EXPLANATORY MEMORANDUM TO

THE WIRELESS TELEGRAPHY (INSPECTION AND RESTRICTIONS ON USE OF EXEMPT STATIONS AND APPARATUS) REGULATIONS 2005

2005 No. 3481

1. This explanatory memorandum has been prepared by the Office of Communications ("Ofcom") and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Description

2.1 Under this instrument a person in possession or control of radio frequency identification equipment (commonly referred to as "RFID") must on the demand of an authorised person permit and facilitate its inspection. That person must also, on demand, cease use of the station or apparatus or restrict its use for a period of time. The instrument also consolidates these provisions on RFID with provisions previously contained in regulation 6 of the Wireless Telegraphy (Exemption) Regulations 2003 (the "2003 Regulations").

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The Joint Committee is referred to regulation 3 of the instrument which revokes the provisions on inspection and restrictions on use of equipment contained in the 2003 Regulations. These provisions are brought together with the RFID provisions, by regulation 4 of the instrument. That consolidation is desirable for the following reason.

3.2 The vires for the 2003 regulations was section 1(1) of the Wireless Telegraphy Act 1949 and section 3(1) of the same Act. Under section 1(1) the Secretary of State could make regulations exempting users, stations and apparatus from the need to hold a wireless telegraphy licence. Under section 3(1) the Secretary of State could, inter alia, make regulations which imposed on users of wireless telegraphy stations and apparatus (including stations and apparatus exempt from licensing) obligations to facilitate inspection and permitting authorised persons to require that use to cease or be restricted. Regulations under these sections were subject to annulment in pursuance of a resolution of either House of Parliament ("negative procedure").

3.3 Since the 2003 regulations entered into force, the power to make regulations under section 1(1) and section 3(1) was transferred from the Secretary of State to the Office of Communications. At the same time, changes were made to the exercise of these powers. On one hand, regulations made by Ofcom under section 1(1) are now not subject to any Parliamentary procedure. On the other, regulations made by Ofcom under section 3(1) are now subject to negative procedure and also require the approval of the Secretary of State.

3.4 Ofcom intends early next year to make amendments to the 2003 Regulations to extend the types of exempt equipment to which they apply. To do that Ofcom is very likely to amend the definition of "relevant apparatus" in the 2003 Regulations in order to include equipment in additional schedules to that instrument. The effect of such an amendment to the definition would be twofold. Firstly, it would extend the types of apparatus subject to licence exemption under regulation 4(1) of the 2003 Regulations. Secondly, it would increase the types of apparatus which are subject to the provisions on inspection and restriction on use contained in regulation 6 of the 2003 Regulations.

3.5 Ofcom, is unable to make a single instrument which has these combined effects because that would entail relying on both section 1(1) and section 3(1) for vires, and, different Parliamentary procedures apply to regulations made under these two sections. Ofcom consulted the Clerks to the Joint Committee and has been informed that negative procedure and "no procedure" material should not be combined in the same instrument, because that might create procedural difficulties if a prayer were tabled against the instrument.

3.6 Therefore, in order to amend the definition of "relevant apparatus" in the 2003 Regulations, Ofcom would make two separate instruments. The first instrument (relying on regulation 3(1) for vires) revokes regulation 6 of the 2003 Regulations (the provisions on inspection and restriction on use). A second instrument (relying on section 1(1) for vires) can then amend then the definition and increase the types of apparatus which are subject to licence exemption.

3.7 Ofcom, concluded that it was desirable to take the opportunity of enacting provisions on inspection and restrictions on use for RFID equipment to undertake the first of those steps (the revocation of regulation 6 of the 2003 Regulations) and also to bring the provisions which were contained in regulations 6 of the 2003 Regulations together with the new provisions which apply to RFID equipment. This is achieved by regulations 3 and 4(1)(b) in this instrument. In future it is intended that all new powers to inspect or restrict use of exempt equipment will be enacted by amending this instrument.

4. Legislative Background

4.1 Under section 1(1) of the Wireless Telegraphy Act 1949 it is an offence to establish or use a station or apparatus for wireless telegraphy except under the authority of a licence or where Ofcom have made exemption regulations. The instrument is being made and enters into force at the same time as the Wireless Telegraphy (Radio Frequency Identification Equipment) (Exemption) Regulations 2005 (the "RFID Exemption Regulations"). These regulations provide that the establishment, installation and use of RFID equipment is exempt from the need to hold a wireless telegraphy licence under section 1(1).

4.2 Under section 3(1) of the Wireless Telegraphy Act 1949 Ofcom may make regulations imposing on users of wireless telegraphy stations and apparatus obligations to facilitate inspection and permitting authorised persons to require use to cease or be restricted. This instrument provides that persons in possession or control of RFID equipment must on the demand of an authorised person, permit or facilitate its inspection, or cause its use to cease or be restricted for a period of time. The

instrument consolidates these provisions together with previous provisions on inspection and restrictions on use.

5. Extent

5.1 This instrument applies to all of the United Kingdom.

5.2 This instrument also applies to the Channel Islands and the Isle of Man and their legislatures have been consulted and consented to proposals to make this instrument.

6. European Convention on Human Rights

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 RFID is a form of electronic bar coding and identification, using low power radio frequencies to scan and read codes. It is useful for tracking and locating the movement of goods. RFID readers employ low power radio frequencies to read minute chips inserted into such items. The establishment or installation and the use of wireless telegraphy stations or apparatus has been made exempt from the need to hold a wireless telegraphy licence by virtue of the RFID Exemption Regulations, subject to certain terms.

7.2 In line with the position relating to other stations and apparatus which are exempt from wireless telegraphy licensing, this instrument will enable officers of Ofcom to inspect such RFID devices and to take enforcement action to restrict usage (for example, have them cease operation if they fail to comply with the conditions set out in the RFID Exemption Regulations). Such action may be necessary to prevent harmful interference which could impact on other legitimate radio spectrum users (for example, if the readers emit the wrong frequencies or the power output is accidentally increased).

7.3 The instrument also revokes Section 6 of the 2003 Regulations and consolidates its provisions to enable officers of Ofcom to continue to inspect or restrict any apparatus or stations in accordance with the conditions set out in those Regulations.

7.4 Ofcom has given notice of its proposal to make this instrument to persons representative of the those appearing to Ofcom to be likely to be affected by the implementation of the proposal, as required by section 403 of the Communications Act 2003. The notice and Ofcom's statement following the notice are available at www.ofcom.org.uk. There were only three respondents and they supported the proposals.

8. Impact

8.1 A Regulatory Impact Assessment is attached.

8.2 There will be little financial impact on the public sector. The cost of enforcing the provisions in the instrument will be borne by Ofcom from its existing enforcement budget.

9. Contact

Roger Stewart, Ofcom, 2a Southwark Bridge Road, London SE1 9HA (020 7981 4296 or roger.stewart@ofcom.org.uk) can answer any queries regarding the instrument.

The Wireless Telegraphy (Inspection and Restrictions on Use of Exempt Stations and Apparatus) Regulations 2005

Regulatory Impact Assessment

Publication date: 16 December 2005

Regulatory Impact Assessment

Introduction

1. Regulatory Impact Assessments (RIAs) form part of best practice policy-making and are commonly used by other regulators. Ofcom carries out RIAs where our proposals would be likely to have a significant effect on businesses or the general public, or when there is a major change in Ofcom's activities.

2. These Regulations provide for the inspection of Radio Frequency Identification Devices (RFID) equipment and for persons authorised by Ofcom to require on demand restrictions on use or cessation of use of non-compliant RFID equipment.

3. Use of RFID equipment without the need to hold a wireless telegraphy licence (under section 1 of the Wireless Telegraphy Act 1949) is permitted under the Wireless Telegraphy (Radio Frequency Identification Equipment) (Exemption) Regulations 2005 (the "RFID Exemption Regulations") which are being made to enter into force at the same time as these Regulations.

4. The Regulations also revoke regulation 6 of the Wireless Telegraphy (Exemptions) Regulations 2003 (the "2003 regulations") and consolidate its provisions in regulation 4 of these Regulations. That will enable Ofcom to make changes to the types of equipment which are exempt from wireless telegraphy licensing under the 2003 Regulations.

5. Ofcom has given notice of its proposal to make these Regulations to persons representative of those appearing to Ofcom to be likely to be affected by the implementation of the proposal, as required by section 403 of the Communications Act 2003. The notice and Ofcom's statement are available at www.ofcom.org.uk. There were only three respondents to the notice and they supported the proposals. Two respondents took the view that Ofcom should not make exemption regulations about equipment such as RFID without simultaneous enforcement and inspection regulations being in place. Ofcom is therefore making the entry into force of these Regulations coincide on this occasion with the entry into force of the corresponding RFID Exemption Regulations. For future regulations we will need to consider on the merits of each case whether or not joint timing is essential, although we do agree it is desirable where possible.

Costs and benefits

Option 1(a): *Providing for the inspection of RFID equipment and powers to restrict use of non-compliant RFID equipment*

6. The cost of compliance for users of RFID under wireless telegraphy licence exempt status under the RFID Exemption Regulations is not material. Ofcom has consulted on the terms of the exemption. Stakeholders who are likely to employ this equipment are developing equipment that will comply with the terms of the RFID Exemption Regulations. Also, users of legitimate RFID devices would not be required to apply for a licence to operate equipment under the Wireless Telegraphy Act 1949. Consequently users of RFID equipment do not have to pay a licence fee because use of the equipment is exempt from licensing and so the direct cost to business of these regulations is zero.

7. The cost to the regulator of making RFID devices which meet the requirements of the regulations, exempt from requiring a licence (under the RFID Exemption Regulations) will include the one-off cost to Ofcom of making these regulations.

8. In addition, Ofcom will undertake enforcement activities (in accordance with its statutory functions and duties) to ensure that devices not meeting the necessary technical specifications, and therefore risking the possibility of harmful interference, can be located, and their use restricted or prevented. These costs, however, will be absorbed within the existing budget for enforcement activities and so there will be little financial impact on the public sector.

9. In relation to benefits, efficient use of the radio spectrum will be encouraged because non-compliant devices that could cause harmful interference to other legitimate users of exempt equipment that utilise the same bandwidth (or contiguous bandwidths) of spectrum can be identified. Powers to inspect equipment and require users to cease or restrict the use of their equipment provide incentives for users of non-complaint equipment to internalise costs that would otherwise be externalised (i.e. through interference). Costs of inspection and enforcement include the direct costs of operating a field force that can identify and remedy instances where non-complaint devices are causing harmful interference.

Option 1(b) *Consolidation of the provisions in Regulation 6 of the 2003 Regulations*

10. Consolidation of the provisions (as described above) will enable Ofcom to amend the 2003 Regulations to extend the types of exempt equipment to which they apply. Without first undertaking the revocation of regulation 6 (and consolidating its provisions in this way) Ofcom would be unable to make its desired amendments the 2003 Regulations to extend the types of exempt equipment to which they apply.

11. Ofcom currently has power to exempt stations and apparatus from the need for the requirement to hold a wireless telegraphy licence under section 1(1) of the Wireless Telegraphy Act 1949. Under section 3(1) of the Wireless Telegraphy Act 1949 Ofcom may make regulations imposing on users of wireless telegraphy stations and apparatus (including stations and apparatus exempt from licensing) obligations to facilitate inspection of the stations and apparatus and permitting authorised persons to require that use was to cease or be restricted.

12. The main benefit of the consolidation is the avoidance of possible Parliamentary procedural difficulties when make amendments to the 2003 Regulations to exempt additional types of wireless telegraphy equipment.

13. Procedural difficulties might arise since regulations made under section 1(1) of the Act (exempting equipment) require no Parliamentary procedure, whereas section 3(1) of the Act (powers to inspect and enforce compliance) requires consent of the Secretary of State (SOS) and are subject to annulment by resolution in Parliament known as a “negative procedure”. Accordingly, it would not be possible to achieve the desired amendments to the 2003 Regulations by relying on both section 1(1) and 3(1) for vires in a single statutory instrument.

14. The consolidation will enable Ofcom to amend the 2003 Regulations to extend the types of exempt equipment to which they apply. That will increase the flexibility and responsiveness of Ofcom in discharging its statutory duty to exempt equipment (that does not give rise to harmful interference) and to minimise interference.

15. Wireless telegraphy licence exemptions are beneficial to users of equipment which does not cause interference. The exemption removes the requirement for the user to obtain a licence to operate that device, thereby reducing costs of compliance for the user and reducing enforcement costs for the regulator. Costs of licence exemptions include the direct costs of assessing possible exemptions and the direct administrative costs of drafting an amendment to allow for new exemptions. (For instance, users of digital cordless (DECT) phones that utilise spectrum are exempt from requiring a licence. Last year several million DECT phones were sold, which would, in the

absence of exemptions, imply high compliance and enforcement costs for consumers and the regulator.)

16. In future, regulations which exempt equipment from licensing (under section 1(1)) will be distinct from those that provide for enforcement powers (under section 3(1)). It is difficult to quantify the benefits of facilitating the decoupling of the processes by which exemptions are made and enforcement regulated for. Qualitatively, the proposal to decouple and minimise procedural risk is likely to have material benefits. The ability of Ofcom to respond to market developments could be important in reducing costs of regulation on markets which are dependent of the exemption process and enforcement regime. Equally, these benefits should not be overstated, as the procedural difficulties are to some extent present (albeit to a lesser degree) in this proposal.

17. The costs of the proposal relate primarily to the direct one-off administrative cost of revoking regulation 6 and re-enacting the provision in a separate Statutory Instrument which is not a material cost. There will be little financial impact on the public sector.

18. The benefits of the proposal are therefore likely to outweigh the one-off cost of amending the regulations. The proposal is ultimately intended to ensure regulations can respond quickly and effectively to making exemptions and minimising harmful interference through inspections and enforcement. Ofcom considers that the proposal is therefore justified.

Option 2: Not make the proposed Regulations

19. The impact of not making the regulations would be twofold:

19.1 Firstly, the efficient use of the spectrum might be compromised slightly because Ofcom's enforcement personnel would not be able to require inspection of equipment and would not be able to require on demand that there should be cessation or restriction of use where use of RFID is failing to comply with the terms of the RFID Exemption Regulations.

19.2 Secondly, the existing 2003 Exemption Regulations would continue in force without being updated to reflect developments. That is because Ofcom cannot make necessary changes to the 2003 Exemption Regulations without first revoking regulation 6 and re-enacting it in a separate statutory instrument. This is unsatisfactory because the 2003 Regulations will become outdated.

Conclusion

20. For the reasons identified in paragraphs 1-19 above, Ofcom considers the benefits of making the 2003 Regulations outweigh the costs. Ofcom therefore has decided to:

- exempt for and provide for the inspection of Radio Frequency Identification Devices (RFID) and powers to restrict use of non-compliant RFID equipment
- revoke Regulation 6 and consolidate its provisions in these Regulations.

Declaration

I have read the Regulatory Impact Assessment and I am satisfied that the benefits justify the costs.

Signed

David Currie

Chairman of the Office of Communications

16th December 2005

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