



House of Lords
House of Commons
Joint Committee on
Statutory Instruments

**Thirteenth Report
of Session 2009-10**

Drawing special attention to:

*Draft Wireless Telegraphy Act 2006 (Directions to OFCOM) Order 2010
(Draft SI)*

*Buckinghamshire Hospitals National Health Service Trust (Trust Funds:
Appointment of Trustees) Revocation Order 2010 (S.I. 2010/417)*

*Goods Vehicles (Plating and Testing) (Amendment) Regulations 2010
(S.I. 2010/448)*

*London Skills and Employment Board (Specified Functions) Order 2010
(S.I. 2010/458)*

*Work and Families Act 2006 (Commencement No. 4) Order 2010
(S.I. 2010/495)*

*Ordered by the House of Lords to be printed
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Joint Committee on Statutory Instruments

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The full constitution and powers of the Committee are set out in House of Commons Standing Order No. 151 and House of Lords Standing Order No. 74, available on the Internet via www.parliament.uk/jcsi.

Remit

The Joint Committee on Statutory Instruments (JCSI) is appointed to consider statutory instruments made in exercise of powers granted by Act of Parliament. Instruments not laid before Parliament are included within the Committee's remit; but local instruments and instruments made by devolved administrations are not considered by JCSI unless they are required to be laid before Parliament.

The role of the JCSI, whose membership is drawn from both Houses of Parliament, is to assess the technical qualities of each instrument that falls within its remit and to decide whether to draw the special attention of each House to any instrument on one or more of the following grounds:

- i. that it imposes, or sets the amount of, a charge on public revenue or that it requires payment for a licence, consent or service to be made to the Exchequer, a government department or a public or local authority, or sets the amount of the payment;
- ii. that its parent legislation says that it cannot be challenged in the courts;
- iii. that it appears to have retrospective effect without the express authority of the parent legislation;
- iv. that there appears to have been unjustifiable delay in publishing it or laying it before Parliament;
- v. that there appears to have been unjustifiable delay in sending a notification under the proviso to section 4(1) of the Statutory Instruments Act 1946, where the instrument has come into force before it has been laid;
- vi. that there appears to be doubt about whether there is power to make it or that it appears to make an unusual or unexpected use of the power to make;
- vii. that its form or meaning needs to be explained;
- viii. that its drafting appears to be defective;
- ix. any other ground which does not go to its merits or the policy behind it.

The Committee usually meets weekly when Parliament is sitting.

Publications

The reports of the Committee are published by The Stationery Office by Order of both Houses. All publications of the Committee are on the Internet at www.parliament.uk/jcsi.

Committee staff

The current staff of the Committee are John Whatley (*Commons Clerk*), Kath Kavanagh (*Lords Clerk*) and Jennifer Steele (*Committee Assistant*). Advisory Counsel: Peter Davis, Peter Brooksbank and Christine Cogger (*Commons*); Allan Roberts, Peter Milledge and Nicholas Beach (*Lords*).

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Instruments reported

At its meeting on 30 March 2010 the Committee scrutinised a number of Instruments in accordance with Standing Orders. It was agreed that the special attention of both Houses should be drawn to five of those considered. The Instruments and the grounds for reporting them are given below. The relevant Departmental memoranda are published as appendices to this report.

1 Draft S.I: Reported for doubtful *vires* and defective drafting

Draft Wireless Telegraphy Act 2006 (Directions to OFCOM) Order 2010 (Draft SI)

1.1 The Committee draws the special attention of both Houses to this Order on the ground that, if it is approved and made, in two respects there will be a doubt as to whether it is *intra vires*; and in one respect it will be defectively drafted.

1.2 The Order sets out directions to the Office of Communications (OFCOM) with respect to the exercise by that body of their radio spectrum functions. Article 4 directs OFCOM to vary a specified kind of wireless telegraphy licence (subject to the consent of the holder) to provide for the licence to continue in force unless or until revoked by OFCOM. Similar provision is made in articles 11(b) and 14(2)(b) where OFCOM are required in each case to grant particular descriptions of wireless telegraphy licence for an indefinite period.

1.3 Paragraph 5 of Schedule 1 to the Wireless Telegraphy Act 2006 (“the 2006 Act”) provides for wireless telegraphy licences to “continue in force, unless previously revoked by OFCOM, for such period as may be specified in the licence”. This appears to preclude a licence of indefinite duration. The Department for Business, Innovation and Skills was invited to explain how articles 4, 11 and 14 are compatible with paragraph 5. In a memorandum printed at Appendix 1a, the Department for Business Innovation and Skills indicates that OFCOM have already issued wireless telegraphy licences of indefinite duration. This is confirmed in its further memorandum printed at Appendix 1b. However, the fact that OFCOM have issued such licences cannot define the meaning of paragraph 5 of Schedule 1. The Department states that paragraph 5 does not require a licence to be of a fixed duration, but no explanation is given to justify this view.

1.4 The Committee does not consider the words “may be specified” necessarily indicate that OFCOM have a discretion as to whether or not to specify a period for the licence. In the view of the Committee, the word “period” ordinarily implies a finite length of time, and the words “may be specified” simply indicate that the length of the licence is in each case a matter for OFCOM to decide in the exercise of its discretion. **The Committee accordingly reports that there is a doubt whether articles 4(4)(b), 11(b) and 14(2)(c) are *intra vires*.**

1.5 Article 7 directs OFCOM to use their powers under section 14 of the 2006 Act to provide for certain types of wireless telegraphy licence to be auctioned. Specific provision is made in article 9 limiting the total number of frequencies that a person may hold as a result of the auction. Under article 9(4) a person who successfully bids in the auction must “commit to surrender” frequencies if that is necessary to bring them below the limits set out in that article. Section 9 of the 2006 Act enables OFCOM to grant a wireless telegraphy

licence subject to such terms, provisions and limitations as OFCOM think fit. Articles 12 and 13, when read together, direct OFCOM to exercise their powers under section 9 to ensure that, where a person is required to surrender frequencies as a result of being successful in an auction, the person is required to surrender the licence authorising the use of those frequencies within 2 years of the completion of the auction at which their bid was successful.

1.6 The Department was invited to explain which provisions of the 2006 Act authorised article 13 to require a licence granted following the auction to include a provision requiring the licence holder to surrender a separate licence. In its further memorandum the Department mentions that section 9(1) of the 2006 Act permits OFCOM to include such terms as they think fit. The Department also suggests that it would be open to OFCOM alternatively to require the surrender of a licence under section 11 of the 2006 Act by exercising its powers under paragraph 6 of Schedule 1 to that Act to revoke the licence first. Whilst this latter point must be right, it does not strike the Committee as relevant to whether a direction can require OFCOM to impose the kind of term or provision referred to in article 13.

1.7 The Committee doubts whether the provision made by article 13 (when read together with article 12) is compatible with the provisions of the 2006 Act. The Committee is not persuaded that section 9 would allow OFCOM to make the grant of a wireless telegraphy licence subject to a term or provision which relates to an entirely separate licence. But even if section 9 allowed that, it is difficult to see how that section could authorise a term or provision requiring the surrender of an existing licence, given that section 11 of the 2006 Act does not provide for the surrender of wireless telegraphy licences which have not been revoked or which have not expired. The Committee notes that this is consistent with paragraph 5 of Schedule 1 to the 2006 Act (referred to above), where there is no reference to a licence ceasing to have effect where it is surrendered by the licence holder. **The Committee accordingly reports that there is doubt whether article 13 is intra vires.**

1.8 Article 15(2) (when read together with article 12) requires OFCOM to include a specified provision in a licence referred to as “the relevant 800MHz licence”. This is defined in article 15(3) to mean the licence specified by OFCOM *for the purposes of the Combined Auction or any subsequent auction.*

1.9 Articles 7 to 9 make provision requiring OFCOM to provide in regulations under section 14 of the 2006 Act for the carrying out of an auction of wireless telegraphy licences (known as “the Combined Auction”) and, if necessary, one or more subsequent auctions. But those provisions do not require a particular 800MHz licence to be specified for the purposes of those auctions. In its further memorandum the Department states that OFCOM will specify which licence will carry the condition in article 15(2) at the time of the Combined Auction or, if that licence is not sold in the Combined Auction, in a subsequent auction. This is so that bidders will know which of the licences will have the additional condition and will be able to consider their bid accordingly.

1.10 In the light of the Department’s explanation of what is proposed, it seems to the Committee that the intention is to impose two separate requirements on OFCOM. The first is to require OFCOM to specify a particular licence which is to be subject to the condition set out in article 15(2), and to this extent the licence is being specified *for the purposes of giving effect to article 15(2)* rather than for the purposes of the Combined

Auction or any subsequent auction. The second is to require OFCOM to identify for those bidding in the Combined Auction or any subsequent auction which licence will be subject to the provision in article 15(2). The Committee does not consider that article 15(3) is capable of being construed as imposing either of these requirements and **it therefore reports article 15(2) and (3) on the ground that it is defectively drafted.**

2 S.I 2010/417: Reported for failing to comply with *Statutory Instrument Practice*

Buckinghamshire Hospitals National Health Service Trust (Trust Funds: Appointment of Trustees) Revocation Order 2010 (S.I. 2010/417)

2.1 The Committee draws the special attention of both Houses to this Order on the ground that it fails to comply with *Statutory Instrument Practice*.

2.2 This Order revokes the Buckinghamshire Hospitals National Health Service Trust (Trust Funds: Appointment of Trustees) Order 2010 shortly before it would have come into force. In a memorandum printed at Appendix 2 the Department of Health recognises that copies of this Order should have been made available free of charge to all known recipients of the earlier instrument, and should have borne an italic headnote to that effect, in accordance with paragraphs 3.4.11 and 3.4.14 of *Statutory Instrument Practice*. Arrangements have been made to rectify the position. **The Committee accordingly reports this Order for a failure to comply with *Statutory Instrument Practice*, acknowledged by the Department.**

3 S.I 2010/448: Reported for failing to accord with proper drafting practice

Goods Vehicles (Plating and Testing) (Amendment) Regulations 2010 (S.I. 2010/448)

3.1 The Committee draws the special attention of both Houses to these Regulations on the ground that they do not accord with proper drafting practice in two identical respects.

3.2 Regulations 4 and 5 each replace a table of fees in the Goods Vehicles (Plating and Testing) Regulations 1988. The format of the new tables follows that of the previous ones in setting out, for various descriptions of vehicles, the amounts of the fees in two columns, dependent on whether or not the relevant examination or test is carried out at a vehicle testing station provided by the Secretary of State. However, in the case of these Regulations, the amounts in the two columns are the same, so a single column would have sufficed.

3.3 Paragraph 4.3 of the Explanatory Memorandum laid before Parliament with these Regulations mentions the retention of the separate columns, and states that it is expected that the fees will diverge again in 2011—with fees for testing at premises provided by the Secretary of State being greater than elsewhere. In a memorandum printed at Appendix 3

the Department for Transport explains the policy background fully, and that it considered retention of the same table format in these Regulations provided users with greater clarity and transparency as most users would not regard the instrument in isolation but would see it as part of a regulatory framework that was in the process of change.

3.4 Whilst understanding the Department’s motivation in this case, the Committee is concerned that the tables currently substituted by regulations 4 and 5 of these Regulations are unnecessarily complex. The amounts of the fees in the tables may or may not be amended in the future, resulting in a need for two columns of fees once again, but that is irrelevant to the proper drafting of the present Regulations, which fall to be considered by the Committee as they are now. **In retaining the two separate (but now identical) columns of fees, regulations 4 and 5 of these Regulations fail to accord with proper drafting practice. The Committee reports the Regulations accordingly.**

4 S.I 2010/458: Reported for failing to accord with proper drafting practice

London Skills and Employment Board (Specified Functions) Order 2010 (S.I. 2010/458)

4.1 The Committee draws the special attention of both Houses to this Order on the ground that it does not accord with proper drafting practice in two respects.

4.2 Article 1(2) contains a definition of “the Chief Executive” which replicates the effect of section 81(2) of the enabling Act, as read with section 11 of the Interpretation Act 1978. In a memorandum printed at Appendix 4 the Department for Business, Innovation and Skills states that the definition was provided in the Order to assist a casual reader’s understanding of it. However, the Department accepts that inclusion of the definition was unnecessary. The Committee observes that a footnote or the Explanatory Note could have provided this information to the reader if thought helpful, instead of the Order blending operative and superfluous text.

4.3 The memorandum also acknowledges that the definition of “the London Skills and Employment Board” in article 1(2) should have been omitted. That expression appears only in the title and the citation provision (which are in the nature of signposts) and in the Explanatory Note which is not part of the Order.

4.4 For reasons explained in the memorandum, the Department is not currently proposing to correct the Order, though it plans to avoid parallel errors in future, and it is implicit from the memorandum that, had it proposed to correct the Order, the Department might have sought to proceed by correction slip. The Committee's view is that, if the Department later decides to correct the Order, a further Order would be appropriate, as the subject-matter is too large in scale for a correction slip.

4.5 The Committee reports article 1(2) of this Order for failure to accord with proper drafting practice in the above respects, acknowledged in principle by the Department.

5 S.I 2010/495: Reported for failing to comply with *Statutory Instrument Practice*

Work and Families Act 2006 (Commencement No. 4) Order 2010 (S.I. 2010/495)

5.1 The Committee draws the special attention of both Houses to this Order on the ground that it fails to comply with *Statutory Instrument Practice*.

5.2 This Order revokes and replaces an earlier commencement instrument before the commencement date of that earlier instrument. In a memorandum printed at Appendix 5 the Department for Business, Innovation and Skills acknowledges that this Order should have been made available free of charge to all known recipients of the earlier instrument, and should have borne an italic headnote to that effect, in accordance with paragraphs 3.4.11 and 3.4.14 of *Statutory Instrument Practice*. Arrangements are to be made to rectify the position. **The Committee accordingly reports this Order for a failure to comply with *Statutory Instrument Practice*, acknowledged by the Department.**

Instruments not reported

At its meeting on 30 March 2010 the Committee considered the Instruments set out in the Annex to this Report, none of which were required to be reported.

A memorandum from the Department of Health in connection with the NHS Professionals Special Health Authority (Abolition) Order 2010 (S.I. 2010/425) is printed at Appendix 6.

Annex

Instruments to which the Committee does not draw the special attention of both Houses

- *denotes that the written evidence submitted in connection with the instrument is printed with this Report*

Draft Instruments requiring affirmative approval

Draft S.I.	Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2010
Draft S.I.	Fiscal Responsibility Order 2010
Draft S.I.	Misuse of Drugs Act 1971 (Amendment) Order 2010

Instruments subject to annulment

- **S.I. 2010/425** NHS Professionals Special Health Authority (Abolition) Order 2010
- S.I. 2010/502** Charities (Exception from Registration) Regulations 2010
- S.I. 2010/576** Smoke Control Areas (Authorised Fuels) (England) (Amendment) Regulations 2010
- S.I. 2010/577** Smoke Control Areas (Exempted Fireplaces) (England) Order 2010
- S.I. 2010/617** Her Majesty's Chief Inspector of Education, Children's Services and Skills (Fees and Frequency of Inspections) (Children's Homes etc) (Amendment) Regulations 2010
- S.I. 2010/622** Local Safeguarding Children Boards (Amendment) Regulations 2010
- S.I. 2010/624** Initial Sixth Form College Corporation Designation (England) Order 2010
- S.I. 2010/625** Specified Sixth Form College Corporation Order 2010
- S.I. 2010/629** Merchant Shipping (Light Dues) (Amendment) Regulations 2010
- S.I. 2010/630** Marine and Coastal Access Act 2009 (Commencement No. 1, Consequential, Transitional and Savings Provisions) (England and Wales) Order 2010

- S.I. 2010/631** North Western and North Wales Sea Fisheries District (Consequential and Transitional Provisions) Order 2010
- S.I. 2010/641** Social Security (Miscellaneous Amendments) (No. 2) Regulations 2010
- S.I. 2010/654** Town and Country Planning (General Permitted Development) (Amendment) (England) Order 2010
- S.I. 2010/656** Crime and Disorder (Prescribed Information) (Amendment) Regulations 2010
- S.I. 2010/659** Health Protection (Notification) Regulations 2010
- S.I. 2010/674** Harbours Act 1964 (Delegation of Functions) Order 2010
- S.I. 2010/677** Apprenticeships, Skills, Children and Learning Act 2009, Parts 7 and 8 (Consequential Amendments) Order 2010
- S.I. 2010/680** Merchant Shipping (Passenger Ships) (Safety Code for UK Categorised Waters) Regulations 2010
- S.I. 2010/686** Insolvency (Amendment) Rules 2010
- S.I. 2010/688** Insolvency (Scotland) Amendment Rules 2010
- S.I. 2010/689** Civil Enforcement of Parking Contraventions Designation (No. 2) (West Sussex) (Chichester and Crawley) Order 2010
- S.I. 2010/690** Children Act 1989 (Contact Activity Directions and Conditions: Financial Assistance) (Revocation and Transitional Provision) (England) Regulations 2010
- S.I. 2010/708** Health and Social Care Act 2008 (Commencement No. 15, Consequential Amendments and Transitional and Savings Provisions) Order 2010
- S.I. 2010/719** Building and Approved Inspectors (Amendment) Regulations 2010
- S.I. 2010/720** Health Act 2009 (Powers in Relation to NHS Bodies- Consequential Amendments) Regulations 2010
- S.I. 2010/721** Social Security Contributions (Amendment No. 4) Regulations 2010
- S.I. 2010/723** Policing and Crime Act 2009 (Consequential Provisions) (England) Order 2010
- S.I. 2010/726** Human Fertilisation and Embryology (Procedure on Applications and Execution of Warrants) Regulations 2010
- S.I. 2010/728** Measuring Instruments (EEC Requirements) (Fees) (Amendment) Regulations 2010
- S.I. 2010/731** Magistrates' Courts Fees (Amendment) Order 2010
- S.I. 2010/732** Insolvency Proceedings (Fees) (Amendment) Order 2010
- S.I. 2010/733** Adult Skills (Specified Qualifications) Regulations 2010

S.I. 2010/734	Insolvency (Amendment) (No. 2) Rules 2010
S.I. 2010/737	Merchant Shipping (Maritime Labour Convention) (Medical Certification) Regulations 2010
S.I. 2010/738	School Teachers' Incentives Payments (England) Order 2010
S.I. 2010/744	Childcare (Exemptions from Registration) (Amendment) Order 2010
S.I. 2010/745	Biocidal Products (Amendment) Regulations 2010
S.I. 2010/747	Tribunal Procedure (Upper Tribunal) (Amendment) Rules 2010
S.I. 2010/751	Tax Credits (Miscellaneous Amendments) Regulations 2010
S.I. 2010/784	Asylum Support (Amendment) Regulations 2010
S.I. 2010/785	British Nationality (General) (Amendment) Regulations 2010
S.I. 2010/786	Family Proceedings (Amendment) Rules 2010
S.I. 2010/787	Family Proceedings Courts (Children Act 1989) (Amendment) Rules 2010
S.I. 2010/788	Social Security Benefit (Persons Abroad) (Amendment) Regulations 2010
S.I. 2010/789	Education (Publication of Draft Proposals and Orders) (Further Education Corporations) (England) (Amendment) Regulations 2010
S.I. 2010/791	Copyright Tribunal Rules 2010
S.I. 2010/818	Community Legal Service (Financial) (Amendment No. 2) Regulations 2010

Instruments subject to annulment (Northern Ireland)

S.R. 2010/59	Carriage of Explosives Regulations (Northern Ireland) 2010
S.R. 2010/76	Mental Health Review Tribunal (Amendment) Rules (Northern Ireland) 2010
S.R. 2010/77	Charity Tribunal Rules (Northern Ireland) 2010
S.R. 2010/90	Juries (Amendment) Regulations (Northern Ireland) 2010
S.R. 2010/93	Legal Aid (General) (Amendment) Regulations (Northern Ireland) 2010
S.R. 2010/104	Valuation Tribunal (Amendment) Rules (Northern Ireland) 2010

Instruments not subject to Parliamentary proceedings not laid before Parliament

S.I. 2010/503	Charities Act 2006 (Commencement No. 7, Transitional and Transitory Provisions and Savings) Order 2010
S.I. 2010/697	Child Maintenance and Other Payments Act 2008 (Commencement No. 7) Order 2010
S.I. 2010/712	Criminal Justice and Immigration Act 2008 (Commencement No.14) Order 2010

- S.I. 2010/722** Policing and Crime Act 2009 (Commencement No. 1 and Transitional and Saving Provisions) (England) Order 2010
- S.I. 2010/727** Cambridgeshire Community Services National Health Service Trust (Establishment) Order 2010
- S.I. 2010/741** Blackburn with Darwen Primary Care Trust (Change of Name) (Establishment) Amendment Order 2010
- S.I. 2010/773** Government Annuities Payment (Amendment) Regulations 2010

Appendix 1a

Draft S.I: memorandum from the Department for Business, Innovation and Skills

Draft Wireless Telegraphy Act 2006 (Directions to OFCOM) Order 2010 (Draft S.I.)

1. This voluntary memorandum for the Joint Committee on Statutory Instruments has been prepared by the Department for Business, Innovation and Skills to assist the Committee in considering the Order in view of the instrument's technical nature and the representations that the Committee has received in respect of it. The Department has withdrawn and re-laid the Order in order to correct some drafting errors. This memorandum accompanies the amended version laid on 23rd March 2010.
2. The instrument is a direction to the regulator, OFCOM, which is made by affirmative order; as such the instrument is addressed to an audience which has expert knowledge of the powers available to achieve the results of the direction, and is expert in the subject matter. The direction requires OFCOM to exercise its powers in order to achieve certain results. In so far as the direction leaves the manner in which a result is to be achieved to the discretion of OFCOM it is for them to decide how to exercise its powers to achieve the result. In doing so OFCOM will need to consult further with interested parties on how to exercise its powers so as to achieve the result of the Direction. For example whilst the direction tells OFCOM the purposes to be achieved by licence conditions it is for OFCOM to determine through consultation the precise wording of the licence conditions.
3. The term "lightly loaded cell" which is in Article 3 is not defined in the Order. This term was used in the Department's consultation and is known to industry and OFCOM. The Order does not seek to define it further as it will be for OFCOM using its technical expertise to consult on the specific meaning to be given to this terms in giving effect to the directions.
4. Article 4 relates to the variation of existing Wireless Telegraphy Act 2006 ("the Act") licences. OFCOM must comply with the Direction and in doing so act in accordance its statutory duties. In respect of licence variations this will require them to notify the licensees concerned of the text of the proposed amendments, and seek representations about them from the licensees.
5. OFCOM has the power in the Act to vary licences. The licences referred to in the Order contain provision about when OFCOM may vary the licence without the consent of the licensee. These circumstances include where variations to licences are required in order to comply with international obligations, and where the variation is required for spectrum management reasons. However, in some cases variation may only take place with the consent of the licensee.

6. In the case of the licences referred in article 4(2) and (3), certain variations of those licences are required to comply with the revised GSM directive and the RSC Decision (Directive 2009/114/EC and Commission Decision 2009/766/EC). There are other variations to those licences which are required for the more efficient management of the spectrum. In each case these amendments do not require the consent of the licensee.

7. In the case of the licences referred to in article 4(4) the consent of the licensee is required to the variations in the directions. For this reason whilst article 4(4) requires OFCOM to vary the licences, it recognises that this requires the consent of the licensee.

8. We consider that paragraph 5 of Schedule 1 to the Act does not require a licence period to be specified in a licence so that licences may have an indefinite duration. OFCOM has confirmed that there are existing licences which it has granted under the Wireless Telegraphy Act 2006 which are of indefinite duration.

Surrender of licences

9. References in the draft Order to surrendered frequencies refer to licences which authorise the use of certain frequencies and which have been surrendered. Section 11 of the Act makes provision for a procedure for surrendering licences, but does not make any provision as to the grounds for surrendering a licence. The terms of a licence may, however, make such provision and provide also for further procedural steps to permit a person to surrender a licence for which he has no further use. Such provisions have been included in licences. Ofcom may use its powers to revoke a licence to compel the surrender of a licence as set out in section 11 of the Act.

Revocation of licences

10. Article 14 gives two bases for revocation of licences: for spectrum management reasons on five years' notice "or otherwise in accordance with the licence". This allows OFCOM to include provisions in licences to allow them to revoke those licences for other reasons than spectrum management. Our policy is that licences should include provision to permit OFCOM to revoke them for spectrum management reasons, and leaves it open to OFCOM to include in licences provisions as they see fit to provide for revocation on other grounds.

Allegations of unlawfulness

11. We note that at least one mobile network operator has copied a letter to the Committee in which that operator makes a number of allegations about the draft Order.

12. We consider that we have carried out a full and proper consultation, and we reject the assertion that the Order is unlawful on the basis that the proper consultation has not been carried out. Although the European Commission's merger decision came after the consultation closed, the possibility of a joint venture being permitted was considered in the original proposal and in the consultation document. The decision has been taken account of in the directions in the draft order.

13. Furthermore, contrary to what is alleged, the Department gave operators the opportunity to discuss potential amendments to the Direction in the light of the Commission's decision. The Department engaged with the operators affected in the period before the Order was laid before Parliament.

14. So far as the lawfulness of the wholesale access conditions under EU law is concerned we consider that paragraph 1 of Part B of the Annex to the Authorisation Directive enables Member States to provide that rights of use of radio frequencies are conditional on particular services being provided. In this case the Direction provides that the relevant rights of use are to be conditional on access being provided to particular operators.

15. An allegation is made that the temporary spectrum caps contained in article 9(2) of the Order are unlawful under the Authorisation Directive (Directive 2002/20/EC). The Authorisation Directive requires that that due weight must be given to achieving the objectives contained in Article 8 of the Framework Directive (Directive 2002/12/EC). This obliges national regulatory authorities to promote competition and ensure that there is no distortion or restriction of competition in the electronic communications sector. OFCOM is thus required to ensure that there is adequate competition in the market for the limited available spectrum. It was to address the potential competitive advantage of those holding lower frequencies that the temporary caps were proposed.

Department for Business, Innovation and Skills
23 March 2010

Appendix 1b

Draft S.I: supplementary memorandum from the Department for Business, Innovation and Skills

<p><i>Draft Wireless Telegraphy Act 2006 (Directions to OFCOM) Order 2010 (Draft S.I.)</i></p>
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1. This supplementary memorandum is submitted in response to 3 questions submitted by the Committee to the Department for Business, Innovation and Skills on 25th March 2009.

Article 4(4)(c) requires OFCOM to vary 2100MHz licences to provide for the licence to continue in force unless or until revoked by OFCOM. Does the Department want to add anything to what is said in paragraph 8 of its voluntary memorandum to explain why that provision is compatible with paragraph 5 of Schedule 1 to the Wireless Telegraphy Act 2006 (“the 2006 Act”)? (A similar point arises on articles 11(b) and 14(2)(b).)

2. We confirm our view that paragraph 5 of Schedule 1 to the 2006 Act does not require a licence to be issued for a fixed duration. A licence may either be silent as to its

duration, or provide explicitly that it remains in force until revoked. OFCOM has confirmed to us that certain licences referred to in the Direction are already of indefinite duration. These licences state “this licence shall continue in force until revoked by Ofcom or surrendered by the Licensee”. Ofcom has therefore exercised the discretion conferred on it to grant licences of indefinite duration in some cases and one for a limited duration in others.

The Order refers in articles 9 and 13 to the surrender of frequencies and spectrum. In view of the Department’s reference in paragraph 9 of its voluntary memorandum to section 11 of the 2006 Act, explain what other provision of that Act authorises-

- a) article 9(4) to provide for a person to “commit to” the surrender of a licence which has not expired or has not been revoked, and*
- b) article 13 to provide for a licence to include provision under which OFCOM must require the licensee to surrender a separate licence held by that person.*

3. The direction requires OFCOM to make regulations under section 14 of the 2006 Act which will set the conditions of the Combined Auction. Section 14(3)(d) allows those regulations to specify requirements which must be met by an applicant. The direction requires the auction regulations to include provision as to requirements on those bidding for licences in that auction. The direction requires OFCOM to provide in those regulations as a condition of participation in the auction that a person who holds, or will hold, more than the stated amount of frequency, must commit to give up part of a licence (i.e. the rights to use some of the frequencies covered by the existing licence which he holds) if he is successful in the auction. This is in order to ensure that the person’s combined spectrum holding following a successful bid in the auction complies with the caps on the amounts of spectrum that can be held. By way of an example, if the cap is 10, and a bidder already holds 8, but wants to bid for 4, he has to commit to surrender 2 of his existing 8 in the event that he wins 4 in the auction. If he does not win, then there is no need for him to surrender any of his existing 8 to remain within the cap.

4. Article 13 relates to new licences granted pursuant to the Combined Auction. Where a person who has committed to relinquish some frequencies into the auction as a condition of getting new frequencies in that auction is successful, then he will be granted a new licence for those new frequencies. Section 9(1) of the 2006 Act permits OFCOM to include such terms as they think fit in a licence. We anticipate that the person’s new licence would require him to “clear” the spectrum being given up for use by another party within 2 years of acquiring the new licence. The person will, at the end of that 2 year period, be required to surrender the old licence (he will by then no longer be using those frequencies for the provision of services), so that the person who won the right to use those frequencies in the auction can then start using them. Alternatively, OFCOM may revoke that “old” licence at the end of the 2 year period, in accordance with the procedure set out in Schedule 1 of the 2006 Act.

Which licence is being referred to in article 15(2) and (3)? Is it a licence granted pursuant to the Combined Auction or any subsequent auction (as referred to in article 12)? What is

intended by the words “specified by OFCOM for the purposes of the Combined Auction or any subsequent auction” in article 15(3)?

5. It is intended that the obligations in article 15(2) should only apply to one licence which will authorise the use of certain frequencies in the 800MHz band. There will be several licences available authorising the use of 800MHz spectrum. OFCOM will specify which licence will carry the condition in article 15(2) at the time of the Combined Auction, or if that licence is not sold in the Combined Auction, in a subsequent auction. Therefore, bidders will know which of the licences will have the additional condition and will be able to consider their bid accordingly. The licence referred to in article 15(2) and (3) is a licence granted pursuant to the Combined Auction or a subsequent auction.

Department for Business, Innovation and Skills
26 March 2010

Appendix 2

S.I 2010/417: memorandum from the Department of Health

Buckinghamshire Hospitals National Health Service Trust (Trust Funds: Appointment of Trustees) Revocation Order 2010 (S.I. 2010/417)

1. In its letter to the Department of 17th March 2010, the Joint Committee requested a memorandum on the following points:

Has the Department made arrangements (in accordance with paragraph 3.4.11 of *Statutory Instrument Practice*) for copies of this instrument to be made available free of charge to all known recipients of S.I. 2010/310? If not, explain why not. If so, explain why this instrument does not bear a headnote to that effect (see paragraph 3.4.14 of *Statutory Instrument Practice*).

2. The Department’s response is as follows.
3. The Department recognises that copies of this instrument should have been made available free of charge to all known recipients of S.I 2010/310. Known purchasers of this instrument will be refunded by The Stationery Office. The Stationery Office will add the appropriate headnote to any future reprint of the instrument. The Department apologises for this error.

Department of Health
22 March 2010

Appendix 3

S.I 2010/448: memorandum from the Department for Transport

Goods Vehicles (Plating and Testing) (Amendment) Regulations 2010 (S.I. 2010/448)

By a letter dated 17th March 2010 the Committee has asked for a memorandum on the following point:

With respect to the unnecessary complexity of the new tables substituted by regulations 4 and 5, does the Department have anything to add to paragraph 4.3 of the Explanatory Memorandum in the light of the Committee's recorded reluctance to accept deviation from normal drafting standards in cases where the deviation is backed by nothing more than future expectation (see, for example, the 23rd Report for the 2007-08 Session on S.I. 2008/1284)?

The following paragraphs explain the background to the Department's policy regarding the fees for testing at VOSA and non-VOSA test centres and the reason for retaining the format of tables in regulations 4 and 5. The Department wishes to say immediately that it accepts that it should have provided a fuller explanation of the reasons for its drafting approach in the Explanatory Memorandum.

On 3rd March 1997, a supplementary charge for tests carried out on non-VOSA premises was introduced by S.I. 1997/82 (see paragraphs 4A of regulations 12 and 16 of the Goods Vehicles (Plating and Testing) Regulations 1988 (the "1988 Regulations")), making the charges for tests at non-VOSA premises higher than those at VOSA premises.

In 2008, the Department announced a new policy to transform testing, which included encouraging more tests to be undertaken at non-VOSA premises. As part of the implementation of that policy, the Department announced its intention to reduce by stages the fee for having a VOSA test conducted at non-VOSA premises.

The Department began by halving the supplementary charge for tests at non-VOSA premises in S.I. 2009/799, which came into force on 20th April 2009. In an effort to simplify the presentation and allow for consistent presentation as the fees changed over successive years, new tables were inserted into regulations 12(3) and 16(1) of the 1988 Regulations showing the fees for testing at VOSA and non-VOSA testing stations in separate columns.

The Department continued this policy in S.I. 2010/448 by equalising the fees of tests at VOSA and non-VOSA premises, and has indicated that fees at non-VOSA premises will probably move to being lower than those at VOSA sites in the 2011/12 financial year. The phrase "it is expected that they will diverge again in 2011" was used in paragraph 4.3 of the Explanatory Memorandum, in place of a more definite commitment, because the Department has not yet consulted on this proposal.

When drafting S.I. 2010/448, the Department considered it clearer to retain the same table format as in 2009 for this stage in the policy implementation in order to avoid the potential

confusion, assuming the further proposed reduction is taken forward, of three format changes in three successive years.

The Department's starting position is always to make its drafting as simple as possible. The Department accepts that it should have better explained in the Explanatory Memorandum why the columns concerned contained the same fees, and why the Department had chosen not to have single columns of fees in the instrument. Although it recognises that the conventional drafting approach would have been to use a single column and re-introduce a second column should the fees diverge again, for the reasons given above the Department considered that the drafting approach it took provided users with greater clarity and transparency. Most users would not regard the instrument in isolation but would see it as part of a regulatory framework that is in the process of change.

The Department therefore considers that this situation is different from that covered by the Committee's reports in relation to S.I. 2008/1284 (23rd Report 07/08) and S.I. 2010/60 (11th Report 09/10), which concerned empty provisions in those instruments. However, if the Committee disagrees, the Department will take into account its views when drafting instruments in the future.

Department for Transport
23rd March 2010

Appendix 4

S.I. 2010/458: memorandum from the Department for Business, Innovation and Skills

London Skills and Employment Board (Specified Functions) Order 2010 (S.I. 2010/458)

1. In its letter to the Department dated 17 March 2010, the Joint Committee requested a memorandum on the following points:

1. Given that the term "Chief Executive" is defined in section 81(2) of the Apprenticeships, Skills, Children and Learning Act 2009 for the purposes of Part 4 of that Act (in which the enabling power is found), explain why the definition of that term is included in article 1(2).

2. Explain the inclusion of a definition of "the London Skills and Employment Board" in article 1(2), given that this expression only appears in the title of the SI, the citation provision and the Explanatory Note.

2. In relation to the first point, a definition of the Chief Executive was provided in order to assist a casual reader's understanding of the Order. The Department accepts, however, that it is not necessary to include such a definition for the reason set out by the Joint Committee. The Department apologises for this error.

3. On the Joint Committee's second point, this Order broadly replicates, with appropriate modifications, the London Skills and Employment Board (Specified

Functions) Order 2008 (S.I. 2008/119), which contains a definition of “the London Skills and Employment Board”. The Department accepts, however, for the reason given by the Joint Committee, that the inclusion of this definition is not required and apologises for this error.

4. The Department will seek to ensure that such drafting errors are not repeated in relation to future similar orders. For this Order, the Department considers that neither of these drafting errors affects the meaning or effect of the Order, and that therefore a correction slip is not necessary.

Department for Business, Innovation and Skills
19 March 2010

Appendix 5

S.I. 2010/495: memorandum from the Department for Business, Innovation and Skills

Work and Families Act 2006 (Commencement No. 4) Order 2010 (S.I. 2010/495)

In its letter to the Department of 17 March 2010, the Joint Committee on Statutory Instruments requested a memorandum on the following point:

Has the Department made arrangements (in accordance with paragraph 3.4.11 of Statutory Instrument Practice) for copies of this instrument to be made available free of charge to all known recipients of S.I. 2010/128? If not, explain why not. If so, explain why this instrument does not bear a headnote to that effect (see paragraph 3.4.14 of Statutory Instrument Practice).

The Department acknowledges its error in failing to make arrangements in accordance with paragraph 3.4.11 of *Statutory Instrument Practice*. The Department apologises for this error and will ensure that such arrangements are made. The Department will also ensure that henceforth all copies of this instrument will bear the headnote referred to in paragraph 3.4.14 of *Statutory Instrument Practice*.

Department for Business, Innovation and Skills
23 March 2010

Appendix 6

S.I. 2010/425: memorandum from the Department of Health

NHS Professionals Special Health Authority (Abolition) Order 201 (S.I. 2010/425)

1. In its letter to the Department of 17th March 2010, the Joint Committee requested a memorandum on the following points:
 - (1) How is it expected to be legally possible to transfer a liability from the Secretary of State to a limited liability company via a transfer document (as intended immediately after this Order comes into force – see paragraph 7.6 of the Explanatory Memorandum)?
 - (2) If it is concluded that it is not expected to be legally possible, identify whether — had that previously been realised — it would have affected the content of this Order and, if so, how.
2. The Department’s response to each of the Committee’s points is as follows.
3. Point (1) – The Department is aware that it may not be legally possible to transfer certain liabilities (e.g. in tort) to a limited liability company via a transfer document. Such a document may however provide for the company to take financial responsibility for a liability, by providing an indemnity to the Secretary of State. It was in this sense that the Explanatory Memorandum indicated that all liabilities were to be “transferred” to the company.
4. The transfer document, which is to be entered into immediately after the Order comes into force between the Department and the limited company, (the “Transfer Agreement”) provides for the sale and purchase of the business, assets and liabilities of the dissolving Special Health Authority. The limited liability company will purchase the business, assets and liabilities of the Special Health Authority which have been transferred to the Secretary of State. Pursuant to the sale, all liabilities of the dissolving Special Health Authority which have been transferred to the Secretary of State and which it is legally possible to transfer, will be so transferred.
5. In addition, the Transfer Agreement provides that the limited company will be responsible for all outstanding obligations and liabilities which are due or owing to any third party, arising from the dissolving Special Health Authority’s business (or the conduct of it, or which are otherwise attributable to the business or any of its assets (as defined in the transfer document)). The intention is to cover all liabilities or obligations that may arise - the Transfer Agreement makes clear that this applies to actual, prospective or contingent liabilities and obligations, which

arise by statute, contract or otherwise (which would include tortious liabilities), and whether or not of a pecuniary nature. The Transfer Agreement also provides that the limited company will indemnify the Secretary of State against any and all actions and losses which relate to the ownership or conduct of the business of the dissolving Special Health Authority, or which otherwise relate to it or to any of the transferring assets. This includes any actions or losses that arise or relate to a period before or after the completion of the Transfer Agreement.

6. Accordingly, in the event that any liabilities are not transferred, such as tortious liabilities, although they will remain with the Secretary of State, the limited company agrees to be responsible for them.
7. Point (2) – As indicated above, the Department was aware that it may not be legally possible to transfer all liabilities from the Secretary of State to the limited liability company. This did not affect the content of the Order.

Department of Health
22 March 2010