as respects the use of stations or apparatus of a particular description, they must make regulations under subsection (3) exempting the establishment, installation and use of a station or apparatus of that description from subsection (1).
>
> (5) The conditions are that the use of stations or apparatus of that description is not likely to –
>
> (a) involve undue interference with wireless telegraphy;
> (b) have an adverse effect on technical quality of service;
> (c) lead to inefficient use of the part of the electromagnetic spectrum available for wireless telegraphy;
> (d) endanger safety of life;
> (e) prejudice the promotion of social, regional or territorial cohesion; or
> (f) prejudice the promotion of cultural and linguistic diversity and media pluralism."

*The judge's findings*

45. Rose J dealt with the effect of those provisions of domestic law at paragraphs 75-91 of her judgment.

46. In argument before her, the appellants pointed to the absence of any mention of public security in section 1AA of the 1949 Act or section 8 of the 2006 Act and contended that even if Article 5 of the Authorisation Directive did allow a Member State as a matter of EU law to rely on public security as a reason for maintaining an individual licensing regime, the United Kingdom did not take advantage of that option by incorporating it into domestic law and it was not therefore open to the Secretary of State to rely on public security as a ground for maintaining the commercial use restriction. The Secretary of State, by contrast, relied on the power in section 5 of the 2003 Act for the Secretary of State to give directions to Ofcom in the interests of national security. This was said to transpose into domestic law the public security aspect of Article 5.

47. The judge found in favour of the Secretary of State on that issue. She rejected the appellants' argument that a direction under section 5 could not be used to override the duty imposed on Ofcom in primary legislation (namely section 1AA of the 1949 Act and section 8 of the 2006 Act) to issue an exemption in the circumstances specified. She also rejected an argument based on the wording of section 5(4) of the 2003 Act: she read the subsection as preventing the Secretary of State from directing Ofcom to restrict or suspend the rights of a specific individual or company, not as preventing him or her from directing that a restriction be imposed generally. As to the fact that no direction had ever been given under section 5 to impose an individual licensing regime on GSM gateways, the judge held that such a direction would only have been necessary if and when the 2003 Exemption Regulations were remade by Ofcom in exercise of the powers conferred on it by section 1AA of the 1949 Act or section 8 of

the 2006 Act. As it was, however, the 2003 Exemption Regulations had been validly made by the Secretary of State under section 1 of the 1949 Act and were treated by Schedule 18 to the 2003 Act as having been made under that power by Ofcom. In so far as the commercial use restriction depended for its validity on a public security justification, it was capable of being made under section 1 of the 1949 Act despite the insertion of section 1AA in 2003 because the 2003 Act also conferred a power on the Secretary of State to give a direction to Ofcom to make the exemption subject to that restriction. The 2003 Exemption Regulations could therefore have been validly made in their current form at any point in the relevant legislative history. There was no need to remake them after the coming into force of the 2003 Act and so no need for the Secretary of State actually to make a direction under section 5 of that Act.

*The appellants' challenge to the judge's findings*

48. The appellants submit that from 25 July 2003 onwards, by virtue of section 1AA of the 1949 Act, there was a clear *duty* on Ofcom to exercise the power in section 1 of the 1949 Act to exempt the commercial use of GSM gateways from the individual licensing regime unless such use gave rise to a risk of harmful interference. There was no basis in the legislation for refraining from doing so on public security grounds. The same position obtained under the 2006 Act. The 2011 amendments to the 2006 Act expanded the grounds on which exemption could be withheld but they still did not include public security. It is submitted that there are three insuperable problems concerning the judge's reliance on the power of the Secretary of State under section 5 of the 2003 Act to give a direction to Ofcom on national security grounds:

49. First, it is pointed out that no such direction was ever made and it is said to be unclear in those circumstances how the power under section 5 could be of any relevance. It is not disputed that the 2003 Exemption Regulations were *intra vires* when made or that they were continued in effect by the transitional provisions of the 2003 Act. But the relevant point is that Ofcom failed to repeal or amend those regulations pursuant to its duty under section 1AA of the 1949 Act and section 8 of the 2006 Act.

50. Secondly, by section 5(4) a direction cannot lawfully be made under section 5 if the effect is to restrict "a person's entitlement to provide an ... electronic communications service", but it is submitted that that is exactly what any hypothetical direction under section 5 in the present case would have had to do and that the judge's construction of the subsection was clearly wrong.

51. Thirdly, it is submitted that even if a section 5 direction had been made, it could not lawfully have directed Ofcom to breach its duty under section 1AA of the 1949 Act with regard to the making of exempting regulations. Section 5 cannot be interpreted as entitling the Secretary of State, by an executive act in the form of a ministerial direction, to undermine the clear requirements of a statute: cf. *R v Secretary of State for Social Security, ex p. Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275, 292-293. Had a direction been intended to have the effect found by the judge, the draftsman would have used express language of the kind to be found in other relevant provisions. Thus, section 94 of the Telecommunications Act 1984, as amended, provides:

> "94(1) The Secretary of State may, after consultation with a person to whom this section applies, give to that person such

> directions of a general character as appear to the Secretary of State to be necessary in the interests of national security ....
>
> ...
>
> (3) A person to whom this section applies shall give effect to any direction given to him by the Secretary of State under this section notwithstanding any other duty imposed on him by or under Part 1 of Chapter 1 of Part 2 of the Communications Act 2003 ...."

Similarly, section 3 of the 2006 Act, which places a duty on Ofcom to have regard to various matters in carrying out its radio spectrum functions, provides:

> "(5) Where it appears to OFCOM that a duty under this section conflicts with one or more of their duties under sections 3 to 6 of the Communications Act 2003, priority must be given to their duties under those sections."

52. Accordingly it is submitted that the United Kingdom failed to put in place any lawful basis for reliance upon public security as a ground for refraining from issuing a general authorisation for the commercial use of GSM gateways and that, on the contrary, domestic law positively prohibited reliance upon any ground other than the risk of harmful interference (or the expanded grounds allowed by the 2011 amendments). If a Member State is to avail itself of an exception available under a directive, it must make clear provision in its implementing legislation: cf. Case C-159/99, *Commission v Italy* [2001] ECR I-4027. Moreover Article 18 of the Authorisation Directive expressly required Member States to adopt implementing measures by 24 July 2003 and to *apply* those measures from 25 July 2003. For all those reasons the appellants were entitled to rely as a matter of EU law on their right under Article 5 of the Authorisation Directive to be included within a general authorisation in respect of GSM gateways. The failure to grant them that right was a clear breach of EU law.

53. Whilst the appellants' arguments have served to highlight unsatisfactory features of the domestic legislation, they have not persuaded me that the resulting situation is one in which the commercial use restriction is in breach of the Authorisation Directive in so far as the judge found it to be justified on the ground of public security. In my view the key lies in the 2003 Exemption Regulations which, by excluding the commercial use of GSM gateways from the scope of the exemption otherwise conferred, kept in place the commercial use restriction. Those regulations were validly made prior to the date for implementation of the directive. A decision not to make any material amendment to them was made just before the implementation date and was based on considerations of public security as a prime reason. The regulations, together with the commercial use restriction inherent in them, were then maintained in force as from the implementation date by the transitional provisions of the 2003 Act. They have remained in force to this day. As a matter of domestic law, therefore, the commercial use restriction has been valid throughout. The judge found the restriction to be justified on grounds of public security in so far as it related to COMUGs (though not COSUGs). Since public security was at all material times an available ground of justification under Article 5 of the Authorisation Directive, the

restriction in respect of COMUGs was compatible at all material times with the directive. (On the judge's findings, of course, the position in relation to COSUGs is different, but that relatively minor issue can be left on one side for the time being.)

54. The *Commission v Italy* case on which the appellants rely was concerned with a very different situation, in which Italy had failed to transpose a directive with the exactitude, precision and clarity required by Community law. By contrast, the 2003 Exemption Regulations were precise and sufficiently clear. It was not necessary to spell out that the justification for the commercial use restriction inherent in them was public security. The regulations were applied by the 2003 Act with effect from 25 July 2003, the date specified by the Authorisation Directive.

55. The appellants' submissions focus understandably on the fact that the duty to make exempting regulations which was imposed on Ofcom by section 1AA of the 1949 Act (as inserted by section 166 of the 2003 Act) and then by section 8 of the 2006 Act was not expressed to be subject to any public security exception. I find the domestic legislation very puzzling in that respect. There is a real tension between a duty expressed in those terms and the maintenance in force of the 2003 Exemption Regulations, under which GSM gateways were excluded from the scope of the exemption for reasons that had been openly stated to include public security. It would be surprising in those circumstances if the legislative intention was for Ofcom to make new exempting regulations, revoking or amending the 2003 Exemption Regulations, without regard to public security. Moreover, section 5 of the 2003 Act shows the importance attached by Parliament to national security in this general context and gives the Secretary of State substantial powers to act to protect it.

56. The wording of section 5 is, however, problematic. Section 5(2) provides that if directions are given by the Secretary of State, it is the duty of Ofcom to carry out its relevant functions (which include its duty under section 1AA of the 1949 Act to make exempting regulations) "in accordance with those directions". That cannot readily be interpreted as requiring Ofcom, if so directed by the Secretary of State, not to carry out a statutory duty otherwise imposed on it. The wording may be contrasted with the terms of section 94(3) of the Telecommunications Act 1984, quoted above, which require a person to give effect to a direction "notwithstanding any other duty imposed on him", and with the terms of section 3(5) of the 2006 Act, also quoted above, which make clear how a conflict between statutory duties is to be resolved. On this point, therefore, I have greater reservations than did Rose J, who said at paragraph 86 of her judgment that she did not see why a direction under section 5 could not be used to override Ofcom's duty to make exempting regulations. (I consider that the point is essentially one of construction of the 2003 Act and that the *Joint Council for the Welfare of Immigrants* case on which the appellants rely does not provide any real assistance.)

57. On the other hand, I agree with the judge, albeit for a slightly different reason, in rejecting the appellants' argument based on section 5(4). That subsection precludes the Secretary of State from directing Ofcom to suspend or restrict a person's entitlement to provide a relevant service. It seems to me that the provision is directed towards the suspension or restriction of an existing entitlement. The present issue, however, is whether a direction under section 5 could qualify Ofcom's duty to make regulations granting an exemption to, and thereby conferring an entitlement on, a person who, *ex hypothesi*, has no existing entitlement. Such a direction, if effective,

would prevent an entitlement from arising; it would not direct the suspension or restriction of an entitlement.

58. No relevant direction has ever been issued under section 5. None has needed to be issued in the absence of any decision by Ofcom to make exempting regulations to remove the commercial use restriction. The relationship between section 5 and Ofcom's duty to make exempting regulations has therefore never been put to the test in practice. I have expressed my doubts about the effectiveness of section 5 for the purpose on which the Secretary of State relies on it in these proceedings (and, as explained below, has relied on it in dealings with the European Commission) but I do not think it necessary to reach any concluded view on the subject. That is because, in my judgment, the compatibility of the commercial use restriction with the directive does not depend on whether the Secretary of State has the power under domestic law, by way of a direction under section 5, to prevent Ofcom from making exempting regulations to remove the restriction. I come back to the point that the commercial use restriction, as a valid measure of domestic law which is justified by considerations of public security in so far as it relates to COMUGs, is compatible to that extent with Article 5 of the Authorisation Directive.

59. For those reasons I would reject this ground of challenge to the judge's decision. I should add that even if I had concluded that the unsatisfactory features of the domestic legislation resulted in a situation in which the commercial use restriction was in breach of the directive, it would not affect the ultimate outcome of the case because, as explained later in this judgment, in my view that breach would not be sufficiently serious to give rise to liability under *Francovich* principles.

***The first ground of cross-appeal: harmful interference***

60. The risk of harmful interference has been available at all material times under Article 5 of the Authorisation Directive as a ground on which a Member State may apply an individual licensing regime rather than grant a general authorisation. "Harmful interference" is defined by Article 2(2)(b) of the Authorisation Directive:

> "'harmful interference' means interference which endangers the functioning of a radionavigation service or of other safety services or which otherwise seriously degrades, obstructs or repeatedly interrupts a radiocommunications service operating in accordance with the applicable Community or national regulations."

That definition tells one when an interference is to be regarded as "harmful" but does not define "interference" itself, nor is that expression otherwise defined in the directive.

61. As set out earlier in this judgment, the duty imposed on Ofcom by section 1AA of the 1949 Act to make exempting regulations was subject to the condition that the use of the relevant apparatus was not likely to involve any "undue interference" with wireless telegraphy. The Wireless Telegraphy Acts have at all material times contained a definition of "interference". They have also set out when interference is to be regarded as "undue", in terms that were amended to reflect the definition of

"harmful interference" in the Authorisation Directive. Thus, the 1949 Act, as amended with effect from 25 July 2003, provided:

> "19(4) In this Act, the expression 'interference', in relation to wireless telegraphy, means the prejudicing by any emission or reflection of electro-magnetic energy of the fulfilment of the purposes of the telegraphy (either generally or in part, and, without prejudice to the generality of the preceding words, as respects all, or as respects any, of the recipients or intended recipients of any message, sound or visual image intended to be conveyed by the telegraphy), and the expression 'interfere' shall be construed accordingly.
>
> (5) Interference with any wireless telegraphy is not to be regarded as undue for the purposes of this Act unless it is also harmful.
>
> (5A) For the purposes of this Act interference is harmful if –
>
> (a) it creates dangers, or risks of danger, in relation to the functioning of any service provided by means of wireless telegraphy for the purposes of navigation or otherwise for safety purposes; or
>
> (b) it degrades, obstructs or repeatedly interrupts anything which is being broadcast or otherwise transmitted –
>
> (i) by means of wireless telegraphy; and
>
> (ii) in accordance with a licence under this Act, regulations under the proviso to section 1(1) of this Act or a grant of recognised spectrum access under Chapter 2 of Part 2 of the Communications Act 2003 or otherwise lawfully."

The 2006 Act contained provisions in similar, though slightly simplified, terms.

62. The Secretary of State relies on the risk of harmful interference as providing a separate and sufficient basis under EU and domestic law (i.e. Article 5 of the Authorisation Directive and section 1AA of the 1949 Act) for the retention of the commercial use restriction.

63. The judge dealt with this issue at paragraphs 115-149 of her judgment. Having set out the legislative provisions, she said:

> "120. The issues between the parties here are first what kinds of problems do GSM Gateways cause to the operation of the MNOs' networks and secondly, do those problems fall within the definition of 'harmful interference' for the purpose of the Authorisation Directive and domestic legislation?

> 121. Both parties submitted expert evidence on those issues [the experts were Professor Webb on behalf of the appellants and Professor Saunders on behalf of the Secretary of State] …."

64. She went on to examine the expert evidence. She referred to certain matters of common ground between the experts, including the point that the use of a SIM card in a GSM gateway is likely to create problems for the network on which the card operates. She gave details of this at paragraphs 126-128 of her judgment. She continued:

> "129. I have no difficulty in finding that the use of an MNO's SIM cards in a GSM Gateway has the potential to cause congestion on that MNO's network and this may result in other subscribers to that network who are trying to make or receive calls suffering dropped or blocked calls or experiencing significant degradation in the quality of the calls they manage to make."

65. Professor Webb, however, had described problems arising from sources within an MNO's own network as "self-interference", which in his view was not a matter for regulatory intervention and was not harmful interference for the purposes of the directive or the domestic legislation. Whilst Professor Saunders did not agree with all of Professor Webb's analysis, the judge said at paragraph 138 that *both* experts described harmful interference as the presence of an "unwanted" signal in the presence of a "wanted" signal. Where they differed was in whether they considered signals sent by a GSM gateway to the MNO's base station as wanted or unwanted. Professor Webb considered that it was a wanted signal, so that the problems caused to a network by the use of the MNO's SIM cards in a GSM gateway did not constitute harmful interference. Professor Saunders took a different view. The judge preferred the opinion and evidence of Professor Webb, for reasons given at paragraphs 141-149 of her judgment. She said, for example:

> "141. … I do not consider that the problems which undoubtedly arise for the MNOs from the use on their network of genuine SIM cards that they have sold can be described as 'harmful interference' or that the phone calls made from the SIM cards in a GSM Gateway are 'unwanted' in the sense used when describing interference as 'harmful'."

66. Mr Moser, who presented this part of the Secretary of State's case both before the judge and in this court, submitted that, perhaps through a deficiency in his own submissions, the judge "dropped a stitch" between paragraph 120 and paragraph 121 of her judgment: she did not consider the definition of interference in the directive and the domestic legislation but moved straight to consideration of the expert evidence, focusing exclusively on the narrow, technical meaning of interference as an unwanted signal in the presence of a wanted signal. He submitted that the definition of interference is not limited to the technical meaning. The definition of harmful interference in Article 2(2)(b) of the Authorisation Directive refers generally to interference which "seriously degrades, obstructs or repeatedly interrupts" a radio communications service. The definition of interference in section 19(4) of the 1949 Act is in similarly general terms: "the prejudicing by any emission or reflection of

electro-magnetic energy of the fulfilment of the purposes of the telegraphy". Those definitions do not limit interference to an unwanted signal in the presence of a wanted signal, or to interference from an extraneous source. Thus, the problems arising within an MNO's network from the use of GSM gateways on that network – congestion, dropped and blocked calls, and a degradation in call quality – fall clearly within the definition of interference and they are plainly of such seriousness as to count as harmful interference. The judge fell into error in finding otherwise.

67. I do not accept that the judge fell into error on this issue or that Mr Moser has any reason for concern about the content of his submissions to her. The expert evidence and the judge's assessment of it did not overlook the legislative definitions of interference (to the extent it was separately defined) or harmful interference. Professor Webb evidently considered, and the judge accepted his evidence, that harmful interference for the purposes of the directive and the domestic legislation did not include self-interference, which was not a matter for regulatory intervention; and both experts considered, and the judge again accepted, that harmful interference required an unwanted signal in the presence of a wanted signal. Whilst the focus was on harmful interference, I think it clear that the points being made were based on an understanding of what constituted interference for the relevant purposes. Consideration of the technical issues did not overlook the definitions in the directive and the domestic legislation but proceeded on the basis that interference in those contexts had a technical meaning. In my judgment, that was the correct approach.

68. As already noted, interference is not separately defined in the Authorisation Directive. There is no reason to believe that the definition in the domestic legislation fails substantially to reflect the meaning of the term in the directive, but in both cases it is important to have regard to the technical, regulatory context in which the term is used. In that context one would expect the term to have a technical meaning as attributed to it in the expert evidence accepted by the judge. The definition in the domestic legislation can be accommodated readily within that approach: an emission or reflection of electromagnetic energy from a source internal to a wireless telegraphy network and constituting a wanted signal within that network is not to be regarded as "prejudicing … the fulfilment of the purposes of the telegraphy".

69. That approach to the interpretation of interference is supported by the decision of the Competition Appeal Tribunal in *Floe Telecom Limited v Office of Communications* [2006] CAT 17. In that case the tribunal was concerned with whether GSM gateways caused harmful interference within the meaning of Article 2(i) of the RTTE Directive (Directive 1999/5/EC on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity). In a part of her judgment against which there is no appeal, Rose J held that the RTTE Directive did not apply in the present case. The relevant definition is, however, identical to that of harmful interference in the Authorisation Directive, so that the tribunal's observations in relation to it are relevant. The tribunal stated:

> "220. In our judgment, it is clear from the context of the Directive as a whole that the language used in the RTTE Directive must be read in the context of terminology applicable to radio equipment and telecommunications. We therefore reject the submission that the word 'interference' must be given a colloquial meaning in the definition of 'harmful interference'.

> 221. During the hearing the Tribunal caused copies of an extract from the Oxford English Dictionary definition of 'interference' to be provided to all the parties. The Oxford English Dictionary lists various senses of the word 'interference' including sense 5 'Broadcasting and Telecommunications' for which the definition is 'disturbance of the transmission or reception of signals by the intrusion of extraneous signals; hence, signals collectively or radiation by which it is perceived (e.g. unwanted sounds in radio reception)'.
>
> 222. The dictionary definition of 'interference' applicable in the broadcasting and telecommunications sense refers to a disturbance by the intrusion of 'extraneous signals' and to 'unwanted sounds'. Accordingly we find that the term 'interference' used in the definition of 'harmful interference' in the RTTE Directive refers to extraneous or unwanted signals. Congestion, or increased call traffic, on the other hand, does not arise as a result of 'extraneous' or 'unwanted' signals but because too many 'relevant' or 'wanted' signals compete to use the radio waves at the same time, so that not all of them are able to use the relevant radio waves at the same time. Exceeding available capacity in this way is not 'interference' in the sense used in the definition of 'harmful interference' in Article 2(i) of the RTTE Directive."

70. One needs to be cautious about interpreting a term in an EU directive by reference to the definition in the Oxford English Dictionary, but it seems to me that the tribunal was right to concentrate on the meaning to be given to the term in the broadcasting and telecommunications context; and the tribunal's view that in that context it refers to disturbance by the intrusion of extraneous or unwanted signals fits well with the approach accepted by the judge in the present case. (I should mention that the tribunal's decision was the subject of an appeal and that its interpretation of interference was one of the grounds of appeal, but the Court of Appeal did not need to decide that issue: see [2009] EWCA Civ 47, [2009] Bus LR 1116.)

71. I would therefore reject the first ground of cross-appeal.

***The second ground of cross-appeal: the COSUG/COMUG dividing line***

72. The great majority of the judge's reasoning on the question whether the commercial use restriction was justified in practice by considerations of public security was set out in the confidential annex to her open judgment. On that question the open judgment was confined to considering some preliminary matters (paragraphs 109-113) and to expressing the judge's conclusion that "the public security concerns justify the imposition of the Commercial Use Restriction in so far as that restricts the provision of COMUGs but not in so far as it restricts the provision of COSUGs" (paragraph 114).

73. By the second ground of cross-appeal the Secretary of State contends that the judge should have accepted the public security justification in respect of COSUGs as well.

Mr Beard, who presented this part of the case on behalf of the Secretary of State, succeeded in dealing with the matter in open court, inviting the court to read for itself the few passages in the confidential annex that were necessary to the argument. The issue is a short one and it seems to me that it can be dealt with adequately in an open judgment. I cannot see that the public interest would be prejudiced by the very limited references that I need to make to material in the confidential annex.

74. The issue arises out of the fact that a self-use GSM gateway (i.e. where a customer buys and installs the GSM gateway for use in its own business) is exempted by the 2003 Exemption Regulations and is therefore not subject to the commercial use restriction. The judge found that all uses of GSM gateways gave rise to some degree of public security concerns. The difference of treatment between single-user and multi-user GSM gateways was nevertheless a rational one and did not render the commercial use restriction arbitrary or discriminatory. But the difference of treatment between different types of single-user gateways, namely self-use GSM gateways on the one hand and COSUGs on the other, was not justified. The Secretary of State did not seek to justify the difference of treatment on the basis of a difference in the scale of public security problems as between self-use GSM gateways and COSUGs but on the basis that it simplified administration and policing to apply the same regime to COSUGs as to COMUGs. The judge rejected the argument.

75. Mr Beard submitted that the judge fell into error in failing to allow for the broad margin of appreciation that should be enjoyed by the Secretary of State, with his broader knowledge of the relevant practicalities, in deciding where to draw the line. The line drawn by the judge might have been a reasonable one for her to draw if she had been the primary decision-maker but she was wrong to substitute her own view for that of the Secretary of State. In support of his submissions, Mr Beard cited *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] 1 AC 173 as to the drawing of bright line demarcations by ministers and Parliament, and *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [2003] 1 AC 153, in particular at paragraphs 53-54, concerning the limited bases on which a court may interfere with a decision by the Secretary of State as to whether something is or is not in the interests of national security.

76. I do not accept that the judge fell into the error suggested. At paragraphs 110-111 of the open judgment she referred to Mr Beard's submission, made by reference to EU case-law, that the national authorities must be allowed a margin of discretion in matters of public security. She said:

> "I accept that that is the right way to approach this case though this does not mean that the court should not look closely at the evidence presented to see if the public security concerns are real and if the Government's response to them is appropriate."

That is the approach she then adopted in the confidential annex. In the annex she also considered the judgments in *Carson*. The *Rehman* case had not been cited to her but there is nothing in it to support the contention that she fell into error. She simply found that the evidence did not support the justification relied on for applying the same restriction to COSUGs as to COMUGs rather than treating them in the same way as self-use GSM gateways. It was essentially a finding of fact. There is no basis for interfering with it.

### *The appellants' ground 2: sufficiently serious breach*

77. It follows from the above that in my view the judge approached the issue of sufficiently serious breach from the correct starting point, namely that the only breach of the Authorisation Directive lay in the application of the commercial use restriction to COSUGs. I will consider ground 2 primarily on the same basis but, as previously indicated, I will also consider it on the alternative basis that, because of the unsatisfactory features of the domestic implementing measures, the application of the commercial use restriction to COMUGs was a breach of the directive. The appellants' arguments on sufficiently serious breach are addressed mainly to that wider possibility, but it is submitted that even if the breach related only to COSUGs the judge ought to have found that it was sufficiently serious to satisfy the second condition for *Francovich* liability.

78. The judge dealt with the issue at paragraphs 172-228 of her judgment. It was common ground before her that she should apply the "multi-factorial" test that was summarised by Maurice Kay LJ in *R (Negassi) v Secretary of State for the Home Department* [2013] EWCA Civ 151, [2013] 2 CMLR 45, following a review of the authorities:

> "14. It follows that Mr Negassi's claim for damages must be assessed by reference to the multifactorial test for sufficient seriousness, the essence of which is apparent from *British Telecommunications* [1996] 2 CMLR 217 and *Haim* [2002] 1 CMLR 11. In the domestic context, it was the subject of helpful guidance in the speech of Lord Clyde in *R v Secretary of State for Transport, Ex p. Factortame Ltd (No.5)* [1999] 3 CMLR 597; [2000] 1 AC 524, at pp.554-556. He identified the following as potential factors: (1) the importance of the principle which has been breached; (2) the clarity and precision of the rule breached; (3) the degree of excusability of an error of law; (4) the existence of any relevant judgment on the point; (5) whether the infringer was acting intentionally or involuntarily of whether there was a deliberate intention to infringe as opposed to an inadvertent breach; (6) the behaviour of the infringer after it has become evident that an infringement has occurred; (7) the persons affected by the breach or whether there has been a complete failure to take account of the specific situation of a defined economic group; (8) the position taken by one of the Community institutions in the matter. He added (at p.554B-D) that the application of the 'sufficiently serious' test 'comes eventually to be a matter of fact and circumstance':
>
> > 'No single factor is necessarily decisive. But one factor by itself might, particularly where there was little or nothing to put in the scales on the other side, be sufficient to justify a conclusion of liability.'"

79. The multi-factorial test remains common ground before us. Ms Carss-Frisk referred, however, to a number of further authorities in order to bring out relevant factors. In

Case C-278/05, *Robins v Secretary of State for Work and Pensions* [2007] ECR I-1081, for example, the Court of Justice repeated certain basic principles:

> "70. The condition requiring a sufficiently serious breach of Community law implies manifest and grave disregard by the Member State for the limits set out on its discretion, the factors to be taken into consideration being, inter alia, the degree of clarity and precision of the rule infringed and the measure of discretion left by that rule to the national authorities (*Brasserie du Pêcheur and Factortame*, paragraphs 55 and 56).
>
> 71. If, however, the Member State was not called upon to make any legislative choices and had only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach (see *Hedley Lomas*, paragraph 28).
>
> 72. The discretion enjoyed by the Member State thus constitutes an important criterion in determining whether there has been a sufficiently serious breach of Community law.
>
> 73. That discretion is broadly dependent on the degree of clarity and precision of the rule infringed."

In *R v Department of Social Security, ex p. Scullion* [1999] 3 CMLR 798, Sullivan J (as he then was) had regard, *inter alia*, to the absence of evidence that the Government sought any legal advice as to whether the discriminatory legislation in issue in that case was, or was likely to be held by the Court of Justice to be, within the scope of a derogation permitted by the relevant directive (paragraph 43). He also took into account that the detriment to the applicant and to other women in her position was foreseen (paragraph 46). In *Byrne v Motor Insurers' Bureau* [2008] EWCA Civ 574, [2009] QB 66, where it was emphasised that the test is not hard-edged, one of the points considered important in establishing liability was the serious consequences of failure to comply with the relevant directive.

80. Having explained the multi-factorial test, the judge said that the factors referred to in the case-law that were relevant to the infringement she had found were the clarity of the provision being implemented; the good faith or otherwise of the Secretary of State in arriving at the decision to retain the commercial use restriction; the attitude of the Community institutions to the Member State's transposition; the persons affected by the breach; and whether there was a complete failure to take account of the situation of the GSM gateway operators. She proceeded to examine each of those matters in turn.

81. She found first that the lack of clarity of Article 5 in both its original and amended form and the nature of the infringement she had found were factors which militated against a finding of state liability (paragraph 179).

82. On the issue of intentional or voluntary infringement, she looked in detail at the origin and history of the commercial use restriction, concluding:

> "202. The conclusions I draw from this history is that the balancing of the interests of the GGOs [GSM gateway operators] against public security concerns was given prolonged and detailed consideration by those in Government with responsibility for deciding whether to continue to use the Commercial Use Restriction. There certainly has not been a 'complete failure to take account of the specific situation of a defined economic group' to quote Kay LJ in *Negassi*. The GGOs were able to make submissions to the DCMS officials both in writing and at meetings to put across their arguments as they wished. There is nothing to suggest that the Government approached the matter with a closed mind. On the contrary, it is clear that OFCOM and BIS approached the matter on the basis that the default position should be to lift the Commercial Use Restriction unless they could be convinced that it was needed. In the end, they were convinced by the public security arguments put forward by the Home Office. If OFCOM and BIS were in error to the extent that I have found, then that was an excusable error and not an egregious error for the purposes of the *Franvovich* test.
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> 203. I have considered whether the Home Office was at fault in failing to make the distinction between COMUGs and COSUGs that I have held ought to have been made. I do not consider that it was. The GGOs arguing forcefully for liberalisation did not, so far as I am aware, propose this compromise. Their businesses depended in large part on selling COMUG services and they were intent on getting the Commercial Use Restriction lifted in its entirety. The failure to draw that distinction is not a serious and manifest disregard of the UK's obligations under the Directive.
>
> 204. It is true that the submissions of officials were not cast in terms of the Government's obligations under the relevant EU or domestic legislation, but I do not see how the substance of the discussions would have differed if it had been expressly considered within that framework. There is nothing in the history of the Government's analysis of the issue that indicates an intention to restrict the use of GSM Gateways for some purpose other than that publically expressed and consulted upon or to disregard the UK's legal obligations. The facts I have set out militate firmly against any finding that there has been a manifest disregard of the UK's legal obligations."

83. The judge next considered the infraction proceedings threatened by the European Commission in respect of the commercial use restriction. A complaint was made to the Commission by Floe Telecom Limited in 2004 but the matter was stalled pending the proceedings brought by that company against Ofcom in the domestic courts. It was picked up again by the Commission in 2010, with the focus on whether there was a breach of the Authorisation Directive. In response to the Commission's initial

letter, the UK representatives argued that there were compelling public security reasons for the restriction and that this justification was available under Article 5 of the Authorisation Directive. They also set out the history of the restriction, referring *inter alia* to the July 2003 decision that the commercial use of GSM gateways should continue to be excluded from the exemption in the 2003 Exemption Regulations. By a further letter dated 18 July 2011 seeking clarification, the Commission referred erroneously to section 8B of the 2006 Act, which did not in fact apply to GSM gateways: noting that the section did not refer to public security, the Commission asked if public security was defined elsewhere in UK law as a general interest objective that could justify the grant of individual rights. By a letter in response dated 10 August 2011, the UK representatives explained the error about section 8B and added:

> "... Under domestic legislation public security issues in relation to the exercise by Ofcom of its functions are dealt with under section 5 of the Communications Act 2003. Pursuant to that section Ofcom has a duty to carry out its functions under the WTA 2006 in relation to the management of the radio spectrum in accordance with directions given by the Secretary of State. The section provides that one of the purposes for which the Secretary of State may exercise his direction power is in the interests of national security."

Thereafter the Commission decided not to pursue the threatened proceedings.

84. In her conclusions on this issue, at paragraphs 209-211, Rose J said that the fact that the Commission had looked into the matter carefully and decided not to proceed pointed at the least to the difficulty of the issues raised and hence militated against a finding that there had been manifest disregard of the United Kingdom's EU obligations. The appellants had contended before her that the letter of 10 August 2011 was misleading in referring to section 5 of the 2003 Act without also referring to the fact that no direction had actually been made in respect of GSM gateways. She rejected that criticism, referring back to her finding that there was no need for a direction to be made since the 2003 Exemption Regulations were carried forward by the transitional provisions of the 2003 Act.

85. In the light of those various considerations the judge reached the overall conclusion that the breach she had found in relation to COSUGs did not amount to a manifest and grave disregard of the United Kingdom's obligations under the directive.

86. In submitting that the judge was wrong to reach that conclusion, Ms Carss-Frisk gave the following summary of factors relied on by the appellants as establishing a manifest and grave disregard: (1) The process in 2003 that led to the decision to retain the commercial use restriction was fundamentally flawed, in that there was no consideration of the United Kingdom's obligations under EU law or of the way those obligations were about to be implemented in domestic law. (2) In consequence, the minister who made the decision did not even ask himself whether it was open to him under EU law to rely on public security. (3) If Article 5 of the Authorisation Directive did not permit reliance on public security, the failure to consider it at all was serious and inexcusable. (4) But even if Article 5 did permit reliance on public security in principle, the United Kingdom chose not to rely on it, in that, by the new

section 1AA of the 1949 Act, Parliament chose to adopt only the risk of harmful interference as a ground for not granting a general authorisation. The appellants were therefore entitled to be granted the right to provide commercial GSM gateway services under a general authorisation. The failure to grant them that right was inexcusable and serious. (5) The basic obligation under the directive was clear. (6) Even if there was some lack of clarity in Article 5, Parliament made a clear choice in the 2003 Act, imposing a duty to make exempting regulations. The situation was close to one where the case-law indicates that a mere breach of EU law may give rise to an entitlement to damages. (7) The principles of EU law on which the directive depends (free movement, completion of the internal market) are important principles. (8) There is no evidence of legal advice having been taken either in 2003 or thereafter: EU law was simply ignored. (9) It was elementarily foreseeable that persons such as the appellants would suffer damage as a result of the commercial use restriction. (10) The Commission was misled in the correspondence relating to the threatened infraction proceedings. (11) The restriction was maintained over a large number of years notwithstanding that Ofcom had expressed views over time in favour of some liberalisation.

87. I am not persuaded by those submissions. It seems to me that the judge, having directed herself correctly as to the multifactorial test, applied that test in a manner that is not open to material criticism. As regards the absence of express reference to the Authorisation Directive and its pending domestic implementation at the time of the decision in July 2003 to maintain in force the commercial use restriction, I agree with the judge that such reference would not have affected the substance of the discussions. Moreover the relevant officials and minister (who had piloted the Communications Bill through Parliament) must have been fully cognisant of the legislative background to the discussions. On the judge's findings, with the substance of which I have expressed agreement, a public security justification was available in principle under the directive; and the commercial use restriction (as inherent in the 2003 Exemption Regulations) was continued in force under the domestic implementing legislation and was justified on the ground of public security in so far as it related to COMUGs. The finding that it was not justified in relation to COSUGs meant that there was a breach of the directive but only of a limited nature: it is clear that the provision of COSUG services was of far less importance to the appellants than the provision of COMUG services. In circumstances where the only breach lay in the lack of a sufficient public security justification for the application of the restriction to COSUGs, I do not think that the absence of evidence as to the taking of legal advice is of any materiality. I agree with the judge that the United Kingdom did not mislead the Commission in the exchanges relating to the threatened infraction proceedings. The fact that the Commission decided not to pursue those proceedings is itself a pointer against a finding of sufficiently serious breach.

88. I am therefore satisfied that there is no basis for interfering with the judge's conclusion that the breach she had found did not amount to a manifest and grave disregard of the United Kingdom's obligations under the directive.

89. If, contrary to the view I have taken, the judge ought to have found a wider breach of the directive arising out of the unsatisfactory features of the domestic implementing legislation, in my judgment that would still not justify a finding of sufficiently serious breach. It would remain the position that a public security justification was available

in principle under the directive and that the commercial use restriction was in fact justified on that ground in its application to COMUGs. In substance, therefore, the result was one permitted by the directive. I see no reason to doubt that the UK authorities also believed the result to be permitted by the domestic implementing legislation, in that the 2003 Exemption Regulations had been continued in force by the 2003 Act and section 5 of that Act gave the Secretary of State power to issue directions to Ofcom in the interests of national security if Ofcom were otherwise minded to revoke or amend the regulations so as to remove the commercial use restriction: that ties in with the reliance placed on section 5 in meeting the Commission's concerns about the United Kingdom's implementation of the directive. If on its true construction the implementing legislation had the effect contended for by the appellants and if in consequence the United Kingdom must be taken not to have availed itself of the possibility of relying on public security as a ground for withholding a general authorisation, so that the failure to grant a general authorisation was in breach of the directive, the breach was in my view inadvertent and excusable. Taking everything into account, I do not accept that such a breach would have amounted to a manifest and grave disregard of the United Kingdom's obligations under the directive.

***Conclusion***

90. For the reasons given I would dismiss the appeal.

**Lady Justice Black :**

91. I agree.

**Lady Justice Rafferty :**

92. I also agree.