

The Secretary of State's power to issue directions to Ofcom under the Communications Act 2003 (VIP Communications Ltd (In Liq), R (On the Application Of) v The Secretary of State for the Home Department)

This analysis was first published on Lexis®PSL on 30/11/2020 and can be found [here](#) (subscription required)

TMT analysis: The Court of Appeal has upheld the High Court's decision (R (VIP Communications Ltd) v Secretary of State for the Home Department) declaring ultra vires the Secretary of State's direction (pursuant to section 5(2) of the Communications Act 2003 (CA 2003)) to Ofcom requiring it not to make regulations exempting commercial multi-user gateways (COMUG) from statutory licensing requirements (as Ofcom had intended to do pursuant to its duty in section 8(4) of the Wireless Telegraphy Act 2006 (WTA 2006)). In so doing, the Court of Appeal has also clarified the scope of the power of the Secretary of State to issue directions to Ofcom pursuant to CA 2003, s 5(2). Written by Rory Cochrane, barrister, at Devereux Chambers.

R (on the application of VIP Communications Ltd (in liquidation)) v Secretary of State for the Home Department [\[2020\] EWCA Civ 1564](#)

What are the practical implications of this case?

While the decision is most relevant to a relatively narrow audience interested in, or advising on, GSM gateways, it is also relevant to those advising telecommunications companies on the powers of the Secretary of State in relation to Ofcom.

In practice, the immediate impact of the decision is that the Secretary of State's direction requiring that Ofcom not make regulations exempting COMUGs from the licensing requirements in [WTA 2006, s 8\(1\)](#) will not prevent Ofcom from exercising its discretion to make such regulations, as it had indicated it would do following a consultation and the publication of a notice ('Commercial Multi User Gateway Review Notice of proposed regulations Statement & Notice' published on 6 July 2017).

However, it seems likely that the government will continue to oppose the liberalisation of GSM gateways on national security and public safety grounds and may well quickly move to restrict the use of GSM gateways by other legislative or regulatory means. Most obviously, the Court of Appeal stated that the Secretary of State would be entitled to give a direction to Ofcom that any grant of exemption should be subject to certain conditions.

More generally, the Court of Appeal has clarified that the Secretary of State's power in [CA 2003, s 5\(2\)](#) cannot be relied upon to override Ofcom's duties in the [CA 2003](#) or elsewhere, without clear statutory words. Given that the Secretary of State could potentially rely on [CA 2003, s 5\(2\)](#) to issue directions bearing upon all of Ofcom's functions under [CA 2003, Pt 2](#) (which runs from [CA 2003, ss 32–197](#) and covers a wide range of functions), this is a significant decision for those advising on regulatory telecommunications generally.

What was the background?

VIP Communications Ltd (the respondent company) was engaged until 2003 with the commercial exploitation of COMUGs. COMUGs are essentially 'gateways' by which phone calls and text messages from landlines are routed directly on to mobile networks with the intention of saving money on call charges. Inherent to COMUGs is that the end user's call data is not passed onto the network, concealing their identity, with uncontested implications for national security and public safety. COMUGs were in effect prohibited, relevantly for this decision, in 2003 by the Wireless Telegraphy (Exemption) Regulations 2003, [SI 2003/74](#) (the Commercial Use Restriction).

Following litigation on the legality of the Commercial Use Restriction (see [\[2014\] EWCA Civ 1370](#)), Ofcom conducted a consultation and issued a notice on 6 July 2017. The notice stated that Ofcom intended to make regulations pursuant to its duty in [WTA 2006, s 8\(4\)](#) to exempt COMUGs from the licensing requirements (and in effect to remove the Commercial Use Restriction). In response, on 25 September 2017 the Secretary of State gave a direction to Ofcom under [CA 2003, s 5\(2\)](#)—in essence requiring Ofcom not to exempt COMUGs from the licensing requirements in [CA 2003, s 8\(1\)](#), and not to grant any such licence unless the COMUG provider was able to demonstrate (in broad summary) that the telecommunications operator with whom a device or account was registered was able to provide accurate telecommunications data (such as data that identifies the sender and end-recipient of communication, or the time or duration of a communication), and comply with an interception warrant issued by the Secretary of State.

The liquidator of VIP Communications sought judicial review of the Secretary of State's decision to issue the direction. At first instance, Mr Justice Morgan allowed the application and held that the direction was ultra vires. The Secretary of State appealed.

What did the court decide?

Like the High Court below, the Court of Appeal was faced with the task of resolving a conflict between two duties imposed by statute on Ofcom. These were:

- [WTA 2006, s 8\(4\)](#) which imposed a duty on Ofcom to make regulations granting an exemption from the licensing requirement in [WTA 2006, s 8\(1\)](#) where Ofcom was satisfied that the conditions in [WTA 2006, s 8\(5\)](#) were satisfied (such as whether there would be interference with wireless telegraphy or effects on technical quality of service, and endangerment to safety of life), and
- [CA 2003, s 5\(2\)](#), which imposed a duty on Ofcom to carry out functions (including the function in [WTA 2006, s 8\(4\)](#) above) '...in accordance with such general or specific directions as may be given to them by the Secretary of State'

As Ofcom had become satisfied following its consultation that the conditions in [WTA 2006, s 8\(5\)](#) were satisfied in relation to COMUGs, it was under a duty to make the regulations exempting COMUGs from licensing under [WTA 2006, s 8\(4\)](#). The Secretary of State had relied on [CA 2003, s 5\(2\)](#) to issue a direction requiring Ofcom not to comply with its duty in [WTA 2006, s 8\(4\)](#), creating a clash of duties.

The Court of Appeal held, first, that a statutory power to give a direction will not be construed as extending to giving a direction not to comply with a statutory duty in the absence of clear words by Parliament to that effect (para 54). There was in [CA 2003, s 5\(2\)](#) 'a complete absence of clear words' (para 65).

Further:

- when Parliament intends that one duty owed by Ofcom should, in the case of conflict, be subordinate to another, it says so expressly (such as [CA 2003, s 154\(4\)](#)) and did not do so in this case
- [CA 2003, s 5\(2\)](#) imposes a duty on Ofcom to 'carry out' its functions in accordance with the Secretary of State's directions, and 'carry out' cannot be extended to include 'not carry out'
- the fact that there were certain specific restrictions on the extent of power under [CA 2003, s 5\(2\)](#) did not bear upon whether clear words were used in [CA 2003, s 5\(2\)](#) to widen the Secretary of State's power, and
- no 'lacuna' was created in the legislation by a construction which limited the Secretary of State's powers under [CA 2003, s 5\(2\)](#). This was because the Secretary of State could impose conditions on the grant of an exemption, including the substance of the Secretary of State's direction.

Accordingly, the Court of Appeal upheld the decision of Morgan J and dismissed the appeal.

Case details:

- Court: Court of Appeal, Civil Division
- Judge: Lord Justice Underhill, Lord Justice Macur and Lord Justice Flaux
- Date of judgment: 20 November 2020