RECALL SUPPORT SERVICES LIMITED ET AL v SECRETARY OF STATE FOR CULTURE MEDIA AND SPORT

Ligia Osepciu
November 2013

The Secretary of State for Culture, Media and Sport, assisted by the Home Secretary, has successfully defended six claims for *Francovich* damages totalling £451 million brought by commercial operators of GSM gateway telecommunications apparatus. The claimants alleged that the UK government's decision to impose a license requirement on the operation of GSM gateway apparatus infringed the requirements of the RTTE[1] and the Authorisation[2] Directives. The High Court (Rose J) held that the imposition of a license requirement in respect of *certain types* of commercial GSM gateway operation constituted a breach of the Authorisation Directive, but not one that was sufficiently serious to sound in an award of damages against the UK. It was also held that the licensing requirement was not in breach of EU law when applied to other types of commercial gateway operation.

The complex judgment in this case touches on a number of issues of European, competition and telecommunications law. It is perhaps of greatest interest to would-be commercial operators of GSM gateways, who now have a clear platform from which to demand the removal of licensing requirements from certain types of commercial gateway use, and mobile network operators ("MNOs"), who will need once again[3] to consider carefully the competition law implications of refusing to supply SIM cards to GSM gateway operators.

GSM gateways

A GSM gateway is a piece of telecommunications switching equipment to be used in conjunction with one or more mobile phone SIM cards of one or more mobile network operators ("MNOs"). When a call originating on either a fixed or mobile telephone is routed through a GSM gateway, it is converted into a call from one of the SIM cards in the gateway with the result that the call is treated by the terminating call provider as originating on the mobile network to which that SIM card is registered.

1 Directive 1999/5/EC on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity.
2 Directive 2002/20/EC on the authorization of electronic communications networks and services.
3 The issue of MNOs' refusal to supply SIM card to commercial GSM gateway operators was initially considered in Floe Telecom Ltd (in administration) v OFCOM [2006] CAT 17, upheld on appeal in OFCOM v Floe Telecom (in liquidation) [2009] EWCA Civ 47 (see below).

GSM gateways provide a price arbitrage opportunity by allowing calls from fixed phones to mobile phones ("F2M calls") to be treated by terminating MNOs as calls from between mobile phones ("M2M calls"), which typically attract lower termination charges from MNOs than F2M calls. Similarly, GSM gateways enable calls originating on one mobile network and terminating on another mobile network ("off-net calls") to be treated by the terminating MNO as calls originating on its own network ("on-net calls"), which attract lower termination charges.

There are three categories of GSM gateway use:

(1) Self Use GSM gateways ("SUGs"), whereby an individual or (more likely) a business purchases and installs a GSM gateway for use in its own private/business communications.
(2) Commercial Single-User GSM gateways ("COSUGs"), whereby a person uses a GSM gateway to provide services by way of a business to a single end-user (either an individual or, more likely, another business).
(3) Commercial Multiple-User GSM gateways ("COMUGs"), whereby a person uses a GSM gateway to provide services by way of a business to multiple end-users (individuals or businesses).

Factual background to the claim

The claimants in this case were five former GSM gateway operators ("GGOs") and one former wholesale supplier of SIM cards to GGOs. By the end of 2002, all of the GGOs had established GSM gateway businesses. Those businesses (i) predominantly involved the operation of COMUGs rather than COSUGs and (ii) were reliant on supplies of SIM cards registered with various MNOs, which were sourced either directly from MNOs or from wholesaler intermediaries.

In early 2003, the MNOs decided that they did not wish to allow GGOs to operate using SIM cards registered to their networks. The MNOs, accordingly, took steps to discontinue supply of SIM cards to GGOs and to block the operation of SIM cards that the MNOs suspected had been incorporated into a COSUG or a COMUG.

Two of the GGOs complained to Ofcom that the MNOs' refusal to supply SIM cards amounted to an abuse of a dominant position in breach of section 18 of the Competition Act 1998 ("the Chapter II prohibition"). Ofcom's rejection of the complaint was appealed to the Competition Appeal Tribunal[4] and ultimately to the Court of Appeal.[5] The appeal failed on the ground that any refusal to supply by the MNOs was objectively justified because (i) the use of GSM gateways for the purpose of providing telecommunications services by way of a business to another person (i.e. the operation of both COMUGs and COSUGs) is unlawful in the absence of a licence granted by Ofcom and (ii) the GGOs had not been granted any such licence.[6]

4 Floe Telecom Ltd (in administration) v OFCOM [2006] CAT 17.
5 OFCOM v Floe Telecom (in liquidation) [2009] EWCA Civ 47.
6 Judgment, paragraph 34. See section 1(1) of the Wireless Telegraphy Act 1949, replaced by section 8 of the Wireless Telegraphy Act 2006. See also regulation 4(2) of the Wireless Telegraphy (Exemption) Regulations 1999, replaced by

RECALL SUPPORT SERVICES LIMITED ET AL v SECRETARY OF STATE FOR CULTURE MEDIA AND SPORT

Following the failure of the competition law appeal, the claimants launched the present proceedings claiming *Francovich* damages against the UK government on the grounds that the imposition of a licensing requirement on commercial GSM gateway operators constitutes a serious infringement of EU law, specifically the RTTE and the Authorisation Directives.

The Secretary of State for Culture, Media and Sport did not accept that the RTTE Directive was engaged on these facts. He did, however, accept that the effect of Article 3 of the Authorisation Directive is to prevent Member States from subjecting the provision of electronic communications services (including the services provided by GGOs) to any more stringent regulatory requirements than the conditions of general authorization, save where such requirements are justified in accordance with the provisions of the Directive. The Secretary of State argued that a more stringent regulatory requirement (i.e. a licensing requirement) was justified in relation to the GGOs in this case on grounds of (i) public security, (ii) avoidance of harmful interference and (iii) ensuring the efficient use of spectrum. On this basis, the Secretary of State resisted the *Francovich* claim in its entirety.

Relevance of the RTTE Directive

The RTTE Directive provides that, where telecommunications apparatus conforms with the requirements of the Directive, Member States shall not impose any further restrictions on the marketing of such equipment in their territory: Article 6(1). However, Member States may restrict the putting into service of such equipment for reasons relating to effective use of spectrum, avoidance of harmful interference or matters relating to public health: Article 7(2).

The claimants argued that the right to market telecommunications equipment in Article 6(1) of the RTTE Directive implies a right to access the radio spectrum necessary to put the equipment into service.[7] Rose J rejected this argument[8] as inconsistent with the existence of the Authorisation Directive, which addresses in terms the issue of allocation of radio spectrum by Member States. [9]

---

regulation 4(2) of the Wireless Telegraphy (Exemption) Regulations 2003.

7 Judgment, paragraph 41.

8 Judgment, paragraph 47-50.

9 The claimants referred to Case C-380/08 Centro Europa [2008] ECR I-349 in support of their argument on the impact of the RTTE Directive. Rose J noted that Centro Europa was a very different case from the one at hand. In that case a person had been granted broadcasting rights pursuant to a national auction, on the understanding that necessary broadcasting frequencies would not be allocated until a national frequency allocation plan had been completed; the allocation plan did not materialize, with the result that incumbent broadcasters were able to continue broadcasting, but the new entrants that were awarded the right to broadcast at the latest auction were not able to do so. The CJEU held in that case that the right to broadcast necessarily implied the right to be allocated the frequency to do so – however, that does not mean that the mere purchase of broadcasting equipment necessarily confers a right to broadcast or to access any particular frequency for that purpose.

European law: available justifications for GGO licence requirement

Article 3 of the Authorisation Directive provides in relevant part:

> *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 authorization…*
>
> (emphasis added)

The original version of Article 5(1) of the Authorisation Directive, in force from 7 March 2002 until 19 December 2009, provided as follows:

> *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.* (emphasis added)

Article 5(1) of the Authorisation Directive was amended by the Better Regulation Directive[10] with effect from 19 December 2009 to read as follows:

> *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.*** (emphasis added)

The claimants argued that, prior to the amendment of Article 5(1) by the Better Regulation Directive, the only basis on which the imposition of a GGO licensing requirement could be justified under the Authorisation Directive was the avoidance of harmful interference. They accepted that, after amendment of Article 5(1), a GGO licensing requirement could also be justified on grounds of public security and the need to ensure efficient use of spectrum.

The Secretary of State maintained that the public security and efficient use of spectrum justifications for GGO licensing were available throughout the lifetime of the Authorisation Directive – under both the original and the amended Article 5(1).

10 Directive 2009/140/EC amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services.

Public Security

Whilst the claimants conceded that it was always, in principle, open to a Member State to derogate from the provisions of a particular Directive on grounds of public security under Article 52, TFEU, they noted that any derogation pursuant to that Article must be notified to the EU institutions in accordance with the procedure set out in Article 114, TFEU. The notification procedure had not been followed in this case, thus reliance could not be placed on Article 52, TFEU. [11]

Rose J held that it was unnecessary for the UK to rely on Article 52, TFEU in this case – as public security was available as a justification for imposing a GGO licence requirement under the original, as well as the amended, version of Article 5(1) of the Authorisation Directive. She arrived at this interpretation of the original Article 5(1) on the basis of:

a) the use of the words "in particular" in the original Article 5(1), suggesting that the avoidance of harmful interference – which is the only consideration expressly mentioned in that Article - is not the only potential justification for imposing a licence requirement;[12] and
b) the use of the amended Article 5(1) as an aid to the interpretation of the original Article, which was warranted in this case because "*one intention of the amendment of Article 5 in 2009 was to spell out the content of the previously vague "in particular" in the original Article 5".*[13]

Accordingly, there was no need for the UK government to follow the Article 114 TFEU procedure in order to rely on the public security derogation in this case: that procedure only applies where a Member State derogates from a harmonising measure in a manner or on grounds not contemplated within the measure itself.[14]

Efficient use of spectrum

Rose J also held that the need to ensure the efficient use of spectrum provided a potential justification for the imposition of a licensing requirement under the original, as well as the amended, version of Article 5(1).

She reached this view essentially on the basis of Article 5(5) of the original Authorisation Directive, which provides that *"Member States shall not limit the* ***number of rights of use*** *[of radio spectrum] to be granted except where this is necessary to ensure the efficient use of radio frequencies in accordance with Article 7"* (emphasis added). She considered that it would be odd if the efficient use of spectrum could provide a justification for limiting the number of licenses (rights of use) granted, but not for imposing a licensing scheme in the first place. [15]

11 Judgment, paragraph 67.
12 Judgment, paragraph 69.
13 Judgment, paragraph 70.
14 Judgment, paragraphs 72 & 73.
15 Judgment, paragraph 96.

Domestic law: available justifications for GGO licence requirement

Article 5 of the Authorisation Directive was first transposed into UK law by section 1AA of the Wireless Telegraphy Act 1949[16] ("the 1949 Act"), which was in force between 25 July 2003 and 7 February 2007. Section 1AA was repealed and replaced by similar language in section 8 of the Wireless Telegraphy Act 2006 ("the 2006 Act") with effect from 8 February 2007.

Prior to the amendment of section 8 of the 2006 Act (see below), both of the aforementioned sections had essentially provided that, where Ofcom was satisfied that the *"use of stations or apparatus [of a particular description] is not likely to involve undue interference with wireless telegraphy",* Ofcom was required to exempt the installation or use of stations or apparatus of that description from the application of a licensing requirement.

On 26 May 2011, section 8(5) of the 2006 Act was amended[17] such that Ofcom is henceforth required to exempt the installation and use of communications stations and apparatus from the application of a licensing requirement where it considers that those stations or apparatus was not likely to (a) cause harmful interference, (b) have an adverse effect on technical quality of service, (c) lead to inefficient use of the electromagnetic spectrum, (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 claimants argued that, even if the Authorisation Directive at all relevant times permitted the imposition of a GGO licensing requirement on grounds of public security and/or efficient use of spectrum, the relevant portions of the Authorisation Directive were not transposed into UK law until the amendment of section 8 of the 2006 Act on 26 May 2011. Accordingly, the claimants argued that, as a matter of domestic law, it was not open to the UK government to rely on public security or efficient use of spectrum as justifications for GGO licensing for the period prior to 26 May 2011.

Public security

The Secretary of State argued[18] that, notwithstanding the lack of reference to public security in section 1AA of the 1949 Act and section 8 of the 2006 Act, public security remained an available ground for justifying a GGO licensing requirement under domestic law because:

a) the *Marleasing* principle[19] requires section 1AA and section 8 to be interpreted consistently with Article 5(1) of the Authorisation Directive (which admitted a public

16 Added to the 1949 Act by section 166 of the Communications Act 2003.
17 This amendment was made by the Electronic Communications and Wireless Telegraphy Regulations 2011, Schedule 2, para. 4(c), which was intended to implement the amendments to Article 5 of the Authorisation Directive made in the Better Regulation Directive.
18 See Judgment, paragraph 80.
19 Case C-106/89 Marleasing [1990] ECR I-4135.

security justification at all material times); and/or
b) section 5 of the Communications Act 2003 ("the 2003 Act") allows the Secretary of State to direct Ofcom to impose a licensing requirement in relation to the provision of communications services on grounds of public security.[20]

Rose J did not accept that the *Marleasing* principle was engaged on these facts, as there was no incompatibility between the domestic implementing legislation and the EU legislation that it was intended to implement.[21] She noted that, while Article 5(1) *allows* Member States to impose regulatory obligations going beyond a general authorization on grounds of public security, it does not *require* Member States to do so – thus, a lack of availability of a public security justification does not render UK law incompatible with the Authorisation Directive.

On the other hand, the judge did accept that section 5 of the 2003 Act allows the Secretary of State to direct Ofcom to impose a licensing requirement where such requirement was necessary on the grounds of public security.[22] She found that it did not matter that the Secretary of State had not made any specific section 5 public security direction requiring the licensing of GGOs, as the GGO licensing requirement had been validly created prior to the entry into force of the Communications Act 2003 and had been validly maintained in force pursuant to transitional provisions. [23]

Efficient use of spectrum

Rose J did not decide whether the efficient use of spectrum was available as a justification for the imposition of a GGO license requirement under domestic law prior to the amendment of section 8 of the 2006 Act on 26 May 2011. She considered this to be a difficult legal issue, which it was unnecessary to determine in this case as the imposition of a GGO license requirement could not, on the facts, be justified by reference to use of spectrum considerations.[24]

Application of public security justification

Rose J considered that the GGO licensing requirement was justified on grounds of public security in relation to COMUGs, but not in relation to COSUGs.[25] The bulk of reasoning on this issue appears to be contained in a Confidential Annex to the Judgment. It is, however, clear from the judgment that Rose J considered the precautionary principle to be engaged in this case and that this principle played an important role in her assessment

20 Section 5(2) of the Communications Act 2003 provides that "It shall be the duty of OFCOM to carry out [its functions under Part 2 of the 2003 Act and under the enactments relating to the management of the radio spectrum that are not contained in that Part] in accordance with such general or specific directions as may be given to them by the Secretary of State" (emphasis added). Section 5(3) of the 2003 Act provides that "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…".
21 Judgment, paragraphs 83 & 84.
22 Judgment, paragraph 85.
23 Judgment, paragraph 89-91.
24 Judgment, paragraph 105.
25 Judgment, paragraph 114.

of the proportionality of the GGO licensing requirement. [26]

Application of harmful interference justification

Rose J's findings on the application of the harmful interference justification were based essentially on her assessment of the expert evidence presented. The experts on both sides agreed that *"interference arises when the presence of another unwanted signal disrupts the presence of the wanted radio signal"*,[27] but disagreed on the meaning of an "unwanted signal" in this case. The judge had no trouble in accepting that the use of an MNO's SIM cards in a GSM gateway had the potential to cause "congestion" on that MNO's network in proximity to the site of the GSM gateway, potentially leading to dropped calls or a degradation of call quality on the MNO's network.[28] These congestion issues arose essentially because mobile phone networks have not been optimized to accommodate the usage pattern of SIM cards installed in GSM gateways, which are used to place calls almost continuously until the number of available minutes loaded onto the SIM card expires. Whilst this sort of continuous usage is not expressly prohibited by the MNOs' retail contracts, it is certainly not the pattern of usage assumed by MNOs when designing their network.[29]

Against that background, Rose J noted that these congestion issues associated with GSM gateways were caused by the use of genuine SIM cards – that is, by signals created by an MNOs' own network – which she did not consider could properly be described as "unwanted" signals in this context.[30] She considered that the Secretary of State's proposed definition of "unwanted signals" simply as *"signals that the MNOs do not want on their network"* to be overly broad and noted that such definition would lead to the "curious result" that Ofcom's powers to regulate on the basis of harmful interference could change over time based essentially on MNOs' changing commercial priorities.[31] She, therefore, concluded that the imposition of a licensing requirement on the commercial use of GSM gateways was not justified by reference to the need to avoid harmful interference.[32]

Rose J noted that, even in the absence of regulatory intervention, MNOs could manage the congestion issues associated with the operation of GSM gateways by (i) expanding their network to accommodate the additional traffic caused by gateways, (ii) changing their distribution model to ensure that SIM cards are only supplied to individual mobile phone users and not to GGOs or (iii) amending their contractual terms to prohibit the use of minutes made by SIM cards in gateways or to make that use sufficiently profitable. [33]

26 Judgment, paragraph 112 & 113.
27 Judgment, paragraph 123.
28 Judgment, paragraph 129.
29 Judgment, paragraph 141.
30 Judgment, paragraph 141.
31 Judgment paragraph 144.
32 Judgment, paragraph 149.
33 Judgment, paragraph 143.

Application of efficient use of spectrum justification

Rose J also rejected the Secretary of State's argument that imposition of the GGO licensing requirement was justified by reference to the need to ensure the efficient use of spectrum. The argument was essentially that GSM gateways make inefficient use of radio spectrum by using two radio resources in order to deliver a single F2M call – one resource for the call from the fixed line to the gateway and once resource for the call from the gateway to the mobile telephone – whereas a standard F2M call uses one radio resource only.

This was considered to be an unduly narrow interpretation of "efficient use of spectrum" and inconsistent with Ofcom's past regulation of the industry. For many years Ofcom has allowed MNOs to charge lower termination rates for M2M calls than for F2M calls, notwithstanding that F2M calls used only one radio resource and M2M calls use two radio resources. If "efficient" use of spectrum is really to be interpreted as "reduced" or "the minimum possible" use of spectrum, one would have expected Ofcom to regulate against this pricing.[34]

Application of *Francovich* criteria

Having established that the UK government did commit a breach of the Authorisation Directive by imposing a licensing requirement on COSUGs (although it did not commit any breach by imposing that requirement on COMUGs), Rose J went on to consider whether the UK government should be liable in damages for such breach. For this purpose, she applied the three cumulative criteria for state liability set out in Case C-6/90 *Francovich* [ECR] I-5357 and Joined Cases C-46/93 and C-48/93 *Factortame* and *Brasserie du Pecheur* [1996] ECR I-1029 ("the *Francovich* criteria"), which are as follows:

a) the European law rule infringed must confer rights on individuals;
b) the breach must be sufficiently serious;
c) there must be a direct causal link between the breach of the obligation resting on that State and the damage caused to the claimant.

Conferral of rights on individuals

Rose J found, without difficulty, that Article 5 of the Authorisation Directive was intended to confer on the claimants a right to provide services under a general authorization unless the imposition of an individual licensing regime is open to the State on the facts.[35]

Sufficiently serious breach

The claimants and the Secretary of State agreed that, as the UK had made a bona fide attempt at transposing the Authorisation Directive into domestic law, an automatic

34 Judgment, paragraphs 153, 154 & 156.
35 Judgment, paragraphs 168-171.

presumption of sufficiently serious breach was not appropriate in this case.[36] Instead, the issue of sufficiently serious breach should be assessed in accordance with a "multifactorial test", taking account of, *inter alia*, the importance of the principle which has been breached, the clarity and precision of the rule breached, the degree of excusability of the error of law, whether the breach was deliberate or inadvertent and the position of the EU institutions on the matter. [37]

At paragraphs 176-211 of the Judgment, Rose J assessed a large amount of evidence going to the application of the various relevant factors. She ultimately concluded that the imposition of a licensing requirement in respect of COSUGs did not amount to a sufficiently serious breach of the Authorisation Directive because: [38]

a) Article 5 of the Authorisation Directive is broadly drafted so as to leave open the extent of factors that can be taken into account when deciding whether to impose a balancing requirement;
b) the Secretary of State consulted widely on the issue of whether to maintain or remove the GGO licensing requirement and balanced the commercial interests of GGOs against the competing public security interests voiced by the Home Office *"with care and thoroughness"*;
c) the European Commission threatened but did not pursue infraction proceedings against the UK, suggesting that the European law position was not clear cut.

Causal link between breach and loss

The Secretary of State argued that, even if the imposition of a GGO licensing requirement did constitute a sufficiently serious breach of the Authorisation Directive, the fact that the claimants never applied to Ofcom for a license to operate their gateways broke the chain of causation. This argument was rejected on the facts, as it was found that Ofcom would not have given the GGOs such a license in any event as it considered that the operation of GSM gateways caused insuperable problems.[39]

The Secretary of State also argued that the likely behavior of the MNOs in the absence of the licensing requirement – i.e. refusal to supply GGOs with SIM card for commercial use – broke the chain of causation. Rose J also rejected this argument, finding that the likely behavior of the MNOs was relevant to the quantum of loss incurred, but did not break the chain of causation as "*no doubt there was some truncation of the Claimants' business by reason of the imposition of the [licensing] requirement*".[40]

36 See R(Negassi) v Secretary of State for the Home Department [2013] EWCA Civ 151 at [13].
37 Ibid., at [14].
38 Judgment, paragraph 228(ii).
39 Judgment, paragraph 220.
40 Judgment, paragraph 227.

Rose J's comments in quantum of loss

Having found that the second of the cumulative *Francovich* criteria was not met, Rose J did not need to engage in a detailed assessment of the quantum of damages in the case, but did offer some comments on the questions of whether, absent the licensing requirement, MNOs would have:

a) refused to supply SIM cards or SIM cards services to the GGOs;
b) changed their tariff structure to remove the arbitrage opportunity available to GGOs;
c) competed aggressively with the GGOs so as to reduce GGO profitability.

As regards (a) above, Rose J held that MNOs would likely have relied on congestion problems arising from the use of GSM gateways to justify a refusal to supply SIM cards to GGOs.[41] She also considered whether the threat of a competition law claim or investigation for abuse of a dominant position would have acted as a constraint on the behavior of the MNOs when deciding whether to sell SIM cards to GGOs;[42] she considered that there would be difficulties both in establishing that any of the MNOs were dominant in the relevant market for the supply of SIM cards or SIM cards services and in establishing that refusal to supply was not objectively justified in this case.[43] Against that background, she found that the threat of an abuse of dominance claim would not have exercised a substantial constraint on MNO behavior if they were being asked to supply SIMs to GGOs at the sort of rate assumed in the claimants' expert report. [44]

Separately, Rose J considered that:

a) there was a risk that the MNOs would ultimately rebalance their tariff structure to remove the arbitrage opportunity available to GGOs. Further evidence would be required to determine the "tipping point" at which GGOs demand for and use of SIM cards would cause such rebalancing; however, the judge acknowledged that the existence of the "tipping point" was a potential constraint on the expansion of GGOs' businesses.[45]
b) the expansion of the GGOs' businesses would also have been constrained by some sort of competitive response from the MNOs, which would also need to be taken into account in the calculation of loss.

The judge noted that, had she found the *Francovich* criteria satisfied, she would have adjourned the determination of quantum to give the claimants sufficient time to take stock of the value of their claim against the background of her preliminary comments set out above.

41 Judgment, paragraph 251.
42 Judgment, paragraph 253.
43 Judgment, paragraph 255 & 256.
44 Judgment, paragraph 256.
45 Judgment, paragraph 258.

Comment

The *Recall Support Services* judgment does find that the imposition of a licensing requirement on the operation of COSUGs is not justified under the Authorisation Directive, however, Rose J made no order disapplying that licensing requirement (presumably as the relief sought in this case was limited to damages). Accordingly, it appears that the licensing requirement continues to remain in force for all commercial operation of GSM gateways (COSUGs and COMUGs) until such time as removed by the legislation or disapplied by the order of a subsequent court. For those entities interested in operating COSUGs, the judgment does provide a strong platform to lobby for the removal of the licensing requirement as regards those gateways – although, there remains a possibility of appeal by the Secretary of State,[46] so some level of uncertainty around the legal status of COSUGs may persist for some time.

The judgment suggests that Ofcom has, thus far, maintained a policy of simply not granting licences to any OGGs, notwithstanding its ability to do so. It would also be interesting to know whether Rose J made any comments in the Confidential Annex about the circumstances in which and the terms on which Ofcom might be required to grant a licence for the operation of a COMUG. Admittedly, these issues were outside the scope of the matters that she was required to decide, but it cannot be ruled out that some remarks were made on these issues – particularly as she was careful to deal with all issues before her even where these did not arise on the facts (e.g. quantum of damages). The upshot is that would-be COMUG operators may receive a more sympathetic hearing from Ofcom if they apply for a licence now than they would have in the past.

From the perspective of MNOs, the judgments in the *Floe Telecom* competition law litigation would appear to stand – i.e. until the current legislation concerning licensing is amended or disapplied, the unlicensed operation of both COSUGs and COMUGs remains unlawful, providing an objective justification for refusal to supply SIM cards or SIM card services. However, given the findings of EU law infringement made in the judgment, MNOs should consider the competition law position in relation COSUGs with particular care and, where possible, examine the availability of other justifications for any refusal to supply.

Philip Moser QC and Brendan McGurk acted for DCMS.

Daniel Beard QC acted for the Home Office, intervening.

The comments made in this case note are wholly personal and do not reflect the views of any other members of Monckton Chambers, its tenants or clients.

46 Notwithstanding that the Secretary of State successfully defended the damages claim in this case, it may be entitled to appeal on certain issues in relation to which it was unsuccessful. Indeed, in the initial abuse of dominance proceedings involving GSM gateways, Ofcom was given permission to appeal certain parts of the Competition Appeal Tribunal judgment that were adverse to it, notwithstanding that it had been successful overall: OFCOM v Floe Telecom (in liquidation) [2009] EWCA Civ 47.

Monckton Chambers
1 & 2 Raymond
Buildings
Gray's Inn
London, WC1R 5NR

Tel: +44 (0)20 7405 7211
Fax: +44 (0)20 7405 2084
Email: chambers@monckton.com
www.monckton.com